THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

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

2024 - VOL. VIII
(AUGUST)

PAGES 1 TO 1362

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

INDIAN LAW REPORTING COUNCIL

ALLAHABAD SERIES

****

PRESIDENT

HON'BLE THE CHIEF JUSTICE ARUN BHANSALI

******

COUNCIL

HON'BLE MR. JUSTICE SAUMITRA DAYAL SINGH

HON'BLE MR. JUSTICE JAYANT BANERJI

HON'BLE MR. JUSTICE NALIN KUMAR SRIVASTAVA

****

EDITORIAL PANEL

SENIOR LAW REPORTERS

1. MR. VINAY SARAN, SENIOR ADVOCATE
2. MR. SAMIR SHARMA, SENIOR ADVOCATE

JUNIOR LAW REPORTERS

1. MR. ANOOP BARANWAL, ADVOCATE
2. MS. PRIYA AGRAWAL, ADVOCATE
3. MR. ASHUTOSH MANI TRIPATHI, ADVOCATE
4. MS. NOOR SABA BEGUM, ADVOCATE
5. MR. SAROJ GIRI, ADVOCATE
6. MS. MANISHA CHATURVEDI, ADVOCATE
7. MR. ARVIND KUMAR GOSWAMI, ADVOCATE
8. MR. VINEET DUBEY, ADVOCATE
9. MR. PRASHANT MISHRA, ADVOCATE
10. MR. ABU BAKHT, ADVOCATE

****

JUDGES PRESENT

Chief Justice: Hon'ble Mr. Justice Arun Bhansali	
Puisne Judges:	
1. Hon'ble Mr. Justice Manoj Kumar Gupta	33. Hon'ble Mr. Justice Vivek Varma
2. Hon'ble Mr. Justice Anjani Kumar Mishra	34. Hon'ble Mr. Justice Sanjay Kumar Singh
3. Hon'ble Mr. Justice Mahesh Chandra Tripathi	35. Hon'ble Mr. Justice Piyush Agrawal
4. Hon'ble Mr. Justice Vivek Kumar Birla	36. Hon'ble Mr. Justice Saurabh Shyam Shamshery
5. Hon'ble Mr. Justice Attau Rahman Masoodi (Sr. Judge, Lko.)	37. Hon'ble Mr. Justice Jaspreet Singh
6. Hon'ble Mr. Justice Ashwani Kumar Mishra	38. Hon'ble Mr. Justice Rajeev Singh
7. Hon'ble Mr. Justice Rajan Roy	39. Hon'ble Mrs. Justice Manju Rani Chauhan
8. Hon'ble Mr. Justice Siddhartha Varma	40. Hon'ble Mr. Justice Karunesh Singh Pawar
9. Hon'ble Mrs. Justice Sangeeta Chandra	41. Hon'ble Dr. Justice Yogendra Kumar Srivastava
10. Hon'ble Mr. Justice Vivek Chaudhary	42. Hon'ble Mr. Justice Manish Mathur
11. Hon'ble Mr. Justice Saumitra Dayal Singh	43. Hon'ble Mr. Justice Rohit Ranjan Agarwal
12. Hon'ble Mr. Justice Arvind Singh Sangwan	44. Hon'ble Mr. Justice Mohd Faiz Alam Khan
13. Hon'ble Mr. Justice Shekhar B. Saraf	45. Hon'ble Mr. Justice Narendra Kumar Johari
14 Hon'ble Mr. Justice Salil Kumar Rai	46. Hon'ble Mr. Justice Raj Beer Singh
15. Hon'ble Mr. Justice Jayant Banerji	47. Hon'ble Mr. Justice Vipin Chandra Dixit
16. Hon'ble Mr. Justice Rajesh Singh Chauhan	48. Hon'ble Mr. Justice Shekhar Kumar Yadav
17. Hon'ble Mr. Justice Irshad Ali	49. Hon'ble Mr. Justice Deepak Verma
18. Hon'ble Mr. Justice Saral Srivastava	50. Hon'ble Dr. Justice Gautam Chowdhary
19. Hon'ble Mr. Justice J. J. Munir	51. Hon'ble Mr. Justice Shamim Ahmed
20. Hon'ble Mr. Justice Rajiv Gupta	52. Hon'ble Mr. Justice Dinesh Pathak
21. Hon'ble Mr. Justice Siddharth	53. Hon'ble Mr. Justice Manish Kumar
22. Hon'ble Mr. Justice Ajit Kumar	54. Hon'ble Mr. Justice Samit Gopal
23. Hon'ble Mr. Justice Rajnish Kumar	55. Hon'ble Mr. Justice Donadi Ramesh
24. Hon'ble Mr. Justice Abdul Moin	56. Hon'ble Mr. Justice Sanjay Kumar Pachori
25. Hon'ble Mr. Justice Rajeev Misra	57. Hon'ble Mr. Justice Subhash Chandra Sharma
26. Hon'ble Mr. Justice Ajay Bhanot	58. Hon'ble Mr. Justice Ajai Kumar Srivastava - I
27. Hon'ble Mr. Justice Neeraj Tiwari	59. Hon'ble Mr. Justice Chandra Kumar Rai
28. Hon'ble Mr. Justice Manoj Bajaj	60. Hon'ble Mr. Justice Krishan Pahal
29. Hon'ble Mr. Justice Prakash Padia	61. Hon'ble Mr. Justice Sameer Jain
30. Hon'ble Mr. Justice Alok Mathur	62. Hon'ble Mr. Justice Ashutosh Srivastava
31. Hon'ble Mr. Justice Pankaj Bhatia	63. Hon'ble Mr. Justice Subhash Vidyarthi
32. Hon'ble Mr. Justice Saurabh Lavania	64. Hon'ble Mr. Justice Brij Raj Singh

65. Hon'ble Mr. Justice Shree Prakash Singh
66. Hon'ble Mr. Justice Vikas Budhwar
67. Hon'ble Mr. Justice Vikram D Chauhan
68. Hon'ble Mr. Justice Saurabh Srivastava
69. Hon'ble Mr. Justice Om Prakash Shukla
70. Hon'ble Mr. Justice Mohd. Azhar Husain Idrisi
71. Hon'ble Mr. Justice Ram Manohar Narayan Mishra
72. Hon'ble Mr. Justice Mayank Kumar Jain
73. Hon'ble Mr. Justice Surendra Singh -I
74. Hon'ble Mr. Justice Nalin Kumar Srivastava
75. Hon'ble Mr. Justice Syed Qamar Hasan Rizvi
76. Hon'ble Mr. Justice Manish Kumar Nigam
77. Hon'ble Mr. Justice Anish Kumar Gupta
78. Hon'ble Ms. Justice Nand Prabha Shukla
79. Hon'ble Mr. Justice Kshitij Shailendra
80. Hon'ble Mr. Justice Vinod Diwakar
81. Hon'ble Mr. Justice Prashant Kumar
82. Hon'ble Mr. Justice Manjive Shukla
83. Hon'ble Mr. Justice Arun Kumar Singh Deshwal

(2024) 8 ILRA 6
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2024

BEFORE

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

Matters Under Article 227 No. 1015 of 2024
(Civil)

Sanjay Kumar Tripathi & Anr. ...Petitioners
Versus
Smt. Suryakali Tripathi ...Respondent

Counsel for the Petitioners:
Sri Anuj Kumar Srivastava, Sri Nisheeth Yadav

Counsel for the Respondent:
Sri Manu Srivastava, Sri Vivek Kumar Srivastava, Sri Abhishek Tandon, Sri Anurag Singh

Civil Law – Uttar Pradesh Revenue Code, 2006 – Sections 4 (14), 116 & 206 (2) r/w Item No.16 of Second Schedule - Specific Relief Act, 1963 - Section 34 - Property in dispute, i.e the suit property, is agricultural land, wherein both the petitioners and respondent (mother) hold shares as they claim - Suit property is admittedly undivided – Respondent under influence of her daughter has transferred an area of 155.33 square yards vide registered sale deed in favour of two persons - Petitioners plead that respondent has no right to transfer her share in suit property, which is unpartitioned, unless it is partitioned in accordance with law - Application for temporary injunction by petitioners – Trial Court ordered to maintain status quo – Appeal by respondent – District Judge set aside the ad interim injunction – Impugned order challenged – Held, in the nature of remedy open to a co-sharer, division of holdings, as it is called u/s 116 of the Revenue Code, partition is the only remedy that is permitted by law - Until partition takes place by metes and bounds with the passing of a final decree, none of co-sharers can forbear the other from transferring his/ her undivided or unpartitioned interest in suit property in favour of a third party - Suit property is revenue paying land, relief which the petitioners seek, is governed by provisions of Section 206 - Impugned order was rightly set aside. (Para 2, 4, 5, 6, 14, 16, 19)

Petition Dismissed. (E-13)

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

1. This petition under Article 227 of the Constitution is directed against an order passed by Mr. Vinay Singh, Additional District Judge, Court No.21, Kanpur Nagar, allowing Misc. Civil Appeal No.103 of 2023 and setting aside the ad interim injunction dated 19.09.2023, granted by the learned Additional Civil Judge (Jr. Div.), Court No.8, Kanpur Nagar in O.S. No.1341 of 2023.

2. The petitioners are the plaintiffs of O.S. No.1341 of 2023, whereas the sole defendant-respondent to this petition is their mother. The property in dispute, that is the suit property, is agricultural land, wherein both the plaintiff-petitioners (for short, 'the plaintiffs') and the defendant-respondent (for short, 'the defendant') hold shares as they claim. The suit property is admittedly undivided. The details of this property are given at the foot of the plaint, giving rise to the suit, whereas in paragraph Nos.2 and 3, the plaintiffs disclose their shares in the suit property and that of the defendant. The cause of action, which the plaintiffs set forth in the plaint, is that the defendant, who is a co-sharer of the plaintiffs and their mother, under the influence of the plaintiffs' sister, Anita Mishra and her husband, with whom, the

defendant resides, has transferred an area of 155.33 square yards (125.69 square meters) of land out of *Khasra No.*164, Khata No.00298, admeasuring a total of 0.3160 hectare, situate at Village Hora Bangar, Tehsil, Pargana and District Kanpur Nagar, *vide* registered sale deed dated 17.09.2019 in favour of one Rajesh and another Deepak. It is also pleaded that the plaintiffs and the defendant together, out of the same plot, sold off an area of 75.25 square meters vide registered sale deed dated 04.07.2017, but the defendant, in connivance with the plaintiffs' sister, Anit Mishra, has misappropriated the sale consideration. The plaintiffs plead that the defendant has no right to transfer her share in the suit property, which is unpartitioned, unless it is partitioned in accordance with law with the precise shares of parties determined.

3. It is also their case that the defendant has offered for sale the suit property jointly owned by the plaintiffs and the defendant, leading to a broker entering upon the said property and attempting to lay a foundation thereon. It is the plaintiffs' case that upon resistance by them, he picked up an altercation, compelling them to report the matter to the Police. Saying that the entire suit property is the joint holding of the plaintiffs and the defendant, the plaintiffs' case is that the defendant has no right to transfer her share without a partition being effected. It is on the foot of this case and cause of action that the plaintiffs have claimed the following reliefs (translated into English from Hindi):

"A. that by a decree of permanent injunction in the plaintiffs' favour and against the defendant, the Court may restrain the defendant from transferring land comprising Khata No.00071, Khasra No.101, admeasuring 0.7270 hectare; Khata No.00141, Khasra No.59, 0.2030 hectare, situate at Village Hora Bangar, Tehsil and District Kanpur Nagar; Khata No.00298, Khasra No.162, 0.3160 hectare, situate at Village Hora Bangar, Tehsil and District Kanpur Nagar; Khata No.00072, Khasra No.99, 0.1020 hectare; Khata No.00137, Khasra Nos.206, 208, 205, 216, 217, 218, 219, 0.4300 hectare, 0.1230 hectare, 0.4710 hectare, 0.1430 hectare, 0.3280 hectare, 0.2770 hectare, 0.5740 hectare; Khata No.00138, Khasra No.176, area 0.3940 hectare, situate at Village Hora Kachhar, Pargana, Tehsil and District Kanpur Nagar; Khata No.00211, Khasra No.79, 0.4530 hectare situate at Village Hora Kachhar, Pargana, Tehsil and District Kanpur Nagar, as per boundaries given at the foot of the plaint or any part thereof in favour of any third party by way of sale, will, hiba, agreement etc.

B. The Court, by a declaration, may declare the plaintiffs' co-sharers in possession of a 1/4th share in Khata No.00071, Khasra No.101, admeasuring 0.7270 hectare; Khata No. 00141, Khasra No.59, 0.2030 hectare, situate at Village Hora Bangar, Tehsil and District Kanpur Nagar; Khata No.00298, Khasra No.162, 0.3160 hectare, situate at Village Hora Bangar, Tehsil and District Kanpur Nagar; Khata No.00072, Khasra No.99, 0.1020 hectare; Khata No.00137, Khasra No.206, 208, 205, 216, 217, 218, 219, admeasuring 0.4300 hectare, 0.1230 hectare, 0.4710 hectare, 0.1430 hectare, 0.3280 hectare, 0.2770 hectare, 0.5740 hectare; Khata No. 00138, Khasra No.176, 0.3940 hectare, situate at Village Hora Kachhar, Pargana, Tehsil and District Kanpur Nagar; and in the rest of the plots, the plaintiffs be declared owners of a half share and the defendant and other co-sharers owners of

the other half share; and further, in Khata No.00211, Khasra No.79, admeasuring 0.4530 hectare, situate at Village Hora Kachhar, Pargana, Tehsil and District Kanpur Nagar, the plaintiffs and the defendant be declared owners of a 1/3rd share each in 1/2 of the said land."

4. Along with the suit, the plaintiffs made an application for temporary injunction, expressing an apprehension that the defendant without a partition was intending to sell off her undivided share to third parties, which would prejudice the plaintiffs' interest and snatch away their sole source of livelihood, all at the instance of the plaintiffs' sister and the defendant's daughter, Anita Mishra. The plaintiffs claimed a temporary injunction to the effect that the defendant be restrained from transferring the suit property or any part thereof in favour of any third, either by sale, will, hiba or agreement pending suit.

5. The learned Trial Judge, before whom the temporary injunction application came up on 19.09.2023, upon perusing the plaint, the application for temporary injunction and the affidavit together with papers filed in support, found it to be a case where the interest of the plaintiffs was required to be protected by an ad interim injunction and that it would be defeated by the delay in issuing notice to the other side. The learned Judge, therefore, issued notice returnable on 19.10.2023 and ordered both parties until the said date to maintain *status quo* and forbear from transferring the suit property in favour of any third party.

6. The defendant appealed this order to the learned District Judge, giving rise to Misc. Civil Appeal No.103 of 2023 on the file of the learned District Judge. The Misc. Appeal came up for determination before the Additional District Judge, Court No.21, Kanpur Nagar on 09.01.2024, who by the order impugned, set aside the ad interim injunction dated 19.09.2023 passed by the Trial Judge, leaving him free to decide the temporary injunction application on merits within 15 days.

7. Aggrieved by the said order, this petition under Article 227 of the Constitution has been instituted by the plaintiffs.

8. Heard Mr. Nisheeth Yadav, learned Counsel for the plaintiffs and Mr. Abhishek Tandon, Advocate holding brief of Mr. Anurag Singh, learned Counsel appearing on behalf of the sole defendant.

9. The learned Judge has found the suit instituted before the Court to be barred by the provisions of Section 206 (2) read with Item No.16 of the Second Schedule to the Uttar Pradesh Revenue Code, 2006 (for short, 'the Revenue Code'). In addition, the learned Judge has held that there is no law, which may give right to a co-sharer to prevent another co-sharer of his to alienate his undivided share. The learned Judge in the Court of appeal has opined that the plaintiffs acknowledge the defendant's share in the suit property, and, therefore, if they had to sue, it had to be for partition. The learned Judge has found upon the plaintiffs' case that the relief which they seek that the defendant may not transfer her share in the suit property unless partitioned, is not countenanced by law. It is also opined by the learned Judge in the Court of appeal that where the Court has no jurisdiction to grant a permanent injunction, a temporary injunction cannot be granted. It is on the basis of all this reasoning that the learned Judge in the Court of appeal has set aside the order of

temporary injunction granted by the Trial Judge.

10. A bare reading of the plaint, in particular the relief, shows that the plaintiffs admit the defendant to be a co-sharer in the suit property along with them. The foremost question, therefore, is if the plaintiffs can seek any injunction forbearing the defendant from transferring her unpartitioned share in the suit property. It is on first principle that a co-sharer, who has an unpartitioned share, is always free to sell or otherwise assign it to a third party. It is true that the owner of a share cannot transfer any particular portion of the property without a partition by metes and bounds. It is not the plaintiffs' case that the defendant has effected a transfer by metes and bounds of a particular portion of the suit property commensurate to her share. It is also not the plaintiffs' case that the defendant has transferred or is proceeding to transfer more than her share in the suit property in favour of third parties. There is absolutely no right inhering in the co-sharer of a property to prevent another co-sharer by the Court's injunction from transferring that other's unpartitioned share. In a case like the present one, the defendant's transferee would not be entitled to possession, or so to speak khas possession, over any portion of the suit property. He would become the owner of the share or the area of land transferred, which such transferee can, like the defendant or any other co-sharer, seek partition of through a suit instituted for the purpose. In no event, the plaintiffs would, therefore, be entitled to an injunction of the kind they claim, seeking to restrain the defendant, a co-sharer in the suit property from transferring her unpartitioned share in favour of a third party.

11. Likewise, the other relief, which they seek, is as misconceived as the first. It is a declaration, which the plaintiffs seek of their own share and that of the defendant in the different *khatas* of the suit property. Section 34 of the Specific Relief Act, 1963 (for short, 'the Act of 1963') reads:

"34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.—A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not inexistence, and for whom, if in existence, he would be a trustee."

12. All that the proviso to Section 34 of the Act of 1963 intends to provide is that where substantial relief of a particular kind is envisaged by law, provided in law or necessary, a bare declaration cannot be granted. It would be an absurdity to imagine about a plaintiff seeking a declaration that the defendant owes him a particular sum of money, say 'X' and nothing more. That kind of a declaration can never be granted. The proviso to Section 34 would bar such a declaration and oblige the plaintiff to sue for recovery of money or accounts or other substantial relief, appropriate to the cause of action. Likewise, a plaintiff, who is out of possession and seeks to recover it from the defendant, who denies the plaintiff's title, must sue for the relief of recovery of

possession. It is another matter that if the plaintiff's title in a case like that is thickly and arguably disputed, the plaintiff in certain cases may be obliged to seek a declaration together with the relief of possession. A classical case of this kind would be if the plaintiff, the owner of the land says that he has been dispossessed by the State or an instrumentality of the State from his land that he owns, without the State acquiring it in accordance with law. In such a case, perhaps the plaintiff need seek a declaration together with a consequential decree for recovery of possession. In none of these cases, however, the plaintiff can just seek a declaration of his title even with an injunction. Like the first illustration, about the claim for money, the plaintiff cannot be permitted to sue for declaration that the defendant owes him a liquidated sum of money, say 'X', together with a consequential mandatory injunction against the defendant, directing him to pay the money owed. These kind of reliefs would be absolutely barred by the proviso to Section 34 of the Act of 1963.

13. A declaration is a general relief, which is neither to be sought nor granted in a case where there are other substantive reliefs known to law. A suit for rendition of accounts would involve the plaintiff asking for a decree for accounts, and likewise, in a case where the money owed to the plaintiff is secured by a mortgage, a decree for foreclosure or sale of the mortgaged property. A plaintiff, who has a cause of action against a co-sharer in an undivided estate, is obliged by law to sue for the relief of partition, specifically pleading the share that he claims. The Court would then try the suit and pass a preliminary decree for partition, declaring the share of parties. The preliminary decree in a suit for partition is in fact a declaration of the parties' share, which includes the plaintiff and all other co-sharers. After the preliminary decree for partition is passed, it is open to the plaintiff to apply for the preparation of a final decree, where according to the shares of parties and the myriad factors that are relevant, the Court would pass a suitable final decree for partition, demarcating and delivering *khas* possession of the plaintiff's share in the suit property.

14. Of course, it would also be open to the defendant or defendants, whose shares are declared by the preliminary decree to likewise apply for a final decree, partitioning their share by metes and bounds upon payment of requisite court fee. In the nature of the remedy open to a co-sharer, division of holdings, as it is now called under Section 116 of the Revenue Code, partition is the only remedy that is permitted by law. Until partition takes place by metes and bounds with the passing of a final decree, none of the co-sharers can forbear the other from transferring his/ her undivided or unpartitioned interest in the suit property in favour of a third party.

15. Seen from this vantage, the relief, which the plaintiffs seek, can never be granted even if all the allegations in the plaint at the trial are proved to the hilt.

16. There is another facet of the matter, which the learned Additional District Judge has considered and about which too, he has drawn the correct conclusions. The suit property is revenue paying land and the relief, which the plaintiffs seek, is clearly governed by the provisions of Section 206 read with Item 16 of the Second Schedule. Section 206 of the Revenue Code reads:

"206. Jurisdiction of civil Courts and revenue courts.– (1) Notwithstanding anything contained in any

law for the time being in force, but subject to the provisions of this Code, no Civil Court shall entertain any suit, application or proceeding to obtain a decision or order on any matter which the State Government, the Board, any Revenue Court or revenue Officer is, by or under this Code, empowered to determine, decide or dispose of.

(2) Without prejudice to the generality of the provisions of sub-section (1), and save as otherwise expressly provided by or under this Code-

(a) no Civil Court shall exercise jurisdiction over any of the matters specified in the Second Schedule; and

(b) no Court other than the revenue Court or the revenue officer specified in column 3 of the Third Schedule shall entertain any suit, application or proceeding specified in column 2 thereof.

(3) Notwithstanding anything contained in this Code, an objection that a Court or officer mentioned in sub-section (2)(b) had or had no jurisdiction with respect to any suit, application or proceeding, shall not be entertained by any appellate, revisional or executing Court, unless the objection was taken before the Court or officer of the first instance, at the earliest opportunity, and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice."

17. The Second Schedule to the Revenue Code is extracted below:

"SECOND SCHEDULE
(See Sections 206 (2)(a))
Matters excluded from the jurisdiction of the Civil Court

1	Any question regarding the determination 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 the 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.

18. Item No.16 in the Second Schedule of the Revenue Code clearly speaks of "any claim to establish the rights of a co-tenure holder in respect of any land". Land is defined under Section 4(14) of the Revenue Code, which reads:

"4. Definition.-In this Code.– .....

(14) 'land', except in Chapters VII and VIII and sections 80, 81 and section 136, means land held or occupied for purposes connected with agriculture;"

19. There is no quarrel by the plaintiffs that the suit property is land within the meaning of Section 4(14) of the Revenue Code, which is used for agriculture and recorded as such. It is after all held by the plaintiffs and the defendant for purposes connected with agriculture. If then that is the plaintiffs' case, a suit by them to establish their right as co-tenure holders against the defendant, would clearly be in the teeth of Item No.16 of the Second Schedule to the Revenue Code read with Section 206 (2) (a). The plaintiffs' relief, howsoever quaintly drafted, does not take it out of mischief of Section 206 (2) (a) read with Item No.16 of the Second Schedule to the Revenue Code. The jurisdiction to try a suit of this kind would, therefore, on a bare reading of the plaint, lie exclusively in the Revenue Court. If the plaintiffs were to seek any meaningful relief, they would have to seek a decree for division of their holdings/ the suit property, which again would be exclusively cognizable by the Revenue Court under Section 116 of the Revenue Code. As the relief stands, if at all it can be granted, it is by the Revenue Court and not the Civil Court. Quite apart, the terms, in which the relief has been sought, read together with the cause of action involved in this suit, the relief can never be granted by any Court, as remarked earlier for the reasons indicated.

20. In the considered opinion of this Court, therefore, the learned Additional District Judge was absolutely right in setting aside the ad interim injunction granted by the Trial Court. No exception can be taken to the impugned order by the plaintiffs, which must in our opinion be unhesitatingly upheld.

21. In the result, this petition fails and is **dismissed with costs of Rs.10,000/-.**

(2024) 8 ILRA 12
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2024

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ B No. 3320 of 2024

Bhoora Singh ...Petitioner
Versus
Deputy Director of Consolidation & Ors. ...Respondents

Counsel for the Petitioner:
Devendra Kumar Mishra

Counsel for the Respondents:
C.S.C., Hari Narayan Singh

Civil Law - U.P. Consolidation of Holdings Act - Section 9-B, Disposal of objections on the Statement of Principles - S. 9-B (3), Any person aggrieved by an order of the Consolidation Officer under sub-section (1) or sub-section (2) may file an appeal before the Settlement Officer, Consolidation, whose decision, except as otherwise provided by or under this Act, shall be final - *Issue :* Whether Revision u/s 48 maintainable against order Section 9-B (3) or not? *Held:* Phrase "except as otherwise provided by or under this Act" means that the litigant can resort to the remedy in case the same is available under the Act and the rules or regulations made therein - Intention of legislation is that the order passed by the S.O.C. in appeal may be assailed in the revisional jurisdiction of the D.D.C., who has been entrusted ample power to examine the correctness, legality, or propriety of any order, including the power to examine any finding, whether of fact or law, returned by the Consolidation Officer or the S.O.C., and also includes the power to reappreciate any oral or documentary evidence (Para 7)

Allowed. (E-5)

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel for State-respondents as well as learned counsel for Gaon Sabha.

2. In view of the peculiar facts and circumstances of the present case and the order proposed to be passed hereunder, this Court proceeds to decide the instant writ petition finally, with the consent of learned counsel for the parties who are present in the Court, without calling for their respective affidavits.

3. The petitioner is aggrieved with the order dated 31.05.2024 passed by the Deputy Director of Consolidation (in brevity 'D.D.C.') whereby revision filed on behalf of the petitioner, arising out of proceeding under Section 9-B of the U.P. Consolidation of Holdings Act (in brevity 'U.P.C.H. Act'), has been dismissed on the ground of maintainability.

4. Having considered the rival submissions advanced by learned counsel for the parties and perusal of record, it is manifested that the question involved in the instant writ petition lies in a narrow compass as to whether revision under section 48 of U.P.C.H. Act filed by the petitioner assailing the order passed by the Settlement Officer of Consolidation (in brevity 'S.O.C.') under Section 9-B(3) of U.P.C.H. Act is maintainable or not. D.D.C. has held that order passed by S.O.C. under section 9-B(3) of U.P.C.H. Act is final order on the merits of case, thus, revision against said order is not maintainable.

5. Section 9-B of U.P.C.H. Act denotes the provision wherein any person aggrieved with the statement of principles prepared under Section 8-A of U.P.C.H. Act has legal right to challenge the same by moving an objection under Section 9-B(1) of U.P.C.H. Act. Sub section 2 discuss the situation where no objection has been filed against the statement of principles, however, the Consolidation Officer on his own wisdom, in case, comes to conclusion that there is need to examine the correctness of statement of principles, he shall make local inspection of the unit and pass appropriate order after due notice to the Consolidation Committee. Section 9-B(3) of U.P.C.H. Act gives statutory right to the aggrieved person to file an appeal against the order passed under sub section 1 and 2 of Section 9-B. For ready reference Section 9-B of U.P.C.H. Act is quoted herein below :-

"9-B. Disposal of objections on the Statement of Principles.-

(1) Where objections have been filed against the Statement of Principles under Section 9, the Assistant Consolidation Officer shall, after affording opportunity of being heard to the parties concerned and after taking into consideration the views of the Consolidation Committee, submit his report to the Consolidation Officer, who shall dispose of the objections in the manner prescribed.

(2) Where no objections have been filed against the Statement of Principles within the time provided therefor under Section 9, the Consolidation Officer shall, with a view to examining its correctness, make local inspection of the unit, after giving due notice to the Consolidation Committee, and may thereafter make such modifications or alterations in the

Statement of Principles as he may consider necessary.

(3) Any person aggrieved by an order of the Consolidation Officer under sub-section (1), or sub-section (2), may, within 21 days of the date of the order, file an appeal before the Settlement Officer, Consolidation, whose decision, except as otherwise provided by or under this Act, shall be final.

(4) The Consolidation Officer and the Settlement Officer, Consolidation, shall, before deciding an objection or an appeal, make local inspection of the unit after giving due notice to the parties concerned and the Consolidation Committee.)"

6. Language employed under sub section 3 of Section 9-B unequivocally enunciates that the order passed by the appellate court shall be final "except as otherwise provided by or under this Act". The D.D.C., in his own wisdom, has misread and misinterpreted the aforesaid phrased and comes to conclusion that order passed by the S.O.C. became final and aggrieved person has no option to resort to the remedy of filing revision under section 48 of U.P.C.H. Act.

7. The phrase "except as otherwise provided by or under this Act" indicates that order passed by S.O.C. is generally final, however, same is subject to any exceptions or further recourse that may be specified within the Act itself or under any rules, regulations, or notifications issued under the Act. Thus, this finality is not absolute and this section effectively provides an exception. The U.P.C.H. Act includes provisions that allow for further recourse or exceptions to this finality; specifically as enunciated under section 48 of U.P.C.H. Act. Needless to say that similar phrase has been used by the legislation under Section 11 (1), where provision of filing an appeal arising out of proceeding under Section 9-A of U.P.C.H. Act has been given, and under Section 21(2) of U.P.C.H. Act which enunciates resorting to remedy of filing an appeal assailing the order passed under section 21 (1) of U.P.C.H. Act. Intention of legislation in all these sections is abundantly clear that order passed by the S.O.C. in appeal may be assailed in the revisional jurisdiction of the D.D.C. who has been entrusted ample power to examine the correctness, legality or proprietory of any order includes the power to examine any finding, whether of fact or law, returned by the Consolidation Officer or the S.O.C., and also includes the power to re-appreciate any oral or documentary evidence, as enunciated under Explanation 3 to Section 48 of U.P.C.H. Act. Needless to say that the Assistant Consolidation Officer, Consolidation Officer and the S.O.C. are subordinate to the D.D.C./Director of Consolidation, as enunciated under Explanation 1 to Section 48 of U.P.C.H. Act. Thus, the remedy to file a revision is a right of the litigant which is provided under the Statute and the same cannot be curtailed by any authority on his own whims. It appears that the D.D.C. has failed to understand the phrase "except as otherwise provided by or under this Act" which means that the litigant can resort to the remedy in case same is available under the Act and the rules or regulations made there in.

8. In this conspectus, as above, I am of the considered view that the D.D.C. has failed to exercise his revisional jurisdiction so vested in him by law. He has misread and misinterpreted the provision as enunciated under Section 9-B(3) of U.P.C.H. Act on his own whims and

against the very intention of the legislation. As such, instant writ petition succeeds and is **allowed.** Order dated 31.05.2024 passed by the D.D.C. is hereby quashed. Revision no.0008 of 2024 filed on behalf of Bhoora Singh (petitioner herein) is restored to its original number and the parties are relegated before the D.D.C. to get the revision decided afresh on merits. It is expected that the D.D.C. shall decide the revision in accordance with law, expeditiously, preferably within a period of three months from the date of production of certified copy of this order.

(2024) 8 ILRA 15
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.08.2024

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Criminal Misc. Bail Application No. 8192 of 2024
And
Criminal Misc. Bail Application No. 8751 of 2024

Chandra Raj @ Chandra ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Prashant Shukla, Mahendra Singh Chaodhary

Counsel for the Opposite Party:
G.A.

A. Criminal Law - Bail - Code of Criminal Procedure, 1973 - S.ection 439 - The Scheduled Castes And The Scheduled Tribes (Prevention Of Atrocities) Act, 1989 - 14-A(2) - An appeal shall lie to the High Court against an order of the Special Court granting or refusing bail - Sessions Court/ Special Courts constituted under the SC/ST Act is duly and well empowered to consider the offences against the accused even under IPC. Once the Special Court constituted under the Act is empowered to take cognizance and to try offences together, all the rigors of the SC/ST Act would apply.

B. Criminal Law - Bail - Code of Criminal Procedure, 1973 - Section 439 - The Scheduled Castes And The Scheduled Tribes (Prevention Of Atrocities) Act, 1989 - 14-A(2) - FIR under sections 328, 376-D, 506 IPC r/w Section 3(2)(v) 2 of SC/ST Act was lodged - Subsequently, charge-sheet was filed, in which, the applicant was charged for an offence under Sections 328, 376D, 506 IPC only and was not charged under Section 3(2)(v) of SC/ST Act - applicant preferred a bail application, which came to be dismissed by the Special Court against which, the bail application before High Court u/s 439 of Cr.P.C. was filed - *Held :* An appeal under Section 14-A (2) of the SC/ST Act would be maintainable against an order rejecting the bail application by the Special Court. (Para 21)

B. Criminal Law - Bail - Code of Criminal Procedure, 1973 - Section 439 - The Scheduled Castes And The Scheduled Tribes (Prevention Of Atrocities) Act, 1989 - 14-A(2) - FIR under Sections 147, 148, 149, 323, 307, 302, 504, 506, 34 IPC lodged. Subsequently, sections of SC/ST Act was also added, however, as against the applicants only charges under IPC was framed and not under SC/ST Act. Applicants filed bail applications before the Special Court which was rejected against which, the Bail Application was filed under Section 439 of Cr.P.C. seeking enlargement on bail *Held :* An appeal under Section 14-A (2) of the SC/ST Act would be maintainable against an order rejecting the bail application by the Special Court. (Para 21)

Dismissed. (E-5)

List of Cases cited:

1. Ghulam Rasool Khan & ors. Vs St. of U.P. & ors.; 2022 (8) ADJ 691

2. Pradeep S. Wodeyar Vs St. of Karn.; (2021) 19 SCC 62

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

4. Gyanendra Maurya Vs U.O.I. through Secy Ministry Social Justice and Empowerment & ors.2023 SCC OnLine All 46

5. Teja Vs St. of U.P. (Criminal Appeal No.3603 of 2019) along with other criminal appeal, decided on 27.09.2019

6. Pramod Yadav Vs St. of M.P. & ors.; 2021 SCC OnLine MP 3394

7. Sunita Gandharva (Smt.) Vs St. of M.P. & anr.; I.L.R. [2020] M.P. 2691

8. Pramod Vs St.of U.P. (Criminal Misc. Bail Application No.2447 of 2024), decided on 01.03.2024

9. Ami Chand Vs St. of H. P.; 2020 SCC OnLine HP 1840

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard Sri Prashant Shukla and Sri Prateek Tiwari, learned counsel appearing on behalf of the applicant Chandra Raj @ Chandra and Sri Vivek Gupta holding brief of Sri Arshad Siddiqui, learned Counsel for the complainant. Sri Anuj Dayal, learned Counsel appearing on behalf of the accused applicants Isha and Shanti as well as Sri Abhinav Srivastava, learned Counsel for the complainant. Sri Nikhil Singh, learned AGA-I for the State in both the cases.

2. As common issues and objections have been raised in the abovesaid bail applications, I intend to decide both the applications by means of this common order.

3. For the sake of brevity, the facts in brief as emerge from Bail Application No.8192 of 2024 are that an FIR No. 300 of 2024, under Sections 328, 376-D, 506 IPC read with Section 3(2)(v) of SC/ST Act at Police Station Bachhrawan, District Raebareli was lodged against all the accused named in the FIR including the applicant. Subsequently, a charge-sheet was filed, in which, the applicant was charged for an offence under Sections 328, 376D, 506 IPC only and was not charged under Section 3(2)(v) of SC/ST Act. The applicant, Chandra Raj preferred a bail application, which came to be dismissed by the Special Court constituted under the provisions of The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (In short "SC/ST Act") vide order dated 05.06.2024, against which, the present bail application before this Court under Section 439 of Cr.P.C. has been filed. In Bail Application No.8751 of 2024, the FIR No.233 of 2024, under Sections 147, 148, 149, 323, 307, 302, 504, 506, 34 IPC at Police Station Raunahi, District Ayodhya. Subsequently, it appears that sections of SC/ST Act was also added, however, as against the applicants, Isha and Shanti only charges under IPC was framed and not under SC/ST Act. The applicants filed a bail applications before the Special Court seeking bail under the sections of IPC, which came to be rejected vide orders dated 25.07.2024 and 19.07.2024 by the same Special Court, against which, the Bail Application No.8751 of 2024 has been filed under Section 439 of Cr.P.C. seeking enlargement on bail.

4. While arguing the bail applications filed under Sections 439 of the Code of Criminal Procedure (In short "Cr.P.C.") read with Section 483 of The Bharatiya Nyaya Suraksha Sanhita, 2023, it is argued by the Counsel for the applicants that on the facts of the case, the applicants have not

been charged under the SC/ST Act and have been charged only for the offences under India Penal Code (IPC), as such, the bail application can be heard and decided by this Court.

5. A preliminary objection was raised by the Counsel for the informant and the learned A.G.A. that in terms of the mandate of Section 14-A(2) of the SC/ST Act, the present bail application is not maintainable under Section 439 of Cr.P.C. and the applicants, if so desire, can avail the specific remedy of appeal prescribed under Section 14-A(2) of the said Act. The said preliminary objections are advanced in both the cases by the learned Counsel for the complainants and learned A.G.A.

6. Sri Prashant Shukla, learned counsel appearing on behalf of the applicant, Chandra Raj @ Chandra argues that in view of the specific judgment on this point in case of ***Pramod vs State of U.P. (Criminal Misc. Bail Application No.2447 of 2024),*** this exact objections were considered by a co-ordinate Bench of this Court and the bail application was held to be maintainable under Section 439 of Cr.P.C. mainly on the ground that in the criminal cases, in which the accused are not charge-sheeted under SC/ST Act are liable to be processed under the provisions of Cr.P.C. even if the offences are being tried by the Special Court established under the SC/ST Act and the Court proceeded to decide the bail application, vide order dated 01.03.2024. In the light of the said, it is proposed to be argued that the bail application is maintainable under Section 439 of Cr.P.C.

7. He further argues that while enacting the SC/ST Act, there is no specific bar to the invocation of Section 439 of Cr.P.C., and no bar under Section 18 to apply for bail is provided when the offences under SC/ST Act are prima facie not made out as held by the Hon'ble Supreme Court in the case of ***Prathvi Raj Chauhan vs Union of India and others; (2020) 4 SCC 727.*** Person not implicated under the SC/ST Act should not be made to suffer all the stringent provisions of the Act only because of the joint trial. There is no specific provision under the SC/ST Act for joint trial or the application of Cr.P.C. as contained in all other acts. He draws my attention to Section 14 of the SC/ST Act, which prescribed for constitution of Special Courts. He also draws my attention to similar enactment, wherein, Special Court has been prescribed to be constituted, namely, The Prevention of Corruption Act, 1988 (In short "PC Act"), The Prevention of Money Laundering Act, 2002 (In short "PML Act") and The Narcotic Drugs and Psychotropic Substances, Act, 1985.

8. Sri Prashant Shukla argues that in the said enactments, there is a specific enactment enabling the Special Courts constituted under the said Acts to hear the offences under IPC apart from the offences under the said Acts as prescribed under Section 43(2) of the PML Act and Section 4 (3) of the PC Act. He argues that while enacting the SC/ST Act, specific provisions such as those contained in sub-Section (2) of Section 43 of the PML Act and sub-Section (3) of Section 4 of PC Act are missing and as such, the Special Court would not have the jurisdiction to try the offences not arising under the SC/ST Act as such, the restrictions placed by means of Section 14-A(2) of SC/ST Act would also not be applicable and the applicant is at liberty to avail the remedy of bail conferred upon the higher court by virtue of Section 439 of Cr.P.C. He places reliance on the following judgments:

"(i). Prathvi Raj Chauhan vs Union of India and others; (2020) 4 SCC 727;

(ii). Gyanendra Maurya vs Union of India through Secy Ministry Social Justice and Empowerment and others; 2023 SCC OnLine All 46;

(iii). Teja vs State of U.P. (Criminal Appeal No.3603 of 2019) along with other criminal appeal, decided on 27.09.2019;

(iv). Pramod Yadav vs State of M.P. and others; 2021 SCC OnLine MP 3394;

(v). Sunita Gandharva (Smt.) vs State of M.P. and another; I.L.R. [2020] M.P. 2691;

(vi). Pramod vs State of U.P. (Criminal Misc. Bail Application No.2447 of 2024), decided on 01.03.2024; and

(vii) Ami Chand vs State of Himachal Pradesh; 2020 SCC OnLine HP 1840."

9. Sri Anuj Dayal, learned Counsel appearing on behalf of the applicants, Isha and Shanti mainly adopts the arguments as advanced by Sri Prashant Shukla and states that the Special Court can only try the offences, which are prescribed as offence under the said Special Act and nothing beyond that.

10. On the other hand, Sri Vivek Gupta, learned Counsel appearing on behalf of the complainant of Bail Application No.8192 of 2024 argues that Section 14-A(2), is an enactment which is at variance with the Cr.P.C. and it provides for an appellate forum against any order passed by the Special Court. He argues that in the present case admittedly the bail application filed by the applicant was rejected by the Special Court constituted under Section 14 of the SC/ST Act and once an appellate remedy is prescribed, the normal recourse which is available under Section 439 of Cr.P.C., cannot be resorted to. My attention was also drawn on the Full Bench decision of this Court in the case of ***Ghulam Rasool Khan and others vs State of U.P. and others; 2022 (8) ADJ 691,*** wherein specific question *"whether keeping in view the judgment of Rohit (supra), an aggrieved person will have two remedies available of preferring an appeal under the provisions of Section 14-A of the Act, 1989 as well as a bail application under the provisions of Section 439 of the Cr.P.C.?",* was considered and was answered by the Full Bench holding that only an appeal would lie.

11. Considering the submissions made at the Bar and considering the defence of language used in the statute of the SC/ST Act and the other statutes such as PC Act, PML Act etc. wherein there are similar provisions, it is noteworthy to note the said sections. Section 14 of SC/ST Act reads as under:

"14. Special Court and Exclusive Special Court.*--(1) For the purpose of providing for speedy trial, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, establish an Exclusive Special Court for one or more Districts:*

Provided that in Districts where less number of cases under this Act is recorded, the State Government shall, with the concurrence of the Chief Justice of the High Court, by notification in the Official Gazette, specify for such Districts, the Court of Session to be a Special Court to try the offences under this Act:

Provided further that the Courts so established or specified shall have

power to directly take cognizance of offences under this Act.

(2) It shall be the duty of the State Government to establish adequate number of Courts to ensure that cases under this Act are disposed of within a period of two months, as far as possible.

(3) In every trial in the Special Court or the Exclusive Special Court, the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Special Court or the Exclusive Special Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded in writing:

Provided that when the trial relates to an offence under this Act, the trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet."

12. Section 43 of the PML Act reads as under:

***"43. Special Courts.**—(1) The Central Government, in consultation with the Chief Justice of the High Court, shall, for trial of offence punishable under section 4, by notification, designate one or more Courts of Session as Special Court or Special Courts or such area or areas or for such case or class or group of cases as may be specified in the notification.*

Explanation.—In this sub-section, "High Court" means the High Court of the State in which a Sessions Court designated as Special Court was functioning immediately before such designation.

(2) While trying an offence under this Act, a Special Court shall also try an offence, other than an offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial."

13. Section 4 of the PC Act also reads as under:

***"4. Cases triable by special Judges.** - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.*

(2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the special Judge appointed for the case, or, where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

[(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the trial of an offence shall be held, as far as practicable, on day-to-day basis and an endeavour shall be made to ensure that the said trial is concluded within a period of two years:

Provided that where the trial is not concluded within the said period, the special Judge shall record the reasons for not having done so:

Provided further that the said period may be extended by such further period, for reasons to be recorded in writing but not exceeding six months at a time; so, however, that the said period

together with such extended period shall not exceed ordinarily four years in aggregate.] [Substituted by Act No. 16 of 2018, dated 26.7.2018.]"

14. At this instance, although not cited by any of the Counsel, it is essential to note a similar provisions for constitution of Special Courts under Section 30-B of The Mines and Minerals (Development and regulation) Act, 1957 (hereinafter referred to as "the MMDR Act"), which is as under:

***"[30B. Constitution of Special Courts**.—(1) The State Government may, for the purposes of providing speedy trial of offences for contravention of the provisions of sub-section (1) or sub-section (1A) of section 4, constitute, by notification, as many Special Courts as may be necessary for such area or areas, as may be specified in the notification.*

(2) A Special Court shall consist of a Judge who shall be appointed by the State Government with the concurrence of the High Court.

(3) A person shall not be qualified for appointment as a judge of a Special Court unless he is or has been a District and Sessions Judge.

(4) Any person aggrieved by the order of the Special Court may prefer an appeal to the High Court within a period of sixty days from the date of such order."

15. On a plain reading of the statutory provisions prescribed for constituting the Special Courts, for the furtherance of aims and objects of the special enactment, it is to be noticed that the language used in Section 14 of the SC/ST Act is similar to the language used for constitution of Special Courts under Section 30-B of the MMDR Act. Although, it has not been argued by both the Counsel, it is also essential to notice the mandate of Sections 220 and 223 of the Cr.P.C., which are quoted below:

***"220. Trial for more than one offence**.—(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.*

(2) When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in sub-section (2) of section 212 or in sub-section (1) of section 219, is accused of committing, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more offences of falsification of accounts, he may be charged with, and tried at one trial for, every such offence.

(3) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(5) Nothing contained in this section shall affect section 71 of the Indian Penal Code (45 of 1860).

***223. What persons may be charged jointly**.—The following persons may be charged and tried together, namely:—*

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate [or Court of Session] may, if such persons by an application in writing, so desire, and if he (or it) is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.

16. Section 30B of MMDR Act, which is pari materia to the provisions of Section 14 of the SC/ST Act, came up for interpretation before the Hon'ble Supreme Court in the case of ***Pradeep S. Wodeyar vs State of Karnataka; (2021) 19 SCC 62***, wherein, a similar argument was raised with regard to the power of Special Court to try for the offences under IPC. It was specifically argued in para 59, which is as under:

"59. The appellant had raised a contention that even if the Special Judge had the power to take cognizance of the offence, he could only have taken cognizance of offences under the MMDR Act and could not have taken cognizance (and conduct trial) of the offences under the provisions of IPC. For this purpose, the counsel for the appellant referred to Section 30-B(1) of the MMDR Act which states that the State Government may for providing speedy trial of offences under Section 4(1) or Section 4(1-A) of the MMDR Act constitute Special Courts. Section 30-B(1) reads as follows:

"30-B. Constitution of Special Courts.—(*1) The State Government may, for the purposes of providing speedy trial of offences for contravention of the provisions of sub-section (1) or sub-section (1-A) of Section 4, constitute, by notification, as many Special Courts as may be necessary for such area or areas, as may be specified in the notification."*

17. In furtherance of the aforesaid submissions before the Hon'ble Supreme Court attention was drawn to the provisions

Section 4(3) of the PC Act, Section 14(1) of NI Act and Section 28(2) of POCSO Act and it was argued that in the said enactments, there existed specific provisions for trying the offences under IPC also, no such provisions was prescribed under Section 30-B of the MMDR Act. The submission recorded by the Hon'ble Supreme Court in para 61 of the said judgment Pradeep S. Wodeyar (supra) reads as under:

"61. It is contended by the appellant that the Special Court established under a statute can try offences under IPC (or any offence other than the offences under the statute) only if expressly provided. To buttress this argument, Section 4(3) of the PC Act, Section 14(1) of the NIA Act, and Section 28(2) of the Protection of Children from Sexual Offences Act, 2012 ("the Pocso Act") were referred to. All the three provisions expressly provide the Special Court with the power to try offences other than those offences specified in the Act. Section 4(3) of the PC Act reads as follows:

"4. (3) When trying any case, a Special Judge may also try any offence, other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial."

(emphasis supplied)

Section 14 of the NIA Act read as follows:

***"14. Powers of Special Courts with respect to other offences.**—(1) When trying any offence, a Special Court may also try any other offence with which the accused may, under the Code be charged, at the same trial if the offence is connected with such other offence.*

(2) If, in the course of any trial under this Act of any offence, it is found that the accused person has committed any other offence under this Act or under any other law, the Special Court may convict such person of such other offence and pass any sentence or award punishment authorised by this Act or, as the case may be, under such other law." (emphasis supplied)

Section 28(2) of the Pocso Act provides the following:

"28. (2) While trying an offence under this Act, a Special Court shall also try an offence other than the offence referred to in sub-section (1), with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974) be charged at the same trial."

(emphasis supplied)"

18. The Hon'ble Supreme Court extensively dealt with the said submissions and also considered the mandate of Section 220 of Cr.P.C., which was specifically not an offence under the MMDR Act like in the present case and decided the issue as under:

"***C.4.2. Joint trial and implied repeal***

69. The general rule of construction is that there is a presumption against a repeal by implication because the legislature has full knowledge of the existing law on the subject-matter while enacting a law. When a repealing provision is not specifically mentioned in the subsequent statute, there is a presumption that the intention of the legislature was not to repeal the provision. The burden to prove that the subsequent enactment has impliedly repealed the provision of an earlier enactment is on the party asserting the argument. This presumption against implied repeal is rebutted if the provision(s) of the subsequent Act are so inconsistent and repugnant with the

provision(s) of the earlier statute that the two provisions cannot "stand together". [Harshad S. Mehta v. State of Maharashtra, (2001) 8 SCC 257 : 2001 SCC (Cri) 1447; Justice G.P. Singh, Principles of Statutory Interpretation (14th Edn. LexisNexis 2016) 737-738] Therefore, the test to be applied for the construction of implied repeal is as follows :

Whether the subsequent statute (or provision in the subsequent statute) is inconsistent and repugnant with the earlier statute (or provision in the earlier statute) such that both the statutes (or provisions) cannot stand together. [Also see, State of Orissa v. M.A. Tulloch & Company, 1963 SCC OnLine SC 18 : AIR 1964 SC 1284; Syndicate Bank v. Prabha D. Naik, (2001) 4 SCC 713; State of M.P. v. Kedia Leather & Liquor Ltd., (2003) 7 SCC 389 : 2003 SCC (Cri) 1642; Lal Shah Baba Dargah Trust v. Magnum Developers, (2015) 17 SCC 65 : (2017) 5 SCC (Civ) 412;] The test when applied in the context of this case is whether Section 30-B of the MMDR Act is inconsistent and repugnant to Section 220CrPC that both the provisions cannot go hand in hand.

72. One of the contentions raised by the counsel for the appellant in Harshad S. Mehta case [Harshad S. Mehta v. State of Maharashtra, (2001) 8 SCC 257 : 2001 SCC (Cri) 1447] was that similar earlier enactments have expressly granted the power to grant pardon to the Special Court constituted under the Act and that when the legislature has deliberately omitted the inclusion of the provision, it would mean that the power was not intended to be granted. The counsel contended that the Special Court under the Act consists of a Judge of the High Court, while Section 306 for the purpose of the provision only enumerates categories of Magistrates. The Bench observed that an express provision needs to be made in the subsequent specific statute only when wider powers or no powers are intended to be given : (Harshad S. Mehta case [Harshad S. Mehta v. State of Maharashtra, (2001) 8 SCC 257 : 2001 SCC (Cri) 1447] , SCC p. 276, para 38)

"38. It is understandable that if powers wider than the one contemplated by the Code are intended to be conferred, a provision to that effect will have to be made. It does not follow therefrom that in an altogether different statute, if no special provision is made, an inference can be drawn that even where the powers under the Code and not wide powers were intended to be conferred, save and except where it is so stated specifically, the effect of omission would be that the Special Court will not have even similar powers as are exercised by the ordinary criminal courts under the Code."

75. The Judicial Magistrate First Class is invested with the authority to try offences under Sections 409 and 420IPC. On the other hand, the Sessions Judge is appointed as a Special Judge for the purposes of the MMDR Act. If the offences under the MMDR Act and IPC are tried together by the Special Judge, there arises no anomaly, for it is not a case where a Judge placed lower in the hierarchy has been artificially vested with the power to try the offences under both the MMDR Act and the Code. Additionally, if the offences are tried separately by different fora though they arise out of the same transaction, there would be a multiplicity of proceedings and wastage of judicial time, and may result in contradictory judgments. It is a settled principle of law that a construction that permits hardship, inconvenience, injustice, absurdity and anomaly must be avoided. Section 30-B of the MMDR Act and Section 220 CrPC can be harmoniously construed and such a

construction furthers justice. Therefore, Section 30-B cannot be held to impliedly repeal the application of Section 220CrPC to the proceedings before the Special Court."

19. As the pari materia provisions contained in Section 30-B of the MMDR Act along with other provisions contained in the said Act has already been interpreted by the Hon'ble Supreme Court in the said case Pradeep S. Wodeyar (supra) and the conclusions to that effect are recorded in para 108 to the following effect:

"D. The conclusion

108.1. The Special Court does not have, in the absence of a specific provision to that effect, the power to take cognizance of an offence under the MMDR Act without the case being committed to it by the Magistrate under Section 209CrPC. The order of the Special Judge dated 30-12-2015 taking cognizance is therefore irregular.

108.2. The objective of Section 465 is to prevent the delay in the commencement and completion of trial. Section 465CrPC is applicable to interlocutory orders such as an order taking cognizance and summons order as well. Therefore, even if the order taking cognizance is irregular, it would not vitiate the proceedings in view of Section 465CrPC.

108.3. The decision in Gangula Ashok [Gangula Ashok v. State of A.P., (2000) 2 SCC 504 : 2000 SCC (Cri) 488] was distinguished in Rattiram [Rattiram v. State of M.P., (2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] based on the stage of trial. This differentiation based on the stage of trial must be read with reference to Section 465(2)CrPC. Section 465(2) does not indicate that it only covers challenges to pre-trial orders after the conclusion of the trial. The cardinal principle that guides Section 465(2)CrPC is that the challenge to an irregular order must be urged at the earliest. While determining if there was a failure of justice, the courts ought to address it with reference to the stage of challenge, the seriousness of the offence and the apparent intention to prolong proceedings, among others.

108.4. In the instant case, the cognizance order was challenged by the appellant two years after cognizance was taken. No reason was given to explain the inordinate delay. Moreover, in view of the diminished role of the committal court under Section 209 of the Code of 1973 as compared to the role of the committal court under the erstwhile Code of 1898, the gradation of irregularity in a cognizance order made in Sections 460 and 461 and the seriousness of the offence, no failure of justice has been demonstrated.

108.5. It is a settled principle of law that cognizance is taken of the offence and not the offender. However, the cognizance order indicates that the Special Judge has perused all the relevant material relating to the case before cognizance was taken. The change in the form of the order would not alter its effect. Therefore, no "failure of justice" under Section 465CrPC is proved. This irregularity would thus not vitiate the proceedings in view of Section 465CrPC.

108.6. The Special Court has the power to take cognizance of offences under the MMDR Act and conduct a joint trial with other offences if permissible under Section 220CrPC. There is no express provision in the MMDR Act which indicates that Section 220CrPC does not apply to proceedings under the MMDR Act.

108.7. Section 30-B of the MMDR Act does not impliedly repeal Section

220CrPC. Both the provisions can be read harmoniously and such an interpretation furthers justice and prevents hardship since it prevents a multiplicity of proceedings.

108.8. Since cognizance was taken by the Special Judge based on a police report and not a private complaint, it is not obligatory for the Special Judge to issue a fully reasoned order if it otherwise appears that the Special Judge has applied his mind to the material.

108.9. A combined reading of the Notifications dated 29-5-2014 and 21-1-2014 indicate that the Sub-Inspector of Lokayukta is an authorised person for the purpose of Section 22 of the MMDR Act. The FIR that was filed to overcome the bar under Section 22 has been signed by the Sub-Inspector of Lokayukta Police and the information was given by the SIT. Therefore, the respondent has complied with Section 22CrPC.

108.10. The question of whether A-1 was in charge of and responsible for the affairs of the company during the commission of the alleged offence as required under the proviso to Section 23(1) of the MMDR Act is a matter for trial. There appears to be a prima facie case against A-1, which is sufficient to arraign him as an accused at this stage."

20. There appears no reason for this Court to take a view as canvassed by Sri Prashant Shukla and Sri Anuj Dayal, learned Advocates, as such, on the foundation of the interpretation of the Hon'ble Supreme Court in the case of *Pradeep S. Wodeyar (supra),* I have no hesitation in holding that the Sessions Court/ Special Courts constituted under the SC/ST Act is duly and well empowered to consider the offences against the accused even under IPC. Once the Special Court constituted under the Act is empowered to take cognizance and to try offences together, all the rigors of the SC/ST Act would apply and keeping in view the Full Bench decision of this Court in the case of *Ghulam Rasool Khan (supra),* an appeal would be maintainable against an order rejecting the bail application by the Special Court, thus, the present bail applications filed under Sections 439 of Cr.P.C. deserve to be rejected.

21. Accordingly, both the bail applications are hereby ***rejected*** giving liberty to the applicants to file an appeal under Section 14-A (2) of the SC/ST Act, if so advised.

22. I am not dealing with the judgments cited by the learned Counsel in view of the specific interpretation of the Hon'ble Supreme court in the case of *Pradeep S. Wodeyar (supra)* interpreting a *pari materia* provisions which aspect was neither raised nor considered in any of the referred judgments as such the bail applications are rejected with the liberty recorded above.

23. Office is directed to provide certified copies of the bail rejection orders and the first information reports on moving appropriate applications by the Counsel for the applicants.

(2024) 8 ILRA 25
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 241 of 2007

Sunil ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:
Sri R.K. Singh, Sri Ajay Vashistha, Sri Ashok Kumar Tripathi, Sri Noor Mohammad, Sri Yogesh Srivastava

Counsel for the Respondent:
Govt. Advocate

(A) Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 313 & 374(2) - Indian Penal Code, 1860 - Sections 302, 304, 449 & 452 - Appeals – against conviction & sentence – offence of murder – FIR – accused had struck severely with brick on the head and face of his deceased wife Kunti Devi on account of some abrupt wrangling over some issue, deceased died due to the injuries who had a pregnancy of either months - investigation – recovery – charge-sheet u/s 304, 452 IPC – Trail took cognizance – later on trial court framed charges u/s 302, 449 IPC – conviction & sentenced – Appeals - Evaluation of evidences – court finds that, - (i) according to PW-6 the FIR was registered on same day when the Tehrir was received, it indicate that FIR was prepared ante dated, (ii) FIR was registered u/s 304, 452 IPC but PW6 has not sent the special report of the case to the higher authorities – omission of such an action on the part of the police, cast doubt about the fact that FIR was lodged ante time, (iii) As per rule, FIR should be sent to the CJM within 24 hours of the lodging, but on what date it was sent, is not mentioned therein – which indicates doubt about the prompt lodging of FIR, (iv) PW-1 has nowhere mentioned in his PM report, case no., papers sent to him by police and sections of IPC & other descriptions of the matter – which further indicates that FIR was not in existence till the post-mortem was over, (v) the evidence on the record will also suggest that FIR has been prepared after due deliberations and concoction, (vi) the PMR reveals that deceased was gravid of eight months – but such an important fact is not mentioned either in Tehrir nor in the St.ment of accused u/s 161 Cr.P.C. – which cast doubt about the truthfulness of his testimony and also about the FIR – Held, - in view of the above FIR in this case appears to be ante timed, however, it would not be safe to throw over board the entire prosecution case on this score only. (Para – 34, 35)

(B) Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 313 & 374(2) - Indian Penal Code, 1860 - Sections 302, 304, 449 & 452 - Appeals – against conviction & sentence – offence of murder – FIR – accused had struck severely with brick on the head and face of his deceased wife Kunti Devi on account of some abrupt wrangling over some issue, deceased died due to the injuries who had a pregnancy of either months - investigation – recovery – charge-sheet u/s 304, 452 IPC – Trail took cognizance – later on trial court framed charges u/s 302, 449 IPC – conviction & sentenced – Appeals - Evaluation of evidences – court finds that, - (a) in present case there is no direct evidence, (b) the motive attributed for committing the crime by the accused appellant does not inspire confidence, (c) prosecution has filed to establish any motive of committing crime which renders the prosecution case doubtful, (d) there are several contradictions and discrepancies in the St.ment of prosecution witnesses – and the same is not of much significance or material or prejudicial to appellant, (e) there is no eye witnesses of the occurrence – therefore it is a case of circumstance evidence, which requires that there should be a complete chain of evidence pointing towards guilt of the accused/appellant, (f) prosecution has not examined any independent witness, despite their availability and presence at the spot, to corroborate, testimonies of PW-2 & PW-3 – as such entire prosecution story is disproved - (g) the chain of evidence of the circumstances is not complete in toto - Held, - prosecution has failed to established the allegations beyond reasonable doubt, pointing unerringly towards the guilt of the appellant and the learned trial court misevaluated and mis-appreciated the entire evidence in convicting and sentencing the appellant – resultantly, appeal is allowed - directions issued accordingly. (Para – 46, 48, 50, 51, 52, 53)

Appeal is allowed. (E-11)

List of Cases cited:

1. In Jay Prakash Singh Vs St. of Bihar & anr. (2012) 4 SCC 379

2. St. of H. P. Vs Gian Chand, AIR 2001 S.C. 2075

3. Om Prakash Vs St. of Har. 2014 Cr. L.J.2567 (SC)

4. Meharaj Singh Vs St. of U.P. (1994) 5 SCC 188),

5. Ramdas & ors.Vs St. of Mah. (2007) 2 SCC 170,

6. Kanhaiya Lal & ors.Vs St. of Raj. (2013) 5 SCC 655

7. Mohammad Muslim Vs St. of U.P. 2023 live law (SC) 489

8. Pandurang & ors.Vs St. of Hyd. (AIR 1956 SC 216).

9. Dadu Baburao Kerleka Vs St. of Mah. 2018 AIR SC 659.

10. St. of Raj. Vs Smt. Kalki & anr. (1981) 2 SCC 752

11. Hari Obula Reddy Vs St. of A.P. (1981) 3 SCC 675

12. S. Sudershan Reddy & ors. Vs St. of A.P. (2006) 10 SCC 163

13. Rai Sandeep Vs St. (NCT of Delhi), (2012) 8 SCC 21

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Present criminal appeal, under Section 374(2) Cr.P.C., has been preferred before this Court, on behalf of appellant, Sunil, challenging the judgement and order dated 29.11.2006, passed by Additional District and Sessions Judge, Court No.3, Bulandshahar, Sessions Trial No.972 of 2006 (State Versus Sunil) in Case Crime No.117 of 2006, u/s 452 and 449 I.P.C., Police Station Khurja, District Bulandshahar, wherein the accused/appellant has been convicted under Sections 302 and 449 I.P.C. and sentenced to undergo life imprisonment with fine of Rs.5,000/- for the offence punishable under Section 302 I.P.C., and to serve out seven years imprisonment with fine of Rs.3,000/- for the offence punishable under Section 449 I.P.C. In default of payment of fine, the appellant was directed to undergo additional simple imprisonment of one year for the offence punishable under Section 302 I.P.C. and six months' additional simple imprisonment for the offence punishable under Section 449 I.P.C. Both the sentences were directed to run concurrently.

2. Succinctly, the prosecution story, as projected in F.I.R., undisputed facts and other material on record, is that on 15.07.2006 at about 9.30 p.m. complainant Vinod Kumar s/o Natthi Singh, R/o Mobarikpur, Police Station Khurja Dehat, District Bulandshahar, presented a Tehrir, scribed by Jai Prakash Singh and signed by the complainant, in Police Station Khurja, in respect of an incident, alleged to have occurred on 15.07.2006 at about 7.30 p.m., unravelling therein the fact that on the fateful day he had gone to Khurja at about 3.00 p.m. to collect his wages. At about 7.30, in the evening, when he returned at his home, he saw that Sunil s/o Badam Singh, hailing from Village Bagrai Khurd, after flinging his wife Kunti Devi, down on the ground, inside the house, was inflicting blows on her head and face, with a brick. His co-villagers Heera Lal and Ved Ram are brothers-in-law of the father of Sunil. Hence he used to visit their house frequently. Sunil had done to death his wife Kunti, by causing injuries on her head and face. On her shriek and wailing, Devkaran, Sukhdeo and several others, of his vicinity gathered on the spot. Looking to the gathering of people and his insipid position, the accused- Sunil disappeared from the place of occurrence, giving a push to the

complainant. There was no animus and animosity between Sunil, as well as with his family members and complainant. Sunil had struck severely with brick on the head and face of his deceased wife Kunti Devi on account of some abrupt wrangling over some issue.

3. On the basis of aforesaid Tehrir (Ext. Ka-1), Criminal Case Crime No. 117 of 2006 under Section 304 and 452 I.P.C. was registered at the Police Station Khurja Dehat, against accused Sunil. The entries were drawn in Kaimi G.D. No. 39 dated 15.07.2006, at 21.30 hours and simultaneously Chik F.I.R. (Ext. Ka-12), was prepared. Initially the investigation was entrusted to Sub Inspector, Daya Chand Satsangi.

4. Thus, the investigation set into motion. The Investigating Officer proceeded to place of occurrence in association with Station Officer, Karan Singh Chauhan, C- Iqbal Khan, C- Suresh Pal, etc. He recorded statements of witnesses under Section 161 Cr.P.C. and prepared site-plan. After nominating the witnesses, the Investigating Officer launched the inquest proceeding, of the dead body of the deceased, at about 9.30 p.m. on the same day. In the opinion of panches, the deceased Kunti Devi died due to the injuries sustained by her. It is also mentioned in the inquest report that the deceased had a pregnancy of eight months. However, they opined that in order to ascertain the real cause of death, postmortem may be got done. The Investigating Officer subscribed to the opinion of the inquest witnesses. Therefore, the Investigating Officer prepared formal papers, photo lash, report to the R.I., request for postmortem to Chief Medical Officer and challan lash. Corpse of the deceased was wrapped in cloth and sealed. Specimen of the seal was also prepared. The dead body was handed over to C- Iqbal Khan and C- Suresh Pal along with papers, to take it to the mortuary at District Hospital, where autopsy of the dead body of deceased Kunti Devi was conducted by Dr. B.P. Singh Kalyani on 16.01.2006 at about 4.00 p.m.

5. The Investigating Officer collected blood saturated brick, plain and blood stained earth from the place of occurrence in the presence of witnesses Manoj Kumar, Shyam Shanker Sharma and Station Officer Ratan Lal Sharma, which were kept in a polythene bag in separate boxes and sealed. He also prepared the recovery memo (Ext. Ka-8) of the same over which signature of the witnesses were obtained. A bloodstained underwear (Ext. Ka-10) was also taken into possession by the Investigating Offer which were sent to Forensic Science Laboratory for chemical examination.

6. The accused-appellant was arrested on 19.07.2006 at 18.05 hours from Old G.T. Road, Bichhona Curve. After due investigation and collection of credible and clinching material and evidence showing the complicity of the accused-appellant submitted charge-sheet under Sections 304 and 452 LPC. against accused Sunil, in the court of Chief Judicial Magistrate, Bulandshahar, who took the cognizance of the case. Since the case was exclusively triable by the court of sessions, learned Chief Judicial Magistrate vide his order dated 31.08.2006, committed it to the Court of Sessions, wherein it was registered as Sessions Trial No.972 of 2006, Learned sessions judge in turn, transferred it to the court of Additional District and Sessions Judge, Court No.3, Bulandshahar for trial.

7. Learned trial court, after hearing both the parties, framed charges against the accused / appellant Sunil under Sections 302 and 449 I.P.C. The accused/ appellant renounced the charges, pleaded not guilty and claimed to be tried.

8. During the course of trial, the prosecution in order to appreciate the charges levelled against the accused-appellant examined following witnesses in ocular evidence:

Sl. No.	Name of witness	PW no.	Remarks
i	ii	iii	iv
1.	Dr B.P. Singh Kalyani	PW-1	Dr. postmortem
2.	Vinod Kumar (nephew of PW-3)	PW- 2	Complainant,
3.	Sukhdeo	PW-3	Uncle of PW-2
4.	C-1263 Suresh Pal	PW-4	Inquest witness
5.	S.I. Daya Chand Satsangi	PW-5	I.O.
6.	H.C.P.-19 Subhash Chandra	PW-6.	Chik and G.D. writer

9. Besides, aforesaid ocular evidence, the prosecution has adduced following documentary evidence:

Sl. No.	Particulars	Ext Nos.	Proved by
i	ii	iii	iv
1.	Tehrir	Ext. Ka-1	PW-2
2.	Inquest Report	Ext. Ka-2	PW-5
3.	Challan lash	Ext. Ka-3	PW-5
4.	Letter to RI	Ext. Ka-4	PW-5
5.	Requestto CMO	Ext. Ka-5	PW-5
6.	Photo lash	Ext. Ka-6	PW-5
7.	Memo of plain and blood stained earth	Ext. Ka-7	PW-5
8.	Memo of Blood saturated brick	Ext. Ka-8	PW-5
9.	Site-plan	Ext. Ka-9	PW-5
10.	Memo of the blood soaked underwear	Ext.Ka10	PW-5
11.	Charge-sheet	Ext.Ka11	PW-5
12.	Chik F.I.R.	Ext.Ka12	PW-6
13.	Kaimi G.D	Ext.Ka13	PW-6
14.	Postmortem Report,	Ext.Ka14	PW-1

10. In further corroboration of its case, the prosecution has also adduced following material objects in evidence: (1) Blood saturated brick and (2) blood-stained vest of the accused-appellant (Ext. Nos. 1 and 2).

Sl.No.	Material Ext.	Ext Nos.	Proved by
i	ii	iii	iv
1	Blood saturated bricks	Ext.-1	PW-5
2	Plain and blood stained earth	Ext.-2-5	PW-5
3.	Blood soaked underwear	Ext. 6	PW-5
4.	Vaginal slide report	Ext. 7	PW- 5

11. After conclusion of the prosecution evidence, the accused was afforded an opportunity under Section 313 for offering his explanation/rebuttal of the prosecution evidence/charges against him. His statement under Section 313 Cr.P.C. was recorded in question-answer form. In his statement he denied his presence on the spot, on the day of occurrence. He also denied the prosecution allegations and charges. He negated and renounced prosecution evidence as wrong.

12. Accused/ appellant did not adduce any defence evidence, oral or documentary.

13. Learned trial court, after examining the entire material on record, testimonies of the witnesses, undisputed facts scrutinized and evaluating it, came to the conclusion that there is a complete chain of the evidence, showing the complicity of the accused-appellant in commission of the crime conducted that prosecution has proved its case beyond reasonable doubts, convicted the accused/ appellant, accordingly, under Sections 302 and 499 1.P.C. and sentenced him as stated above, vide its judgement and order dated

29.11.2006. Felt aggrieved, accused-appellant preferred the present appeal.

14. We have heard Sri Ashok Kumar Tripathi, learned Amicus Curiae appearing for the appellant, learned A.G.A. for the State, in extenso and have been taken through the entire material on record.

15. Learned counsel for the appellant assailed the impugned judgement of conviction and sentence on various grounds and advanced several arguments in this respect. Let us examine analyse and scrutinize the contentions, advanced by the learned counsel for the appellant on the touch stone of the evidence adduced by the prosecution, the undisputed facts and circumstances and entire material on record of the case. This opens door for us to enter into the prosecution evidence on record.

16. Prosecution in substantiation of its case, examined PW- 1 Dr. B.P. Singh Kalyani, who deposed that on 16.07.2006, during his posting in the District Hospital Bulandshahr, he had conducted the autopsy of the body of deceased Smt. Kunti, at about 4.00 a.m., which was brought by the C-1265 Suresh Pal and C-224 Iqbal Khan. The said corpse was identified by them.

(I)- External Examination: The deceased was an average built lady, aged about 22 years. Eyes of the deceased were closed. There was no injury on the breasts, hip waist, thighs and vagina. Rigor mortis passed in upper limb extremities, but present in the lower limbs of her person. There was no injury on the brests, hip, waist, thighs and vagina. Brain membrane and brain were torn. She died one day before the postmortem.

Ante-mortem Injuries: During dissection the doctor found the following ante-mortem injuries on the person of the deceased:-

(i)- Lacerated wound 5.00 c.m. x 2.00 c.m. x bone deep on right side of head. 5 c.m. above right ear. On exploration haematoma present underlying. Parietal bone was found fractured.

(ii)- Lacerated wound 4 c.m. x 1.5 c.m. x bone deep on left side head. 8 c.m. above left ear.

(iii)- Lacerated wound 5 c.m. x 3 c.m. x bone deep on right side of forehead just above middle of right eye-brow.

On exploration frontal bone on right side found fractured.

(iv)- Lacerated wound 1 c.m. x 1 c.m. x muscle deep on front and middle part of no
se.

(v)- Lacerated wound 4 c.m. x 2 c.m. buccal cavity deep on right side of face just below r
ight angle of mouth. Mandible on right side was found fractured.

(vi)- Lacerated wound 2 c.m. x 1 c.m. x muscle deep on right face just below right eye.

(II)- Internal Examination: On internal examination of the body of deceased about 60 ml. blood present in cardinal cavity. About 200 grams semi digested food was found in the stomach. Doctor also observed that deceased Kunti was gravid. Her uterus was 36 cm. in length carrying a mail foetus in the womb. He further proved that there was possibility of causing these injuries by inflicting with brick and were sufficient to cause her death. Doctor proved autopsy report as Ext. Ka-14, by stating that it is in his writing and signature. Doctor further averred that two slides of vaginal smears were collected to ascertain the presence of spermatozoa. He found 13 items on the dead body of the deceased, which were handed over to the

police personnel, who brought the dead body, the slides were also sent to P.S. concerned for pathological examination. Generally, these injuries were sufficient to cause death of the victim and these were possible to come on 15.07.2006 at about 7.30 p.m.

(III)- Cause of death:- Doctor has opined that death of the deceased Kunti was caused due to shock and haemorrhage, as a result of ante mortem injuries and excessive bleeding.

17. PW- 1 Dr. B.P. Singh Kalyani, has averred in his cross examination that all the injuries suffered by the victim were in the form of lacerated wound and could not be caused by hitting her with danda etc. All the injuries were caused by hard and blunt object. These injuries could not be received on felling down of the victim. However, the head injury could be received, if the victim falls on the floor, but such a number of injuries cannot be received as a result of fall on the earth. The doctor negated the suggestion by saying that if there is a fight between two persons, it is not possible to get these injuries, even in a scuffle. These injuries can also not be received if someone fling the victim by fastening his/ her holding him by his waist. These injuries can be inflicted by a single man. Injuries of the victim were one day old. The doctor further denied the suggestion that these injuries were not caused by one person, in stead three or four persons caused the injuries. There was no mark of injury over other parts of the dead body, except on the face and head. These injuries are not possible to be self inflicted.

18. PW- 2 Vinod Kumar is the complainant of the incident and husband of the deceased Kunti Devi. In his examination-in-chief he deposed that Sunil is the resident of village Bagrai, which is 15-16 km. away from his village. His two Bua (father's sister) are married in his village. The house of one is situated in front of his house. Sunil used to visit his Bua frequently. A hand-pipe is installed in his house. Neighbouring people used to take water from it. About three and half months ago he went for his work at about 3.00 p.m. in the noon to Khurja and returned at about 7.30 p.m. therefrom. On entering in his house, he saw that in his room near the bed, Sunil had thrown his wife on the ground and was crushing her head with a brick, sitting on the top of her. He made shriek, but Sunil pushed him aside and ran away from there. On shrill and shriek, his co-villegers Shukdev and Devkaran reached on the spot. They also saw Sunil coming out from his house. He chased Sunil, but passing through the houses of Harveer and Kunwer Pal, jumping over the wall, he escaped and could not be arrested. His wife died on the spot. Then he got scribed a tehrir of the incident by dictating it to Jay Prakash, and signed. He proved the written scribe as Ext. Ka- 1. At the time of incident his wife was gravid of 7 months. On the fateful evening, he had gone to Khurja to take his due wages from Rajkumar. The house of Hiralal, Fufa of Sunil is situated in front of his house. 2-4 days before the incident, there happened to be a dispute between his wife and wife of Hiralal regarding taking of water from the hand pump. On the day of the incident, Hiralal's daughter Renu came to our house, for bathing, but she restrained her to do so. Renu had made a complaint of it, in her house. Sunil was staying with uncle Hiralal for last 7-8 days, of the occurrence. Sunil murdered his wife on the issue of using hand pump. The witness has also been put under cross-examination.

19. PW- 3 Sukhdev has averred that he know accused Sunil. He is the son of the

brother-in-law, of his co-villeger Hira Lal and Ved Ram. One of his father's sister (bua) is married to Hira Lal and other is married to Ved Ram. Vinod is his real nephew. Vinod and his wife Kunti were residing together in the house, Vinod's father had already expired. His mother had gone to her maika and his only brother resides in his sasural at Gram Kile. Vinod has a sister also, who is already married. On the fateful day, Vinod and his wife were alone in their house. Sunil used to visit his Fufa's house frequently. Vinod had no child. Incident had taken place about three and half month earlier. It was 7.30 p.m. On hearing shriek and lamentation, he reached towards the house of Vinod. He saw Sunil, pushing Vinod, was coming out of his house. He saw Sunil coming out through gallery of his house. He jumped in the house of Kunwer Pal and fled away, towards the village Bichaula. His hands were ensanguine with blood. Two-three days before the incident, there was an altercation between Kunti and Sunil's aunt Kamlesh, over the use of hand pipe, which is situated in the house of Vinod. On the day of occurrence Renu D/o Heera Lal had gone to take bath on the hand pipe, to which Kunti opposed. At the relevant time, Sunil murdered Kunti on this issue. Sun was setting but it was not complete sunset and there was sufficient visibility at that time. The witness was thoroughly cross examined also by the defence.

20. PW-4 Constable Suresh Pal has stated on oath that on 15.07.2006 he was posted at the police station Khurja Dehat. On that day he reached at the house of Vinod kumar, where the dead body of the deceased Kunti was lying, alongwith S.I. D.C. Satsangi, C- Iqbal Khan, S.O. Karan Singh Chauhan and other Police personnels. S.I. D.C. Satsangi conducted the Inquest proceeding of the dead body of the deceased Kunti, at about 23.50 p.m. He prepared the other papers also. The dead body of the deceased Kunti was wrapped in a cloth and sealed. He prepared specification of the seal also. The sealed dead body was handed over to him and C-Iqbal khan with direction that no one should be allowed to touch or disturb the dead body, till the postmortem proceeding are over, which we adhered to. After the postmortem, the dead body was handed over to the family member of the deceased Kunti and sealed bundle of the cloths and two envelops, one containing two slides and one P.M. Report given by the doctor to them, were submitted at the police station.

21. In his cross examination the witness deposed that he was called to the police station at about 09.30 p.m. C-Iqbal Khan was present there. Both of them reached the police station through their cycles and set out for the place of occurrence, they entered their departure (Ravangi) in G.D. also. It took about 45 minutes to reach there. 2–4 family member of the deceased Kunti and 2-4 other people, were present near the dead body. Panchayatnama of the corpse was prepared in his presence, over which five witnesses put their signature as panch. They brought the dead body of Kunti, through tractor trolley up to Khurja and from there through tempo, and reached at the mortuary. He do not remember the name of the owner of the tractor. The dead body was not flicked anywhere, while being carried one tractor or the tempo. The road was plain and smooth.

22. PW-5 S.I. Daya Chand Satsangi, is investigating officer. He has stated that on 15.07.2006 instant Criminal Case No. 117/2006 under sections 304, 452 IPC was

registered at the police station Khurja dehat and he was entrusted the investigation of the case. He recorded the statement of witnesses and proceeded to the place of occurrence, i.e. house of Vinod, situate in the village Mubarikpur, through Jeep along with H.M. Subhash Channdra Verma, S.O. Karan Singh Chauhan, C- Iqbal Kahn, C- Suresh Pal and other police personnels. They saw the dead body of deceased Kunti lying on the floor in a room. He nominated witnesses of inquest (Panches) and launched inquest proceedings of the corpse of deceased Kunti Devi and prepared the report in the presence of witnesses and obtained their signatures on the inquest report. He proved inquest report as Ext. Ka- 2. In the opinion of the witnesses deceased died due to injuries on the face and head, but to ascertain real cause, post-mortem be got done. He also subscribed to the opinion of witnesses. So, he prepared challan lash, letter to R.I., letter to C.M.O., photo lash sealed the dead body and the specimen seal was prepared, and body was handed over along with the papers to C- Suresh Pal and C- Iqbal khan, to take it to mortuary. They were instructed that no one should be accorded opportunity to touch and disturb the sealed dead body, till the postmortem was over. The witness proved inquest report as Ext Ka-2. Challan lash as Ext Ka- 3. Letter to R.I. as Ext. Ka- 4, request to C.M.O. as Ext. Ka- 5, Photo lash as Ext. Ka- 6. The witnesses stated that he collected plain and blood stained earth, which was sealed in two separate boxes in the presence of the witnesses and prepared memo for the same in his writing and signature, singnatures of witness were also obtained. He proved it as Ext. Ka- 7. He also collected a blood saturated bricks from the spot which was sealed and recovery memo for the same was prepared by him in his hand-writing and signature of the witnesses were obtained over it. He proved the memo as Ext. Ka- 8. On 16.07.2006 he also recorded the statement of tehrir scribe Jay Prakash and prepared site plan at the instance of the complainant. He proved site plan as Ext. Ka- 9. He also recorded the statement of Harviri and on her instance collected a blood stained underwear from the place where the accused had jumped over the wall. The recovery memo for the same was prepared in the presence of the witnesses in his hand-writing and signature. He proved it as Ext. Ka- 10. On 19.07.2006 he arrested accused Sunil at about 18.05 hours and recovered a country-made pistol from him. For which separate criminal case was registered against him. On 29.07.2006 he received two slides, sent by the autopsy surgeon, sent for test. The report of the same was received from the lab after photological examination. He also recorded the statement of C- Suresh Pal and C- Iqbal Khan and the statements of the inquest report. After completion of the investigation he submitted a charge-sheet against the accused Sunil in his writing and signature. The witness proved the charge-sheet as Ext. Ka- 11. The witness also identified the brick which he has collected from near the dead body on 15.07.2006 and also proved it as the material Ext. 1 to 7. I.O. was also put to several queries in his cross-examination.

23. PW-6 H.C. 19 Subhas Chandra is the police personnel who on 15.11.2006 has registered Case Crime No. 117/2006, under Section 452, 304 I.P.C. against accused Sunil, on the basis of the tehrir Ext. Ka- 1 of complainant Vinod Kumar and drawn chik and entries in kaimi G.D. No. 39 at 9.30 p.m. dated 15.07.2006 in his writing and signature. He proved chik FIR as Ext. Ka- 12 and kaimi G.D. as Ext. Ka- 13.

24. In his cross-examination PW- 6 has stated that complainant came along with Shyam Sunder, Manoj and Jay Prakash to the police station to lodge FIR. At that time S.I. D.C. Satsangi was present at and he made his signature on chik. He has written Section 304, 452 I.P.C. on the chik. The copy of the same were given to I.O. who proceeded for the spot immediately, when he returned, he was not on duty. He do not know when I.O. returned at the police station. He has not sent any special report because there is no need to send special report regarding the occurrence under Section 304 I.P.C. He do not know that paper of the tehrir is taken from a note book or not. On 15.07.2006 no FIR was registered about any cognizable offence prior or afterward to this case. He declined the suggestion that he registered the case after I.O. returned from investigation.

25. Learned Amicus Curiae, appearing for the appellant, has assiduously argued that in the present case FIR is ante timed and has been lodged after a long deliberation and confabulation. So it is the creature of afterthought, which shrouded the veracity and probity of prosecution story in serious doubt. Learned A.G.A. dispelled the contention of the learned counsel for the appellant. In view of the rival submissions of the parties it is pertinent to have an bird's eye view of legal scenario, in this behalf.

26. In **Jay Prakash Singh Vs. State of Bihar and Anr. (2012) 4 SCC 379,** it is held by the Hon'ble Apex Court:-

"12. The FIR in a criminal case is a vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of the eyewitnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity, danger creeps in of the introduction of colored version, exaggerated account or concocted story as a result of large number of consultations / deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question."

27. We may refer with profit a passage from **State Of Himachal Pradesh vs Gian Chand,** AIR 2001 S.C. 2075, also:-

"Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the Court in its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

28. In **Om Prakash vs State Of Haryana** 2014 Cr. L.J.2567 (SC),followed

in **Mange Ram vs State Of Haryana And Ors,** Hon'ble Supreme Court has held that :-

That apart, it is settled in law that mere delay in lodging the first information report cannot by itself be regarded as fatal to the prosecution case. True it is, the court has a duty to take notice of the delay and examine the same in the backdrop of the factual score, whether there has been any acceptable explanation offered by the prosecution and whether the same deserves acceptation being satisfactory, but when delay is satisfactorily explained, no adverse inference is to be drawn. It is to be seen whether there has been possibility of embellishment in the prosecution version on account of such delay. These principles have been stated in Meharaj Singh v. State of U.P. (1994) 5 SCC 188, **State of H.P. v. Gian Chand** (2001) 6 SCC 71, Ramdas and others v. State of Maharashtra (2007) 2 SCC 170, Kilakkatha Parambath Sasi and others v. State of Kerala (2011) 4 SCC 552 and Kanhaiya Lal and others v. State of Rajasthan (2013) 5 SCC 655.

29. In, **Meharaj Singh** (supra) the Apex court has enunciated some checks about the ante timed FIR. One of the checks pointed out is regarding the receipt of the copy of FIR by the local Magistrate. If it is sent late it will give rise to an inference that FIR is not lodged within reasonable time. Further sending of the copy of the FIR with the dead body for autopsy along with inquest report, will lead the inference that FIR is in time. The absence of those details indicate the facts that the prosecution story was still in an embryo state and it has come to be recorded later on, after due deliberation and consultation. **Maharaj Singh** (Supra) has been followed by the Apex Court in **Mohammad Muslim Vs. State of U.P. 2023** live law (SC) 489 also.

30. In**, Ram Das and others vs State of Maharastra 2007 (2) SCC 170** the Apex Court has observed the law as under:-

"In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No strait jacket formula can be evolved in such matters, and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. (See AIR 1956 SC 216 : Pandurang and others vs. State of Hyderabad). Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and appreciation of evidence by the court of fact."

31. Hon'ble Supreme Court has reiterated the same principle in **Latesh alias Dadu Baburao Kerleka vs. State of Maharashtra 2018 AIR SC 659**. The Apex Court has observed as follows:-

"The value to be attached to the FIR depends upon facts and circumstances of each case. When a person gives a statement to the police officer, basing on which the FIR is registered. The capacity of reproducing the things differs from person to person. Some people may have the ability to reproduce the things as it is, some

may lack the ability to do so. Some times in the state of shock, they may miss the important details, because people tend to react differently when they come across a violent act. Merely because the names of the accused are not stated and their names are not specified in the FIR that may not be a ground to doubt the contents of the FIR and the case of the prosecution cannot be thrown out on this count."

32. Thus, law is well settled that even if there is delay in lodging of FIR but delay stands well explained, then it would have absolutely no adverse effect on the case of prosecution. Even if the delay remain unexplained, the case of prosecution cannot be thrown away out rightly on this score alone, but in that case a duty is cast upon the court to scrutinize prosecution evidence with extra care and caution and then to reach the conclusion.

33. In present case, as per tehrir (Ext Ka-1) and chik FIR (Ext Ka-12), the incident is alleged to have taken place on 15.07.2006 at about 07.30 p.m. Complainant Vinod Kumar gave the tehrir about the incident at the police station on 15.07.2006 at 21.30 p.m., which has been entered in Kaimi GD (Ext. Ka-13), No. 39, dated 15.07.2006 at 21.30 p.m. and the Case Crime No. 117 of 2006 was registered against accused Sunil under sections 452 and 304 IPC. The distance between the Police Station and place of occurrence situated in village Mubarikpur, is 17 Kms. towards south. Thus, there is a delay of about 2 hours in lodging of FIR. Keeping in view the nature of the crime occurred, prima facie, two hours delay in the circumstances of the case did not appear to be inordinate delay in lodging the FIR, rather it is too prompt to lodge it. However, referring to the statement of PW- 6 H.C. 19 Subhash Chandra, learned counsel for the appellant has urged that there is a serious doubt that FIR has been lodged on the day of occurrence i.e. on 15.07.2006 so it is ante time. Learned A.G.A. has refuted the contention of the learned counsel appearing for the appellant.

34. In view of the rival contentions of learned counsels for the parties following facts may be mentioned:-

(i)- PW- 6 H.C. 19 Subhash Chandra has deposed that he received the tehrir on 15.04.2006 and drawn the chik Ext. Ka- 12, on the same day at 21.30 hours in his hand-writing and signature and registered Case Crime No. 117/06, under Sections 452, 304 I.P.C. In his cross-examination he verified that he draw the chik Ext. Ka- 12 at the time when tehrir was given by the complainant. Thus, according to PW- 6 he received the tehrir Ext. Ka- 1 on 15.04.2006 and registered the criminal case against the accused on the same day. It indicate that FIR was prepared ante dated.

(ii)- PW- 6 H.C. 19 Subhash Chandra has admitted that the case against the accused was registered under Section 304, 452 I.P.C. but he has not sent the special report of the case to the higher authorities, because it was not a case of cognizable nature. It may be observed that offence u/s 304 I.P.C. has been categories as cognizable offences in Cr.P.C. Sending of special report of such grievous cases to higher authorities promptly, may prove a safeguard that FIR was lodged without unreasonable delay. Omission of such an action on the part of the Police, cast doubt about the fact that FIR was lodged ante time.

(iii)- FIR is alleged to have been sent by the police station to Local

Magistrate, having jurisdiction, for perusal and necessary information. As per rules, it should be sent to the CJM, having local jurisdiction, within 24 hours of the lodging of the FIR. In this case although chik FIR has been sent to CJM but on what date it was sent, is not mentioned therein, CJM has seen it Ext. Ka- 12 but marked no date or time below his signature. This non-compliance of the mandatory provision of law, also indicates doubt about the prompt lodging of FIR in the case.

(iv)- PW- 1 Dr. B.P. Singh Kalyani has nowhere mentioned in his post-mortem report, Ext. Ka- 14, Case No., papers sent to him by the police and sections of the crime in Indian Penal Code and other descriptions of the matter. It further indicates that FIR was not in existence till the post-mortem was over.

(v)- This apart, the evidence on record will also suggest that FIR has been prepared after due deliberations and concoction. So it is the result of afterthought leaving ample time to twist and turn the real facts. For instance, PW-3 Sukhdev has admitted in his cross-examination that Jay Prakash, who is his son, scribed the tehrir Ext. Ka- 1. At the time of scribing tehrir, four-six persons were present there. Report was prepared with the deliberation and advice of all them. Scriber, Jay Prakash has not been examined by the prosecution, for the reasons best known to it. Thus, an adverse inference may be drawn against prosecution that FIR in the case is the result of deliberation and a result of an afterthought.

(vi)- Another highlighted circumstance requires mention here. The P.M.R. reveals the fact, admitted by PW- 1 Vinod Kumar, that his wife was gravid of eight months. Admittedly complainant had no issue at the relevant time of incident. In such a situation it was more important to rescue his wife, but he has not mentioned the fact that his wife was gravid of eight months, either in the tehrir nor in his statement under Section 161 Cr.P.C. to I.O. Why such an important fact is not mentioned there, is not explained. It was for the first time he admitted this fact in his deposition in the court, which seems to be a kind of improvement in his statement and cast doubt about the truthfulness of his testimony and also about the FIR.

35. In view of the above discussion FIR in this case appears to be ante timed, but it would not be safe to throw over board the entire prosecution case on this score only.

36. Learned counsel for the appellant has vehemently argued that the entire prosecution story is the product of fabrication with an oblique object of wreaking vengeance. Witnesses produced by the prosecution are partisan, inimical to the appellants and interested witnesses and not independent witness. They are unreliable witnesses and as such no credence can be attached to their testimony and their deposition is not reliable and deserves to be discarded. Learned A.G.A. refuted the contention of the learned counsel for the appellant. He submitted that ordinarily a close relative would not spare the real culprit who has caused the death and implicate an innocent person. It will be beneficial to discuss law on the issue and evaluation of testimonies prosecution witnesses.

37. In case of **State of Rajasthan Vs. Smt. Kalki and Anr. (1981) 2 SCC 752** the Hon'ble Supreme Court distinguished between the “related” and “interested” witness. It held that ‘Related' witness is not

equivalent to 'interested' witness. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in a decree of a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of the case, cannot be said to be 'interested'. In the present case the witnesses produced have nothing to gain if the appellant is convicted or acquittal. There is not even an iota of evidence that any of these witnesses will get some benefit out of litigation between complainant and the accused. They are eye witnesses. So, they are not interested witnesses.

38. The aforesaid submission of the learned counsel for the appellant that prosecution witnesses are partisan and inimical to appellant, was thoroughly considered by the Hon'ble Apex Court in case of **Daleep Singh Vs. State of Punjab AIR 1953 SC 364** and enunciated the following principles:-

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

39. In a three Judges Bench of the Supreme Court of India in Hari Obula **Reddy Vs. State of A.P. (1981) 3 SCC 675** observed as under:-

"13. ...it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

40. Again, in **S. Sudershan Reddy and others Vs. State of A.P (2006) 10 SCC 163,** the Hon'ble Supreme Court has held as under:-

"12. We shall first deal with the contention regarding interests of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible.

15. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this

Court as early as in Dilip Singh case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses."

41. It is well known that there may be three kinds of witnesses:-

(i) Wholly reliable,
(ii) Wholly unreliable,
(iii) Partly reliable and partly unreliable,

There is no problem to evaluate testimony of wholly reliable or wholly unreliable witnesses, but it is different to deal with the witness, who are partly reliable and partly unreliable. The court has to be very careful in evaluation of such kind of witnesses.

42. The testimony of a reliable witness must be of sterling quality, on which implicit reliance can be placed for convicting the appellants. The Apex Court in **Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21** has very vividly describe describe the characteristics of a sterling witness as under:

"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."

43. Thus, Hon'ble Apex Court in its enumerable decisions has categorically held that if evidence of an eye-witness, is found truthful, it can not be discarded

simply because the witnesses were relatives of the deceased. The only caveat is that the evidence of relative witnesses should be subjected to careful scrutiny and accepted with caution.

44. It is germane to point out here that admittedly at the time of occurrence, 10-12 people had gethered at the spot according to PW- 3 Sukhdev there were Gajay Singh, Devi Singh and Devi Ram, had reached at the place of occurrence at the time of incident. However, prosecution has examined only two witnesses of facts. PW-2 Vinod Kumar, who is the complainant of the case and husband of the deceased Smt. Kunti Devi and PW- 3 Sukhdev who is the uncle of Vinod Kumar, so they are related witnesses. One may call them interested witness. However, they claimed to be eye witnesses. As per law discussed above, therefore, their testimony be scrutinized and evaluated with extra care and caution and then their credibility and reliability be weighed.

Presence of the examined witnesses at the place of occurrence

45. Now it is pertinent to see that whether the prosecution witnesses were present at the scene of occurrence at the relevant time. Following facts give the impression that the witnesses were not present the scene of occurrence and they have not seen the actual incident committing by the accused / appellant.

(i)- PW-1 Vinod Kumar has stated in his examination that he is a mason. On the fateful day at about 3.00 p.m. he had gone to Khurja to take his due wages from Rajkumar, when he returned at his home, by bicycle, at about 7.30, p.m. he saw the occurrence. Khurja is about four and half k.m. from his village. It takes half an hour to reach there from his residence. In Khurja he went to the office of Rajkumar, which is situated about 10 km. from his village. He halted in the office of Rajkumar and had made conversation/ discussion with him, as he wanted to get constructed some building by him. After sometime at about 6.05 p.m., he returned from Khurja. There is a big question mark regarding the truthfulness of his statement. In the facts of the case, is it really possible for him to return to his house in the nick of the time mentioned by him through bicycle and could witness the occurrence at 07.30 p.m.

(ii) On reaching at his house, he saw that in his room, near the bed Sunil flinged his wife Kunti Devi down on the ground and was sitting over top of her, crushing her head and face with a brick. He tried to apprehend him and made shrieks, but he pushed him aside and ran away therefrom. In his cross-examination he has stated that when he returned from Khurja it was 7.30 p.m. He saw that his dead wife's feet and back were towards the door of the room. On his reaching at the spot, Sunil pushed him aside and fled away. He chased, but could not apprehended him. It was a little dark at 7.30 p.m. He also stated that his house is pakka. There is no pakka floor in his room. There is a gate in the the gallery, which remains closed and open also. There is a room, kitchen, yard and a gallery in his house. The room exist in front of the main road and towards gallery.

(iii) In the backdrop of the circumstances and the statement of PW- 1 Vinod Kumar it is clear that at the time of occurrence in fact he was not present at the spot. When he reached at 7.30 p.m. on the scene of occurrence, he saw accused sitting over the top of his wife, flinging her down on the ground and crushing her head and

face by a brick. On his reaching, accused pushed him away and ran away from the place of occurrence. As per site plan Ext Ka-9 one could reach in the bed room of the deceased from, main gate through the gallery. In the process of reaching in the room some noise was bound to happen/ occur, providing sufficient time to the accused to make his escape good, which in fact the culprit did. This witness might have seen him running away but possibly could not see accused / appellant committing gruesome murder of the deceased Kunti Devi. It may be mentioned that PW-3 Sukhdev saw accused fleeing with ensanguine hands. If PW- 1 Vinod Kumar, who is the husband of the deceased has reached at the place of occurrence and saw accused committing the crime, he would have strived to save and rescued the deceased, from the ire of the accused. and in that process he was bound to receive some blood stains on his clothes/ person. But no such blood stains were found on his clothes or person by the investigating officer and no cloth of the complainant was recovered and taken into possession for examination by I.O.

(iv) The P.M.R. Ext Ka-14 reveals the fact, admitted by PW- 1 Vinod Kumar, that his wife was gravid of eight months. Admittedly complainant had no issue at the relevant time of incident. In such a situation it was more important to rescue his wife. But he has not mentioned this fact either in tehrir Ext Ka-1 or in his statement under Section 161 Cr.P.C. Why such an important fact is not mentioned there, is not explained. It was for the first time he admitted this fact in his deposition in the court, which seems to be a kind of improvement in his statement and cast doubt about truthfulness on the veracity of his testimony. Had he been present at the scene of occurrence he would have desperately tried to rescue his wife. But strangely there in no such attempt made by the PW-2. IO has not found any blood stain on his cloth or even a scratch of injury on his body. This further indicate that PW-2 was not present on the scene of occurrence and he has not actually witnessed accused appellant committing the crime.

(v) It is also note worthy that in FIR it is mentioned that the accused was crushing his wife on face and head with brick. There is no mention of the fact that accused was sitting over the top of the deceased and committing the crime. It is for the first time in his deposition he introduced this facts. It may be observed that the deceased was gravid of eight months at the time of occurrence, so it was an important fact, as it may be dangerous to life of the deceased in itself. Therefore, it should have been mentioned in FIR. On adding this fact by way of improvement in his deposition, an inference may be drawn about his absence, at the time of occurrence.

(vi) The incident took place at the time of at 07.30 p.m. in the bedroom situated in side the house of the complainant. Admittedly at that time it was partially dark. No source of light is mentioned in the room. In the absence of any light, a complete darkness in the room may be presumed. In such a condition, it is difficult to witness the culprit committing the crime. That too when he is said to have swiftly fled away. This fact also indicate that there was no possibility for PW-3 to see the incident of crime.

(vii)- PW-3 Shukhdev has very clearly admitted in his cross examination that on hearing wail and shriek he reached towards the house of Vinod Kumar. He saw Sunil fleeing through gallery in the house of Vinod Kumar. He ran towards south. Thus, the witness has admitted that he has

not seen Sunil committing the crime. Thus, the credibility of his testimony is not reliable at all.

46. On the basis of the above discussion, it may be inferred that PW- 2 Vinod Kumar and PW-3 Shukhdev, were not present at the spot, at the relevant time of occurrence and they are not the eye witnesses. Their presence on the spot at the time of incident is highly doubtful. Therefore, their testimony is not credible and reliable. It is to be discarded accordingly.

47. Learned Amicus Curiae for the appellant has argued that no motive has been imputed to the appellant and it has failed to adduce any evidence to establish motive for the commission of offence. Learned A.G.A. has refuted the argument by saying that the appellant committed the crime owing to a dispute over the use the hand-pump, where Renu the daughter Heera Lal, had gone to take bath, before the incident and to which deceased Kunti Devi had prevented her. This caused ire and anger to the accused appellant and he committed the incident.

48. It is a established canon of law of criminal justice that motive is sine qua none of a criminal act. It is an important element of committing a crime. In, a plethora of cases including in **Badam Singh vs State Of Madhya Pradesh 2004** CRILJ 22 the Apex Court has observed –

"20……...Even though existence of motive loses significance when there is reliable ocular testimony, in a case where the ocular testimony appears to be suspect the existence or absence of motive acquires some significance regarding the probability of the prosecution case....."

49. Thus, Where there is direct and credible evidence, motive occupies a back seat. However, where the ocular testimony appears to be suspected the existence or absence of motive, acquires some significance. In the present case there is no direct evidence. Even presence of so called eye witnesses, is doubtful. Therefore motive assumes some importance. Appellant is said to have committed the crime because of dispute between the deceased and Kamlesh, wife of his neighbor Heera Lal. Its is alleged that there is a hand pipe in the courtyard of the deceased house from where people used to take water. Renu daughter of neighbor of the complainant, Heera Lal, went to take bath on the hand pipe 2-3 days before the incident. Deceased Kunti restrained her. Renu had complained of it, in her house. Heera Lal is Phufa of Sunil and he was residing with Heera Lal for last 7-8 days, Sunil, out of ire and anguish, committed the alleged crime. However the motive attributed for committing the crime by Sunil does not inspire confidence, because firstly, there is no evidence, regarding the said motive, on record. So it is not proved. Secondly if prosecution story, regarding motive, is accepted, even then restraining Renu from taking bath, on the hand pipe would cause much ire and anguish to Heera Lal against the deceased and there is a remote possibility that it would cause such ire and anguish to prompt the appellant to commit the crime who is an out sider and on a short visit at the house of Heera Lal. Prosecution could have brought Heera Lal in the witness box to establish existance of any motive towards appellant. Thus, prosecution has failed to establish any motive of committing the crime to the accused/ appellant and this further renders the prosecution case doubtful.

50. The learned Amicus Curiae for appellant has submitted that prosecution did not obtain any report from FSL regarding the material Exhibit-1, the brick, which appellant is alleged to have used in the commission of crime. PW-5 S.I. Daya Chand Satsangi, the I.O. of the case, has stated that he has collected a blood saturated piece of brick which is alleged to have been used by the appellant Sunil, in commision of the crime to crush the head and face of the deceased. There is a memo of recovery, Ext Ka-8, duly proved by PW-5 I.O. Daya Chand Satsangi, on record. But there is no evidence that the same was sent to FSL for Chemical examination, to ensure blood of human body and that too of the deceased Kunti Devi on the blood saturated piece of brick. Thus, the prosecution has miserably failed to establish its story that appellant had crushed the head and face of deceased Kunti Devi by brick. It renders the prosecution story wholly doubtful and untrustworthy.

51. Besides, there are several contradictions and discrepancies in the statement of the prosecution witnesses, which shake the very edifice of prosecution version but the same is not of much significance or material or prejudicial to appellant which could be mentioned here.

52. In the light of prolix and verbose discussion made herein above and also regard being had to the entire fact and circumstances of the case, we are of the considered opinion that findings arrived at the trial court is perverse and erroneous. There is no eye witnesses of the occurrence. Therefore it is a case of circumstantial evidence, which requires that there should be a complete chain of evidence pointing towards guilt of the appellant that deceased was inflicted serious injuries with brick, by the accused / appellant. Prosecution has not examined any independent witness, despite their availability and presence at the spot, to corroborate, testimonies of PW-2 Vinod Kumar and PW-3 Shukhdev. In view of non-presence of PW-2 and PW-3 on the spot at the relevant time, of occurrence witnessing the actual incident, non-examination of independent witnesses is fatal to the prosecution case. The absence of any such witness the entire prosecution story is disproved. The chain of evidence of the circumstances is not complete in toto. It conclusively, fails to establish that appellant is the only perpetrator of dreadful crime. The learned Trial Judge misevaluated and misappreciated the entire evidence in convicting and sentencing the appellant in aforesaid crime. The circumstances from which the conclusion of guilt is to be drawn is not fully established. Prosecution has failed to show that in all human probability the act must have been done by the appellant. Thus prosecution has miserably failed to establish the allegations beyond reasonable doubt, pointing unerringly towards the guilt of the appellant. The learned trial court has not appreciated the prosecution evidence in right perspective and has illegally recorded the finding of conviction against the appellant which we reversed.

53. Resultantly, the judgment and order of learned trial court is set aside and appeal is **allowed.** Appellant is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged.

54. Let the trial court record be remitted back immediately, for necessary compliance.

Shri Ashok Kumar Tripathi, Advocate was appointed an Amicus Curiae in the instant case. He has rendered valuable assistance to the Court. The Court

quantifies Rs.10,000/- to be paid to Shri Ashok Kumar Tripathi, Advocate towards fee for the able assistance provided by him in hearing of the instant criminal appeal. The said payment shall be made to Shri Ashok Kumar Tripathi, Advocate by the Registry of this Court within one month from today.

(2024) 8 ILRA 44
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.08.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 361 of 2021

Arun Mishra ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Aditya Yadav, Sri Mahendra Pratap, Sri Sanjay Tripathi, Sri Shivang Tripathi, Sri Sushil Kumar Dwivedi

Counsel for the Respondent:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 313 & 437-A - Indian Penal Code,1860 - Sections 376 & 506 - Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 – Sections 3(1)(XII) & 3(2)(5) - Appeal – against conviction & sentence – accused committed offence of rape and threats to the informant's wife who belongs to a scheduled caste member – FIR - offence committed on 12.09.2008 – FIR was lodged on 23.09.2008 – victim was examined medically on 24.09.2008, wherein no internal or external injury was found on the private parts of the victim – in the pathologist report of two slides of vaginal smear show no signs of dead or live spermatozoa – St.ments were recorded – charge-sheet – charges were framed under section - 497 IPC & 3(1)(XII), 3(2)(v) of SC/ST Act – evaluation of evidence - court finds that, (i) incident was reported after 11 days which rising doubts about the credibility of the claims, (ii) inconsistencies in the victim's testimony, lack of corroborative evidence, and no proof of rape being committed due to caste identity, leading to the conclusion that the prosecution failed to establish its case beyond the reasonable doubt - Held, - highlighting the lack of corroboration, unexplained delay in reporting case and absence of proof linking the crime to caste identity, leading to the acquittal of the accused – consequently, the conviction and sentence of the accused appellant is reversed – Appeal is allowed – conviction and sentence is set aside – direction issued accordingly. (Para – 34, 35, 36, 37, 39, 40)

Appeal is allowed. (E-11)

List of Cases cited:

Patan Jamal Vali Vs the St. of Adhara Pradesh – (2021 vil. 16 SCC 225).

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

1. This appeal is directed against judgment and order of conviction and sentence dated 8.1.2021, passed by the Additional Sessions Judge (Court No.2)/ Special Judge, SC/ST Act, Mahoba in Special Case No.29 of 2009 (State Vs. Arun Mishra), arising out of Case Crime No.1596 of 2008, Police Station Kulpahar, District Mahoba, whereby the accused appellant Arun Mishra has been convicted and sentenced to rigorous life imprisonment alongwith fine of Rs.20,000/- under Section 376 IPC read with Section 3(2)5 SC/ST Act and on failure to deposit fine to undergo additional simple imprisonment for two months.

2. Informant in the present case belongs to scheduled caste and is a resident

of Village Rikhwaha, Police Station Kulpahar, District Mahoba. Accused appellant was a Watcher in the forest and had engaged several ladies and gents of the village for afforestation work at Badarwara. Informant and his wife (victim) were also engaged in the project. On 12.9.2008 the plantation work on one side got over but some of the trees were still left to be planted by the informant's wife for which the accused detained the victim. Other ladies were allowed to go. At about 12.00 in the afternoon when the victim was going towards other ladies, she was grabbed by the accused appellant, who laid her on the ground and by extending threat subjected her to sexual assault. Informant's wife (victim) out of fear did not inform other ladies, but on her way back to home she told about the incident to her brother-in-law (Jeth) namely, Ganpat (not produced). On reaching home she informed of the incident to informant but due to threats it was not discussed. Two days later accused threatened informant's wife to give him her silver belly chain (half-peti) or else he would kill the entire family. Under threat the victim gave her silver belly chain to the accused without telling it to her husband. When the informant came to know of the incident, he asked the accused to return the silver belly chain or else he would report the incident. On this the accused returned the silver belly chain. The informant accordingly has come to lodge the report. The report was not lodged earlier due to threat. The written report has been made on 23.9.2008 by the informant Pyarelal (PW-1). The report was scribed by Dashrath Kumar, Advocate (PW-5). On the basis of the above information, in respect of the offence committed on 12.9.2008 at 12.00 in the afternoon, the FIR got lodged on 23.9.2008 at 20.30 hours, under Sections 376, 506 IPC read with Section 3(1)(XII) of SC/ST Act, at Police Station Kulpahar, District Mahoba.

3. The victim was medically examined at 2.00 pm on 24.9.2008 at District Hospital, Mahoba, wherein no internal or external injury was found on any part of her body. No injury was found on the private parts of the victim, either. Two slides of vaginal smear were prepared and sent for pathological report. The report of the Pathologist shows no signs of dead or live spermatozoa. Statement of witnesses were recorded in the matter, whereafter a chargesheet came to be submitted against the accused appellant on 6.10.2008 under Section 497 IPC and 3(1)(XII) SC/ST Act. Cognizance was taken in the matter and the case was committed to the court of Additional Sessions Judge (Court No.2), Mahoba as Special Case No.29 of 2009 (State Vs. Arun Mishra). Charges were framed on 27.9.2010 and also on 2.3.2020 under the aforesaid sections as also under Section 3(2)(v) of SC/ST Act. The accused denied the accusation 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-7; written report as Ex.Ka-1; injury report as Ex.Ka-4, injury report as Ex.Ka-5; supplementary report as Ex.Ka-6; chargesheet as Ex.Ka-3; and site plan with Index as Ex.Ka-2.

5. In addition to above, during the course of trial, informant has appeared as PW-1 and has supported the prosecution case. He has alleged that his wife was sexually assaulted on account of threat extended to her. None was present at the place of occurrence. Informant did not come out of house for two days as the accused kept roaming nearby his house

armed with an axe. Two days later when the informant had gone to Kulpahar the accused extended threats and took his wife's silver belly chain (Half-peti). Accused was a Watcher in the Forest Department. On return when the informant came to know of it, he asked the accused to return the silver belly chain (Half-peti) or else he would report the matter. The accused then returned the silver belly chain (Half-peti). The informant alleges that he kept visiting the police station for lodging the report regarding rape but the same was not lodged. Informant then took Ashok Baudh and Dashrath, Advocate with him only whereafter the report was lodged after it was scribed by Dashrath, Advocate, on his dictation. The witness has proved the written report (PW-1). The victim was medically examined at Mahoba.

6. In the cross-examination, PW-1 has stated that he does not know the value of the silver belly chain, and that the victim had not worn the ornament while going to work. When the ornament was not returned by the accused, he came to Dashrath Vakeel. By the time he came to Dashrath, Advocate, the silver ornament was already returned. PW-1 claimed that the silver belly chain was given to the accused without informing him. Accused had not taken the silver belly chain from his house. It (silver belly chain) was also not given to the accused at the Jungle rather it was given near the well. No body was present when the ornament was given to the accused. PW-1 has admitted that he felt extremely annoyed when he came to know that accused has taken his wife's silver belly chain. His report was not lodged initially by the police and only when he came with Advocate Dashrath and Ashok Baudh to the police station that his report was lodged. Informant was not aware that Ashok Baudh was the District President of the Ruling Party. Ashok Baudh is also a relative of the witness. His signatures were obtained on the written report. On coming out of Police Station, Dashrath, Advocate had not informed him that accused will be arrested or sent to jail. The silver ornament was not produced in court. Accused is a Government Servant working in the Forest Department.

7. PW-1 during cross examination admitted that on the asking of accused he had gone for work alongwith his wife to the forest. Accused never withheld the wages of informant or his wife. Informant and his wife were never thrown out of work by the accused. Rape was not committed in his presence. None, except his wife, was present at the place of occurrence. Informant was told about the incident of rape prior to taking of silver belly chain by the accused appellant. Though it is alleged that the informant had visited the concerned authorities on the next day but his report was not lodged. The complaint typed for the purpose, however, was not produced. It was also not given to the Investigating Officer. He has denied the suggestion that due to non-providing of work a false police report was lodged alongwith Dashrath, Advocate and Ashok Baudh. On the date of incident Maan Singh was working with the victim in the garden. PW-1 was working in the garden for the last 5-6 days. He was not having his meal with his wife. On the fateful day also, he told his wife that he shall work only up-till lunch, and that he did so. He had his meal separately while his wife had her meal separately. He left without informing his wife that he is leaving for home. PW-1 had informed the scribe of report that silver ornament was returned two days earlier and he cannot explain why this fact was not

mentioned in the written report. He also stated that such statement was made by him to the Investigating Officer also and he cannot explain why such facts are not mentioned in his statement under Section 161 Cr.P.C.

8. Victim was produced during trial as PW-2. She has supported the prosecution case. It was 12.00 O'clock in the afternoon when she was planting trees in the nursery. Two trees were left to be planted. Accused appellant instructed her to plant remaining two trees and sent all the other ladies working in the nursery. Worker Maan Singh remained at the nursery. PW-2 informed that she is going to deliver meal (breads) to her husband. After delivering meals she returned for work. By the time she returned, Maan Singh had also left. Victim thereafter was also going towards other ladies when accused grabbed her near Purwaria, and pushed her. She tried to escape but she was again grabbed by the accused, who committed sexual assault upon her. Accused had put clothe in her mouth, so she could not scream. Nobody was present there. On return she informed about the incident to her brother-in-law (Jeth) Ganpat and later told about the incident to her husband. Two days thereafter the accused took her silver belly chain. The report was lodged by her husband two days later.

9. In the cross-examination, PW-2 stated that her husband was the only male member working there. Prior to plantation in the nursery she had not gone for work anywhere else. On the date of incident her husband was not present. She had given meal to her husband 10 minutes prior to the interval. As soon as PW-2 gave the meal to her husband he told her that he was not having his meal there, although prior to the incident he used to have his meal with her. She used to go for work with her husband and return together. She had seen her husband leaving from the place of work. She did not inform accused appellant that her husband would not return for work after 12.00 O'clock. She asserted that accused was with him for half an hour and committed rape once.

10. In her further cross-examination, PW-2 stated that while returning on the date of incident she met Ganpat and told him about the incident. PW-2 has denied the suggestion that she was seen with the accused by Ganpat. Two days later her silver ornament had been taken by the accused. She used to obey the accused as he would threaten her with an axe. Accused never threatened her in presence of her husband. Silver belly chain was taken by the accused by threatening her with axe. She told her husband about giving of silver ornament two days later. Her husband told that he would now have to go to Dashrath, Advocate. When she informed the Advocate about taking of silver belly chain then the Advocate said that he would lodge such report against the accused that he would have to go to jail. The silver ornament was returned after lodging of the report. The silver ornament has now been sold by her husband and the same is not with her now.

11. PW-3, Brijmohan Singh was the Investigating Officer of the case and has proved the police papers. He recorded the statement of various person and had filed the chargesheet. The victim had not disclosed him about receiving of threat by showing axe. He had recorded the statement of Ganpat, who did not tell him that the incident was disclosed to him by the victim, rather he came to know of it

after lodging of case from uncle Mukundi. Upon investigation he did not find any evidence of rape upon the victim.

12. PW-4 is Dr. Rashmi Sharma. She medically examined the victim on 24.9.2008 at 2.00 pm. She has proved the pathology report, wherein no semen has been found. She found no signs of physical assault or coercion.

13. PW-5 is Advocate Dashrath Kumar who has scribed the written report. He has stated that informant came to him and told him about rape on his wife by the accused, as well as threats by the accused to the victim. He has stated that written report has been prepared by him. In the cross-examination PW-5 has stated that he is working as Advocate from prior to 2008. He has admitted that the written report was lodged after deliberation and consultation. He has denied the suggestion that report has been written on his own and not on the instructions of the informant.

14. PW-6 is Kalka Prasad Richhariya, who was working as Helper in the forest department. He has denied the prosecution case and has been declared hostile. Constable Roop Singh has been produced as PW-7 and has proved the chick FIR and GD entry.

15. The above evidence of prosecution has been confronted to the accused for recording his statement under Section 313 Cr.P.C. The accused has alleged the evidence to be false. He has stated that the FIR contents are false and have been prepared by an Advocate purposively. The defence has produced Maan Singh as DW-1, who has stated that on 12.9.2008 he was working with the victim and the informant, and that no such incident of rape was committed by the accused. In the cross-examination, DW-1 has admitted that he has been asked to give evidence by the accused. He has denied having given any statement to police that the accused and the victim were having close terms and used to crack jokes etc., or that physical relations were performed by them.

16. On the basis of above evidence led by the parties, during the trial, the court of sessions has convicted and sentenced the accused appellant for the offence under Section 376 IPC read with Section 3(2)(5) SC/ST Act. The accused, however, has been acquitted of the charges levelled under Section 497 IPC read with Section 3(1)(XII) SC/ST Act. Aggrieved by the said judgment of conviction and sentence the accused appellant has preferred the present appeal.

17. Learned counsel for the appellant argues that the accused appellant has been falsely implicated in the present case on the persuasion of PW-5, who scribed a false written report, on his own, just to secure return of silver belly chain. He submits that FIR has been lodged after consultation and deliberation. Learned counsel further argues that the reason of discord between the parties was giving of silver belly chain to the accused, by the victim, for its safe custody. It is also highlighted that in fact the husband of victim later sold it to someone and the victim has thus lost it for all times to come. Argument is that since silver belly chain was given to the accused for its safe custody, without the knowledge of the husband and as soon as he came to know of it a false report has been lodged in order to secure its return. The FIR has been lodged with false allegation of rape, whereas no such offence was actually

committed. It is submitted that weight of evidence has been completely discarded and misconstrued by the court of sessions while convicting and sentencing the accused appellant. Learned counsel also argues that there is no corroboration of the testimony of victim and the very statement of victim clearly shows that the incident was something else but has rather been made out a case of rape for ulterior reasons.

18. Sri Sanjay Tripathi, learned counsel for the informant and learned AGA appearing for the State, however, submit that the evidence on record clearly proves the commissioning of offence and in such circumstances, the finding returned by the court of sessions merits no interference and the appeal merits rejection.

19. We have heard Sri Sushil Kumar Dwivedi, learned counsel for the appellant, Sri Sanjay Tripathi, learned counsel for the informant and Ms. Archana Singh, learned AGA for the State and have perused the materials brought on record.

20. The prosecution case emanates on the written report of the informant, which has been scribed by PW-5. The written report is dated 23.9.2008 in respect of the incident of 12.9.2008 at 12.00 in the afternoon. The report is thus lodged after eleven days of the incident. The written report is essentially in two parts. The first part relates to committing of rape by the accused on the informant's wife at around 12.00 in the afternoon, which fact was allegedly disclosed by the victim to her brother-in-law Ganpat on the date of incident itself. However, on account of threats extended by the accused, no FIR was lodged on that day. The second part of the written report relates to threats being extended by the accused for taking silver belly chain from the informant's wife and taking such ornament from the victim without the knowledge of the informant; demand for return of silver ornament by the informant and the actual return of the ornament by the accused to the informant. Delay in filing of the FIR is sought to be explained by contending that out of fear the report was not lodged earlier.

21. So far as the first part of the incident is concerned, it is admitted on record that there is no independent eye-witness account of it. As such offences are otherwise done in seclusion it is hard to find an independent witness of the crime. It is from surrounding circumstances, medical evidence and the version of victim that the offence can be proved. Testimony of PW-1 and PW-2 would go to show that the informant and the victim, both, were working in the plantation work undertaken by the forest department. They used to come together for work and would go back together. However, on the date of incident i.e. 12.9.2008, the informant returned from work at around 12.00 O'clock and did not return for work in the later half of the day. The victim claims that she gave meal to her husband around lunch time but instead of having it there, the informant returned taking his meal with him. Other workers engaged at the plantation also left. The victim, nevertheless, was detained at the plantation nursery since few trees were yet to be planted by her. Maan Singh was the only person left behind, who also left a little later. It is the prosecution case that while victim was leaving towards other ladies she was grabbed by the accused and raped on the strength of threats. This part of the prosecution case is based entirely upon the statement of victim herself.

22. What transpires from the record is that while the incident of rape was

committed by the accused appellant on the victim, yet the victim did not report the incident to anyone. According to the prosecution the victim informed of the incident of rape to Ganpat (victim's jeth) while returning from work. Ganpat is not produced in evidence. No reasons are explained as to why Ganpat was not produced. Ganpat is not even shown a witness in the chargesheet. In this regard the testimony of the Investigating Officer assumes significance. He has stated that during the investigation statement of Ganpat was recorded, who clearly stated that the victim never informed him about rape, and that such fact came to his notice on the disclosure of Mukundi uncle. This part of the testimony of the Investigating Officer is reproduced hereinafter:-

"मैने साक्षी गनपत जो पीड़िता का चचेरा जेठ है का ब्यान अंकित किया था। उसने पीड़िता द्वारा घटना के बारे में कोई बात बताने का बयान नहीं दिया था, बल्कि यह बयान दिया था कि बलात्कार की घटना के बारे में मुकदमा लिखाने के बाद मुकुन्दी चाचा ने मुझे बताया था।"

23. Informant moreover has alleged that prior to the incident of taking silver belly chain by the accused appellant from his wife, he was already informed of the offence of rape. He claims that an application was got prepared to report the incident and he had also gone to the police station to lodge it but the report was not lodged. PW-1 has specifically stated that he came to the police station on the very next day when his wife told him about the incident of rape. However, neither any written report has been produced, nor its copy has been furnished to the investigating officer. It is somewhat surprising that the act of rape was not reported by the victim to anyone including her own husband on the date of incident or soon thereafter. This is so as the incident was not reported. Though it is the case of PW-1 that the incident was informed to him by the victim but out of fear he did not report it to anyone. The fact that for more than ten days no report was lodged of rape creates doubt on the prosecution case when no plausible explanation is offered for the long delay.

24. As already noticed, the specific case of the prosecution is that the incident was reported on the date of incident itself by the victim to Ganpat, but there is no evidence on record to prove it, inasmuch as, Ganpat is not produced. We have already noticed the statement of I.O., as per which, no such statement was given by Ganpat to the I.O. We, therefore, find that the prosecution evidence is lacking on the point of disclosure of incident of rape upon the victim to Ganpat. It is also not clear as to when the incident of rape was reported by the victim to her husband. The victim is a married lady and if an act of rape is committed upon her the natural conduct of the victim would be to report it either to the police or at least to some member of the family or in whom she reposes confidence. No evidence is led on this count.

25. The second part of the prosecution story with regard to giving of silver belly chain to the accused by the victim remains shrouded in mystery. We are at a loss to understand as to why the lady gave her silver belly chain to the accused two days after she was raped by him. This silver belly chain is neither produced, nor exhibited during trial.

26. It is admitted to PW-2 (victim) that she did not give silver belly chain to the accused in the forest. She also says that the silver belly chain was not given by her to the accused at her house, rather case of

the victim is that she gave it to the accused near the well. Statement of victim, in this regard, reads as under:-

"घटना वाले दिन के दो दिन बाद अपनी चाँदी की पेटी अभि० को दे दी थी मैने स्वयं नहीं दी थी बल्कि उसने धमकी देकर ले ली थी। अभियुक्त मुझे जिस बात के लिये धमकी देता था मैं उसकी वह बात कर देती थी क्योंकि कुल्हाड़ी दिखाता था। अभियुक्त मुझे इस तरह की धमकी अकेले में देता था पति के सामने नहीं देता था। अभियुक्त मुझे केवल कुल्हाड़ी दिखाता रहता था मारता नहीं था। अभियुक्त ने मुझे कुल्हाड़ी दिखाकर कमर की पेटी ले ली थी।"

27. So far as the accused threatening the victim with axe is concerned, the Investigating Officer in his statement has clearly stated that the victim made no such disclosure to him about accused having extended threats of axe. This part of the testimony of PW-2 is a clear improvement over what was disclosed by her to the I.O. during investigation.

28. We also find from the testimony of PW-2 that threats were extended to her by the accused only when she was alone. We find this part of the version of PW-2 to be somewhat strange inasmuch as the consistent prosecution case is that large number of ladies were employed for plantation at the nursery wherein the husband of the victim was also employed. It is not clear as to when and how the victim was alone with the accused at other times such that the accused could threaten her when such large number of workers were engaged at the place of occurrence. The incident of 12.09.2008 is otherwise reported to be an isolated incident when the victim was alone with the accused. There is no evidence of the prosecution that on other occasions also the victim was alone with the accused. In such circumstances the version of the victim of having received threats from the accused appellant and on account of such threats silver belly chain being given to the accused remains unexplained.

29. The evidence on record is primarily on the second part of the allegation contained in the written report i.e. giving of silver belly chain by the victim to the accused. PW-1 has clearly stated that his wife gave silver belly chain to the accused without his knowledge. He got enraged on coming to know of it and had even gone to lodge a report which was not registered. It was thereafter that the informant had gone to the Dashrath vakeel and Ashok Bouddha. Ashok Boudhha was the District President of the Ruling Party. The version of PW-1, in that regard, is relevant and is reproduced hereinafter:-

"जब अभियुक्त ने मेरी पत्नी की चांदी को पेटी नहीं लोटाई तो मैं दशरथ वकील के पास आया था। और उनसे यह बताया था कि अरुण मिश्रा ने मेरी पत्नी की पेटी ले ली थी और वापस कर दी थी। दशरथ वकील साहब के पास जब शिकायत करने गया था तब मेरी चाँदी की हाफ पेटी वापस हो चुकी थी। पत्नी ने मुझे बिना बताये पेटी अरुण मिश्रा को दे दी थी। इसके पहले मेरी पत्नी ने मुझे विना बताये किसी अन्य को कोई जेवर नहीं दिया। अरुण मिश्रा ने मेरी पत्नी से घर आकर पेटी नहीं ली थी। मेरी पत्नी ने पेटी जंगल में नहीं दी थी बल्कि हमारे कुआँ पर दी थी। पेटी देते समय गांव का कोई आदमी मौजूद नहीं था। यह सही है कि जब मेरी पत्नी से अरुण मिश्रा ने पेटी ले ली है तो मुझे बहुत तेज गुस्सा आ गया था। मैं पेटी की शिकायत करने थाने नहीं गया था रिपोर्ट करने गया था। दरोगा जी मेरी थाने में कई बार जाने के बाद भी रिपोर्ट नहीं लिखी। फिर मैं परेशान होकर दशरथ वकील व अशोक बौद्ध को लेकर थाने आया था। मुझे नहीं मालूम कि जब पार्टी सत्ता में थी तब वह पार्टी के जिलाध्यक्ष थे। आशोक वौद्ध हमारे दूर के रिश्तेदार है। अशोक बौद्ध व दशरथ वकील जब थाने पहुंचे तब मेरी रिपोर्ट लिखी गई।"

30. Version of PW-2 is on similar lines and is reproduced as under:-

"मैने अपने पति को कमर की पेटी देने के दो तीन बाद यह बताया था कि मैने अभियुक्त को अपने कमर की पेटी दे दी है। इस पर मेरे पति ने कहा कि अब श्री दशरथ वकील साहब के यहाँ चलना पड़ेगा। इस पर जब मैने वकील साहब को बताया कि अभि० हमारी चाँदी की पेटी ले गया है तो उन्होने कहा कि अब हम ऐसी रिपोर्ट लिखायेंगे कि अभियुक्त को जेल जाना पड़ेगा। वकील साहब ने यह नहीं कहा था कि तुम्हे पुलिस के सामने यह कहना पड़ेगा कि अभियुक्त ने मेरे साथ बुरा काम किया है बल्कि सही बात यह है कि अभियुक्त ने मेरे साथ बुरा काम किया है। मेरे द्वारा अभियुक्त के ऊपर उक्त कार्यवाही करने पर चाँदी की पेटी लौटा दी है।"

31. The Investigating Officer in his cross-examination had admitted that he found no proof of any rape having been committed on the victim by the accused. This specific statement of the Investigating Officer reads as under:-

"सभी गवाहो के बयानात व घटनास्थल के निरीक्षण आदि के उपरान्त तमामी विवेचना से मैनें पीड़िता के साथ बलात्कार होने का तथ्य मैने नहीं पाया था।"

32. We have already noticed that PW-5, who is the scribe of the written report has clearly admitted that the written report to lodge the FIR was prepared after due deliberation and consultation.

33. Upon evaluation of the evidence on record, we do find substance in the argument of the defence that in fact the victim had given silver belly chain to the accused appellant for its safe custody, without the knowledge and consent of her husband. When this fact came to the knowledge of the informant-husband, he got annoyed and with the intent of securing return of the silver belly chain a written report was prepared under the advise of an advocate so as to compel the accused appellant to return the silver belly chain. The statement of the victim is categorical in this regard. In her deposition she has clearly stated that when the advocate was informed that accused has taken her silver belly chain, he assured that he would lodge such report in the matter that the accused will have to go to Jail. She has stated that after the proceedings were initiated against the accused appellant, the silver belly chain has been returned by the accused to the victim. In the further deposition the victim says that the ornament has been sold by her husband. Her version, in that regard, is extracted hereinafter:-

"मैने जब अभियुक्त को चाँदी की पेटी दी तो मुझे किसी भी व्यक्ति ने यह पेटी देते नहीं देखा था। उसने धमकी देकर पेटी ली थी। इस घटना के बाद अब मेरा पति कहीं मजदूरी करने नहीं जाने देता है। मेरी उक्त चांदी की पेटी अब मेरे पास नहीं है मेरे पति ने बेच डाली है। यह कहना गलत है कि मेरे साथ अभियुक्त ने कोई घटना न की हो। मैने लालच वश यह झूठा मुकदमा दर्ज करा दिया हो।"

34. Upon analysis of the evidence brought on record in the present case, we are persuaded to accept the defence argument that prosecution has not succeeded in establishing the allegation of rape against the accused appellant and the accused appellant is entitled to benefit of doubt, inasmuch as, various aspects relating to prosecution case remains unexplained. For the sake of convenience these aspects are reiterated as under:-

"(i) there is no independent corroboration of the version of victim regarding rape and her testimony is inconsistent with the weight of evidence on record. Though rape was alleged on 12.9.2008 at about 12.00 in the afternoon, but the report has been lodged after 11 days without any explanation of the unusual delay;

(ii) the prosecution case that victim informed of rape to Ganpat is not

proved as Ganpat is not produced in evidence, moreover the Investigation Officer states that Ganpat made no such disclosure to him during investigation, rather Ganpat came to know of the incident after the report was lodged;

(iii) there is no disclosure as to when the victim informed of the incident of rape to her husband. The version of PW-1 that such fact was disclosed to him by the victim is inconsistent with the version of victim (PW-2), who specifically asserts that the incident of rape was disclosed by her to Ganpat and it was later only that the husband was informed;

(iv) medical report shows existence of no injuries or even scratch marks, etc., on the body of the deceased;

(v) the version of victim that she was threatened with an axe is a clear improvement from her previous version as per the Investigating Officer;

(vi) the allegation of rape is made only after the second incident of giving silver belly chain to the accused appellant by the victim;

(vii) statement of PW-2 and PW-5 clearly reveals that the report was lodged on the basis of advise of the lawyer who assured that accused would now have to go to Jail."

35. On a cumulative assessment of the evidence on record it cannot be ruled out that the allegation of rape was introduced in the written report, on the basis of deliberation and consultation with the advocate, only with the intent to secure the return of silver belly chain to the victim. This is particularly so, as the informant admits that incident of rape was reported to him earlier but the report was lodged with the police only after the victim gave silver belly chain to the accused. In the absence of any credible explanation of delay in reporting of the incident coupled with the inherent contradiction in the prosecution case, as noticed above, we are inclined to hold that the defence is entitled to benefit of doubt in the matter.

36. We have also perused the judgment of trial court in which the aspects relating to contradictory and inconsistent version of the victim and informant have been clearly overlooked. The fact that there was no corroboration of the victim's allegation regarding rape coupled with the fact that rape was not reported and it was only later that such incident was alleged in order to secure the return of silver belly chain has been overlooked.

37. We further find that though the Court of Sessions has convicted and sentenced the accused appellant under Section 3(2)(v) of the SC/ST Act, but there is absolutely no evidence on record to show that the offence of rape was committed on the victim on account of her caste identity. Not a single word is uttered by any of the prosecution witnesses nor any other evidence is adduced by the prosecution to establish that the offence was committed upon the victim, by the accused appellant on account of her caste identity. In the absence of any evidence worth the name the offence under Section 3(2)(v) SC/ST Act is clearly not made out against the accused-appellant. Even otherwise, once we come to the conclusion that offence of rape itself is not established beyond reasonable doubt the conviction and sentence of the accused appellant under Section 3(2)(v) of the SC/ST Act becomes impermissible.

38. In what manner an offence under Section 3(2)(v) SC/ST Act can be established has been dealt with by the

Hon'ble Supreme Court in Patan Jamal Vali Vs. The State of Andhra Pradesh, reported in (2021) 16 SCC 225. In para 62 to 64 of the report, the Supreme Court has clearly laid down that the prosecution must prove that the offence was committed on account of caste identity of the victim by the accused appellant, which are reproduced hereinafter:-

"62. The issue as to whether the offence was committed against a person on the ground that such person is a member of an SC or ST or such property belongs to such member is to be established by the prosecution on the basis of the evidence at the trial. We agree with the Sessions Judge that the prosecution's case would not fail merely because PW 1 did not mention in her statement to the police that the offence was committed against her daughter because she was a Scheduled Caste woman. However, there is no separate evidence led by the prosecution to show that the accused committed the offence on the basis of the caste identity of PW 2. While it would be reasonable to presume that the accused knew the caste of PW 2 since village communities are tightly knit and the accused was also an acquaintance of PW 2's family, the knowledge by itself cannot be said to be the basis of the commission of offence, having regard to the language of Section 3(2)(v) as it stood at the time when the offence in the present case was committed. As we have discussed above, due to the intersectional nature of oppression PW 2 faces, it becomes difficult to establish what led to the commission of offence — whether it was her caste, gender or disability. This highlights the limitation of a provision where causation of a wrongful act arises from a single ground or what we refer to as the single axis model.

63. It is pertinent to mention that Section 3(2)(v) was amended by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which came into effect on 26-1-2016. The words "on the ground of" under Section 3(2)(v) have been substituted with "knowing that such person is a member of a Scheduled Caste or Scheduled Tribe". This has decreased the threshold of proving that a crime was committed on the basis of the caste identity to a threshold where mere knowledge is sufficient to sustain a conviction. Section 8 which deals with presumptions as to offences was also amended to include clause (c) to provide that if the accused was acquainted with the victim or his family, the court shall presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise. The amended Section 8 reads as follows:

"8. Presumption as to offences.— In a prosecution for an offence under this Chapter, if it is proved that—

(a) the accused rendered any financial assistance in relation to the offences committed by a person accused of, or reasonably suspected of, committing, an offence under this Chapter, the Special Court shall presume, unless the contrary is proved, that such person had abetted the offence;

(b) a group of persons committed an offence under this Chapter and if it is proved that the offence committed was a sequel to any existing dispute regarding land or any other matter, it shall be presumed that the offence was committed in furtherance of the common intention or in prosecution of the common object.

(c) the accused was having personal knowledge of the victim or his family, the Court shall presume that the accused was aware of the caste or tribal identity of the victim, unless the contrary is proved."

64. The Parliament Standing Committee Report on Atrocities Against Women and Children has observed that, "high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration" and recommends inclusion of provisions of the SC & ST Act while registering cases of gendered violence against women from the SC & ST communities. However, as we have noted, one of the ways in which offences against SC & ST women fall through the cracks is due to the evidentiary burden that becomes almost impossible to meet in cases of intersectional oppression. This is especially the case when courts tend to read the requirement of "on the ground" under Section 3(2)(v) as "only on the ground of". The current regime under the SC & ST Act, post the amendment, has facilitated the conduct of an intersectional analysis under the Act by replacing the causation requirement under Section 3(2)(v) of the Act with a knowledge requirement making the regime sensitive to the kind of evidence that is likely to be generated in cases such as these."

39. There is no evidence on record to show that the offence of rape was committed by the accused appellant on account of the caste identity of the victim. In the absence of any evidence in that regard, we hold that the offence under Section 3(2)(v) SC/ST Act is not made out against the accused appellant. The conviction and sentence of the accused appellant under Section 3(2)(v) SC/ST Act is, therefore, reversed.

40. Consequently, the present appeal succeeds and is allowed. The judgement and order of conviction and sentence dated dated 8.1.2021, passed in Special Case No.29 of 2009 (State Vs. Arun Mishra), is set aside. The appellant Arun Mishra shall be released from Jail, forthwith, unless he is wanted in any other case, subject to compliance of Section 437-A Cr.P.C.

(2024) 8 ILRA 55
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.08.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 553 of 2006

Lakhan & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Anil Kumar Singh

Counsel for the Respondent:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 446 & 449 - Appeal – against order of forfeiting the sureties – appellant stood as sureties for the accused – accused abscond – upon the accused's failure to appear in court, the surety amount Rs. 10,000/- was ordered to be forfeited – a recovery warrant issued – application for reconsideration was rejected – appeal – court find that, - appellants took all possible steps to rectify the situation after the accused failure to appear – they demonstrated their commitment by bringing the accused before the court as soon as practically possible – this action reflects their sincere intention to uphold their surety obligations and the liability of the surety ended when the accused surrendered – held, in the light of appellants' genuine efforts and the eventual surrender of the accused, the continuation of the recovery proceedings for the surety amount Rs. 10,000/- is found to be unjust and lacking proper legal authority – accordingly, appeal is allowed - direction issued accordingly. (Para – 19, 20, 21, 22)

Appeal is allowed. (E-11)

List of Cases cited:

Patan Jamal Vali Vs the St. of Adhara Pradesh – (2021 vil. 16 SCC 225).

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

1. Heard learned counsel for the parties and perused the material available on record.

2. This appeal is filed under Section 449 of the Criminal Procedure Code (Cr.P.C.) against the judgment and order dated 25.01.2006 passed by the court of learned Additional Session Judge, Hardoi.

3. Learned counsel for appellants has submitted that the appellants stood as sureties for the accused in Criminal Case No. 199/97. Upon the accused's failure to appear in court, the surety amount of Rs. 10,000/- was ordered to be forfeited. The learned Additional Session Judge, Hardoi, issued a recovery warrant for the said amount through the order dated 25/01/2006, rejecting the appellants' application for reconsideration

4. Learned counsel for appellants has further submitted that as soon as the appellants received the information about the abscond of the accused, they made their best efforts to surrender the accused before the court.

5. Learned counsel for appellants has further submitted that the order dated 25/01/2006 passed by the learned Additional Session Judge, Hardoi, is unjustified both in law and in fact.

6. Learned counsel for appellants has further submitted that the learned court below failed to appreciate the relevant facts of the case, leading to the issuance of the recovery warrant against the appellants. The liability of the surety ended when the accused, Mahendra, surrendered before the concerned court on 16.11.2005 at District Jail Hardoi.

7. Learned counsel for appellants has further submitted that the appellants made several efforts to produce the accused before the court but were unable to do so due to his illness and ongoing treatment at various places. The learned Additional Session Judge did not adequately consider these facts and wrongly rejected the application filed by the appellants.

8. Learned AGA submitted that the purpose of Section 446 Cr.P.C. is to ensure compliance with court orders and secure the presence of the accused. The attachment of property serves as a deterrent against non-compliance and a mechanism to enforce the surety's obligation.

9. The learned AGA Submitted that the order of the learned Additional Session Judge, Hardoi, stating that the surety amount was forfeited due to the appellants' failure to produce the accused as required.The government maintains that the recovery proceedings for the surety amount are in accordance with the law and should be upheld.

10. Learned AGA further submitted that the trial court took the correct approach in rejecting the appellants' application, considering the procedural requirement for enforcing surety obligations and ensuring justice is upheld. The trial court exercised discretion based on the existing circumstances, and there was no manifest error in its decision-making process.

11. I have heard the learned counsel for the appellants and the learned AGA for the State.

12. In light of the arguments presented and the facts established, it is evident that the appellants acted diligently to comply with their surety obligations and took all possible steps to ensure the presence of the accused before the court.

13. The court finds that the appellants made sincere efforts to produce the accused before the court, as evidenced by their actions and attempts to locate him despite his illness and treatment. The surrender of the accused, Mahendra, before the concerned court on 16.11.2005, effectively ended the liability of the surety.

14. The accused, Mahendra, surrendered before the concerned court on 16.11.2005 at District Jail Hardoi. This surrender is a critical event that should have been duly considered by the lower court. The surrender of the accused effectively ended the liability of the sureties, as their primary obligation was to ensure the accused's appearance in court.

15. Section 446 of the Criminal Procedure Code (Cr.P.C.) deals with the forfeiture of bonds given by individuals (sureties) in criminal proceedings, particularly when there is a failure to comply with the conditions of the bond. This section outlines the procedure for handling situations where a surety bond is forfeited, including the consequences and recovery methods. a detailed explanation:

Section 446 Cr.P.C.

"When a bond is forfeited under this Code, the Court may, in its discretion, issue a warrant for the recovery of the penalty or may, after giving the surety an opportunity of being heard, order the surety to pay the penalty or show cause why it should not be paid. If the surety fails to show cause or fails to pay the penalty, the Court may proceed to recover the penalty as if it were a fine imposed under this Code."

Scope: Section 446 applies to bonds taken under the Cr.P.C. for ensuring appearance in court or compliance with other conditions. It comes into play when a surety bond is forfeited, which typically occurs if the conditions of the bond are not met.

Court's Discretionary Powers:

Issuing a Warrant: The court has the discretion to issue a warrant for the recovery of the forfeited penalty. This means that if a bond is forfeited, the court can take active steps to recover the penalty amount from the surety.

Opportunity to Be Heard: Before taking any recovery action, the court must give the surety an opportunity to be heard. This ensures that the surety can explain any reasons for their failure to comply with the bond conditions or present any mitigating circumstances.

Show Cause or Order to Pay :

Show Cause: The court may also require the surety to show cause why the penalty should not be paid. This means the surety must provide reasons or evidence as to why they should not be held financially liable for the forfeiture.

Order for Payment: The court may order the surety to pay the forfeited penalty. This order will be issued after considering the surety's explanation and the circumstances surrounding the forfeiture.

Procedure: If the surety fails to show a valid cause or does not pay the penalty, the court can proceed to recover the penalty as if it were a fine imposed

under the Cr.P.C. This means that the court can use standard methods for recovering fines to collect the forfeited amount.

Enforcement: The recovery process can include various methods such as attachment of property or other enforcement measures available under the law.

When a bond is forfeited, the court must follow the procedures outlined in Section 446. This includes issuing a warrant for recovery if necessary, giving the surety a chance to explain their non-compliance, and then proceeding with recovery if the surety fails to provide a valid cause.

16. The appellants faced unforeseen circumstances due to the accused illness, which prevented them from producing him in court within the stipulated time. These circumstances were beyond the control of the appellants. The appellants provided detailed explanations and evidence of their efforts, including medical reports and treatment records, which were not sufficiently considered by the learned Additional Session Judge.

17. The appellants submitted an application to the concerned court, explaining the reasons for their inability to produce the accused and requesting relief from the forfeiture of the surety amount. The learned Additional Session Judge, however, did not adequately consider these explanations and circumstances, resulting in an unjust order against the appellants.

18. In the interest of justice and fair play, it is crucial to recognize that the appellants have complied with their obligations and have made sincere efforts to correct the situation. The continued attachment of their property is disproportionate to the intended purpose of ensuring compliance.

Justice is not merely the application of law but a reflection of its spirit, which seeks to balance legal mandates with human realities. In this case, we confront the tension between strict adherence to procedural requirements and the equitable treatment of individuals who act in good faith.

19. In the present matter, the appellants took all possible steps to rectify the situation after the accused failure to appear. They demonstrated their commitment by bringing the accused before the court as soon as practically possible. This action reflects their sincere intention to uphold their surety obligations and the liability of the surety ended when the accused, Mahendra, surrendered before the concerned court on 16.11.2005 at District Jail Hardoi.

20. Based on the above analysis, it is evident that the order dated 25.01.2006 passed by the learned Additional Session Judge, Hardoi, was not justified either in law or on the facts of the case. The appellants made sincere and diligent efforts to fulfill their obligations as sureties, and the unforeseen circumstances of the accused's illness and subsequent surrender were beyond their control.

21. In light of the appellants' genuine efforts and the eventual surrender of the accused, the continuation of the recovery proceedings for the surety amount of Rs. 10,000/- is found to be unjust and lacking proper legal authority.

22. Accordingly, the appeal is **allowed** and the impugned order dated

25.01.2006 passed by the learned Additional Session Judge, Hardoi is hereby **set aside** and **reversed.** The appellants are relieved from the obligation to pay the forfeited amount. The appellants are discharged from their obligations as sureties in this case.

23. A certified copy of the order be also sent to the court concerned for compliance.

24. Office is directed to communicate this order to the court concerned for necessary compliance.

25. Lower court record, if any, shall also be sent back to the district court concerned.

(2024) 8 ILRA 59
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 940 of 2021

Ankita Punia **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Arun K. Deshwal, Sri Jitendra Kumar Shishodia

Counsel for the Respondent:
Y, Y, G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 161 & 374(2) - Indian Penal Code,1860 - Sections 302, 376, 458, 506 & 511 - Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 – Sections 3(2)5 - Appeal – against conviction & sentence – accused committed offence of rape, murder and threats to the informant's Grand-mother who belongs to a scheduled caste member – FIR – investigation – victim who is aged about 100 years died during treatment - arrest – charge-sheet – in defence, plea taken that, accused appellant taken a loan from the informant and when he failed to returned it they lodged a false FIR so that they will success in getting monetary relief under the victim compensation scheme from govt. – court finds that, (i) contradiction in testimony of witness, (ii) in medical evidences - no sign of any external force of being used, no sign of nay external injury, cause of death is 'septic Simia shock', (iii) no any report of vaginal semen nor any blood matching report, (iv) no any recovery nor any independent witnesses (v) prosecution witness accepted that they got 8 lacs rupees form the govt. – held, prosecution is failed to stablished offence committed by the accused appellant beyond reasonable doubt – Perhaps charges of murder & sexual assault was imposed just to get money from the government - consequently, the conviction and sentence of the accused appellant is reversed – Appeal is allowed – conviction and sentence is set aside – direction issued accordingly. (Para – 19, 20, 21, 22)

Appeal is allowed. (E-11)

(Delivered by Hon'ble Dr. Gautam Chowdhary, J.)

1- अपीलार्थी की ओर से यह दाण्डिक अपील, मु०अ०सं० 550 सन 2017 अन्तर्गत धारा 458, 376, 302, 506 भा०८०वि०, थाना जानी, जिला मेरठ से उद्भूत दाण्डिक वाद सं० 01 सन 2018 में विशेष न्यायाधीश (एस०सी०/एस०टी० ऐक्ट) मेरठ द्वारा पारित निर्णय दि० 20-11-2020, जिसके द्वारा अपीलार्थी/अभियुक्त अकित पूनिया को धारा 302 भा०दं०वि० के अपराध में आजीवन कारावास एवं रू० 25,000/- अर्थदण्ड से तथा

अर्थदण्ड अदा न करने पर 3 माह के अतिरिक्त कारावास के दण्ड से दण्डित किया गया है, धारा 376/511 ना०द०वि० के अपराध में 7 वर्ष के कारावास एवं रू० 10,000/- अर्थदण्ड से एवं अर्थदण्ड अदा न करने पर 3 माह के अतिरिक्त कारावास के दण्ड से दण्डित किया गया है तथा धारा 458 भा०द०वि० के अपराध में 7 वर्ष का कारावास एवं रू० 10,000/- अर्थदण्ड से एवं अर्थदण्ड अदा न करने पर 3 माह के अतिरिक्त कारावास के दण्ड से दण्डित किया गया है, के विरूद्ध योजित की गयी है।

2- वाद के तथ्य संक्षेप में इस प्रकार हैं कि वादी मुकदमा शनि कुमार बाल्मिकी निवासी ग्राम रघुनाथपुर थाना जानी, जिला मेरठ, ने तहरीर थानाध्यक्ष को इस कथन के साथ प्रेषित की कि वह बाल्मिकी जाति (अनुसूचित जाति) का व्यक्ति है। उसकी 100 साल की वृद्ध एवं बीमार दादी मां श्रीमती फुल्लो देवी पत्नी स्व. श्री हिम्मत सिंह निवासी ग्राम रघुनाथपुर, थाना जानी, मेरठ, दिनांक 29.10.2017 को समय करीब 11:30 पीएम रात्रि में बीमारी के कारण बेहोशी की हालत में रजाई ओढकर अपनी चारपाई पर घर के बरामदे में सोई हुई थी। वह और उसकी पत्नी श्रीमती अंजु बरामदे के पास बने हुए एक कमरे में लेटे हुए थे तभी बरामदे में अर्द्ध बेहोशी की हालत में सोई हुई उसकी दादी मां के कराहने की आबाज उसे व उसकी पत्नी श्रीमती अंजु को सुनाई दी तो उसने व उसकी पत्नी ने बाहर निकलकर बरामदे में देखा कि उसके ही गांव का अंकित पूनिया पुत्र स्व. सतेन्द्र पूनिया उसकी 100 साल की वृद्ध और बीमार दादी मां के साथ उनके ऊपर लेटा हुआ संभोग कर रहा है। उसने और उसकी पत्नी ने उसे बड़ी मुश्किल से दादी मां के ऊपर से उठाया तो अंकित पूनिया शराब के नशे में धुत था और जब उसने उसे पकड़ने का प्रयास किया तो यह दरवाजे से भाग गया। वह अपनी दादी मां को एम्बूलेंस में डालकर थाने लाया। उसकी रिपोर्ट दर्ज कर कार्यवाही की जाए।

3- उपरोक्त तहरीर पर अभियुक्त अंकित पूनिया के विरूद्ध दिनांक 30.10.2017 को समय 1:45 बजे मुकदमा अपराध संख्या 550/2017, अन्तर्गत धारा 458, 376 ना०द०सं० व धारा 3(2)5 एस.सी.एस.टी. एक्ट दर्ज हुआ जिस पर क्षेत्राधिकारी द्वारा विवेचना की गयी।

4- विवेचक द्वारा विवेचना के दौरान घटनास्थल का मौका मुआयना किया गया। पीडिता का चिकित्सीय परीक्षण कराया गया। दौरान विवेचना दिनांक 30.10.2017 को समय करीब तीन बजे रात्रि पीडिता की मृत्यु हो गयी जिस कारण मामला धारा 302 भा०द०सं० में जी०डी० संख्या 20, परिवर्तित हुआ। अभियुक्त को गिरफ्तार किया गया जिसका हवाला जी०डी० सं० 27 दिनांकित 30.10.2017 में दिया गया है।

5- विवेचक ने मृतका का पंचायतनामा व पोस्टमार्टम कराया। गवाहान के बयान दर्ज किये। मृतका की स्लाईड़ जांच हेतु विधि विज्ञान प्रयोगशाला भेजी गयी। विवेचक द्वारा

मौका मुआयना कर नक्शा नजरी बनाया गया। अभियुक्त के विरूद्ध प्रथम दृष्टया मामला पाते हुए आरोप पत्र अन्तर्गत धारा 458, 376, 302 506 भा०दं०सं० व धारा 3(2)5 एस सी.एस.टी एक्ट प्रेषित किया गया।

6- अभियुक्त को आरोप विरचित किये जाने हेतु कारागार से तलब किया गया और दिनांक 20.7.2018 को धारा 458, 376, 302, 506 भा०दं०सं० व धारा 3 (2) 5 एस.सी. / एस.टी.एक्ट में आरोप विरचित किया गया। अभियुक्त ने आरोप से इंकार किया और परीक्षण चाहा।

7- आरोप को साबित करने हेतु अभियोजन पक्ष की ओर से दस्तावेजी साक्ष्य में तहरीर प्रदर्श क-१, पंचायतनामा प्रदर्श क-2, चिकित्सीय परीक्षण रिपोर्ट प्रदर्श क-3.चिकित्सक द्वारा जारी मृत रिपोर्ट प्रदर्श क-4 पोस्ट मार्टम रिपोर्ट प्रदर्श क-5. चिकित्सीय रिपोर्ट प्रदर्श क-6, प्रथम सूचना रिपोर्ट प्रदर्श क-7, जी०डी० कायमी प्रदर्श क-8, पुलिस प्रपत्र सं० 13 प्रदर्श क-9, फोटोनाश प्रदर्श क-10, प्रतिसार निरीक्षक को प्रेषित पत्र प्रदर्श क-11, मुख्य चिकित्साधिकारी को प्रेषित पत्र प्रदर्श क 12. नमूना मोहर प्रदर्श क-13, नक्शा नजरी प्रदर्श क 14 एवं आरोप पत्र प्रदर्श क-15 तथा विधि विज्ञान प्रयोगशाला की रिपोर्ट दिनांकित 4.7.2020 प्रस्तुत की गयी।

8- मौखिक साक्ष्य में बादी मुकदमा शनि कुमार को अभियोजन साक्षी सं0-1. चश्मदीद गवाह श्रीमती अंजू अभियोजन साक्षी सं०-2, वादी के पिता इल्मे अभियोजन साक्षी सं०-3, चिकित्सीय रिपोर्ट देने वाली डा० नमृता अभियोजन साक्षी सं०-4, पोस्टमार्टम करने वाले डा० डी०के० शर्मा अभियोजन साक्षी सं०-5, एफआईआर लेखक शर्मिम जहां अभियोजन साक्षी सं०-6, एस०आई० विनोद कुमार अभियोजन साक्षी सं0-7, विवेचक संतोष कुमार सिंह अभियोजन साक्षी सं०-8 को परीक्षित किया गया।

9- अभियोजन साक्षी सं० 1 वादी मुकदमा ने मुख्य परीक्षा में सशपथ कथन किया है कि वह बाल्मिकी अनुसूचित जाति का है। अभियुक्त अंकित पूनिया जाट बिरादरी का है और उसी के गांव का है। दिनांक 29.10.2017 की रात्रि 11:30 बजे की घटना है उसकी दादी फुल्लो देवी उम्र करीब 100 वर्ष बीमारी के कारण बेहोशी की हालत में रजाई ओढकर धर के बरामदे में चारपाई पर सोई थी। वह अपनी पत्नी अंजू के साथ बरामदे के साथ बने कमरे में लेटा था। उसके पिता ऐलन सिंह जो कुछ ऊंचा सुनते हैं, बरामदे में लेटे थे। दादी के कराहने की आवाज सुनकर वह अपनी पत्नी के साथ बरामदे में गया तो उन्होने बल्ब की रोशनी में देखा कि हाजिर अदालत अंकित पूनिया उसकी दादी के ऊपर लेटा हुआ संभोग कर रहा था। उसकी दादी 15-20 दिन से बीमारी की हालत में नीचे का कपड़ा नहीं पहनती थी क्योंकि लेटे रहने के कारण उनकी पीठ पर घाव हो गये थे। उसने शोर मचाते हुए अपने पिता के साथ अंकित पूनिया को पकड लिया। जब वह अपनी दादी को देखने लगा तो उसी समय अंकित पूनिया धमकी देते हुए कि इसका तो उसने काम कर दिया है उसे भी नहीं छोडेगा, धक्का मुक्की

करते हुए मौके से भाग गया। उसके पिता पकडने के लिए दौडे लेकिन वह भाग गया। उसकी दादी की हालत अत्यधिक खराब हो गयी थी। उसने एम्बूलेंस बुलाई और थाने जाकर तहरीर दी। गवाह ने तहरीर प्रदर्श क-1 को साबित किया है। रात को उसकी दादी का डाक्टरी मुआयना हुआ था। पहले जानी ले गये थे बाद में पी०एल० शर्मा अस्पताल ले गये। इलाज के दौरान ही उसकी दादी की मृत्यु हो गयी थी। पुलिस ने पंचायतनामा भरा था। गवाह ने पंचायतनामा पर अपने हस्ताक्षर की शिनाख्त कर उसे प्रदर्श क-2 के रूप में साबित किया है। पुलिस ने उसकी दादी का पोस्ट मार्टम कराया था। सीओ साहब ने उसकी निशानदेही पर नक्शा नजरी बनाया था।

10- अभियोजन साक्षी सं0-2 श्रीमती अंजू ने मुख्य परीक्षा में सशपथ कथन किया है कि उसकी ददिया सास फुल्लो देवी की उम्र करीब 100 वर्ष थी जो काफी बीमार व वृद्ध थीं। दिनांक 29.10.2017 की रात्रि लगभग 11:00-11:30 बजे की घटना है। उसकी ददिया सास बरामदे में लेटी थीं जो अर्द्धबेहोशी की हालत में थीं और कराह रही थीं। उसके ससुर ऐलन सिंह बरामदे में ही लेटे थे। वह अपने पति के साथ बरामदे के पीछे बने कमरे में लेटी थी। वह अपनी ददिया सास के कराहने व ससुर के चीखने की आवाज सुनकर अपने पति के साथ बरामदे में गयी तो बल्ब की रोशनी में देखा कि हाजिर अदालत मुल्जिम, जो गैर अनुसूचित जाति का है, और उसी के गांव का है, उसकी ददिया सास के ऊपर लेटा हुआ बलात्कार कर रहा था। उसकी ददिया सास बीमारी के कारण नीचे कोई कपडा नहीं पहनती थी। अंकित पूनिया भी नग्न अवस्था में था। मौके पर अंकित पूनिया को उसके पति व ससुर ने पकड लिया था लेकिन ददिया सास की हालत खराब थी। जब उसके पति दादी को देखने लगे तो धक्का-मुक्की देते हुए यह कहते हुए कि इसका तो मैने काम कर दिया है उनको भी नहीं छोड़ेगा व जान से मारने की धमकी देते हुए गिरते पडते भाग गया। वह नशे की हालत में था। अंकित पूनिया ने हमारी जाति को जानते हुए ददिया सास के साथ बलात्कार किया है। उसके पति ने एम्बूलेंस बुलाई थी। वह एम्बूलेंस में ददिया सास को लेकर अपने पति के साथ थाने गयी। थाने में तहरीर दी और उसके बाद पुलिस वालों के साथ पी०एल० शर्मा अस्पताल आये थे जहां उसकी ददिया सास का चिकित्सीय परीक्षण हुआ था। दौरान इलाज सुबह के समय उसकी ददिया सास की मृत्यु हो गयी।

11- अभियोजन साक्षी सं० 3 इल्मे, जिसको ऊचा सुनाई देता है और कान के पास बोलने पर सुनकर-समझकर जबाब दे रहा है, ने मुख्य परीक्षा में सुशपथ कथन किया है कि उसकी मां का नाम फुल्लो था। उसकी मां की उम्र कितनी थी उसे नहीं पता। **उसे यह भी नहीं पता कि उसकी मां के साथ क्या हुआ था। उसे नहीं पता कि उसकी मां कैसे मरी। वह घर पर था उसे नहीं पता कि रात को मां के साथ क्या हुआ था। वह तो सो गया था। विद्वान**

अभियोजन अधिकारी की प्रार्थना पर न्यायालय द्वारा इस गवाह को पक्षद्रोही घोषित किया गया।

12. अभियोजन साक्षी स०-4 डा. नम्रता, हाल तैनाती पीएचसी रोहटा सम्बद्ध 6 पीएसी. 12- मेरठ ने मुख्य परीक्षा में सशपथ कथन किया है कि घटना वाली रात दिनांक 30.10.2017 को वह डीडब्लू-एच मेरठ में तैनात थी उस दिन समय लगभग तीन बजे एएम (रात) म०का० 2683 सीमा थाना जानी मेरठ श्रीमती फुल्लो देवी पत्नी हिम्मत सिंह निवासी ग्राम रघुनाथपुर को मैडिकल परीक्षण हेतु लेकर आयी थीं। श्रीमती फुल्लो उस समय अर्द्ध मूच्छित थीं। होश हवास में नहीं थीं एवं बोलने व जवाब देने में असमर्थ थीं। उनकी तरफ से उनके बेटे की बहू लक्ष्मी व उनके पोते की बहु अंजू ने बातें बताई। श्रीमती फुल्लो के बांये गाल पर एक काला तिल था। अंजू व लक्ष्मी ने बताया कि दिनांक 29.10.2017 की रात्रि 11 बजे उनके घर पर लडका अंकित घुस आया था और उसने बरामदे में लेटी फुल्लो देवी, जो एक महीने से पूर्ण रूप से बिस्तर पर है, के साथ पूर्ण नग्न अवस्था में यौन संबंध करते देखा। यह घटना अपनी मां के पास बरामदे में सोये इलम सिंह ने देखी थी और अंकित को नग्न अवस्था में पकड़ा था। **श्रीमती फुल्लो देवी के एक महीने से बिस्तर पर लेटे रहने से उनको 'बैडसोर" था। पीडिता के कोई चोट के निशान नही मिले थे।** पीड़िता ने सिर्फ शर्ट पहनी थी। नीचे कुछ नहीं पहना था। लेटी रहती थीं। पल्स 80 प्रति मिनट थी। बी.पी. 100-70 था। सांस 18 प्रति मिनट थी। **पीड़िता के शरीर पर कोई बाह्य चोट नही थी**। कोई कपडा सुरक्षित रखने हेतु नही लिया था। उसने परीक्षण के दौरान एक वैजायनिल स्लाईड दो वैजायनिल स्लैब व उएमएल ब्लड चार बंडल में सील करके सर्वे मोहर के साथ आयी कांस्टेबल को सौंप दिया था। चार सील बंद लिफाफे महिला कां० सीमा को सौंप दिये थे। गवाह को कागज संख्या 63/1 ता 63/9 दिखाये गये जिन पर गवाह ने अपने हस्ताक्षरों की पहचान की और बताया कि यह मैडिकल उसके ही हस्तलेख में है। गवाह ने मैडिकल रिपोर्ट प्रदर्श क-3 को साबित किया है।

13- पीडब्लू-5 डा. डी० के०शर्मा ने मुख्य परीक्षा में सशपथ कथन किया है कि उनके द्वारा दिनांक 30.10.2017 को समय करीब 3:30 पीएम हाल सी 2683 सीमा सोलंकी और थाना जानी द्वारा सीपी 359 सर्वेश कुमार थाना जानी द्वारा श्रीमती फुल्लो देवी पत्नी स्व० हिम्मत सिंह, उम्र करीब 100 बर्ष महिला निवासी ग्राम रघुनाथपुर थाना जानी मेरठ का शव पोस्ट मार्टम हेतु लाया गया जिसकी पहचान सनी कुमार व सचिन (पोते) द्वारा की गयी। मृतका का शव पैरों को छोडकर सारा अकड़ा हुआ था। **मृतका के शरीर पर पीछे कमर के निचले हिस्से में और पीछे नितम्ब पर संक्रमित बैड सोल थे। जिसका साइज 30 सेमी X 22 सेमी था।** फेफडे दोनो साईड के सक्रमित थे। उनकी राय में मृतका की मृत्यु का समय लगभग आधे से एक दिन पहले का था। **मृत्यु**

सैप्टिक सीमिया शॉक से हुई। टीम में डा० रिचा देशवाल लेडी मैडिकल आफिसर सीएचसी परीक्षितगढ, मेरठ, में तैनात थी। **कोई बाहरी चोट जबरदस्ती का प्रमाण नहीं था।** मृतका के दो वेजाइनल स्मीयर स्लाइड बनाई जो फोरेन्सिक विभाग भेजी। गवाह द्वारा पोस्टमार्टम रिपोर्ट प्रदर्श क-5 व फोटो नाश प्रदर्श क 6 को साबित किया गया है।

14- अभियोजन साक्षी सं0-6 कां0 2401 शर्मिन जहां अभियोजन साक्षी सं० 7 एस०आई० विनोद कुमार तथा अभियोजन साक्षी सं० ४ संतोष कुमार सिंह औपचारिक साक्षी हैं जिन्होंने अपने-अपने द्वारा की गयी कार्यवाही के संबंध में बयान दिया है तथा आवश्यक फर्व प्रदर्श आदि को साबित किया है।

15- अभियोजन साक्ष्य सम्पन्न होने के उपरांत अभियुक्त का बयान अन्तर्गत धारा 313 द०प्र०सं० अंकित किया गया जिसमें उसने घटना को गलत बताया और गलत विवेचना कर झूठा आरोप पत्र प्रेषित करने का कथन किया। **उसने कश्थन किया कि सरकार से मिलने वाले मृतक आश्रितों के पैसे के कारण झूठा फंसाया है।** बादी सनी कुमार ने पैसे के लेन देन के कारण रंजिशन आपराधिक षडयंत्र कर उसे झूठा फंसाया है। अभियुक्त को प्रतिरक्षा साक्ष्य का अवसर दिया गया किन्तु उसके द्वारा प्रतिरक्षा साक्ष्य नहीं दिया गया।

16- अपीलार्थी के विद्वान अधिवक्ता श्री जितेन्द्र कुमार शिशोदिया एवं उत्तर प्रदेश राज्य की ओर से अर्चना सिंह को सुना तथा पत्रावली का परिशीलन किया।

17- अपीलार्थी के विद्वान अधिवक्ता ने तर्क प्रस्तुत किया कि वादी मुकदमा ने अभियुक्त से सुअर पालने हेतु एक लाख रूपये उधार लिये थे. जिसको वह अदा नहीं कर रहा था, उक्त उधार की रकम को वापस न देने के उद्देश्य से तथा सरकार से मिलने वाली आर्थिक सहायता पाने के लिए अभियुक्त गलत एवं कपोलकल्पित कहानी बनाकर झूठा फंसाया गया है तथा वादी द्वारा अभियुक्त के विरूद्ध प्रथम सूचना रिपोर्ट लिखकर दोहरा लाभ अर्जित किया है। **इस फर्जी एफ०आई०आर० लिखाने से बादी जहाँ एक ओर उधार की रकम वापस करने से बचा वहीं दूसरी ओर सरकार से भी आर्थिक सहायता प्राप्त की जिसे उसने अपने बयानों में स्वीकार किया है। अभियोजन साक्षी तं० 1 वादी ने अपने बयानों में यह भी स्वीकार किया है कि वह घटना के समय अपनी पत्नी के साथ गाजियाबाद में रह रहा था, इसलिए वह चश्मदीद गवाह नहीं हो सकता, इस प्रकार अभियोजन साक्षी सं० 1 एवं अभियोजन साक्षी सं० 2 के बयान पर विश्वास नहीं किया जा सकता। अभियोजन साक्षी सं० 3 ने न्यायालय में सशपथ बयान दिया है कि उसके सामने कोई घटना नहीं हुयी, न ही उसे जानकारी है। कोई स्वतंत्र गवाह पेश नहीं किया गया। घटना रात्रि के समय की है और अभियुक्त को कपड़ा छोड़कर भागने का कथन किया गया है, लेकिन वादी के द्वारा वहां से कोई**

बरामदगी नहीं दिखायी गयी है। विधि विज्ञान प्रयोगशाला में भी रक्त की कोई मैचिंग नहीं पायी गयी और न ही कपड़ों पर स्पर्म या वीर्य पाया गया। पीड़िता बीमार थी तथा उसकी मृत्यु बैडसोल के कारण हुयी है, बलात्कार किये जाने का कोई साक्ष्य नहीं है, अभियोजन साक्षीगण के बयानों में घोर विरोधाभाष है। अभियोजन पक्ष मामले को संदेह से परे साबित करने में असफल रहा है।

18- विद्वान अपर शासकीय अधिवक्ता ने अपीलार्थी के विद्वान अधिवक्ता के तर्को का प्रबल विरोध करते हुए तर्क प्रस्तुत किया कि अभियुक्त द्वारा रात्रि के समय गृह भेदने कर वृद्ध व बीमार पीडिता से बलात्कार किया गया, यह जानते हुए कि वह अनुसूचित जाति की महिला है। बलात्कार करने के बाद पकडे जाने पर जान से मारने की धमकी दी और इसी जघन्य कृत्य के कारण पीडिता फुल्लो देवी की मृत्यु हुई जो कि हत्या की कोटि में अभियुक्त के कृत्य के कारण आयेगी। गवाहान ने घटना को बखूबी साबित किया है। अभियुक्त घटना के समय नशे में धुत था। अभियोजन पक्ष द्वारा मामले को संदेह से परे साबित किया गया है। इस आधार पर यह अपील निरस्त किए जाने योग्य है तथा विद्वान विशेष न्यायाधीश / एस०सी० एस०टी० ऐक्ट द्वारा पारित प्रश्नगत निर्णय दि० 19-11-2020 पुष्ट किए जाने योग्य है।

19- उभय पक्ष के विद्वान अधिवक्ताओं के तों को सुनने तथा साक्ष्य का परिशीलन करने के उपरान्त न्यायालय का अभिमत है कि :-

(क)- विधारण न्यायालय ने अभियुक्त को धारा 458. 376/511, 302 भा०८०वि० का दोषी पाने हेतु यह अभिमत व्यक्त किया है कि :-

"चूंकि घटना यादी के घर के अंदर बरामदे में हुई तथा घर के अंदर दुष्कर्म अथवा बलात्कार करने की नीयत से अभियुक्त घर में घु में घुसा था। घटना रात्रि के समय की है। ऐसे में अभियुक्त के द्वारा रात्री पृच्छन्न गृह अतिचार या रात्रि गृहमेदन का अपराध अन्तर्गत धारा 458 भा०दं०सं० सन्देह से परे साबित होता है।

जहां तक धारा 376 भा०दं० सं० का प्रश्न है, गवाह पी०डब्लू०-1 व पी०डब्लू०-2 द्वारा मौके अभियुक्त युक्त को नग्न अवस्था में पीडिता के उपर लेटा पर सम्भोग करने की स्थिति में देखा। पीडिता पहले से ही बैडसोर के कारण नीचे से नग्न अवस्था में थी। मेडिकल रिपोर्ट में दर्ज बयान के आधार पर भी पीडिता सिर्फ टी-शर्ट पहने वैडसोर के कारण नीचे कुछ नहीं पहनी थी। पीड़िता के कोई बाहरी चोट या जबरदस्ती बलात्कार करने के निशान नहीं है। विधि विज्ञान प्रयोगशाला की रिपोर्ट कागज संख्या 37क के अनुसार शर्ट पर रक्त पाया गया था। वैजइनल स्मीयर स्लाइड पैन्ट टी-शर्ट पेनाईल स्मीयर स्लाइड बक्कल स्मीयर स्लाइड पर कोई रक्त नहीं मिला। किसी वस्तु पर शुक्राणु या वीर्य नहीं पाया गया और ना ही पीडिता की मेडिकल रिपोर्ट में गुप्तांग पर कोई बाहरी चोट के लक्षण मिले। अभियुक्त द्वारा पेनेट्रेशन किये जाने का कोई साक्ष्य या लक्षण नहीं पाया गया। बल्कि वह संभोग कर प्रयत्न कर रहा था। चूंकि अभियुक्त बलात्कार करने का प्रयत्न में था. जिसे गवाहान द्वारा साबित किया गया है। अतः अभियुक्त द्वारा अपराध अन्तगत धारा 376/511 भा०दं०सं० बलात्कार करने का प्रयास करना साबित होता है।

अभियुक्त द्वारा पीड़िता से दिनांक 29-10-2017 की रात्रि 10.30 बजे बलात्कार करने का प्रयत्न किया गया वह अत्यन्त वृद्ध बीमार 100 वर्षीय महिला थी। बैड्सोर से पीड़ित थी। अभियुक्त का उक्त कृत्य से मृतका को इतना सदमा लगा कि उस सदमे के कारण उसकी मृत्यु हो गयी। बीमारी व वृद्ध अवस्था में उसके साथ बलात्कार का प्रयास किया गया, ऐसा सदमा उसके लिये मृत्यु कारित करने के लिए पर्याप्त था। अभियुक्त के उक्त कृत्य से ही उसी रात में मृतका की मृत्यु हो गयी। अभियुक्त के विरूद्ध धारा 302 मा०८०वि० का अपराध सन्देह से परे साबित होता है।"

(ख) इस न्यायालय का अभिमत है कि अभियोजन साक्षी सं० 2 वादी की पत्नी है तथा वह अपने को चश्मदीद साक्षी कह रही है. उसने अपनी जिरह में बयान दिया है कि **"अभियुक्त नग्न अवस्था में ही भाग गया था. हमने अभियुक्त को कपड़े पहनने का मौका नहीं दिया था, यह बात सही है कि मेरे घर से अभियुक्त का कोई कपड़ा, सामान, जूते चप्पल आदि न ही हमारे द्वारा बरामद किया गया और न ही पुलिस द्वारा बरामद किया गया"** वहीं पर यह कहना सनीचीन प्रतीत होता है कि यदि अभियोजन साक्षी सं० 2 के इस कथन को मान भी लिया जाय कि अभियुक्त नग्न अवस्था में ही भाग गया था उसे कपड़े पहनने का मौका नहीं दिया गया, तो उसके कपड़े आदि घटनास्थल से ही क्यों नहीं बरामद किये गये, इस तथ्य से अभियोजन साक्षी सं० 2 का कथन असत्य हो जाता है। इस अभियोजन साक्षी ने प्रतिपरीक्षा में यह भी कहा है कि "**इस घटना का कोई अड़ोसी-पड़ोसी गवाह नहीं है"** यह तथ्य अपने आप में भ्रामक है **कि वादी व उसके परिवार वालों के शोर पर अभियुक्त के भागने पर अड़ोस-पड़ोस के किसी व्यक्ति के आने का किसी भी साक्षी ने जिक नहीं किया है।** विचारण न्यायालय ने स्वयं भी यह अभिमत व्यक्त किया है कि वैजइनल स्मीयर स्लाइड पैन्ट टी-शर्ट पेनाईल स्मीयर स्लाइड बक्कल स्मीयर स्लाइड पर कोई रक्त नहीं मिला। किसी वस्तु पर शुक्राणु या वीर्य नहीं प्राया गया और ना ही पीडिता की मेडिकल रिपोर्ट में गुप्तांग पर कोई बाहरी चोट के लक्षण मिले। अभियुक्त द्वारा पेनेट्रेशन किये जानें का कोई साक्ष्य या लक्षण नहीं पाया गया। अभियोजन साक्षियों के बयान से विचारण न्यायालय की यह अवधारणा गलत है कि अभियुक्त बलात्कार करने के प्रयत्न में था. इसलिए **अभियुक्त के विरुद्ध धारा 376/511 भा०दं०वि० बलात्कार करने का प्रयास करना साबित नहीं होता है।**

(ग)- मृतका के चिकित्सीय परीक्षण आख्या में चिकित्सक ने कहा है कि "No External injury Present at the time of Examination" तथा चिकित्सक ने अन्त में अपना अभिमत व्यक्त किया है कि "No Sign of Force being used sexual assault can not be ruled out."

(घ) - विधि विज्ञान प्रयोगशाला को प्रेषित 6 वस्तु प्रदर्शों की जाँच के उपरान्त विधि विज्ञान प्रयोगशाला ने आख्या दिया है **कि बस्तु (1) से (6) पर शुकाणु अथवा वीर्य नहीं पाया गया**

(४०)- मृतका के शव विच्छेदन आख्या में कहा गया है कि **"No Sign of any external force of being used, No sign of any external injury, 2 Sample of vaginal semen slide sent to forensic, Final comment can be given after submission reports, however sexual assault can not ruled out."**

(च) अभियोजन साक्षी सं० 5 डा० डी०के० शर्मा, जिन्होंने मृतका का शव विच्छेदन किया है के बयान के अनुसार " बैड सोल के अलावा मृतका के शरीर पर कोई नारी चोट के निशान नहीं थे और न ही अन्दरूनी चोट थी व निशान थे मृतका की मृत्यु **सेप्टिक सीनर** व वृद्धा अवस्था के कारण मृत्यु हुयी है।"

(छ)- चूँकि डाक्टर ने मृतका की मृत्यु सेप्टिक सीमर से होना कहा है. इसलिए इस स्तर पर **"सैप्टिक सीमिया शॉक"** की परिभाषा पर विचार किया जाना आवश्यक है, जो निम्नवत् हैः-

"Septic shock is a potentially fatal medical condition that occurs when sepsis, which is organ injury or damage in response to infection, leads to dangerously low blood pressure and abnormalities in cellular metabolism. The Third International Consensus Definitions for Sepsis and Septic Shock (Sepsis-3) defines septic shock as a subset of sepsis in which particularly profound circulatory, cellular, and metabolic abnormalities are associated with a greater risk of mortality than with sepsis alone. Patients with septic shock can be clinically identified by requiring a vasopressor to maintain a mean arterial pressure of 65 mm Hg or greater and having serum lactate level greater than 2 mmol/L (>18 mg/ dL) in the absence of hypovolemia. This combination is associated with hospital mortality rates greater than 40%.

The primary infection is most commonly caused by bacteria, but also may be by fungi, viruses or parasites. It may be located in any part of the body, but most commonly in the lungs, brain, urinary tract, skin or abdominal organs.[2] It can cause multiple organ dysfunction syndrome (formerly known as multiple organ failure) and death. [3]

Frequently, people with septic shock are cared for in intensive care units. It most commonly affects children, immunocompromised individuals, and the elderly, as their immune systems cannot deal with infection as effectively as those of healthy adults. The mortality rate from septic shock is approximately 25-50%

Causes

Septic shock is a result of a systemic response to infection or multiple infectious causes. The precipitating infections that may lead to septic shock if severe enough include but are not limited to appendicitis, pneumonia, bacteremia, diverticulitis, pyelonephritis, meningitis, pancreatitis, necrotizing fasciitus, MRSA and mesenteric ischemia. [4][5]

According to the earlier definitions of sepsis updated in 2001,[6] sepsis is a constellation of symptoms secondary to an infection that manifests as disruptions in heart rate, respiratory rate, temperature, and white blood cell count. If sepsis worsens to the point of end-organ dysfunction (kidney failure, liver dysfunction, altered mental status, or heart damage), then the condition is called severe sepsis. Once severe sepsis worsens to the point where blood pressure can no longer be maintained with intravenous fluids alone, then the criterion has been met for septic shock."

(ज) उपरोक्त साक्ष्य इंगित करते हैं कि मृतका की उम्र करीब 100 वर्ष थी और उसकी मृत्यु किसी प्रहार या चोट इत्यादि से नहीं हुयी। उसकी मृत्यु को मानव-वध की श्रेणी में डाले जाने का कोई साक्ष्य प्रस्तुत नहीं किया गया है। ऐसी स्थिति में इस अवधारणा को समर्थन मिलता है कि शायद सरकार से धन प्राप्त करने के लिए ही Sexual offence और मानव वध का आरोप लगाया गया।

(झ)- उपरोक्त व्याख्या के प्रकाश में यह तथ्य विश्वसनीय है कि अभियुक्त को वादी ने सरकार से मिलने वाले मृतक आश्रितों को पैसों के कारण झूठा फंसाया गया तथा वादी सनी कुमार ने अभियुक्त से लिए गए पैसों के कारण रंजिशन आपराधिक षड्यंत्र करके झूठा फंसाया गया है. क्योंकि अभियोजन साक्षी सं० 1 ने अपनी प्रतिपरीक्षा में यह स्वीकार किया है कि **"मेरी दादी फुल्लो देवी की मृत्यु के पश्चात् तीनों भाई को मेरे पापा व उनके दोनों भाइयों को सरकार से सबा आठ लाख रूपये मिले थे।"**

(३०)- इस मामले में यह तथ्य भी विचारणीय है कि किसी भी साक्षी ने कहीं पर भी मृतका को जातिसूचक शब्दों का प्रयोग नहीं किया है. ऐसी स्थिति में अभियुक्त के विरूद्ध एस०सी०/एस०टी० ऐक्ट का कोई अपराध गठित नहीं होता है।

20- इस **प्रकार अभियुक्त अंकित पूनिया के विरूद्ध :-**

(1) धारा 302 भा०दं०वि० का अपराध गठित नहीं होता है चूंकि चिकित्सक के अनुसार मृतका की मृत्यु का कारण **"सेप्टिक सीमर"** पाया गया है। इस आधार पर अवर न्यायालय द्वारा अभियुक्त को धारा 302 भा०८०वि० में की गयी दोष-सिद्धि का निर्णय खण्डित किया जाता है।

(2) धारा 376/511 भा०दं०वि० का अपराध गठित नहीं होता है कि चूंकि मृतका की मृत्यु पूर्व परीक्षण करने वाले चिकित्सक द्वारा यह आख्या दी गयी है कि **"No External injury Present at the time of Examination"** तथा चिकित्सक ने अन्त में अपना अभिमत व्यक्त किया है कि **"No Sign of Force being used sexual assault can not be ruled out."** इस आधार पर अवर न्यायालय द्वारा अभियुक्त को धारा 376/511 भा०दं०वि० में की गयी दोष-सिद्धि का निर्णय खण्डित किया जाता है।

(3) अभियोजन साक्षीगण इस बात को भी साबित करने में असफल रहे हैं कि अभियुक्त रात्रि के समय घर के अन्दर दुष्कर्म अथवा बलात्कार करने की नीयत से घर के अन्दर घुसा इसलिए अभियुक्त द्वारा रात्रो पृच्छन्न गृह अतिचार या रात्रि गृहभेदन का अपराध अन्तर्गत धारा 458 भा०द०वि० का भी अपराध सन्देह से परे साबित नहीं होता है।

21- निष्कर्षतः यह दाण्डिक अपील **स्वीकार** की जाती है तथा अभियुक्त को उस पर लगाए गए आरोप अन्तर्गत **धारा 302, 376, 511, 458 भा०दं०वि० के अपराध में दोष-मुक्त**

किया जाता है एवं दाण्डिक वाद सं० 01 सन 2018 में विशेष न्यायाधीश (एस०सी०/एस०टी० ऐक्ट) मेरठ द्वारा पारित निर्णय दि० 20-11-2020, जिसके द्वारा अपीलार्थी/अभियुक्त अंकित पूनिया को धारा 302 भा०दं०वि० के अपराध में आजीवन कारावास एवं रू0 25,000/- अर्थदण्ड से तथा अर्थदण्ड अदा न करने पर 3 माह के अतिरिक्त कारावास के दण्ड से दण्डित किया गया है. धारा 376/511 ना०दं०वि० के अपराध में 7 वर्ष के कारावास एवं रू0 10,000/- अर्थदण्ड से एवं अर्थदण्ड अदा न करने पर 3 माह के अतिरिक्त कारावास के दण्ड से दण्डित किया गया है तथा धारा 458 भा०दं०वि० के अपराध में 7 वर्ष का कारावास एवं रू० 10,000/- अर्थदण्ड से एवं अर्थदण्ड अदा न करने पर 3 माह के अतिरिक्त कारावास के दण्ड से दण्डित किया गया है. को **अपास्त** किया जाता है।

22- तद्नुसार संबंधित न्यायालय को निर्देशित किया जाता है कि अपीलार्थी/अभियुक्त अंकित पूनिया को कारागार से नियमानुसार **मुक्त** कर दिया जाय।

23- कार्यालय को निर्देश दिया जाता है कि विचारण न्यायालय का अभिलेख वापस भेज दिया जाय तथा इस आदेश की एक प्रतिलिपि संबंधित अवर न्यायालय को अनुपालन हेतु तुरंत भेजना सुनिश्चित किया जाय।

(2024) 8 ILRA 69
APPELLATE JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 08.08.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal U/S 372 CR.P.C. No. 1251 of 2022
With
Government Appeal Defective No. 60 of 2022

Shiv Mohan Shilpkar ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri Daya Shankar

Counsel for the Respondents:
G.A., Sri Jyoti Bushan

Criminal Law - Criminal Procedure Code, 1973 - Sections 164 & 372 - Indian Penal Code,1860 - Sections 376 & 511 - Protection of Children From Sexual Offence Act, 2012- Sections 3 & 4: - Appeals – against acquittal – offence of attempt to Rape – victim aged about 6 years – FIR - charge-sheet – trial court finds that - victim was examined medically but no external or internal injuries were found – no spermatozoa is seen in vaginal slides – hymen is also intact - in her St.ment made before court victim said whatsoever which was told to her by her father -court finds that - major contradictions in the version of the victim viz-a-viz her father as well as material improvements in her version from what was St.d earlier u/s 164 Cr.P.C. also remain unexplained – and neither any triable issue is raised before us in these appeals nor any perversity is shown, which may persuade this court to interfere in these appeals - court in agreement with the view of trial court that the prosecution has failed to established its case beyond reasonable doubt – held, view taken by the court below is clearly a permissible view and just because a different view could be taken would ordinarily not be a ground for this court to interfere with the order of acquittal - hence, there is no occasion for this court to interfere

with the judgment of acquittal passed by the court below – consequently, appeal lacks merits and appeals are dismissed. (Para – 15, 19, 20, 21, 22)

Appeals are dismissed. (E-11)

List of Cases cited:

Viram @ Virma Vs The St. of M.P. (2022 vol. 1 SCC 341),

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Dr. Gautam Chowdhary, J.)

1. Heard Sri Daya Shankar, learned counsel for the appellant-informant, Sri Jyoti Bhushan, learned counsel for the accused appellant and learned AGA for the State.

2. Delay in filing the government appeal is explained to the satisfaction of the Court. Delay is, accordingly, condoned. Application for condonation of delay stands allowed.

3. These appeals are by the informant as well as the State challenging the judgment of acquittal dated 26.5.2022, passed by the court below in Special Sessions Trial No.23 of 2014 (State Vs. Praveen Kumar Yadav), arising out of Case Crime No.07 of 2014, under Sections 376, 511 IPC and Section 3/4 POCSO Act, Police Station Jahanaganj, District Azamgarh.

4. The informant in the present case has made a written report stating that he is a resident of Village Sukhpur Police Station Jiyanpur, District Azamgarh. He had returned on 20.1.2014 from his in-laws place at Jahanaganj in the evening. At about 9.00 PM when the victim (informant's daughter) aged six years had gone to offer tea to the driver, the driver attempted rape on her. The daughter informed this fact to her mother. With these allegations the FIR came to be registered as Case Crime No.07 of 2014 under Section 376, 511 IPC. The statement of the victim was recorded on 31.1.2014 in which she has claimed that her father asked her to give tea to the driver. When the victim offered tea the accused asked her to kiss her and when she refused the accused started beating her. On her screaming victim's father came and rescued her. The victim has been medically examined in which no external or internal injuries have been found on the victim. It has also come in the pathological report that no spermatozoa is seen in the vaginal slides. The hymen of the victim was also found intact. The age of the victim has been found to be seven years. It is thereafter that the charge-sheet was submitted in the matter and ultimately trial commenced when the accused denied the charges framed against him by the Court.

5. The informant has appeared as PW-1 and has supported the prosecution case. He has alleged that the accused was his driver for the last about one year. He has denied the suggestion that there was a dispute between him and the driver on account of non-payment of his salary. He has admitted that knowledge of this incident was received by him from is wife.

6. The victim has been produced as PW-2. She has although alleged that after she refused to accept the request of the accused to kiss her the accused gagged her mouth and thereafter started 'intercourse'. The victim moreover stated that she does not understand meaning of word

'intercourse'. She further stated that she said before the Court what was told to her by her father.

7. PW-3 and PW-4 are formal police witnesses and not much turn on their testimony.

8. PW-5 is Dr. Madhu Yadav, who had examined the victim. She has proved the medical report in which no spermatozoa was found on the vaginal smear of the victim and victim's hymen was found fully intact. The doctor has opined that there was no signs of rape on the victim. No external or internal injuries are found on the victim.

9. The material produced in evidence, by the prosecution, were confronted to the accused, who stated that he has been falsely implicated.

10. Trial court on the basis of aforesaid evidence has come to the conclusion that the prosecution has failed to prove its case beyond reasonable doubt.

11. Challenging the judgement of acquittal, learned counsel for the informant as well as learned AGA submits that as the victim is aged six years some inconsistencies in her version ought to be ignored. It is also argued that minor contradictions in the testimony of witnesses are liable to be ignored, particulary when victim is a six year old girl. Learned counsel for the informant further argues that the judgment of acquittal, in such circumstances, ought not to be sustained.

12. Learned counsel appearing for the accused appellant, however, submits that the evidence has been appropriately evaluated by the Court of Sessions and it has rightly come to the conclusion that prosecution has failed to establish its case beyond reasonable doubt. He further argues that just because the victim is a minor it would not mean that accused has to be convicted even if there is no convincing evidence to implicate him.

13. We have heard learned counsel for the parties and have perused the materials on record including the trial court record and the judgment of acquittal.

14. Facts relating to the present case has already been noticed above and need not be repeated.

15. First and foremost it is to be noticed that the victim in her statement under Section 164 Cr.P.C. has stated that she had gone to deliver tea to the accused on the instructions of her father. It is also the version of the victim that the accused asked her to kiss her and when she refused the accused started assaulting him. The victim has also stated that when she screamed her father came and rescued. This part of the testimony of the victim nowhere alleges that any attempt was made to rape her. Moreover we have examined the testimony of the victim and do not find it convincing and reliable as it is the admitted case of the prosecution that the father of the victim was not present when the incident occurred. Once that be so, it is difficult to conceive as to how the father could have come to the victim's rescue on hearing her scream. The father in his statement has categorically admitted that he was not even present and it was only when he received information from his wife that he arrived at the place of occurrence. The other contradictions which have been noticed by the Court of Sessions for acquitting the accused is the fact that there is a material improvement in the version of the victim at

the stage of trial viz-a-viz her previous statement under Section 164 Cr.P.C. In the statement of the victim made before the Court the victim alleges that she was raped, while in her statement before the Magistrate no such claim was made. The victim has though alleged that accused committed intercourse with her but has admitted that she does not know what is meant by intercourse. The victim has also categorically stated that her statement is based on the instructions of her father. The version of the victim regarding committing of rape upon her is thus a clear improvement from what was stated by her in her statement under Section 164 Cr.P.C. The medical evidence otherwise shows no external or internal injuries on the victim and the hymen of the victim was found intact.

16. In the facts of the case, we are of the opinion that the specific case of the eye-witnesses is completely belied by the medical evidence on record. In our opinion, the material contradiction in the medical evidence viz-a-viz the eye-witness account clearly creates a doubt on the prosecution case.

17. Hon'ble Supreme Court has dealt with a similar issue in Viram @ Virma Vs. The State of Madhya Pradesh, reported in (2022) 1 SCC 341, wherein in Para 13, the Court has observed as under:-

"13. The oral evidence discloses that there was an indiscriminate attack by the accused on the deceased and the other injured eye-witnesses. As found by the Courts below, there is a contradiction between the oral testimony of the witnesses and the medical evidence. In Amar Singh v. State of Punjab (supra), this Court examined the point relating to inconsistencies between the oral evidence and the medical opinion. The medical report submitted therein established that there were only contusions, abrasions and fractures, but there was no incised wound on the left knee of the deceased as alleged by a witness. Therefore, the evidence of the witness was found to be totally inconsistent with the medical evidence and that would be sufficient to discredit the entire prosecution case."

18. We have already observed that the ocular version of the incident is irreconcilable with the medical evidence on record and the inconsistency remains unexplained by the prosecution. Once that be so, it cannot be said that prosecution has succeeded in proving its case beyond reasonable doubt. Consequently, the applicant is entitled to get the benefit of doubt.

19. The trial court having noticed the aforesaid contradictions has found the prosecution case not be credible or reliable and, consequently, the accused has been acquitted of the charges levelled against him.

20. Though learned counsels submits that the evidence has not been examined in correct perspective but we fail to find any substance in such argument. The evidence clearly shows that neither the victim is credible nor is reliable nor the medical evidence on record supports her allegation.

21. The major contradictions in the version of the victim viz-a-viz her father as well as material improvements in her version from what was stated earlier under Section 164 Cr.P.C. also remains unexplained. We are, therefore, in agreement with the view taken by the Court

of Sessions that the prosecution has failed to establish its case beyond reasonable doubt. Once that be so we find that there is no occasion for this Court to interfere with the judgment of acquittal passed by the court below.

22. The view taken by the court below is clearly a permissible view, in the facts of the case, and just because a different view could be taken would ordinarily not be a ground for this Court to interfere with the order of acquittal. In such circumstances we find that neither any triable issue is raised before us in these appeals nor any perversity is shown, which may persuade this Court to interfere in these appeals.

23. The appeals lack merits and are, consequently, dismissed.

(2024) 8 ILRA 73
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 1821 of 2018

Babu Ram ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Sushil Kumar Pandey, Sri Jitendra Pal Singh

Counsel for the Respondents:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 161, 164, 313 & 437(a) - Indian Penal Code,1860 - Sections 376, 376(2)(f) & 376(2)(n), - Protection of Children From Sexual Offence Act, 2012- Sections 5 & 6: - Appeal – against conviction & sentence – FIR – allegation of sexual assault by the accused appellant, on his own minor daughter - investigation – victim who is aged about 14-15 years was sexual assaulted for the last about 13 months – chargesheet – plea taken that, allegations are false and the prosecution evidence is not reliable – conviction & sentence - court finds that - (i) victim did not specified the date, time, manner or place in her St.ment when she was first subjected to sexual assault and there is general allegation that for almost 13 months she was sexually assaulted by the accused, (ii) admittedly, victim staying with her grandparents and accused was lived in a different house with his wife and child and she was also lived in nearby other relatives but none was informed about her rape nor anyone ever saw the incident or came to know of it, (iv) there is no evidence of any other persons, who may have been informed about her sexual exploitation during the entire period of 13 months, (v) in medical evidences, no external or internal injury, hymen of the victim was found old torn, (vi) in the pathological report, no dead or live spermatozoa has been found, (vii) in such circumstances, the only testimony which remains on record to support the prosecution case, (viii) a distinct possibility of the victim having framed her father to avenge the murder of her mother by him – court inclined to hold that the defence has succeeded in creating a doubt on the prosecution case of rape for 13 months upon the victim – therefore, accused appellant is entitled to benefit of doubt – resultantly, appeal succeeds and is allowed - conviction and sentence is set aside – direction issued, accordingly. (Para – 40, 41, 42, 43, 45)

Appeals are allowed. (E-11)

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

1. This criminal appeal is directed against the judgment and order dated 24.2.2018, passed by the learned Additional Sessions Judge/Court No.1, Pilibhit in Sessions Trial No.8 of 2015, arising out of Case Crime No.622 of 2015,

under Sections 376(2)(f), 376(2)(n) IPC and 5/6 POCSO Act, Police Station Newriya, District Pilibhit; whereby the appellant Babu Ram has been convicted and sentenced to life imprisonment under Section 5/6 POCSO Act alongwith fine of Rs.10,000/-; sentenced to ten years rigorous imprisonment under Section 376(2)(f) IPC alongwith fine of Rs.10,000/-; sentenced to ten years rigorous imprisonment under Section 376(2)(n) IPC alongwith fine of Rs.10,000/-. In default of payment of fine to undergo one year additional imprisonment in all above sections. All the sentences are directed to run concurrently.

2. In the present case the first informant is the step-brother of victim, namely Sandeep (PW-2). He intimated the Incharge of Police Station Neoria, District Pilibhit that his father died several years ago. After death of his father his mother Smt. Somwati started living with the accused appellant Babu Ram and out of their union a daughter was born who is around 18 years of age (the victim). Smt. Somwati, biological mother of informant and victim died when the victim was only about a year and a half old. The victim is residing with her father Babu Ram (the accused). About five years back accused Babu Ram remarried a Bengali lady. Informant alleged in his written report (Ex.Ka.3) that for the last about one year the accused appellant Babu Ram has been sexually exploiting the victim and after she got fed up, the victim informed of it to him and also to his cousin Jagdish (s/o Ram Awtar). The victim also informed them that about ten days ago the accused appellant also committed rape on her sister. The contents of the information were incorporated in the general diary and the First Information Report came to be registered in the matter on 2.6.2015, being Case Crime No. 622 of 2015. Victim was medically examined and her statement under Section 161 and 164 Cr.P.C. was recorded on 3.6.2015. The victim stated before the Magistrate that her father Babu Ram has been establishing physical relations with her for the last one year and on her refusal she was threatened. This has continued for a year. Victim further asserted that she informed her travails to her brother (PW-2) since her mother had already died. In her statement to the Investigating Officer the victim informed that she got the report filed through her step-brother Sandeep (PW-2) and cousin Jagdish (not produced).

3. Victim was medically examined on 3.6.2015. The doctor opined that the victim was 14-15 years of age and thus a minor. No external or internal injuries were found on the victim. Victim's hymen was found old torn. Vaginal slides were prepared but in the pathological report no live or dead spermatozoa was found. After conclusion of investigation the charge-sheet was submitted by the police in the matter on 11.7.2015. The Magistrate took cognizance of the charge-sheet and referred the matter to the Court of Sessions where it got registered as Sessions Trial No. 8 of 2015. The concerned court has charged the accused appellant of offence under Section 376(2)(f), 376(2)(n) IPC and 5/6 POCSO Act. The charges were read out to the accused on 14.9.2015, who denied the accusations and demanded trial.

4. Before we proceed further with the facts of the case we may place on record that on the previous occasion a direction was issued by us to inquire about the status and well-being of the victim. Learned AGA has produced a report from the concerned police station stating that the victim is

already married with three children and is happily settled. Further details of the victim and her family or its composition is withheld to protect the identity and privacy of the victim.

5. At the stage of trial the prosecution has produced following documentary evidence:-

"1. FIR dt. 2.6.2015 as Ex.Ka.6
2. Written Report dt. 2.6.2015 as Ex.Ka.3
3. Statement u/s 164 Cr.P.C. dt. 3.6.2015 as Ex.Ka.2
4. Statement of victim Km. Kranti as Ex.Ka.1
5. Medical report dt.3.6.2015 as Ex.Ka.5
6. Medical report dt. 3.6.2015 as Ex.Ka.12
7. X-ray Report dt. 3.6.2015 as Ex.Ka.4
8. Medical examination report dt. 3.6.2015 as Ex.Ka.13
9.Supplementary Report dt. 25.6.2015 as Ex.Ka.14"

6. The victim has been produced as PW-1 at the trial. She has supported the prosecution case with regard to sexual assault on her by the accused appellant for nearly thirteen months. She has also proved her statement under Section 164 Cr.P.C. Victim further stated that on her refusal to submit to sexual advances of accused she was threatened with dire consequences.

7. In the cross-examination the victim has informed that she had come to the Court with her brother (PW-2). The victim further stated that her mother was murdered by the accused appellant. She got this information from her step-brother Sandeep and her sister. She treats informant as her brother since their mother is common i.e. Smt. Somwati. The victim has denied the suggestion that she has falsely deposed against her father on the persuasion of the informant. She has further alleged that when her mother died the victim was one to one and a half years of age and she has been brought up by the accused appellant and his family members.

8. In her further cross-examination the victim stated that the act of sexual assault upon her was performed for the first time about ten months back but she does not remember the date, time or place when/where the offence was first committed on her. According to the victim she lived with her grandparents in a house with thatched roof while her father lived in a different house with his family. PW-2 Sandeep lived close to the house of her grandparents. Her grandfather is very weak and could hardly move. Her grandparents and father dissuaded her from interacting or speaking to the informant. She had come to depose in the Court with the informant (PW-2).

9. Victim in her deposition has explained the incident of 2.6.2015. On that date the accused had come to the grandparents house while returning from work and asked for a glass of water from the victim. The victim although said that she is getting water but did not give water to the accused. It is thereafter that she was punched on her back by the accused appellant. It is then that the informant and his cousin Jagdish intervened; saved the victim; assaulted the accused and handed him over to police after tying his hand and feet. She indicated her wish to be with her brother and not to stay with her father. Victim has stated that she understands the meaning of rape. She has denied the

suggestion that accused appellant did not commit any rape upon her or that she had framed him to take revenge from the accused appellant for murdering her mother.

10. Informant Sandeep has been produced as PW-2. He has fully supported the prosecution case and has also proved the written report which was exhibited as Ka-3. In the cross-examination also PW-2 supported the prosecution case. He has alleged that accused Babu Ram is his stepfather and at the time of his marriage with her mother he was about 8-10 years old. His mother died when victim was about a year old. PW-2 in the cross-examination has alleged that after death of his mother he stayed for sometime at his nansar (maternal grandfather's house). He has no enmity with the accused Babu Ram nor did he suspect the accused appellant of murdering his mother. He was not aware that accused Babu Ram was got jailed by his maternal uncle. He came to the house 4-5 years after the death of his mother. He rarely got a chance to talk to the victim as the accused Babu Ram and his parents discouraged her to do so. The house of victim's grandfather has a thatched roof with no boundary. It is for the first time on the date of making written report to the police that the victim informed him about rape upon her by the accused. On the date of incident the victim came to his house in the afternoon and informed his cousin Jagdish about her rape by the accused. He came to know about it for the first time at about 5.00 PM when he returned from his in-laws house at Shivpuria. Victim returned to her home thereafter. The act of victim's refusal to give water and her beating was seen by him from beneath the tree infront of the house. Victim rushed to Sandeep whereafter he only apprehended the accused for giving him to the police after he confessed. The report was lodged by the informant alongwith Jagdish and the victim. PW-2 has clearly stated that he would keep the victim with him till she is married. PW-2 has denied the suggestion that due to enmity on account of murder of his mother by the accused that he has falsely implicated the accused.

11. PW-3 is Dr. Jagdish Prasad, Radiologist, who conducted x-ray on the victim and has proved the x-ray report. He has also proved the medical report dated 3.6.2015. In his opinion evidence of rape was not ascertainable from the ultrasound report.

12. PW-4 is lady constable Preeti, who has proved the G.D. report. She had taken the victim for her medical examination.

13. PW-5 is the Investigating Officer SI Awadhesh Singh. He has proved the arrest of the accused at 8.20 hours on 3.6.2015. FIR was registered at about quarter to 12.00 in the night on 3.6.2015. This witness has denied the suggestion that he arrested the accused from his residence. Accused did not enjoy any good reputation. He visited the house of the accused and found that he was residing with the second wife of accused. Parents of the accused lived in the village.

14. PW-6 is Dr. Mahavir Singh, Pathologist. He has proved the medical paper Ex.Ka.12 in which no dead or live spermatozoa was found.

15. Dr. Smt. Anjali Singh has been produced as PW-7. He has proved the medical report Ex.Ka.13. She found the victim's hymen to be old torn. Two vaginal

slides were prepared of the victim. In her opinion the age of the victim was 14-15 years. Victim came at about 2.00 in the night for medical examination. However, no injuries of any kind were found on the victim and the hymen could be ruptured for any other reasons like cycling, playing or injury. As per the doctor in case of sexual assault some signs ought to have been come on the body of the victim. This was not the case here. She could only comment upon fresh sexual assault and not about sexual assault continued for the last one year.

16. On the basis of above evidence the prosecution got the statement of accused recorded under Section 313 Cr.P.C. On being confronted with the prosecution evidence the accused appellant has stated that false case has been lodged against him and the prosecution evidence is not reliable.

17. Sheel Kunwar (mother of accused appellant) aged about 70 years has been produced as DW-1. She stated that when the accused returned from work he asked for water but when the victim did not offer him water to drink the accused got angry and slapped the victim. It is thereafter that the cousins of victim assaulted the accused Babu Ram and took him to the police station where he was formally arrested. She has stated that despite best effort she could not ascertain the whereabouts of the victim. Even after the death of her grandfather the victim did not visit the family. The second wife of the accused appellant and their child have been chased away from the house by the witnesses.

18. Chameli Devi has been produced as DW-2. She has stated that the victim was living with her grandmother and on account of the incident in which the accused slapped his daughter for not offering him water victim's cousin assaulted the accused and got him arrested. DW-2 happens to be the sister of the accused appellant.

19. Trial court on the basis of the above evidence has come to the conclusion that prosecution has established its case against the accused appellant and has consequently convicted the accused appellant, as per above and sentenced him to life imprisonment.

20. Learned counsel for the appellant submits that the accused appellant has been falsely implicated at the instance of PW-2 as he bore a grudge against the accused appellant on account of the misplaced belief that his mother was killed by the accused appellant. It is argued that the victim was staying in the house with the grandparents and the allegation that she was raped for a year without anyone coming to know of it or the victim not informing about it to anyone is improbable. The accused appellant was otherwise married and his wife was also living with her child in the house with the thatched roof. Site plan has been relied upon to state that parties lived in hutments close to each other and it appears improbable that a young girl would be raped for so long without anyone coming to know of it or the victim making complaint to anyone. Argument is that the accused appellant has been framed since it is impossible to believe that the victim was continuously raped for almost one year without anybody coming to know of it or anyone seeing the incident. No exact date, time or place of the act of sexual assault has otherwise been specified by the victim.

21. Alternatively, it is submitted that the accused appellant has already undergone incarceration of more than ten

years nine months and since he has otherwise no criminal history, the appellant is entitled to be released on the sentence already undergone by him. Learned counsel also argues that no reasons have been assigned by the trial Judge to award maximum sentence, in the facts of the present case.

22. We have heard Sri Jitendra Pal Singh, learned counsel for the accused appellant, Sri J.P. Singh, learned AGA for the State and have perused the records including the trial court records.

23. The evidence on record reveals that the victim is unmarried daughter of the accused appellant. Prosecution case is that she was sexually assaulted by her own father for almost a year. The primary evidence of the prosecution is the statement of the victim, who has supported the prosecution case as per which she was sexually assaulted by the accused appellant for almost thirteen months, whereafter complaint was made by the victim to her step-brother Sandeep. The manner in which the incident is alleged to have taken place needs careful analysis in light of the evidence on record.

24. The victim as well as PW-2 both are consistent in saying that on 2.6.2015 accused appellant came to the house of victim's grandparents while returning from work and demanded a glass of water from the victim. The victim however did not give water to drink to the accused appellant. Accused appellant thereafter punched the victim on her back. It is thereafter that PW-2 alongwith his cousin Jagdish came and physically assaulted the accused appellant whereafter he was taken to the police. The incident of sexual assault has not taken place on 2.6.2015. It was apparently the act of accused appellant slapping his daughter (victim) which was the reason for accused appellant to be physically assaulted and then taken to police or the police arresting him. The immediate cause of raising protest against the accused appellant was, therefore, the act of victim being slapped/punched by the accused appellant.

25. Now coming to the allegation of sexual assault by the accused appellant, on his own daughter, the victim's consistent version is that she was sexually assaulted for the last about 13 months. The victim on specific inquiry, however, has not specified the date, time or place when she was first subjected to sexual assault. She has also not disclosed as to when and how the accused appellant sexually abused her. There is just a general allegation that for almost 13 months she was sexually assaulted by the accused on the threat that she would be harmed. For this entire 13 months the victim, however, has not made any complaint to anyone.

26. The prosecution witnesses specifically state that the victim was staying with her grandparents. Accused appellant lived in a different house with his wife and child. These houses were in close proximity. Site plan indicates that family of other brothers of accused also lived close by. Step-brother of the victim, namely Sandeep also lived nearby. Victim therefore had access to the step-brother and other relatives including her grandparents but admittedly none was informed about her rape nor anyone ever saw the incident or came to know of it. The victim has not even alleged that she told anyone about her sexual exploitation.

27. We have also perused site plan which shows that the house of the accused appellant consisted of one thatched roof with a door while another room had no

doors. Outside these two rooms is a platform. Adjoining this house there is a little open space belonging to the brother of the accused appellant and, thereafter lies the thatched rooms belonging to other family members. There is absolutely no evidence of any other persons, who may have been informed by the victim during this entire period of 13 months that she was being sexually assaulted by her own father. Wife of accused appellant admittedly lives close by. Accused appellant Babu Ram also has a child with her second wife (victim's stepmother). It looks rather strange that a young girl was raped for almost 13 months in her own house by her father without anyone coming to know of it or the daughter informing anyone about it. In the entire statement of the victim there is no disclosure that she ever informed anyone of her travails and it was only on the date when she was slapped by her father for not providing him water that she informed about her rape to her stepbrother and his cousin. The victim in her statement has explained the family composition as also the place where she lived in following words:-

''बाबूराम के परिवार में कौन-कौन रहता है मुझे मालूम है। एक परिवार में मैं, दादी, व बाबा रहते हैं। जब मैं रहती थी तब मैंने देखा कि मेरे बाबा बहुत बीमार हालत में थे चल फिर नहीं सकते थे बहुत कम चलते थे। बाबूराम व उसकी पत्नी और बच्चा यह सब अलग मकान में एक परिवार में रहते हैं। शेष भाई अपने-अपने मकान में रहते हैं। संदीप का मकान दादी बाबा के मकान के पास में है। संदीप आंगन में से नहीं निकलते है। बाउण्ड्री टूटी हुयी है। कोई दीवाल नहीं है। इनके घर में छप्पर पड़ा हुआ है। बाबा मेरे छप्पर में रहते हैं। मैं भी उनके साथ छप्पर में ही रहती हूँ। संदीप से बात करने को मेरे पिताजी, दादी, सब लोग मना करते थे। कभी-कभी इस सबसे नजर बचाकर मैं संदीप से बात करती थी। अगर कोई देखता था तो डांटता भी था। आज मेरे साथ मेरा भाई संदीप, मोटरसाईकिल से मुझे लेकर आया है।''

28. The above statement shows that apart from accused appellant Babu Ram and his wife and children the other family members of the family including the grandparents and stepbrother Sandeep were living in close vicinity. There is no reason disclosed as to why the victim never informed anyone about the unbecoming acts of the accused appellant. The victim has also explained the manner in which the incident actually occurred.

''जिस दिन बाबूराम को पकड़ने वाली घटना हुयी थी वह दिन व तारीख व समय याद नहीं है। शाम का समय था। बाबूराम काम पर से लौटकर आये थे और दादी के यहां बाबा को देखने के लिए बैठे थे पानी बाबूराम ने पीने के लिए मांगा था तो मैंने कहा कि अभी लेकर आती हूँ लेकिन दिया नहीं तब उन्होंने मेरे पीठ पर एक घूंसा मारा था। तभी संदीप, जगदीश व घर वाले सब आ गये और बाबूराम को मारने लगे और मुझे अपने घर ले गये और बाबूराम को पुलिस बुलाकर पकड़वा दिया और इन सभी लोगों ने बाबूराम को बांधकर डाल दिया। जिससे यह भाग न जाये। यह पूरी घटना मैनें अपनी आंखो से देखी थी और पुलिस बाबूराम को पकड़ कर ले गयी यह भी मैंने देखा था।''

29. Apart from the oral testimony of the victim herself there is no other corroborative piece of evidence to support the allegation of sexual assault upon the victim. None of the family members who were living in the close vicinity has supported the allegation nor is it anyone's case that any untoward incident was reported by anyone during the last one year.

30. The medical evidence on record has also been examined by us. Three doctors have been examined namely, PW-3, PW-6 and PW-7. In the opinion of the doctors as well as medical examination report no external or internal injuries have been found on the victim. Though the hymen of the victim was found old torn but in the opinion of the doctor there could be various reasons for it. Statement of doctor Smt. Anjali Singh in this regard is relevant and is reproduced hereinafter:-

''पीड़िता बाह्य व आंतरिक परीक्षण मेरे द्वारा किया गया था। पीड़िता शरीर पर बाह्य चोट का कोई भी निशान मौजूद नहीं था और न ही आंतरिक शरीर पर ही कोई निशान मौजूद था। हाइमन पुराना फटा हुआ था। हाइमन किसी भी प्रकार से फट सकता है जैसे साईकिलींग, कोई चोट या खेल कूद से भी फट सकता है। अगर कोई assault हुआ होता तो शरीर पर कोई न कोई निशान होता। लेकिन इस केस में ऐसा कुछ नहीं था।''

31. Even in the pathological report no dead or live spermatozoa has been found. In such circumstances, the only testimony which remains on record to support the prosecution case is the version of the victim herself.

32. Moreover, although the victim alleged that her sister was also raped by the accused appellant about ten days back but no evidence in that regard has been produced.

33. Law with regard to evidentiary value of the victim of sexual assault is well settled. The testimony of a victim is equated to that of an injured witness and is entitled to great weight. Ordinarily allegation of sexual assault has to be viewed with concern and the testimony of a victim is entitled to much weight. However, the testimony of the victim of sexual assault has also to be viewed in the surrounding facts and circumstances so as to consider as to whether she could be treated as a sterling witness such that the conviction of accused could be based only on her statement.

34. When the evidence in the present case is carefully noticed we find that there is a strong motive for the victim to falsely implicate her father. Admittedly, the victim was told by her step-brother (informant) that their mother was killed by the accused appellant. The victim has been specific in alleging so in her deposition. The basis of such information is the disclosure made by the informant (PW-2) and her sister who admittedly has not been produced in evidence.

35. Informant Sandeep was born from the union of the mother of victim, namely Smt. Sonwati and one Parmeshwar Dayal. Smt. Sonwati died when the victim was around a year old. PW-2 was living with her mother and accused appellant Babu Ram. There is no evidence on record to indicate as to how the mother of the informant and the victim Smt. Sonwati died. In this regard statement of the victim assumes significance. Victim has clearly stated in her cross-examination that she was told about the murder of her mother by informant Sandeep and her sister. She has also categorically alleged that she came to know from Sandeep and her sister that it was accused appellant Babu Ram, who had murdered her mother. This is clearly reflected from the following statement of the victim:-

''मुझे मेरी मां की हत्या के सम्बंध संदीप व मेरी दीदी ने बताया था। मुझे इन्ही के द्वारा जानकारी हुयी कि मेरी माँ को बाबूराम ने मारा था। संदीप की माँ व मेरी माँ एक ही थी। इस रिश्ते से मैं संदीप को अपना भाई मानती हूँ।''

36. The above statement of the victim clearly indicates that the victim had a belief that her mother was done to death by the accused appellant. No evidence, however, has been brought on record to even remotely suggest that Smt. Sonwati was killed by accused appellant Babu Ram.

37. On the aspect of alleged murder of victim's mother by the accused appellant the prosecution evidence is full of contradictions. As against PW-1, PW-2 in his cross-examination has categorically

stated that he has no enmity with accused Babu Ram and he does not bear any enmity against him for having killed his mother. Following passages from the statement of PW-2 is relevant and is reproduced:-

''मेरी व बाबूराम की कोई रंजिश नहीं है। मुझे यह भी शक नहीं है कि बाबू राम ने मेरी माँ को मार डाला है। मुझे नहीं पता कि मेरे मामा ने बाबूराम को जेल भिजवाया है। मैं अपनी माँ के मरने के 4-5 साल के बाद अपने घर आ गया था।''

38. Statement of PW-2 and PW-1 contradicts each other on the role of accused appellant in murdering their mother Smt. Sonwati. While the victim says that she was informed by informant (PW-2) and her sister about the accused appellant having murdered her mother, PW-2 (brother of the victim) clearly disowns any such belief of accused appellant having killed his mother. Elder sister of victim has not been produced and it is only PW-2 who has been produced in evidence by the prosecution. Though the question as to who killed Smt. Sonwati may not be directly in question before us, but the accusations in that regard against the accused appellant and its denial by the informant lends credence to the defence version that the victim bore a grudge against the accused appellant. This fact would be relevant as it may constitute the basis for false implication of the accused appellant.

39. In the facts of the case we are inclined to doubt the statement of PW-2 that he did not doubt the accused appellant of having killed his mother. The reason for it is that the victim specifically states that she was informed about the murder of her mother by the accused appellant by PW-2 and there is no reason for the victim to lie on this count. It appears that PW-2 bore a grudge against the accused appellant on account of his belief that the accused appellant had killed his mother and that is why a distance was maintained by the family members from PW-2. Victim and PW-2 both have stated that they were not allowed to interact. It is only on the date of incident i.e. 2.6.2015 that the victim told PW-2 about her rape. It is on this day that accused appellant was assaulted, apprehended and handed over to the police by PW-2. Prior to it no complaint was ever made by the victim about her rape to anyone.

40. It is quite natural for a young girl to carry a grudge against her own father if she harbours a firm belief that her mother was killed by him. This feeling can be strong enough to convince her to justify levelling of false accusation also so that the guilty father be punished for his act. During the course of trial specific suggestion has been given both to PW-1 and PW-2 by the defence that it was to avenge the enmity with the accused appellant on account of his having murdered their mother that the victim has made false allegation against the accused appellant.

41. Upon careful perusal and analysis of the evidence on record we do find a distinct possibility of the victim having framed her father to avenge the murder of her mother by him, particularly when such facts were told to her by the informant Sandeep. The evidence, further shows that all family members discouraged the victim from interacting with the informant. It appears that the informant did carry this belief that her mother was done to death by the accused appellant and he did told the victim about it. However, at the trial he has completely backtracked on this accusation so as to resist any plea of false implication. Nevertheless, the testimony does show that

the victim and PW-2 both harboured a belief that her mother was murdered by the accused appellant. In such circumstances, we are not inclined to place the testimony of the victim in the category of wholly reliable witness such that no corroboration of her testimony would be warranted.

42. Once the testimony of victim is placed in the category of partially reliable and partially unreliable we would be required to look for corroboration of the victim's accusation in other evidence on record. Upon a careful evaluation of the evidence we find that there is no corroboration of the victim's accusation except the version of PW-2, who himself is not an eye-witness and his testimony is also based upon the information furnished to him by PW-1.

43. In the facts of the case, it is apparent that accused appellant has already undergone incarceration of more than ten years, nine months with remission. In light of the discussions aforesaid, we are inclined to hold that the defence has succeeded in creating a doubt on the prosecution case of rape for 13 months upon the victim and, therefore, the accused appellant is entitled to benefit of doubt.

44. So far as judgment of conviction and sentence passed by the court of Sessions is concerned, we find that the trial court although has noticed the evidence on record but has completely omitted to consider the import of the victim's accusation of his father in having murdered her mother. The possibility of false implication of the accused appellant on account of such enmity has been completely overlooked. The fact that the accused appellant otherwise has no criminal history; there is no evidence of his sexual perversion otherwise reported in the past; the accused appellant was already married and it will be difficult to conceive that the act of sexual assault for almost a year may go unnoticed or without a grievance being raised to anyone seems improbable; the immediate provocation was the slapping/punching of the victim by accused appellant for not providing water which enraged the informant who assaulted and apprehended the accused and got him arrested etc. have been overlooked. In that view of the matter, we are not persuaded to accept the reasoning assigned by the court of Sessions in convicting and sentencing the accused appellant, who has already undergone incarceration of more than ten years in jail.

45. Resultantly, this appeal succeeds and is allowed. The judgment and order dated 24.2.2018, passed by the learned Additional Sessions Judge/Court No.1, Pilibhit in Sessions Trial No.8 of 2015, arising out of Case Crime No.622 of 2015, under Sections 376(2)(f), 376(2)(n) IPC and 5/6 POCSO Act, Police Station Newriya, District Pilibhit is set aside.

46. The accused-appellant, who is reported to be in jail, shall be released, forthwith, unless he is wanted in any other case, subject to compliance of Section 437A Cr.P.C.

(2024) 8 ILRA 82
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.08.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 2616 of 2006

Sohan Lal **...Appellant**

Versus

The State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Jyotindra Mishra

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Criminal Procedure Code, 1973 - Section - 313, Excise Act, 1944- Section 60, - Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 8, 18, 20, 50, 50(1), 55 & 57: - Appeal – conviction and sentence – police search – recovery – on being serviced, Ganja as well as liquor bottles were recovered from the accused persons - FIR – investigation – chemical examination – St.ment of witnesses - charge sheet – conviction – court finds that, admittedly, all witnesses are police persona and the prosecution has not produced other independent eye-witnesses of the alleged recovery and even no explanation has been offered by the prosecution for their non-production before any Gazetted officer or Magistrate, as required by section 50 of NDPS Act, - held, prosecution failed to prove the mandatory compliance of section 50 NDPS Act, and in absence of compliance of mandatory provision cannot be held as proved beyond reasonable doubt – hence, this court, unable to uphold the conviction and sentence of the appellant – appellant is entitled to be acquitted - appeal is allowed - direction issued, accordingly. (Para – 18, 19, 21, 22)

Appeal is allowed. (E-11)

List of Cases cited:

1. St. of Raj. Vs Parmanand & anr.(2014 vol. 2 SCC (cri) 5630,

2. Vijaysinh Chandubha Jadeja Vs St. of Guj. (2010 vol. 2 EFR 755),

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

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

2. Heard learned counsel for the parties.

3. This appeal has been preferred against the judgment and order dated 01.12.2006 passed by learned Additional Sessions Judge / Fast Track Court No.1, Raebareli in S.T. No.25/1998, Police Station Sareni, District Raebareli, convicting and sentencing the appellant under Section 20 of N.D.P.S. Act for three years rigorous imprisonment alongwith fine of Rs.10,000/- with default stipulation.

4. The prosecution story, in brief, as disclosed in the first information report, is that while the S.H.O. Rameshwar Singh alongwith other police personnel were searching accused of other case, they saw four persons on a jeep who were unloading some sacs. The police personnel caught them and asked the accused whether he want to get searched by a gazetted officer or police may make a search upon him. The accused consented that police may make search upon him. On being searched, ganja as well as liquor bottles were recovered from the accused persons. On the basis of aforesaid incident, Case Crime No.60 of 1997 and 61 of 1997, under Section 60 of Excise Act and Section 8/20 of N.D.P.S. Act and Case Crime No.62 of 1997, under Section 18/20 of N.D.P.S. Act was registered at Police Station Sareni, District Raebareli.

5. Investigation was handed over to the Sub Inspector, who in turn got the sample chemically examined and received a report. He took the statements of witnesses of recovery and prepared the site plan and on finding sufficient evidence, he filed charge sheet against the accused in the Court.

6. The accused-appellant was charged for offence u/s 8/20 N.D.P.S. Act; to which he pleaded not guilty and claimed for trial.

7. In support of the prosecution case, the prosecution examined P.W.-1 Sub Inspector Janardan Prasad, P.W.-2

Inspector Rishi Kumar, P.W.-3 Constable Shivnand and P.W.-4 Constable Ramautar Shukla.

8. Formal proof of prosecution papers have been admitted by the accused.

9. Appellant was examined under Section 313 of Code of Criminal Procedure, 1973, (in short 'Code') wherein he stated that he had been falsely implicated due to enmity. No witness in defence were accused by the accused persons.

10. Learned trial Court, after going through the evidence available on record as well as after due hearing the learned counsel for both the parties, convicted and sentenced the appellant under Section 20 of N.D.P.S. Act for three years rigorous imprisonment alongwith fine of Rs.10,000/- with default stipulation.

11. Aggrieved by the aforesaid judgment and order, the appellant has filed this appeal.

12. Learned counsel for the appellant argued that Section 50 of the N.D.P.S. Act is a mandatory provision. The arresting officer has not complied with that provision. As such, the recovery is illegal which vitiates the trial. Learned counsel further submitted that the alleged place of recovery is public place but no effort to invite the public witness at the time of recovery was made by the police party. Learned trial Court without proper appreciation of the evidence available on record has illegally convicted the appellant vide impugned judgment and order which is liable to be set aside as the prosecution has miserably failed to prove its case beyond reasonable doubt. In support of his argument learned counsel for the appellant has placed reliance on law laid down by Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755 and State of Rajasthan Vs. Parmanand and another, (2014) 2 SCC (Cri) 563.***

13. Learned A.G.A. vehemently opposed the submission of learned counsel for the appellant and submitted that there is no illegality in the impugned judgment and order as it is settled provision of law that only on the solitary testimony of witness, conviction can be maintained and statement of police witness cannot be rejected on the ground that he is a police witness. Learned A.G.A. further submitted that impugned judgment and order, passed by trial Court, is well reasoned, well discussed and appeal is liable to be dismissed.

14. After considering the arguments advanced by learned counsel for the parties and after perusal of record, this Court finds that the prosecution case is based on oral testimony of police personnel. It is settled principle of law that only on account of the fact that prosecution case is based on testimony of police witness, it cannot be thrown out, if the evidence of such witness is wholly reliable.

15. Severe punishment has been provided in the N.D.P.S. Act to check the misuse of this Act by the police personnel or officers and certain safeguards particularly Section 50 of N.D.P.S. Act has been incorporated in this Act that search of the suspected person must be done before the Magistrate or Gazetted Officer. Similarly Section 55 and 57 of N.D.P.S. Act provides that seized contraband article be kept by Station House Officer in safe custody and report of arrest and seizure be

sent immediately to immediate Superior Officer within 48 hours.

16. Hon'ble Supreme Court in ***Vijaysinh Chandubha Jadeja Vs. State of Gujarat, 2010 (2) EFR 755,*** while discussing the importance and relevancy of section 50 of N.D.P.S. Act, in para-22, has opined as under:-

"22. In view of the foregoing discussion, we are of the firm opinion that the object with which right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect, viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that in so far as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires a strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision. As observed in Re Presidential Poll (1974) 2 SCC 33, it is the duty of the courts to get at the real intention of the Legislature by carefully attending to the whole scope of the provision to be construed. "The key to the opening of every law is the reason and spirit of the law, it is the animus imponentis, the intention of the law maker expressed in the law itself, taken as a whole." We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said Section in Joseph Fernandez (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf. We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well."

17. Hon'ble Supreme Court in ***State of Rajasthan Vs. Parmanand and another, (2014) 2 SCC (Cri) 563,*** again in paragraph-17, has opined as under:-

"In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the

NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval."

18. Admittedly, the prosecution has not produced other independent eye-witnesses of the alleged recovery and even no explanation has been offered by the prosecution for their non-production. All the witnesses are police personnel. Non-production of independent eye witness is serious lacuna which has made the prosecution case very doubtful.

19. In addition to above, admittedly the appellant, prior to his search, was not produced before any Gazetted Officer or Magistrate, whereas according to prosecution before his search the police personnel were informed by the appellant that he was carrying the ganza. Prosecution has also not produced any written consent of the appellant for his search. From perusal of testimony of prosecution witnesses, it does not transpire that any efforts were made by them to produce the appellant before any Gazetted Officer or Magistrate, as required by Section 50 of N.D.P.S. Act, in view of law laid down by Apex Court in ***Vijaysinh Chandubha Jadeja (Supra).***

20. Further, it is also pertinent to note at this juncture that not only the manner in which the appellant was searched, is doubtful, the prosecution has also not prosecuted the case seriously, knowing that severe punishment has been provided in N.D.P.S. Act. It produced only four witnesses i.e P.W.-1 Sub Inspector Janardan Prasad, P.W.-2 Inspector Rishi Kumar, P.W.-3 Constable Shivnand and P.W.-4 Constable Ramautar Shukla and withheld other witness without any justification.

21. In the light of above discussion, it is clear that the prosecution has failed to prove the mandatory compliance of Section 50 N.D.P.S. Act. In absence of compliance of mandatory provision of Section 50 N.D.P.S Act, the prosecution case, based on testimony of police personnel i.e. P.W.-1 Sub Inspector Janardan Prasad, P.W.-2 Inspector Rishi Kumar, P.W.-3 Constable Shivnand and P.W.-4 Constable Ramautar Shukla, whose statements are not wholly reliable, cannot be held as proved beyond reasonable doubt in view of the other illegalities and material irregularity committed by the witnesses as discussed above.

22. Thus this Court is of the view that prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant. The trial Court has not properly discussed the evidence produced

by the prosecution and has passed the impugned judgment and order against the settled principle of law including provisions of N.D.P.S. Act. This Court, therefore, unable to uphold the conviction and sentence of the appellant. The appellant is entitled to be acquitted. The impugned judgment and order is liable to be set aside and accordingly, appeal is liable to be allowed.

23. In view of the above, impugned judgment and order dated 01.12.2006 passed by learned Additional Sessions Judge / Fast Track Court No.1, Raebareli in S.T. No.25/1998, Police Station Sareni, District Raebareli, is **set aside** and **reversed** and accused/appellant, namely, **Sohan Lal is acquitted** of the charges levelled against him. Consequently, the appeal is **allowed.** His personal bond and surety bonds are canceled and sureties are discharged.

24. Let a copy of this judgment alongwith the lower court record be sent immediately to the Trial Court concerned for necessary compliance.

25. No order as to the costs.

(2024) 8 ILRA 87
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 3149 of 2004

Saleem @ Sambha ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Mohd. Naushad Siddiqui

Counsel for the Respondents:
Govt. Advocate

A. Criminal Law - Indian Penal Code,1860 -- *Culpable Homicide & Murder* - S. 299 Culpable Homicide - S. 300 Murder - S. 300 "*culpable homicide amounting to murder*", punishable under Section 302 I.P.C. - *"culpable homicide not amounting to murder"* punishable under Section 304 I.P.C. - 'Culpable Homicide' is the genus and 'Murder' is its species. All 'Murders' are 'Culpable Homicides' but all 'Culpable Homicides' are not 'Murders' – *'Intention' and 'Knowledge'* - Distinction between the two expressions - Legislature has used two different terminologies 'Intention' and 'Knowledge' and separate punishments are provided for acts committed with intent to cause bodily injury likely to cause death and for acts committed with knowledge that the act is likely to cause death without the intent to cause such bodily injury - *Knowledge* is awareness of the consequences of the act – Knowledge of the consequences resulting from an act is different from the intention that such consequences should result – When intention is not proved, the offence will be culpable homicide if the doer of the act causes death with knowledge that his act is likely to cause death - Intention - Requisite intention must be proved by the prosecution. It must be proved that the accused, by doing the act, intended to cause death, or had the aim of causing such bodily injury as was likely to cause death – Intention is inferred from the circumstances of the case, considering the nature of the weapon, part of the body injured, extent of the injury, degree of force used, manner of attack, and the circumstances preceding and attending the attack – (Para 57, 58, 60, 65, 67).

B. Criminal Law – Indian Penal Code – Sections 302, 304 – Murder & Culpable Homicide Not Amounting to Murder –

Section 304 Part- I or Section 304 Part- II - Appellant and the deceased were in the same business of selling meat and had cordial relations, with no prior enmity. Dispute arose over an amount of Rs. 50/- owed by the deceased. On the day of the incident, the appellant called the deceased to settle the matter and, during a conversation, in a moment of provocation, stabbed the deceased with a *chhuri*. *Held* - Weapon of assault *chhuri* is a common item which could be found in dwelling houses, specially where selling of meat is the business. incident had occurred *without any premeditation* and on trivial matter i.e. dispute regarding meager amount of Rs.50/-. It could not be inferred that appellant had a pre-planned intention to kill the deceased. none of the clauses of Section 300 I.P.C. are attracted as *intention* of *the appellants to cause death was not proved.* Offence committed by the appellant would fall within the meaning of "culpable homicide not amounting to murder" under Section 304 I.P.C. - Intention was to pressurize by brandishing the chhuri and not to cause bodily injuries. Only one blow. In sudden provocation, the single blow proved fatal. Considering the intention of appellant, mode of occurrence and weapon used, nature of injury, act falls within the province of Section 304 Part- II I.P.C. Appellant not guilty of murder punishable under Section 302 IPC but he is guilty of committing homicide not amounting to murder an offence which is punishable under Section 304 Part II IPC (Para 69, 70, 71)

C. Criminal Law - Indian Evidence Act, S. 3 - *'Related' witness - 'interested' witness - Relative witness* - 'Related' witness is not equivalent to 'interested' witness. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in a decree of a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of the case, cannot be said to be 'interested'. If evidence of an eye-witness, is found truthful, it can not be discarded simply because the witnesses were relatives of the deceased. The only caveat is that the evidence of relative witnesses should be subjected to careful scrutiny and accepted with caution. Relationship is not a factor to affect the credibility of a witness. A relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible. (Para 30, 31, 36)

D. In the instant case all the witnesses were related witnesses of the deceased. Therefore, their evidence was viewed with extra caution. All witnesses narrated the prosecution story in a very intrinsic and a natural way. PW-1, PW-2, PW-3, and PW-4 firmly St.d that the appellant and the deceased were engaged in a meat-selling business, and a financial dispute of ₹50 led to the fatal altercation. The evidence established that the appellant took the deceased to settle accounts, where he was stabbed. The prosecution's case was corroborated by multiple witnesses, who saw the appellant stabbing the deceased and fleeing while brandishing the weapon. No evidence at all on record that these witnesses are inimical to the appellant which could prompt them to rope him in the said crime. (Para 38)

Allowed. (E-5)

List of Cases cited:

1. St. of Rajasthan Vs Smt. Kalki & anr.. (1981) 2 SCC 752

2. Daleep Singh Vs St. of Pun. AIR 1953 SC 364

3. Hari Obula Reddy Vs St. of A.P. (1981) 3 SCC 675

4. S. Sudershan Reddy & ors. Vs St. of A.P (2006) 10 SCC 163

5. Rai Sandeep Vs St. (NCT of Delhi), (2012) 8 SCC 21

6. Bhurey Singh Vs St. of U.P. 2008 (4) ALJ 772 Alld.

7. Maharaj Singh Vs St. of U.P. (1994) 5 SCC 188

8. Mohammad Muslim Vs St. of U.P. 2023 live law (SC) 489

9. Stalin V/s The St. Through The Inspector Of Police, AIR 2020 SC 718

10. Mahesh Balmiki @ Munna V/s St. Of M. P., AIR 1999 SC 3338

11. Rampal Singh Vs St. of U.P., (2012) 8 SCC 289

12. Smt. Mathri v. St. of Punjab , AIR 1964 SC 986

13. Basdev Vs St. of Pepsu, AIR 1956 SC 488

14. Pulicherla Nagaraju @ Nagaraja Reddy vs St. of A.P., 2006 (11) SCC 444

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. The instant criminal appeal, under Section 374 (2) Cr.P.C. emanates out of the judgment and order dated 18.5.2004, passed by Additional District & Sessions Judge, Fast Track Court No. 4, Kanpur Nagar, in Sessions Trial No. 178 of 2001, State Vs. Saleem alias Sambha, (Case Crime No. 11/2001, P.S. Ghatampur, Kanpur Nagar), whereby the learned trial court, convicted the accused/ appellant Saleem alias Sambha under Section 302 IPC and sentenced him for life imprisonment, with a fine of Rs. 3,000/-. In case of default, appellant was directed to undergo an additional imprisonment for a period of six months.

2. Bereft of unnecessary details, the prosecution case, as culled out from the First Information Report (FIR), undisputed facts and other material on record, is that the informant Lukman s/o Usman, R/o of Mohalla- Hafizpur, town- Ghatampur, police station- Ghatampur, District Kanpur Nagar, presented a tehrir (Ext Ka-1), on 17.01.2001 at about 12.45 p.m. in the police station Ghatampur, about the incident happened on 1701.2001 at about 11.30 a.m., scribing therein that his maternal uncle (Mama) Aziz and Saleem alias Sambha s/o Habib both R/o Mohalla Hafizpur, Town- Ghatampur, District-Kanpur Nagar, were engaged in the business of selling meat (gosht) some times separately and some times jointly with each other. Saleem alias Sambha alleged that Aziz owed Rs. 50/- to him but Aziz denied it. On 17.01.2001 at about 11.30 a.m., Saleem alias Sambha called Aziz from his house and had taken him to the house of Balia s/o Badkan to settle the account. The complainant Lukman, along-with Faheem s/o Late Saleem and Saeed s/o Majeed, followed them. Saleem alias Sambha and Aziz went inside the house of Balia and started talking about the disputed transactions, while the persons accompanying them, remained standing outside the door of Balia's house. Both the parties were disputing over the accounts, meanwhile Saleem alias Sambha stabbed Aziz in his abdomen with a chhuri (dagger), with an intention to kill him. On hearing shrill and shriek, persons, standing outside, entered into the house of Balia and saw accused Saleem alias Sambha coming outside brandishing blood soaked dagger in his hand. He threatened them also. They chased Saleem alias Sambha, but he managed his escape good. Injured Aziz was taken to the government hospital at Ghatampur for treatment, where he succumbed to his injury.

3. On the basis of the aforesaid tehrir a case crime no.11 of 2001 under Section 302 IPC was registered at Police Station Ghatampur, District Kanpur Dehat (now

Kanpur Nagar) against Saleem alias Sambha. Entries were drawn in Kaimi G.D. (Ext. Ka-9) and the chik FIR (Ext. Ka-3) at about 12:45 on 17.01.2001. The investigation was entrusted to S.H.O. R.K. Sharma.

4. Thus, the investigation started rolling. I.O. reached at the place of occurrence and visited at C.H.C., Ghatampur along with police party, where corpse of the deceased Aziz was kept. S. I. Sarvesh Kumar launched inquest proceeding after nominating Mohd. Arif, Mohd. Rafiq, Mohd. Usman, Shahbaz Quresi and Devi Prasad the witnesses, on 17.11.2001 at about 12.45 pm. The panchan remarked that there is a blood plum injury on the left side of the chest near pelvis region. The panches opined that the cause of death is the injury inflicted upon deceased Aziz, nevertheless in order to ascertain the real cause of death, the postmortem may be conducted. S.I. Sarvesh Singh also subscribed the opinion of the panches. Therefore, he prepared a request letter to this effect to the CMO and send the wrapped and sealed corpse of Aziz through C- Brijnandan Singh and C- Rajesh Kumar, along with copy of inquest report (Ext. Ka- 10), reference slip to CMO (Ext. Ka-11), Sample of seal (Ext. Ka-12), Challan lash (Ext. Ka-14), Letter to the R.I. (Ext. Ka-15) to Mortuary for autopsy. The postmortem of the deceased was conducted by Dr. M.K. Jain (PW- 5) on 18.01.2001 at 12.00 O' clock.

5. On 17.01.2001 I.O. proceeded at place of occurrence and recorded the statement of the witnesses under section 161 I.P.C. and collected blood soaked and plain pieces of bricks, in the presence of witnesses from the place of occurrence. He also prepared recovery memo (Ext. Ka- 7) for the same. He prepared site plan of place of occurrence (Ext. Ka- 6), at the instance of the complainant and other witnesses and site plan of place of recovery of weapon of assault (Ext. Ka- 8) in the presence of witnesses. I.O. collected other relevant evidences also.

6. I.O. was in search of the accused, however, he surrendered on 25.01.2001 in the court of CMM. Thereafter with the leave of the court I.O. recorded the statement of the accused on 29.01.2001 in jail, wherein he confessed his guilt and stated that he can get recovered the weapon of assault, from the place, where he had hidden it. Hence I.O. prayed and was granted 24 hours police custody remand for the purpose of recovery by the court. Pursuant to the leave of the court, on 01.02.2001 at about 8.00 am in the morning, the accused was taken in police custody and as per disclosure of accused, proceeded to the place, where he had hidden the said weapon. He himself walked towards a place in shrubs standing on Bhadras road and took out a dried blood stained on its front, chhuri in the presence of the witnesses and handed over to I.O. The recovery memo (Ext Ka-5) for the same was prepared by the I.O, in his hand-writing and signatures, over which signatures of the witnesses were also obtained. I.O. also prepared site plan (Ext Ka-8) of the place of recovery. Chhuri recovered and other materials was sent for forensic examination. The FSL report of which was received and is part of the record as Ext Ka-16.

7. Investigating officer after due investigation and collecting credible and clinching material and evidence showing the complicity of the accused appellant submitted charge sheet under Section 302

I.P.C. against the accused Saleem alias Sambha, in the court of learned CJM, Kanpur Dehat, who took the cognizance of the case. Since the case was exclusively triable by the court of sessions, CJM, committed it to the court of sessions Kanpur Nagar, vide its order dated 10.04.2001. In the court of sessions it was registered as S.T. No. 178 of 2001, who in turn transferred it to the court of additional Sessions Judge, Fast Track Court No. 4 Kanpur, for trial.

8. The learned trial Sessions Judge framed charge under Section 302 IPC, against the accused/ appellant Saleem alias Sambha. Accused appellant abjured the charge, pleaded not guilty and claimed to be tried.

9- In order to bring home guilt of the appellant, prosecution has examined following witnesses in ocular evidence:-

SL No.	Name of Witness	PW No.
i	ii	iii
1	Lukman (Informant)	PW-1
2	Mohd. Faheem (independent witness)	PW-2
3	Sayeed (independent witness)	PW-3
4	Sadiq (independent witness)	PW-4
5	Dr. M.K. Jain (post-mortem)	PW-5
6	C.P. Kameshwar Mishra (H.M.)	PW-6
7	SI Maharaj Singh Tomar (Witness of recovery of weapon of assault)	PW-7
8	Inspector Vigilance R.K.Sharma (I.O.)	PW-8
9	SI Sarvesh Kumar Singh (Inquest witness)	PW-9

10. Besides, aforesaid ocular evidence, prosecution has adduced following documentary evidence also-

Sl No.	Particulars	Ext. Nos.	Proved by
i	ii	iii	iv
1	Tehrir	Ext. Ka-1	PW-5
2	Post-mortem report	Ext. Ka-2	PW-5
3	Chik F.I.R.	Ext. Ka-3	PW-6
4	Corban copy of tehrir	Ext. Ka-4	PW-6
5	Recovery memo of knife	Ext. Ka-5	PW-7
6	site-plan	Ext. Ka-6	P.W-8
7	Recovery memo blood stained and plain brick	Ext. Ka-7	P.W-8
8	Site plan place of recovery of weapons	Ext. Ka-8	P.W-8
9	Kaimi GD	Ext. Ka-9	P.W-6
10	Inquest Report	Ext.Ka10	P.W-8
11	Reference slip to CMO	Ext.Ka11	P.W-9
12	Sample of seal	Ext.Ka12	P.W-9
13	Form no. 13	Ext.Ka13	P.W-
14	Photo lash	Ext.Ka14	P.W-9
15	Letter to the R.I.	Ext.Ka15	P.W-9
16	F. S. L. Report	Ext.Ka16	P.W-9

11. In further corroboration of its story, prosecution has also produced following material objects in evidence:-

SLNo	Particulars	Proved by	Ext. No.
i	ii	iii	iv
1	Chhuri (dagger)	PW-7&8	Ext.-1
2	Vests, tahmad, under wear	PW-7&8	Ext.-2
3	Plain and blood soaked pieces of bricks	PW-7&8	Ext.-3

12. After conclusion of prosecution evidence the accused was confronted with the evidence on record and his statement under Section 313 Cr.P.C. was recorded, wherein he denied prosecution version and stated that on 17.01.2001 the deceased Aziz had gone to the house of Sadiq. Aziz had illicit relationship with the wife of Sadiq. At the relevant time, Sadiq and Balia also reached there. Seeing Aziz present there they started beating him. Sadiq stabbed him in his abdomen and killed him. When he reached, he saw that Aziz was injured, while Sadiq and Balia were present there. They screamed, that Saleem had killed

Aziz. They also chased him Sadiq called the family members of Aziz and blamed him to be the assailant. In question no. 10, the appellant has denied that he got recovered any weapon of assault chhuri and the recovery is planted.

13. Accused appellant examined DW-1 Rakesh Kumar as defence witness.

14. The learned trial court, after examining and scrutinizing testimonies of prosecution witnesses and entire material on record, came to the conclusion that there is a complete chain of evidence pointing towards guilt and the complicity of the accused/ appellant in the commission of said crime. Thus, prosecution has proved its case beyond reasonable doubts and accordingly, convicted, accused/ appellant Saleem alias Sambha under Sections 302 I.P.C. and sentenced him for the charge u/s 302 IPC R.I. for life and fine of Rs. 3,000/- with default stipulation, vide impugned judgment and order dated 18.5.2004. Felt aggrieved, the appellant has preferred the present appeal.

15. We have heard Sri Mohd. Naushad Siddiqui, learned Amicus Curiae for the appellant, Sri Arun Kumar Pandey, learned A.G.A. for the State, in extenso and have been taken through the entire material on record.

16. Learned Amius Curiae appearing for the appellant assailed the conviction and sentence passed by impugned judgment dated 18.05.2004, on various grounds and advanced several arguments in this behalf. Let us test, examine, scrutinize and analyze the contentions advanced by the learned counsel for the parties, on the touchstone of the evidence adduced, undisputed facts and circumstances of the case. It bring us to view the prosecution evidence.

17. PW- 1 Lukman who, claimed to be an eye witness. He is informant of the incident. He deposed that the incident took place on 17.01.2001 at 11.30 a.m. He was sitting on the spot. His maternal uncle, Aziz s/o late Abdul Karim and Saleem alias Sambha used to sell meat in Ghatampur. Aziz was indebted Rs. 50/- of Saleem alias Sambha. Aziz was taken to the house of Baliya s/o Badkan for settlement of account. He, Faheem and Saeed, also followed them. Aziz and Saleem alias Sambha went inside the house of Baliya for settling the accounts. The other persons remained standing talking outside the door of Baliya. During talk about the dispute, Saleem alias Sambha stabbed a knife in the stomach of Aziz, with an intention to kill him. Hearing the scream, they went inside the house and saw that Saleem alias Sambha has a bloodstained dagger, in his hand. Saleem alias Sambha threatening them came out of the house. He was chased, but could not be found. He took his injured uncle to Government hospital Ghatampur, where he was declared dead. Corpse of the deceased Saleem was kept in the Government hospital. He got a tehrir scribed by journalist Siraji on his dictation which was signed by him in urdu, he proved the tehrir as Ext. Ka.1. Tehrir was given at the police station Ghatampur, on which the case was registered. The said witness was confronted with several queries during his cross examination.

18. PW- 2 Mohd. Faheem has deposed that it was a chilly cold weather. The incident took place on 17th January, 2001. The deceased Aziz was his real uncle (chacha). He was engaged in business of meat (gosht) selling in partnership with accused Saleem alias Sambha. Saleem claimed that Aziz owed Rs.50/- to him. His uncle denied his claim and expressed his

willingness and readiness to settle the account and make payment, if he owes any amount towards Saleem alias Sambha. The incident took place in the house of Badkan, who is the father of Sadiq and Baliya and where the deceased was taken for settling the accounts. His uncle Aziz and Saleem alias Sambha had gone inside the house of Badkan, while they remained standing in front of the door of the house. As the accounts were being settled, suddenly vulgar dialogues started between Aziz and Saleem. We asked them for peaceful settlement of accounts. Meanwhile, Saleem alias Sambha took out a chhuri and stabbed in the abdomen of his uncle Aziz. They tried to catch hold of Saleem alias Sambha, he brandished the chhuri to kill us too, rushed towards the door, and came out brandishing chhuri in his hand. They took injured Aziz to the hospital. The doctor stated that it is a police case and asked to first lodge the report. Meanwhile, doctor examined injured Aziz and declared him dead. The report of this incident was lodged by Lukman. The police had done paper work regarding dead body of deceased in the hospital itself. The Sub-Inspector had recorded his statement with regard to the incident. The witness identified the accused/ appellant present in the court, saying he is Salim alias Sambha, who had killed his uncle Aziz. The said witness was also thoroughly cross examined.

19. PW- 3 Saeed has averred in his examination that the deceased Aziz was his elder uncle (bade baap). He was runing the business of sale of meat severely and sometimes jointly in partnership with the accused Saleem alias Sambha. The incident occurred 10-12 days before 26 January 2001. The incident occurred around 11:30 in the day. The incident took place in the house of Baliya and Sadiq. Saleem alias Sambha called Aziz and asked him to settle the account. When these people were going, he, Faheem and Lukman followed them. All of them remained standing at the door of Sadiq. Saleem alias Sambha and Aziz went inside the house. Saleem alias Sambha asked for payment of Rs. 50/-, Aziz assured that he will give the amount by tomorrow. During the course of dialogue, Saleem alias Sambha stabbed Aziz with chhuri with intention to eliminate him. He took out the chhuri and threatened us, saying that he would kill anyone who spoke. They tried to catch him, but he made his escape good. Saleem alias Sambha ran away towards Kallu's hotel and could not be arrested. They took Aziz to the hospital where he expired. The police report of the incident was lodged by Lukman. A sub-inspector had interrogated and recorded his statement regarding the incident. The witness identified accused present in the court room stating that he is the Saleem alias Sambha, who stabbed Aziz. The witness was cross-examined, in extenso.

20. P.W.4, Sadiq has averred that the incident occurred around 11:30 AM, one year and nine months ago. He is well acquainted with Saleem and Aziz. They used to do the business of meat (gosht) in partnership. Saleem alias Sambha and Aziz had an accounting dispute between them for a paltry sum of only Rs. 50/-, over which they quarreled. Aziz had indebted Rs. 50/- to Saleem alias Sambha. His house is very big and he was present in his house at the time of incident. The incident had occurred outside his house on the road, made up of bricks. He came outside on hearing the screaming. Saleem alias Sambha was holding a dagger (Churi) in his hand. He stabbed it, in the abdomen of Aziz. When they challenged him, he ran

away towards the Kallu's hotel. Then, they took Aziz to the police chowki, where they were asked to take him to the police station. By that time Aziz was already dead. When the incident occurred, he was in the Verandah (Daalan) of his house. The witness further deposed that Baliya is his brother, both of them lived together. It is not true that the incident occurred inside his house and later on the deceased and Saleem alias Sambha came outside. He also stated that he was taking meal inside his house at the time of occurrence. I.O. has recorded his statement in this regard. Witness was thoroughly cross examined also.

21. P.W.5 Dr M.K. Jain has deposed that during his posting as Surgeon on 18.01.2001 at K. P. M. Hospital, he conducted postmortem of the dead body of the deceased Aziz, brought by C-1260 Rajesh Kumar Pandey and C- 2007 Brij Nandan Singh of P. S. Ghatampur, at about 12.00 noon. During autopsy he found the following injuries:-

(I)-**External Examination:**- The deceased was a man of average height and built. His mouth was half opened and eyes were closed. Rigor- mortis was present in both hands and legs.

(II)- **Ante-mortem injuries** - During the course of autopsy postmaortem surgeon found following ante-mortem injuries on the person on the deceased-

Lacerated and perforating wounds 3 cm x 1.5 cm x abdominal cavity deep and the same was present on the upper side of the abdomen below the ribs towards the left side in a 10 O'clock position, 9 cm above the umbilicus.

(III)-**Internal examination:**- Both the chambers of the heart were devoid of blood. The abdominal walls and membrane were torn. There were one and half liters of blood in the body and clots present in the stomach. The small intestine was cut at two places, and it was cut across at one place. There was also cut wound on the spleen. There was six ounces of semi digested food present in the stomach.

(IV)-**Opinion :**- PW-5, Dr. M. K. Jain, opined that the deceased died about a day before the postmortem was conducted, due to excessive bleeding and shock, due to pre-mortem injuries. The injury on the body of the deceased would have been caused by knife or Churi. The death of the deceased is possible on 17.01.2001 at about 11.30 A.M. The witness prepared the post mortem report in his own hand writing and signature. He proved it as Ext. Ka- 2.

22. PW- 5 Dr. M.K. Jain deposed in his cross-examination that there was only one visible injury on the body of the deceased. The wound's margin were sharp. He marked it as incised wound. He did not marked in PMR if the margins of the wound margins were pointing, inward or outward. He could not say whether blood was oozing out from the dead body at the time of post-mortem because it was in a supine position. Such injuries could be caused to a person lying down or in a sitting position. The direction of attack was unclear as the wound was deep and perforating. The rupture of the spleen below the wound, indicate its direction almost vertical. He could not tell about the length, width and thickness (size) of the weapon, with which the deceased was inflicted the said injury but that weapon must be sharp edged and its end should be pointed. He denied the suggestion that the said injury could be caused to the victim skinning a buffalo and that weapon slipped from his hand and by the slip of the dagger which skinning the buffalo.

23. P.W.6, C.P. Kamleshwar Mishra has stated in his testimony that on

17.01.2001, he was deployed as a Constable/clerk at P.S. Ghatampur. On that day, on the tehrir of complainant Lukman, he registered a Criminal Case vide Case Crime No. 11/2001, u/s 302 IPC against Saleem alias Sambha. He entered the particulars of the case in kaimi GD and had drawn chik FIR. The witness stated that these documents are in his hand writing and signature. He further stated that carbon copy of the GD was prepared in the same process with original. He proved Chick FIR as Ext Ka-3 and kaimi GD as Ext ka -4.

24. In his cross-examination PW- 6 further stated that Lukman reached in the police station at 12.45 P.M. to lodge the FIR. The tehrir was scribed by Shiraji and signed by Lukman. It took half an hour lodging the FIR. SHO was informed about the incident, who reached on the spot.

25. P.W.7, S.I. Maharaj Singh Tomar, is the I.O. and one of the formal witnesses, who deposed that he recorded the statement of the accused Saleem alias Sambha. On 01.02.2001 he took accused Saleem alias Sambha in police custody remand in expectation of recovery of weapon of assault used in the crime No. 11/ 2001. He set out from the P.S. in the jeep, along with SHO R.K. Sharma, SI Ramendra Kumar Singh, C- Pawan Kumar, C- Sunil Kumar jeep driver Abdul Rahman, at the place disclosed by the accused. Accused Saleem alias Sambha in presence of the witnesses Kalaam and Umar Siddqui got recovered chhuri and hand over the same to him. It was a pointed iron weapon (chhuri), measuring 1 pawn, 7 fingers. There were spots of dry blood on its handle. The Chhuri was recovered at the pointing out of the accused at around 8 o'clock, which was wrapped in a news paper and sealed at the spot in the presence of the witnesses. Accused Salim Alias Sambha stated that he had murdered Aziz with this weapon only. This witness has proved recovery memo of knife as Ext Ka-5 as well as recovered knife as material Ext-1.

26. PW- 7 S.I. Maharaj Singh also exhibited the recovered chhuri, blood stained clothes and two nos. of plain and blood stained bricks. He proved them as material Ext. 1, 2 & 3. He further stated that these items were sent to FSL, Lucknow for forensic examination

27. P.W. 8, Rakesh Kumar Sharma, Inspector deposed before the court that he took over the investigation of the present Case Crime No. 11 of 2001, under Section 302 I.P.C. on 17.1.2001. This witness has proved the entire proceedings conducted by him during investigation. This witness raided the house of accused Saleem alias Sambha after recording the statement of complainant but no one was found. S.I. Ramendra Singh was sent in search of the accused person. Thereafter spot inspection was conducted at the instance of complainant and witnesses. Site plan (Ext Ka- 6) was prepared and blood stained as well as plain piece of brick were taken into custody and memo was prepared. He further stated that after conclusion of the prosecution evidence, finding sufficient, clinching and riveting evidence pointing towards the guilt of the accused, he submitted Charge sheet under Section 302 I.P.C against the accused Saleem alias Sambha.. This witness has proved site plan of spot as Ex Ka-6, recovery memo of brick piece Ex Ka-7, site plans of the place of occurrence and the place wherefrom weapon used in the murder was recovered as Ext. Ka-8), Charge Sheet No 35 dated 9.2.2001 (Ex Ka-9) as well as pieces of blood stained and plain bricks Ex-2 and 3.

28. Sarvesh Kumar,S.I.(P.W.9) has proved the inquest proceedings. Thereafter Constable Rajesh Kumar and Constable Brijnandan were sent with the dead body along with documents for postmortem. This witness has proved Inquest report as Ex Ka-10, letter to C.M.O. Ex Ka-11, Sample seal Ex Ka-12, Challan of the body Ex Ka-13, photo Lash as Ex Ka-14 and letter written by R.I. to C.M.O. Kanpur as Ex Ka-15.

29. Learned Amicus Curiae for the appellant audaciously argued that witnesses produced by the prosecution are partisan, inimical to the appellants and interested witnesses and not independent witness. They are unreliable witnesses and as such no credence can be attached to their testimony and their deposition is not reliable and deserves to be discarded. Learned A.G.A. refuted the contention of the learned Amicus Curiae for the appellant. He submitted that ordinarily a closed relative would not spare the real culprit who has caused the death and implicate an innocent person. It will be beneficial to discuss law on the issue and evaluation of testimonies such witnesses.

30. In case of **State of Rajasthan Vs. Smt. Kalki and Anr.** (1981) 2 SCC 752 the Hon'ble Supreme Court distinguished between the related and interested witness. It held that ‘Related' witness is not equivalent to 'interested' witness. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in a decree of a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of the case, cannot be said to be 'interested'. In the present case the witnesses produced have nothing to gain if the appellant is convicted or acquittal. There is not even an iota of evidence that any of these witnesses will get some benefit out of litigation between complainant and the accused. They are eye witnesses. So, they are not interested witnesses.

31. The aforesaid submission of the learned Amicus Curiae for the appellant that prosecution witnesses are partisan and inimical to appellant, was thoroughly considered by the Hon'ble Apex Court in case of **Daleep Singh Vs. State of Punjab AIR 1953 SC 364** and enunciated the following principles:-

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

32. In a three Judges Bench of the Supreme Court of India in **Hari Obula Reddy Vs. State of A.P. (1981) 3 SCC 675** observed as under:-

"13. ...it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that

interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

33. Again, in **S. Sudershan Reddy and others Vs. State of A.P (2006) 10 SCC 163,** the Hon'ble Supreme Court has held as under:-

"12. We shall first deal with the contention regarding interests of the witnesses for furthering the prosecution version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible.

15. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses."

34. It is well known that there may be three kinds of witnesses:-

(i) Wholly reliable,

(ii) Wholly unreliable,

(iii) Partly reliable and partly unreliable,

There is no problem to evaluate testimony of wholly reliable or wholly unreliable witnesses, but it is different to deal with the witness, who are partly reliable and partly unreliable. The court has to be very careful in evaluation of such kind of witnesses.

35. The testimony of a reliable witness must be of **sterling quality** on which implicit reliance can be placed for convicting the appellants. The Apex Court in **Rai Sandeep v. State (NCT of Delhi), (2012) 8 SCC 21** has very vividly describe the characteristics of a sterling witness as under.

"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."

36. Thus, Hon'ble Apex Court in its enumerable decisions has categorically held that if evidence of an eye-witness, is found truthful, it can not be discarded simply because the witnesses were relatives of the deceased. The only caveat is that the evidence of relative witnesses should be subjected to careful scrutiny and accepted with caution.

37. It is germane to point out here that prosecution in the present case has examined as many as 9 witnesses in support of its version. Out of which four are the witnesses of facts and rest are formal witnesses. PW-1 Lukman is the complainant of the incident and nephew of the deceased Aziz. Thus, admittedly deceased Aziz is the maternal uncle of PW-1 Lukman. PW- 2 Mohd. Faheem is also nephew of the deceased. It is also undisputed that deceased Aziz was real elder uncle (bade baap) of PW- 3 Saeed. PW- 4 Sadiq has admitted that deceased Aziz was his relative and brother. He also admitted that witnesses, Lukman, Mohd. Faheem and Saeed are his nephews and relatives. Thus, all these witnesses are related witnesses of the deceased Aziz. Therefore, their evidence be viewed with extra caution to reach on conclusion regarding their reliability and credibility.

38. At this juncture it may also be pointed out that a close scrutiny of the testimonies of these witnesses spontaneously bring us to conclusion that they have narrated the prosecution story in a very intrinsic and a natural way. All these witnesses, PW- 1 Lukman, PW- 2 Mohd. Faheem, PW- 3 Saeed and PW- 4 Sadiq have, without exception, stated that deceased Aziz and the appellant were engaged in business of selling meat and there was a dispute of Rs. 50/- between them. Appellant Saleem alias Sambha claimed that Aziz owe Rs. 50/- to him, while Aziz has disputed it. In his cross examination. PW-2 Faheem has stated that after the incident Aziz was lying writhing in agony pooled in blood. He asked to carry him to the hospital subsequently, apprehend Saleem alias Sambha first and then carry. He saw Saleem alias Sambha in the courtyard of the house of Sadiq. This conversation indicates that it was Saleem alias Sambha who had stabbed the deceased Aziz. He denied the suggestion

that he had taken Rs. 40,000/- from the Saleem alias Sambha and to avoid payment of the amount, he is falsely deposing. It may be pointed out that it is just a suggestion in defence to the witness but it has not been proved by him by any cogent evidence. PW- 1 Lukman, PW- 2 Mohd. Faheem and PW- 3 Saeed have also supported prosecution story firmly that on 17.01.2001 at about 11.30 a.m. appellant Saleem alias Sambha had called upon and taken deceased Aziz to settle the account at the house of Balia and Sadiq sons of Badkan. Father and sons reside jointly in one house. They also followed them to the house of Balia. These witnesses further corroborated the prosecution story by stating that the deceased Aziz and appellant Saleem alias Sambha went inside the house of Balia, while they remained standing out at the fornt the door of the house. During course of conversation regarding settlement of the accounts, they over heard screaming consequent thereto they also entered into the house and saw that Saleem alias Sambha has stabbed Aziz with a chhuri and thereafter scaring the witnesses by brandishing it left the house. PW- 1 Lukman and PW- 2 Faheem tried to catch hold of the appellant Saleem alias Sambha but he threatened them and managed his escape good. Thereafter injured Aziz was carried to hospital, where he died. PW- 1 Lukman lodged the FIR. PW- 4 Sadiq has supported prosecution version to a great extent. He substantiated all the facts stated above by the witnesses except the actual place of occurrence. According to him he was present in his house at the time of incident and was taking meal. On hearing the shrieks he came out of his house and saw Saleem alias Sambha holding a blood soaked chhuri in his hand. Saleem has stabbed the chhuri in the stomach of Aziz. They chased him up to hotel of Kallu, thereafter they carried injured Aziz to the police outpost. He died on the way. Thus, all these witnesses were present at the scene of occurrence during the incident and they are the eye witnesses. There is no evidence at all on record that these witnesses are inimical to the appellant which could prompt them to rope him in the said crime. It is also to be mentioned that nothing was elicited from their examination which could be beneficial to the appellant version of the defence. It is also not out of place to mention that even defence witness DW- 1 Rakesh Kumar, though half heartedly, has supported the prosecution case that deceased Aziz was stabbed by Sadiq and Balia but he could not see as to who stabbed Aziz. In fact he has not seen anyone stabbing Aziz. He deposed that he has given the earlier statement of Sadiq assaulting deceased by knife without understanding its true import Aziz. Thus, the defence witness is so contradictory in his statement that by no stretch of imagination could be said to have supported the defence version at all.

39. DW- 1 Rakesh Kumar has narrated the defence version in his deposition. Negating defence version he deposed that on 17.01.2001 at about 11.30 a.m. he heard screaming in the house of Balia and Sadiq. At the relevant time he was passing through from where he saw that Saziq stabbed Aziz with chhuri. Aziz had illicit relation with the wife of Sadiq Ayesha. Large number of persons had gathered at the place of occurrence. In his cross-examination he stated that at about 11.30 a.m. he was taking tea at the hotel of Kallu, he heard the shrieks near the house of Balia. He has not witnessed the murder of Aziz. Aziz was beaten by Sadiq and Balia. They were quarreling outside the courtyard in the house of Balia which was

visible. Many people gathered there and tried to pacify them inside the house. He has not seen the act of stabbing Aziz by anyone in the house of Balia.

40. Appellant in his defence has stated that deceased Aziz had gone to the house of Sadiq. Aziz had illicit relationship with the wife of Sadiq. At the relevant time Sadiq and Balia also reached there. Seeing Aziz present there, they started beating him. Sadiq had stabbed him in his abdomen and killed him. When he reached, he saw that Aziz was injured, while Sadiq and Balia were present there. They screamed, that Saleem had killed Aziz. They also chased Sadiq and later called the family members of Aziz and blamed him to be the assailant. It may be mentioned that defence has not led any inspiring evidence to prove this version of defence. Assuming this defence version as true, he should have cross examined PW- 4 Sadiq on this point, but no such suggestion was put to him, to strengthen the hypothesis of the defence case. The defence has not put any suggestion to prosecution witnesses to inspire confidence regarding the defence version in this regard. In this way the defence version is not tenable and it do not inspire over confidence and is liable to be discarded outrightly.

41. The learned Amicus Curiae for the appellant urged that there is no independent witness to support the prosecution version, while admittedly several persons were present at the scene of occurrence. It creates serious doubt about the truthfulness and probity of the prosecution version. Learned A.G.A. has opposed the arguments. In this behalf it may be mentioned that it is established cannon of law of evidence that it is the quality, not the quantity of evidence, which matters to prove a case. The prosecution has examined eye witnesses of the occurrence who were present at the place of occurrence. It has also produced all relevant formal witnesses which in no way affects the prosecution case adversely. It is also established law that if eye witnesses successfully proves the prosecution version and testimonies of these witnesses are reliable, then non-production of any independent witness will not in any way affect the prosecution case adversely.

42. Learned Amicus Curiae for the appellant has argued that in the present case FIR is delayed, ante timed and is the result of embellishment which as a creature of afterthought. However, learned A.G.A. dispelled the contention of the learned Amicus Curae. It is pertinent to discuss, in brief, the legal scenario in this behalf. A Division Bench of Allahabad High Court in **Bhurey Singh Vs. State of U.P. 2008 (4) ALJ 772 Alld.** has referred the Apex Court in **Maharaj Singh Vs. State of U.P. (1994) 5 SCC 188** some checks about the ante timed FIR. One of the checks pointed out is regarding the receipt of the copy of FIR by the local Magistrate. If it is sent late it will give rise to an inference that FIR is not lodged within reasonable time. Further if sending FIR with the dead body, its inference is noted in the inquest report will lead that FIR is within time. The absence of those details indicating the facts that the prosecution story was still in an embryo state and it has come to be recorded later on, after due deliberation and consultation. **Maharaj Singh** (Supra) has been followed by the Apex Court in **Mohammad Muslim Vs. State of U.P.** 2023 live law (SC) 489 also. In the present case witnesses of prosecution PW- 1 complainant Lukman, PW- 2 Mohd. Faheem, PW- 3 Saeed and PW- 4 Sadiq in their deposition have stated

that the incident has occured on 17.01.2001 at about 11.30 a.m. Chik FIR Ext. Ka- 3 and PW- 6 C.P. Kameshwer Mishra and PW- 8 I.O. Inspector vigilance R.K. Sharma have stated that FIR has been registered at 12.45 p.m. (noon). The distance of the police station concerned from the place of occurrence is about 1 km. Thus, it took about 1.15 hours to get registered the FIR. The incident pertains to the murder. PW- 2 Faheem has stated in his cross-examination that after the incident Aziz was brought to the hospital where they were told that it is a police case, so lodge the FIR first. Hence, they came to the P.S. concerned and lodged the FIR meanwhile injured Aziz was declared dead in the hospital. Amongst all these facts and circumstances of the case, it is natural to take 1.15 hours to get FIR registered and there is no unreasonable delay in lodging the FIR. Thus, FIR in the matter is prompt and there is no possibility of manipulating and twisting the real facts. It cannot be termed afterthought. Therefore arguments put forth by the learned Amicus Curiae for the appellant, has no substance and is liable to be discarded.

43. Learned Amicus Curiae for the appellant has contended that prosecution has miserably failed to fix the place of occurrence, which renders prosecution case incredible and unreliable. Learned A.G.A. has vehemently opposed this contention of the appellant and argued that the incident occurred inside the house of the Balia. As per FIR, PW- 1 Lukman, PW- 2 Mohd. Faheem and PW- 3 Saeed, the incident in question occurred in the courtyard of the house of Sadiq while PW- 4 Sadiq has averred that incident had occurred outside his house on the road in front of the door of his house. All the prosecution witnesses live in the vicinity of each other, so they are well acquainted with each other. PW- 1 Lukman, PW- 2 Mohd. Faheem, PW- 3 Saeed have stated in their examination that there was a dispute of Rs. 50/- between the deceased Aziz and the accused appellant Saleem alias Sambha. On the fateful day Saleem alias Sambha called deceased Aziz and took him in the house of Badkan to settle the account. Both of them went inside the house of Badkan (which is also the house of PW- 4 Sadiq) and started conversing about the settlement of the account. All of sudden Saleem alias Sambha stabbed a dagger in the abdomen of the Aziz. The witnesses who followed Aziz and Saleem alias Sambha while they were proceeding towards the house of Sadiq, stayed outside and Saleem alias Sambha and Aziz went inside the house. Thus, according to these witnesses incident occurred in side the house of the Badkan. However, PW- 4 Sadiq has stated in his examination that at the time of the incident he was present in his house and taking meal. He also stated that on hearing the scream, he came out of his house where he saw Aziz lying injured. Saleem alias Sambha had stabbed him with a chhuri and he saw Saleem alias Sambha fleeing from the spot. In view of the consistent statement of prosecution witnesses PW- 1 Lukman, PW- 2 Mohd. Faheem, PW- 3 Saeed that the incident occurred inside the house of Balia. We are of the opinion that the incident actually occurred inside the house. It appears that PW- 4 Sadiq, either did not witness the occurrence or he was not present on the spot at the time of incident. In their cross-examination Pws has stated that on hearing the shriek inside the house of Sadiq they reached inside the house and tried to lay injured Aziz on a cot and brought him outside the house. Thus, incident of stabbing occurred inside the house of Sadiq and after receiving fatal

injury they brought deceased Aziz out of house on the road, in front of the door of the house of Sadiq. Thus, it is established that initially the place of occurrence was the courtyard inside the house of Sadiq. Similar case has been set up by PW- 8 I.O. R.K. Sharma who has rightly depicted the place of occurrence inside the house of Balia in the site map, which he has proved as Ext. Ka- 6 in his statement.

44. In this regard it has also been argued by the learned Amicus Curiae for the appellant that if the incident had occurred in the courtyard of the house of Balia some blood must have been recovered there but the I.O. has not collected any blood stained soil, from the said place. To the contrary he is shown to have collected blood stained bricks while the floor of the yard was not made of bricks. Learned A.G.A. has refuted this argument.

45. It may be mentioned in this regard that there is no satisfactory evidence on record that the blood soaked bricks were collected by I.O. from which place, either from road side or from the courtyard of the house of Balia. It may also be a discrepancy in the statement of I.O. that he has not clarified the position in this regard in his statement. Therefore, it does not mean that incident has not occurred inside the house of Balia and thus the appellant cannot be given any benefit of such lapses/ mistake of the I.O. Thus, the argument that prosecution has not fixed the place of occurrence and hence its case is doubtful, is not acceptable.

46. Learned Amicus Curiae for the appellant has also argued that the questionable recovery of *chhuri* (dagger) by the accused appellant further makes prosecution case doubtful. The recovery is false and there is no independent witness of such recovery. Learned A.G.A. has refuted the argument and urged that the recovery of the weapon of assault is at the instance of the appellant, in the presence of the witnesses, which itself indicate involvement of the appellant in the crime. In this behalf it may be pointed out that according to PW- 8 I.O. inspector vigilance R.K. Sharma the appellant surrendered before the court on 25.01.2001 thereafter with the leave of the court he recorded the statement of the accused on 29.01.2001 wherein he has stated that he can got recovered the chhuri by which he has committed the crime. So his police custody remand was prayed and granted, in expectation of recovery of weapon of assault. On 01.02.2001 weapon of assault, chhuri was recovered at the pointing of the appellant from the standing shrubs on the road side of Bhadras on Musa Nagar Road Chungi. In this connection, recovery memo Ext. Ka- 5 was prepared by PW- 7 S.I. Maharaj Singh Tomar over which the signature of the witnesses, I.O. R.K. Sharma, S.I. Ramendra Kumar, C- Pawar Kumar, C- Sunil Kumar were obtained. Thus, the recovery was made in the presence of the witnesses. This weapon of assault material Ext-1 was sent to FSL for chemical examination. FSL report Ext Ka-16 which is on record, reveals that there were stains of human blood on the Churri (dagger) which clearly establish to that the accused appellant used the recovered chhuri (dagger) in commission of the crime. All the prosecution witnesses substantiate the fact that chhuri was used as weapon of assault by the accused appellant in causing the fatal injury to the deceased Aziz. The mode of recovery also indicates that it was only the accused appellant also be involved in the said crime.

47. PW-8, I.O., Inspector vigilance R.K. Sharma has further stated that after committing the crime accused appellant fled away from the scene of occurrence. He tried to arrest the appellant accused and conducted raids at various places to ensure his arrest but failed to arrest him, consequently the appellant surrendered on 25.01.2001 before the court of CJM, concerned. His conduct of fleeing away, just after the incident is relevant under section -8 Indian Evidence Act 1872. This facts strengthens the presumption that he did so, to evade his arrest from the police as incident has been caused by the accused / appellant alone.

48. It has been further submitted that there are material and serious inconsistencies and discrepancies in respect of the place of occurrence, weapon used and the blows inflicted upon the injured. There is some discrepancy in the prosecution version as pointed out by the witnesses that the deceased was wearing 'T-shirt' and 'Tahmad', whereas in inquest there is description of 'Baniyan' and 'Tahmad' on his person. Some witnesses had stated that after committing the crime Saleem alias Sambha, entered into the house of Sabhapati, whereas other witnesses had stated that after committing the incident, accused ran away towards the hotel of Kallu, P.W.- 4 Sadiq has stated that accused fled from the scene of occurrence brandishing chhuri (dagger) towards Kallu's hotel. This creates serious doubts about the truthfulness of the prosecution version and the appellant, who has no criminal history and has falsely been implicated. However, in our opinion these are not such discrepancies and inconsistencies, which could affect prosecution case adversely. Thus there is no material contradictions in the statement of the prosecution witnesses.

49. Learned Amicus Curiae for the appellant has also contended that there is no motive for appellant to commit such a gruesome murder for trivial issue of dues of Rs. 50/- only. If it was the motive it was the weakest kind of motive. Learned A.G.A. disputed the contention of Amicus Curiae. It deems pertinent to point out that the incident has occurred in the broad day light and in the presence of several witnesses. All the prosecution witnesses including the witness of the defence has stated that the appellant and deceased Aziz were engaged in the business of selling of meat (gosht), some times jointly and some time severally. Saleem alias Sambha alleged that Aziz owed Rs. 50/- to him but Aziz denied it. On the fateful day, Saleem alias Sambha called Aziz from his house and taken him to the house of Balia s/o Badkan to settle the dispute. PW- 1 Lukman, PW- 2 Faheem s/o Late Saleem and PW-3 Saeed, followed them. Saleem alias Sambha and Aziz went inside the house of Balia and started conversing about the disputed transactions, while the persons accompanying them, remained standing outside the door of Balia's house. Both the parties were quarrelling over the statement of accounts in the house, meanwhile Saleem alias Sambha stabbed Aziz in his abdomen with a churi (dagger), with an intention to kill him. On hearing shrill and shrieks, persons, standing outside, entered into the house of Balia and saw accused Saleem alias Sambha, coming out of the house, brandishing blood soaked dagger in his hand. He even extended threats to them, who chased Saleem alias Sambha, but he managed his escape good. The injured Aziz was taken to the government hospital at Ghatampur for treatment, where he succumbed to his injury. PW-1 Lukaman, PW-2 Faheem, PW-3, Saeed have supported this prosecution case in their

testimonies. Even PW-4 Sadiq has supported prosecution version except to the extent that the incident had occurred outside his house while all other witnesses stated that it occurred inside in the courtyard of the house of the Sadiq but as has been discussed herein above there is a suspicion about the presence of Sadiq on the spot witnessing the incident. There is no corroborative evidence to support the statement of the defence witness DW-1 Rakesh kumar who had no information/ knowledge about the illicit relation of the wife of Sadiq with deceased Aziz. Nevertheless he also supported prosecution case regarding the dispute of Rs. 50/- between the parties and going to the place of occurrence and causing the death of the deceased Aziz by the appellant Saleem alias Sambha.

50. It has also been contended by the learned Amicus Curiae for the appellant that that the appellant has wrongly been convicted under Section 302 IPC whereas as per prosecution story it can easily be inferred that the case would fall under Section 304 Part- II of the I.P.C., as it is said that only a single blow of the knife was given. In support of his contention, he has invited our attention towards the decision rendered in the case of **Stalin V/s The State Through The Inspector Of Police**, AIR 2020 SC 718. He has further placed reliance upon the case of **Mahesh Balmiki alias Munna V/s State Of Madhya Pradesh,** AIR 1999 SC 3338. In the case of Mahesh Balmiki, the Court observed as under:-

"Adverting to the contention of a single blow, it may be pointed out that there is no principle that in all cases of single blow Section 302 I.P.C. is not attracted. Single blow may, in some cases, entail conviction under Section 302 I.P.C., in some cases under Section 304 I.P.C and in some other cases under Section 326 I.P.C. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury-(A), whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused, and the manner in which the injury is inflicted, are all relevant factors, which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant case.

51. Concluding, learned Amicus Curiae for the appellant has submitted that the alleged incident took place on 17.1.2001 and since then 23 long years has elapsed and still he is suffering continuous mental agony. In these circumstances, while not disputing the conviction, learned Amicus Curiae for the appellant submitted that ends of justice would be met, if the appellant is sentenced to the period already under gone by him.

52. Refuting the said assertion of the learned Amicus Curiae, the State Counsel argued that the findings of guilt recorded by the Trial Court are based on proper appreciation of evidence on record. T`he prosecution has examined the most natural witnesses of the case, whose presence at the time of occurrence can not be doubted. Credibility of the witness has to be judged in view of the facts and circumstances of every case and the trial judge strictly scrutinized their evidence with utmost care. He next averred that minor discrepancies on the part of investigating officer could not be a justification for discarding the accusation against the appellant. Prosecution witnesses have proved

prosecution case beyond all shadow of doubts. The prosecution has successfully been able to prove the date, time and place of occurrence. The appellant has not been able to prove by any evidence that he has falsely been implicated in the case and as such the appeal is liable to be dismissed.

53. Learned Amicus Curiae appearing for the appellants has next submitted that there was absolutely no intention on the part of the appellant to have caused death of deceased Aziz, nor to cause any bodily injury to the him. He further submitted that considering the manner in which the incident had occurred and the role attributed to the appellant, the present case does not travel beyond the scope of the offence u/s 304 Part- II I.P.C. i.e. causing injuries with the knowledge that it was likely to cause death but without any intention to cause death. He has further submitted that the conviction of the appellants u/s 302 IPC is a result of misappreciation of evidence on record. At the most the appellant can be convicted for the offence u/s 304 Part II of IPC.

54. Per contra, learned AGA has submitted that prosecution has proved its case beyond all reasonable doubt from the evidence adduced during the course of trial both intention and knowledge could be attributed to the appellant in causing the death of Aziz and, therefore, the trial court has rightly convicted the appellant under Section 302 I.P.C., which order do not require any interference.

55. Having considered the rival submissions made by the learned counsel for the parties and having gone through the material available on record, the only question that now falls for our consideration is that whether the conviction of the appellant would fall within the scope of Section 300 IPC or it is a case of culpable homicide not amounting to murder punishable u/s under Section 304 Part I or Part II of IPC.

56. We have already gone through the evidence adduced by the prosecution and the genesis of the occurrence and the role attributed to the appellant herein. During the course of autopsy of the dead body of the deceased P.W.-5- Dr. M.K. Jain has found only one ante-mortem injury in the form of lacerated and perforating wounds 3 cm x 1.5 cm x abdominal cavity deep and the same was present below the ribs towards the left side in a 10 O'clock position, 9 cm above the umbilicus. Prosecution witnesses have stated that there was no other injury on the body of the deceased. Thus, this is a case of single blow.

57. Sections 299 and 300 of the IPC deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death-

(i) with the intention of causing death or

(ii) with the intention of causing such bodily injury as is likely to cause death, or

(iii) with the knowledge that such an act is likely to cause death.

A bare perusal of this provision, reveal that it emphasises on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an

offence is caused in any of the three stated manners, noted-above, it would be 'culpable homicide'. Section 300 IPC, however, deals with 'murder', although there is no clear definition of 'murder' in Section 300 of the IPC. In **Rampal Singh vs. State of U.P., (2012) 8 SCC 289** it has been held by this Court, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'.

58. The Court must address itself to the question of mens rea. If Clause thirdly of Section 300 is to be applied, the assailant must intend the particular injury inflicted on the deceased. This ingredient could rarely be proved by direct evidence. Inevitably, it is a matter of inference to be drawn from the proved circumstances of the case. The court must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack.

59. When single injury is inflicted by the accused results in the death of the victim, no inference, as a general principle, can be drawn that the accused did not have the intention to cause the death or that particular injury which resulted in the death of the victim. Whether an accused had the required guilty intention or not, is a question of fact which has to be determined on the facts of each case.

60. Thus, while defining the offence of culpable homicide and murder, the framers of the IPC laid down that the requisite intention or knowledge must be imputed to the accused when he committed the act which caused the death in order to hold him guilty for the offence of culpable homicide or murder as the case may be. The framers of the IPC designedly used the two words 'intention' and 'knowledge', and it must be taken that the framers intended to draw a distinction between these two expressions. The knowledge of the consequences which may result in the doing of an act is not the same thing as the intention that such consequences should ensue. Except in cases where mens rea is not required in order to prove that a person had certain knowledge, he "must have been aware that certain specified harmful consequences would or could follow."

61. The phraseology of Sections 299 and 300 respectively of the IPC leaves no manner of doubt that under these Sections when it is said that a particular act in order to be punishable be done with such intention, the requisite intention must be proved by the prosecution. It must be proved that the accused aimed or desired that his act should lead to such and such consequences. For example, when under Section 299 it is said "whoever causes death by doing an act with the intention of causing death" it must be proved that the accused by doing the act,intended to bring about the particular consequence, that is, causing of death. Similarly, when it is said that "whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death" it must be proved that the accused had the aim of causing such bodily injury as was likely to cause death.

62. The word "intent" is derived from the word archery or 'aim'. The "act" attempted to must be with "intention" of killing a man. Intention, is a state of mind, can never be precisely proved by direct

evidence as a fact; it can only be deduced or inferred from other facts which are proved. The intention may be proved by res gestae, by acts or events previous or subsequent to the incident or occurrence, on admission. Intention of a person cannot be proved by direct evidence but is to be deduced from the facts and circumstances of a case.

63. In the case of **Smt. Mathri v. State of Punjab,** AIR 1964 SC 986, at page 990, Das Gupta J. has explained the concept of the word 'intent'. The relevant observations are made by referring to the observations made by Batty J. in the decision Bhagwant vs. Kedari, I.L.R. 25 Bombay 202 as under:-

"The word "intent" by its etymology, seems to have metaphorical allusion to archery, and implies "aim" and thus connotes not a casual or merely possible result-foreseen perhaps as a not improbable incident, but not desired-but rather connotes the one object for which the effort is made-and thus has reference to what has been called the dominant motive, without which, the action would not have been taken."

64. In the case of **Basdev vs. State of Pepsu,** AIR 1956 SC 488, at page 490, the following observations have been made by Chadrasekhara Aiyar J.:-

"6. ... Of course, we have to distinguish between motive, intention and knowledge. Motive is something which prompts a man to form an intention and knowledge is an awareness of the consequences of the act. In many cases intention and knowledge merge into each other and mean the same thing more or less and intention can be presumed from knowledge. The demarcating line between knowledge and intention is no doubt thin but it is not difficult to perceive that they connote different things. Even in some English decisions, the three ideas are used interchangeably and this had led to a certain amount of confusion."

65. Bearing in mind the test suggested in the aforesaid decisions and historical background that our legislature has used two different terminologies 'intent' and 'knowledge' and separate punishments are provided for an act committed with an intent to cause bodily injury, which is likely to cause death and for an act committed with a knowledge that his act is likely to cause death without intent to cause such bodily injury as is likely to cause death, it would be proper to hold that 'intent' and 'knowledge' cannot be equated with each other. They connote different things. Sometimes, if the consequence is so apparent, it may happen that from the knowledge, intent may be presumed. But it will not mean that 'intent' and 'knowledge' are the same. 'Knowledge' will be only one of the circumstances to be taken into consideration while determining or inferring the requisite intent.

66. In another case **Pulicherla Nagaraju @ Nagaraja Reddy vs State of A.P,** 2006 (11) SCC 444, the Hon'ble Supreme Court has laid down various relevant circumstances from which the intention could be gathered. Some relevant considerations are the following:-

(i) The nature of the weapon used,

(ii) whether the weapon was carried by the accused or was picked up from the spot,

(iii) whether the blow is aimed at the vital part of the body,

(iv) the amount of force employed in causing injury,

(v)whether the act was in the course of sudden quarrel or sudden fight,

(vi) whether the incident occurred by chance or whether there was any premeditation,

(vii) whether there was any prior enmity or whether the deceased was a stranger,

(viii) whether there was a grave or sudden provocation and if so, the cause for such provocation,

(ix) whether it was heat of passion,

(x) whether a person inflicting the injury has taken undue advantage or has acted in a cruel manner,

(xi)whether the accused persons has dealt a single blow or several blows.

67. Thus, requirements of law with regard to intention may be satisfied for holding an offence of culpable homicide. It is also necessary to prove specific intentions Even when such intention is not proved, the offence will be culpable homicide, if the doer of the act causes the death with the knowledge that he is likely by his such act cause death, i.e., with the knowledge that the result of his act may be such as may result in death.

68. Now we recapitulate the facts and circumstances of the case. It is an admitted case of prosecution that deceased and the appellant were engaged in business of selling meat. Their relations were cordial as PW- 2 has stated that Saleem alias Sambha has never threatened the deceased. During the course the business there arose a dispute between them, when appellant demanded his due amount Rs. 50/- which the deceased owed towards him. The deceased asked the appellant to settle the account between them and if there is any amount due upon him, he is ready to pay. On the fateful day Saleem alias Sambha called the victim and taken him to the house of Balia to settle the disputed account. It is important to note that both the parties are in relation to each other and their residences are in the same town and vicinity, to each other. They had simillar business also and generally belong to the same profession and community. Prosecution witnesses stated that there was no enmity of any kind, between them and there was not even a remote possibility that the dispute between them could result in the commission of murder by appellant but something has occurred between them during the course of conversation and in the spur of moment and sudden provocation, appellant stabbed ‘chhuri’ in the abdomen of the deceased. The weapon of assault chhuri is a common item which could be found in dwelling houses, specially where selling of meat is the business. In these circumstances it could not be inferred that appellant had a pre-planned intention to kill the deceased Aziz and from the mode of occurrence it could not be inferred that the appellant had knowledge that by his act of stabbing the deceased would receive such an injury which would likely culminate in the death of the deceased.

69. Thus, from the aforesaid discussion, we are of the view that none of the clauses of Section 300 I.P.C. are attracted as intention of the appellants to cause death or such bodily injury which he knew would cause the death of the other person or sufficient in the ordinary course of nature to cause death, is not proved. Resultantly, we are of the opinion that the appellants had not committed an offence within the meaning of Section 300 IPC, i.e., "culpable homicide amounting to murder",

punishable under Section 302 I.P.C. The incident had occurred without any premeditation and on trivial matter i.e. dispute regarding meager amount of Rs.50/-. Thus, the offence committed by the appellant would fall within the meaning of "culpable homicide not amounting to murder" under Section 304 I.P.C.

70. Now the next question would be as to whether the appellant would be guilty in Part-I or Part-II of Section 304 IPC The intention probably was to pressurize by brandishing the chhuri and not to cause bodily injuries. Otherwise there would have been more than one blow, which would have surely done away with the deceased. However, in sudden provocation, the single blow proved fatal. Considering all the facts and circumstances of the case intention of appellant gathered, mode of occurrence and weapon used, nature of injury, his act falls within the province of Section 304 Part- II I.P.C.

71. In view of the foregoing discussion, we are of the opinion that the appellant is not guilty of murder punishable under Section 302 IPC but he is guilty of committing homicide not amounting to murder an offence which is punishable under Section 304 Part II IPC, we partially accept this appeal and alter the offence from that of Section 302 IPC to one under Section 304 Part II of the Indian Penal Code.

72. In the light of prolix and verbose discussions made herein above and also regard being had to the entire facts and circumstances of the case and re-appreciation of the entire evidence, we are of the opinion that the prosecution has proved its allegations beyond reasonable doubts, pointing unerringly the guilt of the accused / appellant, punishable under section 304 Part- II IPC. Having regard to the facts and circumstances of the instant case, we find that the sentence of 10 years' rigorous imprisonment would serve the ends of justice adequately for the offence of which the appellant has been held guilty.

73. We, therefore, award a sentence of 10 years' rigorous imprisonment to the appellant Saleem alias Sambha. The judgment under appeal is modified and the appeal is allowed in part, accordingly.

74. The Chief Judicial Magistrate, Kanpur is directed to take appellant Saleem alias Sambha in custody in the aforesaid case and send him to jail to serve out the remaining sentence awarded to him.

75. Let a copy of the judgment and order be sent to the trial court concerned for necessary compliance. The trial court record be remitted back within fifteen days. The compliance report shall be communicated to this court in a further period of two weeks, thereafter.

(2024) 8 ILRA 109
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 4577 of 2005

Smt. Kaushalya ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:

Satyendra Narayan Singh, Girdhar Prasad Tripathi, Jagdish Prasad Mishra, P.K. Singh, Ravi Agarwal, Shishir Prakash, Swetashwa Agrawal

Counsel for the Respondent:
Govt. Advocate, Onkar Singh

A. Criminal Law - Evidence Act, 1872 - Section 3 - Testimony of Interested witness - A witness is normally to be considered independent unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Interested evidence is not necessarily unreliable evidence. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. If on scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. If evidence of an eye-witness, is found truthful, it can not be discarded simply because the witnesses were relatives of the deceased. The only caveat is that the evidence of relative witnesses should be subjected to careful scrutiny and accepted with caution. Foundation has to be laid if plea of false implication is made. In the instant case, prosecution examined seven witnesses, including PW-1 (informant and elder brother of the deceased), independent witnesses PW-2 and PW-3, who had no motive to falsely implicate the appellant. Medical and formal witnesses PW-4 to PW-7 supported the prosecution's case. Defence failed to prove any enmity between the witnesses and the appellant. Evidence of PW-1, PW-2, and PW-3 was credible. (Para 45, 46)

B. Indian Evidence Act, 1872 - Section 134 - No particular number of witnesses is required for the proof of any fact. Evidence must be weighed, not counted. In the instant case, prosecution examined two eyewitnesses, PW-2 and PW-3, who testified that the appellant gave sugar-coated cardamom to the deceased children. PW-7, the Investigating Officer, recovered pieces of newspaper from the crime scene in which the sugar-coated cardamom had been wrapped. Forensic examination of the cardamom and the viscera of the deceased, sent to the forensic laboratory, confirmed the administration of Aluminum Phosphide to the children. However, the accused argued that the prosecution had not examined key witnesses mentioned in the charge sheet, nor had it explained why these witnesses were not examined. *Held:* Prosecution's established the case beyond reasonable doubt. Although several witnesses were named in the charge sheet, the law does not require the multiplication of witnesses. Absence of some witnesses in the trial does not adversely affect the prosecution's case. If the incident had occurred differently, as suggested by the defense, the accused could have examined the omitted witnesses as defense witnesses, but he chose not to do so (Para 48)

C. Criminal Law - Code of Criminal Procedure, 1973 -Section 364 - Power to examine the accused - It is settled proposition of law that St.ments or answers given by accused is not substantive piece of evidence and it is not sole base for convicting the accused. St.ments of accused can be used for proper appreciation of evidence to accept or reject it. Non-examination of accused under Section 313 of Cr.P.C. does not vitiate the entire proceedings or case of prosecution. Accused can make good of the same even at appellate stage. Mere defective/ improper examination under Section 313 Cr.P.C. is no ground for setting aside the conviction of the accused, unless it has resulted in prejudice to the accused. (Para 55, 56)

D. Criminal Law - Indian Penal Code - S. 302, 304 Part-I, S. 328 - In the instant case PW-2 and PW-3 eyewitnesses, had seen the acused giving sugar coated cardamom seeds to the children. In

forensic chemical examination, elaichi danas were having elements of aluminum phosphide, as a result of which, three innocent children died. Accused appellant did not have any strong motive and animosity, but has acted in a sudden emotion without pre-concerted plan. She has a knowledge that if someone take aluminum posphide he might be dead. Hence, the accused-appellant convicted and sentenced under Section 304 Part-I of IPC and 328 I.P.C. Trial court has not imposed the fine in either of the Sections, which is integral part of the sentence under those sections. Accused appellant served about 26 years of the sentence awarded. Accused was directed to be released for the period already undergone u/s 304 Part-I of IPC and a fine of Rs.2,00,000/-, which will go to the to their father. Conviction and sentence awarded u/s 328 IPC shall remain intact with the modification that she will further pay a fine of Rs.1,00,000/-. In case of default, she will serve six months additional imprisonment. (Para 73)

Partly Allowed. (E-5)

List of Cases cited:

1. Daleep Singh Vs St. of Punjab AIR 1953 SC 364

2. Hari Obula Reddy Vs St. of A.P. (1981) 3 SCC 675

3. S. Sudershan Reddy & ors. Vs St. of A.P (2006) 10 SCC 163

4. Vadivelu Thevar Vs St. of Madras AIR 1957 SC 614

5. Raj Kumar Singh @ Raju @ Batya Vs St. Of Raj. AIR 2013 SC 3150

6. Sanatan Naskar & anr vs St. of W. B. in AIR 2010 SC 3507

7. Mohan Singh Vs Prem Singh 2002 SC 3582

8. Dehal Singh Vs St. of H.P. AIR 2010 SC 3594

9. St. of M.P. Vs Ramesh (2011) 4 SCC 786

10. Rajkumar Singh @ Raju Vs St. of Rajasthan AIR 2013 SC 3150

11. Gyan Chand & ors. Vs St. of Har. AIR 2013 SC 3395

12. Rampal Singh Vs St. of U.P. reported in (2012) 8 SCC 289

13. Pulicherla Nagaraju @ Nagaraja Reddy vs St. of A.P. reported in 2006 (11) SCC 444

(Delivered by Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. The present appeal has been oscillating before this Court from the year 2005, the accused appellant Smt. Kaushalya has been convicted u/s 302, 328 IPC and sentenced to life imprisonment. Swinging of the appeal years together due to procedural technicalities and change of counsel is only a device to narrow down the advancement of fair justice, which cannot be gainsay to a person who has been gasping with life in jail. Since the accused appellant has been incarcerating in jail from 2004, and paper book has been prepared way back in the year 2022, therefore, this appeal cannot be permitted to remain hanging on any technicality. The basic objective of concluding a trial is to protect the life and liberty of a person, serving a sentence in jail. The life and liberty of the accused cannot be downsized on the score of any technicality or negation of counsel to address the Court.

2. The instant appeal has been preferred on behalf of the appellant Smt. Kaushalya, u/s 374(2) Cr.P.C., assailing the judgment and order dated 05.09.2005, passed by the learned Special Additional Sessions Judge, Muzaffar Nagar, in Sessions Trial No.1040 of 2004 (State

versus Narendra and Another), arising out of Case Crime No. 81 of 2004, Police station Rtan Puri, District-Muzaffar Nagar, under Sections 302, 328 Indian Penal Code 1860 (in short, further referred as IPC), whereby the accused appellant Smt. Kaushalya was convicted for the offence under Sections 302, 328 IPC, and sentenced for the offence punishable under sections 302 IPC to undergo life imprisonment and for the offence punishable under section 328 IPC to serve out ten years rigorous imprisonment. Both sentences were directed to run concurrently.

3. The genesis of prosecution story, as emanates from record, in a narrow compass, is that on 27.06.2004 at about 12.05 p.m. Pramod Kumar father of the deceased, informed to the P. S. Ratan Puri that he went to his field alongwith his three children daughter Annu aged about 11 years, and sons Shivam aged about 8 years and Satyam aged about 4 years, He sent the children to fetch water from government hand-pipe located in the vicinity to harijan temple, near chak road. When returned, they fell unconscious and fainted. He informed about the incident to his elder brother Prem, who alongwith Ram Niwas taken the children to hospital of Dr. Narendra Tyagi at khetauli where he declared Shivam and Satyam to have been brought dead and later Annu also died. This information was enterd in the G.D. No.16 at 12.05 p.m. dated 27.06.2004 at police station Ratan Puri. On the basis of this information SHO went on the spot, inquest proceedings were conducted and the deceased children were sent for autopsy.

4. On 28.06.2004, at about 08.00 a.m. informant Prem gave a tehrir, scribed by Rakesh Kumar Sharma, reiterating above facts and divulging some additional facts, against Narendra (since deceased) and the accused/appellant Smt. Kaushalya, (wife of Narendra), at Police Station Ratan Puri, in respect of the incident occurred on 27.6.2004 at about 9.30 a.m. divulging therein that on 27.6.2004, Pramod Kumar, elder brother of complainant Prem, had gone to his field at about 7.30 a.m. on a Buggi along with his daughter Annu aged about 11 years, and sons Shivam aged about 8 years and Satyam aged about 4 years. Pramod Kumar had sent his children to fetch water from government hand pump, situated in the proximity of Harijan Temple. When his children were coming back taking water and reached near the Chakroad, the accused Narendra (since deceased) and his wife Kaushalya (the appellant) hailing to Brahman community supplied them devotional offering (prasad) in the shape of cardamom seeds, coated with sugar (Ilaychi Dana) wrapped in a pieces of newspaper. At that crucial moment, Krishna Pal s/o Shiv Ram and Praveen s/o Deep Chand who were going to their fields via Chakroad, had seen appellant supplying the devotional offering (Prasad) to those children. The children lost their consciousness and fainted in the field. Pramod informed him about the incident. They had taken the children to nursing home of Dr. Narendra Kumar Tyagi, located at Khatuli. where doctor declared them dead. The children of Pramod died on account of devouring poisonous devotional offering (Prasad) given by Narendra (since deceased) and Smt. Kaushalya (present appellant). The said incident/ fact had come in his notice on the information given by the witnesses.

5. On the basis of the aforementioned tehrir Ext. Ka-1, Case Crime No.81 of 2004 under Sections 302/328 IPC was registered

against the accused i.e. present appellant Smt. Kaushalya and her husband Narendra (since deceased). Particulars of the same were drawn in Kaimi G.D. No. 12, Ext. Ka-6, at about 08.00 a.m. dated 28.06.2004 P.S. Ratan Puri. Simultaneously entries were made in chik FIR, Ext. Ka-6, also. Investigation was entrusted to S.I. D.N Verma SHO.

6. As stated above the Investigating Officer (I.O.) reached at the spot and after nominating the witnesses launched inquest proceedings of the corpse of the children Shivam, Annu and Satyam, on 27.06.2004, from 12:05 p.m. to 12:30 p.m. Inquest proceedings were completed in the presence of the witnesses. According to the opinion of the witnesses of the inquest, the death of those children happened on account of devouring of poisonous stuff. I.O. subscribed to the opinion of the panchan (witnesses). Panchnamas (Inquest reports) of the deceased children were duly prepared on 27.6.2004 and signatures of witnesses were obtained over the inquest reports.

7. After carrying out the necessary formalities, inclusive of handing over of letter to C.M.O, Photo Lash, Lash Challan etc, dead bodies of children duly wrapped in the cloth and sealed and then were taken to the mortuary for autopsy. The documents with regard to autopsy of the deceased children were handed over to constable 165 Ram Beer and constable 73 Chatar Pal. The post mortem of the deceased children namely Annu aged about 11 years, Shivam aged about 8 years and Satyam aged about 4 years was conducted on 27.6.2004 at about 10.00 p.m. onward at District Hospital Muzaffar Nagar by Dr. Yogendra Tirkha ad postmortem reports of all the three deceased children Ext Ka-3, Ka-4, Ka-5 were prepared by the autopsy surgeon.

8. The Investigating Officer recorded statement of the witnesses under section 161 Cr.P.C., prepared site plan Ext Ka-23. On 27.6.2004 recovered a piece of news paper on which 12th June and in the margin Chaurasi and Gujarat riot etc. words were written in the box and in one side photo was stuck and on a piece of that newspaper some cardamom was kept. A sample of cardamom (Prasad) was taken from it. The said cardamom was put in one polythene as well as one piece of newspaper was also collected and kept. It was opined that three children died of devouring that cardamom. The polythene in which cardamom (Prasad) was kept was duly sealed after conducting all necessary formalities. Memo of recovery, Ext. Ka-22, was duly prepared, signed by I.O. and the witnesses.

9. On 28.06.2004, the accused Narendra and Kaushalya were arrested and on their pointing a newspaper "Royal Bulletin", dated 13th June, in which the news of 12th June, was published. The said newspaper was having 12 pages, of which below the main page on the right side, a portion was split. The torn portion as below the page no.9, on the right side, was taken out from the drawer of dressing table of the accused persons. It was unfolded by them that on a piece of that newspaper, they had given cardamom (prasad) to Annu, Shivam and Satyam, near the tubewell of Pramod Kumar. The said incriminating material was taken into possession by the police and recovery memo of the same was prepared. The pieces of the newspaper were kept in a polythene without seal because a piece of that newspaper on which the mark of cardamom (Prasad) was existing, was recovered from the place of occurrence on

27.6.2004. The said portion of newspaper was kept for tallying. The said recovery memo was prepared by constable 778 Dharm Pal Singh and was duly signed by the witnesses. The recovered incriminating articles were sent to chemical analyst. In the report of the chemical analyst Aluminum phosphide, pungent smell was found in the recovered article tallying with the cardamom. The report of the chemical analyst was duly marked as Ext. Ka-26.

10. The investigation officer after collecting the credible and clinching material and evidence showing the complicity of the accused appellant and her husband (Narendra–since deceased) and after duly conclusion of investigation, submitted the charge sheet, Ext. Ka- 25, under Sections 302/328 IPC, before the learned Chief Judicial Magistrate Muzaffar Nagar, against the accused. Learned CJM took cognizance of the case. Since it was exclusively triable by the court of Sessions, hence, he committed it to the Sessions, vide his order dated 21.09.2004, where it was registered as S.T. No. 1040 of 2004 and in turn learned sessions judge transmitted the same to the court of Additional Sessions Judge Court No.6 Muzaffar Nagar for trial.

11. Learned trial judge framed charges against the accused appellant Kaushalya and her husband Narendra (since deceased) under Sections 302/328 IPC. The accused persons abjured the charges and claimed to be tried. Thus, the trial commenced against the accused persons.

12. To bring home the charges, the prosecution examined as many as seven witnesses in ocular evidence as under:-

Sl. No.	Name of witnesses	PW No.	Remarks
i	ii	iii	iv
1.	Prem	P.W.-1	Informant
2.	Krishan Pal	P.W.-2	Public witness
3.	Parvindra Sharma	P.W.-3	Public Witness
5.	Dr. Yogendra Tirkha	P.W.-5	Doctor P.M.R.
6.	H.C. Harendra	P.W.-6	Formal witness
7.	D. N. Verma	P.W.-7	SHO / I.O.

13. In order to further substantiate the charges, leveled against the appellant, prosecution has also adduced following documentary evidence as under :-

Sl. No.	Particulars	PW No.	Remarks
(A)	(B)	(C)	(D)
1.	Tehrir	Ext. Ka-1	P.W.-1
2.	Report	Ext. Ka-2	P.W.-1
3.	M Report Shivam	PExt. Ka-3	P.W.-5
4.	P.M. Report Annu	Ext. Ka-4	P.W.-5
5.	P.M. Report Satyam	Ext. Ka-5	P.W.-5
6.	Chik FIR	Ext. Ka-6	P.W.-6
7.	Inquest report Shivam	Ext. Ka-7	P.W.-7
8.	Photolash, Shivam	Ext. Ka-8	P.W.-7
9.	Letter to CMO, Shivam	Ext. Ka-9	P.W.-7
10.	Letter to RI, Shivam	Ext. Ka-10	P.W.-7
11.	Challan Lash Shivam	Ext. Ka-11	P.W.-7
12.	Inquest report Annu	Ext. Ka-12	P.W.-7
13.	Photolash, Annu	Ext. Ka-13	P.W.-7
13.	Photolash, Annu	Ext. Ka-13	P.W.-7
14.	Letter to CMO, Annu	Ext. Ka-14	P.W.-7
15.	Letter to RI, Annu	Ext. Ka-15	P.W.-7
16.	Challan Lash Annu	Ext. Ka-16	P.W.-7
17.	Inquest report Satyam	Ext. Ka-17	P.W.-7
18.	Photolash, Satyam	Ext. Ka-18	P.W.-7
19.	Letter to CMO, Satyam	Ext. Ka-19	P.W.-7
20.	Letter to RI, Satyam	Ext. Ka-20	P.W.-7
21.	Challan Lash Satyam	Ext. Ka-	P.W.-7

		21	
22.	Recovery Memo of News paper Wrapped ilaichi dana	Ext. Ka-22	P.W.-7
23.	Site Plan	Ext. Ka-23	P.W.-7
24.	Recovery Memo of part of News paper from residence	Ext. Ka-24	P.W.-7
25.	Charge Sheet	Ext.Ka.-25	P.W.-7
26.	F.S.L. Report	Ext. Ka-26	P.W.-

14. On conclusion of the prosecution evidence accused/ appellant Smt. Kaushalya is confronted with evidence on record against her, to explain defence version. Her statement under Section 313 Cr.P.C. was recorded on 27.06.2005, in question-answer form as follows:-

प्रश्न संख्या- 1- अभियोजन साक्ष्य में आया है कि प्रमोद कुमार अपने तीन बच्चों सत्यम आयु 4 वर्ष, शिवम आयु 8 वर्ष, कुमारी अन्नू आयु 11 वर्ष, को दिनांक 27.06.2004 को, सुबह के 07:30 बजे, बुग्गी में लेकर खेत पर काम करने गया था इस वारे में आपको क्या कहना है?

उत्तर- पता नहीं।

प्रश्न संख्या- 2- अभियोजन साक्ष्य में आया है कि खेत से बच्चों को पिता प्रमोद ने तीनो बच्चों को गांव में हरिजनो के मंदिर के पास सरकारी नल से डिब्बे में पानी लेने भेज दिया बच्चे पानी लेने चले गये थे। इस वारे में आपको क्या कहना है?

उत्तर- ग़लत है।

प्रश्न संख्या- 3- अभियोजन साक्ष्य में आया है कि जब तीनो बच्चे डिब्बे में पानी भरकर चले और चकरोड के सामने समय करीब 9.30 बजे आये तो आप व अभियुक्त नरेन्द्र ने बच्चो को प्रसाद के रूप में इलायची दाना अखबार के टुकड़ों में रखकर खाने के लिए दे दिया था। उस समय गवाहान कृष्णपाल व प्रवीन अपने खेतो की ओर जा रहे थे, जिन्होने आपको बच्चो को प्रसाद देते देखा है। इस बारे में आपको क्या कहना है?

उत्तर- गलत है।

प्रश्न संख्या- 4- अभियोजन साक्ष्य में आया है कि जब तीनो बच्चो ने प्रसाद इलायची दाना खाया तो वे खेत पर जाकर बेहोश हो गये। इसकी सूचना बच्चो के पिता प्रमोद ने गांव में अपने भाइयों को दी। तीनो बच्चो को लेकर इलाज के लिए कस्बा खतौली के डाक्टर नरेन्द्र कुमार के नर्सिंग होम पर ले गये जहाँ पर तीनों बच्चो को मृत घोषित कर दिया। इस बारे में आपको क्या कहना है?

उत्तर- गलत है।

प्रश्न संख्या- 5- अभियोजन साक्ष्य में आया है कि इस घटना मे आप वा व अभियुक्त नरेन्द्र व द्वारा बच्चो को इलायची दाना प्रसाद देने की जानकारी प्रेम को गवाहान कृष्णपाल व प्रवीण के बताने पर हुई। आप अभियुक्त नरेन्द्र व श्रीमति कौशल्या ने जहरीला प्रसाद इलायची दाना तीनो बच्चो को देकर उनकी हत्या कर दी। इस बारे में आपको क्या कहना है?

उत्तर- गलत है।

प्रश्न संख्या- 6- अभियोजन साक्ष्य में आया है कि आपके खिलाफ वादी प्रेम ने लिखित तहरीर राकेश कुमार शर्मा से लिखवाकर थाना रतनपुरी में दिनांक 28.6.2004 को दी वह रिपोर्ट प्रदर्श क-2 है। इस बारे में आपको क्या कहना है?

उत्तर- झूठी रिपोर्ट लिखाई।

प्रश्न संख्या- 7- अभियोजन साक्ष्य में आया है कि वादी प्रेम की लिखित तहरीर के आधार पर पी०डब्लू-5 एच०सी० हरेन्द्र सिंह ने चिक रिपोर्ट तैयार की जो प्रदर्श क-6 है जिसका खुलासा थाने की जी०डी० में किया, जी०डी० दिनांक 28.6.2004 प्रदर्श क-7 है। इस बारे में आपको क्या कहना है?

उत्तर- फर्जी कागजात तैयार किए।

प्रश्न संख्या- 8- अभियोजन साक्ष्य में आया है कि पी०डब्लू०-4 डा० नरेन्द्र कुमार त्यागी ने तीनो बच्चो को अपने नर्सिंगहोम मे देखा और अपने ओ०पी०डी० रजिस्टर मे बच्चों के नाम दर्ज किये और एक बच्चे अन्नु का इलाज किया और उन्हे मृत घोषित किया। उनका ओ०पी०डी० रजिस्टर प्रदर्श क-2/1 है। इस बारे में आपको क्या कहना है?

उत्तर- पता नही

प्रश्न संख्या- 9- अभियोजन साक्ष्य में आया है कि प्रमोद कुमार की दिनांक 27.6.2004 को पुलिस को दी गयी। सूचना पर उपनिरीक्षक मुन्शीलाल ने थानाध्यक्ष पी०डब्लू०-7 डी०एन० वर्मा के निर्देशन मे मृतक तीनों बच्चो शिवम, कुमारी अन्नु, सत्यम के शव का पंचायतनामा उनसे सम्बन्धित कागजात तैयार किये तीनो शवो को सील मोहर सर्वे मोहर करके पोस्टमार्टम कराने के लिए सिपाहियो के सुपुर्द किया। शिवम का पंचायतनामा प्रदर्श क-7, फोटो लाश प्रदर्श क-8, चिट्ठी सी०एम०ओ० प्रदर्श क-9, चिट्ठी आर०आई० प्रदर्श क-10 चालान लाश प्रदर्श क-11 है। कुमारी अनु का पंचायतनामा प्रदर्श क-12 फोटो लाश प्रदर्श क-13, चिट्ठी सी०एम०ओ० प्रदर्श क-14, चिट्ठी आर०आई० प्रदर्श क-15, चालान लाश प्रदर्श क-16 है। सत्यम का पंचायतनामा प्रदर्श क-17, फोटो लाश प्रदर्श क-18, चिट्ठी सी०एम०ओ० प्रदर्श क-19, चिट्ठी आर०आई० प्रदर्श क-20, चालान लाश प्रदर्श क-21 इस बारे में आपको क्या कहना है?

उत्तर- कागजात थाने पर तैयार किया।

प्रश्न संख्या- 10- अभियोजन साक्ष्य में आया है कि मृतक शिवम, अनु व सत्यम के शवो का पोस्ट मार्टम पी०डब्लू-5 डा० योगेन्द्र तिरखा ने किया और पोस्ट मार्टम रिपोर्ट तैयार की। शिवम की पोस्टम मार्टम रिपोर्ट प्रदर्श क-3 है। कुमारी अन्नु की पोस्ट मार्टम रिपोर्ट प्रदर्श क-4 है। सत्यम की पोस्ट मार्टम रिपोर्ट प्रदर्श क-5 है। मृत्यु का कारण जानने के लिए तीनो का अलग-अलग विसरा जग मे लेकर सील मोहर सर्वे मोहर किया जिसको विधि विज्ञान प्रयोगशाला आगरा में जाँच के लिए भेजा गया। इस बारे में आपको क्या कहना है?

उत्तर- पता नही

प्रश्न संख्या- 11- अभियोजन साक्ष्य में आया है कि पी०डब्लू०-7 थानाध्यक्ष डी०एन० वर्मा ने इस केस की विवेचना की। घटना स्थल खेत प्रमोद से एक अखबार का टुकड़ा जिसमें इलायची दाना लगा था। इलायची दाना को सील मोहर करके रसायनिक परीक्षण के लिए विधि विज्ञान प्रयोगशाला आगरा भेजा गया अखबार का टुकड़ा जिसमें प्रसाद रखा था। उसको कब्जे पुलिस में लिया। अखबार का टुकड़ा वस्तु प्रदर्श-1 है। उसकी फर्द मौके पर तैयार की। फर्द प्रदर्श क-22 है। इस बारे में आपको क्या कहना है?

उत्तर- फर्जी कार्यवाही की।

प्रश्न संख्या- 12- अभियोजन साक्ष्य में आया है कि अभियुक्त नरेन्द्र व कौशल्या को पी०डब्लू-7 थानाध्यक्ष डी०एन० वर्मा ने गिरफ्तार किया आपने जिस अखबार मे तीनो बच्चो को जहरीला प्रसाद दिया था। उसका शेष भाग अपने घर से बरामद कराया। उसकी फर्द मौके पर तैयार की। फर्द प्रदर्श क-24 है। अखबार का शेष भाग वस्तु प्रदर्श-2, पोलिथीन व वस्तु प्रदर्श-3 है। इस बारे में आपको क्या कहना है?

उत्तर- गलत है।

प्रश्न संख्या- 13- अभियोजन साक्ष्य में आया है कि पी०डब्लू०-7 विवेचनाधिकारी डी०एन० वर्मा ने घटनास्थल जहाँ पर तीनों बच्चो को आपने जहरीला प्रसाद खाने को दिया था उसका स्थल निरीक्षण करने के बाद स्थल चित्र तैयार किया जो प्रदर्श क-23 है और विवेचना पूर्ण करने के बाद अभियुक्तगण के विरुद्ध आरोप पत्र प्रदर्श क-25 न्यायालय में प्रस्तुत किया। इस बारे में आपको क्या कहना है?

उत्तर- गलत है।

प्रश्न संख्या- 14- अभियोजन साक्ष्य में आया है की मृतको का विसरा विधि विज्ञान प्रयोग शाला आगरा मे भेजा गया और अखबार में मिला इलायची दाना जो बच्चो ने खाया था। उसका शेष बचा हुआ इलायची दाना विधि विज्ञान प्रयोग शाला आगरा भेजा गया। संयुक्त निदेशक विधि विज्ञान प्रयोगशाला आगरा की रिपोर्ट प्रदर्श क-26 है। इस बारे में आपको क्या कहना है?

उत्तर- रिपोर्ट गलत है।

प्रश्न संख्या- 15- अभियोजन साक्षीगण अ०सा०-1 प्रेम, अ०सा०-2 कृष्णपाल, अ०सा०-3 प्रवीण अ०सा०-4 डा० नरेन्द्र कुमार त्यागी, अ०सा०-5 डा० योगेन्द्र तिरखा अ०सा०-6 एच०सी० हरेन्द्र सिंह, अ०सा०-7 उपनिरीक्षक डी०एन० वर्मा आपके विरुद्ध साक्ष्य क्यों देते है?

उत्तर- प्रेम पाल, कृष्णपाल, प्रवीन रंजिश से गवाही देते है।

प्रश्न संख्या- 16- आपके ख़िलाफ मुकदमा क्यों चला ?

उत्तर- रंजिशन।
प्रश्न संख्या- 17- क्या कुछ और कहना है ?
उत्तर- कोई प्रसाद नहीं दिया है।

15. The accused/appellant has examined DW-1 Abdul Haq, in ocular defence evidence.

16. The learned trial court, after examining the entire material on record, scrutinizing testimonies of the prosecution witnesses and also evaluating the oral and documentary evidence, came to the conclusion that there is a complete chain of evidence showing the complicity of the accused appellant in the commission of said crime and the prosecution has proved its case beyond reasonable doubts, pointing the guilt against the accused person including, appellant, Smt. Kaushalya under Sections 302 and 328 I.P.C, and sentenced her as stated herein above. Felt aggrieved, the appellant preferred the present criminal appeal.

17. We have heard Sri Arvind Kumar Mishra as well as Giridhar Prasad Tripathi, learned counsel appearing on behalf of appellant and Sri Onkar Singh and Sri Arun Kumar Pandey, learned counsels appearing on behalf of complainant, and learned AGA representing the State, in extenso and taken through entire record.

18. Learned counsel for the appellant assailed the impugned judgment of conviction and sentence on various grounds and advanced several arguments in this respect. He submitted that accused/ appellant has been falsely roped in the case. I.O. has involved him in the instant case on basis of presumptions. The impugned judgment and order of the learned trial court is against the facts, law and weight of evidence on record. Learned trial court completely misread, misappreciated and miscrutinized the evidence on record and had sentenced appellant too severely.

19. Learned counsel for the appellant further argued that the appellant is a lady and is languishing in jail merely on the dint of suspicion. There on material inconsistencies and discrepancies in the prosecution version. There are blatant and glaring contradiction between the statement and witnesses of the prosecution had made improvements in their deposition and had narrated the manner of incident in such a way which cannot be perceived by ordinary course of diligence and prudence. There is material inconsistency in the postmortem reports. The investigation was also done in a pedantic and lackadaisical manner with the oblique motive of implicating the appellant on the undue pressure of witnesses of fact. The recovery of incriminating articles on the pointing of accused appellant is also highly untrustworthy and dubious. There is no material from the side of the prosecution to evince that the accused appellant had harbored any vengeance against the complainant Pramod as a consequence of which she had given poisonous devotional offerings, mixed with aluminum phosphide to his three children. The witnesses of fact are kith and kin of complainant and have supported the prosecution case fabricating a false story. The presence of the prosecution witnesses at the place of occurrence was highly doubtful and do not really commend any acceptance for their testimony. Tangible materials were elicited from the evidence of the prosecution witnesses in cross examination by which their testimony is not found to be trustworthy. The chain of evidence and circumstances is also not

complete, so as to conclusively establish that the accused/appellant is the actual perpetrator of dreadful crime. Some unknown miscreants who were nurturing animus and grudge against him, succeeded in their venomous and filthy design of eliminating his children by offering cardamom mixed with aluminum phosphide. The accused/appellant had no animus against the complainant and his children, whereby she had taken drastic step of offering cardamom with aluminum phosphide to them . The prosecution could also not prove any motive against the accused/appellant which actuated her to take such a drastic step of ruining her own life. In a gruesome cases where witnesses of fact are expected to give an account of true version, there is always probability of tutoring them because of influence of interested and partisan persons. There is no independent and impartial witness to support the prosecution version. The prosecution has failed to show that in all human probability, the act must have been done by the accused appellant. The conviction and sentence awarded to the accused/appellant under Sections 302/328 IPC is not sustainable and the impugned order dated 05.09.2005 may be set aside and the accused appellant may be set at liberty. It is also to be noted that the chain of facts and circumstances pointing towards the guilt of the accused appellant is not complete. The defence witness had given his statement in a very fair and impartial manner on the basis of which the entire prosecution story rests. The prosecution has failed to prove the guilt beyond reasonable doubt.

20. Per contra, learned AGA has opposed the contention raised by the learned counsel for the appellant contending that there is no embellishment in the prosecution version. The children died on account of devouring the devotional offerings (Prasad) mixed with aluminium phosphide. The prosecution witness has narrated entire incident in a very intrinsic and natural way. It is a case of homicidal death. The incident has taken place in broad day light at the public place in the presence of the witnesses, who supported the prosecution version in examination-in-chief as well as cross examination. There is a chain of evidence to demonstrate that deceased children were supplied cardamom mixed with aluminum phosphide, as a result of which, they fainted and ultimately succumbed to their injuries. The supplying of cardamom mixed with aluminum phosphide is sufficient to demonstrate that the accused-appellant had already nurtured animus and grudge to eleminate the victims. The accused-appellant was taken into custody and confessed to her guilt. The incriminating materials were recovered on her pointing out. In case, there is any variation or omission in the examination will not dismantle the entire prosecution version and will absolve the accused appellant from the guilt. The non-examination of any witness, who was illustrated in the list of charge-sheet will also not destroy the prosecution version in entirety.

21. In order to prove their case, parties have adduced the evidence. Let us examine, analyse and scrutinize the contentions, advanced by the learned counsel for the appellant and learned A.G.A, on anvil of the evidence adduced by them, the undisputed facts and circumstances and entire material on record. This opens door for us to enter into the prosecution evidence on record.

22. The prosecution has examined P.W.-1 Prem s/o Rajaram, who has deposed that present incident had occurred on

27.06.2004, He was present at his house. His younger brother Pramod in the company of his three children namely Annu aged about 11 years, Shivam aged about 8 years and Satyam aged about 4 years, had gone in a Buggi at his field at about 7.30 a.m. Pramod had sent his children to fetch water from the hand-pump located near the temple of Harijans. When they were returning towards the field, taking water in a container and appeared on the chakroad in front of road, Narendra (now deceased) and his wife Kaushalya (present appellant) gave cardamom to those children in a pieces of newspaper. Krishan Pal and Parveen alias Pravindra, hailing to the same village, were going towards their field had witnessed the process of handing over of devotional offer to those children. After devouring the devotional offering, those children had fallen fainted and withered. On information, the complainant, his brother Pramod and younger brother Ram Niwas, as well as, his son Sunil arranged to carry and admit those children in the nursing home of Dr. Narendra Kumar Tyagi, located at Khatauli. All the three children namely Annu aged about 11 years, Shivam aged about 8 years and Satyam aged about 4 years were declared dead by the doctor. Subsequent thereto, those children were brought at home. On 28.06.2004, when children were taken to bury, then Kishan Pal and Parveen disclosed that Narendra and Kaushalya had supplied cardamom to those children before him. On 28.06.2004 he had given information to the Police Station Ratanpuri through a written tehrir, scribed by Rakesh Kumar Sharma and duly signed by him, with respect to that incident. The said written report was duly marked as Ext. Ka-1. He had given application before the District Magistrate concerned on 27.04.2004 for autopsy deceased children because the doctors of the hospital were not conducting the post mortem. He had also proved the application exhibited as Ka-6/1. During the course of cross examination of PW- 1 this fact surfaced that Raj Pal and Kishan Pal s/o Sheo Raj were hailing from the same lineage and were witness of that incident. Praveen alias Pravindra s/o Daulat Ram was also hailing to the same pedigree and was also witness of the incident. The brother of Praveen was Om Prakash and the son of Om Prakash was Aadesh. He was also a witness of the incident. The complainant and Pramod were living in the same house. The house of Kishan Pal was located at a distance of 60 yards. The field where Pramod was working was in his possession. There was a demarcation line between the field of Praveen and Pramod. The field of Kishan Pal was located in the south east of the field of Pramod. The field of Shriniwas was located towards west. There was a distance of about 180 yards from the field of Pramod towards south path of temple. The house of the culprit was situated at a distance of 200 yards from temple. There were 8-9 houses in between. There was no school in the vicinity of offenders. He was informed by the children about the incident. At the place of occurrence, Pramod, Ram Niwas Sunil and a number of persons of the locality were present. Unconscious children were lying on the chakroad running towards the field of Pramod. Those children who were taken to Khatauli in unconscious condition were brought back at about 11.45 a.m. in dead condition. Pramod, Ram Niwas and Sunil had gone at the hospital in a motor cycle. The full particular of the complainant was noted by the doctor. Two children were declared brought dead. One child who was in an unconscious condition was being treated and during treatment he died. Pramod had gone at the police station from

Khatauli. Aadesh Kumar had also gone to Khatauli. Pramod had comeback to village in between 15-20 minutes after arrival of complainant. It was about 12.15 (noon) and the police personnel had also come with Pramod. He had not seen Praveen and Kishan Pal at the place of occurrence. When the corpse of children was brought from Khatauli, he did not see them. There was a gathering on the arrival of police personnel. The police personnel stayed in the village about 3'1/2 to 4 hours. In the meantime, he did not see Praveen and Krishna Pal. He could not recollect as to whether any person from the family of Praveen was present there. The daughter in law of Krishna Pal was present. Rajpal, Tejpal, daughter in law and his son were present there. The complainant and Pramod had accompanied to the police personnel who were carrying the corpse of those children. Praveen and Kishan Pal came across to the complainant on the next day at about 4 to 5 'O'clock, when the corpse of those children were to be buried. After autopsy the corpse of those children came in the village at about 1'1/2 to 2 'O'clock. Praveen and Kishan Pal and other people of village did not come at the night. There was distance of 14 to 15 house from the house of Praveen and 6-7 house from the house of Kishan Pal. Kishan Pal and Praveen did not come across to him on 27.06.2004. After burying the corpse of those children, the report was got written by Rakesh. Praveen and Kishan Pal were not present at the moment of getting the report lodged. The message was sent to relatives on telephone and Rakesh had come on the same night. Rajpal and Attar Singh had gone at the police station with the complainant. The house of the offenders was situated at a distance of 200 to 250 yards. This fact was not incorporated in the first information report that Kaushalya and her husband were playing the skill of black magic (Tantrik). This fact was divulged by him in his statement. The house of Sripat was located at a distance of 50-60 yard. The house of Sivani s/o Preetam was situated at a distance of 300 yards. Srikrishna and Siwani were also playing the skill of hocus pocus but they were not distributing the devotional offering. The complainant or his relative never approached the miscreants for the purpose of black magic. Narendra had got a case registered against complainant and Krishna Pal with respect to mar peet in which he was sent to jail and was released on bail. The said incident had occurred prior to 6-7 years. There has not been any property dispute between complainant and Narendra. He was not aware with respect to any legal proceeding between Deep Chand and Praveen. The police personnel arrived at the village in a span of 1-2 hours after registration of report. The team of police remained in the village at about 10-11 hours. The police personnel had gone at the place of occurrence. The police personnel came back at his house from the place of occurrence. The police personnel remained present at the field about 5 to 7 minutes. The devotional offering was not distributed to the village folk by the person who were getting the black magic done. He supported the prosecution version and the defence could not derive anything to belie the prosecution case. He narrated the prosecution story in a most natural way. He denied that he had lodged the first information report against them on account of grudge and animus. The narration of facts with respect to happening of said incident perpetrated by the accused leaves no shadow of doubt to suspect their conduct.

23. In authentication of its stand, the prosecution has examined P.W.-2 Krishna Pal who has averred that he was well familiar with the accused Narendra and his

wife Kaushalya. They are resident of same village. He was also well conversant with Satyam aged about 4 years, Shivam aged about 8 years and Km. Annu aged about 11 years, offspring of Pramod. The progeny of Pramod namely Satyam, Shivam and Km. Annu died of about 1'1/2 years back. On the fateful day of occurrence, the P.W.2 Krishnapal and Praveen hailing to the same village were going towards their field. It was about 9.30 a.m. when the aforesaid children reached in the proximity of Chak road, P.W.2 Krishna Pal and Praveen were also going towards that chakroad. Narendra (accused) tore a piece of paper and supplied to Kaushalya (now appellant). In the piece of newspaper, cardamom was placed. The said children began to devour the cardamom before them. The children proceeded towards their field and P.W.2 Krishna Pal and Praveen proceeded towards their fields. P.W.2 Krishna Pal came back from his field at the evening, it was informed by his wife that three children of Pramod had expired. The last rites of the children was held next day morning.

24. It was divulged by P.W.2 Krishna Pal to Prem at the crematory ground that the accused had supplied devotional offering (Prasad) to those children. He had given the description of the adjoining area. There is a chakroad towards east abutting the field of Pramod. The field of Praveen is located towards east of chakroad. The field of P.W.2 Krishna Pal was not located towards south of the field of Pramod. The field of Ram Niwas and Vinod was located. The field of P.W.2 Krishna Pal was located towards east-south. The sugarcane crop was standing in the field of Praven at that point of time. The tubewell was installed in the direction of north-west of the field of Pramod. The tubewell was standing towards the corner of field and Chakroad. The field of Sriniwas was located towards west of Pramod. Sriniwas did not have any other field except that one. P.W.2 Krishna Pal had about 75 Bigha land and Praveen had about 20-22 bigha land adjoining to each other towards south. Pramod had about 8-9 Bigha land. P.W.2 Krishna Pal did not have any information what Pramod was doing in his field. In the field of Pramod, the crop of sugarcane was existing and the height of sugarcane was upto knee. P.W.2 Krishna Pal had seen Pramod. Pramod was working with shovel in his field. P.W.2 Krishna Pal was looking after his bottle gourd (Lauki). P.W.2 Krishna Pal was not aware with respect to functioning of Praveen. He could not see Pramod and Praveen from his field. His house was situated at a distance of 5-6 house. The house of Rajpal and Tejpal was situated in the vicinity of his house. P.W.2 Krishna Pal remained present at night in his house. During cross-examination, it has come in light that accused Narendra had lodged a report against P.W.2 Krishna Pal, Tejpal, Sudhir, Rajpal and Prem in the year 1999 with respect to marpit. In that case, P.W.2 Krishna Pal was released on bail. He has proved his presence in his field at the crucial moment of incident. He supported the prosecution case and has unfolded the incident without any embellishment.

25. In corroboration of occurrence, the prosecution has also examined P.W.-3 Parvindra Sharma who has averred that he was well conversant with accused Narendra and his wife Kaushalya. On 27.06.2004 he along with Kishan Pal was going towards their fields at about 9.30 a.m. Annu aged about 11 years, Shivam aged about 8 years and Satyam aged about 4 years, the children of Pramod, were going towards their field taking water in a container.

Narendra and Kaushalya were behind the children. Narendra, taking out from his pocket, gave cardamom in wrapper to his wife Kaushalya and piece of news paper Kaushalya had given the said cardamom to those children, who devoured the same and proceeded towards their field in front of these P.W.3 Parvindra Sharma and Kishan Pal proceeded towards their field. He returned from his field in the evening. His wife informed him that three children of Pramod had expired. P.W.3 Parvindra Sharma immediately went at the house of Pramod. There was none at his house. The ladies were lamenting and bewailing. He told the fact supplying cardamom to those children after their last cremation, to Prem at about 6-6:30 a.m. Narendra and his wife were playing black magic. In his cross-examination, the witness stated that those children had met him at the turning point of chakroad leading to road. He is at a distance of 200 metres. He had gone to remove the shrubs from his field. Pramod was present and was doing some work in his field at a distance of 60 paces from Tubewell. The tubewell of Pramod was located at a distance of few paces from chakroad. There was a chakroad in between his field and field of Pramod. The field of Kishan Pal was also located towards south to his field. The field of Vinod and Ram Niwas was located towards south to the field of Pramod. This fact was brought in the notice of Station Officer concerned that Narendra was playing black magic and in case Station Officer concened did not mention it in his statement, he could not be held responsible for it. He made his best to prove the prosecution case and the defence could not elicit anything to belie it. The defence had not been able to cull out any aberration or deviation in the prosecution to create any suspicion about its genesis rather P.W.3 had fully proved his presence on the fateful day of occurrence and divulged the shape of incident in a very intrinsic and natural manner.

26. In corroboration of the prosecution case P.W.-4 Dr. Narendra Kumar Tyagi was examined, who has deposed that he had set up a Nursing Home in Kasba-Khtauli, which has got its popularity in the name and style of Tyagi Nursing Home. On 27.06.2004 at about 10:45 a.m. Ram Niwas had brought three children namely Annu aged about 11 years, Shivam aged about 9 years and Satyam aged about 3 years, for treatment in his Nursing Home. Ram Niwas stated that he is Tau of the children. He examined those three children. Shivam and Satyam had expired prior to their admission in his nursing home. Km. Annu was struggling with life. He statrted treating Annu by drip injection hydrocortison 100 ml and injection Periset. After lapse of about 5 minutes, she succumbed to cardiac arrest. The doctor opined that all the three children died of devouring poisonous stuff. P.W.4 Dr. Narendra Kumar Tyagi had presented relevant OPD Register in which at the serial numbers 2457 name of Shivam, at 2458 Satyam and 2459 name of Annu respectively was mentioned. He proved that this material was exhibited as Ex. Ka-2/1. It was also proved that those children were brought by Ram Niwas. The children were drenched in excreta and urine. He proved the OPD Register and after tallying from original represented photo copy registered and proved it Ext. Ka-2/1. There was clear mention with respect to admission of Shivam, Satyam and Annu in Tyagi Nursing Home in the OPD register. Defence could not draw any benefit to create suspicion in prosecution story.

27. The prosecution has examined PW- 5 Dr. Yogendra Tirkha, who

conducted autopsy of the deceased children. He has stated that he was posted as Physician in District Hospital Muzaffar Nagar on 27.06.2004. On that fateful day, in compliance of the directions of District Magistrate Kritrim Prakash and Chief Medical Superintendent, District Hospital, Muzaffar Nagar, he had conducted autopsy of the deceased children as under:-

(I)- Post-mortem of deceased Shivam:- aged about 8 years. The body was brought by Constable 4165 Ram Veer and Constable 73 Chatarpal in a sealed cover and the same was identified by them. He conducted autopsy of Shivam on 27.06.2004 at about 10.00 p.m. The death of that child had occurred half day before autopsy. The child was average built. There was rigor mortis all round the body. The lip, tongue and nail were of blue colour. There was no external injury on the person of that child. In the internal examination membranes of brain was congested. Both lungs were congested. The membranes of stomach was congested. There was semi-digested food. Cause of death could not be ascertained. Hence, the Viscera was preserved. The viscera was sealed in two containers and was given to the constables.

(II) Post mortem of deady body of Km. Annu:- Deceased was aged about 11 years. The corpse of Annu was brought by the same police personnels. The corpse was duly identified by them. He conducted autopsy on 27.06.2004 at about 10:30 p.m. The death had occurred about half day before the autopsy. The girl was of average built. There was rigor mortis all over the body. Lips, tongue and nail were of blue color. There was no visible injury on external examination of the corpse. In the internal examination, congestion was found in the membranes of brain, both lungs, stomach and spleen. Semi-digested food of black colour was found in the stomach. Uterus was not gravid. The cause of death could not be ascertained. Hence, Viscera was preserved. It was sealed in two containers and was given to the police personnels.

(III)-

The autopsy of Satyam, aged about 4 years, was done at about 11:00 p.m. The corpse of Satyam was conducted on 27.06.2004 at 11.00 p.m. brought by the same police personnel. The corpse was duly identified by them. The death had occurred about half day before the autopsy. The boy was of average built. There was rigor mortis all over the body. The lip, tongue and nail were of blue colour. There was no injury on external examination. In the internal examination, congestion was found in the membranes of brain, both lungs, membranes of stomach, and spleen. There was semi-digested food of black colour in the stomach. The cause of death could not be ascertained, viscera was preserved. The viscera was sealed in two container and was given to the constables, who brought the dead bodies.

(IV)- All the three deceased met with their death because of taking some poisonous substance. Their death is possible on 27.06.2004 at about 9-10 a.m. The post-mortem reports of those dead children were prepared by Doctor PW-5 Dr. Yogendra Tirkha in his own hand-writing and signature. Doctor has proved the autopsy report of of the three deceased as Ext. Ka-3, Ka-4 and Ka-5 respectively. In his cross-examination DW- 5 Dr. Tirkha has opined that the cause of death could not be ascertained, so viscera was present. Aluminum sulphide is a substance of expunjent. He cannot say that after taking aluminum phosphide expunjent smell originate because such smell also comes after taking other kind of poisonous substance. He do not remember that any

expunjent smell was found or not from the dead bodies. He has not observed any remark about omitting and dysentery which is soaked in his cloth. Generally, such remarks are made on demand of the police. After two to three hours of consuming aluminum phosphide, the body of the person taking it, starts swelling.

Some gas is formed that the body starts bursting at various places after some time. It could be affirmed only by forensic experts.

28. The prosecution, has examined P.W.6 H.C.-169 Harendra, in order to substantiate the prosecution version. He stated that on 28.6.2004, he was posted at Police Station Ratanpuri, District Muzaffar Nagar. On that day, he had prepared the Chik FIR vide Case Crime No. 81 of 2004 in his hand-writing and signature. He proved chik FIR as Ext. Ka- 6. He drew kaimi G.D. No.12 at 8:00 a.m. on 28.06.2004 and simultaneously, prepared its carbon copy in the same process of original in his own writing and signature. A written information (tehrir) was given at the police station concerned with respect to said occurrence of 27.06.2004. The station officer D.N. Verma proceeded at the place of occurrence. D.N. Verma, Station Officer did not come back on 27.06.2004. The other constables namely Munshi Lal Sub-inspector, H.C.P. Yashpal Singh, C-217 Ashok, C-659 Saifuddin, C-754 Arun Kumar, C-73 Chatar Pal, C-165 Ramveer also did not come back at the Police Station on 27.06.2004. The Station Officer D.N. Verma came back at the Police Station on 28.06.2004 at about 6:20 a.m. alongwith all constables except two, who carried the corpse of those children. On returning at the Police Station, D.N. Verma, Station Officer, had produced one sealed bundle, one newspaper dated 13th June and the inquest report. These articles were deposited at the Malkhana. Station Officer D.N. Verma again departed at 8:00 a.m. on the same day. He came back at 6:30 p.m. No other case was registered at the Police Station concerned barring to the present one. Pramod had named three persons, namely, Kishan, Narendra and Simakshi with respect to distribution of devotional offerings Prasad. This fact was incorporated in the report that his children had succumbed to death on account of devouring cardamom. The defence could not draw any material suspicion in the cross examination of P.W.6 Harendra. He had presented vivid description with respect to the manner of incident and proved the same.

29. To bring home the charges leveled against the accused, the prosecution examined P.W.7 D.N. Verma, Station House Officer, He has disclosed that he was posted as Station House Officer Ratanpuri on 27.06.2004. He had entered in G.D. the narration of case on the basis of written information furnished. On the said information, he reached at the place of occurrence, where the dead body of children were lying. He visited the house of Pramod Kumar in the company of S.I. Munshi Lal, H.C.P. Yash Pal Rana, Constable Ramveer, Constable Ashok Kumar and constable Chatarpal. The inquest report of dead children was prepared on his direction. He proved the signature and writing of S.I. Munshi Lal, who was posted with him at Police Station Ratanpuri. He described the process of preparing the inquest report and sending the dead bodies of children to mortuary for autopsy. He proved the recovery of cardamom and the piece of news paper, in which, devotional offering was given to the deceased children. P.W.7 D.N. Verma had

described the entire thing in a very natural and fair manner. Nothing was left to be proved by him which would have created a suspicion in the manner of incident and process of proving the recovery of cardamom and the piece of newspaper in which few cardamom was stuck. All the materials were duly exhibited.

30. Subsequent thereto, on 28.06.2004, Prem had given a written information (tehrir) Ext Ka-1 at the Police Station concerned, on the basis of which, a Case Crime No. 81 of 2004, under Sections 302/328 IPC was registered against Narendra (since deceased) and Smt. Kaushalya.

31. During the course of investigation, on 28.06.2004 he had copied the written information in the case diary and noted down the statement of scribe of FIR. He noted in the case diary, the statement of first informant, inquest report with respect to Annu, Shivam and Satyam, recovery of devotional offering (cardamom) and the pieces of newspaper etc. The statement of the witnesses of inquest were also recorded. The statement of Krishna Pal, the witness of the incident was recorded. He prepared the site plan of chak raod, place of occurrence, on the pointing of witnesses and informant. The original site plan was duly verified and proved by him. The said document was marked as Ext. Ka-23. The accused persons were arrested on 28.06.2004 at the tip off of police sympathizer. Accused Narendra had confessed the offering of cardamom to three children. He also disclosed that from which newspaper, a piece was torn could be brought from the house. Thereafter, accused Smt. Kaushalya was interrogated she disclosed that poisonous devotional offering was given. The remnant of devotional offering was lying in her house which could be given. The police personnel went at the house of accused persons where Narendra and his wife, they recovered incriminating devotional offerings from the drawer of pretty deck in the presence of Dharmpal and Rajpal. The recovered incriminating articles and piece of newspaper were marked as Ext. Ka-24. The said materials were duly proved by him. Both accused persons were kept at the police station at 18:50 'O'clock. On 30.06.2004, constable Ramveer Singh was given incriminating materials collected from the place of occurrence with respect to the said incident in six containers inclusive of viscera pertaining to deceased Annu, Shivam and Satyam for chemical analysis. This material aspect was also entered in the Case Diary. On 04.07.2004, the statement of Smt. Poonam w/o Pramod Kumar and the witnesses of fact namely Suneel, Praveen was entered in the Case Diary. On 10.07.2004, the statement of Dr. Narendra Kumar Tyagi was recorded. After carrying out the investigation, the Investigating Officer submitted the charge-sheet against the accused appellant and Narendra. In the court of Learned CJM. The witness duly proved the charge sheet as Ext. Ka-25. Viscera preserved was sent to forensic laboratory Agra.

32. The viscera report of the forensic laboratory Agra with respect to absorption of aluminum phosphide in the cardamom as a devotional offering, was obtained and proved as Ext. Ka- 26.

33. In Viscera report following facts were found:-

Sl. No.	Exhibits Particulars	Sl. No.	Exhibits Particulars
1	stomach	11	Spleen
2	आंत का टुकड़ा	12	परिरक्षी सूखा नमक

3	लीवर का टुकड़ा पित्ताशय सहित	13	stomach
4	एक किडनी	14	आंत का टुकड़ा
5	Spleen	15	लीवर का टुकड़ा पित्ताशय सहित
6	परिरक्षी सूखा नमक	16	एक किडनी
7	stomach	17	Spleen
8	आंत का टुकड़ा	18	परिरक्षी सूखा नमक
9	लीवर का टुकड़ा पित्ताशय सहित	19.	पैकेट में थोड़ा सा सफेद और भूरे रंग का पदार्थ जिसको प्रसाद इलायची दाना बताया गया है
10	एक किडनी	------	----------

परिणाम:- विसरा के भाग (1-5),(7-11), (13-17) व (19) में एल्युमिनियम फॉस्फाइड विष पाया गया है, किन्तु यह वस्तु (6), (12) व (18) में नहीं था| रसायनिक विधिया प्रयोग की गई| अन्य रसायनिक विष के प्रयोग नकारात्मक रहे, प्रयोग के समय समस्त सावधानिया ध्यान में रखी गई|

Aluminum phosphide is a highly toxic stuff, which causes profound shock, myocarditis and multi-organ failure leading to death. The defence could not draw any material to belie the prosecution case, rather there has been consistent material in support of prosecution pointing towards the guilt of accused persons.

34. During the course of interrogation in the trial, opportunity was given to the appellant to put his defence and explanation in rebuttal of the charges leveled against her.

35. The defence had produced D.W.1 Abdul Haq, Assistant Record Keeper, Muzaffar Nagar. He had produced the daily activities register. Police Station Ratnapuri. According to Daily Activities Register, on 27.06.2004, Constable Dharmpal Singh was entrusted the work of surveillance of Police Station. The said constable was not sent anywhere on 27.06.2004. In Report No.16 at 18:05 hours, it is incorporated that Constable Dharmpal Singh was entrusted the work of serving summon to Ram Manohar, in Government Hospital, Muzaffar Nagar. That summon dated 30.06.2004 was issued from the A.D.J., Court No.1. Thereafter, there was no mention of any return of Constable Dharam Pal Singh on 27.06.2004. According to Daily Activities Register dated 28.06.2004, the return of Constable Dharmpal Singh was entered in Report No.11 at about 7:45 a.m. There was no mention in Daily Activities Register with regard to further departure of Constable Dharmpal Singh on 28.06.2004. According to Daily Activities Register dated 27.06.2004, in Report No.16 at about 12:05 'O'clock, there is mention of written information of Pramod Kumar. The said information was copied in G.D. There is also mention of departure of D.S. Verma, Station Officer in the said G.D., with police personnel, but there was no mention of return of D.S. Verma, Station Officer in the G.D. dated 27.06.2004. He did not lend support to G.D. dated 27.04.2004 and 28.04.2008. It was disclosed by him that G.D. was in the supervision of Surendra Kumar Sharma, Record Keeper, S.S.P. Office. In his absence, D.W.-1 Abdul Haq used to look after his work. There is cutting in G.D. Report No.22 at about 22:30 hours on 27.06.2004. D.W.-1 Abdul Haq could not mention the duty hour of Constable Dharmpal Singh on 27.06.2004. There was also overwriting in G.D. dated 27.06.2004 bearing Report No.6, site plan bearing Serial No.15. There was no signature on the cutting. D.W.-1 Abdul Haq could not disclose the name of person, who had put signature on G.D. dated 28.06.2004 bearing Report No.11 at about 7:45 hours. He disowned that he had given this statement in collusion with accused persons. There had been some aberration and deviation in the statement of defence witness Abdul Haq, who had created some suspicion with respect to verity and probity of prosecution story.

36. Learned counsel for the appellant has submitted that appellant has been

falsely roped in the case, as complainant had grudge anguish and animosity against her. Learned A.G.A. refuted the contention of the appellant and submitted that there was no enmity of complainant against the appellant. In this behalf, it may be mentioned that it is axiomatic that enmity is a double edged weapon. On the one hand, it may be instrumental to rope the accused in a false case, at the same time it may be the real cause of the incident too. Therefore, benefit of the enmity may go to either of the parties, depending upon the facts and circumstances of each case. The moot point is whether at the time of incident there existed any enmity between complainant and the appellant.

37. PW-1 Prem has stated in his testimony that accused Narendra has lodged a criminal case against him and Krishna Pal regarding an incident of marpeet, 6-7 years ago in the year 1999 before the present incident. PW-2 Krishna Pal has corroborated the statement of PW-1. However, both the witnesses denied lodging of any FIR against the appellant-accused and testifying out of jealousy. PW-3 has stated that Narendra has never lodged any report against him. There is no land dispute between Narendra and him. However, a lis is pending between his Tau and Narendra, but he has no concerned with his Tau. Learned counsel for the appellant has tried to show that the appellant has been falsely implicated due to incident between the complainant and the appellant. The complained incident related to simple marpeet. The said incident is about 6-7 years old to the present incident. Even if, taken it to be true, the burden of proving this facts lies upon the appellant that she was roped due to that enmity, but appellant failed to discharge her burden in this behalf. It is common knowledge that in villages some disputes arise on trivial pretext amongst the rustic villagers. But they are solved due to lapse of time suo motu. In the present case, the said incident of small marpeet, has occurred 6-7 years prior to the present incident. Even FIR has not been lodged of that incident by either of the parties. Therefore, it could not be said to be of such a nature, which could be the reason to rope appellant falsely, leaving the real culprit. Therefore, the argument of learned counsel for the appellant pertaining to enmity is not tenable.

38. Learned counsel for the appellant has audaciously urged that there was no motive for the appellant to commit the aforesaid crime. The prosecution could also not prove any motive against the accused/appellant which actuated her to take such a drastic step of ruining her own life. In a gruesome cases where witnesses of fact are expected to give an account of true version, there is always probability of tutoring them because of influence of interested and partisan persons. Learned A.G.A. has refuted this argument of the learned counsel for the appellant. He went on arguing that accused-appellant had strong motive of eliminating to the children as she was well aware that aluminum phosphide is highly toxic inorganic compound and can cause irritation of the nose, mouth, throat and lungs leading to death of the consumer. The testimony of the witnesses is trust worthy and reliable. No explanation has been given by the accused appellant as to how and in what manner the victims died of devouring devotional offerings. The evidence led by the prosecution witnesses is consistent with the hypothesis of the guilt of the accused appellant. There is no other hypothesis except the guilt of the accused appellant. Mere conviction and sentence as well as

incarceration of the accused/ appellant will not assuage or mitigate the severity and barbarity of offence wherein innocent children have died of in a grotesque and ruthless manner. The death of the minor children in such a planned manner shook the heart of the general folk. The appellant has failed to bring on record any material as to why she was implicated leaving to the actual culprit. It has also been argued by learned AGA that even in case there is no motive but prosecution case is proved by eye witness account of credible and reliable evidence, motive looses its importance. He relied upon Ramasheesh vs, Jagdish Singh 2005 A.I.A.R. 62 in support of his argument.

39. In view of the above submissions of learned counsels for the parties it may be mentioned that every criminal trial is a voyage of discovery in which nectar in the form of quest is churned and gleaned from the fathomless ocean. A duty is cast on the Presiding Officer to explore every avenue in order to discover the truth and advance the cause of justice.

(I) In present case incident has taken place in broad day light, in open place. PW- 2 Krishna Pal, PW- 3 Pravindra Sharma and PW- 7 D.N. Verma has proved the prosecution case by there cognate, credible and trustworthy evidence. In Ramasheesh (supra) and in a plethora of other cases Hon'ble Apex court has held that were prosecution case is proved by a eye witness upon of relible and credible evidence, motive looses its importance and occupies the backseat.

(II) Besides, PW- 1 Prem, PW- 2 Krishna Pal and PW- 3 Pravindra Sharma has clearly stated in their statement that accused/ appellant who hails from Brahman Community are engaged in black magic activities for personal gains. There are many other people in the village who are engaged in the same activities. Such people used to do these activities adopting tantra mantra (occult) techniques in favour of their clients. Appellant might have been actuated to commit the incident in order to do favour of some client or even for herself, for she knew the consequences of taking aluminum phosphide and there is clear evidence that supplying the poison in sugar coated cardamom to the innocent teen-aged children without showing any humanitarian attitude.

(III) Learned counsel for the appellant has contended that appellant is not engaged in necromancy activities and there is no reference in FIR of this fact and the same disclosed by the witnesses for the first time in their deposition in the Court. It is nothing but afterthout improvement in the prosecution version. Learned AGA opposed this contention. In this behalf it may be mentioned that it is well settled that FIR is not an encyclopedia, where in each and every minutes detail of incident be mentioned. In a case where three minor innocent children have died in a family, it is not expected that the complainant will think the things in technical manner or with a view to involved criminal litigation in a criminal court. All the three witnesses of facts have vividly deposed that appellant are engaged in occult activities. Although appellant in her statement under section 313 Cr.P.C has taken a defence that she has not distributed prasad. However, she has not adduced any evidence in corroboration of her statement. Distribution of such kind of devotional offering (prasad) to innocent victims might be a technique to impress upon their clients.

(IV) As it will be further discussed hereinafter that the prosecution has successfully proved by direct and

credible evidence, its case, against the appellant. Hon'ble Apex court in a catena of decisions have observed that where in a criminal trial prosecution has established it case by direct and credible evidence, motive looses its importance and occupies backseat. In the present case also prosecution has established its version by credible and trustworthy evidence,therefore, motive looses its importance. Besides, there is a strong motive to commit the crime in view of occult activities of the appellant. therefore, motive is diluted and did not affects the prosecution case by any means.

40. Learned counsel for the appellant has vehemently argued that witnesses produced by the prosecution are partisan, inimical to the appellants and interested and not independent witness. They are unreliable and as such no credence can be attached to their testimony and their deposition is not reliable. Hence, their evidence deserves to be discarded. Learned A.G.A. refuted the contention of the learned counsel for the appellant. He submitted that ordinarily a closed relative would not spare the real culprit who has caused the death and implicate an innocent person. It will be beneficial to have a bird's eye view of the law on the issue and evaluation of testimonies of such witnesses.

41. The aforesaid submission of the learned counsel for the appellant that prosecution witnesses are partisan and inimical to appellant, was thoroughly considered by the Hon'ble Apex Court in case of ***Daleep Singh Vs. State of Punjab reported in AIR 1953 SC 364*** and enunciated the following principles:-

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth."

42. In a three Judges Bench of the Supreme Court of India in **Hari Obula Reddy Vs. State of A.P. reported in (1981) 3 SCC 675** observed as under:-

"13. ...it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon."

43. Again, in ***S. Sudershan Reddy and others Vs. State of A.P reported in (2006) 10 SCC 163***, the Hon'ble Supreme Court has held as under:-

"12. We shall first deal with the contention regarding interests of the witnesses for furthering the prosecution

version. Relationship is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal the actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyze evidence to find out whether it is cogent and credible.

15. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dilip Singh case in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses."

44. It is well known that there may be three kinds of witnesses:-

(I) Wholly reliable,

(ii) Wholly unreliable, and

(iii) Partly reliable and partly unreliable,

There is no problem to evaluate testimony of wholly reliable or wholly unreliable witnesses, but it is different to deal with the witness, who are partly reliable and partly unreliable. The court has to be very careful in evaluation of such kind of witnesses.

45. Thus, Hon'ble Apex Court in its enumerable decisions has categorically held that if evidence of an eye-witness, is found truthful, it can not be discarded simply because the witnesses were relatives of the deceased. The only caveat is that the evidence of relative witnesses should be subjected to careful scrutiny and accepted with caution.

46. It is germane to point out here that the prosecution has examined as many as seven witnesses in support of its version. Out of which PW-1 informant Prem, is the elder brother of the Pramod, whose deceased children has fallen prey of the incident and Tau of the deceased children. Although, he is not an eye-witness of the incident, but on receiving the information about the diabolic and faint state of health of the deceased children, he reached at the spot and was instrumental in taking the deceased children for medical treatment to Tyagi Nurshing Home at Khetauli and informing police for afterward proceedings and inquest, postmortem and cremation of the deceased children PW-2 Krishna Pal and PW-3 Ravindra Sharma are public witnesses of facts. PW-4 Dr. Narendra Kumar Tyagi and PW-5 Dr. Yogendra Tirkha are the witness of medical treatment and post-mortem. PW-6 is the head moharrir and formal witness, while PW-7 S.H.O. D.N. Verma is the Investigating Officer. Thus, PW-4 to PW-7 are formal witnesses. PW-2 and PW-3 are independent witnesses, so there is no possibility for them to implicate the appellant falsely. As discussed herein above, defence has not been able to point out any such enmity of PW-1 informant Prem, PW-2 Krishna Pal and PW-3 Ravindra Sharma, against appellant which could be considered a cause of false implication of the appellant. Therefore, their evidence could not be said to be devoid of credence and could not be discarded. Nevertheless, in view of the law discussed above they should be subjected to careful scrutiny and accepted with caution.

47. Learned counsel for the appellant has urged that first information report in this case is inordinately delayed and ante-timed. It is the result of embellishment

which is a creation of after thought. The incident in the case alleged to have occurred on 27.06.2004 at 09:30 a.m., while its FIR has been lodged on 28.06.2004 at 08:00 a.m. the distance of the place of occurrence from the police station is about six kilometers only. The prosecution has not furnished any satisfactory explanation of this delay. Learned A.G.A has dispelled the contention of the appellant, and argued that it was a case of day light murder of two teenaged brothers and a sister. After taking the sugar coated cardamom seeds (elaichi dana) all the three children reached in the sugarcane field, where their father Pramod was working. They lost their consciousness and fainted in the field. Pramod informed to his elder brother Prem about their condition, then Prem and Ram Niwas reached there and taken them to the hospital of doctor Narendra Kumar Tyagi, for treatment. By then two of the children were found already dead, while the third one died after some time. Pramod father of the deceased children informed to the police station concerned. The perusal of the record shows that his information was entered in to the General Diary No.16, 12:05 p.m. dated 27.06.2004, Police Station Ratan Puri. The carbon copy of this G.D. is on record. PW-7 Investigating Officer D.N. Verma has proved its entry in G.D. by uttering that he has entered the scribed information given by Pramod Kumar on 27.06.2004 at about 12:05 p.m., in this G.D. He has further stated that on the basis of the information he proceeded to the place of occurrence i.e. the house of Pramod kumar, where the corpses of the children were lying and under his supervision the inquest proceeding were conducted, over which, signatures of the witnesses were obtained. He proved the inquest reports as Ext. Ka-7, 12 & 17 respectively. After completion of inquest proceedings, Photo Lash, Chitthi C.M.O., Chitthi R.I., Challan Lash, were prepared and the dead bodies of the children were wrapped in clothes and sealed. The witness proved these papers as Ext. Ka.-7, Ka.-8, Ka.-9, Ka.-10 and Ext. Ka.-11. Ext. Ka.-12 to Ext. Ka.-16 and Ext. Ka.-17 to Ext. Ka.-21. The dead bodies were sent to the district hospital for the postmortem. All the proceedings were completed on 27.06.2004 on the basis of information entered in to above stated G.D. No.16 by PW-6. From the facts and the circumstances of the case it emanates that the crime has been committed in a very brutal and diabolical manner shaking the conscience and heart of public at large. Naturally the entire family of the deceased children would be engulfed in utter disturbance and sorrow. Nevertheless, the investigation continued through out and further on-wards when on 28.06.2004 the written tehrir was presented by the complainant Prem, wherein he disclosed the names of the accused also. Thus, there was no time and opportunity to torn and twist the facts of the case and to lodge the F.I.R. with complete details disclosing the name of real culprits as furnished by the eye witnesses PW-2 and PW-3. Thus, the delay in lodging the FIR in a formal way is self-explanatory and it did not adversely affect the prosecution case.

48. Learned counsel for the appellant has argued that prosecution has not examined prime witnesses mentioned in charge sheet, nor has it explained as to why theses witnesses has not been examined. On this count adverse inference may be drawn against the truthfulness of the prosecution case. Learned A.G.A. has repelled the contention of the learned counsel for the appellant. In a very illustrating judgment Vadivelu Thevar v.

State of Madras AIR 1957 SC 614, the Apex Court has held as under:-

11. ".The contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in Section. 134 which by laying down that "no particular number of witnesses shall, in any case, be required for the proof of any fact" has enshrined the well recognized maxim that "Evidence has to be weighed and not counted." It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. ."

The prosecution having examined two eye witnesses, of the incident PW-2 Krishan Pal PW-3 Parvindar Sharma, who have witnessed appellant giving sugar coated cardamom to the deceased children. PW-7 I.O. D.N. Verma has recovered the pieces of news paper in which sugar coated cardamon in wrapped and supplied to the deceased children from the place of occurrence and from the dressing table of the appellant. Above all the cardamom and Viscera of the deceased sent to the forensic laboratory Agra has confirmed administering of Aluminum phosphide to the children. In these circumstances prosecution case established beyond reasonable doubts, Although several names of the witnesses are mentioned in the charge sheet but the law as discussed above there was no necessity of multiplying the number of witnesses and no adverse inference could be drawn against the prosecution merely on the ground that some of the witnesses mentioned in the charge sheet has not examined. If the incident had not taken place as suggested by the prosecution but had happened in a different manner, there was no impediment in the way of the accused-respondents to examine the aforesaid left out witnesses as defence witnesses, but they did not chose to do so.

Having given our careful consideration to the submissions made by learned counsel for the parties, we are of the opinion that only on the basis of the non examination of the left of the witnesses discarding the prosecution case are also unsustainable in law.

49. Learned counsel for the appellant has argued that the learned trial court has not been afforded the opportunity to be heard on the sentencing as it is mandatory under Section 235(2) Cr.P.C. Learned AGA had vehemently opposed this argument. He submitted that a perusal of the impugned judgment and order dated 05.09.2005 itself exhibit that ample opportunity was accorded to the appellant to present her case on sentencing. The perusal of the impugned judgment also reveal that she had utilized the opportunity and presented her case on the point of the sentencing before the learned trial pronounced final verdict. In corroboration of this facts following relevant extract from the judgment is reproduced here under :-

"..... वर्तमान मामले में अभियुक्तगण के विरुद्ध पर्याप्त विश्वस्नीय साक्ष्य पत्रावली पर उपलब्ध है प्रत्यक्षदर्शी साक्षियों ने अभियुक्तगण को स्वयं इलायची दाना अखवार में दिया जाना देखा, जिसके खाने से तीनो बच्चों की मृत्यु हुई और उक्त मृत्यु का समर्थन भली भाती डॉक्टरी परीक्षण रिपोर्ट व विधि विज्ञान प्रयोगशाला द्वारा दी गई रिपोर्ट

से होता है अभियुक्तगण के विरुद्ध उन्हें झूठे फ़साये जाने का कोई आधार पत्रावली पर नहीं है मेरे विचार से अभियुक्तगण के विरुद्ध अभियोजन मामले को सिद्ध करने में सफल रहा है और वह दोष सिद्ध किये जाने योग्य है|

दंड के प्रश्न पर यदि वो कुछ कहना चाहता है तो उन्हें सुनवाई का अवसर प्रदान किया जाता है|

ए.स./डी.

दिनांक: 05.09.2005 विशेष अपर सत्र न्यायाधीश

मैने अभियुक्त को दंड के प्रश्न पर सुना|

आदेश

अभियुक्त नरेंद्र की मृत्यु होने के कारण उसके विरुद्ध कार्यवाही समाप्त की जाती है तथा उसकी पत्नी को धारा 328 भा. दं. सं. के अंतर्गत दस वर्ष के कठोर करावास के दंड से तथा धारा 302 भा. दं. सं. के अंतर्गत आजीवन करावास के दंड से दंडित किया जाता है| उक्त दोनो सज़ाये साथ-साथ चलेंगी|

एस/डी

दिनांक: 05.09.2005

विशेष अपर सत्र न्यायाधीश

यह निर्णय आज दिनांकित और हस्ताक्षरित होकर खुले न्यायालय में सुनाया गया|

दिनांक: 05.09.2005

एस/डी

(विशेष अपर सत्र न्यायाधीश)

Thus, we fined that the argument the learned counsel for the appellant is devoid of force.

50. Learned counsel for the appellant has also contended that there is no reference of the statement of the appellant under section 313 Cr.P.C. which indicated learned trial court has passed the impugned judgment in a hurry with out taking care of the defence case. Learned AGA audaciously opposed the argument of the learned counsel for the appellant and submitted that statement of the appellant was recorded on every point of evidence which goes against the appellant, in a marathan exercise in question and answer forms and appellant has answered each question voluntarily. So it is ridiculous that no mention of the statement 313 Cr. P.C. has been taken while pronouncing the impugned judgment.

51. In view of the rival contentions of the learned counsels for the parties on the issue raised herein above, it will be beneficial have an bird eye view of the provision of section 313 Cr.P.C which reads as under:-

"Section 313. Power to examine the accused:-

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—

(a) may at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence

for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

[(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this section.]"

52. Thus, Section 313 Cr.P.C. envisages the power of the trial court to examine the accused to explain the evidence against the accused. It is fundamental principle of natural justice is that no one should be condemned unheard. It provides an opportunity to the accused to enable him to explain the facts and circumstances of the case and adduced evidence against him. If the lower court fail to give an opportunity to him, he is entitled to ask appellate court to place him in the same position as he would have been in, had he been asked. However it is the discretion of the court to question at any stage of the trial.

53. It was held by Honorable Supreme Court in the case of ***Raj Kumar Singh @ Raju @ Batya Vs State Of Rajasthan reported in AIR 2013 SC 3150***, in para no.25 that :-

"In a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice i.e. audi alterum partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him and have to be excluded from consideration."

54. The purpose, procedure and consequences of examination of accused in 313 examination was discussed elaborately by Apex Court in ***Sanatan Naskar & Anr vs State Of West Bengal reported in AIR 2010 SC 3507:-***

" ....The answers by an accused under Section 313 of the Cr.PC are of relevance for finding out the truth and examining the veracity of the case of the prosecution. The scope of Section 313 of the Cr.PC is wide and is not a mere formality. Let us examine the essential features of this section and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Cr.PC. As already noticed, the object of recording the statement of the accused under Section 313 of the Cr.PC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the

accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and, besides ensuring the compliance thereof, the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or, in the alternative, to explain his version and reasons, for his alleged involvement in the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, 54.made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) of Cr.P.C. explicitly provides that the answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against the accused in any other inquiry into or trial for, any other offence for which such answers may tend to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution. Another important caution that Courts have declared in the pronouncements is that conviction of the accused cannot be based merely on the statement made under Section 313 of the Cr.P.C. as it cannot be regarded as a substantive piece of evidence."

55. In Mohan Singh Vs. Prem Singh reported in 2002 SC 3582, Dehal Singh Vs. State Of H.P. reported in AIR 2010 SC 3594, State of M.P. Vs. Ramesh reported in (2011) 4 SCC 786, Rajkumar Singh alias Raju Vs. State of Rajasthan reported in AIR 2013 SC 3150 and in a plethora of cases, it has been held by the Hon'ble Apex Court that it is settled proposition of law that statements or answers given by accused is not substantive piece of evidence and it is not sole base for convicting the accused. The statements of accused can be used for proper appreciation of evidence to accept or reject it.

56. Non-examination of accused under Section 313 of Cr.P.C. does not vitiate the entire proceedings or case of prosecution. Accused can make good of the same even at appellate stage. It is not sole base for eviction unless accused shown miscarriage of justice. In State (Delhi Administration) Vs. Dharampal reported in AIR 2001 SC 2924, the Hon'ble Apex Court has held as under:

"Thus it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has

occurred that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellate Court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him…"

57. In Gyan Chand and Others Vs. State of Haryana reported in AIR 2013 SC 3395, plea to non-compliance of the provisions of Section 313 Cr.P.C. was taken for the first time before the Supreme Court. But there was no material showing as to what prejudice has been caused to the accused persons, if facts of conscious possession was not put to them. Thus the court held that the trial was not vitiated for non compliance of the provisions of Section 313 Cr.P.C. Mere defective/ improper examination under Section 313 Cr.P.C. is no ground for setting aside the conviction of the accused, unless it has resulted in prejudice to the accused. Unless the examination under Section 313 Cr.P.C. is done in a perverse way, there cannot be any prejudice to the accused. See SC Bahri v. State of Bihar; AIR 1994 SC 2420, Shobhit Chamar v. State of Bihar; AIR 1998 SC 1693.

58. The law mandates every incriminating evidence should be put to the accused separately. Section 313 Cr.P.C. is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation, if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Trial judge should taken care that questions of an inquisitorial nature should be put an accused, simply because statements given by accused under this section is not sole base for conviction, presiding officer cannot be treat it as formality as it carries much importance in appreciation of evidence.

59. It is germane to point out that the learned trial court has put, as many as 17 questions to the appellant regarding each and every incriminating evidence, against her and thus, affording opportunity to her to answer and explain her stand and to put her defence case. She has shown her ignorance about the death of the deceased children in answer to question no.1. She negated giving any prasad to the deceased children. In answer to question no.2, 3, 4, 5 she denied committing any crime, in answer to question no.6, she told the report against her to be false, in answer to question no.7, she stated to have prepared of the forged document, in answer to question no.8, 9, 10, she showed her ignorance and in answer to question no.11, she told the report against her is false, for the rest of the question, she answer that witnesses Prem Pal, Krishna Pal and Praveen is giving false evidence, in answer to question no.16, she stated that she has been implicated due to enmity and in answer to question no.17, when she was asked, she denied to give any prasad to deceased children. Thus, she has explained and answered each and every evidence incriminating her. Her statement under

Section 313 Cr.P.C. is well discussed by the trial court as well as in the present decision. In the impugned judgment her statement duly considered by the learned trial judge, in the impugned judgment and order at page no.2. Not only this learned trial court has given her opportunity to examine D.W.-1 Abdul Haq as to strengthen her defence. Thus, we are of the considered opinion that no prejudice has been caused in respect of her statement under Section 313 Cr.P.C. She was afforded adequate opportunity to be heard and to explain her defence case. She has utilise opportunity to lead the defence evidence. Consequently, the argument of learned counsel for the appellant contains no force.

60. The accused-appellant had strong motive of eliminating to the children as she was well aware that aluminum phosphide is highly toxic inorganic compound and can cause irritation of the nose, mouth, throat and lungs leading to death of the consumer. The testimony of the witnesses is trust worthy and reliable. No explanation has been given by the accused appellant as to how and in what manner the victims died of devouring devotional offerings. The evidence led by the prosecution witnesses is consistent with the hypothesis of the guilt of the accused appellant. There is no other hypothesis except the guilt of the accused appellant. Mere conviction and sentence as well as incarceration of the accused appellant will not assuage or mitigate the severity and barbarity of offence wherein innocent children have died of in a grotesque and ruthless manner. The death of the minor children in such a planned manner shook the heart of the general folk. The appellant has failed to bring on record any material as to why she was implicated leaving to the actual culprit. The learned Trial Judge has passed the order of conviction and sentence after appreciating the entire evidence on record and has rightly arrived at the conclusion that it was the accused appellant who committed the serious offence of taking away the life of these innocent children hence the judgment and order passed by the learned Special Judge deserves to be sustained and upheld. The testimony of prosecution witnesses can not be discarded merely because of their relationship or slight aberration and deviation in their testimony. Every criminal trial is a voyage of discovery in which nectar in the form of quest is churned and gleaned from the fathomless ocean. A duty is cast on the Presiding Officer to explore every avenue in order to discover the truth and advance the cause of justice.

61. Learned counsel for the appellant has submitted that considering the manner in which the incident had occurred and the role attributed to the appellant, the present case does not travel beyond the scope of the offence u/s 304 Part II IPC, causing injuries with the knowledge that it was likely to cause death but without any intention to cause death. He has further submitted that the conviction of the appellants u/s 302 IPC is a result of misappreciation of evidence on record. At the most the appellant can be convicted for the offence u/s 304 Part II of IPC.

62. Having considered the rival submissions made by learned counsel for the parties and having gone through the material available on record the question is whether the conviction of the appellant will fall within the scope of Section 300 of I.P.C. or it is a case of culpable homicide not amounting to murder punishable under Section 304 Part-I or Part-II of I.P.C. These provisions invokes the concept of motive, intention and knowledge.

63. Sections 299 and 300 of the IPC deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death-

(i) with the intention of causing death or

(ii) with the intention of causing such bodily injury as is likely to cause death, or

(iii) with the knowledge that such an act is likely to cause death.

A bare perusal of this provision, reveal that it emphasises on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the three stated manners, noted-above, it would be 'culpable homicide'. Section 300 IPC, however, deals with 'murder', although there is no clear definition of 'murder' in Section 300 of IPC.

64. In ***Rampal Singh vs. State of U.P. reported in (2012) 8 SCC 289*** it has been held by this Court, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'.

65. In another case ***Pulicherla Nagaraju @ Nagaraja Reddy vs State of A.P. reported in 2006 (11) SCC 444***, the Hon'ble Supreme Court has laid down various relevant circumstances from which the intention could be gathered. Some relevant considerations are the following :-

(i) The nature of the weapon used,

(ii) whether the weapon was carried by the accused or was picked up from the spot,

(iii) whether the blow is aimed at the vital part of the body,

(iv) the amount of force employed in causing injury,

(v)whether the act was in the course of sudden quarrel or sudden fight,

(vi) whether the incident occurred by chance or whether there was any premeditation,

(vii) whether there was any prior enmity or whether the deceased was a stranger,

(viii) whether there was a grave or sudden provocation and if so, the cause for such provocation,

(ix) whether it was heat of passion,

(x) whether a person inflicting the injury has taken undue advantage or has acted in a cruel manner,

(xi)whether the accused persons has dealt a single blow or several blows.

66. Thus, requirements of law with regard to intention may be satisfied for holding an offence of culpable homicide. It is also necessary to prove specific intentions Even when such intention is not proved, the offence will be culpable homicide, if the doer of the act causes the death with the knowledge that he is likely by his such act cause death i.e. with the knowledge that the result of his act may be such as may result in death.

67. Having regard to the overall facts and circumstances of the case and discussions of the evidence and material on record, there is no manner of doubt about the complicity of the accused appellant in

offering cardamom to those children as a result of which they succumbed to injuries after some hours. The witnesses were cross examined by the defence but no contradiction could be elicited so as to discard the version regarding the involvement of the accused appellant in committing such a brutal and inhumane act of taking away the life of innocent children. The medical evidence, post mortem report as well as the chemical analyst report, adduced by prosecution relating to offering of cardamom to the children stood fully proved. The prosecution story will not stand demolished for the fault of the investigating officer. The trial court had assessed and analyzed the entire evidence and defence of the accused appellant on the yardstick of its reliability and trustworthiness and has rightly reached at the conclusion that the appellant is the real perpetrator of the crime of offering cardamom to the children mixed with aluminum phosphide. There is clear and categorical evidence to establish and prove the accusations of offering cardamom mixed with aluminum phosphide. There is no reason to ignore such solitary evidence so as to absolve the perpetrator of such grotesque crime.

68. After scrutinizing the entire materials on record and the evidence led by prosecution, it emanates that there is no reason to implicate the accused appellant falsely leaving the actual culprit. Nothing tangible could be elicited from the evidence of the witnesses in cross examination by which the prosecution version could be doubted or discarded. If courts are to insist on plurality of witnesses in proof of any fact, it will be directly encouraging subornation of witnesses. If the situation and circumstance arise that there is only a single person available to give evidence in support of the prosecution version, the court naturally has to weigh carefully and cautiously such a testimony and if the court is satisfied that the evidence is trustworthy, reliable and free from all taints and flaws, then a duty is cast upon the court to act upon such testimony. In case, the witness is not found to be reliable and there are some circumstances which may show that credibility is shaken by adverse circumstance, then the court will not insist upon such evidence. It is a platitude to elaborate here that it is the quality and not the plurality of witnesses who are required to prove the testimony. The dispensation of justice would be affected and hampered if number of witnesses are to be insisted upon.

69. Learned counsel for the appellant submits that there are material inconsistencies and contradictions in the statement of prosecution witnesses and the investigation has not been fairly conducted. Learned A.G.A. refuted the said argument. It is well settled principle of law that accused appellant cannot be given benefit of laches in investigation or non-material contradictions and inconsistencies in the prosecution witnesses. In Ram Bali Vs. State of U.P. 2004 A.I.A.R. Crl. 417 the Apex Court has held that failure or negligence or omission on the part of I.O. is not fatal to the prosecution case, in case testionmony of eyewitnesses corroborated by medical evidence fully establishes the prosecution version. In the present case, appellant has failed to point out any material negligence or omission in the investigation, on the basis of prosecution version could be discarded.

70. In the light of prolix and verbose discussions made herein above and also regard being had to the entire facts and circumstances of the case, we are of the opinion that the prosecution has proved its allegations beyond reasonable doubt pointing unerringly guilt of the accused appellant.

71. Now, we recapitulate the facts and circumstances of the case. PW-2 Krishna Pal and PW-3 Pravindra Sharma, who are eye-witnesses, had seen the appellant giving sugar coated cardamom seeds in paper which was enquired by PW-7 Investigating Officer D.N. Verma. In forensic chemical examination, elaichi danas were having elements of aluminum phosphide, as a result of which, three innocent children died. Thus, looking to the nature of allegations, the materials on record and also manner of executing the crime, it appears that the accused appellant did not have any strong motive and animosity, as a result of which, she has given devotional offerings mixed with aluminum posphide. The accused appellant has acted in a sudden emotion without pre-concerted plan. She might have no immediate intention to cause death of the deceased children but she has a knowledge that if someone take aluminum posphide he might be dead. Hence, the accused-appellant deserves to be convicted and sentenced under Section 304 Part-I of IPC. The judgment and order dated 05.09.2005 passed by learned Special Additional Sessions Judge, Muzaffar Nagar is modified to the extent of awarding the conviction and sentence under Section 304 Part-I of IPC only. The conviction and sentence awarded under Section 328 IPC shall remain intact.

72. Accused-appellant is in actual incarceration for last about 20 years and about 6 years remission earned. Thus, she has served about 26 years of the sentence awarded.

73. Resultantly, the instant criminal appeal is **partly allowed** to the extent that the appellant is convicted under Sections 304 Part-I and 328 I.P.C. So far as the quantum of sentence is concerned, learned trial court has not imposed the fine in either of the Sections, which is integral part of the sentence under these sections. It will serve the ends of justice, if she is released for the period already undergone under Section 304 Part-I of IPC and a fine of Rs.2,00,000/-, which will go to the to their father. In case, he is not alive, the amount will go to their surviving mother or their legal heirs, as compensation. In case of default, she will serve one year's additional imprisonment. The conviction and sentence awarded under Section 328 IPC shall remain intact with the modification that she will further pay a fine of Rs.1,00,000/-, which will go to the to the father of the deceased. In case, he is not alive, the amount will go to their surviving mother or to their legal heirs, as compensation. In case of default, she will serve six months additional imprisonment.

74. Certify the judgment to the trial court to incorporate entry of the result of this appeal in the relevant register. The compliance be reported to this court within fifteen days.

75. Trial court record be sent back.

(2024) 8 ILRA 140
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 4723 of 2013

Mohd. Hamid **...Appellant**

Versus

State of U.P. **...Respondent**

Counsel for the Appellant:
Sri Ashutosh Tripathi, Sri Adarsh Shukla, Sri Amit Krishna, Sri Amit Kumar Pandey, Sri

Ashutosh Tripathi, Sri Firdos Ahmad, Ms. Gunjan Sharma, Sri Rajiv Shukla

Counsel for the Respondents:
Govt. Advocate

Criminal Law – Indian Penal Code,1860 - Section 376 - Rape - Failure to Prove Guilt Beyond Reasonable Doubt - Acquittal - Parents of the victim (PW-1 & PW-2) were not present at the time of the incident and did not support the prosecution's case regarding the commission of rape by the accused upon their minor daughter. Both were declared hostile. No eyewitness came forward to establish that the accused was seen committing the offence or was apprehended at the spot. Although the Investigating Officer stated that villagers apprehended the accused at the scene, there was no independent witness to confirm his arrest. Prosecution relied on medical evidence, which established that the 4-5-year-old victim was subjected to sexual assault. Medical report revealed swelling on the vulva, a ruptured hymen with irregular margins, tenderness, and bleeding from the private part. However, no evidence connected those findings to the accused appellant. *Held:* The prosecution failed to prove the accused's complicity in the offence beyond a reasonable doubt. Conviction set aside. Appeal allowed.

Allowed. (E-5)

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

1. This appeal is directed against judgment and order of conviction and sentence dated 21.9.2013, passed by the Additional Sessions Judge, Court No.4, Azamgarh in Session Trial No.560 of 2011 (State Vs. Mohd. Hamid), arising out of Case Crime No.306 of 2011, Police Station Mubaraqpur, District Azamgarh, whereby the accused appellant Mohd. Hamid has been convicted and sentenced to rigorous life imprisonment alongwith fine of Rs.20,000/- under Section 376 IPC and on failure to deposit fine to undergo additional imprisonment for two years.

2. Victim in the present case is a four year old girl, who has been subjected to rape. Victim's father has lodged the written report saying that he is a resident of Village Gajahara, Police Station Mubaraqpur, District Azamgarh. On the date of incident, i.e. 15.8.2011 when the informant returned from work at about 3.00 he came to know that his wife had gone to get cow dung cake from the neighbourhood and in between the accused entered the house and sexually assaulted the victim. On arrival of the informant's wife she raised an alarm whereafter the accused fled and was apprehended by the villagers. The victim was bleeding from her private parts and was brought with the informant for lodging the report. It is with this allegation that the First Information Report came to be registered as Case Crime No.306 of 2011 under Section 376 IPC at 4.30 PM on the date of incident. The Investigating Officer proceeded with the investigation and collected the clothes worn by the victim and the same was exhibited during trial as Ex.Ka.2. The accused was also arrested on the same day and his jeans pant was recovered vide Ex.Ka.6 on the same day. The victim was examined at the District Women Hospital, Azamgarh on the date of incident itself and following injuries were found on the victim:-

"Both vulva swelling and bluish colour.
Hymen tear and irregular margin.
Tenderness present.
Altered color blood present.
Vagina: Inter tip of finger."

3. A supplementary medical report was also produced which shows that the

victim's hymen contained tear with margins irregular and tenderness was present. There was also swelling in both the vulva. The age of the victim was determined as five years. Vaginal slides were also prepared of the victim but no spermatozoa was seen on it. The cloths worn by the victim as also the jeans worn by the accused were sent for scientific examination to the Forensic Science Laboratory at Varanasi. The report is on record according to which no blood or semen was found on the jeans worn by the accused. However, on the underwear and cloths of the victim, blood and semen both were found.

4. On the basis of material collected during the course of investigation charge-sheet came to be submitted against the accused appellant Mohd. Hamid by the Investigating Officer. The concerned Magistrate committed the case to the Court of Sessions Judge, Azamgarh where charges were framed against the accused on 3.11.2011. Charges were explained to the accused, who denied his implication and demanded trial.

5. During the course of trial, documentary evidence have been adduced by the prosecution in the form of FIR as Ex.Ka-3; written report as Ex.Ka-1; recovery memo of Frock & Chaddhi as Ex.Ka-2, recovery memo of Jeens Pant as Ex.Ka-6; medical report as Ex.Ka-9; supplementary report as Ex.Ka-7; pathology report as Ex.Ka-8; X-ray report as Ex.Ka-10; FSL report as Ex.Ka-13; chargesheet as Ex.Ka-11; and site plan with Index as Ex.Ka-5.

6. PW-1 is the informant, who in his examination-in-chief, conducted on 29.3.2012, supported the prosecution case, as per which while his wife had gone to collect cow dung cake from the neighbourhood the accused entered the house and committed rape upon the victim. He also proved the written report in the examination-in-chief. The cross-examination, however, was not conducted on that date and was deferred on the application of the accused. The cross-examination of PW-1 was then held on 17.7.2012, when PW-1 turned hostile and has disowned his previous statement. On the request of the State Counsel, the informant was, consequently, declared hostile by the court concerned. In the cross-examination PW-1 stated that he got the written report prepared on the disclosure of the villagers and that neither he himself saw the incident. He did not disclose the name of persons from whom he got information of the incident, either.

7. PW-2 is the mother of the victim, who during her examination-in-chief itself did not support the prosecution case and turned hostile. She has also disowned her statement given to the Investigating Officer under Section 161 Cr.P.C. Similarly, PW-3, who is a neighbour, also turned hostile at the stage examination-in-chief itself. The victim was produced as PW-4 but the court found that she was not mature enough to give her statement. Masoom Ali was produced as PW-5, who is a witness of recovery of clothes of the victim. This witness has also turned hostile and has not supported the recovery of clothes of the victim.

8. PW-6 is Dr. Lalmani, who had medically examined the victim. In her deposition the doctor has supported the medical evidence brought on record during trial, according to which the victim was aged about 5 years and her hymen was

ruptured. The margins were irregular and tenderness was present. In her opinion the colour of blood was different and the incident apparently was not fresh. She further stated that in the vaginal slides prepared of the victim, no semen or spermatozoa was found.

9. PW-7 is Head Constable Anil Kumar Mishra, who has proved the GD and other police papers. PW-8 is Shailendra Tripathi, who had conducted the investigation in the matter. He has supported the prosecution case, according to which the accused was apprehended by the villagers and his trousers (jeans) was recovered and was sent for scientific evaluation. He has denied the suggestion that investigation has been done by him sitting in his office. PW-9 is the Station House Officer, who has supported the prosecution case, according to which the accused was apprehended by the villagers. He has stated that informant was not present at the time when the accused was apprehended by the villagers.

10. The above evidence produced during trial by the prosecution has been confronted to the accused, who has stated that the report lodged against him is false and evidence is fabricated. He has also stated that due to village enmity on account of election of Pradhan, he has been falsely implicated. The above evidence has been evaluated by the court of session, who ultimately has convicted and sentenced the accused appellant, as per above.

11. Challenging the judgment of conviction and sentence, learned counsel for the appellant argues that there is absolutely no evidence on record to connect the accused appellant with the commissioning of offence and the contrary finding of the court below is wholly perverse. Learned counsel also submits that neither any injury has been found on the accused nor any blood or semen has been found on his clothes and even his arrest at the spot has not been proved. Submission is that merely because prosecution has established that injuries existed on the victim, it would not necessarily follow that the offence of rape was committed by the accused appellant or that his implication is substantiated on the basis of admissible evidence. It is further urged that even though there is no evidence against the accused appellant, yet he is incarcerated in jail since the year 2011, and thus the period of incarceration undergone by the accused appellant is nearly 13 years, by now. Submission is that accused appellant is entitled to be acquitted.

12. Learned AGA, on the other hand, opposes the argument of the appellant's counsel and submits that medical evidence on record clearly proves the commissioning of offence and since there was none else present at the place of occurrence, therefore, the accused appellant has rightly been convicted and sentenced by the court below. It is also submitted that sexual assault on a four year old minor girl is a serious offence, and therefore, the sentence of life is appropriate, considering the gravity of offence.

13. We have heard Sri Ashutosh Tripathi, learned counsel for the appellant and Sri G.P. Singh, learned AGA for the State and have perused the material brought on record.

14. The evidence led by the prosecution would go to show that the informant was himself not present at the place of occurrence when the incident

occurred. The informant (PW-1) in the written report as also in his deposition has clearly admitted that he had gone out and it was only on his return that he came to know that accused had committed rape upon his daughter. The informant, therefore, is not an eye-witness. The other prosecution witness of fact is the wife of the informant, who also was not present when the incident occurred. The assertions in the written report and the testimony of PW-1 clearly go to show that the informant's wife had gone to get cow dung cake from the neighbourhood and by the time she returned, the incident of rape was committed upon her daughter. It is also the prosecution case that the accused was apprehended near the spot by the villagers, once they saw the accused fleeing from the place of occurrence after subjecting the four year old minor girl to rape. The incident of rape has been proved by the prosecution on the strength of the medical report, which is on record. The injury report of the victim clearly goes to show that the victim had been subjected to sexual assault. The testimony of doctor supports the prosecution allegation of rape, inasmuch as the doctor found that there was swelling on the vulva of the victim and the hymen was ruptured. Margins were irregular. Tenderness was also present. Although the doctor in the cross-examination has stated that no semen was found on the vaginal smear prepared of the victim but she has clearly ruled out the possibility of such injury having been caused accidentally, by the insertion of pointed object or on account of fall of the victim etc. as was suggested by the defence. The FIR allegations otherwise are to the effect that victim was found bleeding from her private part. The medical examination of the victim has been conducted on the date of incident and the same has been clearly proved. From the medical evidence, which is supported by the statement of the doctor, it is abundantly clear that 4-5 year old minor victim has been subjected to sexual assault. The finding of the sessions court holding that the prosecution has proved the occurrence of rape is, therefore, sustained.

15. This takes us to the central part of the prosecution case, which is the implication of the accused appellant as being perpetrator of the aforesaid crime of rape on a minor girl. The prosecution heavily relies upon the testimony of witnesses of fact, all of whom have turned hostile. Admittedly PW-1 and PW-2, who are the parents of the victim, were not present at the time of incident, and they have not supported the prosecution case regarding commissioning of rape by the accused upon minor daughter and they are declared hostile. It is, therefore, apparent that there is no oral testimony of any witness, who implicates the accused appellant of committing rape upon the victim. The only other prosecution evidence is the medical evidence and the scientific evidence. The medical evidence on record has been carefully examined by us and we find that there is nothing in it to connect it with the accused appellant. The accused appellant has not been medically examined and there is no medical report of the accused on record. The only recovery made from the accused is of his trousers (jeans) on which neither there is any blood found nor there are any traces of semen etc. No individual has come forward from the side of the prosecution to prove the fact that the accused was seen committing the offence or he was soon apprehended by them. Though the Investigating Officer states that accused was apprehended on the spot by the villagers, but that statement in

itself would not be sufficient to connect the accused appellant with the commissioning of offence. Moreover, there is no arrest memo on record to prove the fact that the accused was arrested on the spot, nor there is any independent witness of arrest of the appellant.

16. We have carefully perused the available records, but from its perusal we have not been able to find any credible evidence produced by the prosecution, on the basis of which we may reasonably come to the conclusion that it was the accused appellant who had committed sexual assault upon the victim. So far as the judgment of conviction and sentence is concerned, we find that the trial court has placed reliance upon the testimony of PW-2, wherein she has supported the prosecution case with regard to apprehending of accused on the spot. Apart from it, there is absolutely no other evidence, which has been referred to or relied upon by the trial court to implicate the accused appellant. The statement of PW-2 has been perused by us, wherein she has alleged that the villagers had apprehended the accused but she does not known whether the accused was rightly apprehended by the villagers or not. We find that this evidence in itself would not be sufficient to sustain the finding that prosecution has established its case of arrest of the accused appellant, on the spot, soon after committing rape, beyond reasonable doubt.

17. In the facts of the case, we find that accused appellant otherwise has undergone incarceration of nearly 13 years. Upon analysis of the evidence on record, we are, therefore, persuaded to accept the argument of appellant's counsel that the prosecution has failed to establish the complicity of the accused appellant in committing the offence, beyond reasonable doubt. The accused appellant, accordingly, is held entitled to benefit of doubt.

18. Consequently, the present appeal succeeds and is allowed. The judgement and order of conviction and sentence dated dated 21.9.2013, passed in Session Trial No.560 of 2011 (State Vs. Mohd. Hamid) is set aside. The appellant Mohd. Hamid shall be released from Jail, forthwith, unless he is wanted in any other case, subject to compliance of Section 437-A Cr.P.C.

(2024) 8 ILRA 145
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 5011 of 2021

Rajendra Yogi ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Subham Chandra Raghav

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

Indian Penal Code, 1860 - Section 304 - Culpable homicide not amounting to murder - Evidence Act, 1872 - Section 3 - Unexplained contradiction in the ocular testimony and the medical evidence - In the instant case witnesses of fact alleged that deceased was badly beaten with fists and kicks and later his head was banged on the wall and that the deceased died due to such beating. Held : Since the deceased was a minor child of six years,

any serious beating on him, leading to his death, was bound to carry some apparent signs of injury and were expected to be observed in the postmortem report. Neither any injury was found on the head nor any signs of injury were shown on the face or forehead of the deceased. Medical evidence showed cause of death to be throttling with hyoid bone fractured but the two witnesses of fact do not allege anywhere that the deceased was throttled. It raised questions about the correctness of the ocular version. Contradiction, remained unexplained. Material contradiction in the medical evidence viz-a-viz the eye-witness created a doubt on the prosecution case - Accused was granted the benefit of doubt.(Para 35, 37)

Allowed. (E-5)

List of Cases cited:

Viram @ Virma Vs The St. of M. P., reported in (2022) 1 SCC 341

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

1. This criminal appeal is directed against the judgment and order dated 4.2.2020, passed by the learned Additional Sessions Judge, Court No. 8, Mathura in Sessions Trial No. 477 of 2015, arising out of Case Crime No. 188 of 2015, under Section 304(1) IPC, Police Station – Refinery, District – Mathura; whereby the appellant Rajendra Yogi has been convicted under section 304(1) IPC and sentenced to life imprisonment along with fine of Rs.1,00,000/- and in default of payment of fine to undergo one year additional imprisonment.

2. Informant Kushalpal Singh (PW-1) is the son of Ramesh Chandra (PW-4) and is resident of Village Sirsa, Police Station Farah, District Mathura. His mother-in-law Smt. Meenakshi (PW-2) lives in a rented house in Giriraj Vatika owned by Radhaballabh. On 18.5.2015, on receiving information of death of the deceased the informant came and was told by his brother-in-law that on 17.5.2015 Dharmendra (deceased) had taken bread/food from a neighbour aunt and when the father Rajendra Singh (accused appellant) came to know of it, he mercilessly beat Dharmendra due to which, he fainted. When accused appellant saw Dharmendra in the morning, he fled. The neighbour aunt informed that Dharmendra has died and, therefore, he has come to lodge the report. With these contents the first information report came to be lodged in Case Crime No. 188 of 2015, under Section 304 IPC in Police Station Refinery, District Mathura at 12:30 hours in the afternoon on 18.5.2015.

3. Investigation proceeded in the matter and the investigating officer recovered a bloodstained bed-sheet from the bed where deceased was sleeping. Inquest followed and concluded at 3.30 pm. The witnesses of inquest including Ramesh Chandra (PW-4) observed bloodstains on the nose and face of the deceased. In the opinion of the inquest witnesses, deceased died on account of beating as a result of which various injuries were caused to him on his face and head. However, in order to ascertain the correct cause of death, it was resolved that postmortem be conducted. The body was accordingly sealed and sent to mortuary for postmortem.

4. Postmortem on the dead body has been conducted by Dr. K.K. Mathur (PW-7). Cause of death is ascertained as asphyxia due to throttling. Hyoid bone of the deceased was found fractured. Lungs were found congested. Apart from multiple

small abrasion on both sides of the neck, there are no other signs of injury on the deceased. The relevant observations made in the postmortem report of the deceased conducted at 5.30 pm on 18.5.2015 are as under:-

"Name of deceased – Dharmendra
Age – 6 years/male
Body – Average body built
Postmortem Changes – Rigor mortis all over body
Skull – Brain Congested
Orbital, Neck, Mouth, Tongue and Pharynx – Filled with blood & blood clots
Hyoid Bone – Hyoid Bone Fractured
Lungs – Lungs congested
Heart – Right full, Left empty
Stomach – Stomach contain 100 ml of pasty fluid.
Liver, Spleen, Kidney – congested
Time since dead – About 1/2 day back
Cause of death – Asphyxia due to throttling
Antemortem Injuries – Multiple Small Abrasion, Both side front of neck."

5. Age of the deceased has been determined as 6 years. Statement of witnesses was recorded whereafter charge-sheet came to be filed against the accused appellant under Section 304 IPC.

6. The concerned magistrate took cognizance of the charge-sheet and referred the matter to the Court of Sessions, where it was registered as Sessions Trial No. 477 of 2015. The charges were explained to the accused of committing offence under Section 304 IPC, who pleaded not guilty and claimed to be tried.

7. The trial commenced in which the prosecution has adduced following documentary evidence:-

"1. FIR dated 18.05.2015 as Ex.Ka.4
2. Written Report dated 18.05.2015 as Ex.Ka.1
3 Recovery Memo of blanket of the deceased as Ex.Ka. 3
4. Postmortem Report dated 18.5.2015 as Ex.Ka.6
5. Panchayatnama dated 18.5.2015 as Ex.Ka.2
6. Chargesheet dated 1.6.2015 as Ex.Ka.15"

8. The prosecution has also adduced oral testimony of Kushalpal Singh (PW-1), Smt. Meenakshi (PW-2), Jitendra (PW-3), Ramesh Chandra (PW-4), Ajeet Singh (PW-5), Manoj Kumar (PW-6), Dr. K.K. Mathura (PW-7) Suresh Chandra Yadav (PW-8).

9. PW-1 Kushalpal Singh who is the first informant has supported the prosecution case, according to which the accused mercilessly beat the deceased after he came to know that the deceased had taken bread/food from a neighbour aunt. Informant came to know of the incident from Jitendra (PW-3), who is real brother of the deceased. Jitendra also was beaten but he hide himself in the toilet and slept there throughout the night and only in the morning he came out. He found his brother bleeding from the nose and face and that there were various signs of injury on the face and head of the deceased. After having caused the death of the deceased, the accused apparently left him lying naked on

the bed by covering him with a bed-sheet. Jitendra was also locked from outside. When Jitendra asked for help from inside the house, it was the neighbour aunt, who opened the door and found the deceased to have died.

10. It appears that the accused appellant had not engaged any counsel and the learned Sessions Judge had provided him the services of an amicus curiae. In the cross-examination, PW-1 has stated that the deceased was his brother-in-law. His father-in-law had already died. His mother-in-law (PW-2) had two daughters and two sons from her first husband. After death of her first husband, she solemnized marriage with accused Rajendra, with whom she had no child. PW-1 has stated that he does not know the name of the neighbour aunt. He had come to the place of occurrence at about 11.00 in the morning and found the police present at the spot. He has stated that he has not seen the incident himself and the basis of his statement is the information given to him by Jitendra (PW-3).

11. PW-2 Smt. Meenakshi is the mother of the deceased and is aged about 32 years. She worked as a labour. Her husband Surendra Singh had died about three and half years back. She had five children with Surendra Singh consisting of three daughters and two sons. The youngest daughter has already died due to illness. Two elder daughters were already married. Jitendra and Dharmendra were her two sons. She remarried accused Rajendra and was living with him in a rented house in Giriraj Vatika. The house was of Radhaballabh. She has stated that on 17.5.2015, she had gone for some personal work to her village leaving the two sons with her husband Rajendra. On account of urgent work, she stayed in the village at night. She tried to telephone Rajendra but his phone was continuously switched off. She called the son of landlord namely Prakash, who informed that her six years old son was badly beaten by the accused as a result of which he died. Since the witness PW-2 was at Teekamgarh, Madhya Pradesh, she immediately rushed and arrived at Mathura on 19.5.2015. She came to know that her son was already cremated by the police and the informant.

12. In the cross-examination, PW-2 admitted that she came to know of the incident on 18.5.2015 evening and she left Teekamgarh at about 11.00 in the night so as to arrive at Mathura on 19.5.2015 at 8.00 am. She was informed about the entire incident by Jitendra (PW-3). She has further stated that neither deceased was assaulted in her presence, nor her other son was locked in latrine.

13. Sheet-anchor of the prosecution case is PW-3 Jitendra, inasmuch as, it is on his information that the FIR has been lodged. He is 12 years of age and on the basis of questions posed to him, the court of sessions has held that he is capable of giving statement before the court. He has supported the prosecution case, as per which, her mother had gone to village to collect money from the farm and he alongwith his younger brother were at home alongwith accused, to whom he called Papa. Deceased Dharmendra had taken food from a neighbour aunt and informed the accused appellant that since he already had his food, as such, he may cook food for himself and Jitendra. On this, the accused got annoyed and beat Dharmendra with fists and kicks and banged his head on the wall. Accused appellant had a knife in his hand and had locked him in the toilet. Accused also

knocked on the toilet and threatened that he would kill Jitendra too. The witness was instructed not to raise any alarm. Thereafter the accused fled by locking the door from outside. PW-3 then raised an alarm whereafter the neighbour aunt came and opened the door and found his brother dead. The incident of beating occurred at about 10.00-10:30 in the night. The witness on coming out made a telephone call to the police on helpline no.100 and also informed his brother-in-law (Jija) Kushalpal. Kushalpal alongwith his family then arrived. Deceased was cremated by the witness.

14. In the cross-examination, PW-3 has stated that the deceased had not taken food from the neighbour aunt in the presence of accused, nor had he eaten food in his presence and before locking the witness in the toilet the accused had beaten the deceased. Accused initially slapped the deceased and thereafter beat him with fists and kicks and banged his head on the wall. The door was opened later by the neighbour aunt. He could see from the space below the door. He had called neighbour aunt from inside the toilet. He could not open the toilet door as it was locked from outside. Ration distributor in the neighbourhood informed the Police about the incident by dialing no. 100. He had not himself telephoned the police. Accused had also beaten the deceased 2-3 weeks before when his mother was not there. He has then explained the manner in which informant came and the report was lodged with the police. He was taken out of the toilet at about 9-10 am by the neighbour aunt. He was locked in the toilet at about 10.30 in the night by the accused. This witness has denied the suggestion that only because of differences between his mother and accused that he is making a false statement against the accused and that he has not himself seen the incident.

15. PW-4 is Ramesh Chandra, who is a inquest witness and proved the inquest report. PW-5 is Ajeet Singh, who is the computer operator and has proved the GD Report. Manoj Kumar has been produced as PW-6, who was also a tenant in the other part of the house where PW-2 and her family lived. He has stated that the deceased had taken food from his wife Smt. Madhu and being annoyed by this act the accused had beaten the deceased and PW-3 at about 12.00 in the night. He had seen the incident from the window. He also heard the deceased weeping. There was light inside the house. Jitendra (PW-3) was seen by him standing frightened. PW-6 has stated that accused banged the head of the deceased on wall whereafter he fainted and later the witness came to know that he has died.

16. In the cross-examination, PW-6 has claimed that he saw the incident in which the accused had beaten the deceased to death. At the time of incident, he did not know the name of two children. He used to call the deceased as Chhotu. At the time of incident there was no light. There was open space in front of the room. He is a tempo driver and returned home at about 8.00 pm. His statement was not recorded by the I.O. with regard to the incident occurred at about 12.00-12.30 the previous night. He alleged that accused while was being beating, the other son Jitendra (PW-3) had locked himself inside the toilet. He has stated that accused kept beating the deceased almost for one and half hours. He made no attempts to save the child. His wife also made no attempt in that regard. Witness has stated that he was not aware that the accused would kill the boy.

Deceased was earlier slapped and he could hear noise coming from inside of the house. He had not seen the deceased being banged on the wall by the accused. This witness has denied the suggestion that due to close association with the mother of the deceased, he is making false deposition.

17. PW-7 is Dr. K. K. Mathur, who has conducted the postmortem. He has clearly stated that there were no signs of any beating or injury on the deceased except the abrasions on both sides of the neck. The doctor has clearly stated that there was no sign of any injury on the forehead or face of the deceased. Specific statement of the doctor in that regard is as under:-

"मृतक के सिर पर माथे पर और चेहरे पर किसी भी प्रकार की कोई जाहिरा चोटे नही थी। मृतक की गर्दन मे दोनो तरफ और सामने और दोनो वगलो पर खुर्सट के निशान थे।"

18. PW-8 is retired Sub-Inspector Suresh Chandra Yadav, who was the Investigating Officer of the case and has proved the police papers. As per him, the deceased had multiple marks of injury on his face and he was bleeding from his face and nose. In the cross-examination, the I.O. has stated that he does not know the name of the neighbour aunt from whom the deceased had taken food which became the cause for the deceased to be beaten by the accused. Name of the lady aunt has also not been mentioned in the case diary. He has denied the suggestion that the deceased died for some other reason and accused has been falsely implicated.

19. The accused has been confronted with the evidence led by the prosecution against him during trial so as to record his statement under Section 313 Cr.P.C. The accused has stated that allegation against him that he had beaten the deceased, which became the cause of his death, is false. He claimed to be innocent. He has specifically stated that neither he beat Dharmendra, nor had any concern with it. He has claimed that he had no concern with the two children or their mother. He has denied that he stayed with PW-2. In reply to Question No. 11 the accused has stated that possibly it was the neighbour aunt, who had beaten the child as a result of which he sustained injuries and PW-6 Manoj Kumar has misled everybody and a false story has been cooked up to implicate him.

20. Trial Court on the basis of aforesaid evidence led by the prosecution has found the charges levelled against the accused-appellant under Section 304 I.P.C. to be proved beyond reasonable doubt and has consequently convicted the accused and sentenced him to life imprisonment.

21. Aggrieved by the conviction of the accused-appellant under Section 304 I.P.C., the accused appellant is before this Court in the present appeal.

22. Sri Subhash Chandra Raghav, learned counsel for the appellant strenuously urged that this is a case of false implication, inasmuch as, the consistent case of the prosecution is that the deceased was assaulted by the accused appellant, due to such injuries caused by fists and kicks the deceased died. It is argued that the entire prosecution story stands belied by the postmortem report in which absolutely no signs of any injury on the face, forehead or other part of the body has been noticed on the deceased, nor such injuries were the cause of death. It is submitted that the cause of death is throttling and the injuries on the body of the deceased are only suggestive of death being caused by

throttling. It is alleged that none of the two witnesses of fact namely PW-3 and PW-6 have even remotely alleged that the accused appellant had throttled the deceased to death. It is also submitted that non-existence of injury on the face, forehead or nose clearly proves that the witnesses of fact have actually not seen the incident and the actual cause of death is something else. Submission is that the finding of the trial court that accused appellant had caused homicidal death of deceased by causing injuries on him are contrary to the weight of evidence on record and, therefore, the finding of guilt and consequential sentence is unsustainable. Learned counsel has placed reliance upon the judgment of the trial court to show that the findings contained therein are wholly perverse, inasmuch as, the court of sessions has ignored the specific argument raised on behalf of the defence during trial that the injuries on the deceased are inconsistent with the ocular testimony and, therefore, the finding of guilt is unsustainable.

23. Learned A.G.A. on the other hand has supported the finding of guilt recorded by the court of sessions and has argued that the conviction and sentence of the accused appellant suffers from no infirmity and, therefore, does not warrant any interference.

24. We have heard the counsel for the parties and perused the materials on record including the original records of the trial court.

25. The prosecution case is that while mother of the minor deceased had gone to her village at Teekamgarh, Madhya Pradesh leaving her two sons Dharmendra (deceased) and Jitendra (PW-3) in the care and custody of the accused appellant that the accused appellant committed the murder of the deceased after he had taken food/bread from a neighbour aunt.

26. Evidence on record has been carefully scanned by us. It transpires that the witnesses of fact produced by the prosecution fall into two distinct categories. The informant Kushalpal Singh is married to the elder sister of the deceased. He has lodged the FIR on the basis of the facts disclosed to him by the brother of the deceased namely Jitendra (PW-3). Source of information about the actual incident in which death of the deceased was caused is based on hearsay. Similarly, PW-2 is the mother of the deceased, who also was not present at the time of incident. She has neither seen the incident, nor was even present at the place of occurrence. Her source of information is the disclosure made by PW-3 Jitendra and PW-6 Manoj Kumar, who happens to be the neighbour and was living in other part of the house on rent. These two witnesses of fact, therefore, do not throw much light on the prosecution case about the manner in which the incident occurred. Their testimony, therefore, is not much helpful for the prosecution case.

27. PW-3 is the eye-witness and his disclosure forms the basis of statement of PW-1 and PW-2. PW-3 is the elder brother of the deceased. This witness has categorically supported the prosecution case that the deceased had taken bread/food from the neighbour aunt and later this fact was disclosed by him to the accused on which he got infuriated. As per PW-3, the accused appellant slapped Dharmendra and thereafter beat him by fists and kicks and ultimately pushed him to the wall as a result his head banged on the wall on account of which Dharmendra fainted. PW-

3 then comes up with a conflicting version regarding his being locked inside the toilet. At one stage, he claims that he locked himself in the toilet while at other places he claims that he was locked in the toilet, by the accused appellant. There are also two versions of PW-3, as to how, he came out of the toilet. One version is that he came out of the toilet in the morning and on seeing his brother dead raised an alarm whereafter the neighbour aunt came from outside after opening the door of the house which was bolted from outside. The other version of PW-3 is that he raised alarm in the morning from inside the toilet whereafter the neighbour aunt came from outside and brought him out of the toilet.

28. The above inconsistent version of PW-3 has not been explained by the prosecution. This is particularly so as PW-3 clearly states that the accused appellant knocked the toilet door and had threatened that he would kill him too. This version suggests that PW-3 had locked himself from inside as a result of which he was saved since the accused appellant could not enter the toilet and, therefore, could get no access to PW-3. If that was so, the statement of PW-3 that he was brought out of the toilet by neighbour aunt since the toilet door was closed from outside remains unexplained.

29. In the facts of the present case, we find that the neighbour aunt was an important witness of the incident, inasmuch as, it was she who gave bread/food to the deceased; brought out PW-3 from the toilet on hearing his alarm; was the first to open the gate and enter the house where the incident had occurred. However, for reasons unknown the neighbour aunt has neither been interrogated by the I.O., nor has been produced as a witness, even during the course of trial. This is a serious lapse on part of the prosecution. The neighbour aunt had a crucial role in the entire incident and was possibly the best person to have reported the manner in which the entire incident occurred. Her non-production, therefore, has weakened the prosecution case.

30. Coming next to the testimony of PW-3 it transpires that the accused on coming to know that the deceased had consumed bread/food mercilessly beat the deceased. PW-3 has alleged that initially Dharmendra was slapped, then he was beaten by fists and kicks and lastly his head was banged on the wall whereafter the deceased Dharmendra became unconscious and was later found dead. This version of PW-3 is similar to what is stated by other prosecution witness of fact namely Manoj Kumar (PW-6). The version of Dharmendra having been beaten by the accused appellant finds support from the inquest in which the witnesses of inquest have observed signs of injury on the face and forehead of the deceased. It is alleged that there were hematoma (neelgu marks) and other signs of injury on the face and forehead of the deceased.

31. Curiously, when the postmortem was conducted on the same day just two hours after the inquest, at 5.30 pm., except for some abrasions on the neck the doctor has found no injury on the face or forehead of the deceased. The hyoid bone of deceased was also found fractured. This dichotomy between the ocular testimony and the medical evidence on record remains wholly unexplained. In the event deceased was beaten by the accused such that the deceased died due to such beating some apparent signs of injury marks were expected to be observed in the postmortem

report. The fact that absolutely no marks of injury are shown on the face and forehead of the deceased in the postmortem report raises questions about the correctness of the ocular version of PW-3 and PW-6.

32. The medical evidence in the form of postmortem report as well as testimony of autopsy surgeon categorically narrates that the deceased died on account of throttling. Ligature mark is present on the neck of the deceased. There is absolutely no explanation forthcoming in the testimony of any of the prosecution witnesses of fact suggesting that the accused appellant had throttled the deceased. PW-3 has been consistent in saying that he saw the entire incident. PW-6 also says that he substantially saw the incident. None of these two witnesses even remotely suggest that Dharmendra was throttled or that the accused had strangulated him to death. The cause of death as per postmortem report and the opinion of autopsy surgeon is at crossroads with the oral testimony of the witnesses of fact. This apparent contradiction in the version of prosecution case remains wholly unexplained.

33. We have perused the judgment of the trial court and it is observed that this dichotomy between the oral testimony of witnesses and the medical evidence was specifically highlighted before the court of sessions on behalf of the appellant. The submission has been noticed by the trial judge in following words:-

"दौरान बहस बचाव पक्ष की ओर से तर्क प्रस्तुत किया गया कि जिस प्रकार की मारपीट अभियोजन साक्षियों द्वारा कहा जा रहा है उस प्रकार की कोई भी चोटें मृतक के शरीर पर नहीं हैं यह भी उल्लिखित किया गया कि सिर को दीवार से मारे जाने की बात कही गयी है परन्तु सिर पर कोई भी चोट नहीं पायी गयी। इस सम्बन्ध में साक्षी पी०डब्लू० 7 डा० के० के० माथुर की जिरह की ओर ध्यानाकृष्ट कराया गया जिन्होने अपनी जिरह में स्वीकार किया है कि मृतक के सिर, माथे और चेहरे पर किसी प्रकार की कोई जाहिरा चोट नहीं थी।"

34. The above contention has been rejected by the trial judge observing as under:-

"प्रश्न उठता है कि क्या इस साक्षी के साक्ष्य के आधार पर अभियोजन कथानक को संदिग्ध माना जायेगा। इसका उत्तर कदाचित नकारात्मक है क्योंकि यह आवश्यक नहीं है कि जिस प्रकार का साक्ष्य अभियोजन के मौखिक / चक्षुदर्शी साक्षी पेश करें उसी प्रकार की चोट मृतक के शरीर पर शवविच्छेदन करने वाले चिकित्सक के द्वारा पायी जायें। कई बार अभियोजन साक्षी उत्साह में और डरवश घटना को थोड़ा बढ़ाकर न्यायालय के समक्ष प्रस्तुत करते हैं वहीं दूसरी ओर चिकित्सक के द्वारा जो भी साक्ष्य न्यायालय के समक्ष प्रस्तुत की जाती है, वह साक्ष्य विशेषज्ञ साक्ष्य तो होती है परन्तु उनकी साक्ष्य मात्र एक राय पर आधारित होती है इसलिए दोनों ही साक्ष्यों का सम्यक् विश्लेषण किया जाये तो स्पष्ट है कि ऐसे मामले जिसमें एक छह वर्षीय बालक को मारापीटा गया हो और जिसकी हायड बोन फ्रेक्चर पायी गयी हो उसमें चिकित्सीय साक्ष्य के प्रकाश में जो मौखिक साक्ष्य पेश की गयी है, उसको अस्वीकार नहीं किया जा सकता। इस सम्बन्ध मे न्यायिक नजीर उ.प्र. राज्य बनाम हरवंश सहाय 1998 (37) ए.सी.सी. 14 सुप्रीम कोर्ट का उल्लेख करना न्यायालय समीचीन पाता है जिसमें माननीय उच्चतम न्यायालय द्वारा उपरोक्त सिद्धान्त प्रतिपादित किया गया है कि चिकित्सीय आख्या के प्रकाश में मौखिक साक्ष्य को अस्वीकार नहीं किया जा सकता।"

35. We are not impressed by the reasoning assigned by the trial judge to reject the defence version regarding contradiction in the ocular testimony and the medical evidence. In the facts of the case, we are of the opinion that the specific case of the eye-witnesses is completely belied by the medical evidence on record. Witnesses of fact alleged that deceased Dharmendra was badly beaten with fists and kicks and later his head was banged on the wall but neither any injury is found on the head nor any signs of injury are shown on the face or forehead of the deceased.

Since the deceased was a minor child of six years, any serious beating on him, leading to his death, is bound to carry some signs of injury. This is not the case as per the medical evidence. The contradiction, therefore, remains unexplained. Similarly, medical evidence shows cause of death to be throttling with hyoid bone fractured but the two witnesses of fact do not allege anywhere that the deceased was throttled. This contradiction also remains unexplained. In our opinion, the material contradiction in the medical evidence viz-a-viz the eye-witness account clearly creates a doubt on the prosecution case. We do not subscribe to the view taken by the Sessions Court that these are aspects which could be overlooked.

36. Hon'ble Supreme Court has dealt with a similar issue in Viram @ Virma Vs. The State of Madhya Pradesh, reported in (2022) 1 SCC 341, wherein in Para 13, the Court has observed as under:-

"13. The oral evidence discloses that there was an indiscriminate attack by the accused on the deceased and the other injured eye-witnesses. As found by the Courts below, there is a contradiction between the oral testimony of the witnesses and the medical evidence. In Amar Singh v. State of Punjab (supra), this Court examined the point relating to inconsistencies between the oral evidence and the medical opinion. The medical report submitted therein established that there were only contusions, abrasions and fractures, but there was no incised wound on the left knee of the deceased as alleged by a witness. Therefore, the evidence of the witness was found to be totally inconsistent with the medical evidence and that would be sufficient to discredit the entire prosecution case"

37. We have already observed that the ocular version of the incident is irreconcilable with the medical evidence on record and the inconsistency remains unexplained by the prosecution. Once that be so, it cannot be said that prosecution has succeeded in proving its case beyond reasonable doubt. Consequently, the applicant is entitled to get the benefit of doubt.

38. For the discussions and deliberations held above, we find that the prosecution has not been able to establish its case beyond reasonable doubt. The conviction and consequential sentence awarded by the Court of Sessions, therefore, cannot be sustained. The appeal consequently succeeds and is allowed. The judgment and order dated 4.2.2020, passed by the learned Additional Sessions Judge, Court No. 8, Mathura in Sessions Trial No. 477 of 2015, arising out of Case Crime No. 188 of 2015, under Section 304(1) IPC, Police Station – Refinery, District – Mathura, is set aside.

39. The accused-appellant Rajendra Yogi shall be set to liberty, forthwith, unless he is wanted in any other case, subject to compliance of Section 437A Cr.P.C.

(2024) 8 ILRA 154
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.08.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 5306 of 2002

Heera ...Appellant

Versus

State of U.P. ...Respondent

Counsel for the Appellant:

Sri Rajiv Gupta, Sri Shyam Babu Vaish

Counsel for the Respondents:
D.G.A.

Indian Penal Code, 1860 - Section 376 - Rape - Evidence Act, 1872 - Section 3 - Appreciation of evidence - One of the witnesses of fact stated that he saw the accused-appellant running towards the forest while buttoning up his pant, and the victim was lying bleeding. Medical examination of the victim was conducted within six and a half hours of the time of the incident. In the medical examination of the victim, no bleeding or injury, etc., was found. Neither any redness was seen, nor any swelling was noticed by the doctor in the private part of the victim, and her hymen was found intact. Medical report stated that the vagina admits the tip of the finger. Supplementary report stated that no spermatozoa was seen. *Held:* At the tender age of six years, if the victim is subjected to rape, some sort of injury is bound to occur. Had there been any bleeding, the doctor would not have opined that the vagina admits the tip of the finger. Opinion of the doctor that no rape was committed was completely ignored by the trial court. Victim merely shook her neck while answering the questions put to her. Possibility of the minor victim having been tortured to shake her neck instead of giving an oral reply cannot be ruled out, particularly as a girl of 5-6 years may ably answer the questions put to her. Statements of witnesses of fact, as well as the victim, do not corroborate with the medical evidence. Prosecution failed to prove the charges of rape. (Para 17, 22, 24)

Allowed. (E-5)

List of Cases cited:

1. Dola @ Dlagobinda Pradhan & anr. Vs St. of Odisha reported in 2018 (18) SCC 695

2. Sadashiv Ramrao Hadbe Vs St. of Mah., 2007 (1) SCC (Cri.) 161

(Delivered by Hon'ble Dr. Justice Gautam Chowdhary, J.)

1. By means of the instant appeal, the accused-appellant Heera is assailing the judgment and order of conviction dated 24.10.2002 passed by the learned Additional Sessions Judge (Fast Track) Court Room No. 16, District Bulandshahr in Sessions Trial No. 122 of 2002 (State Vs. Heera) arising out of Case Crime No. 107 of 2001 whereby the accused-appellant has been sentenced under Section 376 I.P.C. to undergo for life imprisonment along with fine of Rs. 1000/- and in default in payment of fine to further undergo simple imprisonment of two years.

2. The prosecution case emanates on the written report of the informant (exhibit ka-1), as per which, on 31.03.2001 when the informant had gone for work and his wife Smt. Heera Devi had gone to jungle to bring the fodder and his daughter aged about 04 years was alone in the house, while playing she went out of the house to look for her mother, at about 06:00 P.M., when the accused-appellant enticed her away and took her to the wheat field of Isthtiaq Haji and committed rape upon her. On hearing her cry, Gurcharan Singh son of Mohar Singh and Durga Prasad son of Moti Ram rushed towards the spot and saw that the accused-appellant had forcefully pressed the victim and was committing rape upon her. As soon as Gurucharan Singh and Durga Prasad reached, the accused appellant ran away towards the forest. The trouser (Pajami) of the victim was brought down and was soaked with blood and the victim was lying unconscious. The informant and his wife rushed to the place of occurrence and brought back the victim. Upon such report, the F.I.R. came to be lodged on 31.03.2001

in Case Crime No. 107 of 2001, under Section 376 I.P.C. at Police Station Jahangirabad, District Bulandshahr. The matter was entrusted for investigation to the Investigating Officer and the victim was medically examined on 01.04.2001 at about 12:30 A.M. Thereafter statements of the witnesses including that of the victim were recorded under Section 161 Cr.P.C. and 164 Cr.P.C. The Investigating Officer, after collecting evidence, culminated the investigation in submission of charge sheet against the accused-appellant under Section 376 I.P.C. upon which cognizance was taken on 11.06.2001 by the concerned Magistrate. The case was committed to the Court of Sessions and the case was registered as Sessions Trial No. 122 of 2002 (State Vs. Heera). Charge was framed under Section 376 I.P.C., against the accused-appellant. The accused-appellant denied the charges and demanded trial. Consequently, the trial commenced.

3. During trial, the prosecution has relied upon following documentary evidence:-

"(i) Written report (Ex. Ka-1).
(ii) Medico Legal Examination Report (Ex. Ka-2).
(iii) Supplementary Medical Report (Ex. Ka-3).
(iv) Recovery memo of "Pajami" G.D.entry (Ex. Ka-4)
(v) Site Plan with Index (Ex. Ka-5).
(vi) Charge sheet original (Ex. Ka-6).
(vii) F.I.R. Ka-7)
(viii) Site Plan (Ex. Ka-8)
(ix) Inquest report (Ex. Ka-9)."

4. From the side of prosecution, as many as six prosecution witnesses appeared before the trial Court. The P.W.1 is the informant Vinnami, P.W.2 Durga Prasad, P.W. 3 is victim, P.W.4 Gurcharan Singh, P.W.5 Dr. Anita Dutta and P.W.6 S.I. Ram Ji Lal, whereas no defence witness was adduced.

5. The informant-P.W.1 has clearly supported the prosecution case and has repeated the F.I.R. version. In his cross-examination, it borne out that he did not go to the place of occurrence and he saw the victim unconscious at his house.

6. P.W.2 Durga Prasad, one of the witnesses of fact has stated that he alongwith Gurcharan were going towards the jungle and as he reached near the wheat field of Ishtiaq, he heard cry, on which he went to that side where he saw that the accused-appellant ran towards forest buttoning up his pant and the victim was lying bleeding.

7. P.W.3 is the victim, who answered to the questions merely by shaking her neck. The testimony of the P.W.3 as has been recorded before the trial Court, is as under:-

नामः- "Victim" गवाह सवालो का जबाव हाँ ना में गर्दन हिला कर देती है।

प्रश्नः-1 तुम्हारे पीछे कोन खड़ा है ?

उत्तर :- हीरा

प्रश्नः-2 क्या हीरा ने तुम्हे खाने के लिये बिस्कुट दिया ?

उत्तरः- हाँ में गर्दन हिलायी

प्रश्नः-3 हीरा क्या तुम्हे खेत पर ले गया था ?

उत्तरः- गर्दन हिला कर हाँ में बताया।

प्रश्नः-4 क्या हीरा तुम्हारे गांव में रहता है ?

उत्तरः- गरदन हिला कर हाँ में उत्तर दिया।

प्रश्नः-5 हीरा ने खेत पर ले जाकर क्या तुम्हारे साथ बुरा काम किया ?

उत्तरः- हाँ में गर्दन हिलायी।

प्रश्नः-6 जब हीरा बुरा काम कर रहा था तो तुम्हारे कहां दुःख हुआ था?

उत्तरः- हाथ लगाकर पेशाब की जगह बतायी।

प्रश्नः-7 दर्द होने पर तुम रोयी थी ?

उत्तरः- हाँ में गर्दन हिलायी।

प्रश्नः-8 जहाँ दर्द हुआ क्या खून आया था ?

उत्तर:- गवाह ने गर्दन हिलाकर हाँ में जवाब दिया।

8. Another witness of fact, P.W.4 Gurcharan Singh also adduced his testimony before the trial, who has reiterated the similar version as has been stated by P.W.2.

9. P.W.5 is Dr. Anita Dutta, who had examined the victim. The doctor has proved the medical reports. Relying upon the medical papers, the doctor has stated that there are no external or internal injury on the victim and her hymen is intact. The possibility of rape has not been supported by the doctor. P.W.6 is the Sub-Inspector Ramji Lal who is formal witnesses and has supported the prosecution case, on the basis of evidence collected during the investigation.

10. The accused-appellant has been confronted with the material evidence adduced against him during the trial. His statement under Section 313 Cr.P.C. came to be recorded wherein he stated that he has been falsely implicated and that the evidence adduced is not reliable.

11. On the basis of the above material produced during the trial, the Court of Sessions has come to the conclusion that the guilt of the accused appellant has clearly been established beyond reasonable doubt and consequently, the accused-appellant has been convicted and sentenced as per the law.

12. Challenging the impugned judgement and order of conviction and sentence against the accused appellant, Sri Shyam Babu Vaish, learned counsel for the accused-appellant, submits that the Court of Sessions has erred in recording the finding of conviction and sentence against the appellant inasmuch as the testimony of witnesses are not reliable and that the accused-appellant has been falsely implicated. He further submits that the victim did not sustain any internal or external injury and the medical examination as well as supplementary medical report do not corroborate with the prosecution version. Learned counsel further argued that perverse findings has been recorded by the trial Court. Thus, the impugned judgment and order is liable to be set aside.

13. Per contra, learned A.G.A. has submitted that offence has been committed by the accused-appellant and the learned trial Court, after considering the evidence available on record, recorded the findings of conviction and has sentenced the accused-appellant to undergo life imprisonment, therefore there is no illegality or perversity in the judgement and order of conviction passed by the trial Court and thus the impugned judgement and order of conviction does not call for any interference by this Court.

14. We have heard Sri Shyam Babu Vaish learned counsel for the accused-appellant, Sri Pankaj Kumar Tripathi, learned A.G.A. for the State and perused the material on record including the original record of the trial Court.

15. The learned trial Court while recording the findings of conviction has observed though hymen is found intact but according to the medical jurisprudence, in the case of girl of less than 12 years, hymen is posteriorly situated, which restricts the gender (penis) to come in contact with hymen thus it is natural that the hymen would be intact even after the commission of offence alleged furthermore, genital injuries are such that the same cannot be examined without giving anesthesia. The learned trial Court considering the testimony of witnesses of fact i.e. P.W. 2 Durga Prasad and P.W.4 Guru Charan Singh has observed that their statements corroborate each other and they are natural witnesses. Apart from the aforesaid statements, learned trial Court also considered the testimony of the victim, who appeared before the trial Court as P.W.3. After considering the evidence adduced before the trial Court, the learned trial Court has convicted and awarded sentence to the accused-appellant for life imprisonment along with fine.

16. Before discussing the findings of conviction recorded by the trial Court, it is necessary to perused Section 375 I.P.C. in which "Rape" has been defined which reads as under:-

375. Rape-- A man is said to commit "rape": if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a women or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a women or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a women so as to cause penetration into the vagina, urethra, anus or any part of the body of such women or make to do so any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

17. The statement of the victim recorded before the trial Court as P.W.2 shows that merely she has shaken her neck while answering the questions put to her, which not entirely reliable. The possibility of minor victim having been tortured to shake her neck instead of giving oral reply cannot be ruled out particularly as a girl of 5-6 years may ably answer the questions put to her. There is nothing on record to suggest that victim was incapacitated or could not speak. The witness of fact P.W. 2 Durga Prasad has stated before the trial Court that he rushed towards the direction from where the sound of cry was coming and on seeing him, the accused-appellant ran away towards the forest buttoning his pant and the victim was lying bleeding. Similar version was also stated by P.W. 4 Gurucharan. In the medical examination of the victim no bleeding or injury etc. is however found.

18. So far as statements of witnesses of fact are concerned, it is crystal clear after seeing them, the accused-appellant ran away towards the forest buttoning his pant but it has not been specifically stated that the accused-appellant was seen committing rape upon the victim. "Rape" has been defined under Section 375 I.P.C. which specifically states that (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a women or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of

the body, not being the penis, into the vagina, the urethra or anus of a women or makes her to do so with him or any other person; or (c) manipulates any part of the body of a women so as to cause penetration into the vagina, urethra, anus or any part of the body of such women or make to do so any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, whereas no such ingredients of Section 375 I.P.C. has been found in the statement of the witnesses of fact.

19. So far as testimony of P.W.2 victim is concerned, it is necessary to take note of the fact that she has merely shaken her neck while answering the question put to her. There is much inconsistencies in the prosecution version and the cross examination of the victim. While the FIR speaks of the incident to have taken place at 6.00 P.M. and the victim was allegedly taken back home by the informant and his wife, the victim in her cross examination has stated that she went back home alone and it was day time. The Apex Court in the matter of ***Dola alias Dlagobinda Pradhan and another Vs. State of Odisha*** reported in ***2018 (18) SCC 695*** has reversed the concurrent conviction in somewhat similar circumstances observing that the testimony of the victim is full of inconsistencies and does not find support with the medical evidence.

20. Now coming to the finding recorded by the learned trial Court with regard to the medical evidence. In the instant case, the incident is said to have taken place on 31.03.2001 at about 18:00 hours, whereas the medical examination of the victim was conducted on 01.04.2001 at about 12:30 A.M. i.e. within 06:30 hours from the time of incident. The medical examination report of the victim is as under:-

"Certified that I have examined Km. "X" d/o Vinami resident of Village Jalilpur P.S.Jahangirabad B/I Constable CP NO. 99 Rajendra Sharma P.S. Jahangirabad, District Bulandshahr at 12:30 A.M. on 01.04.2001.

M.I. Colour of iris of eyes is black.

G.E. She is fully conscious and alert at the time of examination. Breast not developed. Axillary and public hairs not present.

No mark of injury on her body.

Height-97 c.m. weight 15 kg., Teeth 10/10 (milk teeth)

Internal Examination No mark of injury on her private parts including lower abdomen and inner part of both the thights.

Vagina admits tip of the finger. Hymen intact.

Vagina smear made and sent to pathologist for HPE to District Hospital Bulandshahr.

Referred to Radiologist X-ray department, District Hospital Bulandshahr for X-Ray elbow and wrist joint (including carpal bones) for age."

21. Pursuant to the recommendation made by Medical Officer K.M.G., Bulandshahr for X-Ray as well as pathological examination before the Radiologist, the victim was examined, after her examination, the supplementary report was prepared on 12.04.2001, which reads as under:-

"Supplementary report of "X" daughter of Vinami resident of Jalilpur, P.S. Jahangirabad, District Bulandshahr.

X-Ray Report No. 1543-44 dated 03.04.2001.

X-Ray Rt. Wrist AP view No. 1543 shows appearance of 4 carpal bones. Capitate, Hamate cumeform and lunate distal end of radius appeared but styloid of ulna not appeared.

X-Ray Rt. Elbow joint No. 1544:- Head of radius not appeared. Medial epicondyle of humerus appeared.

Lateral epicondyle not appeared.

Pathology Report No. 23 of 2001 dated 03.04.2001.

No spermatozoa seen in the supplied smear.

Conclusion (1) Her age is about 5-6 years.

(2) No opinion about rape can be given"

22. So far as bleeding of victim is concerned, the medical report states that the vagina admits tip of the finger and also the fact that supplementary report shows that no spermatozoa was seen and therefore, no medical evidence of rape is on record. The medical examination of the victim was conducted within six and half hours of the time of incident and had there been any such bleeding, the doctor would not have opined that vagina admits tip of the finger. The opinion of the doctor that no rape has been committed has been completely ignored by the trial Court. Thus the testimony of P.W.2 and P.W.4 do not find support from the medical evidence.

23. Although in **Sadashiv Ramrao Hadbe Vs. State of Maharastra, 2007 (1) SCC (Cri.)** 161 the Hon'ble Apex Court has held that the sole testimony of prosecutrix is sustainable if it inspires the confidence of the Court but if the version given by the prosecutrix is not supported by the medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the Court shall not act on the solitary evidence of the prosecutrix. The paragraph no. 9 of the aforesaid judgement reads as under:-

"9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

24. We have given our thoughtful consideration to the evidence on record as has been discussed in the preceding paragraph and also the arguments submitted by the learned counsel for the parties. We find that the statements of witnesses of fact as well as the victim do not corroborate with the medical evidence. The medical examination of the victim was conducted within six and a half hours. The specific case of the prosecution is that sexual assault was committed upon the victim. In our assessment at the tender age of six years if the victim is subjected to rape some sort of injury is bound to occur and be reflected in the medical papers or the testimony of doctor. The fact that neither any redishness was seen nor any swelling was noticed by the doctor in the private part of the victim and her hymen was found intact, coupled with the fact that there are contradictions in the manner in which the offence was observed by the witnesses, we are of the considered opinion

that the prosecution has failed to prove the charges of rape levelled against him and accused is entitled to benefit of doubt.

25. In view of the discussions and deliberations held, this criminal appeal succeeds and is allowed. The conviction and sentence of the accused appellant Heera vide judgment and order dated 24.10.2002 passed by the learned Additional Sessions Judge (Fast Track) Court Room No. 16, District Bulandshahr in Sessions Trial No. 122 of 2002 (State Vs. Heera) arising out of Case Crime No. 107 of 2001 under Section 376 I.P.C. Police Station Jahangirabad, District Bulandshahr, is set aside.

26. The accused-appellant shall be released forthwith unless he is wanted in any other case subject to compliance of Section 437-A Cr.P.C.

27. The trial Court record along with the copy of this order be transmitted to the court concerned forthwith.

(2024) 8 ILRA 161
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.08.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 5591 of 2019
And
Criminal Appeal No. 5593 of 2019

Dilawar Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Noor Muhammad, Rajeev Malviya, Shashi Dhar Pandey, Yogesh Kumar Srivastava

Counsel for the Respondent:
G.A.

Evidence Act, 1872 - Section 32 - Dying Declaration - Admissibility of Dying Declaration - Sole ground for conviction of the appellants was the Dying Declaration *Held :* Court held that in the instant case Dying Declaration cannot be relied upon. Dying Declaration had two endorsements of the doctor one at the top and one at the bottom. At both places, there was seal of E.M.O., S.N.M. Hospital with initial of the Doctor but the name of the doctor was not mentioned in both the endorsement. On the top and bottom of the Dying Declaration doctor has used the word "Dying Declaration" instead of "Statement" show that those endorsements were made subsequently when the deceased died and that is why the term "Dying Declaration" was used instead of "Statement". Doctor has stated that the victim was fully conscious and can give her Dying Declaration. On the bottom, again the doctor stated that during recording of the Dying Declaration she was conscious. In ordinary course, the doctor gives an opinion that the victim is in the fit state of mind to get her statement recorded. In both the endorsements, the Doctor has not given any opinion that the victim was in a fit state of mind to get her statement recorded and it is only stated that she is conscious to give her dying declaration. In the absence of any specific opinion by the doctor that the victim is in fit mental state to give the statement, the Dying Declaration become highly suspicious. Doctor has not recorded his satisfaction by asking some preliminary questions that the victim was in a fit mental condition to make her statement. There was no endorsement by doctor that after recording the dying declaration, he has read over the same to the victim and after understanding the same, she has put her thumb impression.Doctor who made the

endorsement was not examined, even his statement under Section 161 Cr.P.C. was not recorded. There was no corroboration by any family members i.e. PW-1 to PW6 that PW-10 had recorded the Dying Declaration naming the accused. In the Dying Declaration, nothing was recorded that on account of demand of dowry or maltreatment or that the victim was subjected to cruelty due to which her husband by pouring kerosene oil has lit the fire. No motive was attributed to the accused. Even in Dying Declaration, no motive was attributed. Dying Declaration was doubtful and was not reliable and benefit of doubt was given to the accused. (Para 54)

Allowed. (E-5)

List of Cases cited:

1. Dattatraya Vs St. of Mah., 2024 SCC OnLine SC 223

2. Shambhubhai Kalabhai Raval Vs St. of Guj., 2023 SCC OnLine SC 1420

3. Umakant & anr. Vs St. of Chhatishgarh, (2014) 7 SCC 405

4.Kanti Lal Vs St. of Raj., (2009) 12 SCC 498

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. The present appeals have been filed against the judgment of conviction dated 9.7.2019 passed by Additional Sessions Judge, Court No. 8, Firozabad in ST No. 392 of 2012 (Case Crime No. 239 of 2012), Police Station – Utter, Firozabad by which the appellants were convicted of charge under Sections 498-A, 304-B IPC, read with Section ¾ of the Dowry Prohibition Act. Accused-appellant, Dilawar Singh, was sentenced to undergo life imprisonment under Section 304-B IPC whereas accused-Jagat Singh and Virendra Singh were sentenced to undergo 10 years of rigorous imprisonment. Under Section 498A of IPC, all the accused were awarded two years of imprisonment with fine of Rs. 5000/- each. In case of default of payment of fine, they were directed to further undergo imprisonment for one month each. Under Section 4 of the Dowry Prohibition Act, the appellants were directed to undergo two years imprisonment with fine of Rs. 5000/- each and in default of payment of fine, they have to undergo one month further imprisonment. All the sentences were ordered to run concurrently.

2. Heard Sri Yogesh Kumar Srivastava, learned counsel for the appellant, Sri Arun Kumar Singh, learned Amicus Curiae, and learned A.G.A. for the State.

3. This case is listed in the category of 'Supreme Court Expedited Cases' as in S.L.P. (Criminal) Diary No. 15422 of 2024 (Dilawar Singh Vs. State of U.P.), he Supreme Court has passed the following order on 26.04.2024, which read as under:

"Delay condoned.

We are not inclined to interfere with the impugned judgment and hence, the special leave petition is dismissed.

We request the High Court to take up Criminal Appeal no. 5591/2019 filed by the present petitioner- Dilawar

Singh for hearing as expeditiously as possible.

In case the appeal is not taken up for hearing within six months from today for reasons not attributable to the petitioner or co-convicts, the petitioner - Dilawar Singh may file a fresh application for grant of bail, which will be considered in accordance with law.

We also observe that the counsel appearing for the petitioner - Dilawar Singh should be ready for arguments when Criminal Appeal no. 5591/2019 is taken up by the High Court for hearing.

Pending application(s), if any, shall stand disposed of."

4. Paper book is ready. Trial Court record is requisitioned and the arguments on main appeal is heard.

5. During pendency of the appeal, the accused-appellant Jagat Singh has died and this fact is verified by the Chief Judicial Magistrate, Firozabad. It is also worth noticing that appellant Virendra Singh was released on bail vide order dated 19.2.2020 as he was on bail during trial, however, the appellant Dilawar Singh is in continuous judicial custody since 29.4.2012 and has undergone 12 years and 5 months of actual custody and 13 years and 4 months of total custody including remission. Both the appellants have no criminal history.

6. Brief facts of the case are that on 29.02.2012, informant- Rambir Singh has given complaint vide Ex.Ka.1 on the basis of which chik FIR (Ex.Ka-3) was registered which read as under:

"सेवा में, श्रीमान थानाध्यक्ष महोदय थाना उत्तर फिरोजाबाद निवेदन है कि मै रामवीर सिंह यादव पुत्र श्री सालिग राम निवासी महरारा जिला हाथरस का रहने वाला हूँ। मैने अपनी बेटी शशि देवी की शादी दो साल पहले दिलावर सिंह यादव पुत्र श्री वीरेन्द्र यादव निवासी जैन नगर थाना उत्तर के साथ की थी। मैने शादी में अपनी हैसियतनुसार दान दहेज भी दिया था। मगर लड़का पक्ष उससे सन्तुष्ट नहीं था वे लोग श्वसुर वीरेन्द्र यादव, पति दिलावर व जेठ विजय कुमार व देवर जगत सिंह अक्सर बेटी शशि देवी के साथ मारपीट करते थे और कहते थे कि अपने माता पिता से 50,000/- नगद व एक मोटर साइकिल लेकर आओ नहीं तो हम तुम्हें मार देंगे 27 फरवरी को मेरे पास मेरी बेटी का फोन आया था कि मम्मी पापा आप जाओ नहीं तो ये लोग मुझे जान से मार देंगे। आज 29 फरवरी को बेटी की ससुराल से फोन आया कि तुम्हारी बेटी जल गई है। जल्दी आ जाओ मै जब अस्पताल पहुंचा तो देखा कि बेटी शशि देवी पूरी तरह से जली हुई है और लड़का पक्ष का कोई भी व्यक्ति अस्पताल में मौजूद नहीं था। मुझे पूरा विश्वास है कि मेरी बेटी को जलाने में इन्हीं सब लोगो का हाथ है। अतः आपसे निवेदन है कि मेरी रिपोर्ट लिखकर उचित कार्यवाही की जाये और उचित न्याय दिलाने की कृपा करें। निवेदन रामवीर s/o सालिगराम ग्रा० महरारा जि० हाथरस थाना सहपऊ फोन 9917535777

नोट- मै c/609 रामवीर सिंह प्रमाणित करता हूँ कि तहरीर की नकल चिक हाजा पर शब्द व शब्द अंकित की गई है कार्बन प्रति साफ व पठनीय है। तहरीर हमरिश्ता मूल एफ.आई.आर. है।

ह० C/609 रामवीर सिंह
थाना उत्तर फि०बाद
दि०29/02/12"

7. The investigation was carried out by the police. During the investigation, one Naib Tehsildar, who later on, appeared as PW-10, recorded the dying declaration of the victim. The

operative part of the dying declaration (Ex.Ka.7) read as under:

"Certified that Smt. Shashi, aged about 25 years, w/o Dilawar Singh R/o Jaid Nagarm ACS North, Distt. Firozabad, is fully conscious and can give her ***Dying Declaration.***

ब्यान शशि w/o दिलावर सिंह नि० जैन नगर फिरोजाबाद उम्र- 32 वर्ष पेशा- गृहणी

बहल्फ ब्यान किया कि घटना दि० 28/2/12 की साय 9.00 बजे की है। घरवालो मेरे पति दिलावर से कहा कि शशि में आग लगा दो। मेरे पति ने मेरे उपर मिट्टी का तेल डाला। ***आग किसने लगाई यह मुझे पता नहीं। मेरा पति दारू पीकर आया था। मेरे पति ने कहा मै जा रहा हूँ। फिर मुझमें आग लगाने की धमकी दी थी।*** *मैने कहा लगा दो। फिर मेरे पति ने मुझमें आग लगा दी। ब्यान सुनकर पढ़कर तस्दीक किया।*

ह० अप०
नि० अ० दाहिना हाथ
29/2/12
ह० अप०
N.T.
29/2/12
Date 29/2/12
N.T.
time 9.30 AM
SNM Firozabad (U.P.)

Certified that Smt. Shashi w/o Dilawar Singh described above remained fully conscious throughout her dying declaration.

ह० अप०
29/2/12
9.30AM
EMO
SNM Hospital
FIROZABAD"

8. The police prepared a Panchayatnama in which it was decided that the post-mortem of the dead body should be conducted. Thereafter, the post-mortem of the victim, who died, on 01.03.2012 was conducted. Thereafter, the final report was submitted against three accused persons namely, appellant-husband Dilawar Singh, brother-in-law- Jagat Singh and father-in-law-Virendra Singh. The case was committed to the Court of Sessions. The Additional Sessions Judge, Firozabad framed the charges against the appellants under Sections 498A, 304B of I.P.C. and in alternative framed the charge under Section 302 read with Section 506 of I.P.C. and Section 3/4 of D.P. Act.

9. The appellants did not plead guilty and claimed the trial.

10. In prosecution evidence, PW-1- informant, Rambir Singh, appeared and stated on the line of the allegations made in the FIR. However, in cross-examination, this witness turned hostile and stated as under:

"नाम साक्षी- रामवीर सिंह पुत्र सालिगराम उम्र करीब 55 साल पेशा नौकरी निवासी ग्राम महरारा थाना सहपऊ जिला हाथरस। शपथ पूर्वक बयान किया कि मैने अपनी लड़की शशि की शादी दिलावर से इस घटना से दो साल पहले की थी। शादी मे मैने अपनी लड़की की शादी अपनी हैसियत के अनुसार की थी। मेरे द्वारा दिये गये दान दहेज से मेरी लड़की के पति दिलावर, ससुर देवर व जेठ सन्तुष्ट नही हुये। और मेरी लड़की के साथ मारपीट करते थे परेशान करते थे और कहते थे कि आप अपने पिता से 50,000/- व एक स्पैण्डर मोटर साईकिल लेकर आ नही तो तुझे जान से मार देंगे। मेरी लड़की ने घटना से दो दिन पहले 27 फरवीर को फोन

किया था मम्मी पापा आप आ जाओ नही तो ये लोग मुझे मार देंगे मुझे परेशान कर रहे है। 29 फरवरी को मेरी लड़की के ससुराल से किसी पड़ोसी अड़ोसी ने फोन किया कि तुम्हारी लड़की जल गई है जल्दी आ जाओ मै अपने पूरे परिवार के साथ सरकारी अस्पताल पहुंचा तो वहां पर मेरी लड़की मुझे जली हुई हालात मे मिली। वहां पर मेरी लड़की के पति व ससुरालीजन कोई अस्पताल मे नही मिले। मेरी लड़की ने मुझे बताया कि ससुर व देवर ने मिट्टी का तेल डालकर आग लगाने के लिये कहा उसी बात पर जेठ विजय कुमार ने मिट्टी का तेल डाल दिया पति दिलावर ने आग लगाई। ससुर वीरेन्द्र व देवर जगत सिंह मौजूद खड़े रहे। फिर इस घटना की रिपोर्ट लिखकर थाना उत्तर पर जाकर दी। पत्रावली मे कागज संख्या 3अ/2 को देखकर गवाह ने कहा कि मैने यही रिपोर्ट थाना उत्तर मे जाकर की थी। जो मेरे अपने हस्ताक्षर की शिनाख्त करता हूँ जिस एक्ज क1 डाला गया। मेरी लड़की सैफई अस्पताल मे 29 तारीख को ही खत्म हो गई थी। वहां पर मेरी लड़की के शव का पंचनामा भरा था उस पर मैने अपने हस्ताक्षर किये। पत्रावली मे कागज सं. 7अ/1 लगायत 7अ/2 पर गवाह ने अपने हस्ताक्षर को शिनाख्त की। मैने अपनी लड़की का दाह संस्कार अपने गांव मे ले जाकर किया था।

X x x

x x

मैं हाईस्कूल फेल हूँ। रिपोर्ट मैने थाने पर बैठकर लिखी थी। अभियुक्त के अधिवक्ता श्री नाहर सिंह यादव धारा 17ब स्थगन प्रार्थना दिया।"

"x x x x x (sic) recorded from PW1 Ranveer Singh recall on oath on dt. 24.7.15 रिपोर्ट प्रदर्श क-1 मैने अपने मन से नहीं लिखी थी। दरोगा जी ने अपनी मर्जी से बोल-2 कर लिखवाई थी। मेरी लड़की के साथ दिलावर सिंह, जगत सिंह, वीरेन्द्र सिंह ने कभी भी अतिरिक्त दहेज की मांग नहीं की और न उसके साथ कभी कोई मारपीट की थी। मेरी लड़की ने मुझे कभी भी अतिरिक्त दहेज की मांग के बारे में नहीं बताया था उसके ससुरालीजनों ने मुझसे कभी अतिरिक्त दहेज की मांग नहीं की थी। मेरी लड़की कम दिमाग की थी और वह खाना बनाते समय स्वयं ही जल गयी थी। यह बात मेरी लड़की ने मुझे भी बताई थी कि वह खाना बनाते समय अपने आप जल गयी थी। मेरी लड़की को उसके ससुरालीजनों ने नहीं जलाया था। मै अपनी लड़की की दाह संस्कार के लिये ले गया था दाह संस्कार में उसके ससुराली जन शामिल हुए थे। मेरी लड़की का अस्पताल में इलाज उसके ससुराल वालों ने कराया था दरोगा जी। विवेचक ने मेरा कभी कोई बयान नही लिया था और न ही पूंछताछ की थी विवेचक को मैने घटनास्थल नहीं दिखाया था।

कोर्ट सर्टि०

सु० तस्दीक किया
ह० अप०
ह० रामवीर सिंह
ASJ/(sic)
24/7/15"

11. PW-2- Smt. Saroj Devi, mother of the victim also did not support the prosecution version and her statement read as under:

"कथन- श्रीमती सरोज देवी उम्र 55 साल w/o श्री रामवीर सिंह पेशा गृहणी R/o महरारा Ps सहपऊ जिला हाथरस ने शपथ पर बयान किया कि मैने अपनी लड़की शशि की शादी वर्ष 2009 में दिलावर सिंह के साथ हिन्दू रीति से की थी। शादी के बाद ससुरालीजन अतिरिक्त दहेज में 50,000/- व मोटर साइकिल की मांग को लेकर मेरी लड़की को तंग व परेशान नहीं करते थे। अतिरिक्त दहेज की मांग को लेकर मेरी लड़की की हत्या आग लगाकर नहीं की है। ----

At this stage declare hostile on the oral request of ADGC to cross examination to the witness (sic)-

मैने अपनी बेटी की शादी साधारण तरीके से की थी। मेरी लड़की ने अपनी तंग परेशानी की कोई शिकायत नहीं की थी। विवेचक ने मेरा बयान नहीं लिया था। गवाह को 161 Cr.P.C. का बयान पढ़कर सुनाया तो उसने बताया कि कैसे बयान लिया मै नहीं बता सकता। यह कहना गलत है कि मै मुल्जिमान से मिलकर सही बात नहीं बता रही हूँ।

x x x by defence counsel-

opportunity given to cross examination

-------NIL-------"

12. PW-3- Satyendra Kumar, the real brother of the victim- deceased also

did not support prosecution version. His statement read as under:

''नाम साक्षी सतेन्द्र कुमार s/o श्री रामवीर सिंह उम्र करीब 27 साल पेशा विद्यार्थी नि. माहरारा थाना सहपऊ जिला हाथरस ने शपथ पूर्वक बयान किया किः-

बहिन की शादी आज से करीब 3 साल पहले दिलावर सिंह s/o वीरेन्द्र सिंह के साथ हिन्दू रीति रिवाज के साथ हुई थी। हम लोगो ने अपनी बहिन शशि की शादी हैसियत के मुताबिक की थी।

मेरी बहिन शशी शुरू से ही चिढ़चिढ़े पन की थी। वह जिद्दी किस्म की थी।

मेरी बहिन की मृत्यु अभी खाना बनाते समय स्वयं जल गई थी।

मै अपनी बहिन के यहां ससुराल में गया था। मेरी बहिन ससुराल में खुश थी। उसने मुझे कभी भी दहेज की मांग की बात नहीं बताई थी।

मेरी बहिन ने मुझे कभी भी नहीं बताया कि मेरे पति दहेज में 50 हजार और स्पैलन्डर की मांग करते थे।

जलने की सूचना मिली थी। तब मै सरकारी अस्पताल फि.बाद गया। जहां मोरचरी में देखा था। वहां पर उसके पति दिलावर, जेठ विजय सिंह, ससुर वीरेन्द्र सिंह, देवर जगत सिंह और उनकी मां बहिन सभी अस्पताल में मौजूद थे। और गांव के आसपास के लोग भी मौजूद थे। वहां पर मुझे बताया था कि तुम्हारी बहिन खाना बनाते में जल गई है। क्योंकि मै अपनी बहिन की ससुराल में जाता था। इसलिए मुझे गांव वाले जानते थे।

गवाह ने पत्रावली पर कागज सं. 7अ/1 को देखकर कहा कि यह वही कागज है जिस पर मेरे हस्ताक्षर है। पढ़कर नहीं सुनाया था मेरे हस्ताक्षर करा लिये थे जो हस्ताक्षर बने है। मै उनकी शिनाख्त करता हूँ। जिस पर प्रदर्श क-2 डाला गया।

इस स्तर पर गवाह को ADGC की प्रार्थना पर पक्षद्रोही घोषित किया गया। जिरह की अनुमति दी गई।

x x x x cross by ADGC.

पुलिस ने मेरा कोई बयान नहीं लिया गया गवाह को उसका 161 Cr.P.C. का बयान पढ़कर सुनाया गया तो गवाह ने कहा कि मैने ऐसा कोई बयान पुलिस को नहीं दिया। कैसे लिख लिया वजह नहीं बता सकता हूँ।

यह कहना गलत है कि हमारा मुल्जिमानों से राजीनामा हो गया हो। इसलिए मैं अदालत में सही बात नहीं बता रहा हूँ।

x x x x cross by defence.
NIL''

13. PW-4- Smt. Neeraj, wife of PW-3, was also declared hostile and did not support the prosecution version regarding the demand of dowry or any physical torture and stated that her sister-in-law (Nanad) died due to an accidental fire while cooking food. This witness was declared hostile and in cross-examination by public prosecutor when she was confronted with her statement under Section 161 of Cr.P.C., she even denied the same by stating that she has not made such statement to the Investigating Officer.

14. PW-5- Mukesh, the paternal uncle of deceased also did not support the prosecution version. This witness stated that he was the mediator in the marriage and this witness was also declared hostile. In cross-examination by public prosecutor, he stated that the victim never lodged any complaint regarding maltreatment or demand of dowry.

15. PW-6- the other brother of deceased- Shashi also did not support the prosecution version and stated that his sister was short-tempered and while cooking food, she accidentally got burn injury and died. He further stated that the cremation was done in presence of both the families. This witness was also declared hostile and stated that as the

deceased could not bear a child, she remained tensed and had committed suicide. This witness also denied having made any statement to the Investigating Officer under Section 161 of Cr.P.C. The statement read as under :

"नाम साक्षीः- जितेन्द्र कुमार एस/ओ श्री राम वीर उम्र करीब 30 साल पेशा मजदूरी निवासी मारदारा थाना सहपऊ जिला हाथरस ने शपथपूर्वक बयान किया किः-

मेरी बहिन (मृतक) शशी की शादी आज से करीब 4 साल पूर्व हिन्दू रीति रिवाज के साथ साधारण तरीके से हुई थी।

मेरी बहिन शशी मुझसे छोटी थी। वह अपनी ससुराल से अपने पति के साथ मेरे घर पर आती जाती थी। हंसी खुशी आती जाती थी।

मेरी बहिन शशी के पति दिलावर उसे लाड़ प्यार से रखते थे।

मेरी बहिन ने कभी भी अतिरिक्त दहेज में मेरे सामने 50 हजार रूपये व एक मोटर साइकिल माँग वाली बात नहीं बताई थी। और न ही उसने अपने पति दिलावर व जेठ विजय कुमार व देवर जगत सिंह आदि लोगों के नाम मेरे सामने मेरी बहिन ने किसी प्रकार की मार पीट करना उसके साथ उत्पीड़न करना और अतिरिक्त दहेज में माँग करने वाली बात किसी प्रकार की मेरे सामने न ही मम्मी पापा को बताया और न ही मुझे बताया।

मैं जब भी अपनी बहिन की ससुराल जाता था। कभी अपनी ससुराल में खाना बनाते मिलती थी। कभी कपड़े धोते मिलती थी। उसने कभी भी मुझसे कोई शिकायत अपने पति व ससुराली जनों की नहीं की। वह अपनी ससुराल में हंसी खुशी रहती थी। उसके कोई बच्चा नहीं ***था। बच्चा न होने की वजह से वह मन ही मन जलती थी। जिससे उसका स्वभाव चिढ़चिड़ा बन गया था। मेरी बहिन अपनी ससुराल में खाना बनाते समय जल गई थी। इसका इलाज सैफई में ही हुआ था।*** *जहाँ पर वह उसी दिन मर गई थी उसका अन्तिम संस्कार हम लोगों ने अपने घर पर किया था। साथ में ससुराली जन भी थे।*

इस स्तर पर गवाह को ADGC की प्रार्थना पर पक्षद्रोही घोषित किया गया। जिरह की अनुमति दी गई।

x x x x x Cross by ADGC

मेरी बहिन अपनी ससुराल जब भी मेरे घर आती थी। हंसी खुशी आती थी। और अपने घर से जब भी अपनी ससुराली जाती थी। वह हंसी खुशी जाती थी।

उसने कभी भी मुझे पति व ससुरालीजनों की उत्पीड़न करने वाली व अतिरिक्त दहेज में 50 हजार रू० व मोटर साईकिल वाली बात नहीं बताई थी। बच्चा न होने की वजह से वह मन ही मन कुढ़ती रहती थी। बच्चा न होने के कारण उसने आग लगाकर अपनी आत्म हत्या कर ली। यह बात सही है कि बहिन को ससुराली जन लाड़ प्यार से रखते थे।

मेरा दरोगा जी ने कोई ब्यान नहीं लिया। गवाह को उसका 161 सी०आर०पी०सी० का बयान पढ़कर सुनाया गया तो गवाह ने कहा कि मैंने ऐसा कोई ब्यान दरोगा जी को नहीं दिया। दरोगा जी ने ऐसा ब्यान कैसे लिख दिया मैं वजह नहीं बता सकता।"

16. PW-7- Rambeer Singh, H.C.P. stated that he received a complaint from PW-1, on which he registered a chik FIR, Ex.Ka.3. He futher stated that the FIR was registered initially under Sections 498A, 320, 506 of I.P.C. and Section 3/4 of D.P. Act. In cross-examination, this witness denied the suggestion that the FIR was ante-time.

17. PW-8- SSI, Ramesh Bhardwaj, I.O. stated that on 07.03.2012, the statement of informant was recorded in which he stated that his daughter-Shashi died during her treatment in Safai Hospital. He proved the 'Naksha Najari' as Ex.Ka.5 and also stated that he has concluded the post-mortem from the hospital. In cross-examination, he stated that he did not investigate the place of occurrence on 03.03.2012 as he came to know that the victim and her husband- Dilawar Singh, both were admitted in the District Hospital, Firozabad and later on, both of them

were referred to PGI Safai. In cross-examination, this witness stated as under:

" इसकी मुझे अस्पताल पर जानकारी हुई थी कि पीडित व उसका पति दिलावर दोनो जिला अस्पताल फिरोजाबाद भर्ती हुऐ थे जिनकी डाक्टरी रिपोर्ट की नकल मेरे द्वारा सीडी में किया गया था। जब तक मैने विवेचना की तब तक कोई चश्मदीद साक्ष्य मुझे प्राप्त नही हुआ था। मृतिका के पिता रामवीर सिंह ने मुझे थाने पर व्यान दिया था कि "मेरी लड़की शशि की सास लौग श्री, ससुर विजय सिंह अस्पताल से रैफर करा कर सैफई अस्पताल ले गये और मै साथ मे था।"

घटनास्थल का निरीक्षण करने गया था तब मृतिका की सास लौग श्री मौजूद थी मकान में कही जलने का निशान नहीं था मैने उस दिन (sic) घटना स्थल का निरीक्षण करने वाले (sic) पड़ौसियों के भी ब्यान अंकित किये थे उसे अपनी समाई साक्ष्य होना बताया था कि हमने सुना है कि दिलावर की पत्नी ने आग लगा ली थी बुझाने में दिलावर भी जल गया है दिलावर की पत्नी की आग से जलने के कारण मृत्यु हो गयी है।"

This witness also stated that he did not record the statement of the victim.

18. PW-9- Dr. K.S. Bhadoria stated that on 01.03.2012, he was posted in District Hospital, Etawah and has conducted the post-mortem of Shashi, wife of Dilawar Singh, who died in R.I.M.S. Safai Hospital. As per the post-mortem, following injuries were found:

"1. बर्न (sic) से तृतीय डिग्री तक मौजूद था। सारे शरीर पर केवल नीचे का ¾ पीछे का हिस्सा छोड़कर दोनो बगलो एवं प्यूबिक (PUBIC एरिया) छोड़कर दाहिने हाथ के पिछड़ी को छोड़कर एवं दाहिने तलवे को छोड़कर मौजूद था। रेड लाईन ऑफ दि मार्क केश मौजूद थी सिर के बाल झुलसे हुये थे।

मस्तिष्क एवं उसके ऊपर की झिल्लियाँ एवं दोनों फेफड़े एवं उसके ऊपर की झिल्लियाँ यकृत, तिल्ली, दोनों गुर्दे कन्जेस्टेड थे। आमाशय में लगभग 100ML पेस्टी फूड था। हृदय के दोनों चेम्बर भरे हुये थे। बच्चेदानी खाली थी।

मृतका की मृत्यु, मृत्यु पूर्व जलने के कारण शॉक से हुई थी।"

In cross-examination, he stated that the burn injuries were on the front portion of the body and on the back side, the burn injuries were less.

19. PW-10- Nanhe Ram, Tehsildar stated that he had gone to the hospital for recording the Dying Declaration of victim- Shashi. He proved the statement as Ex.Ka.7. In cross-examination, he stated that the memo vide which he was directed to record the statement, is not on record. He further stated that he did not record the statement of the doctor on dying declaration and, on the dying declaration, there is seal of S.N.M. Hospital but name of doctor is not mentioned. He pleaded ignorance, how he has recorded the age of the deceased as 25 years. He further stated that the word 'Gharwalon' referred to the in-laws but the word in-laws (Sasuralwalon) is not mentioned in dying declaration. He also stated that in the dying declaration, the deceased did not mention about the demand of dowry or maltreatment. He further stated that on the G.D., his name and designation are not mentioned and he has only put his initials. He further stated that with regard to the contradiction, he has not sought any clarification from the deceased and denied a suggestion that he did not record the dying declaration by personally visiting the hospital.

20. PW-11- Inspector Upendra Nath Rai, I.O. stated that he prepared the Panchayatnama which was signed by him and the Tehsildar. In cross-examination, he stated that he has not seen the victim in the hospital and has recorded the same as per the information given by the Tehsildar. He denied the suggestion that neither he nor the Tehsildar has visited the hospital and prepared the documents while sitting in Tehsil office.

21. PW-12- Asha Ram Yadav, Retired S.P. stated that he has partly conducted the investigation after 15.04.2012 and recorded certain CDs. He stated that he has arrested all the three accused persons vide C.D. No. 12 and thereafter, he added the offence under Section 304B of I.P.C. In cross-examination, this witness stated that he had not seen the dying declaration and has only seen the statement of his previous I.O. He further stated that one of the accused Vijay Singh was not found involved and his name was dropped.

22. PW-13- Dr. Mukesh Kumar who conducted the medico-legal-examination of deceased- Shashi in Govt. Hospital, Firozabad, stated that the deceased when brought to the hospital, was in semi-conscious condition and had suffered burn injury and smell of kerosene oil was emitting from the body. Thereafter, he sent an information to the police station vide Ex.Ka.9. This witness stated that on the same day at about 9:40 PM, he had examined Dilawar Singh s/o Virendra Singh who was also admitted in hospital and in examination, he found that Dilawar had suffered burn injuries on his neck, chest, both hands towards the palm and on the back side of the palm. The hairs on the hand were burnt and he was also sustained injuries due to fire from kerosene oil. He was also admitted in hospital. His MLR was proved as Ex.Ka.10.

In cross-examination, he stated that Shashi was admitted by her brother-in-law Vijay. Vijay has also brought Dilawar to the hospital. Both were brought to the hospital at about same time and he first treated Shashi and then Dilawar. Shashi and Dilawar have sustained 80% and 50% burn injury respectively. Both were emitting smell of kerosene oil.

23. Shri Krishna (PW-14), the Tehsildar, stated that on receiving the information, he went to the Mortuary of P.G.I. Saifai and dictated the Panchayatnama to S.I. Upendra Rai. Five persons namely, Rambir, Satendra, Santveer, Padam Singh and Mahesh Chand were appointed as panchs. Panchayatnama (Ex.Ka-2) was prepared under his signature. He also proved the signatures of other persons from Ex.Ka-11 to Ka-14. In cross examination, this witness stated that he had no knowledge whether at the time when Panchayatnama was prepared, the F.I.R. was registered or not. He further stated that he cannot explain the cuttings and overwriting on the Panchayatnama,

however, the cuttings were due to inadvertent mistakes.

24. On conclusion of the prosecution evidence, the statements of the accused-appellants were recorded under Section 313 Cr.P.C. and all the incriminating evidence was put to them.

Accused-Dilawar Singh denied all the evidence led against him and in reply to question No.15 regarding giving his explanation, he stated that he is innocent and has been falsely implicated in this case.

Similar is the statement of Jagat Singh and Virendra Singh who stated that the Dying Declaration is artificial and no family witnesses has supported or proved the occurrence.

25. Thereafter, the Trial Court held the appellants guilty of offence punishable under Sections 498A, Section 304B of IPC and Section ¾ of Dowry Prohibition Act.

26. The paper book is ready. The Trial Court record is received and re-appreciated with the assistance of learned counsel for the appellant as well as learned Amicus Curiae appointed by the Court and learned A.G.A. for the State.

27. Learned Amicus Curiae has argued that none of the prosecution witnesses of facts have supported the prosecution version. It is submitted that all the witnesses were declared hostile. It is further argued that even PW-1 has disowned his statement made in Ex.Ka-1, forming basis of Chik F.I.R. (Ex.Ka-3) and stated that it was dictated by the Investigating Officer himself.

28. Learned counsel further argued that all the witnesses of facts i.e. PW-1 to PW-7, who are the father, mother, two real brothers, paternal uncle (mediator of marriage), sister-in-law (wife of one of the brothers) have not supported the prosecution version so much so that they all have stated that the victim was never maltreated in her matrimonial home as neither there was any demand of dowry nor she was subjected to any cruelty.

29. It is next argued that PW-1 has stated that his daughter was of feeble mind and while cooking food, she sustained burn injuries and died. This witness stated that when he had gone to meet his daughter, this fact was stated by her. This witness also stated that both families i.e. family of deceased and her in-laws have attended the funeral of his daughter.

30. Counsel has further argued that PW-3, real brother of the deceased, has stated that his sister was very arrogant and developed irritable behaviour. She died as she sustained burn injuries while cooking food. He also denied the allegation of demand of dowry by the accused side.

31. It is next argued that PW-5, the mediator, has also stated that the deceased never complained of demand of dowry from her in-laws.

32. It is argued that PW-6, the other brother of the deceased, has stated that her sister was mentally disturbed as she could not bear a child and, therefore, she has committed suicide. This witness also stated that her in-laws used to treat her in a proper manner. Counsel for the appellant has thus argued that in the absence of any witness of fact supporting the prosecution version, no legal evidence has come on record to convict the appellants.

33. It is next argued that as per the statement of PW-9, the doctor who conducted the postmortem and PW-13, the doctor who initially treated the victim, have stated that the deceased received burn injuries on the front side of her body which suggest that she sustained burn injuries accidentally while cooking food. Thus, it is argued that if someone poured the kerosene oil on her, the same would be spread over the entire body causing injury on all parts of the body.

34. Counsel next argued that the Trial Court has not taken into consideration the fact that even the appellant-husband had tried to douse the accidental fire in which, he himself got burn injuries to the extent of 50% on his body. Counsel has referred to the statement of PW-13, the doctor who has stated that the deceased sustained 80% burn injuries whereas the appellant-husband sustained 50% burn injuries, which are on the front side of his neck, chest and both hands. This witness further stated that accused-Dilawar Singh was also smelling kerosene oil. It is argued that in fact the appellant has tried to douse the accidental fire and in that process, he also sustained burn injuries on front side of his body including both of his hands, neck and chest.

35. Counsel has next argued that PW-13 has further stated that both the victims i.e. the deceased and Dilawar Singh were brought to the hospital at the same time by the elder brother of Dilawar Singh namely Vijay which also prove that the deceased suffered burn injuries in accidental fire while cooking food.

36. Counsel has next argued that the conviction of the appellants is solely based on the Dying Declaration which has not been proved in accordance with law.

37. It is argued that Nanheram (PW-10), the Executive Magistrate, who recorded the Dying Declaration has stated that he has received the information for recording the Dying Declaration through a memo but the memo was never produced on record as admitted by this witness.

38. It is also argued that this witness has admitted that he did not record in the Dying Declaration whether it was recorded in emergency ward or in general ward. This witness further stated that the statement of the Doctor, in whose presence he recorded

the Dying Declaration, was not recorded in the Dying Declaration. It is further argued that this witness stated that there is only seal of E.M.O., S.N.M Hospital and there is short signature on the Dying Declaration.

39. Counsel argued that in the Dying Declaration, it is stated that the victim recorded the words "Gharwalon" and not "Sasuralwaon" i.e. her in-laws. It is also argued that in the Dying Declaration, there is no averment recorded that the deceased had stated that there was any demand of dowry or maltreatment on account of demand of dowry as admitted by PW-10. It is argued that in fact the Dying Declaration was not recorded by this witness while visiting to the hospital.

40. It is also argued that neither the Executive Magistrate recorded his satisfaction about mental condition of victim by asking preliminary questions nor the doctor made a specific endorsement that the victim is in a fit condition of mind to make statement.

41. It is also argued that the endorsement of doctor on the top and bottom of Dying Declaration that victim can record her "Dying Declaration" is in fact recorded after death of victim as in ordinary course doctor should have declared that victim can give statement and not Dying Declaration. The word dying declaration on both the endorsements reflect that it was added later on, after the death of victim.

42. Learned counsel submits that the Doctor who gave a certificate that the deceased was fully conscious and can give her statement, never appeared as a witness and PW-10 has admitted that his name is also not mentioned as he has only put his signature over the seal of the hospital. It is also argued that it has not come on record that right thumb impression which was taken by the Executive Officer, was not having any burn injuries as no such endorsement was made by the doctor.

43. Counsel has next argued that even from the Dying Declaration, on the face value, did not make out that appellant has committed the offence as the deceased has stated that she had no knowledge who had lit the fire and when her husband exhorted to lit the fire, the deceased stated that he may do so.

44. Counsel submits that the manner in which the Dying Declaration was recorded showing the mental state of victim does not reflect that she was fully conscious and was making the statement voluntarily.

45. Counsel has next argued that as per the the statement of PW-1, the marriage of deceased with appellant-Dilawar Singh was performed two years prior to the incident however, during intervening period of two years, there was no complaint lodged by the victim regarding any demand of dowry or maltreatment or physical abuse by the accused side.

46. It is further argued that none of the witnesses of Panchayatnama namely Rambir, Satendra, Santveer, Padam Singh and Mahesh Chand were examined as witness to prove the allegations made in the F.I.R.

47. It is thus argued that the prosecution has failed to prove the charge beyond doubt.

48. In reply, learned A.G.A. for the State has argued that the informant while appearing as witness has supported the prosecution, however, during cross examination he has taken the side of accused persons because of some compromise.

49. Learned A.G.A. has further argued that the Dying Declaration has been recorded in accordance with law and has been duly proved by the Executive Magistrate (PW-10) who has recorded the same. It is also argued that before recording the Dying Declaration, the opinion of the doctor was taken that the deceased was in a fit state of mind to record the statement and, therefore, the Dying Declaration has been proved in accordance with law and prayed for dismissal of the appeal.

50. In reply, learned counsel for the appellant has cited the judgments of the Supreme Court. In **Dattatraya Vs. State of Maharashtra, 2024 SCC OnLine SC 223**, the Supreme Court has held as under :

"21. The act of the appellant is not premeditated, but is a result of sudden fight and quarrel in the heat of passion. Therefore, we convert the findings of Section 302 to that of 304 Part-II, as we are of the opinion that though the appellant had knowledge that such an act can result in the death of the deceased, but there was no intention to kill the deceased. Therefore, this is an offence which would come under Part-II not under Part-I of Section 304 of the IPC.

22. On almost similar facts, (as are present in the case at hand), this Court had converted the findings of Section 302 to that of Section 304 Part II IPC. The case of which reference is being made here is Kalu Ram v. State of Rajasthan (2000) 10 SCC 324. The appellant who had been convicted under Section 302 IPC for causing death of his wife by pouring kerosene on her and then setting her on fire was convicted by the Trial Court under Section 302, which was upheld by the High Court. The facts of the case are as follows:-

23. In the above case, the appellant who in an inebriated state was pressurizing his wife to part with some ornaments so that he could buy some more liquor. On her refusal he poured kerosene on her and set her on fire by lighting a matchstick. But then he also tried to pour water on her to save her. This Court was thus of the opinion that:

"7. Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die he would not

have alerted his senses to bring water in an effort to rescue her. We are inclined to think that all that the accused thought of was to inflict burns to her and to frighten her but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. Therefore we are persuaded to bring down the offence from first degree murder to culpable homicide not amounting to murder.

8. We therefore alter the conviction from Section 302 IPC to Section 304 Part II IPC."

24. The facts of the present case, as we have already discussed above, by and large reflect the same situation, nature of crime as well as the act of the accused and the consequences of his action. We are inclined to accept the arguments raised by the learned senior counsel for the appellant, Mr. Sudhanshu S. Choudhari that under the present circumstances it would indeed be a case of culpable homicide not amounting to murder as given in Section 304 Part II in as much as, though the accused had knowledge of the consequences of the act he was committing, yet there was no intention to cause death.

25. The appeal is partly allowed. We convert the findings of Section 302 to that of Section 304 Part II of IPC and sentence the accused to 10 years of R.I. To this extent the findings given by the trial court and High Court will stand modified. We have also been informed that the appellant has already undergone incarceration for more than 10 years. Therefore, he shall be released forthwith from the jail, unless he is required in some other offence."

51. Counsel for the appellant has also relied upon the decision in **Shambhubhai Kalabhai Raval vs. State of Gujarat, 2023 SCC OnLine SC 1420**, wherein the Supreme Court has held as under :

"6. There are other factors on the basis which we can say that the dying declaration is not free from a serious doubt. The said reasons are as under:- (i) The dying declaration itself does not bear the endorsement of the doctor regarding the fitness of the deceased to make a statement; (ii) A panchnama (Exhibit '29') was recorded around 10:10 P.M. on 31.07.1994, which records that the deceased was barely able to tell her name and she stated that she could not speak. The alleged dying declaration was recorded between 09:45 P.M. to 10:00 P.M.; (iii) Even the police personnel, who recorded the panchnama has stated that the deceased was not in a position to speak; and (iv) PW5 - Dr. Rajendra, who examined the deceased stated in the cross-examination that when he asked the deceased about the cause of burn injuries, she disclosed that she poured kerosene on herself. But she gave no reason why she did the act.

7. These factors taken together create a serious doubt about the correctness of the dying declaration.

Therefore, the dying declaration will have to be kept out of consideration. In any case, 5 the dying declaration is not of that sterling quality on which the conviction can be based in absence of any other evidence. Therefore, the prosecution has failed to prove the guilt of the appellant beyond a reasonable doubt. The appeal succeeds and the impugned orders are quashed and set aside. The appellant is acquitted."

52. Counsel for the appellant has also relied upon the decision in **Umakant and another Vs. State of Chhatishgarh, (2014) 7 SCC 405** wherein the Supreme Court has held as under :

"22. The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in Atbir v. Government of NCT of Delhi- 2010 (9) SCC 1, taking into consideration the earlier judgments of this Court in Paniben v. State of Gujarat - 1992 (2) SCC 474 and another judgment of this Court in Panneerselvam v. State of Tamilnadu - 2008 (17) SCC 190 has given certain guidelines while considering a dying declaration:

"(i). Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.

(ii). The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii). Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv). It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborative. The rule requiring corroboration is merely a rule of prudence.

(v). Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi). A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii). Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii). Even if it is a brief statement, it is not to be discarded."

9. When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

10. If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration.

23. In the light of the above legal position that governs the consideration of a dying declaration,

the factual matrix has to be scrutinised. As already extracted above, in the dying declaration Ex.P-13, the deceased stated before the Magistrate that the appellants demanded dowry and that the appellants set fire to her and she asked her brother-in- law to rescue her, but he had chosen not to do so, and further on hearing her cries, the neighbours came and extinguished the fire and admitted her in the hospital. After she was admitted in the hospital, her parents came and she informed them about the incident. The deceased is said to have stated that when she was pregnant she was beaten up by the accused and because of which the child died in the womb. At that time, she had taken treatment in Revival Hospital]. This statement is found in Ex.P-23, FIR written by K.B. Singh (P.W.23), and not in Ex.P13 dying declaration.

24. When we look at the dying declaration, it is not inspiring confidence in the mind of this Court and throws serious doubt that the same is a product of tutoring by the family members of the deceased for the reason that, the sister of the deceased who was present when the deceased was admitted in the hospital had signed in Ex.P-2 wherein it is stated that it was an accident and nobody has burnt the deceased, but later she turned around and stated that unless she signed on that, they were told that the deceased would not be treated, and the High Court has taken this fact into consideration, whereas in the dying declaration, the deceased has stated that when her parents came to the hospital on 06.08.2003, she informed to the parents for the first time and she had not mentioned that she informed her sister or anybody before that, but according to the sister of the deceased, on 02.08.2003, she was aware of this, which shows that the evidence of the witness is not reliable and clouded with doubt.

53. Counsel for the appellant has relied upon the the decision in **Kanti Lal vs. State of Rajasthan, (2009) 12 SCC 498** wherein the the Supreme Court with reference to the admissibility of the Dying Declaration has held as under :

32. It is well settled that one of the important tests of the credibility of the dying declaration is that the person, who recorded it, must be satisfied that the deceased was in a fit state of mind. For placing implicit reliance on dying declaration, the court must be satisfied that the deceased was in a fit state of mind to narrate the correct facts of occurrence. If the capacity of the maker of the statement to narrate the facts is found to be impaired, such dying declaration should be rejected, as it is highly unsafe to place reliance on it. The dying declaration should be voluntary and should not be prompted and physical as well as mental fitness of the maker is to be proved by the prosecution.

33. In the present case, as noticed above DW 2 has not taken any certificate from the doctor to prove that the deceased was in a fit state of mind

to give statement nor he has recorded any endorsement to that effect on the alleged dying declaration (Ext. D-4). Another factor which impairs the credibility of the alleged dying declaration (Ext. D-4) and belies the statement of DW 2 was that, according to Dr. Vasudev, dying declaration was recorded by the reader of the Tahsildar and not by DW 2.

34. It is also proved on record that DW 2 did not ask preliminary questions from the deceased before the dying declaration allegedly made by her was recorded and this fact also created doubt about the correctness and truthfulness of the dying declaration. It is also the evidence of DW 2 that after recording the alleged statement of the deceased, he did not seal the dying declaration and the unsealed document was handed over to the Station House Officer. DW 2 has not produced on record the original copy of the "tehreer" submitted to him by a constable requesting him to visit the hospital for recording the alleged dying declaration of the deceased, and a carbon copy whereof was produced by him during his cross-examination.

35. A categorical refusal of putting her signature or thumb impression on the alleged dying declaration (Ext. D-4) by PW 6 Bhanvri (the mother of the deceased) would further go to prove that the alleged dying declaration was not at all recorded by DW 2 in the room of the hospital where the deceased was lying before she died.

36. The abovestated facts and circumstances would prove that the alleged dying declaration, on which much reliance has been placed by the defence, cannot be said to be an admissible and reliable document. The fact that the alleged dying declaration (Ext. D-4) did not bear endorsement of DW 2 to the effect that it was read over and explained to the deceased, also created a doubt on its credibility and truthfulness.

37. The trial court as well as the High Court both have concurrently and, in our considered view, have rightly rejected the genuineness and credibility of the alleged dying declaration to prove the defence version that the deceased made the said statement to DW 2 and she died because of accidental death. We agree with the findings and reasoning of the courts below that the alleged dying declaration (Ext. D-4) suffers from a number of basic infirmities and such dying declaration cannot be found admissible and accepted as a genuine document.

38. Ms Aishwarya, learned counsel, has relied upon the judgment of this Court in Gaffar Badshaha Pathan v. State of Maharashtra [(2004) 10 SCC 589 : 2004 SCC (Cri) 2037] to contend that it is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of

accidental death. In such case, the burden on the accused is much lighter.

39. In the present case, according to the learned counsel, A-1 and A-3 have established beyond reasonable doubt that the statement of the deceased was recorded by DW 2 with bona fide intention and without putting any pressure upon the deceased and therefore, the document has to be accepted as an admissible and reliable document to indicate that the deceased died due to accidental fire.

40. We have gone through the abovecited judgment in Gaffar Badshaha Pathan [(2004) 10 SCC 589 : 2004 SCC (Cri) 2037] . In that case, this Court while dealing with the dying declaration produced on record held as under: (SCC p. 590f-h)

"It is one thing for an accused to attack a dying declaration in a case where the prosecution seeks to rely on a dying declaration against an accused but it is altogether different where an accused relies upon a dying declaration in support of the defence of accidental death. The burden on the accused is much lighter. He has only to prove reasonable probability. The High Court erred in holding that the recording of the dying declaration and story stated therein apparently appears to be false and concocted. ... the fact whether the dying declaration is false and concocted has to be established by the prosecution. It is not for the accused to prove conclusively that the dying declaration was correct and the story therein was not concocted."

41. In Ghurphekan v. State of U.P. [(1972) 3 SCC 361 : 1972 SCC (Cri) 531] this Court while dealing with the case which entirely rested on dying declaration of the deceased held as under: (SCC p. 362)

"(i) A dying declaration, recorded within a few hours after the incident, when it bore the endorsement of the doctor, that the victim was at that time in 'proper senses' to be able to give the statement and where the evidence of the recording Magistrate showed no flaw in taking it down, there is no reason to reject it.

(ii) Where the dying declaration had two weaknesses, namely, it did not mention the name of one of the witnesses present at the spot and it did not account for the injuries on the persons of the attacking party, it cannot be rejected on those omissions only, if otherwise it could be shown to be true in other respects, by other satisfactory evidence.

(iii) Where the circumstantial evidence negatived the alternative case set up by the defence and the investigating officer's evidence about the place of incident, the medical officer's evidence in support of the prosecution about the manner of the occurrence of the incident, and the explanation of some witnesses for their presence at the spot, are consistent with the dying statement and the circumstantial evidence; the dying declaration possesses acceptability in spite of any weaknesses pointed out by the defence."

42. In Kans Raj v. State of Punjab [(2000) 5 SCC 207 : 2000 SCC (Cri) 935] this Court held (SCC p. 218, para 11) that the statement of a person "as to any of the circumstances ... which resulted in his death" must have some close and proximate relation with the actual occurrence and proximity would depend upon the circumstances of each case for the purpose of admissibility of such statement as dying declaration under Section 32(1) of the Evidence Act, 1872.

43. In Kamalakar Nandram Bhavsar v. State of Maharashtra [(2004) 10 SCC 192 : (2010) 1 SCC (Cri) 495] this Court on scrutiny of the evidence on record found that the victim of dowry death/bride burning had suffered burn injuries to the extent of 94-95% could not have made dying declaration as stated by the doctor during the cross-examination that a dying declaration was made by the victim when she was in hospital. The alleged dying declaration was admitted in evidence at the behest of the defence by the trial court supportive to the defence of the accused. On the facts of the case, this Court observed that the source of production of dying declaration was neither mentioned in the trial court's judgment nor was there any evidence to prove the said document. In these circumstances, this Court held that the High Court had rightly rejected the said dying declaration.

44. In the present case, as noticed in the earlier part of the judgment A-1 and A-3 have not proved on record the source of production of the dying declaration by DW 2 who after recording the statement of the deceased was duty bound to hand over the alleged dying declaration under a sealed cover to the prosecuting agency. In this case, the origin and source of the alleged dying declaration produced by DW 2 at the time of his examination as a defence witness is highly doubtful and such document cannot be accepted as genuine and truthful document in support of the defence of A-1 and A-3.

45. In State (Delhi Admn.) v. Laxman Kumar [(1985) 4 SCC 476 : 1986 SCC (Cri) 2] this Court while dealing with a case of bride burning on the basis of dying declaration, held as follows: (SCC pp. 488 & 490, paras 21 & 25)

"21. ... A dying declaration enjoys almost a sacrosanct status as a piece of evidence as it comes from [the] mouth of a person who is about to die and at that stage of life he is not likely to make a false statement. ...

***

25. ... Ordinarily, a document as valuable as a dying declaration is supposed to be foolproof and is to incorporate the particulars which it is supposed to contain."

Further, it is held that: (Laxman Kumar case [(1985) 4 SCC 476 : 1986 SCC (Cri) 2] , SCC p. 492, para 28)

"28. ... unless the dying declaration is in question and answer form it is very difficult to know to what extent the answers have been suggested by questions put. What is necessary is

that the exact statement made by the deceased should be available to the court."

It is also said that if the doctor happened to be present at the time of recording of the dying declaration and he had heard the statement made by the deceased, he would ordinarily endorse that the statement had been made to his hearing and had been recorded in his presence. The endorsement as made is indicative of the position that a statement had been recorded and the same was being attested by the doctor.

46. In the present case, these basic principles are ignored by DW 2 at the time of recording of the alleged dying declaration of the deceased. As noticed above, the doctor has not made any endorsement on the dying declaration to state that it was recorded in his presence and attested by him. The mother of the deceased refused to put her thumb impression on the said document. Thus, the judgment cited above cannot strengthen the defence of A-1 and A-3 that the dying declaration, Ext. D-4 had been recorded by DW 2 by observing the principles laid down in the above-said case.

47. The prosecution in support of the charge of dowry death has produced and relied upon the testimony of PW 5 Parasmal, father; PW 6 Bhanvri, mother and PW 8 Mahender Kumar, "mama" (mother's brother) of the deceased. Before we proceed to deal with and consider the evidence of the prosecution on the question of dowry death, we may consider the ratio of the law laid down in the cases relied upon before us.

48. In Pawan Kumar v. State of Haryana [(1998) 3 SCC 309 : 1998 SCC (Cri) 740] this Court held that: (SCC p. 314, para 6)

"6. ... The ingredients necessary for the application of Section 304-B are:(a) When the death of a woman is caused by any burns or bodily injury, or

(b) occurs otherwise than under normal circumstances,

(c) and the aforesaid two facts spring within 7 years of girl's marriage,

(d) and soon before her death, she was subjected to cruelty or harassment by her husband or his relative,

(e) this is in connection with the demand of dowry."

(emphasis in original)

49. In Hira Lal v. State (Govt. of NCT), Delhi [(2003) 8 SCC 80 : 2003 SCC (Cri) 2016] this Court reiterated that the essential ingredients to attract application under Section 304-B are that: (SCC p. 81b-c)

"(i) the death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance, (ii) such a death should have occurred within seven years of her marriage, (iii) she must have been subjected to cruelty or harassment by her husband or any relative of her husband, (iv) such cruelty or harassment should be for or in connection with demand of dowry, and (v) such cruelty or harassment is

shown to have been meted out to the woman soon before her death."

Further it is said that the presumption under Section 113-B of the Evidence Act, 1872 is a presumption of law.

"... On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The essentials required to be proved for raising the said presumption are that (i) the question before the court must be whether the accused has committed the dowry death of the woman, (ii) the woman was subjected to cruelty or harassment by her husband or his relatives, (iii) such cruelty or harassment was for or in connection with any demand for dowry, and (iv) such cruelty or harassment was soon before her death." (Hira Lal case [(2003) 8 SCC 80 : 2003 SCC (Cri) 2016] , SCC p. 81c-d)

50. Again, in Kamesh Panjiyar v. State of Bihar [(2005) 2 SCC 388 : 2005 SCC (Cri) 511] , Ram Badan Sharma v. State of Bihar [(2006) 10 SCC 115 : (2007) 1 SCC (Cri) 166] , Trimukh Maroti Kirkan v. State of Maharashtra [(2006) 10 SCC 681 : (2007) 1 SCC (Cri) 80] , Kailashv. State of M.P. [(2006) 12 SCC 667 : (2007) 2 SCC (Cri) 359] and Appasaheb v. State of Maharashtra [(2007) 9 SCC 721 : (2007) 3 SCC (Cri) 468] this Court reiterated and reasserted the settled principles laid down in Hira Lal case [(2003) 8 SCC 80 : 2003 SCC (Cri) 2016] ."

54. After hearing the counsel for the parties, we find merit in the present appeal for the following reasons :

A. None of the witnesses of fact i.e. PW-1, father-informant, PW-2, PW-3 and PW-6, the real brothers of the deceased, has supported the prosecution version. Though PW-1 in chief examination has stated on the line of the F.I.R., however, in cross examination he has disowned his statement in Ex. Ka-1 forming basis of Chik F.I.R. (Ex.Ka-3) and has rather gone to the extent of saying that his daughter was of a feeble mind and sustained accidental burn injuries while cooking food. He further stated that when he had gone to the hospital, his daughter told him that while cooking food, she sustained burn injuries. This witness also stated that in the cremation of his daughter, his family and the family of accused side were present and there was no demand of dowry.

The two real brothers of the deceased have also stated that there was no demand of dowry and victim was happy in her matrimonial house. PW-3 has stated that her sister has developed irritable habit and was headstrong stubborn person. She sustained burn injuries while cooking food. Even PW-6, the other brother of the deceased, has not supported the prosecution version and rather stated that her sister was disturbed on account of non conceiving a child and committed suicide though

her in-laws were treating her in a nice manner. Similar is the statement of PW-2, the mother of the deceased. She has also not supported the prosecution version. PW-4, who is the wife of PW-3, has also stated that the deceased died due to accidental burn injuries. One independent witness i.e. PW-5 who is the mediator in the marriage has also not supported the prosecution version.

All the prosecution witnesses i.e. PW-1 to PW-6 have even denied having made any statement under Section 161 Cr.P.C. to the police and, therefore, none of them have supported the prosecution version.

B. The sole ground for conviction of the appellants as held by the Trial Court is the Dying Declaration which was recorded by PW-10, an Executive Magistrate. However, in the light of the decisions in **Dattatrya's Case, Shambhubhai Kalabhai Raval's Case, Umakant's Case** and Kanti Lal's Case (Supra), we find that the Dying Declaration cannot be relied upon for the following reasons :

(i) PW-1, father of the deceased, stated in cross examination that when he visited, his daughter told him that her father-in-law and brother-in-law (devar) exhorted to pour ker osene oil on her. Her brother-in-law, Vijay, against whom the police did not submit challan, poured kerosene oil and her husband lit the fire whereas her father-in-law and brother-in-law, Jeet Singh, were standing there. In contrast to the statement of PW-1, in the Dying Declaration, the victim stated that "Gharwale" exhorted and asked Dilawar to light the fire and her husband poured kerosene oil but she did not know who lit the fire. Her husband came after consuming liquor and then said that he was going somewhere and threatened to put her on fire. Upon which, the victim stated that he may do so and then her husband lit the fire.

The two versions given by PW-1 and in the Dying Declaration are quite contradictory.

(ii) In the Dying Declaration recorded by PW-10 has two endorsements of the doctor one at the top and one at the bottom. At both places, there is seal of E.M.O., S.N.M. Hospital with initial of the Doctor but, the name of the doctor is not mentioned in both the endorsement. The doctor has stated that the victim-Shashi is fully conscious and can give her Dying Declaration. On the bottom, again the doctor stated that during recording of the Dying Declaration she was conscious. It is surprising that the doctor has given such endorsement that the victim can give her Dying Declaration though in ordinary course, the doctor gives an opinion that the victim is in the fit state of mind to get her statement recorded. This raises serious suspicion that the endorsement on the top and bottom of the Dying Declaration where the doctor has used the word "Dying Declaration" instead of "Statement" show that these endorsements were made subsequently when the deceased died and that is why the term "Dying Declaration" has been used instead of "Statement". In both the endorsements, the Doctor has not given

any opinion that the victim was in a fit state of mind to get her statement recorded and it is only stated that she is conscious to give her dying declaration. Therefore, in the absence of any specific opinion by the doctor that the victim is in fit mental state to give the statement, the Dying Declaration become highly suspicious.

(iii) In the light of the decisions referred to above, PW-10 has not recorded his satisfaction by asking some preliminary questions that the victim was in a fit mental condition to make her statement specially when the doctor who made the endorsement was not examined. Even his statement under Section 161 Cr.P.C. was not recorded.

(iv) There is no corroboration by any family members i.e. PW-1 to PW-6 that PW-10 had recorded the Dying Declaration naming the accused.

(v) In the Dying Declaration, nothing is recorded that on account of demand of dowry or maltreatment or that the victim was subjected to cruelty due to which her husband by pouring kerosene oil has lit the fire.

(vi) A careful perusal of statements of PW-1 to PW-6, the witnesses of facts, show that no motive is attributed to the accused. Even in Dying Declaration, no motive is attributed.

(vii) There is no witness on Dying Declaration though it has come in evidence that the father, mother, and brothers of deceased were present at the spot.

(viii) There is no endorsement by PW-10 that after recording the dying declaration, he has read over the same to the victim and after understanding the same, she has put her thumb impression.

Therefore, the Dying Declaration is doubtful and is not reliable and benefit of doubt has to be given to the accused.

C. As per the statement of the doctor who treated both the victims i.e. deceased-Shashi and Accused-Dilawar Singh, both the victims had sustained burn injuries. As per his statement, victim-Shashi sustained burn injuries on the front portion of her body and there were few injuries on the back side of her body which suggest that she sustained burn injuries in accidental fire. Similarly, appellant-Dilawar Singh has sustained burn injuries on the front side of his body i.e. neck, chest and both the hands which also suggest that while dousing the fire, he sustained the burn injuries.

D. It has come in the statement of PW-1, father of the victim and PW3 & 6, the two real brothers of the victim-deceased, that the victim was arrogant and short tempered and she was mentally disturbed for not bearing a child. PW-6 has gone to the extent that she has committed suicide on that account which supports the defence version that the deceased died due to accidental fire.

55. In view of the above, the present appeal is allowed and the appellants are acquitted of the charges. As noticed above, one of the appellants namely Jagat Singh has died.

Appellant-Dilawar Singh was never granted bail and as of today he has undergone more than 12 years and 5 months of actual sentence. Appellant-Virendra Singh who was awarded 10 years of rigorous imprisonment has also undergone substantive sentence as he was granted bail by this Court.

56. Accordingly, judgment of conviction and order of sentence is set aside. Bail bond of accused Virendra is discharged. Appellant Dilawar Singh be released from the custody forthwith if he is not required in any other case.

57. The Trial Court's record be remitted back.

58. Mr. Arun Kumar Singh (A/A 1906/2012), learned Amicus Curiae, appointed by the Court be paid his fee by the High Court Legal Services Committee.

(2024) 8 ILRA 184
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.08.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 5954 of 2018
With
Criminal Appeal No. 5924 of 2018
With
Criminal Appeal No. 6012 of 2018
With
Criminal Appeal No. 6457 of 2018

Ambika Soni & Anr. ...Appellants

Versus

State of U.P. ...Respondent

Counsel for the Appellants:
Sri Virendra Kumar Yadav, Sri Amit Kumar Srivastava, Sri Prashant Vyas, Sri Rajiv Lochan Shukla, Sri G.S. Chaturvedi (Sr. Advocate)

Counsel for the Respondents:
G.A., Sri Vikas Singh

Criminal Law - Criminal Procedure Code, 1973 - Sections 161 & 313 - Indian Penal Code, 1860 -Sections 147, 148, 149, 302, 504& 506 - Appeals – against conviction & sentence – offence of murder – Accused persons had allegedly assaulted upon complainant's father resulting he was died during treatment – FIR – investigation – recovery – charge-sheet – trail – conviction & sentenced – Appeals - Evaluation of evidence – court finds that, - (i) informant is not an eye-witness, (ii) delay in FIR explained, (iii) motive is proved, (iv) mere the St.ment of PW-1 & PW-2 was recorded after 3 – 4 days do not raise suspicion on the prosecution version, (v) plea that MLC was not done in both hospital is also without any merit as it is a case of prosecution that since both hospital did not provide any medical assistance except first aid, therefor no MLC was conducted, (vi) injuries were sustained by a sharp edged weapon and therefore, no benefit can be granted to the accused on this aspect, (vii) the defence failed to cross examine both CW-1 & CW-2 on the point whether the injured was fit to make St.ment, at any time (viii) defence side could not dispute that the *Chapad* was recovered from appellant-Himansu Soni in presence of witnesses and it was the same *Chapad* which was sent for examination to FSL therefore recovery of Chapad is proved, (ix) the defence set up by the accused cited that deceased was in the business of providing loan to the people by pledging their valuable articles like jewellery and would forfeit the same, due to that reason, some unknown persons have caused murder of deceased is not proved by leading any cogent evidence and putting this defence to the witness of fact, (x) prosecution has failed to prove the second version of complaint wherein a knife was attributed and no

recovery of knife was effected, therefore accused Nandu Singh is entitled to benefit of doubt (xi) nothing has come on record to prove that two new accused persons had nay motive to attack the victim (xii) None of the St.ments of PWs named the name of Pappu Soni, therefore present of Pappu Soni is also doubtful – held, (a) court holding the appellants Himansu Soni, Ambika Soni and Pammu Soni guilty of primary offence u/s 302 IPC, is upheld - (b) court acquit the accused Nandu Singh & Pappu Soni by giving benefit of doubts - Hence, appeal no. 5954/2018 & 5924/2018 are dismissed and 6012/2018 & 6457/2018 are allowed - directions issued accordingly. (Para – 25, 26, 27, 28, 29, 30)

Two Appeals are allowed & two appeals are dismissed. (E-11)

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. All these four appeals are preferred against the judgment of conviction dated 27.09.2018, passed by VIth Additional District and Sessions Judge, Fatehpur in S.T. No. 257 of 2014 (State Vs. Himanshu Soni and others) vide which the appellants, Ambika Soni, Pammu Soni, Himanshu Soni, Nandu Singh and Pappu Soni, were held guilty of offence punishable under Sections 147, 148, 302/149, and 506 of I.P.C. as well as the order of sentence of the same date vide which all the accused-appellants were awarded life sentence along with fine of Rs. 50,000/- each under Section 302/149. In case of non-payment of fine, further they were directed to undergo imprisonment of one year. Under Section 147, they were sentenced to one year of imprisonment, under Section 148 for two years with fine of Rs.1000/- each, under Section 506, the accused-appellants were sentenced to one year of imprisonment with fine of Rs.1000/- each. Appellant-Ambika Soni was also convicted under section 504 and sentenced for six months of imprisonment. All the sentences were directed to run concurrently.

2. Heard Sri. G.S. Chaturvedi, learned Senior Counsel and Sri Rajiv Lochan Shukla, learned counsel for the appellants, Sri Vikas Singh, learned counsel for the informant, and Sri A.M. Mulla, learned AGA for the State.

3. The Trial Court's record is received and paper books are ready. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

4. Brief facts as per the information given to the police vide complaint (Ex.Ka-1) read as under:

"सेवा में,
श्रीमान् प्रभारी निरीक्षक
थरियॉव
महोदय,

निवेदन है कि प्रार्थी राकेश कुमार एस/ओ अमरनाथ निवासी ग्राम हसवा थाना थरियॉव का रहने वाला हूँ दिनांक 27-03-2014 को मेरे पिता अमरनाथ अपने बर्तन की दुकान स्थित बडौदा बैंक के पास में बर्तन बेच रहे थे समय करीब 6.30 पी०एम० पर मेरे मुहल्ले के ही हिमांशु सोनी पुत्र अम्बिका प्रसाद सोनी व अम्बिका सोनी, पम्मू सोनी पुत्र अम्बिका सोनी, नन्दू सिंह पुत्र स्व० दिलीप सिंह दुकान पर आये हिमांशु अपने हाथ में चापड़ लिए हुए था तथा अम्बिका सोनी ने ललकारा कि अमरनाथ को मार डालो साले को क्योंकि यह दुकान खोलकर हमारे ग्राहकों को तोड़ रहा है। इस पर अम्बिका, पम्मू, नन्दू ने मेरे पिता का हॉथ पैर पकड लिए

तथा हिमांशु सोनी अपने हॉथ में लिए चापड से मेरे पिता के सर, जबडे, आँख, गला पर जान से मारने के नियत से हमला शुरू कर दिया जिससे मेरे पिता शोर मचाए तो मेरा भाई रमेश कुमार पुत्र अमरनाथ, उमेश कुमार पुत्र अमरनाथ सराफे की (कागज कटा) दौड़े तो इन लोगों को देखकर अभियुक्त (का०फ०) गाली देते हुए जान से मारने की धम(कागज कटा) देते हुए कि एफ०आई०आर० करोगे तो जान से पूरे (कागज कटा) को नष्ट कर देगें। तथा मेरे (कागज कटा) मृत्यु समझकर छोड़कर भागे मेरे (कागज कटा) ने व मुहल्ले के लोगों ने एम्बुलेन्स (कागज कटा) अस्पताल ले गये वहाँ से रिफर हो (कागज कटा) कृष्णा हास्पिटल कानपुर ले गये परन्तु वहाँ कुछ सुविधा न होने के कारण रिजेन्सी हास्पिटल में मेरे पिता का इलाज हो रहा है जो कि आई०सी०यू० में भर्ती है। पिता के इलाज के कारण एफ०आई०आर० कराने में विलंभ हुआ।

अतः श्रीमान् जी से निवेदन है कि मेरी रिपोर्ट लिखकर कानूनी कार्यवाही करने की कृपा करे।

तारीख 28-03-2014

प्रार्थी
राकेश कुमार
नि० ग्रा० व पो० हसवा
जि०- फतेहपुर
ह० राकेश कुमार
मो०नं० 8858956231"

5. On registration of the F.I.R., the police started investigation.

6. During investigation, another complaint was given by the informant-Rakesh Kumar, Ex. Ka-2, which read as under:-

"सेवा में.
चौकी इन्चार्ज
हसवा फतेहपुर

महोदय निवेदन है कि प्रार्थी राकेश कुमार निवासी हसवा थाना थरियाँव का निवासी है। मेरे पिता अमरनाथ को दिनांक 27-03-2014 को अभियुक्त गणों ने चापड व चाकू से मारा जिससे मेरे पिता गंभीर रूप से घायल हो गये जिनके इलाज हेतु भानपुर रीजेन्सी हास्पिटल में भर्ती कराया दिनांक 28-03-2014 को मेरे द्वारा अभियुक्त हिमांशु सोनी एस/ओ अम्बिका सोनी, अम्बिका सोनी एस/ओ सीताराम सोनी, पम्मू सोनी एस/ओ अम्बिका सोनी, नन्दू सिंह एस/ओ स्व० दिलीप सिंह निवासी हसवा थाना थरियाँव के विरूद्ध अपराध सं०166/14 धारा 307, 504, 506 आई०पी०सी का पंजीकृत कराया था। चूंकि उस समय और लोगों के बारे में जानकारी नहीं हो पायी मुझे व गवाहों को यह जानकारी हुयी कि घटना में पप्पू सोनी एस/ओ करन सोनी, विमल सोनी एस/ओ अम्बिका सोनी भी शामिल थे।

अतः निवेदन है कि इन अभियुक्तों को भी विवेचना में शामिल करते हुए शीघ्र अतिशीघ्र कार्यवाही करने की कृपा करे।

गवाह- प्रार्थी
राम? बहादुर राकेश कुमार
राम? कुमार नि० हसवा
राज कुमार थाना थरियॉव
इक्ज क 2 मो0नं0 8858956231"

7. Vide this complaint, two additional accused namely, Pappu Soni and Vimal Soni were also nominated. Apart from this, a knife injury was also added to the victim. The victim died on 4.4.2014 and the information was given by the informant to the police vide Ex.Ka-3. During the investigation, the police arrested the accused persons, effected the recovery of a chapad (weapon used for cutting meat etc.), recovered the bloodstained earth and other articles from the spot. The chapad and other articles were sent to Forensic Science Laboratory, Lucknow for seeking a report. The Panchayatnama was prepared and the postmortem of the dead body got conducted. The Cause of

death was declared as coma due to ante mortem injuries. The police, on completion of investigation, submitted report before the trial court. The case was committed to the Court of Sessions and the charges were framed under Section 302/149, 147, 148, 504 & 506 of IPC vide order dated 8.10.2014. The accused did not plead guilty and claimed trial.

8. In prosecution evidence, Rakesh Kumar (PW-1) stated that he knew the accused, Himanshu Soni, Ambika Soni, Pammu Soni, Vimal Soni, Nandu and Pappu Soni previously. He stated that prosecution qua Vimal Soni was dropped by the police and he was not present in the Court. This witness stated that on 27.3.2014, at about 6.30 PM, his father-Amar Nath (deceased) was present on his shop situated near Bank of Baroda and was selling utensils. All the above named accused came, Himanshu Soni was carrying chapad and Nandu was carrying a knife, and raised a voice that Amarnath be killed as by opening a jewellery shop, he was alluring their customers which affected the business of the accused. On this, Ambika Soni, Pappu Soni, Pammu Soni and Vimal Soni caught hold of hands and feet of Amarnath and Himanshu Soni with a chapad and Nandu Singh with knife caused multiple injuries on the head, ear, eye, nose and jaw of his father. In the meantime, his brother-Ramesh and Umesh sitting on the jewellery shop and PW-1 from his utensils shop ran towards the spot. Accused persons, by extending threat and deeming that his father has died, ran away from the spot. It is further stated that they took their father to Sadar Hospital. From there, the victim was referred to Krishna Hospital, Kanpur, and then to Regency Hospital, where he remained admitted in ICU. In this regard, a written complaint was given to the police which is Ex.Ka-1. Another complaint (Ex.Ka-2) was given later on as he came to know from witnesses about the names of Pappu Soni and Vimal Soni. This witness further stated his father died on 4.4.2014 in Regency Hospital, Kanpur and his cremation was done on 5.4.2014 and on 6.4.2014 he gave an information (Ex.Ka-4) to the Police Station about death of his father. On 29.4.2014, the police took accused-Himanshu Soni in Village Haswa where, Himanshu Soni got recovered the chapad used in the occurrence, underneath a heap of bricks. The police recovered the same vide a memo which was signed by PW-1 and other witnesses. The police also recovered the bloodstained earth vide a separate recovery memo. In cross examination, this witness stated that he is a teacher and his elder brother-Raju sits on the utensils shop. At the time of incident, they had three utensils shop in Village Haswa and the accused had no utensils shop in Haswa either before the incident or thereafter. He further submitted that at the time of incident one shop of utensils was at the home, the second was near Bank of Baroda and the third one was in the market. The shop at home was managed by his mother. The shop in the market was

managed by his elder brother-Raju and the shop near Bank of Baroda, his father used to sit. All the three persons i.e. mother, brother-Raju and father of the informant used to maintain the accounts of these three respective shops. He further stated that the incident took place at the shop adjacent to the Bank of Baroda. Abutting the shop is the house of one Indrajeet Singh who stays there with his family. Raj Bahadur is the son of maternal uncle of his father whom his father has brought from Banda. He has a son. Both Raj Bahadur and his son have a utensils shop in which, they were also doing the jewellery work. With regard to the incident, he made the following further declaration :

''"पिता जी को अस्पताल मैं, मेरा भाई राजू, राजबहादुर ले गये थे। मैंने एफ०आई०आर० में अपने पिताजी को भाइयों के द्वारा भर्ती कराये जाने की बात नहीं लिखायी। गवाह को एफ०आई०आर० पढ़कर सुनायी गयी तो उसने कहा कि भाईयों व मोहल्ले वालों के द्वारा अस्पताल में भर्ती कराये जाने की बात लिखी है मेरे द्वारा भर्ती कराने की बात नहीं लिखी ***है। मैंने अपनी तहरीर में यह बात लिखायी थी कि मेरे पिता जी ने शोर मचाया तो मेरे भाई रमेश कुमार पुत्र अमरनाथ, उमेश कुमार पुत्र अमरनाथ सर्राफे की दूकान से दौड़े तो इन लोगों को देखकर अभियुक्तगण गाली देते हुये जान से मारने की धमकी देते हुए कि एफ०आई०आर० करोगे तो जान से पूरे परिवार को नष्ट कर देगे"। मेरे द्वारा एफ०आई०आर० में यह बात कि शोर पर मैं भी मौके पर पहुंच गया था नहीं लिखायी थी क्योंकि मैं परेशान था।*** *दरोगा जी ने मेरा बयान करीब 4 दिन बाद लिया था। मैंने दरोगा जी को बताया था कि मैं मौके पर शोर सुनकर पहुंच गया था यदि यह बात उन्होंने मेरे बयान में न लिखी हो तो मैं इसका कोई कारण नहीं बता सकता। दरोगा जी से मैंने यह भी बताया था कि पिताजी को मेरे भाई उमेश व रमेश अस्पताल ले गये थे। सबसे पहले सदर अस्पताल ले गये थे।"''*

This witness further stated that he has no knowledge that prior to the registration of the F.I.R., on the basis of the information given by him to the police, if any other person has sent any information regarding the incident in Police Post – Haswa or Police Station – Sadar Kotwali. This witness further stated as under :

''मेरे पिता जी गिरोगांठ? का काम करते थे व लोगों का सामान रखकर पैसा देते थे। जब पैसा वापस मिल जाता था तब सामान वापस कर देते थे। समय के अन्दर यदि गिरो रखने वाला पैसा नहीं दे पाता था तो सामान जप्त हो जाता है।

यह कहना गलत है कि मेरे पिता जी बदमाशों से कीमती सामान गिरोगाठ के रूप में रख लिया हो उनके द्वारा पैसा देने के बावजूद सामान वापस न किया गया हो इसी कारण बदमाशों के द्वारा मेरे पिता जी के हत्या अंधेरे में अज्ञात समय में चोट पहुंचायी हो।

यह कहना भी गलत है कि मेरे पिता जी ने घटना के एक साल पहले व्यवसाय के लिए 50 हजार रूपया मुल्जिम अम्बिका सोनी से लिया हो समय पर पैसा न दे पाने पर अम्बिका सोनी व उसके लड़कों से कहा सुनी हुयी हो जिसमें आप व आपके घर वालों ने बरवाद करने की धमकी दिया हो। इसी रंजिश के कारण आपने बदमाशों के द्वारा की गयी घटना में अम्बिका सोनी व उसके लड़को को मुल्जिम बना दिया हो।''

In further cross examination by other co-accused, this witness stated as under :

"मैंने रिपोर्ट प्रदर्श क-1 में यह नहीं लिखाया था कि पप्पू सोनी व विमल सोनी आ गये। मैंने प्रदर्श क-1 में पप्पू सोनी व विमल सोनी ने मेरे पिताजी के हाथ पैर पकड़ लिये नहीं लिखाया था। दरोगा जी ने मुझसे एक बार बयान लिया था घटना के 4 दिन बाद लगभग लिया था। *मैंने दरोगा जी को अपने बयान में यह बताया था कि पप्पू सोनी व विमल सोनी ने मेरे पिता जी के हाथ पैर पकड़ लिये। यदि उन्होंने मेरे बयान में लिखा न होता तो मैं इसका कोई कारण नहीं बता* ***सकता। मैं पप्पू सोनी को घटना के पहले से नाम व शक्ल से अच्छी तरह पहचानता***

हूँ। घटना में पप्पू सोनी रहा यह मैं व्यक्तिगत तौर से जानता हूँ किसी अन्य जानकारी के आधार पर मैं यह नहीं कह रहा हूँ कि पप्पू सोनी घटना में शामिल था। घटना के 5-6 दिन बाद मैंने प्रदर्श क-2 दिया था। प्रदर्श क-2 में मैंने देने की कोई तारीख नहीं डाली थी। तारीख लिखना छूट गया ***था। मैंने प्रदर्श क-2 में यह लिखा था कि "चूंकि उस समय और लोगों के बारे में जानकारी नहीं हो पायी मुझे व गवाहों को यह जानकारी हुयी कि घटना में पप्पू सोनी एस/ओ करन सोनी, विमल सोनी एस/ओ अम्बिका सोनी भी शामिल थे" यह बात मैंने सही लिखी है।*** *तहरीर मेरा ऊपर प्रदर्श क-2 में बाद में जानकारी होने की बात गलत है। मेरा ऊपर का बयान व्यक्तिगत जानकारी वाला सही है। एफ०आई०आर० की नकल जिस दिन मैंने एफ०आई०आर० लिखायी उसी दिन उसी समय दे दिया था। उस नकल को मैंने नहीं पढ़ा क्योंकि मैं उस समय परेशान था। करीब तीन दिन बाद मैंने उसे पढ़ा। मैं घर पर पढ़ा था। मैंने रपट को सही नहीं पाया। जो तहरीर मैंने दिया था उसके अनुरूप नकल थी। जो मैंने तहरीर दिया उसी के आधार पर एफ०आई०आर० लिखी गयी यह सही है।*

मैंने विवेचक को यह बयान नहीं दिया कि "प्रथम सूचना के समय पप्पू व विमल सोनी के बारे में जानकारी नहीं हो पायी थी इस कारण उनका नाम प्रथम सूचना में नहीं दर्ज करा सका जब मुझे जानकारी हुयी तब मैंने यह प्रार्थना पत्र दिया है" यदि उन्होंने मेरे बयान में ऐसा लिखा हो तो मैं इसका कोई कारण नहीं बता सकता। यह बात गलत है।

प्रदर्श क-3 में मैंने पप्पू सोनी का नाम नहीं लिखा था। सिर्फ मृत्यु की सूचना दिया था।

पप्पू सोनी मुल्जिम ने या उसके परिवारीजन ने कभी भी सोनारी अथवा किसी अन्य प्रकार की दूकान नहीं किया। *पप्पू सोनी के बाबा का नाम विष्णु लाल है और अभी जिन्दा है। विष्णुलाल के भाई ज्ञानेन्द्र को नहीं जानता। यह कितने भाई है मैं यह भी नहीं जानता। विष्णुलाल के दो लड़के करन सोनी व राजू सोनी को जानता हूँ बाकी को नहीं जानता। मैं अपने गांव के विपिन, विमल पुत्रगण अम्बिका प्रसाद व अम्बिका प्रसाद पुत्र सीताराम को जानता हूँ। जिस मुकदमे में मैं आज गवाही दे रहा हूँ। उसमें विमल व अम्बिका उपरोक्त मुल्जिम है। मुझे नहीं मालूम कि ज्ञानेन्द्र कुमार उपरोक्त ने विपिन, विमल व अम्बिका के विरूद्ध चोरी का मुकदमा थाना थरियांव में लिखाया या नहीं मुझे नहीं मालूम। उस मुकदमें में उक्त विपिन बगैरह के विरूद्ध मुल्जिम पप्पू सोनी के बाबा विष्णुलाल ने अदालत में गवाही दिया या नहीं।"*

Further, this witness stated that he knew all the accused persons. He stated that there is no enmity with the family of Pappu Soni and his family members. He denied a suggestion that he has not seen the incident and no incident as stated by him took place.

9. Umesh Kumar (PW-2) also deposed on the same line that he knew the accused persons. Pappu Soni and Nandu Singh are friends of all other accused who are sons of Ambika Soni. Regarding the incident, this witness stated as under :

"घटना के दिनांक 27-3-14 को शाम 6-30 बजे की है। उस समय मैं राकेश व रमेश अपनी सर्राफे की दुकान में बैठे थे और पिता जी अपनी बर्तन की दूकान में थे। बर्तन की दूकान बैंक आफ बड़ौदा की बिल्डिग में है। जब मेरे पिता जी बर्तन की दूकान में मौजूद थे तभी उपरोक्त सभी मुल्जिमान आये जिनमें नन्दू सिंह चाकू व हिमांशु सोनी चापड लिये थे बाकी लोग खाली हाथ थे दूकान में आकर अम्बिका सोनी ने ललकारा कि मार डालो साले को सर्राफे की दूकान खोलकर मेरे ग्राहको को भड़का रहा है और इस अम्बिका सोनी व पम्मू सोनी ने मेरे पिता जी का हाथ पकड़ लिया व विमल सोनी व पप्पू सोनी ने पिता जी का पैर पकड़ लिया और हिमांशु सोनी व नन्दू सिंह अपने हाथों में लिये चापड व चाकू से मारने लगे। जब पिताजी ने शोर मचाया तो हम लोग अपनी दूकान से दौड़े तो देखा कि मुल्जिमान उपरोक्त पकड़े थे व हिमांशु सोनी व नन्दू सिंह मार रहे थे। मेरे पिता जी के मुँह में काफी चोटे थी। तब सभी मुल्जिमान गाली गलौज करते जान से फिर मारने की धमकी देते हुए भाग गये। फिर हम लोगों ने 108 नम्बर से एम्बुलेन्स बुलाकर सदर अस्पताल पिता जी को लाये जहां से रिफर कर दिया तब हम लोग पिता जी को कृष्णा अस्पताल कानपुर ले गये वहां पर ठीक सुविधा न होने के कारण रीजेन्सी अस्पताल ले गये और वहां पर पिता जी भर्ती रहे और करीब एक हफ्ते बाद पिता जी की वहीं पर मृत्यु

हो गयी। दरोगा जी ने घटना के सम्बन्ध में पूंछतांछ किया था।''

In cross examination, he stated that he was the student of B.A. First Year at the time of incident, Rakesh Kumar (PW-1) is having a jewellery shop; Raj Bahadur is son of maternal uncle of his father who has shifted from Banda to Village Haswa and is having utensils shop in the market. He was also doing the business on credit basis and was also doing business of jewellery. Himanshu Soni and Ambika Soni are exclusively doing the work of jewellery. His father never informed that Raj Bahadur had taken money from his father and he was not returning the same. He further stated that his statement was recorded by the police after 3-4 days.

In further cross examination, he stated that when they took their father to the hospital, his clothes were not bloodstained though he had picked up his father in injured condition and took him in an Ambulance which was called by some person of the village. In cross examination by other accused Pappu Singh, this witness stated as under :

"इस मुकदमें के सम्बन्ध में पुलिस ने मेरा दो बार लिया। पहली बार बयान घटना के तीन चार दिन बाद घर पर बयान लिया था। *पहली बार बयान में मैने विवेचक को "नामजद मुल्जिमों के साथ पप्पू सोनी के आने की बात व विमल सोनी व पप्पू सोनी ने पिता जी के पैर पकड़ लिया" मैंने विवेचक को यह भी बता दिया था कि "जब हिमांशु सोनी व नन्दू सिंह मार रहे थे उस समय भी पप्पू सोनी व विमल सोनी पिता जी के पैर पकड़ थे।" मैंने दरोगाजी को उस बयान में यह भी बता दिया था कि "नामजद मुल्जिमानों के साथ पप्पू सोनी व विमल सोनी गाली गलौज करते हुए व जान से मारने की धमकी देते हुए भाग गये" अगर उक्त बाते मेरे बयान में न लिखी हो तो मैं कोई कारण नहीं बता सकता।*

दुबारा बयान घटना से 1-1/2 दो महीने बाद घर पर ही लिया था। उक्त सभी बाते मैंने दरोगा जी को दूसरे वाले बयान में भी बता दिया था अगर उन्होंने मेरे बयान में न लिखा हो तो मैं इसकी कोई वजह नहीं बता सकता।

मैंने दरोगा जी को यह बयान दोबारा वाले बयान में नहीं बतायी कि "यह सब पप्पू सोनी पुत्र करन सोनी नि० हसवा थाना थरियांव के शह पर (कहने पर) किये" यदि उन्होनें मेरे बयान में लिखा हो तो मैं इसका कोई कारण नहीं बता सकता।

विमल सोनी का नाम दूसरे वाले बयान में घटना करने के सम्बन्ध में बताया था। यदि उन्होंने न लिखा हो तो मैं कोई कारण नहीं बता सकता।

मैंने अपने दूसरे वाले बयान में यह बयान नहीं दिया था कि "विमल मेरे परिवार का है मेरी जानकारी में इसका कोई रोल लेना देना नहीं है। विमल सोनी निर्दोष है" उन्होनें मेरे बयान में कैसे लिख लिया मैं कोई कारण नहीं बता सकता।

पप्पू सोनी ने मेरी जानकारी में कभी भी सोनारी की दूकान या बर्तन की दूकान या अन्य दूकान नहीं किया है।

घटना के दो तीन दिन बाद जानकारी हुयी कि मेरे भाई ने पिता जी के साथ हुयी घटना की एफ०आई०आर० लिखायी है। यह बात मेरे भाई राकेश ने मुझे बताया था। मैंने राकेश से एफ०आई०आर० की नकल नहीं मांगी और न उन्होंने मुझे दिखायी। इसलिये मुझे उस समय तक किन किन के खिलाफ एफ०आई०आर० लिखायी गयी जानकारी नहीं थी। एफ०आई०आर० लिखाने के हफ्ते भर बाद मुझे इस बात की जानकारी हुयी कि एफ०आई०आर० केवल चार लोगों के खिलाफ मेरे भाई ने लिखायी है। इस जानकारी के बाद मैंने पुलिस अधिकारी व थाने में इस सम्बन्ध की कोई दरखास्त नहीं दिया। दरख्वास्त न देने का मैं कोई कारण नहीं बता सकता।

मेरी जानकारी में नहीं है कि इस घटना के पहले से पप्पू सोनी व अम्बिका सोनी के परिवार से रंजिश थी और मुकदमें बाजी थी। यह बात सही है कि पप्पू सोनी से इस घटना के पहले मेरी या मेरे परिवार के किसी सदस्य से कोई रंजिश नहीं थी। मैं अपने भाईयों का कहना मानता हूँ।''

Dr. Ratnesh Prabhakar (PW-3) conducted the post-mortem of deceased-Amarnath and recorded the following injuries :

*"**अन्टी मार्टम इन्जरी 1**- सिला हुआ घाव 17 सी०एम० लम्बा जिसमें 18 टांके मौजूद थे जो सर के दाहिने तरफ सर के बीच भाग से लेकर फारहेड तक मौजूद था जो दाहिनी भौओं के उपर तक था।*

2- सिला हुआ घाव जो 6 सी०एम० लम्बा था जिसमें 11 टांके मौजूद थे जो सर के दाहिने फोरहेड पर मौजूद और दाहिनी आंख के उपर भाग पर था।

3- सिला हुआ घाव जो 9 सी०एम० लम्बा था जिसमें 14 टॉके मौजूद थे जा चेहरे के दाहिनी तरफ था और नाक के दाहिने तरफ था।

4- सिला हुआ घाव जो 4 सी०एम० X 3 सी०एम० एरिया में मौजूद था बांये ऑख के ऊपर (अपर आईलिड) पर मौजूद था।

5- सिला हुआ घाव जो 7 सी०एम० लम्बा था जिसमें 8 टांके लगे थे चेहरे के बांयी तरफ था। और बांये आंख की तरफ था।

6-सिला हुआ घाव 28 सी०एम० लम्बा था। जो 38 टॉके मौजूद थे जो चेहरे के दांयी तरफ था जो बांये कान तक मौजूद था।

7- सिला हुआ घाव 3 सी०एम० लम्बा था जिसमें पांच टाँके मौजूद थे जो बांयी तरफ चेहरे पर था और मुंह के ए◌ंगिल? के बाहर था।

8- सिला हुआ घाव जो 8 सी०एम० लम्बा था जिसमें 12 टाँके मौजूद थे जो चेहरे के बांयी तरफ था। और उपरी ओठ के बांई की तरफ मिनडेबिल पर था।

9- कटा हुआ घाव 4 सी०एम० X 3 सी०एम० जो फोर आर्म के ऊपरी सतह पर मौजूद था और जो बांयी कलाई पर मौजूद था।

10- एबरेडिट कन्टयूजन जो 7 सी०एम० X 5 सी०एम० जो स्कोटम? पर मौजूद था।

11- कटा हुआ घाव 4 सी०एम० X 3 सी०एम० जो थोडी पर मौजूद था।"

Cause of death was declared as coma due to head injuries which were ante mortem. He proved the post-mortem report as Ex.Ka-5. He further stated that the deceased was admitted in Regency Hospital on 28.3.2024 and as per the record, he was attacked with sharp edged weapon.

10. Constable Amrit Lal (PW-4) stated that on receiving the complaint (Ex.Ka-1), he recorded the Chik F.I.R. No. 166 of 2014 under Sections 307, 504 & 506 of IPC against Himanshu Soni, Ambika Soni, Pammu Soni and Ved Singh. The Chik F.I.R. was proved as Ex.Ka-7. In this regard, G.D. No. 24 was also recorded which is Ex.Ka-7. In cross examination, he stated that prior to the registration of the F.I.R., no other information in this regard was received.

11. S.H.O. Subh Narayan Singh (PW-5) who conducted the part of investigation stated that he has verified the investigation conducted by the previous Investigating Officer, Chand Hussain, and has verified the G.D. No. 8 and 9. This witness also recorded the statements of some of the witnesses and the case property i.e. the bloodstained earth, a pair of slippers and one chapad which were sent to F.S.L., Lucknow on 29.05.2014. On 8.6.2014 vide G.D. No. 11, he recorded the statement of witnesses of Panchayatnama and one eye-witness, Ramesh Soni. He also recorded the statement of Umesh Soni on 10.06.2014 and, thereafter, he submitted the charge-sheet on 10.06.2014 against the accused,

Himanshu Soni, Pammu Soni, Nandu Singh, Pappu Soni and Ambika Soni which is Ex.Ka-9.

In cross examination, this witness stated that on 10.06.2014, when he asked the informant Rakesh Kumar Soni to give statement, he stated that he had already given the statement on investigation regarding Vimal Soni. He stated that informant told him that Vimal Soni belongs to his family and was not present at the spot.

This witness further stated that on 10.06.2014, he recorded the statement of Umesh Soni under Section 161 Cr.P.C. in which he has stated that at the instance of Pappu Soni s/o Karan Soni, the incident took place and Vimal Soni is innocent.

This witness further stated that in the statement recorded on 8.6.2014, Ramesh Soni stated that the incident took place at the instance of Pappu Soni and his father was murdered. He perused the statement of this witness dated 2.4.2014 in which, in the earlier statements, name of Pappu Soni was not there.

In further cross examination, this witness stated as under :

"मैने विवेचना शुरू करने के पहले केस डायरी में अंकित वादी द्वारा लिखायी गयी तहरीर जिसकी नकल प्रथम विवेचक द्वारा केस डायरी में नकल की गयी थी। का अवलोकन किया था। इस तहरीर में अंम्बिका, पप्मू, नन्दू ने मेरे पिता का हाथ पैर पकड़ लिया लिखा है परन्तु नन्दू द्वारा चाकू से मृतक पर प्रहार करने की बात नहीं लिखी हैं।

वादी मुकदमा राकेश कुमार का बयान मैने लेना चाहा था परन्तु उसने मेरे समक्ष घटना से सम्बन्धित कोई बयान न देने की इच्छा प्रकट की क्योंकि बताया था कि मैं पहले बयान दे चुका हूँ। ***गवाह उमेश कुमार सोनी पुत्र स्व० अमरनाथ निवासी ग्राम हसवा थाना थरियांव जनपद फतेहपुर जो मृतक का लड़का है का बयान मैने दिनांक 10.06.2014 को लिया था और उसने अपने बयान में अम्बिका, पम्मू, नन्दू ने भी मिलकर मेरे पिता का हाथ पैर पकड़ लिया और हिमांशू सोनी हाथ में लिये चापड से ताबड़तोड़ मारने लगा। बताया था। उमेश सोनी इस घटना का चश्मदीद साक्षी है और मृतक का लड़का है और इसने अपने बयान में मुल्जिम नन्दू सिंह को चाकू से मृतक को मारने वाली बात नहीं बतायी। यह गवाह मृतक के पंचायतनामा दिनांकि 04.04.2014 का पंच भी है और इसने पंचायतनामा में अंकित राय पंचान में अपने हस्ताक्षर बनाये है तथा राय दी है।"***

12. PW-6, IO Chhotelal Patel made the following statements :-

"दिनांक 28.03.2014 को मैं प्रभारी चौकी हसवा थाना थरियांव जनपद फतेहपुर में नियुक्त था। उस दिन मैंने थाना हाजा में दर्ज मुकदमा अपराध संख्या 166/2014 धारा 307, 504, 506 आई०पी०सी० जो अभियुक्त हिमांशू सोनी आदि से सम्बन्धित है कि विवेचना मेरे द्वारा ग्रहण की गयी थी। दिनांक 28.03.2014 को पर्चा नम्बर-1 जिसमें नकल तहरीर हिन्दी वादी व नकल रपट तथा बयान लेखक एफ०आई०आर० कां० अमृतलाल अंकित किये। पर्चा नम्बर-2 दिनांक 29.03.2014 को किता किया जिसमें गिरफ्तार शुदा अभियुक्त हिमांशु सोनी का कथन अंकित किया। जिसमें अभियुक्त ने जुर्म स्वीकार करते हुये घटना में प्रयुक्त आला कत्ल चापड को बरामद कराने की बात स्वीकार की। नकल रपट संख्या-19 समय 9.15 ए०एम० पर अभियुक्त को लाकअप से लेकर घटना में प्रयुक्त आला कत्ल की बरामदगी हेतु एच०सी० सन्तलाल कां० सत्यपाल कां० अनिल कुमार मिश्रा को साथ लेकर ग्राम हसवा पहुंचा अभियुक्त अपने घर के पास पहुंचने के पहले मोटर साइकिल रुकवाया तथा आगे आगे चलकर घर के पास रखे ईंटों से घटना में प्रयुक्त किये गये चापड़ को समक्ष जनता के गवाहान श्री राजकुमार सोनी व राकेश सोनी व हमराहियान के समक्ष निकाल कर दिया। चापड के हुलिया लोहे के फल दस अंगुल तथा बेंट लोहे का आठ अंगुल चापड को मौके पर एक सफेद कपड़े में रख कर मौके पर सील व सर्व मुहर किया गया था। फर्द को मौके

पर मेरे द्वारा अपने हस्तलेख व हस्ताक्षर में तैयार किया था। अभियुक्त एवं जनसाक्षीगण एवं हमराहियान पुलिसगण को पढ़कर सुनाकर उनके हस्ताक्षर बनवाये गये थे। फर्द की नकल अभियुक्त हिमांशू सोनी को दी गयी थी। माल मुल्जिम व फर्द लेकर थाने आये थे। जिसका जी०डी० में तस्करा किया था। पत्रावली में संलग्न फर्द बरामदगी आला कत्ल चापड कागज संख्या 8अ/2 को देख कर साक्षी ने अपने लेख व हस्ताक्षर की पहचान व पुष्टि की इस पर प्रदर्श क-10 डाला गया तथा नमूना सील भी तैयार किया था जो कि कागज संख्या 13अ/7 है को देख कर गवाह ने अपने लेख हस्ताक्षर की पहचान की जिस पर प्रदर्श क-11 डाला गया।"

This witness further stated that he recorded statement of informant Rakesh Kumar and witness Umesh, Rajkumar and Raj Bahadur from the spot, blood stained mattress and a pair of sleepers were recovered in presence of Rajkumar and Rakesh Kumar and he prepared the site plan of the spot which is Ex. Ka-12. He recovered the article vide recovery memo Ex. Ka-13. Naksha Nazri was prepared which is Ex. Ka-14 and it was signed by the witness Raju. Later on, name of Pappu Soni and Vimal Soni were also surfaced on recording the statement of witness of Raju and thereafter, Section 147, 148, 149 IPC were added, vide letter dated 28.5.2014. He has sent the articles recovered from the spot i.e. blood stained mattress, sleeper and Chapad. Vide memo Ex.Ka-15.

Thereafter, sealed packet were opened and he identified Chapad which was recovered from the accused as Ex. Ka-4 and also proved GD No. 28 as Ex. Ka-21. Regarding investigation, this witness stated as under :

''मैंने इस मुकदमे की विवेचना समय 17.00 बजे दिनांक 28.3.14 को विवेचना? प्रारम्भ की थी।

यह समय मैंने सी०डी० में नहीं लिखा। उस दिन मैंने विवेचना कितने बजे समाप्त किया। का उल्लेख सी०डी० में नहीं किया। दिनाँक 2/4/2014 को मैंने राकेश कुमार पुत्र अमरनाथ, रमेश पुत्र अमरनाथ, उमेश कुमार सोनी पुत्र अमरनाथ, राजकुमार पुत्र राज बहादुर सोनी व राजबहादुर पुत्र जगदेव सोनी गवाहान के बयानात लिये यह बात सही है की उक्त गवाहन ने अपने उक्त बयानों में नामजद मुल्जिमानों के अलावा अन्य किसी मुल्जिम या पप्पू सोनी पुत्र शिवसरन? सोनी द्वारा घटना करने की बात व घटना में शामिल होने की बात नहीं बताई। *राजू पुत्र अमरनाथ का बयान मैंने 6-4-14 को लिया। तब उसने मुझे पप्पू सिह पुत्र करन सिंह का नाम बताया था। मैंने राजू पुत्र अमरनाथ से यह नहीं पूंछा की पप्पू सिंह पुत्र करन सिंह कहा के रहने वाले है इनका क्या पता है।*

राजेश कुमार पुत्र अमरनाथ का मजीद बयान मैंने 03/4/14 को लिया था। इस गवाह ने मुझसे यह बताया था। की विमल व पप्पू के बारे में घटना के समय जानकारी नहीं हो पाई थी। अब मुझे जानकारी हुई है। तब मैंने प्रार्थना पत्र दिया है। मैंने इस गवाह से यह नहीं पूछा की आपको किन लोगों ने इनके बारे में दी। और यह जानकारी आपको कब मिली। सम्बन्ध में मैने प्रश्न पूछना आवश्यक नहीं समझा। दिनांक 03-4-14 को मैंने कोई अन्य 27 अभियुक्तगण की अपराध करने में बढ़ोत्तरी नहीं किया।''

This witness further stated that as under :

"ये सही है कि वादी के ही तहरीर के आधार पर पर चिक काटी गयी थी। इस तहरीर में वादी ने "इस पर अम्बिका, पम्मू, नन्दू ने मेरे पिता का हाथ पैर पकड़ लिये। तथा हिमांशू सोनी अपने हाथ में लिये चापड से मेरे पिता के सर, जबड़े, आँख, गला पर जान से मारने की नियत से हमला शुरू कर दिया।" ***ये सही है कि वादी ने अपनी तहरीर में नन्दू मुल्जिम को वादी के पिता को चाकू से मारने की बात नहीं लिखी केवल हाथ पैर पकड़ने की बात वादी ने तहरीर में लिखी है ये तहरीर वादी ने दिनांक 28-3-2014 को थाने में दी थी।*** *वादी का राकेश कुमार सोनी है। वादी का बयान मैंने दो बार लिखा। एक दिनांक 02-4-14 को लिखा तथा दूसरा 03-4-14 को लिखा। मैंने वादी से उसके पहले बयान दिनांक 02-4-2014 को इस बात के*

बताने पर मुल्जिम नन्दू ने घटना के समय अपने हाथ में लिये चाकू से वादी के पिता को मारना बताया। जबकि उसने नन्दू द्वारा घटना में चाकू का इस्तेमाल अपनी तहरीर में नहीं लिखा था। इसका स्पष्टीकरण मैंने उसके बयान लेते समय वादी से नहीं पूंछा। ***वादी ने चाकू वाली बात साक्षीओं के बताने के आधार पर अपने बयान में बताई थी। क्यों कि वादी घटना के समय वादी से 161 के बयान में चाकू वाली बात आने के बाद मैंने उससे यह स्पष्टीकरण नहीं लिया की आपने चाकू वाली बात एफ०आई०आर० में क्यों नहीं लिखायी। चोटहिल की मृत्यु के सम्बन्ध में जब तक मैं विवेचक रहा उसकी मृत्यु की जानकारी नहीं हुई।"***

''इस मुकदमें के चोटहिल अमरनाथ की मृत्यु दिनांक 04-4-14 को हुई। इस मुकदमे की तफतीश मेरे पास दिनांक 28-3-14 से 06-4-14 तक रहीं। ये सही है की मैंने केस डायरी में इस बात का अंकन नहीं किया की ये तफ्तीश मुझसे क्यों की गयी। मैंने वादी राकेश कुमार का बयान दुबारा 03-4-14 को लिया। मैंने दिनांक 3-4-14 के वादी के दूसरे बयान में भी मुल्जिम नन्दू द्वारा घटना में चाकू का प्रयोग करने की बात बताने की बात के बाद मैंने गवाह से तहरीर में नन्दू द्वारा चाकू का स्तेमाल की न लिखे होने का कारण जरूरी नहीं समझे। यह कहना गलत है कि नन्दू मुल्जिम द्वारा घटना में चाकू के इस्तेमाल? की मेरे स्वयं के दिमाग के उपज रहीं।

प्रश्न- वादी राकेश ने आपको अपने बयान 161 में स्पष्ट रूप से ये बताया था कि "इस घटना को मैंने अपने आँखों से देखा।

उत्तर- यह बात स्पष्ट रूप से वादी ने मुझे नहीं बतायी, और न ये बात अपने दूसरे बयान में नहीं बतायी। *वस्तु प्रदर्श 1 व 2 को जब तक तफ्तीश मेरे पास रही तब तक मैंने इनको परीक्षण हेतु नहीं भेजा। इस वस्तु प्रदर्श जो मैंने मोके से लिये थे। उन्हे थाने के माल खाने में कब और समय व किस दिनांक को दाखिल किया। इसका उल्लेख केस डायरी में नहीं है। और न ही मुझे याद है। प्रदर्श क 13 में दि० 2-4-2013 लिखी है। इस 03 को 4 ओवरराइटिंग में है और इस ओवरराइटिंग में कोई सूक्ष्म हस्ताक्षर मेरे नहीं बने।" प्रदर्श क 13 में फर्द लेने कब्जा पुलिस खून आलूद व सादी मिट्टी लिखा है। जिसमें मिट्टी को काटकर बिछी चटाई किया गया है। इस कटिंग पर भी मेरे कोई सूक्ष्म हस्ताक्षर नहीं है फर्द क 13 के अन्त में छोटे लाल पटेल के ऊपर दिनांक 02.3.14 लिखा है जिसमें 02 लिखकर ओवर राइटिंग है व 3 को लिखने के बाद 4 लिखा गया है। फर्द क 13 पर राकेश कुमार व राज कुमार के हस्ताक्षर बने है। फर्द क 13 पर बिछी चटाई के नीचे मेरे सूक्ष्म हस्ताक्षर है ये कहना गलत है की मैंने इस मुकदमे की तफतीश पक्षपातपूर्ण ढंग से की हो। प्रदर्श क 13 में मैंने चूंकि ऊपर दिनांक में कटिंग व ओवर राइटिंग हो गयी थी। इसलिये नीचे दिनांक 2.4.14 स्पष्ट अंकित कर हस्ताक्षर नहीं किया है।''*

This witness further stated that Amarnath died on 4.4.2014 and investigation remained with PW-6 from 28.3.2014 to 6.4.2014. He further stated that he recorded the statement of Rakesh Kumar. However, he did not deem it proper to mention the knife used by the accused Nandu. He denied suggestion that use of knife by Nandu was, in fact, introduced by himself. On a specific question whether informant Rakesh has said in his statement under section 161 Cr.P.C. that he has seen the occurrence from his own eyes. This witness replied that informant informant did not tell this fact clearly either in first or in second statement. He further stated that two recoveries i.e. Ex. Ka-1 and 2 were made till the time the investigation remained with him but he did not send it for forensic examination. He has not made entry regarding case diary in respect of dispositing of the property in the police Malkhana. He stated that in Ex. Ka-13, there is over writing on the month of date 2.4.2014 and has not done his initial signature. In the recovery memo Ex. Ka-13 again there is cutting regarding mattress and he has not put his initial signature. There is another

over writing regarding Chhote Lal Patel where the date is changed and thus he denied that he has prepared this document in collusion with the informant side.

PW-6, in further cross examination by other accused stated as under :-

''घटना की सूचना मिलने पर मै घटना स्थल पर दिनांक 27.03.2014 को समय शाम 6.45 बजे पहुंचा था। तक प्रथम सूचना रिपोर्ट दर्ज नहीं हुई थी। मौ के पर पहुंचने के सम्बन्ध में मेरे द्वारा उक्त बात का कोई उल्लेख जी०डी० पर नहीं किया। मेरे द्वारा उच्च अधिकारियों को घटना के सम्बन्ध में सूचना दी गयी। मेरे द्वारा मौके से लौटकर उच्च अधिकारियों को सूचना दी गयी कि अमरनाथ को चाकू से मारा गया है जो गम्भीर रूप से घायाल था जिसे इलाज के लिए अस्पताल ले जाया गया है। उसे किसने मारा है इस बात की मेरे द्वारा उच्च अधिकारियों को कोई सूचना नहीं दी गयी थी। इसके बाद मैं प्रथम सूचना रिपोर्ट अंकित होने के पश्चात् दिनांक 02.04.2014 को घटना स्थल पर गया था। फिर कहा कि दिनांक 29.03.2014 को मौकाये वारदात मैं कितने बजे पहुंचा था इस समय याद नहीं है। पहुंचने के समय का मैने केस डायरी में उल्लेख नहीं किया है। यह बात सही है कि पहले वाली सूचना अज्ञात व्यक्ति के द्वारा जो मिली थी उसके आधार पर जब मैं मौके पर पहुंचा था उसका समय मुझे याद है किन्तु विवेचना ग्रहण करने के पश्चात् जब मै प्रथम बार घटना स्थल पर पहुंचा तो उसका समय मुझे याद नहीं है। विवेचना ग्रहण के पश्चात् जब मैं पहली बार घटना स्थल पर पहुंचा तो मैं और मेरे साथ मात्र दो सिपाही थे और इसके अलवा अन्य कोई नहीं था। घटना स्थल पर कार्यवाही करने के पश्चात् हम तीनों लोग वापस चौकी आ गये थे।

आला कतल (चापड) बरामद होने वाला स्थान खुला स्थान है। और उस खुले स्थान पर ईंट रखे थे और वह जगह आम रास्ते से लगा हुआ तथा अभियुक्त के घर के बगल में है। लगभग पांच हजार ईंटें थी जो चट्टे के रूप में थीं। यह चापड (आला कतल) लगभग सौ ईंटें हटाने के पश्चात् मिला था। बरामद आला कतल ईटों के पूरवी उत्तरी कोने से बरामद हुआ था। मुझे इस समय याद नहीं है कि आला कतल जिन ईंटों पर रखा था उन ईंटों पर खून लगा था या नहीं। मैने बरामदगी वाले मौके से कोई ईंटा ऐसा बरामद नहीं किया जिस पर खून लगा रहा हो। मुझे मुल्जिम ने यह बताया था कि यह आला कतल मार कर भागते समय यहां पर छिपा दिया था। मुल्जिम को गिरफ्तार करने के बाद उसे मारा पीटा नहीं था उसने प्रेम से जुल्म इकबाल कर लिया था। पकड़ने के तुरन्त बाद अभियुक्त ने मुझे प्रेम से घटना के सम्बन्ध में जुर्म इकबाल करते हुए बता दिया था। इसके पूर्व अभियुक्त पुलिस से बचता हुआ फरार घूम रहा था। आला कतल बरामद करने के बाद थाने ले गये थे। थाने पहुंचने पर हम लोगों में से तथा मेरा हमराह सिपाही व मुल्जिम था। थाने ले जाने के बाद जी०डी० में तस्करा किया और बरामदगी सम्बन्धी लिखा पढ़ी किया।

घटना स्थल के सामने रास्ता उत्तर दक्षिण को गया है। घटना स्थल वाले मकान पर बैंक है। जिस पर कर्मचारी व चौकीदार रहते है। घटना स्थल के अगल बगल आस पास जितने भी मकानात है सभी रिहायसी है। जिनमें लोग रहते हैं। जब मैं पहली बार सूचना पर घटना स्थल पर पहुंचा था तो आस पास के रहने वाले लोग घटना स्थल पर मिले थे। मेरे बहुत पूंछने के बाद भी किसी ने घटना के बारे में मुझे कोई जानकारी नहीं दी थी। घटना स्थल पर परिवार के लोग भी रहे होंगे लेकिन मुझे घटना के सम्बन्ध किसी ने कोई जानकारी नहीं दी थी। प्रथम सूचना रिपोर्ट दर्ज होने के पश्चात् घटना करने वालों के बारे में मुझे जानकारी प्राप्त हुई इसके पहले मुझे इस सम्बन्ध में कोई जानकारी नहीं प्राप्त हुई थी।''

13. PW-7, Kesh Pal Singh, Sub Inspector, stated that on receiving the information regarding the death of Amarnath on 4.4.2014, he visited the hospital and prepared the Panchayatnama which is Ex. Ka-16. Thereafter, the dead body was sent for postmortem to the Chief Medical Officer by taking photograph of the dead body and the same is Ex. Ka-17 to Ex. Ka-20. In cross examination, this witness stated that in the Panchyatnama, two witnesses Raju and Umesh are the son of the deceased Amarnath. In the Panchyatnama these two persons did not state that Amnarnath died due to injury caused by knife and Chapad. He admits that at the

time of Panchyatnama there is over writing and there is no initial signature. He denied the suggestion that Panchayatnama and other documents were anti timed.

14. CW-1, Dr. Shashi Kumar Gulati from Regency Hospital, Kanpur stated that deceased Amarnath was admitted on 28.3.2014 by his son Rakesh Kumar. Dr. Jayant Verma, Neuro Surgen, operated the deceased on 30.3.2014 and thereafter CW-1 Dr. Shashi Kumar Gulati also conducted second operation. He proved hospital record as Ex. Ka-8. In cross examination, he stated that the injured was operated by CW-2, Neuro Surgen on 30.3.2014 and thereafter he conducted the operation. The injured has again gained consciousness and this fact has been mentioned at Sl No. 53, A/6 of the hospital record, which is signed by his son and one Raju.

15. CW-2, Dr. Jayant Verma, Neuro Surgen, Regdency Hospital, Kanpur stated that on 30.3.2014 he operated on head of the injured Amarnath and proved the hospital record as Ex.Ka-8. In cross examination, this witness stated as under :-

" दि० 28-3-2014 के लगभग 12 बजे चोटहिल अमरनाथ को भर्ती किया गया था। मेरे द्वारा चोटहिल के सर का आपरेशन किया गया था। मेरे द्वारा दाखिल किये गये चिकित्सीय प्रपत्रों में यह उल्लेख नहीं आया कि किसके द्वारा चोट पहुंचायी गयी है। मात्र इस बात का उल्लेख आया कि कुछ लोगों द्वारा चोटहिल को चोट पहुंचायी गयी। ***मेरे द्वारा चोटहिल के आपरेशन करने के पश्चात दिनांक 29-3-2014 को होश में आ गया था।*** *मेरे द्वारा लाये गये प्रपत्रों में ऐसा कोई उल्लेख नहीं है कि पुलिस को पहले या बाद में सूचना दी गयी हो। मेरे द्वारा दाखिल प्रपत्रो के अवलोकन के पश्चात चोटहिल के सिर, आंख (चेहरा) के अलावा चोटहिल के शरीर पर और कोई चोट का उल्लेख नहीं है।"*

16. Thereafter, the statement of the witness under Section 313 Cr.P.C. was recorded and incriminating evidence was put to them. This witness stated that an anti time case is recorded implicating the accused persons falsely. Regarding question No. 14, which was made to Himanshu Soni, he has stated as under :-

"प्र०नं0-14 आपने सभी गवाहों के बयान सुने इस सम्बन्ध में आपको क्या कहना है ?

उत्तर- पी०डब्लू० 1 व 2 उधार पैसा लेन-देन के विवाद के कारण झूठी साक्ष्य व शेष सरकारी गवाह होने के कारण।

प्र०नं० 15 आपके विरूद्ध मुकदमा क्यों चला ?

उत्तर- उधार पैसों के लेन-देन के विवाद के कारण।

प्र०नं0-16 क्या आपको सफाई देनी है?

उत्तर- जी हाँ।

प्र०नं-17 क्या आपको कुछ और कहना है ?

मैंने पचास हजार रु० मृतक को उधार दिया था किन्तु कई बार माँगने के बावजूद भी उसने रूपये वापस नहीं किए इसी पर कहा सुनी हुई थी। जब अज्ञात बदमाशों द्वारा मृतक को मार दिया गया तो मृतक के लड़कों ने पुलिस से साजिश करके यह मुकदमा कराया।"

17. Ambika Prasad in his statement under Section 313 Cr.P.C. also stated on same line and regarding question no. 14 to 17, he also stated that on account of money dispute by PW-1

and PW-2, they have been falsely implicated. The deceased had taken rupees fifty thousand as a loan but it was not returned and some unknown persons have killed him but they have been nominated falsely in this case. Pummu Soni, in reply, stated that due to party conviction in the village, he has been falsely implicated in this case by the police though he has not committed any offence and rather he has told enmity with Ambika Prasad.

18. Nandu, in his statement, further stated that due to party conviction he has been falsely implicated and he has no role in committing offence.

19. Thereafter, the accused side led their evidence. DW-1, Indrasjeet Singh an independent witness was produced who stated as under :-

*''सशपथ बयान किया - दिनांक 27-3-14 को मैं अपनी दुकान में था उस समय शाम के 6-1/2 बजे थे। अमरनाथ की दुकान की तरफ से शोर सुनाई दिया कि दौड़ो बदमाश आ गये है मार रहे हैं शोर सुनकर मैं तुरन्त ललकारते हुये अमरनाथ की दुकान पहुंचा जब मैं अमरनाथ की दुकान पहुंचा तो बदमाशान अमरनाथ को चुटहिल हालत में छोड़कर भाग गये थे। मैंने अमर नाथ से पूंछा कि तुम्हे किन लोगों ने मारा है कि उसने बताया कि अंधेरे की वजह से मारने वालों को मैं पहचान नहीं पाया हूँ। जो लोग अमरनाथ को मार रहे थे वो लोग मेरे गांव हस्वा के नहीं थे। जैसे **ही मैं अमरनाथ के पास पहुंचा वैसे ही 10-15 लोग गांव के और आ गये थे जिनमें उनके लड़के राकेश कुमार सोनी, उमेश कुमार सोनी व रमेश कुमार सोनी भी आ गये थे।** इसके बाद अमरनाथ के लड़के अमरनाथ को एम्बोलेन्स से लादकर अस्पताल ले गये थे। गवाहान ने हाजिर अदालत मुल्जिमान को देखकर कहा यह लोग नहीं थे। अमरनाथ को मारने में यह लोग नहीं थे। मुल्जिमान हाजिर अदालत हिमांशू सोनी, नन्दू सिंह, अम्बिका सोनी, पप्पू सोनी, पम्मू सोनी, अमरनाथ को मारने वालो में नहीं थे। मुल्जिमान हाजिर अदालत मेरे गांव के है और मैं घटना के पहले से जानता पहचानता हूँ।''*

20. In cross examination by the Public Prosecutor, he stated that he did not know whether any Chapad was used or not. He met the police after the incident and informed about the same to the police, but police did not record his statement.

21. Trial Court thereafter vide its judgment of conviction and order of sentence convicted and sentenced the appellants as discussed above. Being aggrieved by the impugned judgment, the appellants have filed four separate appeals.

22. Learned counsel for the appellant has made the following submissions:

A. It is argued that both PW-1 and PW-2 are the sons of deceased and apart from them there is no other witness of fact. It is argued that both of them are interested witnesses and it has come in their statement that the place of incidence was a public place and lot of people were there, however, no independent witness was examined by the prosecution. It is also submitted that one of the neighbour- Indrajeet Singh was also present but he was also not examined as a prosecution witness though he was examined as a defence witnesses.

B. It is next argued that there is a delay in lodging the FIR. It is submitted that the FIR has been lodged after due consultation and consideration. As per the prosecution witnesses, the information regarding the incident was given immediately to the police but the FIR was lodged on the next date at around 4:00 PM. The counsel submits that the incident took place on 27.03.2014 at about 6:30 PM and PW-1 has given the complaint to the police Ex.Ka-1 in which he has named persons, namely, Himanshu Soni, Ambika Soni and Pammu Soni and subsequently by giving another undated complaint, two more accused namely, Vimal Soni and Nandu Singh were introduced.

C. It is argued that there is a lot of variation in the two complaints i.e. Ex.Ka-1 which formed the basis of the chik FIR is Ex.Ka-3 and the undated subsequent complaint is Ex.Ka-2 as it is stated by PW-1 that later on he came to know from witnesses that two more persons Vimal Soni and Nandu Soni were also there and Nandu Soni gave knife injuries to his father. Learned counsel submits that the subsequent complaint Ex.Ka-2 was introduced just to bring the injuries sustained by deceased Amarnath to corroborate with knife injuries and at the first instance, it is stated that Himanshu Soni caused injury with a chapad (an instrument used for cutting meat). Learned counsel submits that no date has come on record regarding the second complaint which is totally an after thought and is made just to fill up the lacunae of the prosecution evidence.

D. It is next argued that prosecution has failed to prove motive as it is stated that on account of opening a jewellery shop, the accused side attacked the victim- Amarnath with a motive that he is trying to influence the customer of the accused side. Learned counsel submits that it has come in the statement of PW-1 that his family had three shops of utensils in village- Haswa, one shop was at home which was managed by his mother, the second shop was in the market which his brother Raju was managing the affairs and third shop was near Bank of Baroda where the incident took place and his father was managing the same. Learned counsel submits that the prosecution has failed to prove that the informant side had any shop of jewellery, for which the motive is attributed that accused side felt offended that the deceased was trying to influence their customers in the business of jewellery shop.

E. Learned counsel submits that the only evidence which has come against the appellant is that as per PW-2, his father’s maternal uncle's son one Raj Bahadur was also doing a business of utensil shop and in the same he was also doing the work of sale purchase of jewellery, however, Raj Bahadur was never examined as prosecution witness to support the fact. It is argued that even PW-2 has not stated so in his statement and therefore, the motive is not proved. Learned counsel further argued that it has come in the statement

of PW-1 that the deceased Amarnath was doing the work of pledging the goods of people by giving loan and on that rivalry, some unknown persons has committed the offence. It is also argued that PW-1 was confronted with his statement made to the police where he stated that in Ex.Ka-3, he has not mentioned the name of Pappu Soni and he cannot tell if the I.O. has not so recorded in his statement under Section 161 of Cr.P.C. Learned counsel argued that this witness in cross-examination admitted that in his statement, the I.O. has not recorded about catching hold of the hands and feet of his father by the accused person and he cannot tell the reason.

F. Learned counsel next argued that PW-1 is not at all an eye witness as it is a clear from the facts that **'firstly'** in the complaint Ex.Ka-1, he has nowhere stated that the incident took place in front of his eyes and rather he has stated that he reached there after the incident**. 'Secondly'**, in the second complaint Ex.Ka-3 this witness stated that later on he came to know that from the witnesses that in the incident Pappu Soni and Vimal Soni were also involved. Though he has admitted that all the accused persons are of his village, and he knew them previously and therefore, this witness has not seen the incident. **'Thirdly'**, it has come in the statement of PW-6-I.O. that during his investigation when he recorded the statement of PW-1, he did not clearly record that PW-1 has witnessed the incident and **'fourthly'**, that PW-1 has given undated supplementary complaint, the language of which suggest that he is not an eye witness and trial court has not look into this aspect of evidence.

G. Learned counsel has next argued that the statement of PW-2 is also not trust worthy as this witness has also stated that at the time of incidence, he along with Rakesh and Ramesh were sitting on their shop and his father was sitting on his utensil shop. Learned counsel submits that the description given by this witness that Ambika Soni challenged that Amarnath should be killed as he is trying to influence his customers, upon this, Ambika Soni and Pammu Soni caught hold of hands of his father, Vimal Soni and Pappu Soni caught hold of the feet of his father and Himanshu Soni and Nandu Soni with their chopper and knife caused him injuries do not corroborate the F.I.R. version.

H. Learned counsel has also laid much emphasis that PW-2 stated that when his father raised the voice, they ran towards him from their shop and saw the incident. Learned counsels submits that this part of the statement suggest that they also reached at the spot after the incident took place. Learned counsel has next submitted that Raj Kumar, the maternal uncle's son of his father was doing the business of utensil and jewellery, however, he was never examined though he was a witness of inquest report and witness to Ex.Ka-2, the second complaint.

I. It is also submitted that this witness has clearly stated that this statement was recorded after 3-4 days

of the incident just to introduce him as an eye witness. Learned counsel has raised another point to argue that PW-2 was not present at the spot as he has stated that his father was critically injured and was bleeding, he picked up his father and took him in the ambulance from where he was taken to hospital. However, he stated that his clothes were not blood stained and therefore, his presence is doubtful. Learned counsel has further argued that this witness stated that his second statement was recorded after the one and a half month by the police, just to cover the entire lacunae in the evidence.

J. It is next argued that there is variation in the occular version and the medical version of the prosecution. Learned counsel submits that as per PW-1 and PW-2 immediately after the incident on 27.03.2014, they took their father in an ambulance to Sadar Hospital where they reached about 8:00 PM. From the hospital, his father was referred to Krishna Hospital, Kanpur but there was no proper medical facilities and therefore, he was taken to Regency Hospital, Kanpur. It is argued that neither the doctor at Sadar Hospital nor Krishna Hospital conducted the medico-legal-examination and there is no M.L.C. on record as the deceased died on 04.04.2014, after the gap of seven days. Learned counsel has referred to the statement of PW-3 Dr. Ratnesh Prabhakar who conducted the post-mortem of the deceased and reported the injuries as reproduced above, out of which, the injuries nos. 1 to 8 were reported as stitched wounds and therefore, this doctor has nowhere stated that at the time of conducting the post-mortem he had opened the stitches to find out the nature of weapon used and nature of injuries sustained by the victim and he has given a clear opinion that it is not possible to tell whether injuries nos. 1 to 8 which are stitched wounds were caused by a sharp edged weapon. This witness further stated that injuries nos. 9 to 11 can be caused with a Kundalya i.e. a blunt weapon which as per PW-1 and PW-2 was not used by the accused.

K. Learned counsel submits that even when the injured witness was admitted in the Regency Hospital on 28.03.2014, no MLR was prepared by the said hospital as it has come in the statement of two treating doctors, CW-1 and CW-2. With reference to CW-2, it is argued that this witness has stated that he operated upon the head of the victim on 28.03.2014 being a neurosurgeon and produced the hospital record as Ex.Ka-8 in which he admitted that nothing is opined how the injuries were caused. With reference to CW-1, doctor who conducted the second operation after CW-2 has also stated that he cannot tell the nature of weapon used. The argument is raised that both CW-1 and CW-2 have stated that post operation, the injured victim Amarnath had gained senses and he suffered injuries on head, eye and face.

L. It is argued that the medical evidence nowhere suggest that either the chapad or the knife was used for committing the offence. Learned counsel submits that CW-2 has stated

that in his medical record it has come that the victim has gained consciousness after the operation, however, neither his statement was recorded nor the police tried to find out the manner in which the offence was committed as accused were already named in the F.I.R. falsely.

M. It is next argued that as per the FSL report, the articles sent for examination were a blood stained piece of mattress, a simple piece of mattress, a pair of sleeper and one chapad. As per the report of FSL, the human blood was found at Ex.1 i.e. blood stained mattress and at S. No. Ex.2 and Ex.3, a pair of sleeper and the chapad disintegrated blood was found and therefore its source could not be ascertained. Learned counsel submits that even this part of the evidence do not suggest that the chopper allegedly recovered from Himanshu Soni was used in the offence. It is argued that the second weapon of offence i.e. knife was neither recovered nor sent to the FSL for examination.

N. Learned counsel for the appellants has laid much emphasis on the fact that the second complaint (Exhibit Ka-2) is given with due consideration and to fill-up the lacunas regarding the injuries. It is argued that in this complaint, PW-1-informant (Rakesh Kumar Soni) stated that he came to know from the witnesses that in the incident, Pappu Soni and Vimal Soni were also involved and that his father was given grievous injuries with Chapad and knife.

O. Learned counsel for the appellant submits that this complaint was witnessed by Ram Bahadur, Ram Kumar and Raj Kumar, however none of the three witnesses were the source of information to PW-1 for adding two accused namely, Pappu Soni and Vimal Soni were never examined by the prosecution.

P. Learned counsel for the appellant submits that it has come in the statement of both the Investigating Officers i.e. S.H.O. Subh Narayan Singh (PW-5) as well as IO Chhotelal Patel (PW-6) that Vimal Soni was not present at spot. PW-5 has stated in cross examination that during his investigation, the informant-Rakesh Kumar Soni (PW-1) told him that Vimal Soni belongs to his famly and he was not present at the spot. This witness also stated that the informant did not tell him while recording the FIR that Ambika Soni, Pammu Soni and Nandu Singh caught hold hands of his father and also not recorded that Nandu Singh gave knife blow to the deceased. It is stated that Umesh Kumar who is also an eye witness and son of the deceased, also did not disclose that Nandu Singh gave knife blow to the deceased though Umesh is also a witness of Panchayatnama.

Q. Similarly, IO Chhotelal Patel (PW-6), the second Investigating Officer who recovered the Chapad from accused Himanshu Soni after his arrest stated that recovery was effected in presence of two persons, namely, Raj Kumar Soni and Rakesh Kumar Soni, however both these persons were not examined as an independent witness to prove the recovery and therefore, the

recovery is not proved in terms of Section 27 of Evidence Act. This witness further stated that on 2.4.2014, he has recorded the statement of PW-1, PW-2 and other witnesses including Raj Kumar and Raj Bahadur but they did not state about any other accused except those named in the FIR, including Pappu Soni and only on 6.4.2014, PW-1 named Pappu Soni.

R. Learned counsel for the appellant submits that there is substantive improvement in this regard as the deceased died on 4.4.2014 and later on, Pappu Soni was named on 6.4.2014.

S. Learned counsel for the petitioner submits that though Exhibit Ka-2, the second complaint is undated, however, PW-6 has stated that on 3.4.2014 i.e. after about seven days of incident, Rakesh Kumar Soni (PW-1) told him that at the time of incident, he could not get information regarding involvement of Vimal Soni and Pappu Soni and on coming to know this fact he has given the complaint. However, on that date, he did not nominate the aforesaid two persons in the case, this also suggests that in order to cover-up the second complaint, PW-6 has given its date as 3.4.2014 and if he received the same then he has prepared fake proceeding dated 6.4.2014 as he added the name on 6.4.2014 after death of the victim. This witness stated that neither in the complaint nor the FIR, the informant stated that Nandu Singh gave knife blow to his father and only on 3.4.2014 when he gave the second complaint, this information came on record and, therefore, Nandu Singh has been falsely implicated.

T. Learned counsel for the appellants further submits that the articles which were recovered i.e. Exhibit Ka-1 & Ka-2 as well as Chapad remained in long custody of PW-6 as it is clearly admitted by him in cross examination and the police sent the same to the Forensic Science Lab after a period of two months which again raises suspicion about the recovery effected in this regard.

U. A reference is drawn to recovery memo (Exhibit Ka-13) where the date was changed from 2.3.2013 to 2.4.2013 without any initial signatures and there are other cuttings also on the same regarding the recoveries and on the cutting and overwriting there is no initial signature and, therefore, it is apparent that this documents is manipulated by the Investigating Officer.

V. Learned counsel for the appellant next argued that both PW-1 & PW-2 are not the eye witnesses and the FIR is delayed by one day and was registered with due deliberation as PW-3 has stated that on receiving information on the date of incident i.e. 27.3.2014 at 6:45 p.m., he reached at the spot and till that time, no FIR was registered. However, he has given the information to the Higher Police Official that Amarnath is seriously injured and he has sent him to the hospital. However, who gave him injuries was not reported to the Higher Police Official. This witness stated that thereafter for the first time, he went to

the spot on 2.4.2014, after the FIR was registered.

W. It is next argued that the delay in lodging the FIR itself reflects that it has been registered with a due deliberation of nominating the accused persons otherwise when PW-6 has reached at the spot immediately after the incident at about 6:45 PM where the incident took place at about 6-6:30 PM, he must have enquired from the people of the vicinity as to who had committed the offence but name of the accused never surfaced there and then.

X. It is next argued that one Indrajeet Singh who is having a house where the incident took place appeared as DW-1 and has stated that immediately after the incident when he reached at the spot, he met the victim who was in sense but he did not name the accused persons as assailants. This witness has further stated that police has reached at the spot at that time and he met the police and he told about the incident but the statement was not recorded.

Y. Learned counsel for the appellant next argued that some unknown miscreants have caused the injuries and on his asking, Amarnath, victim told him that due to dark, he could not identified them and even 10-15 people of the village also gathered there. It is next contended that this independent witness was intentionally not examined by the prosecution who has given vital informations as the police immediately after the incident reached at the spot as stated by PW-6 that (i) Amarnath was in senses and (ii) he did not tell and rather stated that he could not identify the assailants, (iii) that the accused persons did not cause injury to Amarnath as he knew all of them well as they belongs to his village. It is thus, submitted that from the statement of DW-1 also, it is proved that PW-1 & PW-2 are not eye witnesses and they reached at the spot later on.

Z. Learned counsel for the appellant next argued that Raj Bahadur, the cousin of deceased-Amarnath who was a witness to the Panchayatnama, the recovery memo Exhibit Ka-13 and as per both PW-1 & PW-2 was doing business of jewellery whom the motive is attributed for causing the injury to Amarnath was not examined to prove this fact. Even two other witnesses, namely, Ram Kumar and Ram Bahadur whose names surfaced in investigation and who are witness to the second complaint (Exhibit Ka-A-2) were not examined as witness to prove the guilt of the appellants.

AA. Sri Rajiv Lochan, learned counsel for the appellant-Ambika Soni, who as per prosecution version caught hold the deceased has additionally argued that at the first instance in the FIR, it is not stated that which assailants caught hold of the hands of the victim and which assailants caught hold of the feet of the victim. It is also argued that in the first complaint as well as chik FIR , name of Pappu Soni and Vimal Soni was not there and in the first complaint as well as chik FIR, no knife was attributed to Nandu Singh.

AB. Learned counsel for the appellant submits that in order to co relate, the injury sustained by the victim, later on 3.4.2014 as per PW-6, the complaint Ex-Ka-2 was given which was undated and the reason for not mentioning a date, on the same was to create presumption that it was given promptly though PW-6 has stated that only on 3.4.2014, PW-1 for the first time named Pappu Soni and Vimal Soni. However, on that date, neither his statement was recorded nor the two accused were added in the FIR and only on 6.4.2014 i.e., after death of victim on 4.4.2014, their names were added in collusion with the complainant / informant's side.

AC. Learned counsel for appellant further submits that it has come in the statement of both the Investigating Officers, PW-5 & PW-6, that during investigation, on verification and as per the statement of PW-1 itself that the subsequently named accused-Vimal Soni belongs to his family and he was not present at the spot, his name was dropped during the police investigation and no charge sheet was presented against him.

AD. Learned counsel for appellant submits that presence of Nandu at the spot is highly doubtful as he is only a friend of other accused and at the first instance, role was attributed to him was that he had caught hold the hands of his father whereas in the second statement Ex-Ka-3 on 6.4.2014, he was assigned role of giving knife blow after due deliberation, by the informant's side.

AE. Counsel has also argued that there is delay of 22 hours in registration of the F.I.R. which is not explained by the prosecution though it has come in the statement of PW-6 that after 15-20 minutes of the incident, he has reached at the spot but did not report name of any assailants to the higher Police Officials which suggests that the incident was committed by unknown persons as the victim was in the business of pledging the articles of the persons in public by giving money and if the money was not returned, he used to seize the same and, therefore, on that account, he was assaulted by unknown persons otherwise, immediately when PW-6, the Investigating Officer, reached at the spot, he could get the name of the appellants as many persons of the vicinity including DW-1, Inderjeet, came there who has deposed that victim-Amarnath told him that he could not see who were the assailants.

AF. It is next argued that naming of accused Nandu Singh by giving second complaint (Ex.Ka-2) is otherwise barred as PW-1 has stated that he came to know about this fact from the witnesses, therefore, Ex.Ka-2 was given on the basis of hearsay evidence which is not admissible.

AG. It is submitted that in Ex. Ka-2, three persons, **Ram Bahadur, Raj Kumar and Raj Bahadur** were cited as witnesses upon whose information PW-1 stated that he had nominated Pappu Soni and Vimal Soni as additional accused as well as introduced one new weapon of offence

i.e. knife. However, none of the three witnesses were examined by the prosecution to prove this aspect of the evidence.

AH. It is next argued that in their statement under Section 313 Cr.P.C. all the accused have stated that they have been falsely implicated as deceased owed Rs.50,000/- to them and they have not committed the offence.

AI. It is thus submitted that PW-1 and PW-2 are not the eye-witnesses of the incident; **'secondly'**, there is consistent improvement in the prosecution version; **'thirdly'**, the F.I.R. was registered after a delay of about 22 hours with due deliberations**; 'fourthly'**, the police did not believe the version of the informant and dropped the proceedings against Vimal Soni who was named in the second complaint (Ex.Ka-2); **'fifthly'**, in the F.I.R., there is no mention of causing injury with a knife; **'sixthly'**, the second complaint (Ex.Ka-2) is undated and is given with due deliberations to corroborate the weapon of offence with the injuries of the victim; **'seventhly'**, no blood staines were found on the clothes worn by PW-1 and PW-2 though they have stated that they had lifted their injured father and took him to the hospital in ambulance and lastly, as per DW-1, injured-Amarnath was in senses but he did not name the accused person as assailants.

23. In reply, learned counsel for the informant and learned A.G.A. for the State have argued that prosecution has discharged the burden as both the PWs are the eye-witnesses and their reliability and presence at the spot cannot be disputed being the sons of the victim as they have stated that they were also present at the shop abutting the shop of the victim where incident took place.

It is also argued that upon pointing out of Himanshu Soni, weapon of offence, Chapad, was recovered which was concealed under heap of bricks and was sent for forensic examination and it was opined that humon blood was found on the same.

It is also argued that the delay in registration of the F.I.R. was due to the fact that both PW-1 and PW-2 took their father to Sadar Hospital and from there, they took him to Krishna Hospital, Kanpur, from there, he was referred to Regency Hospital on the next date i.e. 28.3.2014 and was immediately operated upon for his head injuries by Doctor, CW-1 and CW-2. Therefore, both PW-1 and PW-2 were busy in taking care of his injured father and the delay is duly explained.

It is argued that statement of PW-2 is also a reliable witness as he has described the manner in which all the assailants caused injuries to his father.

Counsel submits that the second complaint (Ex.Ka-2) was given later on because PW-1 was purtured on seeing the injured condition of his father and by giving a reason that he later on came to know from the witnesses about the name of Pappu Soni

and Vimal Soni, he has given a natural version to the police.

It is also argued that motive is proved as it has come in the statement of PW-1 and PW-2 that on one of the shops, they were also doing business of jewellery on which the appellants felt offended that deceased-Amarnath was trying to influence their settled customers.

It is also submitted that statement of DW-1, Inderjeet Singh, is not trustworthy as immediately after the incident, the injured became unconscious and he was taken to the hospital. It is submitted that the condition of the injured was so critical that the Sadar Hospital referred him to the Krishna Hospital, Kanpur, even Krishna Hospital on finding that they did not have appropriate medical facilities, referred the victim to the bigger hospital i.e. Regency Hospital for giving proper treatment.

Learned A.G.A. for the State has argued that there was no occasion to conduct the medico legal examination at the first two hospitals and they did not admit victim and rather referred him immediately to the bigger hospital and, therefore, mere fact that the medico legal report is not on record, do not raise any suspicion about the prosecution version.

It is also argued that independent witness did not come forward as they did not want to depose against other inhabitants of the village in order to avoid any enmity.

Learned A.G.A. has further submitted that if the weapon of offence was not sent to the Forensic Science Lab for a period of two month, no fault can be found with prosecution version as it was duty of the Investigating Officer to send the same immediately.

It is also argued that upon the confession of Himansu Soni recorded by PW-6, he got recovered the weapon of offence which was having blood stains and was sent to F.S.L. for examination.

24. In reply, counsel for the appellant reiterated the argument raised earlier and submitted that delay in sending the weapon of offence for forensic examination is unexplained by the Investigating Officer, the absence of medico legal examination got conducted by Regency Hospital where victim remained admitted from 28.3.2014 till 4.5.2014 when he died and in view of the statement of both the treating doctors i.e. C.W.1 and C.W.2 who have stated that they cannot tell about the nature of the weapon used in commission of offence, the prosecution version is doubtful. It is also submitted that substantive improvements were made by the prosecution, part of which, were disbelieved by the Trial Court.

25. After hearing counsel for the parties and on going through the Trial Court's Record as well as the paper book and on re-appreciation of the entire evidence, we record our finding as under :

A. The argument raised by the counsel for the appellant that PW-1 and

PW-2 being sons of the deceased are interested witnesses and no independent witness was examined by the prosecution, has some force as on a careful perusal of the evidence, we find that Rakesh Kumar, PW-1/Informant is not en eye-witness and is only an informant for the following reasons:

(i) In the complaint given to the police at the first instance, this witness has not specifically stated that he witnessed the incident rather stated that when the accused came armed with weapons and attacked his father, his brothers, Ramesh Kumar and Umesh Kumar, reached at the spot and saw the incident.

(ii) Even in cross examination of PW-6, it has come that during his investigation, it could not be ascertained that PW-1 was in fact a witness of fact and has seen the incident. On a specific question asked to him whether Ramesh Kumar PW-1, in his statement under Section 161 Cr.P.C. stated that he witnessed the incident, the specific reply by PW-6 was that informant did not tell specifically these facts in his statement.

(iii) PW-1 when gave the second complaint (Ex.Ka-2), clearly stated that at the time of incident, he could not get the correct information and later on, he came to know from the witnesses that in the incident, two more accused namely, Pappu Soni and Vimal Soni, were also there, this also reflect that he has not witnessed the incident.

In cross examination, PW-1 has stated that in his first complaint (Ex.Ka-1), he has not stated that Pappu Soni and Vimal Soni caught hold of hand and feet of his father and stated so in the second statement made to the Investigating Officer after four days.

(iv) In the second complaint, he had named three witnesses i.e. Ram Bahadur, Ram Kumar and Raj Kumar. Out of which, Raj Bahadur was also a witness to Panchayatnama. As per PW-1, Raj Bahadur was his father's first cousin and was doing business of jewellery, however, this witness was never examined to say that PW-1 has witnessed the occurrence.

(v) In cross examination PW-1 admitted that he know Pappu Soni and Vimal Soni personally by face and, therefore, by not naming them at first instance and rather putting a new story in second undated complaint Ex.Ka-2 that other witness told him their name afterwards, the second complaint was given with due deliberation as PW-1 has not witnessed the incident.

However, we uphold the finding recorded by the Trial Court that Umesh Kumar, PW-2, is an eye-witness as per FIR. Though, he has also made improvement on the line of second complaint(Ex-Ka-2). PW-2 has made a statement that on the date of incident i.e. 27.03.2014, at about 6.30 PM, he along with his brother-Rakesh and Ramesh were sitting on their jewellery shop and his father was on the utensils shop. He has given the description of the accused persons who came to the shop, out of which, Nandu Singh was carrying knife and Himansu Soni was carrying a chapad, rest of the accused

were empty handed. Ambika Soni exhorted to kill his father-Amarnath as he was influencing their customers in the business of jewellery. Ambika Soni and Pammu Soni caught hold of the hands of his father, Vimal Soni and Pappu Soni caught hold of feet of his father and Himanshu Soni and Nandu Singh, with their respective weapons i.e. chapad and knife, caused injuries. When his father raised the voice, PW-2 along with others, reached the spot and saw the incident.

In cross examination, this witness stated that he has told the Investigating Officer that along with the accused named in the F.I.R., Pappu Soni and Vimal Soni also came. However, he cannot not tell if this fact was not recorded in his statement. This witness stated that even when his second statement was recorded, after one and a half months, he again disclosed this fact but cannot tell the reason, why the Investigating Officer has not recorded the same.

He further stated that he has not made statement that since Vimal Soni is from his family and as per his information, Vimal Soni had no role and is innocent. He pleaded ignorance how the statement was recorded. He also stated that as per his information, Pappu Soni was not in the business of either jewellery or utensils. This witness faced lengthy cross examination but his deposition could not be shattered by the defence except the improvements as admitted by him. Therefore, his statement is partly reliable qua the FIR version.

B. Next argument raised by counsel for the appellant that there is delay in lodging the F.I.R. which has been registered after due consultation and consideration, is also without force as it has been explained both by PW-1 and PW-2 that immediately after the incident, they took their father to Sadar Hospital, from there, they took him to Krishna Hopsital, Kanpur where, due to lack of medical facility, he was referred to Regency Hospital, Kanpur and immediately on the next day, the victim was operated upon by a Neuro Surgeon i.e. CW-2. Therefore, both the witnesses have stated that they were taking care of their father who was in dire need of medical assistance and only after that, they recorded the Chik F.I.R. and, therefore, the delay is explained.

Argument raised by counsel for the appellant that it has come in the statement of PW-6 that on receiving the information of the incident, he reached the spot after 15-20 minutes and thereafter, he did not send any report about the names of the accused, is a normal course as a police officer on a receiving an information of cognizable of offence is bound to reach at the spot. This witness has stated that only after Chik F.I.R. was recorded in which name of the accused surfaced, he started the investigation. Therefore, the delay is properly explained by the prosecution.

C. The next ground raised by counsel for the appellant that motive is not proved as prosecution has failed to prove that the informant side was running the business of jewellery, is

also not correct as it has come in the statement of both PW-1 and PW-2 that his father's cousin Raj Bahadur was also having a utensils shop and was doing the business of jewellery. It has come in their statements that Raj Bahadur was brought by their father to village-Haswa and his father helped him in opening the shop reflect that business of jewellery undertaken by Raj Bahadur, was also the family business of the informant side.

D. Next argument raised by the counsel for the appellant that statement of PW-1 and PW-2 were recorded after 3-4 days of the incident is also not raising doubt on the prosecution version as it has come that the deceased died on 4.4.2014 during his treatment at Regency Hospital, Kanpur. Therefore, mere fact that the statement was recorded after 3-4 days do not raise suspicion on the prosecution version.

E. Another argument raised by counsel for the appellant that no M.L.C. of the injured was done either at Sadar Hospital or at Krishna Hospital, is also without any merit as it is a case of the prosecution that the injured was taken to the Sadar Hospital, from there, he was referred to Krishna Hospital and, thereafter, he was referred to Regency Hospital where he got admitted. Since both Sadar Hospital and Krishna Hospital did not provide any medical assistance except first aid, no M.L.C. was conducted.

F. Next argument raised by the counsel for the appellant that the injuries sustained by the victim are neither proved nor are reciprocating the weapon of offence attributed to the appellants, Himansu and Nandu Singh as it has come in the statement of PW-3, the Doctor who conducted the postmortem that the injury Nos.1 to 8 were stitched wound and injury Nos. 9 to 11 were caused by a blunt weapon. The argument of the counsel that the doctor while conducting postmortem did not open the stitches to find out the nature of the weapon of offence used is without any substance. PW-3 has stated that injuries were sustained by a sharp edged weapon and stitches are normally given to a victim when he suffers incised wound and, therefore, no benefit can be granted to the accused on this aspect.

G. Counsel for the appellant has next argued that it has come in the statement of CW-1 and CW-2, the two treating doctors of Regency Hospital, that after first operation of brain was conducted by CW-2, a Neuro Surgeon, the victim gained consciousness and when the second operation was conducted by CW-1, he again gained consciousness. However, the defence failed to cross examine both these witnesses on the point whether the injured was fit to make statement as both the Doctors have nowhere stated that after getting consciousness, the victim was fit to make statements about the incident.

Therefore, we find force in the argument raised by the counsel for the informant and learned A.G.A. that looking into the nature of the injuries, the victim became unconscious at the

spot and even thereafter as per postmortem, he died due to coma because of the injuries sustained by him and, therefore, the accused failed to prove that the victim after the incident, at any time, was fit to make statement.

H. The next argument raised by the counsel for the appellant that as per the F.S.L. Report, three articles were sent i.e. a bloodstained piece of mattress, a plain piece of mattress, a pair of slippers and one chapad. It is argued that at Ex.1, the bloodstained mattress, at Ex.2 & 3, pair of slippers and chapad was having disintegrated blood, therefore, the source could not be ascertained. It has come in the statement of PW-6 that the articles were sent for F.S.L. examination after two months and, therefore, F.S.L report did not prove that the chapad was having human blood.

However, the defence side could not dispute that the Chapad was recovered from appellant-Himansu Soni in presence of the witnesses as proved by the Investigating Officer (PW-5) and it was the same Chapad which was sent for examination to Forensic Science Lab, therefore, the recovery of chapad from the appellant-Himanshu Soni is duly proved.

I. Argument raised by the counsel for the appellant that a neighbour of the deceased namely, Indrajeet Singh, appeared as DW-1 and deposed that after the incident, he reached the spot and met the victim who stated that he could not identify the accused due to dark, did not support the defence version in any manner as prior to his examination, no application was given to any higher police official that this witness had gone to the place of incident, after the incident took place and he be cited as witness.

J. Next argument raised by counsel for the appellant that Raj Bahadur who is the cousin of deceased Amarnath and as per the prosecution was doing the business of jewellery, which was the motive attributed for the commission of offence, was not examined as a witness to prove this fact. However, since this witness was not cited an eye witness, mere his non-examination do not raise dent on the prosecution version.

K. The next defence set up by the accused cited that the deceased was in the business of providing loan to the people by pledging their valuable articles like jewellery and would forfeit the same, if the amount is not paid and due to that reason, some unknown persons have caused the murder of deceased Amarnath, is not proved by leading any cogent evidence and putting this defence to the witnesses of fact. Even the argument raised by counsel for the appellant that both, PW-1 & PW-2 have admitted that they were having three shops of utensils, one managed by their mother, one by the witnesses and the third by the father, deceased Amarnath where the incident took place and there is no shop of jewellery is not correct because the prosecution version as specifically stated by PW-2 is that he was present at the shop of jewellery run by his brother Rakesh and Ramesh when the accused

persons came and attacked his deceased father and, therefore, there is no force in the arguments raised by counsel for the appellant that prosecution has failed to prove that the family of the deceased was not in the business of jewellery.

26. In view of the finding recorded by the trial court holding the appellants-Himanshu Soni, Ambika Sonia and Pammu Soni guilty of primary offence under Section 302 of I.P.C., is upheld.

27. However, we find merits so far accused Nandu Singh and Pappu Soni concerned for the following reasons:

A. So far the accused Nandu Singh is concerned he was not assigned any injury in the first information report submitted to the police by PW-1. He was subsequently assigned a knife blow in an undated complaint Ex.Ka.1 just to introduce a sharp edge weapon like knife which was attributed to him, in order to co-relate the injuries nos. 1 to 8 sustained by the victim. However, the prosecution has failed to prove when this complaint Ex.Ka.2 was given, though the I.O.- PW-6 stated that after the death of the victim Amarnath on 04.04.2013, he took cognizance of the complaint on 06.04.2013 wherein two new accused persons namely Vimal Soni and Pappu Soni were introduced.

B. No recovery of knife was effected from Nandu Singh as stated in the second version of the complaint which as per the PW-6 was given somewhere on 03.04.2013 or 06.04.2013. Though in the intervening period PW-6 has recorded the statement of PW-2 as stated by him that after 3-4 days, the statement was recorded by I.O.

Therefore, the second version wherein, a knife was attributed to Nandu Singh is not proved as PW-5 in cross examination admitted that in case diary after registration of FIR he did not mention that Nandu Singh gave knife blow. He further stated that even PW-2 in his statement did not state that Nandu Singh gave knife blow to deceased.

C. Even otherwise, for the first time PW-1- informant has stated that from the witnesses, he came to know that in the incident Pappu Soni and Vimal Soni were also involved. In this complaint, three persons namely, Ram Kumar, Ram Bahadur and Raj Kumar were nominated as the witnesses, however, none of them was examined to prove this fact that they had given this information to PW-1 that Nandu Singh has caused injuries with a knife or Pappu Soni and Vimal Soni are also accused.

D. Even otherwise, Nandu Singh is not a person from the family of the Ambika Soni who as per the prosecution version, had a motive to attack the victim Amarnath. The motive attributed is that since Amarnath was in the business of jewellery and was influencing the customers of the accused side, therefore, the accused caused him injuries. However, nothing has come on record that Nandu Singh was either a servant of the accused person or had any motive to attack the victim. Even otherwise Nandu Singh in

the first version Ex.Ka.1 Nandu Singh was only attributed that he had caught hold of the hand and feet of his father whereas while appearing in court PW-1 and PW-2 made improvements by saying that Nandu Singh caused injury with a knife, a version which was not given in the FIR. Therefore, the presence of Nandu Singh at the spot is highly doubtful especially when a new version has been introduced in the undated complaint Ex.Ka.2 that one of the weapon of offence was knife which was never recovered from appellant-Nandu Singh during the investigation. Therefore, we find that accused Nandu Singh is entitled to benefit of doubt.

E. We have also found that the prosecution has failed to prove the case against Pappu Soni, another accused who was introduced for the first time in the second complaint is Ex.Ka.2. It has come in the statement of PW-6 and PW-7, the two Investigating Officers that during investigation, they recorded the statement of both PW-1 and PW-2 that second named person in this complaint Ex.Ka.2, Vimal Soni was found to be innocent as both PW-1 and PW-2 stated that he is their relative and was not present at the spot. The police did not submit the challan against Vimal Soni. Therefore, once partly the version in the second complaint Ex.Ka.2 was found to be an afterthought, as the prosecution has not been able to prove when Ex.Ka.2 was given as it is undated but as per PW-6, either on 03.04.2014 or 06.04.2014 complaint was given and he took cognizance of the same only on 06.04.2014 when the deceased has died. However, PW-6 in cross examination admitted that informant did not record in his statement that Nandu Singh gave knife blow and only stated that he caught hold of hands and feet of his father. He further deposed that he recorded statement of Rakesh Kumar, Ramesh Kumar, Umesh Soni all sons of deceased Amarnath and Raj Bahadur on 2.4.2014 but none of them named Pappu Soni. Therefore, the presence of Pappu Soni is also doubtful.

F. It is also relevant that in this complaint PW-1- informant has stated that he came to know from witnesses that Pappu Soni and Vimal Soni were also present. However, none of the three witnesses i.e. Ram Kumar, Ram Bahadur and Raj Kumar were examined to support this version. It has come in the statement of both PW-1 and PW-2 that Raj Bahadur was first cousin of deceased and was doing the business of jewellery. This witness is also a witness of Panchayatnama and had taken the victim to hospital and despite the fact that he is cited as an eye witness, he was never examined by the prosecution.

G. Both PW-1 and PW-2 have admitted in cross examination that Pappu Soni is not doing business of jewellery and therefore, the motive against him is also not proved. Morever PW-1 also admitted that he personally knew Pappu Soni by face but he was not named in First Information Report.

H. As held above in para 25(A) that PW-1 is only an informant of the incident and he is not an eye witness, for the reasons recorded above,

therefore, Ex.Ka.2 is based on hearsay wherein, Pappu Soni along with Vimal Soni were introduced for the first time and in view of the fact that there is no date on Ex.Ka.2, it was given intentionally at later stage. Therefore, there is nothing to believe the version given in second complaint Ex.Ka.2 as part of it is already disbelieved by the police during the investigation as no charge-sheet was presented against Vimal Soni. In view of above by giving benefit of doubt, we also acquit accused Pappu Soni.

28. In view of the finding recorded above, we dismissed the appeal filed by accused Himanshu Soni, Ambika Soni and Pammu Soni by upholding their conviction in terms of the impugned judgment of conviction dated 27.09.2018 and order of sentence dated 27.09.2018. However, we acquit accused Nandu Singh and Pappu Soni by giving benefit of doubt.

29. As per the trial court judgment, Nandu Singh was never granted bail and he is in custody since 2014. He will be released forthwith if he is not required in any other case. Accused Pappu Soni was on bail and was taken in custody at the time of passing of the impugned judgment. He is also directed to be released forthwith, if not required in any other case.

30. With the aforesaid modification, Criminal Appeal No.5954 of 2018 & Criminal Appeal No.5924 of 2018 are dismissed and Criminal Appeal No.6012 of 2018 & Criminal Appeal No.6457 of 2018 are allowed.

31. Trial court records be transmitted back forthwith.

(2024) 8 ILRA 213
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Appeal No. 6909 of 2009

Mahmood Ali ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Mohd. Afzal, Sri Manoj Singh, Sri Mukhtar Alam, Sri Krishna Kumar (Amicus Curiae)

Counsel for the Respondents:
Govt. Advocate

(A) Criminal Law - Appeal against conviction - Acquittal - Circumstantial Evidence - Reliability of Witnesses - Indian Penal Code, 1860 - Section 302 - Murder - Arms Act, 1959 - Section 25/4 - Possession of firearm - Indian Evidence Act, 1872 - Section 27 - Proof of facts - Reliance on Hostile Witnesses and Contradictory Statements Leads to Acquittal - The prosecution's failure to prove its case beyond reasonable doubt, coupled with the unreliability of contradictory witness statements and the ability of the defense to rely on hostile witnesses, leads to acquittal. (Paras 33, 37, 38, 40)

Accused was convicted of murder - possession of a firearm - prosecution's case relied on

circumstantial evidence - testimony of PW-1 did not support prosecution's case during cross-examination - Contradictions were found in the statements of PW-4 and PW-7 - Recovery of blood stains and the knife used in the crime were not proved – site plan was also not proved - Forensic Science Laboratory report was inconclusive - Failure to examine crucial witnesses. (Para 33 to 41)

Held: -Impugned judgment and order of trial court set aside. Accused appellant acquitted of all charges under Section 302 IPC and Section 25/4 Arms Act. Prosecution's case was not established beyond a reasonable doubt, and the accused was entitled to the benefit of doubt. (Para - 41)

Appeal Allowed. (E-7)

List of Cases cited:

1. Javed Masood & anr. Vs St. of Raj., (2010) 3 SCC 538

2. Shahaja @ Shahajan Ismail Mohd. Shaikh Vs St. of Maha., (2022) 6 SCC 553

3. Harjinder Singh @ Bhola Vs St. of Punj. (2004) 11 SCC 253

4. Javed Masood & anr. Vs St. of Raj., (2010) 3 SCC 538

5. St. through the Inspector of Police Vs Laly @ Manikandan & anr etc., 2022 LiveLaw (SC) 851: AIR 2022 SC 5034

6. Mukhtiar Ahmed Ansari Vs St. (NCTof Delhi) (2005) 5 SCC 258

7. Raja Ram Vs St. of Raj., (2005) 5 SCC 272

8. Satbir Vs Surat Singh & anr. [1997 (4) SCC 192

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

1. The present appeal has been filed against the common judgement and order dated 06.11.2009 passed by the learned Additional Sessions Judge, Court No.6, Ghaziabad in Sessions Trial No.201 of 2008, arising out of Case Crime No.444 of 2007, thereby convicting and sentencing the appellant under Section 302 IPC for life imprisonment with fine of Rs.2,000/- and in default of payment of fine, to further undergo one year additional imprisonment and further in Sessions Trial No.189 of 2008, arising out of Case Crime No.478 of 2007, under Section 25/4 Arms Act, thereby convicting and sentencing the appellant for one year imprisonment with fine of Rs.500/- and in default of payment of fine, to further undergo one year additional imprisonment. However, both the sentences shall run concurrently.

2. As per the prosecution case, the complainant, Raj Mohammad lodged a report mentioning therein that his maternal uncle, Mohd. Raees Ahmad S/o Rafeeq Ahmad used to live in his house and he was going to attend the Namaz on 26.07.2007 at 5.30 AM. The accused-appellant, Mahmood Ali assaulted his maternal uncle by knife in front of Power-loom factory. His maternal uncle made alarm and fell down. The accused-appellant ran away from the place by hurling knife. It is alleged that accused-appellant had brought a lady, namely, Parveen who had gone to some other place after living with him for 5-6 months. The accused-appellant had developed enmity with Mohd. Raees Ahmad believing that Mohd. Raees Ahmad helped Parveen, who left the house of the accused-appellant. The complainant, Mohd. Alam S/o Bundhu and other neighbours had seen the accused-appellant assaulting his maternal uncle. The complainant had taken his maternal uncle to the Government Hospital, but he died before reaching the hospital.

3. On the basis of written Tehrir FIR was lodged in Case Crime No.444 of 2007, under Section 302 IPC and after recovery of the knife, second FIR was lodged in Case Crime No.478 of 2007 under Section 25/4 Arms Act. Inquest was conducted and thereafter the dead body was sent for post-mortem. The cases were investigated by the Investigating Officer, who after completion of enquiry, filed two separate charge sheets; one under Sections 302 IPC and the other under Section 25/4 Arms Act against the accused-appellant. The cases were committed to the court of sessions. Both the cases were tried together. Charges were framed against the accused-appellant under Section 302 IPC and Section 25/4 Arms Act. The accused-appellant denied the charges and pleaded for trial.

4. The prosecution to prove its case, produced the following eight witnesses:-

P.W.-1 Raj Mohammad
P.W.-2 S.I. Sayeed Ahmad
P.W.-3 Nayeem
P.W.-4 Inayat Ali
P.W.-5 S.I. Reshampal Singh
P.W.-6 Rajmani Rakesh
P.W.-7 Sanjay Tyagi
P.W.-8 Dr. Ramendra Singh

5. 19 exhibits were also produced by the prosecution to prove its case.

6. The accused-appellant was confronted under Section 313 Cr.P.C. and he deposed before the court that he was falsely implicated In the case. He also produced D.W.-1, Smt. Parveen to support his case.

7. The trial court after examining the witnesses and adducing the evidence on record, convicted the accused-appellant as mentioned above. Hence, the present appeal has been filed.

8. P.W.-1, Raj Mohammad was examined before the trial court and he deposed the same facts in his examination-in-chief as has been narrated in the FIR. In the cross-examination, he deposed that the FIR was not written by him and he only made signature. He had not seen the incident because he was not present at the place of occurrence. He lodged the report at the behest of the neighbours. He reached to the place of occurrence after half an hour of the incident and he took his maternal uncle to the hospital.

9. P.W.-2, Sayeed Ahmad was examined before the court and he deposed that he was posted as Sub-Inspector on 26.07.2007 in the police station. He took the custody of the dead body of Mohd. Raees Ahmad and conducted the inquest report at 8.45 AM. He further deposed that Chik FIR was signed by Constable Sonveer Singh, who was posted along with him and he had written the report.

10. P.W.-3, Nayeem S/o Nizamuddin was examined by the trial court and he deposed that blood stained, concrete was collected by the Investigating Officer before him and the collected items were kept in two sealed boxes. In cross-examination, he deposed that on 26.07.2007, he was working at his place and he did not sign on the inquest and he did not give any statement.

11. P.W.-4, Inayat Ali S/o Bunaid was examined before the trial court and deposed that he had come to Hapur and stayed at Bashir Ki Sarai. On the next day, he woke up in the morning and went for Namaz and as soon as he reached to the

house of Mohd. Raees Ahmad, he saw that accused-appellant was stabbing Mohd. Raees Ahmad. He wanted to catch him, but he ran away from the place of occurrence. He further deposed that Karamat Ali was also present along with him. He further deposed that he and Karamat Ali found accused-appellant on 03.08.2007 near Chungi at Meerut. Two police men were standing there and he told them that accused-appellant committed murder of his brother and he was identified by them before the police. Accused-appellant confessed before the police that he had killed Mohd. Raees Ahmad with knife. He also confessed that knife was thrown by him at Power-loom factory. The accused-appellant was taken to the place, where the knife was thrown. He took out the knife and confessed that the same knife was used for assaulting the deceased. The recovery memo was prepared and the knife was kept in a sealed cover.

12. In cross-examination, P.W.-4 Inayat Ali deposed that he and Karamat Ali have got their houses side by side. He deposed that he had come to Hapur in the evening and went to the house of his brother Raees Bhai. Mohd. Raees Ahmad used to live alone in a rented house. He further deposed that Bhashir met him. He woke up at 5.30 AM and without taking bath, he had gone to attend the Namaz. Karamat Ali was also sleeping beside him. The Mosque is situated half kilometre from place of Sarai. After Namaz, he came back and thereafter went to the house of his brother Mohd. Raees Ahmad. The house of his brother was situated 1 Km. away from the Mosque. He took 5-6 minutes time to reach to the house of his brother from the Mosque and as soon as he reached to the house of his brother, he saw that accused-appellant was stabbing his brother with knife and at that time, the landlord and residents of the locality came to the place of occurrence. He further deposed that the place of occurrence is just 10-15 meters away from the house of Mohd. Raees Ahmad. He also deposed that accused-appellant stabbed three times to the deceased. He deposed in the cross-examination that he had no idea that Karamat Ali was unconscious. He and Karamat Ali went to the police station at 11 AM. The report was lodged by him. He deposed that knife was recovered in his presence and the residents of the locality were also present. After incident, police did not record the statement and his statement was recorded on 03.08.2007.

13. P.W.-5, Sub-Inspector Resham Singh was examined before the trial court and he deposed that he investigated the case and during investigation, he recorded the statement of the FIR Scriber, Constable Shabi Akhtar Zaidi, Rajmani Rakesh, Station House Officer along with the statement of the accused-appellant. He proved the documents and also deposed that it was not correct to say that knife was not recovered.

14. P.W.-6 Rajmani Rakesh, Station House Officer, Modi Nagar, Ghaziabad was also examined by the trial court and he deposed that Case Crime No.444 of 2007, under Section 302 IPC was registered in his presence. He recorded the statement of witnesses Karamat Ali and Inayat Ali on 04.08.2007. He also conducted the inquest and sent the recovered articles to forensic lab to get report. He also identified Ext.Kha-19 pertaining to the recovery items, which were sent for the forensic report. He also deposed that forensic report pertaining to knife was not known to him.

15. P.W.-7, Sanjay Tyagi S/o Raj Veer Singh was examined by the trial court and he deposed that on 26.07.2007, he had gone to Hapur to his relatives house and he went to meet the deceased Mohd. Raees Ahmad at 5.30 AM and as soon as he reached to the place of Power-loom factory, he saw that one short height person was stabbing Mohd. Raees Ahmad. Later on, he came to know the name of the accused-appellant. After hearing alarm, Karamat Ali, Inayat Ali and many people reached to the place of occurrence and the accused-appellant ran away by hurling the knife. The deceased was taken to the hospital in injured state, however, he died before reaching to the hospital.

16. In cross-examination, P.W.-7, Sanjay Tyagi deposed that before he could reach to the place of occurrence, all the persons present at the place of occurrence took Mohd. Raees Ahmad to the hospital. He did not go to the hospital along with people who had carried the deceased. He went back to Kotwali City from the place of occurrence.

17. P.W.-8 Dr. Rajendra Singh was examined by the trial court and he deposed that he conducted the proceedings of the post-mortem of the deceased. The body was brought by Constables Jaiveer Singh and Sanjay Singh. He conducted the post-mortem of the deceased, which indicates three following injuries on his body:-

"1. Incised wound 11 cm x 2.5 cm x bone deep on left side of forehead, 5 cm from left eyebrow, left ear cut

2. Incised wound 7 cm x 2.5 cm x cavity deep right side front of chest chest just adjacent to right nipple

3. Incised wound 4 cm x 1 cm x muscle deep on left thigh. 10 cm .. left knee joint."

18. P.W.-8 Dr. Rajendra Singh deposed before the court that the deceased died due to shock and haemorrhage as a result of ante-mortem injuries. He also deposed that the injuries could have been caused by knife. He also opined that the deceased could have died due to the injuries caused at 5.30 AM.

19. Sri Krishna Kumar, learned amicus curiae appearing for the accused-appellant has made the following submissions:-

20. Learned amicus curiae has submitted that after looking to the FIR, it is evident that the FIR was lodged on 26.07.2007 by Head Constable Sohan Veer Singh, but he was not examined, rather P.W.-2 S.I. Saheed Ahmad was examined, who stated that Sohan Veer Singh was posted along with him and he identified his signature. It is submitted that P.W.-2 Saheed Ahmad cannot identify the signature of Sohan Veer Singh.

21. Learned amicus curiae has further submitted that Case Crime No.478 of 2007, under Section 25/4 Arms Act, Police Statin Hapur Nagar, District Ghaziabad (Ext Ka-11) was lodged by Shabi Akhtar Zaidi, who is the FIR scriber, but he did not come in the witness box as a prosecution witness to prove the aforesaid FIR. No one on behalf of the police proved the FIR lodged by Shabi Akhtar Zaidi. He has also submitted that FIR is suspicious because unless the same is proved, it is not a peace of evidence.

22. Recovery Memo pertaining to blood stained soil dated 26.07.2007 (Ext.Ka-9) was also not proved as per the Forensic Science Laboratory report dated 29.09.2007 (Ext.Ka-18). It is evident that the blood stains were found disintegrated, therefore, the origin of blood stains could not be determined. It is also not ascertained as to whether the blood stains was pertaining to human being or animal. In Recovery Memo, two witnesses are mentioned, namely, Naeem S/o Nizamuddin and Maulana Anwar S/o Maulana Akhtar. In cross-examination, Naeem denied the version of the examination-in-Chief stating that on 26.06.2007, he was on his duty and did not sign the inquest report.

23. In Recovery Memo dated 03.08.2007 (Ext.Ka-10), Inayat Ali S/o Buniyad Ali and Karamat Ali S/o Murad Ali are mentioned as witnesses, who are cousin brothers of the deceased, Mohd. Raees Ahmad. As per law, both the witnesses of recovery memo should be independent witnesses, but in the present case both the witnesses are not independent witnesses and they are relatives of the deceased.

24. The discovered knife as per the provisions of Section 27 of the Indian Evidence Act is not proved. In the Forensic Science Laboratory report dated 29.07.2007 (Ext.Ka-18), it is mentioned that seal of the bundle with knife was not matched with the specimen, due to which the bundle containing knife was returned to the office of the Senior Superintendent of Police, Ghaziabad without test. It is thus clear that the weapon used, i.e. knife was not proved by the Forensic Science Laboratory. P.W.-6, Rajmani Rakesh, Investigating Officer, in his cross-examination on being asked that what report was obtained from the Forensic Science Laboratory, he deposed that he had no knowledge about it. It is thus clear that the knife as alleged to be used in the crime, was not tested by the Forensic Science Laboratory for the reason that it was not matching with the recovery item.

25. The site plan shows that the accused-appellant was standing with knife and committed murder of the deceased Mohd. Raees Ahmad in front of Bright Rajshahi Public School. It means as per the site plan, the place of occurrence of the incident was Bright Rajshahi Public School, but as per the FIR version, the place of occurrence of the incident was in front of Power-loom factory. The site plan indicates that the accused-appellant was seen by witness stabbing the deceased by knife. P.W.-6 Rajmani Rakesh, Investigating Officer, did not mention the house of the accused-appellant in the site plan. Thus, the site plan was not proved by P.W.-6.

26. P.W.-1, Raj Mohammad has not supported the prosecution case, but he was neither cross-examined by the prosecution nor was declared hostile. It has been submitted that as per the law laid down by Hon'ble Supreme Court in the case of ***Javed Masood and another Vs. State of Rajasthan,*** (2010) 3 SCC 538, the statement given by P.W.-1 is not binding and cannot be relied upon.

27. It has been submitted by the learned amicus curiae that P.W.4, Inayat Ali and P.W.-7, Sanjay Tyagi are chance witnesses. P.W.-4, Inayat Ali is brother of the deceased and P.W.-7, Sanjay Tyagi is resident of near village of the deceased, but surprisingly their names were not

mentioned in the FIR as witnesses. The FIR was also not lodged by any of them, rather it was lodged by P.W.-1, Raj Mohammad. P.W.-4, Inayat Ali in his cross-examination gave contradictory statement and deposed that when he reached to the house of the accused-appellant, he saw that accused-appellant was stabbing the deceased with knife, meaning thereby the place of occurrence was the house of the accused-appellant, but as per the FIR version, the place of occurrence of the incident was Power-loom factory. P.W.-4, Inayat Ali further gave statement that the deceased was living alone in a rented house for the last six years, but as per the FIR version, he was living in the house of P.W.-1, Raj Mohammad. P.W.-4, Inayat Ali in his cross-examination stated that Karamat Ali and other persons of the locality reached to the police Station at 11 AM and thereafter the report was lodged. This statement was also contradictory to the version of the FIR because the FIR was lodged by P.W.-1, Raj Mohammad at 7.45 AM.

28. P.W.-7, Sanjay Tyagi is a chance witness. He has admitted that he was having good relations with the deceased, Mohd. Raees Ahmad, who was resident of his near village. He had given contradictory statement in his cross-examination. It is settled law that if the chance witnesses are relatives or friends and they are giving contradictory statements, their statements cannot be reliable and credible in view of the law laid down by the Hon'ble the Supreme Court in the case of ***Harjinder Singh @ Bhola Vs. State of Punjab,*** (2004) 11 SCC 253.

29. D.W.-1, Parveen, wife of the accused-appellant, was also examined before the court and she deposed that she had not left her husband's house, rather she was living with him. Thus, the motive assigned in the present case is also demolished.

(xi) In support of his contention, learned amicus curiae for the accused-appellant has placed reliance on the following judgements:-

Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra, (2022) 6 SCC 553;

Harjinder Singh @ Bhola Vs. State of Punjab (2004) 11 SCC 253; and

Javed Masood and another Vs. State of Rajasthan, (2010) 3 SCC 538

30. Sri Gyan Narayan Kanaujiya, learned AGA-I, learned AGA while rebutting the arguments of learned amicus curiae for the appellant has submitted that P.Ws.4 and 7, who are the fact witnesses, have proved their case along with formal witnesses, who were examined by the trial court. He has further submitted that knife and the blood stained concrete have been examined by the trial court and the trial court has recorded a finding that the aforesaid exhibits indicate that the deceased was done to death by the accused-appellant. The accused-appellant had assaulted the deceased by using knife in presence of P.Ws.4 and 7. Once the ocular witnesses have deposed that the deceased was assaulted by the accused-appellant by knife in their presence, there is no reason to disbelieve the prosecution case. He has also submitted that motive is established in this case as the accused-appellant believed that deceased Mohd. Raees Ahmad helped Parveen, wife of the accused-appellant, who left the house of the accused-appellant. It is submitted that due to the aforesaid motive, the accused-appellant had enmity with the deceased and he committed the murder to fulfil his motive. It is also

submitted that the injuries were caused by knife, which is admitted by the doctor. There is no doubt in the manner of assault because the injuries are corresponding with the prosecution case as mentioned in the FIR as well as in the statement of the witnesses before the trial court. It is further submitted that since the prosecution case is proved beyond reasonable doubt, therefore, the appeal is liable to be dismissed.

31. In support of his contention, learned AGA has placed reliance on the following judgement:-

State through the Inspector of Police Vs. Laly @ Manikandan and another etc., 2022 LiveLaw (SC) 851: AIR 2022 SC 5034

32. We have heard learned counsel for the parties and the submissions made by them and perused the record.

33. The record reveals that P.W.-1, Raj Mohammad has not supported the prosecution case in the cross-examination, he deposed before the court that the report was not written by him, rather he made signature on it. He did not seen the incident and he was not present at the place of occurrence. He lodged the report at the behest of the neighbours and did not give statement to the police. He further deposed that he reached to the place of occurrence after half an hour and his maternal uncle was taken to the hospital. After looking to the statement of the P.W.-1 and the judgment of the Hon'ble Supreme Court in the case of ***Javed Masood*** (supra), it is evident that P.W.-1 has not supported the prosecution case. The relevant paragraphs of the aforesaid case are extracted herein below:-

"13. In the present case the prosecution never declared PWs 6,18, 29 and 30 "hostile". Their evidence did not support the prosecution. Instead, it supported the defence. There is nothing in law that precludes the defence to rely on their evidence. This court in Mukhtiar Ahmed Ansari vs. State (NCTof Delhi) (2005) 5 SCC 258 observed:

"30. A similar question came up for consideration before this Court in Raja Ram v. State of Rajasthan, (2005) 5 SCC 272. In that case, the evidence of the Doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The Doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the Doctor and it was binding on the prosecution.

31. In the present case, evidence of PW1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to police in which police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, accused can rely on that evidence."

34. The recovery of blood stains dated 26.07.2007 (Ext. Ka-9) was also not proved before the trial court. As per the Forensic Science Laboratory report dated 29.09.2007 (Ext. Ka-18), the blood stains were disintegrated; thus, the origin of blood stains could not be determined whether it was pertaining to human being or animal. P.W.-4, Inayat Ali stated before the court that he was not present at the time of the inquest of the blood stains and he was doing his duty in office. Thus, it is clear

that recovery of blood stains was also not proved by the prosecution.

35. After going through the record, we find that the knife was recovered on 03.08.2007 (Ext. Ka-10) and there are two witnesses of the inquest i.e. Inayat Ali and Karamat Ali, who are cousin brothers of the deceased, Mohd. Raees Ahmad and they are not the independent witnesses. The discovered knife was not proved as per the provisions of Section 27 of the Indian Evidence Act because the Forensic Science Laboratory report dated 29.09.2007 (Ext. Ka-18) indicates that seal of the bundle with knife was not matching with the specimen seal, therefore, the Forensic Science Laboratory had returned back the bundle of knife to the office of the Senior Superintendent of Police, Ghaziabad without examination. It is thus clear that the knife as alleged to be used in the crime, has not been examined by the Forensic Science Laboratory on the ground that seal of the recovered knife was not matching with the specimen.

36. We further find that as per the site plan (Ext. Ka-15), accused-appellant was standing with knife and committed murder of the deceased in front of Bright Rajshahi Public School. It means that as per the site plan, the place of occurrence of the incident was in front of the Bright Rajshahi Public School, but as per the FIR version, the place of occurrence of the incident was in front of the Power-loom factory. P.W.-6, Rajmani Rakesh, Investigating Officer, did not mention the house of the accused-appellant in the site plan. Thus, the site plan is also not proved by P.W.-6.

37. After examination, we further find that P.W.4, Inayagt Ali and P.W.-7, Sanjay Tyagi are the chance witness. P.W.-4, Inayat Ali is the brother of the deceased, Mohd. Raees Ahmad and he has given contradictory statements. He deposed before the court that when he reached to the house of the accused-appellant, he was stabbing his brother Raees Ahmad by knife. After looking to his statement, it is evident that the place of occurrence of the incident was the house of the accused-appellant, but as per the FIR version, place of occurrence of the incident was the Power-loom factory. He made statement in his cross-examination on 24.03.2009 that the deceased was living alone in a rented room for the last six years, but as per the FIR version, he was living in the house of P.W.-1, Raj Mohammad. He further stated in his cross-examination that he and other persons of the locality reached to the police station at 11 AM and thereafter FIR was lodged by him. This is another contradictory statement because the FIR was lodged at 7.45 AM by P.W.-1, Raj Mohammad. It is surprising to note that the incident took place on 26.07.2007 and P.W.-4, Inayat Ali, brother of the deceased and claims to be the witness, did not lodge the FIR. His name was also not mentioned in the FIR as witness; thus his presence is highly doubtful.

38. P.W.-7, Sanjay Tyagi, who is chance witness and the resident of the near village of the deceased, has given contradictory statements before the court. He is friend of the deceased and belongs to nearby village, which is admitted in cross-examination. He did not identify the accused-appellant and deposed that a short height person was stabbing the deceased. Therefore, statements of P.Ws.4 and 7 appear to be incredible in view of the law laid down by the Hon'ble Supreme Court in the case of ***Harjinder Singh @ Bhola (supra).*** The relevant paragraphs of the aforesaid case are extracted herein below:-

"6. P.Ws. 3 and 4, apart from being close relatives of the deceased, happen to be the chance witnesses. It looks as though the assailants were all the while waiting for P.Ws. 3 and 4 to reach the spot and witness the incident. Of course, for the mere reason that they are chance witnesses, their evidence cannot be discarded if we find assurance from the prosecution evidence pointing to the guilt of the accused. We, however, feel that their evidence should have been more carefully analysed and evaluated, which the High Court failed to do.

7. Right from the origin of the prosecution story, we find a number of irreconcilable versions and contradictions on certain material aspects which throw any amount of doubt on the veracity of the evidence tendered by P.Ws. 3 and 4. According to the version of the mother of the deceased (P.W.6), the accused persons took the deceased with them at about 5 p.m. This fact was brought to the notice of her husband when he returned home at about 7 p.m. This is what P.W.3 also says. P.W.3 stated that he left for Jorahan Village at about 7.30 p.m. to find his son. He met P.W.4 (Ranjit Singh) there and both of them searched, but could not find his son. They returned to Ranguwal after 9 p.m. While on the way, they saw the incident near the Primary School. But we have the evidence of P.W.5 (Granthi of the Gurudwara of Village Jorahan) according to whom, he at the instance of P.W.3 made the announcement over the loud-speaker before sunset about the missing person Gurpreet Singh. P.W.4 also states that P.W.3 met him before sunset. As it was the peak winter month of January, the sunset should have been at about 5.30 p.m. This version of P.Ws. 5 and 4 does not, therefore, fit into the version of P.Ws. 3 and 6 that they became apprehensive of the safety of the deceased at about 7 p.m. and thereafter P.W.3 left the house at 7.30 p.m. in search of his missing son.

……..

14. The foregoing discussion leads us to conclude that the Trial Court and the High Court did not consider certain material aspects apparent from the evidence and there was almost a mechanical acceptance of the evidence of the two chance witnesses whose evidence should have been evaluated with greater care and caution. As pointed out by this Court in Satbir Vs. Surat Singh & Anr. [1997 (4) SCC 192], a "cautious and close scrutiny" of the evidence of chance witnesses should inform the approach of the Court. In these circumstances, this Court need not feel bound to accept the findings. The overall picture we get on a critical examination of the prosecution evidence is that PWs 3 & 4 were introduced as eye-witnesses only after the dead body was found."

39. We find that the scriber of Case Crime No.478 of 2007, under Section 25/4 Arms Act, namely, Shabi Akhtar Zaidi was not examined by the trial court. No police personnel was examined to prove the said FIR by the trial court. The discovered knife was returned by the Forensic Science Laboratory on the ground that seal of the bundle of knife was not matched with the recovered knife. Thus, the weapon used in the crime is also not proved.

40. After recording the aforesaid conclusions, which are based on the evidence adduced on record, we find that the finding recorded by the trial court in convicting and sentencing the accused-appellant is against the record and is perverse. Thus, the impugned judgement and order of the trial court suffers from infirmity and it deserves to be set aside.

41. Appeal is accordingly ***allowed*** and the impugned judgement and order dated 06.11.2009 passed by the learned Additional Sessions Judge, Court No.6, Ghaziabad in Sessions Trial No.201 of 2008, arising out of Case Crime No.444 of 2007 convicting and sentencing the accused-appellant for life imprisonment under Section 302 IPC and in Sessions Trial No.189 of 2008, arising out of Case Crime No.478 of 2007, convicting and sentencing the accused-appellant for one year rigorous imprisonment under Section 25/4 Arms Act is hereby set aside and the accused-appellant is acquitted from all the charges.

42. Accused-appellant is in jail. He shall be released forthwith unless wanted in any other case.

43. Before parting, we appreciate Sri Krishna Kumar, learned amicus curiae, who has thoroughly and meticulously prepared the case. We are impressed with the arguments advanced by him. We direct the State Legal Services Authority to pay Rs.15,000/- (Rupees Fifteen Thousand) to Sri Krishna Kumar, learned amicus curiae as honorarium for his valuable assistance in disposal of this appeal. The honorarium will paid to him within fifteen days. Office is directed to send a copy of this judgement and order to the State Legal Services Authority for necessary compliance.

44. Let lower court record be sent back forthwith along with a copy of this judgement and order for compliance.

(2024) 8 ILRA 223

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482 No. 18853 of 2024

Prem Nath Mishra & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Sarvesh Kumar Mishra, Sri Deepak Upadhyay

Counsel for the Opposite Parties:
G.A., Sri Sanjeev Kumar Pandey, Sri Vijay Kumar Pandey

A. Criminal Law-Criminal Procedure Code, 1973-Section 482-Indian Penal Code, 1860-Sections 323, 452, 504 & 506-summoning order-handling of rival NCRs-filing of chargesheet-Subsequent criminal complaint-the present case revolves around the legal representation and procedural handling of rival NCRs (Non Cognizable Reports) and subsequent criminal complaints under IPC-It examines the court discretion in summoning the accused under additional sections of the IPC based on the evidence presented in both the NCRs and the subsequent complaint-It underscores the importance of due process in handling complaints when initial investigations may not fully address all potential charges, specifically highlighting the court's authority to summon the accused under more severe charges if warranted by the evidence-multiple proceedings on same set of facts could not be proceeded further and it could be quashed if they are filed with malafide intention- Hence, impugned order set aside.(Para 1 to 15)

B. Legal error committed by the trial court is that despite being aware that an NCR was already lodged. No police report was summoned to ascertain outcome of NCR and facts thereof only on ground that

some set of allegations, both NCR/FIR and criminal complaint was filed, itself would not be a malafide approach rather the court has to look into attending circumstances to ascertain whether it was a creature of malafide which is not evident in the present case.(Para 13, 14)

The application is allowed. (E-6)

List of Cases cited:

Krishna Lal Chawla & anr. Vs. St. of U.P. & anr. (2021) 5 SCC 435

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. In present case, it is not in dispute that in regard to alleged occurrence took place on 13.03.2021, rival NCR were lodged.

2. It is further not in dispute that in cross NCR filed by applicants, after investigation, since it was found that a cognizable offence took place, therefore, a charge sheet was filed under Sections 323, 325, 504 IPC wherein cognizance was taken and opposite party no.2 and others were summoned.

3. It is further not in dispute that in the NCR filed by complainant herein, a charge sheet was filed only under Sections 323, 504 IPC on 18.03.2021 whereon vide order dated 03.04.2023, in terms of Section 2(d) Cr.P.C., the charge sheet was considered to be a complaint case and present applicants were summoned and that order was not challenged at the instance of either party.

4. After filing of charge sheet as referred above for non-cognizable offence, complainant being felt aggrieved that no charge sheet was filed under Section 452 and 506 IPC i.e. cognizable offence, filed a criminal complaint on 01.10.2022 for same occurrence allegedly occurred on 13.03.2021. In the application, he has disclosed about NCR and for reference, relevant paragraph is mentioned below -:

"प्रार्थी द्वारा थाना जफराबाद में दिये गये प्रार्थना पत्र पर रपट दर्ज न करके संक्षेप में एन०सी०आर०सं० 43/2021 धारा 323, 504 आई०पी०सी० दर्ज कर लिये। उपरोक्त सभी मुल्जिमानों द्वारा घर में घुसकर मारने वाली बात व जान से मारने की धमकी देने वाली बात नहीं लिखा। प्रार्थी मजबूर होकर पूरी घटना की रिपोर्ट जरिये रजिस्टर्ड डाक दिनांक 24/03/2021 श्रीमान् पुलिस अधीक्षक महोदय जौनपुर को दिया फिर भी पुलिस द्वारा आज तक कोई कार्यवाही नहीं की गयी थाना जफराबाद की पुलिस प्रार्थी के मामले में मुल्जिमानो को बचा रही है पूरी रपट प्रार्थी की नहीं लिखी इसलिए प्रार्थी श्रीमान जी के समक्ष परिवाद पत्र प्रस्तुत कर रहा है न्यायहित में मुल्जिमान उपरोक्त को जुर्म दफात उपरोक्त में तलब कर वाद विचारण दण्डित किया जाना आवश्यक है।

अतः श्रीमान जी से प्रार्थना है किअभियुक्त प्रेमनाथ मिश्र सचिन उर्फ सचिन्द्र मिश्र व सुशीला देवी को जुर्म दफात 323, 504, 506, 452 भा०द०वि० में तलब कर वाद विचारण दण्डित करने की कृपा करें ताकि न्याय हो।"

5. Aforesaid complaint was considered as a complaint case. Trial Court after considering statements recorded under

Sections 200 and 202 Cr.P.C. summoned present applicants by impugned order dated 26.04.2024 under Sections 323, 452, 504, 506 IPC. For reference, said order in its entirety is quoted below -:

"दिनांक 26.04.2024

पत्रावली आदेशार्थ पेश हुई। परिवादी के विद्वान अधिवक्ता को सुना तथा पत्रावली का सम्यक परिशीलन किया।

संक्षेप में परिवाद पत्र के कथानक इस प्रकार है कि दिनांक 13.03.2021 समय करीब 08 बजे सुबह उक्त प्रेमनाथ मिश्र व सचिन उर्फ सचिन्द्र अपने-अपने हाथ में लाठी लेकर सुशीला एक राय होकर मारने की तैयारी करके प्रार्थी के घर पर चढ़ आये और गालियां देते हुए कहे कि तुम्हारी हिम्मत कैसे पडी हमारे खेत से पाइप ले जाने की प्रार्थी ने गाली देने से मना किया। इस पर सुशीला ने ललकारते हुए कहा कि यह कमीना बहुत जबान चला रहा है। मारकर हाथ पैर तोड दो। प्रार्थी जान बचाने के लिए घर में भागा कि प्रेमनाथ, सचिन व सुशीला जबरजस्ती प्रार्थी के घर मारने की तैयारी करके घुस गये और लाठी, लात मुक्का से मारने लगे। शोर सुनकर प्रार्थी को बचाने प्रार्थी का लडकी पीयूस व पिता रामाश्रय आये तो उपरोक्त लोगों ने उन लोगों को भी मारापीटा और जान से 'भारने की धमकी दी। प्रार्थी ने घटना के सम्बन्ध में एक लिखित प्रार्थना पत्र थाना जफराबाद में दिया कोई कार्यवाही नहीं हुई। तब प्रार्थी ने श्रीमान् पुलिस अधीक्षक जौनपुर को सूचना दिया फिर भी कोई कार्यवाही नहीं हुई।

परिवादी के विद्वान अधिवक्ता को तलबी के बिन्दू पर सुना गया पत्रावली पर उपलब्ध परिवादी के बयान अंतर्गत धारा 200 दं० १०सं० व उसके गवाहान सी०डब्लू० 1 जय कान्त मिश्र व सी०डब्लू० 2 राजेश कुमार के बयान अंतर्गत धारा 202 दं०प्र०सं० एवं पत्रावली पर उपलब्ध प्रपत्रों का अवलोकन किया।

अतः पत्रावली पर इस स्तर पर उपलब्ध साक्ष्य के आधार पर विषक्षीगण प्रेमनाथ मिश्र, सचिन उर्फ सचिन्द मिश्र व सुशीला देवी के विरुद्ध प्रथम दृष्ट्या अंतर्गत धारा 323,452,504,506 आई.पी.सी. का अपराध गठित होना प्रतीत होता है। ऐसे में विपक्षीगण / अभियुक्तगण उक्त धाराओं में तलब किये जाने योग्य है।"

6. Sri Deepak Upadhyay, learned counsel for applicants has heavily placed reliance on **Krishna Lal Chawla and another vs. State of U.P. and another, (2021) 5 SCC 435** that on similar set of facts as well as on similar set of allegations, proceedings arising out of police report as well as proceedings of complaint case could not proceed together if they are instituting by misleading the Court and abusing its process of law only with a view to harass the helpless litigants and relevant paragraphs thereof are quoted below -:

"23. As aforesaid, the trial courts and the Magistrates have an important role in curbing this injustice. They are the first lines of defence for both the integrity of the criminal justice system, and the harassed and distraught litigant. We are of the considered opinion that the trial courts have the power to not merely decide on acquittal

or conviction of the accused person after the trial, but also the duty to nip frivolous litigations in the bud even before they reach the stage of trial by discharging the accused in fit cases. This would not only save judicial time that comes at the cost of public money, but would also protect the right to liberty that every person is entitled to under Article 21 of the Constitution. In this context, the trial Judges have as much, if not more, responsibility in safeguarding the fundamental rights of the citizens of India as the highest court of this land.

24. As recorded by us above, the present controversy poses a typical example of frivolous litigants abusing court process to achieve their mischievous ends. In the case before us, the Magistrate was aware of the significant delay in the filing of private complaint by Respondent 2, and of the material improvements from the earlier NCR No. 158 of 2012 which were made in the private complaint. It was incumbent on the Magistrate to examine any possibility of abuse of process of the court, make further enquiries, and dismiss the frivolous complaint at the outset after judicial application of mind.

25. However, this was not done — the Magistrate issued process against the appellants by order dated 4-4-2019, and this controversy has now reached this Court for disposal.

26. It is a settled canon of law that this Court has inherent powers to prevent the abuse of its own processes, that this Court shall not suffer a litigant utilising the institution of justice for unjust means. Thus, it would be only proper for this Court to deny any relief to a litigant who attempts to pollute the stream of justice by coming to it with his unclean hands. Similarly, a litigant pursuing frivolous and vexatious proceedings cannot claim unlimited right upon court time and public money to achieve his ends.

27. This Court's inherent powers under Article 142 of the Constitution to do "complete justice" empowers us to give preference to equity and a justice-oriented approach over the strict rigours of procedural law *(State of Punjab v. Rafiq Masih [State of Punjab v. Rafiq Masih, (2014) 8 SCC 883 : (2014) 4 SCC (Civ) 657 : (2014) 6 SCC (Cri) 154 : (2014) 3 SCC (L&S) 134]).* This Court has used this inherent power to quash criminal proceedings where the proceedings are instituted with an oblique motive, or on manufactured evidence *(Monica Kumar v. State of U.P. [Monica Kumar v. State of U.P., (2008) 8 SCC 781 : (2008) 3 SCC (Cri) 649]).* Other decisions have held that inherent powers of High Courts provided in Section 482 CrPC may be utilised to quash criminal proceedings instituted after great delay, or with vengeful or mala fide motives. (Sirajul v. State of U.P. *[Sirajul v. State of U.P., (2015) 9 SCC 201 : (2015) 3 SCC (Cri) 749] ; State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 : AIR 1992 SC 604] .)* Thus, it is the constitutional duty of this Court to quash criminal proceedings that were instituted by misleading the court and abusing its processes of law, only with a view to harass the hapless litigants.

28. In this Court's quest for complete justice, and to bring peace between the parties, who are fighting various litigations since 2006, we exercise our powers under Article 142 to quash all the litigations between the parties arising out of this incident."

7. Sri Vijay Kumar Pandey, learned counsel for opposite party-2 has not able to dispute above referred legal position,

however, he has submitted that in case any proceeding has to be quashed that criminal proceeding arising out of a charge sheet, since Magistrate has, after considering statements recorded u/s 200 and 202 Cr.P.C., to summon the applicants under Sections 323, 504, 506 and 452 IPC. Otherwise, Magistrate could follow procedure prescribed under Section 210 Cr.P.C. i.e. procedure to follow when there is a complaint case and police investigation in respect of the same offence.

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

9. It is not much in dispute that on basis of alleged occurrence, complainant has first filed an NCR wherein after investigation, charge sheet was filed for non-cognizable offence and trial Court considered it to be a complaint case under Section 2(d) Cr.P.C. and summons were issued to applicants for offence u/s 323 and 504 IPC.

10. After charge sheet was filed and before summons were issued, complainant has filed a criminal complaint disclosing facts of NCR that applicants have committed cognizable offence and trial Court vide impugned order, after considering statement u/s 200 and 202 Cr.P.C. has summoned the applicants for offence u/s 323, 504, 506 and 452 IPC.

11. Court takes note of **Krishna Lal Chawla (supra)** that multiple proceedings on same set of facts could not be proceeded further and it could be quashed if they are attended with malafide and initiated only to harass accused persons.

12. In present case, there is no argument on behalf of learned counsel for applicants that impugned passed u/s 204 Cr.P.C. itself is illegal as no requisite reason was assigned that there are sufficient grounds to proceed against applicants as well as that it was not based on material available on record i.e. complaint, statement recorded u/s 200 and 202 Cr.P.C. Relevant part of impugned order has already been quoted in preceding paragraph.

13. In the present case, complainant has specifically stated about lodging of NCR in the complaint and essentially it was reason to file complaint since no FIR was lodged. The applicants have not brought on record before trial Court about factum of filing charge sheet for non-cognizable offence in pursuance of NCR and that it was treated as a complaint case under Section 2(d) Cr.P.C. The conduct of complainant was bonafide and has no malice as he has come up with clean hands.

14. Legal error committed by trial Court is that despite being aware that an NCR was already lodged. No police report was summoned to ascertain outcome of NCR and facts thereof only on ground that on some set of allegations, both NCR/FIR and criminal complaint was filed, itself would not be a malafide approach rather the Court has to look into attending circumstances to ascertain whether it was a creature of malafide which is not evident in present case.

15. In aforesaid circumstances, this Court is of considered opinion that above referred impugned order becomes illegal and accordingly, impugned order dated 26.04.2024 passed in Case No. 105/2022 (Ajay vs. Prem Nath and others) u/s 323, 504, 506, 452 IPC, Police Station-Zafrabad, District- Jaunpur, pending before

ACJM-II, Jaunpur is set aside and matter is remitted back to concerned trial Court to pass a fresh order after taking note of factum about charge sheet filed in NCR lodged by complainant on non-cognizable offence and order passed under Section 2(d) Cr.P.C. as well as while passing fresh order, concerned Court would also take note of Krishna Lal Chawla (supra) after hearing the complainant.

16. Application stands disposed of with above observations.

17. Registrar (Compliance) to take steps.

(2024) 8 ILRA 228
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482. No. 3752 of 2024

Majid Khan ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Mohammad Fateh

Counsel for the Opposite Parties:
G.A.

Criminal Law-The Code of Criminal Procedure-1973-Section 125 & 126-Section 482 Cr.P.C. cannot become a tool to frustrate the very object of Section 125 Cr.P.C. merely on objection of jurisdiction-Section 126 Cr.P.C. provides that proceedings under Section 125 Cr.P.C. may be taken against any person in any district where he is residing or where he or his wife resides. Therefore, if wife resides at Bareilly, she can file complaint under Section 125 Cr.P.C. at Bareilly also

Petition Dismissed. (E-15)

List of Cases cited:

1. Captain Ramesh Chander Kaushal Vs Mrs. Veena Kuashal & ors., AIR 1978 SC 1807)

2. Smt. Dukhtar Jahan Vs Mohammed Farooq (1978)1 SCC 624;

3. Vimla (K.) Vs Veeraswamy (K.) (1991)2 SCC 375;

4. Kirtikant D. Vadodaria Vs St.of Guj. & anr.(1996)4 SCC 479;

5. Chaturbhuj Vs Sita Bai (2008)2 SCC 316

6. Bhuwan Mohan Singh Vs Meena & ors.(2015)6 SCC 353.

7. Nirman Sagar Vs Smt. Monika Sagar Chaudhari & anr.(Criminal Revision No. 3060 of 2021), decided on 01.04.2022

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. The Court proceed to decide present case, i.e., an objection with regard to jurisdiction of an application filed under Section 125 Cr.P.C., in the background that Supreme Court in a judgment passed about four and half decades ago, has observed that provisions of Section 125 Cr.P.C. is a measure of social justice and specially enacted to protect women and children and falls within the constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution. (See, Captain Ramesh Chander Kaushal vs. Mrs. Veena Kuashal and others, AIR 1978 SC 1807)

2. Above observation has been followed in Smt. Dukhtar Jahan vs. Mohammed Farooq (1978)1 SCC 624;

Vimla (K.) vs. Veeraswamy (K.) (1991)2 SCC 375; Kirtikant D. Vadodaria vs. State of Gujarat and another (1996)4 SCC 479; Chaturbhuj vs. Sita Bai (2008)2 SCC 316 and Bhuwan Mohan Singh vs. Meena and others (2015)6 SCC 353.

3. In the present case, Opposite Party No. 2, i.e., complainant, has filed an application under Section 125 Cr.P.C. on 30.07.2021 declaring herself to be resident of District Bareilly.

4. In aforesaid case applicant appeared and filed an objection that complaint is resident of Delhi and she has filed an application under Section 12 of Protection of Women from Domestic Violence Act, 2005 (*hereinafter referred to as "Act, 2005")* stating that she was a resident of Delhi and during proceeding thereof the address was verified also. Applicant has challenged the maintainability of application so filed under Section 125 Cr.P.C. on ground of jurisdiction.

5. Complainant has filed a reply to aforesaid objection mentioning specifically that her permanent address where her parents reside is at Bareilly and only for the purpose of job she stayed at Delhi and she has frequent visits to her permanent address at Bareilly.

6. Principal Judge, Family Court, Bareilly considered the application of complainant and objection of applicant and passed impugned order dated 21.01.2023 whereby objection with regard to jurisdiction was rejected. For reference impugned order is reproduced hereinafter:

पुकारा गया। उभयपक्ष उपस्थित। 13-ख प्रार्थनापत्र पर उभयपक्ष को सुना। उक्त प्रार्थनापत्र विपक्षी की ओर से वाद का क्षेत्राधिकार इस न्यायालय को नहीं होने के बिन्दु पर प्रस्तुत किया गया है तथा कथन किया है कि आवेदिका ने वाद सं० 5412/200 निदा कुमार बनाम माजिद खाँ अंतर्गत धारा 12 घरेलू हिंसा अधिनियम मुख्य मेट्रोपोलिटन मजिस्ट्रेट, साउथ ईस्ट साकेत दिल्ली में दिनांक 28.10.2020 को पंजीकृत कराया था जिसमें उसने अपना निवास एच-14 ए, लेन नं० 3 ए गफफार मंजिल, जामिया नगर, नई दिल्ली-25 बताया है जबकि यह वाद बरेली का निवासी होने का कथन करते हुए बरेली में दाखिल किया है। ऐसी दशा में वाद की सुनवाई का क्षेत्राधिकार इस न्यायालय को नहीं है। अतः वाद खारिज किया जाये।

आपत्ति दिनांकित 17.12.2022 के माध्यम से कथन किया है कि आवेदिका अपनी नौकरी के सिलसिले में किराये के मकान में रहती है जबकि बरेली में उसके माता-पिता निवास करते हैं तथा यह उसका स्थाई निवास है तथा वह उसका दिल्ली से आना जाना बना रहता। है।

अतः आपत्ति के माध्यम से वाद खारिज किये जाने की माँग की गई है।

सुना एवं पत्रावली का अवलोकन किया। आवेदिका ने बरेली को स्थाई निवास बताते हुए वाद प्रस्तुत किया है उसने वर्ष 2020 में एक अन्य मुकदमा नई दिल्ली के पते से विपक्षी के विरूद्ध दायर किया है। उसने न्यायालय के समक्ष यह बताया कि

यह अभी भी दिल्ली में किराये के मकान में रहती है तथा उसका बरेली आना जाना रहता है। चूंकि आवेदिका का स्थाई पता बरेली है तथा वह रोजगार के सिलसिले में नई दिल्ली में भी रहती है इसलिए बरेली में वाद प्रस्तुत करने का क्षेत्राधिकार समाप्त नहीं हो जाता है। आवेदिका दिल्ली के पते से भी वाद प्रस्तुत कर सकती है तथा बरेली के पते से भी प्रस्तुत कर सकती है। अतः प्रार्थनापत्र निरस्त किये जाने योग्य है।

आदेश

प्रार्थनापत्र 13-ख निरस्त किया जाता है। पत्रावली वास्ते प्रतिवाद पत्र दिनांक 02.03.2023 को पेश हो ।.

7. Sri Mohammad Fateh, learned counsel for applicant, has placed reliance on a judgment passed by High Court of Madhya Pradesh at Gwalior in Nirman Sagar vs. Smt. Monika Sagar Chaudhari and another (Criminal Revision No. 3060 of 2021), decided on 01.04.2022 that in terms of Section 126 Cr.P.C. the proceedings under Section 125 Cr.P.C. can be initiated in any district where he or his wife resides or where he last resided with her wife or as the case may be with the mother of the illegitimate child and further held that word ?reside? would not include a casual stay or a flying visit to a particular place.

8. Above submissions are vehemently opposed by Sri Mohd. Zubair, learned counsel appearing for Opposite Party No. 2 and he placed reliance on Captain Ramesh Chander Kaushal (supra) that since provisions of Section 125 Cr.P.C. are of welfare legislation, therefore, the issue of jurisdiction be also considered in a liberal manner.

9. On merit, learned counsel for Opposite Party No. 2 submits that Trial Court has considered that Bareilly is permanent residence of complainant where she is frequently visiting and only for the purpose of job she stays at Delhi though he has not disputed that an application under Section 12 of Act, 2005 was filed at Delhi.

10. Heard learned counsel for parties and perused the material available on record.

11. Aforesaid fact with regard to filing of application under Section 12 of Act, 2005 at Delhi as well as complainant resides at Delhi for the purpose of job, is not under dispute. It is also not under much dispute that complainants parents are permanent resident of Bareilly. Marriage was also solemnized at Bareilly. Therefore, it cannot be much disputed that complainant is visiting at her permanent residence frequently. As such, it cannot be said that visit to Bareilly was a casual stay or a flying visit. Permanent address of complainant at Bareilly would fall within the contour of reside.

12. The other argument of learned counsel for applicant is that since application under Section 12 of Act, 2005 was filed by complainant at Delhi, therefore, she is now not permitted to file any application at Bareilly. However, if this argument is accepted, the very purpose of Section 125 Cr.P.C., which is already referred as a welfare legislation, would be frustrated. Therefore, this Court by invoking inherent power under Section 482

Cr.P.C. cannot become a tool to frustrate the very object of Section 125 Cr.P.C. merely on objection of jurisdiction. The Court cannot ignore that it is not much disputed that complainants parents are permanent resident of Bareilly and she has frequent visit thereat.

13. The facts of present case are distinguishable from the facts of judgment cited by learned counsel for applicant in Nirman Sagar (supra). Section 126 Cr.P.C. provides that proceedings under Section 125 Cr.P.C. may be taken against any person in any district where he is residing or where he or his wife resides. Therefore, if wife resides at Bareilly, she can file complaint under Section 125 Cr.P.C. at Bareilly also. It is upto the complainant to chose the place of jurisdiction and in the present case complainant has chosen to file complaint at Bareilly.

14. In aforesaid circumstances, I do not find that there is any ground to interfere with impugned order whereby objection with regard to jurisdiction was rejected.

15. The application is accordingly rejected.

(2024) 8 ILRA 231
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.08.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application U/S 482. No. 7515 of 2024

Navneet Bhadauria ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Anuuj Taandon, Purnendu Chakravarty

Counsel for the Opposite Parties:
G.A., Digvijay Nath Dubey

(Criminal Law-The Bharatiya Nagarik Suraksha Sanhita,2023-Sections-72 & 91-For seeking benefit of Section 88 Cr.P.C./ Section 91 BNSS, the concerned has to appear/ surrender before the concerned court-Applicant without submitting/ surrendering himself to the jurisdiction of the court, preferred an application for recall of the NonBailable Warrant under Section 70 Cr.P.C./ Section 72 BNSS- it is apparent from the record that anticipatory bail was granted by this Court vide order dated 18.11.2022 and thereafter order granting anticipatory bail was cancelled by this Court after taking note of the fact that the applicant did not appear personally several dates. (Para 14) (E-15)

List of Cases cited:

1. Tarsem Lal Vs Directorate of Enforcement Jalandhar Zonal Office reported in (2024) 7 SCC 61

2. Satender Kumar Antil Vs Central Bureau of Investigation & anr., (2022) 10 S.C.R. 351 : (2022) 10 SCC 51

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Shri Purnendu Chakravarty, learned counsel for the applicant, Shri S. P. Tiwari, learned A.G.A. for the State of U.P. and Shri Digvijay Nath Dubey, learned counsel for the opposite party no. 2 and perused the record.

2. Before proceeding, it would be apt to rectify that in the order dated 28.08.2024 inadvertently name of "Shri Pradeep Kumar Shukla, Advocate" has been indicated as counsel for opposite party no. 2, which is rectified and same would read as "Shri Digvijay Nath Dubey, Advocate".

3. The present application has been filed by the applicant namely Navneet Bhadauria seeking following main relief:

"to allow the present Application filed under section 528 Bhartiya Nagrik Suraksha Sanhita 2024 (BNSS) corresponding to Section 482 Cr.P.C exercising the inherent powers to give effect to the provisions of the Code and quash the impugned order dated 21/8/2024 passed by Learned Court of ACJM I Court No. 25 Lucknow and direct and permit applicant so as to furnish the bonds under section 88 Cr.P.C to the satisfaction of the Learned Trial Court in FIR No. 0363/2021 Case No. 80697/2022 U/s 323,504,506,420,467,468,471 IPC PS Vibhuti Khand Lucknow in the interest of justice."

4. Brief facts of the case, which are relevant for the purposes of disposal of the application under consideration, are as under:

(i) An FIR was lodged as Case Crime No. 363 of 2021 under Sections 147, 323, 504, 506, 406, 420 at Police Station - Vibhuti Khand District - Lucknow by opposite party no.2/Deepak Sharma against Anand Kumar Singh @ Baba Trikaldarshi, Rajeev Lochal Paliwal, Navneet Bhadauria (applicant herein), Vijay Pal Prapati and one unknown.

(ii) After the aforesaid, the investigation was carried out and upon completion of investigation, the Investigating Officer (in short "I.O.") submitted the charge-sheet dated 01.06.2022 under Sections 323, 504, 506, 406, 420, 467, 468, 471 which was submitted before the Court concerned on 19.07.2022.

(iii) Thereafter, the Court concerned took cognizance upon the charge-sheet on 19.07.2022 and summons were issued to the accused indicated in the charge-sheet named above.

(iv) It appears that in pursuance to the summons, the applicant did not appear before the Court.

(v) Thereafter, the Bailable Warrant was issued on 10.10.2022 and despite the order related to issuance of the Bailable Warrant, the applicant did not appear before the trial Court and ultimately on 15.10.2022, the trial Court issued the Non-Bailable Warrant.

(vi) For the purposes of interference in the pending criminal proceedings, the applicant approached this Court by means of **APPLICATION U/S 482 No. 6754 of 2022.** This Court, after considering the facts and circumstances of the case vide order dated 26.09.2022, declined to interfere in the pending criminal proceedings and disposed of the said application preferred by the applicant/Navneet Bhadauria under Section 482 Code of Criminal Procedure (in short "Cr.P.C.") with liberty to the applicant to prefer an application seeking anticipatory bail or regular bail. The relevant portion of order dated 26.09.2022 reads as under:

"In view of the aforesaid case law, this Court has adverted to the entire record of the case.

The submissions made by the applicant's learned counsel call for adjudication on pure questions of fact which may be adequately adjudicated upon only by the trial court and while doing so even the submissions made on points of law can also be more appropriately gone into by the trial court in this case. This Court does not deem it proper, and therefore cannot be persuaded to have a pre-trial before the actual trial begins. A threadbare

discussion of various facts and circumstances, as they emerge from the allegations made against the accused, is being purposely avoided by the Court for the reason, lest the same might cause any prejudice to either side during trial. Therefore, I do not find any justification to quash the proceedings against the applicants as the case does not fall in any of the categories recognized by the Apex Court which may justify their quashing.

Accordingly, the prayer for quashing the same is refused as I do not see any illegality, impropriety and incorrectness in the proceedings under challenge. There is no abuse of court's process either.

However, it is provided that if the applicant appears before the court below and applies for grant of anticipatory bail / bail, the court below shall consider and decide the same expeditiously on the basis of material available before it in accordance with law having regard to the fact that whether the offences under Sections 406, 420, 467, 468, 471 I.P.C. are made out against the present applicant in the facts of this case and on the basis of material collected during investigation.

With the aforesaid observations, the instant application is finally disposed of."

(vii) Prior to issuance of Bailable Warrant and Non- Bailable Warrant, as stated, the applicant preferred an anticipatory bail application under Section 438 Cr.P.C. before this Court registered as **CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. 1841 of 2022**. This Court, after considering the facts and circumstances of the case including the interim protection granted by Division Bench of this Court vide order dated 10.08.2021 passed in **Misc. Bench No. 17201 of 2021 (Rajeev Lochan Paliwal & Anr. Vs. State of U.P.),** allowed the anticipatory bail application preferred by the applicant/Navneet Bhaduaria vide order dated 18.11.2022. The relevant portion of the order dated 18.11.2022 reads as under:

"8. Having heard the learned counsel for the parties, I find that as per prosecution case, first time co-accused Anand Kumar Singh @ Baba Trikaldarshi with dishonest intention by luring the complainant insisted him to invest money in mining business in U.P. and thereafter, he introduced the complainant to Vijay Pal Prajapati (Proprietor of "M/s V.P. Construction"), who was also in his collusion. Subsequently, on their inducement and assurance, complainant believing their words as true, invested money in question in good faith in the mining business along with M/s V.P. Construction. Applicant is neither partner of Vijay Pal Prajapati nor investor in the mining business in question. There is no business deal between the complainant and present applicant-Navneet Singh Bhadauria and he is also not party in the aforesaid agreements dated 05.12.2020. The applicant is not liable to return any amount in question to the complainant. The applicant has no criminal antecedent to his credit. Learned A.G.A. as well as learned counsel for the complainant could not point out any material on record to establish the specific act of forgery or fabrication of any document on the part of present applicant-Navneet Singh Bhadauria. Tender was also not allotted to the applicant. This Court is of the view that in order to constitute the offence under Section 420 I.P.C., there must be element of deception and a person is said to deceive another by "Suggestio falsi" (suggesting false) or "Supressio very" (suppressing the truth) or both intentionally induces another to believe a thing to be

true which he knows to be false or does not believe to be true. Under the facts of this case, I find that the co-accused Anand Kumar Singh @ Baba Trikaldarshi and Vijay Pal Prajapati (Proprietor of M/s V.P. Construction) are the main culprit in this case and the case of the present applicant Navneet Singh Bhadauria is distinguishable from them and stands on better footing than that of co-accused Rajeev Lochan Paliwal, who has been granted anticipatory bail by the co-ordinate Bench as noted above. The incident which is alleged to have taken place on 09.03.2021 as alleged in F.I.R. is a disputed question of fact and can be seen by the trial Court. I also find that non-bailable warrant dated 15.10.2022 was issued during pendency of anticipatory bail application of the applicant before the concerned Court below, which was filed in compliance of above order dated 26.09.2022. So far as judgments relied upon by the counsel for the complainant is concerned, this Court is of the view that the same is distinguishable on the facts of this case. It is well settled that every case turns on its own facts. 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.

9. In view of the above analysis of the case, looking to the overall facts and circumstances of the case, submissions of learned counsel for the parties, reasonable apprehension of arrest of the applicant, taking into consideration the gravity of offence in the light of nature of accusation so far as against the present applicant is concerned which is distinguishable from the case of Anand Kumar Singh @ Baba Trikaldarshi and Vijay Pal Prajapati and there being no possibility of his fleeing from justice as well as reasons noted above, this Court is of the view that prima facie the applicant has made out a case for granting anticipatory bail during trial."

(viii) After the aforesaid, an application seeking cancellation of bail registered as **CRIMINAL MISC. BAIL CANCELLATION APPLICATION No. -37 of 2024** was preferred by Deepak Sharma. This Court took note of the fact indicated in the said application as also the submissions advanced by learend counsel for the applicant (opposite party no. 2 herein) and thereafter vide order dated 05.07.2024, the application seeking cancellation of bail was allowed. The order dated 05.07.2024 reads as under:

"Heard Mr. Digvijay Nath Dubey, learned counsel for the applicant, Mr. Virendra, learned A.G.A. representing the State and Mr. Chandan Srivastava, learned counsel for opposite party no. 2 through video conferencing.

The instant application has been moved by the applicant - Deepak Sharma with a prayer to cancel the anticipatory bail granted vide order of this Court dated 18.11.2022 to opposite party no. 2-Navneet Bhadauria mainly on the ground of violation of condition no.1 of anticipatory bail order dated 18.11.2022, which reads as under :

"(i) That the applicant shall cooperate in the expeditious disposal of the trial and shall regularly attend the court on each dates unless inevitable.

(ii) xxxx

(iii) xxxx

(iv) xxxx"

The only submission of Mr. Digvijay Nath Dubey, learned counsel for the applicant is that opposite party no. 2 is not cooperating with expeditious disposal of trial. Referring the order-sheet of the trial Court, he submits that on 16.06.2023, 28.06.2023, 27.07.2023, 10.08.2023,

21.08.2023, 17.11.2023, 18.01.2024 and 29.01.2024, opposite party no. 2 did not personally appear before the trial Court and moved exemption applications through his counsel in a casual manner.

On the other hand, learned counsel for opposite party no. 2 does not dispute the said fact of moving exemption applications, however, he submits that opposite party no. 2 was appearing before the trial Court on the aforesaid dates through his counsel, therefore, it cannot be said that he is not cooperating with expeditious disposal of trial.

Having heard submission of learned counsel for the parties and perusing the record, I find that it is not in dispute that on several dates as noted above, opposite party no. 2 did not appear in person and moved applications through his counsel for exemption of his appearance. Record also shows that case is running at a slow pace on account of delaying tactics adopted by accused persons by adopting different modus operandi. Opposite party no. 2 despite granting time vide order dated 17.05.2024 did not file counter affidavit. This Court is also of the view that despite granting anticipatory bail to opposite party no. 2, his non-appearance in person before the trial Court and frequently moving exemption applications on the dates fixed amount to his non-cooperation with the expeditious disposal of the trial.

In view of the above, order dated 18.11.2022 granting anticipatory bail to opposite party no. 2-Navneet Bhadauria is hereby cancelled. Opposite party no. 2 is directed to surrender before the trial Court forthwith.

Accordingly, instant anticipatory bail cancellation application succeeds and is allowed.

This order be communicated to the concerned trial Court for information."

(ix) Being aggrieved by the order dated 05.07.2024, quoted above, the applicant approached the Hon'ble Apex Court by preferring **Special Leave to Appeal (Crl.) No. 9752 of 2024**. This appeal was taken up on 29.07.2024 and the Hon'ble Apex Court, after due consideration, dismissed the appeal. The order dated 29.07.2024 dismissing the appeal filed by the applicant challenging the order dated 05.07.2024, whereby the application seeking cancellation of bail filed by Deepak Sharma (opposite party no.2 herein) was allowed, reads as under:

"Having heard learned counsel for the petitioner, we are not inclined to interfere with the impugned judgment and order.

The special leave petition is, accordingly, dismissed.

Pending application(s), if any, shall also stand disposed of."

(x) After dismissal of the special leave to appeal by the Hon'ble Apex Court vide order dated 29.07.2024, whereby the order cancelling the anticipatory bail was affirmed, the applicant approached the trial Court by preferring application(s) under Section 88 Cr.P.C. (Section 91 Bhartiya Nagrik Suraksha Sanhita, 2023 (in short "BNSS") and Section 70 Cr.P.C. (Section 72 BNSS) with a prayer to accept the bond. Both these applications have been rejected by the order under challenge dated 21.08.2024.

(xi) The aforesaid application(s), as stated, were preferred in the light of judgment passed by the Hon'ble Apex Court in the case of **Tarsem Lal Vs. Directorate of Enforcement Jalandhar Zonal Office** reported in **(2024) 7 SCC 61.** The relevant portion of the judgment passed in the case of Tarsem Lal (Supra):

"33. Now, we summarise our conclusions as under:

33.1. Once a complaint under Section 44(1)(b) PMLA is filed, it will be governed by Sections 200 to 205Cr.P.C. as none of the said provisions are inconsistent with any of the provisions of PMLA;

33.2. If the accused was not arrested by ED till filing of the complaint, while taking cognizance on a complaint under Section 44(1)(b), as a normal rule, the court should issue a summons to the accused and not a warrant. Even in a case where the accused is on bail, a summons must be issued;

33.3. After a summons is issued under Section 204Cr.P.C. on taking cognizance of the offence punishable under Section 4 PMLA on a complaint, if the accused appears before the Special Court pursuant to the summons, he shall not be treated as if he is in custody. Therefore, it is not necessary for him to apply for bail. However, the Special Court can direct the accused to furnish bond in terms of Section 88Cr.P.C.;

33.4. In a case where the accused appears pursuant to a summons before the Special Court, on a sufficient cause being shown, the Special Court can grant exemption from personal appearance to the accused by exercising power under Section 205Cr.P.C.;

33.5. If the accused does not appear after a summons is served or does not appear on a subsequent date, the Special Court will be well within its powers to issue a warrant in terms of Section 70Cr.P.C.. Initially, the Special Court should issue a bailable warrant. If it is not possible to effect service of the bailable warrant, then the recourse can be taken to issue a non-bailable warrant;

33.6. A bond furnished according to Section 88 is only an undertaking by an accused who is not in custody to appear before the court on the date fixed. Thus, an order accepting bonds under Section 88 from the accused does not amount to a grant of bail;

33.7. In a case where the accused has furnished bonds under Section 88Cr.P.C., if he fails to appear on subsequent dates, the Special Court has the powers under Section 89 read with Section 70Cr.P.C. to issue a warrant directing that the accused shall be arrested and produced before the Special Court; if such a warrant is issued, it will always be open for the accused to apply for cancellation of the warrant by giving an undertaking to the Special Court to appear before the said court on all the dates fixed by it. While cancelling the warrant, the court can always take an undertaking from the accused to appear before the court on every date unless appearance is specifically exempted. When ED has not taken the custody of the accused during the investigation, usually, the Special Court will exercise the power of cancellation of the warrant without insisting on taking the accused in custody provided an undertaking is furnished by the accused to appear regularly before the court. When the Special Court deals with an application for cancellation of a warrant, the Special Court is not dealing with an application for bail. Hence, Section 45(1) will have no application to such an application;

33.8. When an accused appears pursuant to a summons, the Special Court is empowered to take bonds under Section 88Cr.P.C. in a given case. However, it is not mandatory in every case to direct furnishing of bonds. However, if a warrant of arrest has been issued on account of non-appearance or proceedings under Section 82 and/or Section 83Cr.P.C. have been issued against an accused, he cannot

be let off by taking a bond under Section 88Cr.P.C., and the accused will have to apply for cancellation of the warrant;

33.9. After cognizance is taken of the offence punishable under Section 4 PMLA based on a complaint under Section 44(1)(b), ED and its officers are powerless to exercise power under Section 19 to arrest a person shown as an accused in the complaint; and

33.10. If ED wants custody of the accused who appears after service of summons for conducting further investigation in the same offence, ED will have to seek custody of the accused by applying to the Special Court. After hearing the accused, the Special Court must pass an order on the application by recording brief reasons. While hearing such an application, the court may permit custody only if it is satisfied that custodial interrogation at that stage is required, even though the accused was never arrested under Section 19. However, when ED wants to conduct a further investigation concerning the same offence, it may arrest a person not shown as an accused in the complaint already filed under Section 44(1)(b), provided the requirements of Section 19 are fulfilled."

5. In the aforesaid background of the case, the present application has been filed seeking main relief, quoted above.

6. Impeaching the order dated 21.08.2024 as also seeking relief in terms of Section 88 Cr.P.C., learned counsel for the applicant states that the case of the applicant is squarely covered by the judgement passed in the case of **Tarsem Lal (Supra).** The trial Court by not granting the relief as per the observation made in this judgment erred in fact and law both.

7. It is also stated that the trial Court by means of the impugned order rejected the application under Section 70 Cr.P.C. (Section 72 BNSS) and has not decided the application under Section 88 Cr.P.C. (Section 91 BNSS).

8. In support of his submissions aforesaid, reliance has been placed on para 33 of the judgment passed in the case of **Tarsem Lal (Supra),** quoted above.

9. Shri S. P. Tiwari, learned A.G.A. for the State of U.P. and Shri Digvijay Nath Dubey, learned counsel for the opposite party no. 2 opposed the prayer sought by the applicant. The submissions advanced by the side opposite are as under:

(i) The applicant, in the facts and circumstances of the case, is not entitled to the benefit of the judgment passed in the case of **Tarsem Lal (Supra).**

(ii) The applicant, in fact, is avoiding the proceedings pending before the trial Court.

(iii) The applicant was summoned by the trial Court but the applicant avoided the proceedings, therefore, the Bailable Warrant was issued on 10.10.2022 and despite this, the applicant failed to take benefit of various pronouncements including the pronouncement passed in **Satender Kumar Antil versus Central Bureau of Investigation and another, (2022) 10 S.C.R. 351 : (2022) 10 SCC 51** and therefore, under compelling circumstances after so many dates, the trial Court issued the Non -Bailable Warrant on 15.10.2022.

(iv) The applicant also approached this Court by by means of **APPLICATION U/S 482 No. 6754 of 2022,** which was disposed of vide order

dated 26.09.2022 and no protection was granted to the applicant.

(v) The applicant thereafter preferred an anticipatory bail application under Section 438 Cr.P.C. before this Court registered as **CRIMINAL MISC ANTICIPATORY BAIL APPLICATION U/S 438 CR.P.C. No. - 1841 of 2022** which was allowed vide order dated 18.11.2022 and subsequently, the anticipatory bail application was cancelled vide order dated 05.07.2024 affirmed by the Hon'ble Apex Court vide order dated 29.07.2024.

(vi) In terms of order dated 05.07.2024 passed by this Court, whereby the bail of the applicant was cancelled, the applicant was/in under obligation to surrender/submit himself to the Court's jurisdiction, direction or control.

(vii) In the instant case, after the order dated 05.07.2024, the applicant failed to appear before the Court concerned and thereafter on account of non appearance of the applicant, in compliance of order dated 22.07.2024 passed by the trial Court the Non-Bailable Warrant was issued and taking note of all the relevant facts as also the conduct of the applicant, the trial Court passed the order dated 21.08.2024, whereby rejected both the applications preferred by the applicant.

(viii) It is not mandatory for the trial Court to enlarge the applicant on bail in terms of Section 88 Cr.P.C..

(ix) In the **Tarsem Lal (Supra)** the summons were issued and thereafter on account on non-appearance the warrants were issued and thereafter, the application seeking anticipatory bail before the Special Court was rejected and thereafter the High Court also rejected the prayer seeking anticipatory bail and thereafter, the appellant approached the Hon'ble Apex Court and the interim protection was granted by the Hon'ble Apex Court and subsequently, the Hon'ble Apex Court concluded in para 33, quoted above, referred by learned counsel for the applicant.

(x) In the instant case, from the record it is apparent that after order of granting bail dated 18.11.2022, the applicant did not appear on 16.06.2023, 28.06.2023, 27.07.2023, 10.08.2023, 21.08.2023, 17.11.2023, 18.01.2024 and 29.01.2024 and taking note of the conduct of the applicant, this Court cancelled the anticipatory bail application and it appears that conduct of the applicant was also considered by the Hon'ble Apex Court and therefore the special leave to appeal preferred by the applicant was dismissed vide order dated 29.07.2024 without granting the benefit of the judgment passed in the case of **Tarsem Lal (Supra).**

10. In view of above facts, the benefits of the principles settled in the case of **Tarsem Lal (Supra)** would not be available to the applicant.

11. In response, learned counsel for the applicant states that after the order dated 18.11.2022, the bail bond was accepted on 20.01.2023 and after production of order of this Court dated 05.07.2024 on 23.07.2024, the trial Court, on 22.07.2024, directed the Office to proceed in terms of the earlier order and in compliance thereof, Non Bailable Warrant was issued.

12. It would be apt to indicate that at this stage that from the aforesaid it is apparent that Non-Bailable Warrant was issued before preferring the application(s), which have been rejected by the impugned order dated 21.08.2024.

13. Considered the aforesaid and perused the records.

14. Upon due consideration of the facts of the present case, this Court is of the view that no interfere is required in the composite order dated 21.08.2024, impugned herein, whereby two application(s) i.e. application under Section 70 Cr.P.C./Section 72 BNSS and application under Section 88 Cr.P.C./Section 91 BNSS have been rejected. It is for the following reasons:

(i) The order dated 21.08.2024 is in two parts, as it decides two applications, referred above.

(ii) This Court feels it appropriate to first consider the second part of the order dated 21.08.2024, which relates to the application under Section 88 Cr.P.C./Section 91 BNSS. The same reads as under:

"जहां तक प्रार्थी/अभियुक्त नवनीत भदौरिया द्वारा प्रस्तुत प्रार्थनापत्र अंतर्गत धारा 88 दं.प्र.सं. का प्रश्न है, अभियुक्त नवनीत भदौरिया का उक्त प्रार्थनापत्र अभियुक्त की व्यक्तिगत अनुपस्थिति, उसके विरुद्ध जारी एन.बी.डब्लू, तथा माननीय उच्च न्यायालय के आदेश दिनांकित 05.07.2024 के आलोक में स्वीकार होने योग्य नहीं है"

(iii) From the above extracted part of the order dated 21.08.2024, it is apparent that the Trial Court rejected the application of the application preferred under Section 88 Cr.P.C./ Section 91 BNSS on the ground that the applicant was not present before the Trial Court and also that the applicant did not surrender himself to the jurisdiction of the concerned court in terms of order dated 05.07.2024 of this Court, affirmed by the Hon'ble Apex Court vide order dated 29.07.2924.

(iv) For seeking benefit of Section 88 Cr.P.C./ Section 91 BNSS, the concerned has to appear/ surrender before the concerned court and the same is evident from said provisions. The same are as under:-

"Section 88 Cr.P.C.

Power to take bond for appearance *- When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial."*

"Section 91 BNSS

Power to take bond or bail bond for appearance *- When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond or bail bond for his appearance in such Court, or any other Court to which the case may be transferred for trial."*

(v) Section 88 Cr.P.C. was also considered by a Division Bench of this Court and upon due consideration, the Division Bench of this Court at Allahabad in the case of **Babu Lal and Others Vs. Smt Momina Begum** passed in **Criminal Misc. Application No. 8810 of 1989 on 23.03.2006,** observed as under :-

"Now coming to the question as to whether the cases where section 88 is applicable, can the Officer presiding a Court may require a person to execute bond, who is not present in the Court can be answered, by a simple reading of

Section 88 which clearly mention the word " is present in such Court". In order to apply Section 88 Cr.P.C., therefore, presence of a person is necessary before the Court. The purpose of asking him to execute bond with or without surety is to ensure his presence/appearance in such Court or any other Court to which the cases may be transferred for trial. In the absence of such person even Section 88 Cr.P.C. would have no application. This view has been taken by an Hon'ble Single Judge of this Court in ***Mukesh Kumar Versus State of U.P. and others, 2000 Crl.L.J.1694*** *and after referring to the observations made in para-10 of the judgment in Vishwa Nath Jiloka and others Versus Munsif Lower Criminal Court, Bahraich and others, reported* ***in 1989 AWC 1235*** *the Hon'ble Single Judge has taken a view that the aforesaid observation does not lay down that the bail application should be disposed of without appearance of the accused in person. The provisions of Section 88 Cr.P.C. also requires taking of the bonds, if a person is present in the Court and, therefore, no order for taking of the bonds can be passed, unless the accused appears in person. We agree with the aforesaid view."*

(vi) Para 33 of the judgment passed by the Hon'ble Apex Court in the case of **Tarsem Lal (Supra),** which includes Sub-Para 33.3, 33.5, 33.7 and 33.8 also indicates that for seeking benefit under Section 88 Cr.P.C./ Section 91 BNSS, the accused has to appear in person before the concerned court.

(vii) The benefit of Section 88 Cr.P.C./ Section 91 BNSS would only be available if the accused on his/her own volition appears before the court concerned, and in the instant case the benefit of Section 88 Cr.P.C./ Section 91 BNSS would not be available to the applicant as prior to moving the application in the said provision(s) the Non-Bailable Warrant was issued for the purposes of appearance of the applicant. In this regard reference can be made to Para 33.8 of the judgment passed by the Hon'ble Apex Court in the case of **Tarsem Lal (Supra).** It would be apt to indicate here that on account of non-appearance before the court in terms of order dated 25.07.2024, an order was passed on 22.07.2024 and in compliance thereof, the Non Bailable Warrant was issued, fixing 07.08.2024 and prior to the same, the applications, in issue, i.e. Application under Section 70 Cr.P.C./ Section 72 BNSS and Application under Section 88 Cr.P.C./ Section 91 BNSS, were not preferred by the applicant.

(viii) In view of the aforesaid, the Trial Court, in the instant case, has not committed any error in rejecting the application of the applicant under Section 88 Cr.P.C./ Section 91 BNSS as the applicant was not present in person before the court concerned.

(ix) Non-compliance of the order dated 05.07.2024, affirmed by the Hon'ble Apex Court vide order dated 29.07.2024, is apparent from the record.

(x) The applicant without submitting/surrendering himself to the jurisdiction of the court, preferred an application for recall of the Non-Bailable Warrant under Section 70 Cr.P.C./ Section 72 BNSS.

(xi) Now coming to the first part of the order impugned. First part of the impugned order dated 21.08.2024 deals with the rejection of the application preferred by the applicant under Section 70 Cr.P.C./ Section 72 BNSS. For ready reference, the relevant portion of the order dated 21.08.2024 is extracted hereunder:-

"पत्रावली के अवलोकन से विदित है कि यह पत्रावली माननीय मुख्य न्यायिक मजिस्ट्रेट महोदय के आदेश दिनांकित 31.07.2024 के अनुक्रम हस्तांतरित होकर इस न्यायालय में प्राप्त हुई। पत्रावली के अवलोकन पर यह पाया गया कि अभियुक्त नवनीत भदौरिया को प्रस्तुत प्रकरण में माननीय उच्थ न्यायालय से दिनांक 18.11.2022 को अधिन जमानत प्रदान की गयी थी, जिसके उपरान्त माननीय उच्च न्यायालय द्वारा अपने आदेश दिनांकित 05.07.2024 द्वारा अभियुक्त नवनीत भदौरिया को अग्रिम जमानत, उसके न्यायालय में व्यक्तिगत रूप से उपस्थित न होने तथा प्रायः जरिए अधिवक्ता हाजिरीमाफी प्रस्तुत करने तथा विचारण में सहयोग न करने तथा विचारण को विलंबित करने का प्रयास करने के आधार पर निरस्त करते हुए अभियुक्त को अविलंब विचारण न्यायालय के समक्ष आत्मसमर्पण करने हेतु आदेशित किया गया।, तदोपरांत अभियुक्त उपरोक्त द्वारा माननीय उच्चतम न्यायालय में उक्त आदेश के विरुद्ध एक SLP दाखिल की गयी, जिसे माननीय उच्चतम न्यायालय द्वारा अपने आदेश दिनांकित 29.07.2024 द्वारा निरस्त कर दिया गया। माननीय उच्च न्यायालय के आदेश के उपरांत भी जब अभियुक्त द्वारा इस न्यायालय में आत्मसमर्पण नहीं किया गया, तब पूर्व पीठासीन अधिकारी द्वारा दिनांक 22.07.2024 को पत्रावली पर यह अंकन करते हुए कि अभियुक्त नवनीत भदौरिया के विरुद्ध पूर्व आदेशानुसार यथोचित आदेशिका जारी हो, अभियुक्त नवनीत भदौरिया के विरुद्ध एन.बी.डब्लू. जारी कर दिया तथा दिनांक 17.08.2024 की तिथि पत्रावली में नियत कर दी गयी। न्यायालय के आदेश दिनांकित 22.07.2024 के उपरांत अभियुक्त नवनीत भदौरिया द्वारा न्यायालय में आत्मसमर्पण न करते हुए प्रार्थनापत्र अंतर्गत धारा 70 (2) दं.प्र.सं. प्रस्तुत करते हुए यह आपत्ति की है कि पूर्व पीठासीन अधिकारी द्वारा अपने आदेश दिनांकित 22.07.2024 में शब्द पूर्व आदेशानुसार प्रयोग किया है, जो कि तकनीकी रूप से गलत है। यदि अभियुक्त नवनीत भदौरिया की ओर से की गयी आपत्ति को सही भी मान लिया जाए तो भी यह ध्यान देने योग्य है कि पूर्व पीठासीन अधिकारी द्वारा अपने आदेश दिनांकित 22.07.2024 में स्पष्ट रूप से यह अंकन करते हुए कि माननीय उच्च न्यायालय द्वारा अभियुक्त नवनीत भदौरिया की अग्रिम जमानत निरस्त कर दी गयी है, उसके विरुद्ध एन.बी.डब्लू. जारी किया था। यहां ध्यान देने योग्य यह भी है कि माननीय उच्च न्यायालय के आदेश दिनांकित 05.07.2024 तथा माननीय उच्चतम न्यायालय के आदेश दिनांकित 29.07.2024 तथा इस न्यायालय के आदेश दिनांकित 22.07.2024 के बावजूद अभियुक्त नवनीत भदौरिया द्वारा न्यायालय में व्यक्तिगत रूप से उपस्थित न होते हुए जरिए अधिवक्ता न्यायालय में प्रार्थनापत्र अंतर्गत धारा 70 (2) दं.प्र.सं. प्रस्तुत करते हुए तकनीकी आधार पर, उसके विरुद्ध जारी एन.बी.डब्लू. को निरस्त करने की प्रार्थना की गयी है। न्यायालय के आदेश दिनांकित 22.07.2024 के अवलोकन से स्पष्ट है कि न्यायालय द्वारा उक्त आदेश में माननीय उच्च न्यायालय के आदेश का अंकन करते हुए अभियुक्त उपरोक्त के विरुद्ध एन.बी. डब्लू, जारी किया गया है। वर्तमान में पत्रावली आरोप विरचन के स्तर पर नियत है।

अभियुक्त नवनीत भदौरिया के अतिरिक्त अन्य सभी अभियुक्त न्यायालय में व्यक्तिगत रूप से उपस्थित आ रहे हैं। अभियुक्त नवनीत भदौरिया की अनुपस्थिति के कारण वाद के निस्तारण में विलंब हो रहा है। अभियुक्त नवनीत भदौरिया द्वारा विचारण में सहयोग न करते हुए तथा न्यायालय में उपस्थित न होते हुए जरिए अधिवक्ता तकनीकी आधार पर प्रार्थनापत्र अंतर्गत धारा 70 (2) दं.प्र.सं. प्रस्तुत किया गया है। आदेश दिनांकित 22.07.2024 के अवलोकन तथा अभियुक्त उपरोक्त के आचरण के दृष्टिगत तथा माननीय उच्च न्यायालय के आदेश दिनांकित 05.07.2024 के आलोक में प्रार्थी / अभियुक्त का प्रार्थनापत्र अंतर्गत धारा 70 (2) दं.प्र.सं. स्वीकार होने योग्य नहीं है।"

(xii) From a perusal of the aforesaid part of the order dated 21.08.2024, which relates to rejection of Application under Section 70 Cr.P.C./ Section 72 BNSS, it is apparent that the Trial Court, upon due consideration of the facts of the case, particularly the conduct of the applicant, rejected the said application.

(xiii) In regard to the conduct of the applicant, it is apparent from the record that anticipatory bail was granted by this Court vide order dated 18.11.2022 and thereafter the order dated 18.11.2022 granting anticipatory bail was cancelled by this Court vide order dated 05.07.2024. This order was passed after taking note of the fact that the applicant did not appear personally on 16.06.2023, 28.06.2023, 27.07.2023, 10.08.2023, 21.08.2023, 17.11.2023, 18.01.2024 and 29.01.2024.

(xiv) While cancelling the bail, this Court specifically ordered that "opposite party No. 2 is directed to surrender before the Trial Court forthwith." The expression 'surrender' means appearance personally before the concerned court.

(xv) In this case, the applicant challenging the order dated 05.07.2024 approached the Hon'ble Apex Court and the Hon'ble Apex Court, considering the conduct of the applicant, declined to interfere in the matter and dismissed the Special Leave Petition (SLP) vide order dated 29.07.2024 that too without providing the benefit of the judgment passed in the case of **Tarsem Lal (Supra).**

(xvi) Despite the aforesaid, the applicant again avoided the court proceedings and without making him personally present before the court concerned preferred two applications i.e. Application under Section 70 Cr.P.C./ Section 72 BNSS and Application under Section 88 Cr.P.C./ Section 91 BNSS, in relation to which, this Court has already observed herein-above that the Trial Court has not committed any error in rejecting the prayer seeking benefit of Section 88 Cr.P.C./ Section 91 BNSS.

(xvii) From the aforesaid, it is clear that the applicant does not want to co-operate with the trial and is avoiding the proceedings on one pretext and other by moving applications, referred above.

(xviii) Thus, this Court finds that the Trial Court has not committed any error in rejecting the application of the applicant preferred under Section 70 Cr.P.C./ Section 72 BNSS seeking recall of Non-Bailable Warrant.

15. For the reasons aforesaid, this Court is not inclined to interfere in the impugned order dated 21.08.2024. The instant application is accordingly **rejected**. Costs made easy.

(2024) 8 ILRA 243
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/S 482. No. 12012 of 2024

Nazia @ Dr. Nazia Majid & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Sri Bhuvnesh Kumar Singh, Sri Hitesh Pachori

Counsel for the Opposite Parties:
Sri Ajay Kumar Pandey, G.A.

Criminal Law- The Code of Criminal Procedure-1973-Section-200, The Indian Penal Code, 1860-Sections 467, 468, 471 & 120B/34- Trial Court after taking note of complaint and statements summoned Applicants to face trial for offences under Sections 467, 468, 471, 120B/34 IPC- Statement U/s 200 Cr.P.C is absolutely silent that Applicants-2, 3 and 4 have committed any offence of criminal conspiracy or they have acted in furtherance of their common intention and since they have been summoned only with the aid of Section 120B/34 IPC, therefore, summoning order is bad in law- entire documents filed before Trial Court, there is no such document which was forged and later on was used as genuine. The documents filed before school are not available on record, therefore, no offence is made out under Section 471 IPC- Section 468 IPC relates to forgery for the purpose of cheating and as referred above since no forgery has been pointed out on basis of any document, since even prima facie, no offences (referred above) are made out under Section 468 IPC also- No sufficient material to proceed, no offence is made out against Applicants (Para 7, 9, 11 & 12)

Petition Allowed. (E-15)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri Bhuvnesh Kumar Singh, learned counsel for applicants and Sri Ajay Kumar Pandey, Advocate for Opposite Party No. 2.

2. The dispute between wife (Applicant-1) and husband (Opposite Party No. 2) has affected welfare of their child. Complainant, i.e., husband has filed a complaint that his wife has not only changed the name of their child (girl) in school records but also tempered with her date of birth and has not disclosed name of Opposite Party No. 2, i.e., father of child in school records.

3. Trial Court after taking note of complaint and statements recorded under Sections 200 and 202 Cr.P.C. has summoned Applicant-1, i.e., wife of Opposite Party No. 2 alongwith three other persons to face trial for offences under Sections 467, 468, 471, 120B/34 IPC. Relevant part of impugned order dated 21.11.2023 is reproduced hereinafter:

"परिवादी के विद्वान अधिवक्ता को सुना एवं पत्रावली का अवलोकन किया। परिवादी द्वारा अपने बयान धारा-200 दं०प्र०सं० में परिवाद में किये गये कथनों का समर्थन किया है तथा साक्ष्य धारा - 202 दं०प्र०सं० के अंतर्गत प्रस्तुत साक्षी पी०डब्लू०-मो० इमरान एवं पी० डब्लू० 2 मो.

फैसल ने परिवादी के कथनों का समर्थन किया है। परिवादी की ओर से पत्रावली पर दाखिल अभिलेखीय साक्ष्य के अवलोकन से प्रथम दृष्टया दर्शित होता है कि परिवादी की पुत्री का नाम आयशा फैजान को बदल कर माइशा तथा उसके मूल माता पिता व भाई के स्थान पर विपक्षी अब्दुल माजिद सिद्दकी व माँ शादराना व रमीज माजिद उर्फ जव रखकर दस्तावेज तैयार किये गये हैं तथा आधार कार्ड आदि मे भी परिवादी की पुत्री का असली नाम व पता बदलकर विपक्षीगण ने षडयन्त्र के तहत स्वयं को लाभ पहुँचाने व परिवादी को अपनी पुत्री के अधिकार से दूर करने व उसे हानि पहुँचाने व कूटरचित फर्जी दस्तावेज तैयार कर असली के रूप में प्रयोग किया गया जाना प्रतीत होता है।

परिवादी द्वारा परिवादपत्र में किये गये कथनों एवं प्रस्तुत किये गये साक्ष्यों के अवलोकन के पश्चात मेरी राय में विपक्षीगण नाजिया माजिद अब्दुल माजिद सिद्दीकी, सादिराना बेगम, रमीज माजिद उर्फ लव के द्वारा अंतर्गत धारा 467,468,471,120 बी/34 भा०दं० सं० का अपराध प्रथम दृष्टया कारित किया जाना प्रतीत होता है. शेष धाराओं के तहत विपक्षी को तलब किये जाने हेतु कोई सुसंगत अभिलेखीय साक्ष्य दाखिल नहीं किया गया है। ऐसी स्थिति में अभियुक्त को उपरोक्त धारा में तलब करने हेतु पर्याप्त साक्ष्य पत्रावली पर उपलब्ध हैं। तदनुसार विपक्षीगण तलब किये जाने योग्य है।

आदेश

अभियुक्तगण नाजिया माजिद, अब्दुल माजिद सिद्दीकी, सादिराना बेगम, रमीज माजिद उर्फ लव को अंतर्गत धारा 467,468,471,120 बी/34 भा० दं० सं० के अपराध में विचारण हेतु जरिये समन तलब किया जाता है। परिवादी वांछित पैरवी अन्दर 07 दिवस दाखिल करें। पत्रावली वास्ते हाजिरी दिनांक 20.12.2023 को पेश हो।"

4. Learned counsel for applicants submits that since there was a dispute between husband and wife, name of child was changed in the documents firstly as ?Maisha Faizan? and thereafter as ?Aisha Naaz? though she was earlier known as ?Aisha Faizan? and her Aadhar Card and Passport were also issued in the name of ?Aisha Faizan?. Learned counsel further submits that aforesaid act would not constitute above referred offences. There is absolutely no evidence or statement that other co-accused have hatched a conspiracy or acted in furtherance of their common intention and learned counsel placed certain documents in support of his submissions.

5. Aforesaid submissions are opposed by learned counsel appearing for Opposite Party No. 2 that name of his daughter was changed without his consent. Documents placed at the time of admission in school were forged and correct documents, i.e., Aadhar Card and Passport were not placed. Name of Opposite Party No. 2 was also not

disclosed in school only with an intention that he may not have any contact with his child and even he was not allowed to enter into school to place correct documents.

6. In order to appreciate rival submissions, I have carefully perused the statement of Opposite Party No. 2 recorded under Section 200 Cr.P.C. and for reference the same is reproduced hereinafter:

"बयान अंतर्गत धारा-200 द०प्र०सं०

दिनांक: 18/07/2023

नाम: फैजान पुत्र मोहम्मद इकबाल, उम्र 35 वर्ष, निवासी लोहामंडी, थाना लोहामंडी, व्यवसाय फैब्रिकेशन।

सशपथ बयान करता हूँ कि मेरी शादी नाजिया से दिनांक 15.01.2016 को हुई थी। दिनांक 28.10.2019 से अलग रही है। नाजिया ने मेरी खिलाफ एक मुदकाम दहेज का किया हुआ है। नाजिया का अफेयर ही एक मोहित चौधरी से उसी के साथ दिल्ली रह रही है। मेरी एक बेटी है बेटी नाना नानी के पास रहती है। मेरी बेटी का एडमिशन फ्यूचर किंड स्कूल सैक्टर-3 में करया। स्कूल में गया तो पता चला कि आयशा फेजान नाम की लड़की नहीं पढ़ती है। पिता के नाम पर अब्दुल माजिद रखा गया था। बेटी का मायशा नाम कर दिया। उसकी उम्र 6.5 वर्ष है। पिता का नाम भी बदल दिया। माता का नाम भी बदल दिया। उसके भाई के नाम भी बदल दिया। वह मेरे साथ रहना नहीं चाहती है। मुझे मेरी बेटी से मिलने नहीं देते है। मेरे पास कई साक्ष्य मौजूद है। मैं यही चाहता हूँ कि उसके विरूद्ध कानूनी कार्यवाही की जाये।"

7. Aforesaid statement is absolutely silent that Applicants-2, 3 and 4 have committed any offence of criminal conspiracy or they have acted in furtherance of their common intention and since they have been summoned only with the aid of Section 120B/34 IPC, therefore, summoning order is bad in law qua to Applicants-2, 3 and 4.

8. Now the Court proceed to consider, whether offences under Sections 467, 468, 471 IPC are made out against Applicant-1 or not. These Sections are reproduced hereinafter:

"467. Forgery of valuable security, will, etc.?Whoever forges a document which purports to be a valuable security or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest or dividends thereon, or to receive or deliver any money, movable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any movable property or valuable security, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

468. Forgery for purpose of cheating.?Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose

of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

471. Using as genuine a forged document or electronic record.?Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record."

9. Section 471 IPC describes a crime if a forged document is used as a genuine. However, in entire documents filed by Opposite Party No. 2 before Trial Court, there is no such document which was forged and later on was used as genuine. The documents filed before school are not available on record, therefore, no offence is made out under Section 471 IPC.

10. Section 467 IPC describes a crime if a document is forged and as referred above, there is no document on record which was forged. It is not on record, whether Aadhar Card or Passport were forged or not. Even particulars of Aadhar Card can be changed since a procedure has been prescribed under Aadhar Act.

11. So far as Section 468 IPC is concerned, it relates to forgery for the purpose of cheating and as referred above since no forgery has been pointed out on basis of any document, since even prima facie, no offences (referred above) are made out under Section 468 IPC also.

12. In aforesaid circumstances, this Court is of the considered opinion that there is no sufficient material to proceed, therefore, no offence is made out against Applicant-1 also.

13. In the result, application is allowed. Impugned summoning order dated 21.11.2023 and non-bailable warrant dated 26.02.2024 as well as entire proceedings of Complaint Case No. 201/2023 (Mohd. Faizan vs. Nazia Majid and others), under Sections 467, 468, 471, 120B/34 IPC, Police Station Sikandrra, District Agra, are hereby quashed.

14. However, this order will not come in the way, if Opposite Party No. 2 places record before school authorities to include his name as father of child, as till date no divorce has been taken place. Otherwise also, name of father will remain in record till it has been disowned in a legal way. It is also observed that in case Opposite Party No. 2 approaches the school to meet with Principal, for this purpose he will be allowed and school records may be corrected and for that Applicant-1 will also cooperate since it would be beneficial for welfare of child.

15. A copy of this order be sent to Principal, Kinder Academy, M-49A, Ground Floor, Near Mother Dairy, Malviya Nagar, New Delhi.

16. Registrar (Compliance) to take steps.

(2024) 8 ILRA 246
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Special Appeal No. 135 of 2024

State of U.P. & Ors.
...Respondents/Appellants
Versus
Amar Singh & Anr.
...Petitioners/Opposite Parties

Counsel for the Appellants:
Sri Jagannath Maurya, Sri Rama Nand Pandey

Counsel for the Respondents:
C.S.C., Sri Anil Kumar Mehrotra

A. Special Appeal-Allahabad High Court Rules, 1952-Ch.VIII, Rule 5-The appellant was dismissed for inadvertently forwarding an objectionable Whatsapp message to a group of government officials, although he promptly deleted the message and tendered an apology, disciplinary proceedings were initiated, culminating in his dismissal-on appeal, the State contended that the writ petition was wrongly filed in the Allahabad bench instead of the Lucknow bench as the cause of action occurred in Lucknow-The court held that the Allahabad bench lacked jurisdiction to entertain the writ petition-jurisdiction cannot be conferred by consent or acquiescence of the parties if the court inherently lacks it.(Para 1 to 46)

The petition is allowed. (E-6)

List of Cases cited:

1. Ram Gopal Chaturvedi Vs St. of M.P.(1969) 2 SCC 240

2. U.O.I. Vs T.V. Patel (2007) 4 SCC 785

3. Manish Kumar Mishra Vs U.O.I. & ors.(2020) 6 ADJ 1

4. Nirmal Dass Kathuria Vs St. Trans. (Applt.) Tribunal, U.P. Lko.(1972) AIR All 200

5. Nasiruddin Vs St. Trans. Applt. Tribunal(1975) AIR SCC 2 671

6. Rashtriya Chinni Mills Adhikari Parishad, Lko. Vs St. of U.P. & ors.(1995) 4 SCC 738

7. Universal Insulators & Ceramics Ltd. Vs Official Liquidator, HC Alld(2019) 19 ADJ 437

8. U.O.I. thru Secy. Ministry of Railways, Railway Board, Rail Bhawan, New Delhi & ors.Vs Dr. A.W. Umrdhar(2021) 2 AIR Mom. R 793

9. U.O.I. & ors.Vs T.V Patel

10. Manish Kumar Mishra & ors.Vs U.O.I. & ors.

11. Sneh Lata Goel Vs Pushplata & ors.(2019) 3 SCC 594

12. Om Prakash Agarwal Vs Vishan Dayal Rajput & anr.(2019) 14 SCC 526

13. Kusum Ingots & Alloys Ltd. Vs U.O.I. & anr.. (2004) 6 SCC 264

14. Shanti Devi Vs U.O.I. (2020) 10 SCC 766

15. Amar Kumar Vs CAT Lko. & ors.Service bench No. 992 of 2010

16. U.O.I. & ors.Vs S.K. Kapoor(2011) 4 SCC 589

17. S.N. Narula Vs U.O.I. & ors.(2011) 4 SCC 591

18. Jagmittar Singh Bhagat Vs Dir. Health Services, Haryana & ors.(2013) 10 SCC 136

19. Pioneer Traders & ors.Vs Chief Contrl. of Imports & Exports Pondicherry (1963) AIR SC 734

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Kunal Ravi Singh, learned Chief Standing Counsel and Sri Fuzail Ahmad Ansari, learned Standing Counsel for the State-appellants and Sri Anil Kumar Mehrotra, learned counsel for respondent no.1-petitioner.

2. The instant intra-court Special Appeal under Chapter VIII, Rule 5 of the Allahabad High Court Rules, 1952 (hereinafter referred as the 'Rules, 1952') has been preferred against judgment and

order dated 21.08.2023 passed by learned Single Judge in Writ A No.11040 of 2020 (Amar Singh vs. State of U.P. and others). For ready reference, the operative portion of the judgment and order dated 21.08.2023 is reproduced as under:-

"……65. Having gone through the authorities cited by the learned counsel appearing for the respective parties, I am of the view that the propositions as discussed in those judgments are not contradictory to each other.

66. The principle of law is well settled that interference by the High Court or Tribunal in the judicial exercise of power would not extend to appreciating the evidence and coming to a different conclusion than what Domestic Tribunal has already arrived at but the question is as to whether this decision making process was sound and was not vitiated and that a man of ordinary prudence would have arrived at a decision/ conclusion which could be said to be a rational one on the material available. It is a case where the department failed to present any evidence whatsoever in support of the charge that petitioner circulated the message to defame the Government.

67. In the case of Union of India v. Sardar Bahadur: (1972) 4 SCC 618, the Court held very clearly that any statement made in a criminal trial would have been said to be admissible had the persons who gave the statement were produced by the department before the Inquiry Officer to be cross-examined by the delinquent employee and having failed to do so the department could not have complained of the Inquiry Officer not appreciating the same.

68. Coming to the authorities cited by learned counsel for the petitioner first in the case of Wednesbury Corporation (supra) I find that in the said case the court of appeal has held that it is entitled to investigate the action of local authority in order to find out whether it had taken relevant material into consideration while arriving at a finding or conversely refused to take into account or neglected it even though available. The court, therefore, held that the answer to the question if goes to the authority or in other words like in the present case, one can conclude that authority's action is within the four corners of the matter which they ought to consider but even such a decision if tested on the IQ of a reasonable man and the Court concludes that such a reasonable man could not come to such a conclusion, the Court would still interfere. So not only decision taking process even the conclusion arrived at for the decision is open to judicial review.

69. In the case of Gohil Vishvaraj Hanubhai (supra) the Court discussed in detailed the Wednesbury unreasonableness on the point of power of judicial review. The Court held that the irrationality of a decision making power would account to akin of 'Wednesbury unreasonableness'. In support of this, the view taken by Lord Diplock was reiterated and it was observed that the decision should be so outrageous in its defiance of logic or accepted moral standards that given an application of mind by a reasonable man, it may not be approved of.

70. In the present case I find that second charge was not at all proved by the Inquiry Officer. The first charge was proved partly only and that too on the ground that petitioner had himself made an admission, fair enough, that while trying to delete the message he got the same forwarded in whatsapp group by wrongly touching the icon. This also happened in the midnight hours, therefore, applying the definition of misconduct given in Strout's

dictionary (supra) there was nothing to demonstrate that the petitioner did it intentionally. It was a case where petitioner did delete the message in the midnight hoursbefore anybody could have read it, however, by way of precaution he messaged other whatsapp group members to delete the message wrongly got sent by him. The department would have been justified in bringing home the charge, had it produced the persons who might have read the message or shown to others or had complained against the petitioner. That being not the case, the charge itself did not stand proved and, therefore, punishment of dismissal from service is held to be shockingly disproportionate. Fact position admitted on record is that petitioner had made a fair admission and upon the said fair admission the department sets up an inquiry and did not find a single employee or the member of the group message who were the employees to have read the message before it was deleted in the midnight hours. This being the admitted factual position, I do not see petitioner to deserve such a harsh punishment of dismissal from service. In my considered view, in the absence of evidence as to circulation of message to pollute mind of people towards the government, the government should have appreciated his courage to show admission and should have warned him to be careful in future.

71. Coming to the argument advanced by learned Additional Advocate General that admission is the best piece of evidence and delinquent employee having admitted that he had forwarded the message, nothing more required to bring home the charge, I find that admission was only to the extent that he got the message forwarded due to inadvertence as he was trying to delete the same and further I find that admission was also that petitioner had asked everyone to delete the message. So admission was as to the inadvertent mistake and not as to the intention to forward the message to defame the Chief Minister or his government. Eventually he wanted and honestly attempted to delete the questionable message. The admission is to be read contextually and not in isolation and so in my considered view there was no admission as to the charge levelled against the petitioner.

72. The principles as discussed in authorities cited by learned counsel for the petitioner as well as learned Additional Advocate General herein this above judgment, I find that the order of dismissal deserves interference.

73. Thus the second argument as to quantum of punishment being shockingly disproportionate to the guilt proved though partly also holds merit and impugned order deserves to be quashed.

74. In view of the above, writ petition succeeds and is allowed. The order dated 7th September, 2020 is hereby quashed. Petitioner shall be reinstated in service and shall be entitled to all consequential benefits.

75. The matter is remitted to the extent that the respondent authority may impose any minor punishment in its discretion taking into consideration that admission of the petitioner and his fairness in reporting to the Government that he got objectionable message forwarded in the whatsapp group in the midnight hours mistakenly and deleted the same within 2-3 minutes and messaged others in whatsapp group to delete the message and also the fact that there was no evidence available that the message was got circulated and was read by members of the whatsapp group or any other member on his mobile through whatsapp message. He can only be just issued with a warning for his such

conduct if otherwise his career has been blotless but for this solitary incident.

76. Appropriate order shall be passed by the State Government within 30 days from the date of production of certified copy of this order.

77. Cost made easy."

FACTUAL MATRIX OF THE CASE

3. Respondent no.1-writ petitioner was appointed on 05.02.2001 on the post of Personal Assistant in U.P. Secretariat, Lucknow on being selected by U.P. Public Service Commission 1. His services were governed by the U.P. Secretariat Personal Assistant Service Rules, 2001 2, U.P. Government Servants Conduct Rules, 1956 3 and U.P. Government Servant (Discipline and Appeal) Rules, 1999 4. Respondent no.1-petitioner claimed that he had received an objectionable Whatsapp message, which he was trying to delete but inadvertently it got forwarded to the Whatsapp group of Additional Private Secretary Cadre. Having realized his mistake, he immediately deleted the said message from the group. Thereafter, respondent no.1-petitioner for his inadvertent mistake, on his own accord, tendered an unconditional apology to the State Functionaries of the Government of U.P. with an assurance that no such mistake will be made by him in future.

4. On his application, wherein he has tendered unconditional apology, the Secretary, Administration initiated a disciplinary proceedings against him under the Rules, 1999. In the disciplinary enquiry the charge sheet was served upon respondent no.1-petitioner, to which he gave a reply. On 25.12.2019, the disciplinary authority sent a proposal to the Additional Chief Secretary, Department of Secretariat, Administration with the recommendation to end the departmental proceedings against the respondent no.1-petitioner giving him warning not to repeat such act in future. The matter was placed before the Chief Secretary, who did not agree with the said proposal. Thereafter, a different proposal was placed to the Hon'ble Chief Minister by the Chief Secretary seeking his consent on two proposed alternate punishment against the petitioner (respondent no.1 herein), i.e. the first proposal was "award punishment of censure entry and revert him on the grade of basic salary" and second proposal was "removal from service which does not disqualify from future employment".

5. Hon'ble Chief Minister (as Minister concerned) had accorded approval on 24.02.2020 on second proposal i.e. removal from service of respondent no.1-petitioner, which does not disqualify him from future employment. Consequently, the order dated 7.9.2020 was passed, whereby the services of respondent no.1-petitioner was dispensed with. However, dismissal would not disqualify him from future employment.

6. Aggrieved with the said dismissal order, the respondent no.1-petitioner had invoked the writ jurisdiction by preferring Writ-A No.11040 of 2020 (Amar Singh vs. State of U.P. and others) precisely on the ground that the entire procedure so adopted during disciplinary proceeding was dehors the procedure prescribed under the relevant service rules, with the following reliefs:-

"(A) Issue a writ, order or direction in the nature of Certiorari quashing the impugned order dated 07.09.2020 passed by respondent no.2.

(B) Issue a writ, order or direction in the nature of Mandamus commanding and directing the respondents to not interfere in the working of the petitioner as Additional Private Secretary in the Department of Secretariat Administration, Section-2 (Establishment), Government of U.P. Lucknow and pay his regular salary month to month."

7. In the writ proceeding, it was pressed by the State-respondents that the petitioner therein had admitted to have circulated the Whatsapp message. It was further argued that the termination order does not dis-entitle the petitioner (respondent no.1 herein) from seeking appointment elsewhere, so there was nothing illegal, which would call for interference by the writ Court.

8. After hearing the parties, learned Single Judge vide judgment and order dated 21.08.2023 had allowed the writ petition and held that the alleged enquiry was in gross violation of principle of natural justice and the procedure, which was adopted during the enquiry was also dehors the Rules. Accordingly, the impugned order of dismissal from service was struck down. It was also opined that the quantum of punishment was shockingly disproportionate to the guilt proved though partly holds merit. Learned Single Judge had set aside the termination order and directed for reinstatement of petitioner in service along with all consequential benefits. Further the matter was remitted with observation that the respondent authority may impose any minor punishment in its discretion taking into consideration the admission of the petitioner and his fairness in reporting to the Government that he got objectionable message, forwarded in the whatsapp group.

9. Aggrieved with the judgment and order passed by learned Single Judge, the State-appellants have preferred the instant intra Court appeal.

SUBMISSIONS ON BEHALF OF STATE-APPELLANTS

10. The basic ground taken in the instant appeal is that the dispute pertains to District Lucknow as the respondent no.1-petitioner was employed as Addl. Private Secretary in the Department of Secretariat Administration, Section 2 (Establishment), Civil Secretariat, Lucknow; entire disciplinary proceedings were initiated and culminated at Lucknow and consequently the order dated 7.9.2020 (impugned in the writ petition) was passed by the Authority constituted at Lucknow namely Addl. Chief Secretary, Department of Secretariat Administration, Section-2 (Establishment), Government of U.P., Lucknow.

11. Sri Kunal Ravi Singh, learned Chief Standing Counsel and Sri Fuzail Ahmad Ansari, learned Standing Counsel have vehemently submitted that the aforementioned facts are sufficient enough to highlight the fact that no cause of action arose at Prayagraj, which could confer jurisdiction to the Allahabad High Court to entertain the writ petition. All cause of action falls within the territorial jurisdiction of Lucknow Bench of this Court. As such the judgment and order passed by learned Single Judge is without jurisdiction and liable to be set aside. Learned Standing Counsel submitted that the respondent no.1-petitioner had heavily relied upon paragraph 67 of the writ petition, wherein it is averred that part cause of action arose at Prayagraj as the U.P. Public Service Commission, Allahabad (respondent no.4 in the writ petition) had consented for

imposition of punishment upon the respondent no.1-petitioner as per Rule 16 of Rules, 1999. He submitted that the claim set up by the respondent no.1-petitioner for pressing the relief at Allahabad High Court as part cause of action arose at Prayagraj is wholly incorrect. He submitted that Rule 16 of Rules, 1999 is similar to Article 320 (3) (c) of the Constitution of India. Rule 16 of the Rules, 1999 and Article 320 (3) (c) of the Constitution of India refers to consultation with the Public Service Commission in all disciplinary matters. In such a situation, it is to be seen merely as a consultation. It would not give any legal right to the person with regard to jurisdiction.

12. He submitted that the said question is no longer res integra and the Supreme Court in **State of U.P. v. Manbodhan Lal Srivastava** 5 has held that Article 320 (3) does not afford the public servant any cause of action, which would confer any rights on the public servant so as to enable him to relief under Article 226 of the Constitution of India. The Apex Court had categorically held that *"it is not a right which can be recognized and enforced by a writ"*. He has also placed reliance upon the judgment passed by the Apex Court in **Ram Gopal Chaturvedi v. State of M.P.**6, wherein three Judges Bench had approved the ratio laid down in Manbodhan Lal Srivastava (Supra) and reiterated that the consultation with the Commission did not confer any right on the public servant. Similar view has also been taken by the Apex Court in **Union of India v. T.V. Patel** 7, which also approved that Article 320 (3) (c) does not confer any right upon the public servant to challenge the same. In the said case, the consultation was done from the Public Service Commission and upon advice of the Commission, the final order was passed. Shri Ansari submitted that even in the said case, Hon'ble Apex Court unequivocally approved the ratio laid down in Manbodhan Lal Srivastava (Supra) and held that no cause of action arose to the public servant upon consultation from the Commission.

13. Shri Ansari, learned Standing Counsel, in this backdrop, submitted that consultation or the lack of same with the Public Service Commission does not confer any cause of action upon the public servant so as to confer him any right to challenge the same in writ jurisdiction. Even otherwise, the respondent no.1-petitioner did not challenge the advice given by the Commission inspite of the fact that the same has been reiterated while passing the punishment order. Safely it can be argued that the advice of the Commission merged with the final punishment order, which was passed at Lucknow. He further assertively argued that every fact pleaded in the writ petition would not constitute a cause of action at Allahabad. The fact, which is enumerated in para 67 of the writ petition would have no bearing on the lis and that so does not give cause of action so as to confer territorial jurisdiction upon the Court concerned. In support of his submissions, he has placed reliance upon the Full Bench judgment of this Court in **Manish Kumar Mishra v. Union of India & Ors.**8, wherein similar question was considered and it was held as follows:-

"....59. The expression "cause of action" has been defined in Halsbury's Laws of England19, as follows:-

"20. Cause of action. "Cause of action" has been defined as meaning simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The

phrase has been held from earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. "Cause of action" has also been taken to mean that a particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.

The same facts or the same transaction or event may give rise to more than one effective cause of action.

A cause of action arises wholly or in part within a certain local area where all or some of the material facts which the plaintiff has to prove in order to succeed arise within that area."

14. Shri Ansari, learned Standing Counsel stated that the writ petition was filed for a writ of certiorari against the order passed by Addl. Chief Secretary, Department of Secretariat (Administration) situated at Lucknow and the writ petition was entertained at Allahabad and was finally decided. He submitted that since there was no order as contemplated by second proviso to Article 14 of the U. P. High Courts (Amalgamation) Order 1948, hence writ petition pertaining to jurisdiction of Lucknow Bench of this Court could neither have been entertained much less decided by this Court. In support of the submissions, he has relied upon Full Bench judgment of this Court in the case of **Nirmal Dass Kathuria v. State Transport (Appellate) Tribunal, U. P., Lucknow** 9, wherein five questions were referred for the opinion of the Full Bench, which for ready reference are reproduced as under–

"1. Can a case falling within the jurisdiction of the Lucknow Bench of this Court be presented at Allahabad ?

2.Can the Judges sitting at Allahabad summarily dismiss a case presented at Allahabad pertaining to the jurisdiction of the Lucknow Bench.

3.Can a case pertaining to the jurisdiction of the Lucknow Bench, presented and entertained at Allahabad, be decided finally by the judges sitting at Allahabad, without there being an order as contemplated by the second proviso to Article 14 of the U. P. High Courts (Amalgamation) Order, 1948 ?

4.What is the meaning of the expression "in respect of cases arising in such areas in Oudh" used in the first provision to Article 14of the High Courts (Amalgamation) Order, 1948 ? Has this expression reference to the place where the case originated or to the place of sitting of the last court or authority whose decree or order is being challenged in the proceeding before the High Court ?

5.Whether this writ petition can be entertained and heard by the Judges sitting at Lucknow ?"

15. He submitted that the Full Bench by majority answered the question nos.1, 2 and 3, which are relevant for the present matter, as follows :

"Question no. 1. A case falling within the jurisdiction of the Judges at Lucknow should be presented at Lucknow and not at Allahabad".

"Question No. 2. However, if such a case is presented at Allahabad the Judges at Allahabad cannot summarily dismiss it only for that reason. The case should be returned for filing before the Judges at Lucknow, and where the case has been mistakenly or inadvertently entertained at Allahabad a direction should be made to the High Court office to

transmit the papers of the case to Lucknow."

"Question No. 3. A case pertaining the jurisdiction of the Judges at Lucknow and presented before the Judges at Allahabad cannot be decided by the Judges at Allahabad in the absence of an order contemplated by the second proviso to Article 14 of the of the U. P. High Courts (Amalgamation) Order, 1948."

16. He submitted that the findings given by the Full Bench of this Court on aforesaid three questions have been affirmed by the Hon'ble Apex Court in the case of **Nasiruddin Vs. State Transport Appellate Tribunal** 10. The Hon'ble Apex Court in the said case had observed as under :

"37. To sum up, our conclusions are as follows. First, there is no permanent seat of the High Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the Order. Second, the Chief Justice of the High Court has no power to increase or decrease the areas in Oudh from time to time. The areas in Oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas. Third, the Chief Justice has power under the second proviso to paragraph 14 of the Order to direct in his discretion that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh area shall be instituted or filed at Allahabad instead of Lucknow is wrong. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to paragraph 14 of the Order be directed to be heard at Allahabad. Fourth, the expression "cause of action" with regard to a civil matter means that it should be left to the litigant to institute cases at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. If the case of action arises wholly within Oudh areas then the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in Oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified Oudh areas and part of the cause of action arises outside the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad. Fifth, a criminal case arises where the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the facts and the provision regarding jurisdiction, it may arise in either place."

"38. Applications under Article 226 will similarly lie either at Lucknow or at Allahabad as the applicant will allege that the whole of cause of action or part of the cause of action arose at Lucknow within the specified areas of Oudh or part of the cause of action arose at a place outside the specified Oudh area."

"39. The answers given by the High Court to the first three questions are correct save as modified by our conclusions aforesaid."

"40. The answer given by the High Court to the fourth question is set

aside. The meaning of cases arising in Oudh areas will be found by appropriate courts in the light of this judgment."

"41. The answer to the fifth question is discharged. The matters are sent back to the High Court for disposal in accordance with this judgment."

17. Shri Ansari, learned Standing Counsel submitted that admittedly, in the present case, the entire cause of action falls within the territorial jurisdiction of Lucknow Bench of this Court as the dispute pertains to territorial jurisdiction of Lucknow Bench. It cannot even remotely be said that the part cause of action arose at Allahabad so as to confer jurisdiction upon this Court to entertain and decide the petition.

18. Reliance, in this regard, has also been placed on the judgment in **Rashtriya Chinni Mills Adhikari Parishad, Lucknow v. State of U.P. & Ors.**11. Emphasis has been given on paragraph 16 of the said judgment, which for ready reference, is reproduced as under:-

"Mr. Satish Chandra, learned senior advocate appearing for the appellant has contended that even on the reasoning of the Division Bench judgment itself the conclusions reached by the Bench are erroneous. We see force in the contention. The Division Bench of the High Court in Ram Rakh Vyas vs. Union of India AIR 1977 Rajasthan 243 (the judgment delivered by A.P. Sen , J. as the learned Judge then was), came to the conclusion that the words "arising in " in the context, mean "pertaining to the districts of" or "arising from". It is not disputed that in the present case the order/notification and the advertisement were issued by the State Government at Lucknow. Without there being an order/notification by the Government there could be no cause of action at all. The petitioner got aggrieved only from the order/notification which "arose" from Lucknow. The grievance of the petitioner "arose" at Lucknow which is within the Oudh area and as such on the plain reading of the relevant provisions of clause 14 of the Amalgamation Order, the Bench at Lucknow had the jurisdiction to deal with the matter."

19. He has also placed reliance on the judgment in **Universal Insulators and Ceramics Ltd. v. Official Liquidator, High Court, Allahabad** 12. He has relied upon paragraph 140 of the said judgment, which for ready reference, is reproduced as under:-

"140. In the present case, this issue is not at all involved, hence, we do not find that judgment in Dr. Manju Verma (supra) takes us any further on the question with which we are concerned. We, therefore, answer question (2) holding that since jurisdiction of cases to be entertained at Lucknow and Allahabad are distinct and exclusive over demarcated territories, it renders an order passed by Judges sitting at a place in a matter over which they have no jurisdiction, as nullity."

20. He further elaborated that even in case, the approval of the Commission dated 21.08.2020 would have been assailed at the initial stage while pressing the writ petition even that could not have conferred a territorial jurisdiction in favour of the petitioner to press the relief before this Court as the advice of the Commission is not mandatory and it does not give cause of action to the employee concerned. The reliance has also been placed on the judgment passed by the Division Bench of

the Bombay High Court in the case of **Union of India through Secretary, Ministry of Railways, Railway Board, Rail Bhawan, New Delhi and others vs. Dr. A.W. Umrdkar** 13, paragraphs-6 and 7 of the same are being reproduced herein as under :

"6. The only point falls for consideration is about non-supply of advice sought from UPSC by the respondent. In this regard, the appellant would urge that, there is no legal requirement of supplying the copy of UPSC advice before passing the order of punishment. It is brought to our notice that the copy of advice was provided by the Department at the time of serving punishment order. In support of said submission the appellant has relied on the decision of Karnataka High Court in the case of The Secretary, Ministry of Railways, New Delhi v. Sh. Norman David Fernandez and anr. (Writ Petition No. 15852 of 1998) decided on 27.08.2001. In said case, while deciding similar issue, the Division Bench of Karnataka High Court held that obtaining advice from UPSC under Article 320(3)(c) is not mandatory requirement. Coincidentally, the said petition was also relating to Railway Board based on similar Rules. Besides that, the petitioner relied on the decision of Hon'ble Supreme Court in the case of Union of India v. T.V. Patel 2007 Lawsuit(SC)466. In said case, it is ruled that non-supply of copy of advice tendered by UPSC before passing final order does not afford the rights nor gives cause of action to the employee. The Hon'ble Supreme Court by referring it's earlier decision in the case of State of U.P. v. Manbodhan Lal Srivastava 1958 SCR 533 ruled that, order of punishment passed without looking to the consultation report of UPSC is valid. In other words, supply of consultation report to the delinquent is not a mandatory requirement.

7 Reverting to the impugned order we find that non-supply of UPSC consultation report was sole ground for allowing the Original Application. In view of the law laid by the Hon'ble Supreme Court as well as view taken by the Karnataka High Court the issue is no longer res integra. There is no legal requirement to furnish the copy of consultation report as the UPSC to the employee."

21. He has also placed reliance upon the judgment passed by the Apex Court in **Union of India and others vs. T.V. Patel** (Supra), for ready reference paragraphs-14 and 17 of which are also reproduced herein under:

"14. A Constitution Bench of this Court in the case of State of U.P. v. Manbodhan Lal Srivastava Manu/SC/0123/1957: (1958)IILLJ273SC, considered the question as to whether the consultation of the Commission under Article 320(3)(c) is mandatory and binding on the appropriate authority.

17. In view of the law settled by the Constitution Bench of this Court in the case of Srivastava (supra) we hold that the provisions of Article 320(3)(c) of the Constitution of India are not mandatory and they do not confer any rights on the public servant so that the absence of consultation or ***any irregularity in consultation process or furnishing a copy of the advice tendered by the UPSC, if any, does not afford the delinquent government servant a cause of action in a court of law."*** *(Emphasis supplied)*

22. Reliance has also been placed upon Full Bench decision of this Court in

Manish Kumar Mishra and others vs. Union of India and others (Supra), of which paragraphs 11, 12, 20 and 21 for ready reference are being reproduced herein as under:

"11. From the above, it is evident that there can never be an encyclopedic exposition as to what would constitute cause of action in a case. The decisions of the Full Bench and the Division Benches of this Court and the Apex Court should not be read to exhaustively enunciate as to when and how the Court should determine in a case that the cause of action, wholly or in part, has arisen within its territorial limits. Peculiar facts in the context of the subject matter of the litigation, and relief claimed are the only guiding factors for the learned Judge(s) to decide. It is to be entirely left at the discretion of the Judge(s) considering the petition to ascertain whether the cause of action did exist entitling the petitioner to approach the High Court concerned.

12. Each and every fact pleaded in the writ petition cannot by itself constitute a cause of action. Facts which have no bearing on the lis or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the Court concerned. In view of the expression used in clause (2) of Article 226 of the Constitution, even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter. Integral facts pleaded must have nexus or relevance with the lis so as to constitute a cause of action.

20. 'Cause of action' implies a right to sue. The material facts which are imperative for the suitor to allege and prove constitutes the cause of action. It has been interpreted to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. The question as to whether the Court has territorial jurisdiction to entertain a writ petition, has to be decided on the basis of averments in the petition, truth or otherwise thereof, however, would be immaterial.

21. As cause of action is the bundle of facts to examine the issue of jurisdiction it is necessary that one of the interlinked fact must have occurred in a place where the case has been instituted. All necessary facts must form an integral part of the cause of action. The fact must have direct relevance in the lis involved. It is not that every fact pleaded can give rise to a cause of action so as to confer jurisdiction on the Court in whose territorial jurisdiction it has occurred."

SUBMISSIONS ON BEHALF OF RESPONDENT NO.1- PETITIONER

23. Sri Anil Kumar Mehrotra, learned counsel appearing for respondent no.1/petitioner submitted that no such objection of territorial jurisdiction was taken before the Single Judge, and hence, it is not open for the State-appellant to raise such objection at this stage. He further submitted that cause of action has arisen within the territorial jurisdiction of this Court, inasmuch as, opinion of the Commission was mandatory and had been availed, since the Commission falls within the territorial jurisdiction of the writ court and the Commission was made party and notice was also served upon them. No objection at that point of time was taken by the State or the Commission, even though the matter was heard considerably for long time. To buttress this argument, he has placed reliance on a judgment passed by

Hon'ble Supreme Court in the matter of **Sneh Lata Goel vs. Pushplata and others** 14. The relevant portion of the judgment are quoted below for ready reference :

"Section 21 CPC makes it clear that an objection to the want of territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit. Hence, it has to be raised before the court of first instance at the earliest opportunity, and in all cases where issues are settled, on or before such settlement. Moreover, it is only where there is a consequent failure of justice that an objection as to the place of suing can be entertained. Both these conditions have to be satisfied.

Where the defect in jurisdiction is of kind which falls within Section 21 CPC or Section 11 of the Suits Valuation Act, 1887, an objection to jurisdiction cannot be raised except in the manner and subject to the conditions mentioned thereunder. The judgment in Kiran Singh, AIR 1954 SC 340, on which reliance was placed by the respondent, holds that an objection to territorial jurisdiction and pecuniary jurisdiction is different from an objection to jurisdiction over the subject-matter. An objection to the want of territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit."

24. He has further placed reliance on the judgment passed by Hon'ble Supreme Court in the matter of **Om Prakash Agarwal vs. Vishan Dayal Rajput and Anr.**15, wherein it has been held that objection as to the place of suing should be taken by the party concerned in the court of first instance at the earliest possible opportunity and the objection to this effect shall not be allowed by the Appellate or Revisional Court.

25. He further stated that the ground of jurisdiction has been well taken up in para 67 of the writ petition, which is quoted below:-

"That it is also relevant to mention here that, in the instant case, the opinion of the Uttar Pradesh Public Service Commission was sought and Uttar Pradesh Pubic Service Commission took contrary view to the findings of the enquiry officer, relying on which, the disciplinary authority took the decision to award major penalty of dismissal from service. Thus, it was the incumbent upon the State Government to have supplied a copy of the advice of the Uttar Pradesh Public Service Commission to the petitioner by way of show cause notice and the petitioner ought to have been given an opportunity to meet the proposed punishment. However, the aforesaid procedure has not been followed in the instant case resulting in violation of the principle of natural justice. The aforesaid contention of the petitioner draws force from a judgment and order dated 18.01.2016 passed by a division bench of this Hon'ble Court in the writ petition no.992 (M/B) of 2010 (Amar Kumar vs. Central Administrative Tribunal, Lucknow and Ors) and judgment and order passed by the Hon'ble Supreme Court in the case of S.N. Narul vs. Union of India and others reported in (2011) 4 SCC 591 and in the case of Union of India and others vs. S.K. Kapoor reported in (2011) 4 SCC 589."

26. To the aforesaid, the State gave reply in para 63 of the counter affidavit, wherein it was stated as follows:-

"That the contents of para 67 of the writ petition are not admitted, hence denied. In reply thereto it is submitted that a detailed and proper reply of the same has already been given in the preceding paras of this affidavit."

27. Learned counsel for the respondent no.1-petitioner further submitted that the opinion of the Commission is mandatory and in case of non supply of copy of the opinion of the Commission, the order would be unsustainable, since the Commission is in Allahabad, hence cause of action had also arisen in Allahabad, and hence, the writ court had the territorial jurisdiction to hear and decide the matter.

28. He further submitted that Hon'ble Supreme Court in the matter of **M/s Kusum Ingots and Alloys Ltd. vs. Union of India and another** 16 has held that keeping in view of the expression used in Article 226 (2) of the Constitution of India indisputably even a small fraction of cause of action accrues within the jurisdiction of the High Court, the High Court will have jurisdiction in the matter. The same view has been taken by Hon'ble Supreme Court in the matter of **Shanti Devi vs. Union of India** 17.

29. Since, the Commission is in Allahabad and opinion of the Commission was sought before removal/dismissal of respondent no.1-petitioner from service, hence, part of cause of action is said to have arisen in Allahabad which falls within the jurisdiction of this Court, where the writ petition was preferred and decided.

30. Learned counsel for the respondent no.1-petitioner has further placed reliance on a judgments passed by Hon'ble Supreme Court in the matter of **Amar Kumar vs. Central Administrative Tribunal, Lucknow and ors.18, Union of India and ors. vs. S.K. Kapoor 19 and S.N. Narula vs. Union of India and ors.**20

REJOINDER SUBMISSIONS ON BEHALF OF STATE- APPELLANTS QUA BELATED OBJECTION WITH REGARD TO JURISDICTION AT APPELLATE STAGE

31. Shri Ansari, learned Standing Counsel has submitted that the issue with regard to jurisdiction of the Court to entertain the writ petition escaped from being raised before the learned Single Judge. The issue with regard to jurisdiction of the Court has been raised as Grounds 8 and 9 of the present special appeal. It is submitted that the appellant is entitled to raise the question of jurisdiction of the Court concerned even at the appellate stage, if not taken earlier, as the same goes to the root of the matter. It is submitted that the conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court. If the Court did not have jurisdiction to entertain a matter and went on to pass an order, then the same would amount to a nullity. Such a question of jurisdiction can be raised at any point of time. Reliance in this regard has been placed on the judgment in **Jagmittar Singh Bhagat v. Dir. Health Services, Haryana & Ors.**21, wherein Hon'ble Supreme Court held, *"Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such*

an issue can be raised at any stage of the proceedings."

32. He further submitted that even though the objection with regard to jurisdiction was not taken before learned Single Judge, the same would not give jurisdiction to entertain the writ petition and pass orders on it. Such an order would be without jurisdiction. He has relied upon the judgment in **Pioneer Traders & Ors. v. Chief Controller of Imports and Exports Pondicherry** 22, wherein the Supreme Court held, *"Where an authority whether judicial or quasi-judicial has in law no jurisdiction to make an order the omission by a party to raise before the authority the relevant facts for deciding that question cannot clothe it with jurisdiction."*

33. He submitted that the High Court in Universal Insulators and Ceramics Ltd. (Supra) clearly held that a belated objection to the jurisdiction would have no effect when the Court did not have any jurisdiction over the matter. It was further held that mere delay in raising objections will not validate the order, since, the order lacks patent jurisdiction. The Allahabad High Court did not have any jurisdiction to entertain the writ petition at Allahabad and, therefore, the order was without jurisdiction amounting to a nullity. Such a question of jurisdiction can be raised at any point of time. Since the appeal is the continuation of the writ petition, the said objection can be raised in the appellate forum.

ANALYSIS BY THE COURT

34. Heard rival submissions, perused the record and respectfully considered the judgments cited at Bar.

35. In the present matter, learned counsel for the State-appellants, during the course of hearing, have specifically submitted that they are pressing mainly on the ground qua territorial jurisdiction of the writ Court.

36. Hon'ble the Supreme Court in **Jagmittar Singh Bhagat v. Dir. Health Services, Haryana & Ors.** (Supra) has held that indisputably it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. The relevant para 7 of the said judgment is reproduced as under:-

"7. Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior Court, and if the Court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the roots of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a Court or Tribunal becomes irrelevant and unenforceable/ inexecutable once the forum is found to have no jurisdiction. Similarly, if a Court/Tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetuate and perpetrate, defeating the legislative animation. The Court cannot derive jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply. (Vide: United Commercial Bank Ltd. v. Their Workmen, AIR 1951 SC 230; Smt. Nai Bahu v. Lal

Ramnarayan & Ors., AIR 1978 SC 22; Natraj Studios (P) Ltd. v. Navrang Studios & Anr., AIR 1981 SC 537; and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar & Ors., AIR 1999 SC 2213).”

37. Hon’ble the Supreme Court in **Pioneer Traders & Ors. v. Chief Controller of Imports and Exports Pondicherry** (Supra) has held that where an authority whether judicial or quasi-judicial has in law no jurisdiction to make an order, the omission by a party to raise before the authority the relevant facts for deciding that question cannot clothe it with jurisdiction. Relevant para 38 of the said judgment is reproduced as under:-

“38. These facts can however make no difference to the position in law that if in fact the importations were made on the basis of contracts concluded before November 1, 1954, the Sea Customs Act would not apply and the Collector or the Central Board of Revenue would have no jurisdiction to make any order of confiscation or penalty. Where an authority whether judicial or quasi- judicial has in law no jurisdiction to make an order the omission by a party to raise before the authority the relevant facts for deciding that question cannot clothe it with jurisdiction.”

38. In **Universal Insulators and Ceramics Ltd.** (Supra), this Court has held that mere delay in raising objection will not validate the order, since the order lacks patent jurisdiction. The relevant paragraphs 140, 141 & 145 of the said judgment are reproduced as under:-

“140. In the present case, this issue is not at all involved, hence, we do not find that judgment in Dr. Manju Verma (supra) takes us any further on the question with which we are concerned. We, therefore, answer question (2) holding that since jurisdiction of cases to be entertained at Lucknow and Allahabad are distinct and exclusive over demarcated territories, it renders an order passed by Judges sitting at a place in a matter over which they have no jurisdiction, as nullity.

141. In this very context and answering question (2), we think that even question (3) can be considered simultaneously as to whether objection as to territorial jurisdiction can be raised after a long time i.e. after eight years in the case in hand, and whether appellant's objection should be declined by applying principle of Section 21 C.P.C. that such objection was not raised earlier.

145. When we look at aforesaid judgment and apply it to facts of present case, on the one hand, it appears that it is a simple case of objection relating to territorial jurisdiction, but we find that here objection is in respect of subject-matter also. Cases relating to winding up, upto the stage of Section 439 of Act, 1956, arisen in the area within jurisdiction of Judges sitting at Lucknow, are not within jurisdiction of Judges at Allahabad. Therefore, Judges sitting at Allahabad lack jurisdiction on subject-matter also since, after proceeding under Section 439 of Act, 1956, Judges at Allahabad will have jurisdiction but not earlier thereto. Therefore, winding up matter in the present case involves want of jurisdiction on subject-matter also to Judges sitting at Allahabad, hence, order under appeal, in our view, is without jurisdiction and cannot be sustained. In such a situation, belated objection will make no effect.”

39. In this backdrop, we find that if the Court lacks inherent jurisdiction,

merely participation of the other party does not amount to any acquiescence to the jurisdiction of the Court. We also find that the consultation with the Public Service Commission does not afford the petitioner a cause of action to prefer the writ petition at Allahabad.

40. At this stage, it is relevant to refer to the U.P. High Courts (Amalgamation) Order, 1948 23. In 1948, Governor General in exercise of powers under Section 229 of G.I. Act, 1935 issued Amalgamation Order published in Gazette of Govt. of India (Extraordinary) dated 19.07.1948. It provided that it shall come into force from the date of publication i.e. 19.07.1948. In Article/Clause 2, it defines two terms i.e. "appointed day" and "existing High Courts" and same read as under :

"2.(1) In this order-

"appointed day" means the twenty-sixth day of July, 1948; and "existing High Courts" means the High Courts referred to in Section 219 of the Act, as the **High Court in Allahabad** and the **Chief Court in Oudh**.

(2) The Interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament."

(emphasis added)

41. Article/Clause 3 of U. P. High Courts (Amalgamation) Order, 1948, provided that from appointed day i.e. 26.07.1948, High Court in Allahabad and Chief Court in Oudh/Avadh shall be amalgamated and shall constitute one High Court in the name of "High Court of Judicature at Allahabad", In subsequent part of Order, 1948 it has been referred as "New High Court". Article/Clause (3) is reproduced hereinunder :

"3. As from the appointed day, the High Court in Allahabad and the Chief Court in Oudh shall be amalgamated and shall constitute one High Court by the name of the **High Court of Judicature at Allahabad** (hereinafter referred to as **"the new High Court")."**

(emphasis added)

42. All the existing Judges, whether Permanent or Additional and Acting Judges in the existing High Court, became Judges in the same capacity of "New High Court". Article/Clause 5 provided that the person who, immediately before appointed day, is the Chief Justice of High Court in Allahabad shall be the Chief Justice of "New High Court", meaning thereby Chief Justice of High Court in Allahabad became Chief Justice of Amalgamated High Court i.e. "New High Court". Article/Clause 5 (2) provided the order of other Judges i.e. Chief Judge of High Court in Oudh/Avadh, Puisne Judges of High Court in Allahabad and Puisne Judges of Chief Court in Oudh/Avadh and additional and acting Judges. It says that firstly, the former Chief Judge of High Court in Oudh/Avadh and former Puisne Judges of the High Court in Allahabad, shall be placed according to the priority of their respective appointments in their capacity and thereafter, former Puisne Judges of Chief Court in Oudh/Avadh according to the priority of their respective appointments shall be placed.

43. Then comes Article/Clause 14 of Order, 1948, which prescribes for sitting of "New High Court" and it reads as under :

"14. The new High Court and the Judges and Division Courts thereof, **shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the**

Governor of the United Provinces, appoint :

Provided that **unless Governor** of the United Provinces with the **concurrence of the Chief Justice, otherwise directs, such Judges of the new High Court, not less than two in nubmer, as the Chief Justice, may, from time to time nominate, shall sit at Lucknow,** in order to **exercise in respect of cases arising in such areas in Oudh,** as the **Chief Justice may direct, the jurisdiction and power for** the time being vested in the **new High Court**.

Provided further 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."**

(emphasis added)

44. We also find that the findings given by the Full Bench of this Court in Nirmal Dass Kathuria v. State Transport (Appellate) Tribunal, U.P., Lucknow (Supra) qua the jurisdiction of the High Court have been affirmed by Hon'ble Apex Court in Nasiruddin (Supra). The relevant paragraphs of the said judgment have already been quoted earlier.

CONCLUSION

45. In view of the above discussion and settled law on the subject, we find that the dispute in the writ petition clearly falls within the territorial jurisdiction of the Lucknow Bench of this Court. We are of the considered opinion that the writ petition was wrongly entertained and decided by the writ Court. Therefore, the impugned judgment passed by learned Single Judge is liable to be set aside and the same is accordingly set aside.

46. The special appeal is accordingly **allowed** with liberty to respondent no.1-petitioner to file the writ petition, if so advised, at Lucknow Bench of this Court for appropriate remedy.

(2024) 8 ILRA 263
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.08.2024

BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE JASPREET SINGH, J.

Special Appeal Defective No. 453 of 2024

Chandra Prakash Tiwari ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Shrikant Mishra, Advocate

Counsel for the Respondents:
Sri Pratul Kumar Srivastava Standing Counsel

A. Special Law- Allahabad High Court Rules, 1952-Ch.VIII, Rule 5-The appellant challenged the dismissal of his writ petition which had sought relief from a disciplinary punishment imposed in 2013-the appellant failed to provide explanation for the delay of 9 years in filing appeal-For an appeal to be considered the party must provide a sufficient and credible explanation for any delay in filing-In this case, the court held that an appellant cannot simply shift blame to their counsel without adequate proof-The court emphasized that a failure to monitor the status of the case, especially when information is publicly available, weakens the justification for delay-Thus, the court reaffirmed that the exercise of writ jurisdiction under Article 226 is discretionary-while the limitation act does not strictly apply to the writ petitions courts have developed the doctrine of laches to prevent unreasonable delays in seeking judicial remedies-The court

emphasized that sufficient cause must be shown to condone delays, regardless of their length.(Para 1 to 17)

The petition is dismissed. (E-6)

List of Cases cited:

1. Printers Mysore Ltd. Vs M.A. Rasheed & ors.(2004) 4 SCC 460

2. Northern India Glass Indus. Vs Jaswant Singh & ors.(2003)AIR SC 234.

3. C/M Distt Coop. Bank Ltd. Vs UP Coop. Institutional Service Board & anr.. (2019) SCC Online, All 4646

4. Constable (Civil Police) Sandeep Kuamr Vs U.P. Public Service Tribunal, Lko & ors. MANU/UP/2268/2023

(Delivered by Hon'ble Arun Bhansali, C.J.
&
Hon'ble Jaspreet Singh, J.)

1. Heard Sri Shrikant Mishra, learned counsel for the appellant and Sri Pratul Kumar Srivastava, learned Standing Counsel for the State-respondents.

2. The instant special appeal has been filed against the order dated 13.12.2022 passed by the learned Single Judge in Writ-A No.8305 of 2022 (Chandra Prakash Tiwari Vs. State of U.P. & others) whereby the writ petition filed by the appellant was dismissed noticing that the order impugned in the writ petition was of the year 2013 and no cogent explanation was given by the appellant for filing the writ petition after nine years.

3. Learned Single Judge also noticed that there was sufficient material on the basis of which the impugned order of punishment had been passed after affording an opportunity of hearing hence it declined to interfere in exercise of its jurisdiction under Article 226 of the Constitution of India.

4. The instant appeal is also accompanied by an application seeking condonation of delay of 583 days bearing I.A.No.1 of 2024.

5. Submission of the learned counsel for the appellant is that his erstwhile counsel Sri Ranjit Singh had assured the appellant of filing his special appeal against the judgment of the learned Single Judge and since 30.01.2023 he kept informing the appellant that his appeal had been filed and would be taken up soon after the Holi Vacation. Thereafter similar response was given by his counsel that his appeal would be taken up in the forthcoming month and this went on through the entire year of 2023 and even till the month of May 2024. It is only thereafter the appellant suspected that perhaps his counsel was not guiding him appropriately and he then made a complaint against his erstwhile counsel and engaged the present counsel who has filed the instant appeal and in the aforesaid context it has been urged that the delay in filing the appeal be condoned.

6. Learned counsel for the appellant has further urged that the impugned order of punishment which was affirmed by the Appellate Authority is bad as it does not meet the basic standard of compliance with the principles of natural justice; inasmuch as the orders are without any reason, hence were liable to be set aside but this aspect has not been taken note of by the learned Single Judge while dismissing the writ petition. Accordingly, the instant appeal be heard on merits.

7. The Court has considered the submissions of the learned counsel for the

parties and from the perusal of the material on record, it appears that the reason as indicated by the appellant for seeking condonation of delay of 583 days is not adequately explained as the blame has been put on the counsel allegedly engaged by the appellant who kept giving him incorrect information regarding filing of the special appeal.

8. The explanation does not inspire confidence for more than one reason.

Firstly, the present appellant has been engaged in several litigation and he is not new to it. He had filed three writ petitions since 2017 and it cannot be assumed that he did not know about the legal requirements and that he could not gain information of the status of his case which otherwise is available in public domain and could be ascertained easily from the website of the Court.

Secondly, in this affidavit seeking condonation of delay, it has not been disclosed on which date the appellant had got his affidavit sworn at the time when he had handed over the papers to his erstwhile counsel. Had there been some truth to his alleged allegation then he could have indicated the date he got his affidavit sworn in the first instance as without it his special appeal could not have been filed by his erstwhile counsel.

Thirdly, it appears that deliberate allegations have been levelled against his erstwhile counsel only to cover the period of delay. In paragraph-12 of the affidavit seeking condonation of delay, it has been stated that the appellant had made a complaint against the said counsel with the Bar council but from the perusal of the complaint which has been brought on record as Annexure-A-1, there is no detail of the said counsel mentioned in the said complaint as neither his address nor his enrollment number or his mobile number has been mentioned. Moreover, it has not been indicated as to how the complaint was sent to the Bar Council as there is no postal receipt nor any receiving is on record nor any update or status of the complaint has been mentioned which clearly indicates that the said complaint is merely an eye-wash and has been deliberately introduced for seeking condonation of delay. The alleged complaint made against his lawyer being bereft of necessary details does not inspire confidence.

Fourthly, there is another reason why the explanation as tendered by the appellant does not inspire confidence and that is the fact that the appellant himself has been in the police service and it cannot be said that he is not well versed with the court proceedings especially when he had already filed three petitions earlier relating to his service matter and has also been involved in certain criminal cases where he has been acquitted. Hence the explanation as tendered does not appear to be bonafide.

9. Significantly, for seeking condonation of delay it is not the length of delay which is material but the sufficiency of cause. A long delay if sufficiently explained can be condoned whereas in case if the cause shown is not sufficient then even a short delay may not be condoned. In the instant case, the cause shown for the aforesaid reason does not inspire confidence to persuade this Court to condone the delay of 583 days.

10. Another fact which is reflected from the record is the that the appellant had filed his writ petition assailing the order of the year 2013 in the month of December 2022 almost after nine years and in the entire petition, there is not a single whisper regarding the latches.

11. There is a difference between a matter being barred by limitation and the petition which suffers from the vice of latches. In a writ petition the provisions of the Limitation Act do not apply, however, the Courts have evolved the concept of latches to ensure that a person who approaches the Court must do so promptly while invoking the extraordinary jurisdiction of this Court under Article 226/227 of the Constitution of India.

12. A writ court exercises powers under Article 226 of the Constitution of India, which is a purely discretionary. Thus, the issue of latches assumes significance as it guides the Court to determine whether the 'lis' before it deserves the indulgence in order to exercise its discretion in befitting matters. This is quite different from a proceedings which is governed by the Limitation Act and in terms of Section 3 of the Limitation Act, even if at all, a party does not raise the issue of limitation yet it is incumbent upon the Court to look into this aspect.

13. In the aforesaid circumstances, though the issue of limitation is not attracted to a writ petition but taking an overall scenario, the Court would be well justified in refusing to entertain a petition on the ground of latches. This has been noticed by the Apex Court in ***Printers Mysore Ltd. Vs. M.A. Rasheed and others (2004) 4 SCC 460*** and ***Northern India Glass Industries Vs. Jaswant Singh and others AIR 2003 SC 234.***

14. This aspect has been taken note of by the learned Single Judge while dismissing the petition as it did not find any cogent reason for interfering with the order of punishment and that too after nine years.

15. The two decisions cited by the learned counsel for the appellant in ***C/M Distt Cooperative Bank Ltd. Vs. U.P. Cooperative Institutional Service Board & another, 2019 SCC OnLine All 4646*** and ***Constable (Civil Police) Sandeep Kumar Vs. U.P. Public Service Tribunal, Lko & others, MANU/UP/2268/2023*** are of no consequence at this stage as the delay in filing the appeal is under consideration and only if the delay is condoned and the latches in filing the petition is found satisfactory only then the merits can be examined.

16. In light of the aforesaid discussions, this Court does not find that there is any adequate explanation tendered to seek condonation of delay in filing this appeal and moreover the petition itself suffered from latches as the petition was filed after nine years.

17. In light of the aforesaid, this Court does not find any palpable error committed by the learned Single Judge in exercise of its jurisdiction while dismissing the writ petition. Accordingly, the application for condonation of delay is dismissed and consequently appeal too is dismissed. Costs are made easy.

(2024) 8 ILRA 266
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.08.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-A No. 2440 of 2022

Shobh Nath Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Shivam Sharma, Dileep Kumar Yadav, Manoj Kumar Mishra, Sunil Kumar Srivastava

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra

A. Service Law-Constitution of India. 1950-Article 226-The petitioner challenged his premature compulsory retirement on adverse remarks in his Annual Confidential Reports (ACRs)-The petitioner claimed that his exoneration in disciplinary inquiries should negate adverse remarks-The court held that compulsory retirement is not a punitive action but is intended to remove officers whose performance and conduct raise serious doubts about their suitability for continued service-The High Court Screening Committees decision was based on the petitioner's overall service record, including repeated adverse remarks about his integrity and thus was neither arbitrary nor illegal.(Para 1 to 32)

The petition is dismissed. (E-6)

List of Cases cited:

1. HC of P&H & Vs Ishwar Chand Jain (1999) 4 SCC 579.

2. R.K. Singh Vs St. of U.P. (1991) Supp (2) SCC 126

3. Nand Kumar Verma Vs St. of Jhar.(2012) 3 SCC 580

4. St. of Guj. Vs Umedbhai M. Patel (2001) SC 1109= (2001) 3 SCC 314

5. Avinash Chandra Tripathi Vs St. of U.P. & ors.(2018) 7 ADJ 582

6. Ram Murti Yadav Vs St. of UP & anr.. (2020) 1 SCC 801

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

1. Heard Shri Manoj Kumar Mishra, and Shri Shivam Sharma, the learned counsels for the petitioner, learned Standing Counsel appearing for the respondent No.1-State of U.P. and Shri Gaurav Mehrotra, the learned counsel appearing for the respondent No.2- High Court of Judicature at Allahabad.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged validity of an Office Memorandum dated 29.11.2021 issued by the State Government, whereby the petitioner has been retired prematurely. The petitioner has also challenged the validity of the recommendation for his compulsory retirement made by the High court, which was communicated through a letter dated 26.11.2021.

3. Briefly stated, facts of the case are that the petitioner was appointed as an Additional Munsif in U.P. Judicial Services in the year 2003. In the year 2008, he was promoted to a post of Civil Judge (Senior Division). In the year 2010-2011, he was given adverse remarks in his Annual Confidential Report and his integrity was not certified as there were oral complaints against him regarding dishonesty and corruption. The petitioner was placed under suspension vide order dated 04.10.2013. A disciplinary inquiry was instituted against him and in the inquiry report dated 11.02.2014, he was exonerated of all the charges. Accordingly, the petitioner was reinstated in service by means of an order dated 16.04.2014 with full salary and allowances for the period of suspension.

4. The petitioner submitted a representation against the adverse remarks made in the Annual Confidential Report for

the year 2009-10 and 2010-11, which were rejected. The petitioner filed Writ-A No.40376 of 2016 before this Court sitting at Allahabad challenging the adverse remarks made in his Annual Confidential Report and the said writ petition is still pending.

5. On 22.03.2017, the petitioner was appointed as Secretary, District Legal Services Authority, Mahoba. On 17.06.2017, the petitioner submitted a representation to the Registrar General of this Court stating that the District Judge was depriving him of the facilities to which he was entitled and that he was being neglected by the District Judge. He further stated in the aforesaid representation that he is suffering from Diabetes and some eye disease for the past 10 years due to which his vision was being affected and he had to undergo a surgical operation in P.G.I., Lucknow in October, 2016. By the aforesaid representation dated 17.06.2017, the petitioner had requested that he be transferred to some other district.

6. Thereafter, the District Judge again made some adverse remarks against the petitioner in the Annual Confidential Report for the period 2017-18 wherein the District Judge remarked that the petitioner's integrity is doubtful. For the year 2018-19 also, the District Judge remarked that the petitioner's integrity is doubtful and several other adverse remarks were made against the petitioner.

7. On the basis of the aforesaid Annual Confidential Report, a departmental inquiry was set-up against the petitioner and he was placed under suspension by means of an order dated 01.04.2019. A charge-sheet was issued to him on 22.07.2019. An inquiry report was submitted on 10.07.2020, whereby the petitioner was exonerated of all the charges.

8. A vigilance inquiry was also instituted against the petitioner and in the report submitted by the Special Officer (Vigilance) of this Court, it was found that the petitioner indulged in non-cooperative activities by not organizing legal literacy camps in the month of June, 2017 and that he indulged in an act of indiscipline by not receiving a D.O. letter issued by the District and Session Judge and by using reckless and derogatory language against the District and Session Judge, Mahoba in his explanation submitted to the latter. The Administrative Committee of the High Court issued a warning to the petitioner to remain vigilant in future and the matter was dropped.

9. On 14.09.2020, the petitioner submitted a representation against the Annual Confidential Report recorded by the Administrative Judge, Mahoba against him for the year 2017-18 to the Administrative Committee of this Court and he submitted an additional representation for the same purpose on 28.09.2020. The Administrative Committee ordered that the overall performance of the Officer for the year 2017-18 be assessed 'Average' and has found that there was nothing in the representation which may warrant interference regarding integrity recorded by the Hon'ble Administrative Judge. Thus, the petitioner's representation was partially allowed to the extent mentioned above.

10. Thereafter, the petitioner has been retired prematurely by means of the impugned order dated 29.11.2024 in

furtherance of recommendation made by this Court.

11. The petitioner has himself given the following information in para-30 of the writ petition. Which reads as under:-

"30. That the ACR of THE last ten years, the adverse remarks for three years, and the disciplinary proceeding for the years in which the adverse ACRs have been made are reproduced herein in a tabulated form as follows:-

Status of Enquiry	*Year*	*Overall Assessment of the petitioner in the ACR*	*Remarks about integrity*
N/A	*2009-10*	*Average*	*Integrity is certified*
Disciplinary Enquiry was initiated wherein petitioner was exonerated upon the basis report of enquiry dated 11.02.2014 in D.E. No.23/2013 N/A	*2010-11*	*Average*	*Integrity is not certified*
N/A	*2011-12*	*Good*	*Integrity is certified*
N/A	*2012-13*	*Good*	*Integrity is certified*
N/A	*2013-14*	*Good*	*Integrity is certified*
N/A	*2014-15*	*Good*	*Integrity is certified*
N/A	*2015-16*	*Good*	*Integrity is certified*
N/A	*2016-17*	*Average*	*Integrity is certified*
Vigilance Enquiry was initiated against the petitioner wherein upon the basis of enquiry report dated 19.11.2019 in V.B. Enquiry No.06/2019, the petitioner was absolved from the charges and was warned to be vigilant in future by the administrative committee of the	*2017-18*	*Average*	*Doubtful*

Hon'ble High Court of Judicature at Allahabad.			
Disciplinary Enquiry was initiated upon the similar allegations as mentioned in the ACR of year 2018-19 wherein the petitioner was exonerated upon the basis of enquiry report dated 10.07.2020 in D.E. No. 04/2019/Cf(A).	*2018-19*	*Average*	*Doubtful*

12. The respondent No.2 – the High Court of Judicature at Allahabad has filed a counter affidavit and a copy of the relevant excerpts of minutes of the meetings of Screening Committee held on 11.06.2020 and 15.06.2020 have been annexed therewith. The Screening Committee has taken into consideration the facts that disposal of old cases by the petitioner was not satisfactory during the year 2009-2010 because 1964 civil suits were pending out of which 678 cases were old cases but the petitioner decided only 3 contested cases. Out of 224 regular execution cases, the petitioner decided only 6 contested matters and out of 16 small causes execution cases, he decided only one contested case. Some complaints were made against the petitioner by members of the Bar. The District Judge had made adverse remarks in the Annual Confidential Report for the year 2009-10 and the petitioner's representation against those remarks had been rejected by the Representation Committee as also by the Administrative Committee. In the year 2010-11, the District Judge has recorded in the Annual Confidential Report that several complaints of dishonesty and corruption had been received against the petitioner and, therefore, his integrity was not certified. His private character was also not good. He used to pass injunction orders without sufficient grounds, on pick and choose basis. He was not amenable to the advice of the District Judge. He did not enjoy a good reputation and he was troublesome in judicial administration. The petitioner's representation against the aforesaid remarks had been rejected by the Administrative Judge, who affirmed the remarks made by the District Judge.

13. In the year 2012-13, it was recorded by the District Judge that a complaint had been received against the petitioner, regarding which an inquiry was being made by the High Court. The petitioner did not decide a single execution case during the year and he has no interest in disposal of execution cases. His judgments were not sound and appreciation of evidence was not good. Disposal of work was not adequate. The petitioner had submitted his works done statement with wrong entries, regarding which a D.O. letter was issued to him but he again submitted the statement with another wrong entry. The petitioner has no control over the office. He had made only two inspections during the year, which were not effective. There was a general complaint that he was not punctual in sitting on the

dais. He was not amenable to the advice of the District Judge. His overall assessment was made as 'Average'. The District Judge rejected the petitioner's representation against the aforesaid entries. The Representation Committee also rejected the petitioner's representation finding it sans merit and it was affirmed by the Administrative Committee vide its resolution dated 03.07.2019.

14. In the year 2017-2018, the District Judge remarked that the petitioner's integrity is doubtful. He was in-disciplined and non-cooperative. He was habitual of not attending the office without any information. His character adversely affects the discharge of his official duties. In his reply dated 06.07.2017, the petitioner has used reckless and defamatory language against the District Judge. His overall assessment was found to be poor.

15. In the year 2018-19, the District Judge has remarked that the petitioner's integrity is doubtful. He is not fair and impartial in dealing with the public and the Bar. His private character is such as lowers him in the estimation of the public and adversely affects the discharge of his official duties. In some instances, his judgments are not proper on facts and law, though some judgment are good also. His overall assessment was made as 'Average'. The District Judge further remarked that the petitioner was habitual of passing indiscreet orders on applications under Section 156(3) Cr.P.C., for which he had been warned on judicial side. The petitioner's representation made against the aforesaid adverse remarks was rejected by the Administrative Judge.

16. A Vigilance inquiry had been initiated against the petitioner on complaints of misconduct and on consideration of the inquiry report, the Administrative Committee of this Court has warned the petitioner to remain vigilant in future.

17. The Screening Committee has also taken into consideration the fact that the District Judge, Mahoba had submitted a letter dated 22.12.2018 complaining about the work, conduct and integrity of the petitioner and the then Administrative Judge, Mahoba, finding the allegations to be serious in nature, had recommended the petitioner's suspension and a vigilance inquiry was set-up against him and the Administrative Committee had placed him under suspension.

18. While assailing the validity of the aforesaid order retiring the petitioner prematurely, learned counsel for the petitioner has submitted that the Screening Committee has not taken into consideration the fact that the petitioner has been exonerated of all the charges in both the departmental inquiries set-up against the petitioner and that the Committee has recommended premature retirement of the petitioner without consideration of the relevant material.

19. The provisions for compulsory retirement is contained in Rule 56(j) of the Fundamental Rules, which reads as under: -

"56(j) *Notwithstanding anything contained in this rule, the Appropriate Authority shall, if it is of the opinion that it is in the public interest so to do, have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months" pay and allowances in lieu of such notice;*

(i) If he is, in Group A or Group B service or post in a substantive, quasi-permanent or temporary capacity and had entered Government service before attaining the age of 35 years, after he has attained the age of 50 years;

(ii) in any other case after he has attained the age of fifty- five years."

20. The submissions of the learned Counsel for the parties were heard on and judgment had been reserved on 21.08.2024. On 23.08.2024 Sri. Manoj Kumar Mishra, the learned Counsel for the petitioner has supplied written submissions alongwith a compilation of six judgments and we proceed to deal with all of those. The first judgment is in the cases of **Madan Mohan Choudhary v. State of Bihar:** (1999) 3 SCC 396 and the learned Counsel for the petitioner has referred to the following passages: -

"26. From the scheme of the Constitution, as set out above, it will be seen that though the officers of the subordinate judiciary are basically and essentially government servants, their whole service is placed under the control of the High Court and the Governor cannot make any appointment or take any disciplinary action including action for removal or compulsory retirement unless the High Court is "consulted" as required by the constitutional impact of both the Articles 233 and 234 and the "control" of the High Court indicated in Article 235.

27. The word "consult" in its ordinary meaning means "to ask advice" or "to take counsel". The Governor is thus a "consultor" and the High Court is the "consultee" which is treated as an expert body in all matters of service including appointments, disciplinary action, compulsory retirement etc. relating to State Judicial Services. Since the Governor cannot act on his own unless he has consulted the High Court, the Constitution has conferred upon the High Court a sacred and noble duty to give the best of advice or opinion to the Governor; an advice tendered after due deliberation and after taking into consideration all the relevant material and record relating to the problem on which consultation is made or advice is sought by the Governor. It is, therefore, essentially a matter of trust and confidence between the Governor and the High Court. The High Court cannot act arbitrarily in giving its opinion to the Governor or else it will be a betrayal of that trust. If the advice is not supportable by any material on record and is arbitrary in character, it may not have any binding value.

28. It has already been pointed out by this Court in Registrar, High Court of Madras v. R. Rajiah (1988) 3 SCC 211 that though the High Court, in its administrative jurisdiction, has the power to recommend compulsory retirement of a member of the Judicial Service in accordance with the Rules framed in that regard, it cannot act arbitrarily and there has to be material to come to a decision that the officer has outlived his utility. It was also pointed out in this case that the High Court while exercising its power of control over the subordinate judiciary is under a constitutional obligation to guide and protect judicial officers from being harassed or annoyed by trifling complaints relating to judicial orders so that the officers may discharge their duties honestly and independently, unconcerned by the ill-conceived or motivated complaints made by unscrupulous lawyers and litigants.

21. There can be no dispute against the aforesaid proposition of law and none

of the principles laid down in the aforesaid case have been violated in the present case. In **Madan Mohan Choudhary** (Supra) the adverse remarks for the years 1991-92, 1992-93 and 1993-94 were not recorded in the "normal course" but were recorded "at one go" and that too when the Standing Committee of the High Court had already formed an opinion to compulsorily retire the appellant from service. These remarks which were recorded in the character roll of the appellant "at one go" and were communicated to the appellant on 29-11-1996 were considered by the Full Court on 30-11-1996 which approved the proposal of compulsorily retiring the appellant from service. The appellant had been categorised as 'B' plus in 1990. There was no categorisation for the next three years and when the action for compulsory retirement of the appellant was initiated by the High Court on the ground that he had granted anticipatory bail in a case under Section 307 IPC, categorisation for 1991-92, 1992-93 and 1993-94 was done "at one go". The Hon'ble Supreme Court found it to be unreasonable and not fair. Moreover, the compulsory retirement was ordered in 1996 and the appellant's categorisation for 1994-95 and 1995-96 was not indicated in the original service record placed before the Hon'ble Supreme Court. It is on account of these abnormalities coupled with other strange circumstances of this case that the Hon'ble Supreme Court held that the categorisation of the appellant as a 'C' Class Officer for the years 1991-92, 1992-93 and 1993-94 could not have been legally taken into consideration and the impugned action of compulsorily retiring the appellant from service was arbitrary in the sense that no reasonable person could have come to the conclusion that the appellant had outlived his utility as a judicial officer and had become dead wood which had to be chopped off. The aforesaid observations made in light of the peculiar facts of that case will not apply to the facts of the present case.

22. The learned Counsel for the petitioner has next relied upon a judgment in the case of **High Court of Punjab & Haryana v. Ishwar Chand Jain**: (1999) 4 SCC 579. In that case, the Inspecting Judge had graded the officer as "B+Good" for the year 1984-85 but the Full Court modified the same to "C-Below average". In an earlier appeal filed by the Officer, the Hon'ble Supreme Court had restored the grading of the Officer in his ACR as "B+Good", but there was no indication of this in the precis prepared by the Registry which certainly would have misled many of the Judges of the Full Court. There was no ACR recorded for the years 1992-93, 1993-94, 1994-95 and for nine months of 1995-96 when the Full Court met on 12.12.1995. In its earlier meeting on 22.09.1995 the Full Court had it recorded ACR for the year 1991-92 grading the Officer as "C-Integrity doubtful" by relying upon an inspection report prepared by the Inspecting Judge on 25.02.1992. There was no material to justify as to why the inspection report of February 1992 was considered by the Full Court in September 1995 and why there could be no inspection from that year till holding of the Full Court meeting. Inspection note by the Inspecting Judge gives an impression that he inspected the Court of the Officer and visited the bar room before he gave his report, whereas in fact the Inspecting Judge had inspected the Court of the Officer only in March 1992. The Inspecting Judge had noted that there were some complaints which formed the subject-matter of the disciplinary proceedings against him, which the Hon'ble Supreme Court found incorrect, as

on the date of the inspection report no disciplinary proceedings were pending against the Officer. There were no particulars of the complaints whether these were in writing or oral and if these related to the judicial work performed by the officer. The Hon'ble Supreme Court found that the inspection note was certainly flawed and it could not have formed the basis for the Full Court to record that integrity of the officer was doubtful and to grade him 'C'. The Inspecting Judge had taken charge of the District only on 21.11.1991 and within three months, i.e., on 25.02.1992, he gave his inspection report. Therefore, the Hon'ble Supreme Court held that the ACR for the year 1991-92 was to be kept aside. There were only four ACRs, which were for the years 1983-84 (B-Average/Satisfactory), 1984-85 (B+Good), 1988-89 (B-Satisfactory) and 1989-90 [(B+(Good)]. On the basis of these ACRs the recommendation of the High Court could not be justified. Further, the Officer was retired while under suspension. The Hon'ble Supreme Court was of the view that the action of the High Court in retiring the Officer was based on the allegation of misconduct, which was the subject-matter of the enquiry before a Judge of the High Court and which was the basis for recording of adverse remarks by the High Court in ACR of the officer for the year 1991-92. The order of compulsorily retiring the Officer though innocuously worded, was in fact an order of his removal from service. This case was also decided in view of the peculiar factual background of the case, which is in no way similar to the facts of the present case.

23. The learned Counsel for the petitioner has next relied upon a judgment in the case of **R.K. Singh v. State of U.P.**: 1991 Supp (2) SCC 126, which was an appeal directed against the order denying Selection Grade to the appellant on the ground that he had been awarded two adverse entries for the years 1980-81 and 1982-83. During the pendency of the appeal before the Hon'ble Supreme Court, the appellant's representation against the adverse entries was allowed and the entries were expunged from his service record and the State Government granted Selection Grade to the appellant with effect from the date he takes over charge. In these circumstances, the Hon'ble Supreme Court held that once the adverse entries awarded to the appellant were expunged, the appellant was entitled to Selection Grade with effect from the date on which he became eligible for grant of Selection Grade. We fail to appreciate as to how this case is relevant for adjudication of the controversy involved in the present case and we are constrained to observe that citing irrelevant judgments does not serve any purpose and it only results in wastage of the time, which the Judges could otherwise have utilized for some better purpose.

24. The next judgment forming part of the compilation is of **Nand Kumar Verma v. State of Jharkhand**: (2012) 3 SCC 580, wherein the Hon'ble Supreme Court the High Court had selectively taken into consideration the service record for certain years only. There were discrepancies in the ACRs relied upon by the High Court and the copies of the ACRs which had been provided to the Officer by the High Court under the Right to Information Act, 2005. From a comparison of the two, the Hon'ble Supreme Court concluded that the High Court had not faithfully extracted the contents of the ACRs. This case was also decided keeping in view the peculiar facts of the matter,

which are in no manner similar to the facts of the present case.

25. The next judgment placed in the compilation is **State of Gujarat v. Umedbhai M. Patel**, AIR 2001 SC 1109 = (2001) 3 SCC 314. In that case, the Hon'ble Supreme Court summarized the law relating to compulsory retirement in the following words: -

"(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure.

26. In **Umedbhai M. Patel** (Supra), there were absolutely no adverse entries in the respondent's confidential record. He had successfully crossed the efficiency bar at the age of 50 as well as at 55. He was placed under suspension on 22.05.1986 pending disciplinary proceedings. The enquiry was not completed within a reasonable time and without waiting for conclusion of the enquiry, the authorities decided to dispense with the services of the respondent merely on the basis of the allegations which had not been proved. Even the Review Committee did not recommend the compulsory retirement of the respondent. The respondent had only less than two years to retire from service. The High Court had quashed the order of compulsory retirement and the Hon'ble Supreme Court affirmed the order of the High Court holding that in the absence of any adverse entries in his service record to support the order of compulsory retirement, the order of compulsory retirement was passed for extraneous reasons.

27. The last judgment placed in the compilation is a judgment rendered by a coordinate Bench of this Court in the case of **Avinash Chandra Tripathi Vs. State of U.P. and Ors.**: 2018 (7) ADJ 582, in which the Bench found that the entire service record of the petitioner was unblemished, the Administrative Committee had decided to drop action on the basis of the vigilance enquiry report and the enquiry report in the disciplinary proceeding the petitioner against were not found proved. There was nothing on record to suggest that the general reputation of the petitioner was tainted or not good. In view of these facts, this Court found that the order of compulsory retirement had been passed without appreciating the material on record correctly and properly, and consequently, we the order of compulsory retirement was quashed. In the present

case, the Screening Committee has considered the service record of the petitioner for the years 2009-10 to 2018-19 and it is not that his service record was unblemished.

28. While dealing with a challenge made to an order of compulsory retirement of a Judicial Officer, the Hon'ble Supreme Court held in **Ram Murti Yadav v. State of U.P. and Another**: (2020) 1 SCC 801, that:-

"14. ***It has to be kept in mind that a person seeking justice, has the first exposure to the justice delivery system at the level of subordinate judiciary, and thus a sense of injustice can have serious repercussions not only on that individual but can have its fall out in the society as well. It is therefore absolutely necessary that the ordinary litigant must have complete faith at this level and no impression can be afforded to be given to a litigant which may even create a perception to the contrary as the consequences can be very damaging. The standard or yardstick for judging the conduct of the judicial officer therefore has necessarily to be strict****. Having said so, we must also observe that it is not every inadvertent flaw or error that will make a judicial officer culpable. The State Judicial Academies undoubtedly has a stellar role to perform in this regard. A bona fide error may need correction and counseling. But a conduct which creates a perception beyond the ordinary cannot be countenanced. For a trained legal mind, a judicial order speaks for itself."*

(Emphasis added)

29. The Hon'ble Supreme Court further held in **Ram Murti Yadav** (Supra) that: -

"6….The scope for judicial review of an order of compulsory retirement based on the subjective satisfaction of the employer is extremely narrow and restricted. Only if it is found to be based on arbitrary or capricious grounds, vitiated by malafides, overlooks relevant materials, could there be limited scope for interference. The court, in judicial review, cannot sit in judgment over the same as an Appellate Authority. Principles of natural justice have no application in a case of compulsory retirement."

30. When we examine the facts of the present case in light of the law laid down in the cases mentioned above, we find that there have been several complaints of corruption and dishonesty against the petitioner ranging from the years 2009-10 to 2018-19. The overall assessment of the petitioner has been made as 'Average' for five years during the aforesaid period. His integrity has not been certified for the year 2010-11 and it has been found to be doubtful for the year 2017-18 and the year 2018-19. Although the Screening Committee has also recorded that the petitioner was placed under suspension and an inquiry was set-up against him, the mere non-mention of petitioner's exoneration in disciplinary inquiry would not affect the legality of the order to retire the petitioner prematurely as had the petitioner been found guilty in the inquiry, proceedings would have been initiated for his punishment. Compulsory retirement is not a punishment and an employee is retired compulsorily only when no case for his punishment is made out, but when keeping in view his overall performance, it is found that he is not suitable for being continued in service, although he is not guilty of any misconduct calling for his punishment.

31. In the present case, the Screening Committee has recommended compulsory retirement of the petitioner keeping in view his overall service record for the period 2009-10 to 2018-19, which has been referred to in the earlier part of this judgment. There appears to be no illegality committed in making a recommendation for the petitioner's compulsory retirement and in acceptance of the recommendation by the State Government by passing an order for the petitioner's premature compulsory retirement.

32. The writ petition lacks merit and the same is hereby ***dismissed***.

(2024) 8 ILRA 277
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ-A No. 3071 of 2023
With
Writ-A No. 6248 of 2023

Satya Prakash ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Megha Pandey

Counsel for the Respondents:
C.S.C., Girjesh Kumar Mishra, Pawan Kumar Nigam, Ram Babu Singh

A. Service Law-Constitution of India, 1950-Article 226-Compassionate Appointment-Dependents under dying in Harness Rules, 1974-Eligibility-Separated spouse Vs Sibling dependency-the two petitioners deceased brother and estranged wife (divorcee) both sought compassionate appointments following the death of the deceased who was employed in the Public Works Department-deceased younger brother was dependent on his late brother, along with their parents and two unmarried sisters while his brother wife had separated from the deceased, filed for divorce and accepted financial settlement before his death but later she changed her mind and claimed a compassionate appointment-Held, the estranged wife was not dependent on the deceased at the time of his death, she is not entitled-deceased younger brother being unmarried, unemployed and living with the family was held to be the rightful claimant for compassionate appointment-Compassionate appointment under the dying in Harness Rules is meant for the dependents of the deceased, and dependency, not just marital status, is the key consideration- The fact that someone is a spouse or family member is insufficient to claim compassionate appointment , the claimant must prove that they were genuinely dependent on the deceased at the time of their death-Hence,deceased younger brother petition allowed with the directions.(Para 1 to 25)

The petition is allowed. (E-6)

List of Cases cited:

1. Parbatbhai Aahir Vs St. of Guj.(2017) 9 SCC 641

2. Gian Singh Vs St. of Punj.(2012) 10 SCC 303 St. of M.P. Vs Laxmi Narayan (2019) 5 SCC 688

3. Mumtaz Yunus Mulani Vs St. of Mah.& Ors

4. The Dir. of Treasuries of Kar. & anr.. Vs Somyashree

5. Mudita Vs St. of U.P. & anr.. SPLA No. 758 of 2015

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

(I.A. No. 3 of 2023 in re: Writ-A No. 6248 of 2023)

Heard.

On due consideration, the application for impleadment is allowed.

Let the necessary impleadment be carried out during the course of the day.

(I.A. No. 6 of 2024 in re: Writ-A No. 3071 of 2023)

Heard.

On due consideration, the application for impleadment is allowed.

Let the necessary impleadment be carried out during the course of the day.

(Order on the Writ Petitions)

1. Heard Ms. Megha Pandey, learned counsel for the writ petitioner in re: Satya Prakash (supra), Shri R.P.S. Chauhan, learned Additional C.S.C. for the State-respondents and Shri Pawan Kumar Nigam, learned counsel for newly impleaded opposite party no. 4 i.e., Smt. Rinki.

2. Shri Nigam has argued the second writ petition in re: Smt. Rinki (supra) on behalf of the petitioner, Shri R.P.S. Chauhan, learned Additional C.S.C. and Smt. Megha Pandey, learned counsel for newly impleaded opposite party no. 4 i.e., Satya Prakash.

3. In the writ petition in re: Satya Prakash (supra), the following prayer has been sought which reads as under:

"1. Issue a writ, order or direction in the nature of Mandamus commanding the respondents to consider and grant compassionate appointment to the petitioner under the Scheme of U.P. Recruitment of Dependents of Government Servants (Dying in Harness) Rules, 1974 as amended up-to- date.

2. Issue any other suitable order or direction, in the nature to which this Hon'ble Court deems just and proper in favour of the petitioner.

3. Allow the writ petition with cost."

4. In writ petition in re: Smt. Rinki (supra), the following prayer has been sought which reads as under:

"(i) Issue a writ, order or direction in the nature of Mandamus directing the opposite parties to make appointment of the petitioner on suitable post in the office of opposite party Nos. 2 & 3 on the basis of on compensate ground under dying in harness Rule 1972.

(ii) Issue any other Writ, Order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iii) Award the cost of the Petition in favor of the petitioner."

5. At the very outset, learned Standing Counsel has drawn attention of this Court towards the letter dated 30.10.2023 passed by the Executive Engineer (Indo-Nepal Border), Public Works Department, Lakhimpur Kheri, U.P. (hereinafter referred to as 'opposite party no.3' in short) addressing to Smt. Rinki apprising that since both the aforesaid writ petitions are pending before this Hon'ble High Court, therefore, any decision in the present matter may be taken after final disposal of the aforesaid writ petitions. The aforesaid letter is taken on record.

6. Learned counsel for the parties in both the writ petitions have agreed to club the writ petitions together and decide the same by the common order and, therefore,

both the writ petitions are being decided finally by the common order.

7. Ms. Megha Pandey has precisely apprised the brief facts of the case that the petitioner Satya Prakash was the real younger brother of the deceased employee namely, Late Chandra Prakash who was serving on the post of Personal Assistant in the Public Works Department under the opposite party no.3 and he died in harness on 27.8.2022. At the time of the death of his brother, Late Chandra Prakash, his old aged parents and the petitioner Satya Prakash were dependent upon him. The petitioner Satya Prakash is unmarried and unemployed. Besides the petitioner Satya Prakash, there are three sisters of Late Chandra Prakash, out of them one has got married and two sisters are still unmarried, therefore, in the entire family, there were total five persons including the petitioner Satya Prakash were dependent upon the deceased employee Late Chandra Prakash.

8. Ms. Megha Pandey has further stated that the petitioner Satya Prakash is a graduate and is eligible for the benefit of the compassionate appointment under the U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974 (hereinafter referred to as "Dying in Harness Rules, 1974") as he fulfills all required qualifications to get the benefit of the compassionate appointment.

9. Ms. Megha Pandey has drawn attention of the Court towards the supplementary affidavit filed on 27.07.2023 enclosing therewith a copy of the interim settlement agreement entered into between Late Chandra Prakash and his wife, Smt. Rinki. The perusal thereof reveals that though Late Chandra Prakash was married to Smt. Rinki on 15.12.2013 but their matrimonial relationship was not well, therefore, they were living separately and Smt. Rinki Pandey has filed some cases against him.

10. She has further stated that a writ bearing Criminal Misc. Writ Petition No. 16472 of 2020 was filed by the said Late Chandra Prakash and the matter was referred to the Mediation & Conciliation Centre of the Court at Allahabad on 05.01.2021. The interim settlement was entered into between the parties on 20.04.2022, on which date Late Chandra Prakash produced the demand draft of Rs. 1,50,000/- dated 11.4.2022 in favour of his wife, Smt. Rinki Pandey before the Mediation Centre and also produced a demand draft of Rs. 30,000/- dated 02.05.2022 and both the demand drafts (total Rs. 1,80,000/-) have been handed over to the wife, i.e., Smt. Rinki Pandey who acknowledged the receipt of the same. Thereafter, the parties have filed mutual divorce petition before the court concerned on the condition that the husband Chandra Prakash shall pay Rs. 3,60,000/- against one time settlement and the aforesaid amount would be given to Smt. Rinki Pandey in two installments. That amount was consisting the *streedhan* also. The mediators were informed that the parties filed mutual divorce petition bearing No. 767 of 2022, under Section 13-B of the Hindu Marriage Act before the Principal Judge, Family Court, Allahabad. She has further submitted that during the pendency of the mediation proceedings, the husband Chandra Prakash died on 27.08.2022, therefore, the remaining amount of Rs. 1,80,000/- could not be paid.

11. Though Smt. Rinki, as per the learned counsel, was willing to take divorce from her husband after receiving the

aforesaid amount of Rs. 1,80,000/- but after the death of her husband, Chandra Prakash on 27.08.2022, she changed her mind saying that she does not want to receive any money under the settlement but wishes to obtain compassionate appointment against the death of her estranged husband, Chandra Prakash.

12. Notably, the FIR bearing Case Crime No. 133 of 2020, under section 498A, 323, 504, 506 IPC & Section 3 /4 of the Dowry Prohibition Act, Police Station- Mahila Thana, District- Prayagraj was lodged by Smt. Rinki, wherein the charge-sheet has been filed against all family members of Chandra Prakash (since deceased). Hence, the Application U/S 482 No. 36791 of 2022 (Vidhya Devi and 7 others vs. State of U.P. and another) has been filed before this Court at Allahabad, wherein the interim orders have been granted. Two orders dated 10.02.2023 and 24.02.2023 thereof are relevant, therefore, those orders are being reproduced herein under respectively:

"1. Upon hearing at some length, it transpires, the matter had earlier been referred to mediation on 5.1.2021. Settlement was reached between the opposite party no. 2 and Chandra Prakash (son of applicant nos. 1 and 2) with respect to matrimonial discord between those parties.

2. Perusal of the settlement reached, reveals, those parties had agreed to dissolve their marriage. Sri Chandra Prakash was required to pay Rs. 3,60,000/- to the opposite party no. 2. Against that, Rs. 1,80,000/- was paid out to her during mediation proceedings. The balance was to be paid upon successful completion of divorce proceedings.

3. During the pendency of the divorce proceedings, the said Chandra Prakash died on 27.08.2022. Thereafter, the opposite party no. 2 appears to have changed her mind such that she does not want to receive any money under the settlement but wishes to obtain compassionate appointment against the death of her estranged husband, Chandra Prakash. While the Court may not make any opinion as to the conduct offered by the opposite party no. 2, (as she continued to live separately from the present applicants and yet claims entitlement to compassionate appointment), plainly she may not resile from the settlement reached.

4. Accordingly, put up on 24.2.2023 in top ten cases.

5. On that date, the opposite party no. 2 may show cause why the present application may not be allowed in terms of the settlement dated 4.5.2022 against Rs. 1,80,000/- already paid to her.

6. Interim order, granted earlier, is extended till the next date of listing.

7. It is also left open to the opposite party no. 2 to reconsider her position and file appropriate affidavit with respect to balance amount under the settlement deed.

XXX

"Heard learned counsel for the applicants, Sri Babu Lal Ram, learned counsel for the opposite party no.2 and learned A.G.A. for the State.

Learned counsel for the opposite party no.2 has filed an affidavit today in Court, which is taken on record.

This application under Section 482 Cr.P.C. has been filed for quashing the charge sheet dated 23.12.2020 as well as summoning order dated 1.9.2022 issued against the applicants in Case No.34 of 2021, State Vs. Chandra Prakash and others, arising out of Case Crime No.133 of

2020, under Sections 498A, 323, 504, 506 I.P.C. and 3/4 D.P. Act, Police Station Mahila Thana, District Prayagraj pending in the court of Additional Sessions Judge (J.D.), Allahabad.

It is submitted by learned counsel for the applicants that a settlement was arrived at before the Mediation Centre of this Court on 4.5.2022 between the husband and wife. A sum of Rs.3,60,000/- was required to be paid by the applicants to the opposite party no.2, out of which, a sum of Rs.1,80,000/- was paid earlier and now today a demand draft of Rs.1,80,000/- has been handed over to the learned counsel for the opposite party no.2 by the learned counsel for the applicants.

He submits that during pendency of the criminal proceedings, the husband has died and now the family members of the husband of opposite party no.2 are facing the criminal proceedings.

Learned counsel for the opposite party no.2 submits that even though the husband has died, the opposite party will honour the settlement and has received the remaining amount of Rs.1,80,000/- by demand draft today. He submits that earlier also the husband has paid a sum of Rs.1,80,000/-. Therefore, the complete amount as per the settlement dated 4.5.2022 before the Mediation Centre of this Court has been received by the opposite party no.2. He further submits that now the opposite party no.2 has no objection in case the criminal proceedings are put to end and the present criminal proceedings were quashed. He has also filed an affidavit to this effect before this Court today.

Learned counsel for the applicants submitted that the compromise has already been entered between the parties on 4.5.2022 before Allahabad High Court Mediation and Conciliation Centre, therefore, the present case be finally decided.

Learned counsel for opposite party no.2 has not disputed the facts as stated by learned counsel for the applicants. He further contended that opposite party no.2 does not want to proceed with the criminal case against the applicants and the same may be quashed.

Learned AGA does not dispute the fact that parties have entered into settlement. It is further submitted that he would have no objection in case criminal proceedings are put to an end. He further submits that in view of settlement there is virtually no chance of any conviction being recorded in the criminal proceedings.

Having examined the matter in its totality, this Court is of the view that the criminal proceedings in the present case had essentially been an outcome of a matrimonial dispute; and there are no such over bearing circumstances for which the applicants ought to be prosecuted even after the parties has entered into a settlement. Needless to observe that with the present stand of the parties in terms of their settlement, there is practically no chance of recording conviction, even if the case under the F.I.R. in question is put to trial. In other words, entire exercise of trial would only be an exercise in futility. On the contrary, looking to the nature of dispute and the fact that the disputants, being the close relatives, have compromised and want to proceed peacefully ahead, it would be in the interest of justice that criminal proceedings in question are quashed.

It would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and the wrongdoer and to secure the ends of

justice, it is appropriate that the criminal case is put to an end.

In view of the fact that the parties do not want to pursue the case any further as stated by them and the fact that matter has been mutually settled between the parties in view of the compromise arrived at, no useful purpose would be served in proceeding with the matter further.

Thus, in view of the well settled principles of law as laid down by the Hon'ble Apex Court in ***Parbatbhai Aahir Vs. State of Gujarat (2017) 9 SCC 641, Gian Singh Vs. State of Punjab (2012) 10 SCC 303 and State of M.P. Vs. Laxmi Narayan, (2019) 5 SCC 688,*** *the proceedings of the aforesaid case is hereby quashed.*

The present application under Section 482 Cr.P.C. is, accordingly, allowed."

13. By means of the aforesaid order dated 10.02.2023, this Court called the opposite party No.2, Smt. Rinki to show cause why the present application may not be allowed in terms of the settlement dated 04.05.2022 against Rs. 1,80,000/- already paid to her. Further, by means of the order dated 24.02.2023 (supra), the aforesaid Application U/S 482 has been allowed by this Court considering the fact that the demand draft of Rs. 1,80,000/- has been handed over to the opposite party no. 2 and also considering the affidavit of Smt. Rinki wherein she has stated that she is not willing to contest the aforesaid case, therefore, any appropriate order may be passed on the basis of compromise settlement entered into between the parties. In such affidavit, she had admitted that pursuant to the settlement agreement, she has received the entire amount. The aforesaid affidavit is on record along with the supplementary affidavit which goes to show that the in her affidavit, Smt. Rinki has stated herself as Rinki, D/o- Surendra Kumar and has not stated as wife of Late Chandra Prakash. This Court by means of the aforesaid order dated 24.02.2023, quashed the entire criminal proceedings in view of the settled proposition of the law laid down in catena of cases referring those cases.

14. Therefore, Ms. Megha Pandey has stated when Smt. Rinki was not living with her late husband for quite long time and pursuant to the settlement agreement, she received the entire amount and filed an affidavit before this Court saying that she is satisfied with the compromise. Further, she is not living with the family members of her late husband, then she may not claim the compassionate appointment under the Dying in Harness Rules, 1974.

15. In support of her contentions, Ms. Megha Pandey has placed reliance on the judgement and order dated 14.03.2008 passed by the Hon'ble Apex Court in re: **Mumtaz Yunus Mulani vs. State of Maharashtra & others;** the judgement and order dated 13.09.2021 passed by the Hon'ble Apex Court in re: **The Director of Treasuries in Karnataka & Another vs. Somyashree** as well as the judgement of the Division Bench of this Court vide judgement and order dated 22.11.2016 in re: **Special Appeal No. 758 of 2015 (Mudita vs. State of U.P. and another)** and has submitted that the main consideration to provide the compassionate appointment would be the 'factum of dependency' of the family of the deceased employee, not the relation and in the present case, the entire family is dependent upon the petitioner Satya Prakash, who is the real younger brother of the deceased employee, is unmarried and unemployed

and the entire family of his elder brother would be benefited, if he is given any appropriate appointment under Dying in Harness Rules, 1974.

16. The relevant para nos. 7, 8 and 8.1 of the judgement in re: **The Director of Treasuries in Karnataka (supra)** are being reproduced herein under:

" 7. While considering the submissions made on behalf of the rival parties a recent decision of this Court in the case of N.C. Santhosh (Supra) on the appointment on compassionate ground is required to be referred to. After considering catena of decisions of this Court on appointment on compassionate grounds it is observed and held that appointment to any public post in the service of the State has to be made on the basis of principles in accordance with Articles 14 and 16 of the Constitution of India and the compassionate appointment is an exception to the general rule. It is further observed that the dependent of the deceased Government employee are made eligible by virtue of the policy on compassionate appointment and they must fulfill the norms laid down by the State's policy. It is further observed and held that the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim of compassionate appointment. A dependent of a government employee, in the absence of any vested right accruing on the death of the government employee, can only demand consideration of his/her application. It is further observed he/she is, however, entitled to seek consideration in accordance with the norms as applicable on the day of death of the Government employee. The law laid down by this Court in the aforesaid decision on grant of appointment on compassionate ground can be summarized as under:

(i) that the compassionate appointment is an exception to the general rule;

(ii) that no aspirant has a right to compassionate appointment;

(iii) the appointment to any public post in the service of the State has to be made on the basis of the principle in accordance with Articles 14 and 16 of the Constitution of India;

(iv) appointment on compassionate ground can be made only on fulfilling the norms laid down by the State's policy and/or satisfaction of the eligibility criteria as per the policy;

(v) the norms prevailing on the date of the consideration of the application should be the basis for consideration of claim for compassionate appointment.

8. Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, we are of the opinion that as such the High Court has gone beyond Rule 2 and Rule 3 of the Rules, 1996 by directing the appellants to consider the application of the respondent herein for appointment on compassionate ground as 'divorced daughter'. Rule 2 and Rule 3 of the Rules, 1996 read as under:

"2. Definitions:- (1) In these rules, unless the context otherwise requires:-

(a) "Dependent of a deceased Government servant" means-

(i) in the case of deceased male Government servant, his widow, son, (unmarried daughter and widowed daughter) who were dependent upon him; and were living with him; and

(ii) in the case of a deceased female Government servant, her widower, son, (unmarried daughter and widowed

daughter) who were dependent upon her and were living with her;

(iii) 'family' in relation to a deceased Government servant means his or her spouse and their son, (unmarried daughter and widowed daughter) who were living with him.

(2) Words and expressions used but not defined shall have the same meaning assigned to them in the Karnataka Civil Services (General Recruitment) Rules, 1977."

6. The eligibility on the death of a female employee is in terms of Rule 3(2)(ii) of the Karnataka Civil Services (Appointment on Compassionate Grounds) Rules, 1996, which reads as follows:

Rule 3(2)(ii):- '(ii) in the case of the deceased female Government servant;

(a) a son;

(b) an unmarried daughter, if the son is not eligible or for any valid reason he is not willing to accept the appointment;

(c) the widower, if the son and daughter are not eligible or for any valid reason they are not willing to accept the appointment.

(d) a widowed daughter, if the widower, son and unmarried daughter are not eligible or for any valid reason they are not willing to accept the appointment.

3. xxx

4 xxx"

8.1 From the aforesaid rules it can be seen that only 'unmarried daughter' and 'widowed daughter' who were dependent upon the deceased female Government servant at the time of her death and living with her can be said to be 'dependent' of a deceased Government servant and that 'an unmarried daughter' and 'widowed daughter' only can be said to be eligible for appointment on compassionate ground in the case of death of the female Government servant. Rule 2 and Rule 3 reproduced hereinabove do not include 'divorced daughter' as eligible for appointment on compassionate ground and even as 'dependent'. As observed hereinabove and even as held by this Court in the case of N.C. Santhosh (Supra), the norms prevailing on the date of consideration of the application should be the basis of consideration of claim for compassionate appointment. The word 'divorced daughter' has been added subsequently by Amendment, 2021. Therefore, at the relevant time when the deceased employee died and when the original writ petitioner – respondent herein made an application for appointment on compassionate ground the 'divorced daughter' were not eligible for appointment on compassionate ground and the 'divorced daughter' was not within the definition of 'dependent.' 8.2 Apart from the above one additional aspect needs to be noticed, which the High Court has failed to consider. It is to be noted that the deceased employee died on 25.03.2012. The respondent herein – original writ petitioner at that time was a married daughter. Her marriage was subsisting on the date of the death of the deceased i.e. on 25.03.2012. Immediately on the death of the deceased employee, the respondent initiated the divorced proceedings under Section 13B of the Hindu Marriage Act, 1955 on 12.09.2012 for decree of divorce by mutual consent. By Judgment dated 20.03.2013, the Learned Principal Civil Judge, Mandya granted the decree of divorce by mutual consent. That immediately on the very next day i.e. on 21.03.2013, the respondent herein on the basis of the decree of divorce by mutual consent applied for appointment on compassionate ground. The aforesaid chronology of dates and events would suggest that only for the purpose of getting appointment on compassionate ground the

decree of divorce by mutual consent has been obtained. Otherwise, as a married daughter she was not entitled to the appointment on compassionate ground. Therefore, looking to the aforesaid facts and circumstances of the case, otherwise also the High Court ought not to have directed the appellants to consider the application of the respondent herein for appointment on compassionate ground as 'divorced daughter'. This is one additional ground to reject the application of the respondent for appointment on compassionate ground. 8.3 Even otherwise, it is required to be noted that at the time when the deceased employee died on 25.03.2012 the marriage between the respondent and her husband was subsisting. Therefore, at the time when the deceased employee died she was a married daughter and therefore, also cannot be said to be 'dependent' as defined under Rule 2 of the Rules 1996. Therefore, even if it is assumed that the 'divorced daughter' may fall in the same class of 'unmarried daughter' and 'widowed daughter' in that case also the date on which the deceased employee died she – respondent herein was not the 'divorced daughter' as she obtained the divorce by mutual consent subsequent to the death of the deceased employee. Therefore, also the respondent shall not be eligible for the appointment on compassionate ground on the death of her mother and deceased employee."

17. Ms. Megha Pandey has stated that in view of the definition of the dependent of the deceased government servant, it is the petitioner Satya Prakash, not Smt. Rinki (supra) who has been living separately for quite long time and would not be able to look after the family members of the deceased employee, therefore, instead of Smt. Rinki (supra), the petitioner Satya Prakash may be given any suitable appointment as per his qualification under Dying in Harness Rules, 1974.

18. Shri Pawan Kumar Nigam has, however, tried to justify the claim of the petitioner Smt. Rinki by submitting that she is the wife of the deceased employee and decree of divorce could not be granted to the parties, therefore, for all practical and legal purposes, she would be treated as wife of the late employee and she may be given an appointment under Dying in Harness Rules, 1974.

19. On being confronted Shri Nigam on the point that since Smt. Rinki (supra) has been living separately from her husband; she lodged the FIR against him and his entire family; the issue went in litigation before this Court; the issue referred to the Mediation Centre; pursuant to the interim settlement after receiving the amount of Rs. 1,80,000/-, she filed the mutual divorce petition before the Family Court concerned; in a petition filed against the charge-sheet, she filed an affidavit saying that she does not wish to contest that case as she has received the entire amount in terms of the settlement agreement; in her affidavit, she has not stated herself as a wife of the late employee, rather has indicated her father's name, then as to how she would be able to look after the family members of the late employee, who were dependent upon the late employee, he could not defend the aforesaid facts, rather he has admitted all the aforesaid facts and circumstances.

20. Therefore, the aforesaid submissions of Shri Pawan Kumar Nigam may be treated as his submissions in the petition of Smt. Rinki (supra) and the submissions of Ms. Megha Pandey may be

considered as her submissions on behalf of the petitioner Satya Prakash who is opposite party no. 4 in the writ petition of Smt. Rinki (supra).

21. Shri R.P.S. Chauhan learned Additional C.S.C. has fairly stated that the authority concerned has given undertaking that he will pass appropriate orders in compliance of the order being passed by this Court in the aforesaid writ petitions as the letter to this effect dated 03.10.2023 has already been issued to Smt. Rinki (supra).

22. Having heard learned counsel for the parties and having perused the material available on the record as well as the decisions of the Hon'ble Apex Court in re: **Mumtaz Yunus Mulani (supra), The Director of Treasuries in Karnataka (supra)** and the judgement of the Division Bench of this Court in re: **Mudita (supra),** I am of the considered opinion that the Dying in Harness Rules, 1974 is a beneficial legislation and any suitable appointment on the compassionate ground under the said Rules is provided to a person who would be able to look after the entire family of the deceased employee as the deceased employee was the only bread earner of the family. The purpose of providing compassionate appointment to any suitable person under Dying in Harness Rules, 1974 is that the person would look after the entire family who was dependent upon the late employee and the specific undertaking to that effect would be taken from such employee to the effect that he will look after the entire family of the late employee in a same manner the late employee was looking after them.

23. In view of the aforesaid facts and circumstances, it is clear that the relation of Smt. Rinki was not cordial with her husband Late Chandra Prakash (since deceased) from the very beginning and she lodged the FIR against him and his entire family having lived separately and pursuant to the orders being passed by this Court, she participated in the mediation proceedings and pursuant to settlement agreement entered into between the parties, she received a sum of Rs. 3,60,000/- as agreed by the parties and, thereafter filed an affidavit before this court saying that she does not want to pursue the criminal proceedings against the family members of her husband and in such affidavit, even she has not indicated herself as wife of the late employee, rather has stated the name of her father giving the address of her father as place of her living, therefore, she may not be provided a suitable appointment under Dying in Harness Rules, 1974 for the reason that she would not be able to look after the family members of her late husband. To the contrary, the younger brother of late employee namely, Satya Prakash (supra) is bachelor and unemployed graduate and has been living with the family of the late employee and looking after them by his meagre means, therefore, he would be the appropriate person to whom any suitable appointment may be offered under Dying in Harness Rules, 1974.

24. In view of the facts and circumstances of the issue in question, the compassionate appointment under Dying in Harness Rules, 1974 should be offered to Satya Prakash (supra) not to Smt. Rinki (supra).

25. Accordingly, the writ petition with regard to the petitioner Satya Prakash is **allowed** and the writ petition with regard to the petitioner Smt. Rinki is **dismissed**.

26. The opposite party no. 4 is directed to pass an appropriate order providing a suitable appointment under Dying in Harness Rules, 1974 to Satya Prakash (supra) with expedition, preferably, within a period of six weeks from the date of production of certified copy of this order so that he could look after the entire family of the deceased employee namely, Chandra Prakash.

27. No order as to costs.

(2024) 8 ILRA 287
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ-A No. 3796 of 2024

Smt. Reena Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ashutosh Srivastava

Counsel for the Respondents:
C.S.C.

A. Service Law-Constitution of India,1950-Article 226-The petitioner, a Head Assistant in the Tourism Department challenged the rejection of her promotion to the post of Administrative Officer-The denial was based on the entries in her Annual Confidential Report (ACR) for the past five years, which were deemed insufficient for promotion as they were classified as "Good" or "Satisfactory" instead of "Very Good" or "Outstanding"-The petitioner contended that these entries were never communicated to her-The court referring the Supreme Court precedents such as Dev Dutt Vs U.O.I. & Rukshana Shaheen Khan Vs U.O.I. held that uncommunicated ACR entries cannot be used to deny promotion as it violates Article 14 of the Constitution- any adverse or below-benchmark entry must be communicated to the employee in a timely manner to ensure transparency and fairness in the employment decision-Thus, the Court quashed the impugned order directing the Director general of Tourism to make a fresh decision.

The petition is allowed. (E-6)

List of cases cited:

1. Dev Dutt Vs U.O.I. & ors.(2008) 8 SCC 725

2. Rukshana Shaheen Khan Vs U.O.I.(2018)AIR SC (Supp) 1252

3. R.K Jibanlata Devi Vs H.C. of Manipur thru its Reg. Gen.(2023) AIR SC 1190

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ashutosh Srivastava, learned counsel for the petitioner and Sri Sudhir Kumar Singh, learned Standing Counsel for the State.

2. At the very outset, learned counsel for the petitioner has requested that he may be permitted to delete the name of opposite party No.5 from the array of opposite parties.

3. Considering the aforesaid request, learned counsel for the petitioner is permitted to delete the name of opposite party No.5 from array of the opposite parties, during the course of day.

4. By means of this writ petition, the petitioner has prayed for the following reliefs:-

"(i) to issue a writ, order or direction in the nature of certiorari

quashing the impugned order dated 01.12.2023 by which the right to claim of the petitioner for the promotion on the post of Administrative Officer has arbitrarily rejected by the opposite parties, contained as Annexure No.1 to this writ petition.

(ii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties to promote the petitioner on the post of Administrative Officer from the date which the junior to the petitioner has been promoted on the said post."

5. Though, for the impugned order dated 01.12.2023 the counter affidavit may be called from he opposite parties but there is an error apparent on the impugned order dated 01.12.2023 itself. By perusing the letter dated 19.03.2024 (Annexure No.8) whereby the information has been provided to the petitioner by the Public Information Officer, Tourism Department, U.P., Lucknow indicating her entries for the last five years as those entries have never been communicated to the petitioner on or before 19.03.2024 (supra), therefore, this writ petition is being decided, with the consent of learned counsel for the parties, at the admission stage. The perusal of the impugned order reveals that the petitioner, who is serving on the post of Head Assistant, could not be promoted on the post of Administrative Officer for the reason that her Annual Confidential Report in the Character Roll for the last five years are not Very Good or Outstanding, rather those entries are either Good or Satisfactory.

6. After knowing the aforesaid impugned order dated 01.12.2023, the petitioner preferred a representation under Right to Information Act on 21.02.2024 and on such representation she has been provided her Annual Confidential Report for the last five years vide letter dated 19.03.2024 (supra) whereby she could know that her entry for the year 2017-2018 is satisfactory and her entries with effect from 2018-2019, 2019-2020, 2020-2021 and 2021-2022 are Good.

7. Therefore, this is a case where on the basis of un-communicated entries in the Annual Confidential Report she could not promoted on the next post of Administrative Officer. So the question before this Court is as to whether the promotion of an employee may be denied on the basis of un-communicated entries. The aforesaid question has been answered by the Apex Court in catena of cases and now the issue is not more res-integra.

8. At the very outset, I would consider the dictum of Apex Court rendered in the case in re: ***Dev Dutt vs. Union of India and others*** reported in ***(2008) 8 SCC 725*** whereby the Apex Court has answered the aforesaid question categorically holding that on the basis of un-communicated entries in the Annual Confidential Report the promotion of an employee may not be denied. The relevant paras-9 & 41 are being reproduced here-in-below:-

"9. In the present case the bench mark (i.e. the essential requirement) laid down by the authorities for promotion to the post of Superintending Engineer was that the candidate should have 'very good' entry for the last five years. Thus in this situation the 'good' entry in fact is an adverse entry because it eliminates the candidate from being considered for promotion. Thus, nomenclature is not relevant, it is the effect which the entry is having which determines whether it is an adverse entry or not. It is thus the rigours

of the entry which is important, not the phraseology. The grant of a `good' entry is of no satisfaction to the incumbent if it in fact makes him ineligible for promotion or has an adverse effect on his chances.

41. In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution."

9. The Apex Court in another case i.e. ***Rukshana Shaheen Khan vs. Union of India*** reported in ***AIR 2018 SC (Supp) 1252*** has also held that uncommunicated and adverse ACRs cannot be relied upon in the process. The relevant para-2 reads as under:-

"2. In view of the decision of this Court in Sukhdev Singh v. Union of India and others, reported in (2013) 9 SCC 556: (AIR 2013 SC 2741), there cannot be any dispute on this aspect. This Court has settled the law that uncommunicated and adverse ACRs cannot be relied upon in the process."

10. In the recent judgment rendered in the case in re: ***R.K. Jibanlata Devi vs. High Court of Manipur through its Registrar General*** reported in ***AIR 2023 SC 1190*** the similar view has been taken by the Apex Court.

11. Learned Standing Counsel has, however, tried to defend the order dated 01.12.2023 but in the light of letter dated 19.03.2024 (Annexure No.8) whereby the petitioner has been communicated the entries of Annual Confidential Report for the last five years, he could not defend the impugned order.

12. Accordingly, the instant writ petition is ***allowed***.

13. The impugned order dated 01.12.2023 (Annexure No.1) is hereby set aside/ quashed. The opposite party No.2 i.e. the Director General (Mahanideshak) Tourism Directorate, U.P., Lucknow is directed to ignore the uncommunicated entries and take a fresh decision for the petitioner, strictly in accordance with law, and before taking appropriate decision the petitioner shall be afforded an opportunity of hearing.

14. No order as to cost.

(2024) 8 ILRA 289
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-A No. 5106 of 2023
Along With
Writ-A No. 10109 of 2024

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

Counsel for the Petitioner:
Sri Kailash Singh Kushwaha

Counsel for the Respondents:
Sri Ashutosh Mani Tripathi, C.S.C., Sri Daya Shankar Mani Tripathi, Sri Ramesh Chandra Dwivedi, Sri Rohit Singh, Sri Vijay Kumar Ojha, Sri R.K. Ojha (Sr. Advocate)

(A) Civil Law – Constitution of India,1950 – Article 226 – Uttar Pradesh Education Service Selection Commission Act, 2023 - Sections 10(1) & 31(1) – Uttar Pradesh Education Service Selection Commission Rules, 2023 - Chapter – V - Rule 28, 28(5) - Writ Petition - challenging the proposal/order forwarded by Joint Director of Education Varanasi to Additional Director of Education (Secondary) UP for transferring the opposite party (Nitya Nand Mishra) to the post of Principal at a Inter college where petitioner is posted as officiating Principal – petitioner represented with request to permit him on the post till joining of a candidate recommended by the UP Secondary Education Services Selection Board – rejected – court finds that, after enactment of UP Education Services Selection Commission Act, 2023 & Rules, 2023 replead the earlier Acts & Rules of 1980, 1982, 1998 and 2019 – Rule 28(5) of Rule, 2023 provides that the vacancies which have been notified, shall not be filled by a solitary transfer and if solitary transfer is necessary in special circumstances, it shall be brought to the notice of Commission and same shall be included in the notified posts and this vacancy shall also be covered by the same selection process – hence, after commencement of the Selection process, no solitary transfer will be made under any circumstances – writ petition dismissed. (Para – 23, 24, 28)

(B) Civil Law – Constitution of India – Article 226 – Uttar Pradesh Education Service Selection Commission Act, 2023 - Sections - 10(1) & 31(1) – Uttar Pradesh Education Service Selection Commission Rules, 2023 - Chapter – V - Rule 28, 28(5) - Writ Petition - challenging the validity of order passed by Director of Education (Secondary) UP, transferring the opposite party (Nitya Nand Mishra) from the post of Principal of a secondary School Kushinagar to a Inter college Varanasi where petitioner is posted as officiating Principal on the medical ground – held, under the UP Education Services Selection Commission Rules, 2023, there is no absolute prohibition against filling up a vacant post of Principal by transfer after a requisition for filling up the vacancy has been sent, provided the selection process has not been commenced – hence, there is no illegality in transfer of opposite party from the post of Principal in question – writ petition are dismissed. (Para – 29)

Writ petitions dismissed. (E-11)

List of Cases cited:

1. Prashant Kumar Katiyar Vs St. of UP & ors.(2013 ADJ vol. 1 523),

2. Hari Pal Singh Vs St. of U.P. (2016 vol. 6 All.L.J. 203).

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

1. Heard Shri Kailash Singh Kushwaha, the learned counsel for the petitioner, Shri Pradeepta Kumar Shahi, the learned counsel for the State of U.P. and Shri R. K. Ojha Senior Advocate assisted by Sri Rohit Singh Advocate, the learned counsel for the opposite party No.5.

2. The petitioner Mayashankar has filed Writ A No.5106 of 2023 challenging a proposal dated 30.12.2022 forwarded by the opposite party No.5 - Joint Director of Education, Varanasi Region, Varanasi to the opposite party No.2 - Additional Director of Education (Secondary), U.P., Prayagraj, for transferring the opposite party No.6 - Nityanand Mishra to the post of Principal, Bharat Sewak Samaj Inter College, Hathiyar, Varanasi and he has prayed for being permitted to continue as Ad-hoc Principal of the aforesaid College till joining of a candidate recommended by the U.P. Secondary Education Services Selection Board. By way of amendment in the writ petition, the petitioner has prayed for quashing of an order dated 16.05.2023 passed by the Additional Director of Education (Secondary), U.P., Prayagraj, rejecting the petitioner's representation submitted against the aforesaid transfer order.

3. Writ A No.10109 of 2024 has been filed by the petitioner challenging validity of an order dated 28.06.2024 passed by the

Director of Education (Secondary), U.P. transferring the opposite party No.5-Nityanand Mishra (opposite party No.6 in Writ A No.5106 of 2023) from the post of Principal, Raj Kumar Higher Secondary School, Kubernath, Kushinagar, to the post of Principal, Bharat Sewak Samaj Inter College, Hathiyar, Varanasi in furtherance of a proposal made by the Joint Director of Education, Varanasi, which is under Challenge in Writ A No.5106 of 2023.

4. As the controversy involved in both the writ petitions revolves around the same set of facts and involves similar grounds of challenge and defence, both the writ petitions are being decided by a common judgment.

5. Briefly stated, the facts pleaded in the writ petitions are that the petitioner - Maya Shanker is the senior most teacher working in Bharat Sewak Samaj Inter College, Hathiyar, Varanasi (herein referred to as 'the College'). After retirement of Principal of the College Dr. Dinesh Chaubey, the Committee of Management of the College had resolved on 30.03.2018 to appoint the petitioner as Officiating Principal of the College. His signatures were attested by the District Inspector of Schools. On 07.07.2018, the Committee of Management of the College had sent a requisition for the post of Principal of the College to the District Inspector of Schools. The District Inspector of Schools had approved the petitioner's appointment as Officiating Principal of the College and had granted financial sanction by means of an order dated 19.09.2018.

6. On 07.06.2019, the Secretary, U.P. Secondary Education Services Selection Board had issued a circular to all the District Inspector of Schools in the State informing that the procedure for receiving requisitions for vacant posts had been changed and with effect from 01.07.2019, requisitions would be accepted only through Online Requisition Portal and through no other mode. Guidelines for sending requisitions through Online Requisition Portal were attached to this circular. Thereafter, a requisition through Online Requisition Portal was also made for the post of Principal of the College on 11.12.2021.

7. On 30.12.2022, the Joint Director of Education forwarded an application submitted by Sri Nityanand Mishra, Principal, Raj Kumar Higher Secondary School, Kubersthan, Kushinagar to the post of Principal of the College in question stating that in furtherance of an application submitted by Sri Nityanand Mishra, the District Inspector of Schools has forwarded the documents wherein it was mentioned that a requisition for the post of Principal of the College has been sent to U.P. Secondary Education Services Selection Board but the post has not been advertised. The transfer application of Sri Nityanand Mishra has been forwarded by Principal of both the Colleges, the District Inspector of Schools of both the Districts and the Joint Director of Education, VIIth Division, Gorakhpur. The Joint Director of Education stated in the letter dated 30.12.2022 that it is provided in the Government Order dated 27.01.2020 that although the transfers will be made online, in special circumstances, the Government will have power to make transfer through offline method. This proposal of the Joint Director of Education has been challenged by the petitioner in Writ A No. 5106 of 2023.

8. On 19.04.2023, this Court had passed an order in Writ A No.5106 of 2023

stating that as the matter was pending before the Additional Director of Education, it would be appropriate that he should hear the petitioner also in the matter of request of transfer of the opposite party No.6.

9. In compliance of the order dated 19.04.2023 passed in Writ A No.5106 of 2023, the Additional Director of Education (Secondary) passed an order dated 16.5.2023 rejecting the petitioner's representation against transfer of Nityanand Mishra, which order has been challenged by making amendment in Writ A No.5106 of 2023 and on 22.05.2023, this Court had passed an interim order directing that the post of Principal of the College shall not be filled by transfer and it can only be filled by regular selection by the Board.

10. The opposite party No. 6 had filed Special Appeal No.462 of 2023 against the interim order dated 22.05.2023, which was dismissed by means of an order dated 06.07.2023.

11. On 12.06.2024, a Government Order was issued regarding transfer of Principals and Teachers of non Government aided secondary schools and it inter alia provided that while making offline transfers, it will be ascertained that the transfer order does not violate any order passed by this Court. On 14.06.2024, the Director of Education (Secondary) issued a circular directing all the Regional Joint Directors of Education (Secondary) and all District Inspector of Schools to comply with the aforesaid Government Order dated 12.06.2024.

12. On 28.06.2024, the Deputy Director of Education (Secondary-III) passed an order transferring the opposite party No.6 from Raj Kumar Higher Secondary School, Kubernath to the College in question at Varanasi, which order has been challenged in Writ-A No.10109 of 2024 mainly on the ground that this transfer order was passed during continuance of the interim order dated 22.05.2023 passed by this Court in Writ-A No.5106 of 2023 as also in violation of the conditions of the Government Order dated 12.06.2024 and that it would result in dislodging the petitioner, without a regularly selected candidate having been appointed on the post in question.

13. On 16.07.2024., an order was passed in Writ A No.10109 of 2024 wherein it was stated that:-

"5. It is clearly stated in last but one paragraph of the aforesaid order that the post of Principal of the institution where the petitioner is working as Officiating Principal shall not be filled-up by any transfer except by mode of regular selection by the Board.

6. It is argued by learned counsel for the petitioner that the transfer of the opposite party no.5 from Kushinagar to the institution where the petitioner is working as Officiating Principal is per se illegal and is in complete violation of the order passed by this Court in Writ-A No. 5106 of 2023, which is quoted above.

7. In this view of the matter, the opposite party no.2-Addtional Director of Education (Secondary), U.P. Prayagraj, is directed to file his personal affidavit explaining that why the contempt proceeding shall not be initiated against him.

8. The aforesaid affidavit be filed within a period of three days from today."

14. After passing of the aforesaid order, the Additional Director of Education (Secondary) passed an order on the same date i.e. 16.07.2024 staying operation of the order dated 28.06.2024 whereby the opposite party No.6 had been transferred to the post of Principal of the College and making it subject to final outcome of Writ A No.5106 of 2023 and this order dated 16.07.2024 was brought on record along with a personal affidavit of Additional Director of Education (Secondary) U.P., Prayagraj filed before this Court.

15. A counter affidavit has been filed on behalf of Sri. Nityanand Mishra-opposite party No.6 in Writ A No.5106 of 2023, by his son Akhilesh Kumar Mishra, inter alia stating that Nityanand Mishra had met with a major road accident on 31.05.2022, in which he sustained grievous injuries in his spine, due to which he became unable to stand on his legs and to move on his own, as he has lost sensation in both his lower limbs. He requires wheelchair assistance for his daily routines and the Doctors have advised that his treatment / rehabilitation may stretch for a considerably long period, during which he would require proper care and treatment with the help of his family members. Wife of Sri. Nityanand Mishra is a permanent Assistant Teacher (L.T. Grade) posted at Varanasi. Sri. Nityanand Mishra is facing extreme difficulty in living alone at Kushinagar, away from his family members who reside at Varanasi, because of his aforesaid physical condition. The State as well as Sri Nityanand Mishra have stated in their counter affidavits that the Government Order dated 27.01.2020 issued regarding transfers of Principal and Teachers of Government aided Institutions inter alia provides that the post on which a Teacher is seeking transfer, should not have been Advertised by U.P. Secondary Education Services Selection Board or U.P. Education Service Selection Commission although a requisition regarding the post might have been sent.

16. In the rejoinder affidavit filed by the petitioner, the aforesaid averments made regarding the physical condition of Sri. Nityanand Mishra due to the injuries suffered by in an accident have not been disputed.

17. The Additional Director of Education (Secondary), U.P., Prayagraj has taken into consideration the pleas taken by all the parties concerned in the impugned order dated 16.05.2023 and he has noted that an offline requisition for the post of Principal of the College was sent on 19.07.2019 and again an online requisition was sent on 11.12.2021. The Selection Board had published a list of 141 posts requisitioned in the year 2021-22, which requisitions were cancelled for various reasons. Bharat Sewak Samaj Inter College, Varanasi is mentioned at serial No.139 of the list and the reason for cancellation of the requisition is mentioned that the post in question had already been requisitioned in the year 2019-20.

18. On 11.01.2020, Secretary, U. P. Secondary Education Services Selection Board had sent a letter addressed to all the District Inspector of Schools stating that as a long period of time had elapsed since online requisitions were received during the year 2019-20 and 2021-22. Therefore, to avoid any kind of disputes, it was decided to verify the online requisitions, for which purpose the requisition portal was being opened for the period 11.01.2023 to 16.01.2023. One of the points to be verified was whether the post has been filled by

way of promotion or was proposed to be filled by transfer. Requisition for the post in question was cancelled on this ground. The Regional Joint Director of Education informed through his letter dated 22.02.2023 that the requisition has not been verified as it was proposed to be filled by way of promotion.

19. The Additional Director of Education rejected the representation by stating that the petitioner was given charge of Officiating Principal till a regularly selected candidate joins the post. In the cases of **Prashant Kumar Katiyar and Hari Pal Singh**, this Court had held that posts which have been requisitioned, cannot be filled by any other manner but requisition of the post in question has already been cancelled and, therefore, the facts of case are different from the facts of the cases of **Prashant Kumar Katiyar and Hari Pal Singh.**

20. In **Prashant Kumar Katiyar Vs. State of U.P. and Others** 2013 (1) ADJ 523, a Full Bench of this Court has held that: -

"The claim of a dependant as per the third proviso to Section 16 of the 1982 Act read with Regulations 101 to 107 of Chapter III of the Regulations framed under the 1921 Act can be considered for compassionate appointment on the post of an Assistant Teacher (TGT grade) against a vacancy that has been notified for being filled up by direct recruitment under the 1982 Act read with the 1998 Rules framed thereunder upto the stage of the last date for receipt of application forms under the advertisement, but not thereafter till the selections are completed by the Board followed by appointments under the provisions aforesaid."

21. Following the decision of the Full Bench in **Prashant Kumar Katiyar (Supra),** a Division Bench of this Court held in **Hari Pal Singh versus State of U.P.:** (2016) 6 All LJ 203, that: -

"The ratio of the Full Bench in the case of Prashant Kumar Katiyar (supra) in paragraphs 38, 39, 40 and 41 has clearly concluded that the power of the Management or the District Inspector of Schools or even the authority which is to give effect to any transfer cannot proceed to adopt any other mode of recruitment after the steps taken for determination and notification as per Rule 11 of the 1998 Rules. It has also been held that the alteration of any such determination is not permissible and cannot be reversed. This has been reiterated in paragraph - 39 of the decision. Not only this in paragraph - 40, the Full Bench also obliges the Committee and the District Inspector of Schools to fulfill their obligations as per Rule 11 for determination and intimation of vacancies. The ratio therefore of the Full Bench read with the aforesaid Rules is clearly to the effect that the authorities, who are obliged to fill up the vacancies occurring in the year of recruitment, have to mandatorily perform their function of determining and notifying the vacancy. The failure by the Management or the District Inspector of Schools to act as per Rule 11 of the 1998 Rules would therefore not generate a right in favour of any person to seek transfer or even in the Committee of Management to defeat the very purpose of Rule 11 of determining or intimating the vacancies to the Selection Board for direct recruitment. The Committee of Management no doubt has the right to select the mode of recruitment when it has to be filled up directly in the event it has an option from a candidate seeking transfer.

However, this conscious decision of the Committee of Management to adopt a particular mode has to be taken within the time frame as provided under Rule 11 of the 1998 Rules. If the Committee of Management is allowed to violate the time schedule, then it would be allowing the Committee of Management to have a free play to choose to determine it's mode of recruitment at any time which is not the purpose of the Rules. For that matter, under Sub-Rule (4) of Rule 11, the District Inspector of Schools is also obliged to take a decision as per the specifications of the time schedule provided in Rule 11 itself for the Committee as well as for the District Inspector of Schools. This compliance has to be adhered to keeping in view the year of recruitment and also the eligibility of the candidate including his qualification as on the first day of the year of recruitment which would be the 1st of July of the year in question. However, any failure on their part would not extend the right of the Management to any stage beyond that for adopting the mode of appointment by way of transfer."

22. The learned counsel for the petitioner has submitted that the proposal for transfer of the opposite party No.6 as well as his transfer has been made after the post in question has been requisitioned and, therefore, the transfer order is illegal and is liable to be quashed.

23. Per contra, the learned counsel for the opposite parties have submitted that subsequent to passing of the judgments in **Prashant Kumar Katiyar and Hari Pal Singh**, the U. P. Education Services Selection Commission Act, 2023 (U. P. Act No. 15 of 2023) has been enacted with effect from 17.10.2023. Section 31 (1) has repealed the Uttar Pradesh Higher Education Services Commission Act, 1980, the Uttar Pradesh Secondary Education Service Selection Board Act, 1982 and the Uttar Pradesh Education Service Selection Commission Act, 2019.

24. With the repeal of the Uttar Pradesh Secondary Education Service Selection Board Act, 1982, the Uttar Pradesh Secondary Education Services Selection Board Rules, 1998, which were framed under the aforesaid Act, also stood repealed.

25. U. P. Education Services Selection Commission Rules, 2023 have been framed under the U. P. Education Services Selection Commission Act, 2023.

26. Chapter V of the U. P. Education Services Selection Commission Rules, 2023 deals with the procedure of recruitment and Rule 28 falling in Chapter V of the aforesaid Rules provides that the appointing authority or the management or the authorized officer shall ascertain the number of vacancies as per the provisions contained in Section 10 (1) of the Act and shall notify the vacancies through the Director (Higher Education) or Director (Secondary Education) or Director (Basic Education) or Director (Training and Employment) or Director General, Atal Awasiya Vidyalaya, as the case may be, to the Commission in the manner prescribed by the Rules.

27. Rule 28 (5) of the U. P. Education Services Selection Commission Rules, 2023 provides that the vacancies which have been notified, shall not be filled by a solitary transfer; provided that if a solitary transfer is necessary in special circumstances, as far as possible, it shall be brought to the notice of the Commission,

expeditiously and the post falling vacant due to the solitary transfer shall be included in the notified posts and this vacancy will also be covered by the same selection process. After commencement of the selection process, no solitary transfer will be made under any circumstance.

28. As the Rules in force at the time when the case of **Hari Pal Singh (Supra)** was decided do not exist any more, the ratio laid down in the aforesaid case would not apply to the present case, where the Rules in force are different from the Rules those were in force at the time of decision of Hari Pal Singh's case.

29. In view of the foregoing discussion, I am of the considered view that under the U. P. Education Services Selection Commission Rules, 2023, there is no absolute prohibition against filling up a vacant post of Principal by transfer after a requisition for filling up the vacancy has been sent, provided the selection process has not commenced. Therefore, there is no illegality in transfer of Sri. Nityanand Mishra from the post of Principal, Raj Kumar Higher Secondary School, Kubernath, Kushinagar, to the post of Principal, Bharat Sewak Samaj Inter College, Hathiyar, Varanasi.

30. Both the Writ Petitions lack merit and the same are ***dismissed***. It is needless to say that as a result of dismissal of the Writ Petitions, the interim orders passed in the Writ Petitions stand discharged.

(2024) 8 ILRA 296
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ-A No. 5951 of 2024

Ravi Prakash Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
S.M. Singh Royekwar

Counsel for the Respondents:
C.S.C., Anindya Shastri

A. Service Law-Constitution of India, 1950-Article 226-petitioner challenged that transfer order issued during the election notification period, claiming it violated the Model Code of Conduct-The transfer was executed without prior approval from the State Election Commission, which is mandatory during such periods-Held, that any transfer order issued without approval during the election notification period is null and void-The court quashed the impugned transfer order, reinstated the petitioner to his original post, and directed the State Election Commission to seek an explanation from the District Panchayat Raj Officer for the violation of the Model Code of Conduct.(Para 1 to 13)

The petition is allowed. (E-6)

List of Cases cited:

R.K. Mittal Vs St.of U.P. & anr..(2004) SCC Online All 1772.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard.

2. This Court has passed order dated 31.07.2024, which reads as under:-

"1. Heard Sri S.M. Singh Royekwar, learned counsel for the

petitioner, Sri Sandeep Sharma, learned Standing Counsel for the State and Sri Anindra Shastri, learned counsel for the opposite party No.8.

2. Sri Yoyekwar, learned counsel for the petitioner has assailed the impugned transfer order dated 20.07.2024 (Annexure No.1), passed by the District Panchayat Raj Officer, Gonda, whereby the petitioner who is serving on the post of Assistant Development Officer (Panchayat), has been transferred from Vikas Khand Wazirganj to Vikas Khand Mujehna, District-Gonda on the ground that the State Election Commission has notified election of Panchayat on 15.07.2024 (Annexure No.2) and election for Block Wazirganj is to be conducted pursuant to the election notification.

3. As per Sri Royekwar, after the notification having been issued by the State Election Commission, the administrative authority cannot transfer an employee from one place to another place even in the same district without taking prior permission from the State Election Commission.

4. On being confronted learned counsel for the State Election Commission as to whether any permission/ approval has been given transferring the petitioner and the same query has been put from Sri Sandeep Sharma learned counsel for the State as to whether the authority concerned has taken consent from the Election Commission, both the counsels appearing for the opposite parties have requested that some short time may be given them to seek specific instructions on that point.

5. List/ put up this case on 02.08.2024 as fresh. On that date, this matter may be taken up immediately after fresh cases.

6. Till the next date of listing, the status-quo as on today i.e. 31.07.2024, shall be maintained."

3. Sri S.M. Singh Royekwar, learned counsel for the petitioner, has filed supplementary affidavit enclosing true copy of the Model Code of Conduct issued by the Election Commission, the same is taken on record.

4. Learned counsel for the State Election Commission and learned Standing Counsel, both, have stated that before issuing the impugned transfer order dated 20.07.2024 no approval/ permission has been taken from the State Election Commission.

5. Sri S.M. Singh Royekwar has drawn attention of this Court towards para-6 (Ka) of the Model Code of Conduct, which categorically provides that during the currency period of election notification, no employee of the area would be transferred/ appointed/promoted and if such transfer etc. is necessary on account of compelling circumstances, prior permission/ approval from the State Election Commission would be required.

6. Sri Royekwar has drawn attention of this Court towards the decision of the Division Bench of this Court in re; **R.K. Mittal Vs. State of U.P. and another, 2004 SCC OnLine All 1772,** wherein the Division Bench has observed that transfer of an employee whose services are required in the election process for conducting the election smoothly, such exercise shall be regulated by the Election Commission in order to conduct the election free and fair; relevant para-23 thereof reads as under:-

"23. Transfer of the employees whose services are required in the electioneering process, may be restrained/regulated by the Election Commission in order to conduct the

election free and fair, for the reason that a political party in power, may post the officers of its liking at a particular place for a definite purpose of some unlawful gain in the election and in order to curb such a situation/possibility, it may be necessary for the Election Commission to issue such kind of direction, and once such a direction is issued, it requires strict adherence. It is not that every direction issued by the Commission requires observance religiously but where the direction is being issued to ensure free and fair election, all other authorities are under obligation to give strict adherence to the same."

7. Therefore, Sri Royekwar has submitted that since no prior permission/ approval has been taken transferring the petitioner from one place to another place during the currency period of election notification, the impugned transfer order would be illegal, arbitrary and uncalled for, therefore, the same is liable to be quashed. He has further submitted that if the aforesaid transfer order has been executed and any person has submitted joining at the transferred place, even then such joining would be quashed for the reason that such transfer order would be non-est and void ab-initio.

8. Learned Standing Counsel has submitted that opposite party no.7 has submitted joining pursuant to the impugned transfer order dated 20.07.2024.

9. Having heard learned counsel for the parties and having perused the material available on record and also the decision of the Division Bench of this Court in re; **R.K. Mittal (supra),** I am of the considered opinion that if during the currency period of election notification, any transfer order has been passed without seeking prior approval or permission from the Election Commission, that order would be non est in the eyes of law and therefore, it would be treated as if no transfer order has been passed, thus, the execution thereof, if any, would be meaningless. If on account of the fact that one person has submitted his joining at the transferred place pursuant to the illegal and unwarranted transfer order during the currency period of election notification, then the very purpose of issuing election notification and the Model Code of Conduct would be frustrated.

10. Therefore, the impugned transfer order dated 20.07.2024 is hereby set aside/ quashed.

11. The District Panchayat Raj Officer, Gonda is directed to permit the petitioner to serve at Vikas Khand Wazirganj where he was serving before passing the impugned transfer order dated 20.07.2024 and opposite party no.7 shall be permitted to discharge his duties at Vikas Khand Mujehna where he was serving before the impugned order of transfer.

12. Not only the above, since this is an admitted fact that the District Panchayat Raj Officer, Gonda has passed the transfer order during the currency period of election notification without seeking prior permission or approval from the State Election Commission, therefore, the State Election Commission may seek explanation from the District Panchayat Raj Officer, Gonda to the effect that as to how he has issued the transfer order in violation of the Model Code of Conduct.

13. Accordingly, the writ petition is **allowed**.

14. No order as to costs.

(2024) 8 ILRA 299
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-A No. 6590 of 2024

Manoj Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri A.K. Srivastava

Counsel for the Respondents:
C.S.C., Sri Shesh Kumar Srivastava, Sri Vinod Kumar Singh

A. Service Law-Constitution of India,1950-Article 226-The petitioner challenged the appointment of RespondentNo.5 as the Prinicipal of Dayanand Brhama Sanskrit Mahavidyalaya on the grounds of non-eligibility-The petitioner claimed that the respondent did not meet the necessary qualifications for the position and that his own rights were infringed upon by not being considered for the post-The court considered the fact that Respondent no. 5 had already retired upon reaching superannuation on june 30, 2024-As a result, the core issue concering the respondent's appointment had become moot-Citing relevant legal precedents, the court determined that the petitioner's request for removal of Respondent No.5 from the position was no longer actionable since the respondent was no longer in office-Consequently, the writ petition was dismissed as infructuous, since the relief sought by the petitioner could no longer be granted.(Para 1 to 22)

The petition is dismissed. (E-6)

List of Cases cited:

1. Pradeep Kumar Verma & ors.Vs U.O.I. (2018) 11 ADJ 203

2. Board of Mgmt.Dayanand College of Law, Kan. Nagar Vs St. of U.P.(2001) 1 AWC 190 All=(2001) 1 UPLBEC 440

3. Bharat Reddy Vs St. of Kar & ors.(2018) SCC 162

4. Dr. Premchandran Kijoy Vs V.C. Kan. Univ. (2023) SCC Online SC 1592

5. Cent. Electy. Supply Utility of Ori. Vs Dhobei Sahu & ors.(2014) SCC 161

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

1. याचिकाकर्ता के विद्वान अधिवक्ता श्री अशोक कुमार श्रीवास्तव, विपक्षी संख्या-1, 2 एवं 3 की तरफ से विद्वान स्थायी अधिवक्ता श्री सौरभ, विपक्षी संख्या-4 के विद्वान अधिवक्ता श्री शेष कुमार श्रीवास्तव तथा विपक्षी संख्या-5 के विद्वान अधिवक्ता श्री विनोद कुमार सिंह को सुना तथा पत्रावली का अवलोकन किया।

2. भारतीय संविधान के अनुच्छेद 226 के अंतर्गत प्रस्तुत इस रिट याचिका द्वारा याचिकाकर्ता ने विपक्षी संख्या-5 द्वारा श्री दादू बलराम संस्कृत महाविद्यालय के प्रधानाचार्य के पद धारित करने के विरुद्ध एक अधिकार पृच्छा रिट निर्गत किये जाने की प्रार्थना की है तथा साथ ही याचिकाकर्ता ने यह भी अनुतोष माँगा है कि विपक्षी संख्या 1, 2 तथा 6 विपक्षी संख्या-5 को उपरोक्त पद का वेतन न दें।

3. दिनांक 30.04.2024 को पारित आदेश में इस न्यायालय ने यह अंकित किया था कि क्या सम्पूर्णानन्द संस्कृत विश्वविद्यालय से सम्बद्ध दादू बलराम संस्कृत महाविद्यालय के प्रधानाचार्य का पद अधिकार पृच्छा की रिट निर्गत करने के उद्देश्य से लोकपद माना जाएगा तथा सभी पक्षकारों के विद्वान अधिवक्ताओं से इस प्रश्न पर निर्णयज विधियाँ प्रस्तुत करने को कहा था। किसी भी विद्वान अधिवक्ता ने इस बिन्दु पर कोई विधि प्रस्तुत नहीं की।

4. **प्रदीप कुमार वर्मा तथा अन्य बनाम भारत संघः** 2018 (11) ए.डी.जे. 203 के निर्णय में इस न्यायालय की एक खण्डपीठ ने अवधारित किया कि इलाहाबाद विश्वविद्यालय से सम्बद्ध चौधरी महादेव प्रसाद महाविद्यालय, इलाहाबाद के प्रधानाचार्य का पद विश्वविद्यालय अनुदान आयोग अधिनियम, 1956 के प्राविधानों से आच्छादित है तथा यह एक लोक पद है, जिसके संबंध में अधिकार पृच्छा की रिट जारी की जा सकती है।

5. **प्रबंधन बोर्ड, दयानंद कॉलेज ऑफ लॉ, कानपुर नगर बनाम उत्तर प्रदेश राज्यः** 2001) (1), ए.डब्ल्यू.सी. 190 इलाहाबाद (2001) 1 यू.पी.एल.बी.ई.सी. 440 में इस न्यायालय की एक खण्डपीठ ने यह निर्णीत किया कि दयानन्द कालेज ऑफ लॉ के प्रधानाचार्य का पद अधिकार पृच्छा की रिट के उद्देश्य से एक लोक पद है।

6. सम्पूर्णानन्द संस्कृत विश्वविद्यालय, उ०प्र० राज्य विश्वविद्यालय अधिनियम, 1973 (राष्ट्रपति अधिनियम संख्या-10 सन् 1973) से आच्छादित है तथा दादू बलराम संस्कृत महाविद्यालय, जो उक्त विश्वविद्यालय से सम्बद्ध है, भी उपरोक्त अधिनियम से आच्छादित है। अतः दयानन्द कॉलेज ऑफ लॉ तथा प्रदीप कुमार वर्मा के उपरोक्त निर्णयों के अनुसार दादू बलराम संस्कृत महाविद्यालय के प्रधानाचार्य का पद एक लोक पद है और उक्त पद के सम्बन्ध में अधिकार पृच्छा की रिट याचिका पोषणीय है।

7. याचिकाकर्ता का कथन है कि विपक्षी संख्या 5 ने वर्ष 1982 में सम्पूर्णानन्द संस्कृत विश्वविद्यालय द्वारा दी गयी शास्त्री की उपाधि के आधार पर सहायक अध्यापक के पद पर नियुक्ति प्राप्त की थी, जबकि उसकी उपाधि कूटरचित है। उसका कथन है कि दिनांक 10.07.2020 को शिक्षा निदेशक (माध्यमिक) उ०प्र० ने समस्त जिला विद्यालय निरीक्षकों को शासनादेश दिनांक 08.07.2020 के क्रम में प्रमाणपत्रों की जाँच कराए जाने का निर्देश दिया था, किन्तु विपक्षी संख्या-5 के प्रमाणपत्रों की जाँच नहीं की गयी तथा याचिकाकर्ता एवं अन्य लोगों द्वारा

प्रार्थनापत्र देने के बाद भी जाँच की कार्यवाही नहीं की गयी।

8. शासनादेश दिनांक 08.07.2020 तथा शिक्षा निदेशक माध्यमिक का पत्र दिनांक 10.07.2020 में समस्त राजकीय माध्यमिक विद्यालयों, अशासकीय सहायता प्राप्त माध्यमिक एवं संस्कृत माध्यमिक विद्यालयों में कार्यरत समस्त शिक्षकों के संबंध में है तथा संस्कृत महाविद्यालय के संबंध में नहीं है।

9. मात्र जाँच की कार्यवाही न होने से विपक्षी संख्या 5 द्वारा योग्यता धारित न करने की कोई निश्चित अवधारणा नहीं की जा सकती है।

10. **भारती रेड्डी बनाम कर्नाटक राज्य तथा अन्यः** (2018) 6 सुप्रीम कोर्ट केसेज 162 में माननीय सर्वोच्च न्यायालय ने कहा कि जब तक विवादित प्रमाणपत्र सक्षम अधिकारी द्वारा निरस्त अथवा अवैध घोषित नहीं कर दिये जाते, अधिकार पृच्छा की रिट निर्गत नहीं की जा सकती है, क्योंकि अधिकार पृच्छा की रिट मात्र अविवादित तथ्यों के आधार पर ही निर्गत की जा सकती है।

11. यद्यपि अधिकार पृच्छा की रिट याचिका के संबंध में याचिका प्रस्तुत करने की अधिकारिता का प्रश्न कोई विशेष महत्व नहीं रखता है तब भी यह अनिवार्य है कि इस न्यायालय द्वारा भारतीय संविधान के अनुच्छेद 226 के अंतर्गत प्रदत्त शक्तियों के अंतर्गत कोई रिट प्राप्त करने के लिए याचिका स्वच्छ हाथों से तथा समस्त संगत तथ्यों का खुलासा करते हुए की जानी चाहिए।

12. याचिकाकर्ता ने रिट याचिका में अपने को एक समाजसेवी होने का कथन किया है तथा उसने कहा है कि इस प्रकरण में उसका कोई निजी हित सम्मिलित नहीं है। रिट याचिका में यह भी कहा गया है कि विपक्षी संख्या 5 बिना पद के लिए अर्हता रखते हुए नियुक्त हो गया था और याचिकाकर्ता को अधिकार पृच्छा की रिट प्रस्तुत करने का अधिकार है।

13. रिट याचिका में याचिकाकर्ता के समाज सेवी होने के अतिरिक्त उसके द्वारा किये गये किसी कार्य का कोई कथन नहीं किया गया है, जबकि विपक्षी संख्या-5 के विद्वान अधिवक्ता ने न्यायालय को सूचित किया कि याचिकाकर्ता श्री दादू बलराम संस्कृत महाविद्यालय में मानदेय के आधार पर संस्कृत शिक्षक के पद पर कार्यरत था। दिनांक 13.05.2024 को उप-निरीक्षक, संस्कृत पाठशालायें मेरठ क्षेत्र, मेरठ द्वारा विद्यालय का आकस्मिक निरीक्षण किया गया, जिसमें यह पाया गया कि याचिकाकर्ता दिनांक 17.04.2024 से बिना किसी सूचना के अनुपस्थित चल रहा था।

निरीक्षक महोदय के आदेशानुसार महाविद्यालय के प्राचार्य ने दिनांक 14.05.2024 के द्वारा याचिकाकर्ता से स्पष्टीकरण माँगा, किन्तु उसने कोई स्पष्टीकरण नहीं दिया तथा इस कारण से दिनांक 27.05.2024 के आदेश से याचिकाकर्ता को संस्कृत शिक्षक पद से हटा दिया गया।

14. उपरोक्त तथ्यों से यह स्पष्ट है कि याचिकाकर्ता रिट याचिका प्रस्तुत करने के संबंध में शपथपत्र तैयार करने के दिनांक अर्थात् 18.04.2024 को एवं रिट याचिका प्रस्तुत करने के दिनांक 26.04.2024 को श्री दादू बलराम संस्कृत महाविद्यालय में संस्कृत शिक्षक के पद पर कार्यरत था, जिस विद्यालय के प्रधानाचार्य के विरुद्ध उसने यह अधिकार पृच्छा की रिट प्रस्तुत की है।

15. **डॉ० प्रेमचन्द्रन कीजोय बनाम कुलधिपति, कानपुर विश्वविद्यालय,** (2023) एस०सी०सी० ऑनलाइन एस०सी० 1592 के निर्णय में माननीय उच्चतम न्यायालय ने कहा है कि लोकपद के सम्बन्ध में कोई भी व्यक्ति अधिकार पृच्छा की रिट हेतु याचिका प्रस्तुत कर सकता है, किन्तु न्यायालय को यह देखना चाहिए कि क्या याचिका सदाशयपूर्वक प्रस्तुत करी गयी है तथा क्या जनहित में यह घोषित करना आवश्यक है कि किसी लोकपद को बिना विधिक अधिकार के हड़प लिया गया है। यदि याचिका सदाशयतापूर्वक प्रस्तुत नहीं की गयी है तो उसे निरस्त किया जाना चाहिए।

16. याचिकाकर्ता का उपरोक्त कृत्य, कि उसने उसी महाविद्यालय में संस्कृत शिक्षक पद पर कार्यरत रहते हुए, इस तथ्य को छिपाते हुए एवं स्वयं को मात्र समाज सेवक कहते हुए विद्यालय के प्रधानाचार्य के विरुद्ध अधिकार पृच्छा की रिट प्रस्तुत की, निंदनीय है। ऐसा प्रतीत होता है कि याचिकाकर्ता ने विपक्षी संख्या-5 के विरुद्ध निजी द्वेषवश इस न्यायालय की रिट अधिकारिता का प्रयोग करने का प्रयास किया है।

17. विपक्षी संख्या-5 के विद्वान अधिवक्ता ने न्यायालय को सूचित किया कि विपक्षी संख्या- 5 दिनांक 30.06.2024 को सेवानिवृत्त हो चुका है तथा अब वह प्रधानाचार्य श्री दादू बलराम संस्कृत महाविद्यालय का पद धारित नहीं कर रहा है एवं रिट याचिका सारहीन हो गयी है।

18. इस प्रारम्भिक आपत्ति के उत्तर में याचिकाकर्ता के विद्वान अधिवक्ता ने कथन किया कि यदि विपक्षी संख्या-5 की नियुक्ति अवैध थी, तो उसकी सेवानिवृत्ति के उपरान्त भी यह न्यायालय उसकी नियुक्ति की वैधता का परीक्षण करने में सक्षम है तथा यदि न्यायालय यह पाता है कि

विपक्षी संख्या 5 ने बिना किसी विधिक अधिकार के अपनी मूल नियुक्ति से सेवानिवृत्ति तक पद धारित किया, तो उसको उसकी सेवा के संबंध में भुगतान की गयी समस्त धनराशि की वसूली का आदेश पारित किया जाए। याचिकाकर्ता के विद्वान अधिवक्ता ने यह भी तर्क दिया कि यह रिट याचिका दिनांक 26.04.2024 को प्रस्तुत कर दी गयी थी, जिस तिथि को विपक्षी संख्या 5 प्रधानाचार्य दादू बलराम संस्कृत महाविद्यालय के पद पर कार्यरत था तथा इस न्यायालय में याचिका लंबित रहने के दौरान विपक्षी संख्या 5 के सेवानिवृत्त हो जाने के कारण याचिका सारहीन नहीं हो सकती है।

19. जबकि विपक्षी संख्या 5 महाविद्यालय के प्रधानाचार्य के पद से सेवानिवृत्त हो चुका था तथा अब वह किसी पद को धारित नहीं करता है, अधिकार पृच्छा की रिट जारी करके विपक्षी संख्या-5 को पद से हटाये जाने की संभावना समाप्त हो चुकी है। याचिकाकर्ता द्वारा माँगा गया द्वितीय अनुतोष, कि बिपक्षी संख्या-1, 2 तथा 6, विपक्षी संख्या-5 के वेतन का भुगतान रोक दें, भी सारहीन हो गया है क्योंकि सेवानृिवत्त होने के उपरान्त विपक्षी संख्या-5 वेतन पाने का अधिकारी नहीं बचा है।

20. जहाँ तक याचिकाकर्ता के विद्वान अधिवक्ता का तर्क कि विपक्षी संख्या-5 को किये गये समस्त भुगतान की वसूली की जानी चाहिए तथा उसकी पेंशन का भुगतान रोक देना चाहिए, विपक्षी संख्या-5 के विद्वान अधिवक्ता ने सूचित किया कि विपक्षी संख्या 5 की नियुक्ति दिनांक 01.07.1982 को हुई थी तथा चालीस वर्ष की सेवा पूर्ण करने के उपरान्त वह दिनांक 30.06.2024 को सेवानिवृत्त हुए हैं। जब विपक्षी संख्या-5 की सेवायें चालीस वर्षों तक ली गयीं और इसके विरुद्ध लगभग 30 वर्ष 10 माह तक किसी ने किसी प्रकार की कोई आपत्ति भी नहीं की, तो इस स्तर पर विपक्षी संख्या-5 की सेवानिवृत्ति के उपरान्त उसको दिये गये वेतन तथा अन्य लाभों की वसूली न तो किसी न्यायिक सिद्धांत से समर्थित होगी और न ही न्यायसाम्य (इक्विटी) के सिद्धांत से समर्थित होगी।

21. **सेंट्रल इलेक्ट्रिसिटी सप्लाई यूटिलिटी ऑफ उड़ीसा बनाम धोबेई साहू तथा अन्य,** (2014), सुप्रीम कोर्ट केसेज़ 161 के निर्णय में माननीय उच्चतम न्यायालय ने अवधारित किया कि अधिकार पृच्छा की रिट द्वारा सम्बन्धित व्यक्ति को पद पर कार्यरत रहते हुए किये गये वेतन भुगतान की वसूली नहीं की जा सकती है। इस रिट द्वारा मात्र यह घोषणा की जा सकती है कि व्यक्ति बिना विधिक अधिकार के पद पर है, जिस घोषणा के उपरान्त व्यक्ति पद नहीं रहेगा, किन्तु जब तक उसने पद पर

कार्य किया है, वह वेतन पाने का अधिकारी होगा।

22. अतः उपरोक्त समीक्षा के आलोक में रिट याचिका **निरस्त** की जाती है।

(2024) 8 ILRA 304
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ-A No. 6737 of 2024

Rajendra Prasad Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ratnesh Singh, Pranav Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law-Constitution of India,1950-Article 226-issue of recovery of excess payments made to a retired Class-IV employee-The recovery of Rs. 5,38,674 from petitioner's pension commutation on the grounds that no prior notice or undertaking was provided-The Apex Court judgment Rafiq Mashih protects Class-III and Class-IV employees from such recoveries after retirement-Hence, no recovery can be made from the amount of commutation of pension-the court quashed the order as illegal, arbitrary and violating natural justice-The court directed the authorities to refund the deducted amount within a month, failing which 10% interest penalty for delayed payment.(Para 1 to 14)

The petition is allowed. (E-6)

List of Cases cited:

St. of Punj. & ors. Vs Rafiq Masih (White Washer) & ors.(2015) 4 SCC 334.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Pranav Mishra and Sri Ratnesh Singh, learned counsels for the petitioner and Sri Sandeep Sharma, learned Standing Counsel for the State.

2. By means of this writ petition, the petitioner has prayed for the following reliefs:-

"(i) to issue a writ, order or direction in the nature of certiorari thereby quashing the impugned order dated 29.04.2023 passed by the opposite party No.3 (as contained in Annexure No.1) to the writ petition.

(ii) to issue a writ, order or direction in the nature of mandamus commanding the opposite parties to refund the amount deducted from the post of retiral dues of the petitioner without any diminution to his emoluments."

3. The precise contention of learned counsel for the petitioner is that the petitioner retired from the post of Follower, which is a Class-IV post, on 30.06.2022 while serving at Sitapur. The petitioner is aggrieved from the order dated 29.04.2023 passed by the Superintendent of Police, District-Sitapur indicating therein that the petitioner retired on 30.06.2022 and on 30.07.2022 the Finance Controller of the Police Department found that the petitioner was paid some excess amount to the tune of Rs.5,38,674/- while providing him the benefit of revised pay-scale. This order further reads that the total amount regarding commutation of pension is

Rs.7,94,490/- and after deducting a sum of Rs.5,38,674/- he would be paid Rs.2,55,816/-.

4. Learned counsel for the petitioner has stated that in the aforesaid manner after declaring a sum of Rs.5,38,674/- as excess amount that amount has been deducted from the commutation of pension which is not permissible under the law as no amount can be recoverable from the amount of commutation of pension.

5. Learned counsel for the petitioner has submitted with vehemence that at the time of providing the benefit of revised pay-scale when he was in service, no undertaking was received from the petitioner inasmuch as if any undertaking was received from him that would have been indicated in the impugned order. He has further submitted that before deducting the amount in question from commutation of pension no opportunity of hearing has been provided to the petitioner inasmuch as if any opportunity was afforded to the petitioner, it would have been indicated in the impugned order itself, but both the aforesaid legal requirements are missing in the impugned order. Besides, learned counsel for the petitioner has drawn attention of this Court towards para-18 of the dictum of Apex Court rendered in the case in re: ***State of Punjab and others v. Rafiq Masih (White Washer) and others, (2015) 4 SCC 334,*** wherein the Hon'ble Apex Court has held as under:-

"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to here-in-above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class-III and Class-IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

6. On the basis of aforesaid background, learned counsel for the petitioner has submitted that the Apex Court has held that no recovery in the name of excess amount may be executed against employee who is Class-III or Class-IV employee after his retirement and in the present case, admittedly, the petitioner retired on 30.06.2022 while serving on Class-IV post and the impugned recovery has been executed on 29.04.2023, therefore, the aforesaid impugned order is not only illegal, aribtrary and violative of principles of natural justice but the same is in utter disregard to the dictum of Apex

Court rendered in re: ***Rafiq Masih (supra)*** also.

7. Sri Sandeep Sharma, learned Standing Counsel has requested for sometime to seek complete written instructions in the matter, but on being confronted on the point that neither any reference of undertaking at the time of granting the benefit of revised pay-scale has been indicated in the impugned order nor the reference of an opportunity of hearing has been indicated in the order, Sri Sharma has stated that though both the aforesaid things must have been indicated in the impugned order by the Competent Authority but the same have not been indicated in the impugned order so if he is given some reasonable time he may seek complete instructions on that points too.

8. Having heard learned counsel for the parties and having perused the material available on record, though the request of Sri Sandeep Sharma for seeking sometime to seek instructions is a reasonable request but if there is any mistake apparent on the face of record which makes the impugned order non est and uncalled for in the eyes of law then no purpose would be served to provide any time to seek instructions from the Competent Authority, therefore, the aforesaid request of Sri Sharma is declined.

9. The present petitioner retired from Class-IV post on 30.06.2022 and if any excess amount was paid to him while providing him the benefit of revised pay-scale when he was in service, any undertaking could have been taken from him and if such undertaking was taken from the petitioner the specific recital to that effect must have been indicated in the impugned order but no such undertaking was taken from the petitioner. Further, if after almost 11 months from the retirement of the petitioner any recovery is to be undertaken, at least one opportunity of hearing should have been afforded to the petitioner issuing show cause but no such opportunity has been provided to the petitioner, therefore, the impugned order is violative of principles of natural justice and for that reason the impugned order where the civil consequences are involved, would not sustain in the eyes of law. If any explanation or show cause notice was issued to the petitioner, the recital to that effect must have been indicated in the impugned order but since no such indication is there then it can be presumed that no such opportunity of hearing has been provided to the petitioner before executing the recovery from him.

10. This is a trite law that no recovery of any kind whatsoever in the name of excess amount being paid can be executed or deducted from the amount of commutation of pension, therefore, on that ground alone the impugned order dated 29.04.2023 vitiates.

11. Lastly, when the Apex Court in the case in re: ***Rafiq Masih (supra)*** has settled the legal proposition to the effect that no recovery in the name of excess payment would be undertaken from Class-III or Class-IV employees at the fag end of retirement and after the retirement then such recovery may not be executed from the petitioner who retired from Class-IV post. Therefore, the impugned order is in utter disregard to the direction being issued by the Apex Court.

12. In view of the above, the impugned order dated 29.04.2023 (Annexure No.1) passed by the Superintendent of Police, District-Sitapur is

hereby quashed being illegal, arbitrary, violative of principles of natural justice and being violative of directions of Apex Court issued in the case in re: ***Rafiq Masih (supra).***

13. The Competent Authorities, who may be the Superintendent of Police, District-Sitapur or the Finance Controller of the Police Department, U.P., Lucknow, are directed to refund a sum of Rs.5,38,674/-, which has been deducted from the amount of commutation of pension, to the petitioner forthwith, preferable within a period of one month from the date of production of a certified copy of this order, failing which, the petitioner would be entitled for interest on delayed payment of such amount at the rate of 10% per annum.

14. Accordingly, the instant writ petition is ***allowed***.

15. No order as to cost.

(2024) 8 ILRA 307
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-A No. 6988 of 2024

Shardindu Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gautam Baghel, Sri Om Prakash Singh

Counsel for the Respondents:
Sri Adarsh Singh, C.S.C., Sri Indra Raj Singh, Sri Jamil Ahamad Azmi

A. Service Law-Constitution of India,1950-Article 226-suspension-Petitioner was appointed as an L.T. Grade teacher promoted to lecturer-he was exonerated by the Joint Director of Education from charges of irregular salary payments and procedural lapses in admissions to the NCC-Despite this , the DIOS refused to hand over the charge of Officiating Principal-The court held that suspension should be based on strong prima facie evidence of serious misconduct-The administrative decision of the DIOS was found to be illogical and arbitrary-Suspension orders should not be issued arbitrarily or with malice-The court held that if an employee has been exonerated of specific charges, issuing a suspension order based on the same charges or without sufficient legal grounds constitutes "malice in law"-The administrative actions must be fair reasonable, and supported by valid reasons, as per the legal precedent in U.O.I. Vs Ashok Kumar Aggarwal Case.(Para 1 to 28)

The petition is allowed. (E-6)

List of Cases cited:

1. U.O.I.& anr.. Vs Ashok kumar Aggarwal (2013) 16 SCC 147

2. L.K. Verma Vs H.M.T.Ltd(2006) 2 SCC 269

3. Hombe Gowda Edn. Trust & anr. Vs St.of Kar. & ors.(2005) 10 SCALE 307

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

1. Heard Sri Gautam Baghel, the learned counsel for the petitioner, Sri Gaya Prasad Singh, the learned Standing Counsel appearing on behalf of the State-opposite parties no.1 to 4, 7 and 8, Sri Indra Raj Singh, the learned counsel for the opposite party no.6.

2. The opposite party no.5 - Manoj Kumar Mishra is the District Inspector of Schools, Azamgarh who has been

impleaded in his personal capacity as allegations of malice have been levelled against him.

3. 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 10.04.2024, passed by the District Inspector of Schools, Azamgarh, whereby he has declined to hand over the charge of Officiating Principal of S. K. P. Inter College, Jokhara, Azamgarh (which will hereinafter be referred to as 'the college') to the petitioner till a decision in this regard is taken by the Director of Education (Secondary Education), U.P. The petitioner has also challenged the validity of an order dated 24.07.2024, passed by the opposite party no.7 - Authorized Controller of the college / District Inspector of Schools, Azamgarh, whereby the petitioner has been placed under suspension.

4. Briefly stated, the facts of the case are that the petitioner was appointed as L.T. Grade teacher in S. K. P Inter College, Azamgarh in the year 1993 with the approval of District Inspector of Schools, Azamgarh. The petitioner's services were regularized by means of an order dated 27.06.2001. The petitioner was promoted on the aforesaid post of Lecturer (Zoology) on ad-hoc basis by means of an order dated 26.07.1999, passed by the District Inspector of Schools, Azamgarh, which was confirmed by the Joint Director of Education by means of an order dated 27.09.2001. The senior most Lecturer who was working as ad-hoc Principal of the college resigned on 16.08.2022 and the petitioner was made Officiating Principal of the college and his signatures were attested by the District Inspector of Schools, Azamgarh 01.09.2022.

5. On 10.07.2023 the District Inspector of Schools, Azamgarh issued a circular directing all the Managers/Principals of aided intermediate colleges to give updates of the pending writ petitions filed by the employees of the colleges. Upon issuance of the aforesaid circular the petitioner verified the status of the pending court cases, whereupon it came to light that one Ram Sahai Maurya, a Class-IV employee of the college, had filed Writ-A No.25304 of 2001, in which this court had passed an interim order dated 13.07.2001 directing payment of salary to the petitioner, but the writ petition was dismissed for want of prosecution on 20.04.2018. On 26.07.2023 the petitioner issued a notice to the aforesaid employee asking about the status of his pending case and a similar notice was issued by the Authorized Controller on 27.07.2023.

6. On 03.08.2023, the District Inspector of Schools, Azamgarh issued a show cause notice to the petitioner as to why the aforesaid Class-IV employee was paid salary after dismissal of his writ petition and on 04.08.2023 the authorized controller issued a similar notice to the petitioner.

7. The petitioner submitted a reply to the aforesaid notice stating that he got knowledge of dismissal of the writ petition only after holding an enquiry in pursuance of the circular dated 10.07.2023 issued by the District Inspector of Schools, Azamgarh. He further stated that he had assumed the charge of the post of Principal on 01.09.2022 only and he was never informed about the dismissal of the writ petition on 20.04.2018.

8. On 29.08.2023 the District Inspector of Schools, Azamgarh passed an

order reverting the petitioner to the post of Lecturer on the ground of payment of salary to a Class-IV employee after dismissal of the writ petition and also certain irregularities committed in making admissions to NCC, which ground was not mentioned in the show cause notice.

9. The petitioner challenged the aforesaid order by filing Writ-A No.15234 of 2023 which was disposed off by means of an order dated 12.10.2023 granting liberty to the petitioner to prefer a comprehensive representation to the Joint Director of Education, Azamgarh Region, Azamgarh, who would decide the same.

10. The Joint Director of Education has decided the petitioner's representation by means of an order dated 01.04.2024, whereby the petitioner was exonerated of both the charges and the District Inspector of Schools, Azamgarh/Authorized Controller, S. K. P. Intermediate College, Azamgarh was directed to ensure further action in this regard. After passing of the aforesaid order the petitioner was reinstated in service.

11. On 10.04.2024, the District Inspector of Schools, Azamgarh passed another order stating that the matter of promotion of the petitioner on the post of Lecturer (Zoology) was pending consideration of Director of Education (Secondary) and therefore he cannot be given charge of the post of Principal. The petitioner has filed this writ petition on 02.05.2024 challenging the validity of aforesaid order dated 10.04.2024.

12. On 22.05.2024, this court had passed the following order:

"1. The District Inspector of Schools, Azamgarh will file his affidavit within three days next clearly stating as to who is the senior most Lecturer as on date functioning with the SKP Intermediate College, Azamgarh.

2. The position about the seniority of Lecturers working with the said Institution will be indicated as on date and not on the basis of conjectures for the future as to what may happen once the Director of Education (Secondary), U.P., Prayagraj decides the issue of seniority.

3. Lay as fresh on 28.05.2024 along with a report regarding status of pleadings.

4. By that time, respondent nos. 1, 2, 3 and 4 may file a counter affidavit on whose behalf Mr. Saurabh, learned Standing Counsel accepts notice.

5. Let this order be communicated to the Director of Education (Secondary), U.P., Prayagraj through the Civil Judge (Senior Division), Allahabad and the District Inspector of Schools, Azamgarh and the Joint Director of Education (Secondary), Azamgarh Region, Azamgarh through the Civil Judge (Senior Division), Azamgarh by the Registrar (Compliance) within 72 hours."

13. The purport of the aforesaid order was that the senior most Lecturer of the college is entitled to give charge of the post of Principal of the college.

14. After this Court had passed the aforesaid order dated 22.05.2024, the authorized controller has passed an order dated 24.07.2024 placing the petitioner under suspension and the petitioner has challenged validity of this order also by way of amendment in the Writ Petition. After placing the petitioner under suspension the opposite party no.6 has been given charge of the post of Officiating Principal of the College.

15. The petitioner has challenged the validity of the suspension order by making amendments in the writ petition and it has been submitted that the suspension order has been passed maliciously to deprive the petitioner of the benefit of the order dated 01.04.2024, passed by the Joint Director of Education absolving the petitioner of the charges levelled against him and directing necessary consequences to follow.

16. The learned counsel for the petitioner has submitted that in compliance of the earlier order dated 12.10.2023, passed by this Court in Writ A No.15234 of 2023, the Joint Director of Education has already passed a detailed order dated 01.04.2024, whereby the petitioner has been exonerated of the charge of making wrongful payment of salary of a Class-IV post employee after dismissal of his writ petition for want of prosecution and also for certain irregularities committed in making admissions to NCC and he has directed the District Inspector of Schools, Azamgarh/Authorized Controller, S.K.P. Intermediate College, Azamgarh to ensure further action in furtherance of the aforesaid decision of the Joint Director of Education.

17. The basis of the statement made by the District Inspector of Schools in his letter dated 10.04.2024 that the matter of the petitioner's promotion on the post of Lecturer (Zoology) was pending consideration of Director of Education (Secondary) and therefore he cannot be given charge of the post of Principal, is a report dated 16.12.2023 sent by the Joint Director of Education, Azamgarh Division, Azamgarh to the Director of Education (Secondary), U.P., wherein the Joint Director of Education has stated that the petitioner was promoted from the post of Assistant Teacher to the post of Lecturer on ad-hoc basis on 26.07.1999 and he ought to have first been regularized in L.T. Grade and thereafter his seniority ought to have been fixed and his promotion should have been considered. The aforesaid letter further states that the District Inspector of Schools, Azamgarh had himself decided to promote the petitioner on ad-hoc basis to the post of Lecturer and the Regional Level Committee had regularized his services on 27.06.2001 and thereafter he was promoted to the post of Lecturer (Zoology) on 27.09.2001. Therefore, the promotion of the petitioner to the post of Lecturer made on 27.09.2001 was as per Rules. The Joint Director stated that the Director of Education may take an appropriate decision in this regard. The Director of Education has not taken any decision contrary to the stand of the Joint Director that the petitioner's promotion was made as per Rules.

18. In these circumstances, the action of the District Inspector of Schools, Azamgarh in declining to hand over charge of the post of Officiating Principal to the petitioner on the pretext that the matter of the petitioner's promotion to the post of Lecturer (Zoology) is pending consideration of Director Education (Secondary), is apparently unreasonable and unsustainable in law. When the Joint Director of Education has recorded in the aforesaid letter dated 16.12.2023 that the promotion of the petitioner was made on 27.09.2001 as per Rules and the Director of Education has not taken a decision contrary to it, the District Inspector of Schools, Azamgarh, who is subordinate to the Joint Director, cannot take a decision contrary to the aforesaid finding recorded by the Joint Director of Education that the promotion of the petitioner was made in accordance with

Rules and he cannot refuse to obey the directions of the Joint Director of Education.

19. The subsequent suspension order dated 24.07.2024 passed during pendency of this petition on charges including the charges from which the petitioner already stands absolved by an order passed by the Joint Director of Education, smacks of malice against the petitioner as this order would result in the petitioner being deprived of benefit of the order dated 01.04.2024, passed by the Joint Director of Education.

20. The learned counsel for the petitioner has relied upon a decision of Hon'ble Supreme Court in the case of **Union of India and another Vs. Ashok Kumar Aggarwal**: (2013) 16 SCC 147, wherein the Hon'ble Supreme Court has held as follows: -

"21. The power of suspension should not be exercised in an arbitrary manner and without any reasonable ground or as vindictive misuse of power. Suspension should be made only in a case where there is a strong prima facie case against the delinquent employee and the allegations involving moral turpitude, grave misconduct or indiscipline or refusal to carry out the orders of superior authority are there, or there is a strong prima facie case against him, if proved, would ordinarily result in reduction in rank, removal or dismissal from service. The authority should also take into account all the available material as to whether in a given case, it is advisable to allow the delinquent to continue to perform his duties in the office or his retention in office is likely to hamper or frustrate the inquiry.

22. In view of the above, the law on the issue can be summarised to the effect that suspension order can be passed by the competent authority considering the gravity of the alleged misconduct i.e. serious act of omission or commission and the nature of evidence available. It cannot be actuated by mala fide, arbitrariness, or for ulterior purpose. Effect on public interest due to the employee's continuation in office is also a relevant and determining factor. The facts of each case have to be taken into consideration as no formula of universal application can be laid down in this regard. However, suspension order should be passed only where there is a strong prima facie case against the delinquent, and if the charges stand proved, would ordinarily warrant imposition of major punishment i.e. removal or dismissal from service, or reduction in rank etc.

23. In Jayrajbhai Jayantibhai Patel v. Anilbhai Nathubhai Patel & Ors., (2006) 8 SCC 200, this Court explained:

"18. Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or

excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision."

....

55. The aforesaid facts make it crystal clear that it is a clear cut case of legal malice. The aspect of the legal malice was considered by this Court in Kalabharati Advertising v. Hemant Vimalnath Narichania & Ors., AIR 2010 SC 3745, observing:

"25. The State is under obligation to act fairly without ill will or malice— in fact or in law. "Legal malice" or "malice in law" means something done without lawful excuse. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard to the rights of others. Where malice is attributed to the State, it can never be a case of personal ill will or spite on the part of the State. ***It is an act which is taken with an oblique or indirect object. It means exercise of statutory power for "purposes foreign to those for which it is in law intended". It means conscious violation of the law to the prejudice of another, a depraved inclination on the part of the authority to disregard the rights of others, which intent is manifested by its injurious acts.***

26. ***Passing an order for an unauthorised purpose constitutes malice in law."***

(Emphasis added)

21. Per contra, the learned counsel for the opposite party no.6 has submitted that besides the two charges of which the petitioner has been absolved, eight other charges have been levelled against him, including the charge of misbehaviour with superior officer and he has relied upon a decision of Hon'ble Supreme Court in the case of **L. K. Verma Vs. H.M.T. Ltd.:** (2006) 2 SCC 269, wherein the Hon'ble Supreme Court held that verbal abuse can be sufficient for inflicting punishment of dismissal. The Hon'ble Supreme Court has referred to an earlier decision in the case of **Hombe Gowda Edn. Trust and another Vs. State of Karnataka and others:** (2005) 10 SCALE 307, wherein the Hon'ble Supreme Court has held that indiscipline in an educational institution should not be tolerated.

22. There can be no dispute to the aforesaid proposition of law and this Court has to examine the facts and circumstances of the case in light of the law laid down by the Hon'ble Supreme Court in the cases mentioned above so as to ascertain whether the actions of the DI,O,S< suffer from legal malice or whether the petitioner appears to have committees a serious misconduct warranting his suspension.

23. The petitioner was first imputed with the allegation of making payment of salary to Ram Sahai Maurya, a Class-IV employee after dismissal of his writ petition. Ram Sahai Maurya had filed Writ-A No.25304 of 2001, in which this court had passed an interim order dated 13.07.2001 directing payment of salary to the petitioner. The writ petition was dismissed for want of prosecution on 20.04.2018. The petitioner had taken charge of the post of Principal on 01.09.2022. There is nothing on record that

the fact of dismissal of the Writ Petition filed by Ram Sahai Maurya had been brought to the knowledge of the petitioner or any other authority and this fact came to light only after the petitioner enquired into the matter in compliance of the circular dated 10.07.2023 issued by the District Inspector of Schools, Azamgarh directing all the Managers/Principals of aided intermediate colleges to give updates of the pending writ petitions filed by the employees of the colleges. There is no allegation that the petitioner had paid salary to Sri. Ram Sahay Maurya after the fact of dismissal of his Writ Petition had come to light.

24. Thereafter charge of the post of Officiating Principal was taken away while adding another charge of committing irregularities in making admissions to NCC and charge of the post of Officiating Principal of the college was handed over to the opposite party no. 6.

25. The Joint Director Education had absolved the petitioner of both the aforesaid charges by means of his order dated 01.04.2024 and he had directed the District Inspector of Schools, Azamgarh/authorized controller to ensure necessary action, but the District Inspector of Schools, Azamgarh declined to hand over the charge of the post of Officiating Principal to the petitioner by misquoting a report dated 16.12.2023 sent by the Joint Director to the Director Education wherein the Joint Director of Education has categorically stated that the District Inspector of Schools, Azamgarh had himself decided to promote the petitioner on ad-hoc basis to the post of Lecturer and the Regional Level Committee had regularized his services on 27.06.2001 and thereafter he was promoted to the post of Lecturer (Zoology) on 27.09.2001 and that the promotion of the petitioner to the post of Lecturer made on 27.09.2001 was as per Rules. The Joint Director stated that the Director of Education may take an appropriate decision in this regard. The Director of Education has not taken any decision contrary to the stand of the Joint Director that the petitioner's promotion was made as per Rules. Therefore, the act of District Inspector of Schools, Azamgarh in declined to hand over the charge of the post of Officiating Principal to the petitioner and instead handing over charge of the post to the opposite party no. 6, is apparently unreasonable and unsustainable in law.

26. Apparently, the D.I.O.S. has passed the suspension order dated 24.07.2024 during pendency of this writ petition to deprive the petitioner of the benefit of order dated 01.04.2024, passed by the Joint Director of Education and to illegally permit the opposite party no.6 to continue to hold the aforesaid post.

27. In view of the aforesaid facts and circumstances of the case, the impugned orders suffer from malice in law for which there is no necessity of issuing notice to the District Inspector of Schools, Azamgarh in his personal capacity when he has already filed a counter affidavit sworn by himself. The malice in law is different from malice in fact, which allegation necessitates opportunity of personal hearing to the authority against whom malice in fact is alleged.

28. In view of the foregoing discussion, the writ petition is **allowed**. The impugned order dated 10.04.2024, passed by the District Inspector of Schools, Azamgarh declining to hand over the charge of the post of Officiating Principal

to the petitioner and the order dated 24.07.2024, passed by the authorized controller of the college placing the petitioner under suspension are hereby **quashed**. All the opposite parties are directed to ensure that the petitioner is given charge of the post of Officiating Principal of the college forthwith.

29. So far as the fresh charges levelled against the petitioner are concerned, the opposite parties will be at liberty to hold an enquiry strictly in accordance with law, after giving adequate opportunity of hearing to the petitioner.

(2024) 8 ILRA 314
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.08.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Writ-A No. 7138 of 2020

Sushil Kumar Shukla ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Alok Kumar Tripathi

Counsel for the Respondents:
C.S.C.

(A) Service Law - U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Rule 7 (vii) & (viii) - The Civil Service Regulations - Regulation 351-A - Importance of natural justice and due process - Right to Know Accusations - Fair Chance to Respond - Oral Inquiry Required - Independent Inquiry Officer - No Automatic Proof - Ex-Parte Inquiry - Bona Fide Inquiry. (Para - 9)

(B) Word of phrases – "sublato fundamento cadit opus" - If the very foundation of any structure goes, the superstructure erected thereon would also fall - If initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order - Once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally - a right in law exists only and only when it has a lawful origin. (para - 10,11)

Petitioner's challenge to validity of 3 specific orders - Punishment order passed by Collector/District Magistrate - which reverted petitioner to their initial/basic pay as a Stenographer without following prescribed procedure under Rules, 1999 – no departmental inquiry – no fixing date, time and place for oral inquiry - Order passed by Appellate Authority - Revisional order.**(Para - 3,8,)**

HELD: - Impugned punishment order set aside/quashed because departmental inquiry report was defective & inquiry process violated natural justice principles so its consequential orders i.e. appellate order and revisional order stand automatically vitiated and are liable to be declared non-est in view of the legal maxim *"sublato fundamento cadit opus".* Opposite parties must pass consequential orders, ignoring the quashed punishment orders. Competent authority may initiate new proceedings under Regulation 351-A of the Civil Service Regulations. (Para -10,12 to15)

Petition allowed. (E-7)

List of Cases cited:

1. Roop Narain Pandey Vs U.P. Cooperative Institutional Service Board & ors., [2019 (37) LCD 978]

2. Meenglas Tea Estate Vs The workmen, AIR 1963 SC 1719

3. St. of U.P. Vs C. S. Sharma, AIR 1968 SC 158

4. Punj. National Bank Vs A.I.P.N.B.E. Federation, AIR 1960 SC 160

5. S.C. Girotra Vs United Commercial Bank, 1995 Supp. (3) SCC 212

6. Subhas Chandra Sharma Vs Managing Director & anr., 2000 (1) UPLBEC 541

7. St. of U.P. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

8. Roop Singh Negi Vs Punj. National Bank, (2009) 2 SCC 570

9. Subhash Chandra Gupta Vs St. of U.P., 2012 (1) UPLBEC 166

10. Salahuddin Ansari Vs. St. of U.P. & ors., 2008 (3) ESC 1667

11. Subash Chandra Sharma Vs. Managing Director & anr., 2000 (1) U.P.L.B.E.C. 541

12. Mahesh Narain Gupta Vs St. of U.P. & ors., (2011) 2 ILR 570

13. Chamoli District Co-operative Bank Ltd. Vs. Raghunath Singh Rana & ors., AIR 2016 SC 2510

14. St. of Punj. Vs. Davinder Pal Singh Bhullar & ors. connected with Sumedh Singh Saini Vs Davinder Pal Singh Bhullar & ors., (2011) 14 SCC 770

15. Badrinath Vs St. of Tamil Nadu & ors., AIR 2000 SC 3243

16. St. of Kerala Vs Puthenkavu N.S.S. Karayogam & Anr, (2001) 10 SCC 191

17. Mangal Prasad Tamoli (dead) by Lrs. Vs Narvadeshwar Mishra (dead) by Lrs. &ors., (2005) 3 SCC 422

18. C. Albert Morris Vs K. Chandrasekaran & ors, (2006) 1 SCC 228

19. Upen Chandra Gogoi Vs St. of Assam & ors. (1998) 3 SCC 38;

20. Satchidananda Misra Vs St. of Orissa & ors. (2004) 8 SCC 599

21. Regional Manager, SBI Vs Rakesh Kumar Tewari, (2006) 1 SCC 530

22. Ritesh Tewari & anr. Vs St. of U.P. & ors., AIR 2010 SC 3823)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Upendra Nath Mishra, learned Senior Advocate, assisted by Sri Alok Kumar Tripathi, learned counsel for the petitioner and Sri Prashant Singh Atal, learned Chief Standing Counsel-I for the State-opposite parties.

2. By means of this petition, the petitioner has prayed following reliefs:-

"(i) to issue a writ, order or direction in the nature of Certiorari quashing the impugned orders dated 30.8.2006, 2/6.2.2008 and 28.12.2019 as contained as Annexure Nos. 1, 2 & 3 respectively to this writ petition.

(ii) to issue a writ, order or direction in the nature of Mandamus commanding the respondents to pass appropriate order for restoring the pay scale of petitioner, which would have been applicable to the petitioner in absence of impugned order dated 30.8.2006 and thereafter pay regular salary accordingly.

(iii) to issue a writ, order or direction in the nature of Mandamus directing the respondents to pay arrears of salary after restoring it to the level it would have been in absence of impugned order dated 30.8.2006.

(iv) to pass such other order or direction, which this Hon'ble Court deems it fit and proper under the circumstances of the case.

(vii) to allow the writ petition with costs in favour of the petitioner."

3. By means of the instant writ petition, the petitioner is challenging the validity of the punishment order dated 30.08.2006, passed by the opposite party no.3 i.e. Collector/District Magistrate, Sitapur, whereby major punishment of reversion of the petitioner to the initial/basic pay of his substantive post of Stenographer was passed without following the prescribed procedure contained in statutory Rules, i.e. U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "the Rules, 1999"). The petitioner is also challenging the validity of the order dated 2/6.02.2008, passed by the Appellate Authority i.e. opposite party no.2 as well as the order dated 28.12.2019, passed by opposite party no.2 in the statutory revision filed by the petitioner inasmuch as both the orders were mechanically passed in violation of the Rules, 1999 as well as without application of mind, hence not tenable in law.

4. The petitioner was appointed on the post of Typist in the office of Tehsildar, Biswan, District- Sitapur through direct appointment on 23.06.1987. Meanwhile, another direct recruitment was advertised on the post of Stenographer in which the petitioner qualified the written examination of shorthand and typing and got substantive appointment of Stenographer in the office of Sub Divisional Magistrate, Sidhauli, Sitapur on 18.03.1993 and his services were confirmed as such on 04.02.1998. As per the date of birth, the petitioner retired from service on 30.06.2024.

5. The precise contention of the learned counsel for the petitioner is that the impugned punishment order has been passed on the basis of illegal departmental inquiry whereby the departmental inquiry has been conducted and concluded without fixing date, time and place for oral inquiry and without giving any opportunity to the petitioner to adduce his evidence/witnesses. Attention has been drawn towards Annexure No.12 of the writ petition, which is the findings of the inquiry report, which is undated, however, the same has been served upon the petitioner on 25.07.2006 alongwith show cause notice. The findings of the Inquiry Officer clearly reveals that the charge sheet was served upon the petitioner on 22.05.2006 and the petitioner submitted his defence reply to the show cause notice on 12.06.2006. Thereafter, without fixing any date, time and place for oral inquiry, the petitioner was called for personal hearing on 14.07.2006 and on the basis of aforesaid exercise, the inquiry has been concluded.

6. On being confronted the learned Standing Counsel as to whether oral inquiry has been conducted or not, learned Standing Counsel has fairly submitted that no oral inquiry has been conducted.

7. Learned counsel for the petitioner has also stated that the aforesaid fact has not been disputed in the counter affidavit inasmuch as the recital to this effect has been given in paragraphs no.12, 13 & 14 of the writ petition and those paragraphs have not been denied in the counter affidavit vide paragraphs no.13, 14 & 15. In para-14 of the writ petition, it has been categorically indicated that none of the submissions of defence reply has been considered by the Inquiry Officer and the aforesaid fact has not been disputed in the counter affidavit properly.

8. Having heard learned counsel for the parties and having perused the material available on record, the precise question for consideration before this Court is that as to

whether any inquiry report, which has been prepared without conducting the departmental inquiry strictly in accordance with law, by fixing date, time and place for oral inquiry, would sustain in the eyes of law, particularly in view of the fact that on the basis of aforesaid inquiry report, major punishment has been awarded to the delinquent employee/ petitioner. If the inquiry report would not sustain in the eyes of law, as to whether the punishment order, appellate order and revisional order would sustain in the eyes of law? Undisputedly, the departmental inquiry has been conducted and concluded in violation of Rule 7 (vii) & (viii) of the Rules, 1999, which reads as under:-

"7. (vii) Where the charged Government servant denies the charges the Inquiry Officer shall proceed to call the witnesses proposed in the charge- sheet and record their oral evidence in presence of the charged- Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidences, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence:

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

7. (viii) The Inquiry Officer may summon any witnesses to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of witnesses and Production of Documents) Act, 1976."

9. I had occasion to deal the identical issue in re; **Roop Narain Pandey Vs. U.P. Cooperative Institutional Service Board and Others, [2019 (37) LCD 978]** and considering the relevant decisions of the Apex Court, I allowed the aforesaid writ petition; paragraphs no.13 to 25 thereof are being reproduced herein below:-

"13. In the case of Meenglas Tea Estate v. The workmen, AIR 1963 SC 1719, the Hon'ble Supreme Court observed that it is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way to cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted.

14. In State of U.P. v. C. S. Sharma, AIR 1968 SC 158, the Hon'ble Apex Court held that omission to give opportunity to the officer to produce his witnesses and lead evidence in his defence vitiates the proceedings. The Court also held that in the enquiry witnesses have to be examined in support of the allegations, and opportunity has to be given to the delinquent to cross-examine these witnesses and to lead evidence in his defence.

15. In Punjab National Bank v. A.I.P.N.B.E. Federation, AIR 1960 SC 160, (vide para 66), the Hon'ble Apex Court held that in such enquiries evidence must be recorded in the presence of the charge-sheeted employee and he must be given an opportunity to rebut the said evidence. The same view was taken in A.C.C. Ltd. v. Their Workmen, (1963) II LLJ. 396, and in Tata

Oil Mills Co. Ltd. v. Their Workmen, (1963) II LLJ. 78 (SC).

16. In S.C. Girotra v. United Commercial Bank, 1995 Supp. (3) SCC 212, the Hon'ble Apex Court set aside a dismissal order which was passed without giving employee an opportunity of cross-examination.

17. This Court in Subhas Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541 has held as under:-

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."

18. In the State of Uttar Pradesh v. Saroj Kumar Sinha, reported in (2010) 2 SCC 772, the Hon'ble Apex Court held that:-

"An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

19. Similar view was taken by the Hon'ble Apex Court in Roop Singh Negi v. Punjab National Bank, (2009) 2 SCC 570 as under:-

"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."

20. In another case in Subhash Chandra Gupta v. State of U.P., 2012 (1) UPLBEC 166, 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. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831 as well as by a Division Bench of this Court in Subash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541.

21. A Division Bench decision of this Court in the case of Salahuddin Ansari Vs. 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 Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 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 Vs. U.P.Cooperative Spinning Mills & others, 2001 (2) U.P.L.B.E.C. 1475 and Laturi Singh Vs U.P.Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005."

22. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold and 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).

23. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570 has held as under:-

"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 hose documents are sufficient enough to prove the charges.

24. 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 exparte 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.

25. Recently the entire law on the subject has been reviewed and reiterated in Chamoli District Co-operative Bank Ltd. Vs. Raghunath Singh Rana and others, AIR 2016 SC 2510 and the Hon'ble Apex Court has culled out certain principles as under:

"i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities.

ii) If an officer is a witness to any of the incidents which is the subject matter of the enquiry or if the enquiry was initiated on a report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer.

(iii) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged and give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him.

(iv) On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any."

10. In view of what has been considered above and also in view of the settled proposition of law by the Apex Court, I am of the view that the findings of the Inquiry Officer/ inquiry report is liable to be set aside/ quashed inasmuch as the departmental inquiry has been conducted and concluded without fixing date, time and place for oral inquiry and without affording ample opportunity of hearing to the petitioner. Since the very foundation of the impugned order dated 30.08.2006 passed pursuant to the defective inquiry report is not liable to be sustained in the eyes of law, therefore, the impugned punishment order dated 30.08.2006 is liable to be set aside/ quashed. Consequently, the impugned appellate order and revisional order dated 2/6.02.2008 and 28.12.2019 are also liable to be set aside/ quashed on the basis of maxim *"sublato fundamento cadit opus"*, which means that if the very foundation of any structure goes, the superstructure erected thereon would also fall.

11. The Hon'ble Apex Court in re; **State of Punjab Vs. Davinder Pal Singh Bhullar and others connected with Sumedh Singh Saini Vs. Davinder Pal**

Singh Bhullar and others, (2011) 14 SCC 770, has considered the aforesaid maxim in paras-107 to 111, which are being reproduced here-in-below:-

"107. It is a settled legal proposition that if initial action is not in consonance with law, all subsequent and consequential proceedings would fall through for the reason that illegality strikes at the root of the order. In such a fact-situation, the legal maxim "sublato fundamento cadit opus" meaning thereby that foundation being removed, structure/work falls, comes into play and applies on all scores in the present case.

108. In Badrinath v. State of Tamil Nadu & others, AIR 2000 SC 3243; and State of Kerala v. Puthenkavu N.S.S. Karayogam & Anr,, (2001) 10 SCC 191, this Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically and this principle is applicable to judicial, quasi-judicial and administrative proceedings equally.

109. Similarly in Mangal Prasad Tamoli (dead) by Lrs. v. Narvadeshwar Mishra (dead) by Lrs. & Ors., (2005) 3 SCC 422, this Court held that if an order at the initial stage is bad in law, then all further proceedings, consequent thereto, will be non est and have to be necessarily set aside.

110. In C. Albert Morris v. K. Chandrasekaran & Ors, (2006) 1 SCC 228, this Court held that a right in law exists only and only when it has a lawful origin. (See also: Upen Chandra Gogoi vs. State of Assam & Ors.,, (1998) 3 SCC 381; Satchidananda Misra v. State of Orissa & Ors.,, (2004) 8 SCC 599; Regional Manager, SBI v. Rakesh Kumar Tewari,, (2006) 1 SCC 530; and Ritesh Tewari & Anr. v. State of U.P. & Ors., AIR 2010 SC 3823).

111. Thus, in view of the above, we are of the considered opinion that the orders impugned being a nullity, cannot be sustained. As a consequence, subsequent proceedings/ orders/ FIR/ investigation stand automatically vitiated and are liable to be declared non est."

12. In view of the aforesaid dictums of the Apex Court considered above, I am of the considered opinion that since impugned punishment order dated 30.08.2006 passed on the basis of defective inquiry report is nullity in the eyes of law, therefore, it cannot be sustained, so its consequential orders i.e. appellate order and revisional order stand automatically vitiated and are liable to be declared non-est in view of the legal maxim *"sublato fundamento cadit opus"*.

13. Accordingly, the impugned orders dated 30.08.2006, 2/6.02.2008 and 28.12.2019 as contained in Annexure Nos.1, 2 & 3 to the writ petition respectively are hereby quashed.

14. Opposite parties are directed to pass consequential orders ignoring the impugned punishment order dated 30.08.2006 as well as the appellate order and the revisional order.

15. Since the punishment orders have been quashed only for the reason that the Inquiry Officer had conducted the defective inquiry violating the relevant provisions of Rule 7 of the Rules, 1999, therefore, liberty is given to the competent authority to conduct de-novo proceedings/ inquiry against the petitioner but the petitioner has already retired during the pendency of this writ petition, therefore, such exercise may

be undertaken, if it is so desired, by adopting legal recourse of Regulation 351-A of the Civil Service Regulations.

16. Accordingly, the writ petition is **allowed**.

17. No order as to costs.

(2024) 8 ILRA 322
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-A No. 7169 of 2024

Sushil Chandra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ashok Kumar Rai

Counsel for the Respondents:
C.S.C., Diptiman Singh, Rohit Pandey

(A) Service Law - Writ petition under Article 226 not maintainable for disputes arising from private contracts of service without statutory force or backing, and where the petitioner has not approached the court with clean hands - Remedy under Article 226 - Remedy available only when twin tests are satisfied (i) Authority/person discharges public function/public duty (ii) Action challenged falls within public law domain.(Para - 11,12,13)

Petitioner challenged termination of his service - as Assistant Workshop Superintendent at Raj Kumar Goel Institute of Technology - Institute produced petitioner's resignation letter and proof of payment of dues. (Para - 2)

HELD: - Petitioner's service contract was private, without statutory force or backing. Resignation letter and payment of dues were not disclosed in the writ petition. Petitioner's amended plea of forged resignation appeared to be an afterthought. Petitioner did not approach court with clean hands. No merit. (Para -13 to 16)

Petition dismissed. (E-7)

List of Cases cited:

1. C/M Pratibha Inter College, Barabanki through Manager & Anr. Vs St. of U.P. through Principal Secy., Dept. of Secondary Education, U.P. Govt, Special Appeal No. 115 of 2024

2. St. Mary's Education Society & anr. Vs Rajendra Prasad Bhargava & ors., (2023) 4 SCC 498

3. Uttam Chand Rawat Vs St. of U.P. & ors . , (2021) 9 ADJ 304

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

1. Heard Sri Ashok Kumar Rai - the learned counsel for the petitioner, Sri Saurabh, the learned Standing Counsel representing the opposite party no. 1 – the State of U.P., Sri Rohit Pandey - the learned counsel for the opposite party no. 2 - Dr. A.P.J. Abdul Kalam Technical University, U.P. and Sri. Diptiman Singh, the learned counsel for the opposite party no. 3 - Raj Kumar Goel Institute of Technology, Ghaziabad.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged validity of termination of his service as Assistant Workshop Superintendent, Department of Mechanical Engineering in Raj Kumar Goel Institute of Technology, Ghaziabad.

3. It has been pleaded in the Writ Petition that the petitioner was appointed as an Assistant Workshop Superintendent in the Department of Mechanical Engineering by means of an appointment order dated 23.08.2007. He worked on the aforesaid post till 30.06.2021, on which date he was removed from service by an oral order. The petitioner has stated in the Writ Petition that the institution has given three months salary to him amounting to Rs.1,23,883/-.

4. The petitioner has further stated in the Writ Petition that he approached the Director of the Institute for his reinstatement in service but the Director did not pay any heed to his requests. However, no document has been annexed in support of this contention.

5. On 08.05.2024, this Court had passed an order directing the Director, Raj Kumar Goel Institute of Technology, Ghaziabad to produce the order terminating the petitioner's services, along with his personal affidavit. On 27.05.2024, the Director, Raj Kumar Goel Institute of Technology, Ghaziabad had filed his personal affidavit inter alia stating that the petitioner had submitted his resignation from the post of Workshop Superintendent on 14.07.2021 and he had requested that his entire arrears of salary and gratuity etc. be paid within the month of July, 2021. By another letter dated 14.07.2022, he had demanded experience certificate. The petitioner's resignation was accepted on the same day. The petitioner was paid his dues through five cheques for different amounts – (1) Rs.45,022/-, (2) Rs.6,753/-, (3) Rs.6,753/-, (4) Rs.45,022/- and (5) Rs.20,333/- totaling to Rs. Rs.1,23,883/- on 30.07.2021, which were received by the petitioner on the same date. On 18.08.2022, another cheque for Rs.1,71,188/- was given to the petitioner as full and final payment towards his gratuity. On 18.08.2022, the petitioner had given an affidavit stating that he had received all his dues and he had no claims left against the institute.

6. After filing of a personal affidavit of the Director of the college bringing on record the aforesaid facts which have not been disclosed in the writ petition, the petitioner has filed an application for amendment of the writ petition seeking to incorporate a payer for quashing of his resignation letter dated 14.07.2021 alleging that the resignation letter is forged and fabricated and that he has not received any amount of gratuity, and that he has received some amount towards the salary and arrears of salary only.

7. The learned counsel for the opposite parties did not oppose the amendment application filed by the petitioner and, accordingly, the amendment application has been allowed. The learned Counsel for the opposite parties said that no counter affidavit was required in the case.

8. The learned counsel for the opposite parties have raised a preliminary objection that the petitioner was working in a private college under a private contract of service and his services are not governed by any statutory provision. Therefore, the writ petition filed in respect of termination of service under a private non-statutory contract would not be maintainable. The second submission of the learned counsel for the opposite parties is that the petitioner has not been terminated and he had himself resigned from the service, which resignation was accepted, all the dues of the petitioner were paid and the petitioner had accepted the dues and it is after about three years since he resigned from service,

that he has filed the writ petition claiming that his services has been terminated orally. The learned counsel for the opposite parties have submitted that the petitioner has not approached this Court with clean hands and the writ petition has been filed by concealment of relevant facts as also by misstatements made by the petitioner.

9. The learned counsel for the petitioner has placed reliance on a judgment rendered by a Division Bench of this Court in **C/M Pratibha Inter College, Barabanki through Manager & Anr. v. State of U.P. through Principal Secretary, Department of Secondary Education, U.P. Govt,** Special Appeal No. 115 of 2024, decided on 03.07.2024, Neutral Citation: 2024 AHCLKO 45575.

10. Pratibha Inter College is a college governed by provisions of Intermediate Education Act and regulations framed thereunder, which specifically contain a provision for the employees of private unaided intermediate colleges. The petitioner was employed in an Engineering College affiliated to Dr. A. P. J. Abdul Kalam Technical University and, therefore, the judgment in the case of Pratibha Inter College would not apply to petitioner, whose services are not governed by any statutory provisions.

11. In Pratibha Inter College (supra), the Division Bench has referred to a judgment of the Hon'ble Supreme Court in the case of **St. Mary's Education Society & Anr. v. Rajendra Prasad Bhargava & Ors:** (2023) 4 SCC 498, wherein the Hon'ble Supreme Court held as follows:-

"75. We may sum up our final conclusions as under:

75.1. An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.

75.2. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. ***Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 or it was found that the action complained of has public law element.***

75.3. It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a constitutional court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of

matter relating to service where they are not governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, ***the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.***

75.4. Even if it be perceived that imparting education by private unaided school is a public duty within the expanded expression of the term, an employee of a non-teaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case, ***the terms of employment of contract between a school and non-teaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of non-teaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered with by the Court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.***

75.5. From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character."

(Emphasis added)

12. The learned counsel for the opposite parties has placed reliance on a judgment rendered by Full Bench of this Court in **Uttam Chand Rawat v. State of U.P. & 7 Ors:** (2021) 9 ADJ 304, wherein the Full Bench has dealt with the following question:-

"(i) Whether the element of public function and public duty inherent in the enterprise that an educational institution undertakes, conditions of service of teachers, whose functions are a sine qua non to the discharge of that public function or duty, can be regarded as governed by the private law of contract and with no remedy available under Article 226 of the Constitution"

After referring to numerous precedents on the point, the Full Bench answered the aforesaid question as follows:-

"(1) The remedy under Article 226 of the Constitution of India would be available against an authority or a person only when twin tests are satisfied. The authority or the person should not only discharge public function or public duty but the action challenged therein should fall in the domain of public law. The writ petition would not be maintainable against an authority or person even if it is discharging public function/public duty, if the controversy pertains to the private law

such as a dispute arising out of contract or under the common law."

13. The service contract of the petitioner with Raj Kumar Goel Institute of Technology is also a private contract of service having no statutory force or backing and, therefore, any rights arising out of that contract or denial thereof would not be amenable to challenge under Article 226 of the Constitution of India.

14. Although by way of amendment the petitioner has alleged that the resignation is forged but this plea has only been raised after the Director of the Institute had filed his personal affidavit bringing on record the fact that the petitioner has resigned from service and he has received his dues. The petitioner has concealed this fact by filing the writ petition that he has already received all his service related dues after termination of his service. The aforesaid plea incorporated by way of amendment after the fact of resignation made by the petitioner and receipt of entire dues was brought on record, appears to be afterthought. Besides, it seeks to raise the disputed questions of fact, which could be gone into by this Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India.

15. Even after amending the writ petition, the petitioner has not incorporated any pea in the writ petition explaining the receipt of entire service dues by him in the year 2022 and non disclosure thereof in the writ petition. The aforesaid conduct of the petitioner in not approaching this Court with clean hands and in concealing certain relevant and material facts from this Court, also disentitles the petitioner from seeking any relief from this Court in exercise of its extraordinary discretionary writ jurisdiction.

16. In view of the aforesaid discussion, this Court is of the considered view that the writ petition is without any merit and the same is ***dismissed*** as such.

(2024) 8 ILRA 326
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 8849 of 2018

Sunder Lal ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Ashutosh Tripathi

Counsel for the Respondents:
C.S.C., Om Prakash Singh (Sr. Advocate), Sushil Kumar Rao

A. Civil Law - Disciplinary Proceedings - U.P. State Warehousing Corporation Staff Regulations, 1966 – Rule 16(1) – Imposition of penalties – For imposing a penalty in the nature of recovery, it is necessary to hold a formal enquiry, provide the delinquent employee an opportunity to offer a written explanation, cross-examine witnesses, if any, and produce evidence in defence (Para 13)

B. Civil Law - Disciplinary Proceedings After Retirement - U.P. State Warehousing Corporation Staff Regulations, 1966 - The Regulations do not contain any provision for the continuation of disciplinary proceedings or imposition of penalties after an employee's retirement. (Para 16)

C. Petitioner, a Warehouse Assistant, was removed from service, and a recovery of ₹27,21,930.26 was directed - Enquiry Officer, without fixing any date, time, or place for the enquiry, and without providing an opportunity to cross-examine witnesses, acting in breach of the principles of natural justice submitted his enquiry report - Neither the Enquiry Officer nor the Disciplinary Authority considered the petitioner's reply - findings were based on documentary evidence produced before the Enquiry Officer in the petitioner's absence - Held: The enquiry was flawed due to non-compliance with the prescribed procedure - Impugned order quashed (Para 13, 14)

Allowed. (E-5)

List of Cases cited:

1. Shyam Narain Gaur Vs St. of U.P. & ors.

2. Radhey Kant Khare Vs U.P. Co-Operative Sugar 2003 (1) AWC 704

3. Managing Director Ecil Hyderabad etc. Vs B. Karunakar etc., (1993) 4 SCC 727

4. Salahuddin Ansari Vs St. of U.P. & ors., 2008(3) ESC 1667

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

1. Heard Shri Ashutosh Tripathi, learned counsel for the petitioner and Shri O.P. Singh, learned Senior Advocate assisted by Shri Shushil Kumar Rao, learned counsel for the respondent.

2. Shri O.P. Singh, learned Senior Advocate states that disciplinary proceedings had started prior to retirement and there is no defect in the order imposing penalty after retirement.

3. The petitioner Sunder Lal was a Warehouse Assistant of the U.P. State Warehousing Corporation. He has filed this petition challenging the order of removal from service on the ground that the entire domestic enquiry in the matter of disciplinary proceedings instituted against him was flawed one as the procedures prescribed under relevant Regulations, 1966 were not followed. Petitioner was served with a charge-sheet on 26.05.2014 to which he submitted his reply on 14.07.2014. An enquiry report was submitted on 16.07.2015 and the impugned decision was taken on 24.10.2016 on the basis of the enquiry report. Thus, according to the charge-sheet, petitioner was not able to discharge his duties properly and hence it amounted to misconduct. Resultantly, the order was passed by the Managing Director directing for recovery of Rs 27,21,930.26/- from the salary and other dues to which the petitioner was entitled in law.

4. The submission advanced by the learned counsel for the petitioner is that petitioner was charge sheeted by holding a regular disciplinary proceedings and hence, the Disciplinary Authority was under obligation of law to conclude the entire proceedings as per the procedure prescribed. He submits that when the departmental enquiry was being conducted, petitioner was not given any opportunity to participate in the enquiry as no date and time was fixed, nor any place was decided to hold enquiry so as to permit petitioner due participation. It is thus argued that in the absence of any opportunity being afforded to the petitioner to participate in the enquiry, the entire enquiry was ex-parte and so was the report.

5. He further submits that neither the Enquiry Officer considered his reply submitted in the charge-sheet, nor Disciplinary Authority while passing the order considered the reply given by the

petitioner in response to the notice issued to him. It is also contended by the learned counsel for the petitioner that enquiry could not have been continued after the petitioner had attained the age of superannuation, in the absence of provisions to that effect under the relevant regulations.

6. In support of his argument, learned counsel for the petitioner has relied upon Regulation 16(3) of the Regulations, 1966. He has also placed reliance upon the judgement of the Division Bench of this Court in case of **Shyam Narain Gaur vs. State of U.P. and 2 Others,** which was also in respect of the employ of the Warehousing Corporation. He has also placed reliance upon **Radhey Kant Khare vs. U.P. Co-Operative Sugar 2003 (1) AWC 704.** Learned counsel has also placed reliance upon the judgement of the Supreme Court in the matter of **Managing Director Ecil Hyderabad etc. vs B. Karunakar etc., (1993) 4 SCC 727.**

7. *Per Contra*, it is argued by Shri O.P. Singh, learned Senior Advocate appearing for respondnet-Warehousing Corporation that it is not a strict rule to provide oral participation to the employee and the opportunity of cross-examination in the event the documents relied upon are not disputed. However, he could not dispute the principle laid down by the Constitution Bench in the case of **Salahuddin Ansari Vs. State of U.P. and others, 2008(3) ESC 1667** and Division Bench of this Court in the case of **Shyam Narain Gaur (Supra)** wherein, identicals, facts and circumstances, order of punishment and the enquiry report was quashed and matters were remitted to be proceeded from the stage of charge-sheet. He further states that if the enquiry had already been initiated prior to retirement, then there was nothing bad in terms of procedure and law to continue with the enquiry and resultant punishment.

8. It is an argument now raised by the learned counsel appearing for the petitioner that since petitioner has retired, so the matter should not be remitted to be enquired into afresh for the reason that regulations do not permit for continuation of disciplinary proceedings after retirement. He has placed reliance upon the Chapter IV of the Regulations, 1966 which deals with the conduct of the employees and imposition of penalties and the procedure prescribed for.

9. Having heard learned counsel for the respective parties and having perused the records, I find that a specific plea has been taken in paragraph Nos. 9 and 10 of the writ petition to the effect that no date, time and place was fixed for holding oral enquiry. Thus, it is pleaded specifically in these paragraphs that the petitioner had no opportunity to participate in the enquiry and to get himself orally examined and cross-examined by the departmental witnesses.

10. Paragraph Nos. 9 and 10 of the writ petition run as under:

"9. That thereafter the enquiry officer without fixing any date, time and place for holding of enquiry, without giving any opportunity to cross examine the witnesses, and acting in breach of principle of natural justice submitted his enquiry report dated 16.7.2015 to the disciplinary authority for further action, holding the petitioner guilty of the charges. A copy of the enquiry report dated 16.7.2015 is being filed herewith and marked as Annexure no. 3 to this writ petition.

10. That it is notable that the enquiry officer did not conduct any enquiry in the matter and did not issue any notice fixing a date time and place for holding the enquiry to the petitioner and straight away submitted his enquiry report holding the petitioner guilty of the charges."

11. From the perusal of the aforesaid pleadings, it clearly transpires that no date, time and place was fixed for oral enquiry. The petitioner was not afforded any opportunity to participate in the enquiry and it has also not been specifically denied. Here it is necessary to refer to Regulation 16(3) of the Regulation, 1966 applicable to the employees of the corporation. Regulation 16(3) is reproduced hereunder:

"3) No punishment other than that specified in sub-para (1) (a), (1) (b) or (1) (c) shall be imposed on any employee without formal charges being framed against him and without giving him an opportunity for tendering an explaination in writing and cross examining the witnesses against him, if any, and of producing evidence in defence;

Provided that punishment to an employee on deputation from the Central Government, a State Government or a Government Institution shall be imposed only in accordance with the procedure and rules laid down in this behalf in his parent service."

12. From a bare reading of the aforesaid regulations, it is clear that only punishment prescribed under Sub-Rule (1)(b) and (1)(c) can be imposed without holding a formal enquiry, but in the matter of other punishments, a formal enquiry was must. Rule 16(1)(a) to 16(1)(g) that provides for recovery runs as under"

"(a) fine

(b) censure

(c) postponement or stoppage o increments or promotion,

(d) reduction to a lower post in his permanent class or to a lower stage in his incremental scale,

(e) recovery from pay, security deposit or otherwise of the whole or part of the pecuniary loss caused to the Corporation by the employee,

(f) removal,

(g) dismissal,

Provided that the penalty of fine shall be imposed on employees of class III only."

13. Thus, it is clear that for imposing a penalty in the nature of recovery, it is necessary to hold a regular formal enquiry and to give opportunity to the delinquent employee not only to offer explanation in writing but to cross-examine the witnesses against him, if any, and also to produce evidence in defence. This opportunity, having been denied by the respondents while conducting enquiry will certainly render the enquiry a flawed enquiry for want of compliance of prescribed procedure.

14. Besides the above, I further notice that the petitioner's reply in the enquiry report has just been referred to and there is no discussion as to why the reply made could not be relied upon. The finding is based upon documentary evidence which were produced before the enquiry Officer in the absence of the petitioner. Thus, the findings returned in the enquiry report are certainly ex-parte. This report has been relied upon by the Managing Director in arriving at a conclusion that the petitioner was rightly held guilty but the aspect of non-compliance of the regulations as far as

procedure for holding formal enquiry for imposing penalty of recovery, was not taken care of.

15. The Division Bench judgment cited before me in the case of **Shyam Narain Gaur (supra)** is of the same establishment in which also oral enquiry was not held. The Court took an exception of this procedure and remitted the matter thus:

"The records indicate that upon issuance of the charge-sheet, the petitioner submitted a detailed reply and it is only after the submission of the reply filed by the petitioner that the Enquiry Officer has submitted his report. Apart from the fact that no evidence was led by the department to prove the charges, the Enquiry Officer has not even considered the reply filed by the petitioner and only a casual observation has been made that evidence was not led by the petitioner to disprove the charges. It was for the department to have proved the charges by leading proper evidence but that was not done. This apart, even the reply submitted by the petitioner has not been considered. It is on the basis of the enquiry report that the punishment has been imposed upon the petitioner. In fact, it transpires that the charge-sheet was served on the petitioner on 26 May 2014. The petitioner submitted a reply on 14 July 2014 and the Enquiry Officer has submitted a report on 16 July 2014 within two days of the submission of the reply.

The Appellate Authority has failed to examine this aspect and, therefore, the order passed on 27 February 2016 to reject the appeal filed by the petitioner cannot also be sustained. The orders are, accordingly, set aside. It shall, however, be open to the respondents to conduct a fresh enquiry from the stage of submission of the charge-sheet and the reply filed by the petitioner, if it is permissible under the Regulations, in accordance with law."

16. Shri O.P. Singh, learned Senior Advocate though has contended that the Government Servant Rules provide for imposition of penalty even after the retirement if the proceedings had been initiated prior to the retirement. However, he could not cite any provision of law under which disciplinary proceedings could have been continued even after the retirement. Even if it is taken to be presumable that if employee has been subjected to the disciplinary proceedings then it can be brought to its logical end even if the employee has retired but nothing has been shown that such a rule has been adopted by the Warehousing Corporation. In the given facts and circumstances when the petitioner is no more employee of the Warehousing Corporation, it would not be appropriate now to order him to face the departmental enquiry. An employee ceases to be an employee the moment he attains age of superannuation. The matter has remained ofcourse, sub-judice before this Court but this does not mean that the department will get an opportunity to re-enquire the matter.

17. In such special facts and circumstances of the case, I, therefore, reject the argument of Shri O.P. Singh, learned Senior Advocate that the matter can be remitted to be enquired afresh.

18. In view of the above the order impugned dated 24.10.2016 is hereby **quashed**. Consequences to follow.

19. This writ petition stands **allowed** accordingly.

20. There will, however, be no order as to cost.

(2024) 8 ILRA 331
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-A No. 8981 of 2024

Ms. Tanu Jetly ...Petitioner
Versus
The Chairman/Secretary, Army Welfare Education Society, Ministry of Defence, New Delhi & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amit Malik, Sri Santosh Kumar Giri

Counsel for the Respondents:
C.S.C.

(A) Service Law - Maintainability of a Writ Petition under Article 226 against Army Welfare Society - not maintainable against a private unaided educational institution, such as Army Welfare Education Society, which manages Army Public Schools - relationship between employees and a private educational institution arises out of a private contract, which does not involve a public law element - Army Welfare Education Society is a private unaided society, not a "State" under Article 12 of the Constitution. (Para - 15,17,18)

Petitioner working as a P.R.T. teacher in Army Public School - contractual basis - seeking a direction for continuance of her service - and for regularization of her services after termination thereof. (Para - 1 to 3)

HELD: - Writ petition not maintainable due to lack of public law element and private contract nature. Writ Petition filed by petitioner seeking continuance and regularization of her contractual service in Army Public School after termination thereof due to efflux of contract period not maintainable. (Para – 17 to 19)

Petition dismissed. (E-7)

List of Cases cited:

1. Army Welfare Education Society Vs Sunil Kumar Sharma, 2024 SCC OnLine SC 1683

2. Urmila Chauhan Vs The Chairman Army Public School & ors., S.L.P. (Civil) No. 7994 of 2022

3. St. Mary's Education Society Vs Rajendra Prasad Bhargava, (2023) 4 SCC 498

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

1. Heard Sri. Santosh Kumar Giri Advocate, the learned Counsel for the petitioner, who has submitted that the petitioner is working as a P.R.T. teacher in Army Public School, Bareilly Cantt., Bareilly and she is seeking a direction for continuance her service as such and for regularization her services.

2. It has been pleaded in the writ Petition that the petitioner was appointed on the post of P.R.T. teacher in Army Public School, Bareilly Cantt., Bareilly on contractual basis on 19.08.2010/18.07.2010 initially for a period of two years. On 16.07.2012, the petitioner was again appointed for a period of three years from 26.07.2012 to 25.07.2015. On 11.08.2015, she was appointed afresh for a period of three years. Another contract of service was executed on 14.08.2018 for three years and thereafter another contract of service was executed on 20.07.2018 for the period up to 19.07.2021.

3. Lastly, the petitioner was issued an appointment letter dated 27.09.2021

appointing her for a fixed tenure from 04.10.2021 to 31.03.2024. On 08.01.2024, the petitioner was sent an intimated that her service contract will expire on 31.03.2024 and she can appear for fresh selection. The petitioner had participated in the fresh selection process and a letter dated 18.03.2024 issued by the Principal of the School calling the petitioner for interview, has been annexed with the Writ Petition. It appears that the petitioner remained unsuccessful in selection and thereafter she has filed the Writ Petition seeking continuance and regularization of her service after termination thereof.

4. It has been pleaded that Army Public School is governed by Army Welfare Educational Society, New Delhi, Indian Army, Government of India, Ministry of Defence. The aforesaid pleading is incorrect as in **Army Welfare Education Society v. Sunil Kumar Sharma,** 2024 SCC OnLine SC 1683 the Hon'ble Supreme Court has held that Army Welfare Educational Society is a purely unaided private society established for the purpose of imparting education to the children of the army personnel including the widows and ex-servicemen.

5. Para 17 of the Writ Petition contains the following pleadings: -

"17. That the service of the petition are entitled to be regularized on the subject post as a P.R.T. Teacher ***in view of the long standing teaching and working experience of 25 years as a P.R.T. Teacher in Army Public School, Bareilly Cantonment, District Bareilly*** *at par with other permanent teachers in view of Supreme Court Judgment dated : 26.09.2023.*

A true copy of the judgment dated : 26.09.2023 passed by Hon'ble Apex Court is being filed herewith and marked as ***ANNEXURE-14*** *to this writ petition."*

6. As per the pleadings made in other paragraphs of the Writ Petition, the petitioner was initially appointed on 19.08.2010/18.07.2010 and she has worked for a total of 14 years under five different contract of service and the period of her last contract of service expired on 31.03.2024. The averment made in para 17 of the Writ petition that the petitioner has long standing teaching and working experience of 25 years as a P.R.T. Teacher in Army Public School, Bareilly Cantonment, District Bareilly, is false on the face of the record.

7. The entire Writ Petition has been signed by Shammi Kumar, - the husband of the petitioner, who has filed his affidavit in support of the Writ Petition.

8. The procedure to be followed for filing of cases in this High Court is provided in the Allahabad High Court Rules, 1952, Chapter I whereof deals with Preliminary matters. Rule 7 of Chapter I of the Allahabad High Court Rules provides that: -

"7. Date :- (i) Every application, petition objection or memorandum of appeal, presented in Court, ***shall be signed on every page by the applicant, the petitioner****, the objector or the appellant, as the case may be, or by an advocate appearing on his behalf and shall be dated."*

9. The petitioner has not signed the Writ Petition to take personal responsibility of the false averments made therein.

10. Without the Writ Petition having been signed by the petitioner herself, the Writ Petition ought not to have been accepted by the Registry of this Court and at least the Stamp Reporting Section ought to have pointed out this defect in the Writ Petition. The officials of the Stamp Reporting Section are advised to be careful in future and to examine whether the Writ Petitions comply with the provisions contained in Rule 7 of Chapter I of the Allahabad High Court Rules.

11. However, as the Writ Petition has come up before the Court and submissions on its admission have been heard, I proceed to examine the admissibility of the Writ Petition on the basis of the averments contained in it.

12. The document referred to in paragraph 17 of the Writ Petition as "the judgment dated 26.09.2023 passed by the Hon'ble Supreme Court is in fact an interlocutory order passed by the Hon'ble Supreme Court in S.L.P. (Civil) No. 7994 of 2022 titled **Urmila Chauhan versus The Chairman Army Public School and others,** which provides as follows: -

"6. We have perused the documents that have been filed by the respondent-School. Nothing adverse to the petitioner is revealed in the summary of the ACRs for the years 2009-2010 to 2016-2017. In fact, ***the petitioner was recommended for being appointed as a regular teacher as is apparent from the noting sheets of the respondent – school filed with the additional documents. However subsequently, the Chairman of the respondent-School advised that the matter be put up for consideration later on.***

7. We are of the opinion that in view of the aforesaid facts and circumstances, it is a fit case where the respondent-School ought to reconsider appointing the petitioner on the subject post as a regular teacher. We therefore, direct the Competent Authority of the respondent School to reconsider the petitioner's case for regularization to the subject post within six weeks from today, keeping in mind the aspects referred to hereinabove and file an affidavit immediately thereafter."

13. The learned Counsel for the petitioner has placed an interlocutory order terming it as a judgment of the Hon'ble Supreme Court. Although the learned Counsel for the petition did not inform the Court about the final decision of Urmila Chauhan's case, the aforesaid S.L.P. has been decided by means of an order dated 19.01.2024, in which the Hon'ble Supreme Court observed that: -

"6. ***In the peculiar facts of the instant case and particularly keeping in mind the fact that the management of the respondent-School has been shifting stands from time to time, sometimes placing on record its appreciation for the work done by the appellant and on other occasions, pointing out that she was not up to the mark, it is deemed appropriate to set aside the impugned judgment dated 30th 2 March, 2022, whereunder the directions issued by the learned Single Judge to regularize the appellant in service has been held to be unsustainable.*** *As a consequence, the judgment dated 04th May, 2021 passed by the learned Single Judge is restored with a modification that since the appellant has not been discharging her duties from 04th May, 2021 till now, she will not be entitled to any back wages for the said period. However, her continuity of service and other*

consequential benefits shall not be adversely affected."

(Emphasis added)

14. Therefore, it is clear that the case of **Urmila Chauhan (Supra)** was decided without going into the question of maintainability of the Writ Petition filed against Army Public School and it was decided in view of the peculiar facts and circumstances of the case where the petitioner was recommended for being appointed as a regular teacher as is apparent from the noting sheets of the respondent – school filed with the additional documents. However subsequently, the Chairman of the respondent-School advised that the matter be put up for consideration later on and the management of the respondent-School has been shifting stands from time to time.

15. The question of maintainability of a Writ Petition under Article 226 against Army Welfare Society, which runs and manages Army Public Schools, has been decided by the Hon'ble Supreme Court in **Army Welfare Education Society v. Sunil Kumar Sharma,** 2024 SCC OnLine SC 1683, wherein the Hon'ble supreme Court has framed and decided the following two questions of law:—

"a. Whether the appellant Army Welfare Education Society is a "State" within Article 12 of the Constitution of India so as to make a writ petition under Article 226 of the Constitution maintainable against it? In other words, whether a service dispute in the private realm involving a private educational institution and its employees can be adjudicated upon in a writ petition filed under Article 226 of the Constitution?

b. Even if it is assumed that the appellant Army Welfare Education Society is a body performing public duty amenable to writ jurisdiction, whether all its decisions are subject to judicial review or only those decisions which have public law element therein can be judicially reviewed under the writ jurisdiction?"

16. The Hon'ble Supreme Court relied upon a precedent in the case of **St. Mary's Education Society v. Rajendra Prasad Bhargava:** (2023) 4 SCC 498, in which the following two questions fell for the consideration of the Court:—

"(a) Whether a writ petition under Article 226 of the Constitution of India is maintainable against a private unaided minority institution?

(b) Whether a service dispute in the private realm involving a private educational institution and its employee can be adjudicated in a writ petition filed under Article 226 of the Constitution? In other words, even if a body performing public duty is amenable to writ jurisdiction, are all its decisions subject to judicial review or only those decisions which have public element therein can be judicially reviewed under the writ jurisdiction?"

17. The final conclusion drawn in **St. Mary's Education Society (Supra)** is reproduced hereinbelow:—

"75. We may sum up our final conclusions as under:—

75.1. An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be

shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.

75.2. Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 or it was found that the action complained of has public law element.

75.3. It must be consequently held that ***while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a constitutional court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions****. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution,* ***the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution****. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.*

75.4. Even if it be perceived that imparting education by private unaided school is a public duty within the expanded expression of the term, an employee of a non-teaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case, the terms of employment of contract between a school and non-teaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of non-teaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered with by the Court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.

75.5. From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as

the action was essentially of a private character.

76. In view of the aforesaid discussion, we hold that the learned Single Judge of the High Court was justified in taking the view that the original writ application filed by Respondent 1 herein under Article 226 of the Constitution is not maintainable. The appeal court could be said to have committed an error in taking a contrary view."

(Emphasis added)

18. After quoting the aforesaid law laid down in St. Mary's case, the Hon'ble Supreme Court held in **Army Welfare Education Society v. Sunil Kumar Sharma** that: -

"42. In view of the aforesaid, nothing more is required to be discussed in the present appeals. We are of the view that the High Court committed an egregious error in entertaining the writ petition filed by the respondents herein holding that the appellant society is a "State" within Article 12 of the Constitution. Undoubtedly, the school run by the Appellant Society imparts education. Imparting education involves public duty and therefore public law element could also be said to be involved. However, the relationship between the respondents herein and the appellant society is that of an employee and a private employer arising out of a private contract. If there is a breach of a covenant of a private contract, the same does not touch any public law element. The school cannot be said to be discharging any public duty in connection with the employment of the respondents."

19. In view of the aforesaid pronouncement of law by the Hon'ble Supreme Court, the Writ Petition filed by the petitioner seeking continuance and regularization of her contractual service in Army Public School after termination thereof due to efflux of contract period, is not maintainable and it is ***dismissed*** as such at the admission stage itself.

(2024) 8 ILRA 336
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 9377 of 2024

Mukesh Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Thakur Prasad Dubey

Counsel for the Respondents:
C.S.C., M.N. Singh

(A) Service Law - The U.P. Public Service Commission Advertisement, 2023 - Rejection of Candidature for Non-Submission of Offline Application Form and Documents within Prescribed Time Limit - If a candidate fails to submit either application or requisite documents up to the last date prescribed under the advertisement, no further opportunity can be afforded to such candidate and for such negligence, may be due to inadvertence, subsequently application at the instance of such candidate cannot be allowed - once the conditions stipulated under the advertisement are not fulfilled the department cannot be held liable for the same and candidate will have to suffer. (Para - 5)

Petitioner applied for Assistant Private Secretary position in U.P. Secretariat online - advertisement required applicants to submit a

hard copy of their application form and required documents by April 5, 2024 - qualified for preliminary examination - failed to submit offline application form and documents within deadline - Commission rejected his candidature due to the non-submission of documents. (Para - 2,3)

HELD: - Petitioner failed to submit offline application form and documents within the prescribed time limit. Candidature rejection upheld. (Para – 6 ,8,9)

Petition dismissed. (E-7)

List of Cases cited:

1. Rajendra Patel Vs St. of U.P. & anr., AIR 2015 All 161 (FB)

2. Nirbhay Kumar Vs U.P. Public Service Commission, (Special Appeal No.- 541 of 2014

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

1. Heard Sri Thakur Prasad Dubey, learned counsel for the petitioner and Sri Sanjay Kumar Om, learned counsel for the U.P. Public Service Commission.

2. Petitioner before this Court has been an applicant against the advertisement issued for the post of Assistant Private Secretary in U.P. Secretariat advertised by the U.P. Public Service Commission on 19th September, 2023. It was prescribed under the advertisement that soon after submitting the online application, the printout of the hard copy of the said application shall be drawn by the petitioner and shall submit all the requisite documents regarding essential qualification on or before 5th April, 2024. It was further noticed under the advertisement that beyond the prescribed date no application will be entertained.

3. It is an admitted case of the petitioner that he could not submit the offline application form along with documents but he submits that since it was a sheer mistake inadvertently committed and since he had qualified the preliminary examination his candidature ought not to have been cancelled.

4. Per contra, it is submitted by learned counsel appearing for the U.P. Public Service Commission that under the advertisement there was a clear condition stipulated that till 5:00 pm on 5th April, 2024 the hard copy of the application should be submitted along with documents and if it were not submitted/ deposited in the office of Public Service Commission, then no further time will be allowed and no application shall be entertained subsequently.

5. Sri Om has argued that it is settled legal position that if a candidate fails to submit either application or requisite documents up to the last date prescribed under the advertisement, no further opportunity can be afforded to such candidate and for such negligence, may be due to inadvertence, subsequently application at the instance of such candidate cannot be allowed. He has also placed reliance upon the Full Bench judgment of this Court in the case of **Rajendra Patel v. State of U.P. and another, AIR 2015 All 161 (FB),** where a candidate failed to submit the offline form within the prescribed period. In the said judgment the Court has very categorically held that once the conditions stipulated under the advertisement are not fulfilled the department cannot be held liable for the same and candidate will have to suffer.

6. I have perused the records and find it to be an admitted position that petitioner in his knowledge failed to submit offline

applications along with requisite documents to U.P. Public Service Commission till 5:00 of the last date i.e. 5th April, 2024. The Full Bench of this Court in the case of **Rajendra Patel (supra)** was constituted to decide following reference:

"Where the Commission requires the submission of an online application as well as the submission of a hard copy of the application together with all the requisite documents by a prescribed last date and candidates are placed on notice that the candidature of an applicant who has failed to complete all the prescribed stages by the last date would be rejected, would it be a correct position in law to hold that the Commission is bound to entertain the application though the hard copy together with the documents was received after the last date prescribed merely on the ground that the documents had been dispatched before the last date of the receipt of the application."

7. Holding the judgment of Division Bench in the case of **Nirbhay Kumar v. U.P. Public Service Commission** (Special Appeal No.- 541 of 2014 decided on 30th May, 2014) not to be laying down correct law, the Full Bench (supra) making observations upon the principles of law on the point, concluded thus:

"Even on merits, we are not inclined to accept the correctness of the principle which has been laid down in Nirbhay Kumar (supra) that the submission of a hard copy of the application together with the accompanying documents is merely an act of confirmation of the application. The view which has found acceptance in Nirbhay Kumar (supra) would, in our view, dislocate the examination process and would render the process which is conducted by the Commission in a perpetual state of uncertainty. We are, with respect, in agreement with the view which was expressed by the Division Bench in Raj Narayan Singh (supra) decided on 18 February 2015.

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.

For these reasons, we hold that where the Commission requires the submission of a hard copy of the online application together with all accompanying documents by a prescribed last date and has clearly placed the candidates on notice of the fact that an application which is submitted beyond the last date together with the prescribed documents would result in the invalidation of the candidature, the condition which has been imposed by the Commission would have to be scrupulously observed. It would not be open to the Court to hold that notwithstanding such a clear condition, an application which has not been received by the last date should be entertained. The Commission has given an option to candidates of submitting their applications in the hard copy by either of the two modes, namely by registered post or by personal delivery. A candidate who has opted for one of the two modes, is required to comply with the condition that all the requisite four stages are completed within the time stipulated."

8. Learned counsel for the petitioner could not cite any authority disputing the proposition of law as discussed in the aforesaid Full Bench judgment of this Court.

9. In view of the above settled legal position, I do not find any justification to grant indulgence in the matter.

10. Petition fails and is, accordingly, dismissed.

(2024) 8 ILRA 339
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.08.2024

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 9577 of 2006

Brijesh Kumar Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Dr. L.P. Mishra

Counsel for the Respondents:
C.S.C.

(A) Service Law - The Police Act, 1861 - The U.P. Police Regulations - recruitment of Constables - Illegal and malicious actions by authorities can be challenged - Government orders and medical certification override initial disqualifications - Right to consequential benefits. (Para - 25,26, 35 to 38)

Petitioner applied for a Constable position (in year 1994) - initially rejected due to a chest measurement issue - found short by 1 cm - Despite meeting eligibility criteria and repeated court orders in their favor - Superintendent of Police delayed and refused appointment - prompting multiple writ petitions and contempt cases - court found evidence of willful disobedience and bias - ordering charges against the Superintendent and others. (Para - 1 to 16)

HELD: - Non-enlistment of petitioner as a recruit constable in 1994 was illegal, arbitrary, capricious, and malicious. Impugned order set aside. Petitioner be treated in service as Constable from the date from which the selectee's of 1994 recruits as Constable have

been appointed as Constables with all consequential benefits of continuance in service, fixation of pay, seniority and promotion etc. Pay arrears from 12.04.2006. Respondents must Pay costs to petitioner within 3 months. (Para - 35 to 37)

Petition allowed. (E-7)

List of Cases cited:

1. U.O.I. & Ors. Vs Pritilata Nanda, (2010) 11 SCC 674

2. U.O.I. Vs Mohan Singh Rathore & anr., (1996) 10 SCC 469

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Dr. L.P. Misra and Mrs. Nandini Pandey, learned counsel for the petitioner and Sri Shiv Ganesh Singh, learned Additional Chief Standing Counsel for the State-respondent.

2. By means of the present writ petition, the petitioner seeks to challenge the order dated 25.7.2006, passed by the respondent No.4 (Superintendent of Police, Sitapur). He has prayed as under :-

"(i) To issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 25-07-2006 (Annexure No. 1) issued by opposite party No. 4/ 5.

(ii) To issue a writ order or direction in the nature of mandamus commanding the opposite parties to accept the joining of the petitioner submitted on 29-06-94 and issue Identity Card, Proper dresses and requirements and treat the petitioner to be appointed as U.P. Police/Constable in continuous service from the date of the Hon'ble Governor's sanction vide Government order No. 4017/6-PU-10-94 dated 28-06-94.

(iii) To issue a writ order or direction in nature of mandamus commanding the opposite party No. 4 /5 S.P. Sitapur to issue self speaking appointment order in the light of Govt. order dated 17-06-94 & 28-06-94 and pay him salary with all allowances regularly day to day for the post of U.P. Constable with all consequential benefits of service.

(iv) To issue writ order or direction for payment of special damages at the rate of Rs. 2,00,000/- per year alongwith 22% interest per year in favour of the petitioner for making mentally, physically, socially and financially torture and spoiling the future and career of the petitioner as well as his dependents maliciously, willfully and arbitrary delaying in the matter for about 12 years without any fault of the petitioner with biased and harassing attitude by ignoring the clear-cut orders of Government as well as order of I.G. establishment and various orders of this Hon'ble court in the interest of justice.

(v) To issue writ order or direction to pay the cost of the petition in favour of the petitioner against the opposite parties.

(vi) To issue any other writ, order or direction which this Hon'ble Court deems fit and proper in the nature of the case may also be passed in favour of the petitioner and against the respondents."

3. Facts in brief are that in pursuance to an advertisement issued in the year 1994 for selection and appointment of Constables, the petitioner offered his candidature and appeared at Sitapur Center for consideration of his candidature vide Registration No.1897 on the date fixed. He was found short by 1 cm than the required measurement in the category of expanded chest. He made a representation to the State

Government and a letter dated 15.06.1994 was issued by the State Government addressed to the Chief Medical Officer, Lucknow for getting his physical measurement done and to send report to the State Government. This letter is Annexure-3 to the writ petition.

Consequent upon the communication dated 15.06.1994, a copy of which was also endorsed to the petitioner, the Chief Medical Officer, Lucknow conducted a physical standard examination of the petitioner and reported that his chest on expansion was 88 cm which was more than the prescribed norms.

On receipt of the certification as made by the Chief Medical Officer, Lucknow, the State Government proceeded to issue an order dated 17.06.1994 (Annexure-5) directing the Superintendent of Police, Sitapur to take steps to appoint the petitioner against reserved category of Dependents of Freedom Fighter and Sports as he was found eligible as per physical fitness certificate issued by the Chief Medical Officer, Lucknow.

4. On receipt of the State Government's communication dated 17.06.1994, the then Superintendent of Police, Sitapur wrote a letter dated 19.06.1994 that the petitioner was found unfit in the physical verification and the physical verification made by the Chief Medical Officer had no relevance. Thereafter, the State Government issued a detailed letter dated 28.06.1994 addressed to the Director General of Police, U.P. at Lucknow and Additional Director General of Police, U.P., Police Headquarter at Allahabad, stating that the physical examination of the petitioner was done by the Chief Medical Officer, Lucknow on reference being made by the State Government and the same was done in accordance with the relevant rules prescribed for medical examination. The petitioner was a good player of Judo game and was grandson of freedom fighter and therefore, the State Government has taken a conscious decision that he should be appointed as a Constable. In this government order stands specifically mentioned that in peculiar facts and circumstances, a conscious decision has been taken by the State Government to relax all the rules and after selection the petitioner be sent for receiving training and the said letter shall not be treated as precedence for any other matter. The detailed government order is on record as Annexure-7 to the writ petition.

5. After issuance of the government order dated 28.06.1994, the petitioner submitted his joining report before the Superintendent of Police, Sitapur on 29.06.1994 after annexing a copy of the government order dated 28.06.1994. Another letter dated 27.11.1994 was issued by the State Government addressed to the Director General of Police, U.P., Lucknow that the relaxation from the prescribed procedure for recruitment of Constable was consciously granted by the State Government and there should not be raised any dispute and the selection and appointment of the petitioner as Constable be ensured. This document is on record as Annexure-9 to the writ petition.

Nothing was done and again the State Government issued a letter dated 22.03.2003 addressed to the Director General of Police, U.P., Lucknow and Additional Director General, U.P., H.Q. Allahabad, clearly stating that despite the directions having been issued in the government order dated 28.06.1994,

negligence was shown by the Superintendent of Police, Sitapur and a compliance report be sent to the State Government.

The Inspector General of Police (Establishment), U.P. thereafter wrote a letter dated 31.03.2003 addressed to S.P., Sitapur that the compliance of the government order dated 28.06.1994 be communicated. This document is contained as Annexure-11 to the writ petition. Even then no action was taken by Superintendent of Police, Sitapur.

6. The petitioner being aggrieved against the inaction on the part of the Superintendent of Police, Sitapur preferred Writ Petition No.6143 of 2003 and vide judgment and order dated 14.10.2003 (Annexure-12) this Court required the petitioner to make a detailed representation before the State Government and required the State Government to take a reasoned decision within a period of 3 months from the date of such representation.

7. It appears that the representation made thereafter by the petitioner was processed and the Deputy Inspector General of Police (Establishment), U.P. Police H.Q., Allahabad wrote a letter dated 21.12.2003 communicating to the State Government that the appointment of the petitioner as a member of discipline force i.e. Police force would not be in the interest of Police Force and in the public interest and after due consideration of such a report, the State Government wrote back to Deputy Inspector General of Police (Establishment), U.P. Police H.Q., Allahabad that in view of government's letter dated 27.11.1994 and Police Headquarter's letter dated 31.03.2003, the report dated 25.12.2003 was not proper and in compliance of the judgment dated 14.10.2003 passed by this Court, proper and appropriate recommendations be made available to the State Government. The letter dated 21.05.2004 so written by the State Government is on record as Annexure-13 of the writ petition.

8. The record of the writ petition further reveals that no decision was taken within the time stipulated in the judgment and order dated 14.10.2003 passed by this Court in Writ Petition No.6143 of 2003 and the petitioner filed a Contempt Petition marked as Criminal Miscellaneous Case No.1722 (C) of 2004 and a notice was issued on the said contempt petition by this Court on 07.10.2004. After taking cognizance on contempt for non-compliance of the judgment dated 14.10.2003, the State Government passed an order dated 25.11.2004 (Annexure-15) rejecting the petitioner's representation and further cancelling the government orders dated 28.06.1994 and 27.11.1994 with immediate effect.

9. The petitioner filed Writ Petition No.1423 (S/S) of 2005 before this Court challenging the order dated 25.11.2004 passed by the State Government and the said writ petition was allowed vide judgment and order dated 21.02.2005, a copy of which is on record of the writ petition as Annexure-16. The operative portion of the judgment dated 21.02.2005 reads as under :-

"Consequently, the impugned order dated 25.11.2004/ Annexure 1 to the Writ Petition cannot be sustained and liable to be set aside.

In the result, the impugned order dated 25.11.2004/Annexure 1 to the writ petition passed by Secretary/Respondent no. 2 is hereby set aside, with a direction to

the Petitioner to file additional Representation (if any) and a certified copy of this order before Principal Secretary/Respondent no. 1 to requisition the relevant record from the Secretary in question who shall decide the representation of the petitioner by passing order containing reasons, disclosing application of mind, in accordance with law and on the basis of material on record before it. Decision shall be taken by the respondent no. 1 within four weeks of the receipt of a certified copy of this order and its decision shall be communicated to the petitioner forthwith."

10. The petitioner communicated the certified copy of the judgment and order dated 21.02.2005 passed by this Court in Writ Petition No.1423 of 2005 and the State Government issued an order dated 08.04.2005, rejecting the representation of the petitioner on the premise that such representations were already rejected by the State Government. This order is annexed as Annexure-17 to the writ petition.

11. The petitioner preferred Writ Petition No.4331 (S/S) of 2005, challenging the order dated 08.04.2005, issued by the State Government, which was allowed by this Court vide judgment and order dated 12.04.2006. the relevant portion of the order is as under :-

"A numerous documents annexures-2 to 7 to the writ petition clearly indicate that the petitioner was recommended for appointment and training by the higher authorities but the appointing authority appears to be biased with the petitioner, hence did not appoint the petitioner ignoring the orders of the State Government and thus the petitioner is being harassed by the appointing authority.

In these circumstances the writ petition is allowed. The order dated 8.4.2005 passed by the State Government (annexure-1 to the writ petition) is hereby quashed and a writ of mandamus is issued to opposite party no.9, Superintendent of Police, Sitapur to consider the case of the petitioner for appointment in light of the observations made above within a period of two months from the date a certified copy of this order is produced before him."

12. After passing of the judgment and order dated 12.04.2006, the impugned order dated 25.07.2006 was passed by the Superintendent of Police, Sitapur which stands challenged in the present writ petition.

13. The record of the writ petition further reveals that after filing of the writ petition, the petitioner filed a contempt petition marked as Criminal Miscellaneous Case No. 2633 (C) of 2006 (Brijesh Kumar Pandey Vs. Sri Dawa Sherpa and others) on the ground that the order dated 25.07.2006, which stands impugned in the present writ petition was passed by the alleged contemnor in utter derogation of the directions issued by the writ court vide judgment and order dated 12.04.2006 passed in Writ Petition No. 4331 (S/S) of 2005. In exercise of the contempt jurisdiction, the Contempt Court passed an order dated 11.10.2007, requiring the Superintendent of Police, Sitapur to remain present in person before the Court on 12.10.2007 along with complete records from the Secretariat.

14. On 12.10.2007 the matter was examined by the Contempt Court in depth and it was observed that the case in hand was one of those glaring cases which depicts how the Government machinery

can harass an individual by taking resort to passing of file from one table to the other and referring the matter time and again to its various hands with no relief to an individual, apparently on account of non-fulfillment of demands of a petty clerk. The Government officers have not been bold and fair enough to take a stand and to take an appropriate decision.

15. After relevant considerations including the contents of the judgment and order dated 12.04.2006 passed by the writ court, the Contempt Court, as evident from the order dated 20.12.2007 (Annexure-4 to the petitioner's rejoinder affidavit dated 23.11.2021), required all the District Superintendents of Police, Sitapur who have remained posted during the last 13 years to be present before the Court for taking the charge. The contents of the order dated 20.12.2007 are quoted in verbatim under:-

"This is one of those glaring cases which depicts how the Government machinery can harass an individual by taking resort to passing of file from one table to the other and referring the matter time and again to its various hands with no relief to an individual, apparently on account of non-fulfillment of demands of a petty clerk. The Government Officers have not been bold and fair enough to take a stand and to take an appropriate decision. This contempt application was filed alleging willful disobedience and non-compliance of the judgment of this Court dated 12.04.2006 passed in Writ Petition No. 4331 (S/S) of 2005.

The applicant had appeared in the test for selection to the post of constable in Civil Police in the year 1993-94. On account of certain objections that the applicant did not fulfill the required standard of physical fitness, he was not selected. The applicant represented before the Hon'ble Governor of the State. He was re-examined by the Chief Medical Officer, Lucknow, who gave him a fitness certificate, certifying that the applicant fulfilled the requirements of physical fitness. Thereafter the Hon'ble Governor recommended that the applicant should be selected. The State Government issued an order dated 28.6.1994, addressed to the Director General of Police and also to the Additional Director General of Police Headquarters annexing the recommendation of the Hon'ble Governor relaxing eligibility condition for selection, and directing that the applicant may be selected/ appointed and may be sent for training immediately. The said letter Issued by the Government also provides that the decision taken in the case of the applicant would not be treated as a precedent in future.

The directions of the State Government was not being complied with whereupon a second letter dated 27.11.1994 was issued by the State Government, this time signed by the Joint Secretary and addressed to the Director General of Police to appoint the petitioner as Constable in Civil Police and to send him for training without any delay. The applicant kept running from pillar to post but was not given the appointment. The State Government again on 22.3.2003 reiterated its stand and called for a report from the Director General of Police and also the Additional Director General of Police, Headquarters. Subsequently the Inspector General (Establishment) vide letter dated 31.3.2003 wrote to the Superintendent of Police, Sitapur directing him to take necessary action in accordance with law and to get the Government Order implemented.

When no orders were passed for the appointment of the petitioner he filed a writ petition before this Court, being Writ Petition No.6143 of 2003. The said writ petition was disposed of vide order dated 14.10.2003 directing the State Government to pass an appropriate reasoned order in the matter of the petitioner within a period of three months. Again when no action was taken the applicant filed a Contempt Application being Criminal Misc. Case No. 1722 (C) of 2004. Thereafter it appears that an order was passed on 25.11.2004. The applicant challenged the said order by means of Writ Petition No.1423 (S/S) of 2005. The said writ petition was allowed vide order dated 21.2.2005 and the order dated 25.11.2004 was quashed on the ground that it was non-speaking order and has been passed without application of mind, in contravention to the directions contained in the earlier order of this Court dated 14.10.2003. It was further directed that the Principal Secretary shall decide the representation of the petitioner by a reasoned order after application of mind on the basis of the material on record before it.

The State Government passed an order dated 8.4.2005 again rejecting the claim of the applicant. Against the said order the petitioner filed another writ petition being Writ Petition No. 4331 of 2005. The said writ petition was again allowed vide judgment dated 12.4.2006. This time the Court categorically held that the applicant has been recommended for appointment and training by the higher authorities but the appointing authority was biased with the petitioner and, therefore, did not appoint him ignoring the orders of the State Government. This time while allowing the writ petition the Court quashed the order of the State Government dated 8.4.2005 and issued a writ of mandamus to the respondent no.7 in the writ petition, i.e. Superintendent of Police, Sitapur to consider the case of the petitioner for appointment in the light of the observations made in the judgment within a period of two months.The judgment of this Court dated 12.4.2006 is quoted as under :-

"Heard Dr. L.P. Mishra, learned counsel for the petitioner and learned Standing Counsel for the opposite parties.

By means of this writ petition the petitioner prays for quashing of the order impugned dated 8.04.05 by the State Govt. rejecting the petitioner's representation dated 25.2.05 for appointment as Police Constable as contained in Annexure to the writ petition.

The petitioner appeared before Superintendent of Police, Sitapur for appointment on the post of Constable but he was declared unfit. He approached the State Government, who directed the Chief Medical Officer of Lucknow for physical measurement and medical examination, who found fit in all respects and issued a certificate to that effect. The State Government was pleased to issue the direction on 28.06.94, 27.11.94 and again on 22.03.2003 for appointment and training of the petitioner, even then respondent no.9 did not comply with the aforesaid direction, hence the petitioner filed the Writ Petition No. 6143 (S/S) of 2003, which was disposed of with a direction to the respondents to decide the representation of the petitioner within three months. This order was also not complied with in right perspective. Thereafter another writ petition no. 1423 (S/S) of 2005 was filed by the petitioner which was allowed on 21.02.2005 setting aside the office memorandum dated 25.11.2004. But even then nothing was done hence the petitioner filed a contempt petition no. 835

(C) of 2005. Consequently feeling aggrieved with the petitioner and another office memorandum dated 8.04.2005 impugned in this writ petition has been issued, saying that the relaxation was done in the year 1994 of which no documents are available in the Govt. Office hence no comments could be made on the Govt. Orders dated 28.06.94 and 27.11.94.

A numerous documents annexures- 2 to 7 to the writ petition clearly indicate that the petitioner was recommended for appointment and training by the higher authorities but the appointing authority appears to be biased with the petitioner, hence did not appoint the petitioner ignoring the orders of the State Government and thus the petitioner is being harassed by the appointing authority.

In these circumstances the writ petition is allowed. The order dated 8.4.2005 passed by the State Government (annexure-1 to the writ petition) is hereby quashed and a writ of mandamus is issued to opposite party no.9, Superintendent of Police, Sitapur to consider the case of the petitioner for appointment in light of the observations made above within a period of two months from the date a certified copy of this order is produced before him."

The petitioner submitted certified copy of the judgment dated 12.4.2006 before the Superintendent of Police, Sitapur along with the covering letter dated 21.4.2006. Superintendent of Police, Sitapur thereafter instead of passing appropriate order again referred the matter to the State Government vide letter dated 5.5.2006 seeking further directions from the State Government, instead of complying with the directions of this Court. This Court had already held in the judgment dated 12.4.2006 that despite the specific directions of the State Government, the Superintendent of Police, Sitapur has been delaying the matter and not complying with the same deliberately in order to harass the applicant. Yet again the same story was repeated. After waiting for sufficient time the applicant filed the present Contempt Application for punishing the opposite parties.

As the time passed on and as the Officers were transferred and new incumbent joined, impleadment applications were filed which have been allowed. The present incumbent Sri V.K. Dohare on the post of Superintendent of Police, Sitapur has also filed his affidavit in reply, to which a rejoinder affidavit has also been filed by the applicant. During the course of hearing on the previous date, a detailed order was passed and the original record available in the office of the Superintendent of Police, Sitapur and the U.P. Secretariat at Lucknow with regard to the applicant's matter were summoned and were produced before the Court. They have also been perused by the Court.

I have heard learned counsel for the applicant and also Sri Lalit Shukla, learned Addl. Chief Standing Counsel on behalf of the respondents.

It has been submitted on behalf of the applicant that he is being harassed for the last 13 years only on account of a clerk in the office of the Superintendent of Police, Sitapur, dealing with the file of the applicant. According to the applicant this person has been continuing on the post for the last more than 15 years and has been dealing with the file of the applicant right from the beginning. He had made certain demands, which were not fulfilled by the applicant and, therefore, out of annoyance he has been harassing the applicant on account of malice. Right from 1994 the said clerk has been handling the file and has been making reports and notings which are not consistent with the record. The said

clerk has also been impleaded in this Contempt application and notices were also issued to him. He has not filled any reply.

Having perused the record and also having gone through the affidavit filed by the Superintendent of Police, Sitapur in my opinion it would not be necessary to go into the question as to whether the Opp-party no. 4 Ibbadul Hag is guilty of manipulating with the record or not but disobedience is quite apparent and, therefore, for the reasons stated hereinafter in my opinion it is a case in which prima facie willful disobedience and non-compliance of the directions of this Court is established and the Opp-party must face charges for committing contempt of this Court.

From the original record it is apparent that the applicant had been pursuing the matter right from the beginning with the Superintendent of Police, Sitapur as also the State Government. On record is available the various letters written by the Superintendent of Police, Sitapur time and again right from 1994, and again in 1999 asking for clarification and directions. From the record of office of Superintendent of Police, Sitapur, it also appears that there are certain missing links as if certain correspondence was not produced before the court and some correspondence had been removed from the record. Further from the record of the State Government what appears is that that the State Government has not taken a stand that the orders issued on 28.06.1994 and 17.11.1994 were forged or fictitious. Even the subsequent letters issued by the State Government 22.03.2003 and 05.07.2005 which clearly mention that no further direction is required from the State Government and the Superintendent of Police, Sitapur may after obtaining legal opinion comply with the directions of the High Court. Despite such specific clear cut orders what compelled the Superintendent of Police, Sitapur to again write in May 2006 seeking further opinion of the State Government is not only a clear disobedience of the direction of this Court and of the State Government but shows the jugglery of the Government officers in not doing what they do not want to do and somehow or the other trying to scuttle the matter.

Along with the counter affidavit of the Sri V.K. Dohara, the Superintendent of Police, Sitapur dated 06.09.2007 is annexed an order dated 23.08.2007 rejecting the claim and representation of the applicant. This is again in contravention of the directions of this Court, which did not require him to test correctness of the Government orders but only required him to pass appropriate order for appointment in accordance with law. The liberty given to pass appropriate orders in accordance with law was not to test the correctness of the Government order or the recommendation to appoint the petitioner but this Court had only required the Superintendent of Police, Sitapur to pass orders for appointment in terms of the Government order. He had no business to again test as to whether the appointment could be issued or not.

Normally if an order was passed after a direction of this Court, it would be open to the applicant to challenge the same before the Writ Court submitted on behalf of the State Officers but in the present case what the Court notices is that despite the Court holding in the judgment dated 12.04.2006 that the Appointing Authority was biased and was not issuing the appointment letter ignoring the order of the State Government and thereby harassing

the applicant, it is writ large that Superintendent Of Police, Sitapur is definitely harassing the applicant and not issuing the appointment order.

It is a fit case in my opinion in which suitable action should be taken not only against the present Superintendent of Police, Sitapur but also against the previous Officers posted as Superintendent of Police, Sitapur for substantial period and who have delayed the matter time and again, may be at the pretext or at the instance or at the false and incomplete reporting of the clerk Ibbadul Hag, Opp-party no. 4. The applicant has been running from pillar to post for the last 13 years. Officers who have harassed him will have to suitably compensate him.

List this matter on 22nd January, 2008 for framing of charges. The Opp-party no. 1, 4 and 5 shall remain present on the said date before the Court even if they have been transferred from Sitapur wherever they may be posted.

Let a copy of this order be sent to the Director General of Police, U.P. to ensure presence of the Opp-party nos. 1, 4 and 5 on the next date.

16. Even after passing of such an order dated 20.12.2007, the opposite parties of the writ petition continued to drag their feet contemptuously and the judgment and order dated 12.4.2006 passed in Writ Petition No.4331 (S/S) of 2005 was not complied with in its letter and spirit and even the contents of the order dated 20.12.2007, as quoted hereinabove, were not shown the due regard, it is submitted by learned counsel for the petitioner.

However, after a lapse of about six years from the order dated 20.12.2007, the petitioner was appointed as Constable on May 26, 2013, a copy of which is filed as Annexure-1 to the rejoinder affidavit.

17. In view of the facts narrated above, submission advanced by learned counsel for the petitioner in challenge to the impugned order dated 25.07.2006 passed by Superintendent of Police, Sitapur is that the order has not only been passed illegally and arbitrarily, but patently suffers from perversity inasmuch as that the premise of the impugned order is that the government order dated 17.06.1994, 28.06.1994 and 27.11.1994 were cancelled by the State Government vide order dated 25.11.2004, ignoring the roaringally speaking circumstance that the government order dated 25.11.2004 stood already set aside by the High Court vide judgment and order dated 21.02.2005, passed in Writ Petition No.1423 (S/S) of 2005.

18. It is further submitted that once the order dated 25.11.2004, passed by the State Government, cancelling the earlier government orders was quashed and set aside by this Court, the necessary corollary is that the government orders dated 17.06.1994, 28.06.1994 and 27.11.1994 stood automatically revived and passing of the impugned order on the basis of the government order dated 25.11.2004 is nothing but a perverse approach for the reasons best known to the author of the impugned order.

The second reason assigned in passing the impugned order is that the petitioner did not complete the prescribed eligibility and did not complete the requisite examinations for which there were no provisions of relaxation. It is submitted that this reasoning is again not only arbitrary and perverse but audacious in nature for more than one reason.

It is submitted that in the year 1994 when the advertisement dated 31.03.1994 was issued, there were no statutory rules governing the recruitment of Constables in the State of U.P. and the recruitment, training and appointment as Constables used to be governed by the U.P. Police Regulations framed under the Police Act, 1861, an Act enacted with the assent of the Governor General of India and amended from time to time by various amending Acts. Paragraphs 409 to 415 of the U.P. Police Regulations read as under:-

*"**409. Enlistments of constables for the Armed and Civil Police.-** Enlistments of constables for the Armed and Civil Police will be made by Superintendents. No man who is less than 18 or more than 23 years old may be enlisted (or re-enlisted). In the case of candidates belonging to Scheduled Castes, the upper age-limit shall be greater by five years. Chaukidars of approved character and qualifications may be drafted into the Pradeshik Police up to the age of 30 years. Military pensioners may be enlisted as Constables in the Armed Police provided they are not more than 35 years of age. After appointment, they may draw their pay as members of the Police Force in addition to their Military pension subject to usual rules in this respect. The enlistment should be notified to the Controller of Military Accounts.*

Ex-soldiers who are neither reservists nor pensioners may be enlisted as ordinary recruits both in Civil and Armed Police provided they are not more than 35 years of age. The Director-General of Police will exercise powers of granting relaxation from the minimum / maximum age-limit only where in the interest of fair dealing or in the public interest, it is considered necessary under Notification No. 1129(5)/II-175-39, dated 4th July, 1941. In districts where recruiting is bad, Superintendent may apply to the Recruiting Staff Officer for pensioners or ex-soldiers other than reservists, Indian Armjed reservists and members of the Indian Territorial Force may not be enlisted in any branch of the Police Force, and no member of the Police Force (including clerical staff) is permitted to join the Indian Territorial Force or the Auxiliary Force, India.

***410. Rules for ex-soldiers, who are enlisted as constable in U.P. Police.-** On their enlistment as constable in the Uttar Pradesh Police the exsoldiers of the following classes are entitled to count their previous military service for increments in the time-scale of pay of constables : (1) Ex-soldiers of the combatant units of the Indian Armed Forces, and (2) Ex-soldiers of the combatant units of the late I.S.F. and non-I.S.F. Provided that the military service of a military pensioner or gratuitant will not count for incremental pay if he continues to draw his pension, or unless he refunds any bonus or service gratuity that he may have received in lieu of pension or since discharge from military service in monthly instalments not exceeding thirty-six. The question of re-fixation of pay of such ex-military personnel will be considered only after the entire amount of the bonus/service gratuity has been refunded in full by them. The revised pay will, however, be allowed to them with retrospective effect, i.e., form the date of enlistment in the Police Force. Appendix XXVIII of Army Regulations, India, Volume II, should be consulted as regards the branches of military service which fall in the category of non-combatant services. The cases of men with previous service in units not mentioned in that appendix should be referred to the Inspector-General of Police for orders at*

the time of enlistment unless governed by rulings already generally notified. Indian Army Reservists whose military service was pensionable under military rules and who before they have earned a pension under such rules in respect of their military service are appointed after discharge from the reserve to the Police Force of Uttar Pradesh may, at the discretion of the Inspector-General, whether their military service included service, with the colours in addition to serve in the Reserve or was service in the Reserve alone, be permitted to count for increment of pay in the Police Force the whole of their service with the colours, if any, and half of their service with the Reserve, subject to the condition that they first refund any gratuity which they may have reserved in respect of their military service.

411. Physical requirement for a recruit.- *No recruit shall be enlisted whose chest measurements is less than 34 inches expanded with a minimum expansion of 2 inches and whose height is less than 5 feet 9 inches. To this rule there are the following exceptions : (a) A recruit between 18 and 20 years of age who shown signs of growing, may be enlisted if his height is not less than 5 feet 5 inches and if his expanded chest is not less than 32 inches with a minimum expansion of 2 inches, provided that the Civil Surgeon certified that he is under 20 years of age, and that he is likely to attain standard measurements. (b) In the case of hillmen, the height may be not less than 5 feet 4 inches. (c) In the case of Tribal candidates, the chest measurement must not be less than 34" expanded with a minimum expansion of 2" and the height must not be less than 5'3".*

Note.- (i) As far as possible tall and well-built men should be enlisted in the Police as constable as physical appearance and personality are important factors for efficient discharge of their duties.

(ii) Persons with bow legs, irrespective of the degree of bow present, shall not be recruited. Slight curvature of legs, is , however, to be treated as normal and should not lead to unnecessary rejections.

412. Medical examination of a recruit.- *Before a candidate for recruitment is sent to the Civil Surgeon for medical examination his height and chest measurements must be accurately taken before the reserve inspector. The candidate must be measured round his bare chest with his arms raised. No candidate shall be enlisted without a health certificate in Form No. 29 signed by the Civil Surgeon on the district. Every candidate must also, before he is enlisted, sign an agreement in the following form : I……son of……..of village……thana ……district …… agree to undertake that on being enlisted as a candidate in the Uttar Pradesh Police Force, I will serve for two years in the said Uttar Pradesh Police, from the date of joining the force, unless I am discharged or dismissed or certified by a Civil Surgeon to be unfit for such service. If I resign before the expiry of the said two years I undertake and agree to forfeit a sum to be calculated according to the following rates: (a) Up to 3 months' service Re. 1 for each completed month of service; (b)Over three months but not exceeding six months' service Rs.12 for each completed month of service subject to a maximum of Rs.10; (c) Over six months' but not exceeding one year's service Rs.3 for each completed month of service subject to maximum of Rs.25; (d)After one year's but within two years' service Rs.4 for each completed month of service subject to maximum of Rs.50.*

413. Register of candidates for recruitment.- *A register of candidates for recruitment shall be kept in every district (Form No. 355). Whenever a candidate is sent for examination to the Civil Surgeon the register will be sent with him, all the columns having been filled up except columns, 8, 13, 14, 15, 16 and 17. The Civil Surgeon will fill up columns 8 and 13. If the candidate is declared to be unfit the entry should be struck out with red ink.*

414. All enrolled candidates furnish a certificate of having seen successfully vaccinated.- *All candidates shall, as a necessary condition of their being enrolled, either furnish a certificate of having been successfully vaccinated, except in the event of their having had small-pox; or submit to be vaccinated by the Civil Surgeon; in the latter case, if the Civil Surgeon be not able to perform the operation at once, the recruit will be sent to him for the purpose on the first available opportunity, a memorandum being kept of all such recruits with a column showing the subsequent date of vaccination. Any member of the subordinate police service may be required to submit to re-vaccination when the Civil Surgeon of his district considers necessary. (The second clause will apply only to men enlisted or appointed after 18th July, 1930).*

415. All recruits must possess the minimum physical qualifications.- *All recruits must possess the minimum physical qualifications, be medically fit and of good character. In selecting candidates for enlistment, Superintendents of Police will accept those who are considered to be most suitable for Police Service. For the Civil Police, the candidate must have passed VIII class examination (Junior High School) or an equivalent examination recognized by Government for recruitment to the posts and services under Government and for the Armed Police the candidate must have passed VI Class examination or an equivalent examination recognized by Government. For both Civil and Armed Police, the candidates must also possess a working knowledge of Hindi. Any person including one of Nepalese origin, who is a citizen of India, shall be eligible for recruitment to the services and posts under the rule-making control of Governor. Provided that in the case of a person of Nepalese origin the orders of Inspector-General of Police must first be obtained before such a person is considered for recruitment. When reporting cases to be Inspector-General of Police full details duly verified as to caste, resident, etc. must be intimated along with reasons for recommending the case. Note.- The revised sub-paragraph shall be deemed to have come into effect from March 21, 1959. Full publicity as regards the time and place of selection and the qualifications required should be given through tahsils Schools, Colleges, Panchayats, etc. before recruitment is started by the Superintendent of Police."*

19. Paragraph 409 of the Police Regulations provides that no one who is less than 18 or more than 23 years shall be enlisted but with relaxation of 5 years in case of candidate belonging to Scheduled Caste. Paragraph 410 deals with the certain preferences in regard to candidates having rendered some military services which is not relevant for the purposes of the present case. Paragraph 411 further provides that a recruit should have chest not less than 34 inches expanded with a minimum expansion of 2 inches and whose height is less than 5 feet 9 inches. This further contains certain exceptions to the extent that a recruit between 18 to 20 years of age showing signs of growing may be enlisted

if his/ her height is less than 5 feet 5 inches and if his expanded chest is not less than 32 inches with a minimum expansion of 2 inches provided that the Civil Surgeon certified that he is under 20 years of age and that he is likely to attain standard measurement. There are certain other exceptions mentioned in Para 411 which are not relevant for the purposes of the present case.

20. Paragraph 412 which has got an important bearing in the present case provides that before a candidate for recruitment is sent to the Civil Surgeon, now Chief Medical Officer, for medical examination, his height and chest measurement must be accurately taken before the Reserve Inspector (R.I.). The candidate must be measured round his bare chest with his anus raised. This paragraph further envisages that no candidate was to be enlisted as recruit without a health certificate signed by the Civil Surgeon.

21. Paragraph 413 provides that a register of candidate for recruitment shall be maintained at the district level and the register so maintained shall be sent to the Civil Surgeon while referring the candidate for recruitment for physical measurement.

22. Undisputedly, on the date of physical measurement before the Reserve Inspector, the petitioner was of about 19 years of age in the age group of 18-20 years. In the writ petition the petitioner has specifically pleaded in Paragraphs 4 to 16 that when he was non-suited at the stage of physical fitness verification before the Reserve Inspector (R.I.) on the alleged ground of his expansion of chest being less than 1 cm from the prescribed measurement, he moved an application on 14.06.1994 itself before the then Superintendent of Police, Sitapur Sri Rajesh Pratap Singh, requesting for his physical measurement and verification by Chief Medical Officer, Sitapur in accordance with the provisions of Chapter-XXIX, Para 411(i)(a) of Police Regulations and when his request was not accepted and the petitioner was non-suited without being referred to Chief Medical Officer, Sitapur, then a representation was made by the petitioner before His Excellency, the Governor of U.P. and the Government order was issued requiring Chief Medical Officer, Lucknow for medical fitness measurement and, undisputedly, as per report submitted by the Chief Medical Officer, Lucknow chest of the petitioner was found more than the required measurement. In these paragraphs it has also specifically been mentioned that some hush money was being demanded and as the petitioner did not pay hush money, his case was not referred for physical measurement to the Chief Medical Officer, Sitapur in utter derogation to the prescription made in Para 411 of the Police Regulations.

23. It is submitted that the averments made in paragraphs 4 and 5 of the writ petition have not specifically been denied by the respondents while replying such paragraphs in Para 6 of the counter affidavit. It has nowhere been stated in the counter affidavit that any hush money was not demanded from the petitioner nor any reason has been stated in the counter affidavit to indicate as to why after physical measurement before the Reserve Inspector, the petitioner was not sent to the Chief Medical Officer as provided under Para 412 of the Police Regulations.

24. That being the situation if the State Government referred the petitioner

for physical verification to the Chief Medical Officer, Lucknow and there he was found fit, it cannot at all be said that the petitioner was not eligible. It is no body's case that except the chest measurement even at the stage of physical standard verification at the level of Reserve Inspector, the petitioner was short of any other eligibility criteria. The counter affidavit is also totally silent on non-eligibility of the petitioner except the chest measurement being found short by 1 cm which was found incorrect as per medical certification given by the Chief Medical Officer, Lucknow. Paragraphs 409 to 415 of the Police Regulations nowhere provide for any other eligibility and, needless to say, no other recruitment process stood statutorily prescribed for recruitment/enlistment as Constable.

In view of all these, it cannot be said at all that the petitioner lacked eligibility in any manner for the purpose of enlistment as a recruit for the post of Constable and accordingly for being sent to training. Not only this, the government order specifically granted relaxation to the petitioner and directed for his selection as Constable in the category of Sportsman of eminence and in the category of dependent of freedom fighters. Thus, it is altogether fallacious to plead that the petitioner was not eligible for appointment.

25. A perusal of the judgment dated 12.04.2005 passed in Writ Petition No. 4331 (S/S) of 2005 makes it abundantly clear that a positive finding has been recorded that directions were issued by the higher authorities but the appointing authority was biased with the petitioner and by ignoring the orders passed by the State Government, the petitioner has been harassed by the appointing authority. The judgment dated 12.04.2006 further reveals that the directions were issued for consideration of appointment of the petitioner as Constable in the light of the observations made in the judgment.

26. In view of the aforesaid provisions contained under the U.P. Police Regulations in regard to recruitment of Constables, it was imperative that after the physical measurement at the level of Reserve Inspector (R.I.), the recruits belonging to the age group of 18-20 years, were to be referred to the Chief Medical Officer of the concerned district which was not done despite a specific demand having been made by the petitioner in that regard. In these circumstances, when the petitioner approached the State Government and the orders were passed for physical measurements of the petitioner by Chief Medical Officer, Lucknow, no exception could be taken by a Police Officer supposed to work under the control and supervision of the State Government.

27. However, apart from what has been stated hereinabove, all this matter cannot be re-agitated in the present writ petition in the face of the terms of the judgment and order dated 12.04.2006 passed by this Hon'ble Court in Writ Petition No. 4331 (S/S) of 2005, wherein a positive finding has been remitted that numerous documents contained in the writ petition clearly indicate that the petitioner was recommended for appointment and training by the higher authorities but the appointing authority appears to be biased with the petitioner and that the petitioner was being subjected to harassment by the appointing authority. Otherwise also, neither the impugned order nor the counter affidavit alleges about the requirement of any other examination. It is also worth

mentioning that while giving appointment as Constable in the year 2013, the petitioner has not been required to undergo any other examination and there is also no complaint about his efficient functioning as a member of Police Force.

28. It was the order dated 08.04.2005 which was impugned in the Writ Petition No. 4331 (S/S) of 2005 and the statement as made in the present writ petition for appointment of the petitioner as Constable could cause an outrage was nowhere taken as a ground for rejection of representation of the petitioner vide order dated 04.07.2005 which was set aside by this Court as aforesaid.

29. On behalf of the respondents as a last limb of argument it has been argued that the orders dated 15.06.1994, 17.06.1994. 28.06.1994, 27.11.1994 and 22.03.2003 as also the government order dated 21.05.2004 were forged and a First Information Report dated 18.01.2008 was lodged against the father of the petitioner Sri Ram Naresh Pandey who was a Section Officer in the Home (Police), Section-10 in U.P. Civil Secretariat during the period of issuance of the aforesaid Government orders.

30. Lastly, learned counsel for the petitioner placed reliance upon two judgments, which are as under :-

(i) **Union of India & others Vs. Pritilata Nanda [(2010) 11 Supreme Court Cases 674].** Relevant paragraph-23.

(ii) **Union of India Vs. Mohan Singh Rathore & another [(1996) 10 Supreme Court Cases 469].** Relevant paragraphs-7 and 33.

31. On the other hand, learned Additional Chief Standing Counsel made statement that the government orders issued by the State Government, as referred above were cancelled, therefore, the benefit granted to the petitioner on the basis of aforesaid government orders is not available to the petitioner and has wrongly been granted by the authorities. He further submitted that in paragraph-4 of the supplementary counter affidavit, he has taken the entire ground of non-availability of the benefit of government order referred hereinabove. It is further submitted that the impugned order is just and valid and does not suffer from any infirmity or illegality.

He next submitted that Special Appeal (Defective) No.38 of 2008 has already been filed against the judgment and order dated 12.4.2006, passed in Writ Petition No.4331 (S/S) of 2005, which is still pending and has not been decided. On the basis of the said facts, he made his submission that till the matter is sub-judice before the High Court, no benefit can be granted to the petitioner.

32. In view of what has been submitted by learned counsel for the parties, ground taken in the impugned order as also in the counter affidavit, as raised during the course of argument on behalf of the respondents, are wholly unsustainable and deserve an outright rejection.

33. Learned counsel for the petitioner placed reliance upon a judgment in the case of **Union of India & others Vs. Pritilata Nanda (Supra),** relevant paragraph-23 is being quoted below :-

"23. In the result, the appeal is dismissed. However, the operative part of

the impugned order is modified in the following terms:

(1) The concerned competent authority of the South Eastern Railway shall, within a period of two weeks from today, issue order appointing the respondent on a Class III post. The appointment of the respondent shall be made effective from the date person placed at Sl. Nos.12 in the merit list was appointed. The pay of the respondent shall be notionally fixed with effect from that date and she shall be given actual monetary benefits with effect from 5.9.2008 i.e., the date specified in the order passed by the High Court.

(2) The pay of the respondent shall also be fixed in the revised pay scales introduced from time to time and she be paid arrears within a period of four months.

(3) The seniority of the respondent among Class III employees shall be fixed by placing her below the person who was placed at Sl. No.10 in the merit list.

(4) If during the intervening period, any person junior to the respondent has been promoted on the next higher post, then her candidature shall also be considered for promotion and on being found suitable, she shall be promoted with effect from the date any of her junior was promoted and she be given all consequential benefits.

(5) The General Manager, South Eastern Railway is directed to ensure that the respondent is not victimised by being posted in a remote area.

(6) Since the respondent has been deprived of her rights for almost 21 years, we direct the appellants to pay her cost of Rs.3,00,000/-. The amount of cost shall be paid within 2 months from today."

He also placed reliance upon the judgment in the case of **Union of India Vs. Mohan Singh Rathore & another (Supra).** Relevant paragraph-7 is being quoted below :-

"However, the question is: what would be the relief that could be granted to the respondent. It is seen that the State Government did not forward the "no deterioration certificate" in relation to the respondent and after the retirement of the respondent the State Government had written a letter to the Union of India on February 21, 1989 stating as he was "well deserving" candidate. Nothing had prevented the State Government to send the "no deterioration certificate" of the respondent along with certificates in relation to other candidates when he was due to retire. It is seen that they forwarded the select list on April 11, 1988 to the Government of India and the respondent was due to retire on May 31, 1988. When such was thee incumbency nothing would have prevented the State Government from forwarding the letter. Consequently, the respondent had to lose the chance for being appointed to the IPS Cadre though he was found suitable and approved by the UPSC. Under these circumstances, we think that appropriate direction would be that the Union of India may include his name in the appointment notification dated October 4, 1988 as a select list candidate and give him order of appointment letter. Consequently, the respondent would be entitled to all the retiremental benefits on that basis."

34. In the back-drop of the facts and circumstances of the case, it is more than apparent on the face of the record that the plea of all such government orders being forged one or being not genuine was never raised in the three round of litigation which took place between the parties before filing

of the present writ petition, namely, Writ Petition No. 6143 of 2003 decided vide order dated 14.10.2003, Writ Petition No. 1423 (S/S) of 2005 decided vide judgment and order dated 21.02.2005 wherein government order dated 25.11.2004 cancelling the earlier Government order was set aside and the Writ petition No. 4331 (S/S) of 2005 decided vide judgment and order dated 12.04.2006. In none of these writ petitions the plea as raised during the course of arguments on behalf of the respondents was ever raised. Not only this, in the detailed counter affidavit filed on behalf of respondents, no such allegation in the present writ petition has also been made. Besides, such an allegation appears to be a subterfuge of avoiding the adherence of the government orders as also the terms of the judgment dated 12.04.2006 passed in Writ Petition No. 4331 (S/S) of 2005 and that too, after passing of a detailed order dated 20.12.2007 passed by this Court in exercise of the contempt jurisdiction in Criminal Miscellaneous Case No. 2633 (C) of 2006 as quoted hereinabove.

35. In the backdrop of what has been seen and discussed hereinabove, it is now apposite to see as to what relief should be granted to the petitioner, who has prayed for issuance of direction, as quoted hereinabove. In view of the submission advanced, the Court is of the opinion that there could be no doubt that non-enlistment of the petitioner as a recruit Constable in the year 1994 when the other recruits of the same recruitment were enlisted and sent for training as Constable is wholly illegal, arbitrary, capricious and malicious, more particularly, in view of the judgment dated 12.04.2006, passed in Writ Petition No.4331 (S/S) of 2005 and the judgment dated 21.02.2005, passed by this Court in Writ Petition No.1423 of 2005.

36. On due consideration of overall facts and circumstances of the case, the Court is of the view that the impugned order is not sustainable in the eyes of law and are liable to be set aside. Accordingly, the impugned order dated 25.07.2006 is hereby set aside.

37. In view of peculiar facts and circumstances of the case, respondents are directed to pay a cost of Rs.3,00,000/- (Rupees Three Lakhs Only) to the petitioner within three months from today. However, the petitioner be treated in service as Constable from the date from which the selectees of 1994 recruits of district Sitapur as Constable have been appointed as Constables with all consequential benefits of continuance in service, fixation of pay, seniority and promotion etc.

It is further provided that pay of the petitioner should be fixed, calculated and refixed on the basis of revised scale of pay as made from time to time. Consequent to fixation, calculation and re-fixation as aforesaid, the petitioner be paid arrears of salary w.e.f. 12.04.2006, the date of judgment of this Court in Writ Petition No.4331 (S/S) of 2005. The petitioner be also given promotions against the quota of promotion to the next higher posts from the date, the Constable recruited after 1994 have been promoted.

38. With the aforesaid observation and direction, the writ petition succeeds and is **allowed**.

(2024) 8 ILRA 357
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 10189 of 2024
With
Other Connected Cases

Anupam Srivastava & Ors. ...Petitioners
Versus
U.P. Power Corporation Ltd. & Ors. ...Respondents

Counsel for the Petitioners:
Vikas Upadhyay

Counsel for the Respondents:
Abhishek Srivastava, Devesh Vikram, Manoj Kumar Srivastava

A. Service law – Transfer – UP St. Electricity Reforms Transfer Scheme, 2000 – Clause 6 (10) – Transfers, general in nature – Executive Officers and and Executive Assistant in Purvanchal Electricity Distribution Cooperation Ltd. were transferred from one zone to another zone – Transfer order merely mentions the designation of the employees transferred and the name of offices from where they have been transferred to another zone – Legality challenged – Earlier Circular dated 11.09.2018, which did not permit transfer of an employee from one circle to another circle, was later on superseded vide circular dated 03.06.2019 and 22.07.2023 – Subsequent circulars were not challenged – Effect – Held, if the letter issued on 22.07.2023 enforcing the transfer policy 2019-2020 is not questioned then this Court cannot go into the question of legality of such transfer policy – It was not necessary for corporation to have framed any statutory rules or regulations and the corporation, therefore, could do so by way of issuing executive instructions. It is not the case of petitioners that in the previous establishment when it was known as U.P. St. Electricity Board the employees were not transferable, if the employees were transferable then within the DISCOM the distribution company, I see no justification to hold that transfers inter circle is bad. (Para 31, 35 and 39)

B. Constitution of India – Article 226 – Writ – Judicial Review – Transfer matter – Scope of interference – Held, scope of judicial review in matters of transfer is very Ltd. as the transfer has been held to be incident of service and those who are working on transferable post can of course, be transferred. (Para 42)

Writ disposed of. (E-1)

List of Cases cited:

1. Rajeev Kumar Jauhari Vs St. of U.P. & ors., 2007 (2) AWC 1726

2. Writ A No.- 11856 of 2022; Ashutosh Kumar Singh Vs Uttar Pradesh Power Corporation & ors.

3. SK Nausad Rahaman & ors. Vs U.O.I.& ors.; (2022) 12 SCC 1

4. B. Varadha Rao Vs St. of Karnataka & ors.; (1986) 4 SCC 131

5. Abani Kanta Ray Vs St. of Orissa & ors.; 1995 Supp (4) SCC 169

6. N.K. Singh Vs Union of India; (1994) 6 SCC 98

7. Shilpi Bose (Mrs) & ors. Vs St. of Bihar & ors.; 1991 Supp (2) SCC 659

8. U.O.I.Vs S.L. Abbas (1993) 4 SCC 357

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

1. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Vikas

Upadhyay, learned counsel for the petitioner, Sri Vinay Bhushan Upadhyay, learned counsel for the petitioner in connected petition being Writ - A No.- 9702 of 2024, Sri Shivam Shukla, learned counsel for the petitioner in connected petition being Writ - A No.- 10495 of 2024, Sri Prabhakar Awasthi, learned counsel for the petitioner in connected petition being Writ - A No.- 10096 of 2024, Sri Abhishek Srivastava, learned counsel for the corporation, Sri Adarsh Bhushan, learned counsel for the Managing Director, Purvanchal Vidyut Nitaran Nigam Ltd. Varanasi and Sri Manoj Kumar Sriavastava, learned counsel for the Chief Engineer, Prayagraj.

2. In all these connected petitions different transfer orders have been challenged but more or less the grounds are the same for assailing the transfer orders. Hence all the petitions are being heard to be decided by a common judgment.

3. The petition being Writ – A No.- 10189 of 2024 is taken to be leading petition for reference purposes.

4. Petitioners before this Court in Writ – A No.- 10189 of 2024 are employees working in the Purvanchal Vidyut Vitaran Nigam, Ltd, a Distribution and Supply of the Electricity Company (DISCOM) with the headquarters at Varanasi.

5. The petitioners, who are 8 in numbers are aggrieved by the transfer order dated 28th June, 2024, whereby they have been transferred from their current place of posting to new zone falling in different districts named in the transferred order.

6. It is worth mentioning that petitioner No.- 1 Anupam Srivastava working as Executive Assistant has been transferred from Prayagraj to Varanasi zone, petitioner No.- 2 Sanjay Kumar Pandey working as Executive Assistant has been transferred from Prayagraj to Mirzapur zone, petitioner No.- 3 Ugrasen Singh working as Executive Assistant has been transferred from Kaushambi to Varanasi zone, petitioner No.- 4 Nitin Narayan Srivastava working as Executive Assistant has been transferred from Gorakhpur to Azamgarh zone, petitioner No.- 5 Abhishek Gupta working as Executive Assistant has been transferred from Prayagraj to Varanasi zone, petitioner No.- 6 Hitesh Bhatnagar working as Executive Assistant has been transferred from Prayagraj to Varanasi zone, petitioner No.- 7 Ranjeet Kumar Yadav working as Executive Assistant has been transferred from Prayagraj to Varanasi zone and petitioner No.- 8 Ram Prakash working as Executive Assistant has been transferred from Azamgarh to Gorakhpur zone.

7. In writ petition being Writ – A No.- 9702 of 2024 petitioner Rahul Kumar working as Executive Officer has been transferred from Varanasi to Maharajganj, which is in Gorakhpur zone under the transfer order dated 28th June, 2024.

8. In writ petition being Writ – A No.- 10495 of 2024, petitioner Ganga Prasad Jaisawal working as Executive Officer has been transferred from Prayagraj to new allotted Circle/ EDC Fatehpur.

9. In writ petition being Writ – A No.0 10096 of 2024 the petitioner Arun Kumar Singh working as Executive Engineer has been transferred from District Supply Division Varanasi to the office of Chief Engineer Distribution, Basti Circle, Basti vide transfer order dated 21st June, 2024.

10. The orders of transfer have been challenged basically on three grounds:

(i). Transfer policy of the year 2019-2020 was an annual transfer policy which is no more in existence and merely by a circular letter issued on 22nd July, 2023, such a transfer policy cannot be re-enforced, nor such a circular letter can grant extension to an annual transfer policy of a particular year for subsequent years;

(ii). Transfer is one of the conditions of service and with U.P. Electricity Reforms Transfer Scheme, 2000 coming into force, the corporation was required to frame statutory rules, failing which the old U.P. State Electricity Board Rules will be applicable as the existing service conditions of the Board were to apply mutatis mutandis vide clause 6 (10) of the U.P. Electricity Reforms Transfer Scheme, 2000. Circular letter of the year 2023 having no statutory force cannot be put into service to transfer employees from one circle to another circle and the circular letter issued at the instance of Chairman on 11th September, 2018 only shall have a binding force and;

(iii). Without there being a DISCOM based general policy governing service conditions of its employees including their transfer and adjustments from one circle to another circle, the whimsical transfers are not based upon any administrative exigency or in public interest but for arbitrary exercise of power as many employees from one department got transferred to an inferior department loosing their seniority etc. which was acknowledged by the DISCOM itself in its letter dated 18th July, 2024 which has been brought on record as Annexure SA-2 to the supplementary affidavit.

11. Advancing his argument Sri Anoop Trivedi, learned Senior Advocate has vehemently urged that these companies were formed in the year 2000 and the Corporation has remained idle in the matter qua framing of rules/ regulations and now when the administrative requirements and public interest has compelled them to make transfers of employees as it is alleged, may be for working at their home districts or at any place for substantially a very long period of time that the transfer orders got issued arbitrarily. He has argued that many employees going by their substantive date of appointment stood transferred to a place where in terms of substantive date of appointment junior persons are working on a higher posts, to their utter embarrassment.

12. Sri Trivedi has submitted that this raises administrative issues also because at times for non- availability of vacancies, an Executive Assistant is not promoted in a circle whereas in another circle a much junior due to availability of vacancy got promoted as Executive Officer and there is hardly any chemistry seen in the working of a senior person by virtue of a substantive appointment with a higher officer who is otherwise junior due to date of initial appointment.

13. In support of his argument Sri Trivedi has relied upon various provisions of the Scheme, 2000 and Regulation, 1970. He has submitted that seniority is circle-wise and it is also admitted in the circular letter issued dated 8th September, 2018 and there has been no quarrel about a fact that these transfers, may be for administrative compulsions/ public interest, from one circle to another circle within the DISCOM have not only resulted in serious unrest amongst the employees but has been prejudicial to the public interest as well.

14. Sri Trivedi has argued that ultimately DISCOM has to maintain

supply/ distribution of electricity Board domestic and industrial, so smooth functioning of various circles and divisions in different zones have to be ensured to serve the public interest.

15. In the petition filed by Sri Rahul Kumar one more argument has been advanced that two officers got transferred at one place itself, namely Gorakhpur zone-II, ADC, Maharajganj.

16. One more argument has been advanced in the petition of Ganga Prasad Jaiswal that in effect status of an employee will change with the transfer of the employee and that employee will get new birth in a new circle or zone with the transfer and, therefore, he is liable to be placed at the bottom of seniority in that circle.

17. All the learned Advocates have adopted the arguments of Sri Trivedi, learned Senior Advocate in their respective petitions.

18. Meeting the argument Sri Abhishek Srivastava, learned counsel appearing for the corporation and Sri Adarsh Bhushan, learned counsel appearing for the Purvanchal Vidyut Vitaran Nigam Ltd. have submitted that once the corporation has ensured that seniority would stand protected in the cadre to which the employees belong, there cannot be any issue.

19. It is submitted that petitioners cannot deny that they are all working on transferable posts and their apprehension that if they would be transferred, they would be working under a junior person looking to the date of substantive appointment, is not substantiated by any pleadings raised in any of the writ petitions.

20. It has been argued by learned counsel for the corporation that the document that has been filed as Annexure – SA-2 itself clarifies that no employee would be transferred from one office to another office which is lower in order. Thus, an employee working in the office of Chief Engineer would be transferred to the office Chief Engineer and likewise the employee working in the office of superintending engineer, executive engineer will be transferred under the similar rank of officers. It is also argued that even if the argument is accepted that the seniority is prepared circle wise, then protection of seniority in that circle itself is an example of vigilant approach of corporation in ensuring that as and when the vacancy arises in that circle such an employee because of his transfer does not get prejudiced by losing any chance of promotion in his original circle or division, as the case may be.

21. It is argued that corrections that have taken place by virtue of the order dated 18th July, 2024 would go on to demonstrate that whenever any error comes to the knowledge of corporation any arbitrariness in the matter of transfer or where the employees' interest is seriously getting prejudiced, the matter would always be examined by the competent authority upon the representation being made. It is argued that on a mere apprehension a writ petition should not be entertained. The grounds raised to challenge the order or the argument so advanced must be substantiated by appropriate pleadings. It is argued that none of the petitioners has been able to aver in any of the paragraphs in any of the writ petitions, as to under which

employee they are going to be junior or anyone of them is going to be junior.

22. It is submitted that officer of the same rank would be sitting in office where they are transferred and even though seniority stands protected in the original circle but the DISCOM will ensure that no discrimination is meted out in the treatment of the employees of another circle or division or zone, as the case may be after they join the transferred place.

23. On the question of policy of transfer it has been argued by Sri Srivastava as well as Sri Bhushan, learned Advocates appearing for the respective respondents that Managing Directors of the corporation are fully empowered to formulate policy and no statutory scheme is required to be floated. They have argued that it is a company now and, therefore, no statute is required to regulate its transfer policy. They have also urged that transfer being an incident of service depending upon the administrative exigencies and public interest, by administrative orders or circulars such policy of previous years can always be extended and enforced in subsequent years. They submit that there is no bar for an employee not to be transferred either under the previous Act prior to coming into force of Scheme, 2000 or even by virtue of any subsequent circulars or executive orders issued at the instance of the corporation.

24. It is vehemently urged by learned counsel for the respondents that U.P. Electricity Reforms Transfer Scheme, 2000 was brought into force to transform the erstwhile U.P. State Electricity Board into a power corporation for the purposes of distribution of power and supply of electricity. Thus, U.P. Power Corporation came into existence and five companies, namely, Purvanchal Vidyut Vitaran Nigam Ltd., Dakshinachal Vidyut Vitaran Nigam Ltd.,Madhyanchal Vidyut Vitaran Nigam Ltd., Pashchimanchal Vidyut Vitaran Nigam Ltd. and0 Kanpur Electricity Supply Company, came to be incorporated and registered under the Companies Act, 1956. It is argued that companies are always governed by its own by laws and standing orders and relations framed by it or adopted by it and there is no requirement of any statute to be passed by the State Legislature.

25. It is further submitted that the controversy in the above regard is no more res *integra* in view of the Division Bench judgement of this Court in the case of **Rajeev Kumar Jauhari v. State of U.P. and others, 2007 (2) AWC 1726,** wherein the U.P. Rajya Vidyut Utpadan Nigam Ltd. Absorption Regulation, 2006 were challenged and the Court very categorically held that with the transfer of statutory body to non statutory body like company registered under the Companies Act, 1956 in the present case would certainly deprive the employees of protection under the Statute and now the service conditions would stand governed under the ordinary law of contract.

26. It is thus argued that in terms of the contract law, it is always for the corporation to issue circulars to facilitate transfer of its employees from one place to another place in administrative exigencies and public interest. It is also submitted that in the cases in hand employees have been working for a number of years to say 5 to 10 years or more at one place and that is why the transfers have been effected.

27. Sri Manoj Kumar Srivastava, learned counsel appearing for the Executive

Engineer/ Superintendent Engineer, Purvanchal Vidyut Vitaran Nigam Ltd., Varanasi has adopted the arguments advanced by Sri Abhishek Srivastava and Sri Adarsh Bhushan, learned counsel for the U.P. Power Corporation and Managing Director Eastern DISCOM.

28. Learned counsel for the respondents have also relied upon the judgment of a coordinate Bench of this Court in the case of **Ashutosh Kumar Singh v. Uttar Pradesh Power Corporation and others** in Writ – A No.- 11856 of 2022 and have heavily relied upon paragraphs 6, 7, 8, 9, 10 & 11 of the judgment which runs as under:

"(6) Learned counsel for the Respondents, on the other hand, have referred to the Regulations of 1970, which are still applicable to employees of the Corporation but subject to some Amendments/Modifications/ Clarifications as and when required. He has referred to the Definitions Clause and Regulations-3 (9) where Establishment has been defined as Ministerial Establishment in the office of the Chief Engineer and other Subordinate Offices under the Board. He has also referred to the sources of recruitment in the office of the Chief Engineer, in Circle Office and Divisional Office and he says that Office Assistant is the re-designation of the original Clerical post by the name of Routine Grade Clerk. All Routine Grade Clerks are directly recruited in various offices of the Chief Engineer, Circle offices, and the Divisional Offices but their seniority is maintained as per the date of their substantive appointment and when their promotions are due, the seniority of incumbents shall be determined from the date of their substantive appointment in their own class or cadre. The Cadre remaining the same and the seniority being determined only on the basis of date of substantive appointment, the petitioner shall not be affected adversely by being transferred to Maharajganj Circle.

(7) Learned counsel for the petitioner has pointed out that the letter sent by the Managing Director of U.P. Power Corporation Limited on 11.09.2018 shall be deemed to have been suppressed by the Transfer Policy dated 03.06.2019 issued by the Board of Directors of the Power Corporation Limited.

(8) Learned counsel for the Respondents has referred to Paragraph-3 (ii) of the Transfer Policy wherein the maximum tenure of Grade-III employees in a particular Office/Circle/ District is mentioned. It has been mentioned therein that such Clerical staff shall be allowed to function for a maximum period of three years on one Office table and for a maximum period of six years in such office and that they shall be transferred to some other Tehsil in the same District after six years. The maximum period of posting in one District shall be 10 years, thereafter the incumbent shall be transferred to the Adjoining/Nearby District. In the case of the petitioner he has been working in Gorakhpur for the past more than ten years with effect from 2011 to 2022 and he has been transferred to the adjoining District of Mahanagar. It has also been mentioned that in the said Paragraph-3 (ii) of the Transfer Policy that on transfer, such Clerical staff shall not be affected in terms of their seniority which shall be maintained as per the lien they exercise in their original office.

(9) This Court has considered the interim order granted in Writ-A No.16454 of 2019 as aforesaid where learned Senior counsel for the petitioners had argued that the appointments for each class of posts is

made at three distinct levels i.e. the Office of the Chief Engineer, Circle Office and Divisional Office and employees from one unit if they are transferred to another unit, would stand to loose their seniority and shall be adversely affected in their chances of promotion. It was also argued by the learned counsel for the petitioners therein that the Rules have not been amended and therefore, it would not be open for the employees of one Division/Circle to be transferred to another Division/Circle, as their seniority and chances of promotion would be justified.

(10) Such arguments were made by the learned Senior counsel only on the basis of Regulations and the interim order was passed at a time when there were no instructions received from the Corporation, at the stage of admission of the writ petition. Such benefit of interim order as prayed for by the learned counsel for the petitioner can be given to him in terms of judgments of the Supreme Court in the case of Vishnu Traders Vs. State of Haryana reported in 1995 (Supp 1) SCC 461. However, if a writ petition is being decided finally an interim order cannot be treated as binding. Now that instructions have been received from the Corporation and arguments have been made by the learned counsel for the Respondents on the basis of very Regulations that were relied upon at the time of passing of the interim order dated 05.12.2019, the matter can be decided by this Court.

(11) This Court finds that the Regulations of 1970 were made applicable to the employees of the Power Corporation subject to Clarification/ Modification etc. as required on conversion of the Board to a Government Company. The Power Corporation is now governed by the Board of Directors which has issued a transfer policy wherein taking into account the fact that the Clerical employees have been posted in a Circle Office/Divisional offices for long periods of time and they needed to be transferred a provision has been made that they shall be transferred to the adjoining and nearby places without affecting their seniority. Even otherwise as per the Regulation of the 1970, seniority is maintained as per the Cadre and Establishment is defined under the Regulations itself."

29. It is argued that the coordinate Bench having upheld the transfer policy issued by the Board of Directors, same would amount to a binding judicial precedent for another coordinate Bench. However, it is submitted that they are not averse to an order being passed for consideration of representations of different petitioners, if they make or have already made.

30. Rival submissions fall for consideration.

31. Looking to the transfer order as for instance in the leading petition I find that these transfers are general in nature as by one common order dated 28th June, 2004 a large number of employees have been transferred from one zone to another zone. The petitioners have been transferred like for instance from Azamgarh zone to Varanasi zone or from Prayagraj zone to Varanasi zone and likewise. The transfer order mentions the designation of the employees transferred and the name of offices from where they have been transferred to another zone.

32. It is not specified in the order that they are being transferred to report in a particular office. They have to report to the zonal headquarter from there they will be

assigned duty for a particular department or a circle or division obviously as Sri Srivastava has submitted that in accordance with the letter dated 18th July, 2024 brought on record by means of supplementary affidavit.

33. From the order of transfer it cannot be inferred that petitioners have been transferred to a post and under the officers, who are junior to them, nor there is any specific pleadings raised in any of the paragraphs of the petition. The pleadings are basically indicative of violation of clause 6 (10) of the U.P. State Electricity Reforms Transfer Scheme, 2000 and the Regulation, 1970. The details as have been given vide paragraphs 8 to 15 of the petitioner only demonstrate to the extent that these employees were appointed in a particular year and have been discharging their duties as such. I, therefore, find substance in the submission advanced by learned counsel for the respondents that pleadings are lacking to substantiate the grounds and the arguments advanced that petitioners' seniority are going to be compromised if transfer orders are sustained.

34. Reliance has been placed upon the circular dated 11th September, 2018 to show that employees cannot be transferred from one circle to another circle and this circular, according to Mr. Trivedi, is still in force. This argument of Mr. Trivedi, if accepted, it will run counter to two of his own arguments: firstly, that the transfer policy 2020 would not be enforced and carried forward by any executive instructions or circular unless and until a new policy is enforced; and secondly, if there is no statutory transfer policy or statutory circular which can be given effect to in view of the relevant regulations in the Scheme 2000 then the circular dated 11th November, 2018 could be relied upon.

35. It is an admitted position on record that circular letter dated 11th September, 2018 stood superseded by the circular letter dated 3rd June, 2019 and then by another circular letter dated 22nd July, 2023. The petitioners cannot argue that circular letters or instructions issued on behalf of the corporation would not have any binding force in view of the scheme of 2000 and no circular letter can enforce a previous transfer policy while at the same time rely upon the similar circular letter 2018 which also does not have any statutory force. However, it is also worth noticing that none of the circular letters are challenged in this petition and in the connected petitions. If the letter issued on 22nd July, 2023 enforcing the transfer policy 2019-2020 is not questioned then this Court cannot go into the question of legality of such transfer policy, more specially in the circumstances when a coordinate Bench of this Court in the case of Ashutosh Kumar Singh (supra) had upheld the transfer policy. Vide paragraph 11 of the judgment the Court had held thus:

"(11) This Court finds that the Regulations of 1970 were made applicable to the employees of the Power Corporation subject to Clarification/ Modification etc. as required on conversion of the Board to a Government Company. The Power Corporation is now governed by the Board of Directors which has issued a transfer policy wherein taking into account the fact that the Clerical employees have been posted in a Circle Office/Divisional offices for long periods of time and they needed to be transferred a provision has been made that they shall be transferred to the adjoining and nearby places without

affecting their seniority. Even otherwise as per the Regulation of the 1970, seniority is maintained as per the Cadre and Establishment is defined under the Regulations itself."

36. Besides above, in view of the Division Bench judgment of this Court upholding the Scheme, 2000 and directing that there was no requirement for the company registered under Companies Act, 1956 to have any statutory regulations, every instructions issued on administrative side by a competent authority in its behalf shall have a binding force. It is a contract of employment now between the employees of the corporation and corporation registered under the Companies Act, 1956 and, therefore, corporation is well within its right to issue necessary executive instructions to govern the day to day transfer or otherwise annual transfers. The Division Bench of this Court vide paragraph 32 in the case of Rajeev Kumar Jauhari (supra) had held thus:

"32. Sri Khare lastly sought to argue that Section 23(7) of the Reforms Act, 1999 read with Clause 3 (10) of the Transfer Scheme, 2000 use the word 'Regulation' and therefore, UPRVUNL can only change the condition of service by framing statutory Regulations and not the Regulations, which are non statutory In our view, this submission is to be noted for rejection only. UPRVUNL is not a statutory body, but a Company registered under the Companies Act. It is not disputed that the employment and contract of the petitioners which was earlier with a statutory autonomous body, namely, UPSEB, stood transferred to UPRVUNL and now it is UPRVUNL, who is empowered to determine the conditions of service of its employees. The manner in which such provision can be made would be governed by the Article of Association of such Company and when the Company itself is not statutory, to expect such company to frame statutory Regulations for governing its employees is wholly untenable. The effect of transfer of service from statutory body to a non statutory bod), namely, a company registered under the Company Act, would deprive the statutory protection available to the employees and now the matter would be governed by ordinary law of contract. Normally, the transfer of contract involves the consent of the employees also, but in the present case, the petitioner's contract has been transferred to UPRVUNL by statute itself and, therefore, the employees have no role and their consent is not required. The only rider on the power of transferee employer is that the service condition whenever changed would not be less beneficial and will not deprive past benefits accrued to the transferred employees before transfer, that is, to the extent provided under Section 23(7) of the Reforms Act, 1999. The protection under Section 23(7) neither continue the status of the transferred employee with the new companies as statutory nor otherwise has any other role except to prevent employer from exercising its ordinary powers available in Common Law, which would be contrary to the protection given under Section 23(7) of the Reforms Act, 1999. For all other purposes, the transferee company is free to formulate its policies and enter into contract or lay down terms and conditions of its employees in the manner, it find best suited for the efficient functioning of the company. Merely for the reason that the State Government is 100% share holder of the company does not identify the company itself with the State Government. In Shrikant v. Vasant Rao , the Court held in

para 24 that in the matter of a company where the entire share capital is held by the State Government, yet it cannot be identified with the State Government and is always entitled to act and proceed in a manner a company function. This principle was recognized as long back as in 1970 also by a Constitution Bench in R.C. Cooper v. Union of India , and at page 584, the Apex Court held- "A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Article of Association measured by a sum of money for the purpose of liability, and by a share in the profit."

37. Now testing the arguments of Mr. Trivedi on the touchstone of clause 6(10) of the U.P. State Electricity Reforms Transfer Scheme, 2000, I find that the object behind the enforcement of the Scheme, 2000 was transformation of U.P. State Electricity Board into a power corporation and likewise transfer of property, assets, rights and liabilities of the State Government as a consequence of transfer of vesting or re-vesting of the properties. It is as a sequel to that objective that the scheme was provided and titled as transfer scheme. In no manner it can be taken as a scheme for transferring employees within the corporation or within the company. Transfer is just an incident of service which can be done in administrative exigency or in public interest by the authorities vested with the power to do so. The word 'Transferee' that has come to be referred to in paragraph 6(10) means that corporation shall frame regulations governing the conditions of service of persons.

38. Employees in the present case earlier were employees of the U.P. State Electricity Board which was State own board and with the floating of the Scheme, 2000 they stood transferred to the company. It is in that context that it was provided that the transferee company shall frame regulations. Now the transferee company since did not frame regulations then as per clause 6(10) the existing service condition of the board were made to apply *mutatis mutandis*. The relevant provision of clause 6(9) (10) & (11) of the Scheme, 2000 floated by virtue of U.P. State Electricity Reforms Transfer Scheme, 2000 is reproduced hereunder:

"6(9). The transfer of personnel to the Transferee shall be subject to any orders that may be passed by the courts or Tribunals in any of the proceedings pending on the date of the transfer.

(10). Subject to the provisions of the Act and this Scheme, the Transferee shall frame regulations governing the conditions of service of personnel transferred to the transferee under this Scheme and till such time, the existing service conditions of the Board shall mutatis mutandis apply.

(11). In respect of all statutory and other schemes and employment related matters including the provident fund, gratuity fund, person and any other superannuation fund or any other special fund created or existing for the benefit of the personnel, the relevant Transferee shall stand substituted for the Board for all purposes and all the rights, powers and obligations of the Board in relation to any and all such matters shall become those of the Transferee concerned and the services of the personnel shall be treated as having been continuous for the purpose of the application of this sub-clause.

39. In view of the above Division Bench judgment, it was not necessary for corporation to have framed any statutory

rules or regulations and the corporation, therefore, could do so by way of issuing executive instructions. It is not the case of petitioners that in the previous establishment when it was known as U.P. State Electricity Board the employees were not transferable, if the employees were transferable then within the DISCOM the distribution company, I see no justification to hold that transfers inter circle is bad.

40. In the case of **SK Nausad Rahaman & others v. Union of India and others (2022) 12 SCC 1,** Supreme Court has observed that executive instructions embodied in the office memorandum issued by the department would have binding force unless and until they are violative of any statutory rules concerning the subject matter. The Court has held that it is only in the event of a conflict between the executive instructions and the rules that the rules would prevail, otherwise the executive instructions will have the same force as of a statutory rule. Since the Division Bench of this Court has already held that the service rules of employee of corporation would stand governed under the contract of law and there are no regulations framed governing the transfer of the employees of the corporation within the DISCOM or even otherwise, the executive instructions issued from time to time by the corporation will have a binding force.

41. It has been repeatedly held by this Court and Supreme Court as well that transfer is an incident of service. A transfer order cannot be taken to have varied conditions of service to the disadvantage of employee. In the case of **B. Varadha Rao v. State of Karnataka and others (1986) 4 SCC 131,** the Supreme Court referring to an earlier judgment had observed that *"The observation that transfer is also an implied condition of service is just an observation in passing. It certainly cannot be relied upon in support of the contention that an order of transfer ipso facto varies to the disadvantage of a government servant, any of his conditions of service making the impugned order appealable under Rule 19(1)(a) of the Rules."*

42. Even otherwise the scope of judicial review in matters of transfer is very limited as the transfer has been held to be incident of service and those who are working on transferable post can of course, be transferred. In the case of **Abani Kanta Ray v. State of Orissa and others, 1995 Supp (4) SCC 169,** Supreme Court has observed that *"a court would not ordinarily interfere with the order of transfer unless and until it is found to be arbitrary and vitiated by mala fides or there is infraction of any professed norm or principle governing the transfer"*. This view has been taken by Supreme Court relying upon its earlier judgment in the case of **N.K. Singh v. Union of India (1994) 6 SCC 98.**

43. In the case of **Shilpi Bose (Mrs) and others v. State of Bihar and others, 1991 Supp (2) SCC 659,** the Court while setting aside the order of Patna High Court which had allowed the petition of certain displaced persons on account of transfer being effected, held that except in the event of violation of any statutory rule or mala fides, Court should not interfere with the transfer order made in public interest or for administrative reasons. Vide paragraph 4 the Court has held thus:

"4. In our opinion, the Courts should not interfere with a transfer Order which are made in public interest and for administrative reasons unless the transfer

Orders are made in violation of any mandatory statutory Rule or on the ground of malafide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer Orders issued by the competent authority do not violate any of his legal rights. Even if a transfer Order is passed in violation of executive instructions or Orders, the Courts ordinarily should not interfere with the Order instead affected party should approach the higher authorities in the Department. If the Courts continue to interfere with day-to-day transfer Orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court over looked these aspects in interfering with the transfer Orders."

44. Recently in the case of **SK. Nausad Rahaman and others v. Union of India and others (2022) 12 SCC 1,** Supreme Court has held that the transfer being an incident of service no employee who is working on a transferable post cannot have a fundamental right or vested right to claim a particular place or station or posting of choice. The Court relied upon its earlier judgment in the case of **Union of India v. S.L. Abbas (1993) 4 SCC 357,** wherein vide paragraph 7 the Court has held thus:

"Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the Court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly, if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and the wife must be posted at the same place. The said guideline, however does not confer upon the government employee a legally enforceable right."

45. I may hasten to add here that transfer though is permissible within the distribution company but in no circumstances, seniority of employees should be compromised nor, the employees can be directed to be posted in an inferior office to the one they have been serving at, from where they are sought to be transferred. Thus, if an employee is working in the office of Chief Engineer, he should be transferred in the office of Chief Engineer. Likewise employees working in the office of Superintendent Engineer or Executive Engineer should be transferred to the office of Superintendent Engineer or Executive Engineer only.

46. While it is true that promotions are made unit wise like for instance office of Chief Engineer, Circle and Division as per the availability of vacancy and the feeding cadre for certain posts can be inter-circle or inter-division but this cannot be said to be a good ground to quash the transfer order merely because an employee has been transferred to a place where a higher officer in rank was junior in terms of length of service to the transferred employee while he was in his cadre. A person higher in rank will remain higher in rank because he/ she is promoted in a particular circle for availability of posts and fulfilling eligibility criterion whereas an

employee working in another circle in the same cadre may not have been promoted for want of vacancy even though his length of service more in number of years.

47. I may also observe that interim order relied upon by Mr. Trivedi in the matter of Rajeev Mishra and 19 others has been rightly distinguished by a coordinate Bench of this Court in the case of Ashutosh Kumar Singh (supra) and, therefore, in my considered view, it is of no help to the petitioners.

48. So far as the arguments advanced that two persons have been given posting at one place like both the persons have stood transferred to Maharajganj Division or Azamgarh Division, suffice it to observe that every zone has a large number of divisions and unless and until pleadings are there to the effect that posts are not existing, such arguments are not acceptable and, therefore, deserves rejection.

49. These all petitions are since lacking in pleadings as to the grounds raised and the argument advanced that they would become junior to the officers of their own cadre, no presumption can be raised that the transfer orders are in any manner going to prejudice them in the event they go and join at their respective transferred places. Hence, I decline to interfere with the transfer orders challenged in all these petitions.

50. All the petitioners have already been relieved so they first go and report their joining to the place of transfer and if they have still their grievance, liberty is granted to them to make representation before the competent authority within two weeks of their joining and once any such representation is made by any of the petitioners or by all the petitioners before the competent authority then such representations should be disposed of within a further period of two weeks.

51. U.P. Power Corporation as well as the different DISCOMs will have to ensure that no employee upon transfer from one place to another place is made junior to an employee of his cadre. I may here again refer to paragraph 6 of the judgment in the case of Ashutosh Kumar Singh (supra), wherein it was observed thus:

"(6) Learned counsel for the Respondents, on the other hand, have referred to the Regulations of 1970, which are still applicable to employees of the Corporation but subject to some Amendments/Modifications/ Clarifications as and when required. He has referred to the Definitions Clause and Regulations-3 (9) where Establishment has been defined as Ministerial Establishment in the office of the Chief Engineer and other Subordinate Offices under the Board. He has also referred to the sources of recruitment in the office of the Chief Engineer, in Circle Office and Divisional Office and he says that Office Assistant is the re-designation of the original Clerical post by the name of Routine Grade Clerk. All Routine Grade Clerks are directly recruited in various offices of the Chief Engineer, Circle offices, and the Divisional Offices but their seniority is maintained as per the date of their substantive appointment and when their promotions are due, the seniority of incumbents shall be determined from the date of their substantive appointment in their own class or cadre. The Cadre remaining the same and the seniority being determined only on the basis of date of substantive appointment, the petitioner shall not be affected adversely by being transferred to Maharajganj Circle."

52. Before parting with the case, I may observe here that once the distribution company, say for instance as in the instant case, namely Purvanchal Vidyut Vitaran Nigam Ltd., if transferring its employees from one circle to another circle, from one zone to another zone and from one division to another division then it should also have a general recruitment policy and a DISCOM based seniority list. Appropriate regulation should be framed by U.P. Corporation to create a DISCOM based cadre, whether of Chief Engineer, Superintendent Engineer, Executive Engineer or clerical cadre. This will not only remove the discontent amongst the employees but will also not give chance to any apprehension of a person getting junior to another person working in higher rank but junior in length of service. It will also facilitate the adjustment of the persons against the existing vacancies and will make the transfer more convenient and acceptable to the employees.

53. It is expected that the U.P. Power Corporation will frame necessary regulations to create a DISCOM based cadre strength of its employees and seniority. It is better that it is done at the earliest.

54. With these above observations and directions, these petitions stand disposed of.

(2024) 8 ILRA 370
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-A No. 10594 of 2024

Rajjab Ali ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohammad Ali Ausaf, Sri V.K. Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Kailash Singh Kushwaha, Sri Pranav Mishra, Sri Shree Prakash Upadhyay

(A) सेवा कानून - मदरसा शिक्षा परिषद के खिलाफ याचिका - नियुक्ति वैधता विवाद - मदरसा शिक्षा परिषद द्वारा पारित कार्यालय आदेश की वैधता को चुनौती - लंबी अवधि के पश्चात् किसी कर्मचारी के अनुभव प्रमाण पत्र में त्रुटि के कारण, उसकी नियुक्ति निरस्त नहीं की जा सकती है। (पैरा - 1,2, 3)

न्यायालय ने दो इम्प्लीडमेंट आवेदनों (पक्षकार बनने का प्रार्थना पत्र) को खारिज कर दिया - जिसमें उम्मीदवारों ने संस्थान के सचिव और सामान्य निकाय के सदस्य के रूप में आवश्यक पार्टी होने का दावा किया था - याचिकाकर्ता की 1995 में सहायक शिक्षक (आलिया) और 2024 में प्राचार्य के रूप में नियुक्ति - शैक्षणिक योग्यता में अनियमितताओं का आरोप लगाते हुए याचिकाकर्ता के खिलाफ शिकायत दर्ज की गई - एक ही अवधि के दौरान विभिन्न जिलों में शिक्षण और सीखने के संबंध में याचिकाकर्ता का स्पष्टीकरण - निरीक्षक/पंजीयक, मदरसा शिक्षा परिषद, उत्तर प्रदेश द्वारा याचिकाकर्ता की नियुक्ति को अनियमित/अवैध/अमान्य घोषित करते हुए विवादित आदेश पारित किया गया। (पैरा – 1-5)

निर्णय: - याचिकाकर्ता को सुनवाई का अवसर नहीं दिया गया और व्याख्या को विचार नहीं किया गया । दिनांक 10.06.2024 के आलोच्य आदेश को अपास्त कर दिया गया और याचिकाकर्ता की 1995 में सहायक शिक्षक (आलिया) और 2024 में प्राचार्य के रूप में नियुक्ति वैध है। याचिकाकर्ता को निरंतर सेवा में माना जाता है और वह वेतन सहित सभी लाभों का हकदार है।

निरीक्षक/पंजीयक आगे की कार्यवाही शुरू कर सकते हैं। (पैरा – 5,6)

याचिका स्वीकृत. (ई -७)

उद्धृत मामलों की सूची:

1. प्रबंध समिति, जनता इंटर कॉलेज व अन्य बनाम उ०प्र० राज्य व दो अन्य, (2017 (8) AD) 473)

2. सलाउद्दीन बनाम उ०प्र० राज्य व 5 अन्य ,विशेष अपील संख्या 266 सन 2015 (Neutral Citation No. 2015: AHC:62538-DB)

3. बुद्धिनाथ चौधरी व अन्य बनाम अबाही कुमार व अन्य, (2001 (3) एस.एस.सी. सुप्रीम कोर्ट केसेज 328)

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

याचिकाकर्ता की तरफ से उपस्थित विद्वान वरिष्ठ अधिवक्ता श्री वी०के० सिंह तथा सहयोगी विद्वान अधिवक्ता श्री मोहम्मद अली औसाफ, विपक्षी संख्या 1, 3 व 4 की तरफ से उपस्थित विद्वान अपर मुख्य स्थायी अधिवक्ता श्रीमती अर्चना त्यागी, विपक्षी संख्या 2-निरीक्षक/ निबंधक, मदरसा शिक्षा परिषद की तरफ से उपस्थित विद्वान अधिवक्ता श्री प्रणव मिश्रा तथा विपक्षी संख्या 5. मदरसा अरबिया मदीनतुल इल्म पीरखांपुर, भदोही के प्रबंध समिति की तरफ से उपस्थित विद्वान अधिवक्ता तथा पक्षकार बनने के प्रार्थना पत्र देने वाले आवेदकों की तरफ से उपस्थित विद्वान अधिवक्ता के०एस० कुशवाहा तथा श्री श्री प्रकाश उपाध्याय को सुना एवं पत्रावली का अवलोकन किया।

Order On Impleadment Application No. 02 of 2024.

1. पक्षकार बनने के प्रार्थना में कहा गया है कि प्रार्थी संख्या 1 वर्ष 2021 से 2022 तक विद्यालय का संचालन करने वाली समिति का सचिव था तथा प्रार्थी संख्या 2 व 3 समिति की साधारण सभा के सदस्य है तथा इस कारण से प्रार्थीगण इस प्रकरण में आवश्यक पक्षकार है। पक्षकार बनने के समर्थन में विद्वान अधिवक्ता श्री के०एस० कुशवाहा ने प्रबंध समिति, जनता इंटर कॉलेज व अन्य बनाम बनाम उ०प्र० राज्य व दो अन्य (2017 (8) AD) 473) का आश्रय लिया, जिसमें कहा गया कि संस्था की साधारण सभा के सदस्य को प्रबंध समिति अथवा साधिकार नियंत्रक की अकर्मण्यता के कारण प्रतिकूल रूप से प्रभावित होने नहीं दिया जा सकता, क्योंकि इससे संस्था में शिक्षा की गुणवत्ता प्रभावित होगी।

2. जनता इंटर कॉलेज के उपरोक्त प्रकरण में विद्यालय की प्रबंध समिति को अवक्रमित करके साधिकार नियंत्रक नियुक्त कर दिया गया था तथा इस तथ्यात्मक परिप्रेक्ष्य में न्यायालय ने उपरोक्त टिप्पणी करते हुए भी यह अवधारित नहीं किया था कि संस्था के समस्त सदस्य रिट याचिका में आवश्यक पक्षकार होंगे। जनता इंटर कॉलेज के निर्णय में न्यायालय ने यह भी अवधारित किया कि प्रबंध समिति की एक

वैधानिक पृष्ठभूमि है तथा साधारण सभा के सदस्यों के संबंध में यह नहीं कहा जा सकता कि वह संस्था के प्रबंध समिति से असबंद्ध व्यक्ति है। इस आधार पर ऐसा कोई नियम नहीं माना जा सकता है कि साधारण सभा के सदस्य इस न्यायालय में रिट याचिका प्रस्तुत नहीं कर सकते है।

3. माननीय उच्चतम न्यायालय की उपरोक्त टिप्पणी संस्था के प्रबंधन विवाद के संबंध में की थी तथा यह कहा था कि ऐसे विवादों में साधारण सभा के सदस्य इस न्यायालय में रिट याचिका योजित कर सकते है। प्रस्तुत प्रकरण में प्रबंधन से संबंधित कोई विवाद नहीं है तथा इस कारण से मात्र संस्था के साधारण सभा के सदस्य होने तथा भूतपूर्व सचिव होने के कारण प्रार्थीगण आवश्यक पक्षकार नहीं बन जाते है। श्री कुशवाहा ने एक अन्य निर्णय सलाउद्दीन बनाम उ०प्र० राज्य व 5 अन्य (विशेष अपील संख्या 266 सन 2015. Neutral Citation No. 2015:AHC:62538-DB) में पारित निर्णय दिनांक 01.05.2015 का आश्रय लिया, जिसमें शिकायतकर्ता ने अपने ही छोटे भाई के सहायक अध्यापक के पद पर नियुक्ति की वैधता को चुनौती देते हुए एक शिकायत प्रस्तुत की थी तथा उक्त शिकायत पर जांच किये जाने के अनुरोध के साथ एक रिट याचिका प्रस्तुत की थी। इस न्यायालय की एकल पीठ ने रिट याचिका यह कहते हुए निरस्त कर दी कि यह याचिका भाइयों में निजी विवादों से प्रेरित होकर प्रस्तुत की गयी थी, इसलिए पोषणीय नहीं है। विशेष अपील में एकल पीठ के निर्णय को अपास्त करते हुए इस न्यायालय की खण्डपीठ ने कहा कि अपीलार्थी की शिकायत पर विपक्षी के विरूद्ध कार्यवाही संस्थित हुई थी, जबकि शिकायत के तथ्य न्यायालय के समक्ष रखे जा चुके थे, न्यायालय को उसकी तरफ ध्यान अवश्य देना चाहिए था, क्योंकि शिकायत एक लोकपद के संबंध में थी, जिसमें लोकधन का व्यय सम्मिलित है।

4. प्रस्तुत प्रकरण में ऐसा नहीं है कि न्यायालय शिकायत के आधार पर हुई कार्यवाही का परीक्षण नहीं कर रहा है और राज्य सरकार तथा मदरसा शिक्षा परिषद के साथ ही मदरसे की प्रबंध समिति भी याचिका का विरोध करने को तत्पर है। ऐसी परिस्थिति में शिकायतकर्ता तथा प्रबंध समिति के सदस्य व भूतपूर्व सचिव इस याचिका में आवश्यक पक्षकार नहीं है, क्योंकि ऐसा नहीं है कि उनकी अनुपस्थिति में याचिका का निर्णय संभव नहीं है।

5. तद्नुसार, पक्षकार बनने का प्रार्थना पत्र निरस्त किया जाता है।

Order On Impleadment Application No. 03 of 2024.

1. सैफीउल्लाह खान के द्वारा प्रस्तुत पक्षकार बनने के प्रार्थना पत्र पर श्री श्री प्रकाश उपाध्याय को सुना।

2. श्री सैफीउल्लाह खान द्वारा प्रार्थना पत्र के साथ प्रस्तुत शपथ पत्र में मात्र इतना कहा गया है कि वे इस प्रकरण में आवश्यक पक्षकार है तथा वे किसी प्रकार आवश्यक पक्षकार है, इस संबंध में न ही कोई कथन किया और न ही कोई तर्क किया है।

3. तद्नुसार, पक्षकार बनने का प्रार्थना पत्र निरस्त किया जाता है।

Order On Writ Petition.

1. भारतीय संविधान के अनुच्छेद 226 के अंतर्गत प्रस्तुत इस रिट याचिका के द्वारा याचिकाकर्ता ने निरीक्षक/निबंधक, मदरसा शिक्षा परिषद द्वारा पारित कार्यालय आदेश दिनांक 10.06.2024 की वैधता को चुनौती दी है, जिसके द्वारा याचिकाकर्ता की आलिया (सहायक अध्यापक) पद पर दिनांक 01.08.1995 को हुई नियुक्ति को अनियमित / अविधिक / अमान्य घोषित कर दिया है तथा दिनांक 01.03.2024 को याचिकाकर्ता को प्रधानाचार्य के पद पर कार्य करने के लिए प्रदान की गयी वित्तीय सहमति को भी तत्काल प्रभाव से वापस ले लिया गया है।

2. दिनांक 01.07.1995 को आलिया (सहायक अध्यापक) के पद के लिए एक विज्ञप्ति प्रकाशित हुई, जिसके आधार पर याचिकाकर्ता को दिनांक 25.07.1995 को नियुक्ति प्रदान की गयी। याचिकाकर्ता ने दिनांक 01.08.1995 को सेवा में योगदान दिया तथा दिनांक 09.09.1995 को निरीक्षक ने याचिकाकर्ता के नियुक्ति को अनुमोदन प्रदान कर दिया। लगभग 28 वर्ष की सेवा पूर्ण करने के उपरांत याचिकाकर्ता को कार्यवाहक प्रधानाचार्य के रूप में दिनांक 22.09.2024 को नियुक्ति किया गया तथा दिनांक 01.03.2024 निबंधक / निरीक्षक ने कार्यवाहक प्रधानाचार्य के रूप में याचिकाकर्ता की नियुक्ति का अनुमोदन किया। माह मई 2024 में यह कहते हुए याचिकाकर्ता के विरूद्ध शिकायत की गयी कि उसने वर्ष 1993 में फ़ाज़िल की कक्षा में संस्थागत विद्यार्थी के रूप में जनपद आजमगढ़ में रहकर अध्ययन कार्य किया है, जबकि उसी अविधि में उनके द्वारा जनपद मीरजापुर में वर्ष 1992 से 1994 तक फ़ौकानिया की कक्षाओं में शिक्षण कार्य किया गया है।

3. याचिकाकर्ता ने दिनांक 24.05.2024 को अपना स्पष्टीकरण निबंधक/निरीक्षक, उ०प्र० मदरसा शिक्षा परिषद को दिया, जिसमें उसने कहा कि वर्ष 1992 से 1994 में फ़ाज़िल परीक्षा में सम्मिलित होने हेतु सिर्फ 90 दिवस की उपस्थिति का प्राविधान था। उक्त अवधि में मीरजापुर में सहायक अध्यापक फ़ौकानिया में शिक्षण कार्य करते हुए बीच-बीच में अवकाश लेकर वाछिंत दिवस की उपस्थिति से ज्यादा दिवस की

उपस्थिति के साथ उसने फ़ाज़िल का अध्ययन कर लिया तथा परीक्षा उत्तीर्ण कर ली। याचिकाकर्ता ने यह भी कहा कि उसकी परीक्षा परिणाम को निरस्त या अमान्य नहीं घोषित किया गया है तथा बुद्धिनाथ चौधरी व अन्य बनाम अबाही कुमार व अन्य (2001 (3) एस.एस.सी. सुप्रीम कोर्ट केसेज 328) के निर्णय में अवधारित किया गया है कि लंबी अवधि के पश्चात् किसी कर्मचारी के अनुभव प्रमाण पत्र में त्रुटि के कारण, उसकी नियुक्ति निरस्त नहीं की जा सकती है। प्रस्तुत प्रकरण में भी याचिकाकर्ता के विरूद्ध लगभग 31 वर्षों की सेवा के बाद आपत्ति उठायी गयी, जिसका कोई औचित्य नहीं है।

4. दिनांक 10.06.2024 को पारित आलोच्य आदेश द्वारा उ०प्र० मदरसा शिक्षा परिषक के निरीक्षक/निबंधक ने याचिकाकर्ता के स्पष्टीकरण को अस्वीकार करते हुए एक नया आधार जोड़ते हुए उसकी नियुक्ति को अमान्य घोषित किया कि उक्त मदरसा की प्रबंध समिति को विवादित मानकर दिनांक 26.03.1990 को इस न्यायालय ने प्रकरण को सक्षम अधिकारी को संदर्भित कर दिया था तथा तत्समय मदरसे में वैध प्रबंध समिति नहीं थी। आलोच्य आदेश में याचिकाकर्ता की नियुक्ति को निरस्त किये जाने को कहा गया उपरोक्त आधार, याचिकाकर्ता को पहले से सूचित नहीं किया गया था तथा । एक ही अवधि में फौकानिया की पढ़ाई तथा शिक्षण कार्य अलग-अलग जनपदों में करने के बारे में याचिकाकर्ता द्वारा दिया गया स्पष्टीकरण, कि उक्त पाठ्यक्रम के लिए मात्र 90 दिवस की उपस्थिति अनिवार्य थी, जो उपस्थिति उसने शिक्षण कार्य से अवकाश लेकर पूरी कर ली थी, को निरीक्षक/निबंधक ने अपने आदेश में अंकित नहीं किया है तथा इस पर अपना कोई मत व्यक्त नहीं किया है।

5. उपरोक्त आधारों से यह स्पष्ट है कि आलोच्य आदेश दिनांक 10.06.2024 याचिकाकर्ता को सुनवाई का समुचित अवसर दिये बिना तथा उसके स्पष्टीकरण को ध्यान में रखते हुए उस पर कोई कारण दिये बिना पारित किया गया है तथा इसके कारण से यह आदेश विधि में संधार्य नहीं है।

6. उक्त समीक्षा के आलोच्य में रिट याचिका स्वीकार की जाती है। निरीक्षक /निबंधक, उ०प्र० मदरसा शिक्षा परिषद द्वारा पारित आलोच्य आदेश दिनांक 10.06.2024, जिसके द्वारा याचिकाकर्ता की वर्ष 1995 में हुई आलिया के पद पर नियुक्ति तथा वर्ष 2024 में प्रधानाचार्य के पद पर नियुक्ति को निरस्त कर दिया गया है, को अपास्त किया जाता है। याचिकाकर्ता को आलोच्य आदेश के अपास्त करने के परिणामस्वरूप याचिकाकर्ता को निरतंर सेवा में माना जाएगा तथा उसके आधार पर उसे

देय समस्त लाभ यथा वेतन आदि नियमानुसार प्रदान किये जाएंगे।

7. निरीक्षक/निबंधक, उ०प्र० मदरसा शिक्षा परिषद, याचिकाकर्ता को सुनवाई का समुचित अवसर देते हुए उसके विरूद्ध पुनः कार्यवाही संस्थित करने को स्वंतंत्र होंगे।

(2024) 8 ILRA 375
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 10682 of 2017

Surendra Nath Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Girish Kumar Singh

Counsel for the Respondents:
C.S.C., Ravindra Singh

(A) Service Law - The U.P. Cooperative Societies Services Regulation, 1975 - The U.P. Cooperative Society Service Regulation - Regulation 27 & 28 - If very institution of enquiry or setting up of disciplinary proceeding is void for want of lawful authority then any such consequential action pursuant to such enquiry and consequential enquiry report is liable to be held as null and void - Disciplinary proceedings against seasonal employees must comply with regulatory requirements - non-compliance renders proceedings null and void, and consequential orders based on such proceedings are also null and void. (Para - 11,13,14)

(B) Word of phrases – "sublato fundamento cadit opus" - foundation being removed, the structure falls - *"consequential orders* "- *Once the basis of a proceeding is gone, may be at a later point of meantime, the action taken thereon- would fall to the ground.* - principle is applicable to judicial, quasi-judicial and administrative proceedings equally. (Para - 13)

Petitioner, a Seasonal Clerk with District Cane Services Authority - suspended in 1999 - reinstated in 2001- Disciplinary proceedings were initiated but not concluded - within crushing season or specified time frame - retired in 2009 - Proceedings initiated after retirement were without lawful authority - Appellate authority failed to consider relevant regulatory provisions - Impugned orders passed in 2015 - inflicting punishment and denying post-retirement dues. (Para -2 to 7 ,15)

HELD: - Lack of permission and lawful authority can lead to defective first steps, causing the entire structure to fail. Initiating a proceeding beyond the crushing season and continuing it for years after a seasonal employee's retirement was unwarrant. Disciplinary proceedings initiated against petitioner were null and void for want of lawful authority. Impugned orders quashed. Petitioner entitled to post-retirement dues with interest at 8% from date of superannuation. Additional interest at 12% if payment not made within two months. (Para - 14,15,16)

Petition allowed. (E-7)

List of Cases cited:

1. Sharif-Ud-Din Vs Abdul Gani Lone, (1980) 1 SCC 403

2. Krishna Rai (dead) through legal representative & ors. Vs B.H.U. (2022) 8 SCC 713

3. Tata Chemicals Ltd. Vs Commr. of Customs (2015) 11 SCC 628

4. Badrinath Vs Govt of Tamil Nadu & ors. , (2000) 8 SCC 395

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

1. Heard Shri Girish Kumar Singh, learned counsel for the petitioner and Shri Ravindra Singh, learned counsel for the respondents.

2. Petitioner Surendra Nath Pandey, worked as a Seasonal Clerk with the 4th respondent continuously ever since his initial appointment made in the year 1990 until he attained the age of superannuation on 31.08.2009.

3. In the present petition, petitioner is aggrieved by the order passed by the disciplinary authority, namely, the Secretary of District Cane Services Authority, Kushinagar dated 31.01.2015 whereunder he has been held guilty of loss to the society for his alleged misconduct, embezzlement and resistant and further not to count the period he has been under suspension towards his post retirement dues. Petitioner is also aggrieved by the order passed by the Regional Cane Services Authority/ Deputy Cane Commissioner, Deoria.

4. The submission advanced by the learned counsel for the petitioner is that petitioner being a Seasonal employee of the society and having continuously worked as Seasonal Clerk is entitled to post retirement dues admissible to such employees under the U.P. Cooperative Societies Services Regulation, 1975. He has placed reliance upon the relevant Regulations 27 and 28 of the Service Regulations in support of his argument that if the disciplinary proceedings drawn in respect of Seasonal Clerks are not concluded in the same season, then such proceedings would be taken to have been dropped. He argues that once the proceedings are deemed to be dropped under the relevant Regulations, the respondent could not have reopened the issue after five years of his retirement.

5. Briefly stated facts of the case are that petitioner was placed under suspension on 09.10.1999 on the basis of a report of the Police Superintendent, Kushinagar dated 13.10.1997 asking him to furnish explanations regarding certain charges of utilizing the property of the society for personal benefits. It transpires that the petitioner failed to submit any reply and so the proceedings drawn remained pending. Petitioner was subsequently reinstated revoking the suspension order on 15.02.2001 holding that the disciplinary proceedings will not be adversely affected and will continue. It transpires that some report was submitted upon which the resolution was adopted by the society inflicting punishment and so the consequential order came to be passed by the Secretary of the District Cane Services Authority, Kushinagar on 31.01.2015. Petitioner's appeal was dismissed on merits on the ground that petitioner was found guilty in the enquiry report submitted by specially constituted committee.

6. Countering the arguments advanced by learned counsel for the petitioner, Shri Ravindra Singh, learned Advocate appearing for the respondents No. 3 and 4 submits that the order dated 15.02.2001 to reinstate the petitioner itself provided that disciplinary proceeding, already going on, will not get adversely affected and he submits that the charges were serious and it was not once but the

previous conduct of the petitioner also showed that even in the past he was suspended and faced charges. It is argued by Mr. Ravindra Singh, that the society was fully justified in adopting resolution on the basis of report submitted by the Enquiry Committee dated 27.01.2001, however, Shri Singh could not offer any explanation as to what transpired for the society in taking action after delay of 13 years from the date of presentation of enquiry report.

7. Having heard learned counsel for respective parties and having perused the records, I find it to be an admitted position on the part of the respondent that petitioner after was placed under suspension in the year 1999, disciplinary proceedings instituted was not concluded either in the year 1999 or in the subsequent year 2000. It has though come on record that some enquiry report was submitted on 27.01.2001 but what exactly was the report is not discussed in the order impugned. All that is discussed is that the resolution was adopted by the society in relation to the disciplinary proceedings going on against the petitioner in its meeting held 30.12.2014 and in view of the unanimous resolution so adopted the petitioner was liable to be inflicted with punishment as has been inflicted upon him.

8. In order to appreciate the argument advanced by learned counsel for the petitioner, I have carefully gone through the relevant provisions as contained under Regulation 27 and 28 of the U.P. Cooperative Society Service Regulation that governed the Seasonal Clerks. The relevant Regulations are reproduced hereunder:

"27.Disciplinary proceedings;- In the event of a complaint against any member of the seasonal staff, the secretary of the union shall make a preliminary enquiry and if he is satisfied that a prima facie case is established against the person concerned he shall intimate the same to him in the form of charges and call for his explanation to be submitted within a specified time. The secretary of the union shall examine records and submit his final report along with definite recommendation to the District Authority for passing final order in the case. In case the explanation is not received within the specified time the secretary shall submit his final report to the District Authority, on the basis of material already on the file. These proceedings shall be of a summary nature and the secretary should not take more than a month to complete the same. the District Authority should also arrange to dispose of the case within one month of the receipt of the final report from the secretary. In case of default on the part of secretary of the cane union or District Authority as the case may be is not completing the disciplinary proceedings against a seasonal staff by the end of crushing season, the same shall be deemed to have been automatically dropped.

28. The procedure narrated in regulation No. 27 shall not apply where the person concerned has absconded or is continuously absent from duty for a week or where for other reasons it is impracticable to communicate with him. In such cases the Secretary shall submit his final report to the Committee of Management stating the reasons for not following the procedure laid down in regulation No. 27 together with his views and recommendation based on record available for passing final orders in the case."

9. From a bare reading of Regulation 27 and the language in which provision has

been couched, it can safely be concluded that the proceedings against the Seasonal Clerks by the competent authority are summary in nature and soon after issuing notices and receiving the reply the Secretary should complete the proceedings within one month. The Disciplinary Authority is also placed under obligation to dispose of such cases within one month of the receipt of the final report from the Secretary and it is also provided that if proceedings are not completed as prescribed for, then the enquiry proceedings shall be deemed to be automatically dropped. Mr. Singh during the course of his argument admitted very fairly that disciplinary proceedings are to be concluded within the crushing season in which the seasonal clerk is employed and has been served with the notice to submit explanation. In my considered view the mandate of Regulation 27 would be whether the reply is submitted by delinquent employee or not, the final report of enquiry has to be submitted and action has to be taken within a period of one month. Once the Disciplinary Authority has received the report, it should take decision within a further period of one month. The only exceptional circumstance is where a delinquent employee concerned has absconded or has remained absent from duty for a week or for other reason.

10. Applying the aforesaid provision to the case in hand, I find that petitioner having been placed under suspension by respondents on 09.10.1999, there had been no occasion to treat him to be an absconded person, nor it is the case of the respondent that he never reported for duty. The only fact was that petitioner never submitted reply to the notice dated 09.10.1999. The respondent reinstated the petitioner on 15.02.2001. In my considered view in the light of the relevant provisions of Regulation 27 the disciplinary proceedings initiated against the petitioner on 09.10.1999 would be taken to have been dropped by the end of the year 1999 or within one month or 2 months thereafter or at the most till the end of then cane crushing season.

11. Even if one is to assume that with the order dated 15.02.2001, the disciplinary proceeding was revived afresh as contemplated in the order revoking suspension of petitioner, the said proceeding could at the most be taken to have lasted in any case, by the end of the year 2001. In no circumstances such proceeding could have been dragged for awaiting the enquiry report. Still further, once the petitioner had retired and ceased to be employee of the society no fresh enquiry could have been set up on 28.10.2013 by constituting a new committee for the alleged loss caused to the society during the period 97-98. Neither the Regulations provide for any disciplinary proceeding to be drawn beyond the period of two months of its initiation, nor does it provide for continuation of proceedings afresh after retirement. Petitioner having retired in the year 2009 to be specific on 31.08.2009, the initiation of proceedings by constituting enquiry committee on 28.10.2013 was not only de hors the procedure prescribed but was also null and void for want of lawful authority under Regulations. It is a settled legal position that if very institution of enquiry or setting up of disciplinary proceeding is void for want of lawful authority then any such consequential action pursuant to such enquiry and consequential enquiry report is liable to be held as null and void. In ***Sharif-Ud-Din V. Abdul Gani Lone, (1980) 1 SCC 403*** the Court held:

"In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question is to sub-serve and its design and the context in which it is enacted. If the object of the law is required to be defeated by non-compliance with it, it has to be regarded as mandatory... Whenever the statute provides that a particular act is to be done in a particular manner and also lays down that the failure to compliance with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."

12. This above view has been reiterated by Supreme Court in ***Krishna Rai (dead) through legal representative and others Vs. Banaras Hindu University (2022) 8 Supreme Court Cases 713.*** Even the Court referred to its earlier judgment in ***Tata Chemicals Ltd. V. Commr. of Customs (2015) 11 SCC 628*** where it was held:-

"there can be no estoppel against law. If the law requires something to be done in a particular manner, then it must be done in that manner, and if it is not done in that manner, then it would have no existence in the eyes of the law."

13. It is a well known maxim "sublato fundamento cadit opus" meaning, the foundation being removed, the structure falls. In the case of ***Badrinath V Govt of Tamil Nadu and others (2000) 8 Supreme Court Cases 395*** it has been held vide paragraph 27 thus:

"27. This flows from the general principle applicable to "consequential orders". Once the basis of a proceeding is gone, may be at a later point of meantime-like the recommendation of the State and by the UPSC and the action taken thereon-would fall to the ground. This principle of consequential order which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders. In other words, where an order is passed by an authority and its validity is being reconsidered by a superior authority (like the Governor and this case) and if before the superior authority has given its decision, some further action has been taken on the basis of the initial order of the primary authority, then such further action will fall to the ground the moment the superior authority has set aside the primary order."

14. Thus, lack of permission and lawful authority will always make the very first step defective so the entire edifice will have no base to survive. In the case in hand since very proceeding could not have been initiated beyond the crushing season, matter ought to have been put at rest. Initiation of a proceeding beyond the scope of provision and continuation of proceedings for several years and that too after retirement of a seasonal employee, was totally an unwarrant action and so final order of punishment is liable to be held null and void and is so held as well.

15. The appellate authority having not discussed all these points in the order impugned and passed the order simply affirming the order of the District Cane Services Authority, the appellate authority's order passed by Commissioner as Chairman of the Regional Cane Service Authority dated 30.10.2015 is held to be equally bad and unsustainable. Thus, both the impugned orders dated 31.1.2015 passed by the District Can Service

Authority, Kushinagar and that of the appellate authority namely Chairman the Regional Cane Service Authority, Deoria dated 30.10.2015 are hereby quashed.

16. Petitioner is held entitled to all post retirement dues as admissible in law. Entire dues shall be paid to the petitioner by the competent within two months from the date of presentation of certified copy of this order. Since termination/ removal order has been held to be absolutely null and void for want of lawful authority petitioner is also held entitled to interest at the rate of 8% from the date of superannuation till the actual payment is made of post retirement dues. It is also provided that in case post retirement dues as admissible in law are not paid within the prescribed period as directed hereinabove, petitioner shall be entitled to additional interest at the rate of 12% upon the expiry of two months' period till the actual payment is made.

(2024) 8 ILRA 380
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.08.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 15076 of 2021
And
Writ-A No. 16773 of 2019

State of U.P. & Anr. ...Petitioners
Versus
Birendra Bahadur Singh ...Respondent

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:

(A) Civil Law – Constitution of India,1950 – Article 226 – UP Public Service (Tribunal) Act, 1976 - Sections 4, 4-A, 4-(1), 4(5), 4(6), 5, 5(1)(b), 5(1)(b)(i) & 5(1)(b)(ii) – The Limitation Act, 1963 - Section – 3, Article 173 - Writ Petition filed by claimant – challenging the order of Tribunal – order of punishment of year 2007 – departmental Appeal filed in year 2008 – Revision of year 2008 is Pending – Claimant moved a Legal Notice in year 2014 U/s 4(6) of the Act, 1976 – as revision was still pending claimant filed Claim petition before Tribunal in year 2014 – which was dismissed on the ground of limitation – court finds that, provision of limitation for filing a reference is contained in Section 5(1)(b) and not in section 4(6) – Clause (i) & (ii) of Section 5(1) (b) provide a limitation for filing a reference in case where a final order has been passed - no limitation has been proscribed for a case where no final order has been passed – Limitation will starts only on an order being passed on appeal etc., if no orders have been passed and such appeal etc. remain pending , then, it cannot be said that limitation has started - held, court cannot read into the provision something which is not mentioned therein by the legislation. (para – 22, 23, 24, 27)

(B) Civil Law – Constitution of India – Article 226 – UP Public Service (Tribunal) Act, 1976 - Sections 4, 4-A, 4-(1), 4(5), 4(6), 5, 5(1)(b), 5(1)(b)(i) & 5(1)(b)(ii) – The Limitation Act, 1963 - Section – 3, Article 173 - Writ Petition filed by state – challenging the order of Tribunal – claim petition filed in year 2015 challenging the order of punishment of year 2006 – departmental Appeal was filed in year 2006 – but same was still pending as same was not forwarded to the State Govt. at relevant time – claimant moved a Legal Notice in year 2015 U/s 4(6) of the Act, 1976 – claimant filed Claim petition in year 2015 – Tribunal allowed the petition – State takes plea that, claim petition was hopelessly barred by limitation – court observed that, why should State or its Authorities raise such objections when they have themselves not decided the appeal, revision etc. within a reasonable time – held, to avoid such a situation as has arisen in this case, the Appellate or Revisional or other Authority as may have been empowered to take a decision on appeal etc. prescribed in the Service Rules should do so expeditiously and if

any time period is prescribed in the Service Rules itself, the same be adhered, if it is not prescribed, then, the period mentioned in the proviso to section 4(6) should be taken as a guiding principle and final order should be passed in all such pending proceedings within six months of its initiation by the public servant - Executive and the Legislature should look into this aspect a nd make appropriate provision in the Act, 1976 making it mandatory for the Appellate or Revisional Authorities etc. to pass final orders in such proceedings within reasonable time - till this done, plea of Limitation was not seen by the tribunal and it erred in deciding the claim petition on merits – hence, plea of State is thus rejected, but, on merits, looking into the gravity of the charge which has been found proved, the punishment order did not require any interference – writ petition dismissed. (Para –30, 31, 32, 33, 36)

Writ petitions dismissed. (E-11)

List of Cases cited:

1. Samarjeet Singh Vs State of UP & ors. (2006 (3) AWC 2750),

2. Mahendra Pratap Rai Vs St. of U.P. & ors. (1986 (4) LCD 209).

(Delivered by Hon'ble Rajan Roy, J.)

1. Both these writ petitions involve similar facts and common issues, therefore, they have been heard together and are being decided by a common judgment.

2. Heard Shri Rakesh Kumar along with Shri Shiv Kumar Soni and Shri Ravi Shanker Mishra, learned counsel for the petitioner and Shri Anand Kumar Singh, learned Standing Counsel for the respondent- State in Writ - A No. 16773 of 2019. In connected Writ-A No.15076 of 2021, none has appeared on behalf of the respondent while learned Standing Counsel has argued on behalf of the State.

3. As regards Writ – A No. 16773 of 2019 we find that the petitioner, who was claimant in Claim Petition No. 232 of 2014 before the Tribunal, was visited with a punishment order of 27.10.2007. He filed an Appeal which was decided on 25.10.2008. He thereafter filed a Revision on 22.12.2008. He ultimately gave a legal notice on 02.01.2014 as is referable under the proviso to Section 4(6) of the Act, 1976 and on failure to pass any order in the revision, the said Claim Petition was filed in the year 2014, which has been dismissed, albeit on merits on 29.01.2019. The petitioner- Ram Babu's counsel contended that there is no limitation prescribed for giving a legal notice under the proviso to Section 4(6) of the Act, 1976 and that the State can not take advantage of its own negligence and lapse in not passing any order in Appeal. When no limitation has been prescribed it is not open for this Court to prescribe any limitation in the matter and that in the facts of the case, the claim petition was not barred by limitation. He further contended that the dismissal of the claim petition on merits is erroneous on various grounds as taken in the writ petition, therefore, it is liable to be set-aside. The contention of respondent- State counsel in this writ petition is that the petitioner-claimant could not have slept over the matter for more than 8 years to give notice under the proviso to Section 4(6) of the Act, 1976. He should have given such notice immediately on expiry of period of six months envisaged therein and thereafter, should have filed the claim petition within one year of expiry of the period of one month which was not done, therefore, the claim petition was barred by limitation. A specific objection in this regard was taken by the State in the written statement in para 3, 4.14 and other paragraphs of the written statement, but,

the same have not even been referred much less considered by the Tribunal. He submitted that without considering the question of limitation the Tribunal, has dismissed the claim petition on merits, therefore, the State does not have any grievance with regard to the merits of the dismissal of the claim petition but has raised the said plea of limitation in response to the claim of the petitioner in this writ petition which should also be taken consideration.

4. Writ- A No. 15076 of 2021 (Writ Petition No. 15076 (S/B) of 2021) has been filed by the State of U.P. challenging the judgment and order dated 03.04.2019 passed by the U.P. Public Services Tribunal in Claim Petition No. 1714 of 2015. Claim Petition no. 1714 of 2015 was filed by the respondent-claimant in the year 2015 challenging an order of punishment dated 13.01.2006 with consequential reliefs. The respondent-claimant it appears preferred an Appeal against the said punishment order on 10.04.2006, but, the same could not be forwarded to the State Government at the relevant time and could not be decided. On 26.08.2015 the respondent-claimant gave a legal notice, referable, as claimed, to proviso to Section 4(6) of the Act, 1976 and, thereafter, as the Appeal was not decided within one month he filed Claim Petition No. 1714 of 2015 challenging the punishment order dated 13.01.2006. The claim petition was admitted on 17.03.2016 subject to point of limitation which was involved. It was ultimately allowed on 03.04.2019. The main ground of challenge by the State in this writ petition is that claim petition was hopelessly barred by limitation and a specific objection was taken in this regard in the written statement filed before the Tribunal, but, ignoring the same and without deciding the question of limitation, the merits of the claim petition has been considered and the same has been allowed which is against the provisions of the U.P. Public Services (Tribunal) Act, 1976 (hereinafter referred to as 'the Act, 1976') and the law on the subject. It is alleged by the State Counsel that the Tribunal while deciding the claim petition has noticed the objections on the point of limitation and the provisions of the proviso to Section 4(6) of the Act, 1976, however, it has opined that natural justice requires a decision on merit. The submission is that the Tribunal is not a Court of extraordinary jurisdiction, but, a Tribunal of limited jurisdiction, whose powers are circumscribed by the Act, 1976. The Limitation Act, 1963 (hereinafter to as 'the Act, 1963') is applicable to its proceedings, therefore, the Tribunal was obliged to consider and decide the objection on the point of limitation which was specifically taken in the written statement filed before it. Even if, it had not been taken, the Tribunal was obliged to do so in view of Section 3 of the Act, 1963 and in not doing so, the Tribunal has usurped the Jurisdiction which it did not have, as, limitation involves a point of jurisdiction and a such objection was taken at the first opportunity. Nobody appeared to argue on behalf of respondent in this writ petition.

5. We have also heard Shri Asit Kumar Chaturvedi, learned Senior Advocate and Shri Gaurav Mehrotra, whose assistance we had requested considering the interpretation of the provisions of U.P. Public Services (Tribunal) Act, 1976 and the question of limitation involved herein.

6. We had passed a detailed order on 01.10.2021 in Writ - A No. 15076 of 2021 staying the impugned judgment and also noting the points for consideration.

7. Having heard learned counsel for the parties and having perused the records the first and foremost point is the period of

limitation prescribed for filing a reference or claim petition before the Tribunal and the manner of its determination/ calculation, in a case, where, though, an appeal, revision etc. has been preferred by the public servant but no order has been passed thereon. This issue not only has far reaching consequences in the two cases at hand, but, even otherwise, has immense importance with respect to other proceedings before the Tribunal and determination of point of limitation in the context of reference/claim petitions being filed before it.

8. The U.P. Pubic Services (Tribunal) Act, 1976 was enacted to provide for the constitution of Tribunals to adjudicate dispute in respect of matters relate to employment of all public servant of State.

9. Section 4 of the Act, 1976 reads as under:-

*"**4. Reference of claim of Tribunal.-** (1) Subject to the other provision of this Act, a person who is or has been a public servant and is aggrieved by an the order pertaining to a service matter within the jurisdiction of the Tribunal, may make a reference of claim to the Tribunal for the redressal of his grievance.*

Explanation: For the purpose of this sub-section "order" means an order or omission or in-action of the State Government or a local authority or any other corporation or company referred to in clause (b) of section 2 or of an officer, committee or other body or agency of the State Government or such local authority or Corporation or company:

Provided that no reference shall, subject to the terms of any contract, be made in respect of a claim arising out of the transfer of a public servant;

Provided further that in the case of the death of a public servant, his legal representative and where there are two or more such representative, all of them jointly, may make a reference to the 'Tribunal for payment of salary' allowances, gratuity, provident fund, pension and other pecuniary benefits relating to service due to such public servant.

(2) Every reference under sub-section (1) shall be in such form and be a accompanied by such documents or other evidence and by such fee in respect of the filling of such reference and by such other fees for the service or execution of processes, as may be prescribed.

(3) On receipt of a reference under sub-section (1), the Tribunal shall, if satisfied after such inquiry as it may deem necessary that the reference is fit for adjudication or trial by it, admit such reference and where the Tribunal is not so satisfied, it shall summarily reject the reference after recording its reasons.

(4) Where a reference has been admitted by the Tribunal under sub-section (3), every proceeding under the relevant service rules or regulation or any contract as to redressal of grievances in relation to the subject mater of such reference pending immediately before such admission shall abate, and save as otherwise directed by the Tribunal, no appeal or representation in relation to such matter shall thereafter be entertained under such rules, regulations or contract.

(5) The Tribunal shall not ordinarily admit a reference unless it is satisfied that the public servant has availed of all the remedies available to him under the relevant service rules, regulations or contract as to redressal of grievances.

(6) For the purposes of sub-section (5) a public servant shall be deemed to have availed of all the remedies available to him if a final order has been made by the State Government, an authority or officer thereof or other person competent to pass such order under such rules or regulations or contract rejecting any appeal preferred or representation made by such public servant in connection with the grievance:

Provided that where no final order is made by the State Government, authority, officer or other person competent to pass such order with regard to the appeal preferred or representation made by such public servant within six months from the date on which such appeal was preferred or representation was made, the public servant may, by a written notice by registered post, require such competent authority to pass the order and if the order is not passed within one month of the service of such notice, the public servant shall be deemed to have availed of all the remedies available to him.

(7) For the purposes of sub-section (5) and(6) any remedy available to the public servant by way of submission of a memorial to the Governor or to any other functionary shall not be deemed to be one of the remedies, which are available unless the public servant had elected to submit such memorial."

10. Section 4-A deals with hearing of reference by the Tribunal which is not very relevant for our purpose.

11. Section 5 deals with powers and procedure of the Tribunal. Some of its provisions are relevant which are Section 5(1) and (2) which read as under:-

"(1) (a) The Tribunal shall not be bound by the procedure laid down in the code of civil procedure, 1908, or the rules of evidence contained in the Indian Evidence Act, 1872, but shall be guided by the principles of natural justice, and subject to the provisions of this section and of any rules made under section 7, the Tribunal shall have power to regulate its own procedure (including the fixing of places and times of its sittings and deciding whether to sit in public or in private :

[Provided that where, in respect of the subject matter of a reference, a competent court has already passed a decree or order or issued a writ or direction, and such decree, order, writ or direction has become final, the principal of res judicial shall apply;

(b) The provisions of the Limitation Act, 1963 shall mutatis mutandis apply to reference under section 4 as if a reference were a suit filed in civil court so, however, that:-

(i) Notwithstanding the period of limitation prescribed in the Schedule to the said Act, the period of limitation for such reference shall be one year;

(ii) In computing the period of limitation the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded:

Provided that any reference for which the period of limitation prescribed by the Limitation Act, 1963 is more than one year, a reference under section 4 may

be made within the period prescribed by that Act, or within one year next after the commencement of the Uttar Pradesh Public Services (Tribunals) (Amendment) Act, 1985, shall affect any reference made before and pending at the commencement of the said Act.

Provided further that nothing in this clause as substituted by the Uttar Pradesh Public Service (Tribunals) (Amendment) Act, 1985, Shall affect any reference made before and pending at the commencement of the said Act.

(2) The Tribunal shall decide every reference expeditiously and ordinarily, every case shall be decided by it on the basis of perusal of documents and representations, and of [oral or written argument]3, if any."

12. Section 4 deals with reference of a claim to Tribunal. The reference is in respect of an order pertaining to a service matter within the jurisdiction of the Tribunal, for the redressal of grievance by a public servant. The word "order" used in Section 4(1) has been explained in its Explanation to mean - an order or omission or inaction of the State Government or a local authority etc.

13. Sub-section (5) of Section 4 provides that the Tribunal shall not ordinarily admit a reference unless it is satisfied that the public servant has availed of all the remedies available to him under the relevant service rules, regulations or contract as to redressal of grievance. The word "ordinarily" used therein is indicative of the fact that in given circumstances for valid and justifiable reason a reference can be admitted, even if, the remedies referred therein have not been availed, which may be in cases requiring immediate intervention, especially, at the interim stage.

14. Sub-Section (6) of Section 4 says that for the purpose of Sub-section (5) of Section 4 a public servant shall be deemed to have availed all the remedies available to him if a final order has been made by the State Government, an authority or officer thereof or person competent to pass such order under the rules etc. rejecting any appeal preferred or representation made by a public servant in connection with the grievance.

15. Proviso to Sub-section 6 of Section 4 is relevant for our purposes, as, it deals with a situation where no final order is made by the State Government etc. within six months from the date on which such appeal was preferred or representation was made. In such a situation the public servant may by written notice by registered post require such competent authority to pass the order and if the order is not passed within one month of such notice, the public servant shall be deemed to have availed all the remedies available to him. In the main provision contained in Sub-section (5) of Section 4, the words *"shall be deemed to have availed all the remedies if a final order has been made"* have been used whereas in the proviso to the word "may by written notice by registered post" has been used in the context of expiry of a period of six months from the date of preferring such appeal or representation where no orders have been passed.

16. As is evident from Section 5(1)(b), the provisions of the Limitation Act, 1963 are applicable mutatis mutandis to a reference under Section 4 of the Act, 1976, as if, it was a suit filed in a Civil Court, meaning thereby, the Limitation Act, 1963 is applicable, as it applies to a Suit. This of course is subject to Clause (i) and (ii) and the proviso to Section 5(1)(b).

The period of limitation for filing such reference is one year and as a period of limitation has been prescribed for the said purpose, therefore, Article 137 of the Schedule to the Act, 1963, does not apply for determining limitation in filing a claim or reference. Clause (ii) of Section 5(1)(b) excludes the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being memorial to the Governor), in accordance with the rules and orders regulating his conditions of service, and ending on the date on which knowledge of any such final order passed on such representation, appeal, revision or petition, as the case may be, was acquired by the public servant, in computing the period of limitation for filing reference, which is one year.

17. A Co-ordinate Bench of this Court has rendered a decision reported in ***2006 (3) AWC 2750 in Writ Petition No. 942 (S/B) of 2002; Samarjeet Singh Vs. State of U.P. and Ors.,*** on 09.09.2005 which is relevant. It was a case where an order of punishment was passed against the petitioner- Samarjeet Singh on 05.06.1987. Against which he preferred a statutory appeal on 30.06.1987. The appeal remained pending despite several reminders being made i.e. no final orders were passed. He filed a claim petition in the year 2000 claiming it to be within limitation on the ground that the appeal had not been decided. The State took a defence that the claim petition was barred by limitation which was one year. The Tribunal vide order dated 14.03.2002 dismissed the claim petition at the admission stage as being barred by limitation. The Tribunal noticed the fact that though the appeal had been preferred on 15.06.1987 reminders were sent up to 21.08.2000 and legal notice of 30 days was given on 30.06.2000 i.e. notice envisaged in the proviso to Section 4(6) of the Act, 1976. In spite of it, no final orders were passed. The Tribunal while rejecting the claim petition was persuaded by the fact that even if the petitioner had filed appeal on 30.06.1987 the limitation expired after 12 months while the petitioner sent a reminder dated 21.08.2000 which itself was given after 13 years. It relied upon a decision of a learned Single Judge of this Court rendered in the case of ***Mahendra Pratap Rai Vs. State of U.P. and Ors.*** reported in ***(1986) 4 LCD 209*** to dismiss the claim petition as barred by limitation.

18. The Division of the High Court did not find the reasoning given by the Tribunal, sustainable. It opined that in the case at hand, the appeal had been filed within time, therefore, the dictum in ***Mahendra Pratap Rai's case (supra)*** did not apply. Moreover, according to it, for computing the period of limitation for filing a claim petition the Tribunal had to see the date when the cause of action first accrued and all such subsequent dates when the cause of action again accrued. This was simply for computing the period of limitation i.e. whether the claim petition is within time or not. Section 5 of the Limitation Act prescribed period of limitation and also the manner or procedure when an employee could approach the Tribunal without actually exhausting the departmental remedy. The Division Bench considered the provisions of Section 4(5) and (6) as also its proviso and held that the proviso to Sub-section 6 of Section 4 of the Act, 1976 would not be relevant for extending the period of limitation as the proviso has been made for giving liberty to an employee/public servant to approach the Service Tribunal even without awaiting for decision on the statutory appeal or

representation and thus, removes the bar as imposed by Sub-section 5 of Section 4 of the Act, 1976. The period of limitation would start right from the date when the cause of action first accrued that is the date of order of dismissal and it would again accrue when statutory appeal or representation, under the Rules, are decided. If the appeal or representation are decided after 2, 3, 4 and 5 years etc. the limitation for filing the claim petition shall be computed from the date of passing of the order in such appeal or representation. It can not be said that if the appeal or representation had been decided after one year or more, the claim petition will stand barred by limitation, merely because the claimant did not avail the liberty of coming to the Tribunal in terms of proviso to Sub-section 4 of Section 6 of the Act, 1976. According to the Co-ordinate Bench, Sub-section 5 and proviso to Sub-section 6 of Section 4 of the Act, 1976 did not control the provisions of Section 5(1)(b)(i) and (ii) of the Act, 1976.

19. Para 10 to 22 of the judgment rendered in the case of ***Samarjeet Singh Vs. State of U.P. and Ors.*** reported in ***2006 (3) AWC 2750*** read as under:-

"10. For computing the period of limitation for filing a claim petition the Tribunal has to see the date when the cause of action first accrued and all such subsequent dates when the cause of action again accrued. This is simply for computing the period of limitation, i.e., whether the petition is within time or not. Section 5 of the Act prescribes period of limitation and also the manner or procedure when an employee could approach the Tribunal without actually exhausting the departmental remedy.

11. Sub-section (5) of Section 4 of the Act provides that the Tribunal shall not ordinarily admit a reference unless it is satisfied that the public servant has availed of all the remedies available to him under the relevant service rules, regulations or contract as to redressal of grievance. Subsection (6) of Section 4 of the Act says that for the purposes of Sub-section (5) a public servant shall be deemed to have availed of all the remedies available to him if a final order has been made by the State Government, an authority or officer thereof or other person competent to pass such order under such rules or regulations or contract rejecting any appeal preferred or representation made by such public servant in connection with the grievance.

12. Proviso to Sub-section (6) of Section 4 of the Act says that where no final order is made by the State Government, authority, officer or other person competent to pass such order with regard to the appeal preferred or representation made by such public servant within six months from the date on which such appeal was preferred or representation was made, the public servant may, by a written notice by registered post, require such competent authority to pass the order and if the order is not passed within one month of the service of such notice, the public servant shall be deemed to have availed of all the remedies available to him.

13. Aforesaid Sub-section (5) of Section 4 of the Act requires exhaustion of all departmental remedies available to public servant before approaching the Tribunal and for giving effect to the said provision the Tribunal is supposed to examine, for entertaining the claim petition, whether the employee has availed of or not all available departmental remedies. Even then discretion lies with the Tribunal to entertain the petition though public servant might have not exhausted departmental remedies. It is clear that Sub-

section (5) of Section 4 of the Act puts restriction upon the Tribunal by saying that it shall not 'ordinarily' admit a reference unless it is satisfied that the public servant has availed of all the remedies available to him under the relevant service rules, regulations or contract as to redressal of grievances.

14. An employee cannot be prohibited from approaching the Court/Tribunal for any indefinite period because of the administrative or otherwise inaction on the part of authority/officer concerned in deciding the statutory appeal or revision, and, therefore, proviso to Sub-section (6) of Section 4 was added. Thus, proviso to Subsection (6) of Section 4 of the Act allows to entertain the claim petition, where no final order is made by the State Government, authority, officer or other person competent to pass such order with regard to the appeal preferred or representation made by such public servant within six months from the date on which such appeal was preferred or representation was made, where the public servant, by a written notice by registered post, requires such competent authority to pass the order and if the order is not passed within one month of the service of such notice also by the appointing authority, the employee gets a liberty to approach the Tribunal, with the legal presumption that he had' availed of all departmental remedies in terms of Subsection (5) of Section 4 of the Act, and, therefore, his claim petition can be entertained.

15. This proviso to Sub-section (6) of Section 4 would not be relevant for extending the period of limitation as the proviso has been made for giving liberty to an employee/public servant to approach the service Tribunal even without awaiting for a decision on the statutory appeal or representation and thus it removes the bar as imposed by Sub-section (5) of Section 4 of the Act.

16. The period of limitation would start right from the date when the cause of action first accrued, i.e., the date of order of dismissal and it would again accrue when statutory appeal or representation, under the rules, are decided. If the appeal or representation are decided after two, three, four and five years, etc. the limitation for filing the claim petition shall be computed from the date of passing of the order in such appeal or representation. It cannot be said that if the appeal or revision has been decided after one year or more, the claim petition will stand barred by limitation, merely because the claimant did not avail the liberty of coming to the Tribunal in terms of proviso to Sub-section (4) of Section 6.

17. Sub-section (5) and proviso to Sub-section (6) of Section 4 of the Act do not control the provisions of Section 5(1)(b) (i) and (ii) of the Act. Sub-clause (b)(i) and (ii) of Section 5(1) of the Act says that the provisions of the *Limitation Act, 1963 shall mutatis mutandis apply to reference under Section 4 of the Act as if a reference were a suit filed in civil court so, however, that : (i) notwithstanding the period of limitation prescribed in the Schedule to the said Act, the period of limitation for such reference shall be one year and (ii) in computing the period of limitation the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal revision or*

petition, as the case may be shall be excluded.

18. The aforesaid provision provides that any reference for which the period of limitation prescribed by the Limitation Act, 1963 is more than one year, a reference under Section 4 of the Act may be made within the period prescribed by that Act, or within one year next after the commencement of the U.P. Public Services (Tribunals) (Amendment) Act, 1985 whichever period expires earlier. ***The aforesaid provisions make it clear that while computing the period of limitation, the period of limitation starts from the date on which the public servant makes a representation or prefers an appeal, revision or any other petition and comes to an end when he acquires knowledge of the final order passed. All such period thus has to be excluded while computing limitation. In case final order is passed after one year or two years or so on and so forth, the limitation would be counted from the date of passing of the original order and by excluding the entire period commencing from the date of making the appeal or representation, if provided under rules, and the date when the final orders passed on such appeal or representation come within his knowledge.***

19. In the instant case, the Tribunal was swayed by the provisions of Sub-section (5) of Section 4 and proviso to Sub-section (6) of Section 4 where the right to approach the Tribunal has been given after availing all the remedies available to a public servant under the relevant service rules and the circumstances and the procedure when a public servant can approach the Tribunal, during the pendency of the appeal or revision.

20. ***In the absence of a final order having been passed by the appellate authority it cannot be said that the claim petition would be barred by limitation if the claimant does not avail the liberty given in the provision aforesaid. If statutory appeals or representations are kept pending for years together and no order is passed within six months from the date on which such appeal was preferred or representation was made, the Tribunal ought not to reject the claim petition, on the ground that the public servant should have given a written notice by registered post, requiring such competent authority to pass the order within 30 days, and thus has not filed the claim petition within the limitation prescribed.***

21. In a case wherein the appeal or revision remains unattended for any period beyond six months or one year, the only requirement could be that such a claimant gives the required notice as given in proviso to Sub-section (6) of Section 4 and thereafter to approach the Tribunal whether thereafter, the appeal or revision is decided or not, but this requirement of giving notice in a matter which has been kept pending for years together by the appellate authority, if is not complied with by the complainant, the Tribunal may not dismiss the claim petition summarily but may give an opportunity to the claimant to give a notice as required within a given time and defer the hearing for such period or the Tribunal, or as per the facts of the case, may entertain the petition even without any such notice being given by the public servant as the rule of exhaustion of departmental remedies is itself discretionary in terms of subsection (5) of Section 4, wherein it has been said that 'ordinarily' the Tribunal would not entertain the petition, unless departmental remedy stands exhausted.

22. ***Failure on the part of the appellate authority or the authority who is to decide the representation, in***

discharging their statutory legal obligations cannot defeat the right of a claimant to vindicate his rights by approaching the Tribunal nor can be frustrated."

20. Of course it was a case where a final order had been passed in the appeal after several years, therefore, giving a second cause of action to the public servant to approach the Court and the case at hand and the issue before us is slightly different on facts in the sense that no final orders have been passed even after 8 or 9 years, but, the reasoning given by the Co-ordinate Bench in ***Samarjeet singh's case (supra)*** is relevant and applies to the case at hand also.

21. We agree with the enunciation of law by a Co-ordinate Bench in the case of ***Samarjeet Singh (supra)*** in the context of Section 5(1)(b) and the proviso to Section 4(6) of the Act, 1976 where it has been held that the proviso to Section 4(6) of the Act, 1976 does not qualify the prescription of limitation in Section 5(1)(b) clause (i) and (ii) thereof.

22. The provision of limitation for filing a reference is contained in Section 5(1)(b) and not Section 4(6). Section 5(1)(b) clause (i) and (ii) provide a limitation for filing a reference in a case where a final order has been passed in an appeal, revision or representation prescribed in the relevant service rules i.e. the remedies prescribed under the relevant services rules. No limitation has been prescribed for a case where, though, the remedy has been availed in accordance with law/Rules no final orders have been passed. The language of Clause (ii) of Section 5(1)(b) itself suggests that as long as the appeal or representation etc., which has been filed as per Rules/orders, remains pending, limitation does not start/commence nor does it expire. It starts/commences when an order is passed on such appeal etc. and will expire on completion of one year from the date of knowledge to the public servant regarding such order.

23. As regards the proviso to Section 4(6) of the Act, 1976 the said proviso is relevant only in the context of Section 4(5) which provides that ordinarily the tribunal shall not entertain a reference unless all the remedies prescribed in the service rules have been availed, therefore, envisaging a situation, where, though, the remedy has been availed no final order has been passed, the proviso to Section 4(6) has been added, according to which, in the event no final order has been passed on such appeal or representation etc., a discretion/liberty has been given to the public servant to approach the tribunal after giving one month notice in writing by registered post. Such notice has to be after expiry of the period of six months from the date of filing such appeal, revision or representation as may be prescribed in the service rules. The use of the word 'may' in the proviso to Sub-section (5) of Section 4, as distinct from the use of the word 'shall' in Sub-section (6) of Section 4 of the Act, 1976, makes it clear that the Legislature's intention is to confer a discretion upon the public servant under the proviso, if he so chooses, to approach the Tribunal on expiry of a period of six months after giving one month notice, in the event, even thereafter, no final order is passed, but, this proviso can not be understood and interpreted to qualify the provisions contained in Section 5 (1)(b) Clause (i) and (ii), which do not prescribe any such limitation for filing a reference in a case where no final orders are passed in

an appeal, representation, revision etc. preferred before the competent authority in accordance with the Rules wherein such remedy is prescribed, nor can it be construed as providing any limitation for filing a claim before the Tribunal.

24. There is nothing in Section 5(1)(b) to even suggest that proviso to Section 4(6) prescribes any such limitation for the said purpose and the latter should be read into Section 5(1)(b). We see no reason to do so. We see no reason to prescribe a limitation in a case where no final orders are passed, firstly for the reason, the Legislature has not provided any such limitation. If at all, Clause (iii) of Section 5(1)(b) is indicative that if appeal etc. is filed as per Rules/under, then, limitation will start only on an order being passed thereon. If no orders have been passed and such appeal etc. remains pending, then, it can not be said that limitation has started. If the Legislature intended that proviso to Section 4(6) should come into play and it should prescribe a limitation for such cases, then, it would have specifically mentioned it, which it has not. The purpose and scope of the proviso to Sub-section 6 of Section 4 has already been discussed above. Secondly, why should the State or its Authorities who function as Appellate, revisional or competent authority to pass a final order in such appellate, revisional or other proceedings, should be allowed to take advantage and raise such objections when they have themselves not decided the appeal, revision etc. within a reasonable time. In the aforesaid scenario, it is not open for the State to raise such objections before the Tribunal. There is another reason which persuades us, as was considered in the case of ***Samarjeet Singh (supra).*** What if, the appeal, revision etc. remains pending for more than a year may be several years and no notice is given by the public servant under the proviso to Sub-section 6 of Section 4 but, ultimately, final orders are passed therein. In that eventuality, the said final order will give a cause of action to the public servant aggrieved by such order to file a reference and limitation will have to be calculated on the basis of the date the said final order came to his knowledge. This will be in view of Clause (ii) of Section 5(1)(b) of the Act, 1976, therefore, proviso to Sub-section 6 of Section 4 can not be understood as laying down any limitation for filing a claim petition where no orders have been passed on the appeal etc. referred above.

25. Further, the Legislature has not prescribed any limitation for giving of such notice as envisaged in the proviso to Sub-section 6 of Section 4, after expiry of six months of filing appeal etc. It merely says that written notice may be given by registered post by a public servant if no final orders have been passed within six months of submission of appeal etc. by him. It does not prescribe any outer time limit for giving such notice. Moreover, we have already held, as has the Co-ordinate Bench, that the said provision merely gives a choice to the Public Servant to give such notice which is not mandatory nor does this provisions prescribe a limitation for filing a Claim Petition. We have already discussed the object of the said provisions earlier.

26. Moreover, we can not prescribe a limitation for giving a written notice and treat it as starting point of limitation for filing a claim petition, as, the Legislature in its wisdom has not provided the same in the proviso to Section 4(6). We can not supply a causus omissus. The law is settled in this regard.

27. Even if we prescribe a reasonable period within which the notice envisaged in

the proviso to Sub-section 6 of Section 4 is to be given it will not serve any purpose and the said provision does not qualify Section 5(1)(b). We can not possibly treat such reasonable period as a limitation for filing a claim petition, non adherence to which would lead to a claim being barred by limitation as, firstly it would be beyond the scope and object of the said proviso as discussed, secondly it would be against the scheme of the act and would amount to prescribing a limitation period which the legislature has not provided and would amount to doing injury to section 5(1)(b) which in fact is the provision containing a prescription for filing a claim petition. We can not read into the provision something which is not mentioned therein by the legislature.

28. It would also be highly incongruous to say that if a final order is passed in an appeal etc. after several years it will give a cause of action to a public servant to approach the Tribunal by filing a reference/claim petition by computing the limitation from the date of knowledge of such final order, but, in the event no final order is passed, then, in view of the proviso to Section 4(6) if the written notice is not given or it is given after say one year or some other reasonable period, then, the reference/claim petition would be barred by limitation.

29. The legal position is as discussed hereinabove, meaning thereby, if an appeal, revision etc. i.e. a remedy prescribed in the Rules has been preferred by the public servant before the competent authority as per Rules, as long as no final orders have been passed in such remedies/proceedings, the said period will have to be excluded while computing limitation for filing a reference under Section 5(1)(b) of the Act, 1976. This is in keeping with the intent of the Legislature and the Scheme of the Act, 1976 existing as of now. We answer the question framed by us earlier, accordingly to avoid or prevent such a situation as discussed above.

30. To avoid or prevent such a situation as has arisen in this case in our opinion the Appellate or Revisional or such other Authorities as may have been empowered to take a decision on appeal etc. prescribed in the Service Rules should do so expeditiously. If any time period is prescribed in the service rules itself, the same should be adhered. If it is not prescribed, then, the period mentioned in the proviso to Section 4(6) of the Act, 1976 should be taken as a guiding principle and final order should be passed in all such proceedings within six months of its initiation by the public servant. This will allay a situation of complication where a public servant may approach the Tribunal several years after passing of the final order of punishment etc. by giving a notice as referred in the proviso to Section 4(6) claiming pendency of the appellate/revisional etc. proceedings, and limitation based thereon.

31. Another possible solution is that the Executive and the Legislature should look into this aspect and make appropriate provisions in the Act, 1976 making it mandatory for the Appellate or Revisional Authorities etc. to pass final orders in such proceedings within the reasonable time say six months, unless there are exceptional circumstances, such as, any legal impediment in the form of stay of proceedings by the orders of any Court or higher forum and in the event final orders are not passed in proceedings within six months and, a further a prescription can be

made by the Legislature requiring the public servant to give notice in writing as envisaged in the proviso to Section 4(6) within a specified time to decide the appeal and if the same is not decided, then, on expiry of the period of one month's notice or such period as may be deemed fit by the Legislature, the period of limitation for filing a reference would start, meaning thereby, the public servant would, thereafter, be obliged to file the reference/claim petition before the Tribunal within the limitation prescribed from such date, the limitation at present being one year. This will remove any scope for stale litigation and avoid the complications referred hereinabove. It is, however, for the Executive and the Legislature to look into this aspect of the matter and to do the needful. After all, it is the State which may in given cases suffer more than the public servant on account of filing of claims after several years. Therefore, we expect the State and through it the Legislature to take a call in the matter at the earliest and address the malady appropriately and effectively. We expect that the Executive shall look into the matter at the earliest say within six months and needful shall be done.

32. Till this is done the legal position is as discussed earlier.

33. In view of the above discussions so far as the contention of State counsel in **Writ - A No. 16773 of 2019** that plea of limitation was not seen by the Tribunal and it erred in deciding the claim petition on merits, no doubt it ought to have considered the point of limitation but, as we have ourselves considered this issue, we do not find the plea of limitation to be tenable in this case, as, admittedly, after passing of the appellate order by the Appellate Authority on 25.10.2008 the petitioner/claimant filed a revision before the Revisional Authority on 22.12.2008 which is referable to the provision of punishment and Appeal Rules, 1991 and it is not the case of the State Authorities that said revision had not been preferred or was barred by any limitation prescribed in the Service Rules. In view of the discussion on the legal position referred earlier and our consideration thereon, as the revision filed by the petitioner/claimant in Writ- A No. 16773 of 2019, as, prescribed in Service Rules, 1991, remained pending, he gave one month's notice on 02.01.2014 and even thereafter, the Revisional Authority did not pass any final order, therefore, he filed the petition within one year of expiry of such period of one month, as such, it can not be said that the claim petition was barred by limitation prescribed under Section 5 of the Act, 1976. The plea of the State is thus rejected. On merits of the issues involved in the said writ petition we do not find any substance in the grounds raised by the petitioner while challenging the judgment of the Tribunal. The Tribunal has categorically noticed the statement of the petitioner- claimant rather his admission that he was absent from duty from 10.30 to 01.46 on the fateful day on the pretext of having lunch albeit as claimed by the petitioner after informing his superior Shri Ram Tirath Tripathi. The Tribunal has held that on account of absence of the petitioner-claimant, the accused Sonu was able to escape from the jail premises. We have perused the statement of the petitioner-claimant as recorded in the inquiry proceedings, extract of which is annexed as CA-1 which has not been denied, wherein, he has admitted the said fact. We have also perused the response of Ram Tirath Tripathi to the question posed by the petitioner-claimant, wherein, Shri Tripathi

has denied that the petitioner-claimant had left the premises after seeking permission from him. Even otherwise, it is highly unacceptable and unreasonable that a person would go to have lunch from 10.30 to 01.46. In these circumstances, looking into the gravity of the charge which has been found to be proved, the punishment order did not require any interference and the Tribunal has rightly dismissed the claim petition of the petitioner on merits. No such procedural irregularity/ illegality has been pointed out which could persuade us to interfere with the punishment order nor for that matter with the order dated 26.11.2008 passed by the Disciplinary Authority regarding forfeiture of remaining salary for the period the petitioner-claimant remained under suspension. Neither the punishment order nor the appellate order can be said to be an unseasoned or non speaking order. We do not find any error in the judgment of the Tribunal, therefore, we **dismiss** the writ petition on merits.

Writ- A No. 15076 of 2021

34. As regards **Writ- A No. 15076 of 2021** filed by the State we have gone through our earlier order dated 01.10.2021 on the question of limitation. We have already discussed this issue in the preceding paragraphs and the reasoning given will apply in this case also. In view of the discussion already made, this is not a fit case for interference on the point of limitation as it is the Appellate Authority who did not pass an order in the appeal within a reasonable time, therefore, after giving a legal notice the claim petition was filed as already referred while discussing the facts of this case. In view of the earlier discussion the claim petition of the respondent can not be said to be beyond limitation. The Tribunal has decided the claim petition on merits. The contention of the State in this regard is rejected. This apart, we find that the Tribunal while passing the impugned judgment has referred to a Division Bench judgment of this Court delivered on 04.03.2011 in Writ Petition No. 11921(S/B) of 2009. On merits of the case, the Tribunal has allowed the claim petition on the ground that the charge sheet was issued to the respondent-claimant for imposition of major punishment i.e. a regular inquiry was initiated under Rule 7 of the Rules, 1999, therefore, merely because ultimately a minor punishment has been imposed does not mean that non furnishing of inquiry report to the respondent-claimant could be condoned or justified. We are in agreement with the reasoning given by the Tribunal. The proceedings having been initiated for imposition of a major punishment, a regular inquiry for imposition of such punishment having been held, and an inquiry report having been submitted, it was incumbent upon the Disciplinary Authority to have confronted the respondent-claimant with the finding in the inquiry report and with an opportunity to him to challenge the same, but, this was not done and ultimately punishment of censure was awarded based on such report. We can not loose sight of the fact that the punishment order was passed way back on 13.01.2006. We are now in 2024. The claim petition reveals that the respondent- claimant was about 58 years of age at the time of filing of the claim petition in 2015, therefore, he must have retired in 2017. The claim petition was decided on 03.04.2019. Thus, the writ petition itself was filed after almost two and half years of passing of the judgment by the Tribunal, a fact which escaped notice of this Bench while entertaining the writ petition on 01.10.2021 and staying the operation of the impugned judgment of the

Tribunal. Considering the aforesaid we do not find it a fit case for interference in exercise of our extraordinary jurisdiction under Article 226 of the Constitution of India. We, accordingly, **dismiss** the writ petition.

35. Let a copy of this judgment be sent by Shri Nishant Shukla, learned Additional Chief Standing Counsel to Legal Remembrancer, U.P. for necessary and appropriate action.

(2024) 8 ILRA 395
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.08.2024

BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ-A No. 21482 of 2016

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

Counsel for the Petitioner:
Suresh Chandra Srivastava, Sharad Pathak, Suyash Dwivedi

Counsel for the Respondents:
C.S.C., J.B.S. Rathour, Shailendra Singh Rajawat

(A) Service Law - Challenge to Withdrawal of Family Pension -where a provision has been enacted or notified which is in the nature of a beneficial provision, widest amplitude is required to be given to such provision for it to achieve the object for which it was notified - Giving a narrow meaning to a beneficial provision even where two results are possible, would naturally defeat the very object for which such a beneficial provision has been enacted. (Para -28)

(B) The principles of statutory construction - Words occurring in statutes of liberal import such as 'social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Lilliputian dimensions - Provisions of a beneficial legislation have to be construed with a purpose-oriented approach - exemption clauses in beneficial or social welfare legislations should be given strict construction. (Para - 29)

(C) Doctrine of fairness - when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective - When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the statute may be held to be retrospective in nature. (Para - 35)

(D) Principles of natural justice - must be followed before taking actions that (i) Affect civil rights (ii) Have adverse consequences (iii) Deprive livelihood - Distinction between quasi-judicial and administrative orders is thin - Reasonable opportunity to present case is essential - Procedures must be just, fair, and reasonable - Right to livelihood is part of right to life (Article 21). (Para - 39)

Petitioner challenges an order withdrawing her family pension - granted earlier due to her husband's death in service in 1977 - pension was initially denied but granted after a writ petition in 2007 - it was withdrawn following another writ petition (Phoolmati Devi) and a judgment (Chandrawati Devi). **(Para - 1 to 14)**

HELD: - Government Order dated 16.06.1984 applies retrospectively, making 1982 order applicable to employees who died in service before rendering 20 years. Petitioner's case governed by 1982 order, as made retrospective by 1984 order. Petitioner entitled to family pension under revised eligibility criteria. Impugned order dated 11.05.2016 quashed. Directed opposite parties to pay petitioner's family pension as per the 03.09.2007 order considering the retrospective application of the

1982 order. Make regular payments within 8 weeks. (Para - 18 to 27,40,41)

Petition allowed. (E-7)

List of Cases cited:

1. Chandrawati Devi (Smt.) Vs St. of U.P. & anr., (2010) 3 UPLBEC 2520

2. St. of U.P. & ors. Vs Smt. Shyam Kali & anr., 2011 SCC OnLine All 50

3. K.H. Nazar Vs Mathew K. Jacob & ors., (2020) 14 SCC 126

4. X. Vs Principal Secy., HFWD, Govt. of NCT of Delhi & anr., (2023) 9 SCC 433

5. Vijay Vs St. of Maha. & ors., (2006) 6 SCC 289

6. D.K. Yadav Vs J.M.A. Industries Ltd., (1993) 3 SCC 259

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

1. Heard Mr. Sharad Pathak, learned counsel for petitioner, Mr. Pradeep Kumar Pandey, learned State Counsel for opposite parties no. 1 & 2, Mr. Ran Vijay Singh, learned counsel for opposite party no. 3 and Mr. S.S. Rajawat, learned counsel for opposite parties no. 4 & 5.

2. Petition has been filed challenging order dated 11.05.2016 whereby family pension granted earlier to petitioner vide order dated 03.09.2007 was withdrawn. It is submitted that petitioner's husband late Sudhakar Pandey was employed as Assistant Teacher in Primary School concerned on 16.12.1973 and passed away while in service on 10.01.1977 having rendered service of just about three years.

3. Since petitioner was not granted benefit of family pension, she filed Writ Petition No. 6068 (S/S) of 2004 which was disposed of vide order dated 07.12.2007 directing the concerned authority to consider and decide petitioner's claim for grant of family pension. It is in pursuance thereof that family pension was granted to petitioner vide order dated 03.09.2007. It is submitted that in the meantime one Smt. Phoolmati Devi who was similarly situated as petitioner filed Writ Petition No. 5993 (S/S) of 2015 claiming family pension. The said petition was disposed of vide order dated 12.10.2015 however, indicating the submission of learned counsel for parties that family pension has been granted to other persons as well though they were not covered by the Family Pension Scheme vide Government order dated 17.12.1965. The Director Basic Education was therefore directed to hold an inquiry into the matter and pass appropriate orders and take necessary action where the pension payment orders had been wrongly issued and payments had been made.

4. It is in pursuance of the aforesaid directions that the impugned order has been passed withdrawing family pension to a number of such dependents who had been granted family pension in pursuance of Government order dated 17.12.1965.

5. Learned counsel for petitioner has submitted that earlier a triple benefit scheme was notified by the State Government on 17.12.1965 and as per Clause 24 thereof, it was provided that family pension would be granted for a period of 10 years to the family of an employee who dies either while in service or after retirement upon completion of not less than 20 years of qualifying service. It is submitted that subsequently the State Government issued another Government order dated 31.03.1982 whereby a new

scheme for family pension was introduced. The said scheme came into effect from 01.10.1981 in which substantive change made was in paragraph 3 (ka) whereby it was provided that in case of such employees who passed away while in service after rendering even only one year of continuous service, the dependents thereof would be entitled for family pension.

6. It is further submitted that by means of subsequent order dated 06.06.1984, issued by the State Government, the aforesaid notification was made applicable even in those cases where the employee had passed away prior to 01.10.1981.

7. It is therefore submitted that once Government order dated 31.03.1982 has been made retrospective in operation even upon those employees who passed away prior to 01.10.1981, it is the notification dated 31.03.1982 which would be applicable upon petitioner and since her case would be covered by paragraph 3 (ka), petitioner is entitled for grant of family pension.

8. It is further submitted that the impugned order has been passed in the light of judgment rendered in the Case of **Chandrawati Devi (Smt.) versus State of U.P. and another reported in (2010) 3 UPLBEC 2520** whereby grant of such pensionary benefits was rejected.

9. It is submitted that even in the case of **Smt. Phoolmati Devi (supra),** directions have been issued on the basis of the aforesaid judgment in the case of **Chandrawati Devi (Smt.) (supra)** but the aspect that aforesaid judgment of **Chandrawati Devi (Smt.) (supra)** had been overruled by Division Bench of this Court in the case of **State of U.P. and others versus Smt. Shyam Kali and another** reported in **2011 SCC OnLine All 50** has been completely lost sight of.

10. It is submitted that the scheme being beneficial in nature, widest amplitude is required to be given to the provisions thereof.

11. Learned counsel appearing on behalf of opposite parties have refuted submissions advanced by learned counsel for petitioner with the submission that since petitioner's husband passed away in January, 1977, the case of petitioner would be covered by Clause 24 of Government order dated 17.12.1965. It is submitted that although Government order dated 31.03.1982 has been made retrospective in nature by means of order dated 16.06.1984 but the condition indicated therein is that even for respective application of Government order dated 31.03.1982, the employee or his dependents should otherwise have been eligible for such grant of family pension. It is therefore submitted that since it is Government order dated 17.12.1965 which would be applicable upon petitioner and petitioner not being covered under paragraph 24 thereof, the retrospective application of Government order dated 31.03.1982 would not benefit the petitioner.

12. It is also submitted that neither in Government order dated 31.03.1982 nor even in the order dated 16.06.1984 has the earlier Government order dated 17.12.1965 been rescinded or superseded and would therefore continue to govern such cases where death of the employee has occasioned prior to 01.10.1981.

13. Upon consideration of submissions advanced by learned counsel

for parties and perusal of material on record, the factual aspects as indicated hereinabove are admitted.

14. The only question requiring adjudication in this petition would therefore be whether by operation of order dated 16.06.1984, would petitioner be entitled for grant of family pension in terms of Government order dated 31.03.1982 or Government order dated 17.12.1965?

15. With regard to aforesaid question, it is quite evident that had the order dated 16.06.1984 not been issued by the State Government, Government order dated 31.03.1982 would not have been retrospective and would necessarily have applied only to those employees who passed away after 01.10.1981 and in such a situation, petitioner would necessarily have been governed by Government order dated 17.12.1965.

16. However, a perusal of order dated 16.06.1984 clearly indicates that in view of confusion arising with regard to retrospective applicability of Government Order dated 31.08.1982, the State Government has taken a conscious decision for implementation of Government Order dated 31.03.1982 to those employees who passed away even prior to 01.10.1981. It is the construction of the wordings 'यदि प्रधानाध्यापक के दायित्व को अन्यथा पारिवारिक पेंशन देय हो' as indicated in Government Order dated 16.06.1984, which is creating a hurdle in grant of Family Pension to petitioner.

17. It is the stated case of opposite parties that aforesaid wordings can be construed only to mean that persons such as petitioner would be entitled to grant of Family Pension only in case they were otherwise eligible for such benefit and since it is only Government Order dated 17.12.1965 which is applicable upon petitioner, the otherwise eligibility of petitioner has to be seen only in terms of Government Order dated 17.12.1965 and since petitioner was ineligible for grant of Family Pension in terms of aforesaid Government Order, retrospective applicability of the subsequent Government Order dated 31.03.1982 would be inconsequential.

18. Upon consideration of the wordings of Government Order dated 16.06.1984, it is quite evident that retrospective applicability of Government Order dated 31.03.1982 has been made subject to employee or his dependents being otherwise eligible for grant of such benefits.

19. It is quite evident that Government Order dated 31.03.1982 has not rescinded the earlier Government Order dated 17.12.1965. Nonetheless, it is also evident from a perusal of Government Orders dated 31.03.1982 and 16.06.1984 that the State Government was conveyed a quandary regarding applicability of Family Pension Scheme to persons who were not coming within purview of the same in view of extant Government Orders and service conditions.

20. Government Order dated 16.06.1984 has clearly adverted to such a quandary whereafter it indicates that State Government has taken a conscious decision for retrospective applicability of Government Order dated 31.03.1982. It is noticeable that Government Order dated 31.03.1982 has been made retrospective in its entirety and not with regard to any particular portion thereof.

21. The provisions of Clause 24 of Government Order dated 17.12.1965 relied upon by opposite parties are as follows:-

"24. (1) A family pension not exceeding the amount specified in sub-rule (2) below may be granted for a period of 10 years to the family of an employee who dies either while still in service or after retirement, after completion of not less than twenty year of qualifying service:

Provided that the period of payment of family pension shall in no case extend beyond a period of five years from the date on which the deceased employee would have attained the age of superannuation.

Note. (In case where the qualifying service is less than the prescribed minimum the deficiency should not be condoned"

22. It is relevant that Government Order dated 31.03.1982 in paragraph 3 thereof, has done away with the minimum prescribed service period of 20 years and has in fact indicated that dependents of deceased employees would be entitled for grant of Family Pension where the employee has rendered at least one year's continuous service.

23. Relevant portion of the order is as follows:-

"(क) परिवार पेंशन सेवा में रहते हुये या सेवानिवृत्त के बाद मृत्यु होने पर उस दशा में अनुमन्य होगी जब सेवा निवृत्ति के बाद मृत्यु होने की दशा में शिक्षक मृत्यु के समय कोई प्रतिकर अशक्तता सेवा निवृत्ति या अधिवर्ष पेंशन पा रहा हो या पा रहा होता और सेवाकाल में मृत्यु हो जाने की दशा में यदि उसने कम से कम एक वर्ष की लगातार सेवा जिसमें भत्ता रहित छुट्टी की अवधि, ड्यूटी के रूप में न माना गया निलम्बन तथा 20 वर्ष की आयु से पहले की गयी अवधि सम्मिलित नहीं है पूरी कर ली हो।"

24. Paragraph 4 of aforesaid Government Order dated 31.03.1982 reads as follows:-

"(4) सेवारत रहते हुये मृत्यु हो जाने की दशा में यदि मृतक ने कम से कम सात वर्ष की अधिक सेवा प्रदान की हो तो मृत्यु की तिथि के बाद की तिथि से प्रारम्भिक सात वर्ष या उस तिथि तक उसे जीवित रहने की दशा में 65 वर्ष की आयु प्राप्त कर ली होती, जो भी पहले समाप्त हो, पारिवारिक पेंशन मूल वेतन की आधी अथवा इस योजना के अधीन अन्यथा देय धनराशि का दुगुना, जो भी कम हो के बराबर होगी।"

25. Upon a conjoint reading of paragraph 3 (ka) and paragraph 4 thereof, it is evident that while eligibility for grant of Family Pension has been made available to such employees who have rendered at least one year's continuous service, paragraph 4 pertains to the methods and procedure regarding calculation for grant of such benefits.

26. Thus, it is quite evident that a material change was effected by State Government by notification of Government Order dated 31.03.1982 by bringing down the eligibility of service from twenty years to one year.

27. So far as the case of petitioner is concerned, since petitioner's husband passed away in January, 1977, evidently petitioner's case was required to be seen in light of Government Order dated 17.12.1965 but it is only due to subsequent Government Order dated 16.06.1984 when Government Order dated 31.03.1982 has been made retrospective in application that her case may be required to be seen in that context.

28. It is settled law that where a provision has been enacted or notified which is in the nature of a beneficial provision, widest amplitude is required to be given to such provision for it to achieve the object for which it was notified. Giving a narrow meaning to a beneficial provision even where two results are possible, would naturally defeat the very object for which such a beneficial provision has been enacted.

29. Regarding such a proposition, Hon'ble the Supreme Court in the case of **K.H. Nazar versus Mathew K. Jacob and others** reported in **(2020) 14 SCC 126** has held as follows:-

"11. Provisions of a beneficial legislation have to be construed with a purpose-oriented approach. The Act should receive a liberal construction to promote its objects. Also, literal construction of the provisions of a beneficial legislation has to be avoided. It is the court's duty to discern the intention of the legislature in making the law. Once such an intention is ascertained, the statute should receive a purposeful or functional interpretation.

12. In the words of O. Chinnappa Reddy, J., the principles of statutory construction of beneficial legislation are as follows: (Workmen case SCC p. 76, para 4)

"4. The principles of statutory construction are well settled. Words occurring in statutes of liberal import such as 'social welfare legislation and human rights' legislation are not to be put in Procrustean beds or shrunk to Lilliputian dimensions. In construing these legislations the imposture of literal construction must be avoided and the prodigality of its misapplication must be recognised and reduced. Judges ought to be more concerned with the "colour", the "content" and the "context" of such statutes (we have borrowed the words from Lord Wilberforce's opinion in Prenn v. Simmonds. In the same opinion Lord Wilberforce pointed out that law is not to be left behind in some island of literal interpretation but is to enquire beyond the language, unisolated from the matrix of facts in which they are set; the law is not to be interpreted purely on internal linguistic considerations. In one of the cases cited before us, that is, Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court, we had occasion to say: (Surendra Kumar Verma case, SCC p. 447, para 6)

'6. ... Semantic luxuries are misplaced in the interpretation of "bread and butter" statutes. Welfare statues must, of necessity, receive a board interpretation. Where legislation is designed to give relief against certain kinds of mischief, the court is not to make inroads by making etymological excursions.' "

13. While interpreting a statute, the problem or mischief that the statute was designed to remedy should first be identified and then a construction that suppresses the problem and advances the remedy should be adopted. It is settled law that exemption clauses in beneficial or social welfare legislations should be given strict construction. It was observed in

Shivram A. Shiroor v. Radhabai Shantram Kowshik that the exclusionary provisions in a beneficial legislation should be construed strictly so as to give a wide amplitude to the principal object of the legislation and to prevent its evasion on deceptive grounds. Similarly, in Minister Administering the Crown Lands Act v. NSW Aboriginal Land Council, Kirby, J. held that the principle of providing purposive construction to beneficial legislations mandates that exceptions in such legislations should be construed narrowly."

30. The aspect of interpretation of a particular provision as to whether it is to be given a restrictive or a wider meaning has also been considered by Hon'ble the Supreme Court in the case of **X. versus Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and another** reported in **(2023) 9 SCC 433**. Relevant paragraphs of the judgment are as under :-

"31. The cardinal principle of the construction of statutes is to identify the intention of the legislature and the true legal meaning of the enactment. The intention of the legislature is derived by considering the meaning of the words used in the statute, with a view to understanding the purpose or object of the enactment, the mischief, and its corresponding remedy that the enactment is designed to actualise. Ordinarily, the language used by the legislature is indicative of legislative intent. In Kanai Lal Sur v. Paramnidhi Sadhukhan, Gajendragadkar, J. (as the learned Chief Justice then was) opined that "the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself". But when the words are capable of bearing two or more constructions, they should be construed in light of the object and purpose of the enactment. The purposive construction of the provision must be "illumined by the goal, though guided by the word". Aharon Barak opines that in certain circumstances this may indicate giving "an unusual and exceptional meaning" to the language and words used.

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. 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. 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."

35. The rule of purposive interpretation was first articulated in Heydon case in the following terms: (ER p. 638)

"...for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

7. A catena of decisions emanating from this Court, including Kerala Fishermen's Welfare Fund Board v. Fancy Food, Bharat Singh v. New Delhi Tuberculosis Centre, Bombay Anand Bhavan Restaurant v. ESI Corpn., Union of India v. Prabhakaran Vijaya Kumar, settle the proposition that progressive and beneficial legislation must be interpreted in favour of the beneficiaries when it is possible to take two views of a legal provision."

31. From examination of law enunciated in paragraph 35 of the judgment therefore the aspect required to be examined is the law prior to notification of the Government orders at the defect which was sought to be rectified. In the present case, the law prior to notification of the Government Order dated 16.06.1984 clearly excluded the families of all such persons from family pension, who had passed away prior to rendering 20 years of service. The defect therein clearly was with regard to grant of such beneficial provision to families of those persons who passed away prior to rendering such stipulated 20 years of service. The said aspect is clearly indicated in the Government Order and it is this defect which has been sought to be removed in order to protect the livelihood of families who sole bread earner has passed away suddenly even prior to rendering the stipulated years of service.

32. Upon applicability of aforesaid judgments in present facts and circumstances of the case, it is quite evident that in case Government Order dated 16.06.1984 is considered to have a retrospective applicability of Government Order dated 31.03.1982 only in cases where the employee or his dependents are eligible in terms of Government Order dated 17.12.1965, would give a very restrictive meaning to such a clause and would defeat the very purpose for which Government Order dated 16.06.1984 had been issued since it would exclude from its purview all such persons who have passed away in service without rendering 20 years of service.

33. It is axiomatic that death of a person is a fortuitous circumstance and is not in any individual's hands. There may be cases as in the present case where benefit

of a beneficial provision such as Family Pension could not be availed of due to sudden death of the sole bread earner prior to rendering 20 years of service. It is in such circumstances where the sole bread earner has passed away that the provision of Family Pension has been notified so as the dependents of such sole bread earner are not deprived of their livelihood.

34. It is the object and purpose of grant of such a beneficial provision which is required to be considered in the light so as to give maximum benefit of the same.

35. The aspect of retrospectivity of the Government Orders dated 31.03.1982 and 16.06.1984 can be examined in the light of judgment rendered by Hon'ble Supreme Court in the case of **Vijay versus State of Maharastra and others** reported in **(2006) 6 SCC 289** wherein the following had been held:-

"12. The appellant was elected in terms of the provisions of a statute. The right to be elected was created by a statute and, thus, can be taken away by a statute. It is now well settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness. When a law is enacted for the benefit of the community as a whole, even in the absence of a provision, the statute may be held to be retrospective in nature. The appellant does not and cannot question the competence of the legislature in this behalf."

36. In view of aforesaid, in the considered opinion of this Court, Government Order dated 16.06.1984 cannot be made restrictive once it has itself applied Government Order dated 31.03.1982 retrospectively in its entirety.

37. It is also quite evident that judgment rendered in the case of **Chandrawati Devi (Smt.) (supra)** has thereafter been overruled in **Smt. Shyam Kali (supra)** and was an aspect which was not brought to the notice of coordinate Bench of this Court in the case of **Smt. Phoolmati Devi (supra),** which was the genesis of entire exercise resulting in passing of the impugned order.

38. A perusal of impugned order also does not indicate any consideration of aforesaid aspects particularly the retrospective application of Government Order dated 31.03.1982 by means of subsequent Government Order dated 16.06.2084. The impugned order also does not indicate any show cause notice having been given to petitioner prior to passing of such an order withdrawing a right which had already vested in petitioner.

39. The aspect of adhering to principles of natural justice prior to passing of an order having adverse civil consequences or taking away a right vested has been dealt with by Hon'ble Supreme Court in the case of **D.K. Yadav versus J.M.A. Industries Ltd.** reported in **(1993) 3 SCC 259.** Relevant paragraphs of the judgment are as under :-

"7. The principal question is whether the impugned action is violative of principles of natural justice. In A.K. Kraipak v. Union of India a Constitution Bench of this Court held that the distinction between quasi-judicial and administrative order has gradually become thin. Now it is

totally eclipsed and obliterated. The aim of the rule of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules operate in the area not covered by law validly made or expressly excluded as held in Col. J.N. Sinha v. Union of India. It is settled law that certified standing orders have statutory force which do not expressly exclude the application of the principles of natural justice. Conversely the Act made exceptions for the application of principles of natural justice by necessary implication from specific provisions in the Act like Sections 25-F; 25-FF; 25-FFF etc. The need for temporary hands to cope with sudden and temporary spurt of work demands appointment temporarily to a service of such temporary workmen to meet such exigencies and as soon as the work or service is completed, the need to dispense with the services may arise. In that situation, on compliance with the provisions of Section 25-F resort could be had to retrench the employees in conformity therewith. Particular statute or statutory rules or orders having statutory flavour may also exclude the application of the principles of natural justice expressly or by necessary implication. In other respects the principles of natural justice would apply unless the employer should justify its exclusion on given special and exceptional exigencies.

8. The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the concerned person.

11. The law must therefore be now taken to be well-settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both.

14. It is thus well-settled law that right to life enshrined under Article 21 of the Constitution would include right to livelihood. The order of termination of the service of an employee/workman visits with civil consequences of jeopardising not only his/her livelihood but also career and livelihood of dependents. Therefore, before taking any action putting an end to the tenure of an employee/workman fair play requires that reasonable opportunity to put forth his case is given and domestic inquiry conducted complying with the principles of natural justice. In D.T.C. v. D.T.C. Mazdoor Congress the Constitution Bench, per majority, held that termination of the

service of a workman giving one month's notice or pay in lieu thereof without inquiry offended Article 14. The order terminating the service of the employees was set aside."

40. For aforesaid consideration and discussions, impugned order dated 11.05.2016 is hereby quashed by issuance of a writ in the nature of Certiorari. A further writ in the nature of Mandamus is issued commanding the opposite parties to ensure payment of Family Pension to petitioner as provided vide order dated 03.09.2007 and in continuation thereof. Actual payment thereof and regular payment thereafter shall be ensured within a period of eight weeks from the date a certified copy of this order is served upon opposite party no.2.

41. Resultantly, the petition succeeds and is **allowed**. Parties to bear their own costs.

(2024) 8 ILRA 405
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-A No. 38333 of 2016
With
Other Connected Cases

Bhairav Nath Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kartikeya Saran

Counsel for the Respondents:
C.S.C.

(A) Service Law - Regularization of Guest Lecturers in Government Industrial Training Institutes - U.P. Government Industrial Training Institute (Instructors) Service Rules, 2014 - The Uttar Pradesh Regularization of Persons Working On Daily Wages or On Work Charge or On Contract in Government Departments On Group-C and Group-D posts (Outside The Purview of the Uttar Pradesh Public Service Commission) Rules, 2016 - For regularization, it is essential for the petitioners to establish that they have a right for regularization in service under any Rule, which provides regularization of such appointees who have been engaged under a particular scheme for a particular period - Government Order dated 24.02.2016 and Rules of 2016 apply to daily wage employees, including Guest Lecturers. (Para - 14, 20,21,23,24,25)

Petitioners worked as Guest Lecturers in Government Industrial Training Institutes - Claimed regularization under Government Order dated 24.02.2016 and Rules of 2016 - Orders rejecting regularization challenged. (Para - 1 to 21)

HELD: - Petitioners entitled to consideration for regularization under Government Order dated 24.02.2016 and Rules of 2016. Impugned orders quashed. Fresh orders to be passed within three months.(Para - 25,27,28)

Petitions allowed. (E-7)

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

1. Heard Shri Ujjawal Satsangi Advocate, learned counsel for the petitioners in Writ A No.8507 of 2024 and he is holding brief of Shri Kartikeya Saran, learned counsel for the petitioners in Writ A Nos.38333 of 2016, 40833 of 2016, 44315 of 2016 & 51565 of 2016 and Smt. Archana Tyagi, learned Additional Chief Standing Counsel appearing for the respondents.

2. All the aforesaid five writ petitions have been filed by the petitioners, who are

working as Guest Lecturer in various Government Industrial Training Institutes in the State of U.P. and who are aggrieved by non-regularization of their services.

3. Writ-A No.38333 of 2016 has been filed by four petitioners challenging the validity of an order dated 24.05.2016 passed by the Secretary, Vocational Education and Skill Development Department, Government of U.P., rejecting their claim for regularization of their services as Guest Lecturers in Government Industrial Training Institutes.

4. Writ-A No.40833 of 2016 has been filed by ten petitioners challenging the validity of a similar order dated 13.06.2016, rejecting claim of regularization of the petitioners' services as Guest Lecturers in Government Industrial Training Institutes.

5. Writ A No.44315 of 2016 has been filed by 16 petitioners challenging validity of orders dated 24.5.2016 and 23.06.2016 passed by the Secretary, Vocational Education and Skill Development Department, State of U.P., rejecting their claim for regularization.

6. Writ-A No.51565 of 2016 and Writ A No.8507 of 2024 have been filed by 15 petitioners and 8 petitioners respectively, praying for regularization of their services as they have not been considered for regularization and no orders in this regard has been passed.

7. As common questions are involved in all the writ petitions, the writ petitions are being decided by a common judgment.

8. Briefly stated, facts of the case are that various posts of Instructors were lying vacant in various Government Industrial Training Institutes and, therefore, the Government had launched a Prashikshan Mitra Scheme for appointing Prashikshan Mitra for performing the duties of Instructors in Government Industrial Training Institutes by issuing a Government Order dated 30.08.2000, which provided that Prashikshan Mitra shall be appointed in Government Industrial Training Institutes upon payment of a remuneration of Rs.100/- per day. The Scheme would be for the financial year 2000-2001 whereafter the Scheme will come to an end automatically.

9. After completion of the Scheme period i.e. 2000-2001, another Government Order dated 30.05.2001 was issued providing for appointment of Guest Speakers in Government Industrial Training Institutes to perform the duties of Instructors as the posts of Instructors were lying vacant. This Government Order provided that the Guest Lecturers will be appointed for the period 2001-2002.

10. Even after expiry of the scheme, the petitioners continued to work as Guest Speakers in Government Industrial Training Institutes and performed the duties of Instructors thereof. The remuneration being paid to the petitioners was subsequently enhanced to Rs.300/- per day. It is the case of the petitioners that besides their educational duties relatable to the post of Instructors, they are assigned administrative duties also like other regular teachers of Government Industrial Training Institutes.

11. On 24.02.2016, a Government Order was issued for regularization of persons working in Government Departments, Autonomous Institutions,

Public Sector Undertakings/Corporations, Local Bodies Development Authorities and District Panchayats, who were working since 31.03.1996 on daily wages/work charge and contract basis and who held the minimum eligibility qualification for the post in question, on available vacancies and in case of non-availability of vacancies, on supernumerary posts.

12. The Government Order dated 24.02.2016 has been replaced by the "The Uttar Pradesh Regularization of Persons Working On Daily Wages or On Work Charge or On Contract in Government Departments On Group-C and Group-D posts (Outside The Purview of the Uttar Pradesh Public Service Commission) Rules, 2016" (hereinafter referred to as Rules of 2016). The exclusion Clause in the Rules of 2016 is Clause 2, which provides that:-

"2. These rules shall not apply for regularisation of :

(i) Seasonal Collection Ameen/Seasonal Peon;

(ii) Persons/Persons engaged/employed/deployed for seasonal works in Horticulture Department, Agriculture Department, Agriculture Education Department and such similar Departments;

(iii) Person/Persons engaged/employed/deployed on consolidated pay/ fixed honorarium in the schemes/projects of State Government or Government of India sponsored programmes;

(iv) Person/Persons engaged/employed/deployed as Home Guard Volunteer and Prantiya Rakshak Dal Volunteer;

(v) Person/Persons engaged/employed/deployed as Shiksha Mitra and Kisan Mitra;

(vi) Person/Persons engaged/employed/deployed under MNREGA Scheme (Rural Development Department);

(vii) Person/Persons engaged/employed/deployed in Anganbadi Kendra (Women and Child Welfare Department);

(viii) Person/Persons engaged/employed/deployed as Asha Bahu (Medical, Health and Family Welfare Department);

(ix) Such person/persons or group of persons as notified by the State Government from time to time."

13. The petitioners applied for their regularization, some of which claims have been rejected by different orders passed in their cases which are under challenge in three writ petitions. Their claim has been rejected on the same ground that the petitioners are not covered by the Government Order dated 24.02.2016 and, therefore, their services cannot be regularized.

14. The impugned order states that the Government Order dated 24.02.2016 is not applicable to Guest Lecturers and, therefore, the petitioners are not covered by the provisions of the aforesaid Government Order dated 24.02.2016. The Government Order dated 24.02.2016 excludes persons working as Seasonal Collection Ameen / Seasonal Anu Sewak in Horticulture Department / Agriculture Department / Agriculture Education Department for carrying of seasonal works, persons engaged in MNREGA / Anganwadi work / Asha Bahu / Home Guard Volunteers / P.R.D. Volunteers / Shiksha Mitra / Kisan Mitra or persons engaged on payment of honorarium or other basis under any Scheme of the Central Government / State

Government and the exclusion cause does not make any reference to persons working as Guest Lecturers.

15. In the counter affidavit, the respondents have stated that the services of Guest Speakers were being availed as a time being arrangement according to the provisions of U. P. Government Industrial Training Institute (Instructors) Service Rules, 2014 and they were not entitled to work on the post of Instructors. The Guest Lecturers were appointed to work till regularly appointed Instructors joined the post.

16. The stand of the respondents in the counter affidavit is that the Government Order dated 24.02.2016 was issued regarding daily wager / work charge employees and Contractual Employees only and Prashikshan Mitra are excluded from the purview of Government Order dated 24.02.2016 by virtue of the provision contained in Clause 3 of the aforesaid Government Order.

17. Smt. Archana Tyagi, learned Additional Chief Standing Counsel has further submitted that similar claims were raised before this Court sitting at Lucknow by filing numerous writ petitions, the leading case being Writ Petition No.6565 (S/S) of 2001 and all the writ petitions were dismissed by means of a judgment and order dated 05.03.2003, whereby the claim of regularization of persons working as Guest Speakers in Government Industrial Training Institutes was rejected. Submission of learned Additional Chief Standing Counsel is that the aforesaid order passed by a Co-ordinate Bench of this Court is binding on this Court.

18. Another judgment and order dated 10.01.2008 was passed by a Co-ordinate Bench of this Court sitting at Lucknow in Writ Petition No.5676 (S/S) of 2007 and other connected matters holding that Guest Speakers cannot stop the regularly selected candidates from joining on their post but they can be allowed to work on vacant posts till regular selection is made.

19. The petitioners were engaged as Guest Speakers on daily wage basis and, therefore, they are daily wage employees. The petitioners can only be excluded from the purview of the Government Order dated 24.02.2016, if they fall in any of the categories mentioned in the exclusion Clause No.3 of the aforesaid Government Order but the petitioners do not fall in any such category. Therefore, the contention of the respondents that the Guest Speakers are not covered by the aforesaid Government Order, is not correct.

20. So far as the judgment dated 05.03.2003 passed in Writ Petition No.6565 (S/S) of 2001 and other connected matters is considered, those writ petitions were dismissed for the following reasons:-

"For regularization, it is essential for the petitioners to establish that they have a right for regularization in service under any Rule, which provides regularization of such appointees who have been engaged under a particular scheme for a particular period. Learned counsel for the petitioner has not been able to show any such Rule which provides for regularization of such appointees. The State Government has also not framed any such scheme where the Guest Speakers, who are working under the Scheme of 2000-2001, are entitled for regularization. In the absence of any such Scheme of the State Government and also in the absence of any such statutory rule for regularization, which may be applicable to

the petitioners and the like Guest Speakers, the petitioners cannot claim regularization on the post of Instructor."

21. After passing of the aforesaid judgment in the year 2003, the State Government has issued the Government Order dated 24.02.2016 for regularization of services of persons working in Government Departments, Autonomous Bodies, Public Sector Undertakings / Corporation, Local Bodies, Development Authorities and District Panchayats and thereafter the Government has framed the Rules of 2016. Therefore, the ground on which the earlier writ petitions were dismissed in the year 2003, i.e. the petitioner has not been able to show any such Rule which provides for regularization of such appointees, has ceased to exist after issuance of the Government Order dated 24.02.2016 and now their claim cannot be rejected on the basis of the judgment dated 05.03.2003 passed in Writ Petition No.6565 (S/S) of 2001 and it has to be considered in light of the Rules of 2016.

22. From the aforesaid averments made in the counter affidavit, it appears that the respondents admit that the Guest Lecturers were appointed to perform the duties of Instructor according to the provisions contained in U.P. Government Industrial Training Institute (Instructors) Service Rules, 2014.

23. The learned Additional Chief Standing Counsel has submitted that Rule 2 (iii) of the Rules of 2016 provides that the rules shall not apply for regularization of persons/persons engaged/employed/ deployed on consolidated pay/ fixed honorarium in the Schemes/projects of State Government or Government of India sponsored programmes.

24. In this regard, it is apparent from the record that initially by means of an order dated 30.08.2000, the State Government had launched Prashikshan Mitra Scheme under which the petitioners were appointed as Prashikshan Mitra, which Scheme was for a period of one year only i.e. 2000-2001 and it came to end thereafter. Then the State Government issued another Government Order dated 30.05.2001 for engagement of Guest Lecturers for a period of one year. This Scheme of engagement of Guest Lecturers was extended by means of a Government Order dated 10.05.2002 to the period ending on 30.06.2002. Thereafter this Scheme has not been extended. Therefore, when the petitioners are not working under any Scheme since 01.07.2002 and they do not fall within the exception carved out within Rule 2 (iii) of Rules of 2016.

25. In view of the aforesaid discussion, this Court is of the considered view that the petitioners claim for being considered for regularization of their services under the Government Order dated 24.2.2016 / the Rules of 2016 has wrongly been rejected on the ground that they are not covered by the Government Order. The petitioners are entitled to be considered for being regularized under the provisions of Government Order dated 24.2.2016 / the Rules of 2016.

26. Accordingly, all the writ petitions bearing Writ- A No.38333 of 2016, Writ- A No.40833 of 2016, Writ-A No.44315 of 2016, Writ- A No.51565 of 2016 and Writ- A No.8507 of 2024 are hereby ***allowed***.

27. The impugned order dated 24.05.2016 in Writ A No.38333 of 2016, order dated 13.6.2016 in Writ-A No.40833

of 2016 and orders dated 24.5.2016 and 23.06.2016 in Writ- A No.8507 of 2024 passed by the Secretary, Vocational Education and Skill Development Department, State of U.P. are unsustainable in law and are hereby ***quashed***.

28. A mandamus is issued to the respondent No.1- Secretary, Vocational Education and Skill Development, State of U.P. to pass fresh orders regarding regularization of services of the petitioners, after taking into consideration the merit of the claim of each individual petitioner, within a period of three months from the date of receipt of certified copy of this order. Till a final order is passed in the matter, the petitioners shall be allowed to continue to remain in service and will be paid their salaries regularly.

(2024) 8 ILRA 410
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Sales/Trade Tax Revision No. 21 of 2021

M/S Balrampur Chini Mills Ltd.
...Revisionist
Versus
Commissioner Of Commercial Taxes U.P. Lko ...Opp. Party

Counsel for the Revisionist:
Rishabh Pandey, Rahul Agarwal

Counsel for the Opp. Party:
C.S.C.

Civil Law - U.P. Value Added Tax Act, 2008 - Section 59 - Revisionist is engaged in manufacture of sugar - Controversy raised to purchase of diesel at concessional rate of tax as per Notification of St. Government dated 10.08.2017 - Concession couldn't be availed due to want of certificate of Commissioner as prescribed therein - Application filed before Commissioner - Rejected - Appeal - Commercial Tax Tribunal upheld the order of Commissioner, appeal rejected - Impugned order - Held, transportation of sugarcane from Cane Purchase Centre to factory premises depicts 'manufacture' of sugar - Notification dated 07.12.2019 related to manufacture of sugar after purchasing sugarcane from farmers and transported from Cane Purchase Centre to Factory Gate, while Notification dated 10.08.2017, provides concessional rate of tax to all industrial units for the purpose of manufacture of taxable goods - If revisionist has received benefit under Notification dated 07.12.2019, he can't be denied under Notification dated 10.08.2017 - In absence of any restrictive clause in Notification dated 10.08.2017, the Tribunal and Commissioner had erred in interpreting the Notification dated 10.08.2017 in its application to sugar manufacturing units - Thus, entitled to benefit for purchase of diesel at concessional rate of tax. (Para 3, 4, 5, 6, 8, 12, 17, 18, 19)

Revision is allowed. (E-13)

List of Cases cited:

M/s Triveni Engineering & Industries Ltd Vs Commissioner Trade Tax, (Sales/Trade Tax Revision No. 1496 of 2004)

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

1. Heard Sri Rahul Agarwal, learned counsel for petitioner as well as Sri Sanjay Sarin, learned Standing Counsel for respondents.

2. By means of present revision, the revisionist has challenged the judgment of the Full Bench of the Commercial Tax Tribunal dated 25.02.2021 passed in

Appeal No. 01 of 2021 whereby they have upheld the opinion / decision of the Commercial Tax Tribunal, Uttar Pradesh dated 18.08.2021 wherein it was held that revisionist is not entitled for the benefit of Notification issued by the State of U.P. dated 10.08.2017 wherein the industrial units registered under the U.P. G.S.T. Act, 2017 were entitled for concessional rate of tax on the price of diesel which is used in the process of manufacture of taxable goods against a certificate prescribed by the Commissioner.

3. It has been submitted by learned counsel for revisionist that revisionist is under the U.P. G.S.T. Act and is engaged in manufacture of sugar by its unit at Balrampur, Uttar Pradesh. It is stated that for the purpose of manufacture of sugar, the sugar-cane is purchased from the farmers which are brought by them to the cane purchase centre established within the reserved area or assigned area. From the cane purchase centres the sugarcane is transported by the revisionist industrial unit to the factory premises where it is crushed and ultimately results in manufacture of sugar and also other byproducts.

4. The controversy pertains to the purchase of diesel at concessional rate of tax as per Notification of the State Government dated 10.08.2017 where the concession could not be availed by the revisionist due to want of certificate of the Commissioner as prescribed therein.

5. The petitioner being aggrieved by non-issuance of the certificate by the Commissioner had invoked the provisions of Section 59 of U.P. Value Added Tax (VAT) Act and referred the dispute to the Commissioner stating that they were fully entitled and eligible for being granted permission for purchase on concessional rate of tax of diesel but merely for want of a certificate by the Commissioner they were deprived of the same and consequently prayed that they should be declared to be eligible under the Notification dated 10.08.2017 entitling them to purchase diesel on concessional rate of tax.

6. The Commissioner by his opinion/order dated 04.12.2020 has rejected the application of the revisionist on two grounds. Firstly, that the crushing process starts only when the sugarcane reaches the factory premises and in the present controversy the petitioner is seeking purchase on concessional rate of tax on diesel for its transportation from the cane purchase centre to the factory premises. He was of the view that no aspect of 'manufacturer' is involved in transportation of sugarcane from cane purchase centre to the factory premises.

7. The second reason for rejecting the prayer of the revisionist was that with regard to transport from the cane purchase centre to the factory premises, the State Government in any case is covered by a Notification dated 07.12.2019 wherein the petitioner and the other Sugar Industries has been granted 42 paisa per quintal per kilometer rebate on the price of the sugarcane which is deducted from the farmer and accordingly, he was of the view that double benefit would accrue to the revisionist in case they were also given the benefit of the Notification dated 10.08.2017.

8. The revisionist being aggrieved by the order dated 04.12.2020 has preferred an appeal before the Commercial Tax Tribunal. The Commercial Tax by means

of impugned judgment dated 25.02.2021 also upheld the order of the Commissioner, Commercial Tax dated 04.12.2020 against which the present revision has been filed.

9. The Commercial Tax Tribunal has also affirmed the opinion/order rendered by the Commissioner while rejecting the appeal preferred by the revisionist.

10. Learned counsel for revisionist has submitted that the first issue is pertaining to as to whether the process of manufacturing commences from Cane Purchase Centre or after the sugarcane reaches the factory premises is no longer in res-integra and a Coordinate Bench of this Court in the case of **M/s Triveni Engineering & Industries Ltd Vs. Commissioner Trade Tax, (Sales/Trade Tax Revision No. 1496 of 2004)** has extensively dealt this aspect, as under:-

"6. The term used in Section 8(3)(b) of Act, 1956 is "for use by him in manufacture or processing of goods for sale", which are relevant for the purpose of present case since other items mentioned therein are not admittedly attracted. The question would be whether the two activities, in respect whereto revenue has found assessee guilty of violation, the purpose, for use of which, diesel was allowed to be purchased against Form-C, is one authorised or not.

7. In order to understand, it would be appropriate first to examine as to what is the actual way in which assessee claim aforesaid two activities to constitute part of manufacture and processing of goods.

8. The assessee deals in manufacture and sale of sugar for which sugarcane is the basic raw material. The sugarcane is produced by individual farmers. Sugarcane constitutes basic raw material for the assessee for manufacturing sugar. However, supply and purchase of sugarcane from farmers is not free, inasmuch as, it is controlled by statute and in Uttar Pradesh, it is regulated by U.P.Sugarcane (Regulation of Supply & Purchase) Act, 1953 (hereinafter referred to as "Sugarcane Supply and Purchase Act, 1953").

9. A sugar factory cannot purchase sugarcane from any farmer at its own volition but it is bound to purchase sugarcane only from such farmers, who are within a reserved area declared by Cane Commissioner for the purpose of a particular sugar factory, or assigned to it. For the purpose of sale and purchase of sugarcane in reserved or assigned area, State Government is empowered to regulate it vide Section 16 of Sugarcane Supply and Purchase Act, 1953. In this regard, it has framed rules namely U.P.Sugarcane (Regulation of Supply & Purchase) Rules, 1954 (hereinafter referred to as "Sugarcane Supply and Purchase Rules, 1954"). The factory owner is required to specify cane purchase centres throughout reserved area/assigned area so that farmers may not be required to transport sugarcane for long distance and factory owner himself would purchase sugarcane at those purchase centres and thereafter transport to its factory for its use. At purchase centres, factory owner is also obliged to provide weighment facilities and adequate labour for loading and unloading cane at such purchase centres. This is evident from Rules 38, 38-A and 39 of Sugarcane Supply and Purchase Rules, 1954. The sugarcane purchased by factory owner at purchase centres therefore, become property of factory owner at such purchase centres and therefrom, it has to

be transported by him upto the pithead in the factory for the purpose of its crushing.

10. It is not disputed by learned Standing Counsel that if the sugarcane if stored in factory premises itself, at some place, since a very large quantity thereof would be required continuously, and, if it is transported from that storage point to the pithead for crushing purpose, such transportation would form part of manufacture. In that view, I do not find why transportation of sugarcane from purchase centres to factory premises should be excluded from the term "manufacture of sugar". Nothing has been shown to this Court so as to pursue to take a different view in the matter.

11. The term "manufacture" has varied meanings and has got various sheds. It has to be considered in the context of item, which is up for consideration. General understanding of term "manufacture" is that it means bringing into existence a new substance. The word "manufacture" implies a change but every change in the raw material is not manufacture.

12. In CST Vs. Lal Kunwa Stone Crusher (P.) Ltd., (2000) 118 STC 287 (SC) the Court said that definition of the word "manufacture" makes it clear that every activity in relation to goods not only alter the same but also processing the same has also been included.

13. The term "manufacture" includes any process or part of process for making, altering, ornamenting, finishing, taking, labelling or otherwise drawing or tapping with a view to sell or distribute in the context of a drug. The "manufacture" involves series of processes and includes any process incidental or ancillary to the completion of a manufactured product as held in Union of India Vs. Ahmedabad Electricity Co. Ltd., (2003) 11 SCC 129.

14. In the context of mining of ore, the Court in Chowgule & Co. Pvt. Ltd. and Anr. Vs. Union of India & Ors., AIR 1981 SC 1014 said:

"Where a dealer is engaged both in mining operation as also in processing the mined ore for sale, the two processes being interdependent, it would be essential for carrying on the operation of processing that the ore should be carried from the mining site mined ore for sale, the two processes being inter-dependent, it would be essential for carrying on the operation of processing that the ore should be carried from the mining site where the mining operation comes to end to the place where the processing is carried on and that would clearly be an integral part of the operation of processing and if any machinery, vehicles, barges and other items of goods are used for carrying the ore from the mining site to the place of processing, they would clearly be goods used in processing of ore for sale. It is obvious that, in the present case, the mining of ore is done by the assessee with a view to processing the mined ore through the Mechanical Ore Handling Plant at the Marmagoa harbour and the entire operation of mining ore and processing the mined ore is one integrated process of which transportation of the mined ore from the mining site to the Marmagoa harbour is an essential part and, in the circumstances, it is difficult to see how the machinery, vehicles, barges and other items of goods used for transporting the mined ore from the mining site to the Marmagoa harbour can be excluded from consideration on the ground that they are not goods used in processing of ore for sale. The decision of this Court in Indian Copper Corporation case (supra) is directly in point and completely supports this conclusion which we are inclined to reach on principle. The assessee in that

case was a company which mined copper and iron ore from its own mines, transported the ore to its factory and manufactured finished products from the ore for sale."
(emphasis added)

15. In J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. Sales Tax Officer, Kanpur and Anr., 1965 (1) SCR 900, the Court said that if a process or activity was so integrally related to the manufactured goods so that without that process or activity, manufacture may, even if theoretically possible, be commercially inexpedient, goods intended for use in the process or activity would qualify.

16. In the present case, sugarcane in its entirety cannot be purchased by sugar factory at its factory premises and under law, it is bound to purchase from the farmers at cane purchase centres. For manufacturing of sugar, crushing of surgarcane is an integral part and for that purpose, sugarcane has to be transported from its place of storage or where it has been purchased to the point of crushing pit where it has to be off loaded for crushing. To my mind, this is integrally connected part of process of manufacturing of sugar and therefore diesel purchased against Form-C if used for cane procurement from centres to factory, it would not amount to violation of purpose for which the said diesel was purchased. The question no.1, therefore, is answered accordingly."

11. According to the aforesaid judgment, undoubtedly, the transportation of sugarcane from the Cane Purchase Centre to the Factory Premises is included in the term 'manufacture' of sugar and the Tribunal has not correctly appreciated the controversy and has clearly erred in law.

12. It has further been submitted that the said judgment has become final and the State did not challenge the same before Hon'ble the Supreme Court

13. The second question which arises for consideration is with regard to the benefit obtained by the revisionist under the Notification dated 07.12.2019 which according to the State Advised Price, the revisionist was also given 42 paisa per quintal per kilometer to a limit of Rs. 8.35 p per quintal for transportation of the sugarcane from the Cane Purchase Centre to the Factory Premises.

14. In this regard, it has been submitted that the said amount as prescribed in the Notification dated 07.12.2019 pertains to transportation of sugarcane and it is clearly not in relation to the purchase of diesel for transportation of sugar which two things are distinguishable and separate.

15. It was further vehemently submitted that Notification to benefit of which is being sought by the petitioner dated 10.08.2017 is applicable all across the board to all the manufacturing units which fulfill conditions prescribed therein, namely, that the beneficiary industrial unit should be engaged in manufacture of taxable goods under the U.P. G.S.T. Act and for the said manufacture they are required to obtain a certificate from the Commissioner, subsequent to which they will be entitled to purchase diesel at the concessional rate of tax. It has been submitted that the Notification dated 07.12.2019 and 10.08.2017 have been passed by the State of U.P. which was fully aware of the benefits being granted to the industrial units. The beneficial piece of legislation or policy seeking to promote

industrialization which itself does not provide for any restriction or limitations in its application to any particular segment or the industries given by the State Government has to be liberally construed keeping in view the object for such grant of subsidies or benefits to the industrial units.

16. Sri Sanjay Sarin, learned Standing Counsel for the State has opposed the revision. He has submitted that there is no infirmity in the order passed by the Commissioner, Commercial Tax as well as Commercial Tax Tribunal wherein it has denied the benefit to the revisionist of the Notification dated 10.08.2017 where it was found that the revisionist is already taking benefit of concessional rate of tax as provided for by the State Government in its Notification dated 07.12.2019 and they cannot be given a benefit of transpiration of sugarcane from the Cane Purchase Centre to Factory Premises, once the same benefit has already been obtained by the revisionist.

17. The benefit granted by Notification dated 07.12.2019 clearly confines to the industrial units who are engaged in manufacture of sugar after purchasing sugarcane from the farmers where benefits of transportation from the Cane Purchase Centre to the Factory Gate was provided, while by Notification dated 10.08.2017. Benefit for concessional rate of tax was provided to all the industrial units for the purpose of manufacture of taxable goods. Clearly even if the revisionist has received benefit under the Notification dated 07.12.2019 he cannot be denied the benefits under Notification dated 10.08.2017 inasmuch as there is no provision for excluding the revisionist for being granted benefit under the said Notification, and no such restrictions could be placed before us.

18. Had it been the intention of the Government to deny the benefit of the Notification dated 10.08.2017 in light of the fact that the sugar industrial units are already obtaining benefits under Notification dated 07.12.2019, the said facts would have been clearly mentioned in the Notification dated 10.08.2017. In absence of any restrictive clause in the Notification dated 10.08.2017, the Tribunal as well as the Commissioner, Commercial Tax had erred in interpreting and restricting the interpretation of the Notification dated 10.08.2017 in its application to the sugar manufacturing units.

19. In light of the aforesaid discussions, this Court is of the considered view that Commissioner, Commercial Tax as well as Commercial Tax Tribunal both have erred in interpreting the provisions of Notification dated 10.08.2017, according this Court is of the considered view that the revisionist clearly falls within the ambit of provisions contained in the aforesaid notification and was entitled to the benefit for purchase of diesel at the concessional rate of tax as prescribed therein.

20. In light of the above, the revision is **allowed**. The impugned orders dated 04.12.2020 and 25.02.2021 are set aside.

(2024) 8 ILRA 415
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Civil Revision No. 75 of 2024

Smt. Meetu Paruthi ...Revisionist
Versus
Kushank Paruthi ...Opp. Party

Counsel for the Revisionist:
Shantanu

Counsel for the Opp. Party:
Poorva Agarwal, Punit Kumar Gupta, Satyendra Nath Tripathi

A. Civil Law – Civil Procedure Code, 1908 – O. VII R. 11 – Court Fees Act, 1870 – Deficiency of court fees – Revision against order allowing the defendant's application under O. VII R. 11 – Maintainability – Alternative remedy of appeal under Act, 1870, how far create bar – Held, revision is maintainable and even otherwise alternative remedy is not the absolute bar. (Para 13)

B. Civil Law – Civil Procedure Code, 1908 – O. VII R. 11 – Court Fees Act, 1870 – S. 7(iv)(a) – Court fees – No court fees was claimed to be paid on the basis that the suit is for declaring Will deed void not for cancellation of the same – Permissibility – Held, Section 7 (iv) (a) of Act, 1870 clearly says that either suit is for cancellation or adjudging it to void, in both eventuality, court fee is required, therefore, there is no confusion in the statute – A suit has been preferred after death of testator, therefore, in the light of Section 7 (iv-a) of Act, 1870, it is having money value and court fee is liable to be paid. (Para 18 and 22)

Revision dismissed. (E-1)

List of Cases cited:

1. Pramila Tiwari Vs Anil Kumar Mishra & ors.; 2024:AHC:85067-DB

2. Civil Revision No. 599 of 1988; St. of U.P. Vs Mahant Shiva Nand Giri & ors.

3. First Appeal From Order No. 344 of 1997; Kailash Chand Vs Vth A.C.J., Meerut & ors.

4. First Appeal From Order No. 1480 of 2009; Rajni Swami Vs Shakuntala Sharma

5. First Appeal From Order No. 3382 of 2011; Sudha Sharma Vs Shashi Bala Sharma

6. Original Suit No. 4 of 2021; St. of West Bengal Vs U.O.I.decided on 10.07.2024 (SC)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Shantanu along with Sri Raj Kumar Dhama, learned counsel for revisionist and Sri Punit Kumar Gupta, learned counsel for opposite party.

2. Present civil revision has been filed seeking following relief:-

"It is, therefore, Most Respectfully prayed that this Hon'ble Court may graciously be pleased to stay the effect and operation of the impugned Judgment and Order dated 12.03.2024 passed by the Learned Additional Civil Judge (Senior Division) Court No. 9, Meerut in Original Suit No. 1100 of 2023 (Smt. Meetu vs. Kushank Paruthi) allowing the Application No. 46 Ga filed by the defendant/respondent under Order 7 Rule 11 of C.P.C.; during the pendency of the present revision before this Hon'ble Court, otherwise the revisionist shall suffer irreparable loss and injury."

3. At the very outset, Sri Punit Kumar Gupta, learned counsel for opposite party has raised preliminary objection and submitted that against the impugned order, there is remedy to file appeal under the provisions of The Court-fees Act, 1870 (hereinafter referred to as ' Act, 1870').

4. Sri Shantanu, learned counsel for revisionist has objected the submission made by learned counsel for opposite party and submitted that present revision has been filed against the order passed upon the application filed under Order VII Rule 11 of CPC, therefore, there is no occasion for the revisionist to file appeal and revision is the remedy provided under the law.

5. On merits, he submitted that Original Suit No. 1100 of 2023 has been filed before learned Civil Judge (Senior Division), Meerut under sections 34 & 38 of Specific Relief Act, 1963 to declare void alleged fraudulent Will deed dated 26.03.2021 registered on 20.02.2023 executed by Late Naresh Kumar Paruthi husband of revisionist Smt. Neetu Paruthi. Further, for seeking declaratory decree and permanent injunction in half share of the revisionist in the property belonging to Late Sri Naresh Kumar Partuthi after his death. After filing of suit, application under Order VII Rule 11 of CPC has been filed by defendant, which was partly allowed with direction to plaintiff to deposit court fee.

6. He next submitted that so far as deficiency of stamp fee is concerned, it may not be decided upon the application under Order VII Rule 11 of CPC rather issue is required to be framed after submission of written submissions and should have been decided along with other issues so framed.

7. He firmly submitted that as present suit has been filed to declare the Will deed void and not for cancellation of the same, therefore, no court fee is required and only court fees of Rs. 200/- as paid by the plaintiff is sufficient. He next submitted that similar issue was before the Division Bench judgment of this Court in the matter of ***Pramila Tiwari vs. Anil Kumar Mishra and 4 others; Neutral Citation.- 2024:AHC:85067-DB*** as to whether provisions of compulsory registration of Will is prospective or retrospective and the Court has held that registration of Will is not required in State of Uttar Pradesh. Based upon said judgment, learned counsel for revisionist submitted that once the registration of Will is not necessary, it shall not required to be cancelled and only declaration of void is sufficient.

8. He further submitted that while deciding the application under Order VII Rule 11 of CPC, only plaint is required to be seen and no defence may be considered by the Court. Here in present case, Court has considered the defence so raised by defendant in application under Order VII Rule 11 of CPC, therefore, order is bad and liable to be set aside.

9. Per contra, Sri Punit Kumar Gupta, learned counsel for opposite party firmly submitted that after filing of suit, once the issue of court fees is raised, it is required to be decided first and then Court may proceed to decide the remaining issues, so framed. In support of his contention, he has placed reliance upon the judgment of this Court in the matter of State of ***U.P. vs. Mahant Shiva Nand Giri and others (Civil Revision No. 599 of 1988).***

10. He next submitted that in case Will deed having money value, its cancellation or declaring the said void is having same meaning and effect. Once a Will deed is put-forth for execution either registered or unregistered, it shall be treated an instrument having money value and court fees is required to be paid. In support of his contention, he placed reliance upon the judgment of this Court in the matter ***Kailash Chand vs. Vth A.C.J., Meerut and others (Case No. F.A.F.O. No. 344 of 1997), Rajni Swami vs. Shakuntala Sharma (Case No. : F.A.F.O. No. 1480 of 2009) and Sudha Sharma vs. Shashi Bala Sharma (Case No. : F.A.F.O. No. 3382 of 2011).*** He also pointed out that in light of Section 7 Sub-Section iv(a) of Act, 1870, it is very clear that either suit is for

cancellation or adjudging it to void, in both eventuality, court fee is required, therefore, argument raised by learned counsel for revisionist is having no force.

11. He further submitted that so far as last argument of counsel for revisionist about the consideration of plaint only, while deciding application under Order VII Rule 11 of CPC is concerned, there is no dispute on this point. It has to be decided only from the plaint and it is required on the part of Court concerned to test the plaint on the principles of Order VII Rule 11 of CPC even if no application is filed. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of ***State of West Bengal vs. Union of India passed in Original Suit No.4 of 2021,*** delivered on 10.07.2024.

12. I have considered rival submissions made by learned counsels for parties and perused the records as well as judgments cited above.

13. So far as preliminary objection is concerned, this Court is of the view that as the revisionist has challenged the impugned order based upon the application under Order VII Rule 11 of CPC, therefore, revision is maintainable and even otherwise alternative remedy is not the absolute bar. Therefore, Court is proceeded to decided the case on merits.

14. The defendant-respondent has filed application under Order VII Rule 11 of CPC, which was partly allowed in light of Order VII Rule 11 (c) of CPC, which is quoted below:-

"11. Rejection of plaint.- The plaint shall be rejected in the following cases:-

(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;"

15. From the perusal of Order VII Rule 11 (c) of CPC, it is apparently clear that in case it is found that the relief claimed is under valued, Court may provide liberty to correct valuation within the time and in case of failure, plaint may be rejected. In the present case, Court while partly allowing the application has granted time to remove deficiency of stamp.

16. First issue is as to whether the valuation of plaint has to be seen at the first instance or after framing the issue on this point. Law is very much clear that once the objection is raised about insufficiency of Court fee, it is required on the part of Court to decide the same first and then proceed to decide other issues.

17. The very same view has been taken by this Court in the matter of ***Mahant Shiva Nand Giri*** (Supra). Relevant paragraph No. 12 is quoted below:-

"12. Sub-section (4) of Section 6 gives aright to the defendant to raise an objection about insufficiency of the court fee. Before proceeding with the suit, the court is bound to dispose of the said objection. If the defendant fails to raise any such objection or if he raised but failed to satisfy the court then the field of objection gets occupied by Section 6(3). It requires an objection to be filed by an officer mentioned in Section 24-A of the Act."

18. The second issue raised by learned counsel for petitioner about the

filing of suit for void and not for cancellation, therefore, no court fee is required is also squarely covered itself from section 7 sub-section iv(a) of Act, 1870, which clearly says that either suit is for cancellation or adjudging it to void, in both eventuality, court fee is required, therefore, there is no confusion in the statute. For ready reference, Section 7 sub-section iv(a) of Act, 1870 is being quoted below:-

"For cancellation or adjudging void instruments and decrees.- (iv-A) In suit for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value"

19. Apart that, this issue has also been considered by Division Bench of this Court in the matter of ***Rajni Swami*** (Supra). Relevant paragraph is quoted below:-

"5. The question is whether a Will can be regarded as a legal document which makes any property secure or safe. Section 2(h) of the Indian Succession Act, defines a Will as a "legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. "It is well known that during the life-time of the executant, the Will is ambulatory. It could be revoked by him at his will. Accordingly, a Will does not secure any property during the lifetime of the executant. Section 7(iv-A) does not require that an instrument should secure money or property having money value from the moment of its birth. It seems to us that whether an instrument secures money or property having money value within the meaning of Section 7(iv-A) is to be decided with reference to the date of the institution of the suit. It is to be seen whether a particular instrument secures on the date of the institution of the suit money or property having money value. This reference necessarily follows from a collocational reading of this Section with Section 39 of the Specific Relief Act. If this is so, as we think, then there is little doubt that on the date of the institution of the suit in this case the Will did secure property. Ganga Prasad the testator had died, and after his death the Will became irrevocable. Upon his death his estate would be disposed of in accordance with his directions in the Will. Accordingly it can be said that on the death of the testator the Will secures money or property having money value. We, therefore, hold that the court-fee paid on the plaint and the memorandum of appeal is insufficient. The amount of deficiency mentioned in the office report should now be paid by the plaintiff within three months.

15. We have considered the law. It is our duty to fit the law into the fact to come to a definite finding. There is a big gap between the declaration simplicitor and relief in the garb of declaration. If a person makes a prayer to declare right, title or interest of a property in his favour then it can be construed as declaration simplicitor but when a plaintiff seeks any declaration to disentitle others" right into a property, such type of circumvent prayer cannot be treated to be declaration simplicitor. In other words, he is not asking any relief for himself but want to prevent his opponent from enjoying fruit of the property. Therefore, such type of relief is virtually in the nature of injunction at first with the nomenclature of the "declaration." Therefore, it is required for the Court to go into the real nature of dispute arising out of the plaint to ascertain the cause and incidental cause which helps it. A Will is

execution of document of a testator to give his property to a person of his choice. Such Will will be enforceable only after the death of the testator. In some of the States of India, grant of probate by the appropriate court of law on the Will is compulsory and some of the State it is optional. In the State of U.P., obtain probate on the Will is optional, therefore, as soon as the testator dies and Will comes into light, it operates as a valuable instrument in favour of the person in whose favour property is devolved by such Will. If such person seeks a probate before the Court by filing it, no question of ad valorem court-fee will be applicable but it will be paid as soon as Court will grant such probate in his favour. In the present case, the defendant-respondent never approached to the Court to obtain a probate but enjoying the property as successor under the Will. Now, if such Will is declared by the Court as null and void, right of the person in the property or properties under the Will, will be extinguished. Therefore, the principle of securing property under the Will will be attracted. Therefore, under no stretch of imagination we can hold and say that the suit can be entertained on the basis of the fixed court-fees."

20. Again, in the matter of ***Kailash Chand*** (Supra), Court has taken similar view. Relevant paragraph is quoted below:-

"19. We have already held above that so long as the will has not become operative on account of death of the testator, the will is not a document or an instrument securing property having money value but once the testator dies and a suit is filed after the death of the testator, that will become an instrument securing the property having money value. As in the instant case, admittedly the suit has been filed long after the death of the testator, the will has become operative and, therefore, the will is an instrument or document securing property having money value. Since **Section 7 (IVA) (U. P. Amendment) specifically provides for payment of court fee in case where the suit is for or involving cancellation or adjudging void or voidable an instrument securing** property having money value. Article 17 (iii) of Schedule II of the Court Fees Act shall not be applicable. In our view, therefore, there is no error in the order passed by the trial court.

20. Consequently the appeal fails and is hereby dismissed. We, however, make no order as to costs."

21. In the matter of ***Sudha Sharma*** (Supra), Court has taken similar view. Relevant paragraph is quoted below:-

"10. Now as regards the argument of learned counsel for the appellant with regard to applicability of Article 17(iii) Court Fees Act is concerned, it would be useful to quote para-10 of the report of Kailash Chand's case (supra), which is reproduced as under:

10. On a bare perusal of Article 17(iii), it would appear that this Article shall be applicable in cases where the plaintiff seeks to obtain a declaratory decree without any consequential relief and there is no other provision under the Act for payment of fee relating to relief claimed. The question is whether in case where a decree declaring the will as null and void is sought, there is any provision under the Court Fees Act to cover the question of payment of Court Fees on the relief of such declaration. In case the answer to the question is that there is no other provision under the Act in case of a suit involving cancellation or

adjudging/declaring void or voidable a will on the question of payment of Court fees, then Article 17(iii) of Schedule II of the Court Fees shall be applicable and if such relief is covered by any other provisions of the Court Fees Act, then provisions of Article 17 (iii) of Schedule II will not be applicable. Careful reading of Section 7(iv-A) makes it abundantly clear that it also covers suits for or involving cancellation or adjudging/declaring null and void decree for money or an instrument securing money or other property having such value. The question, therefore, is whether a will would be treated as an instrument securing money or other property having such value. This question specifically arose before the Full Bench of this Court in the case of Smt. Bishnu Shri v. Smt. Suraj Mukhi and others, AIR 1966 All 563 (supra). The Majority view of the Court after considering the provisions of Indian Succession Act and the Court Fees Act was that the word 'instrument' in Section 7(iv-A) includes formal or legal documents in writing. It is sufficiently broad to include wills also. In para 7 the Court held that:

The question is whether a will can be regarded as a legal document which makes any property secure or safe. Section 2(h) of the Indian Succession Act define a will as a "legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. It is well known that during the life-time of the executant, the will Is ambulatory. It could be revoked by him at his will. Accordingly a will does not secure any property during the lifetime of the executant. Section 7(iv-A) does not require that an instrument should secure money or property having money value from the moment of its birth. It seems to us that whether an Instrument secures money or property having money value within the meaning of Section 7(iv-A) is to be decided with reference to the date of the institution of the suit. It is to be seen whether particular instrument secures on the date of the institution of the suit money or property having money value. This reference necessarily follows from a collocational reading of this section with Section 39 of the Specific Relief Act. If this is so we think, then there is little doubt that on the date of the institution of the suit in this case the will did secure property. The Court further held that:

“the word "securing" is the present participle from of verb "to secure". It has got various meanings (Words and Phrases) (Permanent Edition), Vol. 38 page 45-8) "Secures" as used in a contract whereby a vendor agrees to execute a conveyance thereof as soon as the vendee secures the payment of purchase money, means not a payment in money but the giving by the vendees of something by means whereof payment at some future time can be procured or compelled (Ibid), Webster defines "secures" to mean "to make certain" "to put beyond hazard". To secure" is to make safe, to put beyond hazard of losing or of not receiving, as to secure a debt by a mortgage; it also means to get safely in possession, to obtain to acquire certainly, as to secure an inheritance or a price [Ibid 459].”

22. Now coming to the present case. The facts are akin to the facts of judgment reproduced here-in above. In the present case too, alleged Will deed was executed on 26.03.2021 by the husband of revisionist and also registered on 20.02.2023 and to declare the void, present suit has been filed restraining others to claim any right over the half of the property referred in Will deed. Certainly, a suit has been preferred after death of testator, therefore, in the light

of Section 7 (iv-a) of Act, 1870, it is having money value and court fee is liable to be paid.

23. Another issue was as to whether while deciding the application under Order VII Rule 11 of CPC, defence was taken care of by the Magistrate or not. From the perusal of application as well as impugned order, it is apparently clear that so far as defence is involved, the court has not accepted the same, but partly allowed the application only on the ground of insufficiency of court fee, which is strictly in accordance with Order VII Rule 11(C) of CPC. Therefore, I found no infirmity in the impugned order on this point also.

24. Not only this, even if there is no application under Order VII Rule 11 of CPC, it is required on the part of Court to see the ingredients of Order VII Rule 11 of CPC and if it is found, plaint may be rejected.

25. Apex Court has also taken similar view in the matter of ***State of West Bengal*** (Supra),. Relevant paragraph is quoted below:-

"26. In view of the word 'shall' used in the provisions, a duty is cast on the court to examine as to whether the plaint is hit by any of the infirmities provided in the six clauses of Order VII Rule 11 of the CPC. A duty is cast on the court to reject the plaint even without the intervention of the defendant. Reference in this respect could be made to the judgment of this Court in the case of ***Sopan Sukhdeo Sable*** (supra)."

26. Therefore, in the light of law as well as facts discussed here-in above, I found no infirmity or illegality in the impugned order.

27. Writ petition lacks merit and is accordingly ***dismissed***. No order as to costs.

(2024) 8 ILRA 422
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Civil Revision No. 96 of 2024

Punjab National Bank ...Revisionist
Versus
Ikram Khan & Ors. ...Opp. Parties

Counsel for the Revisionist:
Ashok Shankar Bhatnagar

Counsel for the Opp. Parties:
Tarun Agarwal

A. Civil Law – Civil Procedure Code,1908 – O. I R. 10 & O. VII R. 11(a) – Rejection of plaint – No cause of action was shown against few defendant – Remedy available to such defendant – Held, where there is no other cause of action against one of the defendants, but there is cause of action against other defendants, application under Order VII Rule 11 is not maintainable and suit shall proceed – Revisionist-defendant is having remedy to move application to strike out its name from the array of defendants as its name has been joined improperly as neither there is any cause of action shown nor relief has been claimed against the revisionist-defendant. (Para 13, 16 and 22)

Revision dismissed. (E-1)

List of Cases cited:

1. I.T.C. Ltd. Vs Debts Recovery Appellate Tribunal & ors.; AIR 1998 SC 634

2. Nandalal N. Verma And Co. Ltd. Vs Alliance Mills (Leasee) Pvt. Ltd.; (1994)2 CALLT 82 (HC)

3. M. V. "Sea Success I" Vs Liverpool And London Steamship; 2002(2) BomCR 537.

4. Madhav Prasad Aggarwal & anr. Vs Axis Bank Ltd. & anr.; 2019 0 Supreme (SC) 870

5. Sejal Glass Ltd. Vs Navilan Merchants Pvt. Ltd.; 2017 0 Supreme (SC) 1029

6. Balwant Singh Vs The St. Bank of India & ors.; AIR 1976 Punjab and Haryana 316 (FB)

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard Sri Ashok Shankar Bhatnagar, learned counsel for the revisionist and Sri Tarun Agarwal, learned counsel for the opposite party No. 1.

2. Present revision has been filed with the following prayer:

"Hon'ble court may pleased to allowed this revision and set aside the judgment and order dated 16.05.2024 and its formal order dated 11.05.2024 passed by Civil Judge(S.D.), Aligarh in O.S. No. 308 of 2023 Ikram Khan Vs. Smt. Amreena and ors. With costs throughout and may further be pleased to pass any other order or orders, grant any other relief or reliefs and give directions which this Hon'ble Court may deem fit and proper under the facts and circumstances on the following amongst other grounds."

3. Learned counsel for the revisionist submitted that opposite party No. 1-plaintiff has filed Original Suit No. 308 of 2023 and from the perusal of the aforesaid plaint, no cause of action is made out against revisionist-defendant No. 5 IInd set, therefore, revisionist-defendant has filed application under Order VII Rule 11(a) CPC to reject the plaint, which was dismissed vide impugned order dated 16.05.2024. He firmly submitted that once it is undisputed from the plaint that not a single word has been written against the revisionist-defendant, therefore, it is required for the court to reject the plaint, so far as it relates to revisionist-defendant. He next submitted that application under Order VII Rule 11(a) CPC has been filed on the ground that no cause of action has arose for filing of suit against revisionist-defendant and on this ground alone, plaint is liable to be rejected, but the court below has not returned any finding on this point and dismissed the application under Order VII Rule 11(a) CPC by the order impugned. In support of his contention, learned counsel for the revisionist-defendant has placed reliance upon the judgment of Hon'ble Apex Court in the matter of ***I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and others: AIR 1998 SC 634,*** judgment of Calcutta High Court in the matter of ***Nandalal N. Verma And Co. Ltd. Vs. Alliance Mills(Leasee) Pvt. Ltd.: (1994)2CALLT82(HC)*** and judgment of Bombay High Court in the matter of ***M.V. "Sea Success I" Vs. Liverpool And London Steamship: 2002(2) BOMCR537.***

4. Per contra, Sri Tarun Agarwal, learned counsel for the opposite party No. 1 vehemently opposed the submission so made by the learned counsel for the revisionist-defendant and submitted that first of all application under Order VII Rule 11(a) CPC has not been filed for rejecting the plaint only in respect of revisionist-defendant, but it is for rejection of the whole plaint. He also pointed out that plaint may not be rejected in particular for one of the defendants only, either the plaint may be rejected as a whole or may not be rejected at all. In support of his contention,

he placed reliance upon the judgment of Hon'ble Apex court in the matters of ***Madhav Prasad Aggarwal & Anr. Vs. Axis Bank Ltd. & Anr.: 2019 0 Supreme(SC) 870, Sejal Glass Ltd. vs. Navilan Merchants Pvt. Ltd.: 2017 0 Supreme(SC) 1029,*** judgment of Full Bench of Punjab and Haryana High Court in the matter of ***Balwant Singh Vs. The State Bank of India and others: AIR 1976 PUNJAB & HARYANA 316 FULL BENCH.***

5. I have considered the submissions advanced by the learned counsel for the parties and perused the record as well as judgments relied upon.

6. From the perusal of the plaint, it is found that there is no allegations against the revisionist-defendant (Punjab National Bank) and in light of there being no allegation, revisionist has filed application under Order VII Rule 11(a) CPC to reject the plaint. For ready reference Order VII Rule 11(a) CPC is being quoted hereinbelow:

"11. ***Rejection of plaint.****— The plaint shall be rejected in the following cases:—*

(a) where it does not disclose a cause of action;"

7. Learned Judge while deciding the application has rejected the same on the ground that from the perusal of the plaint, there appears to be cause of action against the revisionist-defendant and rejected the application vide order dated 16.05.2024. In the impugned order, court has not returned any finding as to whether, in case there is no cause of action against the revisionist-defendant set as shown in the plaint, as to how plaint would continue.

8. To decide this issue as the facts are undisputed, I have also gone through judgments relied upon the by the learned counsel for the parties.

9. Learned counsel for the revisionist-defendant has placed reliance upon the judgment of Apex Court in the matter of ***I.T.C. Limited(Supra).*** Relevant paragraph of the aforesaid judgment is being quoted hereinbelow:

"29. For the aforesaid reasons, we hold that there is no cause of action even from the plaint allegations, against the appellant. Appeal allowed and the plaint if rejected under Order 7, Rule 11(a) as against the appellant-5th defendant. Appeal is allowed accordingly to that extent. There will be no order as to costs."

10. In the aforesaid case, bank has filed a suit with the allegation of fraud upon the defendant No. 5. Against the said suit, defendant No. 5 has filed application under Order VII Rule 11 CPC to reject the suit as there is no fraud played by him, which was dismissed. Against that, appeal was preferred before the DRAT, which was dismissed and writ petition filed against that order has also been dismissed. The matter went up to Apex Court and the Apex Court has considered that no fraud as alleged has been played by the defendant No. 5 and accordingly rejected the plaint so far as it relates to defendant No. 5.

11. In fact this was not the issue before the Apex Court that as to whether plaint as a whole or in particular may be rejected or not and Apex Court based upon facts of the case as rejected the plaint so far as it related to defendant No. 5.

12. Learned counsel for the opposite party No. 1 has also placed reliance upon the judgments of full Bench of Punjab and Haryana High Court in the matter of ***Balwant Singh(Supra)*** in which the issue was as to whether a plaint does not disclose a cause of action in respect of the part of the claim against some of the defendants is liable to be rejected in its entirety. Relevant paragraph of the aforesaid judgment is being quoted hereinbelow:

"4. The short question that requires determination in this case is, whether a plaint which does not disclose a cause of action in respect of the part of the claim against some of the defendants is liable to be rejected in its entirety.

11. As a result of the above discussion, I hold that the plea raised by the petitioner is untenable and the contrary view is neither sound nor just and is not warranted by the language of the statute. Consequently, my answer to the question posed is that the provisions of Order 7, Rule 11 (a) of the Code of Civil Procedure, would be attracted only in a case where by reason of the plea that a plaint does not disclose a cause of action, the plaintiff is to be wholly non-suited, but this rule would have no applicability to cases where a plaint discloses & cause of action in respect of the part of the claim against some of the defendants, as in that event the names of the defendants against whom there is no cause of action or the suit is barred by law, have to be struck off and the suit has to proceed against the remaining defendants. The case would now go back to the learned Single Judge for disposal on merits."

13. After considering the law as well as judgments, it was held by the Full Bench of Punjab and Haryana High Court that the plaint does not discloses the cause of action and the plaintiff is to be wholly non suited, but in case a plaint discloses a cause of action in respect of part of claim against five defendants in that event, the names of defendants against whom there is no cause of action may be struck of.

14. In 2017 the same issue came before the Apex Court in the matter of ***Sejal Glass Ltd.(Supra).*** In this case, the facts of the case are deposed in paragraph 4 of the judgment and the same is being quoted hereinbelow:

"4. An application dated 08.07.2016 was filed by the Defendant(s) under Order VII Rule 11 stating that the plaint disclosed no cause of action. By the impugned judgment dated 07.09.2016, it has been held that the plaint is to be bifurcated - it discloses no cause of action against the Directors i.e. Defendant Nos. 2 to 4 but the suit is to continue against the Defendant No.1-Company. It has further been held that the defendant, in any case, is barred from filing a written statement in the suit as he has taken inordinate time to do so."

15. In the aforesaid case, Apex Court after considering the provisions in detail has replied in its paragraph 10, 11 & 13. The Court has taken a very clear cut view that plaint as a whole must be rejected and not in part. Paragraph 10, 11 & 13 are being quoted hereinbelow:

"10. We are afraid that this is a misreading of the Madras High Court judgment. It was only on the peculiar facts of that case that want of Section 80 CPC against one defendant led to the rejection of the plaint as a whole, as no cause of action would remain against the other

defendants. This cannot elevate itself into a rule of law, that once a part of a plaint cannot proceed, the other part also cannot proceed, and the plaint as a whole must be rejected under Order VII Rule 11. In all such cases, if the plaint survives against certain defendants and/or properties, Order VII Rule 11 will have no application at all, and the suit as a whole must then proceed to trial.

11. If only a portion of the plaint, as opposed to the plaint as a whole is to be struck out, Order VI Rule 16 of the CPC would apply. Order VI Rule 16 states as follows:-

"16. Striking out pleadings.- The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading-

a) which may be unnecessary, scandalous, frivolous or vexatious, or

b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or

c) which is otherwise an abuse of the process of the Court."

It is clear that Order VI Rule 16 would not apply in the facts of the present case. There is no plea or averment to the effect that, as against the Directors, pleadings should be struck out on the ground that they are unnecessary, scandalous, frivolous, vexatious or that they may otherwise tend to prejudice, embarrass or delay the fair trial of the suit or that it is otherwise an abuse of the process of the Court.

13. The Court is vested with a discretion under this order to deal with an issue of law, which it may try as a preliminary issue if it relates to the jurisdiction of the Court, or is a bar to the suit created for the time being in force. Obviously, this provision would apply after issues are struck i.e. after a written statement is filed. This provision again cannot come to the rescue of learned counsel for the respondent."

16. From the perusal of the judgment of Apex Court in the matter of ***Sejal Glass Ltd.(Supra)*** it is absolutely clear that in case there is no cause of action against one defendant, but plaint survives against certain defendants, application under Order VII Rule 11(a) CPC would have no application and suit as a whole must have been then proceeded to trial. The Apex Court is of the view that in such facts, where there is no other cause of action against one of the defendants, but there is cause of action against other defendants, application under Order VII Rule 11 is not maintainable and suit shall proceed.

17. Again the similar matter was before the Apex Court in the matter of ***Madhav Prasad Aggarwal(Supra)*** and the Court has clearly held that plaint is to be rejected as a whole and not in part. Relevant paragraph of the said judgment are being quoted hereinbelow:

"11. We do not deem it necessary to elaborate on all other arguments as we are inclined to accept the objection of the appellant(s) that the relief of rejection of plaint in exercise of powers under Order 7 Rule 11(d) of CPC cannot be pursued only in respect of one of the defendant(s). In other words, the plaint has to be rejected as a whole or not at all, in exercise of power Order 7 Rule 11 (d) of CPC. Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court in the case of Sejal Glass Limited(supra) is directly on the point. In that case, an application was filed

by the defendant(s) under Order 7 Rule 11(d) of CPC stating that the plaint disclosed no cause of action. The civil court held that the plaint is to be bifurcated as it did not disclose any cause of action against the director's defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit can continue against defendant No.1company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11(d) of CPC. The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaint can either be rejected as a whole or not at all. The Court held that it is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) of CPC will have no application at all, and the suit as a whole must then proceed to trial."

13. Indubitably, the plaint can and must be rejected in exerciseof powers under Order 7 Rule 11(d) of CPC on account of noncompliance of mandatory requirements or being replete with any institutional deficiency at the time of presentation of the plaint, ascribable to clauses (a) to (f) of Rule 11 of Order 7 of CPC. In other words, the plaint as presented must proceed as a whole or can be rejected as a whole but not in part. In that sense, the relief claimed by respondent No.1 in the notice of motion(s) which commended to the High Court, is clearly a jurisdictional error. The fact that one or some of the reliefs claimed against respondent No.1 in the concerned suit is barred by Section 34 of 2002 Act or otherwise, such objection can be raised by invoking other remedies including under Order 6 Rule 16 of CPC at the appropriate stage. That can be considered by the Court on its own merits and in accordance with law. Although, the High Court has examined those matters in the impugned judgment the same, in our opinion, should stand effaced and we order accordingly.

15. A fortiori, these appeals must succeed on the sole ground that the principal relief claimed in the notice of motion filed by respondent No.1 to reject the plaint only qua the said respondent and which commended to the High Court, is replete with jurisdictional error. Such a relief "cannot be entertained" in exercise of power under Order 7 Rule 11(d) of CPC. That power is limited to rejection of the plaint as a whole or not at all.

18. Apex Court in the matter of ***Madhav Prasad Aggarwal(Supra)*** following the judgment in ***Sejal Glass Ltd.(Supra)*** has taken the very same view. In fact, the firm view taken by the Apex Court in ***Sejal Glass Ltd.(Supra)*** has been reiterated in this judgment and the Court has taken the view that in such eventuality, suit will proceed and it cannot be rejected in part only for one defendant.

19. Now, coming to the the facts of the present case. It is undisputed that in the plaint filed by the plaintiff-opposite party No. 1, there is cause of action against other defendants, i.e. defendant Nos. 1 to 4 Ist set, therefore, by the application under Order VII Rule 11(a) CPC filed by the revisionist-defendant No. 5 IInd set, plaint cannot be rejected and the plaint shall proceed as a whole, because it would injustice to the plaintiff so far as the plaint relates to claim against defendants Ist set i.e. defendant Nos. 1 to 4.

20. Now, there is one more legal issue as to whether revisionist-defendant is having any remedy available under the law or not, in case there is no allegation against him in the plaint.

21. I have perused the Order I Rule 10 CPC that will come in the rescue of revisionist-defendant, which is being quoted hereinbelow:

"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

……
……
……
……
……"

22. Order I Rule 10(2) CPC provides that court may at any stage of the proceedings either upon or without the application of either party may strike out name, in case any party is joined improperly, whether it is plaintiff or the defendant. Meaning thereby that revisionist-defendant is having remedy to move application to strike out its name from the array of defendants in Original Suit No. 308 of 2023 as its name has been joined improperly as neither there is any cause of action shown nor relief has been claimed against the revisionist-defendant.

23. Therefore, in view of the law discussed as above, I find no illegality or infirmity in the impugned order dated 16.05.2024.

24. Petition lacks merit and is accordingly **dismissed**.

25. No order as to costs.

(2024) 8 ILRA 428
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.08.2024

BEFORE

THE HON'BLE IRSHAD ALI, J.

Contempt Application (Civil) No. 562 of 2016

Prashant Chandra ...Applicant
Versus
Harish Gidwani Deputy Commissioner Of Income Tax Range 2 ...Opp. Party

Counsel for the Applicant:
Mudit Agarwal, Anand Prakash Sinha, Radhika Singh

Counsel for the Opp. Party:
Neeraj Chitravanshi, Kushagra Dikshit, Manish Mishra

A. Contempt Law – Contempt of Courts Act, 1971 – Section 12 – Scope –Majesty of court of law – Willful disobedience – Writ Court quashed the notice issued to the petitioner for assessment year 2011-12 on the ground of jurisdictional error and the opposite party was to delete all the outstanding amount from the web portal showing the dues to be paid – However, deliberately and intentionally the outstanding of notice of assessment year 2011-12 became operation on the web portal till seven years and seven months which ruined the reputation of the applicant – Willful disobedience alleged – Majesty of court of law, when is required to be upheld – Held, willful and deliberate contempt must be punished both by the imprisonment and fine as it is absolutely imperative to uphold the dignity and majesty of a court of law (Para 48, 51 and 55)

B. Contempt law – Contempt of Courts Act, 1971 – S. 12 – Scope –Courts must not travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. (Para 47)

C. Rule of law – Disobedience of the Court – Role of Judiciary – Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic St.. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protect at all costs. (Para 60)

Contempt disposed of. (E-1)

List of Cases cited:

1. Sebastian M. Hongray Vs U.O.I.; (1984) 3 SCC 82

2. T.N. Godavarman Thirumulpad Vs Ashok Khot & anr.; (2006) 5 SCC 1

3. Patel Rajnikant Dhulalbai & anr. Vs Patel Chandrkant Dhulabhai & ors.; (2008) 14 SCC 561

4. Civil Appeal No. 4955 of 2022; Balwantbhai Somabhai Bhandari Vs Hiralal Somabhai & ors. decided on 06.09.2023

5. Sudhir Vasudeva Vs M. George Ravishekaran; (2014) 3 SCC 373

6. B.K. Kar Vs The Chief Justice and His Companion Judges; AIR 1961 SC367

7. Mrityunjoy Das & ors. Vs Hasibur Rahaman & ors.; (2002) 3 SCC 739

8. Dinesh Kumar Gupta Vs Unite India Insurance Company Ltd. & ors.; (2010) 12 SCC 770

9. Ram Kishan Vs Tarun Bajaj & ors.; 2014(16) SCC 204

10. Avishek Raja & ors. Vs Sanjay Gupta; (2017) 8 SCC 435

11. Civil Appeal No. 8132 of 2019; Principal Commissioner of Income Tax Vs M/S I-Ven Interactive Ltd., Mumbai

12. In Re: P.C. Sen v. Unknown; AIR 1970 SC 1821

13. Raza Textiles Ltd. Vs Commissioner of Income Tax; 1989 (178) ITR 496

14. Commissioner of Income Tax Vs Lalit Kumar Bardia; ITA 127 of 2006

15. Commissioner of Income Tax Vs M/s All India Children Care & Education; IAPL 89 of 2003

16. Commissioner of Income Tax Vs Sohan Lal Sewa Ram Jaggi decided on 05.02.2008

17. Attorney General Vs Time Newspaper Ltd.; 1974 AC 273

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Ms. Radhika Singh, learned counsel for the applicant and Shri Neerav Chitravanshi, learned counsel for the opposite party assisted by Shri Kushagra Dikshit, learned Advocate at length.

2. Order dated 1.11.2023 vide which charges have been framed, notices gist of the matter. The said order is extracted hereinbelow:

1. Heard Ms. Radhika Singh, learned Advocate for the applicant along with Sri Anand Prakash Sinha, learned Advocate and Shri Neerav Chitravanshi, learned counsel for the opposite party assisted by Shri Kushagra Dikshit, learned Advocate.

2. The present contempt application under Section 12 of the Contempt of Courts Act, 1971 has been filed alleging willful and deliberate disobedience of judgment and order dated 31.03.2015 passed by a Division Bench of this Court in Writ Petition No.9525 (MB) of 2013 whereby the following direction was issued:

"A perusal of Annexure SA-3 annexed with the supplementary affidavit dated 31.3.2015 shows that in response to the notice dated 3.11.2014, the petitioner preferred written objection to the Assessing Officer bringing to his notice the pendency of the aforesaid writ petition and also apprising him that Section 127 was not even remotely attracted. Therefore, it was incumbent upon the opposite party No.2 to have waited for the outcome of the writ petition, but he proceeded with the matter which shows prejudicial and impartial attitude of the authority. It may be noted that transparency and fairness is the essence of the state action. Therefore, the authorities are expected to proceed in disciplined manner without creating any doubt in the mind of the asseessees. As averred above, it was the duty of the Assessing Officer to have referred the question of jurisdiction to the Chief Commissioner or the Commissioner as the case may be under sub-section (2) of Section 124 of the Act and not doing so, this vitiated the further proceedings.

Here, there is complete departure from the settled procedure. It comes out from the record that when the petitioner refused to submit to the jurisdiction of the said Assessing Officer at Lucknow, the authority/respondent No.2 proceeded ex parte and dispatched a demand of almost Rs.52 lacs. At the cost of repetition, we would like to mention that in the notice dated 11.9.2013, which is computer generated clearly reveals that the Delhi address of the petitioner was scored out and in handwriting, the local address has been added. Therefore, it is incorrect to say that the Delhi Address was not in the knowledge of the respondents and we find force in the submissions of the petitioner that local address was inserted deliberately to create jurisdiction, which, in fact, legally was not vested with the opposite party No.2. Therefore, the opposite party No.2 exceeded its jurisdiction, which not only vitiates the impugned show cause notice but the entire proceedings. In these circumstances, the entire proceedings being ab initio illegal, without jurisdiction and in violation of Section 143 (1) (a) of the Income-tax Act.

For the reasons aforesaid, the writ petition is allowed and the impugned notice dated 11.9.2013 is quashed. As the notice notice has already been quashed,

consequential orders, if any, are also quashed. "

3. This Court had, after after several hearings, passed an order dated 22.09.2022 putting the respondent-contemnor to notice as to why the charge should not be framed against him for having willfully flouting the order dated 31.03.2015 passed by the writ Court. After hearing the counsel for the parties at length and examining the pleadings of the parties, an order dated 16.12.2022 was passed by this Court disposing of the contempt application and a fine of Rs.25000/- was awarded and the opposite party/ contemnor was ordered to undergo simple imprisonment for a period of one week. Thereafter, vide an order dated 17.01.2022 now the matter has to be heard afresh.

4. Ms. Radhika Singh, learned counsel for the applicant submitted that the order dated 31.03.2015 passed by the writ Court had clearly provided that the jurisdiction to assess the applicant at Lucknow is conspicuously absent in the income tax authority at Lucknow and that the petitioner can only be assessed by the assessing authority at New Delhi. She next submitted that the writ petition had been filed when notices for a manual scrutiny for the assessment year 2012-13 had been received by the applicant and the assessing officer at Lucknow that is the respondent-contemnor did not pay any heed to the objection of jurisdiction taken by the applicant and proceeded with the assessment proceedings threaten to complete the same by 30.03.2015.

5. Learned counsel for the applicant next submitted that as per the official records of the income tax also the applicant is an assessee of income tax at New Delhi and therefore, the computer-generated notice records the New Delhi address of the assessee. She next submitted that scoring out the New Delhi address and sending the notice at Lucknow address was an act of fraud.

6. Learned counsel for the applicant next submitted that the opposite party-contemnor proceeded with the assessment despite the filing of the writ petition and passed an order of assessment which was also assailed by amending the writ petition and the writ Court quashed the order of assessment. Despite the said order having been quashed, the respondent-contemnor did not withdraw the demand which continued to be displayed on the income tax web portal for about 7 years and 7 months and it was only after it was pointed out before this Court during the hearing of the application that the outstanding demand on the web portal had been causing grave humiliation to the applicant who was being treated as a defaulter of income tax by financial institution and the credit worthiness of the applicant had also been seriously impacted which had deprived the applicant in several ways.

7. Learned counsel for the applicant next submitted that even after the writ Court had clearly provided in the judgment and order dated 31.03.201 that the tax authority at Lucknow had no jurisdiction to assess the applicant, the same officer i.e. the opposite party-Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-II, Lucknow revived the notice dated 20.09.2014 which has been issued for manual scrutiny for the succeeding assessment year 2013-14 was revived and a notice dated 24.06.2015 was sent to applicant at his New Delhi address and again on 15.03.2016 another notice was issued to the applicant threatening to make an exparte assessment pursuant to earlier notices sent in respect to the assessment year 2012-13.

8. Learned counsel for the applicant next submitted that written representations were made to the opposite party pointing out that he did not have the jurisdiction to assess the applicant in view of the orders passed by the writ Court on 31.03.2015, but the applicant was told that the order of the writ Court was being appealed against before the Supreme Court and hence, the opposite party was not bound to comply with the order of the writ Court. Learned counsel for the applicant thus submitted that the opposite party is guilty for willful and deliberate contempt as he was fully aware of the impact of the order dated 31.03.2015 passed by the writ Court and had refused to ensure compliance on the ground that the special leave petition was to be filed before the Supreme Court and in furtherance of the said deliberation the opposite party did not withdraw the demand which had been generated in furtherance of the order of assessment made by him although the said order had been set aside by the writ Court vide the order dated 31.03.2015.

9. Per contra, learned counsel for the opposite party submitted that as the Department had taken decision to file a special leave petition against the judgment and order dated 31.03.2015, the opposite party did not commit any illegality in not complying with the order dated 31.03.2015. He pointed out that in paragraph 23 of the counter affidavit, this aspect had clearly been mentioned and only because the special leave petition was not filed would not mean that the opposite party had willfully and deliberately violated the order dated 31.03.2015.

10. Learned counsel for the opposite party next submitted that the order dated 31.03.2015 had been passed in the writ petition filed by the applicant assailing the assessment for the assessment year 2012-13 and as such, the order dated 31.03.2015 would have no application in the succeeding financial year 2013-14. He also pointed out that earlier in respect of the assessment year 2011-12 the applicant had preferred writ petition No.1848 of 2014 which had been dismissed vide an order dated 27.03.2014. This Court in the aforesaid writ petition has held that main place of profession of the applicant would be at Lucknow for the assessment year 2011-12 and accordingly, the assessing officer had rightly exercised power under Section 142 of the Act. Learned counsel next submitted that every assessment year for the purpose of income tax is different and since the order dated 31.03.2015 had been passed in respect of assessment year 2012-13 it would have no application in respect of the assessment year 2013-14.

11. Learned counsel for the opposite party next submitted that the opposite party was not responsible for withdrawing the demand from the web portal of the income tax and in any case after the same had been pointed out clearing the hearing of the contempt petition the opposite party was instrumental in getting the demand reflected on the web portal withdrawn by the present assessing officer and as of now the demand stands withdrawn on 22.11.2022 and the said order dated 22.11.2022 has been placed on record with the supplementary affidavit of Mr. Harish Gidwani filed on 5.12.2022 and indicates that the same was being withdrawn in compliance of the orders dated 31.03.2015 passed in writ petition No.9525(MB) of 2013.

12. Learned counsel for the opposite party next submitted that upon to the jurisdiction being raised by the applicant, sufficient opportunity had been given by the opposite party and on

15.03.2016 the opposite party had given further opportunity to the applicant indicating that no application for transfer of jurisdiction had been received by the opposite party and the applicant had not invoked Section 127 by moving the competent authority to transfer the case to some other assessing officer and no application was made by the applicant to transfer his case to New Delhi.

13. Learned counsel for the opposite party next submitted that the opposite party was the assessing officer as the PAN database was showing his jurisdiction in assessment year 2013-14 against which no order or direction had been passed by this Court in the judgment and order dated 31.03.2015 passed in Writ Petition No.9525 (MB) of 2013. Learned counsel next submitted that the initial notice for the assessment year 2013-14 had been given by the opposite party on 20.9.2014 and the applicant had not filed any objection within 30 days of the issuance of the said notice as is required under Section 124 (3) of the Income Tax Act, 1961 and hence, the notice was valid and the assessment made for the assessment year 2013-14 cannot be faulted.

14. Learned counsel for the opposite party next submitted that new notice issued was also valid as per para-6 of the AST Instruction no.115 of Directorate of Income Tax, Systems, New Delhi circulated vide letter F.No.DIT(S)-II/CASS/2014 dated 02.08.2013 which categorically says that in all cases under compulsory scrutiny, notice under Section 143(2) will be generated from the system only by the officer having PAN in his/ her jurisdiction.

15. Learned counsel for the opposite party next submitted that in order to get the jurisdiction changed, an order under Section 127 of the Income Tax Act, 1961 issued by the competent authority is required which was not complied with by the applicant and as the objections were filed beyond 30 days, the same was not considered by this Court in writ petition No.1848 (MB) of 2014 and the same was dismissed and it has been denied that for the assessment year 2011-12 the applicant was assessed at New Delhi.

16. Learned counsel for the opposite party next submitted that after he passing of the judgment and order dated 31.03.2015, the opposite party has never proceeded against the applicant for the assessment year 2012-13 and the merely changing the principal place of profession or residential address in PAN does not automatically change the jurisdiction of the assessment officer. He next submitted that while passing the assessment order for the assessment year 2013-14 the assessing officer had given opportunity to the applicant during course of the assessment proceedings to provide any such letter or application for transfer of jurisdiction, but no reply was submitted by him. He again submitted that the opposite party has not violated the directions given by this Court vide judgment and order dated 31.3.2015 and no further proceedings for assessment year 2012-13 was initiated by the opposite party is found to have inadvertently violated the orders of this Court, then he renders unconditional apology to this Court.

17. I have considered the submissions advanced by learned counsel for the parties and perused the material on record.

18. On its perusal, it is found that the judgment and order dated 31.03.2015 passed by the writ Court in Writ Petition No.9525 (MB) of 2013 is unambiguous and clear and is not confined to any particular year but lays down the jurisdiction of the

authority in accordance with the provisions contained in the Income Tax Act, 1961. The Divisional Bench also considered the effect of Sections 124 and 127 of the Act and has clearly recorded that in case any objection being raised in respect of the jurisdiction of the assessing officer as has been done in the present case when the applicant had referred the pending writ petition after the issuance of the first notice dated 20.09.2014, the opposite party should have awaited the decision of the writ Court and in any case as the income tax authorities are expected to proceed in disciplined manner without creating any doubt in the minds of the assessee's, it was the duty of the assessing officer (opposite party) to have referred the question of jurisdiction to the Chief Commissioner or Commissioner as the case may be under Section 124(2) of the Act, 1961 and not doing so renders the action of the opposite party illegal.

18. As regards the demand on the income tax portal pursuant to assessment made by the opposite party, I find that the assessment order for the assessment year 2012-13 was passed on 30.03.2015 during the pendency of the writ petition and on the very next day the writ Court had passed the order on 31.03.2015. The demand generated pursuant to the assessment order was only after 31.03.2015 and had been generated by the opposite party who had assessed the applicant. The opposite party, therefore, knowing that judgment and order dated 31.03.2015 had been passed generated the demand. He, thus, acted in contempt of the judgment and order dated 31.3.2015.

19. The submission made by the learned counsel for the applicant that the writ Court vide the judgment and order dated 31.03.2015 had decided the question of jurisdiction and not of any particular assessment year and also that each year assessment being different has no application in cases where the jurisdiction prima facie appears to be correct as this Court finds that the judgment and order dated 31.03.2015 is not confined to any particular assessment year and has generally recorded that the income tax authority at Lucknow does not have jurisdiction over the applicant who is assessed at New Delhi. This Court, is therefore, of the prima facie view that the opposite party is guilty of contempt of the orders dated 31.03.2015 passed by the writ Court and the opposite party does not the jurisdiction or authority to interpret the orders passed by this Court by putting in words which are not contained in the judgment and order dated 31.03.2015 appears to be willful and deliberate.

20. Considering in totalities of facts and circumstances of the case, following charges are being framed and the applicant is required to appear in person and answer the charge of contempt on the next date of listing:

"(i) Why the opposite party-contemnor, Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-II, Lucknow be not punished for willfully flouting the order dated 31.03.2015 passed in Writ Petition (MB) No.9525 of 2013 and proceeded with the assessment year 2013-14 when the writ Court had recorded that the Tax Authority at Lucknow do not have jurisdiction to assess the petitioner at Lucknow and passed an assessment order.

(ii) Why the opposite party-contemnor, Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-II, Lucknow be not punished for willfully flouting the order of writ Court dated 31.03.2015 passed in Writ Petition (MB) No.9525 of 2013 that local address was inserted deliberately to create jurisdiction, which, in fact, legally was not vested with

the opposite party i.e. the present contemnor.

(iii) Why the opposite party-contemnor, Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-II, Lucknow be not punished for the reason that the outstanding amount was not deleted from the web portal for several years which amounts to deliberate and willful disobedience of the judgment and order dated 31.03.2015."

21. List this contempt application on 21.11.2023 to enable learned counsel for the opposite party-contemnor to make submission on the charges so framed."

3. Ms. Radhika Singh, learned counsel for the applicant submitted that the applicant changed his place of business in the assessment year 2011-12 from Lucknow to New Delhi on account of harassment being meted by the Income Tax Authorities at Lucknow, the applicant having businesses at Lucknow as well as New Delhi.

4. Learned counsel for the applicant next submitted that the change in the official records were incorporated only in the assessment year 2012-13 and a note to the said effect was made in the official records of the Income Tax Department and the address of the applicant was shown as that of New Delhi.

5. Learned counsel for the applicant next submitted that as after change of business, for assessment year 2011-12 an assessment was made at Lucknow, the same was challenged but the writ petition was dismissed as by the time the assessment was made, the official records had not been corrected incorporating the place of business of the applicant as New Delhi. The Income Tax Department having recorded the change in the PAN database, an application for review was preferred which is pending disposal before this Hon'ble Court.

6. Learned counsel for the applicant next submitted that a manual notice for scrutiny in respect of the returns of income fired for the assessment for the assessment year 2011-12 was issued by the respondent on 13.09.2013. The address in the official communication which was recorded as that of New Delhi, but is cut out by hand and replaced by the Lucknow address.

7. Learned counsel for the applicant next submitted that the applicant against the manual scrutiny notice for the assessment year 2011-12 was made a representation informing the opposite party-contemnor that he did not have jurisdiction to proceed with the assessment of the applicant on account of the place of business having been transferred from Lucknow to New Delhi, where the return of income had been filed by the applicant. The Delhi address of the applicant had been duly incorporated in official records of the Income Tax Department.

8. Learned counsel for the applicant next submitted that as the opposite party-contemnor refused to stay his hands and continued with the scrutiny proceedings despite categoric objection of the applicant regarding jurisdiction, a writ petition no.9525 (MB) of 2013 was filed seeking quashing of the order/ notice dated 11.09.2013 which was allowed vide the judgment and order dated 31.03.2015.

9. Learned counsel for the applicant next submitted that the writ Court held that after change of business from Lucknow to New Delhi, the Income Tax

Authorities at Lucknow did not have the jurisdiction to assess the applicant at Lucknow. It was also recorded that in case the opposite party-contemnor had any doubt, all that he could have done was to refer the matter to the Chief Commissioner of Income Tax for a decision on the question of jurisdiction but could not have proceeded with the assessment. Sections 124 and 127 were specifically referred to and it was finally laid at rest that there was no jurisdiction with the Income Tax Authorities at Lucknow.

10. Learned counsel for the applicant next submitted that during the pendency of the writ petition, an ex-parte assessment had been made pursuant to the order dated 11.09.2013 assuming jurisdiction at Lucknow. The said order was also set aside by the writ Court vide the judgment and order dated 31.03.2015. After the rendering of the judgment and order dated 31.03.2015, the opposite party-contemnor issued a notice dated 24.06.2015 recording the PAN number of the applicant and the address as D 127 East of Kailash, New Delhi manually selecting the applicant for scrutiny for the assessment year 2013-14, the return of income in respect of which had already been filed at New Delhi.

11. Learned counsel for the applicant next submitted that response to the said notice was submitted by the applicant on 5.7.2015 giving reference of the judgment and order dated 31.03.2015 passed in Writ Petition No.9525 (MB) of 2015 categorically pointing out that the opposite party-contemnor did not have the jurisdiction to select the applicant for manual scrutiny of a return of income already filed at New Delhi and that the issuance of the notice was extraneous and brazenly contemptuous.

12. Learned counsel for the applicant next submitted that after the submission of the response dated 15.07.2015 the opposite party-contemnor maintained a cryptic silence and on 15.03.2016 issued another manually prepared notice and not a notice taken out from the official records in which reference to the notice dated 24.06.2015 was made but the address of the applicant was altered by the opposite party-contemnor from New Delhi to that of Lucknow, contrary to the official records and against the same PAN number. Seven day's time was granted by him to respond to the notice issued without jurisdiction and in violation of the judgment and order dated 31.03.2015.

13. Learned counsel for the applicant next submitted that opposite party-contemnor obstinately responded that he was not bound by orders passed by the High Court and he will get it set aside by the Hon'ble Supreme Court and a SLP is being filed. This assertion is contained in paragraph 7 of the instant contempt application preferred on 28.03.2016. Response has been given in paragraph 23 of the opposite party's counter affidavit dated 18.5.2016 containing a changed stand that a proposal for filing a special leave petition has been submitted duly recommended by the contempt authority before Supreme Court. No SLP was actually filed. The respondent contemnor has filed a false affidavit.

14. Learned counsel for the applicant next submitted that the assessment order was made ex parte and the opposite party-contemnor did not refrain from proceeding with the scrutiny assessment in violation of the judgment and order dated 31.03.2015. In the counter affidavit, the correctness of the judgment and order dated 31.03.2015

has been disputed and submissions contrary to the finding recorded by the Division Bench of this Hon'ble Court in the said judgment and order dated 31.03.2015 have been made. Sections 124 and 127 of the Income Tax Act have deliberately been misread contrary to the finding recorded by the Division Bench in the order dated 31.03.2015.

15. Learned counsel for the applicant next submitted that noticeably no remorse has been expressed and no apology has been tendered. It has been alleged that in case it is found to be inadvertent mistake, the opposite party-contemnor tenders an apology, making it clear that if this Hon'ble Court finds that the mistake was not inadvertent but was deliberate and wilful, no apology for the same is being tendered.

16. Learned counsel for the applicant next submitted that several affidavit have been filed thereafter to justify the contumacious action by reference to extraneous material which had not been considered or were not in existence at the time of committing contempt by scrutinizing the assessment filed at Delhi after selecting the applicant's case for manual scrutiny. In the meantime the opposite party-contemnor had allowed the demand which had been set aside by this Hon'ble Court to be displayed on the income tax portal showing the applicant as a defaulter and thus causing deliberate harm to the reputation of the applicant.

17. Learned counsel for the applicant next submitted that the demand was taken down from the portal by the opposite party-contemnor only after it was pointed out to this Hon'ble Court in November, 2023 that in blatant contempt of the order dated 31.03.2015 the default had been displayed on the official portal of the Income Tax Department by the opposite party. The default was continued to be shown for a period of about 7 years and 7 months.

18. Learned counsel for the applicant next submitted that after several hearings in the present contempt petition, it was found that the action of the opposite party-contemnor in violating the judgment and order dated 31.05.2015 was deliberate and willful, charges were framed in the order dated 1.11.2023. She next submitted that an affidavit has been filed in response to the charges framed against the opposite party-contemnor and the same submissions have been repeated as were made on several hearings before the framing of the charge.

19. Learned counsel for the applicant next submitted that emphasis was laid that the PAN database indicated the address of the applicant as that of Lucknow and as such the opposite party-contemnor had selected the applicant's case for scrutiny. This is factually incorrect. The address in the database had been changed.

20. Learned counsel for the applicant next submitted that notice issued by the opposite party-contemnor himself on 24.06.2015 to the applicant is at his Delhi address calling for information for scrutiny pertaining to the return filed at New Delhi for assessment year 2013-14 and with meticulous cleverness reference has been made only to the notice dated 16.03.2015 which is not an officially generated communication but a notice prepared by the opposite party-contemnor himself by replacing the Delhi address by the Lucknow address.

21. Learned counsel for the applicant next submitted that the judgment and order

rendered by this Hon'ble Court has primacy and the plea raised as an afterthought at a very late stage that the representation given by the applicant on July 5, 2015 had been referred to the CIT in January, 2016 is not quite correct. The respondent is not required to seek any directions of any authority and has to punctiliously and without any reservation follow the orders passed by the High Court. The CIT has not passed any orders contrary to the judgment and order dated 31.03.2015 and the allegation to the contrary made by the respondent is factually incorrect. No such order of the CIT had been brought on record. The respondent is guilty of criminal contempt for having filed a false affidavit knowing it to be false.

22. In support of her submissions, learned counsel for the applicant placed reliance upon the following judgments:

(i) Sebastian M. Hongray v. Union of India; (1984)3 SCC 82

(ii) T.N. Godavarman Thirumulpad (102) through the Amicus Curiae v. Ashok Khot and another; (2006)5 SCC 1.

(iii) Patel Rajnikant Dhulalbai and another v. Patel Chandrkant Dhulabhai and others; (2008) 14 SCC 561

(iv) Civil Appeal No.4955 of 2022 titled 'Balwantbhai Somabhai Bhandari v. Hiralal Somabhai Contractor (Deceased) Rep. By LRS. and others', decided on Spetember 06,2023.

23. On the other hand, learned counsel for the opposite party submitted that the opposite party-contemnor has highest regard for the dignity and majesty of this Hon'ble Court and he could not even think of disobeying or violating the orders of this Hon'ble Court. It is most respectfully submitted that the opposite party-contemnor has not disobeyed or violated the judgment dated 31.03.2015 passed by the Hon'ble Court, in any manner and no further proceedings for the assessment year 2012-13 were undertaken by the deponent. However, if this Hon'ble Court considers any act of omission or commission of the deponent to be contempt of this Hon'ble Court, the deponent renders his unconditional and unequivocal apology for the same.

24. Learned counsel for the opposite party next submitted that the aforesaid contempt petition was filed in impleading the deponent in respect of the alleged contempt committed by him while he was posted as Deputy Commissioner of Income Tax (2), Lucknow. In this regard, it is respectfully submitted that the deponent joined the post of Deputy Commissioner of Income Tax, Lucknow on 9.10.2014 and remained posted there till 09.06.2016 only. Thereafter, he was transferred from the said post and was posted as Deputy Commissioner of Income Tax (Audit), Lucknow and was having no interference or authority regarding the work of his earlier post since he has already handed over the charge of DCIT(2), Lucknow. Further the applicant after serving with the Income Tax Department on different posts has ultimately superannuated from the Income Tax Department on 30.06.2023.

25. In regard to charge no.1, learned counsel for the opposite party while denying the charge so framed submitted that though the notice dated 20.09.2014 and 15.10.2014 u/s 143(2) were issued to the applicant for the assessment year 2013-14 much prior to the passing of the judgment

dated 31.03.2015, but neither the applicant has made any challenge, nor raised any grievance against the said notice issued for the assessment year 2013-14 before this Hon'ble Court nor the Court has taken any cognizance in respect to the said notices which were for the assessment year 2013-14. Thus, the Hon'ble Court in its judgment dated 31.03.2015 was pleased not to consider or deal with either the notices issued for assessment year 2013-14 or the assessment of the assessment year 2013-14 in any manner.

26. Learned counsel for the opposite party next submitted that there no violation of Hon'ble High Court's judgment dated 31.03.2015 as deponent has not proceeded against the applicant in any manner whatsoever for the assessment year 2012-13 as per the mandate of the judgment. The present contempt petition was filed for assessment year 2013-14. There was no objection to the notice on jurisdiction dated 20.9.2014 and 15.10.2014 raised by the applicant within 30 days of the issue of notice under Section 143(2) as required under the provisions of 124(3) of the Income Tax Act and these notices were not even assailed in the writ petition No.9525 of 2013.

27. Learned counsel for the opposite party next submitted that no notice for assessment year 2013-14 was quashed by the Hon'ble Court in its judgment dated 31.03.2015. Further, there was not even any challenge made in the writ petition regarding notices issued for the assessment year 2013-14 which were issued more than six months before the passing of the judgment in writ petition no.9525 of 2013 on 31.03.2015. The applicant has not even objected to the jurisdiction of the Assessing Officer within the mandatory period provided under Section 124(3) of the Income Tax Act, which is 30 days from the date of notice which was first issued to him on 20.9.2014.

28. Learned counsel for the opposite party next submitted that the applicant was requested to submit an application for transfer of jurisdiction u/s 127 of the Act during the course of hearing in the assessment year 2013-14 to which no reply was filed. There is no problem with the Department in transferring cases from one jurisdiction to another. But there is a procedure which when followed, the jurisdiction is transferred which procedure was never adopted for assessment year 2013-14. The said procedure was however, later on, adopted by the applicant for getting his case transferred from New Delhi to Lucknow in the year 2019.

The deponent after taking charge of the office of Deputy Commissioner, Range-2, Lucknow on 9.10.2014 issued notice under Section 143(2) in all cases as required by the statute. In the case of the applicant, notice u/s 143(2) for assessment year 2013-14 was issued by the undersigned on 15.10.2014 subsequent to the first notice issued on 20.09.2014 by his predecessor to which nobody attended which is apparent from the order sheet and the order itself. It is blatantly wrong that compliance was made on 26.09.2014 (six days after the date of notice).

29. Learned counsel for the opposite party next submitted that no objection to the jurisdiction was filed within 30 days of the issue of notice u/s 143(2) dated 20.9.2014. However, the Assessing Officer/ deponent in good faith and gesture referred the matter to the Commissioner of Income Tax vide letter dated 5.1.2015 narrating the non-

corporation of the applicant. It is wrongly claimed by the applicant that the matter was never referred to the Commissioner of Income Tax which was further transmitted to the Board. In view of this letter and subsequent letters written by his successor the case of the applicant was transferred u/s 127(2) vide order dated 21.09.2016. In compliance to the order u/s 127(2) the then Assessing Officer transferred the case records along with other miscellaneous records to the officer having jurisdiction in Delhi.

30. Learned counsel for the opposite party next submitted that under the taxation law each assessment year is considered as an independent from the other and order passed for a year does not act as *res judicata* for the other year. In this reference, it is relevant to point out that even the proceedings for the year 2011-12 were challenged by the applicant by filing writ petition no.1848 of 2014. However, the Hon'ble Court after observing that since the applicant did not object to the jurisdiction within the statutory period of 30 days, the Assessing Officer has rightly exercised the jurisdiction and hence, demised the writ petition vide judgment dated 27.03.2014.

31. Learned counsel for the opposite party next submitted that under the online system of filing of Income Tax Returns, online return for any assessment year can be filed from any corner of the entire country and a change of address in the PAN or even return filed online does not change the jurisdiction of the Assessing Officer automatically from the PAN database, as alleged and therefore, since the jurisdiction to assess the applicant was not transferred in accordance with the provisions of the Act, the deponent was having the jurisdiction to asses the applicant for the assessment year 2013-14 even if he had filed his return with Delhi residential address. Even the acknowledgment of ITR for assessment year 2013-14 shows that it was filed under the jurisdiction of ACIT, Range-II, Lucknow. Further, since as per the PAN database the jurisdiction to the assess the applicant was with the deponent, therefore, he was supposed to perform his functions as per the provisions of the Act unless the jurisdiction was transferred as per Section 127 of the Act, which is not the case here.

Merely by change of address in the ITR or PAN would not automatically change the jurisdiction of the Assessing Officer under the provisions of the Income Tax Act. Hence, in absence of any orders of the competent court or the higher Authorities transferring assessment, he had no other option except to pass the assessment order for assessment year 2013-14 on 22.03.2016 as per the provisions of the Act as the matter was time barring on 31.03.2016 in view of Section 153 of the I.T. Act, 1961 which he did and hence, has not in any manner disobeyed or violated the judgment of the Hon'ble Court.

32. Learned counsel for the opposite party next submitted that the respondent joined the office of DCIT, Range 2, Lucknow on 9.10.2014 and was functioning in accordance with the jurisdiction as conferred by the Central Board of Direct Taxes/ Higher Authorities in accordance with the provisions of Section 120(1) of Income Tax Act. The respondent does not have any power/ authority to transfer the jurisdiction of the case of the applicant on his own and has to perform the function of the Assessing Officer and make assessment as per the provisions of the Act within time frame as

provided under Section 153 of the Income Tax Act. Further, as the limitation for passing of the order was expiring on 31.03.2016 and since there was no direction or order from higher authorities or any competent court either for transferring the jurisdiction of the applicant or directing the deponent/ respondent to not to pass final assessment order in the case of the applicant for assessment year 2013-14, there was no alternative left with the deponent, but to pass the order which would have been otherwise barred by limitation on 31.03.2016. Therefore, the deponent has merely performed his duties conferred upon him by virtue of the provisions of the Income Tax Act and has neither disobeyed nor violated, much less deliberately and willfully violated the judgment dated 31.03.2015 passed by this Hon'ble Court and thus, the charge so framed by this Hon'ble Court is libale to be dropped against the deponent.

33. In regard to charge no.II, learned counsel for the opposite party while denying the charge so framed, submitted that the local address on the alleged notice was never inserted by the deponent/ contemnor. He next submitted that the subject writ petition was filed against the notice dated 11.09.2013, allegedly in which address was inserted, issued for assessment year 2012-13 which was quashed by the Hon'ble Court vide judgment and order dated 31.03.2015 and proceedings held in pursuance to notice dated 11.09.2013 are related to the assessment year 2012-13. It is also denied that the applicant has striked off the Delhi address and inserted the local address.

34. Learned counsel for the opposite party next submitted that the deponent has not held any proceeding nor issued notice to the applicant for the assessment year 2012-13, so it is not correct to say that the deponent has inserted the local address to create the jurisdiction.

35. Learned counsel for the opposite party next submitted that the proceeding for assessment year 2013-14 were not the subject matter of any litigation and proceedings were already commenced even prior to the joining of the deponent on the post of DCIT, Range-II, Lucknow on 9.10.2014. The details already provided by the deponent for assessment year 2013-14 have been discussed in detail in reply to charge-I.

36. Learned counsel for the opposite party categorically denied that in any of notices issued to the applicant the deponent has deliberately inserted the local address after striking off any other address. It is submitted that since the deponent has issued notice as per the address available in the PAN records to proceed with the proceedings which were already commenced before the passing of the order by this Hon'ble Court. Moreover, the proceedings for assessment year 2013-14 were not subject-matter of writ petition no.9525 of 2013.

37. Learned counsel for the opposite party next submitted that the deponent has neither disobeyed nor violated much less deliberately and willfully violated, the judgment dated 31.03.2015 passed by this Hon'ble Court in any manner and thus, the charge so framed by this Hon'ble Court is liable to be dropped against the deponent.

38. In regard to charge no.III, learned counsel for the opposite party while denying the charge so framed, submitted

that though the assessment order for assessment year 2012-13 in pursuance to initial notice dated 11.09.2013 was passed by the deponent on 25.03.2015 wherein a demand for Rs.51 lacs was raised through demand notice dated 25.03.2015. However, after the judgment of this Court dated 31.03.2015, the Court quashed the notice dated 11.09.2013 and consequential proceedings for assessment year 2012-13. The said demand was never pressed against the applicant and no fresh notice of demand was issued to the applicant after the judgment of this Court, nor was the demand adjusted from the refund for any subsequent assessment years.

39. Learned counsel for the opposite party next submitted that the deponent was transferred from the office of DCIT Range-II, Lucknow to DCIT, Lucknow in June, 2016 and was not at all related with the issuance of demand against the applicant or uploading it on web portal. He next submitted that the case of the applicant transferred u/s 127(2) vide order dated 21.09.2016. In compliance with the order u/s 127(2), the then Assessing Officer transferred the case records along with other miscellaneous records to the officer having jurisdiction in Delhi. As per the transfer Memo the case records of 2009-10, 2011-12, 2012-13, 2013-14 along with two writ petition folders for 2011-12 and 2012-13 were transferred.

40. Learned counsel for the opposite party next submitted that part-B of this transfer memo shows the demands which were transferred from Lucknow, AO to Delhi AO. The arrears demands during these periods were kept in annual form as the digitization of arrears demands had not yet started. As per column (a), demands only in respect of assessment year 2011-12 and 2009-10 have been transferred. No demand has been transferred for 2012-13. The respondent was, therefore, in no way responsible for the demand being reflected in the portal in the year 2022 for assessment year 2012-13.

41. Learned counsel for the opposite party next submitted that during this period, the demands were all in a manual state and no uploading or digitization of arrears demands was in vogue. Thus, the demand was not uploaded on the portal till 27.09.2016, the date when the case records were transferred to Delhi after the transfer of the respondent. It is also relevant to mention here that the opposite party-contemnor was transferred from the office of Deputy Commissioner of Income Tax, Range-II, Lucknow in June, 2016 meaning that the demand was not uploaded in his tenure and as the records were transferred and the office in Lucknow could not do anything with any proceedings of the case since the case of the applicant was transferred from Lucknow to Delhi before the uploading of alleged demand on the web portal

42. Learned counsel for the opposite party next submitted that the issue about the reflection of demand on the web portal was raised for the first time by the applicant through his affidavit dated 10.11.2022 and though deponent was not dealing with the matter at that point of time, he immediately raised the issue with present officer on the post and got the same rectified, which was due to some technical error of office maintaining the portal and relevant document in this regard was also placed on record with his affidavit dated 5.12.2022.

43. Learned counsel for the opposite party next submitted that the deponent was

a responsible officer of the Government and while performing his duties and responsibilities has retired from the services of the Government on 30.6.20213. The deponent has the highest regard for the order of this Court.

44. In support of his submissions, learned counsel for the opposite parties relied upon following judgments:

(i) Sudhir Vasudeva v. M. George Ravishekaran reported in (2014)3 SCC 373

(ii) B.K. Kar v. The Chief Justice and His Companion Judges reported AIR 1961 SC367

(iii) Mrityunjoy Das and other v. Hasibur Rahaman and others reported in 2002(3)SCC 739

(iv) Dinesh Kumar Gupta v. Unite India Insurance Company Limited and others reported in (2010)12 SCC 770

(v) Ram Kishan v. Tarun Bajaj and others reported in 2014(16) SCC 204

(vi) Avishek Raja and others v. Sanjay Gupta reported in (2017)8 SCC 435

(vii) Principal Commissioner of Income Tax v. M/S I-Ven Interactive Ltd., Mumbai (Civil Appeal No.8132 of 2019)

(viii) In Re: P.C. Sen v. Unknown, AIR 1970 SC 1821.

(ix) Raza Textiles Ltd. v. Commissioner of Income Tax reported in 1989(178) ITR 496

(x) Commissioner of Income Tax v. Lalit Kumar Bardia reported in ITA 127 of 2006.

(xi) Commissioner of Income Tax v. M/s All India Children Care & Education, IAPL 89 of 2003

(xii) Commissioner of Income Tax v. Sohan Lal Sewa Ram Jaggi decided on 5 February, 2008.

45. I have considered the submissions advanced by learned counsel for the parties and perused the judgments relied upon by learned counsel for the parties.

46. To resolve the controversy involved in the matter, the judgments relied upon by learned counsel for the parties are being quoted below:

(A) Judgment relied upon by learned counsel for the applicant:

i) Sebastian M. Hongray (Supra):

6. Civil contempt is punishable with imprisonment as well as fine. In a given case, the court may also penalise the party in contempt by ordering him to pay the costs of the application. (2) A fine can also be imposed upon the contemnor.

7. Now in the facts and circumstances of the case, we do not propose to impose imprisonment nor any amount as and by way of fine but keeping in view the torture, the agony and the mental oppression through which Mrs. C. Thingkhuila, wife of Shri C. Daniel and Mrs. C. Vangamla, wife of Shri C. Paul had to pass and they being the proper applicants, the formal application being by Sebastian M. Hongray, we direct that as a measure of exem- plary costs as is permissible in such cases, respondents Nos. 1 and 2 shall pay Rs 1 lac to each of the aforementioned two women within a period of four weeks from today.

8. A query was posed to the learned Attorney General about the further step to be taken. It was made clear that further adjourning the matter to enable the respondents to trace or locate the two

missing persons is to shut the eyes to the reality and to pursue a mirage. As we are inclined to direct registration of an offence and an investigation, we express no opinion as to what fate has befallen to Shri C. Daniel and Shri C. Paul, the missing two persons in respect of whom the writ of habeas corpus was issued save and except saying that they have not met their tragic end in an encounter as is usually claimed and the only possible inference that can be drawn from circumstance already discussed is that both of them must have met an unnatural death. Prima facie, it would be an offence of murder. Who is individually or collectively the perpetrator of the crime or is responsible for their disappearance will have to be determined by a proper, thorough and responsible police investigation. It is not necessary to start casting a doubt on anyone or any particular person. But prima facie there is material on record to reach an affirmative conclusion that both Shri C. Daniel and Shri C. Paul are not alive and have met an unnatural death. And the Union of India cannot disown the responsibility in this behalf. If this inference is permissible which we consider reasonable in the facts and circumstances of the case, we direct that the Registrar (Judicial) shall forward all the papers of the case accompanied by a writ of mandamus to the Superintendent of Police, Ukhrul, Manipur State to be treated as information of a cognizable offence and to commence investigation as prescribed by the relevant provisions of the Code of Criminal Procedure.

ii) T.N. Godavarman Thirumulpad (102) through the Amicus Curiae (supra):

5. Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.

7. On the basis of submissions made by learned Amicus Curiae, proceedings were initiated against them. It was highlighted by learned Amicus Curiae that the respondents have acted in brazen defiance of the orders of this Court and their conduct constitutes the contempt by way of (a) wilful dis- obedience of directions issued by this Court, (b) the manner in which contemnors have conducted themselves clearly tends to lower the authority of this Court and obstructs the administration of justice (c) as their conduct falls both under the definition of Civil contempt, as well as seeing dimensions of the matters, under criminal contempt.

20. In B.M. Bhattacharjee (Major General) v. Russel Estate Corpn. it was observed by this Court that "all of the officers of the Government must be presumed to know that under the constitutional scheme obtaining in this country, orders of the courts have to be obeyed implicitly and that orders of the apex court-for that matter any court-should not be trifled with".

21. Any country or society professing rule of law as its basic feature or characteristic does not distinguish between high or low, weak or mighty. Only monarchies and even some democracies have adopted the age old principle that the king cannot be sued in his own courts.

22. Professor Dicey's words in relation to England are equally applicable to any nation in the world. He said as follows:

"When we speak of the rule of law as a characteristic of our country, not only that with us no man is above the law but that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality, or the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done with legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of State, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is a private and unofficial person. (See Introduction to the Study of the Law of the Constitution, 10th Edn. 1965, pp. 193-194).

23. Respect should always be shown to the Court. If any party is aggrieved by the order which is in its opinion is wrong or against rules or implementation is neither practicable nor feasible, it should approach the Court. This had been done and this Court after consideration had rejected the I.A. long before.

26. It is thus crystal clear that the applications of those eligible for grant of licenses were required to be sent to CEC, who was then required to submit a report to this Court. Thereafter, this Court would have decided on the question of entitlement for license. The procedure mandated by this Court was not followed. Instead of that by their impugned actions, the contemnors permitted resumption of operations by the unit holders. There was absolutely no confusion or scope for entertaining doubt as claimed by the contemnors.

28. The explanations of the contemnors are clearly unacceptable. Mens rea is writ large.

29. The inevitable conclusion is that both the contemnors 1 and 2 deliberately flouted the orders of this Court in a brazen manner. It cannot be said by any stretch of imagination that there was no mens rea involved. The fact situation clearly shows to the contrary.

30. Learned counsel appearing for contemnor No.1 and 2 stated that they have tendered unconditional apology which should be accepted.

31. Apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace, the apology is shorn of penitence and hence it is liable to be rejected. If the apology is offered at the time when the contemnor finds that the court is going to impose punishment it ceases to be an apology and becomes an act of a cringing coward.

32. Apology is not a weapon of defence to purge the guilty of their offence, nor is it intended to operate as universal panacea, but it is intended to be evidence of

real contriteness. As was noted in L.D. Jaikwal v. State of U.P. (SCC p. 406, para 1)

"We are sorry to say we cannot subscribe to the 'slap-say sorry-and forget' school of thought in administration of contempt jurisprudence. Saying 'sorry' does not make the slapper taken the slap smart less upon the said hypocritical word being uttered. Apology shall not be paper apology and expression of sorrow should come from the heart and not from the pen. For it is one thing to 'say' sorry-it is another to 'feel' sorry.

33. Proceedings for contempt are essentially personal and punitive. This does not mean that it is not open to the Court, as a matter of law to make a finding of contempt against any official of the Government say Home Secretary or a Minister.

34. While contempt proceedings usually have these characteristics and contempt proceedings against a Government department or a minister in an official capacity would not be either personal or punitive (it would clearly not be appropriate to fine or sequest the assets of the Crown or a Government department or an officer of the Crown acting in his official capacity), this does not mean that a finding of contempt against a Government department or minister would be pointless. The very fact of making such a finding would vindicate the requirements of justice. In addition an order for costs could be made to underline the significance of a contempt. A purpose of the court's powers to make findings of contempt is to ensure the orders of the court are obeyed. This jurisdiction is required to be co-extensive with the courts' jurisdiction to make the orders which need the protection which the jurisdiction to make findings of contempt provides. In civil proceedings the court can now make orders (other than injunctions or for specific performance) against authorized Government departments or the Attorney General. On applications for judicial review orders can be made against ministers. In consequence such orders must be taken not to offend the theory that the Crown can supposedly do no wrong. Equally, if such orders are made and not obeyed, the body against whom the orders were made can be found guilty of contempt without offending that theory, which could be the only justifiable impediment against making a finding of contempt.

35. This is a case where not only right from the beginning attempt has been made to overreach the orders of this Court but also to draw red-herrings. Still worse is the accepted position of inserting a note in the official file with oblique motives. That makes the situation worse. In this case the contemnors deserve severe punishment. This will set an example for those who have propensity of dis-regarding the court's orders because of their money power, social status or posts held. Exemplary sentences are called for in respect of both the contemnors. Custodial sentence of one month simple imprisonment in each case would meet the ends of justice. It is to be noted that in Re: Sri Pravakar Behera (Suo Motu C.P. 301/2003 dated 19.12.2003) (2003 (10) SCALE 1126), this Court had imposed costs of Rs.50,000/- on a D.F.O. on the ground that renewal of license was not impermissible in cases where licenses were issued prior to this Court's order dated 4.3.1997. That was the case of an officer in the lower rung. Considering the high positions held by the contemnors more stringent punishment is called for, and, therefore, we are compressing custodial sentence.

iii) Patel Rajnikant Dhulabhai and another (supra):

58. The provisions of the Contempt of Courts Act, 1971 have also been invoked. Section 2 of the Act is a definition clause. Clause (a) enacts that contempt of court means `civil contempt or criminal contempt'. Clause (b) defines `civil contempt' thus;

2. (b) `civil contempt' means wilful disobedience to any judgement, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court.

Reading of the above clause makes it clear that the following conditions must be satisfied before a person can be held to have committed a civil contempt;

(i) there must be a judgment, decree, direction, order, writ or other process of a Court (or an undertaking given to a Court);

(ii) there must be disobedience to such judgment, decree, direction, order, writ or other process of a Court (or breach of undertaking given to a Court); and

(iii) such disobedience of judgment, decree, direction, order, writ or other process of a Court (or breach of undertaking) must be wilful.

59. Section 12 provides punishment for contempt of Court. The relevant part of the provision reads thus;

"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 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.

60. In Ashok Paper Kamgar Union v. Dharam Godha & Ors., (2003) 11 SCC 1, this Court had an occasion to consider the concept of `wilful disobedience' of an order of the Court. It was stated that `wilful' means an act or omission which is done voluntarily and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say, with bad purpose either to disobey or to disregard the law. According to the Court, it signifies the act done with evil intent or with a bad motive for the purpose. It was observed that the act or omission has to be judged having regard to the facts and circumstances of each case.

61. In Kapildeo Prasad Sah & Ors. v. State of Bihar & Ors., (1999) 7 SCC 569, it was held that for holding a person to have committed contempt, it must be shown that there was wilful disobedience of the judgment or order of the Court. But it was indicated that even negligence and carelessness may amount to contempt. It was further observed that issuance of

notice for contempt of Court and power to punish are having far reaching consequences, and as such, they should be resorted to only when a clear case of wilful disobedience of the court's order is made out. A petitioner who complains breach of Court's order must allege deliberate or contumacious disobedience of the Court's order and if such allegation is proved, contempt can be said to have been made out, not otherwise. The Court noted that power to punish for contempt is intended to maintain effective legal system. It is exercised to prevent perversion of the course of justice.

62. In the celebrated decision of Attorney General v. Times Newspaper Ltd.; 1974 AC 273 : (1973) 3 All ER 54 : (1973) 3 WLR 298; Lord Diplock stated:

"There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity."

63. In Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors., (2002) 4 SCC 21, this Court held that the Contempt of Courts Act has been introduced in the statute-book for securing confidence of people in the administration of justice. If an order passed by a competent Court is clear and unambiguous and not capable of more than one interpretation, disobedience or breach of such order would amount to contempt of Court. There can be no laxity in such a situation because otherwise the Court orders would become the subject of mockery. Misunderstanding or own understanding of the Court's order would not be a permissible defence.

(iv) Balwantbhai Somabhai Bhandari (supra):

116. We may summarise our final conclusion as under:

(i) We hold that an assurance in the form of an undertaking given by a counsel/ advocate on behalf of his client to the court; the wilful breach or disobedience of the same would amount to "civil contempt" as defined under Section 2(b) of the Act, 1971.

(ii) There exists a distinction between an undertaking given to a party to the lis and the undertaking given to a court. The undertaking given to a court attracts the provisions of the Act, 1971 whereas an undertaking gvien to a party to the lis by way of an agreement of settlement or otherwise would not attract the provisions of the Act, 1971. In the facts of the present case, we hold that the undertaking was given to the High Court and to breach or disobedience would definitely attract the provisions of the Act, 1971.

(iii) Although the transfer of the suit property pendente lite may not be termed as void ab initio yet when the court is looking into such transfers in contempt proceedings the court can definitely declare such transactions to be void in order to maintain the majesty of law. Apart from punishing the contemnor, for his contumacious conduct, the majesty of law may demand that appropriate directions be issued by the court so that any advantage secured as a result of such contumacious conduct is completely nullified. This may include issue of directions either for reversal of the transactions by declaring such transactions to be void or passing appropriate directions to the concerned authorities to ensure that the contumacious conduct on the part of the cotemnor does not continue to ensure to the advantage of the contemnor or any one claiming under him

(iv) The beneficiaries of any contumacious transaction have no right or locus to be heard in the contempt proceedings on the ground that they are bona fide purchasers of the property for value without notice and therefore, are necessary parties. Contempt is between the court and the contemnor and no third party can involve itself into the same.

(v) The apology tendered should not be accepted as a matter of course and the course is not bound to accept the same. The apology may be unconditional, unqualified and bona fide, still if the conduct is serious, which has caused damage to the dignity of the institution, the same should not be accepted. There ought not to be a tendency by courts, to show compassion when disobedience of an undertaking or an order is with impunity and with total consciousness.

(B) Judgments relied upon by learned counsel for the opposite party:

i) Sudhir Vasudeva (supra):-

19. The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. Courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or willful violation of the same. Decided issues cannot be reopened; nor can the plea of equities be considered. The Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdiction like review or appal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate in other jurisdictions vested in the Court, as noticed above. The above principles would appear to be the cumulative outcome of the precedents cited at the Bar, namely, Jhareswar Prasad Paul v. Tarak Nath Ganguly, V.M. Manohar Coop. Society Ltd v. Gautam Goswami and Union of India v. Subedar Devassy PV.

ii) B.K Kar (supra):-

"Before a subordinate court can be found guilty of disobeying the order of the superior court and thus to have committed contempt of court, it is necessary to show that the disobedience was intentional. There is no room for inferring an intention to disobey an order unless the person charged had knowledge of the order. If what a subordinate court has done is in utter ignorance of an order of a superior court, it would clearly not amount to intentional disobedience of that court's order and would, therefore, not amount to a contempt of court at all. There

may perhaps be a case where an order disobeyed could be reasonably construed in two ways and the subordinate court construed it in one of those ways but in a way different from that intended by the superior court. Surely, it cannot be said that disobedience of the order by the subordinate court was contempt of the superior court. There may possibly be a case where disobedience is accidental. If that is so, there would be no contempt. What is, therefore, necessary to establish in a case of this kind is that the subordinate court knew of the order of the High Court and that knowing the order it disobeyed it. The knowledge must, however, be obtained from a source which is either authorised or otherwise authentic. In the case before us it is not clear as to who the person who signed the application dated November 27, 1957 was because the signature is illegible. It was not countersigned by a pleader nor is there anything to show that it was presented in court by a pleader authorised to appear on behalf of the complainant. Furthermore, it was not accompanied by an affidavit. Therefore, there could be no guarantee for the truth of the facts stated there- The in. No doubt, it was accompanied by a telegram and even though it was addressed to a pleader there is nothing to indicate that he was authorised to appear for the complainant. Further it is not possible to say as to the capacity of the sender. Had the telegram been received from the court or from an advocate appearing on behalf of the complainant before the High Court and addressed either to the court or pleader for the complainant different considerations would have arisen and it may have been possible to take the view that the information contained therein had the stamp of authenticity. Of course, we do not want to lay it down here as law that every telegram purporting to be signed by an advocate or a pleader is per se guarantee of the truth of the facts stated therein and also of the fact that it was actually sent by the person whose name it bears. In order to assure the Court about these matters an affidavit from the party would be necessary. Upon the materials before us we are satisfied that the Sub-Divisional Magistrate was entitled to ignore the telegram as well as the application. We, therefore, hold that his refusal to act on the telegram did not amount to contempt of court. We may add that the fact that on receiving a copy of the High Court's order through the Additional District Magistrate not only were further proceedings stayed but a writ to redeliver possession was not permitted to issue. This would show clearly that there was no intention on the part either of the Sub-Divisional Magistrate or the second officer to disobey the order of the High Court. The conviction as also the fine of the appellant is erroneous and accordingly set aside."

iii. Mrityunjoy Das (supra):-

"Before however, proceeding with the matter any further it noted that exercise of powers under the Contempt of Courts Act shall have to be rather cautions and use of it rather sparingly after addressing itself to the true effect of the contemptuous conduct. The Court must otherwise come to a conclusion that the conduct complained of tentamounts to obstruction of justice which if allowed, would even permeat in our society (vide Murray & Co. v. Ashok Kr. Newatia & Anr.: 2000(2) SCC 367) this is a special jurisdiction conferred on to the law courts to punish an offender for his contemptuous conduct or obstruction to the majesty of law. It is in this context that the obsrvations

of the this Court in Murrays case (supra) in which one of us (Banerjee,J.) was party needs to be noticed.

The other aspect of the matter ought also to be noticed at this juncture viz., the burden and standard of proof. The common English phrase he who asserts must prove has its due application in the matter of proof of the allegations said to be constituting the act of contempt. As regards the standard of proof, be it noted that a proceeding under the extra-ordinary jurisdiction of the Court in terms of the provisions of the Contempt of Court Act is quasi criminal, and as such, the standard of proof required is that of a criminal proceeding and the breach shall have to be established beyond reasonable doubt.The observations of Lord Denning in Re Bramblevale (1969 3 All ER 1062) lend support to the aforesaid. Lord Denning in Re Bramblevale stated:

A contempt of court is an offence of a criminal character. A man may be sent to prison for it,. It must be satisfactorily proved. To use the time- honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence. Where there are two equally consistent possibilities open to the Court, it is not right to hold that the offence is proved beyond reasonable doubt.

In this context, the observations of the Calcutta High Court in Archana Guha v. Ranjit Guha Neogi (1989 (II) CHN 252) in which one of us was a party (Banerjee,J.) seem to be rather apposite and we do lend credence to the same and thus record our concurrence therewith.

In The Aligarh Municipal Board and Others v. Ekka tonga Mazdoor Union and Others 970 (III) SCC 98), this Court in no uncertain term stated that in order to bring home a charge of contempt of court for disobeying orders of Courts, those who assert that the alleged contemners had knowledge of the order must prove this fact beyond reasonable doubt. This Court went on to observe that in case of doubt, the benefit ought to go to the person charged.

In a similar vein in V.G. Nigam and others V. Kedar Nath Gupta and another (1992 (4) SCC 697), this Court stated that it would be rather hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities.

iv) Dinesh Kumar Gupta (supra):-

12. On a scrutiny of the sequence of events narrated herein before, we are clearly of the view in the first place that the contempt alleged against the appellant would not amount to a criminal contempt because the alleged contempt even if made out would clearly at the best be of a civil nature, which is evident from Section 2 of the Contempt of Courts Act 1971 which lays down as follows:

(a) "contempt of court" means civil contempt or criminal contempt;

(b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;

(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which-

(i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court; or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

On perusal of the aforesaid provision enumerated under Section 2 quoted hereinbefore, it can clearly be inferred that the initiation of contempt proceeding against the petitioner even as it stands, would not give rise to a proceeding for criminal contempt and in any event the alleged contempt cannot be stretched beyond civil contempt under the prevailing facts and circumstances of the case discussed hereinbefore. Nevertheless, it would not be correct on behalf of the appellant to contend that the learned single Judge was not authorised to initiate contempt proceeding against the appellant merely because he was sitting in a single Bench although he might have been in a position to notice whether the alleged action at the instance of any party or anyone else who obstructed the cause of justice, amounted to contempt of Court of a civil or criminalnature and yet would be precluded from intiating suo moto contempt proceedings. The Contempt of Courts Act, 1971 clearly postulates the existence of only the following preconditions before a person can be held to have committed civil contempt:

"(i) There must be a judgment or order or decree or direction or writ or other process of a court; or

(ii) The judgment etc. must be of the court and undertaking must have been given to a court;

(iii) There must be a disobedience to such judgment, etc. or breach of such undertaking;

(iv) The disobedience or breach, as the case may be, must be wilful."

Hence, it would not be right to contend that even though the learned Single Judge might have found material which persuaded him to form an opinion that a contempt has been committed, yet the learned Judge had no authority or jurisdiction to initiate a proceeding for contempt against the plerson who indulged in such action. Thus we find no substance in the plea which has been raised on behalf of the appellant on this court."

13. This now leads us to the next question and a more relevant one, as to whether a proceeding for contempt initiated against the appellant can be held to be sustainable merely on speculation, assumption and inference drawn from facts and circumstances of the instant case. In our considered opinion, the answer clearly has to be in the negative in view of the well-settled legal position reflected in a catena of decisions of this court that contempt of a civil nature can be held to have been made out only if there has been a wilful disobedience of the order and even though there may be disobedience, yet if the same does not reflect that it has been a conscious and wilful disobedience, a case for contempt cannot be held to have been made out. In fact, if an order is capable of more than one interpretation giving rise to variety of consequences, non-compliance of the same cannot be held to be wilful disobedience of the order so as to make out a case of contempt entailing the serious consequence including imposition of punishment. However, when the Courts are confronted with a question as to whether a given situation could be treated to be a case of wilful disobedience, or a case of a

lame excuse, in order to subvert its compliance, howsoever articulate it may be, will obviously depend on the facts and circumstances of a particular case; but while deciding so, it would not be legally correct to be too speculative based on assumption as the Contempt of Courts Act 1971 clearly postulates and emphasizes that the ingredient of wilful disobedience must be there before anyone can be hauled up for the charge of contempt of a civil nature.

18. Besides this, it would also not be correct to overlook or ignore an important statutory ingredient of contempt of a civil nature given out u/s (b) of the Contempt of Courts Act 1971 that the disobedience to the order alleging contempt has to satisfy the test that it is a wilful disobedience to the order. Bearing this important factor in mind, it is relevant to note that a proceeding for civil contempt would not lie if the order alleged to have been disobeyed itself provides scope for reasonable or rational interpretation of an order or circumstance which is the factual position in the instant matter. It would equally not be correct to infer that a party although acting due to misapprehension of the correct legal position and in good faith without any motive to defeat or defy the order of the Court, should be viewed as a serious ground so as to give rise to a contempt proceeding.

19. To reinforce the aforesaid legal position further, it would be relevant and appropriate to take into consideration the settled legal position as reflected in the judgment and order delivered in the matter of Ahmad Ali Vs. Supdt., District Jail, AIR 1987 SC 1491 : Supp. SCC 556 that mere unintentional disobedience is not enough to hold anyone guilty of contempt and although, disobedience might have been established, absence of wilful disobedience on the part of the contemnor, will not hold him guilty unless the contempt involves a degree of fault or misconduct.

Thus, accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is further relevant to bear in mind the settled law on the law of contempt that casual or accidental or unintentional acts of disobedience under the circumstances which negate any suggestion of contumacy, would amount to a contempt in theory only and does not render the contemnor liable to punishment and this was the view expressed also in cases reported in AIR 1954 Patna 513, State of Bihar Vs. Rani Sonabati Kumari and AIR 1957 Patna 528, N. Bakshi Vs. O.K Ghosh.

v) Ram Kishan (supra):-

9. Contempt jurisdiction conferred onto the law courts power to punish an offender for his wilful disobedience/contumacious conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizens that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi-criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to impose sentence for contempt on the authorities in exercise of

contempt jurisdiction on mere probabilities.

10. Thus, in order to punish a contemnor, it has to be established that disobedience of the order is 'wilful'. The word 'wilful' introduces a mental element and hence, requires looking into the mind of person/contemnor by gauging his actions, which is an indication of one's state of mind. 'Wilful' means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. "Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct".

13. It is well settled principle of law that if two interpretations are possible, and if the action is not contumacious, a contempt proceeding would not be maintainable. The effect and purport of the order is to be taken into consideration and the same must be read in its entirety. Therefore, the element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act.

vi) Avishek Raja and others (supra):-

19. The contours of power of the Court so far as commission of civil contempt is concerned have been elaborated upon in a number of pronouncements of this Court. Illustratively, reference may be made to the following observations in the case of Kapildeo Prasad Sah vs. State of Bihar "For holding the respondents to have committed contempt, civil contempt at that, it has to be shown that there has been wilful disobedience of the judgment or order of the Court. Power to punish for contempt is to be resorted to when there is clear violation of the Court's order.

Since notice of contempt and punishment for contempt is of far reaching consequence and these powers should be invoked only when a clear case of wilful disobedience of the court's order has been made out.Whether disobedience is wilful in a particular case depends on the facts and circumstances of that case. Judicial orders are to be properly understood and complied with. Even negligence and carelessness can amount to disobedience particularly when the attention of the person is drawn to the Court's orders and its implication.

Jurisdiction to punish for contempt exists to provide ultimate sanction against the person who refuses to comply with the order of the court or disregards the order continuously.

No person can defy the Court's order. Wilful would exclude casual, accidental, bona fide or unintentional acts or genuine inability to comply with the terms of the order. A petitioner who complains breach of Court's order must

allege deliberate or contumacious disobedience of the Court's order." (Emphassis is supplied by us)

20. Similar is the view expressed by this Court in Ashok Paper Kamgar Union vs. Dharam Godha, Anil Kumar Shahi v. Professor Ram Sevak Yadav, Jhareswar Prasad Paul vs. Tarak Nath Ganguly, Union of India vs. Subedar Devassy PV, Bihar Finance Service House Construction Co-operative Society Ltd. vs. Gautam Goswami and Chhotu Ram vs. Urvashi Gulati. In view of the consistency in the opinions rendered therein, it will not be necessary to burden this order by any detailed reference to what has been held in the above cases except to reiterate that the standard of proof required to hold a person guilty of contempt would be the same as in a criminal proceeding and the breach alleged shall have to be established beyond all reasonable doubt [Chhotu Ram vs. Urvashi Gulati (supra)]. More recent in point of time is the view expressed by this Court in Noor Saba vs. Anoop Mishra wherein the scope of the contempt power in case of breach of a Court's order has been dealt with in paragraph 14 of the report in the following manner-

"To hold the respondents or anyone of them liable for contempt this Court has to arrive at a conclusion that the respondents have wilfully disobeyed the order of the Court. The exercise of contempt jurisdiction is summary in nature and an adjudication of the liability of the alleged contemnor for wilful disobedienceof the Court is normally made on admitted and undisputed facts. In the present case not only there has been a shift in the stand of the petitioner with regard to the basic facts on which commission of contempt has been alleged even the said new/ altered facts do not permit an adjudicationin consonance with the established principles of exercise of contempt jurisdiction so as to enable the Court to come to a conclusion that any of the respondents have wilfully disobeyed the order of this Court..." (Emphassis is supplied by us)

21. Similarly, in Sudhir Vasudeva vs. George Ravishekaran9 the issue has been dealt with in a manner which may be of relevance to the present case. Para 19 of the report is as follows.

"The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act of 1971. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution.

This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self-determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. The Courts must not, therefore, travel beyond the four corners of the order which is 9 (2014) 3 SCC 373 24 alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self-evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or wilful violation of the same.

Decided issues cannot be reopened; nor can the plea of equities be considered. The Courts must also ensure that while considering a contempt plea the power available to the Court in other

corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate in other jurisdictions vested in the Court, as noticed above." (Emphassis is supplied by us)

vii) Principal Commissioner of Income Tax (supra):-

7. Now so far as the observations made by the High Court while concurring with the view of the learned Tribunal that merely by filing of return of income with the new address, it shall be enough for the assessee to discharge its legal responsibility for observing proper procedural steps as per the Companies Act and the Income Tax Act is concerned, we are of the opinion that mere mentioning of the new address in the return of income without specifically intimating the Assessing Officer with respect to change of address and without getting the PAN database changed, is not enough and sufficient. In absence of any specific intimation to the Assessing Officer with respect to change in address and/or change in the name of the assessee, the Assessing Officer would be justified in sending the notice at the available address mentioned in the PAN database of the assessee, more particularly when the return has been filed under E-Module scheme. It is required to be noted that notices under Section 143 (2) of the 1961 Act are issued on selection of case generated under automated system of the Department which picks up the address of the assessee from the database of the PAN. Therefore, the change of address in the database of PAN is must, in case of change in the name of the company and/or any change in the registered office or the corporate office and the same has to be intimated to the Registrar of Companies in the prescribed format (Form 18) and after completing with the said requirement, the assessee is required to approach the Department with the copy of the said document and the assessee is also required to make an application for change of address in the departmental database of PAN, which in the present case the assessee has failed to do so.

viii) In Re: P.C Sen v. Unknown(supra):-

5. Instead of making a frank statement before the Court, the Chief Minister was apparently advised to adopt grossly technical pleas. Counsel informed the Court that the Chief Minister did "not like to use any affidavit showing cause". Evidence was then led before the Court to prove that the offending speech was in fact broadcast by the Chief Minister on the All India Radio, Calcutta Station. After evidence was recorded in the Court about the speech broadcast by the Chief Minister he somewhat belatedly filed an affidavit on March 4, 1966, admitting that he had delivered the speech on the AH India Radio on the night of November 25, 1965, the contents of which were proved by the evidence of the Programme Director. It was also admitted that the Chief Minister had knowledge of the filing of the petition when he broadcast the speech and of the rule served upon the State Government. By the affidavit it was attempted to justify the speech, on the plea that the Chief Minister came to learn that certain persons had started publicly propagating the view that far from achieving the objects, the Order will not only reduce the supply of fluid milk in the area, but also displace numerous

persons from their normal avocation resulting in unemployment for many, that the object of the propaganda was to criticise and ridicule the policy of the State Government in promulgating the Order, that the propaganda had misled certain sections of the people about the object, purpose and nature of the Order and the consequences thereof, particularly with regard to the position of supply of milk and the question of continued employment of the persons working in the sweetmeat shops in the area, that taking advantage of the situation, attempts were made to commence a political agitation against the State Government for having promulgated the Order, and in the circumstances and particularly with a view to preventing widespread agitation in connection with the Order, it was thought that it was the duty of the Chief Minister of the State to explain to the people the policy underlying and the reasons for promulgating the Order, that in making the speech his sole and only intention and purpose was to "remove the confusion and allay the fears, if any, from the minds of the people with regard to the purpose nature, object and effect of the promulgation of the Order", that he had no intention: whatsoever of either showing any disrespect to the Court or interfering in any manner with the due course of the administration of justice, nor did he anticipate that his speech could have any such effect, and that by broadcasting his speech he had committed no contempt of Court nor had he any intention of doing so.

6. Banerjee, J., after a detailed examination of the relevant law and the speech broadcast, held that the speech broadcast amounted to contempt of Court "in the sense that it was likely to have several baneful effects upon the petitioners" in Petition No. 369 of 1965, "upon their cause and upon others having a cause similar to that of the petitioners". The learned Judge accordingly recorded that "the Chief Minister cannot wholly escape the charge of having committed contempt of Court", since "the speech was contumacious in the sense that it was likely to have baneful effects upon the petitioners" in Petition No. 369 of 1965 "their cause, and upon persons having a similar cause and as such was likely to interfere with the administration of justice by the Court." The learned Judge, however, observed that "the contemner Mr. Sen should be let off with an expression of disapproval of his conduct and in the hope that the sort of indiscretion will not be repeated"

8. The law relating to contempt of Court is well settled. Any act done or writing published which is calculated to bring a Court or a Judge into contempt, or to lower his authority, or to interfere with the due course of justice or the lawful process of the Court, is a contempt of Court : R. v. Gray, [1900] 2 Q.B.D. 36 at p. 40. Contempt by speech or writing may be by scandalising the Court itself, or by abusing parties to actions, or by prejudicing mankind in favour of or against a party before the cause is heard. It is incumbent upon Courts of justice to preserve their proceedings from being misrepresented, for prejudicing the minds of the public against persons concerned as parties in causes before the cause is finally heard has pernicious consequences. Speeches or writings misrepresenting the proceedings of the Court or prejudicing the public for or against a party or involving reflections on parties to a proceeding amount to contempt. To make a speech tending to influence the result of a pending trial, whether civil or criminal is a grave contempt. Comments on pending proceedings, if emanating from the parties

or their lawyers, are generally a more serious contempt than those coming from independent sources. The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice. The question is not so much of the intention of the contemner as whether it is calculated to interfere with the administration of justice. As observed by the Judicial Committee in Debi Prasad Sharma and Ors. v. The King-Emperor , L.R. 70 I. A. 216 at p. 224:

"... the test applied by the ....Board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law."

22. Ordinarily a Court will not initiate proceedings for commitment for contempt where there is a mere technical contempt. In Legal Remembrancer v. Matilal Ghose and Ors., I.L.R. 41 Cal. 173 it was observed by Jenkins, C.J., that proceedings for contempt should be initiated with utmost reserve and no court in the due discharge of its duty can afford to disregard them. It was also observed that jurisdiction to punish for contempt was arbitrary, unlimited and uncontrolled and should be exercised with the greatest caution : that this power merits this description will be realised when it is understood that there is no limit to the imprisonment that may be inflicted or the fine that may be imposed save the Court's unfettered discretion, and that the subject is protected by no right of general appeal. We may at once observe that since the enactment of the Contempt of Courts Act12 of 1926 and Act 32 of 1952 the power of the Court in imposing punishment for con tempt of court is not an uncontrolled or unlimited power, That, however does not justify the court in commencing proceedings without due caution and reserve. But Banerjee, J., who must be conversant with local conditions was of the view that action of the Chief Minister was likely to interfere with the course of justice for it was likely to have "baneful effects" upon the petitioners their cause and upon persons having a similar cause, and sitting in appeal we do not think that we can hold that he took an erroneous view of his power or of the tendency of the speech, which hs has chisraeterified as having "baneful effects". Banerjee, J., has ultimately treated the contempt as technical for he has not imposed any substantive sentence, not even a warning.He has merely expressed his displeasure. The speech was ex facie calculated to interfere with the administration of justice. In the circumstances the order of Banerjee, J., observing that the Chief Minister had acted improperly and expressing disapproval of the action does not call for any interference by this Court.

ix. Raza Textiles Ltd. (supra):-

6. It is settled that an assessment year is a self-contained assessment period and a decision in one assessment year does not ordinarily operate as res judicata or estoppel in respect of the matters decided in another year. It is open to the Income-tax Officer to depart from the decision in another year since the assessment is final and conclusive between the parties only in relation to the assessment for a particular year for which it is made.

x. Commissioner of Income Tax v. Lalit Kumar Bardia (supra):-

20. Transfer of proceedings u/s 127 of the Act cannot be retrospective so as

to confer jurisdiction on a person who does not have it. Section 127 of the Act does not empower the Authorities under the Act to confer jurisdiction on a person who does not have jurisdiction with retrospective effect. In fact, the explanation under Section 12 of the Act clearly provides that all the proceedings under the Act which are pending on the date of such order of transfer and all the proceedings which may be commenced after date of such order of transfer would stand transferred to the Assessing Officer to whom the case is transferred by Section 127(1) of the Act. This provision makes it clear that though transfer would come into effect from the date the order of Commissioner passed under Section 127(1) of the Act, the proceedings already commenced would not abate and continue with new Assessing Officer, who assumes charge consequent to transfer subject of course to the pending notices being within jurisdiction of the Officer issuing the notices. It is not a provision which validates without jurisdiction notice issued by an Income Tax Officer. If the submission of the Revenue on the above account is to be accepted, then an order which is without jurisdiction could be bestowed with jurisdiction by passing an order of transfer with retrospective effect. Section 127 of the Act does not validate notices/orders issued without jurisdiction, even if they are transferred to a new Officer by an Order under Section 127 of the Act.

xi. Commissioner of Income Tax v. M/s All India Children Care & Educational (supra):-

"The Apex Court has held, thus under Section 64(3) the question of determination as to the place of assessment only arises if an objection is taken of assessment only arises if an objection is taken by the assessee and the Income Tax officer has any doubts as to the matter. But the determination is to be by the Commissioner of Income Tax or the Central Board of Revenue. The Act does not "contemplate any other authority."

We find that similar kind of provision is contained in sub-section (4) of Section 124. In this view of the matter, it is the Commissioner, or where the question is one relating to areas within the jurisdiction of different Commissioners concerned, or if they are not in agreement by the Board lies. It necessarily excludes any other court or authority. Complete machinery for determination of place of assessment or the authority for assessment is provided for under Section 124."

xii) Commissioner of Income Tax v. Sohan Lal Sewa Ram Jaggi:-

6. We have given our anxious consideration to the various pleas of the learned counsel for the parties. From the facts above, we find that the notice under Section 143(2) of the Act had been served upon the assessee on 18-11-1995. The provisions of Sub section (3) of Section 124 of the Act are specific and clear that an assessee or any other person should have raised objection regarding jurisdiction within 30 days from the date of notice i.e. the service. In the present case, objection, if any, was raised only on 21-3-1996, which is much beyond the period of 30 days as provided in Sub Section (3) of Section 124 of the Act. It is well settled that there is no place for equity in tax laws. Whether the assessee is under a factual impression or has no knowledge of the order of transfer in a particular case and if he is to raise any objection regarding jurisdiction, he should do so within 30 days and not beyond that

and the same having not been done in the present case, we are of the considered opinion that the Tribunal was not justified in annulling the assessment on this ground alone.

47. On perusal of the judgments relied upon by learned counsel for the opposite party, it is evident that Courts must not travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in the judgment or the order violation of which is alleged. It is also evident that there may perhaps be a case where an order disobeyed could be reasonably construed in two ways and the subordinate court construed it in one of those ways but in a way different from that intended by the superior court. Surely, it cannot be said that disobedience of the order by the subordinate court was contempt of the superior court.

It is also evident that in order to bring home a charge of contempt of court for disobeying orders of Courts, those who assert that the alleged contemnor had knowledge of the order must prove this fact beyond reasonable doubt. This Court went on to observe that in case of doubt, the benefit ought to go to the person charged. It is also evident that accidental or unintentional disobedience is not sufficient to justify one for holding guilty of contempt. It is well settled principle of law that if two interpretations are possible, and if the action is not contumacious, a contempt proceedings would not be maintainable.

It is also evident that mere mentioning of the new address in return of income without specifically intimating the Assessing Officer with respect to change of address and without getting the PAN database changed, is not enough and sufficient. In absence of aforesaid, the Assessing Officer would be justified in sending the notice at the available address mentioned in the PAN database of the assessee, more particularly when the return has been filed under Emodule scheme. It is also evident that a Court will not initiate proceedings for commitment for contempt where there is a mere technical contempt.

It is also evident from perusal of the judgments that an assessment year is a self-contained assessment period and a decision in one assessment year does not ordinarily operate as res judicata or estoppel in respect of the matter decided in another year. It is also evident that if the submission of the revenue on the account is to be accepted, then an order which is without jurisdiction could be bestowed with jurisdiction by passing an order of transfer with retrospective effect.

It is also evident that the Apex Court has held thus under Section 64(3) the question of determination as to the place of assessment only arise if an objection is taken of assessment only arise if an objection is taken by the assessee and the Income Tax Officer has any doubts as to the matter. It is well settled that there is no place for equity in tax laws. Whether the assessee is under a factual impression or has no knowledge of the order of transfer in a particular case and if he is to raise any objection regarding jurisdiction, he should do so within 30 days and not beyond that.

48. Perusal of the material available on record shows that the present contempt application has been filed alleging willful and deliberate disobedience of the judgment and order dated 31.03.2015

passed by a Division Bench of this Court in Writ Petition No.9525(MB) of 2013, whereby notice issued to the petitioner-applicant for the assessment year 2012-13 dated 3.11.2014 was quashed on the ground of jurisdictional error and the opposite party was to delete all the outstanding amount from the web portal showing the dues to be paid. Vide order of this Court dated 28.09.2022, a show cause notice was issued to the opposite party- Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-2, Lucknow that why he should not be tried and punished under Section 12 of the Contempt of Courts Act, 1971 for willful and deliberate disobedience of the order dated 31.03.2015 passed in Writ Petition No.9525 (M/B) of 2013. In pursuance to the same, the opposite party filed his reply. This Court, while considering the conduct of the opposite party, has taken prima facie view that the opposite party is guilty of contempt of the judgment and order dated 31.03.2015 and vide order dated 1.11.2023, this Court has framed three charges against the opposite party-contemnor which is extracted hereinbelow:

"(i) Why the opposite party-contemnor, Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-II, Lucknow be not punished for willfully flouting the order dated 31.032015 passed in Writ Petition (MB) No.9525 of 2013 and proceeded with the assessment year 2013-14 when the writ Court had recorded that the Tax Authority at Lucknow do not have jurisdiction to assess the petitioner at Lucknow and passed an assessment order.

(ii) Why the opposite party-contemnor, Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-II, Lucknow be not punished for willfully flouting the order of writ Court dated 31.03.2015 passed in Writ Petition (MB) No.9525 of 2013 that local address was inserted deliberately to create jurisdiction, which, in fact, legally was not vested with the opposite party i.e. the present contemnor.

(iii) Why the opposite party-contemnor, Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-II, Lucknow be not punished for the reason that the outstanding amount was not deleted from the web portal for several years which amounts to deliberate and willful disobedience of the judgment and order dated 31.03.2015."

49. Learned counsel for the opposite while denying the aforesaid charges reiterated the same submissions as have been advanced at the time of framing of charges which have been quoted in paragraph 2 of this judgment.

50. The submission made by the learned counsel for the applicant that the writ Court vide the judgment and order dated 31.03.2015 had decided the question of jurisdiction and not of any particular assessment year and also that each year assessment being different has no application in cases where the jurisdiction prima facie appears to be correct as this Court finds that the judgment and order dated 31.03.2015 is not confined to any particular assessment year and has generally recorded that the Income Tax Authority at Lucknow does not have jurisdiction over the applicant who is assessed at Delhi. This Court is therefore of the view that the opposite party is guilty of contempt of the order dated 31.03.2015 passed by the writ Court and the opposite party does not have the jurisdiction or authority to interpret the order passed by the Court by putting words which are not

contained in the judgment and order dated 31.03.2015 appears to be willful and deliberate.

51. It is not in dispute that notice issued to the applicant for the assessment year 2012-13 dated 3.11.2014 was quashed on the ground of jurisdictional as well as consequential orders were also directed to be set aside. Meaning thereby, the Assessing Officer has to take care that the entry existing on the web portal was to be deleted immediately after passing of the judgment and order dated 31.03.2015 but deliberately and intentionally the outstanding of notice of assessment year 2011-12 became operation on the web portal till seven years and seven months which ruined the reputation of the applicant and this act of the Income Tax Authority was in deliberate and willful disobedience of the judgment and order dated 31.03.2015.

52. Here, in the present case, as per own admission of previous learned counsel for the opposite party, the outstanding amount was deleted from the web portal after seven months, although it is actually seven years and seven months which amounts deliberate and willful disobedience of the judgment and order dated 31.03.201 for which the opposite party is liable to be punished with imprisonment as well as fine.

53. It is also relevant to note that the present contempt application was disposed of vide judgment and order dated 16.12.2022 against which, a review application was filed and the order dated 16.12.2022 was recalled vide order dated 17.1.2023. Against the said order dated 17.01.2023, a special appeal was filed by the opposite party in which the Division Bench refrained from making any observation on the issue as to whether learned Contempt Judge does or does not have power of review and was dismissed the special appeal vide judgment and order dated 24.04.2023 on the ground that no cause of action has accrued to the appellant-opposite party to institute these proceedings.

54. The judgment and order passed by this Court has primacy and the plea raised at a very late stage that the representation given by the applicant on July 5, 2015 had been referred to the CIT in January, 2016 is not acceptable because after referring the representation, the opposite party neither sent any reminder in this regard and neither took any steps for obtaining a decision/ direction from the CIT nor any document in this regard has been produced before this Court till now so as to show his best efforts and regard towards the order of the Court.

55. The Hon'ble Supreme Court as well as this Court, on several occasions while considering the willful disobedience of the order, repeatedly held that willful and deliberate contempt must be punished both by the imprisonment and fine as it is absolutely imperative to uphold the dignity and majesty of a court of law.

56. In view of the above, the ratio of judgments relied upon by learned counsel for the opposite party is not applicable to the present facts and circumstances of the case as in all the decisions a definite finding has been recorded that in case the commission of contempt is willful and deliberate, the contemnor must be punished to uphold the dignity and majesty of a court of law.

57. In the judgment rendered in the case of **Balwantbhai Somabhai Bhandari (supra)** relied upon by learned counsel for the applicant, it has been held that on account of contempt no benefit can accrue to any beneficiary of the contempt. It has also been held that the apology tendered should not be accepted as a matter of course and the court is not bound to accept the same. The apology may be unconditional, unqualified and bonafide, still if the conduct is serious, which has caused damage to the dignity of the institution, the same should not be accepted. There ought not to be a tendency by courts, to show compassion when disobedience of an undertaking or an order is with impunity and will total consciousness.

58. In the celebrated decision of **Attorney General v. Time Newspaper Ltd.; 1974 AC 273**, the Hon'ble Court has held that there is an element of public policy in punishing civil contempt since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.

59. Civil contempt is punishable with imprisonment as well as fine. In a given case, the court may also penalise the party in contempt by order him to pay the costs of the application and a fine can also be imposed upon the contemnor.

60. Disobedience of this Court's order strikes at the very root of the rule of law on which the judicial system rests. The rule of law is the foundation of a democratic society. Judiciary is the guardian of the rule of law. Hence, it is not only the third pillar but also the central pillar of the democratic State. If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protect at all costs. Otherwise, the very corner stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. That is why it is imperative and invariable that Court's orders are to be followed and complied with.

61. Considering in totalities of the facts and circumstances of the case as well as law-reports cited by learned counsel for the parties, this Court finds the charges framed vide order dated 1.11.2023 to be proved against the opposite party. This Court is also of the opinion that the action of the opposite party is not only contemptuous but is also malicious. He took care with the money of the applicant in spite of clear direction of this Court and there is no justifiable reason for the said action. If the action of Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-2, Lucknow (now retired) is considered in the background by the allegations made against him, it was his purposeful act to harass the applicant in spite of order of the writ Court. Unnecessarily *mens rea* is not required to be proved in a case of contempt but in the present case the violation is willful, deliberate and coupled with intention and motive to harass the applicant.

62. For the reasons given above, this Court finds the opposite party- Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-2, Lucknow (now retired) to be guilty under Section 12 of the Contempt of Courts Act, 1971.

63. On these facts, fine only would not meet the ends of justice because Mr.

Harish Gidwani, Deputy Commissioner of Income Tax, Range-2, Lucknow (now retired) was a senior officer, who was the custodian of assessing of the applicant and had committed a grossly reprehensible act and in case he is not punished, it would send down a wrong signal to other officials of Income Tax Department that even such unbusiness like conduct invites only a warning or fine, as Courts are flooded with matters, where orders are passed.

64. Accordingly, a fine of Rs.25,000/- along with simple imprisonment for a period of one week is awarded to the contemnor-Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-2, Lucknow (now retired). In case of default, he would suffer one day's further simple imprisonment.

65. The contemnor-opposite party (Mr. Harish Gidwani, Deputy Commissioner of Income Tax, Range-2, Lucknow (now retired)) will surrender before the Senior Registrar of this Court 3.30p.m. on 9.8.2024 who will send him jail to serve out the sentence.

66. The Senior Registrar of this Court is directed to submit a report by 12.8.2024 to this Court in regard to compliance of the order.

67. Resultantly, the contempt application is finally **disposed off.**

68. All the pending applications, if any pending, are disposed of accordingly.

Order after deliver of Judgment:

(i) After delivery of judgment on 9.8.2024, Shri Neerav Chitravanshi, learned counsel for the opposite party assisted by Shri Kushagra Dikshit, learned Advocate requested that effect and operation of the judgment dated 9.8.2024 be extended for ten days.

(ii) Ms. Radhika Singh, learned counsel for the applicant has serious objection for extension of time for its applicability.

(iii) In view of the fact that the matter has been lingering since long, the prayer made by Shri Neerav Chitravanshi, learned counsel for the opposite party-contemnor for enforcement of judgment dated 9.8.2024 after ten days is **rejected.**

(2024) 8 ILRA 464
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.08.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

First Appeal No. 7 of 2014

U.P. Health System Devp. Project Lko. ...Appellant

Versus

M/S Goel Computers Lko. ...Respondent

Counsel for the Appellant:
Sudeep Kumar, C.S.C.

Counsel for the Respondent:
P. Chakravarty

A. Civil Law – Allahabad High Court Rules, 1952 – Chapter V, Rules 2(ii)(b) and 2(ii)(d) – Jurisdiction of Single Judge – Value of appeal exceeding fifty lakh rupees – Notification dated 23.05.2022, deleting the words 'in which value of the appeal for the purpose of jurisdiction does not exceed fifty lakh rupees', was issued – Applicability to the pending appeal – Held, amendment brought about by the notification dated 23.05.2022 in Rule

2(ii)(b) of Chapter V and Rule 2(ii)(d) of the same Chapter of the Allahabad High Court Rules, 1952, by which the words fifty lakh rupees etc. have been deleted applies to pending appeals also except of course those appeals where under the statute which provides the remedy of appeal, it is to be heard by a Division Bench. (Para 9)

B. Amendment in procedural law – Applicability to pending cases – Held, the provision, in which the amendment has been made, is a procedural provision, therefore, normally any amendment in such a provision even if it is a deletion it has a retrospective effect and applies to pending proceedings also. (Para 8)

Issue decided. (E-1)

List of Cases cited:

1. Om Prakash Agarwal & ors. Vs Vishan Dayal Rajpoot & anr.; (2019) 14 SCC 526

2. I.A. No.99210 of 2021 in Civil Appeal No. 1842 of 2021; ECGC Ltd. Vs Mokul Shriram EPC JV

3. Ultratech Cement Ltd. & anr. Vs St. of Raj. & ors.; (2021) 12 SCC 147

4. Manujendra Dutt Vs Purnedu Prosad Roy Chowdhury & ors.; AIR 1967 SC 1419

5. K. Kapen Chako Vs Provident Investment Company (P) Ltd.; (1977) 1 SCC 593

6. Sudhir G. Angur & ors. Vs M. Sanjeev & ors.; (2006) 1 SCC 141

7. Hitendra Vishnu Thakur & ors. Vs St. of Maharashtra & ors.; (1994) 4 SCC 602

8. Mohd. Idris & ors. Vs Sat Narain & ors., AIR 1966 SC 1499

9. S. Sundaram Pillai & ors. Vs V.R. Pattabiraman & ors.; (1985) SCC 591

(Delivered by Hon'ble Rajan Roy, J. & Hon'ble Om Prakash Shukla, J.)

1. Heard.

2. This is a first appeal under Section 37 of the Arbitration & Conciliation Act, 1996.

3. On 10.05.2014, we had passed the following order :-

"1. This matter was earlier being heard by a Division Bench. However, in view of Notification dated 23.05.2022, the matter was placed before Single Judge Bench on 16.04.2024 and thereafter it continued to be listed before a Single Judge Bench but on 02.05.2024 following order was passed :-

"Shri Devendra Mohan Shukla, learned Additional Chief Standing Counsel submits that this First Appeal under Section 37 of the Arbitration and Conciliation Act 1996 having valuation of Rs.75,66,787/- filed before this court is cognizable by the Division Bench. It was going on before the Hon'ble Division Bench. However as per office report dated 16.04.2024 in view of Notification dated 23.05.2022, it has been put up before this Single Bench.

He submits that by means of Notification dated 23 May 2022, the Rule 2(ii)(b) of Chapter V and Rule 2(ii)(d) of Chapter V of the Allahabad High Court Rules has been amended and the valuation of Rs.50 lakh has been deleted. The instant appeal is covered under Rule 2(ii)(d) of Chapter V, for which the amendment has been made w.e.f.01.07.2022, therefore the appeal filed thereafter shall be covered by the said amendment and not the present appeal. Thus the submission is that this appeal has wrongly been sent by the office before this court, whereas it has not been directed by the Hon'ble Division Bench.

Shri Amit Chandra, Advocate holding brief of Shri P. Chakravarty, learned counsel for the respondents does not dispute that the appeal was filed before the Division Bench and the matter was in active consideration before the Division Bench and also does not dispute the contention of learned counsel for the appellant.

In view of above, let the matter be placed before the concerned Hon'ble Division Bench, who may consider it.

As prayed list in the next week. "

2. The learned Single Judge it appears has opined that as amendment of Rule 2(ii)(d) of Chapter V of the Allahabad High Court Rules vide Allahabad High Court (Amendment) Rules, 2022 dated 23.05.2022 has come into force on 01.07.2022, therefore, this will apply only to appeals filed after the said date i.e. after 01.07.2022 and not to pending appeals. This is how the matter has again come back to the Division Bench.

3. In our view, prima facie, the amendment is essentially procedural one.

4. Order reserved on this issue."

4. Thereafter we posted the matter again by the following order passed on 12.07.2022 :-

"(1) We had reserved our order on 10.05.2024.

(2) Having considered the matter as the Rule in question has been framed by Allahabad High Court, we would like to have the opinion of the High Court itself as to the object/ intent behind the amendment made in Rule 2(ii)(b) of Chapter V and Rule 2(ii)(d) of Chapter V of the Allahabad High Court Rules, 1952, whether the amendments are intended to apply to pending proceedings also?

(3) Let Sri Gaurav Mehrotra, learned counsel for the High Court seek instructions and assist the Court on the next date.

(4) The appeal be listed on 18.07.2024 as first case of the day.

(5) Office to communicate this order to Sri Gaurav Mehrotra, learned counsel for the High Court."

5. Prior to the notification of the High Court dated 23.05.2022, Rule 2 (ii) (b) contained in Chapter-V of the Allahabad High Court Rules, 1952 dealing with Jurisdiction of a Single Judge was to the effect as under :-

"Except as provided by these Rules or other law, the following cases shall be heard and disposed of by a Judge sitting alone, namely :

(i) .....,

(ii) (a) .....,

(ii) (b) a First Appeal instituted before or after the commencement of the U.P. Civil Laws Amendment Act of 2015 (U.P. Act No. 14 of 2015) from a decree in which value of the appeal for the purpose of jurisdiction does not exceed fifty lakh rupees;

(ii) (c).....,

(ii) (d) any other Civil Appeal in which the value of the appeal does not exceed fifty lakh rupees."

6. By the notification dated 23.05.2022, which has been kept on record, the words *'in which value of the appeal for the purpose of jurisdiction does not exceed fifty lakh rupees'* were deleted in Clause (b) and (d) of Rule 2 (ii) of the Allahabad High Court Rules, 1952 referred hereinabove. The provision in question is a procedural provision and we have to consider the effect of said deletion.

7. Today, Shri Gaurav Mehrotra informs the Court that the matter has been examined by the High Court at the competent level and according to the High Court the amendment referred in the aforesaid order is to have retrospective effect and this was the intent behind the amendment, as is evident from the discussion and the notings in the file preceding the said amendment. He has also relied upon the decision in the case(s) of **(i) Om Prakash Agarwal since deceased through legal representatives and others Vs. Vishan Dayal Rajpoot and another**, reported in **(2019) 14 SCC 526, (ii) ECGC Limited Vs. Mokul Shriram EPC JV, I.A. No.99210 of 2021 in Civil Appeal No.1842 of 2021, (iii) Ultratech Cement Ltd. & another Vs. State of Rajasthan & others, (2021) 12 SCC 147, (iv) Manujendra Dutt Vs. Purnedu Prosad Roy Chowdhury & others, AIR 1967 SC 1419, (v) K. Kapen Chako Vs. Provident Investment Company (P) Ltd. (1977) 1 SCC 593, (vi) Sudhir G. Angur & others Vs. M. Sanjeev & others, (2006) 1 SCC 141, (vii) Hitendra Vishnu Thakur & others Vs. State of Maharashtra & others, (1994) 4 SCC 602, (viii) Mohd. Idris & others Vs. Sat Narain & others, AIR 1966 SC 1499, (ix) S. Sundaram Pillai & others Vs. V.R. Pattabiraman & others, (1985) SCC 591,** which were considered at that time by the High Court while bringing the amendment.

8. We are also of the opinion that the provision in which the amendment has been made as referred hereinabove is a procedural provision, therefore, normally any amendment in such a provision even if it is a deletion it has a retrospective effect and applies to pending proceedings also. No appellant has any vested right to have his appeal heard by a Single Judge Bench. The only right is that the appeal be heard by the High Court whether it be heard by a Division Bench or by a Single Judge Bench is immaterial. This does not involve any change of forum also because the forum remains the same, which is the High Court. In either eventuality the next remedy would be before Hon'ble the Supreme Court and not before this Court. In taking this view, we are supported by the law enumerated and propounded in the precedents referred hereinabove.

9. For all these reasons, we hold that the amendment brought about by the notification dated 23.05.2022 in *Rule 2(ii)(b) of Chapter V and Rule 2(ii)(d) of the same Chapter of the Allahabad High Court Rules, 1952*, by which the words fifty lakh rupees etc. have been deleted applies to pending appeals also except of course those appeals where under the statute which provides the remedy of appeal, it is to be heard by a Division Bench, in that case of course, the said Rules will not apply as there would be no question of pecuniary jurisdiction in maintaining such appeal.

10. Let the Registry take note of this order and list the appeal accordingly. As a consequence of the aforesaid, this appeal will now be heard by Single Judge Bench which may have been assigned such appeals.

11. List this appeal before the appropriate Bench on 09.09.2024.

(2024) 8 ILRA 467
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.08.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

First Appeal No. 11 of 2023

Apoorva Gupta @ Apoorva Kumar Gupta
...Appellant

Versus

Vandana Gupta ...Respondent

Counsel for the Appellant:
Akshat Kumar, Sanjay Kumar Srivastava

Counsel for the Respondent:
Sagar Singh, Jyoti Prakash, Shri Ram Maurya

A. Family Law – Hindu Marriage Act, 1955 – Sections 13 – Divorce – Mental cruelty – Desertion – Both parties were living separately since more than a decade – Several notice issued to wife, but she failed to appear before the High Court – Earlier attempt of mediation was failed in Habeas Corpus proceeding – Effect – Held, the parties are living separate from each other for a period exceeding a decade and the appellant has not been able to meet his daughter even once during this period. These facts are sufficient to cause acute mental pain, agony and suffering to both the parties and it would make it impossible for the parties to live with each other, which would come within the broad parameters of mental cruelty – Aforesaid facts are sufficient for grant of a decree of divorce in favour of the plaintiff-appellant. (Para 19, 20, 21 and 25)

Appeal allowed. (E-1)

List of Cases cited:

1. Rakesh Raman Vs Kavita, 2023 SCC OnLine SC 497

2. Debananda Tamuli Vs Kakumoni Kataky: (2022) 5 SCC 459

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

1. By means of the instant appeal filed under Section 19 of the Family Courts Act, the appellant has challenged the validity of a judgment and decree dated 08.02.2022, passed by the First Additional Principal Judge, Family Court, Hardoi, in Regular Suit No.607 of 2019: Apoorva Gupta versus Vandana Gupta, under Section 13 of Hindu Marriage Act, 1955.

2. In response to a notice issued by this Court, the respondent had put in appearance by filing a Vakalatnama appointing three learned Advocates to represent her before this Court. The appeal was admitted by means of an order dated 13.01.2023 and the trial court's record was summoned. Thereafter the following order was passed on 07.08.2023:

"1. The appeal was mentioned by leaned counsel for the appellant. A written notice has also been served to learned counsel for the respondent namely Sri Ram Maurya.

2. Learned counsel for the respondent has failed to appear when the case was called out.

3. The case is ready for hearing.

4. List this matter for ex-parte hearing. Let a notice be sent to the respondent along-with a copy of this order about the date fixed.

5. List in the week commencing 21.8.2023."

3. The office has reported on 13.12.2023 that the notice issued to the respondent has been served through her mother, which is sufficient service, but she has not put in appearance before this court to oppose the appeal and, therefore, the appeal was heard ex-parte on 21.08.2024.

4. In the plaint filed on 06.08.2016 before the Principal Judge, Family Court, Hardoi, the plaintiff-appellant pleaded that the parties got married on 14.04.2012 at Hardoi. The defendant stated that she would not live in Mallawan town and will

live at Delhi. The plaintiff kept her at Delhi for some time but when a proper arrangement for residence at Delhi could not be made, he kept the defendant at Mallawan with his parents. The defendant did not cooperate in performance of the house-hold chores and she went away with her father and she took away all her clothes and jewelry with her. The defendant had lodged a false criminal case against the plaintiff, his parents and both his sisters, in which the plaintiff and his family members were acquitted and accepting the defendant's condition that she will not go to Mallawan, the plaintiff started living with her at Delhi. For this reason, the plaintiff's parents severed their relations with the plaintiff and they deprived him of all the rights in their properties.

5. On 09.05.2014, the defendant went to live with her parents and she delivered a baby girl in a Nursing Home on 12.07.2014, in which the plaintiff rendered his full cooperation, but some quarrel took place there and the plaintiff was threatened and turned away and he was not involved in the ceremonies of his daughter. The plaintiff used to send money-orders for some time but later on the defendant declined to accept the same and she did not let the plaintiff meet his daughter.

6. The plaintiff further pleaded that false complaints were made by the defendant against him and the Women's Commission held mediation between the parties, but the defendant did not agree to live with the plaintiff or to let him meet his daughter. The defendant treated the plaintiff in a cruel manner, she did not cooperate in house-hold chores at Delhi, she indulged into quarrel and beatings almost on daily basis and she got the plaintiff threatened for his life by her brothers. The plaintiff also pleaded that the defendant was living separate from him for the past two years without any cause and she was threatening to entangle him in a false case.

7. The defendant filed a written statement in the suit denying the plaint allegations and she alleged that she was harassed for demanding dowry and the plaintiff left her at her father's residence on 09.05.2014 and since then he did not even inquire about her well being. The defendant stated that she was willing to perform her conjugal obligations.

8. The Family Court framed the following two issues: -

(1) Whether the plaintiff is entitled to get his marriage dissolved on the basis of averments made in the plaint?

(2) To what relief is the plaintiff entitled?.

9. The plaintiff examined himself as PW-1 by filing his affidavit as his examination-in-chief, wherein he reiterated the plaint averments. In his cross-examination, the plaintiff stated that on 24.06.2013, the defendant had lodged an F.I.R. under Sections 498-A, 323, 324, 504, 506 I.P.C. and Sections 3/4, Dowry Prohibition Act against the plaintiff, his parents and two sisters. He further stated that the defendant had deserted him without any reason for the past four years but as he had a threat of his life and property from the defendant, he did not want to live with her.

10. One Sanjay, who works in a shop situated near the plaintiff's house and who claims to know the parties very well, was examined as PW-2 and the plaintiff's father

Anup Kumar Gupta was examined as PW-3 and they also supported the plaintiff's version. The plaintiff's father stated in his cross-examination that the defendant's father has filed a case under Sections 452, 323, 504, 506 I.P.C. in the year 2015 against him and the plaintiff.

11. The defendant examined herself as OPW-1 and she declined all the plaintiff's allegations and she further stated that although the plaintiff used to beat her, she does not have any life threat from him and she wants to live with the plaintiff.

12. The defendant's father Umesh Chandra Gupta was examined as OPW-2, who stated in his examination-in-chief that as a settlement had been arrived at during mediation, the dowry case was got closed by all the witnesses turning hostile. However, no written settlement was entered into between the parties. In his cross-examination. He stated that there was some old relationship between his family and the family of the plaintiff. He admitted that the plaintiff had sent some amount to the defendant through money-order, but without disclosing the amount, he said that it was a meager amount. He stated that he did not understand the meaning of the word 'hostile' used in his affidavit filed as his examination-in-chief.

13. In documentary evidence, the plaintiff filed a copy of the complaint no. 3337 of 2015 filed by the defendant's father against the plaintiff and his father under Section 452, 323, 504, 506 I.P.C. in the Court of the Chief Judicial Magistrate, Hardoi, a copy of F.I.R. relating to Case Crime No. 343 of 2013 under Sections 452, 323, 504, 506 I.P.C. filed by the plaintiff in Police Station Mallawan against the defendant's father and three other persons and a copy of the charge-sheet dated 29.07.2013 filed in respect of that F.I.R.

14. The Family Court dismissed the suit for divorce by means of the impugned judgment and decree dated 08.02.2022 holding that after the F.I.R. was lodged by the defendant, the parties had entered into a settlement and resumed cohabitation and, therefore, the occurrences that had taken place prior to it cannot be taken into consideration for adjudicating whether the defendant has treated the plaintiff with cruelty. Cases have been lodged against each other by persons of both the sides and, therefore, filing of a false case cannot be a ground for granting a decree of divorce. Minor differences in matrimonial relationships are normal and the same cannot be termed as cruelty.

15. Rejecting the claim of divorce on the ground of desertion, the Family Court held that the parties resided together happily as husband and wife till 12.07.2014, the plaintiff has not made any efforts for resuming cohabitation thereafter whereas the defendant has expressed willingness to resume cohabitation with the plaintiff and, therefore, the ground of desertion is not established.

16. The following points arise for determination in this appeal: -

a) Whether the facts and circumstances of the case evidenced by the material available on record make out the grounds of cruelty and desertion?

b) Whether the judgment and decree passed by the Family Court dismissing the suit for divorce is sustainable in law?

17. In **Rakesh Raman v. Kavita**, 2023 SCC OnLine SC 497, the Hon'ble Supreme Court has explained the meaning of the word "cruelty" used in Section 13 of

the Hindu Marriage Act in the following words: -

"18. Cruelty has not been defined under the Act. All the same, the context where it has been used, which is as a ground for dissolution of a marriage would show that it has to be seen as a 'human conduct' and 'behavior" in a matrimonial relationship. While dealing in the case of Samar Ghosh [Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511] this Court opined that cruelty can be physical as well as mental:—

"46…If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse.

19. Cruelty can be even unintentional:—

…The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment."

20. This Court though did ultimately give certain illustrations of mental cruelty. Some of these are as follows:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty." (Emphasis supplied by the Supreme Court)

18. The appellant holds decrees of Bachelor of Technology and Master of Business Administration and is working as a Software Engineer. He got married to the respondent on 14.04.2012. It is evidence from the material available on record that both the parties belong to reputed families. On 24.06.2013, the defendant had lodged an F.I.R. under Sections 498-A, 323, 324, 504, 506 I.P.C. and Sections 3/4, Dowry Prohibition Act against the plaintiff, his parents and two sisters and the plaintiff and his family members were acquitted in that case by means of a judgment and order dated 18.02.2014 passed by the learned Additional Chief Judicial Magistrate, Court No. 5, Hardoi. Thereafter the parties resumed cohabitation, which could continue only for a brief period, as the respondent had left the appellant's house at

Delhi on 09.05.2014 and she never returned to him. The appellant last met the respondent on 12.07.2014 at a nursing home where she had delivered a baby girl. On the last visit of the appellant, he was assaulted by the family members of the respondent and he had filed an application under Section 156 (3) Cr.P.C. in this regard, which was registered as a complaint, the accused persons were summoned and bailable warrants were issued against them due to their non-appearance and the case is still pending. Since then, the respondent did not return to live with the appellant and there has not been any connect or communication between the parties. In his cross examination, the appellant stated that the parties resided together merely for about one year in all and that the respondent had deserted him for a period of about four years without any reason. The appellant also stated that he apprehends a life threat in living with the respondent and he had does not trust her.

19. The appellant had filed Writ Petition No. 12317 of 2017 for issuance of a Writ of Habeas Corpus for custody of his daughter and the matter was referred to mediation, but to no avail.

20. Now a period of more than a decade has elapsed since the parties started living separately. The respondent is not contesting the appeal in spite of service on notice having been issued by this Court twice. The first notice was issued on the application for condonation of delay in filing the appeal, in response to which she had appeared through Counsel, but she preferred not to file any objection. Thereafter the application for condonation of delay in filing the appeal was condoned and the appeal was admitted. When the respondent's Counsel did not appear before this Court, another notice was issued to the respondent on 07.08.2013, which was also served on her but she did not appear so as to give this Court an opportunity to make efforts for an amicable settlement between the parties. She has not come forward to oppose the pleas of the appellant.

21. When we examine the aforesaid facts in light of the law explained in **Rakesh Raman** (Supra), we find that the parties are living separate from each other for a period exceeding a decade and the appellant has not been able to meet his daughter even once during this period. These facts are sufficient to cause acute mental pain, agony and suffering to both the parties and it would make it impossible for the parties to live with each other, which would come within the broad parameters of mental cruelty. The long period of continuous separation of a decade establishes that the matrimonial bond is beyond repair. The marriage between the parties has become a fiction, though supported by a legal tie. In such situation, it leads to mental cruelty. Though the respondent's refusal to live with the appellant may be without any intention of inflicting cruelty upon him, it would not make any difference, as intention is not a necessary element in cruelty. The appellant cannot be denied relief on this ground. By refusing to severe the tie between the plaintiff and the defendant, the Family Court has not served the sanctity of marriage; on the contrary, it has shown disregard for the feelings and emotions of the parties, which are not affectionate towards each other. Therefore, we are of the considered view that the peculiar facts and circumstances of the case make out a case for grant of divorce on the ground of cruelty.

22. The term "desertion" has been explained by the Hon'ble Supreme Court in **Debananda Tamuli v. Kakumoni Kataky**: (2022) 5 SCC 459, in the following words: -

"7. …The law consistently laid down by this Court is that desertion means the intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. The deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. In other words, there should be animus deserendi on the part of the deserting spouse. There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home.

* * *

8. The reasons for a dispute between husband and wife are always very complex. Every matrimonial dispute is different from another. Whether a case of desertion is established or not will depend on the peculiar facts of each case. It is a matter of drawing an inference based on the facts brought on record by way of evidence."

23. The respondent had left the appellant's house on 09.05.2014 and she did not return to live with him till date, i.e. for more than a decade. The respondent is not contesting the appeal, which shows that she has no interest in her relation with the appellant and which indicates that the respondent has abandoned the relationship between herself and the appellant and an *animus deserendi* on her part, which is sufficient to constitute desertion.

24. In view of the aforesaid facts, we are of the considered view that the respondent has deserted the appellant.

25. The aforesaid facts are sufficient for grant of a decree of divorce in favour of the plaintiff-appellant. The Family Court has erred in dismissing the plaintiff's suit for grant of divorce.

26. In view of the aforesaid discussion, our decision of the points involved in this appeal is as follows: -

a) The facts and circumstances of the case evidenced by the material available on record make out the grounds of cruelty and desertion.

b) The judgment and decree passed by the Family Court dismissing the suit for divorce is unsustainable in law.

27. Accordingly, the appeal is ***allowed***. The judgment and decree dated 08.02.2022, passed by the First Additional Principal Judge, Family Court, Hardoi, in Regular Suit No.607 of 2019: Apoorva Gupta Versus Vandana Gupta, under Section 13 of Hindu Marriage Act, 1955 is set aside and the suit is decreed. A decree of divorce is granted in favour of the plaintiff dissolving his marriage with the defendant-respondent, which was solemnized on 14.04.2012.

28. Costs of the litigation made easy.

(2024) 8 ILRA 473
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.08.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

First Appeal No. 133 of 2012

Smt. Kajal Kiran Gupta @ Guddi
...Appellant
Versus
Raj Kumar @ Golu ...Respondent

Counsel for the Appellant:

U.S. Sahai

Counsel for the Respondent:
Madan Gopal Misra

A. Family Law – Hindu Marriage Act, 1955 – Section 12 (1) (C) – Voidable marriage – Fraud – Concealment of fact regarding wife's first marriage – Appellant failed to prove her assertion that the factum of previous marriage was disclosed to the respondent/plaintiff and only thereafter marriage of the appellant was solemnized with the respondent – No evidence has been led on behalf of the appellant nor appellant has produced her mother or brother or father in the witness box to prove the said fact – There was no decree of divorce of her first marriage – Effect – Held, the factum of previous marriage of the appellant with Rajendra Kumar Gupta was a material fact concerning the wife (respondent) relating to her marital status, which was never disclosed to the husband (plaintiff), as such, the consent of the respondent for marriage with the appellant was obtained by fraud and deceipt thereby attracting Section 12 (1) (c) of the Act, 1955. (Para 19 and 20)

Appeal dismissed. (E-1)

List of Cases cited:

1. Raghunath Gopal Daftardar Vs Vijaya Raghunatha Gopal Daftarda; 1971 SCC OnLine Bom 52

2. Harbhajan Singh Vs Shrimati Brij Balab; 1963 SCC OnLine Punj 139

(Delivered by Hon'ble Om Prakash Shukla, J.)

Prelude

(1) This is an appeal filed under Section 28 of the Hindu Marriage Act, 1955 by the wife/appellant, challenging the judgment/ decree dated 31.07.2012 passed by the Principal Judge, Family Court, Faizabad in Original Suit No. 44 of 1997: *Raj Kumar alias Golu vs. Smt. Kajal Kiran alias Guddi and another*, filed by the husband/respondent under Section 12 (Voidable marriages) of the Hindu Marriage Act, 1955.

(2) Vide judgment/decree dated 31.07.2012, the Principal Judge, Family Court, Faizabad, has allowed the Original Suit No. 44 of 1997 and has declared the marriage of the respondent/ husband with appellant/wife dated 26.04.1994 as void and ineffective.

Factual Matrix

(3) Shorn of unnecessary details, facts in brief, as borne out from the pleadings, are as under:-

I. On 26.04.1995, the marriage of the appellant was solemnized with respondent. Gauna took place subsequently and thereafter appellant and respondent lived as husband and wife at Faizabad. One Shri Rajendra Prasad Gupta, resident of Mohalla Gillat Bazar, Varanasi, came to the respondent's house on 28.04.1995 and told him as well as the respondent's father and mother that prior to marriage of the respondent with the appellant, the appellant had married him on 17.05.1990 in accordance with Hindu rites and rituals. Shri Gupta told him (respondent) that subsequently, the appellant developed illicit relationship with another man and as such she was not ready to come back to him. Consequently, his marriage with the appellant was dissolved in accordance with mutual understanding for which written agreement was also entered between them on 16.08.1992, which bears signature of the appellant and her father, and, thumb impression of her mother.

II. On verification, respondent found these facts to be correct. On being confronted, as per the respondent/plaintiff, the appellant/ defendant accepted these facts and also that they were concealed by her from the respondent/husband. This led to the filing of the Original Suit No. 256 of 1995 by the respondent under Section 12 of the Act, 1955 in the District Court on 11.07.1995.

III. The case of the plaintiff was that the defendant has committed a fraud on him by concealing the factum of her earlier marriage and alleged divorce from him, which was a material fact/circumstance regarding her marital status, therefore, he is entitled to relief as prayed on the ground of Section 12 (1) (c) of the Act, 1955. Defendant of the case denied these allegations and stated that these facts were disclosed to the plaintiff and his family members, who were well aware of the same, before marriage, but a cooked up story has been putforth only because the demand of dowry of the plaintiff etc. could not be met by the defendant and her family members.

IV. In the said suit, the Judge (Small Causes Court), Faizabad passed an order of interim maintenance on 22/24.01.1996. This order was put to challenge by the plaintiff by filing Civil Revision No. 23 of 1996, wherein an interim order was passed by the District Judge, Faizabad, staying the order of trial Court dated 22/24.01.1996. Ultimately, the revision was allowed on 05.12.1997, with the *prima facie* observation that divorce of the defendant from the first husband Shri Gupta was not proved, therefore, *prima facie*, she does not appear to be the wife of revisionist/plaintiff. Thereafter, the Family Court was constituted at Faizabad and on the file being transferred to it, the suit was renumbered as Original Suit No. 44 of 1997.

V. On the basis of the pleadings in the suit, the Family Court framed four issues as under :-

1. क्या प्रतिवादिनी व उसके परिवारीजन ने प्रतिवादिनी की तृतीय–पक्ष राजेन्द्र से सम्पन्न हुई ाादी के तथ्य से वादी व उसके परिवारीजनों से छिपा कर व प्रतिवादिनी को कुंवारी बताकर प्रतिवादिनी की ाादी, वादी के साथ कर दी, जैसा कि वाद–पत्र में कहा गया है, यदि हॉ तो प्रभाव ?

2. क्या प्रतिवादिनी ने किसी अन्य व्यक्ति के साथ अवैध ाारीरिक सम्बन्ध कायम किया, जैसा कि वाद–पत्र में कहा गया है ?

3. क्या वादी, प्रतिवादिनी से दहेज की मॉग करता है और उसके अदा न करने के कारण ही उसका परित्याग कर रखा है, जैसा कि प्रतिवाद–पत्र में कहा गया है ?

4. अनुतो ा।

VI. Parties led evidence before the trial Court on the issues framed.

VII. In support of his case, respondent/husband recorded his own deposition as P.W.1 and also filed documents viz. (i) affidavit sworn by the respondent/husband (marked as paper no. 174 Ga 2); and (ii) affidavit sworn by one Brijesh Kumar Singh (marked as paper no. 175 Ga 2).

VIII. Apart from it, the respondent/husband had also filed other documentary evidences i.e. (i) vide List 6-Ga-1, a photocopy of documents pertaining to marriage of the appellant with Rajendra Kumar Gupta, a photocopy of the agreement of dissolution of marriage/divorce between the defendant/ appellant and Rajendra Kumar Gupta, a copy of Registry notice sent by Raj Kumar (respondent) dated 17.06.1995; (ii) vide List-Ga-2, a copy of the certificate issued by Labour Inspector indicating the registration of shop dated 24.08.1981; (iii) vide List 32-Ga-2, an envelop of the marriage card of the plaintiff/ respondent and the defendant/appellant; (iv) vide List

176 Ga-1, 04 CDs (in seal cover) and 10 photographs; and (v) vide List 211-Ga-2, a copy of the order dated 22.10.2010 passed in Writ Petition No. 36 of 1998 by High Court of Judicature at Allahabad, Lucknow.

IX. On the other hand, the appellant/wife recorded her own deposition as D.W.1 and also filed one documentary evidence viz. original document for dissolution of marriage dated 16.08.1991 (marked as List-36 Ga 1).

X. The Family Court, after appraising the pleadings and evidence on record, decided issue no.1, as mentioned above, in affirmative in favour of the respondent/husband by recording a finding that there is no evidence either documentary or oral that prior to marriage of the appellant/defendant with the respondent/plaintiff, respondent had knowledge about earlier marriage of the appellant with Rajendra Kumar Gupta and the appellant/defendant has admitted the fact that earlier her marriage had been solemnized with Rajendra Kumar Gupta on 15.05.1990 and her marriage was thereafter dissolved as per local customs.

XI. So far as issue no.2, regarding illicit relationship of the appellant/wife is concerned, the Family Court has recorded a finding that though the respondent/husband had alleged that erstwhile husband of his wife (appellant) told him about her illicit relationship with some other person, but the respondent/husband did not produce the said Rajendra Kumar Gupta in the witness box, therefore, the respondent could not prove his allegation about illicit relationship of his wife and accordingly, issue no.2 was decided in the negative and in favour of appellant/defendant.

XII. So far as issue no.3 with regard to allegation of the appellant/wife about demand of dowry by her husband and that on account of non-fulfillment of the demand of dowry, her husband had abandoned her, is concerned, the Family Court found that letters available on record and marked as 33Ga 1/1 and 33 Ga 1/2, which were admitted by the appellant as written by her, did not mention the demand of dowry, therefore, allegations of appellant with regard to demand of dowry by the husband from her were found to be unreliable, as such, issue no.3 was decided in the negative, against the appellant/ defendant on the ground that there is no evidence regarding demand of dowry.

XIII. Based on its findings on the aforesaid three issues, the Family Court has proceeded to decide issue no.4 pertaining to relief and has opined that as the appellant/defendant has failed to prove that prior to her marriage with the respondent/plaintiff, she had disclosed to her husband/respondent about her earlier marriage with Rajendra Kumar Gupta and its dissolution, as such, issue no. 4 was decided in favour of the respondent/ husband. Consequently, the Family Court decreed the suit in favour of the respondent/husband and declared marriage of the appellant with the respondent void and ineffective by virtue of the impugned judgment/decree dated 31.07.2012.

XIV. It is the aforesaid judgment/decree dated 31.07.2012, which has been challenged in the present appeal by the appellant/wife.

Points of Determination

(4) Based upon the pleadings, evidence on record and the impugned judgment passed by the Trial Court, the following points for determination arise before us in this appeal:-

1. Whether the appellant-defendant has concealed the factum of her first marriage and alleged Divorce from the

respondent-plaintiff, thereby committing a fraud as to a material fact/circumstance relating to her marital status, thereby entitling him to declaration under Section 12 (1) (c) of the Act, 1955 ?

2. Whether the Family court has erred on facts and law by passing the impugned judgment and decree by recording perverse and illegal findings?

Discussion & Analysis

(5) We have heard Smt. Bhavna Gupta and Shri Devraj Singh holding brief of Shri U.S. Sahai, learned Counsel representing the appellant/wife and Shri Vinod Kumar Srivastava holding brief of Shri Madan Gopal Mishra, learned Counsel representing the respondent and perused the records and the impugned judgment and decree.

(6) The main plank of the submissions made by the learned Counsel for the appellant/wife was that the only basis upon which the suit filed by the respondent-plaintiff was decreed is the statement of the respondent-plaintiff to the effect that the appellant had earlier married Rajendra Kumar Gupta but she did not disclose her marital status to the respondent-plaintiff prior to marriage and even thereafter, which were factually incorrect. It was contended by the learned Counsel for the appellant that prior to marriage of the appellant with the respondent, mother of the appellant/defendant gave full information regarding the first marriage of the appellant/ defendant as well as about dissolution of the said marriage by way of agreement dated 26.04.1995 and in order to satisfy themselves fully, the respondent/plaintiff and some of his relatives came to her house for seeing the appellant/defendant and thereafter they all met her family members and had stayed overnight and thereafter, on the next day, they had also made inquiries in the village and thereafter when they were fully satisfied, only then they had fixed the dates for tilak and marriage ceremony. Thus, his submission was that none of the grounds put forth by the respondent/plaintiff in the suit constitute a ground to declare the marriage of the appellant/defendant with the respondent/plaintiff as void and ineffective in terms of Section 12 (1) (c) of the Act, 1955 and even the suit filed by the respondent/plaintiff under Section 12 of the Act, 1955 is not maintainable since none of the pre-conditions were satisfied.

(7) Replying to the aforesaid contentions raised by the appellant, learned Counsel for the respondent argued that the evidence led by the respondent/plaintiff clearly establishes that prior to her marriage with the respondent/plaintiff, the appellant/defendant had never informed him regarding her previous marriage with Rajendra Kumar Gupta nor their dissolution of marriage through agreement. Learned Counsel taking us through the deposition of the respondent/plaintiff and the documents placed in the suit as well as testimony of the respondent/plaintiff, has contended that respondent/plaintiff was extensively cross-examined but on the point of knowledge of the previous marriage of the appellant with Rajendra Kumar Gupta, respondent/plaintiff was not cross-examined nor any attempt was made on her behalf to cross-examine further during pendency of the plaint, which, according to him, itself proves the fact that prior to marriage, appellant had not informed the respondent about the factum of her previous marriage with Rajendra Kumar Gupta. Moreso, burden of proof lay

on the appellant/defendant to prove the fact that she had informed about her previous marriage to the plaintiff. Thus, the findings recorded by the learned Family Court are just and proper.

(8) To consider the rival arguments and in order to answer the aforesaid point for determination, it will be apposite to mention herein that Section 12 of the Act, 1955 speaks about voidable marriage, which reads as under :-

"Section 12. Voidable Marriage.- (1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:

(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978), the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner."

(9) A specific averment has been made in various paragraph of the plaint especially para-7 regarding the appellant/defendant not having disclosed to the respondent/plaintiff about her marriage. In paragraph-6, plaintiff has pleaded that before her bidai, the respondent/plaintiff inquired from the appellant about the factum of previous marriage, whereupon she firstly denied it but when the document relating to dissolution of her first marriage was shown to her, then, she admitted it and also stated that the said fact was concealed from him (plaintiff) so that her marriage could be solemnized.

(10) The defendants no. 1 to 3 in the suit that is the appellant/wife, her mother and father filed a joint written statement, wherein they admitted the factum of earlier marriage of the appellant with Rajendra Kumar Gupta but said Shri Gupta and his family members used to demand dowry, which could not be fulfilled, therefore, the marriage was dissolved on 16.08.1992. Most important, they have averred in para-18 that these facts were known to the respondent/plaintiff and his family members. They had inquired from villagers and only thereafter marriage was solemnized.

(11) Since, the respondent/husband had premised the present petition before the learned Family Court on the basis of fraud played on him concerning the appellant's previous marriage, it would be apt to understand the meaning and import of 'fraud' used in Section 12 (1) (c) of the Act, 1955.

(12) The term *"Fraud"* in the context of Section 12(1)(c) of the Act, 1955 was interpreted by the Hon'ble Bombay High Court in the case of **Raghunath Gopal Daftardar vs Vijaya Raghunatha Gopal Daftarda** : 1971 SCC OnLine Bom 52. It culled out a distinction between the term "fraud" as appearing in Section 17 of the

Indian Contract Act, 1872 and in Section 12 of Act, 1955 by observing that marriage under Hindu Law is treated as a *'Sanskara'* or a sacrament and not a mere civil contract. The term *"fraud"* as used in the Act, 1955 is not a "fraud" in any general way and that every misrepresentation or concealment would not be fraudulent. If the consent given by parties is a real consent to the solemnization of marriage, then the same cannot be circumvented by alleging fraud. Similarly, in the case of **Harbhajan Singh vs Shrimati Brij Balab** : 1963 SCC OnLine Punj 139, it was observed that 'fraud' as a ground for annulment of marriage under the Hindu law is limited to those cases where the consent for marriage was obtained by some deception. Thus, under the Hindu Law, not every misrepresentation or concealment of a fact shall amount to "fraud" as envisaged under Section 12(1)(c) for annulment of a marriage. The fraud must be material as to the nature of ceremony or to any material fact or circumstance concerning the respondent and thus, at this point it is pertinent to consider what would tantamount to a material fact. The meaning of "material fact" or "circumstance concerning the respondent" is difficult to define with certainty. However, it would be reasonable to say that fact or circumstance which is of such a nature that it would be material or relevant to the consent for marriage would be a material fact or circumstance in terms of Section 12 (1) (c) of the Act, 1955. A fact, which if disclosed, would result in either of the parties not consenting to the marriage, would be a material fact. Such a material fact must be in respect of the person or the character of the person.

(13) A bare perusal of Section 12 of the Act, 1955 reveals that any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity *inter alia* on the ground, if, (i) the consent of the petitioner is obtained by "force" or by "fraud"; (ii) such "force" or "fraud" must be as to the "nature of the ceremony" or as to "any material fact or circumstance" concerning the respondent.

(14) To prove his case, apart from the evidence led by respondent/plaintiff as P.W.1, he has also filed documents viz. (i) affidavit sworn by the respondent/husband (marked as paper no. 174 Ga 2); and (ii) affidavit sworn by one Brijesh Kumar Singh (marked as paper no. 175 Ga 2). Apart from it, the respondent/husband has also filed other documentary evidences i.e. (i) vide List 6-Ga-1, a photocopy of documents pertaining to marriage of the appellant with Rajendra Kumar Gupta, a photocopy of the agreement of dissolution of marriage/divorce between the defendant/ appellant and Rajendra Kumar Gupta, a copy of Registry notice sent by Raj Kumar (respondent) dated 17.06.1995; (ii) vide List-Ga-2, a copy of the certificate issued by Labour Inspector indicating the registration of shop dated 24.08.1981; (iii) vide List 32-Ga-2, an envelop of the marriage card of the plaintiff/ respondent and the defendant/appellant; (iv) vide List 176 Ga-1, 04 CDs (in seal cover) and 10 photographs; and (v) vide List 211-Ga-2, a copy of the order dated 22.10.2010 passed in Writ Petition No. 36 of 1998 by High Court of Judicature at Allahabad, Lucknow.

(15) In his lengthy statement, respondent/plaintiff (P.W.1) has explained all the details including the fact that how the appellant/defendant and her family members played fraud against him (P.W.1) and solemnized his marriage with the

appellant. In his deposition, he (P.W.1) has stated that prior to his marriage with the appellant, he had no knowledge about previous marriage of the appellant with Rajendra Kumar Gupta nor anyone informed him in this regard. He came to know about it only on 28.04.1995. P.W.1 was extensively cross-examined by the appellant/defendant, however, on the point of having knowledge of previous marriage with Rajendra Kumar Gupta prior to his marriage with the appellant, P.W.1 was not cross-examined. The deposition of P.W.1 on this point has not been dislodged in his cross-examination by the appellant/ defendant.

(16) As it is the appellant/defendant who had asserted that they had disclosed the previous marriage, therefore, the burden lay on her to prove this assertion.

(17) The appellant/defendant was examined as D.W.1, wherein she admitted her marriage with Rajendra Kumar Gupta in the year 1990. She has stated that after marriage, she went along with Rajendra to his house at Varanasi and lived therein for two days along with him. She came back to her parents' house from the house of Rajendra after two days of the marriage and did not go back. She admitted the document/agreement relating to dissolution of marriage, however she has stated that these facts have been disclosed to the respondent and his family members prior to marriage and the agreement dissolving the marriage as per local customs had been given by her brother, who had arranged her marriage. She has also stated that she has disclosed the fact in detail when asked by respondent. She has also stated that no divorce had taken place with Rajendra Kumar Gupta through Court. She had not lived with Raj Kumar (respondent) since 1995.

(18) However, appellant did not produce her brother who could have proved as to whether he had handed over the agreement dated 16.08.1992 to respondent or his family members prior to marriage of his sister, if so, when. She has also not produced her father and mother for examination. Moreover, in cross-examination of P.W.1, no specific question or suggestion was given on her behalf that he had prior knowledge of appellant's first marriage or that the appellant and his family members had informed him about it. A cursory suggestion appears to have been given towards end of cross-examination that no fraud has been committed with him, but this is not sufficient.

(19) From the aforesaid testimonies of P.W.1 and D.W.1, two facts are clear; firstly the factum of previous marriage of the appellant was not in the knowledge of the respondent/plaintiff prior to his marriage nor anyone informed him or his family members in this regard; secondly, the factum of previous marriage of the appellant for the first time came to the notice of the respondent when previous husband of respondent, namely, Rajendra Kumar Gupta, came to the house of the plaintiff on 28.04.1995. Further, appellant has failed to prove her assertion that the factum of previous marriage was disclosed to the respondent/plaintiff and his family members and only thereafter marriage of the appellant was solemnized with the respondent. She has failed to discharge her burden in this regard. No evidence has been led on behalf of the appellant nor appellant has produced her mother or brother or father in the witness box to prove the said

fact, though, it was she who asserted that her mother had informed the respondent/plaintiff regarding the first marriage with Rajendra Kumar Gupta. Having not done so, the learned Family Court has rightly drawn an adverse inference of the same. On this count, we hold that the appellant has failed to prove that prior to her marriage with the respondent/plaintiff, her mother or her family member or she herself informed the factum of previous marriage with Rajendra Kumar Gupta to the respondent.

(20) In the facts of the present case, it is decipherable that the factum of previous marriage of the appellant with Rajendra Kumar Gupta was a material fact concerning the wife (respondent) relating to her marital status, which was never disclosed to the husband (plaintiff), as such, the consent of the respondent for marriage with the appellant was obtained by fraud and deceipt thereby attracting Section 12 (1) (c) of the Act, 1955, therefore, he is entitled to a declaration as granted by the Family Court. Point No. 1 is answered accordingly.

(21) There is another aspect of the matter. The appellant/defendant has not been able to prove that there was any custom in her caste or locality for dissolution of marriage by a written agreement. No evidence has been led by her in this regard. She admits to her first marriage. There is no decree of divorce by any Court pertaining to her first marriage. If this reasoning is taken further, then, it will lead to the conclusion that the alleged second marriage apart from being violative of Section 12 (1) (c) is also a nullity during subsistence of the first marriage in view of Section 5 (i) of the Act, 1955, but we do not proceed on this line as the suit was under Section 12 of the Act, 1955 and not Section 11.

(22) The trial Court has considered all the evidence to which we have made a reference and has correctly arrived at its finding with regard to issues no. 1, 2, 3 and 4 and has rightly declared the marriage of the respondent/plaintiff with appellant/ defendant as null and void. There is no perversity in the judgment of the trial Court. The point no.2 for determination referred earlier is answered accordingly.

(23) The appeal is **dismissed**. No order as to costs.

(2024) 8 ILRA 481
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 540 of 2024

Mahavir Prasad ...Appellant
Versus
Balveer Singh & Anr. ...Respondents

Counsel for the Appellant:
Prem Prakash Chaudhary

Counsel for the Respondents:
Abhishek Gupta, Chandra Bhan Gupta

CIVIL LAW –Civil Procedure Code, 1908– Section – 100 - Order – II, Rule 2, – Specific Relief Act, - Sections 22, 22(1)(a) & 22(2) - Registration Act, 1908 - Sections 58, 59 & 60 - Evidence Act, 1872 - Sections 91 & 92- Second Appeal filed by Defendant-Appellant – Plaintiff-respondent filed Original Suit – for specific performance of a registered agreement for sale – decreed – Civil Appeal filed against which was dismissed – present appeal – a plea was taken that the

agreement was got executed under the grab of witnessing a sale deed and the land in dispute being co-owned by various persons as such no necessity to execute the sale deed without partitioned – court finds that, - (i) it is not the case of the defendant-appellant that the was an illiterate person unable to understand the contents of a document or purpose for which it was being executed – (ii) execution of agreement for sale was admitted by the defendant-appellant – (ii) plea regarding 'document was fraudulently got executed' is without any sufficient oral and documentary evidence to dislodge a registered document could not suffice dismissal of the suit – (iv) once execution of registered agreement is admitted to the defendant-appellant, endorsements made by the Sub Registrar would be presumed to be correct under the Act, and this court does not find anything on record sufficient to rebut the said presumption – Held, this court, in exercise of second appellate jurisdiction, cannot upset the findings of fact recorded by the trial court and the first appellant court, unless shown apparently perverse – hence, even when two views are possible, out of which one view has been taken by the courts after appreciating evidence on record, second appellate Court would not substitute that view by its own view –and – Re-appreciation of evidence to arrive at a different conclusion is quite restricted in exercise of jurisdiction u/s 100 of CPC – No substantial question of law arises for consideration – the Second appeal is accordingly, dismissed at the admission stage. (Para – 8, 12, 21, 22, 23)

Second Appeal Dismissed. (E-11)

List of Cases cited:

1. Ameer Trading Corporation Ltd. Vs Shapoorji Data Processing Ltd. (2004 vol. 1 SCC 702),

2. Krishna Chand & ors.Vs Dr. Kailash Chandra Gupta & ors.(2010 Vol. 2 ADJ 666),

3. FDC Ltd. Vs Federation of Medical Representatives Association India (FMRAI) & ors.(AIR 2003 Bombay 371),

4. Kshitish Chandra Purkait Vs Santosh Kumar Purkait (AIR 1997 SC 2517),

5. Bholaram Vs Amirchand (1981 vol. 2 SCC 414),

6. Kamti Devi (Smt.) & anr. Vs Poshi Ram (2001 Vol. 5 SCC 311),

7. Thiagarajan Vs Sri Venugopalaswamy B. Koil (2004 Vol. 5 SCC 762),

8. Kondiba Dagadu Kadam Vs Savitribai Sopan Gujar & ors.(1999 Vo. 3 SCC 722),

9. Commissioner, Hindu Religious & Charitable Endowments Vs P. Shanmugama (2005 Vol. 9 SCC 232),

10. St. of Kerala Vs Mohd. Kunhi (2005 Vol. 10 SCC 139),

11. Madhavan Nair Vs Bhaskar Pillai (2005 Vol. 10 SCC 553),

12. Gurdev Kaur & ors.Vs Kaki & ors.(2007 Vol. 1 SCC 546),

13. Dalip Singh Vs Bhupinder Kaur (2018 vol. 3 SCC 677).

(Delivered by Hon'ble Kshitij Shailendra, J.)

The Appeal

1. The instant appeal has been filed by the defendant of Original Suit No. 974 of 2014 challenging the concurrent judgments and decrees whereby, respectively, the suit for specific performance of a registered agreement for sale dated 25.04.2014 filed by the plaintiffs-respondents, has been decreed and Civil Appeal filed against the said decision has been dismissed.

Plaint case

2. The plaintiffs-respondents filed the aforesaid suit on the basis of registered

agreement for sale dated 25.04.2014 said to have been executed by the defendant-appellant agreeing to sell 500 Sq. yards of his Bhumidhari land bearing Arazi No. 129-A covered by Khata No. 179. It was stated that despite the agreement, sale deed was not executed by the defendant-appellant and when the plaintiff-respondents issued notice dated 29.09.2014 asking him to execute sale deed and, thereafter, presented themselves on 22.10.2014 before the Sub Registrar's office with remaining sum and miscellaneous expenses, the defendant-appellant did not appear for executing the sale deed and, hence, the suit was filed.

Defence

3. The defendant-appellant filed written statement stating that execution of agreement for sale was a fraudulent exercise, inasmuch as, the plaintiffs carried him to the Registrar's office for witnessing some sale deed but, under the garb of said act, an agreement was got executed. It was further pleaded that the land in dispute being co-owned by various persons and having not been partitioned so far, no necessity to execute the sale deed ever arose. Payment of part of sale consideration was also denied.

Defence case dislodged by both the courts

4. The trial court, after framing seven issues and after discussing oral and documentary evidence, decreed the suit by judgment dated 15.12.2022 granting a decree for specific performance of the agreement. Civil Appeal No. 3 of 2023 filed against the said decision has also been dismissed by the judgment and decree dated 14.03.2024.

Counsel heard

5. I have heard Shri Prem Prakash Chaudhary, learned counsel for the defendant-appellant and Shri Chandra Bhan Gupta, learned counsel for the plaintiff-respondents on the point of admission.

Submissions on behalf of appellant

6. Learned counsel for the appellant submits that suit could not be decreed for various reasons; first, that the statement contained at page No. 3 of the agreement for sale as regards cash payment of Rs.5,00,000/- (rupees five lac) by the plaintiffs to the defendant was not proved; secondly, the land forming subject matter of the agreement having not been a specific portion of the land co-owned by various co-sharers, no sale could be executed and, therefore, agreement becomes invalid; thirdly, the witnesses produced by the plaintiffs' side made inconsistent statements regarding payment of advance money; fourthly, bare affidavit filed by PW-1 would not be admissible in evidence unless it is acknowledged by him on appearing in witness box; fifthly, there was no evidence to prove payment of Rs.5,00,000/- before the Sub Registrar and, lastly, burden to prove that the agreement was validly executed would lay upon the plaintiffs, but the same has wrongly been shifted upon the defendant-appellant, who had termed execution of the agreement as a fraudulent act. In support of his submissions, reliance has been placed upon the judgement of Supreme Court in the case of **Ameer Trading Corporation Ltd. Vs Shapoorji Data Processing Ltd, (2004) 1 SCC 702,** particularly, paragraph No. 31 thereof and also judgment of this Court in **Kishan Chand and others vs Dr. Kailash Chandra Gupta and others**, 2010 (2) ADJ

666, particularly, paragraphs No. 37 and 38 thereof.

Submissions on behalf of respondents

7. Per contra, learned counsel for the plaintiff-respondents argues that the agreement for sale being a registered document, strong presumption exists as regards its validity, both on the point of execution as well as its contents and, hence, the plea of the defendant-appellant that the agreement was got executed fraudulently, cannot sustain. As regards payment of advance money, it is contended that the sum was received in presence of witnesses produced by the plaintiffs and the Sub-Registrar's endorsement made on the agreement is conclusive proof of such payment. Shri Gupta further submits that both the courts below have recorded pure findings of fact based upon oral and documentary evidence and the contention of the appellant that there was no proof of payment of advance money stands dislodged in view of non-putting a suggestion from PW-1 to that effect during the course of his cross-examination.

Analysis of rival contentions

8. Having heard learned counsel for the parties, I find that execution of agreement for sale was admitted by the defendant-appellant. Though, a plea was taken that the agreement was got executed under the garb of witnessing a sale deed, evidence to that effect was seriously lacking so as to dislodge validity of a registered document. It is not the case of the defendant-appellant that he was an illiterate person unable to understand the contents of a document or purpose for which it was being executed. Bare plea that the document was fraudulently got executed without any sufficient oral and documentary evidence to dislodge a registered document could not suffice dismissal of the suit. As regards payment of advance money of Rs. 5,00,000/- (rupees five lac), it is found that the Sub Registrar had made an endorsement on the registered agreement to the following effect: -

"निष्पादन लेखपत्र वाद सुनने व समझने मज़मून व प्राप्त धनराशि रु प्रलेखानुसार उक्त विक्रेता"

The recital as regards payment of Rs. 5,00,000/- is contained at internal page No. 3 of the agreement in the following words:

"स्टाम्प पत्र कीमती मुबलिग 20ए100ध. रुपये इस इकरारनामा के साथ में संलग्न हैं तफसील जरे ब्याना मुबलिग 5ए00ए000ध. रुपये फरीक अव्वल ने फरीक दोयम से नगद समय रजिस्ट्री इकरारनामा समक्ष गवाहान के प्राप्त कर लिए हैं।"

9. As regards plea of non-partition amongst co-sharers of the land, paragraph No. 26 of the written statement reads as follows:

"यह कि भूमि प्रतिवादी व उसके सहखातेदारों की है सहखातेदारों व प्रतिवादी के मध्य कोई विभाजन हुआ है ऐसी स्थिति में कोई आवश्यकता भूमि को विक्रय करने के अनुबन्ध की नहीं थी।"

As such, no plea was taken that for non-partition of property, the agreement would not be executable or sale deed cannot be executed, rather the statement was that no necessity arose to execute the agreement as there was no partition amongst co-sharers. This Court cannot read anything which was not pleaded before the courts below and, hence, the contention advanced against executability of the agreement or the sale deed on this score cannot be accepted.

10. As far as submission that bare affidavit would not be treated as evidence unless the witness appears in witness box and acknowledges filing of the affidavit, it is to be noted that after the Code of Civil Procedure, 1908 was amended by Act No. 46 of 1999 w.e.f. 01.07.2002, examination-in-chief is done in the form of affidavits and cross-examination is done after the witness concerned appears in the witness box. In the instant case, both the plaintiffs filed their affidavits in examination-in-chief and their cross-examination would show that no suggestion was made on behalf of the defendant-appellant as regards filing or non-filing of the affidavit in examination-in-chief.

11. It would be apt to observe that whenever a witness appears for cross-examination, he answers only those questions, which are asked from him. That is why, putting of suggestion is of quite significance and if a particular relevant and significant suggestion is not made to the witness, his testimony cannot be discarded for not making a statement during cross-examination. In the present case, such suggestions are completely missing from cross-examination of both the P.Ws. Similar is the position with respect to payment of part of sale consideration. Therefore, when no specific suggestions were made on both the aforesaid counts, testimony of P.Ws. cannot be discarded, rather such circumstances would go against the defendant-appellant and, hence, argument advanced on that line also does not have any force.

12. Once execution of registered agreement is admitted to the defendant-appellant, endorsements made by Sub Registrar would be presumed to be correct under sections 58, 59 and 60 of Registration Act, 1908. Further, on a careful and complete reading of sections 91 and 92 of the Evidence Act, 1872 such a presumption qua contents of the written disposition of property as contained in the agreement could be rebutted, but in the instant case, this Court does not find anything on record sufficient to rebut the said presumption. Both the courts below have examined the pleadings of the parties and oral and documentary evidence led by them and have taken a view against the defendant-appellant. This Court, in exercise of second appellate jurisdiction, cannot upset the findings of fact recorded by the trial court and the first Appellate Court, unless shown apparently perverse.

13. The judgment of Apex Court in ***Ameer Trading Corporation Ltd.*** (supra), as cited form the appellant side had arisen out of civil suit filed in the year 2001 when Code of Civil Procedure had not been amended and the examination-in-chief was done when the witnesses used to appear in witness box and not by way of the affidavit. Paragraph 31 of the said judgment, as relied upon by learned counsel for the appellant, in fact, is quoted version of the judgment of Bombay High Court in ***F.D.C. Ltd. vs. Federation of Medical Representatives Association India (FMRAI) and others, AIR 2003 Bombay 371***. The said paragraph deals with the provisions of Order XVIII C.P.C. as stated prior to C.P.C. Amendment Act 46 of 1999 and even State amendments made in the State of Uttar Pradesh were not considered as the matter had arisen from the State of Maharashtra. Though the view taken by the Bombay High Court was approved by the Hon'ble Supreme Court, considering the amended provisions of C.P.C. read with non-putting of suggestions during the course of cross-examination of P.Ws., oral

testimony of the said witness cannot be dislodged and the appellant shall not get any benefit of the judgment in the case of ***Ameer Trading Corporation Ltd.*** (supra).

14. In the judgment of Kishan Chand (supra) relied upon from the appellant side, a co-ordinate Bench of this Court held the suit for specific performance of an agreement as barred by Section 22(2) of the Specific Relief Act read with Order II Rule 2 of Code of Civil Procedure on the ground that the plaintiffs had failed to identify the shares of alleged vendors, who had entered into an agreement. Here, it would be prudent to refer the said provision itself. Section 22, as stood before amendment made in the Act of 1963, reads as under:

"22. **Power to grant relief for possession, partition, refund of earnest money, etc.**—(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under section 21."

15. A bare perusal of Section 22 would show that it does not refer to any bar against the suit for specific performance. The provision only says that no such relief would be granted, unless it has been specifically claimed. In the present case, such a question would not arise at all as neither any relief in terms of Section 22 (1) (a) of the Specific Relief Act was claimed nor has been granted by the courts below. Therefore, the argument that the suit was barred by Section 22 of the Act, does not have any force and, even otherwise, facts of the instant case are entirely different from those which formed subject matter of the discussion in ***Kishan Chand*** (supra). Further, in the instant case, neither any issue or point of determination was framed with regard to bar of suit under any said provision nor was there any pleading to that effect in the written statement except a bare statement that in view of non-partition amongst the co-sharers necessity to execute the agreement did not arise. Moreover, once the execution of agreement is admitted to the defendant-appellant, he cannot get advantage of any recital made therein, which would confer benefit upon him and be read against the plaintiff-respondents. Interestingly, the defendant-appellant never disclosed as to who were other co-sharers in the property forming subject matter of the agreement and, hence, even necessity to implead alleged co-sharers did not arise. The flaw in the agreement on that ground, if any, would be attributable to the defendant-appellant and in the facts of the case, it would not defeat

the claim of the plaintiff-respondents in whose favour different areas of the concerned gata were agreed to be sold by the defendant-appellant himself. For all the aforesaid reasons, with due respect, the judgment in **Kishan Chand** (supra) is if no help to the defendant-appellant.

16. As regards interference by the High Court in second appellate jurisdiction, the Supreme Court has, in ***Kshitish Chandra Purkait vs Santosh Kumar Purkait***, AIR 1997 SC 2517, held that raising of a new plea at the second appellate stage would not be proper and that would not give rise to a substantial question of law. In ***Bholaram v. Amirchand*** (1981) 2 SCC 414, a three Judges' Bench of Supreme Court reiterated the statement of law and set aside the judgment by which the High Court had upset the decisions of trial court and first appellate court by reappreciating the evidence.

17. In ***Kamti Devi (Smt.) and Anr. v. Poshi Ram*** (2001) 5 SCC 311, the Supreme Court came to the conclusion that the finding reached by the first appellate court cannot be interfered with in a second appeal as no substantial question of law would have flowed out of such a finding. In ***Thiagarajan v. Sri Venugopalaswamy B. Koil***, (2004) 5 SCC 762, the Supreme Court has held that the High Court in its jurisdiction under Section 100 C.P.C. is not justified in interfering with the findings of fact and that it is the obligation of the courts of law to further clear intendment of the legislature and not frustrate it by excluding the same and where findings of fact by the lower appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on the ground that another view was possible.

18. Similar view has been taken in ***Kondiba Dagadu Kadam vs Savitribai Sopan Gujar and others***, (1999) 3 SCC 722 by observing that disturbance in findings of fact would be contrary to limitations imposed by section 100 C.P.C. The Supreme Court again reminded in ***Commissioner, Hindu Religious & Charitable Endowments vs. P. Shanmugama*** (2005) 9 SCC 232 that the High Court has no jurisdiction in second appeal to interfere with the findings of fact. The Apex Court, in ***State of Kerala v. Mohd. Kunhi*** (2005) 10 SCC 139 reiterated the same principle by observing that by such interference, the High Court would go beyond the scope of Section 100 of the Code of Civil Procedure.

19. In ***Madhavan Nair v. Bhaskar Pillai*** (2005) 10 SCC 553, the Supreme Court observed that even if the first appellate court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same. In ***Harjeet Singh v. Amrik Singh*** (2005) 12 SCC 270, the Apex Court, with anguish, observed that the High Court had no jurisdiction to interfere with the findings of fact arrived at by the trial Court and the lower appellate Court regarding readiness and willingness to perform part of contract in its jurisdiction under Section 100 C.P.C.

20. The view taken in the aforesaid decisions has been reiterated by the Apex Court in ***Gurdev Kaur and others vs. Kaki and others***, 2007 (1) SCC 546. In ***Dalip Singh vs. Bhupinder Kaur***, 2018 (3) SCC 677, the Apex Court was dealing with a

case arising out of suit for specific performance of an agreement for sale and set aside the judgement of High Court that had interfered with findings of fact.

Conclusion

21. In view of the above referred decisions of the Supreme Court it is clear that even when two views are possible, out of which one view has been taken by the courts after appreciating evidence on record, second Appellate Court would not substitute that view by its own view. Re-appreciation of evidence to arrive at a different conclusion is quite restricted in exercise of jurisdiction under Section 100 of Code of Civil Procedure and in the present case, finding on executability of the agreement, proof of its contents, question of readiness and willingness on the part of the plaintiff-respondents to get the sale deed executed, are pure findings of fact based upon the material available on record. This Court does not find any apparent perversity in the view taken by both the courts below so as to upset the impugned decisions.

22. No substantial question of law arises for consideration.

23. The second appeal has no force and is, accordingly, **dismissed** at the stage of admission itself.

(2024) 8 ILRA 488
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 1035 of 1996

Mangoo Singh & Ors. ...Appellants
Versus
Ram Autar ...Respondent

Counsel for the Appellants:
Smt. Shikha Singh, Ajay Shankar, Alrafio Basir, D.K. Dwivedi, R.C. Tiwari, Shashi Kumar Dwivedi, Triveni Shankar

Counsel for the Respondent:
Ajit Kumar, Kiran Kumar Arora, Rahul Sahai

A. Civil Law – Civil Procedure Code,1908 – Section 9 – Specific Relief Act, 1963 – S. 31 – UP Z.A.&L.R. Act, 1950 – Ss. 229-B and 331 – Suit of civil nature – Dispute pertaining to the cancellation of registered Will-deed in respect of agricultural land – Whether cognizable by Civil Court or Revenue court – Bar of Section 331 of the Act, 1950 – Applicability – Held, once a deed is challenged, the plaintiff need not be forced to seek a declaration of his title and, hence, bar of Section 331 of the Act of 1950 would not be attracted – Cancellation of the registered Will is, beyond doubt, the main relief as cause of action for the suit was the existence of Will itself – There is no provision under the Act of 1950 empowering a revenue court to cancel an instrument. Even Section 229-B does not contemplate any such provision whereunder an instrument of transfer or conferring testamentary succession can be expressly or impliedly cancelled – Suits for cancellation of a sale-deed or other instruments and documents are essentially suits of civil nature. As per section 9 of C.P.C., every suit of civil nature is cognizable by a civil court except its cognizance is expressly or impliedly barred. (Para 15, 23, 26, 31 and 32)

B. Civil Law – Civil Procedure Code, 1908 – Section 100 – Substantial question of law – Concurrent finding of fact – Both the Court below held that the Will was a result of fraud and undue influence – Scope of interference — Held, the analysis of oral and documentary evidence testing the Will of 1985 on the touchstone as to whether it

was a result of fraud and whether it was surrounded by suspicious circumstances, as done by both the courts below, is covered by pure findings of fact based upon evidence and, hence, the same cannot be upset in second appellate jurisdiction under Section 100 CPC. (Para 33)

Appeal dismissed. (E-1)

List of Cases cited:

1. Shri Ram & anr. Vs 1st Additional District Judge; AIR 2001 SC 1250

2. Kamala Prasad Vs Krishna Kant Pathak; 2007 (1) AWC 1 (SC)

3. Dr. Ram Prakash Gupta Vs District Judge; 2010 (110) RD 613;

4. Mohan Lal Vs Sri Ram & anr.; 2016 (3) AWC 2696

5. Ishwaragouda & ors. Vs Mallikarjun Gowda & ors.; 20009 (1) AWC 1 (SC)

6. Ram Padarath & ors. Vs Second Additional District Judge, Sultanpur; 1989 RD 21 (FB)

7. Chandrika Vs Shivnath & ors.; 2016 (5) AWC 4874

8. Abdul Waheed Khan Vs Bhawani & ors.; 1968 RD 79: AIR 1966 SC 1718

9. Ram Awalamb Vs Jata Shanker; 1968 AWR 731

10. Smt. Bismillah Vs Janeshwar Prasad; AIR 1990 SC 540

11. Church of North India Vs Lavajibhai Ratanjibhai; (2005) 10 SCC 760

12. Narendra Kumar Mittal & ors. Vs M/S Nupur Housing Development Pvt. Ltd. & anr.; 2019 (7) Supreme 157: 2019 (144) RD 785

13. Ram Nath Vs Munna; 1976 RD 220 (FB)

(Delivered by Hon'ble Kshitij Shailendra, J.)

THE APPEAL

1. The instant second appeal at the instance of defendants of Original Suit No.523 of 1989 (Ram Autar Vs. Siyawati and others) has been filed challenging the concurrent judgments and decrees drawn by the trial court and the first appellate court whereby, respectively, suit for cancellation of a registered Will dated 20.03.1985 has been decreed and civil appeal arising out of the decree has been dismissed.

PLAINT CASE

2. As per the plaint case, one Harswaroop had two sons, namely, Ram Autar (plaintiff) and Mangoo (defendant no.2). One Siyawati wife of defendant no.2, was arrayed as defendant no.1. Harswaroop, aged 90 years, used to remain sick in his last days of life. His wife had already died and the plaintiff and defendant no.2 used to take care of their father. When Harswaroop fell seriously ill in March, 1985, the plaintiff and defendant no.2 took him to Modinagar and Meerut for treatment. Initially, Harswaroop got some relief but he again fell ill and, on 20.03.1985, defendant no.2 along with his brother-in-law Nand Kishore took Harswaroop for examination by a doctor at Modinagar. At that time, since the wife of plaintiff was ill, he could not accompany his father. Defendant no.2, in collusion with defendant no.1, i.e. his wife, and his brother-in-law Nand Kishore, took Harswaroop to Ghaziabad for treatment and on 20.03.1985 itself, a Will was obtained from Harswaroop in the name of defendant no.1, i.e. the wife of defendant no.2 pretending that the same was being executed in favour of both plaintiff and defendant no.2. Harswaroop died on

04.01.1989, however, plaintiff could not get any information about the Will but when the defendants, at the strength of the said Will, expressed their absolute ownership in respect of Khasra No.1007, the plaintiff got information about the Will and found it as having been fraudulently executed. A plea with regard to family settlement dated 17.01.1989 was also taken and cause of action for filing the suit was alleged as denial by the defendants to get the Will cancelled, threats extended in April, 1989 as regards possession over the property and on not accepting family settlement.

Defence in written statement

3. The defendants filed written statement pleading due execution of the Will. It was stated that the testator even till his death remained in all good senses and the Will was executed out of his free will. It was further stated that the plaintiff had never taken care of his father and even did not participate in his last rites. Bar of Section 331 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (for short 'the Act of 1950') was also pleaded with a further statement that name of the beneficiary, i.e. the defendant no.1, had already been mutated in the revenue records at the strength of Will.

TRIAL COURT'S JUDGMENT

4. The trial court decreed the suit on 04.11.1993. It found the execution of Will as a result of fraud and fabrication and also recorded that the original Will was neither filed before the Court nor proved in accordance with law. It, however, discarded family settlement relied upon by the plaintiff. As regards bar of Section 331, the trial court observed that since suit was filed seeking cancellation of Will and claiming injunction restraining dispossession and alienation, the civil court had jurisdiction to entertain and decide the suit.

FIRST APPELLATE COURT'S JUDGMENT

5. Aggrieved by the decision of the trial court, the defendants preferred Civil Appeal No.10 of 1993 (Mangoo Singh and others Vs. Ram Autar) that has been dismissed on 05.11.1996.

COUNSEL HEARD

6. I have heard Sri Triveni Shankar along with Sri Narendra Mohan & Sri Ramesh Chandra Tiwari, learned counsel for the defendant-appellants and Sri Kiran Kumar Arora, learned counsel for the plaintiff-respondent.

ADMISSION ORDER

7. The instant second appeal, though filed in the year 1996 when an order of status quo was also passed, it was admitted as late as on 05.10.2021 on the following substantial questions of law:-

"(1) Whether in a case where the plaintiff is not recorded in the revenue records of an agricultural holding, a suit for cancellation of a Will at the instance of such an unrecorded person is maintainable before the Civil Court ?

(2) Whether secondary evidence of a document (photostat copy) is admissible in a case, where the original is available and the two are at variance ?"

SUBMISSIONS ON BEHALF OF APPELLANTS

8. Sri Triveni Shankar, learned counsel for the defendant-appellants vehemently argued that the suit was barred by Section 331 of the Act, 1950, inasmuch as on the date of its institution, name of plaintiff-respondent was not recorded in the revenue records, whereas the name of beneficiary, i.e. defendant no.1 (Siyawati), stood recorded. He submits that the finding of both the courts below holding the suit as maintainable is incorrect, inasmuch bequeath by a bhumidhar is provided under Section 169 of the Act, 1950 and as per sub-section (3) of Section 169, if the Will is in writing and attested by two persons, the same is valid and any person who otherwise claims himself as bhumidhar, would have to seek a declaration under Section 229-B of the Act, 1950 and, therefore, it is the Court described in Second Schedule of the Act which would have jurisdiction to entertain such a claim rendering the suit as barred by Section 331. He, therefore, submits that first substantial question of law should be answered in favour of the appellants and the impugned judgments and decrees should be set aside. As regards question no.2, it is contended that the plaintiff-respondent relied upon a family settlement of 1989 bringing on record its photostat copy, which was inadmissible in evidence and, therefore, the suit was otherwise not liable to be decreed and, hence, the second question may also be answered in favour of the appellants. In support of his contention, learned counsel has placed reliance upon following authorities:-

(i) **Shri Ram and another Vs. 1st Additional District Judge: AIR 2001 SC 1250;**

(ii) **Kamala Prasad Vs. Krishna Kant Pathak: 2007 (1) AWC 1 (SC);**

(iii) **Dr. Ram Prakash Gupta Vs. District Judge: 2010 (110) RD 613;**

(iv) **Mohan Lal Vs. Sri Ram and another: 2016 (3) AWC 2696;**

(v) **Ishwaragouda and others Vs. Mallikarjun Gowda and others: 20009 (1) AWC 1 (SC).**

9. During the course of arguments, certified copy of a document paper No.37-Ka was placed before the Court and it was contended that it is the document dated 17.01.1989 that was termed as family settlement but it did not contain mention of Gata No.1007 about which the disputed Will had been executed, rather it contains description of other gatas and, even otherwise, the document being a photostat copy, it could not be relied upon. When the Court perused the original record of proceedings, it found that in the record of the trial court, original family settlement was indexed as paper No.37-Ka, however, it was not found on record but there was a photostat copy of the same document as paper No.38-Ga. What was placed before the Court was a certified copy of paper No.37-Ka, which was issued from Executing Court dealing with Execution Case No.11 of 2011. As per General Rules (Civil), no certified copy of a photostat copy can be issued by the office of the civil court. It, therefore, appears that paper No.37-Ka, in fact, was an original document forming part of the record of trial court but it is quite surprising as to how its certified copy was issued by the Executing Court. Though, it is true that the decree is executed by the court of first instance itself, this Court fails to understand as to how the original Paper No.37-Ka was taken out from the original record so as to form part of the record of execution proceedings which are said to be going on, whereas original record is with this Court. Probably,

some skeleton file is being maintained by the Executing Court about which there is no illegality or irregularity. It is also permissible that any party to the proceedings can take back any original document from the record of the proceedings by moving application under the relevant Rules and there may also be a possibility that original Paper No.37-Ka, indexed on the file of the trial court, was taken away by the respondent. However, this Court does not want to indulge itself in the inquiry as to how original Paper No.37-Ka forms part of the record of execution proceedings and it proceeds to decide the matter in the light of questions framed by this Court.

SUBMISSIONS ON BEHALF OF RESPONDENT

10. The contention of Sri K.K. Arora is that at no point of time the bar of Section 331 was specifically pressed by the defendants, although a vague plea was taken in the written statement but the trial court's judgment itself shows that the defendants did not press the alleged bar covered by issue No.4 on which the trial court recorded specific finding that the defendants had not produced any such evidence on the basis whereof it could be said that the civil court had no jurisdiction to try and decide the suit. He submits that in view of Section 331 (1-A), no such plea can be permitted to be raised before the second appellate court unless it was pressed before the court of first instance at the earliest possible opportunity. As regards maintainability of the suit before the civil court, it is vehemently argued that only civil court has power to cancel a Will and it is not a case where the plaintiff was claiming declaration of his bhumidhari rights in terms of Section 229-B but a case where a void document, i.e. the Will, was existing to the detriment of the right and interest of the plaintiff and since the revenue court has no jurisdiction to cancel an instrument, the suit was very much maintainable before the court. In support of his submission, Sri Arora places relied upon following judgments:-

(i) **Ram Padarath and others Vs. Second Additional District Judge, Sultanpur: 1989 RD 21 (FB);**

(ii) **Chandrika Vs. Shivnath and others: 2016 (5) AWC 4874.**

11. Shri Arora further submits that since both the courts below have discarded the family settlement for one reason or the other, he is not pressing his claim on that basis and, therefore, for deciding the instant appeal, the document dated 17.01.1989 may be kept aside and ignored and that he would stick to his claim for cancellation of Will and injunction on the basis of findings recorded by both the courts below in his favour. In view of the said submission of Sri Arora, question no.2 as regards admissibility of copy of family settlement becomes redundant and it is answered in the manner that decision in the instant appeal would not be dependent upon admissibility or inadmissibility of alleged family settlement dated 17.01.1989.

12. The moot question on which the instant appeal has been argued revolves around bar of Section 331 of the Act, 1950 and, therefore, the Court deals with the submissions of both the sides in the light of first question framed in the admission order.

ANALYSIS OF RIVAL CONTENTIONS

13. On perusal of original record, it is found that Will was executed on

20.03.1985 and was registered on 08.04.1985. Copy of Khatauni relating to 1393-F to 1398-F is on record as paper No.11-Ka. It contains description of various gatas, viz, 873, 874, 890, 1007, 1009, 1122 and 1204. The Khatauni reveals that pursuant to an order dated 25.03.1989 passed by Additional Tehsildar concerned, after expunging the name of testator Harswaroop, name of beneficiary Siyawati (defendant no.1) was entered on the basis of Will. Copy of this Khatauni was issued on 13.05.1989 and the suit in question was instituted on 18.05.1989, i.e. immediately after five days of issuance of copy of Khatauni. The name of beneficiary was, for the first time, recorded just two months prior to institution of suit, although the Will was executed four years prior in point of time.

14. Having heard learned counsel for the parties, this Court proceeds to elaborately deal with the question as regards maintainability of a suit for cancellation of Will with consequential/ ancillary relief of injunction in respect of an agricultural land.

15. The controversy regarding the jurisdiction of Civil Court and Revenue Court in entertaining a suit regarding agricultural land and also entertainability of the suit seeking cancellation of void instruments and documents has engaged attention of several benches of this Court over decades. Suits for cancellation of a sale-deed or other instruments and documents are essentially suits of civil nature. As per section 9 of C.P.C., every suit of civil nature is cognizable by a civil court except its cognizance is expressly or impliedly barred. In **Abdul Waheed Khan Vs. Bhawani and others, 1968 RD 79: AIR 1966 SC 1718** settled principle was stated that it is for the party who seeks to oust the jurisdiction of civil court to establish his contention and that a statute ousting the jurisdiction of a civil court must be strictly construed.

16. Section 31 of the Specific Relief Act, 1963 makes specific provision for cancellation of void as well as voidable instruments. Suits for cancellation of such documents being of civil nature are cognizable by a civil court and even otherwise suits claiming relief provided under Specific Relief Act are entertainable only by a civil court and no revenue court or any other court can entertain such a suit including for cancellation of an instrument or document. Section 31 of the Specific Relief Act reads as under:

Section 31. **When cancellation may be ordered-**

(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have if adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument bas been registered under the Indian Registration Act 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered and such officer shall note on the copy of the instrument contained in his books the facts of its cancellation."

17. Thus one, who has reasonable apprehension that any instrument, if left outstanding, may cause him serious injury, can approach a competent court of law to get it cancelled. Sub-section (2) of Section 31 casts a mandatory duty upon the court

passing the decree to send a copy of the same to the registering officer, who is enjoined by law to make a note on the copy of such document regarding the order of its cancellation and, after such an endorsement is made, the document becomes legally ineffective and no benefit of the same can be derived by any one. If a certified copy of such a document is issued to anyone, it would obviously contain the note regarding its cancellation by a court of law.

18. So far as voidable documents like those obtained by practising coercion, fraud, misrepresentation, undue influence etc., are concerned, their legal effect cannot be put to an end without their cancellation. But a void document is not required to be cancelled necessarily. Its legal effect can be put to an end by declaring it to be void and granting some other relief instead of cancelling it. Once it is held to be void, it can be ignored by any court or authority being of no legal effect or consequence. A document executed without free consent or one which is without consideration or the object of which is unlawful or executed by a person not competent to contract like a minor or in excess of authority, would be a void document. In case it is in excess of authority, it would be void to that extent only. There is presumption of due registration of a document and correctness of the facts mentioned in the same, but the said presumption is not conclusive and can be dislodged. On the finding that a particular instrument or document was void because of any reason, it will be of no legal consequence and binding on any one without even its cancellation. But existence of such a document or instrument for a substantial period may cause injury to the person whose rights are affected by it and existence of such instrument may create complications giving rise to unnecessary litigations. But for those who are aware of any judgment holding a particular document or instrument to be void or are supposed to be aware of it, others can be misled by its existence if it does not contain any endorsement of its cancellation subsequent to a decision by any competent court of law.

19. The law relating to right, title and interest over the agricultural land is contained in the U.P. Zamindari Abolition and Land Reforms Act, 1950, which is a complete Code by itself and the Schedule-II to it enumerates the suits etc., the cognizance of which is to be taken of by the revenue courts specified therein. The said Act being special Act, its provisions would prevail over the general law. The jurisdiction of Civil Court is ousted if the relief can be granted by the special court conferred with jurisdiction to grant such reliefs. In Section 331 of the Act which specifically ousts the jurisdiction of other courts in respect of all suits, applications etc., enumerated in Schedule II, the main emphasis is on the words cause of action and any relief. The said section reads as under:

Section 331- **Cognizance of suits etc., under this Act**-(1) Except as provided by or under this Act no court other than a court mentioned in column 4 of Schedule II shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (V of 1908), take cognizance of any suit, application or proceedings mentioned in column 3 thereof, or of a suit, application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application.

Provided that where a declaration has been made u/s 143 in respect of any

holding or part thereof; the provisions of Schedule II in so far as they relate to suits, applications, or proceedings under Chapter VIII shall not apply to such holding or part thereof.

Explanation-If the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.

(1-A) Notwithstanding anything in Sub-section (1) an objection that a court mentioned in column 4 of Schedule II, or, as the case may be, a civil court, which bad no jurisdiction with respect to the suits, application or proceedings, smelted jurisdiction with respect thereto shall not be entertained by any appellate of revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity and in all eases where issues are settled, at or before such settlement, and unless there has been consequent failure of justice.

20. Section 331 of the Act makes the phrase "cause of action" as pivotal point for determining the jurisdiction of civil or revenue court. The expression "cause of action" means every fact that would be necessary for the plaintiff to prove in order to support his right of judgment. It is the real "cause of action" which determines the jurisdiction of the court to entertain particular action notwithstanding the language used in the plaint or the relief claimed. The strength on which the plaintiff comes to the court does not depend upon the defence or relief claimed which could determine the forum for the entertainment of claim and grant of relief. It is the pith and substance which is to be seen. The expression "any relief" used in Section 331 of the Act is of too wide import and would not only mean the relief claimed but would also include any relief arising out of the cause of action which led the plaintiff to invoke the jurisdiction of a court of law. The word 'relief' is not part of cause of action nor the same is related to the defence set up in the case. The relief is a remedy which the court grants from the facts asserted and proved in an action.

21. A Full Bench of this Court, in the case of **Ram Awalamb v. Jata Shanker 1968 AWR 731**, observed that "where in a suit, from a perusal only of the relief claimed, one or more of them are ostensibly cognizable only by civil court and at least one relief is cognizable by the revenue court, further questions which arise are whether all the reliefs are based on the same cause of action and if so, (a) whether the main relief asked for on the basis of the cause of action is such as can be granted only by a revenue court or (b) whether any real or substantial relief, though it may not be identical with that claimed by the plaintiff could be granted by the revenue court. There can be no doubt that in all cases contemplated under (a) and (b) above, the jurisdiction shall vest in the revenue court and not in the civil court."

22. Section 331 of the Act, 1950, if read without Explanation, does not create any difficulty. Difficulty regarding jurisdiction arises when Explanation, which is an integral part of the section, is interpreted and applied to the facts of a particular case. It is well settled that the object of Explanation to any statutory provision is to understand the Act in the light of the Explanation which ordinarily does not enlarge scope of the original section which it explains, but only makes its meaning clear beyond dispute. The

Explanation makes the things still more explicit and exists primarily removing doubts and dispute which may crop up in its absence. Section 331 of the Act along with Explanation cannot be read so as to oust the jurisdiction of civil court if the primary relief on the same cause of action can be granted by the civil court notwithstanding the fact that consequential relief or ancillary relief flowing out of the main relief, the grant of which also becomes necessary, can be granted by revenue court alone.

23. In the case of a void document said to have been executed by a plaintiff during his disability or by some one impersonating him or said to have been executed by his predecessor whom he succeeds, the relief of cancellation of the document is more appropriate relief for clearing the deck of title and burying deep any dispute or controversy on its basis in present or which may take place in future. The document, after its cancellation, would bear such an endorsement in Sub-Registrar's register and would be the basis for correction of any paper and revenue record. Section 31 of the Specific Relief Act itself prescribes as to who can seek relief of cancellation. A third person cannot file a suit for cancellation of a void document.

24. The controversy in issue was extensively dealt with by a Three Judges Full Bench of this Court in **Ram Padarath** (supra). The said judgment has been approved by Supreme Court in **Smt. Bismillah Vs. Janeshwar Prasad: AIR 1990 SC 540**. This Court in **Chandrika (supra)**, after placing reliance upon judgments in **Ram Padarath (supra)** and **Smt. Bismillah (supra)**, held that in view of Section 31 of the Act, 1963, a suit for cancellation of sale deed, void or voidable, is a suit of civil nature and can be filed before the Civil Court that has jurisdiction to try it under Section 9 CPC. **Church of North India v. Lavajibhai Ratanjibhai, (2005) 10 SCC 760,** held that a plea of bar to jurisdiction of a civil court must be considered having regard to the contentions raised in the plaint. For the said purpose, averments disclosing cause of action and the reliefs sought for therein must be considered in their entirety. The court may not be justified in determining the question, one way or the other, only having regard to the reliefs claimed *dehors* the factual averments made in the plaint. With a view to determine the question as regards exclusion of jurisdiction of the civil court in terms of the provisions of the Act, the court has to consider what, in substance, and not merely in form, is the nature of the claim made in the suit and the underlying object in seeking the real relief therein.

RECONSIDERATION OF SHRI RAM (SUPRA) AND KAMLA PRASAD (SUPRA) BY SUPREME COURT

25. This Court may gainfully refer to a somewhat recent decision of the Apex Court in the case of **Narendra Kumar Mittal and others Vs. M/S Nupur Housing Development Pvt. Ltd. and another: 2019 (7) Supreme 157: 2019 (144) RD 785**. The case before the Apex Court had arisen out of a suit for cancellation of sale deed dated 15.06.2006 in respect of an agricultural land filed before the civil court. A question arose before the Apex Court whether the decision of the District Court and High Court holding the civil suit as maintainable despite bar of Section 331 of the Act of 1950 was correct. The Supreme Court, after discussing the judgments of **Ram**

Padarath (supra), Shri Ram (supra) and Kamla Prasad (supra), held that the suit before the civil court was very much maintainable. It distinguished the decisions of the Supreme Court in the case of **Shri Ram (supra)** and **Kamla Prasad (supra)** in the following manner:-

"9. This Court in Shri Ram & Anr. v. Ist Addl. Distt. Judge & Ors., (2001) 3 SCC 24 considered the question relating to maintainability of a suit by a recorded tenure holder in possession for cancellation of the sale deed in favour of the respondents executed by some imposters. After noticing the aforesaid judgment of the Full Bench of Allahabad High Court, this Court held that where recorded tenure holder, having a prima facie title and in possession files suit in the Civil Court for cancellation of sale deed having been obtained on the ground of fraud or impersonation, it cannot be directed to file a suit for declaration in the Revenue Court, reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land. However, if the plaintiff is required to seek a declaration of title, he has to approach the Revenue Court.

11. In Kamla Prasad & Ors. v. Kishna Kant Pathak & Ors., (2007) 4 SCC 213 relied on by the learned counsel for the appellant-second defendant, the plaintiff was the co-owner and not a recorded tenure holder. In the plaint, the plaintiff himself had stated that he was not the sole owner of the property and defendants 10 to 12 who were proforma defendants had also right, title and interest therein. He had also stated that though his name had appeared in the revenue record, defendants 10 to 12 also had a right in the property. In this factual background, this Court held that such a question can be decided by the Revenue Court in a suit instituted under Section 229-B of the Act. It was also held that the legality or otherwise of the insertion of names of purchasers in records of rights and deletion of the name of the plaintiff from such record can only be tested by Revenue Court, since names of the purchasers had already been entered into the record. This judgment has no application to the facts of the present case."

26. The Apex Court, while distinguishing the earlier decisions, was of the considered opinion that once a sale deed is challenged, the plaintiff need not be forced to seek a declaration of his title and, hence, bar of Section 331 of the Act of 1950 would not be attracted. Further, in view of the discussion made hereinabove, it can be safely understood that Schedule-II contained in U.P. Z.A. & L.R. Act, 1950 does not contemplate any suit for cancellation of a written instrument and the power vests only in a civil court.

27. As regards the judgments cited on behalf of the appellants, the Apex Court in **Shri Ram (supra)** also placed reliance upon **Ram Padarath (supra)** and its approval in **Smt. Bismillah (supra)**. However, it was observed that where a recorded tenure holder having a *prima facie* title and in possession files suit in the civil court for cancellation of sale deed having obtained on the ground of fraud or impersonation, he cannot be directed to file a suit for cancellation in the revenue court as he does not require declaration of his title to the land but the position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. It was observed that in that

case the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the revenue court as the sale deed being void has to be ignored for giving him relief for declaration and possession. In **Kamla Prasad (supra),** the Supreme Court placed reliance upon **Shri Ram (supra)**. The Apex Court in, **Narendra Kumar Mittal Shri Ram (supra)** has already distinguished both the said judgments holding civil suit maintainable.

28. **Dr. Ram Prakash Gupta (supra)** was a case where the suit was instituted claiming a decree for declaration that a sale deed executed in favour of the plaintiff was valid. Another relief seeking declaration of title on the basis of a Will was also claimed. In that background of facts it was held that the suit was barred by Section 331 of the Act of 1950 as declaration of title can be granted by the revenue court. **Mohan Lal (supra)** was a case where a gift deed was challenged by the plaintiff on the ground that executant had no right to execute the same. The said plaintiff was not recorded tenure holder of the disputed agricultural land and placing reliance upon judgment in **Shri Ram (supra)**, it was held that suit would lie before the revenue court. Not only the facts of that case are distinguishable, inasmuch as here the instrument, i.e. the Will, has been challenged on the ground of fraud, the said judgment is prior in point of time when the Apex Court re-considered the decisions in **Ram Padarath (supra)**, **Shri Ram (supra)** and **Kamla Prasad (supra)** and held that suit for cancellation of an instrument shall lie before the civil court and Section 331 of the Act of 1950 would not create a bar against the suit.

29. **Ishwaragouda (supra)** was a case arising out of State of Karnataka where certain rights were claimed under the provisions of Karnataka Land Reforms Act and applications seeking declaration of cultivation title were filed before the Land Tribunal. Various proceedings were held inter-se parties, such as determination by Land Tribunal, the writ petition before the High Court, demarcation proceedings, an appeal before the Land Reforms Appellate Tribunal and, thereafter, a suit for declaration of title and possession in respect of the land before the civil court. In that background of facts, an issue had arisen as to whether the jurisdiction of the civil court was ousted in view of Section 133 of the Karnataka Land Reforms Act to decide whether an individual is a tenant or the joint family is tenant. Under such circumstances, after dealing with the provisions of Section 133, the Supreme Court found that the suit was barred as declaration of title was within the exclusive jurisdiction of the Land Tribunal. Not only the facts of the said case but also nature of the proceedings as well as provision of law under the concerned Reforms Act were entirely different from the facts of the present case and statutory provision applicable here in the State of U.P. Therefore, with due respect, the said judgment also has no application in the present case and, thus, appellants cannot get any help from it.

30. In order to test the appellants' argument based upon non-recorded tenure holder, in the instant case, status of defendant no.1 being a recorded tenure holder on the basis of the disputed Will has to be analyzed. As noted above, the disputed Will was executed in the year 1985 and the defendant no.1, i.e. the beneficiary of the Will, just immediately prior to institution of the suit in the year 1989, got her name mutated in the revenue records. The challenge came on the 5th day

of obtaining certified coy of the Khatauni Paper No.11-C. It was not a case where since long prior to institution of the suit, the beneficiary was enjoying actual and physical possession as a recorded tenure holder in its true sense but was a case where the cause of action for institution of suit arose in very close proximity of entry in the revenue records on the basis of Will which was not in the knowledge of the plaintiff-respondent prior to obtaining certified copy of the Khatauni that contained reference of a mutation order of the Assistant Tehsildar passed on the basis of Will. Whatelse, except seeking cancellation of Will, could be done by the plaintiff under such circumstance. In the opinion of the Court, the suit for declaration of bhumidhari rights along with his real brother as a joint successor from their late father was not the necessity, inasmuch as it was the Will and consequential entry in the revenue records which was standing against the plaintiff in enjoyment of uninterrupted possession as a co-bhumidhar over the agricultural land. The plaintiff, therefore, was well within his rights to seek cancellation of the Will on available grounds, such as fraud, coercion or undue influence, etc.

31. As discussed above, unless the Will is cancelled by the civil court and, in terms of sub-section (2) of Section 31 of the Specific Relief Act, 1963, unless its intimation is sent to the Sub-Registrar concerned, the Will would remain alive for all theoretical and practical purposes causing injury to the person who would have succeeded rights on the basis of natural succession from his predecessor, here, late Harswaroop. Thus cancellation of the registered Will is, beyond doubt, the main relief as cause of action for the suit was the existence of Will itself. Mutation order, on its basis, directing recording of the name of the defendant therein is found to be a consequential action based on Will. So long as a registered instrument is not cancelled by civil court, revenue court will be bound to respect it and will not able to ignore it, as held by Full Bench of this Court in **Ram Nath Vs. Munna, 1976 RD 220 (FB).**

32. It is also emphasized here that there is no provision under the Act of 1950 empowering a revenue court to cancel an instrument. Even Section 229-B does not contemplate any such provision whereunder an instrument of transfer or conferring testamentary succession can be expressly or impliedly cancelled or that its intimation can be sent to the Sub-Registrar concerned for making an entry in the concerned records so that certified copy of such instrument, as and when issued, may contain remark of its cancellation. The Court is of the considered opinion that even if, while deciding a suit for declaration under Section 229-B in a given case, the revenue court comes to a conclusion that any instrument relied upon by the defendants is void or voidable and records a finding to that effect, the operative portion of the judgment of the revenue court would simply confer a declaration of ownership upon the concerned plaintiff, either exclusively or along with any other person but finding to that effect would not be sufficient to statutorily compel the Sub-Registrar concerned to make an entry of cancellation of the instrument in the concerned records.

33. In so far as the findings of courts below in the instant case that the Will was a result of fraud and undue influence etc, no argument was advanced by the appellants. Even otherwise, the Court finds that the

analysis of oral and documentary evidence testing the Will of 1985 on the touchstone as to whether it was a result of fraud and whether it was surrounded by suspicious circumstances, as done by both the courts below, is covered by pure findings of fact based upon evidence and, hence, the same cannot be upset in second appellate jurisdiction under Section 100 CPC. In so far as the argument of appellant based upon sub-section (3) of Section 169 of Act of 1950, the Court finds that the said provision speaks of execution of Will and has no concern with the proceedings seeking cancellation thereof. Hence, the argument advanced on that line is of no significance.

34. As regards contention of Sri Arora that the plea under Section 331 having not been substantially raised before the courts below and, hence, it cannot be allowed to be raised here, the same is not acceptable in view of clear statement contained in the written statement regarding bar of the said provision and its discussion by both the courts below. However, in view of the above discussion, the said bar is not attracted in the facts and circumstances of the present case and it is held that both the courts below have rightly found civil suit to be maintainable.

35. Before concluding this judgment, it is apt to mention that learned counsel for the appellants filed a very brief written synopsis alongwith which the case laws cited by him were annexed and in the third point of the synopsis, it is mentioned that the courts below have wrongly accepted the case of the plaintiff as full owner of Khasra No.1007, because in case natural succession follows, the plaintiff and defendant being two sons of late Harswaroop, would become co-owners. Here what I notice from the record is that the trial court decreed the suit cancelling the Will dated 20.03.1985 (registered on 08.04.1985) and granting a decree for permanent prohibitory injunction restraining the defendants from causing interference in plaintiff's possession over the land covered by Khasra No.1007. Issue No.2 framed as to whether the plaintiff-respondent is co-owner on the basis of succession, was decided in favour of the plaintiff-respondent holding him as co-bhumidhar in joint possession along with defendants as a consequence of cancellation of the aforesaid Will. Though, in the operative portion, it is mentioned that the defendants were restrained from interfering in the plaintiff's possession, in view of the finding on issue No.2, the possession of the plaintiff-respondent is certainly in the capacity of a co-bhumidhar based upon natural succession from his late father Harswaroop and not as the sole bhumidhar. Therefore, contrary contention raised by the appellants in this regard too is not acceptable.

36. For all the aforesaid reasons, the first question of law is answered in favour of the plaintiff-respondent and against the defendant-appellants and it is held that the suit for cancellation of the Will was very much maintainable before the civil court. Second question has already been held to be redundant in view of the discussion made above.

37. Consequently, the instant second appeal fails and is, accordingly, **dismissed**.

(2024) 8 ILRA 501
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 1396 of 1979

Rama Shanker & Ors. ...Appellants
Versus
Lala Wajiri Lal ...Respondent

Counsel for the Appellants:
Sri Anil Sharma (Sr. Advocate), Sri R.K. Shukla

Counsel for the Respondent:
Sri V. Sahai, Sri B. Dayal

A. Civil Law – Civil Procedure Code,1908 – Section 100 – Substantial question of law – Non-concurrent finding – Benami transaction – Factors of determination – Erroneous finding by first appellate court – Scope of interference – Principle governing to declare a sale-deed as benami transaction discussed – Held, there was neither sufficient pleadings nor trustworthy evidence to hold the transaction as benami. Inter-se communication between two real brothers which does not infer anything regarding the transaction or any communication with third party would not confer owner ship upon Waziri Lal – Ingredient of real intention of parties is also absent. Payment of sale consideration by Waziri Lal is also not proved – Consequently, the conclusion drawn by first appellate court declaring the transaction as benami is found to be erroneous on factual and legal platform – There being no sufficient pleadings and evidence to hold the sale deed of 1942 as benami, the first appellate court has erred in reversing the decree drawn by the trial court. (Para 16 and 17)

Appeal allowed. (E-1)

List of Cases cited:

1. Bhim Singh & anr. Vs Kan Singh; AIR 1980 SC 727

2. V. Shankaranarayana Rao and Ors. Vs Leelavathy & ors.; AIR 2007 SC 2637

3. Diwakar Sahkari Krishi Samiti Ltd. & ors. Vs St. of U.P. & ors.; 1988 R.D. 208

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Summons were duly published in daily newspaper *Amar Ujala* in compliance of order dated 09.12.2022. Compliance affidavit supported by original newspaper is on record. Service of notice upon respondent nos.1/1 and 1/2 is, therefore, held to be sufficient. No one has filed vakalatnama on their behalf.

2. Appeal is ripe for final hearing. The Court, therefore, proceeds to finally decide the appeal.

3. Heard Sri Anil Sharma, learned Senior Counsel assisted by Sri Ramesh Kumar, learned counsel for the defendant-appellants and perused the record.

4. The instant second appeal raises a challenge to the judgment and decree dated 06.04.1979 whereby, the first appellate court has set aside the judgment of the trial court and decreed the suit filed by the plaintiff-respondents for recovery of possession of immovable property and damages.

5. The relevant facts of the present case are that one Kuremal had three sons namely, Dwarika Prasad, Waziri Lal and Banke Lal. Dwarika Prasad had a daughter namely, Kamlawati, who was married to one Ram Narayan. This couple had three

sons namely, Rama Shankar, Ravi Shankar and Rati Shankar. Waziri Lal, i.e. real brother of Dwarika Prasad, instituted Original Suit No.602 of 1970 against Kamlawati and her three sons claiming a decree for possession and damages in respect of immovable property described in the plaint. The basis of the claim was that there was a sale deed dated 09.07.1942 existing in the name of Dwarika Prasad, however it was Waziri Lal, who had actually purchased the property in the name of Dwarika Prasad and, therefore, plaintiff Waziri Lal had become owner of the same.

6. The Trial Court, after analyzing oral and documentary evidence led by the parties, arrived at a conclusion that plea of benami transaction could not be established and, consequently, dismissed the suit.

7. The decree has been reversed by the first appellate court and the issue no.1, which is germane to the controversy involved, was decided against the defendant-appellants holding that the sale deed of 1942 was a benami transaction. Consequently, the appellate court held Waziri Lal as true owner of the property and has drawn the decree against the defendant-appellants.

8. The instant second appeal was admitted by order dated 17.05.1979 on the grounds No.5, 8, 9 and 10 contained in the memo of appeal. The said grounds are quoted hereunder :

"5. Because it having been admitted to Wajiri Lal- plaintiff, that he did not know, who had written the letters purported to have been sent by Dwarika Prasad, Smt. Kamlawati and Sri Ram Narain to him, the said letters were not legally proved in this case and the learned lower appellate Court has wrongly placed reliance on the same.

8. Because the lower appellate court has completely misread the evidence on record to arrive at the conclusion that the sale deed in favour of Lal Dwarika Prasad was a Benami transaction.

9. Because the onus to prove that the property purchased in the name of Lal Dwarika Prasad was Benami was heavily on the plaintiff, who having failed to discharge the same, the finding of the lower appellate Court is erroneous.

10. Because documents on record substantially proved without any doubt that Wajiri Lal himself was not possessed of any means nor he had any source of income, from which he could have purchased the accommodation in dispute, inasmuch as it was not possible for him even to provide for the tuition fee for his son, who had to be taken out from the School for non-payment of the tuition fee. "

9. The submission of learned Senior Counsel is that not only necessary pleadings but also entire evidence led by the plaintiff-respondent was lacking in the sense that it was not stated in the plaint that sale consideration in relation to the sale deed of 1942 had been paid by the plaintiff. It is further contended that as far as evidence is concerned, the first appellate court discussed various letters on record and arrived at a conclusion that since no letter was written to Dwarika Prasad and one Vidyanand interacted with Waziri Lal by sending letters, it would be deemed that Dwarika Prasad was not the real owner of the property and, therefore, the transaction was a benami transaction. Statements of witnesses were also discussed by the appellate court.

10. Learned Senior Counsel has placed reliance upon the following judgments in support of his contention :

1. Bhim Singh (dead) by L.R.s and another v. Kan Singh, AIR 1980 Supreme Court 727.

2. V. Shankaranarayana Rao (D) by L.Rs. & Ors. v. Leelavathy (D) by L.Rs. & Ors., AIR 2007 Supreme Court 2637.

3. Diwakar Sahkari Krishi Samiti Ltd. and others v. State of U.P. and others, 1988 R.D. 208.

11. Placing reliance upon the aforesaid authorities, it is urged that the burden of proving the transfer as benami transaction lies on person who asserts such a transaction as benami and it has to be proved by him that the purchase money came from the person other than the person in whose favour the property is transferred.

12. Having heard learned counsel for the appellant, I find that there is no dispute that sale deed was in the name of Dwarika Prasad who was maternal grand father of defendant nos.2, 3 and 4 and father of defendant no.1. In order to arrive at a conclusion that the sale deed was a benami transaction, there should have been clear pleadings as well as trustworthy evidence to hold the transaction as such. What the court finds from the appellate judgment is that it has given much weightage to various letters on record. The Court has perused the original record of the proceedings. One letter was written by one Vidyanand to Waziri Lal as discussed by the first appellate court. Vidyanand was tenant in the shop in dispute. In the said letter, it is written that he was not aware of the fact as to whether Waziri Lal had or had not acquired rights over the property. Another letter is by one Ram Prakash, which was written to Waziri Lal but it also does not speak anything about ownership of the property. Few letters inter se Dwarika Prasad and Waziri Lal are also on record, however, the Court finds that both the said real brothers were just asking about well being of each other and from nowhere it can be inferred that there is any admission as regards payment of sale consideration by Waziri Lal to Dwarika Prasad in relation to sale deed of 1942. Therefore, the documentary evidence as regards payment of sale consideration is thoroughly lacking. As far as oral testimony of witnesses is concerned, the trial court arrived at a conclusion that except plaintiff, there is no witness was worth believing and the plaintiff being an interested witness, his statement would not make the transaction as benami. The first appellate Court has referred to the testimony of witnesses but the same does not appeal to this Court to arrive at a definite conclusion that sale deed of 1942 was a benami transaction.

13. The Hon'ble Supreme Court, in **Bhim Singh** (supra) held that :

"Two kinds of benami transactions are generally recognized in India. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be the real owner. The difference between the two kinds of benami transactions referred to above lies in the fact that whereas in the former case,

there is an operative transfer from the transfer to the transferee though the transferee holds the property for the benefit of the person who has contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor notwithstanding the execution of the conveyance. One common feature, however, in both these cases is that the real title is divorced from the ostensible title and they are vested in different persons. The question whether a transaction is a benami transaction or not mainly depends upon the intention of the person who has contributed the purchase money in the former case and upon the intention of the person who has executed the conveyance in the latter case."

14. The Apex Court in **V. Shankaranarayana Rao** (supra) held that :

"11. Principle on the basis whereof determination of the question as to whether a transaction is a benami one or not depends upon a large number of factors. Some of them had been noticed by this Court in **Thakur Bhim Singh (Dead) By LRs and Another v. Thakur Kan Singh** [(1980) 3 SCC 72] in the following terms:

"18. The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus: (1) the burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct, etc."

The said principle has been reiterated by this Court in **Binapani Paul v. Pratima Ghosh & Ors.** [2007 (6) SCALE 398] In the aforementioned judgments, this Court has inter alia emphasised on the fact that the role and / or the motive on the part of the person who had advanced the amount of consideration plays an important role in determination of the nature of transaction. The High Court unfortunately had not considered the question from the said angle. The High Court while pronouncing the impugned judgment had also not considered the effect and purport of the requisite ingredients for arriving at a decision as to whether the transaction in question is benami or not."

15. This Court, in **Diwakar Sahkari Krishi Samiti Ltd.** (supra) held that :

"It is well settled law that the source whence the purchase money came is by for the most important test for determining whether the sale standing in the name of one person is in reality for the benefit of another and unless it is established that the source of consideration came from the person other than the ostensible owner, the transaction cannot be held to be Benami transaction. Hence the payment of consideration is the real test for determining as to who is the real owner of the land in dispute. In **Gangadara Ayyar and others v. Subramania Sastrigai and others,** AIR 1949 FC 88, Mr. Justice

Mahajan laid down the following principle at page 92:-

"It is settled law that the onus of establishing that a transaction is Benami is on the plaintiff and it must be strictly made out. The decision of the Court cannot rest on mere suspicion but must rest on legal ground and legal testimony. In absence of evidence, the apparent title must prevail."

In **Surasaibalini Devi v. Phanindra Mohan Majumdar**, AIR 1965 SC 1364, their Lordships laid down on page 1372 that :

"We start with the position that the court will presume an ostensible title to be the real title unless a plaintiff who seeks to assert the contrary pleads and proves that the ostensible owner is not the real owner. In other words, the onus is on the person who alleges a transaction to be Benami to make it out. Of course, the source of the funds from which the purchase is made coupled with the manner of its enjoyment would be a very material fact or for establishing the proof of Benami but the mere proof of the source of purchase money would not finally establish the Benami nature of the defendants title. Even where the plaintiff purchases property with his own funds in the name of 'B' the surrounding circumstances, the mode of enjoyment might still indicate that it was intended to be a gift and it would then be a case of Benami notwithstanding that the purchase money did not proceed from the defendant."

In **Jayadayal Poddar v. Bibi Hazra**, (1974) 1 SCC 3, the Supreme Court observed thus:-

"It is well settled that the burden of proving that the particular sale is Benami and that the appellant purchaser is not the real purchaser always rests on the person asserting it to be so. The burden has to be strictly discharged by adducing the legal evidence of a definite character which would directly affect the proof of fact of Benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of Benami is that the intention of the party of parties is concerned and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be Benami of any part of the serious onus that rests on him nor justify the acceptance of mere conjectures or surmises as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after consideration and the person expressly shown as the purchaser or transferee in the deed starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs."

16. In view of the above discussion of facts and the law laid down by the Apex Court and this Court, I am of the firm opinion that there was neither sufficient pleadings nor trustworthy evidence to hold the transaction as benami. Inter- se-communication between two real brothers which does not infer anything regarding the transaction or any communication with third party would not confer owner ship upon Waziri Lal. Ingredient of real intention of parties is also absent. Payment of sale consideration by Waziri Lal is also not proved.

17. Consequently, the conclusion drawn by first appellate court declaring the transaction as benami is found to be erroneous on factual and legal platform. Accordingly, the questions of law framed by this Court, as above, are answered in favour of the appellants and it is held that there being no sufficient pleadings and

evidence to hold the sale deed of 1942 as benami, the first appellate court has erred in reversing the decree drawn by the trial court. Consequently, the rights in the property of Dwarika Prasad would devolve upon his natural successors, who are the appellants before this Court.

18. In view of the above, the second appeal succeeds and is **allowed**.

19. The impugned judgment dated 06.04.1979 passed by the IV Additional District Judge, Bijnor in Civil Appeal No.363 of 1976 and the decree drawn on that basis is set aside.

20. Office is directed to send back the record of the courts below to District Judge, Bijnor for being preserved in accordance with General Rules (Civil).

(2024) 8 ILRA 506
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.08.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ- B No. 643 of 2023

Smt. Ghasita ...Petitioner
Versus
Board of Revenue Lko. & Ors. ...Respondents

Counsel for the Petitioner:
Pramod Kumar Yadav

Counsel for the Respondents:
C.S.C., Dilip Kumar Pandey

Civil Law – Constitution of India, 1950 - Article 226, - Limitation Act, 1963 - Section - 5, - U. P. Land Revenue Act, 1901 - Section - 54, - UP Revenue Court Manual - Regulation - 489 - Writ Petition – impugned order passed by the Board of Revenue - proceeding u/s 54 of LR Act, initiated by the petitioner – St. contested the same – when St. delaying the proceedings, respondent no. 3 allowed the application - St. authorities filed a recall application along with delay condonation Application – recalled was allowed along with interim measure – Revision - dismissed - court finds that, by means of impugned order, the operation of the principal order has been stayed at best if the intention was to protect the property it could have been protected but was not appropriate to stay the operation of the order itself – this was not considered by the Board of revenue – held, Application of recall was time barred and the interim order could not have been granted before condoning the delay as it affects the right of the parties contesting the proceedings – hence, the Board of Revenue has not exercised its jurisdiction as per law - consequently, order impugned is set aside – writ petition is allowed – petitioner directed to contest the proceedings before the respondent no. 3 where he shall be permitted to file his objections to the recall application as well as to the application under section 5 of the Limitation Act – directions issued accordingly. (Para – 24, 25)

Writ Petition is allowed. (E-11)

List of Cases cited:

1. Asit Kumar Kar Vs St. of W. B. – 2009 vol. 2 SCC 703,

2. Vshnu Agarwal Vs St. of U.P. (2011 vol. 14 SCC 813),

3. Ram Prakash Vs Deputy Director of Consolidation & ors. (2022 SCC online All 107),

4. Bank of Maharashtra Vs Race Shipping & Transport Co. Pvt. Ltd. & anr. (1995 3 SCC 257).

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard learned counsel for the petitioner, Shri Hemant Pandey, learned standing counsel for the State-respondents

and Shri Dilip Kumar Pandey, learned counsel appearing for Gaon Sabha.

2. Under challenge is the order dated 23.06.2023 passed by the Board of Revenue whereby the revision preferred by the petitioner was dismissed upholding the order dated 04.12.2021 passed by the respondent no.3, as a consequence, in recall proceedings at the behest of State the principal order dated 31.07.2021 passed in favour of the petitioner has been stayed.

3. Submission of the learned counsel for the petitioner is that the proceedings were initiated by the petitioner under Section 54 of the U.P. Land Revenue Act 1901. The said proceedings were contested by the State who had also filed their written objections and a copy thereof has been brought on record as annexure no.3. It is also submitted that the respondents were delaying the proceedings and as such the respondent no.3 by means of order dated 31.07.2021 allowed the application of the petitioner.

4. The State Authorities being aggrieved preferred an application for recall on 04.12.2021 which was also accompanied by an application under Section 5 of the Limitation Act, 1963. On the said application, the respondent no.3 on the very same date i.e. 04.12.2021 entertained the application for recall and also as an interim measure passed an order dated 04.12.2021 staying the operation of the order dated 31.07.2021. The petitioner being aggrieved filed a revision before the Board of Revenue which has been dismissed noticing the fact that since the recall application is already seized by the respondent no.3, the petitioner would have ample opportunity to raise objection and contest the proceedings, hence it declined to interfere.

5. Submission of the learned counsel for the petitioner is two fold:-(i) It is urged that once the respondents had already filed their written objections and later it did not participate to contest the proceedings, in such a situation, the orders have been passed on merits and therefore neither an application for recall or review would be maintainable and consequently the Authority had no jurisdiction to pass the order dated 04.12.2021. (ii) It is further urged that even otherwise if at all it may be considered that the application for recall could have been entertained but the fact remains that it was accompanied by an application under Section 5 of the Limitation Act and before condoning the delay, the Authority did not possess the jurisdiction to pass any order staying the operation of the principal orders dated 31.07.2021 which in affect amounts to entering into merits of the matter and allowing the petition by an interim order and thus for both the reasons aforesaid, the impugned order was bad.

6. Shri Hemant Pandey, learned counsel for the State has submitted that even though the State may have filed his objection but the fact remains that on the date of passing of the order dated 31.07.2021, the State was not heard and to that extent the order is *ex parte* which permits the State to move an application for recall.

7. He has further referred to Regulation 489 as contained in the U.P. Revenue Court Manual and has drawn the attention of the Court that the power to grant ad interim *ex parte* order vests with

the authority and in such a case where the property of the State was at stake hence it was justified for the authority to have passed an order and the same cannot be faulted for want of jurisdiction.

8. It has also been urged that the matter is already pending before the authority concerned and it will be open for the petitioner to contest the case on merits and in any case since the petitioner has approached this Court against the order dated 04.12.2021, in exercise of jurisdiction under Article 226 of the Constitution of India, such discretionary orders which do not impact the final rights of the parties may not be interfered with. Hence for the aforesaid reasons the petition is liable to fail.

9. The Court has heard the learned counsel for the parties and also perused the material on record.

10. In pursuance of the order dated 25.07.2023, the State was required to seek instructions as to whether they have participated in any proceedings and filed their objections especially as in the application for recall, the stand of the State appears to be that they were not properly served and the orders have been passed on merits behind the back of the State. This was contested by the petitioner as he had brought on record the copy of the objections filed by State in the proceedings as annexure no.3.

11. In this regard, as per written instructions, it could not be disputed that the objections were filed by the respondent State and this fact has also been taken note of by the respondent no.3 while passing the order dated 31.07.2021.

12. Taking note of the aforesaid, this Court finds that even though if the objections were on record but the fact which could not be disputed by the counsel for the petitioner is that on the given date when the principal order dated 31.07.2021 was passed, the State was not heard and to that extent the order naturally, having been passed in absence of the State Authorities, would be *ex parte*.

13. In so far as the application for recall is concerned, it cannot be said that the same was not maintainable; inasmuch as it is not an application for review since the law for entertaining an application for review is quite different and unless and until such powers of review are conferred on the authority by the statute itself, the said powers cannot be exercised by the authority.

14. However, in case of recall the authority does not enter into the merits and merely recalls the order, plainly, for the reason that the aggrieved party was not heard as it is against the principles of natural justice. The distinction between review and recall has been considered by the Apex Court in the case of **Asit Kumar Kar Vs. State of West Bengal (2009) 2 SCC 703** and the relevant portion reads as under:-

"6. There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

7. We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Excise Licensees' Assn. V. Raghbendra Singh cancelling certain licences was passed without giving an opportunity of hearing to the persons who had been granted licences. In these circumstances, we recall the directions in para 40 of the aforesaid judgment. However, if anybody has a grievance against the grant of licences or in the policy of the State Government, he will be at liberty to challenge it in appropriate proceedings before the appropriate court. The writ petitions are disposed of with these directions."

15. This has been followed subsequently by the Apex Court in ***Vishnu Agarwal Vs. State of U.P. (2011) 14 SCC 813***.

16. In light of the aforesaid, it is clear that in so far as the order dated 31.07.2021 is concerned, the same was ex parte and an application for recall was apparently maintainable, hence the first submission of the learned counsel for the petitioner does not find favour with this Count.

17. Now the question arises as to whether the authority could have passed an order staying the operation of the order dated 31.07.2021. If the provisions of Regulation 489 of the U.P. Revenue Court Manual is seen, it does not bar the exercise of power for grant of interim order but at the same time what is noticeable is that it only relates to proceedings which are in order i.e. does not suffer from any disability such as being beyond limitation. Regulation 489 of the U.P. Revenue Court Manual reads as under:-

489. Ad interim ex parte order- (1) The court may, on the application of any party to a suit, appeal, revision, review or other proceeding and on such terms as it thinks fit, make an order for preservation of any land which is the subject matter of the suit, appeal, revision, review or other proceeding.

(2) The court shall in all cases, except where it appears that the object of making the order for preservation would be defeated by the delay, before making the order, direct notice of the application for the same to be given to the opposite party:

Provided that where it is proposed to make an order without giving notice of the application to the opposite party, the court shall record the reasons for its opinion that the object of making the order would be defeated by delay, and require the applicant-

(a) to deliver to the opposite party or to send to him by registered post/speed post immediately after the order has been made, a copy of the application for the order together with-

(i) a copy of the affidavit filed In support of the application;

(ii) a copy of the plaint, memo of appeal, memo of revision or other application on which the proceeding has been initiated; and

(iii) copies of documents on which the applicant relies; and

(b) to file, on the date on which the order is made or on the working day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

(3) If the condition mentioned in clause (b) of sub-para (2) of this para is complied with, the interlocutory order shall be vacated automatically. Not

(4) Where an order has been made under this para without giving notice to the opposite party, the court shall make an endeavour to finally dispose of application within thirty days from the date on which the order was made and where it is unable so to do it shall record its reasons for such inability.

18. Now if any proceedings are time barred and are accompanied by an application under Section 5 of the Limitation Act in such a case the said Regulation cannot be pressed into service to suggest that even without issuing notice to the other party in whose favour certain rights have been crystallized because of an order which has not been assailed in time as prescribed by law and without condoning the delay the interim order could be passed.

19. It can be gainfully stated that if any suit, appeal, revision, review or other proceedings are filed beyond the prescribed period of limitation, legally speaking, the said proceedings are still born. Only once the delay is condoned only then the proceedings are resurrected to be considered on merits.

20. In this regard, a Division Bench decision of this Court where the issue of limitation vis a vis the right to enter into the merits of a proceeding before condoning the delay was considered in ***Ram Prakash Vs. Deputy Director of Consolidation and others 2022 SCC OnLine All 107***. The relevant paragraph 20 reads as under:-

"20 If any statute provides certain period for filing of appeal, an appeal filed beyond the time limit will certainly be not entertained. If the provisions of 1963 Act are applicable and party is entitled to seek condonation of delay in filing appeal, an application has to be filed specifying the grounds on which delay in filing the appeal is sought to be condoned. It is only after that the application is allowed, the appeal can be entertained and heard on merits. Before that the appeal cannot be taken up and considered on merits."

21. In the instant case, even before the notice on Section 5 of the Limitation Act was issued, the interim order has been passed by the Court. Even though it has been urged by the counsel for the State that merely the land of the State is protected but from the perusal of the order dated 04.12.2021 which is on record as annexure no.9 it would indicate that neither the authority has recorded any reasons for passing the order and moreover no finding has been recorded that in case the order of interim protection if not granted *ex parte* it would defeat the ends of justice and it was necessary in the given reasons for passing an *ex parte* order and without recording such reasons yet the operation of the order dated 31.07.2021 had been stayed.

22. At this stage it will be worthwhile to recall that even Regulation 489 of the U.P. Revenue Court Manual also envisages the recording of reasons before passing an interim order *ex parte* which has not been followed hence the agrument of the State based on Regulation 489 of the U.P. Revenue Court Manual cannot be sustained. Thus the order dated 04.12.2021 was bad as it was passed while the application of Section 5 of the Limitation Act was pending and no notice was issued thereon prior to passing of the order dated 04.12.2021 and even otherwise the order was bad for want of reasons.

23. The said order dated 04.12.2021 is also bad for another reason as by an interim

order the final relief of recall has been indirectly granted. It is also now well settled that by an interim measure, no such order can be passed which has the effect of allowing the main relief (***see Bank of Maharashtra Vs. Race Shipping & Transport Co. Pvt. Ltd. and another, (1995) 3 SCC 257***). The relevant paragraphs reads as under:-

"9. Since the writ petition is still pending in the High Court and the question of maintainability of the writ petition has yet to be considered we do not propose to go into the said question. All that we wish to say at this stage is that the objections that have been raised by the appellant-Bank against the maintainability of the writ petition are not such that they may be disregarded as lacking in substance. This is a factor which has a bearing on the exercise of discretion by the court while passing the interim order in the writ petition.

10. By the interim order the High Court has directed the appellant-Bank to credit a sum of Rs.95,000 in the Current Account No.318 of Respondent 1. The High Court has recorded that respondent through their counsel had given an undertaking to bring back the amount if the Court so desires. The said interim order, in substance, grants the relief which the respondent would have been given at the final stage in the event of their writ petition being allowed by the High Court.

11. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petitioner for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations."

24. There is another way to look at the issue since by means of order dated 04.12.2021, the operation of the principal order has been stayed at best if the intention was to protect the property it could have been protected but it was not appropriate to stay the operation of the order itself. This has not been considered by the Board of Revenue while passing the order even though the petitioner would have ample opportunity to contest the matter before the respondent no.3 but ignoring the aspect as discussed above relating to the fact that the application for recall was time barred and the interim order could not have been granted before condoning the delay as it affects the rights of the parties contesting the proceeding hence, the Board of Revenue has not exercised its jurisdiction as per law.

25. In the aforesaid facts and circumstances where the matter is already seized before the respondent no.3 and the application for condonation of delay alongwith the recall application is pending, this Court taking a holistic view and protecting the rights of the respective parties sets aside the order passed by the Board of Revenue and direct the petitioner to contest the proceedings before the respondent no.3 where he shall be permitted to file his objections to the recall application as well as to the application under Section 5 of the Limitation Act, 1963. The order dated 04.12.2021 whereby the operation of the order has been stayed is set aside. However, the parties shall maintain status quo and none of the parties shall change the nature or create any third party rights till the decision on the application under Section 5 of the Limitation Act. The petitioner shall co-operate in early hearing of the proceedings and so will the State and the court shall

endeavour not only decide the application under Section 5 of the Limitation Act, 1963 first thereafter take up the application for recall. In case if it finds favour in condoning the delay and the recall and if the proceedings are restored thereafter the proceedings itself may be decided after affording full opportunity of hearing to the parties but without granting any unnecessary adjournments on merits so that the proceedings can be culminated in a final order within a period of six months from the date, a copy of this order is placed before the authority concerned.

26. It is made clear that the Court has only touched the decision making process upon which the proceedings have been challenged, however, no expression of opinion on merits have been given by the Court on the respective rights and claims of the parties which shall be considered by the court concerned.

27. With the aforesaid, the petition is allowed in the aforesaid terms. Costs are made easy.

(2024) 8 ILRA 512
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2024

BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE VIKAS BUDHWAR, J.

Writ - C No. 5577 of 2015
with other connected cases

Kisan Sahkari Chini Mills Ltd., Bareilly ...Petitioner

Versus

Presiding Officer, Labour Court, Bareilly & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vrindavan Mishra, Sri Satyam Singh

Counsel for the Respondents:
C.S.C., Sri Gopal Narayan

A. Labour law – UP Industrial Disputes Act, 1947 – Sections 3 & 4-K – Standing Orders – UP Cooperative Society Act, 1965 – S. 70 – Workmen of Cooperative Society – Termination of services – Remedy – Labour Court, how far have jurisdiction – Held, S. 70 of the Cooperative Act, 1965 excludes disputes regarding disciplinary action to be taken against the paid servant. Nonetheless the workmen are not remediless as once the service conditions does not fall under the Cooperative Act, 1965 then in view of the Standing Orders issued from time to time the workmen have a remedy to approach the Labour Courts having jurisdiction over the matter. (Para 24)

Writ disposed of. (E-1)

List of Cases cited:

1. Ghaziabad Zila Sahkari Bank Ltd. Vs Additional Commissioner; (2007) 11 SCC 756

2. Ram Shankar Vaish Vs Presiding Officer, Labour Court; 2011 (131) FLR 391

3. Brij Bhushan Singh & anr. Vs St. of U.P. & ors.; 2009(2) ADJ 314

4. Writ C No. 23765 of 2005; Cooperative Cane Development Union Ltd. Vs St. of U.P. & ors. decided on 18.04.2011

5. Writ C No. 11386 of 1993; Farrukhabad Dugdh Utpadak Sahkari Sangh Ltd. Vs Presiding Officer, Labour Court, Lko. & ors. decided on 04.08.2011

6. Writ A 42227 of 1992 Sunder Lal Vs The L.S.R. Sahkari Samiti Ltd. & ors. decided on 29.11.2011

7. Writ C No. 11395 of 2017; Secretary Sadhan Sahakari Samiti Ltd. Vs Presiding Officer, Labour Court, Faizabad & anr. decided on 04.04.2022

8. Writ C No. 48700 of 2010; Pradeshik Cooperative Diary Federation Ltd. & anr. Vs St. of U.P. & ors. decided on 23.05.2012

9. Aliganj Kshetriya Sahakari Samiti Ltd. Bareilly Vs Murali Lal Sharma & anr.; 2012 (135) FLR 536

10. Writ C No. 25816 of 1999; Firozabad Dugdh Utpadak Sahkari Sangh Ltd. Vs P.O., Labour Court, Agra & ors. decided on 31.07.2012

11. Maharashtra St. Cooperative Housing Finance Corporation Ltd. Vs Prabhakar Sitaram Bhadange; (2017) 5 SCC 623

12. Deccan Merchants Co-operative Bank Ltd. Vs M/s. Dalichand Jugraj Jain & ors.; AIR 1969 SC 1320

13. Co-operative Central Bank Ltd. & ors. Vs The Additional Industrial Tribunal, Andhra Pradesh & ors.; 1969 (2) SCC 43

14. Gujarat St. Cooperative Land Development Bank Ltd. Vs P.R. Mankad & ors.; (1979) 3 SCC 123

15. Bhavnagar University Vs Palitana Sugar Mill (P) Ltd.; (2003) 2 SCC 111

16. Escorts Ltd. Vs Commissioner of Central Excise, Delhi-II; (2004) 8 SCC 335)

17. Bharat Petroleum Corporation Ltd. & anr. Vs N.R. Vairamani & anr.; 2004 (8) SCC 579

18. St. of Orissa Vs MD. Illiyas; 2006 (1) SCC 275

19. Mavilayi Service Cooperative Bank Ltd. & ors. Vs Commissioner of Income Tax, Calicut & anr.; 2001 (7) SCC 90

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Noticing divergent views and finding it difficult to reconcile, the learned Single Judge vide order dated 03.02.2015 has referred the following questions to be answered by Larger Bench.-

"Whether workmen of Kisan Sahkari Chini Mill Ltd. whose services are governed by the Standing Order Covering The Condition of Employment of Workmen In Vacuum Pan Sugar Factories In U.P. can raise industrial dispute involving the provisions of U.P. Industrial Dispute Act, 1947 ?"

Facts

2. Broadly, the facts of the case are that Kisan Sahkari Chini Mills Ltd. (in short 'Sugar Mill') is engaged in the business of manufacturing of sugar by vacuum pan process and claims to have obtained a licence under the provisions of U.P. Vacuum Pan Sugar Factories Licensing Order, 1969 (in short 'Licensing Order 1969').

3. In exercise of the powers conferred under clause (3) of Article 348 of the Constitution of India read with clause (b) of Section 3 of the U.P. Industrial Disputes Act, 1947 (in short 'U.P. I.D. Act, 1947'). The State of Uttar Pradesh framed Standing Orders regulating the Condition of Employment of Workmen in Vacuum Pan and Sugar Factories of Uttar Pradesh on 27.09.1988. Owing to demand for revision of the Standing Orders, revised Standing Orders Governing the Condition of the Employees and Workmen in Vacuum Pan Sugar Factories in Uttar Pradesh came to be framed on 29.04.2022.

4. Dispute with regard to termination of the employment of the workmen resulted in reference under Section 4-K of the U.P. I.D. Act, 1947 which in turn got registered as adjudication cases. Objections were preferred by the Sugar Mill taking a ground that since the Sugar Mills are governed under the provisions of U.P. Cooperative

Societies Act, 1965 (in short 'Co-operative Act, 1965') read with U.P. Cooperative Societies Employees Service Regulations, 1975 (in short 'Regulations, 1975'), therefore, the adjudicating courts under the U.P. I.D. Act, 1947 had no jurisdiction and authority to adjudicate the said disputes. The said objections came to be rejected by the Labour Courts holding that it had the competence to adjudicate the said disputes. Several writ petitions were filed before this Court, category 'A' against the order rejecting the objections raised by the Sugar Mill, category 'B' writ petition filed against the reference orders and category 'C' writ petition filed by the Workmen wherein challenge was raised to the order of the Labour Court holding that it had no jurisdiction to adjudicate the dispute since it falls under the provisions of the Co-operative Act, 1965.

5. On 29.08.2022, this Court appointed Amicus Curiae to assist the Court.

Arguments of Amicus Curiae

6. Sri Samir Sharma, Senior Advocate assisted by Sri Diptiman Singh, Amicus Curiae, submitted that the Sugar Mills are though engaged in manufacture of Sugar like private sector Sugar Mills but there lies a slight distinction that in the case of the petitioner-Sugar Mill the manufacture of Sugar is by Vacuum Pan Process. For the said purpose, a statutory licence is to be obtained under the provisions of Licensing Order, 1969. It is also submitted that in the Sugar Mills in question, the works are being executed by the employees and the workmen. As regards, the condition of the services of the workmen in Vacuum Pan Sugar Factories are concerned they are governed by the Standing Orders notified on 27.09.1988 which stood revised on 29.04.2022. With respect to the employees their service conditions are governed under ***U.P. Cooperative Sugar Mills and Distilleries Employees Service Regulation, 2015*** (in short 'Regulation, 2015). According to the Amicus Curiae, since the Standing Orders issued from time to time specifically deals with the condition of the services of the workmen and reference has been made in the Standing Orders for adjudication of the dispute relating to condition of services by the adjudicating forum under the U.P. I.D. Act, 1947, thus, the provisions of the Cooperative Act, 1965 and Regulations, 1975 would not apply. Argument is that the provisions of Cooperative Act, 1965 and the Regulations, 1975 have no application particularly when Section 70 of the Cooperative Act, 1965 does not deal with the contingency of adjudication of the disputes regarding disciplinary action through arbitration. It is contended that the judgment in the case of ***Ghaziabad Zila Sahkari Bank Limited Vs. Additional Commissioner (2007) 11 SCC 756*** would have no application in the facts of the case particularly when the dispute in the case of Ghaziabad Zila Sahkari Bank Limited (supra) was with regard to grant of ex gratia to the employees, whereas in the present case at hand the dispute is of termination of the engagement/employment which obviously comes within the realm of disciplinary action. It is, thus, submitted that once there happens to be specific Standing Orders occupying the field then the provisions of the Cooperative Act, 1965 would not be of any application and it is the adjudicating authority under U.P. I.D. Act, 1947 which is the only competent forum to decide such type of disputes.

7. Lastly, it has been argued that the judgment in the case of ***Ram Shankar***

Vaish Vs. Presiding Officer, Labour Court 2011 (131) FLR 391 lays correct law while holding that the Labour Court has the absolute and sole jurisdiction to adjudicate the case.

Arguments of the Counsel for Kisan Sahkari Chini Mills Ltd.

8. Sri Satyam Singh who appears for the Sugar Mills had sought to argue that in view of the judgment of Hon'ble Supreme Court in the case of *Ghaziabad Zila Sahkari Bank Limited* (supra), it is beyond shadow of doubt that it is only the provisions of Cooperative Act, 1965 which would apply in the disputes in question as the Cooperative Act, 1965 being a special enactment would prevail upon the general enactment and the Labour Court has no authority under law to adjudicate the said disputes.

9. Submission is that in view of Section 135 of the Cooperative Act, 1965, the provisions of U.P. I.D. Act, 1947 would not apply to the cooperative societies and once the Sugar Mills is a cooperative society then obviously the provisions of Section 70 of the Cooperative Act, 1965 would apply and the matter being arbitrable the Labour Court would have no jurisdiction to adjudicate the said disputes. He seeks to rely upon the judgments in the case of (i) ***Brij Bhushan Singh and another Vs. State of U.P. and Others, 2009(2) ADJ 314***, decided on 19.12.2008, (ii) ***Cooperative Cane Development Union Limited Vs. State of U.P. and Others, Writ-C No. 23765 of 2005***, decided on 18.04.2011, (iii) ***Farrukhabad Dugdh Utpadak Sahkari Sangh Ltd. Vs. Presiding Officer, Labour Court, Lko. & others, Writ-C No. 11386 of 1993***, decided on 04.08.2011, (iv) ***Sunder Lal Vs. The L.S.R. Sahkari Samiti Ltd. & Others, Writ-A 42227 of 1992*** decided on 29.11.2011, (v) ***Secretary Sadhan Sahakari Samiti Ltd. Vs. Presiding Officer, Labour Court, Faizabad and Another, Writ-C No. 11395 of 2017***, decided on 04.04.2022, (vi) ***Pradeshik Cooperative Diary Federation Ltd. & another Vs. State of U.P. & Others, Writ-C No. 48700 of 2010***, decided on 23.05.2012, (vii) ***Aliganj Kshetriya Sahakari Samiti Ltd. Bareilly Vs. Murali Lal Sharma & another, 2012 (135) FLR 536***, decided on 23.07.2012, and (viii) ***Firozabad Dugdh Utpadak Sahkari Sangh Ltd. Vs. P.O., Labour Court, Agra & Others, Writ-C No. 25816 of 1999***, decided on 31.07.2012.

Arguments of the counsel for Workmen

10. Sri Gopal Narayan, learned counsel for the workmen has supported the arguments of Amicus Curiae while adding that Section 70 of the Cooperative Act, 1965 deals with the disputes which may be referred to arbitration as envisaged under clauses (a), (b), (c) and (d) of sub-section (1) and it is restricted to the disputes relating to constitution, management or business of cooperative society which excludes a dispute regarding disciplinary action taken against a paid servant. According to him, the dispute in the case in hand is of termination of the engagement/services which obviously falls within the category of disciplinary action as the termination has been an outcome of misconduct.

11. Submission is that a workman cannot be remediless as once Section 70 of the Cooperative Act, 1965 does not contemplate any arbitration in the matter of the dispute regarding disciplinary action

taken against a paid servant then the only recourse available to the workmen is to approach the competent forum under the U.P. I.D. Act, 1947 in the wake of the clauses of the standing orders as applicable from time to time. It is submitted that the judgment in the case of Ghaziabad Zila Sahkari Bank Limited (supra) is distinguishable on the facts of the case and is not applicable as it relates to the dispute of ex gratia payment which nowhere falls under the category of dispute relating to disciplinary action.

Argument Advanced on behalf of State of Uttar Pradesh

12. Ms. Akanksha Sharma, learned Standing Counsel has also supported the argument of the learned Amicus Curiae while contending that the dispute in the case in hand is amenable to the adjudicating authority under the U.P. I.D. Act, 1947. She while relying upon the judgment in the case of ***Maharashtra State Cooperative Housing Finance Corporation Ltd. Vs. Prabhakar Sitaram Bhadange, (2017) 5 SCC 623*** has contended that the dispute relatable to constitution, management or the business of the cooperative society would not take into its ambit the disputes regarding disciplinary actions taken against the paid servants, specifically when the said disputes have been ousted from being referred to arbitration. According to the learned Standing Counsel, the judgment in the case of *Ghaziabad Zila Sahkari Bank Limited* (supra) is distinguishable in the facts of the case.

13. Before we proceed to answer the questions framed by the learned Single Judge, it would be apposite to have a quick survey of the statutory provisions.-

Statutory Provisions

U.P. Vacuum Pan Sugar Factories Licensing Order, 1969

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

(a)"Producer of Sugar" means a person carrying on the business of manufacturing sugar by vacuum pan process and at its own option, ethanol either directly from sugarcane juice or from molasses, including B-Heavy molasses, or both."

3. "Grant of Licence.- (1) No sugar shall be manufactured from sugarcane by a producer of sugar by vacuum pan process unless he has obtained from the State Government a licence therefor in the form prescribed in Schedule 1.

(2) An application for grant or renewal of a licence under clause (i) shall be submitted to the Sugar Commissioner by the date prescribed in Schedule II in the form prescribed in Schedule III and accompanied by a satisfactory proof of the fee prescribed in Schedule IV:

Provided that the State Government may renew the licence for which an application for renewal is received after the expiry of the prescribed date for receipt of such an application, if State Government is satisfied that there was reasonable cause for the delay."

Standing Orders

Standing Orders dated 27.09.1988	**Standing Orders dated 29.04.2022**
Now, therefore, in exercise of the powers under clause (b) of section 3 of the U. P. Industrial disputes Act, 1947 (U. P. Act no. 28 of 1947) and	Now, therefore, in exercise of the powers under clause (b) of Section 3 of the U.P. Industrial Disputes Act, 1947 (U.P. Act 28 of 1947) and in

insupersession of Government Notification no. 5436-ST- XXXVI-A-208-ST/58, dated October 3, 1958, as amended from time to time, the Governor is pleased to order that all vacuum pan sugar factories in Uttar Pradesh shall comply with the standing orders as annexed hereto, and to direct with reference to section 19 of the said Act that notice of this order shall be given by publication in the official gazette.	supersession of Government Notification No. 5692(HI)/XXXVI-2-110 (HI)-77, dated September 27, 1988, as amended from time to time, the Governor is pleased to order that all vacuum pan sugar factories in Uttar Pradesh shall comply with the Standing Orders as annexed hereto, and to direct with reference to Section 19 of the said Act that notice of this order shall be given by publication in the Gazette		3. There shall be no other service conditions of workmen of all vacuum pan sugar factories in addition to this standing order.
		"Workman" shall have the same meaning as assigned to it under the U.P. Industrial Disputes Act, 1947/Industrial Disputes Act, 1947.	"Workman" shall have the same meaning as assigned to it under the Uttar Pradesh Industrial Disputes Act, 1947/Industrial Disputes Act, 1947 and according to nature of work without any consideration of wage ceiling limit.
2. This order shall come into force with immediate effect and shall, in respect of matters covered by it, bind the vacuum pan sugar factories and the workmen employed there in for a period of one year in the first instance.	2. This order shall come into force from the date of publication of notification and shall, in respect of matters covered by it, bind the vacuum pan sugar factories and the workmen employed therein up to the date of new/next notification. It shall be mentioned in appointment letter of every new workman that their services will be governed by this standing order.	**B. Classification of workmen** 1. Workmen shall be classed as: (1) Permanent, (2) Seasonal, (3) Temporary, (4) Probationers, (5) Apprentices, & (6) Substitutes.	**B. Classification of workmen** 1. Workmen shall be classed as: (i) Permanent, (ii) Seasonal, (iii) Temporary, (iv) Probationers, (v) Apprentices, and (vi) Substitutes.
		An "Apprentice" means a person as defined in section 2(a) of U.P. Industrial Disputes Act, 1947.	An "Apprentice" means a person as defined in the Uttar Pradesh Industrial Disputes Act, 1947 and Apprenticeship Act, 1961.
		Termination	**Termination of**

(Employment- 1. The employemt of a workman, permanent or seasonal may be terminated in the following cases; (a) Genuine retrenchment; (b) Infirmity and disability: (c) Misconduct; Provided that before terminating the services of a seasonal workman on grounds (a) and (b) the management shall give 15 days' notice of their intention to do so during the season. It shall not be permissible to give such a notice till 15 days after the commencement of the season and during that period the workman concerned shall have the right to represent his case to the State Labour Commissioner. The aforesaid notice shall then remain in suspense pending final decision in the matter by the State Labour Commissioner, or if he so directs, by	**Employment:** 1. The employment of a workman permanent or seasonal workman permanent or seasonal may be terminated in the following cases: (a) Genuine retrenchment; (b) Infirmity and disability; (c) Misconduct: Provided that before terminating the service of a seasonal workman on grounds (a) and (b) the management shall give fifteen days' notice of their intention to do so during the season. It shall not be permissible to give such a notice till fifteen days after the commencement of the season and during that period the workman concerned shall have the right to represent his case to the Labour Commissioner, Uttar Pradesh who shall decided the representation of workman within thirty days.	Additional. Labour Commissioner or the Regional Deputy. Labour Commissioner. Provided also that the provision regarding retrenchment on grounds (a) and (b) laid down in the preceding proviso shall not apply to permanent workmen who will be governed in the matter of retrenchment by the Industrial Disputes Act, 1947, as amended from time to time. Note. All vacancies occurring as a result of retrenchment shall be filled in accordance with the provisions of U.P. Industrial Disputes Act, 1947/ Industrial Disputes Act, 1947.	The management shall be at liberty to take decision if representation is not decided within thirty days. In case of termination of employment due to infirmity and disability. if Labour commissioner is not satisfied, shall refer the matter to Medical Board, whose decision shall be final: Provided further that the provision regarding retrenchment on grounds (a) and (b) laid down be the preceding proviso shall not apply to permanent workmen who will be governed in the matter of retrenchment by the Industrial Disputes Act, 1947, as amended from time to time. Note. All vacancies occurring as a result of retrenchment shall be filled in accordance with the provisions of the Uttar Pradesh Industrial Disputes Act, 1947/Industrial Disputes Act, 1947.

			and does not sublet the same.
4. The reasons for the termination of service shall be given by the Manager in the notice referred to in the first proviso to clause (1) above. 5. Unless he has qualified for getting notice under Sec.6-N of the U.P. Industrial Disputes Act, 1947 the employment of a probationer.	4. The reasons for the termination of service shall be given by the Manager in the notice referred to in the first proviso to clause (1) above. 5. Unless he has qualified for getting notice under Sec.6-N of the U.P. Industrial Disputes Act, 1947 the employment of a probationer.	The workmen who are in employment at the time of enforcement of these Standing Orders shall have the right to get their age modified as per clause 3 above with in one year of enforcement of Standing Orders. He shall have the right to represent to the Regional Addl./Dy. Labour Commissioner of the area concerned within one month of notice of retirement. Such representations shall normally be disposed of within a period of one month of the date of receipt of representation of the workmen, and the orders passed by the Addl./Deputy Commissioner regarding the age of the concerned workman shall be and shall not be questioned by any party before any court. In case Regional Add/Dy. Labour Commissioner allows the representation of the	
substitute, temporary or apprentice workman may be terminated by the Manager without any notice or any payment in lieu of notice.	substitute, temporary or apprentice workman may be terminated by the Manager without any notice or any payment in lieu of notice.		
If the termination of a workman's service is the subject matter of an industrial dispute, he shall be allowed to live in the factory quarter allotted to him till the dispute is finally decided, provided that the worker continues to utilise his quarter for his stay and for his family members and does not subject the same.	If the termination of a workman's service is the subject-matter of an industrial disputes, he shall be allowed to live in the factory quarter with all facilities and amenities allotted to him till the dispute is finally decided: Provided that the worker continues to utilise his quarter for his stay and for his family members		

employer shall modify the record of age of the workman immediately on receipt of the said orders.	
If any question arises as to the application or interpretation of these Standing Orders, any employer/workmen may refer it to the Labour Commissioner of the State and the Labour Commissioner shall after giving the parties on opportunity of being heard, decide the question.	If any question arises to as the application or interpretation of these Standing Orders, any employer/workmen may refer it to the Labour Commissioner of the State and the Labour Commissioner shall after giving the parties in opportunity of being heard, decide the question within ninety days. W. Grievance redressal committee There shall be a grievance redressal committee comprising of one member of every registered Trade Unions and equivalent representative of management. The tenure of committee shall be three years and it shall be reconstituted after expiry of the tenure.
	If mutual agreement is not arrived on any disputed issue it shall be referred to regional Additional/Deputy Labour Commissioner, who shall decide after hearing the representative of unions and management.

Uttar Pradesh Co-operatives Societies Act, 1965

"Section 1. Short title, extent and commencement. - (1) This Act may be called the Uttar Pradesh Co-operative Societies Act, 1965.

(2) It extends to the whole of the State of Uttar Pradesh.

(3) It shall come into force from such date as the State Government may, by Notification in the Gazette, appoint in this behalf.

Provided that while appointing such date the State Government may declare that any provision to be specified in the declaration shall not come into force from the date so appointed and in that case such provisions shall come into force from such date or dates as the State Government may similarly appoint in that behalf."

"Section 70. Disputes which may be referred to arbitration. - (1) Notwithstanding anything contained in any law for the time being in force, if any dispute relating to the constitution, management of the business of a co-operative society other than a dispute regarding disciplinary action taken against a paid servant of a society arises-

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between a member, past member or any person claiming through, a member, past member or deceased member, and the society, its committee or management of any officer, agent or employee of the society, including any past officer, agent or employee; or

(c) between the society or its committee and any past committee, any officer, agent or employee or any past officer, past agent or past employee or the nominee, heir or legal representative of any deceased officer, deceased agent, or deceased employee of the society; or

(d) between a co-operative society and any other co-operative society or societies;"

"Section 135. Certain Acts not apply to co-operative societies. - The provisions contained in the Industrial Disputes Act, 1947 (Act XIV of 1947), and the UP. Industrial Disputes Act (U.P. Act XVIII of 1947), shall not apply to Co-operative Societies."

The U.P. Co-operative Societies Employees Service Regulations, 1975

"Section 2 (xi). 'employee' means a person in whole-time service of a co-operative society, but does not include a casual worker employed on daily wages or a person in part-time service of a society;"

"Section 103. The provisions of these regulations to the extent of their inconsistency, with any of the provisions of the Industrial Disputes Act, 1947, U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962, Workmen's Compensation Act, 1923 and any other labour laws for the time being in force, if applicable to any co-operative society or class of co-operative societies, shall be deemed to be inoperative."

U.P. Co-operative Sugar Mills and Distilleries Employees Service Regulations, 2015

"No. 02/2016/117/SC/18-2-2016-77/12 TC. In exercise of the powers under sub-section 2 section 122 of Uttar Pradesh Co-operative Societies Act, 1965 (U.P. Act no. XI of 1966), the Governor is pleased to approve the regulations framed by the Authority as required under Government Notification no. 474/XII-G-1-1987-7-(13)76 T.C. dated March 31, 1987 regarding recruitment, emoluments terms and conditions of service including disciplinary control of the employees of Uttar Pradesh Co-operative Sugar Factories and Distilleries Employees.

1. Short title, extent and commencement.- (1) These Regulation may be called the Uttar Pradesh Co-operative Sugar Mills and Distilleries Employees Service Regulations, 2015.

(2) They shall apply to the employees of Uttar Pradesh Co-operative Sugar Mills and Distilleries"

"(3) Apprentices and Trainees, during the period of Apprenticeship or training."

U. P. SUGAR WAGE BOARD, 1991

"The Governor is pleased to order the publication of the following English translation of notification No. 556(HI)/XXXVI-2-115(HI)-89, dated January 31, 1991 for general information:

No. 556 (HI)/XXXVI-2-115 (HI)-89

Lucknow: Dated January 31, 1991

Whereas by its Resolution No. V-23030/1-85-750A, dated July 17, 1985, the Government of India decided to set up a third Wage Board for the Sugar Industry to consider question of further revision of the

present wage structure in the industry and also to make incidental recommendations;

And, Whereas the report submitted by the said Wage Board was considered by the Government of India and by Resolution No. V-24014/21-89-WB, dated December 29, 1989, it accepted the recommendations of the said Wage Board with certain modifications:

And, Whereas the matter of implementation of the said Resolution of Government of India was considered at Tripartite Conference held in this State on 23rd October, 1989 in which the representatives of the employers namely, the U. P. Branch of the Indian Sugar Mill Association. Cooperative Sugar Federation and U.P. State Sugar Corporation and representatives of various workers' associations operating in the sugar Industry of U. P. were present;

And, Whereas by another Tripartite Conference held on 26th September, 1990 some of the unresolved matters were finally taken up bringing about unanimous accord between the employers and the workmen on the implementation of the recommendations of the said Wage Board:

And, Whereas in the opinion of State Government, it is necessary to implement the recommendations of the said Wage Board as accepted by Government of India for the maintenance of public order and supplies and services essential to the life of the community and for maintaining employment;

Now, Therefore, in exercise of the powers under sub-clause (b) of Section 3 of the U.P. Industrial Disputes Act, 1947 (U.P. Act No. XXVIII of 1947), the Governor is pleased to make the following Order and to direct with reference to Section 19 of the said Act that notice of this Order shall be given by publication in the official Gazette.

"1. This order shall apply to-

(i) all the Vacuum Pan Sugar Factories in this State;

(ii) all employees in the Vacuum Pan Sugar Industry falling within the definition of the term "workman" in the Industrial Disputes Act, 1947 as amended up to date."

Analysis:

14. Undisputedly, the sugar mills have been established under the provisions of the Cooperative Act, 1965. It is also not in dispute that the sugar mills are engaged in manufacturing of sugar through vacuum pan process and holds licences under the provisions of Licensing Order, 1969. In order to regulate the Conditions of the Employment of Workmen in Vacuum Pan Sugar Factories of Uttar Pradesh, Standing Orders have been issued wayback on 27.9.1988 which underwent revision on 29.04.2022. The moot question which has been referred to us and is to be answered is whether in the wake of the provisions contained under Cooperative Act, 1965 and the Regulations, 1975 framed thereunder, the provisions of U.P. I.D. Act, 1947 would apply or not.

15. Evidently, the Cooperative Act, 1965 was enacted in order to consolidate and amend the law relating to cooperative societies in Uttar Pradesh and received the assent of the President on 24.03.1966. As per Section 135, the provisions contained in the U.P. I.D. Act, 1947 was made inapplicable to cooperative societies. However, on 30.12.1967 though the Cooperative Act, 1965 was enforced with effect from 26.01.1968 except Section 135. Section 70 of the Cooperative Act, 1965

deals with settlement of dispute which contains a *non obstante* clause providing that the disputes relating to constitution, management or business of a cooperative society other than the dispute regarding disciplinary actions taken against a paid servant may be referred to Registrar for action in accordance with the provisions of the acts and the rules and no Court shall have jurisdiction to entertain any suit or other proceedings in respect of such dispute. In line with the Cooperative Act, 1965, Regulations 1975 came to be enforced. Sub-clause (ii) of Regulation 2 defines employee which means a person in whole-time servant of cooperative society, but does not include a casual worker employed on daily wage or a person part time service in society. Further, Chapter II deals with the strength of staff recruitment, appointment, probation, conformation, termination and retirement. With respect to the conditions of the employment of workmen in Vacuum Pan Sugar Factories of the State of Uttar Pradesh, Standing Orders was issued on 27.09.1988 under Section 3 in exercise of the powers under clause (b) of Section 3 of U.P. I.D. Act, 1947 which underwent revision on 29.04.2022. Apart from the same, 2015 Regulations came to be framed for regulating service conditions of the employee in the U.P. Cooperative Sugar Mills and Distilleries. In addition to the same, a notification was issued constituting U.P. Sugar Wage board known as **U.P. Sugar Wage Board, 1991** regulating the coverage and wage structure of workmen in Vacuum Pan Sugar Factories in the State of Uttar Pradesh and they were assigned the same definition which found place in the Industrial Disputes Act, 1947 as amended from time to time.

16. Interestingly, the workmen has not been defined either in the Regulation, 1975 or in the Regulation, 2015. What has been referred to and defined is employee. Conversely, the Standing Order defines workmen and the word 'workmen' has been used in various provisions either dealing with the classification of workmen, appointment, confirmation, termination etc. The word employee is not defined. Not only this in exercise of the powers under-sub-section (b) of Section 3 of the U.P. I.D. Act, 1947, the U.P. Sugar Wage Board, 1991 was constituted wherein its coverage was made to all the Vacuum Pan Sugar Industries in the State of Uttar Pradesh and Employees in the Vacuum Pan Sugar Industries falling within the definition of workmen in the U.P. I.D. Act, 1947 as amended from time to time providing for wage structure. Bearing in mind the above noted statutory enactment, the provisions contained under Section 70 of the Cooperative Act, 1965 is to be interpreted.

17. To put it otherwise, the only disputes relatable to constitution, management or business of a cooperative societies amongst the members, past members, persons claiming through members, past members, deceased members and the Committee of Management or an officer, agent or employee of the society including past officer, agent or employee or any officer or between the society or its committee or any past committee, any officer, agent or employee or any past officer etc., are only liable to be referred for settlement of dispute to arbitration.

18. In the case of R.C. Tiwari (supra) the appellant therein was dismissed from service for a proven misconduct, dispute was referred to the Registrar under the provisions of Section 55 of the ***M.P. Cooperative Societies Act, 1960*** wherein

the dismissal was found to be valid and thereafter matter was referred to the Labour Court in view of the provisions contained under U.P. I.D. Act, 1947 which was held to be not maintainable. While interpreting the provisions of Section 55 of the M.P. Cooperative Societies Act, 1960, the Apex Court held that the powers conferred under Section 55 to the Registrar was inclusive of determination of condition of employment in societies as the words "terms and conditions of employment" was employed in the said context.

19. The judgment in the case of R.C. Tiwari (supra) came to be relied upon and followed in the case of Ghaziabad Zila Sahkari Bank Ltd. (supra). In the said case, the dispute was of ex gratia payment to the employees while taking note of Section 70 of the Cooperative Act, 1965, the Hon'ble Supreme Court came to the conclusion that the dispute of ex gratia payment was amenable to the adjudicating authority under the Cooperative Act, 1965 and not under the U.P. I.D. Act, 1947 as there was no restraint or bar in adjudication of the said dispute. The judgment in the case of Ghaziabad Zila Sahkari Bank Ltd. came to be followed in the decisions of this Court in (i) ***Brij Bhushan Singh and another*** (supra), (ii) ***Cooperative Cane Development Union Limited*** (supra), (iii) ***Farrukhabad Dugdh Utpadak Sahkari Sangh Ltd.*** (supra), (iv) ***Sunder Lal*** (supra), (v) ***Secretary Sadhan Sahakari Samiti Ltd.*** (supra), (vi) ***Pradeshik Cooperative Diary Federation Ltd. & another*** (supra), (vii) ***Aliganj Kshetriya Sahakari Samiti Ltd. Bareilly*** (supra) and (viii) ***Firozabad Dugdh Utpadak Sahkari Sangh Ltd.*** (supra).

20. The word 'business' employed in Section 91(1) of the Maharashtra Cooperative Societies Act, 1961 was interpreted by Hon'ble Apex Court in ***Deccan Merchants Co-operative Bank Ltd. Vs. M/s. Dalichand Jugraj Jain and Others, AIR 1969 SC 1320*** Section 91(1) of the Maharashtra Cooperative Societies Act reads as under.-

"91. (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the office bearers, conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated, or by a creditor of the society, to the Registrar, if both the parties thereto are one or other of the following:

(a) a Society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative or any deceased officer, deceased agent or deceased servant of the society, or the liquidator of the society;

(b) a member, past member or a person claiming through a member, past member or a deceased member of a society, or a society which is a member of the society;

(c) a person, other than a member of the society, who has been granted a loan by the society, or with whom the society has or had transactions under the provisions of Section 45, and any person claiming through such a person;

(d) a surety of a member, past member or a deceased member, or a person other than a member who has been granted a loan by the society under Section 45, whether such a surety is or is not a member of the society;

(e) any other society, or the Liquidator of such a society.

It was held as under.-

"16. The principal questions which arise on the interpretation of Section 91 are two: (1) what is the meaning of the expression "touching the business of the society?" and (2) what is the meaning of the expression "a person claiming through a member" which occurs in Section 91 (1) (b)?

17. The answer depends on the words used in the Act. Although number of cases have been cited to us on similar expressions contained in various other Acts, both Indian and English, in the first instance, it is advisable to restrict the enquiry to the terms of the enactment itself, because the legislatures have been changing the words and expanding the scope of references to arbitrators or to the Registrars step by step. The sentence, namely, "notwithstanding anything contained in any other law for the time being in force" clearly ousts the jurisdiction of Civil Courts if the dispute falls squarely within the ambit of Section 91 (1). Five kinds of disputes are mentioned in sub-sec. (1); first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society; and fifthly, disputes touching the business of a society. It is clear that the word "business" in this context does not mean affairs of a society because election office-bearers, conduct of general meetings and management of a society would treated as affairs of a society. In this -section the word "business" has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter under the Act and the Rules and its -laws.

18. The question arises whether the dispute touching the assets of a society would be a dispute touching the business of a society. This would depend on the nature of the society and the rules and bye-laws governing it. Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business. In this case, the society is a co-operative bank and ordinarily a co-operative bank cannot be said to be engaged in business when it lets out properties owned by it. Therefore, it seems to us that the present dispute between a tenant and a member of the bank in a building which has subsequently been acquired by the Bank cannot be said to be a dispute touching the business of the Bank, and the appeal should fail on this short ground."

21. Hon'ble Supreme Court in ***Co-operative Central Bank Ltd. and Others Vs. The Additional Industrial Tribunal, Andhra Pradesh and Others 1969 (2) SCC 43*** had the occasion to consider the provisions of Section 61(1) of the Andhra Pradesh Cooperative Societies Act, 1964 akin to Section 70 of the Cooperative Act, 1965, Section 61(1) reads as under:-

61. Disputes which may be referred to the Registrar:-

(1) Notwithstanding anything in any law for the time being in force, if any dispute touching the constitution, management or the business of a society, other than a dispute regarding disciplinary action taken by the society or its committee

against a paid employee of the society, arises-

(a) among members, past members and persons claiming through members, pas past members and deceased members; or

(b) between a member, past member or person claiming through a member, past member or deceased member and the society, its committee or any officer, agent or employee of the society; or

(c) between the society or its committee and any past committee, any officer, agent or employee, or any past officer, past agent or past employee or the nominee, heir or legal representative of any deceased officer, deceased agent, or deceased employee of the society; or

(d) between the society and any other society,

such dispute shall be referred to the Registrar for decision.

The following was observed.-

7. Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred for decision to the Registrar under Section 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that Section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society; but the meaning given to the expression "touching the business of the society, in our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word "business" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society. Further, the position is clarified by the provisions of sub-section (4) of Section 62 of the Act which limit the power to be exercised by the Registrar, when dealing with a dispute referred to him under Section 61, by a mandate that he shall decide the dispute in accordance with the provisions of the Act and the Rules and bye-laws. On the face of it, the provisions of the Act, the rules and the bye-laws could not possibly permit the Registrar to change conditions of service of the workmen employed by the society. For the purpose of bringing facts to our notice in the present appeals, the rules framed by the Andhra Pradesh Government under the Act, and the bye-laws of one of the appellant Banks have been placed on the Paper-books of the appeals before us. It appears from them that the conditions of service of the employees of the Bank have all been laid down by framing special bye-laws. Most of the conditions of service, which the workmen want to be altered to their benefit, have thus been laid down by the by-laws, so that any alteration in those

conditions of service will necessarily require a change in the bye-laws. Such a change could not possibly be directed by the Registrar when, under Section 62(4) of the Act, he is specifically required to decide the dispute referred to him in accordance with the provisions of the bye-laws. It may also be noticed that a dispute referred to the Registrar under Section 61 of the Act can even be transferred for disposal to a person who may have been invested by the Government with powers in that behalf, or may be referred for disposal to an arbitrator by the Registrar. Such person or arbitrator, when deciding the dispute, will also be governed by the mandate in Section 62(4) of the Act, so that he will also be bound to reject the claim of the workmen which is nothing else than a request for alteration of conditions of service contained in the bye-laws. It is thus clear that, in respect of the dispute relating to alteration of various conditions of service, the Registrar or other person dealing with it under Section 62 of the Act is not competent to grant the relief claimed by the workmen at all. On the principle laid down by this Court in the case of the *Deccan Merchants Cooperative Bank Ltd*., (supra), therefore, it must be held that this dispute is not a dispute covered by the provisions of Section 61 of the Act. Such a dispute is not contemplated to be dealt with under Section 62 of the Act and must, therefore, be held to be outside the scope of Section 61."

22. In ***Gujarat State Cooperative Land Development Bank Ltd. v. P.R. Mankad and Others (1979) 3 SCC 123***, the Hon'ble Supreme Court was confronted with the issue of the termination of a supervisor and while interpreting the provisions contained under the Bombay Cooperative Societies Act, 1925 read with Gujarat Cooperative Societies Act, 1961, the following was observed.-

17. The relevant part of Section 54 of the Act of 1925, reads thus :

(1) (a) if any dispute touching the constitution or business of a Society arises between members or past members of the Society or persons claiming through a member or a past member or between members or past members or persons so claiming and any officer, agent or servant of the Society or its Committee, and any officer, agent, member or servant of the Society past or present, it shall be referred to the Regis- trar for decision by himself or his nominee. . .

18. The corresponding Section 96 of the Act of 1961 lays down:

(1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, management or business of a Society shall be referred in the prescribed form . . . if the parties thereto are from amongst the following:-

(a) a Society, its Committee, any past Committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative of any deceased officer, deceased agent or deceased servant of the Society, or the Liquidator of the Society. . . .

22. As regards the first test, it is to be noted that the expression "any dispute" has not been defined in the Acts of 1925 and 1961. The term "dispute" means a controversy having both positive and negative aspects. It postulates the assertion of a claim by one party and its denial by the other. The word "any" prefixed to "dispute" may, at first glance, appear to give the expression "any dispute" a very wide amplitude covering all classes of disputes,

whatever be their nature. But the context of these provisions, the object and scheme of the Acts of 1925/1961 show that the Legislature never intended to give such a wide scope to this expression. The related provisions and the scheme of the Acts unerringly indicate that the expression "any dispute" has been used in a narrower sense limited to contested claims of a civil nature, which could have been decided by civil or revenue courts, but for the provisions with regard to compulsory arbitration by the Registrar or his nominee, found in Section 54 of the Act of 1925, Section 96 of the Act of 1961. The first indication of this being the right construction, is discernible in sub-section (2) of Section 96 which states that when any question arises whether for the purposes of sub-section (1) a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final. This means it is incumbent on the Registrar to decide as a preliminary issue, whether the dispute is of a kind under sub-section (1) of Section 96 falling within his jurisdiction. If this preliminary issue is found in the negative, he will have no further jurisdiction to deal with the matter.

23. Recently in Maharashtra State Cooperative Housing Finance Corporation (supra) again the provisions of Section 91(1) of the Maharashtra Cooperative Societies Act, 1960 came to be explained by the Hon'ble Supreme Court while observing as under:-

11. In the aforesaid conspectus, we have to examine as to whether this power which is available with the civil court to grant damages is now given to the Cooperative Court under Section 91 of the Act. We may also mention at this stage that some of the States have statutes which contain provisions regarding management and regulations of the cooperative society, where specific machinery under these State Cooperative Societies Acts is provided for resolution of employment disputes as well, between the cooperative societies and its employees, that too by excluding the applicability of the labour laws. No doubt, in such cases, the disputes between the cooperative societies and its employees, including the workmen, would be dealt with by such machinery and the general Act, like the Industrial Disputes Act, would not be applicable (*see Ghaziabad Zila Sahkari Bank Ltd. v. Labour Commr.) and Dharappa v. Bijapur Coop. Milk Producers Societies Union Ltd.).* Pertinently, in the instant case, Section 91 specifically excludes the disputes between the cooperative society as employer and its "workmen". Ultimately, the outcome depends upon the powers that are given to the Cooperative Court or the stipulated tribunal d created under such Acts. It is in this hue we have to find out as to whether Section 91 of the Act at hand empowers Cooperative Courts to decide such disputes.

12. A reading of the provisions of Section 91 would show that there are two essential requirements for conferment of exclusive jurisdiction on the Cooperative Court which need to be satisfied:

(i) The first requirement is that disputes should be "disputes touching" the constitution of the society or elections of committee or its officers or conduct of general meetings or management of the society, or business of the society; and

(ii) The second requirement is that such a dispute is to be referred to the Cooperative Court by "enumerated persons" as specified under subsection (1) of Section 91.

13. When we read the provision in the aforesaid manner, we arrive at a firm

conclusion that service dispute between the employees of such cooperative society and the management of the society are not covered by the aforesaid g provision. The context in which the word "officers" is used is altogether different, namely, election of the committee or its officers. Thus, the word "officers" has reference to elections. It is in the same hue expression "officer" occurs second time as well.

19. The learned counsel for the respondent referred to the judgment of this Court in *R.C. Tiwari v. M.P. State Coop. Mktg. Federation Ltd.* However, a close scrutiny of the said judgment would reveal that the power of the Registrar to deal with the dispute of dismissal from service of the employee was recognised having regard to Section 55 of the M.P. Cooperative Societies Act, 1960 which gave specific power to the Registrar to determine conditions of employment, working conditions and disciplinary actions taken by the society arising between the society and its employees. Therefore, that judgment would be of no help to the respondent.

20. It may be noted that the High Court, in the impugned judgment, has itself proceeded on the basis that if the dispute relates to reinstatement, the Cooperative Court will not have any jurisdiction. The main reason for conferring jurisdiction upon the Cooperative Court in the instant case is is that the Cooperative Court has replaced the civil court and, therefore, powers of the civil court are given to the Cooperative Court. However, the High Court erred in not further analysing the provisions of Section 91 of the Act which spells out the specific powers that are given to the Cooperative Court and those powers are of limited nature. Our aforesaid analysis leads to the conclusion that the disputes between the cooperative society and its employees are not covered by the said provision. We may hasten to add that if the provision is couched in a language to include such disputes (and we find such provisions in the Cooperative Societies Acts of certain States) and it is found that the Cooperative Society Act provides for complete machinery of redressal of grievances of the employees, then even the jurisdiction of the Labour Court/Industrial Tribunal under the Industrial Disputes Act shall be barred having regard to the provisions of such a special statute vis-à-vis general statute like the Industrial Disputes Act (see Ghaziabad Zila Sahkari Bank Ltd.).

21. In *Gujarat State Coop. Land Development Bank Ltd. v. P.R. Mankad*, an employee working as Additional Supervisor was removed from service by giving one month's pay in lieu of notice under the Staff Regulations. He had issued a notice under the Bombay Industrial Relations Act, 1946, as he was an employee as defined under Section 2(13) of the said Act. One of the questions that was considered by this Court was whether a dispute raised by the said employee for setting aside his removal from service on the ground that it was an act of victimisation and for reinstatement in service with back wages was one "touching the management or business of the society", within the contemplation of the Cooperative Societies Act. This Court held that the expression "any dispute" referred to in Section 96 of the Gujarat Cooperative Societies Act, 1961 did not cover a dispute of the kind raised by the respondent employee against the Bank.

22. As a result, this appeal is allowed, the order[1] of the High Court is set aside and the Division Bench judgment[2], on which reliance is placed by the High Court in the impugned judgment, is overruled. As a consequence, it is held that the petition

filed by the respondent before the Cooperative Court is not maintainable. It would, however, be open to the respondent to file a civil suit. Needless to mention, in such a civil suit filed by the respondent, he would be at liberty to file application under Section 14 of the Limitation Act, 1963 in order to save the limitation. No costs."

24. Applying the principles of law culled out in the above noted decisions an irresistible conclusion stands drawn that the dispute touching the business of the society cannot be intermingled with the dispute pertaining to employment and service matters as they are on a different footing. An additional fact also needs to be noticed that Section 70 of the Cooperative Act, 1965 excludes disputes regarding disciplinary action to be taken against the paid servant. Nonetheless the workmen are not remediless as once the service conditions does not fall under the Cooperative Act, 1965 then in view of the Standing Orders issued from time to time the workmen have a remedy to approach the Labour Courts having jurisdiction over the matter. The rule making authorities were conscious about the inter-play between the different statutory enactments and that is why a boundary was carved providing for different adjudicatory forums for the different classes of employees. The purport in the different statutory enactments itself is self indicative of the fact that the service conditions are to be governed differently under the different enactments.

25. In ***Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. (2003) 2 SCC 111,*** Hon'ble Supreme Court in para 59 held as under.-

59. A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. [See Ram Rakhi v. Union of India, Delhi Admn. (NCT of Delhi) v. Manohar Lal, Haryana Financial Corpn. v. Jagdamba Oil Mills and Nalini Mahajan (Dr) v. Director of Income Tax (Investigation).]

26. The said decision came to be followed in the case of ***Escorts Ltd. v. Commissioner of Central Excise, Delhi-II, (2004) 8 SCC 335),*** the following was observed.-

8. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Co. Ltd. v. Horton (AC at p. 761),* Lord MacDermott observed: (All ER p. 14 C-D)

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great

weight to be given to the language actually used by that most distinguished judge,…"

10. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

27. In ***Bharat Petroleum Corporation Ltd. And another vs N.R. Vairamani And Another 2004 (8) SCC 579***, a note of caution was flagged that the Court should not place reliance on the decisions without discussing as to show the factual situation fits in with the situation of the decision on which reliance is placed, it was held as under.-

"9. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton (AC at p. 761) Lord MacDermott observed: (All ER p. 14 C-D)

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge,..."

28. The aforesaid principles of law came to be referred in the case of State of ***Orissa Vs. MD. Illiyas 2006 (1) SCC 275*** and ***Mavilayi Service Cooperative Bank Ltd. & Others Vs. Commissioner of Income Tax, Calicut & another 2001 (7) SCC 90.***

29. In view of the foregoing discussions the answer to the question referred to us is as follows.-

"Industrial Dispute under the provisions of U.P. Industrial Disputes Act, 1947 can be raised by workmen of the *Kisan Sahkari Chini Mills Ltd.,* whose service conditions are governed by Standing Orders covering the condition of employment of workmen in *Vacuum Pan Sugar Factories* in Uttar Pradesh."

30. The legal corollary would be that the judgment in the cases of (i) ***Brij Bhushan Singh and another*** (supra), (ii) ***Cooperative Cane Development Union Limited*** (supra), (iii) ***Farrukhabad Dugdh Utpadak Sahkari Sangh Ltd.*** (supra), (iv) ***Sunder Lal*** (supra), (v) ***Secretary Sadhan Sahakari Samiti Ltd.*** (supra), (vi) ***Pradeshik Cooperative Diary Federation Ltd. & another*** (supra), (vii) ***Aliganj Kshetriya Sahakari Samiti Ltd. Bareilly*** (supra) and (viii) ***Firozabad Dugdh Utpadak Sahkari Sangh Ltd.*** (supra) holding that the Labour Court is bereft of jurisdiction to adjudicate the service disputes of the workmen in Vacuum Pan Sugar Factories in Uttar Pradesh governed by the Standing Orders covering the

condition of employment of workmen is not a correct law.

31. Since we have answered the reference holding that the Labour Court has jurisdiction and competence to adjudicate the said disputes and this is the sole question involved in the writ petitions therefore, it would be a futile exercise to send the matters back to the learned Single Judge. Therefore, we ourselves have undertaken the task to decide the writ petitions.

32. Accordingly, the writ petitions are being decided in the following manner.-

(a) Category 'A' writ petitions (Writ-C Nos. 5577 of 2015, 5578 of 2015, 5580 of 2015, 5582 of 2015, 5583 of 2015, 5585 of 2015, 5586 of 2015, 5588 of 2015, 5590 of 2015, 5591 of 2015, 5593 of 2015, 5594 of 2015, 5597 of 2015, 5598 of 2015, 5599 of 2015) are dismissed.

(b) Category 'B' writ petition (Writ-C No. 2392 of 2009) is dismissed.

(c) Category 'C' writ petition (Writ-C No. 17065 of 2018) is allowed.

(d) The concerned Labour Court(s) shall proceed with the adjudication case(s) and proceed to pass award strictly in accordance with law with most expedition.

33. Before parting, we accord our appreciation to the able assistance rendered by the Amicus Curiae.

(2024) 8 ILRA 532
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.08.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ - C No. 6828 of 2024

U.P. Unaided Medical And Allied Sciences College Welfare Association & Ors.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Amit Jaiswal Ojus Law

Counsel for the Respondents:
C.S.C.

(A) Education Law - determination of fees for professional educational institutions in Uttar Pradesh, India - role of the Fee Regulatory Committee and the State Government in fixing fees - The Uttar Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 – Section 4(8) - Fee Regulatory Committee after its constitution would require the institutions to furnish information, Section 10 - committee shall determine the fee to be charged , Section 11 - appeals, U.P. Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee Consideration Committee), Rules, 2008 - Rule 3(1) – constitution of committee for admission and fee regulation ,Rule 5 - any professional Institution being aggrieved by the order of the Fee Regulatory Committee can file an appeal before the appellate authority appointed under Section 11 of the Act, 2006.

(B) The Uttar Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 - Section 4(8) and Section 10 - *Fee Determination Process* - Fee Regulatory Committee requires institutions to furnish information as per Section 10 , *Institutional Obligation* - Private aided or unaided professional education institutions, or private universities, must provide necessary information to the Committee , *Committee's Role* - The Committee determines the fee based on

the provided information , *Government Notification* - After fee determination, the State Government notifies the fees and the period for which they apply.(Para -33)

(B) Administrative Law – doctrine of legitimate Expectation – six key features - legitimate expectation must be based on a right, not just a hope or anticipation - **it arises from express or implied promises, consistent past practices, or customs followed by public authorities** - **expectations based on sporadic, casual, or random acts cannot be considered legitimate egitimate - expectation applies to both substantive and procedural matters** - **it operates in the realm of public law, where a public authority breaches a promise or deviates from consistent past practice without reasonable basis** - **only those who have dealings or negotiations with public authorities can invoke legitimate expectation, not total strangers. (Para 53)**

(C) Administrative Law – doctrine of legitimate Expectation - Private medical colleges have a legitimate expectation that the Fee Regulatory Committee will determine fees – held - petitioners have a legitimate expectation that the Fee Regulatory Committee will determine fees for the academic session 2024-25 - committee's failure to perform this statutory duty amounts to a breach of legitimate expectation. (Para – 53)

State Government issued a notification – exercising its powers under section 4(8) of the Act 2006 - without any determination of fee by Fee Regulatory Committee - Petitioners (unaided private Medical Colleges) aggrieved by inaction of State Government as well of Fee Regulatory Committee - enhancing the fee to be charged from the students - for various medical courses - for the academic session 2024-25 – hence petition. (Para – 2, 27,32)

HELD: - State Government's order passed without the recommendations of the fee regulatory committee quashed due to lack of jurisdiction. Directions for the Fee Regulatory Committee to proceed with fixing the fee for the academic session 2024-25 in accordance with law. (Para -55,56)

Petition allowed. (E-7)

List of Cases cited:

1. P.A. Inamdar Vs St. of Maha., (2005) 6 SCC 537

2. P.A. Inamdar & Ors Vs St. Of Maha. & ors, (2006) of SCC 293

3. I.I.M.E.S. & Anr. Vs St. of UP & ors., 2016 SCC Online All 3451

4. I.A.E. Vs St. of Karn., (2003) 6 SCC 697

5. A.W.E.S. New Delhi Vs Sunil Kumar Sharma & ors., 2024 SCC online 1683

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

1. Heard Sri Jaideep Narain Mathur, learned Senior Advocate assisted by Sri Amit Jaiswal, Sri S.K. Chaudhary, Sri Mudit Agarwal, Ms. Aishvarya Mathur and Sri Aditya Singh, learned counsel for the petitioners as well as Sri Rahul Shukla, learned Additional Chief Standing Counsel for the respondents.

2. The petitioners are unaided private Medical Colleges who are aggrieved by the inaction of the State Government as well of the Fee Regulatory Committee as constituted under the Uttar Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 *(hereinafter referred to as "the Act of 2006")*in enhancing the fee to be charged from the students for various medical courses run by the petitioner Institutions for the academic session 2024-25.

3. It has been submitted by Sri Jaideep Narain Mathur, Senior Advocate,

appearing on behalf of the petitioner Institutions that with the object that the students should receive education of the highest grade in the field of medicine, the petitioner Medical Colleges have been established with the permission of the National Medical Commission. The Medical Colleges provide comprehensive facilities, faculties, and expert trained professionals for teaching, research and patient care. The petitioner Medical Colleges besides MBBS course offer various postgraduate and medical and allied courses in various clinical and non-clinical departments.

4. The admission to the petitioner Medical Colleges is done based on the National Eligibility Entrance Test (NEET) by the Director-General of Medical Education (DGME) through counseling.

5. The issue pertaining to the fee to be charged by the private medical colleges has been the subject of litigation for a very long time. The interest of the medical colleges who have created the infrastructure out of private funds and their desire to make certain profits resulting in higher fee directly militates with the interest of the students who have to be provided highest quality of education at affordable rates. The courts have consistently held that the private medical colleges cannot charge exorbitant capitation fee and the same have to be reasonably fixed. The balance was found in the case of ***P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537***, the relevant portion is quoted as under:-

"Capitation fees

140. Capitation fee cannot be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee. "Profession" has to be distinguished from "business" or a mere "occupation". While in business, and to a certain extent in occupation, there is a profit motive, profession is primarily a service to society wherein earning is secondary or incidental. A student who gets a professional degree by payment of capitation fee, once qualified as a professional, is likely to aim more at earning rather than serving and that becomes a bane to society. The charging of capitation fee by unaided minority and non-minority institutions for professional courses is just not permissible. Similarly, profiteering is also not permissible. Despite the legal position, this Court cannot shut its eyes to the hard realities of commercialisation of education and evil practices being adopted by many institutions to earn large amounts for their private or selfish ends. If capitation fee and profiteering is to be checked, the method of admission has to be regulated so that the admissions are based on merit and transparency and the students are not exploited. It is permissible to regulate admission and fee structure for achieving the purpose just stated."

6. To regulate the fee charged by the private professional education institutions, the State of Uttar Pradesh has enacted The Uttar Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006.

7. The Act of 2006 defines fee in Section 3 (d) as *"all fees including tuition fee and development charges"*, while sub-clause (i) defines Private Professional Educational Institution as *"a professional educational institution not established or maintained by the Central Government, the State Government or any public body"*, and sub-clause (o) defines Unaided Institution

as *"a private professional educational institution, not being an aided institution"*.

8. Chapter II of the Act of 2006 provides for the constitution of Fee Regulatory Committee while Section 4 provides for composition, qualification and functions of the Committee. The Committee shall be presided over by a person who is or who has been a Senior Administrative Officer of the State or Vice-Chancellor of a Central University or a State University or a Deemed to be University who shall be called the Chairman of the Committee and shall include two other Members having experience in matters of finance or administration.

9. Sub Section (8) of Section 4 of the Act, 2006 provides for determination of fee by the Committee which is as under: -

"(8) The Committee may require a private aided or unaided professional educational institution or, a deemed to be University or a private University to furnish, by a prescribed date, information as may be necessary for enabling the Committee to determine the fee as prescribed under section 10 of this Act that may be fixed by the institution in respect of each professional course, and the fee so determined shall be valid for such period as notified by the State Government."

10. The parameters to be considered by the Fee Regulatory Committee to determine the fees to be charged by the private aided or unaided professional education institution have been provided in Section 10 of the Act, 2006, which is as follows:-

"10.(1) The Committee shall determine, the fee to be charged by a private aided or unaided professional educational institution having regard to:- (i) the nature of the professional course, (ii) the available infrastructure, (iii) a reasonable surplus required for growth and development of the professional institution, (iv) the expenditure on administration and maintenance, (v) the expenditure on teaching and non teaching employees of the institution, (vi) any other relevant factor. (2) The Committee, shall give the institution an opportunity of being heard before fixing any fee:- Provided that no such fee, as may be fixed by the Committee, shall amount to profiteering or commercialization of education."

11. The Act of 2006 also provides for an appeal against the order of the Fee Regulatory Committee in the following terms:-

"11. The State Government shall appoint an Appellate Authority, headed by a person who has been a Judge of the High Court, before which a person or professional institution aggrieved by an order of the Committee may file an appeal, which a period of 30 days from the date of receipt of such an order."

12. To give effect to the provisions of the Act, 2006, the State has framed U.P. Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee Consideration Committee), Rules, 2008 (*hereinafter referred to as "the Rules, 2008"*), by means of which composition of Committee has been fixed. According to Rule 3(1) of the Rules, 2008, Committee for admission and fee regulation has been constituted consisting of (a) Principal Secretary/Secretary to Government in the concerned Department as Chairman alongwith two other members who have experience in the matter of finance and administration.

13. Rule 5 of the Rules, 2008 further provides that any professional Institution being aggrieved by the order of the Fee Regulatory Committee can file an appeal before the appellate authority appointed under Section 11 of the Act, 2006, within a period of 30 days from the date of receipt of such an order.

14. Considering the facts of the present case it has been submitted that in exercise of power under the Act, 2006 read with Rules, 2008 the Fee Regulatory Committee had determined fee for the academic Session 2012-13 which was valid for three academic sessions and thereafter, fee determination was done in the year 2017 and was notified by means of Government Order dated 14.07.2017 for three academic sessions i.e. 2017-18, 2018-19 and 2019-20.

15. The Fee Regulatory Committee was again constituted by means of Government Order dated 13.10.2020 for fixing fee for academic session 2021-22 and according to the scheme provided for under the Act, 2006, proposals were invited alongwith relevant documents in prescribed format for fee determination vide letter dated 23.06.2021. After due consideration by the Fee Regulatory Committee the fee for MBBS, MD/MS was determined for the academic Session 2021-22 and the said fee structure was notified by Government Order dated 08.12.2021. It is relevant to note that as per aforesaid notification of the State Government dated 08.12.2021, the fee was notified only for academic session 2021-22.

16. In 2023, the Fee Regulatory Committee conducted its meetings on 26.09.2023, 27.06.2023 and 31.07.2023 and after considering the various documents and proposals, submitted by the Medical Colleges, it recommended to continue with the same fee structure, which was determined for academic session 2021-22, for academic session 2023-24.

17. For the academic session 2024-25, the Fee Regulatory Committee was constituted on 12.06.2024, but it seems that the Committee did not undertake the exercise as provided for under the Act, 2006 and neither did it make any recommendations to the State Government and in the aforesaid circumstances the State Government by means of impugned Government Order dated 11.07.2024, extended the fee structure as determined for academic session 2023-24 to the academic session 2024-25.

18. The petitioner Institutions have approached this Court by means of present writ petition challenging the notification dated 11.07.2024 and have further sought direction to the respondents to determine tuition fee and other fees on the basis of proposals and documents submitted by the Colleges for academic session 2024-25 in accordance with the Act of 2006. It has been submitted by learned counsel for the petitioners that the respondents are bound to comply with the provisions of Act, 2006 and determine the fee structure after expiry of notification previously issued whereby the fee was determined by the Fee Regulatory Committee and notified by the State Government.

19. It was submitted that the Government Order dated 11.07.2024 is illegal and arbitrary inasmuch as it has been issued bereft of any recommendations by the Fee Regulatory Committee and in absence of any recommendation, the Government has no power or jurisdiction to

issue any notification with regard to the fee structure and accordingly the impugned Government Order has been passed without any jurisdiction.

20. Lastly, it was submitted that there is no nexus between the last date for counseling and fixation of fee, as the respondents were under a mandate to determine the fee prior to commencement of counseling or start of academic session which they have failed to do and now they are seeking benefit of their own lapse. It was submitted that there is no provision either in the Act of 2006 or in the Rules of 2008 providing for determination of the fee prior to counseling. In response to the stand of the State Government and other respondents that there is not much time left before commencement of counseling, it has been submitted on behalf of the petitioner Institutions that they would be ready and willing to give an undertaking that the fee may be enhanced applying the rate of inflation on the fee determined for academic session 2021-22, which exercise can be concluded within a short time, and in any case before the commencement of counseling.

21. The respondents on the other hand have vehemently opposed the writ petition. A preliminary objection has been raised by them that the writ petition having been filed by an Association is not maintainable, in as much as the beneficiaries, if any would be the individual medical colleges and not the Association.

22. It has been submitted that the State Government by means of an order dated 11.07.2024, has decided to continue with the same fee structure as decided by Government Order dated 02.08.2023 for the academic session 2023-24. It was further stated that the said decision has been taken keeping in view the fact that counseling for the MDS course would commence much earlier than in the previous years and not much time is left before commencement of counseling, therefore the fee structure had to be notified so that the students are aware of the fee structure at the time of filing their choices of the Medical Colleges.

23. In the aforesaid circumstances it was submitted that the Government Order dated 11.07.2024 does not suffer from any illegality and the decision has been taken only in the interest of the students so that they do not suffer difficulty while filling up their choice of Institutions during PG Counseling and NEET UG Counseling.

24. It was further submitted that as per the provisions of Section 4(8) of the Act, 2006 it is prerogative of the State Government to extend the fee decided in any particular year to the next academic year, and therefore it was within the jurisdiction of the State Government to have passed the impugned Government Order.

25. It is further submitted by the respondents that the Fee Regulatory Committee was constituted by the Government order dated 12.06.2024 and is in the process to determine fee for five new Medical Colleges who will start the course in the academic session 2024-25. Since fee structure of five new Medical Colleges was not determined, they stand on completely different footing than the petitioner Institutions. It was further submitted that it not necessary that fee be determined every year nor there is any statutory provision providing for the same and accordingly, there is no illegality in continuing the same

fee structure for subsequent years which was determined for the academic session 2021-22.

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

27. The question which falls for consideration before this court is whether the State Government can issue a notification in the exercise of its powers under section 4(8) of the Act of 2006 without there being any determination of fee by the Fee Regulatory Committee?

28. The issue pertaining to regulation of the fee chargeable from the students by the medical and other professional institutions has been subject matter of litigation before the Hon'ble Apex Court and in the case of **P.A. Inamdar & Ors vs State Of Maharashtra & Ors, (2006)13 SCC 293** it was held that the Committee should be formed which would determine the fee to be charged by the professional institutes taking into account various aspects, in the following terms as stated in paragraph 68 of the said judgement:-

"B. FEES:

The Committee suggested by Islamic Academy and the procedure mentioned therein, appears to be the only safe method of ensuring that extortionate fees are not charged by the medical colleges. At the same time, it would be wrong to deny expenditure which the institution undertakes for ensuring excellence in education. Equally, a reasonable surplus should be permitted so that the fees charged cover the entire revenue expenditure and in addition leaves a reasonable surplus for future expansion. This alone would prevent the clandestine collection of capitation fees and would result in entrepreneurs investing in new medical colleges.

The Committee suggested by Islamic Academy appears to be the ideal one consisting of a chartered accountant, a representative of the MCI or AICTE as the case may be, with a retired judge of the High Court or the Supreme Court as the head.

The fee is to be fixed on the proposal of the institution supported by documents and the procedure of fee finalization should commence at least 6 months in advance of the commencement of the academic year."

29. The State of U.P with the object to provide for regulation of admission and fixation of fee in private professional education Institutions and the matters connected therewith enacted the Uttar Pradesh Private Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 which provided for constitution of an admission and Fee Regulatory Committee. The procedure to be followed by the said Committee was provided for under section 4(8) according to which the Committee would require the private aided or unaided professional education Institution to furnish information regarding the nature of professional course, the availability of infrastructure, a reasonable surplus required for growth and development, expenditure on Administration and maintenance the expenditure on teaching and non-teaching employees of the institution etc. as provided in Section 10 of the Act of 2006.

30. Once the information is furnished by the institutions, the committee would proceed to determine the fee to be charged from the students, and such determination

would be valid for such period as notified by the State Government.

31. With regard to the issue of maintainability it is noticed that the present writ petition has been filed by the U.P Unaided Medical and Allied Sciences College Welfare Association, Bareilly along with 17 Medical Colleges. The association has been made a petitioner as the individual medical colleges were in communication with the State Government under the umbrella of the Association. While even if the objections of the respondents are sustained, which are only with regard to the Association, it is noticed that 17 individual medical colleges have also joined as petitioners in the present writ petition, and these individual medical colleges have a common grievance against the respondents pertaining to the determination of fee for the academic session 2024-25 and hence there is no doubt that the petition under Article 226 of the Constitution of India would be maintainable at their behest, as undoubtedly they are the "aggrieved persons" seeking redressal against the purportedly illegal and arbitrary State action. According, the preliminary objection with regard to the maintainability of the writ petition is rejected.

32. The issue for consideration before this court is with regard to the fact as to whether the State Government can notify the fees in exercise of its powers under Section 4 (8) of the Act of 2006 without there being any determination by the Fee Regulatory Committee as has been done for the academic session 2024-25.

33. The answer to the aforesaid question can be found on prudent perusal of Section 4(8) and Section 10 of the Act of 2006, which confers the power and provides the procedure for determination of the fee. In sub-clause 8 of Section 4 the Fee Regulatory Committee after its constitution would require the institutions to furnish information as per Section 10 which may enable it to make determination of fee. The private aided or unaided professional education Institutions or private university etc. must furnish such information to the Committee as sought which is necessary for the Committee which has to "determine" the fee. Therefore, a bare perusal of the aforesaid provisions, clearly indicate that the responsibility of determination of fee has been given only to the Fee Regulatory Committee constituted under the said act. Once the fee has been determined, the State Government would have to notify the said fees and also the period for which such determination has been made.

34. The aforesaid interpretation is also fortified by reading of Section 10 of the Act of 2006 which clearly states that *"committee shall determine the fee to be charged…"*, and therefore, only the Fee Regulatory Committee has been given the mandate to determine the fee. The State Government only has to notify such determination and also specify the period during which is that determination of fee shall remain valid. The recommendations of the Fee Regulatory Committee are binding of the State Government but are implementable on their being notified by the State Government.

35. This Court in the case of **Indian Institute of Management and Engineering Society and Another vs State of UP and others, 2016 SCC Online All 3451** had an occasion to consider a similar controversy whereby the private

technical Institutions had been directed to charge fee for the session 2016-17 as determined earlier by the Fee Regulatory Committee for session 2012-13. The State therein had also taken a similar plea stating that due to paucity of time the fee determined earlier would continue to be the fee for the session 2016-17 as no determination has been made by the Committee. The dispute which had engaged the attention of this Court was also to be resolved having regard to the provisions of the Act of 2006 and therefore the findings of the Court are germane for determination of the controversy in the instant case. This Court had allowed the writ petition in the following terms:-

"The learned counsel for the respondent would urge that in continuing the fee fixed earlier for 2016-17 is in keeping with the interest of the students. The argument on face value appears attractive, but tested in depth, appears shallow and lacks merit. The interest of the students is sub-served best by institutions of repute, imparting quality education of international standard. The students are prepared to pay more on placement in such institutions; if the argument that is sought to be advanced by the learned counsel for the respondent is accepted then a much lower fee would serve the student interest but unfortunately the State does not sponsor or assist financially in either setting up such private institutions or provide working capital. It is for these reasons the Apex Court held that fixation of fee should be left to the private institutions but should be monitored by a Committee so as to prohibit profiteering or from charging capitation fee; the role of the Committee is not that of a 'big brother' to force upon an institution fees determined three years earlier and compel the institution to run the courses at rates which makes it unworkable, therefore, seriously undermining quality instructions to the students. The cow cannot be milked for long without appropriately feeding it.

The cut of date fixed for admission would have no bearing, as admittedly the Committee failed to discharge its statutory duty cast upon it under the Act 2006 and Regulation 2015 framed thereunder. A writ would issue directing the Committee to discharge its legal duty. The conduct of the Committee has not only been casual as reflected from the record but also arbitrary which is deprecated. It is not open for the Committee to say that it would not discharge its statutory duty due to paucity of time.

In the facts of the present case, out of 24 institutions only 5 institutions had submitted their proposal and only three institutions have approached this Court for enhancement of their fee for session 2016-17. The other institutions which have not approached are either not having students in requisite number or infrastructure to cater the students, therefore, may have preferred to continue on the fee determined in 2013. The petitioner-Institution being a premium private institute has sought revision, therefore, it was incumbent upon the Committee to have addressed the issue of fee review.

In these circumstances, the impugned order dated 22 June 2016 passed by the third respondent-Special Secretary, Government of Uttar Pradesh, Lucknow cannot be sustained, accordingly, quashed.

The writ petition is allowed with the following directions:

(i) Committee shall fix the fee for session 2016-17 in respect of the Institutions before the Court, after hearing their representative;

(ii) Institutions undertake to submit their proposal before the Committee within one week from date i.e. by 29 August 2016;

(iii) Committee shall determine the fee for 2016-17 within four weeks thereafter i.e. by 26 September 2016;

(iv) The fee charged by the Institution for 2016-17 would be provisional fee subject to the final fee determined by the Committee;

(v) Upon enhancement, the arrears would be payable by the students in installment (half yearly/quarterly) depending upon the hike recommended by the Committee. Installment to be determined by the Committee.

(vi) Committee in future to discharge its statutory function in determination of fee well in advance."

36. We have perused a few of the previous Government Orders notifying the fee and found that, even the State Government has notified the fee after recommendations have been made by the Fee Regulatory Committee. They had followed this very procedure for the academic session 2011-12, which was preceded by recommendation of the Fee Regulatory Committee. By means of Government Order any 02/06/2016 decision was taken by the Fee Regulatory Committee to extend the fees previously fixed. For academic session 2021–22 the Constitution of the committee was notified on 08/12/2021. On 02/08/2023 the Government order was issued conveying the recommendations of the Fee Regulatory Committee extending the fee for academic session 2023-24. Therefore, the State has all along been issuing notifications conveying the recommendations of the Fee Regulatory Committee. It is for the academic session 2024-25 that the impugned notification has been issued by the State Government in absence of any recommendations having been made by the Fee Regulatory Committee. In paragraph 24 of the counter affidavit, it has been stated that the State Government by means of its order dated 11/07/2023 has decided to continue with the same fee structure as decided by GO dated 02/08/2023, therefore there is no doubt with regard to the fact that for the academic session 2024-25 the determination has been made by the State Government itself to continue with the fee structure decided previously. This decision in the considered opinion of this Court is illegal, arbitrary and contrary to provisions contained in the Act of 2006, where it has been provided that the power to determine the fee of the educational institutions vests only with the Fee Regulatory Committee and the role of the State Government is limited only to notifying such determination/decision as made by the Committee.

37. For the academic session 2024-25 the Fee Regulatory Committee has been constituted on 12/06/2024, and as per the statutory duty cast on it by the Act of 2006, it was under a duty to proceed to determination the fees following the procedure prescribed in the Act of 2006 read with rules of 2008. The counter affidavit has also been filed on behalf of Fee Regulatory Committee, but there is no mention about the stage of exercise which has been conducted by them towards determining the fee, while on the other hand it has been contended that the schedule for counseling of MBBS is to start shortly and therefore there is no time left to determine the fee and the State Government has decided to continue with the same fee structure as decided for previous years. It seems that the Fee

Regulatory Committee has failed to undertake the exercise after being duly constituted and has not made any recommendations determining the fee which is certainly a very serious lapse on its part resulting in deprivation of the enhanced fee which the petitioner institutions would have been legally and validly entitled to.

38. Once the Fee Regulatory Committee has been constituted, it has to proceed to determine the fee in accordance with law, and its mandate ends only when such determination has been made, or the State Government terminates its constitution. In the present case after being duly constituted by means of Government Order dated 12/06/2024, the committee has not forwarded its recommendations to the State Government for notification, nor is there any notification ending its mandate and therefore its mandate continues as neither of these contingencies have occurred.

39. The delay in the Constitution of the Fee Fixation Committee has been attributed to the General Elections in the country. It could not be demonstrated on behalf of the respondents that fixation of fee for educational institutions has any bearing on the elections, or there was any order of the Election Commission restraining the constitution of the said Committee, or further even if there was any confusion in this regard whether any permission was sought from the Election Commission. No plausible explanation in this regard is forthcoming from the respondents. Accordingly, there is no plausible reason for the delay in the constitution of the Committee which is deprecated in strongest terms.

40. Another issue that has been raised and contested by both the parties is with regard to the period during which the recommendations of the Fee Regulatory Committee would hold field, and whether such an exercise would have to be conducted annually.

41. Learned Additional Chief Standing counsel on behalf of the respondents has vehemently urged that this aspect of the matter has been concluded by the Supreme Court in the case of ***Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697*** where it was held:-

"161. Fees once fixed should not ordinarily be changed for a period of three years, unless there exists an extraordinary reason. The proposed fees, before indication in the prospectus issued for admission, have to be approved by the concerned authority/body set up. For this purpose the application should not be filed later than April of the preceding year of the relevant education session. The authority/body shall take the decision as regards fees chargeable latest by October of the year concerned, so that it can form part of the prospectus. No institution should charge any fee beyond the amount fixed and the fee charged shall be deposited in a nationalized bank. In other words, no employee or any other person employed by the management shall be entitled to take fees in cash from the students concerned directly. The statutory authority may consider the desirability of framing an appropriate regulation inter alia to the effect that in the event it is found that the management of a private unaided professional institution has accepted any amount other than the fees prescribed by the Committee, it may have to pay a penalty ten to fifteen times of the amount so collected and in a suitable case it may also lose its recognition or affiliation."

42. In this regard it is noticed that the directions of the Supreme Court in the case of ***Islamic Academy of Education v. State of Karnataka, (supra)*** with regard to the fee Committee hold field only till appropriate statutory regulations are made by the State Governments. This was clearly stated in paragraph 159 which is as follows: -

"159. With a view to ensure that an educational institution is kept within its bounds and does not indulge in profiteering or otherwise exploiting its students financially, it will be open to the statutory authorities and in their absence by the State to constitute an appropriate body, till appropriate statutory regulations are made in that behalf."

43. Considering the above, this Court is of the view that once the State of Uttar Pradesh has enacted the Act of 2006, then the provisions contained therein shall prevail. As already discussed above in detail regarding the provisions contained in Section 4(8) of the Act of 2006, the Fee Regulatory Committee has to call for relevant data and material from the educational institutions and determine the fee. The determination has to be notified by the State Government which has also to provide for *"fee so determined to be valid for such period….."*. Therefore, the validity of the determination made by the Fee Regulatory Committee shall hold field for the duration for which notification has been issued by the State Government. At this stage we would also like to make it clear that even the period of the validity of the fee fixed by the Fee Regulatory Committee must be made by the Committee and is not at the discretion of the Government. The Fee Regulatory Committee at the time of determining the fee can take into account such conditions and apply the principles for fixing the fee, which can extend its validity beyond an academic session or for 2 or more years. Accordingly, this Court is of the considered view that even the extension of the period for which the fee is determined is part of the process of "determination" of fee as per Section 4(8) read with Section 10 of the Act of 2006, which has to be done by the Fee Regulatory Committee. The State Government therefore is tasked only to notify the recommendations of the Committee with regard to the fee as well as the period of its validity.

44. Section 11 of the Act of 2006 provides for constitution of an appellate authority which is headed by a person who has been a Judge of the High Court, before whom a person or professional Institution aggrieved by the order of the committee may file an appeal within 30 days from the date of receipt of the order. Section 11 also makes it clear that only the order of the Committee, is appealable, which means that the quantum of fee fixed by the Committee as well as the validity of the period determination made by the Committee can be subjected to appeal before the appellate authority. There may be a situation where there may not be a dispute about the quantum of fee fixed, but with regard to the period of its validity as the Committee may fix a greater time frame like 3, 5 or 7 years for the validity of the fee against which an appeal can be preferred.

45. In the instant case the impugned order extending the period of the validity of the fee passed by the State Government cannot be subjected to appeal as only the decision of the Fee Regulatory Committee can be subjected to an appeal. It could not

have been the intention of the legislature to have constituted an appellate authority only for hearing appeals against the quantum of determination of fee by the Committee and not against the period of its validity. This leads us to the irresistible conclusion that even the period of validity of the fees has to be recommended by the Committee as it amounts to determination of fee, and this part of the determination can also be appeal against before the appellate authority. Apart from the above, the other reason for coming to the said conclusion is that the Committee while determining the fee will have to consider such other relevant factors so that determination holds good for the duration of its validity, failing which the determination itself would be liable to rendered arbitrary.

46. The precipice of the aforesaid consideration would be that once the Fee Regulatory Committee has been notified it would proceed to embark on its mandate and call for the relevant material as provided in section 10 of the Act of 2006, and proceed to determine the fee for each institution, as the data for each institution would be different. The recommendations of the Committee would have to be notified by the State Government, and as per Section 4(8) and such notification would also indicate the period for which the determination of fee by the Committee would remain valid.

47. Once the period of validity of fee as notified by the State Government expires, the natural consequence would be the reconstitution of the Fee Regulatory Committee, which would conduct the exercise of determination of fee afresh, which would thereafter be notified by the Government prescribing the period for its validity and it would be a cyclic procedure. Therefore, the answer to the question as to whether determination of fee would be an annual exercise, is accordingly answered that the fresh determination of a would have to be made after the expiry of the validity of the previous fee fixed by the Committee. This procedure has been followed by the State Government itself and is evidenced by the previous exercise conducted for determination of fee for the session 2023-24 which was done on the recommendations of the Fee Regulatory Committee which had conducted its meeting on 26/06/2023, 27/06/2023 and 31/07/2023 and after giving due opportunity of hearing to the institutions and had made recommendations to continue with the same fee structure as determined for the session 2021-22. Even previously, in 2017 on the recommendations of the Fee Regulatory Committee, the State Government by means of Government order dated 14/07/2017, notified fee which was valid for 3 academic sessions that is 2017-18, 2018-19 and 2019-20. The said fee continued for the 3 academic sessions and the next determination was made only after the expiry of the period of its validity i.e for academic session 2020-21.

48. It is only for the session 2024-25 the State Government has notified the fee structure on its own, without reference to the recommendations of the Fee Regulatory Committee which in the considered opinion of this court is illegal and arbitrary and wholly without jurisdiction. Once the Fee Regulatory Committee has been constituted, it is deemed to have commenced its function to determine the fee, and the educational institutions as well as the State Government have no option except to wait for the recommendations of the committee, and neither the educational

instructions can charge any enhanced fees, nor can the State Government notify the fee structure on its own without waiting for the recommendations of the fee committee.

49. Finally, the issue raised by the respondents deserve to be examined, that the counseling is to commence from 20/08/2024, and there is no time left to conduct the exercise for determination of fee as per the provisions contained in the Act of 2006 and therefore the State had issued the Government order for continuing the fee structure determined previously. In the peculiar facts, it was prayed that they may be allowed to continue with the fee structure as notified by the impugned order.

50. As per the facts narrated above, there is no dispute that firstly, the State Government was fully aware that the last fee determined by the Committee for professional educational institutions was notified for the academic session 2023-24 and therefore a fresh determination had to be made for the academic session 2024-25. Being in full knowledge of the aforesaid facts they chose to belatedly notify the constitution of the Fee Regulatory Committee only on 12/06/2024 knowing fully well that the counseling for various courses of medical education is to commence from July/August 2024. As per the averments made in the counter affidavit, 2-3 month's time is required for calling for the records, hearing and determining of fee. Merely because the State has slept over the matter despite fully knowing that the statutory provisions contained in the Act of 2006 must be implemented for the academic session 2024-25, cannot be a ground for not determining the fee for the said academic session. The State as well as the Committee were under a duty to determine the fee which it has clearly failed to perform, and it is for this very reason that the Constitutional Courts are required to interfere and see that the obligations placed upon the State by the legislature are complied with in letter and spirit. Similar argument of the State was also considered in paragraph 21 by the coordinate bench of this Court in the case of **Indian Institute of Management and engineering Society**(Supra) in following terms:-

"21. It is averred in the counter affidavit that the fee for the session 2016-17 could not have been determined by the Committee due to paucity of time. The fee, therefore, determined earlier (2013) would be the fee for session 2016-17. The delay has not been attributed to the institutions. Admittedly, five institutions responded, as against 24 Institutions, for fixing Standard Fee, however, the Committee was unable to determine the fee even in respect of the five institutions. Petitioner-Institution being aggrieved by non determination of fee has pleaded that it would not be possible, even considering the inflation, to run the Institution, maintain quality and pay higher salary to the teachers upon implementation of the 7th Pay Commission Report, therefore, the Institution would have to run at expenses less than their revenue, thus, eroding its surplus."

51. The aforesaid argument was considered and rejected in paragraph 31 in the following terms:-

"31. The cut of date fixed for admission would have no bearing, as admittedly the Committee failed to discharge its statutory duty cast upon it under the Act 2006 and Regulation 2015 framed thereunder. A writ would issue directing the Committee to discharge its

legal duty. The conduct of the Committee has not only been casual as reflected from the record but also arbitrary which is deprecated. It is not open for the Committee to say that it would not discharge its statutory duty due to paucity of time."

52. This Court, not in very uncertain terms had clearly stated that the conduct of the Committee has not only been casual as reflected on record but also arbitrary, which is deprecated. Despite inviting such observations and comments from this court the State Government and the Fee Regulatory Committee have raised the same plea for being unable to determine the fee for the academic session 2024-25. It is also important to point out that this Court has been informed that the above judgment of this court has become final as no appeal was filed before the Supreme Court. Accordingly, there is no reason for this Court to take any other view of the matter than what has already been taken in the above case. The failure of the Fee Regulatory Committee to determine the fee in absence of any reasonable cause for not doing so, is writ large on the face of the record, and equally culpable is the State Government for not have learnt anything from the previous judgments despite harsh words like the "deprecated" having been used for them with regard to their conduct in similar circumstances.

53. Apart from the above, this Court is of the considered view that the petitioners have a legitimate expectation from the State Government as well as from the Fee Regulatory Committee to perform their duty as per the Act of 2006. It is not merely a hope or an expectation or an anticipation, but a legal duty cast upon them to have determined the fee for the academic session 2024-25, which statutory duty they have miserably failed to perform , and no explanation whatsoever is forth coming for the delay caused in determining the fee. It has recently been held by the Apex court in the case of **Army Welfare Education Society New Delhi versus Sunil Kumar Sharma and others, 2024 SCC online 1683** as follows :-

"48. A reading of the aforesaid decisions brings forth the following features regarding the doctrine of legitimate expectation:

a. First, legitimate expectation must be based on a right as opposed to a mere hope, wish or anticipation;

b. Secondly, legitimate expectation must arise either from an express or implied promise; or a consistent past practice or custom followed by an authority in its dealings;

c. Thirdly, expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid cannot be treated as a legitimate expectation;

d. Fourthly, legitimate expectation operates in relation to both substantive and procedural matters;

e. Fifthly, legitimate expectation operates in the realm of public law, that is, a plea of legitimate action can be taken only when a public authority breaches a promise or deviates from a consistent past practice, without any reasonable basis.

f. Sixthly, a plea of legitimate expectation based on past practice can only be taken by someone who has dealings, or negotiations with a public authority. It cannot be invoked by a total stranger to the authority merely on the ground that the authority has a duty to act fairly generally.

49. The aforesaid features, although not exhaustive in nature, are

sufficient to help us in deciding the applicability of the doctrine of legitimate expectation to the facts of the case at hand. It is clear that legitimate expectation, jurisprudentially, was a device created in order to maintain a check on arbitrariness in state action. It does not extend to and cannot govern the operation of contracts between private parties, wherein the doctrine of promissory estoppel holds the field."

54. In the present case the petitioners are seeking a direction to the State Government to comply with the provisions of the act of 2006, since despite Constitution of the Fee Regulatory Committee, and submission of all the documents, it has failed to make any recommendations determining the fee for the academic session 2024-25. The duty has been cast on the Committee by the Act of 2006, and consequently at the end of the validity of the previous notification the Committee has to make a fresh determination which it has failed to do, and consequently the petitioners have a legitimate expectation that the Committee will determine the fee as it is statutory required to do. The State Government on its part could not have issued the notification without such recommendation and therefore there is a complete failure of the machinery for determination of fees for the professional medical colleges requiring interference of this Court under Article 226 of the Constitution of India.

55. In light of the above this Court is of the considered opinion that the State Government does not have jurisdiction to pass the impugned Government order dated 11/07/2024 without there being any recommendations of the fee regulatory committee and accordingly the same is quashed.

56. Writ petition is **allowed** with the following directions: -

a. The Fee Regulatory Committee shall proceed fix the fee for academic session 2024-25 in respect of the Institutions before this Court, in accordance with law.

b. The petitioner Institutions are required to submit all the documents and the proposal, if not already done, within one week from today i.e by 24.8.2024.

c. The Committee shall determine the fee for the academic session 2024-25 within 4 weeks thereafter i.e by 21.09.2024, it shall be open for the Committee to consider the request of the petitioner Institutions for enhancement of the fee in proportion to the rate of inflation on the fee determined for academic session 2021-22 as provided for in the order of this Court dated 14/08/2024.

d. At the time of counselling the students will be informed about the fees determined for academic session 2023-24, which would be the provisional fee subject to the final fee determined by the Committee.

e. Upon enhancement, the arrears would be payable by the students in instalments (half yearly/quarterly) depending upon the hike recommended by the Committee, which shall also determine the number of instalments to be paid by the students.

f. This Court while interpreting the provisions of the Act of 2006 in the case of **Indian Institute of Management and Engineering Society and Another, 2016 SCC Online All 3451** had clearly stated that the Committee in future has to discharge its statutory function in determination of fee well in advance, and the Hon'ble Supreme Court in the case of

Islamic Academy (supra) had stated that the fee shall be determine 6 months in advance and despite the said directions the Committee has not determined the fee for the academic session 2024-25, despite the fact that the counselling is about to commence, which clearly amounts to defiance of the orders of this Court and hence they are liable to be proceeded for contempt, but after due consideration this Court is of the view that the end of justice in the present case would be met by directing the Chief Secretary, Government of U.P. to conduct an enquiry against the persons responsible for delay in constitution of the Fee Fixation Committee and also with regard to the failure of the Committee to make determination of fee as mandated by the Act of 2006. Let the enquiry be concluded within a period of 2 months, and a copy shall be forwarded to this Court through its Senior Registrar. We again caution the State Government as well as the Fee Fixation Committee to proceed to determine the fee well in advance for the next session failing which they shall be liable to be proceeded in contempt.

57. No order as to costs.

(2024) 8 ILRA 548
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ - C No. 11344 of 2024

Mohd. Yasir Ali Khan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ms. Archana Singh, Sri Shreeprakash Singh

Counsel for the Respondents:
Sri Arvind Srivastava, C.S.C., Sri Vikrant Gupta

A. Revenue law – Constitution of India,1950 – Article 226 – Writ – Maintainability – UP Revenue Code, 2006 – Ss. 35 and 210 – Mutation proceeding u/s 35 (2) – Maintainability of writ was raised on the ground of availability of alternative remedy of revision u/s 210 against an order passed in an appeal arising out of mutation order – Held, mere fact that there is no further appeal against the order passed by the Sub Divisional Officer in an appeal u/s 35(2) cannot warrant an inference that the legislature intended in any way to limit or control the revisional jurisdiction conferred on the Commissioner u/s 210 of the Code – The order passed by the Sub Divisional Officer in appeal u/s 35(2), against which there is no further appeal, would be subject to the revisional powers of the Commissioner to be exercised u/s 210. (Para 31 and 38)

Writ disposed of. (E-1)

List of Cases cited:

1. Jhinka Devi Vs St. of U.P. & ors.; 2022 (7) ADJ 31

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

1. Heard Sri Shreeprakash Singh, learned counsel for the petitioner, Sri J. N. Maurya, learned Chief Standing Counsel appearing alongwith Sri Abhishek Shukla, learned Additional Chief Standing Counsel, for the State-respondents and Sri Arvind Srivastava, learned counsel for respondent No.5.

2. The present petition has been filed primarily seeking to assail the order

dated 13.07.2023, passed by the respondent No. 3, the Naib Tehsildar, Panwadia, Tehsil Sadar, Rampur, in Case No. 35 of 2023, in proceedings under Section 34 of the U.P. Revenue Code, 20061, and the subsequent order dated 04.12.2023, passed by the respondent No. 2, the Sub Divisional Magistrate, Tehsil Sadar, Rampur, in Case No. 3689 of 2023, an appeal under Section 35(2) of the Code, whereby the earlier order has been affirmed.

3. Counsel appearing for the State respondents and also the counsel appearing for the respondent No. 5, have raised an objection with regard to the entertainability of the writ petition by pointing out that the order passed in appeal, under Section 35(2) of the Code, would be subject to the statutory remedy of a revision under Section 210 of the Code.

4. Learned counsel appearing for the petitioner has sought to refute the aforesaid objection by seeking to urge that the remedy of a revision under Section 210 is available only in a situation where no appeal lies, and in the instant case since the petitioner is seeking to assail an order passed in an appeal under sub-section (2) of Section 35, the remedy of revision would not be available.

5. The question which therefore arises for consideration in the present case is as to whether an order passed in an appeal under sub-section (2) of Section 35 of the Code, would be subject to the remedy of a revision under Section 210 of the Code.

6. In order to appreciate the rival contentions, the relevant statutory provisions under the U.P. Revenue Code, 2006, would be required to be adverted to.

7. The provisions with regard to mutation, as contained under Sections 33, 34 and 35 of the Code, are being extracted below:

"33. Mutation in cases of succession.—(1) Every person obtaining possession of any land by succession shall submit report of such succession to the Revenue Inspector of the circle in which the land is situate in such form as may be prescribed.

(2) On receipt of a report under sub-section (1) or on facts otherwise coming to his knowledge, the Revenue Inspector shall —

(a) if the case is not disputed, record such succession in the record of rights (Khatauni);

(b) in any other case, make such inquiry as may appear to him to be necessary and submit his report to the Tehsildar.

(3) Any person whose name has not been recorded by Revenue Inspector or who is aggrieved by the order passed by the Revenue Inspector under clause (a) or (b) of sub-section (2) may move an application before Tehsildar.

(4) The provisions of this section shall *mutatis mutandis* apply to every person admitted as a Bhumidhar with non-transferable rights or as an asami by the Bhumi Prabandhak Samiti in accordance with the provisions of this Code or any enactment repealed by it.

34. Duty to report in cases of transfer.—(1) Every person obtaining possession of any land by transfer, other than transfer referred to in sub-section (3) of Section 33 shall report such transfer, in the manner prescribed, to the Tehsildar of the Tahsil in which the land is situate.

Explanation.—For the purposes of this section, the word transfer includes a family settlement.

(2) State Government may fix a scale of fees for getting entry recorded in the record of rights on the basis of transfer. A fee in respect of any such entry shall be payable by the person in whose favour the entry is to be made.

35. Mutation in cases of succession or transfer.—(1) On the receipt of a report under Section 33 or Section 34, or upon facts otherwise coming to his knowledge, the Tahsildar shall issue a proclamation and make such inquiry as appears to be necessary and —

(a) if the case is not disputed, he shall direct the record of rights (Khatauni) to be amended accordingly;

(b) [***]

(c) if the case is disputed, he shall decide the dispute and direct, if necessary, the record of rights (khatauni) to be amended accordingly.

(2) Any person aggrieved by an order of the Tahsildar under sub-section (1) may prefer an appeal to the Sub-Divisional Officer within a period of thirty days from the date of such order."

8. The power to call for the records, conferred on the Board of Revenue2 or the Commissioner, in respect of any suit or proceedings decided by any subordinate revenue court, is provided for under Section 210 of the Code. Section 210 of the Code, as it originally stood, is as follows :-

"210 Power to call for the records.—The Board or the Commissioner may call for the record of any suit or proceeding decided by any sub-ordinate revenue court in which no appeal lies, or where an appeal lies but has not been preferred, for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit or proceeding; and if such subordinate court appears to have —

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of such jurisdiction illegally or with material irregularity;

the Board, or the Commissioner, as the case may be, may pass such order in the case as it or he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner, no further application by the same person shall be entertained by the other of them.

(3) No application under this section shall be entertained after the expiry of a period of thirty days from the date of the order sought to be revised or from the date of commencement of this Code, whichever is later."

9. The Uttar Pradesh Revenue Code, 2006 was amended in terms of the Uttar Pradesh Revenue Code (Amendment) Act, 2016 [U.P. Act No. 4 of 2016]. The amendment made to Section 210 in the amending Act of 2016, was as follows :-

"162. Amendment of Section 210.— In Section 210 of the said Code—

(a) for the figures and words "210. The Board" the figures, brackets and words "210. (1) The Board" shall be substituted.

(b) in sub-section (1), the words and punctuation mark "or where an appeal lies but has not been preferred," shall be omitted;

(c) after sub-section (2) and before sub-section (3), the following explanation shall be inserted, namely —

Explanation.─ For the removal of doubt it is, hereby, declared that when an application under this section has been moved either to the Board or to the Commissioner, the application shall not be permitted to be withdrawn for the purpose of filing the application against the same order to the other of them.

(d) in sub-section (3), for the words "thirty days" the words "sixty days" shall be substituted."

10. The U.P. Revenue Code, 2006 was subject to further amendments made in terms of the Uttar Pradesh Revenue Code (Amendment) Act, 2019 [U.P. Act No. 7 of 2019], which was deemed to come into force on March 10, 2019.

11. There was some inconsistency in the Hindi version of the language of Section 210 inasmuch as the words used in sub-Section (1) where "कोई अपील नहीं हुई" as against the language in the English version which was "in which no appeal lies". The aforesaid inconsistency was removed by making suitable amendment in the Hindi version of Section 210 of the principal Act by providing as follows :-

"19. In Section 210 of the principal Act, in the Hindi version, in sub-section (1) for the words "कोई अपील नहीं हुई" the words "कोई अपील नहीं हो सकती" shall be substituted."

12. Section 210, consequent to the amendment made as per the terms of the U.P. Act No. VII of 2019, stands as under:

"210 Power to call for the records.-(1) The Board or the Commissioner may call for the record of any suit or proceeding decided by any sub-ordinate Revenue Court in which no appeal lies, for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit or proceeding, and if such subordinate Court appears to have —

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of such jurisdiction illegally or with material irregularity;

the Board, or the Commissioner, as the case may be, may pass such order in the case as it or he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner, no further application by the same person shall be entertained by the other of them.

Explanation.- For the removal of doubt it is, hereby, declared that when an application under this section has been moved either to the Board or to the Commissioner, the application shall not be permitted to be withdrawn for the purpose of filing the application against the same order to the other of them.

(3) No application under this section shall be entertained after the expiry of a period of sixty days from the date of the order sought to be revised or from the date of commencement of this Code, whichever is later."

13. The principal submission raised by the learned counsel for the petitioner, in regard to the question involved, is that the remedy of revision under Section 210 of the Code is available only in a case in which no appeal lies, and therefore since sub-section (2) of Section 35 provides for an appeal against an order of mutation passed under sub-section (1) thereof, there would be no further remedy

of a revision available thereagainst under Section 210 of the Code. It is thus sought to be urged that the order passed in an appeal under Section 35(2), would be final with no statutory remedy being available against the said order.

14. Controverting the aforesaid submission, the learned Chief Standing Counsel appearing for the State respondents has submitted that the restriction contained under Section 210 providing for the remedy of a revision only in a case 'in which no appeal lies', would not be attracted since the question under consideration is in regard to the availability of the remedy of a revision against the order passed in appeal under sub-section (2) of Section 35, against which no further appeal lies. To support this argument, reliance has been placed upon a recent decision of this Court, in the case of **Jhinka Devi Vs. State of U.P. And 4 Others**3

15. Attention of the Court has been drawn to the Third Schedule of the U.P. Revenue Code, 2006, to point out that in respect of proceedings relating to mutation cases under Section 35, the order of the Tehsildar exercising original jurisdiction is subject to an appeal before the Sub Divisional Officer, and there is no provision with regard to a further second appeal. It is therefore contended that since no further appeal lies against the appellate order of the Sub Divisional Officer under sub-section (2) of Section 35, the remedy of a statutory revision under Section 210, would not be barred.

16. Counsel appearing for the respondent No. 5 has also made his submissions on similar lines.

17. Rival contentions now fall for consideration.

18. Section 210, as it stands after the amendment brought about by the U.P. Act No. 4 of 2016, empowers the Board or the Commissioner to call for the record of any suit or proceedings decided by any subordinate revenue court 'in which no appeal lies' for the purpose of satisfying itself as to the legality or propriety of any order passed in such suit or proceedings.

19. The Board or the Commissioner, may pass such order in the case as it thinks fit, if the subordinate court appears to have —

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of such jurisdiction illegally or with material irregularity.

20. It would therefore be seen that under Section 210, the Board or the Commissioner, may exercise the power to call for the record of any suit or proceedings decided by any subordinate revenue court, under the following conditions :-

(i) where no appeal lies; and

(ii) the subordinate court appears to have ─

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of such jurisdiction illegally or with material irregularity.

The Board or the Commissioner, as the case may be, may thereafter pass such order in the case as it or he thinks fit.

21. A plain reading of the aforesaid provisions may lead to a possible argument that the remedy of a revision under Section 210 being available only in a case where no appeal lies, the order passed by the Sub Divisional Magistrate, under sub-section (2) of Section 35, would not be revisable under Section 210 of the Code.

22. The aforesaid together with the argument regarding the order passed by the Sub Divisional Officer under sub-section (2) of Section 35, having a finality attached to it as regards mutation proceedings, would be required to be examined in the context of the provisions under Section 210 and the overall scheme of the U.P. Revenue Code, 2006.

23. Under the U.P. Revenue Code, 2006, the expression 'Revenue Court', has been defined under Section 4(16), as meaning all or any of the following authorities, that is to say, the Board and all members thereof, Commissioners, Additional Commissioners, Collectors, Additional Collectors, Assistant Collectors, Settlement Officers, Assistant Settlement Officers, Record Officers, Assistant Record Officers, Tahsildar and Naib-Tahsildar.

24. The term "Revenue Officer" has been defined under Section 4 (17) of the Code to mean the Commissioner, an Additional Commissioner, the Collector, an Additional Collector, the Sub-Divisional Officer and Assistant Collector, Settlement Officer, an Assistant Settlement Officer, Record Officer, an Assistant Record Officer, the Tahsildar, Tahsildar (Judicial), the Naib-Tahsildar or the Revenue Inspector.

25. A conjoint reading of the definitions of the aforesaid terms "Revenue Court" and "Revenue Officer" would indicate that some persons who act as Revenue Courts also act as Revenue Officers ─ where a Revenue Officer deals with judicial matters in revenue, he acts as a Revenue Court, which is under the control and supervision of the Board of Revenue; on the other hand, where a Revenue Officer deals with non-judicial matters in revenue, he acts under the control and supervision of the State Government. The functions of the Revenue Officer regarding the land revenue administration may be classified as judicial and non-judicial depending on the nature of the functions being discharged.

26. Section 234 (1) (v) of the U.P. Land Revenue Act, 1901 (now repealed) empowered the State Government to define the matters or proceedings which were deemed to be judicial or non-judicial. In terms of the aforestated provision, para 911 of the Revenue Manual, provided for certain matters to be deemed to be judicial. This included cases relating to mutation in matters relating to succession or transfer under Sections 35 and 40 of the U.P. Land Revenue Act, 1901.

27. The Board of Revenue constituted under Section 7 of the U.P. Revenue Code, 2006, as per Section 8 thereof, is to be the chief controlling authority in all matters relating to disposal of cases, appeals or revisions. The revisional jurisdiction is provided under Section 210 of the Code, and in terms thereof the Board or the Commissioner, as

the case may be, would be empowered to exercise revisional jurisdiction by calling for the record of any suit or proceedings decided by any subordinate court, in which no appeal lies, for the purpose of satisfying itself as to the legality or propriety of any order passed in such suit or proceedings, provided the conditions laid down under clause (a) or clause (b) or clause (c) of sub-section (1) of the section are satisfied. The language of the section is one of wide amplitude and embraces within its fold all cases decided by courts subordinate to the court.

28. Section 210 whereunder the Board or the Commissioner is empowered to call for the records of any suit or proceedings "decided" by any "subordinate revenue court", indicates the legislative intent that a revision would lie against judicial adjudications of suits and proceedings; administrative proceedings conducted by those very authorities being not within the purview of Section 210.

29. The Tehsildar exercising powers under Section 35, in cases of mutation, on the basis of succession or transfer, if the case is disputed, is empowered to 'decide the dispute' as per terms of clause (c) of sub-section (1) of Section 35, and the order passed by the Tehsildar, under sub-section (1) of Section 35, is subject to an appeal under sub-section (2), before the Sub Divisional Officer. The provisions contained under sub-section (1) and sub-section (2) of Section 35, leave no room for doubt that Tehsildar and also the Sub Divisional Officer exercising powers thereunder discharge judicial functions.

30. The Tehsildar while deciding a dispute regarding mutation in cases of succession or transfer, in exercise of powers under sub-section (1) of Section 35 of the Code, acts as a 'Revenue Court' within the meaning of Section 4(16) of the Code. The Sub Divisional Officer while deciding an appeal under sub-section (5), against an order passed by the Tehsildar under sub-section (1) also acts as a 'Revenue Court' and as such would be a Court subordinate to the Commissioner and subject to its revisional jurisdiction.

31. The revisional jurisdiction under Section 210, in order to subserve its purpose, would have to be seen not as a mere power but also a duty, which cannot be effectively discharged unless the Board or the Commissioner see to it that the subordinate revenue courts exercise their jurisdiction in accordance with law. The mere fact that there is no further appeal against the order passed by the Sub Divisional Officer in an appeal under sub-section (2) of Section 35 cannot warrant an inference that the legislature intended in any way to limit or control the revisional jurisdiction conferred on the Commissioner, under Section 210 of the Code.

32. Section 210 is essentially a source of power for the Board of Revenue or the Commissioner to supervise the subordinate revenue courts. The jurisdiction conferred under Section 210 to revise the orders passed by the subordinate revenue courts would not be dependant on a motion being made by a party to the case inasmuch as the section confers power to exercise revisional jurisdiction independent of any such motion having been made. The revisional jurisdiction under section 210 is designed to confer a wide power on the Board or the Commissioner to call for records and supervise the correctness of the proceedings subject to certain conditions.

33. The order of the Sub Divisional Officer passed in exercise of powers under sub-section (2) of Section 35 is an order in appeal against the order of the Tehsildar passed under sub-section (1) of Section 35, and this order is not subject to any second appeal under the Code. This is further clear from a reading of the Third Schedule of the Code wherein in respect of the provisions contained under Section 35 relating to mutation cases the court of original jurisdiction has been specified in column 3 as the court of Tehsildar and the court of first appeal is mentioned in column 4 as the court of Sub Divisional Officer; further column 5 pertaining to the second appeal is left blank. This goes to show that against the order passed by the Sub Divisional Officer in appeal under sub-section (2) of Section 35, against the order of the Tehsildar acting as a court of original jurisdiction under sub-section (2) of Section 35, there is no provision of a second appeal.

34. There being no provision under the Code for a second appeal against the order of the Sub Divisional Officer passed under sub-section (2) of Section 35, it can be said that against the order of the Sub Divisional Officer in appeal, no further appeal lies, and therefore the necessary condition for invocation of the powers of the Commissioner under Section 210 for calling the records and exercising revisional powers against the order passed by the Sub Divisional Officer in appeal under sub-section (2) of Section 35, stands fulfilled.

35. Taking a similar view, this Court in the case of **Jhinka Devi Vs. State of U.P. And 4 Others**4, had held that an order passed in an appeal under Section 24(4) of the Revenue Code would be revisable under Section 210, and the finality attached to the said order would only be to the extent that there is no further appeal thereagainst.

36. A rule of construction, spoken of as, ***ex visceribus actus***, helps in avoiding any inconsistency either within a section or between two different sections or provisions of the same statute. It essentially means that every part of a statute must be construed within its four corners and no provision should be interpreted in isolation.

37. **Craies on Statute Law**5 has explained the rule of ***ex visceribus actus*** by stating as follows :-

"...there is a general rule of construction applicable to all statutes alike, which is spoken of as construction ***ex visceribus actus***— within the four corners of the Act. "The office of a good expositor of an Act of Parliament," said Coke in the ***Lincoln College Case***6, "is to make construction on all parts together, and not of one part only by itself—Nemo enim aliquam partem recte intelligere potest antequam totum iterum atque iterum perlegerit." And again he says : 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 the meaning of the makers.... and this exposition is ***ex visceribus actus***."

38. It would therefore follow as a necessary consequence that the order passed by the Sub Divisional Officer in appeal under sub-section (2) of Section 35, against which there is no further appeal, would be subject to the revisional powers of the Commissioner to be exercised under Section 210.

39. Having come to the aforesaid conclusion, the objection raised on behalf of the State respondents and also the respondent No. 5, with regard to the availability of a statutory remedy against the order passed by the Sub Divisional Officer in an appeal under sub-section (2) of Section 35 of the Code, is sustained.

40. The writ petition is not entertained for the reason of existence of an alternative statutory remedy.

41. The petition stands **disposed of** leaving it open to the petitioner to take recourse to the statutory alternative remedy.

(2024) 8 ILRA 556
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/s 482 No. 1685 of 2020
With
Application U/s 482 No. 292 of 2021

Ram Sunder Shukla & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Utsav

Counsel for the Respondent:
G.A.

Criminal Law- The Code of Criminal Procedure-1973-Section 228, The Indian Penal Code-1860-Sections 307 & 308- The charge could be altered during trial at any time and at any stage before the judgment is passed. As such, even a charge under Section 307 is framed the accused have still liberty to raise submission that, on basis of the evidence led before the learned Trial Court no offence could be made out under Section 307 IPC- The applicants will have a liberty to raise all the legally permissible arguments at the appropriate stage that on the basis of the evidence, which is still to be led before the learned Trial Court, no offence is made out under Section 307 or 308 IPC. (Para 12 & 14)

Petition dismissed. (E-15)

List of Cases cited:

St.of Guj. Vs Dilipsinh Kishorsinh Rao, 2023 SCC OnLine 1294

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. The applicants have approached this Court, by way of filing application under Section 482 Cr.P.C. (1685 of 2020) arising out of Case Crime No. 554 of 2017 (S.T. No. 628 of 2018), State v. Ram Sunder Shukla and others, under Sections 307, 323, 325, 308 and 506 IPC, Police Station- Handia, District- Prayagraj, pending in the Court of the Additional Sessions Judge, Room No. 9, Allahabad, as they are aggrieved by impugned order dated 25.03.2019 whereby their discharge application was rejected. The other petition is arising out of a challenge to framing of charges.

2. From the records, it is evident that an FIR was lodged against applicants that they have committed offences under Sections 323, 324, 506 and 307 IPC. For reference, the contents of FIR is reproduced hereinafter:

"प्रार्थी जगदम्बा प्रसाद शुक्ल S/O मुरलीधर निवासी पूरेघीसा (बजहा मिश्रान) थाना

हण्डिया जिला इलाहाबाद का रहने वाला हूँ आज दिनांक 14.05.2017 को समय 1.30 बजे दिन विपक्षीगण रामसुन्दर शुक्ल S/O पारसनाथ, अजय कुमार शुक्ल S/O रामसुन्दर शुक्ल रोहित शुक्ल S/O देवीचरण शुक्ल, देवीचरण शुक्ल S/O पारसनाथ निवासीगण पूरेघीसा बजहा मिश्रान) थाना हण्डिया एकराय होकर हाथ में कट्टा, भाला, रम्मा, लाठी, डण्डा ईट लेकर प्रार्थी के घर के बरामदे में जहाँ प्रार्थी परिवार के साथ बैठा था घुस आये और अजय कुमार शुक्ल ने कट्टा हाथ में लेकर लहराते हुए ललकारा कि अब क्या देख रहे हो बडे मौके से मिले हैं सबको जान से मार दो इतना कहकर सभी लोग प्रार्थी के पुत्र मनीष शुक्ल को भाला से एवं डंडे से मारने लगे मनीष के सर एवं आँखों पर गंभीर चोट आई और वह बेहोश हो गया बेहोश होने के बाद भी वो लोग उसे पीटते रहे प्रार्थी एवं अन्य परिवार चिल्काते हुए मनीष को बचाने दौडे तो विपक्षीगण उन्हे भी पीटने लगे प्रार्थी को सर पर काफी चोटे आई एवं उनके बड़े भाई रमापति शुक्ल S/O मुरलीधर को भी हाथ एवं पैर पर चोट आई घरवालों का शोर सुनकर गाँव वाले आ गये तो विपक्षीगण कट्टे से फाय कट्टे से फायर करते हुये जान से मारने की धमकी देते हुए एवं फिर दिख लेने की धमकी देते हुए भाग गये विपक्षीगण के ऊपर पहले भी हत्या का केस चल चुका है ये लोग अपराधी प्रवृत्ति के लोग है अतः श्रीमान से प्रार्थना है कि प्रार्थी की प्रथम सूचना रिपोर्ट दर्जकर विपक्षीगण के विरुद्ध आवश्यक कानूनी कार्यवाही करने की कृपा करे दिनांक 14.05.2017"

3. During investigation, injured persons were medically examined and their injury report was taken on record. Statements of injured witnesses and other witnesses were also recorded and a charge-sheet was filed on 07.07.2017 against all the applicants for offences under Section 323, 325, 307, 308 and 506 I.P.C. The learned Trial Court took cognizance and summoned the applicants.

4. In the aforesaid circumstances, the applicants filed a discharge application that, on basis of material collected during evidence, no charge could be framed under Sections 307 and 308 IPC. For reference, the contents of discharge application are reproduced hereinafter:

"1-:यह कि प्रार्थीगण के खिलाफ लगायी गयी उपरोका धाराओं से चार्जशीट में मुलजिम बनाया गया है जो कि इंजरी के आधार पर 307, 308 त0 ह0 की बढ़ोत्तरी की है तथा अभियुक्त के विरुद्ध कार्यवाही करने के लिये पर्याप्त आधार नही है तथा अभियुक्त को उन्मोचित करने की न्यायहित मे आवश्यकता है।

2:- यह कि प्रार्थी/अभियुक्तगण की पत्नी जयंती देवो को जगदम्बा प्रसाद पुत्र मुरलीधर मनीष पुत्र जगदम्बा प्रसाद मनोज पुत्र जगदम्बा प्रसाद, मुरलीधर अभियुक्त के घर में घुस करके सभी लोग एक राय हो कर के प्रार्थिनी के पति एवं बेटे को मारा पोटा तथा कपडे को फाड डाला तथा मनीष शुक्ला प्रार्थिनी को तमंचा सटाकर ले जाने लगा। प्रार्थिनी को बचाने हेतु देवीधरण, अजय, राम सुन्दर तथा रोहित ने बीच बचाव किया उसी बीच बचाव में मनीष आदि को चोटे आयी है जिसका क्रास केस परिवाद संó 2249/2017 ए०सी०जे०एम०१ मे दर्ज है।

3:- यह कि मनीष शुक्ला को उपरहदा प्राथमिक स्वास्थ्य केन्द्र से स्वरूपरानी अस्पताल रेफर किया गया था जिससे इनका इलाज स्वरूपरानी मे चल रहा था तथा हल्की चोट होने के कारण धारT 308,307 नही बन पा रहा था परन्तु बिना किसी रेपर के तेज बहादुर ता अस्पताल से डाक्टर से साठ गाठ करके सप्लीमेन्ट्री रिपोर्ट में इन्होंने पर्ची तरीके से इंजरी बनवाया जो कि निहायत खारिज होने योग्य है।

4:- यह कि जगदम्वा की अंगुली की जो चोट है वो भी फ़र्ज़ी तरीके से डाक्टर से ताँठ गाँठ करके बनवाया है।

5. The above mentioned discharge application was rejected by the impugned order and relevant paragraphs thereof are mentioned hereinafter:

"5. उल्लेखनीय है कि वादी मुकदमा जगदम्बा प्रसाद शुक्ला की लिखित तहरीर थाना हाजा में इस आशय की दी कि आज दिनाँक 14.05.17 को समय 01-30 बजे दिन विपक्षीगण राम सुन्दर

शुक्ल, अजय कुमार शुक्ल, रोहित शुक्ल, देवी चरण शुक्ल एक राय होकर हाथ में कट्टा, भाला, रम्भा, लाठी-डण्डा, ईट लेकर प्रार्थी के घर के बरामदे में घुस आये अजय कुमार शुक्ला ने कट्टा हाथ में लेकर ललकारा कि बडे मौके से मिले है जान से मार दो इतना कहने पर सभी लोग मनीष शुक्ला को भाला एवं डण्डा से मारने लगे मनीष शुक्ला के सिर व आँखों में गंभीर चोटें आयी और वह बेहोश हो गया बेहोश होने पर उसे पीटते रहे। प्रार्थी व अन्य परिवार के लोगों को भी पीटा। प्रार्थी को सिर पर काफी चोट आयी। बडे भाई रमापति शुक्ला को भी हाथों में चोटें आयी। विपक्षीगण कट्टे से फायर करते हुए जान से मारने की धमकी देते हुए भाग गये। वादी मुकदमा की उक्त तहरीर के आधार पर थाना हण्डिया में अ०सं० 554/17 अन्तर्गत धारा 323,324,506,307 भा०द०सं० विरूद्ध अभियुक्तगण राम सुन्दर शुक्ला, अजय कुमार शुक्ला, रोहित शुक्ला एवं देवी चरण शुक्ला पंजीकृत की गयी है। जिसका खुलासा कायमी मुकदमा रोजनामचाआम रपट नं० 39 समय 15-30 दिनांक 14.05.17 को किया गया। विवेचक द्वारा लेने खूनालूदा शर्ट चेकदार मनीष शुक्ला एवं स्थल मानचित्र एक्सरे रिपोर्ट जगदम्बा प्रसाद जिसमें तीसरी अल्ट्राकारपल हड्डी में अस्थि भंग पाया गया। इंजरी रिपोर्ट जगदम्बा प्रसाद शुक्ला की 4 चोटे हार्ट ब्लण्ड आब्जेक्ट बतायी गयी एवं इंजरी रिपोर्ट रमापति को भी 4 चोटें तथा (मनीष शुक्ला की इंजरी रिपोर्ट, एक्सरे रिपोर्ट, पूरक रिपोर्ट तथा गवाहान वादी मुकदमा जगदम्बा प्रसाद शुक्ला एवं चोटहिल रमापति शुक्ला तथा गवाहान फर्द एवं मजरुब मनीष शुक्ला, सीटी स्कैन रिपोर्ट एवं बयान अन्तर्गत धारा 161 द०प्र०सं० डा० कमलाकर सिंह जिन्होंने चोटें सिर पर दाहिनी तरफ फैक्चर तथा प्राणघातक होना कहा है तथा डा० राहुल सिंह ने भी पूरक रिपोर्ट का समर्थन किया है। फलस्वरूप अभियुक्तगण के विरूद्ध धारा 325,308 भा०द०सं० की बढोत्तरी कर गवाहान के बयान अन्तर्गत धारा 161 द०प्र०सं० में अभियोजन कथानक का समर्थन किया है। विवेचक द्वारा पत्रावली पर उपलब्ध साध्य बयान गवाहान व डाक्टर के बयान, इंजरी रिपोर्ट, पूरक रिपोर्ट, फर्द खूनालूदा एक्सरे रिपोर्ट, एक्सरे प्लेट तथा डाक्टरी रिपोर्ट के आधार पर उपरोक्त मामले में धारा 325,308 भा०द०सं० की बढ़ोत्तरी की गयी है तथा विवेचना से संतुष्ट होकर विवेचक ने अभियुक्तगण उपरोक्त के विरूद्ध आरोपपत्र अन्तर्गत धारा 323,325,307.308,506 भा०द०सं० का विचारण हेतु प्रेषित किया गया है। जिस पर न्यायालय द्वारा प्रसंज्ञान लिया जा चुका है तथा पत्रावली विद्वान मजिस्ट्रेट ने प्रकरण अनन्य रूप से सत्र न्यायालय द्वारा विचारणीय होने के कारण सत्र सुपुर्द किया गया है।

6. यहाँ माननीय न्यायालय की निम्नांकित सम्मानित विधि व्यवस्था का उल्लेख करना उचित समझता हूँ।

ज्योति प्रकाश त्रिपाठी बनाम उ०प्र०राज्य 2006 इलाहाबाद दण्ड निर्णय पेज 186 के मामले में यह अवधारित किया गया है कि इस धारा के अधीन चल रही कार्यवाही में केवल उन्हीं दस्तावेजों को देखा जा सकता है और उन पर ही विचार किया जा सकता है, जिन्हें अन्वेषण अधिकारी ने प्रस्तुत किया हो। बचाव पक्ष के समर्थन के दस्तावेजों को केवल विचारण में बचावपक्ष के साक्ष्य के समय ही देखा जा सकता है।

इसी प्रकार तमिलनाडु राज्य बनाम सुरेश राजन एवं अन्य 2014 (84) ए० सी०सी० 656 के मामले में माननीय न्यायालय द्वारा यह अवधारित किया गया है कि उन्मोचन प्रार्थनापत्र के निस्तारण के प्रकरण में न्यायालय को इस उपधारणा के साथ अग्रसर होना चाहिए कि अभियोजन द्वारा प्रस्तुत सामग्री सत्य है। उन सामग्रियो एवं दस्तावेजों का जो अभियोजन द्वारा प्रस्तुत किये गये है इस दृष्टि से मूल्यांकन करना चाहिए कि क्या उनके उदभूत होने वाले तथ्यों से अभ्यारोपित आरोप के तथ्य उदघाटित होते है परन्तु इसके लिए उन सामग्रियों अथवा दस्तावेजो की गहनता से परीक्षण आवश्यक नहीं है, वरन उनसे प्रथमदृष्ट्या अपराध का प्रकटीकरण ही पर्याप्त है। विधि इस प्रक्रम पर लघु विचारण की अनुमति नहीं देती है।

7. इसी कम में यह भी सुस्थापित विधि है कि संज्ञान अपराध का किया जाता है, न कि अपराधी का। अतः आरोप विरचित करने के प्रकम पर कोई व्यक्तिगत अभियुक्त स्वयं के उन्मोंचन की अपेक्षा कर सकेगा, यदि वह दर्शित कर सकता है या कर सकती है की सामग्री अत्यान्तिक रूप से उस विशिष्ट अभियुक्त के विरुद्ध आरोप विरचित करने के लिए अपर्याप्त है। इस प्रकार आरोप विरचित करने के प्रक्रम पर ही दोष सिद्ध के प्रयोजन से सामग्री की पर्याप्तता की अपेक्षा नहीं की जाती है और उन्मोचिन का अनुरोध केवल तभी अनुज्ञात किया जाता है यदि न्यायालय यह पाता है कि सामग्री विचारण के प्रयोजन से पूर्णतया अपर्याप्त है। विधि की यह भी सुस्थापित प्रत्यास्थापना है कि जब

किसी अभियुक्त के विरूद्ध यहाँ तक कि ठोस संदेह उत्पन्न करने वाली सामग्री भी हो, तो न्यायालय उन्मोचन के अनुरोध को नामंजूर करने और विधि के अनुसार, सम्पूर्ण साक्ष्य को अभिलेख पर लाने के अभियोजन को अवसर प्रदान करने में न्यायोचित होगा, जिससे कि दोनों ही पक्षों के मामले पर विचारण की समाप्ति पर समुचित रूप से विचार किया जा सकेगा।"

6. Sri S.K. Shukla, Advocate holding brief of Sri Utsav, learned counsel for the applicants submits that initially the FIR was lodged under Sections 323, 324, 307 and 506 I.P.C. During investigation, injury report of injured persons were collected and on basis of it, Section 308 was also included. He further referred that in case Section 308 IPC has been included, then no charge could be framed under Section 307 IPC. Since, an opinion has been formed that it was a case where an act was undertaken with such intention or knowledge that he by that act caused death, he would be guilty of culpable homicide not amounting murder as mentioned in Section 308 IPC. Therefore, it could not be opined that the the said intention or knowledge was up to the extent that if he, by that act, caused death he would be guilty of murder. Learned counsel submitted that contours of Section 307 and 308 IPC are absolutely different

7. The above referred submissions are opposed by Sri Pushpendra Kumar, learned counsel for opposite party that at the stage of discharge, the learned Trial Court has to see whether there was more than *prima facie* case against the accused. At this stage, it could not be ascertained whether the evidence is sufficient that it would lead to conviction.

8. Heard learned counsel for both parties and perused the record.

9. In the aforesaid background, only contention which required consideration is whether in given facts, a charge under Section 307 IPC could be made out or not. There is substance in the argument of learned counsel for the applicants that contours of Section 307 IPC and 308 IPC are different. Under section 307 IPC, knowledge and intention is in regard to murder, whereas under Section 308 IPC, knowledge and intention is in regard to the culpable homicide not amounting to murder. It is also well settled as held by the Supreme Court in the case of **State of Gujarat Vs. Dilipsinh Kishorsinh Rao, 2023 SCC OnLine 1294** that at the stage of consideration of a discharge application, the Court has to consider whether there is a more than prima facie case against the accused and not that, whether on basis of evidence, conviction could be made out or not. For reference, its para 14 being relevant is mentioned hereinafter :-

> *"14. This Court in the aforesaid judgment has also laid down principles to be considered for exercise of jurisdiction under Section 397 particularly in the context of prayer for quashing of charge framed under Section 228 Cr. P.C. is sought for as under:*
>
> *"27. Having discussed the scope of jurisdiction under these two provisions i.e. Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such*

principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

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

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

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

27.9. 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.

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

11. The Court has carefully considered the contents of Section 307 and 308 IPC and, for reference, the same is reproduced hereinafter:

> **"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 hereinbefore 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.

308. Attempt to commit culpable homicide—Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

12. The Court is also of the considered opinion that the charge could be altered during trial at any time and at any stage before the judgment is passed. As such, even a charge under Section 307 is framed, the accused have still liberty to raise submission that, on basis of the evidence led before the learned Trial Court, no offence could be made out under Section 307 IPC.

13. Learned counsel for the applicants wants this Court to conduct a mini trial at this stage and to consider the statements recorded during investigation at length to give an opinion that in no circumstances, the charge under Section 307 IPC could be made out. However, in the given facts, such exercise could not be undertaken as on the bare perusal of the statements and considering the nature of the injuries caused to three injured persons as well as that the applicants have used firearm also. At this stage, it could not be held that there is absolutely no evidence that no offence is made out under Section 307 IPC. In this regard, statement of Doctor would also be relevant, who has supported the supplementary medical report as referred in impugned order that injuries were dangerous to life. No document is on record which could contradict it.

14. In the aforesaid circumstance, I do not find that there is any illegality in the impugned order. However, the applicants will have a liberty to raise all the legally permissible arguments at the appropriate stage that on the basis of the evidence, which is still to be led before the learned Trial Court, no offence is made out under Section 307 or 308 IPC.

15. Accordingly, application under Section 482, No.1685 of 2020 is **rejected** and order rejecting discharge application is upheld and consequently other matter under Article 227 bearing No.292 of 2021 is also **rejected** since it is against framing of charges i.e. a consequential order.

(2024) 8 ILRA 561
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.08.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application U/s 482 No. 6104 of 2024

Vishal Tripathi ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Dinesh Kumar Mishra, Ripu Daman Shahi, Upendra Kumar Singh

Counsel for the Respondents:
G.A., Rakesh Dwivedi

Criminal Law – Indian Penal Code, 1860 – Sections 147, 323, 325, 427 & 452 – The Code of Criminal Procedure, 1973 – Section 173(8) - FIR was lodged on 24.07.2023, date of incident was not mentioned - As per FIR - At about 10:00 pm, applicant assaulted the informant and his family members - All members sustained injuries – During proceedings, applicant preferred application u/s 173(8) Cr.P.C for reinvestigation - The grounds are based upon the date of incident, time of incident, date of medical examination and date of FIR - The Trial Court rejected the application, being not maintainable after filing of charge sheet - Impugned order challenged - Held, I.O., after due investigation, collected evidence, examined various persons, recorded statements, thereafter on the basis of FIR, medical reports of injured, statements of witnesses of fact, prepared the charge sheet and submitted - The discrepancies related to dates and time would be considered by Trial Court at the stage of trial, the applicant has no right to pray for reinvestigation - Hence, dismissed (Para 5, 6, 17, 18, 19, 40)

Application dismissed. (E-13)

List of Cases cited:

1. Vinubhai Haribhai Malaviya &ors. Vs St. of Guj. & anr.; (2019) 17 SCC 1

2. Preeti Singh Vs St. of U.P., 2023 SCC OnLine All 1410

3. Romila Thapar Vs U.O.I., (2018) 10 SCC 75

4. Kailash Vijayvargiya Vs Rajlakshmi Chaudhuri, 2023 SCC OnLine SC 569

5. State Vs Hemendhra Reddy, 2023 SCC OnLine SC 515

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Supplementary affidavit filed by the learned counsel for the applicant is taken on record.

2. Heard Sri Dinesh Kumar Mishra, learned counsel for the applicant, Sri S.P. Tiwari, learned counsel for the State and Sri Rakesh Dwivedi, learned counsel for the opposite party No. 2.

3. Present application has been filed by the applicant for quashing of impugned order dated 21.06.2024 passed by the Additional Sessions Judge/Special Judge POCSO Act, Ambedkar Nagar (in short "Trial Court") in S.S.T. No. 66 of 2024 (State vs. Vishal Tripathi and Others), whereby the Trial Court rejected the application seeking prayer to direct the Investigating Officer (I.O.) to conduct re-investigation/further investigation in the matter and the applicant has also sought the prayer to direct for re-investigation/further investigation.

4. Facts in brief are to the effect that the FIR No. 0228 of 2023 was lodged on 24.07.2023 at 13:15 Hours under Section 147, 323, 325, 427, 452 IPC by the informant-Pramod Tiwari against Devendra Tripathi, Vishal Tripahti, Rudra Tripathi, Aradhana Tripathi and Susheela. Column No. 3 of the FIR does not indicate date of the alleged incident.

5. According to FIR, at about 10:00 PM accused-applicant assaulted the informant, son of the informant, daughter of the informant.

6. In this incident, informant Pramod Tiwari, son of the informant namely Aditya Tiwari, wife of the informant namely Sonika Tiwari, daughter

of the informant namely Manya Tiwari, sustained injuries.

7. The FIR lodged on 24.07.2023 in regard to the incident says that "आज रात को 10:00 बजे प्रार्थी को लाठी, डण्डे व टगारी, बेलचक से प्रार्थी व प्रार्थी के लड़के आदित्य तिवारी के सिर में गहरी चोटें आयी है व प्रार्थी के पुत्री मान्या तिवारी के हाथ में मारने से हाथ टूट गया है।"

8. After lodging of FIR, the injured/informant Pramod Tiwari was medically examined at C.H.C.-Jalalpur, District-Ambedkar Nagar on 24.07.2023 at 02:10 PM and Doctor opined that all the injuries are simple in nature and can be caused by hard and blunt object except Injury No.4. The injuries sustained by Sri Pramod Tiwari are as under:-

"1-Contusion of size 13cm x 05.5cm tnt on lateral aspect of Lt. arm 04cm above from Lt. elbow joint, color bluish red.

2-Abrated contusion of size 04cm x 01.5cm tnt on 0.5cm below from injury no. 1, colour reddish.

3-Abrated contusion of size 12cm x 05.5cm tnt on posterior aspect of Lt. forearm included with Lt. elbow joint, colour reddish.

4-Tenderness with swelling tnt on Rt. hand advice x-ray (wrist joint-AP & Lat.).

5-C O P on Lt. side front of chest.

6-C O P on Rt. side front of abdomen."

9. X-ray report dated 25.07.2023 of injured Pramod Tiwari indicates following injuries:-

"(i) Fracture lower end of (Rt.) radius bone & styled process of (Rt.) ulna bone is seen. No callus is seen."

10. Injured Sonika Tiwari (wife of Pramod Tiwari) was medically examined on 24.07.2023 at 03:19 PM at CHC-Jalapur, District-Ambedkar Nagar and Doctor opined that all injuries are simple in nature and can be caused by hard and blunt object. Injured Sonika Tiwari sustained following injuries:-

"1-Contusion of size 04.5cm x 03cm tnt on top of skull 13cm above from base of Lt. ear, colour reddish blue.

2-Contusion of size 03.5cm x 02cm tnt on Lt. side forehead 02.5cm above from Lt. eyebrow, colour reddish blue.

3- Abrasion of size 03.5cm x 0.1cm tnt. on Rt. side of face 02cm below from Rt. lower eyelid, colour reddish.

4-Contusion of size 10cm x 08cm tnt. on lateral aspect of arm 07cm above from Rt. elbow joint, colour reddish blue.

5-Contusion of size 02cm x 01.5cm tnt. on dorsal aspect of Rt. forearm 04cm below from Rt. elbow joint, colour reddish blue.

6-Contusion of size 10cm x 04.5cm tnt. on Lt. side back of chest 05cm below from lower border of spin of Lt. scapula, colour reddish blue.

7-Contusion of size 07cm x 04cm tnt on Rt. side back of chest, 04cm medial from lower end of scapula, colour reddish blue.

8-Contusion of size 17cm x 08cm tnt on Lt. buttock just below Lt. iliac crest of Lt. hip, colour reddish blue.

9-COP on Lt. thumb.

10-Abrasion of size 01cm x 0.5cm tnt on medial aspect of Lt. foot 06cm above from base of Lt. great toe, colour reddish."

11. Injured Aditya Tiwari was examined on 24.07.2023 at 02:53 PM at CHC, Jalalpur, District-Ambedkar Nagar and Doctor has opined that all injuries are simple in nature and can be caused by hard and blunt object except injury Nos.1, 3 & 4. Injured Aditya Tiwari sustained following injuries:-

"1-Lacerated wound of size 01.5cm x 0.3cm tnt on scalp deep tnt on Lt. parietal region of skull 06cm above from base of Lt. ear, serum tnt, advice x-ray.

2-Contusion of size 06cm x 02cm tnt on posterior aspect of lower end of Rt. arm 04cm above from Rt. elbow joint colour reddish blue.

3-Tenderness with swelling tnt. on Rt. elbow joint, advice x-ray.

4-Tenderness with swelling tnt on Rt. hand advice x-ray.

5- Contusion of size 11cm x 03cm tnt on Rt. side upper back of chest 03cm lateral from base of neck colour reddish blue.

6-Contusion of size 06cm x 02cm tnt on Rt. side back of abdomen 02.5cm above from Rt. ASIS of hip, colour reddish blue.

7-Abrasion of size 02.5cm x 01cm tnt medial aspect of Lt. melleolus of Lt. foot colour dark red.

8-COP on Rt. front of lower chest."

12. Injured Manya Tiwari was examined on 24.07.2023 at 02:32 PM at CHC, Jalalpur, District-Ambedkar Nagar and Doctor has opined that all injuries are simple in nature and can be caused by any hard and blunt object except injury No.1. Injured Aditya Tiwari sustained following injuries:-

"1-Tenderness and swelling tnt. on Lt hand advice x-ray.

2-Tenderness tnt. on Lt. lower back.

3-COP on front of abdomen.

4-Contusion of size 07cm x 01.5cm tnt on dorsal aspect of Lt. hand, colour reddish."

13. X-ray report dated 25.07.2023 of injured Manya Tiwari indicates following injuries:-

"(i) Fracture 2nd, 3rd metacarpal bones of (Lt.) hand is seen. No callus is seen."

14. Injured Sonika Tiwari before the Investigating Officer stated that incident took place on 23.07.2023 at about 10:30 PM. This witness also indicated name of the applicant and according to her statement on account of blow of hard and blunt object she sustained injuries and hand of Manya Tiwari was fractured and Aditya Tiwari also sustained injury. Statement of Sonika Tiwari is extracted hereinunder:-

"अवलोकन बयान 164 सीआरपीसी.....नाम ***सोनिका तिवारी*** *उम्र 45 वर्ष पति प्रमोद निवासी मथुरा रसूलपुर दारानगर थाना जलालपुर अम्बेडकरनगर द्वारा सशपथ बयान किया कि --- दिनांक 23.07.23 को समय रात के 10.30 बजे की बात है मै घर में थी मेरे पड़ोसी देवेन्द्र तिवारी विशाल रुद्र आराधना सुशीला देवी दरवाजे पर मुझे गालिया दे रहे थे मैने बरामदे से गाली देने से मना*

किया तो देवेन्द्र घर में घुस आया। मुझे पकड़ लिया बदतमीजी करने लगा। बाकी लोग भी मेरे घर मे लाठी डन्डा लेकर घुस आये मेरा बेटा आदित्य बाहर आया बचाने तो उसे भी मारा पीटा ये लोग समझे कि मर गया। मेरी बेटी मान्या का हाथ विशाल ने तोड़ दिया। मेरे सिर पर भी चोट आयी थी। मेरे बेटे को सब्बल से मारा है। मेरे पति छत पर थे अवाज पर नीचे आये तो सभी लोगो ने उन्हे भी मारा पीटा उनका हाथ टुट गया। 100 नम्बर पर काल किया पुलिस आ गयी। पुलिस के आने से पहले मेरी कार को तोड़ दिया। चलने लायक नहीं छोड़ा। पुलिस ने कोई कार्यवाही नही की। देवेन्द्र मेरे दरवाजे के सामने बेठ जाता है। हमने कई बार मना किया इसी बात पर नाराज होकर हमे मारा पीटा। देवेन्द्र अपराधी है गुण्डा किस्म का है जान से मारने की धमकी देता है और कुछ नही कहना है। ह० अंग्रेजी में अपठनीय 10.08.2023"

15. Before the Magistrate/competent court of jurisdiction the injured Manya Tiwari stated that incident took place on 24.07.2023 at 10:00 PM. This witness also levelled specific allegations against the applicant. The statement of Manya Tiwari is extracted hereinunder:-

*"अवलोकन बयान 164 सीआरपीसी.....नाम **मान्या तिवारी** पुत्री प्रमोद तिवारी निवासी मथुरा रसूलपुर दारानगर थाना जलालपुर अम्बेडकरनगर द्वारा सशपथ बयान किया कि 24.07.2023 को समय रात के 10 बजे की बात है घर में मम्मी पापा भाई और मैं थी मेरे पड़ोसी देवेन्द्र रोज हमारे घर के सामने बेठ जाते है और लोगों को बैठा लिया करते है उस पर हमे एतराज है क्योंकि मेरी माँ दिन में अकेली रहती है। घटना के दो दिन पहले मेरे पापा दिल्ली से आये थे देवेन्द्र को बैठाने से मना किया था उसी बात पर 24.07.2023 को घर में देवेन्द्र आ गये। गालिया देने लगे। गालिया देने से मना किया तो मम्मी को पकड़ लिया। घर वालों को बुला दिया। विशाल, रूद्र, आराधना व सुशीला देवी आ गयी। सभी लोगों ने मेरी माँ को मारा पीटा। मेरे पापा भाई और मुझे भी सभी लोगो ने लाठी डन्डे से मारा पीटा। हमारी कार तोड़ दी। मेरे बाल विशाल ने खीच दिये थे धक्का दिया था मैं तख्त पर गिरी थी। विशाल मेरे कपड़े फाड़ने लगा था मैने बचा लिया था मैने धक्का दिया था तभी विशाल ने मेरे हाथ में डन्डा मार दिया। पुलिस को मैने काल किया पुलिस आ गयी। मामला शांति कराया। हम अपने भाई को लेकर अस्पताल गये थे मैं कक्षा 9 में पढ़ती हूँ। मेरी जन्मतिथि 24.04.2008 है और कुछ नहीं कहना है। ह० अंग्रेजी में अपठनीय 10.08.2023"*

16. Taking note of the statement of Manya Tiwari the I.O. added Section 354-B read with Section 7/8 of POCSO Act and submitted the charge sheet.

17. In the aforesaid background of the case accused-applicant preferred an application under Section 173(8) Cr.P.C. praying therein for re-investigation/further investigation. The grounds seeking prayer for re-investigation/further investigation, as appears from the record, are based upon the date of incident, time of incident, date of medical examination and date of lodging of FIR.

18. The Trial Court by the impugned order dated 21.06.2024 rejected the application of the accused-applicant and being aggrieved by the order dated 21.06.2024, present application has been filed. Relevant portion of the order dated 21.06.2024 reads as under:-

*"पत्रावली के अवलोकन से स्पष्ट है कि विवेचक द्वारा प्रस्तुत मामले की सम्पूर्ण विवेचना सम्पादित करते हुए अभियुक्त विशाल त्रिपाठी के विरुद्ध पर्याप्त साक्ष्य पाते हुए दिनाक 08.02.2024 को आरोप-पत्र धारा-147,323,325,452,427,354 ख, भा०दं०सं० व धारा-7/8 पाक्सो एक्ट के अन्तर्गत प्रेषित किया गया है। जिस पर न्यायालय द्वारा प्रसंज्ञान लिया जा चुका है। **धारा-173 (8) दं०प्र०सं०** यह प्राविधान करती है कि-**" इस धारा की कोई बात किसी अपराध के बारे में उपधारा (2) के अधीन मजिस्ट्रेट को रिपोर्ट भेज दी जाने के पश्चात् आगे***

और अन्वेषण को प्रवरित करने वाली नहीं समझी जाएगी तथा जहाँ ऐसे अन्वेषण पर पुलिस थाने के भारसाधक अधिकारी को कोई अतिरिक्त मौखिक या दस्तावेजी साक्ष्य मिले वहाँ वह ऐसे साक्ष्य के सम्बन्ध में अतिरिक्त रिपोर्ट या रिपोर्ट मजिस्ट्रेट को विहित प्ररूप में भेजेगा, और उपधारा (2) से (6) तक के उपबन्ध ऐसी रिपोर्ट या रिपोर्टों के बारे में, जहां तक हो सके, ऐसे लागू होंगे, जैसे वे उपधारा (2) के अधीन भेजी गई रिपोर्ट के सम्बन्ध में लागू होते हैं।"

प्रस्तुत मामले में विवेचक द्वारा अभियुक्त के विरूद्ध दौरान विवेचना पर्याप्त साक्ष्य पाते हुए आरोप-पत्र प्रेषित किया जा चुका है। प्रार्थनापत्र इस स्तर पर पोषणीय नहीं है। अतः मामले के तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुए अभियुक्त विशाल त्रिपाठी द्वारा प्रस्तुत प्रार्थनापत्र अन्तर्गत धारा-173 (8) दं०प्र०सं० पोषणीय न होने के कारण खारिज किये जाने योग्य है।

आदेश

प्रार्थी / अभियुक्त विशाल त्रिपाठी द्वारा प्रस्तुत प्रार्थनापत्र अन्तर्गत धारा-173(8) दं०प्र०सं० खारिज किया जाता है। पत्रावली दिनांक-09.07.2024 को पेश हो।"

19. A perusal of above quoted portion of the impugned order dated 21.06.2024 indicates that the Trial Court rejected the application preferred under Section 173(8) Cr.P.C. being not maintainable after filing of charge sheet.

20. Impeaching the impugned order dated 21.06.2024, Sri D.K.Mishra, learned counsel for the applicant submitted that as per observation of the Hon'ble Apex Court, Magistrate is empowered to pass an order for re-investigation/further investigation in exercise of power under Section 173(8) Cr.P.C. even after submission of charge sheet and accordingly reasoning given by the Magistrate concerned while rejecting the application seeking re-investigation/further investigation under Section 173(8) Cr.P.C. vide order dated 21.06.2024 is unsustainable in the eye of law and accordingly interference of this Court is required in the matter.

21. Reliance has been placed by the learned counsel for the applicant on the judgment passed by the Hon'ble Apex Court in the case of ***Vinubhai Haribhai Malaviya and Others vs. State of Gujarat and Another; (2019) 17 SCC 1***. Relevant para(s), referred, of the same are extracted hereinunder:-

"25. It is thus clear that the Magistrate's power under Section 156(3) CrPC is very wide, for it is this judicial authority that must be satisfied that a proper investigation by the police takes place. To ensure that a "proper investigation" takes place in the sense of a fair and just investigation by the police—which such Magistrate is to supervise—Article 21 of the Constitution of India mandates that all powers necessary, which may also be incidental or implied, are available to the Magistrate to ensure a proper investigation which, without doubt, would include the ordering of further investigation after a report is received by him under Section 173(2); and which power would continue to enure in such Magistrate at all stages of the criminal proceedings until the trial itself commences. Indeed, even textually, the "investigation" referred to in Section 156(1) CrPC would, as per the definition of "investigation" under Section 2(h), include all proceedings for collection of evidence conducted by a police officer; which would

undoubtedly include proceedings by way of further investigation under Section 173(8) CrPC.

26. However, Shri Basant relied strongly on a three-Judge Bench judgment in Devarapalli Lakshminarayana Reddy v. V. Narayana Reddy [Devarapalli Lakshminarayana Reddy v.V. Narayana Reddy, (1976) 3 SCC 252 : 1976 SCC (Cri) 380] . This judgment, while deciding whether the first proviso to Section 202(1) CrPC was attracted on the facts of that case, held : (SCC p. 258, para 17)

"17. Section 156(3) occurs in Chapter XII, under the caption:'Information to the Police and their powers to investigate'; while Section 202 is in Chapter XV which bears the heading:'Of complaints to Magistrates'. The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of Section 156(3). It may be noted further that an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section an investigation 'for the purpose of deciding whether or not there is sufficient ground for proceeding'. Thus the object of an investigation under Section 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him."

This judgment was then followed in Tula Ram v. Kishore Singh [Tula Ram v. Kishore Singh, (1977) 4 SCC 459 : 1977 SCC (Cri) 621] at paras 11 and 15.

27. Whereas it is true that Section 156(3) remains unchanged even after the 1973 Code has been brought into force, yet the 1973 Code has one very important addition, namely, Section 173(8),

which did not exist under the 1898 Code. As we have noticed earlier in this judgment, Section 2(h) of the 1973 Criminal Procedure Code defines "investigation" in the same terms as the earlier definition contained in Section 2(l) of the 1898 Criminal Procedure Code with this difference — that "investigation" after the 1973 Code has come into force will now include all the proceedings under CrPC for collection of evidence conducted by a police officer. "All" would clearly include proceedings under Section 173(8) as well. Thus, when Section 156(3) states that a Magistrate empowered under Section 190 may order "such an investigation", such Magistrate may also order further investigation under Section 173(8), regard being had to the definition of "investigation" contained in Section 2(h)."

22. At this stage, it would be appropriate to take note of some more para(s) of the judgment passed in the case of ***Vinubhai Haribhai Malaviya (Supra)***, as the same would indicate that what was the issue and why the Hon'ble Apex Court directed to lodge the FIR and investigate the issue therein. The same are as under:-

"This case arises out of a first information report (hereinafter referred to as "FIR") that was lodged on 22-12-2009. The FIR is by one Nitinbhai Mangubhai Patel, power-of-attorney holder of Ramanbhai Bhagubhai Patel and Shankarbhai Bhagubhai Patel, who are allegedly residing at "UK or USA". The gravamen of the complaint made in the FIR is that one Vinubhai Haribhai Malaviya is blackmailing these two gentlemen with respect to agricultural land which is just outside the city of Surat, Gujarat and which admeasures about 8296 sq m. The FIR alleges that Ramanbhai Patel and Shankarbhai Patel are absolute and independent owners of this land, having obtained it from one Bhikhabhai Khushalbhai and his wife Bhikiben Bhikhabhai in the year 1975. The FIR then narrates that because of a recent price hike of lands in the city of Surat, the heirs of Bhikhabhai and Bhikiben together with Vinubhai Haribhai Malaviya and Manubhai Kurjibhai Malaviya have hatched a conspiracy in collusion with each other, and published a public notice under the caption "Beware of Land-grabbers" in a local newspaper on 7-6-2008. Sometime thereafter, Vinubhai Haribhai Malaviya then contacted an intermediary, who in turn contacted Nitinbhai Patel (who lodged the FIR), whereby, according to Nitinbhai Patel, Vinubhai Malaviya demanded an amount of Rs 2.5 crores in order to "settle" disputes in respect of this land. It is alleged in the said FIR that apart from attempting to extort money from the said Nitinbhai Patel, the heirs of Bhikhabhai and Bhikiben together with Vinubhai Haribhai Malaviya and Manubhai Kurjibhai Malaviya have used a fake and bogus "Satakhat" and power of attorney in respect of the said land, and had tried to grab this land from its lawful owners Ramanbhai and Shankarbhai Patel.

2. The background to the FIR is the fact that one Khushalbhai was the original tenant of agricultural land, bearing Revenue Survey No. 342, admeasuring 2 ac, 2 gunthas, situated at Puna (Mauje), Choriyasi (Tal), District Surat. Khushalbhai died, after which his son Bhikhabhai became tenant in his place. Bhikhabhai in turn died on 23-12-1984 and his wife Bhikiben died on 18-12-1999. A public notice dated 7-6-2008 was issued in Gujarat Mitra and Gujarat Darpan Dainik by the heirs of Bhikhabhai, stating that Ramanbhai and Shankarbhai Patel are landgrabbers, and are attempting to create third-party rights in the said property. This led to the legal heirs of Bhikhabhai, through their power-of-attorney holder, applying on 12-6-2008 to the Collector, Nanpura (Surat), to cancel revenue entries that were made way back in 1976.

3. Pursuant to the filing of the FIR, investigation was conducted by the police, which resulted in a charge-sheet dated 22-4-2010 being submitted to the Judicial Magistrate (First Class), Surat. On 23-4-2010, the said Magistrate took cognizance and issued summons to the accused regarding offences under Sections 420, 465, 467, 468, 471, 384 and 511 of the Penal Code, 1860 (hereinafter referred to as "IPC"). Pursuant to the summons, the accused appeared before the said Magistrate. On 10-6-2011, an application (Ext. 28) was filed by Accused 1 Vinubhai Haribhai Malaviya for further investigation under Section 173(8) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC") and another application (Ext. 29) for discharge. Likewise, on 14-6-2011, applications for further investigation (Ext. 31) and for discharge (Ext. 32) were filed by Accused 2 to 6. By an order dated 24-8-2011, the Magistrate dismissed the applications that were filed for further investigation (i.e. Exts. 28 and 31), stating that the facts sought to be placed by the applicants were in the nature of evidence of the defence that would be taken in the trial. Likewise, on 21-10-2011 the learned Magistrate also rejected the discharge applications that were made (i.e. Exts. 29 and 32).

4. Meanwhile, on 26-7-2011, Criminal Miscellaneous Application No. 816 of 2011 was moved by Vinubhai Haribhai Malaviya and the other accused to register an FIR, or for the Magistrate to order investigation under Section 156(3) CrPC into the facts stated in their applications. This was rejected by the learned Magistrate by an order dated 9-9-2011.

5. Separate criminal revision applications were filed before the Sessions Court, Surat, being Revision Applications Nos. 376 and 346 of 2011, insofar as the dismissal by the learned Magistrate of further investigation and the order rejecting registration of the FIR were concerned. Both these revision applications were decided

by the learned Second Additional Sessions Judge, Surat by a common order dated 10-1-2012. By this order, the learned Second Additional Sessions Judge went into details of facts that were alleged in the application under Section 173(8) and found that a case had been made out for further investigation. Accordingly, he held:

"As per the abovereferred discussion, it can be seen that no effective investigation or discussions have been carried out in all these respect during the course of the investigation of the said offence and further, it is very noteworthy here that matters for which the prayers are made in these revision applications, all these matters are pertaining to the complaint of this case. Hence, it is very much necessary that for the purpose of carrying out a detailed and full investigation of this complaint, all these matters should also be investigated. But for the said purpose, it is not necessary that a separate complaint be registered and thereafter its investigation be carried out. But by covering this investigation also in the complaint of the present matter, if it is found out in such investigation that any offence was committed, then appropriate criminal proceedings can be initiated against such person."

6. Pursuant to this order, the investigation was handed over to Investigating Officer R.A. Munshi (hereinafter referred to as "IO Munshi") on 6-3-2012, who then submitted two further investigation reports—one within three days, dated 9-3-2012 and a second one dated 10-4-2012, in which the IO Munshi went into the facts mentioned in the Section 173(8) CrPC applications that were filed. On 13-6-2012, the original accused withdrew [Shantaben v. State of Gujarat, 2012 SCC OnLine Guj 6476] Special Criminal Application No. 727 of 2012 filed in the High Court, which was filed challenging the order by which the learned Revisional Court had confirmed the order rejecting the discharge applications, with liberty to move an appropriate application for discharge before the Magistrate. The High Court heard Criminal Revision Application No. 44 of 2012 together with Criminal Miscellaneous Application No. 1746 of 2012, and arrived [Nitinbhai Mangubhai Patel v. State of Gujarat, 2013 SCC OnLine Guj 8980] at the conclusion that, as a matter of law, the Magistrate does not possess any power to order further investigation after a charge-sheet is filed and cognizance is taken. The High Court further castigated IO Munshi, holding that the furnishing of interim investigation reports, not through a special Public Prosecutor and not to the Magistrate, but to the Additional Sessions Judge himself smacks of mala fides, as if IO Munshi wanted to oblige and/or favour the accused persons.

7. The High Court further found that the two interim investigation reports virtually acquitted the accused persons, and

therefore, the High Court set aside the judgment of the learned Second Additional Sessions Judge dated 10-1-2012, and consequently, the two further interim investigation reports. So far as Criminal Revision Application No. 346 of 2011 (which was disposed of by the learned Second Additional Sessions Judge without considering merits, in light of its order in Criminal Revision Application No. 376 of 2011) was concerned, the High Court remanded the same for fresh consideration to the learned Second Additional Sessions Judge, who would then decide as to whether an FIR should be registered, insofar as the allegations contained in the applications for further investigation are concerned. Pursuant to the aforesaid remand, by judgment dated 23-4-2016, the learned Additional Sessions Judge has rejected the application under Section 156(3) CrPC on merits, against which Special Criminal Application No. 3085 of 2016 has been filed and is awaiting disposal. Several other proceedings that are pending between the parties have been pointed out to us, with which we have no immediate concern in this case.

8. Shri Dushyant Dave, learned Senior Advocate, appearing on behalf of the appellants, has forcefully argued, placing reliance on a number of provisions of CrPC, and a number of our judgments, that the High Court was wholly incorrect as a matter of law, in holding that post-cognizance a Magistrate would have no power to order further investigation into an offence. He read out in great detail the FIR dated 22-12-2009, the contents of the charge-sheet dated 22-4-2010, and relied heavily on a communication made by the Commissioner of Revenue, Gujarat to the Collector, Surat dated 15-3-2011. According to him, the contents of this communication would show that there is no doubt that further investigation ought to have been carried out on the facts of this case, in that, a huge fraud had been perpetrated on his clients by land grabbing mafia, and it would be a travesty of justice if the learned Second Additional Sessions Judge's judgment dated 10-1-2012 was not upheld. According to him, the High Court judgment was greatly influenced by the fact that : (1) IO Munshi submitted further interim investigation reports very quickly, and (2) had submitted these reports to the Additional Sessions Judge instead of the Magistrate; resulting in the throwing out of the baby with the bathwater. He therefore urged us to uphold the order of the Second Additional Sessions Judge who ordered further investigation, as that would lead to the truth of the matter in this case.

9. On the other hand, Shri Basant and Shri Navare, learned Senior Advocates appearing on behalf of the respondents, supported the judgments of the trial court and the High Court, stating that there is no doubt that without filing a cross-FIR, what was sought to be adduced is evidence which

may perhaps amount to a defence in the trial to be conducted, which would be impermissible. They emphasised that at no stage had an application been moved to quash the proceedings, and obviously, a belated application made more than a year after cognizance had been taken, to obtain by way of further investigation facts which were wholly divorced from the FIR would be wholly outside the Magistrate's power under Section 173(8) CrPC. They relied upon several judgments, and particularly recent judgments of this Court, in order to show that post-cognizance and particularly after summons is issued to the accused, and the accused appears pursuant to such summons, the Magistrate has no suo motu power, nor can he be moved by the accused, for further investigation at this stage of the proceedings.

10. The question of law that therefore arises in this case is whether, after a charge-sheet is filed by the police, the Magistrate has the power to order further investigation, and if so, up to what stage of a criminal proceeding.

xxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxxxxxxxx

43. We now come to certain other judgments that were cited before us. King Emperor v. Khwaja Nazir Ahmad [King Emperor v. Khwaja Nazir Ahmad, 1944 SCC OnLine PC 29 : (1943-44) 71 IA 203 : AIR 1945 PC 18] , was strongly relied upon by Shri Basant for the proposition that unlike superior courts, Magistrates did not possess any inherent power under CrPC. Since we have grounded the power of the Magistrate to order further investigation until charges are framed under Section 156(3) read with Section 173(8) CrPC, no question as to a Magistrate exercising any inherent power under CrPC would arise in this case.

44.Union of India v. W.N. Chadha [Union of India v. W.N. Chadha, 1993 Supp (4) SCC 260 : 1993 SCC (Cri) 1171] , is a judgment which states that the accused has no right to participate in the investigation till process is issued to him, provided there is strict compliance with the requirements of fair investigation. Likewise, the judgments in Nagawwa v. V.S. Konjalgi [Nagawwa v. V.S. Konjalgi, (1976) 3 SCC 736 : 1976 SCC (Cri) 507] , Prabha Mathur v. Pramod Aggarwal [Prabha Mathur v. Pramod Aggarwal, (2008) 9 SCC 469 : (2008) 3 SCC (Cri) 787] , Narender G. Goel v. State of Maharashtra [Narender G. Goel v. State of Maharashtra, (2009) 6 SCC 65 : (2009) 2 SCC (Cri) 933] and Dinubhai Boghabhai Solanki v. State of Gujarat [Dinubhai Boghabhai Solanki v. State of Gujarat, (2014) 4 SCC 626 : (2014) 2 SCC (Cri) 384] , which state that the accused has no right to be heard at the stage of investigation, has very little to do with the precise question before us. All these judgments are, therefore, distinguishable. Further,

Babubhai v. State of Gujarat [Babubhai v. State of Gujarat, (2010) 12 SCC 254 : (2011) 1 SCC (Cri) 336] , is a judgment which distinguishes between further investigation and re-investigation, and holds that a superior court may, in order to prevent miscarriage of criminal justice if it considers necessary, direct investigation de novo, whereas a Magistrate's power is limited to ordering further investigation. Since the present case is not concerned with re-investigation, this judgment also cannot take us much further. Likewise,Romila Thapar v. Union of India [Romila Thapar v. Union of India, (2018) 10 SCC 753 : (2019) 1 SCC (Cri) 638] , held that an accused cannot ask to change an investigating agency, or to require that an investigation be done in a particular manner, including asking for a court-monitored investigation. This judgment also is far removed from the question that has been decided by us in the facts of this case.

45. When we come to the facts of this case, it is clear that the FIR dated 22-12-2009 is concerned with two criminal acts, namely, the preparing of fake and bogus "Satakhat" and power of attorney in respect of the agricultural land in question, and the demanding of an amount of Rs 2.5 crores as an attempt to extort money by the accused persons. The facts that are alleged in the application for further investigation are facts which pertain to revenue entries having been made in favour of Ramanbhai Bhagubhai Patel and Shankarbhai Bhagubhai Patel, and how their claim over the same land is false and bogus. Shri Basant is, therefore, right in submitting that the facts alleged in the applications for further investigation are really in the nature of a cross-FIR which has never been registered. In fact, the communication of the Commissioner of Revenue, Gujarat dated 15-3-2011 to the Collector, Surat—so strongly relied upon by Shri Dushyant Dave—bears this out. In this communication, the learned Commissioner doubts that a particular order dated 14-4-1976 passed by a revenue authority ever existed, and that by making an application in the name of the long since deceased Bhikhabhai Khushalbhai in 2010, for getting a copy of Form No. 3 would, prima facie, amount to a criminal offence. Further, the learned Commissioner goes on to state that Bhikiben (Bhikhabhai's widow), who had passed away in December 1999, could not possibly have made an application in the year 2000; which shows that her signature is also prima facie forged. Further, the said Ramanbhai and Shankarbhai Patel are at present 48 and 53 years old, and if they could be said to be in possession of the said agricultural land since 1934, they could be said to be in possession at a time when they were not yet born. Further, since these two gentlemen were abroad from the very beginning, it is stated that they could not possibly be farmers cultivating agricultural land. For these, and various other reasons, the Commissioner concluded:

"Thus, looking to all the aforesaid particulars, as per the submission made by the lady applicant, scam has been made in respect of her land by creating false bogus cases/resolutions/orders passed or by forging fake documents. Submission is made for initiating criminal proceedings against all those who are involved in such scam and whether there is substance in this matter or not? Thorough inquiry be made in that connection at your level. Till the real particulars in this matter are not becoming clear, it is appearing necessary to stop the NA permission/construction activities. Therefore, after making necessary proceedings in that regard, detailed report having basis of the proceedings done is to be immediately submitted to the undersigned and periodical information of the proceedings done in this matter also be given to the undersigned."

46. Given the allegations in the communication of 15-3-2011, we are of the view that this is not a case which calls for any further investigation into the facts alleged in the FIR lodged on 22-12-2009. Yet, having regard to what is stated by the learned Commissioner in the said letter, we are of the view that the police be directed to register an FIR qua these facts, which needs to be investigated by a senior police officer nominated by the Commissioner of Police concerned.

47. We, therefore, set aside the impugned High Court judgment [Nitinbhai Mangubhai Patel v. State of Gujarat, 2013 SCC OnLine Guj 8980] insofar as it states that post-cognizance the Magistrate is denuded of power to order further investigation. However, given that the facts stated in the application for further investigation have no direct bearing on the investigation conducted pursuant to the FIR dated 22-12-2009, we uphold the impugned High Court judgment insofar as it has set aside the judgment of the Second Additional Sessions Judge dated 10-1-2012 which had ordered further investigation, and also the consequential order setting aside the two additional interim reports of the IO Munshi. So far as Criminal Revision Application No. 346 of 2011 is concerned, we set aside the impugned High Court judgment which remanded the matter to the Revisional Court. Consequently, the judgment of the learned Additional Sessions Judge dated 23-4-2016 upon remand is also set aside, rendering Special Criminal Application No. 3085 of 2016 infructuous.

48. However, given the serious nature of the facts alleged in the communication of the Commissioner of Revenue dated 15-3-2011, we direct that the police register an FIR based on this letter within a period of one week from the date of this judgment. This FIR is to be enquired into by a senior police officer designated by the Commissioner of Police concerned, who is to furnish a police report pursuant to investigation within a period of three months from the date on which such officer is

appointed to undertake such investigation. If such police report results in a prima facie case being made out, and if the Judicial Magistrate takes cognizance of such charge-sheet, charges will then be framed and trial held. In the meanwhile, the trial in FIR dated 22-12-2009, which has been stayed by this Court by an order dated 24-4-2019 [Vinubhai Haribhai Malaviya v. State of Gujarat, (2019) 17 SCC 43] , will not be commenced until the police report is submitted in the FIR to be lodged by the police pursuant to this judgment. The learned Magistrate may then decide, in the event that cognizance is taken of the police report in the FIR to be filed, as to whether a joint trial should take place, or whether separate trials be conducted one after the other pursuant to both the FIRs."

23. Sri Mishra also stated that in fact no such incidents took place as alleged in the FIR and story of the prosecution is completely bogus and baseless which is apparent from the discrepancies regarding date and time of incident indicated by the informant and witnesses of fact particularly injured witnesses and as such in the instant case re-investigation/further investigation is required.

24. Based upon the supplementary affidavit, filed today, alongwith which some documents, indicated hereinbelow, have been brought on record.

(i) Copy of report dated 21.10.2023 (To show that charge sheet has been filed on 24.09.2023 but I.O. is saying that the investigation is going on and thus, case set up by the prosecution is false.);

(ii) Copies of the affidavits of Rajitram and Indradev Tiwari (To show that the case of the prosecution is false);

(iii) Copy of Tehreer and Copy of FIR lodged on the basis of Tehreer, which bears 24.07.2023 (To show that the case of the prosecution is false);

(iv) Copy of application under Section 173(8) Cr.P.C. preferred by the applicant on 21.06.2024.

25. Sri Mishra submitted that a conjoint reading of all these documents and documents already referred, it is crystal clear that the case of the prosecution is completely false and as such re-investigation/further investigation is required in the matter. Prayer is to cause interference in the matter.

26. Sri S.P.Tiwari, learned AGA and Sri Rakesh Dwivedi, learned counsel for the opposite party No.2 opposed the present application.

27. Sri S.P.Tiwari, learned AGA submitted that all the questions, as indicated by the accused-applicant in the present application as also by the learned counsel for the applicant, are questions of fact and can be considered by the Trial Court after recording of evidence with proper findings thereon.

28. He also stated that accused has no right to get an order for further investigation. In various pronouncements it has been observed in so many words that

accused cannot be permitted to collect the evidence in his defense by seeking an order for further investigation of the case.

29. Considered the aforesaid submissions advanced by the learned counsel for the parties and perused the record.

30. From a conjoint reading of the documents, indicated above, the facts which are borne out, are as under:-

(i) The FIR was lodged on 24.07.2023.

(ii) The FIR does not indicate the date of incident.

(iii) As per FIR, the incident is of 10:00 PM.

(iv) According to affidavit dated 10.10.2023 of Rajitram (Annexure No.SA- 2) on 23.07.2023 at about 09:00 PM some altercation took place between Devendra Tripathi and Pramod Tripathi.

(v) As per affidavit dated 10.10.2023 of Indradev Tiwari (Annexure No. SA-2) on 23.07.2023 at about 09:00 PM some altercation took place between Devendra Tripathi and Pramod Tripathi.

(vi) It is to be noted that Pramod Tripathi is the informant and Devendra Tripathi is one of the accused. Further, applicant (Vishal Tripathi S/o Devendra Tripathi) is also one of the accused.

(vii) The injured/informant Pramod Tiwari was medically examined at C.H.C.-Jalalpur, District-Ambedkar Nagar on 24.07.2023 at 02:10 PM and Doctor opined that all the injuries are simple in nature and can be caused by hard and blunt object except Injury No.4, which after X-ray on 25.07.2023 was opined as 'Fracture'.

(viii) Injured Sonika Tiwari was medically examined on 24.07.2023 at 03:19 PM at CHC-Jalapur, District-Ambedkar Nagar and Doctor opined that all injuries are simple in nature and can be caused by any hard and blunt object.

(ix) Injured Aditya Tiwari was examined on 24.07.2023 at 02:53 PM at CHC, Jalalpur, District-Ambedkar Nagar and Doctor has opined that all injuries are simple in nature and can be caused by any hard and blunt object except injury Nos. 1, 3 & 4.

(x) Injured Manya Tiwari was examined on 24.07.2023 at 02:32 PM at CHC, Jalalpur, District-Ambedkar Nagar and Doctor has opined that all injuries are simple in nature and can be caused by any hard and blunt object except injury No. 1, which after X-ray on 25.07.2023 was opined as 'Fracture'.

(xi) Injured Sonika Tiwari and Manya Tiwari in their statement(s) levelled specific allegations against the accused/applicant.

(xii) The trial Court vide order dated 21.06.2024, under challenge, rejected the application preferred by the accused applicant/(Vishal Tripathi S/o Devendra Tripathi) under Section 173(8) Cr.P.C. being not maintainable.

31. From the facts aforesaid including the facts indicated on the basis of contents of affidavit(s) of Rajitram and Indradev Tiwari, it appears that some altercation took place between the parties in the night of 23.07.2023 i.e. between 09:00 PM and 10:00 PM on 23.07.2023 and thereafter the FIR was lodged on 24.07.2023 under Section 147, 323, 325, 427 & 452 IPC implicating Devendra Tripathi, Vishal Tripahti/(applicant) Rudra Tripathi, Aradhana Tripathi and Susheela and in the incident, injured namely Pramod Tiwari, Sonika Tiwari, Aditya Tiwari and Manya Tiwari sustained injuries, indicated in para(s) 8 to 13 of this judgment and thereafter based upon the statement(s) of Sonika Tiwari and Manya Tiwari, indicated in para(s) 14 and 15 of this judgment, Section 354-B IPC and Section 7/8 of POCSO Act were added and thereafter charge sheet was filed on 24.09.2023.

32. The applicant/(Vishal Tripathi), who is an accused and whose application dated 21.06.2024 under Section 173(8) Cr.P. C. with a prayer for re-investigation/further investigation has been rejected vide impugned order dated 21.06.2024, has approached this Court by means of present application for re-investigation/further investigation in the matter.

33. Accordingly, on the right of accused/applicant in regard to the prayer of re-investigation/further investigation, it would be apt refer relevant para(s) of the judgment passed by the Division Bench of this Court in the case of ***Preeti Singh v. State of U.P., 2023 SCC OnLine All 1410*** which are extracted hereinunder:-

"18. In the present case, the question is as to whether the accused person has any right or hearing at the investigation stage or to question the manner in which evidence is being collected by claiming a direction for fair investigation?

19. The Hon'ble Apex Court in the case of Union of India v. W.N. Chadha, 1993 Supp (4) SCC 260 has specifically held that under the scheme of Chapter XII of the Code of Criminal Procedure, there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceeding is in the stage of an investigation by a police officer. Chapter XII provides for "Information to the police and powers to investigate".

20. Relevant paragraphs of W.N. Chadha (supra) are quoted as under : -

"90. Under the scheme of Chapter XII of the Cr.P.C. there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceeding is in the stage of an investigation by a police officer.

91. In State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 this Court to which both of us (Ratnavel Pandian and K. Jayachandra Reddy, JJ.) were parties after making reference to the decision of the Privy Council in Emperor v. Khwaja Nazir Ahmad and the decision of this Court in State of Bihar v. J.A.C. Saldanha has pointed out that

"…the field of investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation…."

92. More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under Section 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under Section 204 of the Code, as the case may be. Even in cases where cognizance of an offence is taken on a complaint notwithstanding that the said offence is triable by a Magistrate or triable exclusively by the Court of Sessions, the accused has no right to have participation till the process is issued. In case the issue of process is postponed as contemplated under Section 202 of the Code, the accused may attend the subsequent inquiry but cannot participate. There are various judicial pronouncements to this effect but we feel that it is not necessary to recapitulate those decisions. At the same time, we would like to point out that there are certain provisions under the Code empowering the Magistrate to give an opportunity of being heard under certain specified circumstances.

94. Under Section 235(2), in a trial before a Court of Sessions and under Section 248(2) in the trial of warrant cases, the accused as a matter of right, is to be given an opportunity of being heard. Unlike the above provisions which we have referred to above by way of illustration, the provisions relating to the investigation under Chapter XII do" not confer any right of prior notice and hearing to the accused and on the other hand they are silent in this respect.

95. It is relevant and significant to note that a police officer, in charge of a police station, or a police officer making an investigation can make and search or cause search to be made for the reasons to be recorded without any warrant from the Court or without giving the prior notice to any one or any opportunity of being heard. The basic objective of such a course is to preserve secrecy in the mode of investigation lest the valuable evidence to be unearthed will be either destroyed or lost. We think it unnecessary to make a detailed examination on this aspect except saying that an accused cannot claim any right of prior notice or opportunity of being heard inclusive of his arrest or search of his residence or seizure of any property in his possession connected with the crime unless otherwise provided under the law.

96. True, there are certain rights conferred on an accused to be enjoyed at certain stages under the CrPC - such as Section 50 whereunder the person arrested is to be informed of the grounds of his arrest and to his right of bail and under Section 57 dealing with person arrested not to be detained for more than 24 hours and under Section 167 dealing with the procedure if the investigation cannot be completed in 24 hours - which are all in conformity with the 'Right to Life' and 'Personal Liberty' enshrined in Article 21 of the Constitution and the valuable safeguards ingrained in Article 22 of the Constitution for the protection of an arrestee or detenu in certain cases. But so long as an the investigating agency proceeds with his action or investigation in strict compliance with the statutory provisions relating to arrest or investigation of a criminal case and according to the procedure established by law, no one can make any legitimate grievance to stifle or to impinge upon the proceedings of arrest or detention during investigation as the case may be, in accordance with the provisions of the Cr.P.C.

98. If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation lifeless, absurd and self-defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary.

120. For all the aforesaid reasons we unhesitatingly set aside the order of the High Court quashing the letter rogatory dated 5/7th February, 1990 and the rectified letter rogatory dated 21/22nd August, 1990 issued in pursuance of the orders passed by the Special Judge. The respondent who is a named accused in the FIR has no locus standi at this stage to question the manner in which the evidence is to be collected. However, it is open for the respondent to challenge the admissibility and reliability of the evidence only at the stage of trial in case the investigation ends up in filing a final report under Section 173 of the Code indicating that an offence appears to have been committed."

(emphasis supplied)

21. Perusal of the abovequoted paragraphs would clearly indicate that Chapter XII Cr.P.C. provides for information to the police and powers to investigate and this chapter consists of Section 154 to 176, which covers the area from lodging of first information report in a cognizable case, information as to non-cognizable cases and investigation of such cases, police officer's power to investigate and submission of police report as well.

22. As already noticed, Hon'ble Apex Court in paragraph

90 of W.N. Chadha (supra) clearly held that under the scheme of Chapter XII Cr.P.C. there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceeding is in the stage of investigation by a police officer. It has also been observed that the field of investigation of any cognizable offence is exclusively within the domain of investigating agencies over which the courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation.

23. Hon'ble Apex Court in the case of State of Bihar v. J.A.C., (1980) 1 SCC 554 has also held that the accused has no right in regard to the manner and right of the fair investigation. The other exceptions, which are not relevant regarding complaint case etc., have also been noticed. Certain rights of the accused persons have also been noticed, which are all in conformity with the 'Right of Personal Life' and 'Personal Liberty' enshrined in Article 21 of the Constitution of India and valuable safeguards ingrained in Article 22 of the Constitution for the protection of an arrestee or detenu in certain cases. It has also been observed that if prior notice of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law relating to the investigation lifeless, absurd and self-defeating.

24. In W.N. Chadha (supra) the letter rogatory was under challenge before the High Court. While setting aside the order of the High Court letter rogatory dated 5/7the February, 1990 and the rectified letter rogatory dated 21st/22nd August, 1990 issued in pursuance of the orders passed by the Special Judge it was clearly held that the respondent, who is a named accused in the first information report has no locus standi at this stage to question the manner in which the evidence is to be collected, however, it was observed that it is open for the respondent to challenge the admissibility and reliability of the evidence only at the stage of trial in case the investigation ends up in filing a final report under Section 173 Cr.P.C. indicating that an offence appears to have been committed.

25. In the case of C.B.I. v. Rajesh Gandhi, (1996) 11 SCC 253 Hon'ble Apex Court has held as under : -

"There is no merit in the pleas raised by the first respondent either. The decision to investigate or the decision on the agency which should investigate, does not attract principles of natural justice. The accused cannot have a say in who should investigate the offences he is charged with. …."

(Emphasis supplied)

26. Thus, it is very much clear that at the stage of

investigation the accused has no right to be heard and she cannot come forward to claim fair investigation only on the ground that according to her the matter has wrongly been handed over to the Crime Branch and simply for the reason that initially the petitioner was informant and subsequently she had been arrayed as accused in the first information report in question. From perusal of record of petition we do not find any ground worth withdrawing the investigation from the Crime Branch and to transfer the same to some other agency in view of the law as discussed hereinabove."

34. The judgments referred in the above quoted para(s) of the judgment passed in the case of ***Preeti Singh (Supra),*** on the issue of right of an accused at the stage of investigation have not been overruled in the judgment passed in the case of ***Vinubhai Haribhai Malaviya (Supra).***

35. On the right of an accused, the Hon'ble Apex Court (Majority Decision) in the case of ***Romila Thapar vs. Union of India, (2018) 10 SCC 75***, observed as under:-

19. Mr Mehta submits that even though the Court may have jurisdiction to examine all aspects of the matter, considering the fact that the investigation is at a nascent stage and is being done by senior police officials under the supervision of their superior officers up to the level of Commissioner of Police, it is not a case for grant of reliefs as prayed. The accused persons must take recourse to the remedy prescribed by law instead of directly approaching this Court under Article 32 of the Constitution and can get complete justice from the jurisdictional court. He submits that in criminal matters, interference in the garb of public interest litigation at the instance of strangers has always been discouraged and rejected by this Court. Further, the present petition is nothing but abuse of the process and as the named accused Varavara Rao, Sudha Bharadwaj and Gautam Navalakha have filed their respective petitions before the jurisdictional High Courts, which proceedings are pending for adjudication, the same persons have now filed affidavits before this Court for transposing them as petitioners and allowing them to adopt the prayer of the writ petitioners. They ought to elect their remedy to be pursued and in particular, before the jurisdictional courts. Therefore, this petition must be discouraged.

20. Mr Mehta submits that the modified relief claimed in the writ petition to release the accused persons is in the nature of habeas corpus which is not maintainable in respect of the arrest made during the ongoing investigation. He submits that no right can enure in favour of the accused to seek relief of investigation of the crime through an independent agency and for the same reason, even strangers to the offence under investigation or next friends of the accused, cannot be permitted to pursue such

a relief in the guise of PIL. He submits that the foundation of the present writ petition is the perception of the writ petitioners (next friends) that the accused are innocent persons. He submits that that basis is tenuous. For, there are enough examples of persons having split personality. In a criminal case, the action is based on hard facts collected during the course of investigation and not on individual perception. He contends that the argument of the writ petitioners that liberty of the five named accused cannot be compromised on the basis of surmises and conjectures is wholly misplaced and can be repelled on the basis of the material gathered during the ongoing investigation indicating the complicity of each of them. He relies on Section 41 CrPC which enables the police to arrest any person against whom a "reasonable suspicion" exists that he has committed a cognizable offence. Therefore, the integrity of the investigating agency cannot be doubted as there is enough material against each of the accused. He further submits that the argument of the writ petitioners based on the circumstances pressed into service for a direction to change the investigating agency is completely against the cardinal criminal jurisprudence and such a relief is not available to persons already named as accused in a crime under investigation.

21. Mr Harish Salve, learned Senior Counsel appearing for the complainant at whose instance FIR No. 4 of 2018 came to be registered at Vishram Bagh Police Station (Pune City), submits that there is no absolute right, much less a fundamental right, to market ideas which transcend the line of unlawful activity. The Court must enquire into the fact as to whether the investigation is regarding such unlawful activity or merely to stifle dissenting political voice. If it is the former, the investigation must be allowed to proceed unhindered. In any case, the affected persons, namely, the named accused must take recourse to remedy prescribed by law before the jurisdictional court as it is not a case of unlawful detention or action taken by an unauthorised investigating agency. According to him, the Court must lean in favour of appointing a SIT or an independent investigating agency or court-monitored investigation only when the grievance made is one about the investigation being derailed or being influenced by some authority. In the present case, the grievance is limited to improper arrest of individuals without any legal evidence to indicate their complicity in the commission of any crime or the one registered in the form of FIR No. 4 of 2018. The allegation of motivated investigation is without any basis. No assertion is made by the writ petitioners or the named accused that the investigation by Pune City Police is mala fide in law. If the allegation is about mala fide in fact, then the material facts to substantiate such allegation, including naming of the person at whose instance it is being so done,

ought to have been revealed. That is conspicuously absent in this case. According to the learned counsel, the reliefs claimed in the writ petition do not warrant any indulgence of this Court.

22. After the high-pitched and at times emotional arguments concluded, each side presenting his case with equal vehemence, we as Judges have had to sit back and ponder over as to who is right or whether there is a third side to the case. The petitioners have raised the issue of credibility of Pune Police investigating the crime and for attempting to stifle the dissenting voice of the human rights activists. The other side with equal vehemence argued that the action taken by Pune Police was in discharge of their statutory duty and was completely objective and independent. It was based on hard facts unravelled during the investigation of the crime in question, pointing towards the sinister ploy to destabilise the State and was not because of difference in ideologies, as is claimed by the so-called human rights activists.

23. After having given our anxious consideration to the rival submissions and upon perusing the pleadings and documents produced by both the sides, coupled with the fact that now four named accused have approached this Court and have asked for being transposed as writ petitioners, the following broad points may arise for our consideration:

23.1. (i) Should the investigating agency be changed at the behest of the named five accused?

23.2. (ii) If the answer to Point (i) is in the negative, can a prayer of the same nature be entertained at the behest of the next friend of the accused or in the garb of PIL?

23.3. (iii) If the answer to Questions (i) and/or (ii) above, is in the affirmative, have the petitioners made out a case for the relief of appointing Special Investigating Team or directing the court-monitored investigation by an independent investigating agency?

23.4. (iv) Can the accused person be released merely on the basis of the perception of his next friend (writ petitioners) that he is an innocent and law abiding person?

24. Turning to the first point, we are of the considered opinion that the issue is no more res integra. In Narmada Bai v. State of Gujarat [Narmada Bai v. State of Gujarat, (2011) 5 SCC 79 : (2011) 2 SCC (Cri) 526] , in para 64, this Court restated that it is trite law that the accused persons do not have a say in the matter of appointment of investigating agency. Further, the accused persons cannot choose as to which investigating agency must investigate the offence committed by them. Para 64 of this decision reads thus : (SCC p. 100)

"64. ... It is trite law that the accused persons do not have a say in the matter of appointment of an investigating agency. The accused persons cannot choose as to which investigating agency must

investigate the alleged offence committed by them."

(emphasis supplied)

25. Again in Sanjiv Rajendra Bhatt v. Union of India [Sanjiv Rajendra Bhatt v. Union of India, (2016) 1 SCC 1 : (2016) 1 SCC (Cri) 193 : (2016) 1 SCC (L&S) 1] , the Court restated that the accused had no right with reference to the manner of investigation or mode of prosecution. Para 68 of this judgment reads thus : (SCC p. 40)

68. The accused has no right with reference to the manner of investigation or mode of prosecution. Similar is the law laid down by this Court in Union of India v. W.N. Chadha [Union of India v. W.N. Chadha, 1993 Supp (4) SCC 260 : 1993 SCC (Cri) 1171] , Mayawati v. Union of India [Mayawati v. Union of India, (2012) 8 SCC 106 : (2012) 3 SCC (Cri) 801] , Dinubhai Boghabhai Solanki v. State of Gujarat [Dinubhai Boghabhai Solanki v. State of Gujarat, (2014) 4 SCC 626 : (2014) 2 SCC (Cri) 384] , CBI v. Rajesh Gandhi [CBI v. Rajesh Gandhi, (1996) 11 SCC 253 : 1997 SCC (Cri) 88] , CCI v. SAIL [CCI v. SAIL, (2010) 10 SCC 744] and Janata Dal v. H.S. Chowdhary [Janata Dal v. H.S. Chowdhary, (1991) 3 SCC 756 : 1991 SCC (Cri) 933] ."

(emphasis supplied)

26. Recently, a three-Judge Bench of this Court in E. Sivakumar v. Union of India [E. Sivakumar v. Union of India, (2018) 7 SCC 365 : (2018) 3 SCC (Cri) 49] , while dealing with the appeal preferred by the "accused" challenging the order [J. Anbazhagan v. Union of India, 2018 SCC OnLine Mad 1231 : (2018) 3 CTC 449] of the High Court directing investigation by CBI, in para 10 observed : (SCC pp. 370-71)

"10. As regards the second ground urged by the petitioner, we find that even this aspect has been duly considered in the impugned judgment [J. Anbazhagan v. Union of India, 2018 SCC OnLine Mad 1231 : (2018) 3 CTC 449] . In para 129 of the impugned judgment, reliance has been placed on Dinubhai Boghabhai Solanki v. State of Gujarat [Dinubhai Boghabhai Solanki v. State of Gujarat, (2014) 4 SCC 626 : (2014) 2 SCC (Cri) 384] , wherein it has been held that in a writ petition seeking impartial investigation, the accused was not entitled to opportunity of hearing as a matter of course. Reliance has also been placed on Narender G. Goel v. State of Maharashtra [Narender G. Goel v. State of Maharashtra, (2009) 6 SCC 65 : (2009) 2 SCC (Cri) 933] , in particular, para 11 of the reported decision wherein the Court observed that it is well settled that the accused has no right to be heard at the stage of investigation. By entrusting the investigation to CBI which, as aforesaid, was imperative in the peculiar facts of the present case, the fact that the petitioner was not impleaded as a party in the writ petition or for that matter, was not

heard, in our opinion, will be of no avail. That per se cannot be the basis to label the impugned judgment as a nullity."

27. This Court in Divine Retreat Centre v. State of Kerala [Divine Retreat Centre v. State of Kerala, (2008) 3 SCC 542 : (2008) 2 SCC (Cri) 9] , has enunciated that the High Court in exercise of its inherent jurisdiction cannot change the investigating officer in the midstream and appoint an investigating officer of its own choice to investigate into a crime on whatsoever basis. The Court made it amply clear that neither the accused nor the complainant or informant are entitled to choose their own investigating agency, to investigate the crime, in which they are interested. The Court then went on to clarify that the High Court in exercise of its power under Article 226 of the Constitution can always issue appropriate directions at the instance of the aggrieved person if the High Court is convinced that the power of investigation has been exercised by the investigating officer mala fide.

28. Be that as it may, it will be useful to advert to the exposition in State of W.B. v. Committee for Protection of Democratic Rights [State of W.B. v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571 : (2010) 2 SCC (Cri) 401] . In para 70 of the said decision, the Constitution Bench observed thus : (SCC p. 602)

"70. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the courts must bear in mind certain self-imposed limitations on the exercise of these constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. Insofar as the question of issuing a direction to CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extraordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where the incident may have national and international ramifications or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process lose its credibility and purpose with unsatisfactory investigations."

29. In the present case, except pointing out some circumstances to question the manner of arrest of the five named accused sans any legal evidence to link them with the crime under

investigation, no specific material facts and particulars are found in the petition about mala fide exercise of power by the investigating officer. A vague and unsubstantiated assertion in that regard is not enough. Rather, averment in the petition as filed was to buttress the reliefs initially prayed for (mentioned in para 8 above) — regarding the manner in which arrest was made. Further, the plea of the petitioners of lack of evidence against the named accused (A-16 to A-20) has been seriously disputed by the investigating agency and have commended us to the material already gathered during the ongoing investigation which according to them indicates complicity of the said accused in the commission of crime. Upon perusal of the said material, we are of the considered opinion that it is not a case of arrest because of mere dissenting views expressed or difference in the political ideology of the named accused, but concerning their link with the members of the banned organisation and its activities. This is not the stage where the efficacy of the material or sufficiency thereof can be evaluated nor is it possible to enquire into whether the same is genuine or fabricated. We do not wish to dilate on this matter any further lest it would cause prejudice to the named accused and including the co-accused who are not before the Court. Admittedly, the named accused have already resorted to legal remedies before the jurisdictional court and the same are pending. If so, they can avail of such remedies as may be permissible in law before the jurisdictional courts at different stages during the investigation as well as the trial of the offence under investigation. During the investigation, when they would be produced before the court for obtaining remand by the police or by way of application for grant of bail, and if they are so advised, they can also opt for remedy of discharge at the appropriate stage or quashing of criminal case if there is no legal evidence, whatsoever, to indicate their complicity in the subject crime.

30. In view of the above, it is clear that the consistent view of this Court is that the accused cannot ask for changing the investigating agency or to do investigation in a particular manner including for court-monitored investigation. The first two modified reliefs claimed in the writ petition, if they were to be made by the accused themselves, the same would end up in being rejected. In the present case, the original writ petition was filed by the persons claiming to be the next friends of the accused concerned (A-16 to A-20). Amongst them, Sudha Bhardwaj (A-19), Varvara Rao (A-16), Arun Ferreira (A-18) and Vernon Gonsalves (A-17) have filed signed statements praying that the reliefs claimed in the subject writ petition be treated as their writ petition. That application deserves to be allowed as the accused themselves have chosen to approach this Court and also in the

backdrop of the preliminary objection raised by the State that the writ petitioners were completely strangers to the offence under investigation and the writ petition at their instance was not maintainable. We would, therefore, assume that the writ petition is now pursued by the accused themselves and once they have become petitioners themselves, the question of next friend pursuing the remedy to espouse their cause cannot be countenanced. The next friend can continue to espouse the cause of the affected accused as long as the accused concerned is not in a position or incapacitated to take recourse to legal remedy and not otherwise."

36. In view of above, this Court has no hesitation to say that an accused has no right at the stage of investigation. Thus, the application under Section 173(8) Cr.P.C. preferred by the accused, applicant herein, for re-investigation itself was not entertainable.

37. The subject matter in this case relates to re-investigation/further investigation, as prayed, in the instant application, and accordingly, it would be apt to refer expression "investigation" which is defined in Section 2(h) of Cr.P.C.:-

"investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf;"

38. Regarding expression "investigation", it would be appropriate to refer para(s) 53 to 55 of the judgment passed in the case of ***Kailash Vijayvargiya v. Rajlakshmi Chaudhuri, 2023 SCC OnLine SC 569***, which are extracted hereinunder:-

"53. The Code vide Chapter XII, ranging from Section 154 to Section 176, deals with information to the Police and their power to investigate. Section 154 deals with the information relating to the commission of a cognizable offence and fiats the procedure to be adopted when prima facie commission of a cognizable offence is made out. Section 156 authorises a police officer in-charge of a Police station to investigate any cognizable offence without the order of a Magistrate. Sub-section (3) of Section 156 provides for any Magistrate empowered under Section 190 to order an investigation as mentioned in Section 156(1). In cases where a cognizable offence is suspected to have been committed, the officer in-charge of the Police station, after sending a report to the Magistrate empowered to take cognizance of such offence, is entitled under Section 157 to investigate the facts and circumstances of the case and also to take steps for discovery and arrest of the offender. Clauses (a) and (b) of the proviso to sub-section (1) to Section 157 give discretion to the officer in-charge not to investigate a case, when information of such offence is given

against any person by name and the case is not of serious nature; or when it appears to the officer in-charge of the Police station that there is no sufficient ground for entering the investigation. In each of the cases mentioned in clauses (a) and (b) to the proviso to sub-section (1) to Section 157, the officer in-charge of the Police station has to file a report giving reasons for not complying with the requirements of sub-section (1) and in a case covered by clause (b) to the proviso, also notify the informant that he will not investigate the case or cause it to be investigated. Section 159 gives power to a Magistrate, on receiving such report of the officer in-charge, to either direct an investigation or if he thinks fit, proceed to hold a preliminary inquiry himself or through a Magistrate subordinate to him, or otherwise dispose of the case in the manner provided by the Code.

54. Sections 160 to 164 deal with the power of the Police to require attendance of witnesses, examination of witnesses, use of such statements in evidence, inducement for recording statement and recording of statements. Section 165 deals with the power of a Police officer to conduct search during investigation in the circumstances mentioned therein.

55. The power under the Code to investigate generally consists of following steps : (a) proceeding to the spot; (b) ascertainment of facts and circumstances of the case; (c) discovery and arrest of the suspected offender; (d) collection of evidence relating to commission of offence, which may consist of examination of various persons, including the person accused, and reduction of the statement into writing if the officer thinks fit; (e) the search of places of seizure of things considered necessary for investigation and to be produced for trial; and (f) formation of opinion as to whether on the material collected there is a case to place the accused before the Magistrate for trial and if so, taking the necessary steps by filing a chargesheet under Section 173."

39. The Hon'ble Apex Court in the case of ***State vs. Hemendhra Reddy, 2023 SCC OnLine SC 515***, observed as under:-

"35. Section 169 of the CrPC reads as under:

***"169. Release of accused when evidence deficient**.—*

If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial."

36. The perusal of the aforesaid Section would reveal that the Investigating Officer is under

an obligation to release such person, who is in custody on executing a bond with or without sureties, if evidence is not sufficient and/or there are no reasonable grounds of suspicion to forward such person to the Magistrate.

37. The plain reading of Section 169 of the CrPC, therefore, postulates that when the Investigating Officer reports his action to the learned Magistrate, it will not be a report, however it will be a report of his action either by the Investigating Officer or by the Officer in-charge of the police station.

38. Section 173 of the CrPC states about the steps to be taken by the Investigating Officer after the completion of the investigation. The Officer in-charge of the police station is required to forward the report under said Section to the Magistrate empowered to take cognizance of the offence in prescribed form.

39. Section 173 of the CrPC reads thus:

"173. Report of police officer on completion of investigation.—

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1A) The investigation in relation to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or 376E from the date on which the information was recorded by the officer in charge of the police station.

(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB or section 376E of the Penal Code, 1860 (45 of 1860).

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under subsection (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of subsections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).''

(Emphasis supplied)

40. Thus, Section 169 of the CrPC is silent in making report to the Magistrate, however the Investigating Officer is under an obligation to submit its report to the Magistrate under Section 173 of the CrPC. Thus, though Section 169 of the CrPC does not contemplate making a report, it contemplates of obtaining a bond with or without sureties from the accused to appear if and when so required before the Magistrate empowered to take cognizance of the offence on a police report and such report is contemplated under Section 173 of the CrPC. Clauses (d) and (f) of

Section 173(2)(i) of the CrPC read as under:

"173(2)(i)

xxx

xxx

(d) whether any offence appears to have been committed and, if so, by whom;

xxx xxx

xxx

(f) whether he has been released on his bond and, if so, whether with or without sureties".

41. Section 173(8) of the CrPC deals with further investigation and supplementary report. In the Code of Criminal Procedure, 1898 (for short, 'the Old Code'), there was no identical provision to that of Section 173(8) of the CrPC. The same is a newly added provision in the CrPC. It was added on the recommendation of the Law Commission in its 41st Report that the right of the police to make further investigation should be statutorily affirmed.

42. In the Old Code, there was no provision prescribing the procedure to be followed by the police for fresh investigation, when fresh facts came to light, upon the submission of the police report and subsequent to taking cognizance by the Magistrate. There was, also, no express provision prohibiting further investigation by the police.

43. The said omission was sought to be supplied for the first time by a two-Judge Bench of the Madras High Court as early as in 1919 in Divakar Singh v. A. Ramamurthi Naidu reported in AIR 1919 Mad 751, where it was observed that:

"Another contention is put forward that when a report of investigation has been sent in under Section 173 of the Cr PC, the police has no further powers of investigation, but this argument may be briefly met by the remark that the number of investigations into a crime is not limited by law and that when one has been completed another may be begun on further information received.".

44. After recognition of the right of the police to make repeated investigations under the Old Code in Divakar's case, a three-Judge Bench of this Court in H.N. Rishbud v. State of Delhi reported in AIR 1955 SC 196, held that:—

"It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such reinvestigation as the circumstances of an individual case may call for. Such a course is not altogether outside the contemplation of the scheme of the Code as appears from Section 202 under which a Magistrate taking cognizance on a complaint can order investigation by the police. Nor can it be said that the adoption of such a course is outside the scope of the inherent powers of the

Special Judge, who for purposes of procedure at the trial is virtually in the position of a Magistrate trying a warrant case."

45. Some High Courts were also of the view that with the submission of a chargesheet under Section 173, the power of the police to investigate into an offence comes to an end and the Magistrate's cognizance of the offence started. For instance, in State v. Mehar Singh reported in 1974 Cri LJ 970, a Full Bench of the High Court of Punjab and Haryana held that the police became functus officio once the Court took cognizance of an offence on the filing of a chargesheet by the police and thereafter, further investigation by the police was not permissible.

46. It was, however, observed that in light of the decision in H.N. Rishbud (supra), it would be open to the Magistrate to 'suspend cognizance' and direct the police to make further investigation into the case and submit a report.

47. The said inconsistency and incongruity in the judicial decisions was recognized by the Law Commission in its 41st Report (under Clause 14.23) and it was recommended that the right of the police to make further investigation should be statutorily affirmed. Accordingly, in the CrPC, Section 173(8), came to be introduced, which statutorily empowered the police to undertake further investigation after submission of the final report under Section 173(2) of the CrPC. Conspicuously, it still did not confer such powers on the Magistrate to direct further and/or fresh investigation after submission of the final report by the Police.

48. Section 173(8) of the CrPC may be fragmented or dissected as under:

(1) Further investigation can be done in respect of an offence wherein report under Section 173(2) has been forwarded to the Magistrate; and

(2) During further investigation, the officer-in-charge has power

(a) to obtain further evidence, oral or documentary,

(b) to forward to the Magistrate, a further report or reports regarding such evidence in the form prescribed,

(3) The provisions of sub sections (2) to (6) shall, as far as may be, apply in relation to such further report or reports.

49. Sub section (1) of Section 173 of the CrPC provides that every investigation by the police shall be completed without unnecessary delay and sub section (2) of Section 173 of the CrPC provides that as soon as such investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government.

50. Under sub section (2) of the Section 173 of the CrPC, a police report (chargesheet or Challan) is filed by the police after investigation is complete.

51. Sub section (8) of Section 173 of the CrPC, states that nothing in the section shall be deemed to preclude any further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate.

52. Thus, even where chargesheet or Challan has been filed by the police under sub section (2) of Section 173 of the CrPC, the police can undertake further investigation in respect of an offence under sub section (8) of Section 173 of the CrPC. (Reference : Article titled "Different Aspects of Section 173(8) of the CrPC" by D. Nageswara Rao, Prl. JCJ, Manthani.)

What is the meaning of the term "Further Investigation"?

53. In Rama Chaudhary v. State of Bihar reported in (2009) 6 SCC 346, this Court held that, "further investigation within the meaning of provision of Section 173(8) CrPC is additional; more; or supplemental. "Further investigation", therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether."

What are the alternatives before a Magistrate when a "Final Report" is filed?

54. Wherever a final report forwarded by the Investigating Officer to a Magistrate under Section 173(2)(i) of the CrPC is placed before him, several situations may arise. The report may conclude that an offence appears to have been committed by a particular person and persons, and in such a case the Magistrate may either:

(1) accept the report and take cognizance of offence and issue process,

(2) may disagree with the report and drop the proceeding or may take cognizance on the basis of report/material submitted by the investigation officer,

(3) may direct further investigation under Section 156(3) and require police to make a report as per Section 173(8) of the CrPC.

(4) may treat the protest complaint as a complaint, and proceed under Sections 200 and 202 of the CrPC.

What is the prime consideration for "Further Investigation"?

55. As observed in Hasanbhai Valibhai Qureshi v. State of Gujarat reported in (2004) 5 SCC 347, the prime consideration for further investigation is to arrive at the truth and do real and substantial justice. The hands of investigating agency for further investigation should not be tied down on the ground of mere delay. In other words, the mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial and effective justice.

Difference between "Further Investigation" and "Re-investigation"

56. There is no doubt that "further investigation" and "re-investigation" stand altogether on a different footing. In Ramchandran v. R. Udhayakumar reported in (2008) 5 SCC 413, this Court has explained the fine distinction between the two relying on its earlier decision in K. Chandrasekhar v. State of Kerala reported in (1998) 5 SCC 223. We quote paras 7 and 8 as under:

"7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation. This was highlighted by this Court in K. Chandrasekhar v. State of Kerala [(1998) 5 SCC 223 : 1998 SCC (Cri) 1291]. It was, inter alia, observed as follows : (SCC p. 237, para 24)

"24. The dictionary meaning of 'further' (when used as an adjective) is 'additional; more; supplemental'. 'Further' investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a 'further' report or reports—and not fresh report or reports—regarding the 'further' evidence obtained during such investigation."

8. In view of the position of law as indicated above, the directions of the High Court for reinvestigation or fresh investigation are clearly indefensible. We, therefore, direct that instead of fresh investigation there can be further investigation if required under Section 173(8) of the Code. The same can be done by CB CID as directed by the High Court."

Position of Law on the subject of "Further Investigation"

57. In King-Emperor v. Khwaja Nazir Ahmad, (1943-44) 71 IA 203 the Privy Council delineated the powers of the police to investigate. It was held thus:

"Just as it is essential that every one accused of a crime should have free access to a Court of justice, so that he may be duly acquitted if found not guilty of the offence with which he is charged, so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes on them the duty of inquiry. In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an

unfortunate result if it should be held possible to interfere with those statutory rules by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary, not overlapping, and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Courts to intervene in an appropriate case when moved under Section 491 of the Criminal Procedure Code to give directions in the nature of Habeas Corpus."

58. In Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj v. State of A.P. reported in (1999) 5 SCC 740, it was held in paras 10 and 11:

"10. Power of the police to conduct further investigation, after laying final report, is recognised under Section 173(8) of the Code of Criminal Procedure. Even after the court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. This has been so stated by this Court in Ram Lal Narang v. State (Delhi Admn.) [(1979) 2 SCC 322 : 1979 SCC (Cri) 479 : AIR 1979 SC 1791]. The only rider provided by the aforesaid decision is that it would be desirable that the police should inform the court and seek formal permission to make further investigation.

11. In such a situation the power of the court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in Section 173(8) to suggest that the court is obliged to hear the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As the law does not require it, we would not burden the Magistrate with such an obligation."

59. In Hemant Dhasmana v. Central Bureau of Investigation reported in (2001) 7 SCC 536, it was held:

"15. When the report is filed under the sub-section the Magistrate (in this case the Special Judge) has to deal with it by bestowing his judicial consideration. If the report is to the effect that the allegations in the original complaint were found true in the investigation, or that some other accused and/or some other offences were also detected, the court has to decide whether cognizance of the offences should be taken or not on the strength of that report. We do not think that it is necessary for us to vex our mind, in this case, regarding that aspect when the report points to the offences committed by some persons. But when the report is against the allegations contained in the complaint and concluded that no offence has been committed by any person, it is open to the court to accept the report after hearing

the complainant at whose behest the investigation had commenced. If the court feels on a perusal of such a report that the alleged offences have in fact been committed by some persons the court has the power to ignore the contrary conclusions made by the investigating officer in the final report. Then it is open to the court to independently apply its mind to the facts emerging therefrom and it can even take cognizance of the offences which appear to it to have been committed, in exercise of its power under Section 190(1)(b) of the Code. The third option is the one adumbrated in Section 173(8) of the Code. ...

16. Although the said sub-section does not, in specific terms, mention about the powers of the court to order further investigation, the power of the police to conduct further investigation envisaged therein can be triggered into motion at the instance of the court. When any such order is passed by a court which has the jurisdiction to do so, it would not be a proper exercise of revisional powers to interfere therewith because the further investigation would only be for the ends of justice. ..."

60. In Union Public Service Commission v. S. Papaiah reported in (1997) 7 SCC 614, it was held in Para 13:

"The Magistrate could, thus in exercise of the powers under Section 173(8) CrPC direct the CBI to "further investigate" the case and collect further evidence keeping in view the objections raised by the appellant to the investigation and the "new" report to be submitted by the investigating officer would be governed by sub-sections (2) to (6) of Section 173 CrPC.".

61. This Court in Hasanbhai (supra) held thus:

"12. Sub-section (8) of Section 173 of the Code permits further investigation, and even dehors any direction from the court as such, it is open to the police to conduct proper investigation, even after the court took cognisance of any offence on the strength of a police report earlier submitted. All the more so, if as in this case, the Head of the Police Department also was not satisfied of the propriety or the manner and nature of investigation already conducted.

13. In Ram Lal Narang v. State (Delhi Admn.) [(1979) 2 SCC 322 : 1979 SCC (Cri) 479 : AIR 1979 SC 1791] it was observed by this Court that further investigation is not altogether ruled out merely because cognisance has been taken by the court. When defective investigation comes to light during course of trial, it may be cured by further investigation, if circumstances so permitted. It would ordinarily be desirable and all the more so in this case, that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light instead of being silent over the matter keeping in view only the need for an early trial since an effective trial for real or actual offences found during course of proper investigation is as much

relevant, desirable and necessary as an expeditious disposal of the matter by the courts. In view of the aforesaid position in law, if there is necessity for further investigation, the same can certainly be done as prescribed by law. The mere fact that there may be further delay in concluding the trial should not stand in the way of further investigation if that would help the court in arriving at the truth and do real and substantial as well as effective justice."

62. In Ram Lal Narang v. State (Delhi Administration) reported in (1979) 2 SCC 322, this Court held thus:

"21. As observed by us earlier, there was no provision in the CrPC, 1898 which, expressly or by necessary implication, barred the right of the police to further investigate after cognizance of the case had been taken by the Magistrate. Neither Section 173 nor Section 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under Section 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the court by seeking its formal permission to make further investigation."

63. In State of Andhra Pradesh v. A.S. Peter reported in (2008) 2 SCC 383, this Court held thus:

"9. Indisputably, the law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out of a further investigation even after filing of the charge-sheet is a statutory right of the police. A distinction also exists between further investigation and reinvestigation. Whereas reinvestigation without prior permission is necessarily forbidden, further investigation is not."

64. In Nirmal Singh Kahlon v. State of Punjab reported in (2009) 1 SCC 441, this Court held as follows:

"68. An order of further investigation in terms of Section 173(8) of the Code by the State in exercise of its jurisdiction under Section 36 thereof stands on a different footing. The power of the investigating officer to make further investigation in exercise of its statutory jurisdiction under Section 173(8) of the Code and at the instance of the State having regard to Section 36 thereof read with Section 3 of the Police Act, 1861 should be considered in different contexts. Section 173(8) of the Code is an enabling provision. Only when cognizance of an offence is taken, the learned

Magistrate may have some say. But, the restriction imposed by judicial legislation is merely for the purpose of upholding the independence and impartiality of the judiciary. It is one thing to say that the court will have supervisory jurisdiction to ensure a fair investigation, as has been observed by a Bench of this Court in Sakiri Vasu v. State of U.P. [(2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440], correctness whereof is open to question, but it is another thing to say that the investigating officer will have no jurisdiction whatsoever to make any further investigation without the express permission of the Magistrate."

65. In Vinay Tyagi (supra), it was held that "further investigation" in terms of Section 173(8) of the CrPC can be made in a situation where the investigating officer obtains further oral or documentary evidence after the final report has been filed before the Court. The report on such further investigation under Section 173(8) of the CrPC can be termed as a supplementary report.

66. In Vinay Tyagi (supra), it was held that:

"40.2. A Magistrate has the power to direct "further investigation" after filing of a police report in terms of Section 173(6) of the Code.

x x x x x x x x x x

40.4. Neither the scheme of the Code nor any specific provision therein bars exercise of such jurisdiction by the Magistrate. The language of Section 173(2) cannot be construed so restrictively as to deprive the Magistrate of such powers particularly in face of the provisions of Section 156(3) and the language of Section 173(8) itself. In fact, such power would have to be read into the language of Section 173(8).

40.5. The Code is a procedural document, thus, it must receive a construction which would advance the cause of justice and legislative object sought to be achieved. It does not stand to reason that the legislature provided power of further investigation to the police even after filing a report, but intended to curtail the power of the court to the extent that even where the facts of the case and the ends of justice demand, the court can still not direct the investigating agency to conduct further investigation which it could do on its own.

40.6. It has been a procedure of propriety that the police has to seek permission of the court to continue "further investigation" and file supplementary charge-sheet. ..."

67. In Vinubhai (supra); a three-Judge Bench of this Court has endeavoured to lay at rest the controversy enveloping the evasive issue of further investigation directed by the Magistrate. This Court, speaking through Justice R.F. Nariman, has laid down at Para 38 that:

"To say that a fair and just investigation would lead to the conclusion that the police retain the power, subject, of course, to the

Magistrate's nod under Section 173(8) to further investigate an offence till charges are framed, but that the supervisory jurisdiction of the Magistrate suddenly ceases midway through the pre-trial proceedings, would amount to a travesty of justice, as certain cases may cry out for further investigation so that an innocent person is not wrongly arraigned as an accused or that a prima facie guilty person is not so left out. There is no warrant for such a narrow and restrictive view of the powers of the Magistrate, particularly when such powers are traceable to Section 156(3) read with Section 156(1), Section 2(h) and Section 173(8) CrPC, as has been noticed hereinabove, and would be available at all stages of the progress of a criminal case before the trial actually commences. It would also be in the interest of justice that this power be exercised suo motu by the Magistrate himself, depending on the facts of each case. Whether further investigation should or should not be ordered is within the discretion of the learned Magistrate who will exercise such discretion on the facts of each case and in accordance with law." It was also clarified that, "The "investigation" spoken of in Section 156(3) would embrace the entire process, which begins with the collection of evidence and continues until charges are framed by the Court, at which stage the trial can be said to have begun.".

68. Thus, this Court, in conclusion, observed that, "when Section 156(3) states that a Magistrate empowered under Section 190 may order "such an investigation", such Magistrate may also order further investigation under Section 173(8), regard being had to the definition of "investigation" contained in Section 2(h)."

69. Thus, in view of the law laid down by this Court in the various decisions cited hereinabove, it is well settled that sub section (8) of Section 173 of the CrPC permits further investigation, and even dehors any direction from the court, it is open to the police to conduct proper investigation, even after the court takes cognizance of any offence on the strength of a police report earlier submitted.

70. However, the question before this Court is whether sub section (8) of Section 173 of the CrPC permits further investigation after the Magistrate has accepted a final report (closure report) under sub section (2) of Section 173 of the CrPC. The contention raised on behalf of the accused persons is that acceptance of a closure report would terminate the proceedings finally so as to bar the investigating agency from carrying out any further investigation in connection with the offence.

71. The learned counsel appearing for the accused persons submitted that an order accepting the closure report under Section 190(1)(c) of the CrPC is a judicial order and not an administrative order. Relying on the

decision of this Court in Kamlapati Trivedi v. State of West Bengal reported in (1980) 2 SCC 91, it was submitted that when a final report of the police is submitted to the Magistrate and the Magistrate passes an order (a) agreeing with the report of the police and filing proceedings; or (b) not agreeing with the police report and holding that the evidence is sufficient to justify the forwarding of the accused to the Magistrate and takes cognizance of the offence complained of, such order is a judicial order.

72. We are at one with the aforesaid submission canvassed on behalf of the accused persons. However, this is not going to make any difference. What is necessary to be examined is as to whether an order passed under Section 190(1) of the CrPC accepting a final report being a judicial order would bar further investigation by the police or the CBI as in the present case, in exercise of the statutory powers under chapter XII of the CrPC?

73. In State of Rajasthan v. Aruna Devi reported in (1995) 1 SCC 1, a complaint was filed in the Court of Munsif and Judicial Magistrate, First Class, Bilara, against the respondents under various sections of the IPC. The gravamen of the allegation was that the respondents had, in pursuance of a conspiracy, transferred some land on the strength of a special power of attorney bearing forged signature. The Magistrate, after perusal of the complaint, directed an investigation to be made as contemplated by Section 156(3) of the CrPC. A case was registered thereafter, by the police and a final report was submitted on 18.07.1981 stating that complaint was false. The report came to be accepted by the Magistrate on 23.09.1981. It, however, so happened that the Superintendent of Police had independently ordered further investigation on 24.09.1981 and a challan came to be filed by police against the respondents, inter alia, under Sections 420 and 467 of the IPC. The Magistrate took cognizance on 25.06.1984. A challenge was made to this act of the Magistrate before Sessions Judge, Jodhpur, who dismissed the revision. On further approach to the High Court, the revision was allowed and the order of cognizance was set aside. The State came in appeal under Article 136 of the Constitution.

74. This Court observed in paras 3 and 4 respectively as under:

3. A perusal of the impugned judgment of the High Court shows that it took the view that the Magistrate had no jurisdiction to take cognizance after the final report submitted by police had been once accepted. Shri Gupta, appearing for the appellant, contends that this view is erroneous in law inasmuch as Section 173(8) of the Code permits further investigation in respect of an offence after a report under sub-section (2) has been submitted. Sub-section (8) also visualises forwarding of another report to the

Magistrate. Further investigation had thus legal sanction and if after such further investigation a report is submitted that an offence was committed, it would be open to the Magistrate to take cognizance of the same on his being satisfied in this regard.

4. Shri Francis for the respondents, however, contends that the order of the Magistrate taking cognizance pursuant to filing of further report amounted to entertaining second complaint which is not permissible in law. To substantiate the legal submission, we have been first referred to Pramatha Nath Taluqdar v. Saroj Ranjan Sarkar [1962 Supp (2) SCR 297 : AIR 1962 SC 876 : (1962) 1 Cri LJ 770], in which a three-Judge Bench of this Court dealt with this aspect. A perusal of the judgment of the majority shows that it took the view that dismissal of a complaint under Section 203 of the Code is no bar to the entertainment of a second complaint on the same facts; but the same could be done only in exceptional circumstances some of which have been illustrated in the judgment. Further observation in this regard is that a fresh complaint can be entertained, inter alia, when fresh evidence comes forward. In the present case, this is precisely what had happened, as on further investigation being made, fresh materials came to light which led to the filing of further report stating that a case had been made out.

75. The aforesaid decision of this Court has been rightly referred to and relied upon by the High Court in its first order dated 11.09.2014.

76. This Court in K. Chandrasekhar (supra) was considering a case, where on the complaint of a Police Inspector, a case was registered by the Kerala Police against the appellants therein for the offences punishable under Sections 3 and 4 respectively of the Official Secrets Act, 1923 read with Section 34 IPC on the allegation that in collusion with some Indians and foreigners they had committed acts prejudicial to the safety and sovereignty of India. During the investigation, certain other persons (appellants in accompanying appeals) were arrested. Thereafter, a DIG of Police, who was the head of the team conducting the investigation, recommended the case for being investigated by the CBI. Pursuant to such recommendation, the Government of Kerala by a notification dated 02.12.1994 accorded its consent under Section 6 of the Delhi Special Police Establishment Act, 1946 (for short, 'the Act') for further investigation of the case by the CBI. Accordingly, the CBI took up the investigation. After completion of the investigation, on 16.04.1996, the CBI filed its report in the final form under Section 173(2) of the CrPC, stating that the charges were not proved and were false. Accepting the report, the Magistrate discharged the accused-appellants. Thereafter, on 27.6.1996, the Government of Kerala issued a notification withdrawing the consent earlier

given to the CBI to investigate the said case. The object of the said notification was to enable a reinvestigation of the case by a team of State Police Officers. By a mandatory notification dated 08.07.1996, the words "reinvestigation of the case" were substituted by the words "further investigation of the case". The State Government notification dated 27.6.1996 (as amended) was upheld by the High Court. This Court held that, from a plain reading of Section 173 of the CrPC, it is evident that even after submission of police report under sub section (2) on completion of investigation, the police has a right of "further" investigation under sub section (8), but not "fresh investigation" or "reinvestigation". The dictionary meaning of "further" (when used as an adjective) is "additional; more; supplemental". "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. The Court drew inspiration from the fact that sub section (8) clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report or reports - and not fresh report or reports-regarding the "further" evidence obtained during such investigation. The Court held that once it is accepted that an investigation undertaken by CBI pursuant to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that "further investigation" is a continuation of such investigation which culminates in a further police report under Section 173(8), it necessarily means that withdrawal of consent in the said case would not entitle the State Police to further investigate into the case. However, the Court further observed thus:"To put it differently, if any further investigation is to be made, it is the CBI alone which can do so, for it was entrusted to investigate into the case by the State Government." (Emphasis supplied). Thus, what was held by the Court was that after submission of report under Section 173(2) Cr. P.C. reinvestigation or fresh investigation is not permissible. However, it has been expressly observed that if any further investigation is to be made, it is the CBI alone which can do so. In other words, further investigation could be carried out, but that the same could be done by the CBI alone as it was entrusted to investigate into the case by the State Government and had carried out the investigation and submitted final report in connection therewith.

77. In S. Papaiah (supra) on a complaint made by the UPSC, investigation had been carried out by the CBI and final report was submitted under Section 173 of the CrPC before the Metropolitan Magistrate, before whom the first information report had been

lodged, seeking closure of the case. The CBI in spite of the request made to it by the UPSC did not inform about the filing of the final report seeking closure of the case to the UPSC. The report was returned by the learned Metropolitan Magistrate as notice had not been issued to the complainant by the CBI though the CBI had asserted that it had informed the UPSC regarding the filing of the closure report. The final report was resubmitted by the CBI to the Court of the Metropolitan Magistrate along with a copy of the notice sent by the CBI to the UPSC. It appears that the report was again returned by the Metropolitan Magistrate seeking proof of service of notice on the de facto complainant. While the proceedings of submission of the final report were pending, the UPSC addressed a letter to the Director of CBI pointing out that the investigation had not been carried out properly and that the filing of the closure report was not justified. While the UPSC was awaiting further communication from the CBI in that behalf, the CBI resubmitted the closure report and the learned Metropolitan Magistrate accepted the final report submitted by the CBI and closed the file without any opportunity being provided to the UPSC to have its say. Upon receipt of communication of the order of the court accepting the closure report, the UPSC filed a petition before the learned Metropolitan Magistrate submitting that the complaint had not been properly investigated and that it had no notice about the acceptance of the final report. The Court rejected the petition of the UPSC observing that it had accepted the final report filed by the CBI on 16.03.1995, since the UPSC had not filed its objections to the acceptance of the final report and as such, it could not complain. The Court also opined that since an order accepting final report was a judicial order and not an administrative order, therefore, it had no power to review such an order passed by it "rightly or wrongly" and that the UPSC could file a revision petition seeking appropriate orders against the acceptance of the final report from the revisional court. The revision petition filed by the UPSC was dismissed by the revisional court. In appeal before this Court, it was held thus:

"13. The appellant brought the contents of communication dated 23.01.1995 to the notice of the learned Metropolitan Magistrate through its Miscellaneous Petition No. 2040 of 1995 seeking 'reinvestigation' but the learned Magistrate, rejected the petition vide order dated 4.11.1995, observing that 'rightly or wrongly that court had passed an order and it had no power to review the earlier order.' Here, again the learned Magistrate fell into an error. He was not required to 'review' his order. He could have ordered 'further investigation' into the case. It appears that the learned Metropolitan Magistrate overlooked the provisions of

Section 173(8) which have been enacted to take care of such like situations also."

(Emphasis supplied)

78. After referring to the provisions of Section 173(8) of the CrPC, the Court observed that the Magistrate could, thus, in exercise of the powers under Section 173(8) of the CrPC, direct the CBI to "further investigate" the case and collect further evidence keeping in view the objections raised by the UPSC to the investigation and the "new" report to be submitted by the Investigating Officer would be governed by sub-sections (2) to (6) of Section 173 of the CrPC. The Court held that the learned Magistrate failed to exercise the jurisdiction vested in him by law and his order dated 04.11.1995 cannot be sustained.

79. In the light of the aforesaid decision of the Supreme Court, it appears that though the order passed by the learned Magistrate accepting a final report under Section 173 is a judicial order, there is no requirement for recalling, reviewing or quashing the said order for carrying out further investigation under Section 173(8) of the CrPC. As held by this Court in the said decision, the provisions of Section 173(8) of the CrPC have been enacted to take care of such like situations also.

80. In N.P. Jharia v. State of M.P. reported in (2007) 7 SCC 358, proceedings had been initiated against the appellant therein in connection with possession of pecuniary resources disproportionate to his known sources of income. After investigation the Special Police Establishment (SPE) submitted a "final report" on 01.03.1990 informing the court that no offence was made out against the appellant. The final report was accepted by the Special Judge on 17.04.1990. But on 01.07.1992, the SPE submitted an application before the Special Judge, seeking permission for further investigation. The Special Judge permitted further investigation. Thereafter, the sanction for prosecution was obtained from the State Government on 01.03.1995. The chargesheet was filed in the court on 24.07.1995. On behalf of the appellant, it was urged that once the final report was submitted there is no scope for further investigation. The Court held that so far as further investigation was concerned in the background of Section 173(8) of the CrPC the plea was clearly untenable.

81. In Kari Choudhary v. Mst. Sita Devi reported in (2002) 1 SCC 714, FIR No. 135 was registered on the basis of a complaint lodged by Sita Devi and investigation was commenced thereafter. During investigation, the police found that the murder of the victim, Sugnia Devi was committed pursuant to a conspiracy hatched by her mother-in-law Sita Devi and her daughters-in-law besides the others. So, the police sent a report to the court on 30.11.1998 stating that the allegations in FIR No. 135 were false. The police continued

with the investigation after informing the court that they had registered another FIR as FIR No. 208 of 1998. This Court, inter alia, held thus:

"11. Learned counsel adopted an alternative contention that once the proceedings initiated under FIR No. 135 ended in a final report the police had no authority to register a second FIR and number it as FIR No. 208. Of course the legal position is that there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation would be carried on under both of them by the same investigating agency. Even that apart, the report submitted to the court styling it as FIR No. 208 of 1998 need be considered as an information submitted to the court regarding the new discovery made by the police during the investigation that persons not named in FIR No. 135 are the real culprits. To quash the proceedings merely on the ground that final report had been laid in FIR No. 135 is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who have committed it.

12. Even otherwise, the investigating agency is not precluded from further investigation in respect of an offence in spite of forwarding a report under sub-section (2) of section 173 of a previous occasion. This is clear from Section 173(8) of the Code."

(Emphasis supplied)

82. Thus, a conspectus of the aforesaid decisions of this Court rendered in cases where final reports (closure reports) had already been submitted and accepted makes the position of law very clear that even after the final report is laid before the Magistrate and is accepted, it is permissible for the investigating agency to carry out further investigation in the case. In other words, there is no bar against conducting further investigation under Section 173(8) of the CrPC after the final report submitted under Section 173(2) of the CrPC has been accepted. It is also evident, that prior to carrying out a further investigation under Section 173(8) of the CrPC, it is not necessary for the Magistrate to review or recall the order accepting the final report.

83. We may summarise our final conclusion as under:

(i) Even after the final report is laid before the Magistrate and is accepted, it is permissible for the investigating agency to carry out further investigation in the case. In other words, there is no bar against conducting further investigation under Section 173(8) of the CrPC after the final report submitted under Section 173(2) of the CrPC has been accepted.

(ii) Prior to carrying out further investigation under Section 173(8) of the CrPC it is not

necessary that the order accepting the final report should be reviewed, recalled or quashed.

(iv) Further investigation is merely a continuation of the earlier investigation, hence it cannot be said that the accused are being subjected to investigation twice over. Moreover, investigation cannot be put at par with prosecution and punishment so as to fall within the ambit of Clause (2) of Article 20 of the Constitution. The principle of double jeopardy would, therefore, not be applicable to further investigation.

(v) There is nothing in the CrPC to suggest that the court is obliged to hear the accused while considering an application for further investigation under Section 173(8) of the CrPC."

40. Upon due consideration of the facts of the instant case, indicated above, as also the observations made by the Hon'ble Apex Court in various pronouncements, referred above, this Court finds that in the instant case, request/prayer for re-investigation/further investigation by an accused, who is applicant in the instant case, is not liable to be acceded. It is for the following reasons:-

(i) In Para 36 of this judgment the Court has already observed regarding right of an accused at the stage of investigation, according to which, the accused has no right.

(ii) It appears that the I.O., after due investigation which includes collection of evidence, examination of various persons and reduction of statements into writing and thereafter considering the contents of the same including FIR, medical report(s) of injured(s) namely Pramod Tiwari, Manya Tiwari, Sonika Tiwari and Aditya Tiwari as also the statements of witnesses of fact, prepared the charge sheet and thereafter submitted it before the Court concerned.

(iii) The discrepancies related to date(s) and time, as indicated by the learned counsel for the applicant, would be considered by the trial Court at the stage of trial and the same are not required for seeking re-investigation/ further investigation so far as the present case is concerned. It is in view of the observation made in Para 24 of this judgment, wherein this Court after considering the facts including the facts based upon the various documents including the affidavit(s) of Sri Rajitram and Indradev Tiwari filed alongwith the supplementary affidavit by the applicant, observed that some altercation between two sides took place in the night of 23.07.2023 between 09:00 PM and 10:00 PM.

41. For the reasons aforesaid, this Court finds no force in the present application. It is accordingly ***dismissed***.

(2024) 8 ILRA 607
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.08.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application U/s 482 No. 7104 of 2024

Mohit & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicants:
Prathama Singh, Ashish Kumar Singh, Pal Singh Yadav

Counsel for the Respondents:
G.A.

Criminal Law-The Bharatiya Nagarik Suraksha Sanhita,2023-Sections-126/135-Court cannot construe a section of statue with reference to that of another unless the latter is in pari materia with the former-when the law requires the Magistrate to apply his mind, then there has to be a due application of mind. The manner in which the notice has been issued, it clearly transpires that it has been prepared by some person of the office of the Sub Divisional Magistrate and thereafter he put his signatures and the notice has got issued. This practice is reprimanded. It is expected that the Sub Divisional Magistrate shall apply his mind as required in law before issuing notice under Section 130 of BNSS for taking appropriate action under Section 126/135 of BNSS-Printed format cannot be a satisfaction which is required under Section 130 of BNSS while issuing notice under Section 126/135 of BNSS. (Para 17,21 & 22) (E-15)

List of Cases cited:

1. Siya Nand Tyagi Vs St.of U.P. reported in 1994 Cri. LJ 1298

2. Tavindar Kumar & anr.Vs St.reported in 1990 Cri LJ 40.

3. Application U/S 482/378/407 No. 2927 of 2017(Dr. Mirza Shahab Shah Vs St.Of U.P. & Ors.)

4. 2016 (1) U.P. Criminal Ruling page 483 & 2008 (3) U.P. Criminal Ruling page 496

5. APPLICATION U/S 482 No. 3065 of 2019

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Ms. Prathama Singh, learned counsel for the applicants and learned AGA for the State and perused the record.

2. The present application has been filed for the following main reliefs:-

> *"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to summon the record from opposite party no.2 and quash the impugned order/notice dated 27.07.2024 passed by opposite party no.2 viz. Sub Divisional Magistrate Sidhauli, District Sitapur as Annexure no. 1 to this petition.*
>
> *It is further prayed that till disposal of instant petition, further proceeding pending before learned Sub Divisional Magistrate Sidhauli District Sitapur be stayed in the interest of justice."*

3. By means of the present application, a notice dated 27.07.2024 issued under Section 130 Bhartiya Nagrik Suraksha Sanhita, 2023 (in short "BNSS") by Sub Divisional Magistrate, Sidhauli, Sitapur.

4. It is stated that on account of apprehension that the applicants may cause breach of peace, a report dated 15.07.2024 was submitted by the S.H.O., Police Station- Sidhauli, District-Sitapur in the light of provisions indicated under Section 126/135 of BNSS.

5. Learned counsel for the applicants submitted that the impugned notice dated 27.07.2024 is liable to be set aside because the same has been issued without application of mind as the concerned Magistrate has not recorded his opinion to the effect that their exists sufficient ground to take action under the provisions of Section 130 of BNSS and further that the same is a printed proforma.

6. She further submitted that a printed format cannot be a satisfaction which is required under Section 130 of BNSS while issuing notice under Section 126/135 of BNSS.

7. She has placed reliance upon the judgement of this Court in the Case of ***Siya Nand Tyagi v. State of U.P.*** reported in ***1994 Cri. LJ 1298*** and also the judgement of the Delhi High Court in the case of ***Tavindar Kumar and another v. State*** reported in ***1990 Cri LJ 40***.

8. This Court in Siya Nand Tyagi v. State of U.P. (supra) has clearly held thus:-

> *"3. It is unfortunate that the requirement of Section 107 of the Code that the Executive Magistrate receiving information should be of the opinion that there are sufficient grounds for proceedings under the said section have become a dead letter and are always followed in its breach. It should be borne in mind that the proceedings Under Section 107 / 116 of the Code some times cause irreparable loss and unnecessary harassment to the public who run to the Court at the costs of their own vocations of life. Unless it is absolutely necessary proceedings Under Section 107/116, Cr. P.C. should not be resorted to experience tells that proceedings like the one under Section 107/116 of the Code are conducted in a most lethargic and lackadaisical manner by the learned Executive Magistrate causing harassment to public beyond measure.*
>
> *4. 107 is aimed at a person who causes reasonable apprehension of conduct likely to lead to apprehension of breach of peace or a disturbance of public tranquillity. It is a preventive measure. Proceedings under Section 107/116 should not be transformed into persecution of innocent persons at the sweet will of the police or other persons acting mala fide.*
>
> *5. In the case of Mohan Lal v. State of U.P., 1977 All Cri C 333 this Court observed:-*
>
> *"There are a series of decisions in which it has been held that the provisions contained in Section 111 of the Code are mandatory and that the non-compliance thereof vitiated the entire proceedings."*
>
> *6. In the case of Madhu Limaye v. S. D. M. Mongyr, , the Apex Court, in para 36 of its judgment observed:*

We have seen the provisions of Section 107. That section says that action is to be taken in the manner here-in-after provided and this clearly indicate that it is not open to a Magistrate in such a case to depart from the procedure to any substantial extent. This is very salutary because the liberty of the person is involved and the law is rightly solicitous that this liberty should only be curtaided according to its own procedure and not according to the whim of the Magistrate concerned. It behoves us, therefore, to emphasise the safeguards built into the procedure because from there will arise the consideration of the reasonableness of the restrictions in the interest of public order or in the interest of the general public."

In this very case the Apex Court went on the observe in para 37 "Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquillity at his hands. Although the section speaks of the `substance of the information' it does not mean the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word 'substance' means the essence of the most important parts of the information."

7. In the present case the learned Sub-Divisional Magistrate has thrown the mandatory provisions of Section 111 of the Code to the winds and has prepared a printed pro forma. The learned Magistrate has also not recorded his opinion that there existed sufficient grounds to take action under the provisions of Section 107 of the Code."

9. In the judgment dated 04.05.2017 passed in ***Application U/S 482/378/407 No. 2927 of 2017(Dr. Mirza Shahab Shah vs. State Of U.P. & Ors.)***, this Court quashed the similar notice under Section 111 Cr.P.C., after considering the relevant provisions and judgments cited i.e. ***2016 (1) U.P. Criminal Ruling page 483 and 2008 (3) U.P. Criminal Ruling page 496.*** The relevant portion of the judgment dated 04.05.2017 reads as under:-

"9. It has been submitted by the learned counsel for the applicant that the notice issued to the applicant under Section 111 Cr.P.C. is absolutely without jurisdiction, as it does not fulfill the requirement of law. The learned counsel for the applicant has referred to a judgment of this Court reported in 2016 (1) U.P. Criminal Ruling page 483 and 2008 (3) U.P. Criminal Ruling page 496.

10. In both the aforesaid cases it has been held that passing of an order under Section 111 Cr.P.C. is not a mere formality. It should be clear on the face of the order that the order has been passed after application of judicial mind. If no substance of the information is mentioned in the order, the person against whom the order has been made, will remain ignorant of the material against

him. The person to be proceeded against has to show cause, therefore, he must know the grounds for apprehending a breach of peace or disturbance at his hands. The preliminary order passed under Section 111 Cr.P.C. is the foundation of the jurisdiction and the words "substance" means, the essence of the information received by the Magistrate.

11. In the present case, a perusal of the notice issued to the applicant clearly reveals that no substance of the information received, is mentioned in the order or the notice. Even challani report sent by the police does not disclose, as to how the applicant, who is holding such an important post, would cause breach of peace. In these circumstances, I find that the learned City Magistrate has proceeded on a wrong assumption that the applicant is a person of such reputation that he may disturb law and order during the assembly elections. The learned Magistrate has not recorded his opinion that there exists sufficient grounds to take action against the applicant."

10. In similar circumstance the proceedings relating to Case No. 55 of 2019 (State vs. Pradeep Singh) under Section 111 Cr.P.C, Village- Rasoolabad, Police Station-Kaiserganj, District-Bahraich pending in the Court of Pargana Magistrate, Kaiserganj, District Bahraich was challenged by way of filing 482 ***Petition No. 3065 of 2019*** and this Court allowed the same vide order dated 23.04.2019, which on reproduction reads as under:-

"This instant petition has been filed under Section 482 Cr.P.C. challenging the entire proceedings relating to Case No. 55 of 2019 (State vs. Pradeep Singh) under Section 111 Cr.P.C. Village- Rasoolabad, Police Station Kaiserganj, District Bahraich pending in the Court of Pargana Magistrate, Kaiserganj, District Bahraich.

It is contended that Pargana Magistrate, Kaiserganj, District Bahraich has issued the impugned notice under Section 111 Cr.P.C. on the basis of the police report dated 03.03.2019 without application of judicial mind. It is alleged that impugned notice has been issued on typed format in cyclostyle manner. In the said typed format only the date and name of the police station has been filled in the gaps. It is further submitted that contrary to the provisions of Section 111 Cr.P.C., the Pargana Magistrate has not set forth the substance of the information received by him in the impugned notice which is mandatory in nature and non-compliance thereof vitiates the entire proceedings.

Learned AGA opposed the petition and has submitted that impugned proceedings under Section 111 Cr.P.C. are in accordance with law.

In this respect, learned counsel for the revisionist has relied on 2010 (2) JIC 36 (All) (LB) Rakesh Singh @ Rakesh Kumar Singh vs. State of UP. The relevant part of the judgment is reporduced as under:-

".....5. Learned counsel for the petitioner placed reliance on the law laid down by Hon'ble Apex Court in the cases of Madhu Limaye v. Sub-Divisional Magistrate, Monghyr and others, reported in 1970 (3) SCC 746, Gopalanachari v. State of Kerala, reported in A.I.R. 1981 SC 674 1980 (Supp) S.C.C. Page 649 SC and also in support of his arguments cited law laid down by this Court in the cases of, Siya Nand Tyagi v. State of U.P., reported in 1993 (30) ACC page 146, Ranjeet Kumar and others v. State of U.P. and others, reported in 2002 (43) A.C.C. Page 627, Shiv Kant Tripathi v. State of U.P. and another, reported in 2005 (3) JIC 477 (All), Devendra Kumar v. State of U.P. reported in 2006 (1) JIC page 196 (All), Har Charan v. State of U.P. another, reported in 2008 (2) JIC page 418, Lola @ Manish Dhar Dubey @ Babloo v. State of U.P., reported in 2009 (1) JIC 629 (All) and Mahesh Prasad Kannaujia v. State of U.P. reported in 2009 (2) JIC 918 (All).

6. Chapter VIII of the Code of Criminal Procedure, 1973 under the heading "security for keeping peace and for good behaviour" authorizes the Magistrate to take appropriate steps for preventing a person from committing breach of public peace.

7. Sections 110 and 111 of the Code of Criminal Procedure, 1973 (Act No.2 of 1974) are reproduced as under :-

"110. Security for good behaviour from habitual offenders.- When (an Executive Magistrate) receives information that there is within his local jurisdiction a person who-

(a) is by habit a robber, house-breaker, thief, or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter II of the Indian Penal Code (45 of 1860), or under Section 489-A, Section 489-B, Section 489-C or Section 489-D of that Code, or

(e) habitually commits, or attempts to commit, or abets the commission of, offences, involving a breach of the peace, or

(f) habitually commits, or attempts to commit, or abets the commission of-

(I) any offence under one or more of the following Act, namely :-

(a) the Drugs and Cosmetics Act, 1940 (23 of 1940);

(b) the Foreign Exchange Regulation Act, 1973 (46 of 1973) ;

(c) the Employees' Provident Fund (and Family Pension Fund) Act, 1952 (19 of 1952)

(d) the Prevention of Food Adulteration Act, 1954 (37 of 1954) ;

(e) the Essential Commodities Act, 1955 (10 of 1955) ;

(f) the Untouchability (Offences) Act, 1955 (22 of 1955);

(g) the Customs Act, 1962 (52 of 1962) ;

(h) the Foreigners Act, 1946 (3 of 1946) ; or

(ii) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community,

Such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

111. Order to be made.- When a Magistrate acting under Section 107, Section 108, Section 109 or Section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

8. A bare perusal of provisions of Section 110 Cr.P.C. would reveal that the proceedings under Section 110 are taken to prevent committing such acts, a person as mentioned therein. The object of Section 110 is to afford protection to the public against a repetition of crimes against their person or property ; not a punishment of the offender for his past offences but securing good bahaviour for the future. The passing of preliminary order under section 111 Cr.P.C. is a condition precedent for taking further steps, no final order in proceeding can be passed without giving an opportunity to such person to show cause.

9. In the case of Gopalanachari (Supra), it was observed by Hon'ble the Apex Court "Law is what the law does, even as freedom is what freedom does. Going by that test, Section 110 cannot be permitted in our free Republic to pick up the homeless and the have-nots as it did when under British subjection because today to be poor is not a crime in this country. George Bernard Shaw, though ignorant of Section 110, did sardonically comment that "the greatest of evils and the worst of crimes is poverty."

10. Since Section 110 Cr.P.C. confers drastic powers, bind down suspected persons, but not proved to have committed any of the offences specified in various clauses, the power should be used with extreme caution and judicial discretion and strictly according to procedure laid down, so that it may not be used as an engine of oppressions, black-mail or private vengeance and the Magistrate should not be influenced by vague rumour or gossip.

11. In the case of Gopalanachari (Supra), Hon'ble the Apex Court observed in para -6 of the judgment as under :-

"The constitutional survival of Section 110 certainly depends on its obedience to Article 21, as this Court has expounded. Words of wide import, vague amplitude and far too generalised to be safe in the hands of the police cannot be constitutionalised in the context of Article 21 unless read down to be as a fair and reasonable legislation with reverence for human rights. A glance at Section 110 shows that only a narrow signification can be attached to the words in clauses (a) to (g), "by habit a robber.....", " by habit a receiver of stolen property .....", "habitually protects or harbours thieves.....", "habitually commits or attempts to commit or abets the commission of....." "is so desperate and dangerous as to render his being at large without security hazardous to the community." These expressions, when they become part of the preventive chapter with potential for deprivation of a man's personal freedom up to a period of three years, must be scrutinized by the court closely and anxiously. The poor are picked up or brought up, habitual witnesses swear away their freedom and courts ritualistically. commit them to prison and Article 21 is for them a freedom under total eclipse in practice. Courts are guardians of human rights. The common man looks upon the trial Court as the protector. The poor and the illiterate, who have hardly the capability to defend themselves, are nevertheless not 'non-persons', the trial Judges must remember. This Court in Hoskot case has laid down the law that a person in prison shall be given legal aid at the expense of the State by the court assigning counsel. In cases under Section 110 of the Code, the exercise is often an idle ritual deprived of reality although a man's liberty is at stake. We direct the Trial Magistrates to discharge their duties, when trying cases under Section 110, with great responsibility and whenever the counter-petitioner is a prisoner give him the facility of being defended by counsel now that Article 21 has been reinforced by Article 39- A. Otherwise the order to bind over will be bad and void. We have not the slightest doubt that expressions like 'by habit', 'habitual', 'desperate', 'dangerous', 'hazardous' cannot be flung in the face of a man with laxity of semantics. The court must insist on specificity of facts and be satisfied that one swallow does not make a summer and a consistent course of conduct convincing enough to draw the rigorous inference that by confirmed habit, which is second nature, the counter-petitioner is sure to commit the offences mentioned if he is not kept captive. Preventive sections privative of freedom, if incautiously proved by indolent judicial processes, may do deeper injury. They will have the effect of detention of one who has not been held guilty of a crime and carry with it the judicial imprimatur, to boot. To call a man dangerous is itself dangerous ; to call a man desperate is to affix a desperate adjective to stigmatize a person as hazardous to the

community is itself a judicial hazard unless compulsive testimony carrying credence is abundantly available. A sociologist may pardonably take the view that it is the poor man, the man without political clout, the person without economic stamina, who in practice gets caught in the coils of Section 110 of the Code, although, we as court, cannot subscribe to any such proposition on mere assertion without copious substantiation. Even so, the court cannot be unmindful of social realities and be careful to require strict proof when personal liberty may possibly be the causality. After all, the judicial process must not fail functionally as the protector of personal liberty."

12. The powers under section 110 Cr.P.C. must be exercised after observing all the formalities required under the law. The Magistrate can apply his power only on convincing testimony that the person is clear and present danger to the society. It is for the prevention, not the punishment of the crime. The Magistrate has to exercise his discretion in judicious manner.

13. The passing of preliminary order under Section 111 Cr.P.C. is obligatory. An order under section 111 Cr.P.C. is a condition precedent for taking further steps in any proceedings under sections 107 - 110 Cr.P.C. The first thing that the Magistrate must do after receipt of the information referred to in Sections 107 - 110 Cr.P.C. is to apply his mind to such information and, if he is satisfied that there is ground for proceeding under this chapter, to pass an order in writing under section 111 Cr.P,C. The order under section 111 Cr.P.C. must be in a writing and broadly contain the elements (i) Substance of the information received under Sections 107 - 110 Cr.P.C. (as the case may be), (ii) Upon a consideration of such information he has formed the opinion that there is a likelihood of a breach of the peace and that it is necessary to proceed under the relevant sections (Sections 107 - 110 Cr.P.C. as the case may be). He is not bound to draw up an order under Section 111 Cr.P.C., merely because he has received a Police Report or other information, (iii) the amount of the bond to be executed, (iv) the term for which the bond is to remain in force, (v) The number, character and class of sureties required, in cases under Section 110 Cr.P.C., and, if so required, under Sections 107 - 109 Cr.P.C. On the other hand, the order under section 111 Cr.P.C. need not give - (i) the source of the information received, or supply a copy of the Police report (ii) the list of witnesses in support of the information or the order, (iii) the definite acts which the person intends to commit where the substance of the information is communicated, (iv) a reference to Section 111 Cr.P.C. itself, if the substantive section (107-110 Cr.P.C. as the case may be) is mentioned in the order, (v) the period of imprisonment to be suffered in default of execution of the bond, (vi) any extraneous matter.

14. In the case of Madhu Limaye (Supra), Hon'ble the Apex Court observed "Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquility at his hands. Although the section speaks of the 'substance' of the information it does not mean that the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word 'substance' means the essence of the most important parts of the information."

15. From the perusal of the record, it transpires that the impugned notice under section 111 Cr.P.C. has been issued on a typed format in a cyclo styled manner and in the said typed format only the name, date and police station has been filled in the gaps and also the Pargana Magistrate did not set forth the substance of the information received by him in the impugned notice.

16. In the case of Madhu Limaye (Supra) it was held by Hon'ble the Apex Court that the person proceeded against show cause notice must be informed of the allegations made against him, by giving him the substance of the information so that he may meet such allegations.

17. The preliminary order contemplated under Section 111 Cr.P.C. is a judicial order and has to be prepared and drawn up cautiously and carefully in compliance with the provisions of section 111 Cr.P.C. and the order must contain reasons of the Magistrate satisfaction. The substance of the information is the matter upon which he has to show cause. If substance of information is not given in the order under Section 111 Cr.P.C. the person against whom the order has been made will remain in confusion. The extent of information which must be set forth depends in each case upon the circumstances of that case. The basic object of preliminary order being to give the person proceeded against an opportunity to meet the allegation made against him as well as nature of the order proposed."

In the present case also the impugned order has been passed on the printed format without recording any reasons and this shows total non application of judicial mind. The impugned order in view of the aforesaid judgment is not in accordance with law. The notice under Section 111 Cr.P.C. contains allegations on printed/cyclostyle proforma which indicates per-conceived notions hence, the impugned notice under challenge is void and proceedings against the petitioner is nullity and without jurisdiction as substance of information received as required is incomplete and ambiguous which vitiates the entire proceedings. Such notice is apparently abuse of process of law and the Pragana Magistrate has failed to comply with the mandatory requirements of

Section 111 Cr.P.C. which vitiates the preliminary order as well as the consequential proceedings. The procedure followed by learned Magistrate is not in accordance with law.

Considering the aforesaid facts and law laid down by this Court as well as the Apex Court in the aforesaid cases, it is a fit case to invoke the powers of this Court under Section 482 Cr.P.C.

Consequently, the petition under Section 482 Cr.P.C. is allowed and the entire proceedings relating to Case No. 55 of 2019 (State vs. Pradeep Singh) under Section 111 Cr.P.C. Village-Rasoolabad, Police Station Kaiserganj, District Bahraich pending in the Court of Pargana Magistrate, Kaiserganj, District Bahraich and the notice issued are quashed. However, learned Magistrate shall be at liberty to draw the fresh proceedings against the petitioner in accordance with the provisions of law."

11. Perused the impugned notice issued under Section 130 of BNSS and also considered the judgements placed before this Court.

12. For coming to the conclusion, it would be appropriate to take note of relevant provisions of the Code of Criminal Procedure, 1973 (in short "Cr.P.C.) (now repealed) and BNSS.

13. Chapter VIII (Security for keeping the peace and for good behaviour) of Cr.P.C. deals with preventive actions and Chapter IX (Security for keeping the peace and for good behaviour) of BNSS also deals with preventive action.

14. The relevant provisions related to the present case of Chapter VIII of Cr.P.C. are extracted herein-under:

***"106. Security for keeping the peace on conviction**.-(1) When a Court of Session or Court of a Magistrate of the first class convicts a person of any of the offences specified in sub-section (2) or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding three years, as it thinks fit.*

(2) The offences referred to in sub-section (1) are-

(a) any offence punishable under Chapter VIII of the Indian Penal Code (45 of 1860), other than an offence punishable under Section 153-A of Section 153-B or Section 154 thereof:

(b) any offence which consists of, or includes, assault or using criminal force or committing mischief;

(c) any offence of criminal intimidation;

(d) any other offence which caused, or was intended or known to be likely to cause, a breach of the peace.

(3) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(4) An order under this section may also be made by an appellate court or by a Court when exercising its powers of revision.

***107. Security for keeping the peace in other cases**.-(1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, [with or without sureties] for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.*

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

***108. Security for good behaviour from persons disseminating seditious matters**.-(1) When [an Executive Magistrate] receives information that there is within his local jurisdiction any person who, within or without such jurisdiction,-*

(i) either orally or in writing or in any other manner, intentionally disseminates or attempts to disseminate or abets the dissemination of,-

(a) any matter the publication of which is punishable under Section 124-A or Section 153-A or Section 153-B or Section 295-A of the Indian Penal Code (45 of 1860), or

(b) any matter concerning a Judge acting or purporting to act in the discharge of his official duties which amounts to criminal intimidation or defamation under the Indian Penal Code (45 of 1860),

(ii) makes, produces, publishes or keeps for sale, imports, exports, conveys, sells, lets to hire, distributes, publicly exhibits or in any other manner puts into circulation any obscene matter such as is referred to in Section 292 of the Indian Penal Code (45 of 1860),

and the Magistrate is of opinion that there is sufficient ground for proceeding, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

(2) No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with, the rules laid down in the Press and Registration of Books Act, 1867 (25 of 1867), with

reference to any matter contained in such publication except by the order or under the authority of the State by the State Government in this

109. Security for good behaviour from suspected persons.*-When [an Executive Magistrate] receives information that there is within his local jurisdiction Executive to conceal his presence and there is reason to believe that he is doing so with a view to committing a cognizable offence, the Magistrate may, in the manner hereinafter provided, require such person to shore cause why he should not be ordered to execute a bond, with or without sureties for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.*

110. Security for good behaviour from habitual offenders*. When an Executive Magistrate] receives information that there is within his local jurisdiction a person who-*

(a) is by habit a robber, house-breaker, thief, or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of 1860), or under Section 489-A, Section 489-B, Section 489-C or Section 489-D of that Code, or

(e) habitually commits, or attempts to commit, or abets the commission of, offences, involving a breach of the peace, or

(f) habitually commits, or attempts to commit, or abets the commission of-

(i) any offence under one or more of the following Acts, namely:-

(a) the Drugs and Cosmetics Act, 1940 (23 of 1940);

[(b) the Foreign Exchange Regulation Act, 1973 (46 of 1973)]:

(c) the Employees' Provident Fund 56 [and Family Pension Fund] Act, 1952 (19 of 1952);

(d) the Prevention of Food Adulteration Act, 1954 (37 of 1954);

(e) the Essential Commodities Act, 1955 (10 of 1955);

(f) the Untouchability (Offences) Act, 1955 (22 of 1955);

(g) the Customs Act, 1962 (52 of 1962); 57[*]

[(h) the Foreigners Act, 1946; or]

(ii) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to

execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

***111. Order to be made**. When a Magistrate acting under Section 107, Section 108, Section 109 or Section 110, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.*

15. The relevant provisions related to the present case of Chapter IX of BNSS are extracted herein-under:

> ***"125. Security for keeping peace on conviction**.—(1) When a Court of Session or Court of a Magistrate of the first class convicts a person of any of the offences specified in sub-section (2) or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond or bail bond, for keeping the peace for such period, not exceeding three years, as it thinks fit.*
>
> *(2) The offences referred to in sub-section (1) are—*
>
> *(a) <u>any offence punishable under Chapter XI of the Bharatiya Nyaya Sanhita, 2023 (45 of 2023), other than an offence punishable under sub-section (1) of section 193 or section 196 or section 197 thereof;</u>*
>
> *(b) any offence which consists of, or includes, assault or using criminal force or committing mischief;*
>
> *(c) any offence of criminal intimidation;*
>
> *(d) any other offence which caused, or was intended or known to be likely to cause, a breach of the peace.*
>
> *(3) If the conviction is set aside on appeal or otherwise, the bond or bail bond so executed shall become void.*
>
> *(4) An order under this section may also be made by an Appellate Court or by a Court when exercising its powers of revision.*
>
> *<u>(See: Section 106 of Criminal Procedure Code 1973.)</u>*
>
> ***126. Security for keeping peace in other cases.—(**1) When an Executive Magistrate receives information that any person is likely to commit a breach of the*

peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond or bail bond for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

(See: Section 107 of Criminal Procedure Code 1973.)

127. Security for good behaviour from persons disseminating certain matters.—(1) When an Executive Magistrate receives information that there is within his local jurisdiction any person who, within or without such jurisdiction,—

(i) either orally or in writing or in any other manner, intentionally disseminates or attempts to disseminate or abets the dissemination of,—

(a) any matter the publication of which is punishable under section 152 or section 196 or section 197 or section 299 of the Bharatiya Nyaya Sanhita, 2023 (45 of 2023); or

(b) any matter concerning a Judge acting or purporting to act in the discharge of his official duties which amounts to criminal intimidation or defamation under the Bharatiya Nyaya Sanhita, 2023;

(ii) makes, produces, publishes or keeps for sale, imports, exports, conveys, sells, lets to hire, distributes, publicly exhibits or in any other manner puts into circulation any obscene matter such as is referred to in section 294 of the Bharatiya Nyaya Sanhita, 2023, and the Magistrate is of opinion that there is sufficient ground for proceeding, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a

bond or bail bond, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.

(2) No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and edited, printed and published in conformity with, the rules laid down in the Press and Registration of Books Act, 1867 (25 of 1867) with reference to any matter contained in such publication except by the order or under the authority of the State Government or some officer empowered by the State Government in this behalf.

(This section corresponds to Section 108 of Criminal Procedure Code 1973.)

***128. Security for good behaviour from suspected persons**.—When an Executive Magistrate receives information that there is within his local jurisdiction a person taking precautions to conceal his presence and that there is reason to believe that he is doing so with a view to committing a cognizable offence, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond or bail bond for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit.*

(See: Section 109 of Criminal Procedure Code 1973.)

***129. Security for good behaviour from habitual offenders**.—When an Executive Magistrate receives information that there is within his local jurisdiction a person who—*

(a) is by habit a robber, house-breaker, thief, or forger; or

(b) is by habit a receiver of stolen property knowing the same to have been stolen; or

(c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property; or

(d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter X of the Bharatiya Nyaya Sanhita, 2023, or under section 178, section 179, section 180 or section 181 of that Sanhita; or

(e) habitually commits, or attempts to

commit, or abets the commission of, offences, involving a breach of the peace; or

(f) habitually commits, or attempts to commit, or abets the commission of—

(i) any offence under one or more of the following Acts, namely:—

(a) the Drugs and Cosmetics Act, 1940 (23 of 1940.);

(b) the Foreigners Act, 1946 (31 of 1946);

(c) the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952);

(d) the Essential Commodities Act, 1955 (10 of 1955);

(e) the Protection of Civil Rights Act, 1955 (22 of 1955);

(f) the Customs Act, 1962 (52 of 1962);

(g) the Food Safety and Standards Act, 2006 (34 of 2006); or

(ii) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption; or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community, such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bail bond, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.

(This section corresponds to Section 110 of Criminal Procedure Code 1973.)

***130. Order to be made**.—When a Magistrate acting under section 126, section 127, section 128 or section 129, deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force and the number of sureties, after considering the sufficiency and fitness of sureties."*

(See: Section 111 of Criminal Procedure Code 1973.)

16. From a conjoint reading of provision(s) of Cr.P.C. and BNSS, referred above, it is apparent that the same are similar/pari materia, except underlined portion(s) of the same. The underlined portion(s), in the aforesaid provision(s) have no bearing on the procedure to be followed while exercising the power under the said provision(s), which deals with preventive actions.

17. The rule of construction is well settled. A Court cannot construe a section of statue with reference to that of another unless the latter is in pari materia with the former.

18. Both the Acts, indicated above, are in pari materia i.e. statues dealing with the same subject matter or forming part of the same system, except the underlined portion(s). These underlined portion(s) do not play any role in determining the exercise of power under the said provision(s), which deals with preventive actions.

19. Thus, in view of above, the principles settled in the judgments, referred above, would also apply in relation to the proceedings related to the above referred provision(s) of BNSS.

20. Hence, any deviation from the established principles is not required.

21. In the considered opinion of the Court, when the law requires the Magistrate to apply his mind, then there has to be a due application of mind. The manner in which the notice has been issued, it clearly transpires that it has been prepared by some person of the office of the Sub Divisional Magistrate, (Sidhauli), Sitapur and thereafter he put his signatures and the notice has got issued. This practice is reprimanded. It is expected that the Sub Divisional Magistrate, (Sidhauli), Sitapur, shall apply his mind as required in law before issuing notice under Section 130 of BNSS for taking appropriate action under Section 126/135 of BNSS.

22. The notice/order appears to be on printed proforma and on a pointed query being made to the learned Additional Government Advocate, he could also not justify the notice.

23. Having considered the above including the observations made in the judgment(s) referred above as also that the impugned notice/order which appears to be a printed proforma, the notice/order dated 27.07.2024 issued by the Sub Divisional Magistrate, (Sidhauli), Sitapur, is hereby quashed.

24. Accordingly, present application is ***allowed***.

25. Magistrate concerned shall be at liberty to issue a fresh notice/order under Sections 126/135 BNSS in accordance of law.

26. The Court records the assistance given by Ms. Urmish Shankar, Research Associate, attached with me in this judgment and finding out case laws applicable in the present case.

27. Office is directed to communicate this order to the Magistrate concerned forthwith.

(2024) 8 ILRA 623
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/s 482 No. 9885 of 2024

Prakash & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:

Sri Mayank Pratap Singh

Counsel for the Respondent:
Sri Dharmendra Pratap Singh, G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 482-Indian Penal Code, 1860-Sections 323, 427 & 504-summoning order-handling of rival NCRs-filing of chargesheet-Subsequent criminal complaint-the present case revolves around the legal representation and procedural handling of rival NCRs (Non Cognizable Reports) and subsequent criminal complaints under IPC-It examines the court discretion in summoning the accused under additional sections of the IPC based on the evidence presented in both the NCRs and the subsequent complaint-In this case, the learned Magistrate while passing an order u/s 204 CrPC was not aware about factum of filing of a charge sheet for non-cognizable offence in pursuance of an investigation conducted on NCR against 4 applicants and the same has not been disclosed in statements recorded u/s 202 CrPC-learned magistrate failed to take note of filing of NCR and its outcome - Hence, impugned order set aside-Matter remanded back to decide afresh.(Para 1 to 15)

B. Upon similar set of facts as well as on similar set of allegations, proceedings arising out of police report as well as proceedings of complaint case could not proceed together if they are instituting by misleading the court and abusing its process of law only with a view to harass the helpless litigants. However, in the present case, the conduct of complainant was bonafide and has no malice and he has come up with clean hands - complainant has specifically stated about lodging of NCR in the complaint and essentially it was the reason to file complaint since no FIR was lodged.(Para 11)

The application is disposed of. (E-6)

List of Cases cited:

1. Krishna Lal Chawla & anr. Vs. St. of U.P. & anr. (2021) 5 SCC 435

2. Kapil Agarwal & ors. Vs. Sanjay Sharma & ors. (2021) 5 SCC 524

3. Prem Nath Mishra & ors. Vs St. of U.P. & anr. 2024: AHC: 124406

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. In the present case, on basis of alleged occurrence took place on 10.07.2016, complainant has lodged an NCR on 11.08.2016 i.e. about 1 month against Prakash, Manoj, Raja Babu and Bintu (applicants no. 1 to 3 and 6) for offence under Sections 323, 504, 427 IPC.

2. The complainant thereafter has filed an application under Section 155(2) Cr.P.C. for investigation disclosing names of all six applicants and that they have committed offences under Sections 323, 504, 427 IPC wherein vide order dated 16.08.2016, a direction was passed for investigation. Consequently investigation was conducted on above referred NCR and a charge sheet was submitted on 03.01.2017 against above referred 4 applicants under Sections 323, 504, 427 IPC.

3. The trial Court considered above referred charge sheet as a complaint under provisions of Section 2(d) Cr.P.C. and summoned above referred 4 applicants under Sections 323, 504, 427 IPC vide order dated 18.03.2017.

4. Controversy involved in present case arose when before above referred charge sheet was filed on 03.01.2017, the complainant approached Court of a Magistrate by way of filing a criminal

complaint on 17.09.2016 not only above referred 4 applicants but other two applicants (applicants no. 4 and 5) that they were involved in above referred occurrence allegedly took place on 10.07.2016 and have committed cognizable offence under Sections 452, 323, 504, 506, 427 IPC. In complaint, factor of filing NCR was disclosed with an allegation that correct facts and name of all assailants were not correctly recorded.

5. In aforesaid complaint, learned Magistrate recorded statement of complainant and witnesses respectively under Section 200 and 202 Cr.P.C. (on 09.12.2016, 21.01.2017 and 17.07.2018) and thereafter vide order dated 16.11.2018 passed under Section 204 Cr.P.C. summoned all applicants to face trial for offence under Sections 452, 323, 504, 506, 427 IPC. It would be relevant to refer here that statement of complainant Nawab Singh and witness Kunwar Singh were earlier recorded by police during investigation of NCR but this fact was not disclosed in their subsequent statement recorded in criminal complaint case as well as they have disclosed involvement of only 4 applicants therein.

6. Applicants being aggrieved by above summoning order have filed a revision petition mainly on ground that on same occurrence, complainant has already filed an NCR wherein name of only 4 applicants were mentioned for committing non-cognizable offence, on which investigation was conducted and a charge sheet under non-cognizable offence against only 4 applicants was filed and which was treated as a complaint case and summons were issued. Aforesaid facts were suppressed at least during arguments and trial Court has also not taken endeavour to call a report on it and erroneously summoned the applicants.

7. In support of above grounds, Sri Rishi Bhushan Johari, Advocate holding brief of Sri Mayank Pratap Singh, learned counsel for applicants has placed reliance on **Krishna Lal Chawla and others vs. State of U.P. and others, (2021) 5 SCC 435 and Kapil Agarwal and others vs. Sanjay Sharma and others, (2021) 5 SCC 524** that filing of multiple complaints for similar alleged occurrence by improving earlier version, would be considered as abuse of process of law.

8. Sri Dharmendra Pratap Singh, learned counsel for opposite party-2 and learned AGA for State have not disputed aforesaid facts on basis of record but they submitted that there is no legal bar in lodging NCR and complaint case on same occurrence and in such event, procedure prescribed under Section 210 Cr.P.C. would be applicable.

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

10. As referred above, it is not disputed that on basis of same occurrence, two proceedings were initiated, one arising out of charge sheet filed on basis of non-cognizable report wherein after investigation, a charge sheet was filed for non-cognizable offence and proceedings were commenced as per Section 2(d) Cr.P.C. and another on basis of a complaint case wherein after statement recorded under Sections 200 and 202 Cr.P.C. summons were issued against all applicants for committing cognizable offence.

11. Issue involved in present case has recently been considered by this Court

in a judgment passed in the case of **Prem Nath Mishra and others vs. State of U.P. and another, 2024:AHC:124406** and relevant paragraphs thereof being relevant are quoted below -:

> "6. Sri Deepak Upadhyay, learned counsel for applicants has heavily placed reliance on **Krishna Lal Chawla and another vs. State of U.P. and another, (2021) 5 SCC 435** that on similar set of facts as well as on similar set of allegations, proceedings arising out of police report as well as proceedings of complaint case could not proceed together if they are instituting by misleading the Court and abusing its process of law only with a view to harass the helpless litigants and relevant paragraphs thereof are quoted below -:
>
> "23. As aforesaid, the trial courts and the Magistrates have an important role in curbing this injustice. They are the first lines of defence for both the integrity of the criminal justice system, and the harassed and distraught litigant. We are of the considered opinion that the trial courts have the power to not merely decide on acquittal or conviction of the accused person after the trial, but also the duty to nip frivolous litigations in the bud even before they reach the stage of trial by discharging the accused in fit cases. This would not only save judicial time that comes at the cost of public money, but would also protect the right to liberty that every person is entitled to under Article 21 of the Constitution. In this context, the trial Judges have as much, if not more, responsibility in safeguarding the fundamental rights of the citizens of India as the highest court of this land.
>
> 24. As recorded by us above, the present controversy poses a typical example of frivolous litigants abusing court process to achieve their mischievous ends. In the case before us, the Magistrate was aware of the significant delay in the filing of private complaint by Respondent 2, and of the material improvements from the earlier NCR No. 158 of 2012 which were made in the private complaint. It was incumbent on the Magistrate to examine any possibility of abuse of process of the court, make further enquiries, and dismiss the frivolous complaint at the outset after judicial application of mind.
>
> 25. However, this was not done — the Magistrate issued process against the appellants by order dated 4-4-2019, and this controversy has now reached this Court for disposal.
>
> 26. It is a settled canon of law that this Court has inherent powers to prevent the abuse of its own processes, that this Court shall not suffer a litigant utilising the institution of justice for unjust means. Thus, it would be only proper for this Court to deny any relief to a litigant who attempts to pollute the stream of justice by coming to it with his unclean hands. Similarly, a litigant pursuing frivolous and vexatious proceedings cannot claim unlimited right upon court time and public money to achieve his ends.

27. This Court's inherent powers under Article 142 of the Constitution to do "complete justice" empowers us to give preference to equity and a justice-oriented approach over the strict rigours of procedural law (State of Punjab v. Rafiq Masih [State of Punjab v. Rafiq Masih, (2014) 8 SCC 883 : (2014) 4 SCC (Civ) 657 : (2014) 6 SCC (Cri) 154 : (2014) 3 SCC (L&S) 134]). This Court has used this inherent power to quash criminal proceedings where the proceedings are instituted with an oblique motive, or on manufactured evidence (Monica Kumar v. State of U.P. [Monica Kumar v. State of U.P., (2008) 8 SCC 781 : (2008) 3 SCC (Cri) 649]). Other decisions have held that inherent powers of High Courts provided in Section 482 CrPC may be utilised to quash criminal proceedings instituted after great delay, or with vengeful or mala fide motives. (Sirajul v. State of U.P. [Sirajul v. State of U.P., (2015) 9 SCC 201 : (2015) 3 SCC (Cri) 749] ; State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426 : AIR 1992 SC 604] .) Thus, it is the constitutional duty of this Court to quash criminal proceedings that were instituted by misleading the court and abusing its processes of law, only with a view to harass the hapless litigants.

28. In this Court's quest for complete justice, and to bring peace between the parties, who are fighting various litigations since 2006, we exercise our powers under Article 142 to quash all the litigations between the parties arising out of this incident."

9. It is not much in dispute that on basis of alleged occurrence, complainant has first filed an NCR wherein after investigation, charge sheet was filed for non-cognizable offence and trial Court considered it to be a complaint case under Section 2(d) Cr.P.C. and summons were issued to applicants for offence u/s 323 and 504 IPC.

10. After charge sheet was filed and before summons were issued, complainant has filed a criminal complaint disclosing facts of NCR that applicants have committed cognizable offence and trial Court vide impugned order, after considering statement u/s 200 and 202 Cr.P.C. has summoned the applicants for offence u/s 323, 504, 506 and 452 IPC.

11. Court takes note of **Krishna Lal Chawla (supra)** that multiple proceedings on same set of facts could not be proceeded further and it could be quashed if they are attended with malafide and initiated only to harass accused persons.

12. In present case, there is no argument on behalf of learned counsel for applicants that impugned passed u/s 204 Cr.P.C. itself is illegal as no requisite reason was assigned that there are sufficient grounds to proceed against applicants as well as that it was not based on material available on record i.e. complaint, statement recorded u/s 200 and 202 Cr.P.C. Relevant part of impugned order has already been quoted in preceding paragraph.

13. In the present case, complainant has specifically stated about lodging of NCR in the complaint and essentially it was reason to file complaint since no FIR was lodged. The applicants have not brought on record before trial Court about factum of filing charge sheet for non-cognizable offence in pursuance of NCR and that it was treated as a complaint case under Section 2(d) Cr.P.C. The conduct of complainant was bonafide and has no malice as he has come up with clean hands.

14. Legal error committed by trial Court is that despite being aware that an NCR was already lodged. No police report was summoned to ascertain outcome of NCR and facts thereof only on ground that on some set of allegations, both NCR/FIR and criminal complaint was filed, itself would not be a malafide approach rather the Court has to look into attending circumstances to ascertain whether it was a creature of malafide which is not evident in present case."

12. In present case also, the learned Magistrate while passing an order under Section 204 Cr.P.C. was not aware about factum of filing of a charge sheet for non-cognizable offence in pursuance of an investigation conducted on NCR against 4 applicants and same has not been disclosed in statements of witnesses recorded under Section 202 Cr.P.C. though in the statement recorded under Section 200 Cr.P.C., complainant has disclosed about fact of lodging NCR with a contention that it was not rightly recorded. The advocate who has argued for summoning has also not disclosed status, though prior to impugned order, four applicants were summoned in complaint case (under Section 2(d) Cr.P.C.), possibly learned counsel was not properly instructed. For reference, order passed under Section 204 Cr.P.C. on 16.11.2018 is quoted below -:

"16-11-2018

परिवाद की यह पत्रावली आदेश हेतु पेश हुई। पूर्व नियत दिनांक पर परिवादी के विद्वान अधिवक्ता को सुना जा चुका है, आदेश हेतु पत्रावली का अवलोकन किया।

परिवाद में तथ्य संक्षेप में इस प्रकार हैं कि दिनांक 10-07-2016 को समय करीब 11-00 बजे परिवादी अपने घर पर था कि तभी पडा◌ेसी प्रकाश परिवादी की पत्नी से गुपचुप तरीके से बात कर रहा था। प्रकाश से परिवादी ने पूछा कि तुम मेरी पत्नी से क्या बात कर रहे हो तो इतना सुनते ही प्रकाश उसे गन्दी गन्दी गालियों देते हुए चला गया और थोडी देर बाद समय 11-30 बजे प्रकाश अपने भाईयों मनोज, राजाबाबू, दीपक, वीरेन्द्र व बिन्दू के साथ एकराय मश्वरा होकर उसके घर में गन्दी गन्दी गालियों देते हुए घुस आया और लात मुक्कों, लाठी डण्डा व सरिया से मारपीट करने लगे। विपक्षीगण ने उसकी जेब से मोबाइल निकाल कर तोड दिया। चीख पुकार कुँवर चौधरी, तेजवीर आदि काफी लोग मौके पर आ गए, जिन्होंने घटना देखी और उसे बचाया। विपक्षीगण जान से मारने की धमकी देते हुए चले गए।

परिवादिनी ने अपने कथनों के समर्थन में स्वंय को तथा तारा 202 द०प्र०सं० के अन्तर्गत साक्षीगण कुमर चौधरी व श्यामवीर सिंह का मौखिक साक्ष्य अंकित कराया है।

प्रस्तुत मामले में परिवादिनी के द्वारा विपक्षीगण पर मुख्य रूप से घर में घुसकर गाली गलौच कर मारपीट करने व जान से मारने की धनकी देवे व जेब से मोवाइल निकालकर तोड देने का अभियोग लगाते हुए यह परिवाद प्रस्तुत किया है।

धारा 200 द०प्र०सं० के बयानों में परिवादिनी द्वारा यह कहा गया है कि विपक्षीगण प्रकाश, मनोज, राजाबाबू, दीपक, वीरेन्द्र व विन्दू के साथ एकराय मश्वरा होकर उसके घर में गन्दी गन्दी गालियां देते हुए घुस आए और लात मुक्का, लाठी डण्डा व

सरिया से मारपीट करने लगे। उसकी जेब से मोबाइल निकाल कर तोड दिया तथा लोगों के आने पर जान से मारने की धमकी देते हुए चले गए। इसी प्रकार के तथ्यों का उल्लेख परिनादी की ओर से परीक्षित साक्षीगण द्वारा अपने बयान अन्तर्गत धारा 202 द०प्र०सं० में भी किया गया है।

विपक्षीगण के विरूद्ध परिवादी की ओर से प्रस्तुत की गई साक्ष्य व साक्षीगण की साक्ष्य के विश्लेषण से विपक्षीगण प्रकाश, मनोज, राजाबाबू, दीपक, वीरेन्द्र व बिन्दू के विरूद्ध धारा 452, 323, 504, 506 व 427 भा०द०सं० का अपराध बनना प्रथम दृष्टया प्रतीत हो रहा है। तदानुसार अभियुक्तगण प्रकाश, मनोज, राजाबाबू, दीपक, वीरेन्द्र व बिन्टू उक्त अपराध में तलब किए जाने योग्य हैं।"

13. In present case, arguments were on legal issue and no argument was submitted that impugned order was legally incorrect on basis of statements recorded under Section 200 and 202 Cr.P.C. and that there was no sufficient grounds to proceed.

14. The contents of above referred impugned order shows that learned Magistrate has absolutely not taken note of filing of NCR and its outcome as well as not taken step or endeavour to ascertain it. It is also apparent that before Revisional Court also, specific legal and factual issues were not properly raised.

15. In aforesaid circumstances, orders dated 20.01.2024 passed in Criminal Revision No. 390 of 2023 (Prakash and others vs. State of U.P. and another) by learned Sessions Judge, Aligarh as well as summoning order dated 16.11.2018 passed by learned ACJM, Court-3, Aligarh in Complaint Case No 3240 of 2016 (Nawab Singh vs. Prakash Singh and others) under Sections 452, 323, 504, 506, 427 IPC, Police Station- Harduaganj, District-Aligarh are hereby set aside and matter is remitted back to concerned Revisional Court to pass a fresh order after taking note of judgments of **Krishna Lal Chawla (supra)** and **Kapil Agarwal (supra)** as well as Prem Nath Mishra (supra) as well as record of Case No. 477/2017 (State vs. Prakash and others) u/s 323, 504, 427 IPC, Police Station- Harduaganj, District-Aligarh within 3 months after hearing the complainant only.

16. Application is, accordingly, **disposed of**.

17. Registrar (Compliance) to take steps.

(2024) 8 ILRA 629
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/s 482 No. 10408 of 2024

Udairaj Singh @ Udaiveer & Ors.
...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Amitrana

Counsel for the Respondent:
G.A., Nagendra Pratap Singh

Criminal Law-The Indian Penal Code,1860-Section 307- The Evidence Act-1872-Section 72 - The Code of Criminal Procedure-1973-Section 204- The Magistrate who is conducting an investigation himself under the procedure as provided under Cr.P.C. for complaint case is not so handicapped that even it could not look the material annexed along with charge sheet, specifically a

document, which could fall within fore corner of a 'public document' as deprived under Section 74 of Indian Evidence Act- Essential ingredients of Section 307 I.P.C. are prima facie made out that has assailant at least knowledge that under such circumstances (i.e. when he aimed at chest of injured, if he by that act caused death he would be guilty of murder) (Para 11 & 14)

Application U/s 482 Cr.P.C rejected. (E-15)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

Oral Order:

1. In the present case few facts are not under disputed that complainant has initially lodged an FIR against present applicants, which was registered as Crime No. 0086 of 2020, under Sections 147, 148, 149, 342, 504, 307 I.P.C., Police Station Noorpur, District Bijnor.

2. In the aforesaid FIR investigation was conducted, however, a final report was submitted on 27.04.2020. The complainant thereof filed a Protest Petition, which was considered as a Criminal Complaint by an order dated 06.12.2022. Thereafter, statement of complainant under Section 200 Cr.P.C. and witnesses under Section 202 Cr.P.C. were recorded and present applicants were summoned under Sections 147, 148, 149, 307, 504 I.P.C. by impugned order dated 31.05.2023 passed under Section 204 Cr.P.C.

3. Learned counsel for applicants has mainly argued that impugned order was passed essentially on basis of a medical report of injured which has been extensively recorded and considered in the impugned order. His further argument is that the said medical report was not placed by complainant or witnesses during proceedings and was taken note possibly from document annexed with the charge sheet, which ought to not have done as it was alien to procedure prescribed for consideration of complaint case and to pass an order under Section 204 Cr.P.C.

4. It is further contended that even on basis of nature of injury, which is "Lacerated 2 x 2 cm right upper margin are inverted, blackening wound bone deep and tattooing are present and also blackening present. KUO. Opinion- above injury are KUO, Fresh and caused by fire arm," was not sufficient to summon the applicants under Section 307 I.P.C. as not only it was caused on non vital part, but was not dangerous to life also. It is on record that doctors, who examined injured as well as operated, were examined under Section 202 Cr.P.C. The relevant part of impugned order is reproduced hereinafter:-

"पत्रावली के अवलोकन से विदित है कि परिवादी द्वारा विपक्षीगण पर मुख्यतः यह आरोप किया गया कि जब वादी के चाचा अमरपाल खेत पर काम कर रहे थे, तब अभियुक्तगण ने वादी के चाचा अमरपाल को घेरकर गालियां देते हुए उन पर जान से मारने की नीयत से फायर किया, जिससे वे घायल हो गये। परिवादी द्वारा बयान अंतर्गत धारा 200 दं०प्र०सं० में घटना का समर्थन किया गया है। परिवादी साक्षी अमरपाल, जो कि प्रकरण का चुटैल भी है, उसके द्वारा स्वयं पर विपक्षीगण महेन्द्र, उदयराज, सनी, आकाश, देवेंद्र तथा ओमकार द्वारा तमंचे से फायर करना कहा गया है तथा दाहिने हाथ में गोली लगना कहा गया है। परिवादी साक्षी बरम सिंह द्वारा भी घटना का समर्थन किया गया है। परिवादी साक्षी डॉ. अजय धर्मेश द्वारा बयान अंतर्गत धारा 202 दं०प्र०सं० में कहा गया कि अमरपाल सिंह का मेडिकल मेरे द्वारा दिनांक 19 मार्च 2020 को किया गया। मैं उस दिन प्राथमिक स्वास्थ्य केंद्र नूरपुर पर अपनी ड्यूटी पर मौजूद था। मजरूब के

शरीर पर आई बाह्य संगों पर चोटों का परीक्षण मेरे द्वारा समय 19:15 बजे किया गया। शरीर पर आई चोट का उपचार मेरे द्वारा किया गया। चोट नंबर 1 फायर आर्म्स चोट थी। मजरूब के दाहिने हाथ की भुजा पर गोली का निशान ब्लैकनिंग, जिसका एक्स रे जिला चिकित्सालय में कराया गया था। दिनांक 23 मार्च 2020 को मजरूब के शरीर से गोली के छर्रे निकाले गए थे। सभी चोटों का विवरण मेरे द्वारा मेडिकल रिपोर्ट में सप्लीमेंट्री रिपोर्ट में दर्शाया गया है, जो मैंने विवेचक को सपोर्ट कर दी थी। परिवादी साक्षी डॉ. नरेश जौहरी द्वारा बयान अंतर्गत धारा 202 दं०प्र०सं० में कहा गया कि दिनांक 23 मार्च 2020 को मेरे द्वारा ऑपरेशन करके अमरपाल के दाहिने हाथ में लगी गोली के छर्रों को निकाला गया था। उक्त निकाले गए गोली के छर्रों को मेरे द्वारा एक डिब्बी में रखकर अस्पताल के टेप से सील किया गया था तथा मेरे हस्ताक्षर बने थे उक्त निकाले गए छर्रों की डिब्बी मैंने विवेचक को सुपुर्द कर दी थी।

मेडिकल रिपोर्ट के अवलोकन से दर्शित है कि मजरूब अमरपाल सिंह का मेडिकल पुलिस द्वारा दिनांक 19.03.2020 को समय 07:15 अपराह्न पर कराया गया है, जिसमें मजरूब अमरपाल सिंह को निम्नलिखित चोट दर्शायी गयी है:- Lacerated 2 x 2 cm right upper margin are inverted, blackeningwound bone deep and tattooing are present and also blackening present. KUO. Opinion above injury are KUO, Fresh and caused by fire arm सप्लीमेंट्री रिपोर्ट व एक्स-रे रिपोर्ट भी भी पत्रावली में संलग्न है। मजरूब को फायर आर्म्स से चोट आना दर्शाया गया है। चिकित्सक द्वारा मजरूब के दाहिने हाथ से निकाले गोली के छर्रे को विवेचक को सुपुर्द किया जाना कहा गया है। साक्षीगण बरम सिंह एवं अमरपाल सिंह द्वारा परिवाद के तथ्यों का समर्थन किया गया है। साक्षियों के बयानों एवं परिवाद के तथ्यों में कोई गंभीर विरोधाभास दर्शित नहीं होता है। परिवादी व उसके द्वारा परीक्षित साक्षियों के उपरोक्त साक्ष्य, मेडिकल रिपोर्ट व पत्रावली पर उपलब्ध प्रपत्रों के आधार पर अभियुक्तगण महेन्द्र, उदयराम, सनी, आकाश, देवेन्द्र एवं ओमकार द्वारा धारा 147,148,149,307 व 504 भा०दं०सं० का अपराध प्रथम दृष्टया कारित किया जाना पाया जाता है। ऐसी स्थिति में परिवादी के कथनों एवं उपलब्ध साक्ष्य के आधार पर प्रथम दृष्टया विपक्षीगण को विचारण किये जाने हेतु तलब किये जाने का आधार पर्याप्त दर्शित होता है।"

5. The above submissions are opposed by Sri Nagendra Pratap Singh, learned counsel for opposite party no. 2, though on basis of material on record, he is not able to show that above referred medical report was either placed by complainant or witnesses during their statements recorded under Sections 200 and 202 Cr.P.C. except in impugned order, the learned Trial Court has noted in impugned order that medical report, supplementary report and x-ray report was available on record. So far as nature of injury is concerned, it is the argument of learned counsel for opposite party no. 2 that aforesaid fire arm injury was caused when injured has tried to safe his life from a bullet aimed on him and it hit him on hand and by operation, number of pellets were taken out.

6. Heard Sri Rajnish Kumar Singh, Advocate holding brief of Sri Amit Rana, learned counsel for applicants, Sri Nagendra Pratap Singh, learned counsel for opposite party no. 2, learned A.G.A. for State and perused the record.

7. The above referred facts are not under disputed that an FIR was lodged by complainant, which was investigated and finally a final report was submitted. Lateron a Protest Petition was filed by complainant, which was treated as a Complaint Case and thereafter statements were recorded under Sections 200 and 202 Cr.P.C. and thereafter applicants were summoned by impugned order dated 31.05.2023, under Sections 147, 148, 149, 307, 504 I.P.C.

8. In present case, complainant got examined Dr. Ajay Dharmesh and Dr. Naresh Johari, under Section 202 Cr.P.C., who have examined and operated the injured. In their respective statements they have mentioned that injured got a fire arm injury and on operation number of pellets were taken out. For reference, said statements are reproduced hereinafter:-

"पी०डब्लू०- 3

4.4.23 डाक्टर अजय धर्मेश गन्धर्व हाल तैनात प्राथमिक स्वास्थ्य केन्द्र नूरपुर ने सशपथ बयान किया कि-

अमर पाल सिह का मेडीकल मेरे द्वारा दिनाक 19.3.20 को मजरू अमरपाल सिंह निवासी ग्राम पुरैना थाना नूरपुर जनपद बिजनौर को मय चिटठी मजरूबी के वास्ते कराने मेडिकल मेरे समय लाया गया था मैं उस दिन प्राथमिक स्वाथ्य केन्द्र नूरपुर पर अपनी डियूटी पर मौजूद था।

मजरूब अमर पाल सिह के शरीर पर आयी वाह्य आंगों पर आयी चोटो का परीक्षण मेरे द्वारा समय 19:15 बजे पर किया गया शरीर पर आयी चोटों का उपचार मेरे द्वारा किये गये।

चोट नं0 1- फायर आर्म्स चोट थी मजरूब के दाहिने हाथ की भुजापर गोली का निशान ब्लैकनिंग जिसका एक्स-रे जिला चिकित्सासलय बिजनौर में कराया गया था तथा दिनांक 23.3.20 को मजरूब के शरीर से गोली के छर्रे निकाले थे सभी चोटों का विवरण मेरे द्वारा मेडिकल रिपोर्ट व सप्लीमेन्ट्री रिपोर्ट में दर्शाया गया है जो मैने इनवेस्टिगेशन ऑफिसर के सुपुर्द कर दी थी।

सुनकर तस्दीक किया।

उपरोक्त बयान मेरे द्वारा बोलने पर रीडर द्वारा लिखा गया।

"पी०डब्लू०-4

***नाम साक्षी-** डाक्टर नरेश जौहरी हाल तैनाती जिला अस्पताल बिजनौर ने सशपथ बयान किया कि - दिनांक 19.03.2020 को प्राथमिक स्वास्थ केन्द्र नूरपुर से डाक्टर श्री अज गन्धर्व के द्वारा गोली से घायल व्यक्ति अमरपाल पुत्र यादराम निवासी ग्राम पुरैना थाना नूरपुर जनपद बिजनौर को रैफर जिला चिकित्सालय बिजनौर भेजा गया था जिसका एक्स-रे के बाद दिनांक 23.03.2020 को मेरे द्वारा आपरेशन करके उसके दाहिने हाथ में लगी गोली के छर्रों को निकाला गया था उक्त निकाले गये गोली के छर्रों को मेरे द्वारा एक डिब्बी में रखकर अस्पताल के टेप से सील किया गया था तथा मेरे हस्ताक्षर बने थे उक्त निकाले गये छर्रों की डिब्बी मैंने विवेचक के सुपुर्द कर दी थी।"*

9. The statement of complainant Amarpal, uncle (injured) who was initially examined at P.H.C. Hospital Noorpur from where he was referred to Bijnor where operation took place was also recorded and for reference is also reproduced hereinafter:-

पी०डब्लू० -1

9.1.23

नाम साक्षी- अमरपाल सिह पुत्र यादराम सिह उम्र लगभग 57 वर्ष नि० ग्राम पुरैना थाना नूरपुर जिला बिजनोर ने सशपथ बयान किया कि मेरा व मेरे गावं अनोध (Anodh) का खेत की मेढ को लेकर विवाद चल रहा था। दि० 19.3.20 को समय 6:30 बजे शाम में अपने दूसरे खेत पर काम कर रहा था तभी महेन्द्र पुत्र सुखबीर उदयराज पुत्र महेन्द्र सनी पुत्र अनोर आकाश पुत्र अनोद देवेन्द्र पुत्र सुखबीर तथा ओमकार पुत्र कुन्दन अपने हाथों में तमन्चे लेकर मेरे खेत पर आ गये और कहने लगे कि दो दिन पहले तूने हमारे अनोद कुमार के चोट पहुँचायी तो उस मुकदमें में कानून तुझे सजा सुनाने में काफी देर करेगा इसलिए हम तुझे आज ही सजा सुना देते हे। आज गोली मार देगें तुझे, और इतना कहते ही सभी मुल्जिमान ने एक राय होकर कहा कि सालो को जान से मार दो सनी पुत्र अनोद व आकाश पुत्र अनोद ने अपने हाथों मे लिये तमन्चों से मुझे जान से मारने की नीयत से तमन्चों से फायर कर दिये। ।

मै उक्त मुल्जिमानो के इरादे को भाप गया और एक तरफ को हटा गया जिससे मुलजिमानो द्वारा चलायी गयी गोली मेरे सीने मे न लग कर हाथ मे लग गयी और मै घायल अवस्था में ही लूडक गया।

गोलियों की आवाज सुनकर मेरा भतीजा लवनीश कुमार तथा नइम सिह और गांव के काफी लोग घटना स्थल पर पहुँच गये भीड़ को देखकर उक्त सभी मुलिजमान भाग गये तब मेरे परिजन व मौके पर पहुंचे भीड़ की मदद से मुझे तुरन्त अस्पताल ले जाया गया

जहा मेरी गम्भीर स्थिति को देखकर नूरपुर से सरकारी अस्पताल तिर्वा रेफर कर दिया मेरे परिवार वालें मुझे जिला अस्पताल बिजनौर में भर्ती कर दिया।

दि० 20.3.20 को मेरा एक्स-रे हुआ जिसमें मेरे गोली दाहिने हाथ की भुजा में गोली फसा होना बताया गया था जिनके आधार पर 23.3.20 को डाक्टर के द्वारा आपरेशन करके गोली निकाली तब जाकर मेरी जान बची है। मुल्जिमानों को पहले से जानता था मैने उन्हे ठीक से पहचान लिया था।

सुनकर तस्दीक किया।

उपरोक्त बयान मेरे बोलने पर रीडर द्वारा लिखा गया।"

10. Under aforesaid circumstances, on basis of statement of injured as well as statement of doctors, at this stage, it is not under disputed that injured has suffered a fire arm injury at his right forearm and he was operated also wherein pellets were recovered. Nature of fire arm injury clearly indicate that it was fired from a close range.

11. The argument of learned counsel for applicants is that the learned Magistrate could not peruse material placed alongwith the charge sheet and in present case the document is a medical report. Though, he may be legally correct in regard to statements recorded under Sections 161 Cr.P.C. or 164 Cr.P.C. after Protest Petition was considered as a complaint but the Magistrate, who is conducting an investigation himself under the procedure as provided under Cr.P.C. for complaint case is not so handicapped that even it could not look the material annexed alongwith charge sheet, specifically a document, which could fall within fore corner of a 'public document' as deprived under Section 74 of Indian Evidence Act. It is not under disputed that medical report was placed on record during investigation, therefore, a medical report collected during investigation is a public document and contents thereof are not much in dispute. Learned Magistrate has perused the said document only in order to verify statement of injured as well as statement of doctors recorded under Section 202 Cr.P.C., which was completely corroborated. Therefore, there was no legal error if the Magistrate has looked into the medical report annexed alongwith charge sheet, even while passing an order under Section 204 Cr.P.C. At one stage, learned Magistrate has referred that these documents were available on record (पत्रावली).

12. Now, only argument left for consideration is whether referred nature of injury is prima facie sufficient to summon applicants under Section 307 I.P.C. In this regard, contents of Section 307 I.P.C. would become relevant, wherein it has been stated that "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 and in case if hurt is caused, he may be punished either to life imprisonment which may extent to ten years". In this regard, the statement of P.W.-3 (Dr. Ajay Dharmesh), P.W.-4 (Dr. Naresh Johari) as well as statement of injured P.W.-1 (Amarpal), which are part of earlier paragraph are relevant is also reproduced hereinafter:-

"पी०डब्लू०- 3

4.4.23 *डाक्टर अजय धर्मेश गन्धर्व हाल तैनात प्राथमिक स्वास्थ्य केन्द्र नूरपुर ने सशपथ बयान किया कि-*

अमर पाल सिह का मेडीकल मेरे द्वारा दिनाक 19.3.20 को मजरू अमरपाल सिंह निवासी ग्राम पुरैना थाना नूरपुर जनपद बिजनौर को मय चिटठी मजरूबी के वास्ते कराने मेडिकल मेरे समय लाया गया था मैं उस दिन प्राथमिक स्वाथ्य केन्द्र नूरपुर पर अपनी डियूटी पर मौजूद था।

मजरूब अमर पाल सिह के शरीर पर आयी वाह्य आंगों पर आयी चोटो का परीक्षण मेरे द्वारा समय

19:15 बजे पर किया गया शरीर पर आयी चोटों का उपचार मेरे द्वारा किये गये।

चोट नं0 1- फायर आर्म्स चोट थी मजरूब के दाहिने हाथ की भुजापर गोली का निशान ब्लैकनिंग जिसका एक्स-रे जिला चिकित्सालय बिजनौर में कराया गया था तथा दिनांक 23.3.20 को मजरूब के शरीर से गोली के छर्रे निकाले थे सभी चोटों का विवरण मेरे द्वारा मेडिकल रिपोर्ट व सप्लीमेन्ट्री रिपोर्ट में दर्शाया गया है जो मैने इनवेस्टिगेशन ऑफिसर के सुपुर्द कर दी थी।

सुनकर तस्दीक किया।

उपरोक्त बयान मेरे द्वारा बोलने पर रीडर द्वारा लिखा गया।

पी०डब्लू०-4

नाम साक्षी- डाक्टर नरेश जौहरी हाल तैनाती जिला अस्पताल बिजनौर ने सशपथ बयान किया कि - दिनांक 19.03.2020 को प्राथमिक स्वास्थ केन्द्र नूरपुर से डाक्टर श्री अज गन्धर्व के द्वारा गोली से घायल व्यक्ति अमरपाल पुत्र यादराम निवासी ग्राम पुरैना थाना नूरपुर जनपद बिजनौर को रैफर जिला चिकित्सालय बिजनौर भेजा गया था जिसका एक्स-रे के बाद दिनांक 23.03.2020 को मेरे द्वारा आपरेशन करके उसके दाहिने हाथ में लगी गोली के छर्रों को निकाला गया था उक्त निकाले गये गोली के छर्रों को मेरे द्वारा एक डिब्बी में रखकर अस्पताल के टेप से सील किया गया था तथा मेरे हस्ताक्षर बने थे उक्त निकाले गये छर्रों की डिब्बी मैंने विवेचक के सुपुर्द कर दी थी।।

पी०डब्लू० -1

9.1.23

नाम साक्षी- अमरपाल सिह पुत्र यादराम सिह उम्र लगभग 57 वर्ष नि० ग्राम पुरैना थाना नूरपुर जिला बिजनोर ने सशपथ बयान किया कि मेरा व मेरे गावं अनोध (Anodh) का खेत की मेढ को लेकर विवाद चल रहा था। दि० 19.3.20 को समय 6:30 बजे शाम में अपने दूसरे खेत पर काम कर रहा था तभी महेन्द्र पुत्र सुखबीर उदयराज पुत्र महेन्द्र सनी पुत्र अनोर आकाश पुत्र अनोद देवेन्द्र पुत्र सुखबीर तथा ओमकार पुत्र कुन्दन अपने हाथों में तमन्चे लेकर मेरे खेत पर आ गये और कहने लगे कि दो दिन पहले तूने हमारे अनोद कुमार के चोट पहुँचायी तो उस मुकदमें में कानून तुझे सजा सुनाने में काफी देर करेगा इसलिए हम तुझे आज ही सजा सुना देते हे। आज गोली मार देगें तुझे, और इतना कहते ही सभी मुल्जिमान ने एक राय होकर कहा कि सालो को जान से मार दो सनी पुत्र अनोद व आकाश पुत्र अनोद ने अपने हाथों मे लिये तमन्चों से मुझे जान से मारने की नीयत से तमन्चों से फायर कर दिये। ।

मै उक्त मुल्जिमानो के इरादे को भाप गया और एक तरफ को हटा गया जिससे मुलजिमानो द्वारा चलायी गयी गोली मेरे सीने मे न लग कर हाथ मे लग गयी और मै घायल अवस्था में ही लूडक गया।

गोलियों की आवाज सुनकर मेरा भतीजा लवनीश कुमार तथा नइम सिह और गांव के काफी लोग घटना स्थल पर पहुँच गये भीड़ को देखकर उक्त सभी मुलिजमान भाग गये तब मेरे परिजन व मौके पर पहुंचे भीड़ की मदद से मुझे तुरन्त अस्पताल ले जाया गया जहा मेरी गम्भीर स्थिति को देखकर नूरपुर से सरकारी अस्पताल तिर्वा रेफर कर दिया मेरे परिवार वालें मुझे जिला अस्पताल बिजनौर में भर्ती कर दिया।

दि० 20.3.20 को मेरा एक्स-रे हुआ जिसमें मेरे गोली दाहिने हाथ की भुजा में गोली फसा होना बताया गया था जिनके आधार पर 23.3.20 को डाक्टर के द्वारा आपरेशन करके गोली निकाली तब जाकर मेरी जान बची है। मुल्जिमानों को पहले से जानता था मैने उन्हे ठीक से पहचान लिया था।

सुनकर तस्दीक किया।

उपरोक्त बयान मेरे बोलने पर रीडर द्वारा लिखा गया।"

13. As referred above, injured has specifically stated that accused person have fired upon him aiming his chest, but since he step aside, he was hurt by fire arm on his hand and he immediately fallen down as well as the Court also takes note that P.W.-2 and P.W.-3, Doctors have also stated in their statements about nature of fire arm injury that there was a blackening, as such, it was shot from a close range. The doctors have also stated that medical report as well as supplementary report was handed over to Investigating Officer. At this stage, the Court is only considering where there are sufficient material grounds to proceed against applicants as required under Section 204 Cr.P.C. and is not conducting a mini

trial whether conviction could be made out or not. Therefore, even considering statements referred above, even without looking into the medical report, nature of injury is absolutely clear that it was a fire arm injury, shot from a close range and after operation pellets were recovered.

14. In these circumstances, statement of injured become very relevant that it was aimed on his chest and therefore, essential ingredients of Section 307 I.P.C. are prima facie made out that has assailant at least knowledge that under such circumstances (i.e. when he aimed at chest of injured, if he by that act caused death he would be guilty of murder).

15. A half hearted argument is also placed on record that allegation of firing was only on two applicants, however, learned counsel has missed that it was specific case of complainant as well as injured witness that all applicants have formed an unlawful assembly and have acted in furtherance of their common object. At this stage, the Court could not fracture the story, which has been supported by witnesses including two doctors. The last argument is that it was a counterblast case, as the applicants side has lodged an FIR of an occurrence against complainant side, which took place two days prior to present occurrence. However, this could not be a ground to reject a well reasoned order passed by learned Trial Court, who has meticulously examined the material on record to assign an opinion that there are sufficient ground to proceed.

16. Accordingly, all arguments raised by learned counsel for applicants have been dealt above and the Court is of considered opinion that they have no merit.

17. Accordingly, I do not find any reason to interfere with the impugned summoning order and therefore, present application is **rejected**.

(2024) 8 ILRA 635
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.08.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/s 482 No. 10451 of 2024

Smt. Reha Verma & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Sri M.S. Chauhan, Sri Shivkumari Chauhan

Counsel for the Respondent:
G.A., Ms. Shaili Ganguly

Criminal Law- The Code of Criminal Procedure-1973-Sections -204- Applicants are summoned for offence under Sections 323, 504, 506, 452 IPC-No offence of causing hurt is made out, therefore, offence of trespass is also not made out as it is alleged that after trespass, applicants have caused hurt to number of persons of complainant side-Basic ingredients of Section 504 & 506 IPC that there must be an 'alarm' as well as that nature of insult must be of such extent that complainant and his associates would be provoked to breach peace are missing as well as nature of insult or abusive language was also not disclosed by any witnesses, therefore, neither of said offences are made out-impugned order was passed only on basis of sweeping general and omnibus allegations without any specific role attributed to the accused, it would be unjust if they are forced to go through the tribulation of a trial-Result-Impugned order set aside.(Para 8, 9 & 10) (E-15)

List of Cases cited:

1. Mohammad Wajid & anr.Vs St.of U.P. & ors., 2023 SCC OnLine SC 951

2. Kahkashan Kausar @ Sonam & ors.Vs St.of Bihar & ors., (2022) 6 SCC 599

3. Achin Gupta Vs St.of Har. & anr., 2024 0 INSC 369

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri M.S. Chauhan, learned counsel for applicants and Ms. Shaili Ganguli, learned counsel for opposite party-2.

2. Applicants (8 in numbers) are family members whereas applicant no.1 is wife of complainant.

3. Learned counsel for applicants has extensively referred impugned order passed under Section 204 Cr.P.C. whereby all applicants are summoned for offence under Sections 323, 504, 506, 452 IPC as well as statement of complainant under Section 200 and of witnesses under Section 202 Cr.P.C. that impugned order was passed only on basis of omnibus and general allegations only for the purpose of putting wife of complainant (applicant no.1) and her close relatives under pressure as earlier applicant no.1 has lodged an FIR for matrimonial dispute against complainant and his close relatives as well as other 3 cases also. For reference, relevant part of impugned order dated 16.01.2024, statements under Section 200 and 202 Cr.P.C. are quoted below -:

"16.01.2024

सुना व अवलोकन किया। अवलोकन से दर्शित है कि परिवादी पंकज कुमार का बयान अंतर्गत धारा 200 दं०प्र०सं० दर्ज किया गया। परिवादी द्वारा साक्षी पी०डब्लू०1 पूजा कठेरिया, साक्षी पी०डब्लू०2 गोमती देवी तिवारी का बयान अंतर्गत धारा 202 दं०प्र०सं० अंकित कराया गया। परिवादी द्वारा अपने बयान अंतर्गत धारा 200 दं०प्र०सं० में विपक्षीगण द्वारा परिवादी के घर में घुसकर परिवादी के माता-पिता, बहन व छोटी बहू से मारपीट करने, गाली गलौज करने व घर में घुसकर 70,000/- ले जाने का कथन किया गया है। साक्षी पी०डब्लू०1 तथा साक्षी पी०डब्लू० 2 द्वारा अपने बयान अंतर्गत धारा 202 दं०प्र०सं० में परिवादी द्वारा किए गए कथनो की पुष्टि की गयी है। परिवाद पत्र के साथ दस्तावेजी साक्ष्य दाखिल किए गए है। दौरान जाँच एकत्र किए गए साक्ष्यों का परिशीलन करने के पश्चात यह निष्कर्ष निकलता है कि परिवादी द्वारा प्रस्तुत साक्ष्यों से परिवाद पत्र में वर्णित घटना के तात्विक बिन्दु प्रथम दृष्टया विश्वसनीय प्रतीत होते है।

पत्रावली पर उपलब्ध समस्त साक्ष्यों के आलोक में परिवाद कथानक में नौसर्गिकता परिलक्षित होती है, जिसके आधार पर विपक्षीगण श्रीमती रेहा वर्मा, राम औतार कठेरिया, श्रीमती आशा देवी, देवेन्द्र प्रताप कठेरिया, वीरेन्द्र प्रताप कठेरिया, प्रियंका उर्फ दिव्या, नीरज सिंह उर्फ गुड्डू व श्रीमती नेहा उर्फ सुमन को धारा 323,504,506 व 452 भा०दं०सं० के अन्तर्गत अपराध कारित किया जाना प्रतीत होता है। अतः अभियुक्त उपरोक्त को ऊपर वर्णित धाराओं में तलब किए जाने का आधार पर्याप्त है।

बयान अंतर्गत धारा 200 सी.आर.पी.सी.

नाम- पंकज कुमार, पिता राजेन्द्र कुमार, उम्र 35 वर्ष, पेशा- प्राइवेट नौकरी, पता- नई बस्ती, बिरतियान, कानपुर नगर। परिवादी ने सशपथ बयान दिया की मेरा विवाह रेहा वर्मा के साथ दि० 25.11.2008 को सम्पन्न हुआ। हमारे बीच विवाद था। मेरी पत्नी ने मेरे व मेरे परिवारजनो के विरूद्ध कुल 4 केस हरदोई कोर्ट में दाखिल किये है जो निम्नलिखित है- धारा 125 सीआरपीसी के अंतर्गत लूट का मुकदमा, घरेलू हिंसा 498ए आदि। दि० 27.11. 2020 को मै मेरा भाई व मेरी माता हरदोई जिला न्यायालय गये। उस दिन मुकदमा अंतर्गत धारा-125 सी.आर.पी.सी. व Dowry Prohibition के मुकदमें में तारीख लगवाई थी। कचहरी से लगभग 200

मीटर की दूरी पर हम खड़े थे व सुनवाई के बाद घर वापस जा रहे थे तभी रेहा, राम औतार कठेरिन आशा देवी, विरेन्द्र, प्रताप, देवेन्द्र प्रताप व कुछ अज्ञात व्यक्ति हमारी ओर आये और आते ही गाली गलौच करने लगे। धक्का मुक्की देने लगे कह रहे है। तेरे समय 5.15 पी.एम. बजे रेहा आशा देवी राम औतार कठेरिया, देवेन्द्र व वीरेन्द्र नीरज उर्फ गुड्डू, रेहा मेरे घर आये। इसके अतिरिक्त दिव्या भी आई मै आफिस में था। मेरे घर में मेरी मां मुन्नी देवी, पिता राजेन्द्र कुमार, बदन पूजा, घोर्य बहू पूजा घर में मौजूद थे। वे बात-चीत बताकर घर में आये परंतु घर में आने बाद वे लड़ाई झगड़ा करने लगे। रेहा मेरे घर से रू० 70,000/- ले गई मेरे परिवारजनों के साथ मार पीट करी गाली गलौज करी मेरी बहन ने पुलिस को बुलाया तो पुलिस आई। फिर पुलिस उनको ले गई। पुलिस ने कुछ पुछताछ करी परंतु फिर उन्हे छोड़ दिया और कोई कार्यवाही नहीं करी। मैने बिठूर थाने में शिनाख्त करी व डाक द्वारा पुलिस अधिकारी को शिकायत भेजी परंतु कोई कार्यवाही नहीं हुई। कुछ और नहीं करना।

बयान अंतर्गत धारा -202 सी.आर.पी.सी.

नाम- पूजा कठेरिया सी/ओ राजेन्द्र कठेरिया निवासी विरतियान मंहाना कानपुर नगर उम्र-26 वर्ष, पेशा पढ़ती है, सशपथ बयान करती हूँ कि घटना 21.01.21 शाम 5 बजे की है। मेरी भाभी रेहा वर्मा ने जिला हरदोई कचहरी में मेरे माता-पिता दोनो भाई व मेरे खिलाफ पत्नी उत्पीड़न दहेज प्रताड़ना का मुकदमा चल रहा है। दि० 27.11.20 को मेरे माता पिता व भाई के साथ मार पिट व हाथा पाई की। उसकी सूचना मैने हरदोई पुलिस में भी की थी दि० 21.01.21 को समय लगभग सवा पाँच बजे सभी अभियुक्तगण एक राय होकर मेरे घर में घुस आये तथा मेरे माता पिता व मुझे भद्दी- भद्दी गालियां देते हुये मार-पीट करने लगे। मै अपने माता पिता को बचाने दौडी मेरे भाई की दो सालियां दिव्या व नेहा ने मेरे साथ मार- पिट की और मेरी भाभी रेहा वर्मा साली दिव्या मेरे भाई की सास आशा देवी कमरे में घुस गयी मेरे छोटे भाई की डिलिवरी के लिए रखे 70 हजार रूपये लूट लिये मेरे भाई की सूचना मिलने पर वह घर आया। अभियुक्तगणों ने मेरे भाई पंकज वर्मा के साथ भी मार पीट की। 112 नम्बर पर डायल किया था। पुलिस आयी थी। मंधना चौकी ले गयी था वहाँ से उनको पुलिस ने छोड़ दिया दि० 22.01.22 को बिठूर थाना को व एस.एच.ओ. को प्रा० पत्र दिया था। किन्तु कोई कार्यवाही नही हुयी। घटना को कई लोगो ने देखा है।

बयान अंतर्गत धारा-202 सी.आर.पी.सी.

साक्षीः गोमती देवी तिवारी aged about 66 years अविवाहित पुत्री स्व० कल्लू तिवारी पेशा गृहणी निवासी ग्राम विरिनयान थाना बिठूर कानपुर नगर ने सशपथ बयान किया कि मैं पंकज कुमार वर्मा की पड़ोसी हूँ तथा मेरा पंकज कुमार वर्मा के घर आना जाना है। जनवरी 2001 की शाम को लगभग 5.15 पीएम पर की घटना है कि पंकज कुमार वर्मा की पत्नी श्रीमती रेहा वर्मा उसका पिता राम औतार कठेरिया व उसकी माँ श्रीमती आशा देवी तथा पांच अन्य लोग जिनमें महिलायें भी थी सभी पंकज कुमार वर्मा के घर में घुस गये तथा पंकज कुमार वर्मा के माता- पिता व बहन पूजा को भद्दी- भद्दी गालिया देते हुये मारपीट करने लगे पंकज कुमार की बहन पूजा अपने माता-पिता को बचाने दौड़ी तो पंकज कुमार वर्मा की सास आशा देवी व उनके साथ आयी महिलाओं ने पूजा के साथ मारपीट की। पंकज की पत्नी रेहा वर्मा अपने पति पंकज के कमरे में घुस गयी तथा पंकज के छोटे भाई अमित की पत्नी की डिलीवरी के लिये रखे 70,000/- रूपये लूट लिये। पुलिस आयी थी सभी को मंधना चौकी ले गयी थी। यह घटना जिस समय हुयी थी मैं पंकज के घर में मौजूद थी तथा पंकज कुमार वर्मा के माता पिता से मिलने गयी थी। रेहा वर्मा ने अपने पति, सास एवं देवर के खिलाफ दहेज की मांग का मुकदमा पिता हरदोई में किया गया है। ये सब खुद मैने देखा है और मैने जो कुछ भी देखा वही सब कुछ बता रही हूँ। मुझे अब और कुछ नही कहना है, यही मेरा बयान है।"

4. Learned counsel for opposite party-2 has supported the impugned order that on basis of statements recorded during proceedings and after taking note that there are sufficient grounds to proceed against applicants, therefore, impugned order is passed whereby they were summoned.

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

6. It is clearly evident from statement of complainant under Section 200 Cr.P.C. that he has made sweeping general and omnibus allegations against all applicants including that they have stolen Rs. 70,000/- from his house. It is also evident from impugned order that trial Court has disbelieved allegations in regard to theft since applicants have not summoned under said offence as such substantial part of statements were found false, therefore, all witnesses have stated exaggerated version.

7. It was alleged that applicants have committed offence for causing hurt not only with complainant but her relatives also. No alleged injured was medically examined since no injury report was placed on record.

8. In regard to alleged offence of trespass, allegedly applicant no.1 has come to her matrimonial house along with her relatives and since on basis of above discussion, Court is of opinion that no offence of causing hurt is made out, therefore, offence of trespass is also not made out as it is alleged that after trespass, applicants have caused hurt to number of persons of complainant side.

9. So far as ingredients of Section 504 and 506 IPC are concerned, Court takes note of **Mohammad Wajid and Another Vs. State of U.P. And Others, 2023 SCC OnLine SC 951** and since their basic ingredients that there must be an 'alarm' as well as that nature of insult must be of such extent that complainant and his associates would be provoked to breach peace are missing as well as nature of insult or abusive language was also not disclosed by any witnesses, therefore, neither of said offences are made out. Admittedly, complainant's wife has filed various cases against complainant and his family members, therefore, it would be a reason for false implication of applicants being counterblast.

10. In aforesaid circumstances, since impugned order was passed only on basis of sweeping general and omnibus allegations against applicants who are 8 in numbers, therefore, in view of judgment of Supreme Court in **Kahkashan Kausar @ Sonam and others vs. State of Bihar and others, (2022) 6 SCC 599** that in the absence of any specific role attributed to the accused, it would be unjust if they are forced to go through the tribulation of a trial i.e. general and omnibus allegations cannot manifest in a situation where relatives of complainant's wife are forced to undergo trial as well as in view of **Achin Gupta vs. State of Haryana and another, 2024 0 INSC 369**, I am of considered opinion that it is a fit case where inherent powers of this Court could be invoked.

11. Accordingly, impugned order dated 16.01.2024 passed by learned Additional Chief Metropolitan Magistrate, Court-1, Kanpur Nagar in Case No. 911 of 2021 (Pankaj Kumar vs. Smt. Reha Sharma and others) under Sections 323, 504, 506, 452 IPC, Police Station- Bithur, District- Kanpur Nagar, pending before ACMM, Court-1, Kanpur Nagar and consequential proceedings thereof are hereby set aside.

12. In view of above, application is **allowed**.

13. Registrar (Compliance) to take steps.

(2024) 8 ILRA 639
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.08.2024

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Application U/s 482 No. 12982 of 2009

Chandra Bhan @ Lalla & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Pradeep Chandra, Sunita Chauhan

Counsel for the Respondent:
G.A.

Criminal Law- The Code of Criminal Procedure-1973-Sections -204, 210 & 482- FIR lodged earlier and Criminal Complaint lodged after seven years thereof are based on same set of facts, allegations, offence and accused persons- That filing of instant complaint case and issuance of summoning order thereon by learned Magistrate amounts to abuse of process of law, as this is tantamount to reopening of a case based on same allegations which has already been concluded on the basis of police report by orders of the Court, around seven years before-Result- impugned summoning order dated as well as the entire proceedings in said complaint case are hereby quashed. Petition allowed. (Para 12,13 & 27) (E-15)

List of Cases cited:

1. Zunaid Vs St.of U.P. & ors.in Criminal Appeal Nos. 2628-2629 of 2023

2. A.M. Mohan Vs The St.represented by SHO & anr.reported in 2024 SCC Online SC 339

3. [G. Sagar Suri v. St.of U.P., (2000) 2 SCC 636]

4. Naresh Kumar & anr. Vs The St.of Karnataka & anr.2024 SCC Online SC 268 arising out of SLP (Crl.) No.1570 of 2021

5. Apex Court in Randheer Singh Vs St. of U.P. (2021) 14 SCC 626

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

1. As per office report dated 20.08.2024, notice has reportedly been served on opposite party no.2 personally.

2. Heard Sri Akshay Raj Singh, Advocate holding brief of Sri Pradeep Chandra, learned counsel for the applicants, learned A.G.A. for the State and perused the record.

3. In the instant application filed under Section 482 Cr.P.C., the applicants have prayed to quash the summoning order dated 20.04.2009 passed by Judicial Magistrate, Jalaun in Complaint Case No.70 of 2009, under Sections 307, 504, 506 IPC and Sections 3 (1) (x) of SC/ST Act P.S. Ait, District Jalaun and also to quash the entire proceedings in Complaint Case No.70 of 2009 with regard to said matter.

4. Learned counsel for the applicants submits that opposite party no.2 Lala Ram filed a complaint case with averments that he belongs to scheduled caste category and he was working as a labourer in the field of Munni Babu, who is a co-villager. He was subjected to forced labour, day in and day out. In the intervening night of 17/18.04.2000 at 3:30 hours when opposite party no.2 was taking rest in Khalihan of Munni Babu, he asked him to come and do work whereupon he requested him for being permitted to have rest, then the accused, Munni Babu abused

him by caste specific words, thereafter accused, Chandra Bhan alias Lalla, on being exhorted by Munni Babu took licensee gun of Munni Babu and fired at complainant which hit him on thigh and he became injured. Accused, Amar Singh and Kallu were also present there. They subsequently assaulted the complainant by butt of Rifle. The case was reported by his brother at police station but the report was not lodged in proper manner and charge sheet was filed wrongly under Section 338 IPC and that too against accused Chandrabhan @ Lalla only in which accused got himself saved by confessing the offence of Section 338 IPC after paying Rs.1,000/- as fine. The applicant stated that he was suffering from fire arm injuries received on his thigh and unable to walk.

4. He next submitted that on the similar facts F.I.R. was lodged on 14.04.2000 at the instance of one Raghubir, brother of the injured Lala Ram and same was registered vide Crime No. 40 of 2000, under Sections 307, 504, 506 IPC and Section 3(1) (X) of SC/ST Act. However, the case under Section 307 IPC was not found to be made out during investigation and charge sheet was filed under Section 338 IPC against petitioner No.1 only. The said criminal case was decided on the basis of confession against one of the applicants viz Chandrabhan @ Lalla recorded by learned court below for charge under Section 338 IPC. The present complaint case has been filed only to make pressure on the accused persons after conclusion of police case instituted on same set of facts. He lastly submitted that the prosecution in the complaint case is abuse of process of law and deserves to be quashed.

6. Per contra, learned A.G.A. opposed the prayer made in present application under Section 482 Cr.P.C. and submitted that the filing of complaint case after conclusion of police case instituted on same facts, has been duly explained by the complainant/injured in the complaint itself. The impugned summary order is legally and factually sound and just. It needs no interference in present proceedings.

7. From perusal of material on record, it appears that an FIR was lodged initially in the case at the instance of Raghubir son of Zalim Chamar against the accused Lalla @ Chandrabhan Niranjan, Amar Singh, Munni Babu and Kallu. The accused belonged to same family. The FIR was drawn on the basis of written report filed by the informant vide Crime No.40 of 2000 under Sections 307/504/506 IPC and Section 3(2)(V) of SC/ST (P.A.) Act, at Police Station Ait, District Jalaun at Orai in which an acquisition was made to the effect that on 17.04.2000 at around 3:30 am accused persons abused and intentionally insulted Lalaram, the real brother of the informant when he was taking rest in the agricultural field of accused persons accused Munni Babu and Chandrabhan Niranjan and when he tried to plead his stand that he was badly tired due to thrashing work and requested the accused persons to refrain from abusing, Munni Babu got enraged and exhorted Lalla @ Chandrabhan Niranjan to kill him. On being exhorted by Munni Babu, Lalla @ Chandrabhan Niranjan fired a shot at Lalaram by a licensed gun of Munni Babu which hit Lalaram and he fell down on earth. The accused persons also abused Lalaram with caste specific words. The incident was witnessed by Krishna Murari Chamar, Kailash and Ravi Shankar who came there on hearing sound of firing. The informant also reached there alongwith the said witnesses and Lalaram was rushed to

Jhansi for treatment, thereafter he was referred to Gwalior where he had been admitted.

8. The informant lodged FIR on 19.04.2000 at 22:45 hours after returning from Gwalior. The police investigated the same and recorded statements of the informant and witnesses. During investigation the FIR version was not found reliable and the Investigating Officer concluded that the injured Lalaram was working at the place of accused Munni Babu for last six months. The injured Lalaram stated that when he sat down on being tired of work, on order of Munni Babu, Lala @ Chandrabhan Niranjan fired a shot at him and when he got injured, Munni Babu got him driven by tractor to a doctor at Ait where he was given first aid; he was taken to Jhansi where he was treated for few days, and thereafter he was rushed Gwalior where he was treated for four days. Accused Munni Babu bore the expenses of his treatment. Some witnesses stated to Investigating Officer that in fact two persons Lalaram and one Pratap Bahadur Singh from the side of the accused got injured as firearm kept by Chandrabhan @ Lala went off accidently. At the time of incident, harvesting was closed and Lalaram, Pratap Bahadur Singh and Chandrabhan were sleeping, suddenly the country made pistol possessed by Chandrabhan @ Lalla went off accidently which hit Lalaram on his thigh, and Pratap Bahadur Singh on his hand. The injuries of Lalaram and Pratap Bahadur Singh were not on vital part.

9. The Investigating Officer placed reliance on statements of independent witnesses Pappu Basor, Shiv Ram, Ravi Shankar and Kailash Chamar and concluded that none of the penal sections mentioned in FIR attracted against the accused persons, and complicity of only Chandrabhan @ Lala was found for charge under Section 338 IPC and accordingly chargesheet under Section 338 IPC was filed against Chandrabhan @ Lalla before the court on 20.04.2000. The accused Chandrabhan @ Lalla moved an application on 16.02.2001, expressing his desire to confess the guilt for said charge, which was allowed and statements of accused was recorded by learned Special Judicial Magistrate-II and on the basis of confession he was convicted of charge under Section 338 IPC and sentenced to Rs.1,000/- fine and 20 days' imprisonment in default, by order dated 16.02.2001 the criminal case arising out of said FIR Crime No.40/2000 P.S. Ait, District Jalaun concluded. The informant Raghubir assailed said order dated 16.02.2001 before court of session by filing a Criminal Revision before the Court of session and said Criminal Revision No.1998 of 2001 was dismissed by Special Judge EC Act, Jalaun at Orai vide order dated 22.11.2001 with observation that no interference is warranted in the impugned order passed by learned Magistrate while deciding the case on the basis of confession of accused. There is a separate procedure for enhancement of sentence. Any other order in the ends of justice can only be passed under Article 482 Cr.P.C. by Hon'ble High Court and the revision was dismissed with these observations.

10. Consequently the order dated 16.02.2001 passed by learned Magistrate was affirmed by court of session in Criminal Revision. The revisional order has now attained finality, as the informant perused no further remedy in the matter before any higher court.

11. About seven years of passing the above stated revisional order the injured/complainant Lalaram filed a Criminal Complaint before the Court of C.J.M. Jalaun, at Orai on 10.10.2007 against the same accused persons with regard to same incident. The allegations in the FIR lodged at the instance of Raghubir, the brother of the complainant and Criminal Complaint has been filed by the injured Lalaram based on same statement of facts and accusation. In nutshell, it can be said that the FIR lodged earlier and Criminal Complaint lodged after seven years thereof are based on same set of facts, allegations, offence and accused persons. The learned Magistrate recorded statement of complainant Lalaram under Section 200 Cr.P.C. and witnesses Smt. Savitri, wife of Lalaram and Ravi Shankar, the brother of Lalaram under Section 202 Cr.P.C., learned Magistrate vide order dated 20.04.2009 considered the allegations made in the complaint and statement of complainant and the two witnesses recorded in inquiry under Sections 200 and 202 Cr.P.C. summoned all the four accused persons after finding a prima facie case made out against them, to face trial for charge under Section 307, 504, 506 IPC and Section 3(X) SC/ST (P.A.)Act.

12. Feeling aggrieved by the impugned summoning order the accused persons have filed present petition under Section 482 Cr.P.C. If we look into the statutory provisions with regard to lodging of FIR and filing of complaint in respect of same offence the procedure is found under Section 210 of the Code of Criminal Procedure which may be reproduced as under:-

"210. Procedure to be when there is a complaint case and police investigation in respect of the same offence.

(1)When in instituted a case otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such enquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2)If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3)If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

13. On perusal of aforementioned provision it is apparent that subs-section (1) applies where a complaint case is instituted during progress of police investigation in a case and sub-section (3) provides for

proceeding the case as a complaint case where police report does not relate to an accused in the complaint case, or if the Magistrate does not take cognizance of any offence on the police report. In such a situation, the Magistrate consolidates both the cases together and proceed in the matter by observing procedure prescribed for complainant cases. In Session triable case, there is no distinction between a case instituted or a police report or on complaint, so far as trial is concerned and procedure prescribed for trial before the Court of session is applicable for both type of cases after committal of the case by a Magistrate concerned to court of Session for trial.

14. The present case was instituted on the basis of complaint of injured although for altogether different offences in distinction to offence found in chargesheet filed after investigation into said FIR and concluded by order dated 16.02.2001 passed by learned Magistrate on the basis of conviction of chargesheeted accused Chandrabhan @ Lalla for charge under Section 338 IPC and when complaint was filed no police case was pending. The present complaint which has been assailed by the accused persons in present petition under Section 482 Cr.P.C. was filed after six years and eight months of conclusion of earlier police case based on same accusations.

15. On conclusion of police case by by order of Magistrate on the basis of conviction, sole accused and no plausible explanation has been found in complaint or in statement of the complainant and witnesses for such an inordinate delay. The complainant has stated in complaint itself that he was not aware of proceedings of the court of Magistrate regarding filing of chargesheet under Section 338 IPC.after investigation of case instituted on the basis of investigation carried out in FIR lodged at the instance of his brother Raghubir. He has stated that he came to know about order of learned Magistrate-II regarding closure of case on the basis of conviction under Section 338 IPC. On 06.08.2007 when he filed an application before the Court of Magistrate concerned seeking progress of the case; which is inconceivable as the informant Rabhubir filed a Criminal Revision before the court of session against the order dated 16.02.2001 passed by learned Magistrate without any delay, which was decided by the Court concerned by order dated 22.11.2001 and no interference was made in the impugned order passed by learned Magistrate in said police case.

16. After a lapse of period of six years on dismissal of Criminal Revision preferred by the informant who is none other than the real brother of the complainant the present complaint has been filed.

17. This Court is not oblivious of settled proposition of law that even after acceptance of closure report filed by Investigating Officer, after investigation of the case, the informant /aggrieved person can file a criminal complaint before the competent Magistrate.

18. The Hon'ble Supreme Court in a recent case ***Zunaid Vs. State of U.P. and others in Criminal Appeal Nos. 2628-2629 of 2023*** observed as under:-

> *…….11. In view of the above, there remains no shadow of doubt that on the receipt of the police report under Section 173*

Cr.P.C., the Magistrate can exercise three options. Firstly, he may decide that there is no sufficient ground for proceeding further and drop action. Secondly, he may take cognizance of the offence under Section 190(1)(b) on the basis of the police report and issue process; and thirdly, he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. It may be noted that even in a case where the final report of the police under Section 173 is accepted and the accused persons are discharged, the Magistrate has the power to take cognizance of the offence on a complaint or a Protest Petition on the same or similar allegations even after the acceptance of the final report. As held by this Court in ***Gopal Vijay Verma Vs. Bhuneshwar Prasad Sinha and Others****, as followed in* ***B. Chandrika Vs. Santhosh and Another,*** *a Magistrate is not debarred from taking cognizance of a complaint merely on the ground that earlier he had declined to take cognizance of the police report. No doubt a Magistrate while exercising his judicial discretion has to apply his mind to the contents of the Protest Petition or the complaint as the case may be.*

19. However, the facts of present case are distinguishable from the facts of the case in which Hon'ble Supreme Court made above observations, as in the present case the police had not submitted closure report after investigation of the case lodged at the instance of the informant Raghubir and filed chargesheet against one of the named accused persons for charge under Section 338 IPC, which is a minor offence and complicity of other accused persons was not found in the offence. The complaint itself has been filed after lapse of a period of seven years of the conclusion of the case on the basis of police report and subsequent dismissal of revision preferred by the informant against final order passed by learned Magistrate. The revisional order has not been challenged before any superior court by the informant/defacto complainant. In as much as, fact of filing of Criminal Revision by the informant in police case and dismissal of the Revision by court concerned has been concealed in complaint case instituted by the complainant/ respondent No.2.

20. In these facts and circumstances, I am of the considered opinion that the complaint was not maintainable after lapse of six years of decision in Criminal Revision preferred against the order of Magistrate dated 16.02.2001.

21. The petitioner/applicants have invoked indulgence of this Court in exercise of powers under Section 482 Cr.P.C. vested in this Court. The scope of exercise of powers under Section 482 Cr.P.C. by the High Court has been discussed and circumscribed by Hon'ble Apex Court in a number of judicial precedents.

22. The law in regard to inherent powers under Section 482 Cr.P.C. is discussed hereinafter :-

"Inherent Power of the High Court under Section 482 Criminal Procedure Code 1973 :-

(I) "Inherent Power" of the High Court under Section 482

Cr.P.C., an extraordinary power is with purpose and object of advancement of justice, which is to be exercised "to give effect to any order under the Cr.P.C.", or "to prevent abuse of process of any Court", or "to secure ends of justice", making arena of the power very wide, yet it is to be exercised sparingly, with great care and with circumspection, that too in the rarest of rare case.

(II) It is no more res integra that exercise of inherent power could be invoked to even quash a criminal proceeding/First Information Report/complaint /chargesheet, but only when allegation made therein does not constitute ingredients of the offence/offences and /or are frivolous and vexatious on their face, without looking into defence evidence, however such power should not be exercised to stifle or cause sudden death of any legitimate prosecution. Inherent power does not empower the High Court to assume role of a trial court and to embark upon an enquiry as to reliability of evidence and sustainability of accusation, specifically in a case where the entire facts are incomplete and hazy. Similarly quashing of criminal proceedings by assessing the statements under section 161 Cr.P.C. at initial stage is nothing but scuttling a full fledged trial.

(III) There can not be any straight jacket formula for regulating the inherent power of this Court, however the Supreme Court has summarised and illustrated some categories in which this power could be exercised in catena of judgments. Some of them are ***State of Haryana Vs Bhajan Lal : 1992 Supp (1) SCC 335, Zandu Pharmaceutical Works Ltd Vs Mohd Sharaful Haque: (2005) 1 SCC 122, Ahmed Ali Quarashi and Anr Versus The State of Uttar Pradesh : 2020 SCC Online SC 107, Joseph Salvaraja A v. State of Gujarat (2011) 7 SCC 59, Sushil Sethi and another Vs The State of Arunachal Pradesh and others (2020) 3 SCC, 240, Priti Saraf and Anr Vs State of NCT of Delhi and Anr : 2021 SCC Online SC 206.*** *Some categories/ circumstances as illustrations but not exhaustive are : allegations made in FIR / complaint, if are taken at their face value and accepted do not prima facie constitute any offence or are so absurd and inherently improbable to make out any case or no cognizable offence is disclosed against the accused, criminal proceedings is maliciously instituted with an ulterior motive and with a view to spite the accused due to private and personal grudge, or where there is a specific legal bar engrafted in any of the provisions of the Code or in the concerned Act to the institution and continuance of the proceedings or when dispute between the parties constitute only a civil wrong and not a criminal wrong, further Courts would not permit a person to be harassed although no case for taking cognizance of the offence has been made out.*

(IV) In ***Sau. Kamal Shivaji Pokarnekar v. The State of Maharashtra : (2019) 14 SCC 350****, the Apex Court has laid emphasis on the principles laid down in two of its previous judgements namely,* ***State of Karnataka v. M. Devendrappa : 2015 (3) SCC 424 and Indian Oil Corporation v. NEPC India Ltd. & Ors.: (2006)6 SCC 736*** *and held that quashing of criminal proceedings is called for only when the complaint does not disclose any offence, or the complaint is frivolous, vexatious, or oppressive and further clarified that defences available during a trial and facts/aspects whose establishment during the trial may lead to acquittal cannot form the basis of quashing a criminal complaint. The criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature, if the ingredients of the alleged offence are prima facie made out in the complaint.*

(V) The Supreme Court in ***M/s Neeharika Infrastructure Pvt. Ltd Versus State of Maharashtra and Others : (2020) 10 SCC 118****, has categorically held that High Court is not justified in passing the order of not to arrest and or no coercive steps either during the investigation or till the final report/ charge sheet is filed under Section 173 Cr.P.C., while dismissing/disposing petition under Section 482Cr.P.C. and/or under Article 226 of the Constitution and even in exceptional cases where High Court is of the opinion that a prima facie case is made out for stay of further investigation,such order has to be with brief reasons, though such orders should not be passed routinely, casually and/or mechanically.*

(VI) Whether the allegations are true or untrue, would have to be decided in the trial. In exercise of power under Section 482 of the Cr.P.C., the Court does not examine the correctness of the allegations in a complaint except in exceptionally rare cases where it is patently clear that the allegations are frivolous or do not disclose any offence. (see ***Ramveer Upadhyay & Anr. versus State of U.P. & Anr. 2022 SCC Online SC 484)***

(VII) "A careful reading of the complaint, the gist of which we have extracted above would show that none of the ingredients of any of the offences complained against the appellants are made out. Even if all the averments contained in the complaint are taken to be true, they do not make out any of the offences alleged against the appellants. Therefore, we do not know how an FIR was registered and a charge-sheet was also filed.....It is too late in the day to seek support from any precedents, for the proposition that if no offence is made out by a careful reading of the complaint, the complaint deserves to be quashed." (See, ***Wyeth Limited & others vs, State of Bihar & another, Criminal Appeal No.1224 of 2022 (Special Leave Petition (Crl.) No.10730 OF 2018), decided on 11th August, 2022)."***

(emphasis supplied)

23. Hon'ble Supreme Court in a recent judgment **A.M. Mohan Vs. The State represented by SHO and another reported in 2024 SCC Online SC 339 (three Judge Bench)** considered the scope of Section 482 Cr.P.C. while deciding the appeal challenging the order passed by learned Single Judge of the High Court of Madras on an application under Section 482 Cr.P.C. the Hon'ble Court observed as under:-

> *…….9. The law with regard to exercise of jurisdiction under Section 482 of Cr.P.C. to quash complaints and criminal proceedings has been succinctly summarized by this Court in the case of* ***Indian Oil Corporation v. NEPC India 10 Limited and Others*** *after considering the earlier precedents. It will be apposite to refer to the following observations of this Court in the said case, which read thus:*
>
> *"12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few— Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [(1988) 1 SCC 692 : 1988 SCC (Cri) 234] , State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] , Rupan Deol Bajaj v. Kanwar Pal Singh Gill [(1995) 6 SCC 194 : 1995 SCC (Cri) 1059] , Central Bureau of Investigation v. Duncans Agro Industries Ltd. [(1996) 5 SCC 591 : 1996 SCC (Cri) 1045] , State of Bihar v. Rajendra Agrawalla [(1996) 8 SCC 164 : 1996 SCC (Cri) 628] , Rajesh Bajaj v. State NCT of Delhi [(1999) 3 SCC 259 : 1999 SCC (Cri) 401] , Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd. [(2000) 3 SCC 269 : 2000 SCC (Cri) 615] , Hridaya Ranjan Prasad Verma v. State of Bihar [(2000) 4 SCC 168 : 2000 SCC (Cri) 786] , M. Krishnan v. Vijay Singh [(2001) 8 SCC 645 : 2002 SCC (Cri) 19] and Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque [(2005) 1 SCC 122 : 2005 SCC (Cri) 283] . The principles, relevant to our purpose are:*
>
> *(i) A complaint can be quashed where the allegations made in 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 the case alleged against the accused.*
>
> *For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.*
>
> *(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.*

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

24. Hon'ble Apex Court further observed that there is nothing in the words of section 482 Cr.P.C. which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High Court can exercise jurisdiction under Section 482 CrPC even when the discharge application is pending with the trial court [**G. Sagar Suri v. State of U.P., (2000) 2 SCC 636].**

25. Hon'ble Supreme Court in a recent judgment **Naresh Kumar and another Vs. The State of Karnataka and another reported in 2024 SCC Online SC 268 arising out of SLP (Crl.) No.1570 of 2021** observed as under:-

.....6. In the case of Paramjeet Batra v. State of Uttarakhand (2013) 11 SCC 673, Hon'ble Supreme Court recognized that although the inherent powers of a High Court under Section 482 of the Code of Criminal Procedure should be exercised sparingly, yet the High Court must not hesitate in quashing such criminal proceedings which are essentially of a civil nature. This is what was held:

"12. While exercising its jurisdiction under Section 482 of the Code the High Court has to be cautious. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any court or otherwise to secure ends of justice. Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil

transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash the criminal proceedings to prevent abuse of process of the court." (emphasis supplied)

26. Relying upon the decision in Paramjeet Batra (supra), **Apex Court in Randheer Singh v. State of U.P. (2021) 14 SCC 626**, observed that criminal proceedings cannot be taken recourse to as a weapon of harassment. In Usha Chakraborty & Anr. v. State of West Bengal & Anr. 2023 SCC OnLine SC 90, relying upon Paramjeet Batra (supra) it was again held that where a dispute which is essentially of a civil nature, is given a cloak of a criminal offence, then such disputes can be quashed, by exercising 8 the inherent powers under Section 482 of the Code of Criminal Procedure."

27. Considering the submissions of learned counsel for the applicants and learned A.G.A. on behalf of State and keeping in the light facts and circumstances of the present case and above stated judgments of Hon'ble Apex Court; on the basis of foregoing discussion, I am of the considered opinion that filing of instant complaint case and issuance of summoning order thereon by learned Magistrate amounts to abuse of process of law, as this is tantamount to reopening of a case based on same allegations which has already been concluded on the basis of police report by orders of the Court, around seven years before. The petition under Section 482 Cr.P.C. stands **allowed** and impugned summoning order dated 20.04.2009 as well as the entire proceedings in said complaint case are hereby quashed.

(2024) 8 ILRA 649
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2024

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/s 482 No. 20471 of 2024

Dinesh Kumar ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Man Mohan Singh

Counsel for the Respondent:
G.A.

Criminal Law-The Negotiable Instruments Act, 1881-Sections 138 & 142(1)(b)- to constitute the offence under Section 138 of N.I. Act, the cheque must be presented for encashment within its validity period and after the receipt of intimation with regard to dishonor of the cheque, the holder of the cheque is required to issue demand notice within a period of 30 days from the date of intimation of dishonor of the cheque and after the legal demand notice is issued and served on the drawer of the cheque, the holder of the cheque is required to wait for a period of 15 days. When after expiry of 15 days, the demand notice is not complied with by the drawer of the cheque only then the cause of action of filing the complaint under Section 138 N.I. Act would arise. Thereafter, the complainant has a further period of one month in terms of Section 142(1)(b) for filing the complaint. (Para 7) (E-15)

List of Cases cited:

Mamta Gautam Vs St.of U.P. passed in Criminal Revision No. 530 of 1998 dated 2.5.2000

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Man Mohan Singh, learned counsel for the applicant and Sri Rajeev Kumar Singh, learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing of the entire criminal proceedings of Complaint Case No. 1397 of 2021 (Rajveer Singh vs. Dinesh Kumar) under Section 138 of Negotiable Instruments Act, 1881, Police Station-Jaithra, District-Etah as well as order dated 16.08.2022.

3. Learned counsel for the applicant relying upon the judgement of the Coordinate Bench of this Court in the case of ***Mamta Gautam vs. State of U.P.*** passed in ***Criminal Revision No. 530 of 1998*** dated 2.5.2000 has vehemently submitted that the instant complaint case filed by the opposite party no. 2 is time barred as the legal demand notice was sent on 18.2.2021 which was served on 19.2.2021 on the applicant, therefore the complaint ought to have been filed within one month from the date of service of notice. However, in the instant case the complaint was filed on 2.4.2021 which is beyond the period of one month from the date of service of notice, therefore, learned counsel for the applicant seeks quashing of the entire proceedings of the instant case.

4. Per contra, learned A.G.A. submits that in terms of Section 142 (1)(b) of N.I. Act, the complainant has one month's time to file the complaint under Section 138 of N.I. Act from the date when the cause of action arises for filing such complaint and the cause of action for filing the complaint would arise only after the expiry of 15 days period from the date of service of demand notice on the drawer of the cheque. In the instant case, demand notice was served on 19.02.2021, therefore, the cause of action for filing the complaint would arise after the expiry of 15 days period from 19.02.2021 i.e. 7.03.2021 and from 07.03.2021 the complainant had the time of one month to file the complaint and in the instant case the complaint has already been filed within the period of limitation i.e. on 02.04.2021. In view thereof, learned A.G.A. submits that no interference is called for in the instant matter.

5. Having heard the rival submissions made by learned counsel for the parties, this Court has carefully gone through the record of the case.

6. From the record of the case, it is apparent that the cheque was allegedly issued by the applicant herein on 18.10.2020 and 20.10.2020. The aforesaid cheques were presented for encashment on 21.01.2021 which were dishonored on 22.01.2021 with the remark 'payment stopped by the drawer'. Thereafter, on 18.2.2021 legal demand notice was issued by the opposite party no.2 which was served on 19.2.2021 upon the applicant herein, thereupon the complaint was filed on 02.04.2021. To appreciate the submissions made by learned counsel for the applicant, it is relevant to take note of the provisions of Section 138 and 142(1)(b) of the Negotiable Instruments Ac, 1881, which are reproduced herein as under:-

> ***"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 provision 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.

Explanation.?For the purposes of this section, "debt of other liability" means a legally enforceable debt or other liability.

***142. Cognizance of offences**.?(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),?*

(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138:

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period;

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

(2) The offence under section 138 shall be inquired into and tried only by a court within whose local jurisdiction,?

(a) if the cheque is delivered for collection through an account, the branch of the bank

where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation.?For the purposes of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

7. From the plain reading of the aforesaid provisions, it is apparent that to constitute the offence under Section 138 of N.I. Act, the cheque must be presented for encashment within its validity period and after the receipt of intimation with regard to dishonor of the cheque, the holder of the cheque is required to issue demand notice within a period of 30 days from the date of intimation of dishonor of the cheque and after the legal demand notice is issued and served on the drawer of the cheque, the holder of the cheque is required to wait for a period of 15 days. When after expiry of 15 days, the demand notice is not complied with by the drawer of the cheque only then the cause of action of filing the complaint under Section 138 N.I. Act would arise. Thereafter, the complainant has a further period of one month in terms of Section 142(1)(b) for filing the complaint.

8. In view of the aforesaid observations, the observation made by Coordinate Bench of this Court in **Mamta Gautam (supra)** that "under Clause (b) of Section 142, Negotiable Instruments Act, the complaint can be filed within a period of one month, from the date of service of the notice" is in the considered opinion of this Court, per incuriam as language of Section 142(1)(b) is categorically clear which says that one month period for filing the complaint will start when the cause of action arises under clause (c) of the proviso to Section 138 of N.I. Act.

9. In view thereof, the instant application lacks merit and is accordingly, **dismissed**.

(2024) 8 ILRA 652
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2024
BEFORE

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

Application U/s 482 No. 21148 of 2024

Rohan Singh ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sheshadri Trivedi, Shiv Babu Dubey

Counsel for the Respondents:
G.A.

(Criminal Law- The Code of Criminal Procedure-1973-Section-437(6)- Section 437 Cr.P.C. itself goes to show that any person accused of any non-bailable offence triable by Magistrate, is entitled to be released on bail, if in case the trial is not concluded within a period of 60 days from the first date fixed for taking evidence in the case, the satisfaction of the Magistrate has to be recorded while passing the order releasing such an

accused on bail, however in case the Magistrate directs otherwise, reasons have to be recorded in writing. In present facts of the case Magistrate while rejecting the application of the applicant has given detailed reasons for the same. (Para 7)

Result Application u/s 482 CrPC rejected. (E-15)

List of Cases cited:

1. Arvind Kumar Vs St. of U.P., order dated 08.01.2010 passed in Criminal Misc. Bail Application No. 31262 of 2009

2. Saurabh Singh Chandel Vs St. of U.P., Neutral Citation No.2021:AHC:81934

3. Suresh Verma Vs St.of U.P. & anr., Neutral Citation No.2013:AHC:40699

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

1. Heard Mr. Sheshadri Trivedi, learned counsel for the applicant and Mr. Amit Singh Chauhan, learned AGA-I for the State.

2. This application under Section 482 Cr.P.C. has been filed to set aside the impugned order dated 31.05.2024 passed by learned Chief Judicial Magistrate, Banda as well as the entire proceeding of Crl. Case No. 7658 of 2023 (State of U.P. Vs. Roshan Singh) arising out of Case Crime No. 531 of 2023, under sections 419, 420, 467, 468, 471 IPC, Police Station Kotwali Nagar, District Banda, pending against the applicant in the court of learned Chief Judicial Magistrate Banda, District Banda.

3. As per the allegations in the FIR lodged by Poonam Gupta; Principal, Arya Kanya Inter College, Kotwali Nagar, Banda, when the re-examination 2018 for the post of Village Development Officer was going on, in the second meeting on 26.06.2023 at about 04:20 pm, a call was received from the Control Room, Lucknow regarding examination room no. 4 informing that the bio-metric of one Ranjan Gupta was found suspicious. On the aforesaid, a team was constituted for checking, in which the person sitting in place of Ranjan Gupta was found to be Roshan Singh, whose photograph and bio-metric fingerprint did not match with the admit card of the original candidate Ranjan Gupta. Information about the same was sent to the Commission conducting the examination, on the basis of which, an FIR has been lodged.

4. The applicant was arrested and he filed bail application No. 34031 of 2023, which has been rejected by this Court, vide order dated 22.02.2024. After investigation charge sheet was submitted on 19.08.2023, thereafter the case was committed and charges under sections 419, 420, 467, 468, 471 IPC were framed against the applicant by order dated 05.09.2023 passed by Chief Judicial Magistrate, Banda, 19.09.2023 was the first date fixed for leading of evidence by the prosecution fixing 04.10.2023 as the next date. The witness of prosecution did not appear on any of the dates and period of more than 8 months elapsed without producing a single witness, thus the application dated 13.05.2024 was filed on behalf of applicant before the learned trial court as the trial of the present case has not been concluded within more than a period of eight months since first date fixed for taking evidence in the case i.e. 19.09.2023, hence the applicant may enlarged on bail in accordance with provision of section 437(6) of the Cr.P.C. The aforesaid application has been rejected by order

dated 31.05.2024, hence the present petition has been filed.

5. Learned counsel for the applicant submits that the applicant is entitled to be released on bail under section 437(6) of Cr.P.C. due to reason that the trial could not conclude within 60 days from the first date fixed for taking prosecution evidence. He further submits that the provisions of section 437(6) Cr.P.C. are mandatory in nature and only in exceptional circumstances for the reasons to be recorded a bail prayer may be refused under section 437(6) Cr.P.C. The applicant is jail since 29.06.2023. The first date fixed for prosecution evidence was 19.09.2023 and since then the trial is pending with no logical progress and only one witness i.e. PW-1 Pushpa Singh who appeared before the learned trial court on 24.05.2024 has been examined and her cross examination was also concluded on the same day. In support of his submission he has relied upon judgement and orders passed by co-ordinate Bench of this Court in case of **Arvind Kumar Vs. State of U.P., passed in Criminal Misc. Bail Application No. 31262 of 2009** vide order dated 08.01.2010, in case of **Saurabh Singh Chandel vs. State of U.P., Neutral Citation No.2021:AHC:81934.** Relying upon the judgment of this Court in case of **Suresh Verma Vs. State of U.P. and Anr., Neutral Citation No.2013:AHC:40699**, learned counsel for the applicant submits that the court below has rejected the application without considering the mandatory requirement of the provision u/s 437(6) Cr.P.C. The applicant is in jail since 29.06.2023. It is also not disputed that the first date fixed for taking prosecution evidence was 19.09.2023 and the trial has not been concluded within 60 days from that date. Thus as per the provision of section 437(6) Cr.P.C., in non bailable offence, if the trial is not concluded from the first date fixed for evidence such person is entitled to be released on bail and thus the application has been illegally rejected by the order impugned.

6. The learned AGA on the other submits that in the present case it would be appropriate to quote 437 (6) Cr.P.C. prior to preceding with the arguement with the case, which is as follows:-

> *"437. When bail may be taken in case of non-bailable offence.*
>
> *(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but ---*
>
> *(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."*

7. He further submits that bare reading of section 437 Cr.P.C. itself goes to show that any person accused of any non-bailable offence triable by Magistrate, is entitled to be released on bail, if in case the

trial is not concluded within a period of 60 days from the first date fixed for taking evidence in the case, the satisfaction of the Magistrate has to be recorded while passing the order releasing such an accused on bail, however in case the Magistrate directs otherwise, reasons have to be recorded in writing. In present facts of the case Magistrate while rejecting the application of the applicant has given detailed reasons for the same.

8. Even otherwise, the bail application of the applicant has already been rejected by order dated 22.02.2024, therefore, the present case amounts to second bail application, thus the judgments as relied upon by the counsel for the applicant are not applicable in present facts of the case as they are silent about the situation where first bail application of the applicant is rejected.

9. In view of the above, the aforesaid prayer as made by learned counsel for the applicant for setting aside the order impugned is refused and the application u/s 482 Cr.P.C. is **rejected** accordingly.

(2024) 8 ILRA 655
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2024

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Application U/s 482 No. 37396 of 2012
With
Application U/s 482 No. 39186 of 2023

Raju @ Raj Kumar & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Ram Raj Pandey

Counsel for the Respondent:
G.A.

Criminal Law- The Code of Criminal Procedure-1973-Sections-320 & 482-Petition for quashing entire proceedings under Sections 498-A, 323, 504, 506, 307 IPC and 3/4 D.P. Act- this Court can exercise its power vested under section 482 Cr.P.C. beyond the boundaries of Section 320 Cr.P.C- Court can invoke its jurisdiction under Section 482 Cr.P.C. even in non- compoundable offence and can quash the proceedings on the basis of settlement arrived at between the parties even in the cases of noncompoundable offences but while exercising its jurisdiction this Court must consider the fact that whether the proceedings relates to any serious and heinous offences and whether the crime in question has impact over the society. (Para 8, 17 & 18)

Result-Petition allowed n the light of the compromise entered between the parties and verified by the court concerned. (E-15)

List of Cases cited:

1. Gian Singh Vs Punjab, reported in (2012)10 SCC 303

2. Nareinder Singh Vs St.of Pun. reported in (2014) 9 SCC 466

3. Parbatbhai Aahir @ Parbathbhai Bhimsinhbhai Karmur & ors.Vs St. of Guj.& anr.reported in [(2017) 9 SCC 641]

4. St.of M. P. Vs Laxmi Narayan & ors. reported in (2019) 5 SCC 688

5. Arun Singh & ors.Vs St. of U. P. Through its Secretary & anr. reported in 2020 (3) SCC 736

6. Ram Gopal & anr.Vs St.of M. P. reported in [2021 0 Supreme (SC) 529]

7. Daxaben Vs The St.of Guj. & ors. 2022 LiveLaw (SC) 642

8. Dharmraj Vs Shanmugam & ors. decided on 8th September 2022 in Crl. Appeal Nos. 1515-1516 of 2022

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

1. Heard Sri Ram Raj Pandey, learned counsel for the applicants, learned AGA for the State and perused the record.

2. Both applications are arising out of same summoning order, same proceedings and informants are co-accused in the same criminal case, hence both the applications are being heard and decided by a common judgment.

3. By means of instant application filed under section 482 Cr.P.C. the applicants have assailed same cognizance order, summoning order dated 10.03.2010 passed by Judicial Magistrate, Baghpat and has also prayed for quashing the entire proceedings of S.T. No.497 of 2010 arising out of Case Crime No.294 of 2009, under Sections 498-A, 323, 504, 506, 307 IPC and 3/4 D.P. Act, Police Station Balainee, District Baghpat (State Vs. Raju @ Rajkumar and others).

4. According to prosecution version, the informant- Smt. Rinki @ Guddi, (respondent No.2) lodged the first information report at Police Station concerned on 9.11.2009 with averments that she was married with Monu S/o Gulab Giri on 17.6.2009, in which her father given sufficient gifts and dowry up to his financial capacity. Unfortunately, after three months of marriage, in the night of 12/13.9.2009 her husband died. An offer was made by her father-in-law to her father to re-marry the informant with his other son Raju @ Rajkumar due to death of her husband and her marriage was solemnized with Raju @ Rajkumar on 18.9.2009. However, after her marriage with Raju @ Rajkumar, her husband and parents-in-laws started harassing for non fulfilment of dowry, she narrated her story to her parents and her brother when he came to meet her on 10.01.2009. Her father and family members tried to convinced the persons not to harass her but they did not pay any heed and continued with demand of dowry and on 8.11.2009 11.00 A.M. when she was in her parental house, her husband Raju @ Raj Kumar, parents-in-law and brother-in-law Sonu visited her house and in absence of her parents and family members, who had gone to see paddy crops, they abused, her husband and mother-in-law tried to commit murder by a rope tied around her neck, her father-in-law, brother-in-law assaulted her by a knife and stick, the witnesses came at the place of occurrence to hear her cries and saved her. She got her medical examination at Government Hospital. The police, after investigation filed charge sheet against the applicants under sections 498-A, 323, 504, 506, 307 IPC and 3/4 D.P. Act.

5. Learned counsel for the applicants submits that during pendency of the present applications, under Section 482 Cr.P.C before this Court, parties wished at compromise and this fact has been brought to the notice of this Court in compliance of the order dated 12.4.2024 by this Court, a compromise deed was filed before the court concerned i.e. Ist Additional Sessions Judge, Baghpat and learned court below has verified the compromise on 11.6.2024 and passed an order in this regard. A certified coy of this order dated 11.6.2024 has already been filed with the present application. Therefore, the matter may kindly be decided on the basis of

compromise and proceedings pending before the court below may be quashed in the light of the compromise agreed by the complainant and accused persons. He lastly submitted that dispute between the parties being essentially matrimonial in nature and this is in the interest of justice and family peace the proceedings of trial court be quashed accordingly.

6. Per contra, learned AGA submits that the applicants are prosecuted in a case under sections 498A, 323, 504, 506, 307 IPC and Section 3/4 D.P. Act before the Sessions Court and charge under section 307 IPC of being serious in nature and proceedings against the applicants should not be quashed on the basis of compromise. However, it is admitted fact that this Court can exercise its power under Section 482 Cr.P.C to scuttle the proceeding, on the basis of compromise even in non-compoundable offences but where the offences are serious and heinous in nature which affects the society at large then this Court should not quash the proceedings pending against the accused persons on the basis of compromise arrived between the parties.

7. From perusal of the first information report itself appears that informant had not suffered any serious injury in the hands of accused persons. She herself visited the police station to lodge the FIR.

8. The Apex Court in catena of judgements held that this Court can exercise its power vested under section 482 Cr.P.C. beyond the boundaries of Section 320 Cr.P.C. which states that only compoundable offence can be compounded and this Court can even quash the proceedings relate to non-compoundable offences on the basis of the compromise executed between the parties but at the same time Apex Court cautioned that the proceeding of serious and heinous offences which affects the society at large, should not be quashed on the basis of compromise executed between the parties.

9. The three Judges Bench of the Apex Court in **Gian Singh Vs. Punjab**, reported in **(2012)10 SCC 303** discussed the circumstances very elaborately and held that this Court can quash the proceedings in the cases of non-compoundable offences on the basis of settlement arrived at between the parties and observed as follow:-

> "58. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court. **In respect of serious**

offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed".

10. In **Nareinder Singh Vs. State of Punjab** reported in **(2014) 9 SCC 466**, the Supreme Court held that in case of heinous and serious offences, which are generally to be treated as crime against society, it is the duty of the State to punish the offender. Hence, even when there is a settlement, the view of the offender will not prevail since it is in the interest of society that the offender should be punished to deter others from committing a similar crime.

11. The Three Judges Bench of the Apex Court in the case of **Parbatbhai Aahir Alias Parbathbhai Bhimsinhbhai Karmur and Others V. State of Gujrat and Another** reported in **[(2017) 9 SCC 641]**, after discussing its earlier judgements observed as follows:-

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

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

16.2. The invocation of the jurisdiction of the High Court to quash a first information report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482

is attracted even if the offence is non-compoundable.

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

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

16.5. The decision as to whether a complaint or first information report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated.

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

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

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

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

16.10. There is yet an exception to the principle set out in propositions 16.8. and 16.9. above. Economic offences involving the financial and economic well-being of the State have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanor. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. The Three Judge Bench of the Apex Court in **State of Madhya Pradesh V. Laxmi Narayan & Ors.** reported in **(2019) 5 SCC 688** laid down the following principles:-

> 15. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:
>
> 15.1. That the power conferred under Section 482 of the Code to quash the criminal proceedings for the non-compoundable offences under Section 320 of the Code can be exercised having overwhelmingly and predominantly the civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes and when the parties have resolved the entire dispute amongst themselves;
>
> **15.2. Such power is not to be exercised in those prosecutions which involved heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society;**
>
> 15.3. Similarly, such power is not to be exercised for the offences under the special statutes like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender;
>
> **15.4. Offences under Section 307 IPC and the Arms Act, etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act, etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delicate parts of the body, nature of weapons used, etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge-sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under**

> **investigation. Therefore, the ultimate conclusion in paras 29.6 and 29.7 of the decision of this Court in Narinder Singh (supra) should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove;**
>
> 15.5. While exercising the power under Section 482 of the Code to quash the criminal proceedings in respect of non-compoundable offences, which are private in nature and do not have a serious impact on society, on the ground that there is a settlement/compromise between the victim and the offender, the High Court is required to consider the antecedents of the accused; the conduct of the accused, namely, whether the accused was absconding and why he was absconding, how he had managed with the complainant to enter into a compromise, etc."

13. The Apex Court in the case of **Arun Singh and Others v. State of Uttar Pradesh Through its Secretary and Another** reported in **2020 (3) SCC 736**, held as under:-

> "14. **In another decision in Narinder Singh v. State of Punjab (supra) it has been observed that in respect of offence against the society it is the duty to punish the offender. Hence, even where there is a settlement between the offender and victim the same shall not prevail since it is in interests of the society that offender should be punished which acts as deterrent for others from committing similar crime.** On the other hand, there may be offences falling in the category where the correctional objective of criminal law would have to be given more weightage than the theory of deterrent punishment. In such cases, the court may be of the opinion that a settlement between the parties would lead to better relations between them and would resolve a festering private dispute and thus may exercise power under Section 482 CrPC for quashing the proceedings or the complaint or the FIR as the case may be.

14. The Apex Court in case of **Ram Gopal & Another Vs. State of Madhya Pradesh** reported in **[2021 0 Supreme (SC) 529]** had occasioned to discuss the issue and observed in paragraph -14 as follows:-

> 14. In other words, grave or serious offences or offences which involve moral turpitude or have a harmful effect on the social and moral fabric of the society or involve matters concerning public policy, cannot be construed betwixt two individuals or groups only, for such offences have the potential to impact the society at large. Effacing abominable offences through quashing process would not only send a wrong signal to the community but may also accord an undue benefit to unscrupulous habitual or professional offenders, who can secure a "settlement' through duress, threats, social boycotts, bribes or other dubious means. It is well said that "let no

guilty man escape, if it can be avoided."

15. The Supreme Court in case of **Daxaben Vs. The State of Gujarat & others 2022 LiveLaw (SC) 642** observed as follows:-

"38. However, before exercising its power under Section 482 of the Cr.P.C. to quash an FIR, criminal complaint and/or criminal proceedings, the High Court, as observed above, has to be circumspect and have due regard to the nature and gravity of the offence. Heinous or serious crimes, which are not private in nature and have a serious impact on society cannot be quashed on the basis of a compromise between the offender and the complainant and/or the victim. Crimes like murder, rape, burglary, dacoity and even abetment to commit suicide are neither private nor civil in nature. Such crimes are against the society. In no circumstances can prosecution be quashed on compromise, when the offence is serious and grave and falls within the ambit of crime against society.

39. Orders quashing FIRs and/or complaints relating to grave and serious offences only on basis of an agreement with the complainant, would set a dangerous precedent, where complaints would be lodged for oblique reasons, with a view to extract money from the accused. Furthermore, financially strong offenders would go scot free, even in cases of grave and serious offences such as murder, rape, brideburning, etc. by buying off informants/complainants and settling with them. This would render otiose provisions such as Sections 306, 498A, 304-B etc. incorporated in the IPC as a deterrent, with a specific social purpose.

"40. In Criminal Jurisprudence, the position of the complainant is only that of the informant. Once an FIR and/or criminal complaint is lodged and a criminal case is started by the State, it becomes a matter between the State and the accused. The State has a duty to ensure that law and order is maintained in society. It is for the state to prosecute offenders. In case of grave and serious non-compoundable offences which impact society, the informant and/or complainant only has the right of hearing, to the extent of ensuring that justice is done by conviction and punishment of the offender. An informant has no right in law to withdraw the complaint of a non-compoundable offence of a grave, serious and/or heinous nature, which impacts society."

16. The Supreme Court in the case of **P. Dharmraj Vs. Shanmugam and others decided on 8th September 2022 in Crl. Appeal Nos. 1515-1516 of 2022**, after discussing in earlier judgements observed in para-42 as follows:-

"Thus it is clear from the march of law that the Court has to go slow even while exercising jurisdiction under Section 482 Cr.PC or Article 226 of the Constitution in the matter of quashing of criminal proceedings

on the basis of a settlement reached between the parties, when the offences are capable of having an impact not merely on the complainant and the accused but also on others."

17. From the decisions noticed above, the law as it stands is that although this Court can invoke its jurisdiction under Section 482 Cr.P.C. even in non-compoundable offence and can quash the proceedings on the basis of settlement arrived at between the parties even in the cases of non-compoundable offences but while exercising its jurisdiction this Court must consider the fact that whether the proceedings relates to any serious and heinous offences and whether the crime in question has impact over the society.

18. Considering the nature of offences, nature of dispute, facts and circumstances of the case, I am of the opinion that the case against the applicants, which is pending in Court of Ist Additional Sessions Judge, Baghpat is to be quashed in the light of the compromise entered between the parties and verified by the court concerned vide order dated 11.6.2024.

19. Therefore, the applications under Section 482 Cr.P.C. are allowed. The proceedings of Criminal Case pending before the Judicial Magistrate, Baghpat against the applicants as stated above is hereby quashed on the basis of compromise entered between the parties.

(2024) 8 ILRA 663
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.08.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Appeal No. 4574 of 2014
With
Criminal Appeal No. 4897 of 2014

Ahrar Ahmad ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Rajrshi Gupta, Sri Vinod Singh, Sri Mohd. Sahiba Alam Khan, Sri Pushpendra Singh, Sri Dilip Kumar (Sr. Advocate)

Counsel for the Respondent:
Govt. Advocate, Sri Brijesh Sahai, Sri Ganesh Shankar Dubey, Sri Pratik J. Nagar, Sri Rajul Bhargva, Sri Sikander B. Kochar, Sudhir Kumar Agarwal

A. Criminal Law - Indian Penal Code, 1860 -Sections 30 & 34- Appellants, Nadeem Ahmad & Ahrar Ahmad, were charged with the murder of Asif -Prosecution was able to prove the guilt of appellant, Nadeem Ahmad - Nadeem Ahmad was named in the FIR. Eyewitnesses (PW-1 and PW-2) testified that Nadeem, using a country-made pistol, fired at Asif, causing his death. Both witnesses confirmed that Nadeem, tried to flee the scene, firing in the air to escape. Motive was attributed to Nadeem, due to electoral rivalry with Asif. Licensed revolver belonging to Nadeem was recovered by the police, and ballistic reports confirmed that the weapon was used in the crime. Doctor who conducted the post-mortem, confirmed that the injuries sustained by the deceased were consistent with the firearm used by Nadeem. No evidence suggested that two different firearms were involved in the murder. Appellate Court upheld the judgment of conviction and order of sentence passed by the trial court for accused Nadeem Ahmad. (Para 33)

B. Criminal Appeal - Murder - Indian Penal Code, S. 302, S. 34- Acquittal on Benefit of

Doubt - Appellants, Nadeem Ahmad & Ahrar Ahmad, were charged with the murder of Asif -Prosecution could not prove the guilt of Ahrar Ahmad. No firearm was recovered from Ahrar. No specific motive was attributed towards him.Independent witness stated that Ahrar was present at Jama Masjid of village- Akbarpur at the time of incident. Appellate Court set aside the judgment of conviction and order of sentence for appellant- Ahrar Ahmad and he was acquitted of the charge. (Para 34)

Appeal partly Allowed. (E-5)

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. This appeal is preferred against the judgment of conviction dated 12.11.2014, passed by Additional Sessions Judge, Court No. 3, Bulandshahar in S.T. No. 104 of 2013 (State Vs. Nadeem & another) arising out of Case Crime No. 688 of 2012, Police Station- Kotwali Nagar, District- Bulandshahar vide which the appellants Nadeem and Ahrar were held guilty of offence punishable under Section 302 read with Section 34 of I.P.C. as well as the order of sentence dated 15.11.2014 vide which both the accused were awarded life sentence along with fine of Rs. 40,000/- each. In case of non-payment of fine, further they were directed to undergo punishment of one year. The two-third amount of the fine was directed to be paid the legal heirs of Asif.

It is worth noticing that appellant-Ahrar Ahmad filed S.L.P. (Criminal) No. 21671 of 2022 praying for bail. The Supreme Court, however, vide order dated 14.12.2022, directed the High Court to finally decide and dispose of the appeal within a period of nine months. Therefore, this appeal is taken in the category of Supreme Court expedited cases.

2. Heard Mr. Dilip Kumar, learned Senior Counsel assisted by Mr. Vinod Singh, Advocate, Mr. Mohd Sahibe Alam Khan and Mr. Pushpendra Singh, learned counsel for the appellant, Mr. Sudhir Kumar Agarwal, learned counsel for the informant and learned AGA for the State.

3. The Trial Court's record is received and paper books are ready. With the assistance of learned counsel for the parties, the entire evidence is re-scrutinized and re-appreciated.

4. Brief facts of the case as per the FIR read as under:

"श्रीमान जी आज दिनांक 14.10.2012 को समय करीब 5बजे शाम मैं आबिद व मेरा छोटा भाई आसिफ पुत्र अताऊरहमान अहमद निवासी अकबरपुर अपने बहनोई अबसार अहमद पुत्र अल्ताफ अहमद निवासी मऊखेडा के यहां से दावत खाकर अ (का०फटा) व अकबरपुर वापस आ रहे थे मैं व मेरा बहनोई अबसार एक मोटर साइकिल पर थे तथा मेरा भाई आसिफ अपनी अलग मोटर साईकिल पर मेरे चाचा मौ० ऊमर पुत्र मुस्लिम के साथ हमारे अ◌ागे आगे थे जब हम लोग भूड के पार बनी बिसा कोलोनी में आसिफ निवासी अकबरपुर की मोबाइल की दूकान से 10 कदम पहले पहुंचे तो वहां मेरे ही गांव के नदीम व अहरार व दो अन्य व्यक्ति खडे मिले कि एकदम इन्होने मेरे भाई आसिफ को रोक लिया और उसके साथ गाली गलौच व मारपीट करने लगे मैंने तुरन्त अपने बहनोई अबसार की मोटर साइकिल रूकवाई तथा मैंने व बहनोई अबसार ने तथा मेरे चाचा मौ० ऊमर ने उनसे कहा सुनी की ओर मारपीट का कारण पूछा तो मेरे व अन्य गवाहो के सामने ही मेरे गांव के नदीम व अहरार पुत्रगण हुसैन खां तथा अन्य दो व्यक्तियों ने अपने अपने हाथों में लिए हथियारों से मेरे भाई को जान से मारने की नियत से गोलियां चला दी जो मेरे भाई को लगी मैंने अन्य गवाहों की मदद से मुलजिमान को पकडना चाहा तो हवाई फायर करते हुये भाग गये हाथ

नहीं आये मेरा भाई वही लहूलुहान होकर गिर पडा मैंने अपने आपको सभालते हुये गांव के तनवीर को फोन करवाकर गाडी मगाई और अपने भाई को गवाहो व अन्य लोगो की मदद से सरकारी अस्पताल बु०शहर में लेकर आया जहां डाक्टरों ने मेरे भाई को मृत घोषित कर दिया मेरा भाई आसिफ मुलजिम नदीम के दादे मुम्ताज के सामने प्रधानी की चुनाव ल़डा था तभी से ये लोग उससे रंजिश मानते थे और उसे मारने की फिराक में थे आज मौका मिल गया तो इन्होने मेरे भाई की हत्या कर दी है मेरे भाई की लाश सरकारी अस्पताल में रखी है रिपोर्ट को आया हूं रिपोर्ट लिखकर कानूनी कारावाई की जाय प्रार्थी आबिद पुत्र अताऊरहमान गांव अकबरपुर थाना कोतवाली देहात जिला- बु०शहर लेखक अबसार अहमद एस०ओ० अल्ताफ अहमद गांव मऊखेडा थाना कोतवाली नगर बु०शहर एम 9927523132

नोट- मैं सी/सी प्रमाणित करता हूं कि तहरीर की नकल चिक पुस्त पर शब्द वा शब्द अंकित है मूल तहरीर संलग्न मूल है।

का० 821 भूपेन्द्र सिंह
थाना- कोतवाली नगर
बुलन्दशहर
दिनांक 14.10.12"

5. The police prepared the Panchayatnama and thereafter sent the dead body for post-mortem examination. Thereafter, the police conducted the investigation and effected the recovery of blood stained earth vide recovery memo and further recovered the licensed 32 bore revolver no. F.G. 34117 on the pointing out of accused- Nadeem from his house along with the three cartridges inside the chamber of revolver and five live cartridges in the holster were recovered. The license which was in the name of accused- Nadeem Ahmad was also taken in possession by the police vide recovery memo.

6. The bullet recovered from the spot along with the revolver and live cartridges were sent to F.S.L. for ballistic examination. The police, on completion of investigation, submitted the final report before the court which was submitted to the court of Sessions. The Sessions Judge, Bulandshahar on 18.02.2023 framed the charge under Section 302 read with Section 34 I.P.C. against the accused person.

7. The accused did not plead guilty and claimed trial.

8. In prosecution evidence, PW-1- Aabid Hussain- informant stated on the line of information given to the police in the FIR. This witness stated that on 14.10.2012 at about 5:00 PM, he along with his younger brother- Asif, paternal uncle- Mohd. Umar and brother-in-law- Afsar were coming back on the motorcycles after having food in the house of Afsar, situated at Maukheda. One motorcycle was driven by Asif and Mohd. Umar was sitting on the pillion seat. Second motorcycle was driven by informant and his brother-in-law- Afsar was the pillion rider. Asif was driving the motorcycle ahead of PW-1. When they reached near the shop of one another Asif- a shopkeeper, Nadeem, Ahrar and two other persons stopped his brother- Asif and started abusing him and gave him beatings. PW-1 stopped his motorcycle and asked the assailants why they were beating and abusing his brother. In the meantime, accused- Nadeem and Ahrar took out their firearms and fired on Asif. PW-1 along with Afsar, Mohd. Umar tried to catch hold of Nadeem and Ahrar but they ran away towards village Bhud while firing in air and threatening to kill them. His brother fell down on the corner of southern side of the road. By making a phone call to one Tanveer, he arranged the vehicle and took his brother to Govt. Hospital, Bulandshahar where the doctor declared him brought dead. This witness stated that the grandfather of the accused namely Mumtaz had contested the election of Village

Pradhan against his brother deceased-Asif and since then the accused were having enmity with him.This witness proved the complaint given to the police as Ex.K1. In cross-examination, this witness stated that he is less educated and can only sign. He further stated that his eye sight is poor and he cannot read without glasses, however, he can see from distance place. He further stated that his mobile no. is 9927523132 and at the time of incident, he was carrying this mobile. This witness denied a suggestion that his brother Asif and accused Nadeem were good friends and used to stay together for 12 to 14 hours in a day. He further stated that his brother Asif contested the election of Village Pradhan in 2000.

9. This witness further stated that Mumtaz against whom Asif contested the election is in relation with the accused by third degree of generation. This witness further stated that his wife Mehnaz contested the election of Pradhan in 2005 against Smt. Shabnam wife of Tanveer who is son of his uncle Mohd. Umar. He further stated that Smt. Firozan wife of Mumtaz also contested the election. This witness denied a suggestion that on account of this election he was not on the talking terms with Mohd. Umar. This witness further stated that he, his uncle- Mohd. Umar and deceased- Asif have no criminal history. The place of occurrence was an habitated place and there were shops nearby. In further cross-examination, he stated that the I.O. did not prepare the site plan in his presence, however, he has told the detail about the incident to the I.O. He further stated that Mumtaz has died about seven years ago and qua his sons Asrar and Avrar, he had no knowledge whether the cases are pending against both of them and he did not know whether Mumtaz also faced the criminal cases. In further cross-examination, PW-1 stated about the place of occurrence, the time when they started from village- Maukheda and the manner in which they took injured Asif in a car and that his clothes were also blood stained. This witness further stated that he did not know whether one Mustakim by dialing 100 number gave information to the police and rather denied whether that has given information that there were four assailants. On a specific question about the firing by the accused person, this witness replied that when accused gave him slaps, Asif moved about one pace. He further stated that he cannot tell which accused fired upon Asif, however, all the four accused fired. He further stated that when the accused fired upon Asif he was about one and a half steps away from them. At the end of the lengthy cross-examination, this witness denied a suggestion that he had not witness the occurrence and also that he was not present at the spot.

10. PW-2- Mohd. Umar stated that deceased- Asif was his nephew and on the date of incident at about 5:00 PM, he and Asif were going on one motorcycle and on the second motorcycle Aabid and Afsar were coming. This witness also gave the complete description of the incident, when accused Nadeem and Ahrar after giving beating to Asif took out the country made pistol and fired on Asif, which hit him and thereafter, he fell down and accused by firing in air ran away. When Asif was taken to the hospital, he was declared dead. He further stated that his statement was recorded by the I.O. after about 8 to 10 days. This witness also stated that Village Pradhan Mumtaz died about 5-7 years ago and Avrar and Asrar are his sons. He further stated that his son Tanveer’s phone no. is 9837552410 and his younger son is named

Tafseer and both of them reside in Saudi Arabia. This witness further stated that he did not know if any part of his statement made to the I.O. was not recorded in his statement. This witness was cross-examined at length by the defence counsel about the relationship of the accused with Mumtaz. He denied a suggestion that he was not present at the spot along with Aabid and Afsar or that one Mustakim prior to his reaching at the spot gave information to the police by dialing 100 number. PW-2 also denied a suggestion that he along with Aabid and Afsar reached the hospital, later on, when the deceased was got admitted in the emergency hospital by some electrician and they reached subsequent to the death of Aabid.

11. PW-3- Dr. Sachin Kumar who conducted the post-mortem reported the injuries as:

"चोट नं०- 1- आग्नेआस्त्र का प्रवेश घाव 1 x 1 cm चेस्ट केवटी तक गहरा दायीं तरफ छाती पर ऊपरी भाग में दायी निपिल से 3 से०मी० ऊपर 12 बजे की स्थिति में जिसके मार्जिन अन्दर की तरफ थे।

चोट नं०- 2 आग्नेआस्त्र का प्रवेश घाव 1.5 x 1.5 cm चेस्ट केवटी तक गहरा दायी तरफ छाती में दाहिली निपिल के 6 cm ऊपर की तरफ 5 बजे की स्थिति पर था उसके किनारे अन्दर की ओर थे।

चोट नं०-3 आग्नेयास्त्र के निकलने का घाव 1x1 cm छाती की गुहा तक गहरा दायी तरफ छाती में बांजू की साईड में बगल से 6 cm नीचे मध्य भाग में इसके किनारे बाहर की तरफ थे।

चोट नं०-4 आग्नेयास्त्र का निकाशी का घाव 1 x 1 cm छाती की गुहा तक गहरा बायीं तरफ छाती के पीछे बायी स्कपला से 6 से०मी०2 बजे की स्थिति में इसके किनारे बाहर की तरफ निकले हुये थे छाती की गुहा को खोलने पर चोट नं० 1 व 4 एक दूसरे से मिली हुई थी।

चोट नं० 2 व 3 आपस में मिली हुई थी। दायां फेफडा पिलूरा व पसली सं०3 4,5,6 टूटी हुई पायी गयी, लगभग 1.8 लीटर खून दायी छाती की गुहा में पाया गया।

चोट नं०-5 फटा हुआ घाव 1.5 cm x 1 cm दायी तरफ छाती के ऊपरी भाग पर चोट सं०- 2 के 3 cm नीचे था।

चोट नं० 6 – फटा हुआ घाव 1 cm x 1 cm दायी तरफ छाती के ऊपरी भाग पर चोट सं० 5 से आधा से०मी० नीचे था।

चोट नं०-7- आग्नेयास्त्र का प्रवेश घाव 1 cm x 1 cm बायीं जांघ पर बायी् घुटने से 10 cm ऊपर सामने के भाग पर था। इस चोट को खोलने पर एक धातु की मेटालिक बुलट जांघ से पायी गयी।"

In cross-examination this witness stated that

"चोट नं०-1 पर कोई कालिग व गोडन (बेलेकनिंग व टेटोइंग) मौजूद नहीं थी। चोट नं०-2 पर भी बेलेकनिंग व टेटोइंग मौजूद नहीं थी। यदि मृतक को 6 फुट से कम की दूरी से आग्नेयास्त्र से चोट पहुंचाई गयी होती तो इन चोट नं० 1 व 2 बेलेकनिंग टेटोईग आना सम्भव था।"

This witness stated that the injured cannot sustain injuries on both side of his body i.e. front and backside due to a fall and the injury nos. 5 and 6 can be caused by a pointed article made of an iron rod.

12. PW-4- Bhupendra Singh constable proved that he had recorded the chik FIR Ex. K3. In cross-examination, he stated that his statement was recorded by the I.O. He pleaded ignorance, if prior to registration of the FIR, some message through wireless was received in the police station that Asif has died.

13. PW-5- S.I.- Shyam Sundar stated that on 14.10.2012, he had gone to

district hospital's mortuary and prepared the Panchayatnama regarding death of Mohd. Asif. The Panchayatnama is Ex.K-5, the sketch of the dead body was prepared which is Ex.K-6, letter of CMO is Ex.K-8 and another letter to R.I. is Ex.K-9. The dead body was handed for post-mortem as per letter is Ex.K-10. The S.H.O.- Jitendra Kumar visited the spot and collected the blood stained and simple earth in separate boxes which were sealed. The recovery memo of the S.H.O. is Ex.K-11. In cross-examination, this witness stated about the time of panchayatnama as well as the time when the post-mortem was conducted. This witness stated that at page 33, in the Panchayatnama, there is over-writing as rapat no.40 is changed to 41. He denied suggestion that he has prepared the papers of investigation while sitting in a police station.

14. PW-6- Jitendra Kalra stated that he was S.H.O. in P.S.- Kotwali and he has supervised the investigation. chik FIR and G.D. was registered and thereafter, the investigation started. He prepared the site plan at the spot which is Ex.K-12. This witness also stated about the arrest of accused- Nadeem and upon his pointing out he recovered a revolver used in commission of crime and the accused also confessed about involvement of his brother- Ahrar. This witness further stated that accused Nadeem took the investigation team to his house and from a room, recovered one revolver in which there were three empty cartridges and five live cartridges in the holster. The revolver was of 32 bore and it was licensed in the name of Nadeem. The recovery memo of the weapon is Ex.K-13. Thereafter, on 03.11.2012, Afsar was arrested and his statement was recorded and confessed about committing the offence along with accused Nadeem. He stated that he had thrown away the country made pistol. Thereafter, PW-6 along with witnesses and accused Ahrar went to place where he has stated about throwing the country made pistol but the same could not be recovered. He approved the charge-sheet which is Ex.K-14. With the permission of the court, a sealed packet was opened which was consisted of five live cartridges in a belt and a revolver of 32 bore, and from the envelope, three empty cartridges EC1, EC2 and EC3 were taken out and two empty cartridges TC1 and TC2 along with bullets were seen. The witness identified all these recoveries and the same were exhibited from Ex.1 to Ex.15. One bullet EB1 was also taken out from the packet which the witness stated that it was recovered from the body of the victim at the time of the post-mortem. The same is Ex.16. The gun license is Ex.17. Thereafter, all these articles were sealed in a white coloured cloth bag is exhibited from Ex.18 to Ex.21. This witness stated that these articles were sent to F.S.L. for cross-examination.

15. In cross-examination, this witness stated about the information received in the police station at about 7:00 PM. He stated that he got the information from the brother of deceased Asif and after recording the statement, he went to hospital. He also stated about recording the statement by Constable regarding the chik FIR and when he reached the hospital, he found Asif was lying dead. In further cross-examination, this witness stated that he had prepared the site plan of the spot on the identification of the informant and has given complete details of the investigation conducted by him. He admitted that later on, the receiving information from a secret informer regarding two unknown persons, he had removed their names in the

investigation as the informant and witnesses have stated that only two persons have fired upon the deceased. He stated that he recorded the statement of both the witnesses on 26.11.2012 but could not record the statement of Mohd. Umar and Afsar for a period of about more than one month being busy in government work. At spot, he did not recover any empty cartridge and no bullet or pellet was seen on the wall at nearby place. In further cross-examination, this witness gave details about the time, the conduct of post-mortem, the recovery effected from the spot etc. After a lengthy cross-examination, he denied a suggestion that he visited the spot and he prepared the investigation documents while sitting in the police station.

16. Thereafter, the statement of accused Nadeem and Ahrar was recorded under Section 313 of Cr.P.C. and all the incriminating evidences were put together to them. In reply to question no.7 regarding the enmity of the informant side and the accused, it was asked that as grandfather of accused contested the election against deceased Asif, he replied that Mumtaz is not my grandfather and there is a difference of five degree of generation in between and they did not have any direct relation. Regarding registration of the chik FIR and GD Nos. Ex.K3 and Ex.K4, this witness stated these are ante-time and the I.O. has falsely implicated them due to part them. Regarding question no.25, i.e. what clarification he want to give, the accused replied that on the date of incident Ahrar was not with him. He had not committed any offence and at the time of incident, he was in Bulandshahr and at night he came to know about the death of Asif, when he reached his village. Thereafter, by calling him, from his home his licensed revolver was taken in possession by way of a false recovery.

17. In the statement under Section 313 of Cr.P.C., accused Ahrar was also put to all the incriminating evidences and he gave similar reply to question no.7 that Mumtaz and his family has a gap of five degree of generations. Regarding question nos. 19 to 21, recovery of blood stained earth, weapon, the witness stated that the police under pressure of the informant's side has falsely implicated. In reply to question no.25 for giving his clarification, replied that at the time of incident, he was reading 'Namaz' in the Jama Masjid of village- Akbarpur. A total number of 36 respectable persons of the village gave affidavit to S.S.P.- Bulandshahar in this regard that he has no connection with the offence.

18. In defence, DW-1- Hussain M. Zaidi, Nodal Officer, Idea Cellular Limited was examined who stated that in compliance of the order of the court, he has brought the call details and location details from the mobile nos. 9837555515, 9837552410 and 9927523132 for the date 14.10.2012, the same is signed and attested by him with a seal of the company. The details of all the mobile phones were Ex.Kha-2 to Ex.Kha-4. He has given the details of all the three mobile numbers from 1:00 PM to 6:00 PM. In cross-examination by the public prosecutor, he stated that one tower covered about one kilometre as per the Ministry of Telecommunication's directions.

19. DW-2- Om Prakash Singh, Zonal Control Police, Office of Inspector General stated that on 14.10.2012, he was Radio Inspector in the control room on 14.10.2012 and at about 17:45 hours from mobile no. 9027108618. Informant gave information that one person is injured in

firing incident in Veesa Colony to the police. The informant gave his name Mustakim, s/o Fakhruddin, r/o Chandrawali, P.S.- Sikandarabad. Thereafter, the police team/ Kotwali Nagar police station reached the spot and sent injured to the hospital. In cross-examination by public prosecutor and he stated that he is making the statement on the basis of the complaint registered from 100 number.

20. DW-3- Faheem Ahmad, S.O., P.S.- Kotwali (rural) stated that on 14.10.2012, at about 4:45 PM, he had gone to Jama Masjid of Village- Akbarpur for reading the 'Namaz' and found that Ahrar s/o Hussain Khan was also present in the Jama Masjid and about 30-35 persons were also reading the 'Namaz'. Ahrar stay in the Masjid for half an hour later on he came to know that Asif is murdered and he had given an affidavit on 27.11.2012 in this regard to the S.S.P., he also proved the copy of the affidavit. He also stated that apart from him, 20-25 persons have also given the affidavit. In cross-examination, he gave name of some of the persons who have given the affidavit and denied a suggestion that he is making a false statement.

21. The trial court thereafter, vide impugned judgment dated 12.11.2024 held the appellant guilty of offence under Section 302/34 of I.P.C and vide impugned order dated 15.11.2014 awarded them life imprisonment along with fine as discussed above.

22. Learned counsel for the appellant has argued that the FIR is registered after a delay of about 1 hour 40 minutes and it is stated that four persons have committed the offence whereas during investigation, the I.O.- PW-6- S.H.O.- Jitendra Kalra has stated that on the basis of the information from some secret informer and as per the statement of the informant and the witnesses only two persons were found involved who fired upon the deceased. Counsel submits that informant has given an aggravated version. It is next argued that the statement of the eye-witness is not trustworthy. PW-1- Aabid and PW-2- Mohd. Umar are in fact not the eye-witnesses. It is submitted that from the statement of DW-1, Nodal Officer, the call details of the phones of PW-1 and PW-2 show that they were not present at the place of occurrence. It is argued that in cross-examination of PW-1, a specific question was asked about the mobile phone no. 9927523132 which he was using at the time of the incident and he admitted it to be correct. As per the statement of DW-1, the location of the said phone was not at the place of occurrence. It is argued that this witness has proved that on 14.10.2012, PW-1 for whole day till 5:15 PM was in village- Akbarpur and has not come to village- Maukheda where the incident took place.

23. It is submitted that even from the call details of Tanveer, it is proved that he was in his village- Akbarpur, and was not at Maukheda till 5:51 PM and he did not make any phone call. It is argued that in such circumstances, both Afsar and Abid persons have not seen the place of occurrence where allegedly the accused were present. Counsel submits that even call details of Tanveer proved that no call was made on his phone which falsify the version of the prosecution that he was called at the spot by the informant. Counsel submits that there is nothing on record to prove that on the date of incident, Afsar had invited 5-10 persons at his house for a feast

at about 3:00 PM. As per his call details, he himself was not present at his place of residence, the story build up by the prosecution that the informant and deceased had gone to house of Afsar for attending an invitation is not proved. Similarly, his presence at the spot is also not proved. It is next argued that the prosecution has failed to prove any motive against the accused person. The motive set up by the prosecution that deceased Asif has contested the election against one Mumtaz in the year 2000 and therefore, the accused persons being the grandson of Mumtaz had enmity with Asif is not proved. It is argued that firstly PW-1 has clearly admitted that Mumtaz was related to them in the third degree of generation. It is also argued that if election was contested in the year 2000, there was no justification for committing the offence in 2012 as Mumtaz has already died in the year 2006.

24. Learned counsel has argued that the motive with regard to contesting the election 12 years prior to the incident that to when Mumtaz, a distant collateral of the accused had already died in the year 2006 is totally unbelievable. It is next argued that as per the informant, the incident took place outside the shop of one Asif who was having a mobile phone shop but the he was not examined as an independent witness to support the interested witnesses PW-1 and PW-2. It is argued that the occular and medical version of the prosecution do not corroborate each other.

25. As per the oral evidence, the gun shot were fired from a close range but on injury nos. 1, 2 and 7 neither there is charring nor tatooing and there is no inversion of skin wound. It is also argued that the doctor has failed to explain how injury nos. 5 and 6 were caused. It is also argued that in the stomach of the deceased only 150mg food was found whereas the prosecution version was that the deceased along with PWs was coming back after having a feast on invitation from Afsar. It is next argued that it has come in the statement of DW-1 that the information in the police control room was given by one Mustakim s/o Fakhruddin at 17:45 hours who was resident of village- Chandrawali and however, this informant was never made a witness by the police.

26. It is also submitted that contrary to the version of PW-1 and PW-2 that after the incident, he called Tanveer on his mobile phone and he came and took the injured person to the hospital, the record shows that one Ahad Shyam got the deceased admitted in the hospital. The information to the police was given vide GD No. 40 at 18:39 hours by Ajay Kumar, ward boy but the I.O. neither recorded the statement of Mustakim nor of Ahad Shyam and even the statement of Ajay Kumar was not recorded as a prosecution witness which raises a serious doubt about the presence of PW-1 and PW-2 at the spot. It is also argued that there is a variation in the statement of PW-5- Shyam Sundar and PW-6-SHO- Jitendra Kalra to support the argument that the I.O. has not signed the Panchayatnama and for a period of 1 and 3/4 months, the statement of the eye witnesses were not recorded and it was not clear in the statement where there were two or four assailants. It is next argued that the recovery of license revolver from accused Nadeem is doubtful as it is recovered from the room which was already open.

27. It is next argued that the Forensic Science Lab report does not support the prosecution version as it is not

clear which weapon was used for commission of offence. Learned Senior Counsel has laid much emphasis on this report to submit that an opinion is given that the bullet retrieved from the body of the deceased, was not fired from the revolver recovered from the accused Nadeem and therefore, it is not proved that the offence was committed from the licensed revolver of Nadeem. It is also submitted that no recovery was effected from accused Ahrar.

The FSL report is reproduced as under:

"विधि विज्ञान प्रयोगशाला उत्तर प्रदेश, 15 ताज रोड, आगरा-282001

प्रेषक,
संयुक्त निदेशक

विधि विज्ञान प्रयोगशाला, उ०प्र०,
15 ताज रोड, आगरा- 282001

सेवा में,
पुलिस क्षेत्राधिकारी नगर,
जनपद- बुलन्दशहर।

पत्रांकः 8526-आग्ने-12 दिनांकः- 12.6.13

अपराध सं०ः 688/12 राज्य बनामः नदीम

राः 302 IPC 27/30A Act थानाः कोतवाली नगर

आपका पत्र सं० दिनांक-21.12.12

उपर्युक्त मामले से संबंधित निम्नलिखित प्रदर्श प्रयोगशाला में दिनांक 24.12.12 को आपके विशेष वाहक कां० 108 सी.पी. जगदीश प्रसाद द्वारा प्राप्त हुये।

(1) तीन अदद नमूना मुहरें, जिन्हें न-1 से न-3तक से चिन्हित किया गया है।

(2) कपड़े का समुद्रित बण्डल, जिस पर न-1 जैसी महोरे लगी है तथा इस पर "...एक रिवाल्वर... तीन खोखा व 5 जिन्दा कार. 32 बोर .. अ.सं. 688/12..." आदि सा लिखा है, को खोलने पर निम्न प्रदर्श प्राप्त हुये।

(A) कपड़े का समुद्रित बण्डल, जिस पर न-2 जैसी मोहरे लगी है तथा इस पर ".. एक रिवाल्वर .32 बोर व 3 खोखा कारतूस व 5 जिन्दा कारतूस .32 बोर ... अ.सं. 688/12 ... बनाम नदीम..." आदि सा लिखा है, को खोलने पर कवर से एक अदद .32 बोर रिवाल्वर नं. FG 34117, रिवाल्वर के चैम्बर से तीन चले कारतूस .32 बोर (KFS &WL) व कवर से पाँच जिन्दा कारतूस .32 बोर (KFS &WL) प्राप्त हुये। रिवाल्वर को 1/2013 से, .32 बोर चले कारतूसों को EC-1,EC-2 व EC-3 से तथा .32 बोर जिन्दा कारतूसों को LC-1 से LC-5 तक से चिन्हित किया गया है।

(B) कागज का समुद्रित लिफाफा, जिस पर न-3 जैसी मोहरे लगी है तथा इस "PM N.686/12Dt.15-10.12 Mohd. Asif ...One metallic bullet..." आदि सा लिखा है, को खोलने पर कपड़े की सील्ड पोटली प्राप्त हुई, जिस पर न-3 जैसी मोहरे लगी है, इसे खोलने पर एक चली बुलैट .32 बोर (लैड धातु की) प्राप्त हुई। जिसे EB-1 से चिन्हित किया गया है।

नोट- प्राप्त .32 बोर रिवाल्वर का नं. FG 34117 है, जबकि अग्रेषण पत्र में रिवाल्वर का नं. FS 3447 वर्णित है।

निरीक्षण

विवादित .32 बोर रिवाल्वर नं. FG 34117 चिन्हित 1/2013 द्वारा .32 के दो कारतूस प्रयोगशाला में परीक्षार्थ चलाये गये, जिन्हें TC-1,TC-2 से चिन्हित किया गया है। इनसे रिकवर की गयी बुलैट्स को क्रमशः TB-1,TB-2 से चिन्हित किया गया है।

विवादित एवं परीक्षार्थ कारतूसों/बुलैट्स पर उपस्थित चिन्हों का निरीक्षण हैण्डमैग्नीफायर एवं तुलनात्मक सूक्ष्मदर्शी यंत्रों द्वारा किया गया।

विवादित कारतूस चिन्हित EC-1,EC-2 व EC-3, पर फायरिंग पिन व ब्रीच के चिन्ह उपस्थित है। परीक्षार्थ कारतूस चिन्हित TC-1,TC-2 पर फायरिंग पिन व ब्रीच के चिन्ह उपस्थित हैं।

विवादित बुलैट् चिन्हित EB-1, पर 6-6 लैण्डस/ग्रूव्स के चिन्ह उपस्थित हैं, जिनका घुमाव दाहिनी तरहफ है। परीक्षार्थी बुलैट्स चिन्हित TB-1, TB-2 पर 6-6 लैण्डस/ग्रूव्स के चिन्ह उपस्थित हैं, जिनका घुमाव दाहिनी तरफ है।

कारण

विवादित एवं परीक्षार्थी कारतूसों/बुलैट्स पर उपस्थित चिन्हों का मिलान तुलनात्मक सूक्ष्मदर्शी यंत्र द्वारा किया गया। विवादित .32 बोर कारतूस चिन्हित EC-1,EC-2 व EC-3, पर उपस्थित फायरिंग पिन व ब्रीच के चिन्ह व्यक्तिगत विशेषताओं में परीक्षार्थ कारतूसों चिन्हित TC-1,TC-2 पर उपस्थित फायरिंग पिन व ब्रीच के चिन्हों के समान है। विवादित बुलैट् चिन्हित EB-1 पर उपस्थित लैण्डस/ग्रूव्स के चिन्हों में, परीक्षार्थ बुलैट्स चिन्हित TB-1व TB-2 पर उपस्थित लैण्डस/ग्रूव्स के चिन्हों से तुलनार्थ व्यक्तिगत विशेषताओं का अभाव है।

परिणाम

(1) विवादित .32 बोर कारतूस चिन्हित EC-1,EC-2 व EC-3, .32 बोर रिवाल्वर नं० FG 34117 चिन्हित 1/2013 द्वारा चलाये गये हैं।

(2) विवादित .32 बोर बुलैट् चिन्हित EB-1 पर .32 बोर रिवाल्वर नं०FG 34117 चिन्हित 1/2013 से तुलना करके निश्चित अभिमत निर्धारित करने हेतु व्यक्तिगत विशेषताओं का अभाव है।

नोटः-(1) उपरोक्त परिणाम प्रदर्शों के माइक्रोस्कोपिक निरीक्षण पर आधारित है।

(2) प्रदर्श वापसी का प्रबंध शीघ्र करें।"

28. Learned counsel has further argued that it has come in the statement of DW-3, an independent witness that at the time of incident accused Ahrar was not present at the spot and he was reading the 'Namaz' in the Jama Masjid of village-Akbarpur. The counsel has argued that as many as 36 people of the said village were also reading the 'Namaz' at the relevant time and given affidavits to SSP but were not made as the part of the investigation. Counsel submits that even recovery of blood stained earth do not to prove guilt of the appellant.

29. Learned counsel further argued that the presence of Ahrar Ahmad is not at all proved at the spot and even no recovery of the country made pistol was effected from him.

30. In reply, learned counsel for the informant as well as learned AGA for the State have, however, opposed the arguments of the appellant on the ground that the motive to commit the offence is proved as it has come that the deceased Asif has contested election against one Mumtaz in the year 2000 and Mumtaz is grandfather of the accused person. Therefore, they had the enmity to commit the offence. It is also submitted that both PW-1 and PW-2 are credible witnesses who are present at the spot and have seen the incident. They are the eye witnesses and the call detail records cannot be read in evidence in the absence of 65B certificate. It is also argued that as per the prosecution version, the accused persons first stopped the motorcycle of the deceased Asif, pick up a brawl and then gave him beatings and PW-1 and PW-2 tried to intervene, by taking out the gun they fired upon the deceased. It is also argued that the time and place of incident is not disputed by the accused while by not giving any suggestion to the prosecution witnesses of fact. It is submitted that Afsar s/o Altaf was scriber of the complaint forming the basis of the chik FIR and therefore, his presence at the spot is proved. It is argued that there is no reasons to discard the statement of prosecution witnesses and variation if any,

in the statement of PW-1 and PW-2 as well as between PW-5 and PW-6 is minor and in ordinary course the same is bound to occur. It is also argued that the prosecution has led sufficient evidence to prove the guilt of accused person.

31. Learned counsel submits that as per the prosecution version, two firearms were used, however, from the statement of PW-3- Dr. Sachin Kumar, it is not proved that injury nos. 1, 2 and 6 were caused with two different firearm weapons and therefore, in the absence of any recovery from appellant- Ahrar Ahmad, the injuries attributed to him, are not explained in the post-mortem.

32. After hearing counsel for the parties and on re-appreciation of evidence, we find that the prosecution has been able to prove the guilt of appellant- Nadeem Ahmad but could not prove the guilt of Ahrar Ahmad beyond doubt for the following reasons:

A. Appellant- Nadeem Ahmad is named in the FIR along with accused- Ahrar. However, in the FIR, two unknown persons were also named but later on, their names were dropped as their identity could not be proved.

B. PW-1 has categorically stated that Nadeem and Ahrar have fired upon from their country made pistol (tamancha) which hit Asif. When PW-1 along with other witnesses tried to catch hold of the accused, they ran away by firing in air. A motive is attributed that deceased Asif has contested election against one Mumtaz who was the grandfather of accused, being a collateral and Nadeem had a grudge against him on that account. This witness has further stated that accused Nadeem was having relationship with the deceased Asif and even Asif has contested the election in the year 2000.

C. The police has recovered the licensed revolver of accused Nadeem along with three cartridges in the chamber of the revolver and five live cartridges in the holster which was sent to the FSL for examination.

D. The trial court has rightly recorded a finding that Nadeem has fired upon Asif with his licensed revolver. However, no firearm was recovered from the appellant- Ahrar. As per the statement of PW-3- Dr. Sachin Kumar who conducted the post-mortem examination, has nowhere stated that the characteristics of the injuries sustained by the deceased, by use of firearm indicate that the same were caused by two different firearms, therefore, only the injury attributed to accused- Nadeem by his revolver is corroborated by the post-mortem report.

E. Even PW-2 had stated that accused- Nadeem and Ahrar by taking out the country made pistol fired upon Asif, however, no such firearm was recovered from appellant- Ahrar. This witness has also attributed the main allegation towards accused- Nadeem and even motive is attributed towards him. Even this witness stated that there are two unknown accused who also fired upon deceased- Asif. However, no evidence in this regard is led by the prosecution. In

cross-examination, this witness stated that the unknown offender did not give any beatings to deceased- Asif.

F. PW-3- Dr. Sachin Kumar who conducted the post-mortem stated that on injury nos. 1 and 2, there was not blackening or tatooing. He further stated that if the firearm was used at a distance of less than six feet, the possibility of blackening and tatooing was there. Similarly, injury no.7 also had no blackening or tatooing which suggest that the same were fired upon from a distance of more than six feet. PW-1 and PW-2 both have stated that at the first instance, Nadeem had fired upon the deceased, therefore, the firearm injury sustained by the deceased on injury nos. 1, 2 and 7 have similar margins.

G. PW-6- I.O. in his deposition has proved that the licensed revolver of accused-Nadeem Ahmad, the cartridges-EB1, which was retrieved from the body of the deceased and cartridges EC1 and EC2 which were test fired from the licensed revolver of Nadeem Ahmad, were sent to the Forensic Science Lab to ascertain the user of the revolver. All this evidence relates to Nadeem Ahmad only as it is a case of prosecution that no recovery of any weapon was effected from Ahrar Ahmad.

H. In the statement under Section 313 of Cr.P.C., accused-Nadeem Ahmad, in reply to question no.25 regarding his clarification, has stated that on the date of incident, Ahrar was not along with him and he has not committed any offence as he was in Bulandshahar and later on, he reached back home and came to know about the death of Asif and thereafter by calling him from his house, the revolver was taken in possession by police.

I. In statement under Section 313 of Cr.P.C., accused-Ahrar Ahmad has categorically stated that he was present in Jama Masjid of village- Akbarpur and he was reading the 'Namaz'. He has also stated that about 36 persons of the village who were also reading 'Namaz' had given their affidavits to S.S.P., Bulandshahar regarding his presence at Jama Masjid in village of Akbarpur.

J. The trial court has not properly appreciated the defence evidence led by the accused Ahrar. DW-1- Hussain M. Zaidi, Nodal Officer, Idea Cellular Limited has proved the call details of PW-1 as well as of Ahrar. The location of phone number belonging to Ahrar Ahmad from 3:00 PM till 5:20 PM was at village- Akbarpur which also shows that Ahrar Ahmad was not present at the spot when the incident took place. The trial court has also not considered the statement of DW-2- Om Prakash Singh, Zonal Control Police, Office of Inspector General, Meerut wherein he has stated that a radio wireless message was received from 9027108618 and the informant told that one person has suffered firearm injury in Veesa Colony. The informant gave his name as Mustakim, s/o Fakhruddin, r/o Village- Chandrawali, P.S.-Sikandarbad, Bulandshahar and the

same was entered in G.D. Number 161/3440. To the contrary, PW-1 has stated that he has sent the information to the police and this evidence was not considered by the trial court.

K. DW-3- Faheem Ahmad, S.O., P.S.- Kotwali (rural), r/o Akbarpur, District- Bulandshahar has stated that on 14.10.2012 at about 16:45 hours, he had gone to Jama Masjid in his village- Akbarpur for reading 'Namaz' and he found that Ahrar, s/o Hussain Khan was also present along with 30-35 persons of this village and they altogether were reading 'Namaz'. Ahrar was there for more than half an hour. On coming to know that Ahrar has been nominated in the murder of Asif, DW-3 along with many other persons have given affidavit to S.S.P., Bulandshahar and a copy of the affidavit dated 13.08.2014 was produced on record. In cross-examination, by the public prosecutor of all DW-1 and DW-2, their testimony could not be shattered being based on the public record and similarly, DW-3 was consistent in making the statement that Ahrar was present in Jama Masjid of village- Akbarpur at the time of incident.

33. In view of above, considering the statements of PW-1 and PW-2, the two eye-witnesses who have named Nadeem Ahmad as the principal accused who first fired upon the deceased- Asif and PW-6- S.H.O./I.O., who recovered the licensed gun from Nadeem Ahmad and considering the report of FSL, coupled with the fact that PW-3- Dr. Sachin Kumar who has conducted the post-mortem, did not state that two firearms were used and lastly considering that no recovery of any firearm was made from accused Ahrar Ahmad, who had also led defence evidence to show the location of his phone which was in village- Akbarpur as well as one independent witness who stated that he along with 35 villagers have given an affidavit to S.S.P., Bulandshahar to show that Ahrar was present at Jama Masjid of village- Akbarpur at the time of incident, we find no merits so far the appeal of Nadeem Ahmad is concerned and we uphold the judgment of conviction and order of sentence passed by the trial court for accused Nadeem Ahmad. The accused Nadeem Ahmad is in custody and he will undergo the remaining sentence in accordance with law.

34. However, considering the evidence in entirety as noticed above, we find that the prosecution has failed to prove the presence of accused Ahrar Ahmad at the spot; beyond doubt no recovery was effected from him and no specific motive was attributed towards him. We find merit in the appeal filed by Ahrar Ahmad and set aside the judgment of conviction and order of sentence for appellant- Ahrar Ahmad and he is acquitted of the charge. As per custody certificate dated 16.01.2023, Ahrar Ahmad is in custody for more than 11 years and 8 months of actual sentence. Therefore, appellant- Ahrar Ahmad be released from judicial custody forthwith, if he is not involved in any other case.

35. With the aforesaid modification in the impugned judgment of conviction and order of sentence passed by the trial court, we uphold the conviction and order of sentence of accused- Nadeem and modified the judgment for accused

Ahrar Ahmad by acquitting him by giving benefit of doubt. With the aforesaid modification, the appeal is **disposed of**.

36. The trial court records be transmitted forthwith.

(2024) 8 ILRA 677
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.08.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

First Appeal No. 131 of 2012

Kuldeep Singh ...Appellant
Versus
Smt. Yashoda Devi ...Respondent

Counsel for the Appellant:
Asif Hasan, Rajendra Prasad Tiwari, Shweta Singh

Counsel for the Respondent:
Ambika Prasad, Narvind Kumar Singh, R.K. Yadav

A. Family Law – Family Courts Act 1984 – Section 7 - Explanation Cl. (b) – Jurisdiction of Family Court – Matrimonial status – Second Suit was filed to nullify the divorce decree obtained on the basis of mutual consent – Objection to jurisdiction of Family Court was raised – Permissibility – Held, subsequent suit that had been filed by the respondent is in essence for determining her matrimonial status as wife of the appellant for which the Family Court would indeed have jurisdiction in terms of Clause (b) of the 'Explanation' to Section 7 (1) of the 1984 Act. (Para 13)

B. Family Law – Hindu Marriage Act, 1955 – S. 13-B – Mutual divorce decree – Absence of jurisdictional prerequisite – Fiduciary relationship – Husband and wife had not been living separately for one year preceding the filing of Mutual divorce suit as was a prerequisite for a suit u/s 13-B of the Act, 1955, and even thereafter they lived together – Decree of divorce dated 08.07.2005 was alleged to be the result of misrepresentation, deceit and fraud practiced by her husband taking advantage of the trust reposed by her on him, she not being much educated, being a trusting Indian wife – Effect – Held, the appellant/husband took advantage of his dominant position vis-a-vis his wife as also the trust reposed by her on account of her fiduciary relationship and betrayed the same – High Court held the decree dated 08.07.2005 obtained by misrepresentation and deceit and resultantly null and void. (Para 26, 27, 35, 38 and 39)

Appeal dismissed. (E-1)

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Shri Rajendra Prasad Tiwari, learned Counsel representing the appellant/husband. Although, the respondent/ wife has filed her counter-affidavit, however, none appeared on behalf of the respondent/wife at the time of final hearing.

(2) The appellant/husband has filed the present appeal under Section 19 of the Family Courts Act, 1984 read with Order XIII Rule 1-A of the Code of Civil Procedure, 1908 against the judgment and order dated 01.08.2012 passed by the Additional Principal Judge, Family Court, Lucknow, in Original Suit No. 1411 of 2005 : *Smt. Yashoda Devi Vs. Kuldeep Singh*.

(3) Apparently, in the aforesaid suit, the respondent/wife had sought declaration of the judgment/decree dated 08.07.2005 passed in Original Suit No. 32

of 2005 filed under Section 13-B of the Hindu Marriage Act, 1955 (hereinafter referred to as '**Act, 1955**') by which divorce on the ground of Mutual Consent was granted, to be a nullity. Vide judgment and order 01.08.2012, the learned Family Court, while allowing the suit, has set-aside the judgment and decree dated 08.07.2005 and has held it to be a nullity, consequently, appellant/husband has been prohibited from marrying another woman unless he takes divorce from respondent/wife in accordance with law.

(4) The factual matrix relevant to decide the present appeal can be captured from the records as herein below :-

(i) The appellant/husband married the respondent/wife on 05.05.1996 in accordance with Hindu rites and rituals. After marriage, respondent/wife was residing at her husband's/in-laws' house situated at village Haluni, Post Sangla Koti, district Pauri Garhwal, Uttranchal (now Uttarakhand). Out of their wedlock, two male children were born on 21.07.1997 and 05.07.2000, respectively.

(ii) Appellant/husband was serving in the Indian Army. He was transferred and posted at Lucknow on his personal request on 25.04.2003. As per the appellant, he was allotted an official accommodation at Lucknow on 01.11.2004. He then brought the respondent/wife and his younger son to Lucknow in November, 2004 and lived together at Lucknow till January, 2005. As there were irreconcilable differences between the two, they decided to part ways amicably, therefore, on 06.01.2015, a suit under Section 13-B of the Act, 1955 for dissolution of marriage on ground of mutual consent was filed before the Principal Judge, Family Court, Lucknow, which was registered as Original Suit No. 32 of 2005 and was decreed on 08.07.2005.

(iii) After passing of the decree, as per the respondent/wife, the appellant/husband took her to her in-laws' house where she stayed for two days and then he left her at her parents' home at Dehradun on the premise that as soon as he arranges a house at Joshimath where he had been posted, he will take her with him but, he never came back. The respondent/wife and her father went to her in-laws' house to inquire, who, ill-treated them, and also disclosed that their son (appellant herein) had divorced her at Lucknow. It is then that respondent/wife came to know about the divorce. She then came to Lucknow with her father, met an Advocate, and inquired about the case in the Family Court, Lucknow and then filed Suit No. 1411 of 2005, as referred above.

(iv) The case of the respondent/wife is that while staying with the appellant/husband, she was made to sign blank papers and photographs which, as per the appellant/husband, were necessary for his service related matters and for this very purpose, she was again made to sign papers and photographs after six months and was also taken to a place which,

according to the appellant, was his office. By practicing deceit and fraud not only on the respondent but also on the Court, he was able to obtain a decree of divorce for cancellation of which the subsequent suit was filed.

(v) Suit No. 1411 of 2005 was filed on 10.10.2005 by the respondent/wife within about three months of the decree in the earlier suit dated 08.07.2005.

(vi) Notice was issued to the husband/defendant in Suit No. 1411 of 2005. In response, husband/defendant put in appearance and filed his written submission, denying the averments made in the aforesaid suit filed by the wife/plaintiff.

(vii) On the basis of pleadings and documents, the learned Family Court framed following issues in Suit No. 1411 of 2005 filed by the wife/respondent:-

i. क्या मूल वाद संख्या 32/05 कुलदीप बनाम यशोदा देवी अंतर्गत धारा–13 बी हिन्दू विवाह अधिनियम–1955 में दिनांक 8.7.05 को अपर प्रधान न्यायाधीश, पारिवारिक न्यायालय, लखनऊ के द्वारा पारित किया गया निर्णय एवं आज्ञप्ति, प्रस्तुत वाद में दिये गये कारणों के आधार पर शून्य घोषित किये जाने योग्य है ?

ii. क्या मूल वाद संख्या 32/05, अंतर्गत धारा 13 भबी हिन्दू विवाह अधिनियम 1955 में पारित किया गया विवाह विच्छेन की आज्ञप्ति प्रतिवादपत्र में दिये गये कारणो से शून्य घोषित किए जाने योग्य है ?

iii. क्या वादिनी किसी अन्य अनुतोष को पाने की अधिकारिणी है। यदि हॉ तो क्या ?

(viii) The wife/respondent, in support of her case, examined herself as P.W.1 and her father, namely, Shri Bhagirath Singh as P.W.2. No documentary evidence was adduced by the wife/respondent.

(ix) The husband/appellant examined himself as D.W.2 and filed documentary evidence along with list of documents (marked as C36/1) viz. (i) original train ticket for the journey dated 23.11.2004 from Kotdwara to Lucknow (marked as C36/2); (ii) original train ticket for the journey dated 18.01.2005 from Lucknow to Najibabad (marked as C36/3); and (iii) photocopy of accommodation allotment letter dated 11.11.2004 issued to the appellant/husband (marked as C36/4). Besides these documents, no other documentary evidence was filed by the appellant/husband.

(x) On an application, the trial Court summoned the original record of Suit No. 32 of 2005, which is tagged with the records of Suit No. 1411 of 2005.

(xi) On a consideration of the facts pleaded and evidence led in the light of the issues framed, the learned Family Court has decided issues no. 1 and 2 in favour of the respondent/ plaintiff and has decreed the suit.

(5) Shri Rajendra Prasad Tiwari, learned Counsel representing the appellant/husband would urge that respondent-wife, after having validly agreed to file a suit for divorce by mutual consent under Section 13-B of the Act, 1955, had signed the memorandum of Original Suit No. 32 of 2005 as well as affixed her photograph on it on the basis of

which the judgment and decree dated 08.07.2005 was passed by the learned Family Court at Lucknow in Original Suit No.32 of 2005 and as such, respondent/wife could not resile from the same and seek its cancellation. Moreso, according to the learned Counsel, the Family Court has failed to appreciate the fact that there is nothing on record to belie the statement recorded by the learned Family Court prior to the passing of consent decree in earlier suit filed under Section 13-B of the Act, 1955 and also there is nothing on record to substantiate the allegation of collusion, misrepresentation and fraud on the part of the appellant, hence the findings recorded by the learned Family Court in the impugned judgment and decree dated 01.08.2012 are not based on any evidence rather they are based on surmises and conjecture.

(6) Learned Counsel representing the appellant also urged that the respondent/wife is 10th Class pass and is also quite educated, therefore, her allegation of being lured in signing the earlier plaint in the suit filed under Section 13-B of the Act, 1955 on the alleged pretext of service record, is absolutely concocted and bald allegation. According to the learned Counsel, in any case, the subsequent Original Suit No.1411 of 2005 seeking to declare the earlier judgment and decree dated 08.07.2005 as nullity by the respondent/wife, was not maintainable before the Family Court as it was not open for the Family Court to exercise jurisdiction declaring the decree passed earlier by it under Section 13-B of the Act, 1955 a nullity. Elaborating his submission, learned Counsel urged that though the issue relating to jurisdiction of the Family Court for passing of a decree for nullifying a decree passed earlier by it in earlier proceedings on the basis of mutual consent between the parties, is a very important issue, however, the learned Family Court has lost sight of the fact in not framing this issue while adjudicating the matter. Thus, he prays that the impugned judgment and decree dated 01.08.2012 is liable to be set-aside.

(7) Although, no oral submission was led by the respondent/wife, however, in the counter affidavit filed on behalf of the respondent/wife, she has reiterated the allegations made in the plaint and also stated that her husband had played fraud on her in seeking divorce under Section 13-B of the Act, 1955 and as such, learned Family Court had rightly declared the judgment and decree dated 08.07.2005 a nullity and had rightly allowed the suit filed by her, hence appeal is liable to be dismissed. Respondent/wife had also stated that learned Family Court had framed the issues based on the pleadings of the parties, which were never objected by the appellant before the learned Family Court nor any application in this regard was filed by him before the Family Court, hence at this stage such an objection as raised by the appellant is not sustainable.

(8) Having regard to the contentions of the appellant/husband and having gone through the record available before us in this appeal as well as record of the trial Court, the points which fall for determination in this appeal are as under :-

I. Whether a Family Court constituted under the Family Courts Act, 1984, has the jurisdiction to set aside or nullify a decree of Divorce passed by it under Section 13 (B) of the Act, 1955 ?;

II. Whether, findings of the trial Court on issues no. 1 and 2 are perverse and unsustainable in law, thereby rendering the impugned judgment erroneous ?;

III. Whether the judgment and decree dated 08.07.2005 in Suit No. 32 of 2005 was obtained by deceit, misrepresentation and fraud?;

IV. Whether the judgment and decree dated 08.07.2005 in Suit No. 32 of 2005 is liable to be declared null and void ?

Point No. I

(9) No such objection to jurisdiction of the Family Court to hear the suit in question was raised by the appellant before the trial Court nor any application was filed for framing additional issue on this point. Nevertheless, as a jurisdictional issue has been raised before us, we proceed to consider the same.

(10) Section 7 of the Family Courts Act 1984 (hereinafter referred to as '**Act, 1984**) deals with the jurisdiction of the Family Court. Section 7 of 1984 reads as follows :-

"7. Jurisdiction.-- (1) Subject to the other provisions of this Act, a Family Court shall—

(a) **have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and**

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.--The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:--

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit of proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit of proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

> (a) the Jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and
>
> (b) such other jurisdiction as may be conferred on it by any other enactment."
>
> **(emphasis added)**

(11) A bare reading of the aforesaid provision shows that a Family Court subject to the provision of the 1984 Act has and exercises all jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature that are referred to in the 'Explanation'; besides, it is deemed for the purposes of exercising such jurisdiction under such law, to be a District Court, or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends. Section 10 of the Act 1984 is also relevant in this context.

(12) From the facts of the present case, it is seen that Original Suit No. 1411 of 2005 (hereinafter referred to as '**second suit'**) was filed by the respondent-wife for declaring the judgment and decree dated 08.07.2005 passed by the learned Family Court at Lucknow dissolving the marriage to be a nullity and for cancellation of the same, as allegedly, the same was obtained by misrepresentation and fraud. The outcome of the second suit filed by the respondent-wife thus related to the determination of her matrimonial status, that is to say, as to whether she is or she is not the wife of the appellant.

(13) The decree of the Family Court dated 08.07.2005 by which the matrimonial relationship between the parties stands severed declares the legal character of the parties as far as their relationship of husband and wife is concerned. Thus, the subsequent suit that had been filed by the respondent is in essence for determining her matrimonial status as wife of the appellant for which the Family Court would indeed have jurisdiction in terms of Clause (b) of the 'Explanation' to Section 7 (1) of the 1984 Act. The plea of the appellant is, accordingly, rejected. Point No.1 is answered accordingly.

Point Nos. II, III and IV

(14) Point nos. II, III and IV are being dealt with conjointly. Learned Family Court, while considering issues no. (i) and (ii) framed by it, has recorded a finding that circumstances and evidence of the present case do not support divorce by mutual consent viz. firstly because in para-3 of Original Suit No.32 of 2005 filed under Section 13-B of the Act, 1955, on one hand, it was stated that both of them were living together and on the other, it was also stated that they were living separately since 2002; secondly because there is no explicit mention nor any statement regarding any alimony given by the appellant/husband to the respondent/wife at the time of divorce by mutual consent, whereas generally in such a case the situation regarding alimony would be determined; thirdly if the wife had actually accepted such an important incident of her life willingly, then, she would have told it gladly and immediately to her parents but not doing so, shows that she was unaware of the proceedings and nature of the documents signed by her and that her signature and photograph were

taken by deceit as the wife had stated in her plaint that her husband brought her by telling her about the necessity of affixing her signature and photograph in the formalities related to his service; fourthly P.W.1 (the wife herself) and P.W.2, who is the father of the respondent/wife, had stated that on 26.09.2005, when he along with his daughter (respondent herein) went to in-laws of her daughter, then, they came to know the factum of divorce. The learned Family Court has recorded a finding that P.W.1 herself had stated that on 15.06.2005, her husband/appellant brought her to permanent residence at Pauri Garhwal, from where her husband brought her to her parents' residence at Dehradun on 18.08.2005 by saying that he would take some time for arranging accommodation at Joshimath.

(15) Besides the aforesaid, the learned Family Court has also opined that on one hand, in the Original Suit no. 32 of 2005 filed under Section 13-B of the Act, 1955, both have accepted to live together and as such, in that situation, as per the provisions of Section 13-B of the Act, 1955, it cannot be said that at the time of filing of the suit, both the parties were living separately for a year or more. In this background, learned Family Court has decided issues No.1 and 2 in the affirmative in favour of the wife and has decreed the suit of the respondent/plaintiff.

(16) As far as these points are concerned, this Court finds that appellant/husband was serving in Indian Army and was posted at Joshimath (Uttaranchal). He got married with the respondent/wife on 05.05.1995 in accordance with Hindu rites and rituals in Village Gadauli, district Pauri Garhwal (Uttaranchal). After marriage, appellant/husband brought respondent/wife to his residence at village Haluni, district Pauri Garhwal. Out of their wedlock, two male children were born on 21.07.1997 and 05.07.2000, respectively. The appellant/husband was transferred to Lucknow on 25.04.2003. The wife continued to live with the in-laws as stated by P.W.2 with no contrary evidence led by appellant on this issue.

(17) The appellant/husband, as per his own testimony, was allotted official accommodation at Lucknow on 01.11.2004. He brought the respondent/wife and his younger son to Lucknow in November, 2004, though the wife says that she was brought in January, 2005. Be that as it may, as per the wife, she was brought to Lucknow. The husband has brought on record the photographs of the train tickets in support his claim, which we will deal later. The husband brought her to Lucknow as per the wife on the pretext of completion of necessary service related formalities while leaving both the children in the custody of his parents. In paragraph-6 of her plaint, respondent/wife has stated that on 05.01.2005, her husband/appellant brought her to a place and got her signature on some papers as this was necessary in connection with his service. Her husband/appellant also convinced her not to disclose anything about the photograph and signature to anyone. Thereafter, her husband kept her there till afternoon and then brought her to his temporary residence near his work place, where the appellant intimidated and confused the respondent/wife not to tell anyone about the signatures as well as pasting of the photographs etc. In paragraph-7, she has stated that while going on duty, she was instructed not to meet anyone nor to leave the house. Her husband kept her with him

for about 6 months only. During the said period, again her husband brought her to the said designated place by telling her that some interrogation in connection with her signatures and photographs already made on the service related documents were required, wherein her husband, in his presence, again got signed some papers. Thereafter, on 15.08.2005, her husband brought her to his village Halauni, district Pauri Garhwal and told her that he had been transferred from Lucknow to Joshimath and he would require some time for arranging accommodation etc. at Joshimath and till then she should stay with his parents and after arranging accommodation etc. at Joshimath, he would take her to Joshimath. In paragraph-9, wife/respondent has stated that after staying for two days at her in-laws house, on 18.08.2005, her husband took her to the residence of her father posted at Dehradun and left her there. When her husband did not come to take her to her matrimonial home, then on 26.09.2005, she along with her father went to the house of her in-laws, wherein her in-laws for the first time disclosed to the respondent/wife and her father that the appellant had already taken divorce from Lucknow Court and now she had no relation with her in-laws and her husband and sent her away. In paragraph-10, respondent/wife has stated that on 04.10.2005, she came to Lucknow with her father and sought legal guidance from an Advocate and on 07.10.2005 filed an application for information regarding the case alleged to have been filed in the Family Court and then she came to know that Original Suit No. 32 of 2005 was registered on 06.01.2005.

(18) In the plaint, respondent/wife has also asserted that the said suit was not even verified and most significantly there was no mention of giving lump sum amount to her towards permanent alimony. Further, it has been contended that her signature on the said suit were due to misrepresentation and deceit by her husband/appellant. It has been also stated that the respondent/ wife was a rural woman, not much educated, who gullibly signed the papers on the instructions of her husband as any other Indian wife in her position would do.

(19) The appellant denied the case of the respondent/plaintiff in his written statement but there are certain pleadings therein, which are relevant. In para-4, he has stated as under :-

> "4.---------वास्तविकता यह है कि प्रतिवादी के मूल निवास के साथ वादिनी समय≤ पर, स्थानान्तरिण होने पर और निवास की सुविघा प्राप्त होने पर, स्थानान्तर स्थान पर निवास करती रही और लखनऊ में नवम्बर 2004 से जनवरी 2005 तक सेना के सरकारी आवास में निवास किया था। वाद–पत्र संख्या–32/2005 अं0 धारा–13 (बी) दाखिला के 12 दिन बाद प्रतिवादी के मूल निवास उत्तरांचल में 22 अप्रैल तक तथा 23 अप्रैल से 10 जुलाई तक फिर लखनऊ में रहने के बाद वादिनी को उसके मायके भेज दिया गया था। वादिनी का यह कहना भी गलत है कि दोनो बच्चे मूल निवास छोड दिये गये थे। वास्तविकता यह है कि बडा पुत्र स्कूल हेतु मूल निवास पर रह रहा था तथा छोटा पुत्र आकाश सिंह प्रतिवादी व वादिनी के साथ लखनऊ में निवास कर रहा था।"

(20) In para-5 of written statement, it has been averred as under :-

> "5.------वास्तविकता यह है कि प्रतिवादी का लखनऊ स्थानान्तरण होने पर, सरकारी आवास सुविधा प्राप्त होने पर नवम्बर 2004 में ही छोटे पुत्र तथा वादिनी के साथ निवास हेतु आ गया था जिसका रिकार्ड सेना के सरकारी आवास से प्राप्त किया जा सकता है आवास एलाटमेन्ट की प्रति संलग्नक–1 हैं।

वादिनी का यह अभिकथन कि जनवरी 2005 में कलु ित उद्देश्यों की पूर्ति हेतु वादिनी को लखनऊ लाया गया असत्य है। छोटे पुत्र आकाश सिंह का इलाज लखनऊ में चल रहा था, जो संलग्नक–2 है। स्वयं सिद्ध करता है कि वादिनी असत्य अभिभा ाण कर रही है। वादिनी को छोटे पुत्र सहित लखनऊ लाया गया था रिजर्वेशन स्लिप को फोटो प्रति संलग्नक–3 है।"

(21) These averments clearly show that even as per appellant, respondent/wife before coming to Lucknow had been residing at the appellant/husband permanent residence i.e. village Halauni Pauri Garhwal, meaning thereby they had not been living separately for one year preceding the filing of Suit No. 32 of 2005 on 06.01.2005 as was a prerequisite for a suit under Section 13-B of the Act, 1955, and even thereafter they lived together.

(22) Further, in para-11 of the written statement, while responding to the plea in para-12 of plaint regarding the suit not being maintainable on account of non-existence of jurisdictional prerequisites mentioned in Section 13-B pertaining to one year of separate living, it has been averred by the husband, as under :-

"11. यह कि वाद-पत्र की धारा-12 का कथन असत्य, भ्रमपूर्ण है मनगढंत है, गुमराह करने का प्रयास है इनकार है सत्यता यह है कि मूल वाद सं0-32/2005 की धारा-3 वादिनी के लिखित साक्ष्य में जनवरी 2002 से पति-पत्नी के शारीरिक सम्बन्ध न रहना कहा गया है जो स्पष्ट करता है कि पक्षकारों के मध्य पति एवं पत्नी के सम्बन्ध समाप्त हो गए थे और पति-पत्नी इस आशा से एक साथ रह रहे थे की समय बीतने पर हो सकता है की पति-पत्नी के सम्बन्ध फिर से मधुर हो जाये जो लखनऊ में आकार एक साथ निवास करने पर भी सम्भव नहीं हो सका और अं0 धारा 13(बी) हि0 वि0 अधि0 की आवश्यकता पक्षकारों के मध्य संस्थित किया गया।"

(23) These averments again amount to an admission that they were not living separately during the immediately preceding one year from the date of filing of Suit No. 32 of 2005. Language used in Section 13 (B) of the Act, 1955 is *"on the ground they have been living separately for a period of one year or more."*

(24) In para-10 of his written statement, appellant has averred that respondent has studied upto Class-10th, a fact which has been denied by her in her plaint, examination-in-chief and cross-examination. Interestingly, no suggestion/question was put to her by the appellant in her cross-examination.

(25) Before considering the oral testimony and other evidence on record, in continuation of the above, we may refer to the pleadings in the earlier suit to examine as to whether the jurisdictional prerequisites for attracting Section 13 (B) of the Act, 1955 were satisfied or not. In para-3, 10, 11 and 12 of the plaint under Section 13 (B) of the Act, 1955, it was averred as under :-

"3. यह कि उपरोक्त पते पर हम याची गण साथ–साथ रह रहे है किन्तु आपस में अत्यधिक मतभेद के कारण जनवरी 2002 से अलग–अलग रह रहे है और दोनो के मध्य इस बीच पति–पत्नी के सम्बन्ध नहीं रह गये है।

10- यह कि इस समय उभय पक्षकार उपरोक्त पते पर एक साथ निवास

कर रह है किन्तु आज दिनांक 6–1–2005 से अलग–अलग रहेंगे और उपरोक्त वाद में प्रस्तुत होकर मुकदमे की पैरवी करते रहेंगे।

11. यह कि वाद–का कारण आपस में पति–पत्नी का सम्बन्ध समाप्त हो जाने के बाद जनवरी 2002 को उत्पन्न हुआ जब पति–पत्नी के बीच में उपरोक्त वाद को विवाह विच्छेदन हेतु दाखिल करने का समय लिया गया।

12- यह कि उभय पक्षकार लखनऊ जनपद में उपरोक्त पते पर विवाह के बाद से निवास कर रहे थे और इस समय भी निवास कर रहे है जो माननीय न्यायालय के क्षेत्राधिकार में है।"

(26) Apart from the fact that the written statement of the appellant in Suit No. 1411 of 2005 itself contains averments/admissions that they had not been residing separately for one year or more prior to 06.01.2005, the averments in the plaint of the earlier suit quoted above, apart from being self contradictory and contrary to subsequent pleadings in written statement of subsequent suit, especially para-10 and 12 clearly establish that they had not been living separately and the jurisdictional prerequisite for moving a suit under Section 13 (B) (1) was absent.

(27) In her examination-in-chief filed on affidavit, respondent/wife (P.W.1) has categorically stated that the alleged decree of divorce was the result of misrepresentation, deceit and fraud practiced by her husband taking advantage of the trust reposed by her on him, she not being much educated, being a trusting Indian wife. She has stated that by keeping her in dark, her husband got her signature on the pretext of some service related formalities of the husband. She has categorically stated that if she had even slightest information that these documents were related to divorce, then, she would never have signed them nor would have gone anywhere.

(28) In her cross-examination, she (P.W.1) has categorically stated that her husband told her the necessity of her signature and her photograph on the service related documents. P.W.1, in her cross-examination, has also stated that she did not enquire anything from her husband relating to her visit to Court. This statement, in our view, is quite natural because P.W.1 herself has stated in as many words that her husband had asked her to not say anything regarding her signature and photograph to anyone and had also threatened her with dire consequences if she told anyone in this regard. She has clearly stated in her cross-examination that she did not know the subject of the first suit. The subsequent suit has been filed because her husband had cheated her. She has accepted that her husband was allotted official accommodation in November, 2004 and after a few days, he had taken her and she had stayed with him for 6 or 7 months. She has further stated as under :-

" यह कहना सही है कि नौकरी सम्बन्धी कागजातों पर वादिनी के हस्ताक्षर व फोटो लगाया जाना आवश्यक है कहकर, निर्धारित स्थान पर ले गये। यह बात दि० 05.01.2005 की है। दि० 05.01.2005 की सुबह 10:00 बजे मुझे ले गये। शाम को 2:00-3:00 बजे वापस लाए। इन्होंने कहा था कि वो मेरा ऑफिस है ऑफिस ले गये। मुझे कोई नौकरी नहीं मिली। इन्होंने मुझसे यह भी कहा था कि किसी से यह बात बताना नहीं कि कागजात पर हस्ताक्षर किया है व फोटो लगाया है। मुझे नहीं मालूम कि मुझे किसी से बताने को मना क्यों किया था। मैने पूछा था तो इन्होंने कहा था कि अन्दर की बात बाहर नहीं जाना चाहिए। पहले मुझे नहीं मालूम था अब मुझे मालूम है कि वह स्थान कचहरी था, जहाँ मुझे ले गये थे। मुझे दोबारा पुनः उसी स्थान पे ले गये जहाँ पहले ले गये थे। वह स्थान यही कचहरी थी, जहाँ दोबारा मुझे लाए थे।

05-01-05 के बाद दोबारा मुझे 5-6 माह उसी स्थान पर कचहरी लाए थे। मुझे नहीं मालूम कि दोबारा जब लाए थे तो उस समय वहाँ ऐसा ही माहौल था, जैसा आज यहाँ है। दोबारा जब मुझे लाए थे तब वहाँ मेरा हस्ताक्षर व अँगूठा लगवाए थे। दोबारा जब मैं 2005 में आयी थी तब मुझसे कोई पूछताछ नहीं हुई थी। मैं अगस्त 2005 में लखनऊ से वापस गयी। मैं अपने पति के साथ वापस गयी थी। लखनऊ से चलकर मैं कार द्वारा स्टेशन में उतरी थी। वहाँ से हम दोनों गाँव हलोनी गये थे। मुझे 2005 के मुकदमे की जानकारी सबसे पहले मेरी सास व मुझे दी थी। मुझे सितम्बर 2005 में जानकारी प्राप्त हुई थी। तिथि याद नहीं है। मैं अक्टूबर 2005 में लखनऊ कचहरी में 2005 के मुकदमे की जानकारी करने आयी थी। मैं उसी कचहरी में आई, जहाँ पहले दो बार आ चुकी थी। यहाँ आकर मैं अधिवक्ता श्री आर० के० यादव से सम्पर्क किया। उन्होंने मुझे मुकदमे के बारे में बताया। मैं वकील साहब के तख्त पर बैठी थी। वकील साहब ने जानकारी करके मुझे बताया था। मैं किसी न्यायालय या कार्यालय में नहीं गयी। जानकारी होने पर मेरे साथ जो धोखाधड़ी हो रही थी, उसके खिलाफ मैंने मुकदमा दायर किया। जानकारी होने व मुकदमा दायर करने के मध्य मैंने किसी कागज पर हस्ताक्षर नहीं किया था।

(29) She (P.W.1) has reiterated in her cross-examination that she was not literate. No question or suggestion was made to her in her cross-examination as to whether she had been living separately for one or more year prior to filing of Suit No. 32 of 2005.

(30) This Court cannot be oblivious of the fact that the respondent/wife being a woman of humble and rural background, not much educated, who reposed trust in her '*Patiparmeshwar*' and it was quite natural that wife/respondent did not know relevance of those papers upon which her husband got her signature and also pasted her photograph albeit with ulterior motive and ultimately used them for the said purpose of divorce.

(31) P.W.2-Bhagirath Singh, who is father of the respondent/wife, was also examined and he has stated in his cross-examination that his son-in-law (appellant) himself had brought her daughter (respondent) from his permanent matrimonial house (Village Haluni, district Pauri Garhwal) to Lucknow in the first week of January, 2005, though he did not remember the date. He has further stated that her daughter lived along with her husband (appellant) in Lucknow till August, 2005. He met his daughter on 18.08.2005. Prior to it, he had not met her. This was obvious because she was residing at her in-laws and thereafter with her husband. He has further stated that her daughter could neither read Hindi nor understand it nor speak it. His daughter had passed Middle class. He has also stated that his son-in-law brought her daughter to his house in the month of August, 2005 and at that time he had no information regarding divorce, however, on 26.09.2005, when he went along with his daughter to her in-laws house, then, parents of his son-in-law told them about the divorce. He has categorically stated that his daughter did not say anything about divorce between 18.08.2005 (date on which appellant left his wife to her parents at Dehradun) to 26.09.2005 (the date when P.W.2 and her daughter/respondent went to in-laws' house of the respondent).

(32) The testimony of P.W.2 clearly establishes that the appellant had brought his wife to his house on 18.08.2005 when he met her and that prior to it, she had been living with the appellant since January, 2005. Most important, he (P.W.2)

has stated that she did not tell him about any divorce nor did appellant tell him any such fact which establishes the version of the wife (his daughter) that she was unaware about any such divorce proceedings.

(33) Now, we examine the testimony of appellant, who was examined as D.W.1. In his cross-examination, he has stated that on 06.01.2005, he along with his wife, for the first time, came to Court and both of them came to Court to seek divorce by mutual consent due to lack of mutual understanding. Thereafter, both of them came to Court second time after six months i.e. on 07.07.2005. The learned Judge inquired from them separately. Their statements were also recorded by the Reader of the Court but he did not know the date of recording of the statement, however, he guessed that these statements were recorded on 7th or 8th July, 2005. He has also stated that both of them had borne the cost of litigation jointly filed under Section 13-B of the Act, 1955. Appellant has further disclosed that the respondent/wife was engaged in the work of tailoring in his quarter out of which his wife met the expenditure of litigation. He has clearly admitted that respondent was living with him at the time of filing of suit under Section 13 (B) of the Act, 1955.

(34) Based on an examination of pleadings and evidence on record what comes out is firstly that the prerequisite for initiating proceedings under Section 13 (B) of the Act, 1955 i.e. separate living for one or more year was admittedly absent, therefore, the Suit No. 32 of 2005 was not maintainable in the first place and any proceedings held de hors Section 13-B of the Act, 1955 were clearly without jurisdiction. Secondly, the respondent/ wife, who was not much educated nor aware about the ways of the world certainly not about law and legal proceedings, was deceived by misrepresentation to sign blank papers and photographs, which were used to obtain a decree of divorce by the appellant fraudulently, we have no reason to disbelieve the testimony of P.W.1 and P.W.2, whereas the testimony of D.W.1 does not inspire confidence. Whether respondent/wife came to Lucknow in November, 2004 or January, 2005 is not very relevant in view of absence of prerequisite for attracting Section 13 (B) of the Act, 1955. Photocopy of tickets filed by the appellant in this regard are also not of much significance in view of the discussion already made.

(35) So far the statements of the parties recorded in the earlier proceedings of Suit No. 32 of 2005 and the order passed on the said case, firstly the learned Judge, who decided the case, did not even satisfy himself about existence of prerequisites of Section 13 (B) of the Act, 1955, absence of which was apparent from the pleadings of the plaint, moreover, the order-sheet reveals cryptic observation regarding attempt for mediation and inquiry. Most important, the statement of respondent and appellant are almost verbatim similar which is not natural. The statements were recorded by the Reader. Though they bear the signature of the Presiding Officer and an endorsement that the Reader had recorded it on his dictation the verbatim similarity in the statements does not inspire confidence especially when the Presiding Officer did not even bother to see as to whether the suit was maintainable on the basis of pleadings before him. Proceedings did not appear to have been held in accordance with law. Even the address of the husband and wife in their statements recorded by the Reader

and the plaint were same but even this was not noticed nor mentioned by the Presiding Officer. Suit No. 1411 of 2005 was filed within almost three months of the decree dated 08.07.2005 being passed in Suit No. 32 of 2005, as soon as the respondent came to know about the fraud, which was not only on her but also on the Court. P.W.1 and P.W.2 have stood there ground in cross-examination, whereas the defence of the appellant/defendant is shaky and unbelievable/ unacceptable.

(36) Section 13-B of the Act, 1955 reads as under:-

> **"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 solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 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 solemnized 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."

(37) The requirements of Section 13-B of the Act, 1955 for grant of divorce are that the parties had been living separately for a period of one year or more at the time of filing the petition and that they had not been able to live together, besides, they had mutually agreed that the marriage should be dissolved. As already discussed, both these ingredients were not satisfied.

(38) The appellant/husband took advantage of his dominant position vis-a-vis his wife as also the trust reposed by her on account of her fiduciary relationship and betrayed the same.

(39) The Family Court giving reference to the plaint and the written statement as well as circumstances of the case has rightly came to the conclusion that the appellant by playing fraud upon the Family Court as well as by keeping his wife in the dark, obtained the decree of divorce vide judgment/decree dated 08.07.2005, which was legally not sustainable. Its finding on issues no. 1 and 2 do not suffer from perversity. They are reinforced by our own reasoning. The decree dated 08.07.2005 was obtained by misrepresentation and deceit. The suit itself was not maintainable. The decree dated 08.07.2005 is null and void. Point nos. II to IV are answered accordingly.

(40) For the reason aforesaid, we do not find any illegality or infirmity in the impugned judgment/order. The Family

Court has rightly set-aside the judgment/order dated 08.07.2005.

(41) The First Appeal is hereby dismissed. No order as to costs.

(42) Registry shall transmit the trial Court's record to the Court concerned forthwith.

(2024) 8 ILRA 690
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.08.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 392 of 2013

Shyampati ...Appellant
Versus
Ram Karan Pandey & Ors. ...Respondents

Counsel for the Appellant:
V.P. Nagaur

Counsel for the Respondents:
Ram Raj Ojha, Durga Prasad

A. Civil Law – Civil Procedure Code – Sections 96 & 107 - O. XLI - R. 31 – Non formulation of points of determination – Appellate court observed about the agreement between parties for not framing the new issues – Effect – Held, first appellate court proceeded to decide the issues framed by the trial court one by one and recorded its findings on all the aforesaid five issues, therefore it cannot be said that there is any violation of Order 41 Rule 31 CPC. (Para 20 and 21)

B. Civil Law – Civil Procedure Code,1908 – Section 100 – Substantial question of law – UP Z.A.&L.R. Act, 1950 – Ss. 7(aa) and 9 – Perverse finding based on conjectures and surmises – Scope of interference – Non consideration of evidence of plaintiff and defendants by the first appellate court – First appellate court failed to consider that all the buildings situated within the limits of a St. belonging to any person shall also continue to belong to that person and any land appurtenant thereto shall be deemed to be settled with him and a person of the categories mentioned in Section 7(aa) of the Act would continue with the similar right as was enjoying on the date immediately preceding the date of vesting and defendants-respondents are also claiming the said structure their on the ground that it settled with them u/s 9 – Permissibility – Held, though the First Appellate Court has considered all the issues framed by the trial court and no new issue was raised to be considered but recorded perverse findings on the basis of conjectures and surmises. Hence the same are not tenable in the eyes of law and liable to be set aside. (Para 23, 27, 28 and 35)

Appeal partly allowed. (E-1)

List of Cases cited:

1. Maharaj Singh Vs St. of U.P. & ors.; (1976) 1 SCC 155

2. Second Appeal No. 232 of 1990; Jhoori & ors. Vs Shambhoo Nath & ors. decided on 27.03.2019

3. Bala Devi (Smt.) Vs Mukhtyar Singh; 2017 (2) ARC 363

4. Bhudan Singh & anr. Vs Nabi Bux & anr.; (1969) 2 SCC 481

5. Second Appeal No. 251 of 2019; Chandrajit Vs Baliram (dead) & ors. decided on 22.11.2019

6. Smriti Debbarma Vs Prabha Ranjan Debbarma; AIR 2023 SC (Civil) 472

7. Baij Nath Ram (Dead) & ors. Vs Smt. Sonmati & ors.; 2008 (4) ADJ 708(DB)

8. B.V.Nagesh & anr. Vs H.V.Sreenivasa Murthy;(2010) 13 SCC 530

9. Habibullah & ors. Vs Mohd.Yasin & anr.; 1995 (13) LCD 1073

10. G. Amalorpavam & ors. Vs R.C. Diocese of Madurai & ors.; (2006) 3 SCC 224

11. Mrugendra Indravadan Mehta & ors. Vs Ahmadabad Municipal Corporation; Live Law (SC) 369

12. U. Manjunath Rao Vs U.Chandrashekar & anr.; (2017) 15 SCC 309

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

1. Heard, Shri V.P.Nagaur, learned counsel for the appellant and Shri Ram Raj Ojha, learned counsel for the respondent No.1. The respondent no.2 has died and no other legal heir has been substituted and respondent no.3 is the court concerned.

2. Learned counsel for the plaintiff-appellant submitted that the First Appellate court has decided the appeal without following the provisions of Order XLI Rule 31 CPC as it has been decided without formulating the points of determination, which arises for adjudication and recording reasons for its decision on the said point. He further submitted that merely because the plaintiff-appellant, who is an illiterate lady could not give correct description of the things, it cannot be said that she failed to prove her case. He further submitted that the space between the house of the plaintiff-appellant and the land in dispute is part of her property and left for rain water and on account of same it cannot be said that the land in dispute is not appurtenant to the house of the plaintiff-appellant. He further submitted that merely because the Husk is existing on the land in dispute, it cannot be said that it is not Sahan of the plaintiff-appellant because in view of the provisions made in the United Provinces Village Abadi Act, 1948 the house owner is entitled to make construction in the Sahan Darwaja or land appurtenant to the house as may be necessary for agricultural and domestic purposes. He also submitted that a person ordinarily residing in an area of the Gram Sabha is entitled to be registered in the village Register as per U.P.Panchayat Raj (Maintenance of Village Register) Rules 1970 and since the name of the plaintiff-appellant is recorded in the Family Register, her rights on the land in dispute cannot be disputed. He also submitted that all efforts have been made by the defendants-respondents for forceful possession on the land in dispute and making construction. The plaintiff-appellant tried to get it settled before filing the suit but merely on this ground it cannot be said that the land in dispute is not of the plaintiff-appellant. Thus since the plaintiff-appellant is in possession of the land in dispute since prior to abolition of Zamindari and her house is existing adjacent to the land in dispute and the land in dispute is being used for various agricultural and house hold purposes since the time of ancestors of her husband, it is settled with them under Section 7 (aa) and 9 of the U.P.Z.A.&L.R.Act. He also submitted that if there was any dispute in regard to settlement of land in dispute with the parties under Section 9 of the U.P.Z.A.&L.R.Act the issue should have been framed and decided after affording opportunity of evidence to the parties.

3. On the basis of above, learned counsel for the plaintiff-appellant submitted that the findings recorded by the first appellante court are perverse, illegal and based on conjectures and surmises, therefore the same are not sustainable in the eyes of law and are liable to be set aside by this court and the appeal is liable to be

allowed. He relied on **Maharaj Singh Versus State of U.P. and others; (1976) 1 SCC 155, judgment and order dated 27.03.2019 passed in Second Appeal No.232 of 1990; Jhoori and others Vesus Shambhoo Nath and others.**

4. Learned counsel for the defendants-respondents submitted that the defendants-respondents are in possession and owner of the land in dispute as it is a part of their Sahan land and being used by them for various agricultural and house hold purposes since prior to abolition of Zamindari, therefore it is settled with them under Section 9 of the U.P.Z.A.&L.R.Act. The plaintiff-appellant or her husband or his ancestors were never in possession of the land in dispute because the possession was taken by her forcefully through police force after the judgment and decree dated 12.01.2010 passed by the trial court, which is apparent from the information given under Right to Information on 13.04.2010 by the concerned Police Station and filed as Paper No.24-Ga/1 before the first appellate court. He further submitted that it is not in dispute that the fire had broken in the village on 02.04.2005, in which some portion of the house of the defendants-respondents was also burnt. He further submitted that the plaintiff-appellant has not produced any witness of the village, in which the land in dispute is situated. The plaintiff-appellant had appeared herself as P.W.1, who could not tell the correct things and P.W.2 was the interested witness as he was brother-in-law of Chandra Pal, the husband of the plaintiff-appellant, who lives in another village. He further submitted that the defendant-respondent No.1 had appeared as D.W.1 and deposed that his thatch was burnt in the fire in 2005, for which government aid was given to him and houses of nine others were also burnt, therefore it cannot be said that the land in dispute is not appurtenant land of the defendants-respondents. The plaintiff-appellant had admitted in her evidence that his Pakka house was constructed 30-40 years back and since then she is making Kanda-Uppala on its roof, therefore the contention of the plaintiff-appellant that she is using the land in dispute for the said purposes is misconceived and not tenable,but the trial court recorded the contrary findings on presumption that since there is dispute between the parties in regard to the land in dispute, therefore if the plaintiff-appellant is making Kanda-Uppala on her roof to avoid quarrel and beating, it cannot be said that she is not in possession of the land in dispute. He further submitted that in the commission report, the door of the land in dispute is in front of the house of the defendants-respondents and the land in dispute is not connected with the house of the plaintiff-appellant in any manner, which was admitted by the plaintiff-appellant also. He also submitted that plaintiff-appellant has to prove her case and she can not get any benefit of weakness of the defendants-respondents but she has failed to prove her case.

5. On the basis of above, learned counsel for the defendants-respondents submitted that the trial court has passed the judgment and decree without considering the whole evidence and recording contrary and perverse findings, therefore it has rightly and in accordance with law been set aside by the first appellate court after considering the whole pleadings, evidence and recording the findings on the basis thereof on all issues framed by the trial court as no new issue was raised, therefore there is no violation of Order 41 Rule 31 CPC also. This Second Appeal has been

filed on misconceived and baseless grounds, which is liable to be dismissed. He relied on **Bala Devi (Smt.) Versus Mukhtyar Singh; 2017 (2) ARC 363, Bhudan Singh and another Versus Nabi Bux and another; (1969) 2 SCC 481, judgment and order dated 22.11.2019 passed in Second Appeal No.251 of 2019; Chandrajit Versus Baliram (dead) and 6 others, Smriti Debbarma (dead) through Legal Representative Versus Prabha Ranjan Debbarma; AIR 2023 SC (Civil) 472, Baij Nath Ram (Dead) and others Versus Smt. Sonmati and others; 2008 (4) ADJ 708(DB), B.V.Nagesh and another Versus H.V.Sreenivasa Murthy;(2010) 13 SCC 530 and Habibullah and others versus Mohd.Yasin and another; 1995 (13) LCD 1073**.

6. I have considered the submissions of learned counsel for the parties and perused the records.

7. The appellant-plaintiff filed a suit for permanent injunction for restraining the defendants-respondents for ever not to disturb the peaceful possession of the land in dispute marked with read in the map of the plaint and do not forcefully dispossess and make no new construction and demolish the wall of the husk structure (Thatch) thereon. The suit was filed alleging therein that House No.1149 of the plaintiff-appellant was got constructed by her husband and situated since prior to abolition of Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (here-in-after referred to as U.P.Z.A.&L.R.Act). It has further been alleged that since the time of construction of her house Sahan, Baithaka, Bhusaila (husk), etc. is situated on the western side. The land in dispute is part of Sahan of plaintiff-appellant, in which there is a Bhusaila (Husk). It has also been alleged that the plaintiff-appellant used to tie her animals, make Kanda-Uppala and all other agricultural and homely works and keeps Bhusa, Puwal, Lakdi, Kanda etc. in the Husk. All these works are being done since the time of her husband like his ancestors and after his death the plaintiff-appellant is doing all such works. Thus the plaintiff-appellant is in possession and the same is settled with the husband of the plaintiff-appellant under Section 9 and Section 7 (aa) of the U.P.Z.A.& L.R.Act and after his death the plaintiff-appellant is owner and in possession of the land in dispute. It has further been alleged that all the four walls of Husk are five fit high on which there is a thatch. It has further been alleged that the defendants-respondents have neither any concern with the land in dispute nor they are in possession of the same. The house of the defendants-respondents is on the northern side of the land in dispute after the path, the Sahan Darwaja of which is on the eastern side. The defendants-respondents on the basis of their muscle power use to harass the plaintiff-appellant. The fire had broken on 02.04.2005 in the village, in which the thatch kept on the husk had fallen and taking the benefit of the same the defendants-respondents tried to make possession on the land in dispute and on being objected they threatened the plaintiff-appellant and the defendants-respondents were not ready to settle the dispute (make tafsiya) in any manner, therefore the plaintiff-appellant approached the trial court with the aforesaid prayer.

8. The suit was contested by the defendants-respondents by filing two separate written statements; one by defendants no.1 and 2 and the other by the defendant no.3, who was wife of the

defendant-respondent no.2 denying the pleadings of the plaint of the suit and admitting that the house No.1149 of the plaintiff-appellant is recorded in the Parivar Register. It has also been admitted that the wall of the land in dispute is five fit high. The defendants-respondents alleged that the plaintiff-appellant has no concern with the land in dispute and she was never in possession of the same. It has further been alleged that the defendants-respondents are the permanent residents of the village in question and their house is situated at its place since the time of their ancestors, the Sahan of which is on the eastern side till date and it is wrong to say that there is a path in between the house of the defendants-respondents and the land in dispute. It has further been allged that the construction in the land in dispute was got made by the ancestors of the defendants-respondents for their sitting, which is called 'Chaupal' also. The defendants-respondents also claimed that on a part of the land in dispute they are tying their animals, making Uppla Kanda and doing other works relating to agriculture and house hold since prior to abolition of Zamindari and after abolition of Zamindari the same is settled with them under Section 9 of U.P.Z.A.&L.R.Act. It has further been alleged that after death of the husband of the plaintiff-appellant, she filed the suit with malafide intention. During pendency of the suit an application for amendment was moved on 23.05.2006 and the amendment was made in paragraph 14 of the additional pleas changing their stand to the effect that some portion of the land in dispute was given to the plaintiff-appellant as demanded by her for making her new house.

9. On the basis of pleadings of the parties the following five issues were famed:-

(I) Whether the plaintiff is owner and in possession of the land in question?

(ii) Whether suit is under valued and court fee paid thereon is insufficient?

(iii) Whether the suit is barred by section 34/41 of Specific Relief Act?

(iv) Whether the suit is barred by Limitation Act?

(v) The plaintiff is entitled to get which relief?

10. The plaintiff-appellant, in support of her claim got examined herself as P.W.1 (Shyampati) and Shree Nath as P.W.2 and filed documentary evidence. She filed Paper No.8-Ga-1 (Certified copy of Pariwar Register), Paper No.8-Ga ½ and 14-Ga-1 (Certified copy of order of the High Court), Paper No.15-Ga ½ and 62 Ga-1 to 63-Ga-3 (Original Mukhtarnama Khaas). The defendants-respondents got examined Ram Karan as D.W.1, Rajendra Prasad as D.W.2 and Ram Kripal as D.W.3. In documentary evidence, they filed Paper No.32-Ga-1 (Copy of commissioner report with map of original suit no.471/96), Paper No. 33-Ga-1/2 and Paper No.53-Ga-1/4 and Paper No.54-Ga-1 (Photographs). The commission was also got conducted during pendency of the suit and the report submitted by the Commissioner is on record as Paper No.50-Ga-2, which was confirmed by the trial court subject to evidence by the parties to the suit.

11. The trial court, after considering the pleadings of the parties, evidence and the material on record decreed the suit in favour of the plaintiff-appellant restraining the defendants-respondents from making forceful possession on the land in dispute and any

new construction on the land in dispute and not to demolish the walls of Husk by means of the judgment and decree dated 12.01.2010 passed in Regular Suit No.162 of 2005; Shyampati Versus Ram Karan Pandey and others by Civil Judge (Sr.Div.), Court No.15, District-Sultanpur.

12. Being aggrieved by the judgment and decree passed by the Trial Court, the defendants-respondents preferred Civil Appeal No.4 of 2010; Ram Karan Pandey and others Versus Shyam Pati, which has been allowed by means of the judgment and decree dated 21.11.2013 by the Additional District Judge, Court No.4, Sultanpur and the judgment and decree dated 12.01.2010 has been set aside and the Regular Suit filed by the plaintiff-appellant has been dismissed with costs. Hence this Second Appeal has been filed.

13. The following substantial questions of law have been formulated in this second appeal:-

> "(1) Whether the lower appellate court has committed manifest illegality in not complying with the provision of Order XLI Rule 31 CPC and thereby not formulating the points of determination?
>
> (2) Whether the non compliance of provision of Order XLI Rule 31 CPC would make the impugned judgment and order unsustainable in the eyes of law?
>
> (3) Whether the findings recorded by the lower appellate court are totally perverse and based on conjecture and surmises?"

14. The appeal filed under Section 96 is a valuable right of the appellant. Section 107 of the Code of Civil Procedure, 1908 (here-in-after referred as C.P.C.) provides the powers of appellate court, which is extracted here-in-below:-

> ***"107. Powers of Appellate Court**.—(1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—*
>
> *(a) to determine a case finally;*
>
> *(b) to remand a case;*
>
> *(c) to frame issues and refer them for trial;*
>
> *(d) to take additional evidence or to require such evidence to be taken.*
>
> *(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein."*

15. According to the aforesaid Sub-Section 2 of Section 107 subject to the provision made in sub-section(1), the appellate court shall have the same powers and duties as are conferred and imposed on the courts of original jurisdiction of suits instituted therein. Thus, the first appellate court has all the powers of the trial court while deciding the appeal, therefore the appellate court is required to consider all the pleadings of the parties, evidence and material available on records while deciding the appeal. The appellate court is required to pass judgment in appeal in accordance with the provisions of Order 41 Rule 31 CPC, which is extracted here-in-below:-

> ***"31. Contents, date and signature of judgment.—**The judgment of the Appellate Court shall be in writing and shall state—*

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

***Allahabad**._ At the end of the rule, substitute a semi-colon for the full stop and add the following:*

"Provided that where that presiding Judge pronounces his judgment by dictation to a shorthand-writer in open court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge and shall bear the date of its pronouncement."

16. In view of above, the appellate court is required to state the points for determination and record its reasons for the decision thereon and it can reverse or vary the decree against which the appeal has been preferred and in such case the relief to which the appellant is entitled, therefore the appellate court can not only reverse the findings of the trial court but also take a different view and it can be done after considering the pleadings, evidence and material on record as a trial court and also considering the findings recorded by the trial court and as to whether the same have rightly and in accordance with law been recorded or not after evaluating the pleadings, evidence and material on record as a trial court. It is for the reason that if any plea or evidence has been left to be considered by the trial court, it can appropriately be considered by the first appellate court to avoid injustice to either of the parties. Thus the first appeal is in continuation of trial and if all the issues framed by the trial court are considered by the first appellate court in accordance with law after considering the pleadings, evidence and material on record and dealing them appropriately and no new issue is raised at the appellate stage, this court is of the view that the judgment passed by the first appellate court may not be said to be vitiated and liable to be set aside only on this ground as there would be substantial compliance of Order 41 Rule 31 CPC.

17. The Hon'ble Supreme Court, in the case of **G. Amalorpavam and others Versus R.C. Diocese of Madurai and others; (2006) 3 SCC 224**, has held that it is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient and where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point for determination.

18. The Hon'ble Supreme Court, in a recent judgment and order dated 10th May, 2024 in the case of **Mrugendra Indravadan Mehta and others Versus Ahmadabad Municipal Corporation;**

(Civil Appeal Nos.16956-16957 of 2017) 2024 Live Law (SC) 369, considered the aforesaid judgment and other judgments of Hon'ble Supreme Court and held that the High Court did set out all the issues framed by the trial court in the body of the judgment and was, therefore, fully conscious of all the points that it had to consider in the appeal and no issue was left to be considered while adjudicating the appeal, therefore there is no merit in the contention that impugned judgment is liable to be set aside on this issue. The Relevant paragraphs 27 to 31 are extracted here-in-below:-

> "27. This being the legal position vis-à-vis the Act of 1976, it was contended before us by the plaintiffs that the impugned judgment of the High Court is liable to be set aside on the short ground that no points for determination were framed therein, as required by Order 41 Rule 31 CPC. Reliance was placed on *Malluru Mallappa (Dead) through Lrs. v. Kuruvathappa*5, wherein this Court observed that the first appellate Court is required to set out the points for determination, record the decision thereon and give its own reasoning. It was further observed that, even when the said Court affirms the judgment of the Trial Court, it has to comply with the requirements of Order 41 Rule 31 CPC as non-observance thereof would lead to an infirmity in its judgment. However, it may be noted that no absolute proposition was laid down therein to the effect that failure to frame points for determination, in itself, would render the first appellate Court's judgment invalid on that ground.
>
> 28. Reference was also made to *Santosh Hazari v. Purushottam Tiwari (Deceased)* by LRs6, wherein this Court held that a first appeal is a valuable right and unless restricted by law, the whole case would be open for rehearing before it, both on questions of fact and law, and, therefore, the judgment of the first appellate Court must reflect conscious application of mind and it must record findings supported by reasons on all the issues arising, along with the contentions put forth and pressed by the parties for decision of the said Court. It was further observed that, while reversing a finding of fact, the first appellate Court must come into close quarters with the reasoning of the Trial Court and then assign its own reasons for arriving at a different finding. This, per this Court, would satisfy the requirement of Order 41 Rule 31 CPC.
>
> 29. However, in *Laliteshwar Prasad Singh v. S.P. Srivastava (Dead) thru. Lrs*.7, this Court, while affirming the aforestated principles, observed that it is well settled that the mere omission to frame the points for determination would not vitiate the judgment of the first appellate Court, provided that the first appellate Court recorded its reasons based on the evidence adduced by both parties.
>
> 30. Thus, even if the first appellate Court does not separately frame the points for determination

arising in the first appeal, it would not prove fatal as long as that Court deals with all the issues that actually arise for deliberation in the said appeal. Substantial compliance with the mandate of Order 41 Rule 31 CPC in that regard is sufficient. In this regard, useful reference may be made to *G. Amalorpavam v. R.C. Diocese of Madurai8*, wherein this Court held as under:—

'9. The question whether in a particular case there has been substantial compliance with the provisions of Order 41 Rule 31 CPC has to be determined on the nature of the judgment delivered in each case. Non-compliance with the provisions may not vitiate the judgment and make it wholly void, and may be ignored if there has been substantial compliance with it and the second appellate court is in a position to ascertain the findings of the lower appellate court. It is no doubt desirable that the appellate court should comply with all the requirements of Order 41 Rule 31 CPC. But if it is possible to make out from the judgment that there is substantial compliance with the said requirements and that justice has not thereby suffered, that would be sufficient. Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisement of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination. The object of the rule in making it incumbent upon the appellate court to frame points for determination and to cite reasons for the decision is to focus attention of the court on the rival contentions which arise for determination and also to provide litigant parties opportunity in understanding the ground upon which the decision is founded with a view to enable them to know the basis of the decision and if so considered appropriate and so advised to avail the remedy of second appeal conferred by Section 100 CPC.'

31. As already noted hereinabove, the High Court did set out all the issues framed by the Trial Court in the body of the judgment and was, therefore, fully conscious of all the points that it had to consider in the appeal. Further, we do not find that any particular issue that was considered by the Trial Court was left out by the High Court while adjudicating the appeal. In effect, we do not find

merit in the contention that the impugned judgment is liable to be set aside on this preliminary ground, warranting reconsideration of the first appeal by the High Court afresh."

5. (2020) 4 SCC 313,
6. (2001) 3 SCC 179,
7. (2017) 2 SCC 415,
8. (2006) 3 SCC 224

19. The Hon'ble Supreme Court, in the case of **U.Manjunath Rao Versus U.Chandrashekar and another; (2017) 15 SCC 309**, has held that it is well settled in law that the reason is the life of law. It is that filament that injects soul to the judgment. Absence of analysis not only evinces non-application of mind but mummifies the core spirit of the judgment. The Hon'ble Supreme Court with reference to Rule 31 of Order 41 CPC has held that it is quite clear that the judgment of the appellate court has to state the reasons for the decision. It has also been held that the appellant could raise issues pertaining to facts and appreciation of evidence and this is indicative of the fact that the first appellate court has a defined role and its judgment should show application of mind and reflect the reasons on the basis of which it agrees with the trial court. There has to be an "expression of opinion" in the proper sense of the said phrase. Needless to say, it is one thing to state that the appeal is without any substance and it is another thing to elucidate, analyze and arrive at the conclusion that the appeal is devoid of merit and the appellate court has to keep in view the language employed in Order 41 Rule 31 CPC. Similar view has been taken by the Hon'ble Supreme Court in the case of **B.V.Nagesh and another Versus H.V.Sreenivasa Murthy (Supra).**

20. On perusal of the impugned judgment, this court finds that the first appellate court has though not framed the points for determination, but on the basis of the arguments raised before the First Appellate court observed that nothing has been stated on behalf of both the parties for framing any new issue, therefore the issues framed by the trial court would be examined by the court. The relevant paragraph is extracted here-in-below:-

"इस न्यायालय के समक्ष उभय पक्ष की ओर से किसी नवीन वाद विन्दु के निर्धारण के सम्बन्ध में कोई कथन नहीं किया गया, इसलिए अधीनस्थ न्यायालय द्वारा विरचित किये गये वाद विन्दु की ही समीक्षा इस निर्णय में की जायेगी।"

21. After recording the aforesaid, the first appellate court proceeded to decide the issues framed by the trial court one by one and recorded its findings on all the aforesaid five issues, therefore it cannot be said that there is any violation of Order 41 Rule 31 CPC and impugned judgment vitiates and liable to be set aside on this ground alone. Thus the case of **Bala Devi (Smt.) Versus Mukhtyar Singh (Supra)** relied by learned counsel for the respondent no.1 is not applicable on the facts and circumstances of the present case.

22. Adverting to the facts of the pesent case the Suit filed by the plaintiff-appellant was decreed by the trial court, which was challenged before the First Appellate court. The First Appellate Court recorded a finding that the trial court though mentioned all the facts mentioned in the plaint, but has not based his judgment on the evaluation of the evidence of the plaintiff-appellant and P.W.2 and only the evidence of the defendants-respondents have been referred and the suit has been decreed, whereas the plaintiff-appellant had to prove her case on the basis of her evidence and the Suit could not have

been decreed on the basis of evidence of the defendants-respondents, but failed to disclose as to how the plaintiff-appellant has failed to prove her case and as to why the reference of evidence of the plaintiff-appellant and P.W.2 was not sufficient for deciding the issue no.1 in her favour.

23. The learned First Appellate Court has recorded that the trial court has referred the evidence of defendants-respondents i.e. D.W.1, D.W.2 and D.W.3 in detail, which is not required to be mentioned again in the judgment, which clearly shows that the evidence of defendants-respondents have not been considered by the First Appellate Court merely on the ground that they have been referred extensively by the trial court, whereas it is settled law that once the parties have adduced the evidence, the burden of proof looses its efficacy, and therefore evidence of both the parties is required to be considered and evaluated.

24. The First Appellate Court considering the averments of the plaintiff-appellant in paragraph 6 of the plaint that the defendants-respondents are very powerful persons and they are not ready to settle (Tafsia) the matter observed that the plaintiff-appellant claims herself to be the owner and in possession of the land in dispute then what settlement she wanted to do and held that it indicates that the plaintiff-appellant was not confirmed about her ownership on the land in dispute, but failed to consider the further averment made in paragraph 6 of the plaint that despite repeated requests of the plaintiff-appellant, the defendants-respondents are not ready to stop their illegal activities, therefore the necessity of filing of suit arose. Thus on the basis of a sentence in a paragraph without considering the other averments made in the plaint and further averment in the said paragraph and the evidence adduced before the trial court, the presumption has been drawn by the appellate court that the plaintiff-appellant was not confirmed about her ownership on land in dispute, which could not have been done.

25. The learned First Appellate Court, in regard to the husk on the land in dispute, recorded a finding that if the same would have been of the plaintiff-appellant, the door should have been on the southern side and without considering the plea of the plaintiff-appellant in regard to the passage between the house of the plaintiff-appellant and husk recorded a finding that there is no explanation as to why the said distance has been left, whereas the plaintiff-appellant has given the explanation for the same i.e. for rain water, but it has not been considered in the light of the pleadings and evidence adduced. A presumption has also been drawn without any pleadings and evidence that if the said husk would have been of the plaintiff-appellant, it would have been got constructed in the northern side of her Baithka (sitting place) because no person would get his husk made adjacent to his house, but failed to consider that there is a passage between house and husk and if a person would not construct his husk adjacent to his house then why he would construct adjacent to the place where he/she may be sitting and entertaining his/her guests. However it is also required to be considered as to when the door of husk is not towards the house or sahan of the plaintiff-appellant, how she can claim it to be her.

26. The learned First Appellate Court recorded a finding that the plaintiff-appellant is claiming in her suit that the

house No.1149 is situated since prior to Zamindari Abolition Act, whereas as per her statement in evidence the Pakka house was constructed 30-40 years ago. Her statement has been recorded on 13.07.2007. Zamindari was abolished in 1952, therefor, certainly the said house would not have been constructed prior to abolition of Zamindari, even then the trial court has recorded a finding that the house of the plaintiff-appellant was on the land in dispute since prior to Zamindari abolition, but failed to consider as to whether there was any house or not at the time of abolition of Zamindari and even if the Kachcha house was there, it cannot be said that there was no house.

27. The First Appellate Court recorded a finding that the land appurtenant to the construction would settle with the owner of the construction under Section 9 and Section 7(aa) of the U.P.Z.A.&L.R.Act and the husk in the land in dispute comes under the category of construction, therefore the plaintiff-appellant could not have the owner of husk, but failed to consider that all the buildings situated within the limits of a State belonging to any person shall also continue to belong to that person and any land appurtenant thereto shall be deemed to be settled with him and a person of the categories mentioned in Section 7(aa) of the Act would continue with the similar right as was enjoying on the date immediately preceding the date of vesting and defendants-respondents are also claiming the said structure their on the ground that it settled with them under Section 9 of the Act, whereas the defendant-respondent No.1 i.e. D.W.1 and D.W.2 have specifically stated that they do not know about the abolition of Zamindari in their cross examination, which is in contradiction to their pleadings. Even otherwise the United Provinces Village Abadi Act, 1948, provides under Section 3 that all houses built in a village abadi and existing on the 15th day of August, 1947, shall, unless the contrary is proved, be presumed to have been built with the consent of the landlord. Section 4(b) of the said Act provides notwithstanding any custom or usage to the contrary in any agricultural village, a house-owner may make such construction in the sahan darwaza or land appurtenant to such house as may be necessary for agricultural or domestic purposes.

28. The First Appellate Court, without considering the evidence of the plaintiff-appellant and P.W.2, recorded a finding that in the present matter the case of the plaintiff-appellant is not proved by the evidence of plaintiff-appellant and P.W.2 and she has failed to prove that she was in possession on the disputed husk since prior to abolition of Zamindari on account of which she has become the owner, whereas the plaintiff-appellant pleaded the same in her suit as well as deposed the same in examination-in-chief but no cross examination was made from her on this point in her cross-examination, but it has not been considered and no findingn has been recorded as to why it is not proved.

29. The Hon’ble Supreme Court, in the case of **Maharaj Singh Versus State of U.P. and others (Supra)**, has held that the ‘appurtenance’ is dependence of the building on what appertains to it for its use as a building. The relevant paragraphs 27 and 28 are extracted here-in-below:-

> *27. "Appurtenance', in relation to a dwelling, or to a school, college .... includes all land*

occupied therewith and used for the purpose thereof (Words and Phrases Legally Defined--- Butterworths, 2nd edn).

"The word 'appurtenances' has a distinct and definite meaning ....Prima facie it imports nothing more than what is strictly appertaining to the subject-matter of the devise or grant, and which would, in truth, pass without being specially mentioned:Ordinarily, what is necessary for the enjoyment and has been used for the purpose of the building, such as easements, alone will be appurtenant. Therefore, what is necessary for the enjoy- ment of the building is alone covered by the expression 'appurtenance'. If some other purpose was being fulfilled by the building and the lands, it is not possible to contend that those lands are covered by the expression 'appurte- nances'. Indeed 'it is settled by the earliest authority, repeated without contradiction to the latest, that land cannot be appurtenant to land. The word 'appurtenances' includes all the incorporeal hereditaments attached to the land granted or demised, such as rights of way, of common ...but it does not include lands in addition to that granted'. (Words and Phrase, supra).

28. In short, the touchstone of 'appurtenance' is dependence of the building on what appertains to it for its use as a building. Obviously, the hat, bazar or mela is not an appurtenance to the building. The law thus leads to the clear conclusion that even if the buildings were used and enjoyed in the past with the whole stretch of vacant space for a hat or mela, the land is not appurtenant to the principal subject granted by s. 9, viz., buildings. This conclustion is inevitable, although the contrary argument may be ingenious. What the High Court has grant- ed, viz., 5 yards of surrounding space, is sound in law although based on guess-work in fact. The appeal fails and is dismissed but, in the circumstances, without costs.

30. The Hon'ble Supreme Court, in the case of **Budhan Singh Vs. Nabi Bux and Another (supra),** has held that it is true that the legislature could have used the word "lawfully held" in place of the word "held" in section 9 but as mentioned earlier one of the dictionary meanings given to the word "held" is, "lawfully held". The expression "held" has been used in various other sections to connote possession by legal title, therefore ‘held’ means ‘lawfully held’. It has been relied by a Coordinate Bench of this Court in the case of **Chandrajit Versus Baliram (Dead) and 6 others (Supra)**

31. The First Appellate Court on the one hand recorded a finding that even after adducing the evidence by both the parties the case was to be proved by the plaintiff-appellant first and on the other hand recorded that where both the parties have adduced the evidence the ‘burden of proof’ looses its importance, but without considering the evidence of the respective parties i.e. the plaintiff-appellant and defendants-respondents recorded a finding that keeping into mind the evidence adduced by the parties the commission report of Regular Suit No.471/96 i.e. Paper No.33-Ga/3 should have been considered,

which is also in contradiction to it's own findings and also failed to consider that the said report was in regard to a suit in which the parties of the instant suit were not parties and the same was also not proved in this case in accordance with law. The Hon'ble Supreme Court, in the case of **Smriti Debbarma (Dead)** through Legal Representative Versus Prabha Ranjan Debbarma (Supra), has held that the burden to prove facts rests with party who substantially asserts in the affirmative and not on the party which is denying it and if the parties fail to adduce evidence the suit must fail. The burden of proof and establish the title lies upon the plaintiff and onus of proof shifts and shifting is a continuous process in the evaluation of process. A Coordinate Bench of this Court in the case of **Habibullah and others Versus Yasin and another (Supra)** has held that a suit can be allowed on the strength of the evidence of the plaintiff and not on the weakness of the respondents. A Co-ordinate Bench of this court after considering the judgments of the Hon'ble Supreme Court in the case of **Baij Nath Ram (Dead) and others Versus Smt.Sonmati and others (Supra)** has held that where two contesting parties have led evidence, the burden of proof looses it's imporance and it would assume secondary importance. Thus when both the parties have led evidence, the same are to be considered in accordance with law and if on the evaluating the evidence of the parties, it is found that the strength of the evidence of the plaintiff is sufficient to prove his case in comparison to the defendant the suit can be allowed.

32. The First Appellate Court without considering the evidence adduced by the defendants-respondents and merely on the basis of their averments recorded a finding that P.W.2 was the interested witness as he was the relative of the plaintiff-appellant, whereas it was specifically denied by the P.W.2, which has been recorded but not considered and reason for not accepting it has also not been recorded. The First Appellate Court also discarded the evidence of plaintiff-appellant in view of some contradiction in her statement in regard to the brothers of her husband, but failed to consider her evidence as discussed above.

33. A plea has been raised by the plaintiff-appellant that since both the parties were claiming the possession on the land in dispute and the construction thereon since prior to the abolition of Zamindari, therefore specific issue should have been framed in this regard in view of judgment and order dated 27.03.2019 passed in **Jhoori and others Versus Shambhoo Nath and others (Supra)** and the District Magistrate and Gaon Sabha should also have been impleaded to clarify the position. However in the said case the Coordinate Bench of this Court had observed that in the facts and circumstances of the said case the court found it appropriate. However in the present case though the plea of settlement of land is disputed under Section 9 of the U.P.Z.A.&L.R.Act has been raised by the defendants-respondents also, but in evidence the defendant-respondent no.1 and D.W.2 have specifically stated that they do not know about the abolition of Zamindari, therefore the plea taken by them seems to be nothing but a camouflage because a plea was taken by the plaintiff-appellant. However since the matter is being remitted, it is open for the appellate court to consider it in accordance with law.

34. This court also notices that the information given under the Right to Information on 13.04.2010 by the Police

Station Jamo, District-Sultanpur was placed on record before the Lower Appellate Court as paper no.24-Ga/1, which indicates that the compliance of judgment and decree dated 12.01.2010 passed by the Civil Judge (Sr.Div.), Court No.15, Sultanpur was made by the police on an application made by the plaintiff-appellant on 14.02.2010, therefore it appears that the plaintiff-appellant was not in possession on the land in dispute on the date of judgment and decree dated 12.01.2010, whereas the Suit was filed alleging therein that the plaintiff-appellant is owner and in possession of the land in dispute and defendants-respondents have neither any concern with the land in dispute nor in possession of the same. The interim injunction for maintaining the status quo by the parties was granted on 06.05.2005 in Civil Revision filed by the plaintiff-appellant before the Court of District Judge, Sultanpur and application for interim injunction was allowed by means of order dated 06.12.2006 by the trial court, therefore the First Appellate Court while considering the case and evaluating the evidence and material on record should also have considered it.

35. In view of above this court is of the view that though the First Appellate Court has considered all the issues framed by the trial court and no new issue was raised to be considered but recorded perverse findings on the basis of conjectures and surmises. Hence the same are not tenable in the eyes of law and liable to be set aside with a direction to re-consider and decide the appeal afresh. The substantial questions of law formulated in this appeal are decided accordingly.

36. This Second Appeal is, accordingly, **partly allowed**. The judgment and decree dated 21.11.2013 passed in Civil Appeal No.4 of 2010; Ram Karan Pandey and others Versus Shyampati by the Additional District Judge, Court Room No.4, District-Sultanpur is hereby set aside. The matter is remitted back to the First Appellate Court to consider and decide the Civil Appeal No.4 of 2010; Ram Karan Pandey and others Versus Shyampati in accordance with law and in the light of the observations made here-in-above in this order expeditiously and preferably within a period of six months from the date of production of a certified copy of this order without granting unnecessary adjournment to either of the parties. The parties shall appear before the First Appellate Court on 18th of September 2024. No order as to costs.

37. The Lower Court Record shall be remitted back to the Lower Appellate Court expeditiously and in any case within a period of two weeks from today.

(2024) 8 ILRA 704
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SURENDRA SINGH-I, J.

Government Appeal No. 1851 of 1983

State of U.P. ...Appellant
Versus
Raja Ram & Ors. ...Respondents

Counsel for the Appellant:
A.G.A., Sri Kamal Krishna

Counsel for the Respondent:
Sri S.P.S. Raghav, Sri Pankaj Kumar Tyagi, Sri Akash Tyagi

A. Criminal Law - Indian Penal Code,1860 - Section 302 - Death - Circumstantial evidence - suspicion - 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 (Para 67)

B. Criminal Law -Criminal Procedure Code, 1973- Section 378 - Appeal against an order of acquittal - scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused - (i) That the judgment of acquittal suffers from patent perversity; (ii) That the same is based on a misreading/omission to consider material evidence on record; (iii) That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record. Appellate Court, in order to interfere with the judgment of acquittal, would have to record pertinent findings on the above factors, if it is inclined to reverse the judgment of acquittal rendered by the trial Court. In the instant case Motive was not satisfactorily proved. The testimony of Badley and Surajveer was not at all reliable, and a false story was cooked up by them in order to lend credence to the prosecution story. A vital delay in lodging the first information report was not satisfactorily explained. The chain of circumstances was not complete so as to record the finding of conviction against the accused-respondent by reversing the finding of acquittal recorded by the trial court. The trial court passed a well reasoned and detailed order, which cannot be said to be perverse, impossible and illegal and, as such, the Government Appeal filed by the State was dismissed. (Para 89, 93, 94, 95)

C. Criminal Law - Indian Penal Code, 1860 - Section 302 - Death - Circumstantial evidence -Instant case based on circumstantial evidence, as most of the witnesses produced during the trial were not eyewitnesses to the incident. Only Ramphal Singh (P.W.-4) was alleged to be an eyewitness. Ramphal Singh stated that on the date of the incident, while he was easing himself in his field, he saw 6-7 persons forcibly taking away Har Lal. He further stated that Chand assaulted Har Lal with a knife, while the other accused attacked him with lathis. Thereafter, they wrapped Har Lal in a bed sheet and carried him toward the village by hanging him on a lathi. However, Ramphal Singh neither made any attempt to rescue the deceased nor raised an alarm. Instead, after witnessing the incident, he simply went home. He did not even attempt to lodge a report, which casts serious doubt on the credibility of his testimony. His conduct raised questions about the truthfulness of his eyewitness account, making him a highly doubtful witness, unworthy of reliance. Furthermore, during cross-examination, he admitted to having appeared as a prosecution witness in multiple police cases, leading to the inference that he was a pocket witness for the police. *Held :* Considering these factors, the Court held that it would not be safe to rely upon his uncorroborated testimony as an eyewitness to the incident. (Para 64)

Dimissed. (E-5)

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Mah.

2. G. Parshwanath Vs St. of Karn. (2010) 8 SCC 593

3. Sadhu Saran Singh Vs St. of U.P. (2016) 4 SCC 397

4. Harljan Bhala Teja Vs St. of Guj. (2016) 12 SCC 665

5. Rajesh Prasad Vs St. of Bihar & anr. Criminal Appeal No. 111113 of 2015

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Sri Jitendra Kumar Jaiswal, learned AGA for the State, Sri

Pankaj Kumar Tyagi assisted by Sri Akash Tyagi, learned counsel for the accused-respondents and perused the record.

2. Learned AGA has informed this Court that in the instant Government Appeal, Raja Ram, Bhagwan Singh and Sagar Singh son of Mukhtiar Singh has already passed away and the instant appeal on their behalf has already been abated vide order dated 15.5.2024 and now the appeal survives only qua appellant No. 3- Shri Chand.

3. The present Government Appeal has been filed against the judgment and order dated 3.5.1983 passed by Special Judge, Bulandshahr in Sessions Trial No. 230 of 1980 (State Vs. Raja Ram and others), P.S. Gulaoti, District- Bulandshahr, by which the accused-respondents have been acquitted of all the charges framed against them.

4. The prosecution case as unraveled in the first information report lodged at the instance of P.W.-6 Surajveer is that the first formant is the permanent resident of village-Bhadaula, P.S. Modinagar, District-Ghaziabad, however for the last eight years they have been living at the house of one Badley, their maternal uncle resident of village-Barmadpur, P.S. Gulaoti, District-Bulandshahr, who was running a Wheat Flour Mill (Aata-Chakki). It is alleged that said Wheat Grinding Mill was run by Har Lal brother of the first informant. On 19.6.1978 at about 5 p.m., elder daughter of Shyami Gurjar reached at Wheat Grinding Mill for collecting her wheat flour. At the relevant time, Har Lal was present at the Wheat Grinding Mill and incidently, his shoulder rubbed against the shoulder of the girl, consequent to which, she felt bad and the girl after hurling abuses left for her house.

5. It is further alleged that the said factum was disclosed by his brother to Pyare Lal and Bachan Singh. At about 7.30 p.m. when his brother after taking his meal was sitting at the Wheat Grinding Mill, Bhagwan Singh, Rajaram and Sagar Singh reached there and started hurling abuses for the aforesaid conduct of Har Lal. On his refusal for the same, they took him away for clarifying the said incident of the matter. He alongwith his maternal uncle started following them, however they were stopped stating that he will return very soon after clarifying the matter, as such they did not accompany him.

6. It is further alleged that when his brother Har Lal did not return back at his Wheat Grinding Mill till 9.30 P.M., then he alongwith his maternal uncle Badley set out to know his whereabouts and searched for him towards village- Ustara, where near the canal contributory they saw Rajaram, Bhagwan Singh, Sagar Singh. Shri Chand son of Shyami alongwith 2-3 unknown persons coming from the field of Jalla. It is further alleged that they were carrying his brother in a hanging position towards the Wheat Grinding Mill Ustara. On their interception they started assaulting his maternal uncle Badley by lathi and also rushed towards him, however he alongwith his maternal uncle made his escape good. On account of fear they stayed the whole night in the Jungle and on the next morning reached the police station to lodge the report, however, found that all the accused assailants were present there, as such they dared not to enter the police station and on making query, it was revealed that they had killed his brother and had lodged a false report of loot.

7. It is further alleged that on that very day at about 6 p.m. he had sent a telegram addressed to S.P, Bulandshahr from Hapur. On the basis of said written report, a first information report is shown to have been registered on 22.6.1978 at 12.15 p.m., vide Case Crime No. 144A, under Sections 147, 323, 504, 302 IPC, P.S. Gulaoti, District- Bulandshahr in respect of an incident alleged to have taken place on 19.6.1978 at 7.30 p.m.

8. Perusal of the record of the instant case shows that prior to lodging of the aforesaid first information report another FIR had already been lodged by Mukhtiar Singh father of accused Sagar Singh at the same police station of District-Bulandshahr, which is registered vide Case Crime No. 144 of 1978, under Section 394 IPC alleging therein that near village-Ustara they are having their fields having a tubewell and a Wheat Grinding Mill, where his son Sagar Singh alongwith his servant Rajendra Singh were sleeping and a bulb was lighting at the tube-well. At about 11.30 in the night, some miscreants came at his tube-well and looted his son and servant and assaulted them. On raising alarm, his younger brother Parmal Singh alongwith some other villagers reached there, consequent thereto, the miscreants left the place looting his wrist watch, however one of the miscreant, who was having a country made pistol alongwith cartridges was apprehended by Rajendra and Sagar Singh alongwith villagers. In the said attempt to apprehend him, he suffered injuries on his head. While the miscreant was being carried in a buggi, he died in the intervening night at about 2.30 A.M. Leaving him in the buggi, he has come to lodge the report. On the basis of a written report a first information report has been registered at P.S. Gulaoti, Bulandshahr on 20.6.1978 at 2.45 A.M. After registration of the said information, its corresponding G.D. Entry was prepared at the police station and thereafter S.I. Dinesh Lal Sharma (P.W.-12), who was posted there at the relevant time, proceeded to village-Ustara for conducting the inquest on the person of the deceased and when he reached near old Dharamshala, he found a corpse lying in a buggi and large number of persons had collected there. P.W.-12 Dinesh Lal Sharma conducted the inquest of the deceased and prepared the inquest report and also prepared the other relevant documents namely Challan nash, Photo nash, Letter to R.I., letter to C.M.O. and thereafter sealed the corpse in a cloth and after preparing its sample seal handed over the same to the police constable for carrying to the mortuary for conducting of an autopsy on the person of the deceased.

9. On 20.6.1978 at 4.45 p.m. Dr. V.P. Mittal had conducted an autopsy on the person of the deceased Har Lal and has noted the following injuries :-

1. Lacerated wound 2 ¼" x ⅓" bone deep right Side head 4" above right ear.

2. Lacerated wound ¾" x ¼" muscle deep tip of nose.

3. Contusion 4" x 4" right shoulder.

4. Contusion 7" x 3" outer aspect to arm middle.

5. Contusion 11" x 3 ½" outer and back of right forearm.

6. Stab wound 1" x ½" right lateral chest cavity deep right side chest 5" below right nipple at 8 o'clock upward and obliquely directed.

7. Abrasion 3" x ¼" right side chest 2" above injury no. 6.

8. Multiple abraded contusions are of 14 ½" x 12 ½" on the back scapular region.

9. Traumatic swelling 7" x 3 ½" front of right leg middle fracture tibia right.

10. Contusion 3" x 1 ½" left shoulder.

11. Contusion 6" x 3 ½" front of left thigh lower 1/3rd.

The cause of death has been noted to be as a result of injuries.

10. After the autopsy on the person of the deceased, his corpse was handed over to his brother Surajveer and Badley, who had taken the dead body to Hapur in a truck. Enroute to Hapur it is stated that at about 8.35 p.m. in the night on 20.6.1978 a telegram addressed to S.P. Bulandshahr, was sent by P.W.-6 Surajveer, wherein it is stated that his brother Har Lal, who was taken away by Rajaram, Bhagwan Singh and Sagar, has been done to death at the Wheat Grinding Mill of Sagar Singh in village- Ustara and when he went to lodge the report, the police detained him till 3 p.m. but did not lodge his report and is in collusion with the accused persons. The said telegram has been proved and marked as Exhibit Ka – 2.

11. Perusal of the record further shows that on 22.6.1978 P.W.-6 Surajveer reached at P.S. Gulaoti and handed over a written report to the Head Moharrir at Police Station- Gulaoti, District- Bulandshahr, on the basis of which, a cross case was registered vide Case Crime No. 144A, under Sections 147, 323, 504, 302 IPC against four accused respondents in presence of Surajveer. After registration of the aforesaid first information report, the investigation of the said case was handed over to P.W.-12 Dinesh Lal Sharma, Ist Investigating Officer, who recorded the statement of first informant Surajveer and then proceeded to village- Barmadpur, where he recorded the statement of Badley, Ratiram, Ramphal, Jeet Singh and other witnesses and thereafter inspected the place of incident on way to Wheat Grinding Mill and prepared the site plan proved and marked as Exhibit Ka-17 & 18. On the way to Wheat Grinding Mill of accused Sagar Singh found blood at three places at the boundary marks of Ramphal and Vedpal and from the field of Khoob under the mulberry tree. He collected the blood stained earth and plain earth from the said places, which was kept in a container and sealed and its fard recovery memo was prepared. The aforesaid recovery memo has been proved and marked as Exbts. Ka-19, 20 & 21. On 22.6.1978, the Investigating Officer is said to have collected a Register maintained at the Wheat Grinding Mill of the Surajveer containing the name of one Kalicharan, who had given wheat for grinding on 16.6.1978. On the basis of which, a recovery memo has been prepared by the Investigating Officer, which has been proved and marked as Exhibit Ka-16. The Investigating Officer thereafter recorded the statement of Pyare Lal and Bachan Singh and thereafter the Investigation is said to have been transferred to P.W.-10- Shashi Pal Singh Tomar, 2nd Investigating Officer, who after concluding the investigation submitted the charge sheet against the accused-respondents on 28.11.1978.

12. On the basis of said charge sheet, learned Magistrate had taken cognizance and since the case was exclusively triable by the court of Sessions, as such the same was made over to the

court of Sessions for trial, where it was registered as Session Trial No. 230 of 1980 (State vs. Rajaram and others). The trial court framed the charges against the accused-respondents, which was read over and explained to them, who abjured the charges, did not plead guilty and claimed to be tried.

13. During the course of trial, the prosecution in order to prove the guilt against the accused respondents have produced as many as twelve witnesses. Badley (P.W.-2), Ratiram (P.W.-3), Ramphal Singh (P.W.-4), Jeet Singh (P.W-5), Surajveer (P.W.-6) and Pyare Lal (P.W.-11) are the witnesses of fact whereas Dr. V.P. Mittal (P.W.-1) is the medical officer, who conducted an autopsy on the person of the deceased and prepared the post-mortem examination report, Dr. Anees Ahmad (P.W.-7) is the medical officer, who had examined the injuries of P.W.-2- Badley, Khoob Chand (P.W.-8) is the constable, who had taken the dead body to the mortuary for autopsy, Santpal Singh (P.W.-9) is the Head Moharrir, who had proved the chick first information report lodged by Surajveer (P.W.-6), Shashi Pal Singh Tomar (P.W.-10) is the second I.O., who concluded the investigation and submitted the charge sheet and Dinesh Lal Sharma (P.W.-12) is the Investigating Officer of the instant case. After recording the entire evidence, the statement of the accused persons were recoded under Section 313 Cr.P.C. and thereafter statement of one Dr. M.P. Singh, who was produced as defence witness, was recorded and thereafter the trial court vide impugned judgment and order dated 3.5.1983 has acquitted all the accused persons. Against which, the present Government Appeal has been preferred with the prayer to reverse the acquittal of the accused-respondents and to convict them for the offence charged with.

14. In order to appreciate the controversy in question and to determine the correctness of the conclusions recorded by the trial court, it would be apt to discuss the evidence in brief adduced by the witnesses examined by the prosecution as well as defence.

15. Dr. V.P. Mittal (P.W.-1) is the medical officer, who had conducted an autopsy on the person of the deceased and has noted the ante-mortem injuries found on the person of the deceased. The said injuries have already been discussed in the earlier part of the judgment. As per the opinion of the doctor, the deceased could have died on 19.6.1978 at 8.30 p.m. and the injury no. 6 could be caused by a knife, which itself was sufficient to cause death, the other injuries could be caused by lathi.

16. Badley (P.W.-2) is the maternal uncle of the deceased. He, in his testimony, has stated that Har Lal was his nephew, he alongwith Surajveer were living with him for the last eight years and used to run his thresher and Wheat Grinding Mill. Accused Bhagwan Singh and Shri Chand are the nephews of Rajaram and accused Sagar Singh is the friend of Shri Chand, resident of village-Ustara. He further stated that about four years back, Har Lal was done to death. On the day of incident, Sheela daughter of Kalicharan had reached at the Wheat Grinding Mill of Har Lal for taking flour. At the time of her leaving, Har Lal's shoulder incidently brushed the shoulder of Sheela, consequent thereto she felt bad about it and started hurling abuses to Har Lal, however thereafter she left. Badley

further stated that on the same day in the evening at about 7 p.m. he alongwith Surajveer and Har Lal were sitting at the Wheat Grinding Mill alongwith Pyare Lal and Bachan, who are the employees of Har Lal. At the relevant time Rajaram, Bhagwan Singh and Sagar reached there and Rajaram and Bhagwan asked Har Lal as to why he pushed the girl and started hurling abuses. Har Lal stated that he can clarify the said issue and with an intention to clarify things, set out with them. They also tried to follow him, however Har Lal stopped them stating that he would return back after making clarification.

17. It is further stated that they waited there till 9 p.m. however, Har Lal did not return back at the Wheat Grinding Mill and as such he alongwith Surajveer set out to search him out and went upto the house of Kalicharan but could not find him there, then they returned back and proceeded towards village-Ustara for searching Har Lal and when they reached at the bridge of the canal contributory near the field of Jalla, they saw all four accused persons alongwith three unknown persons, who were having a bundle (hereinafter referred to as gathri) from which cries of some person could be heard. On questioning the accused assailants as to where they left Har Lal they kept the gathri down and Bhagwan Singh and Shri Chand assaulted him with lathi, consequent to which he fell down, however Surajveer made his escape good and thereafter the accused persons after assaulting him left the place taking away the gathri. It was a moon lit night. After the accused persons left, he slowly proceeded towards his village and on the way found Surajveer sitting on the boundary marks of the field of Kalicharan. He also sat with him and remained sitting there the whole night due to fear and on the next day when it dawned morning they left for Gulaoti and reached at the police station Gulaoti and asked the police to lodge their report however, the police personnel asked them to sit down, but despite assurance did not lodge their report.

18. It is further alleged that inside the police station they saw all four accused persons alongwith one Mukhtiar, father of Sagar standing, however the police did not lodge their report and continued to converse with the accused persons. He further categorically stated that he had seen the dead body of Har Lal lying inside police station. At about 10-11 a.m., the police tied the corpse of Har Lal on a tonga and asked him to take the corpse to Bulandshahr. He sat alongwith the corpse on the tonga and reached Bulandshahr. Surajveer also reached separately at the hospital in Bulandshahr. At the hospital his injuries were examined. After the autopsy on the person of deceased Har Lal, he returned back to his house and corpse of Har Lal was taken away by Surajveer to his village.

19. During cross examination he stated that Har Lal is the resident of Bhadaula, District- Ghaziabad and one P.W.-11 Pyare Lal is also of the same village, however, the village of Bachan Singh another witness is not known. Surajveer brought Pyare Lal and Bachan at his Wheat Grinding Mill for training. The distance between village- Barmadpur and Ustara is two miles.

20. Further, he stated that about 6-7 years back, elections for the office of Pradhan were held in his village, which was contested by Bhuley and Ramphal. He supported the candidature of Ramphal

however, Bhuley was supported by accused Bhagwan Singh, Rajaram and his family members, and since then there has been parti-bandi in the village.

21. He further stated that house of Shri Chand, Bhagwan Singh and Rajaram is situate at a distance of 25 paces from his house. He further stated that in his village there are four persons in the name of Shri Chand, however accused Shri Chand is the son of Kalicharan. After about 3-4 days of the incident, the Investigating Officer had recorded his statement. He further stated that the incident of brushing of shoulder of Har Lal with Sheela resulting in hurling of abuses by Sheela did not occur in his presence but was disclosed to him by Har Lal, which fact he had disclosed to the Investigating Officer. However, if the said factum has not been recorded by the I.O. in his statement, then he cannot explain the reason for the same. He further stated that in the evening he was sitting at his Wheat Grinding Mill when the accused persons reached there. Pyare Lal (P.W.-11) and Bachan were also sitting there. He further stated that as soon as the accused persons reached there, they started hurling abuses, which lasted for 2-3 minutes, however then he did not suspect that the accused persons will commit such an incident. He did not restrain Har Lal not to accompany the accused alone in the night hours. The accused took him away to give clarification before the girl. There was no reason to follow them. It is wrong to state that the accused persons did not come at his Wheat Grinding Mill and Har Lal did not accompany them. At the time of setting out to search Har Lal he did not ask Pyarelal and Bachan to accompany him. He further stated that on the day of incident when he alongwith Surajveer reached at the canal contributory, in search of Har Lal no persons were present there. When for the first time he had seen the 'gathri', he was 5-6 paces away from it. The said place was pointed out by him to the Investigating Officer, however he cannot explain as to why Investigating Officer has not shown the said place in the site-plan.

22. He further stated that "मैनें दरोगा को यह ब्यान दिया था "हमने मुलजिमान से पूछा कि तुमने हरलाल को कहाँ छोड़ा इतने में उन्होनें गठरी रख दी। भगवान सिंह व श्री चन्द ने मुझे लाठी मारी।" यह बात दरोगाजी ने क्यों नहीं लिखी कारण नही बता सकता।

मेरी चोटों से खून नही निकला। मैनें दरोगाजी को बता दिया था कि जब मैं गिर गया तो मुलजिमान ने और लाठी मारी यह बात ब्यान में नहीं लिखी, कारण नहीं बता सकता।

मुलजिमान के जाने के बाद मैं उठ कर अपने गांव की तरफ चल दिया। मै 40, 50 गज बरमदपुर की तरफ चला तो मुझे सूरजवीर मेंड पर बैठा मिला। मैनें दरोगाजी को ब्यान दिया था कि " मै मुलजिमान के चले जाने के बाद धीरे धीरे उठ कर गाँव कीर तरफ चला और मेरा भाँजा सूरजवीर मेंड पर बैठा मिला मै उसके साथ बैठ गया और रात भर वहीं बैठा रहा " मैं कारण नहीं बता सकता मेरे ब्यान में क्यों नही लिखा।

हम थाने के भीतर नही गये हमें थाने के फाटक पर ही बिठा दिया था। मुझे फाटक पर पुलिस के सिपाही मिले थे कहा था यही बैठना। मैने उस सिपाही से कहा था कि हमे अन्दर जाने दो रपट करानी है तो सिपाही ने कह दिया यही बैठे रहे। हरलाल की लाश घोड़ा तांगे में रखी थाने के फाटक पर ही आ गई ताँगे में मैं बैठा एक चोकीदार बैठा। लाश बाहर आ जाने के बाद मैंने थाने में घुसने का प्रयास नही किया क्योकि डर गया।

जब हम अस्पताल से लाश लेकर चले तो रात हो गई थी। मैने या सुरजवीर ने थाना कोतवाली में कोई रपट नही लिखाई। मै और सूरजवीर चीरघर से लाश लेकर ठेले से गुलावटी आठ बजे आ गये। गुलावटी पहुँचकर मैं ठेले से उतर गया और सूरजवीर लाश लेकर अपने घर चला गया।

मैनें दरोगाजी को यह ब्यान दिया था " हमने कहा कि हमारी रिपोर्ट लिख दो थाने वालो ने कहा की बैठ जाओ हम तुम्हारी रिपोर्ट लिख देगे। थाने वालो ने हमारी रिपोर्ट नही लिखी" मेरे ब्यान मे दरोगा ने यह बात नहीं लिखी कारण नही बता सकता।"

23. He further stated that it is wrong to state that no such incident has

taken place and on account of parti-bandi and enmity, he is falsely deposing. He further denied the suggestion that on 19.6.1978 accused Sagar Singh and his servant were sleeping at the tube-well and at about 11.30 p.m. Har Lal and 2-3 other miscreants went at the tube-well and assaulted him and looted him. He further denied the suggestion that Mukhtiar and Sagar Singh were taking away the dead body at Gulaoti on a buggi, where he died. He further denied the suggestion that in order to save himself from the incident reported by Mukhtiar Singh, he is falsely deposing.

24. Rati Ram (P.W.-3) is an another witness of the incident, who alleges to have seen Sri Rajaram, Bhagwan Sahai and Sagar taking away Har Lal towards Ustara. In his oral testimony he states that about four years back at about 8 p.m. he had gone to ease and while he was returning back home, he met 6-7 persons but identified Sri Rajaram, Bhagwan Singh and Sagar. Har Lal was also there, Sagar and Shri had held Har Lal by his shoulders, Rajaram gagged his mouth and Bhagwan Singh was pushing him towards village-Ustara. They were armed with lathies. On being questioned they asked him to leave and stated that it is none of his concern. On the next day, he came to know that Har Lal was done to death.

25. During cross examination, he stated that after three days of the incident, he was interrogated by the Investigating Officer. He in his statement recorded u/s 161 Cr.P.C. had disclosed the fathers name of accused persons however, if it is not there he cannot assign any reason for the same. Since last one year, there is no dispute between him and accused Bhagwan Singh. He had gone to ease near the pond, however except the accused persons no one was met him there. He had pointed out the said place to the Investigating Officer, however, he does not finds the said place, shown in the site-plan for which he cannot state anything. He saw the accused persons for a minutes who thereafter proceeded towards vilalge-Ustara and he returned back home and remained there till his statement was recorded by the Investigating Officer. He further stated that he did not disclose the aforesaid fact to any other person except the Investigating Officer. He further stated that there are two persons by the name of Kalicharan, one is father of Shri Chand and other Kalicharan is the son of Girdhari. He further denied the suggestion that because of inimical terms and parti-bandi and on the instigation of Surajveer and Badley he is falsely deposing.

26. Ramphal Singh (P.W.-4) is another eye witness, who claims to have seen the accused persons assaulting the deceased. He stated that about four and a half years back at about 8.30 p.m. he was easing in his millet field. When he saw 6-7 persons taking away Har Lal from village Barmadpur to village- Ustara. He identified Sagar, Bhagwan Singh, Rajaram and Shri Chand amongst them but not the three others. Sagar and Bhagwan Singh were holding him by his arms and rest were pushing him. Rajaram held him by his mouth. When Rajaram hands slipped from the mouth of Har Lal then he had bitten Sagarmal, consequent to which, Sagar asked Shri Chand to stab him by a knife. Shri Chand then assaulted Har Lal by a knife while others assaulted him by lathies. Thereafter they wrapped him in a bed sheet, hanged him on a lathi and proceeded towards village-Ustara. He further categorically stated that he did not reacted

at all and returned back to his home. Next day he came to know that Har Lal had been killed by the accused persons. At the time of incident, there was moon light.

27. During cross examination, he stated that in number of cases, he had been a police witness and had deposed before the Court. He further stated that he had pointed out to the Investigating Officer the place, where he had gone to ease, however the said place has not been shown in the site-plan. He further stated that he had seen the accused persons from a distance of 4-5 paces but did not question them, when accused persons had taken Har Lal towards village-Ustara then he returned back to his house. After 3-4 days of the incident, the Investigating Officer has recorded his statement. He further stated that on the next day the factum of accused taking away Har Lal was disclosed by him to the villagers, however, he did not consider it necessary to lodge any report of the incident.

28. During cross examination he stated that he saw the accused persons and their men dragging away Har Lal towards Ustara but no mark of dragging was seen by him. He further denied the suggestion that on account of enmity and parti-bandi and under the influence of police he is falsely deposing.

29. Jeet Singh (P.W.-5) is the another witness of the incident and he stated that about four years back at about 10 p.m. he alongwith one Charan Singh was returning from village-Ustara to his village and when he reached near the mulberry tree in the field of Vedu, he saw 5-7 persons present, out of which Rajaram, Sagar, Shri and Bhagwan Singh could be identified however, the other three persons standing under the mulberry could not be identified. They were armed with lathies and a bundle (gathri) was lying there. He tried to question them, however he was snubbed. Thereafter on the next day he came to know that Har Lal has been killed. He further denied the suggestion that there is some dispute between him and Rajaram over irrigation of their fields by rotation.

30. He further stated that on the relevant day of incident, he had gone alongwith Charan Singh to purchase a buffalo, however, could not buy it. He further stated that he did not disclose to the Investigating Officer that he had gone to Sherpur to buy a buffalo rather had stated to him that after completing his job he was returning back from Ustara which was correct. He further stated that he had pointed out the place to the Investigating Officer, from where he had seen the accused persons but it has not been shown in the site plan. He had disclosed the said incident to the some villagers and then went to sleep and on the next day he came to know about the murder of Har Lal however, he did not lodge the report nor asked anyone else to lodge the report. He further stated that he is related to Badley. He further denied the suggestion that on account of being the relative of Badley and being an inimical terms and under the pressure of the police, he is falsely deposing.

31. Surajveer (P.W-6) is the first informant of the incident and brother of the deceased. He further stated that since last eight years, he has been staying in village-Barmadpur alongwith his brother Har Lal at the house of his maternal uncle, where he runs a Wheat Grinding Mill and a thresher machine. About four years back at about 5 p.m. Sheela daughter of Kalicharan had come at his Wheat Grinding Mill for

grinding of wheat, however, while she was leaving, her shoulder brushed with the shoulder of Har Lal, consequent to which, she hurled abuses and left. On the same day at about 7 p.m. When he alongwith his brother Har Lal, maternal uncle Badley, servants Bachan Singh and Pyare Lal were present at the Wheat Grinding Mill, Bhagwan Singh, Rajaram and Sagar came at the Wheat Grinding Mill armed with lathies and started hurling abuses and asked Har Lal to explain his conduct of brushing his shoulder with that of the girl. He alongwith Har Lal tried to clarify the issue however, they restrained him there and took away Har Lal stating that he will come back after clarifying the issue. When Har Lal did not return back even after 9 p.m. then he alongwith Badley set out to find out his whereabouts and went towards the house of Kalicharan but did not find him there then they proceeded towards canal contributory to search Har Lal and when they reached on the bridge of the canal near the field of Jalla then they heard some faint noise and were 4-5 mitres away then saw Rajaram, Lakhan Singh, Sagar and Shri Chand alongwith 2-3 unknown persons holding a gathri proceeding towards village-Ustara. The said gathri was hanging on a lathi. On questioning them about Har Lal they kept down the gathri and started assaulting them. He did not receive any injury and ran away, however, his maternal uncle received injuries. He thereafter hid himself in the field of Rajaram. After 5 minutes Badley also reached there and on account of fear they stayed there the whole night and in the morning at about 5 a.m. reached police station- Gulaoti to lodge the report. On reaching there they found the accused persons present in the police station- Gulaoti, however, the police personal asked them to sit outside the police station and detained them there till 11 a.m. On questioning the police personnels, he was informed that accused persons had lodged a false report of dacoity and had killed Har Lal. At about 11 a.m. the police personnels sent the corpse of Har Lal for post-mortem by a tonga, on which his maternal uncle also sat and subsequently, he also reached at the mortuary in Bulandshahr. At about 5 p.m. after the post-mortem the corpse of Har Lal was handed over to him, who brought corpse on a truck to Hapur and thereafter at about 8 p.m. he sent a telegram addressed to S.P. Bulandhahr, a copy of which is proved and marked as Exbt. Ka-2 and thereafter he took the corpse to his village- Bhadaula. On the next day he came to Bulandshahr and met the S.P. who took a written report, which has been proved and marked as Exbt. Ka-3 signed by him and scribed by one Dilawar Singh. The accounts of Wheat Grinding Mill was maintained by his brother Har Lal in a register marked as Material Exhibit- 1, which contains an entry dated 16.06.1978 in the name of Kalicharan, which has been marked as Exhibit- 4.

32. During cross examination he stated that he was an Army personnel and remained in Army Services for five years however, he was tried and convicted in a case. He used to visit his nanihal since childhood and the house of the accused persons is at a distance of 100-150 meters from his chakk. He has further stated that although he was aware of the parentage of accused Rajaram, Bhagwan Singh and Sagar but did not mention it in the FIR. He further stated that he had not mentioned the name of Shri Chand in his telegram as he was in a hurry and had nominated only three persons in the telegram as only these three persons came to call his brother. After three days of the incident, the Investigating

Officer had recorded his statement. He further stated that in the FIR he had stated that Sheela daughter of Kalicharan had come for grinding of her wheat at his Wheat Grinding Mill, however if the said fact is not written there, he cannot assign any reason for the same. He further stated that when he reached at his Wheat Grinding Mill at 6.30 P.M., the incident with Sheela had already been over.

33. He further stated that when accused persons came at his Wheat Grinding Mill in the evening he was sitting however, no one else was sitting with him. Though he saw the accused persons were armed with lathi but he did not suspect anything otherwise. On drawing his attention to the register marked as Material Exhibit-1, he pointed out that name of the person, who comes for grinding of wheat, is entered in the register however, in the said register name of Sheela is not mentioned. He further stated that he is not aware of the fact that there are two persons in the name of Kalicharan in his village.

34. He further stated that "मैंने अपनी रपट में यह बातें लिखाई थी कि " मुल्जिमान के हाथों में लाठियाँ थी। इन लोगों ने हम लोगों को गालियाँ दी और मेरे हरलाल से लड़की के साथ कन्धा छूने वाली बात की सफाई के लिये कहा" रपट में यह बात अगर नहीं है तो इसकी कोई वजह नहीं बता सकता। वैसे यह बात मैनें दरोगाजी को बता दी थी। मुल्जिमान के गाली देने और हाथ में लाठी लिये होने पर हमें उन पर कोई शक नहीं हुआ। हरलाल से नही कहा कि रात हो रही है इन लोगो के साथ मत जाओ। मैनें उनसे यह नहीं कहा कि जो हो गया उसको छोड़ो अब सफाई की क्या जरूरत है। चूँकि मुल्जिमान हरलाल को लड़की के पास ले जा रहे थे। मैंने नही पूछा कि कहाँ ले जा रहे हो। मैं व मेरे मामा बदले हरलाल के जाने के बाद वही चक्की पर बैठे रहे। 2 घन्टे तक बैठे रहे। इस बीच में किसी को हरलाल को देखने के लिये नही भेजा।"

35. He further denied the suggestion that no incident had taken place with Sheela and no one has come to take away Har Lal. To quote :- "मैनें अपने रपट में लिखा दिया था कि राजा राम के खेत में छिपे थे और दरोगाजी को भी बता दिया था यदि हमारे ब्यान में राजाराम के खेत नही लिखा तो इसकी कोई वजह नही बता सकता और रिपोर्ट में भी नही लिखा तो इसकी वजह नही बता सकता। बदले की चोटों से कोई खून नहीं निकला था। मेरे ब्यान 161 व F.I.R. में यह बात कि उन्होने गठरी रख दी क्यों नही लिखी गई इसका कारण नहीं बता सकता। हमने पूछा कि हर लाल कहा है यह बात रपट में लिखाई क्यों नही लिखा, कारण नहीं बता सकता। मैंने दरोगाजी को स्थान नही दिखाया जहाँ मुल्जिमान ने गठरी रख दी थी।"

36. He further stated that he alongwith his uncle reached at the police station- Gulaoti at 5 p.m. where a constable was standing at the gate, however, he did not went inside the police station as accused persons were present inside the police station nor asked the police personnels to lodge his report and remained sitting there till 11 a.m. He asked the police personnels to record his statement but they did not paid any heed. He further denied the suggestion that they remained sitting at the police station till 3 p.m., however he further stated that the factum of sitting at the police station till 3 p.m. has inadvertently been mentioned by him in the telegram in a hurry and the police personnels made them sit outside the police station only till 11 a.m. It is wrong to state that he did not went to police station to lodge the report.

37. He further stated that when he reached the police station, the corpse of Har Lal was seen lying in the police station, which he could not identify to be that of Har Lal. Alongwith the corpse one police personnel went on a tonga, however, he did not ask him to lodge his report. He did not state in his report or in his statement recorded under Section 161 Cr.P.C. that the police personnels sent the corpse of Har Lal

for post-mortem examination on a tonga at 11 a.m. nor stated that his maternal uncle sat on the tonga with the corpse, for which he cannot give any explanation. He stayed in mortuary for two hours and thereafter reached Bhadaula alongwith corpse at about 8 p.m., however, he did not lodge any report at the police station- Gulaoti. On 22.6.1978 he had lodged the report, which is marked as Exbt. Ka-3. Between the said period he remained in village- Bhadaula. In the first information report, name of witnesses Ratiram and Jeet Singh has not been mentioned.

38. He further denied the suggestion that the information about the death of Har Lal was received on 30.6.1978 and false telegram was sent. It is wrong to state that just in order to save himself from the report of Mukhtiar Singh father of accused Sagar, the instant case has been falsely cooked up and concocted on account of enmity and parti-bandi and no such incident had taken place.

39. Dr. Anees Ahmad (P.W.-7) is the medical officer, who had examined injuries of Badley (P.W.-2) and has noted the following injuries:-

(i). Contusion 7 c.m. x 2 c.m. on right side back.

(ii). Contusion 8 c.m. x 3 c.m. on right scapula.

(iii). Contusion 11 c.m. x 2½ c.m. on middle of right side back.

(iv). Contusion 4½ c.m. x 2 c.m. on left scapular region.

The said injuries have been proved and marked as Exbt. Ka-5. He further stated all the injuries are simple in nature and could be caused by lathi on the date and time of incident. During cross examination, he has stated that all the injuries are on approachable part and none of the injuries are on vital part of the body and could be manipulated.

40. Khoob Chand (P.W.-8) is the constable, who had accompanied S.I. D.L. Sharma (P.W.-12) for conducting the inquest. He further stated that on 20.6.1978, he was posted as a constable at police station- Gulaoti and on the said date had gone with S.I. D.L. Sharma for conducting the inquest. He further stated that after conducing the inquest, the corpse was sealed and after preparing relevant documents was handed over to him alongwith constable Bheem Singh, who had taken the corpse to the mortuary and handed over the same to the doctor.

41. After conducting the post-mortem, the doctor handed over them certain documents, which they brought at the police station and handed them over to the concerned Moharrir. During cross examination, the said witness clearly stated that from the place of incident he straight-way to Bulandshahr and had not gone to police station- Gulaoti. He reached Bulandshahr after 12' o clock. To quote :- "मौके से लाश लेकर मै सीधा बुलन्दशहर आया था थाना गुलावटी नही गया था मै बुलन्दशहर 12 बजे पहुँचा था।"

42. Sant Pal Singh (P.W.-9) is the Head Moharrir and on 22.6.1978, he had drawn FIR on the basis of written report given by Surajveer (P.W.-6), which has been proved and marked as Exbt. Ka-3, on which, there was an order by the C.O. to register the first information report. On the basis of which, the chick FIR has been drawn, which has been proved and marked as Exbt. Ka-7 and its corresponding G.D. vide G.D. Report No. 21 has been drawn, which has been proved and marked as

Exbt. Ka-8. He further stated that on 20.6.1978 at 8.45 p.m. constable Bheem Singh and Phool Chand returned back at the police station alongwith the relevant documents and handed over to him, on the basis of which, G.D. Report No. 25 has been drawn.

43. During cross examination, he stated that carbon copy of the chick report of Case Crime No. 144, under Section 394 IPC at the instance of Mukhtiar Singh was drawn by him on the basis of allegation made therein. The carbon copy is proved and marked as Exbt. Kha-1 vide G.D. Report No. 3, which has been proved and marked as Exbt. Kha-2. He further stated that through constable C.P. 903 Suresh Pal he had sent accused Sagar for medical examination. He further stated that whenever a cognizable or non cognizable offence is reported, it is immediately registered. He categorically stated that neither on 19th nor on 20th June, 1978 Badley or Suraj did not visit the police station to lodge the report. To quote:- "जब थाने पर किसी Congnizable या non cognizable offence की इतला होती है उसकी रिपोर्ट तुरन्त दर्ज की जाती है। 19 या 20 जून सन् 78 को बदले या सूरज की हमारे थाने पर कोई रिपोर्ट दर्ज कराने के लिये नहीं आये।"

44. Shashi Pal Singh Tomar (P.W.-10) is the second Investigation Officer, who stated that in the year 1978 he was posted at the police station- Gulaoti and on 24.6.1978 the investigation of the said case was handed over to him by S.I. D.L Sharma, which was concluded by him and charge sheet was submitted against the accused persons on 28.11.1978, which has been proved and marked as Exbt. Kha-11.

45. During cross examination he stated that the case, which was registered at the police station for assaulting Sagar, there has also been a version of the witnesses of the said case. He further denied the suggestion that he in collusion with the first informant of the instant case he had filed a final report.

46. Pyare Lal (P.W.-11) is another prosecution witness, who is said to be an employee of Har Lal on its Wheat Grinding Mill. He, in his testimony, stated that about four years back he used to work as an employee in the Wheat Grinding Mill of Surajveer and Badley. At about 5 p.m. when Sheela daughter of Kalicharan came to Wheat Grinding Mill to take flour, Har Lal and Bachan Singh were also present with him, however, on account of sudden noise made by Wheat Grinding Mill, Har Lal rushed towards it. Meanwhile Sheela was coming out from the gate and his shoulder brushed with the shoulder of the girl, who started hurling abuses and stated that she will inform the inmates of her house regarding the said incident.

47. During cross examination he stated that three days after the incident, the Investigating Officer has recorded his statement and he has disclosed that he was working as an employee in the Wheat Grinding Mill of Surajveer at Barmadpur, however if the said fact has not been stated in any statement then he cannot explain its absence. He further stated that he did not remember if he has disclosed the name of Sheela in his statement recorded under Section 161 Cr.P.C. however, on his attention been drawn to his statement recorded under Section 161 Cr.P.C. he stated that if it does not contain the name of Sheela, he cannot give any explanation. He further stated that he forgot to disclose the factum of Har Lal rushing towards his chakki while the girl was coming out from

the gate. He further denied the suggestion that he was not employed in Wheat Grinding Mill and under influence of Surajveer and Badley is falsely deposing in the instant case and that he had not actually seen the incident.

48. Dinesh Lal Sharma (P.W-12) is the first Investigating Officer of the instant case and on 20.6.1978 he was posted as S.I. at the police station- Gulaoti. He further stated that the cross case of the incident was handed over to him for investigation. He further stated that he conducted the inquest on the person of the deceased Har Lal, which has been proved and marked as Exbt. Ka-12. He also stated that other relevant documents including the photo-nash, challan-nash, chitthi C.M.O. and chitthi R.I. were prepared by him, which has proved and marked as Exbt. Ka-13 to Ka-15. After sealing the dead body, sealed sample was prepared by him and the dead body was handed over to constables Khoob Chand and Bheem Singh for carrying it the mortuary for post-mortem. On 22.6.1978 the instant case was instituted at the police station and investigation of which was also taken over by him. He thereafter recorded the statement of Surajveer and then reached Barmadpur and recorded the statement of Badley, Ratiram, Ramphal, Charan Singh and other witnesses and inspected the site-plan i.e. Wheat Grinding Mill and prepared its map, which has been proved and marked as Exbt. Ka-17 and Ka-18. On the way at three places, he found blood at the boundary marks of Ramphal and Vedram and also under the mulberry tree. He collected the blood stained earth and plain earth from the other places and sealed the same in a container and prepared fard recovery memo, which is exhibited as Exbt. Ka-19 to Ka-21. On 23.6.1978 he recorded the statement of Bachan Singh. On 24.6.1978 the investigation of the said case was handed over to S.O. Shashi Pal Singh Tomor.

49. During cross examination he stated that on 20.6.1978 Mukhtayar father of accused Sagar had lodged the report under Section 394 IPC, which was registered vide Case Crime No. 144 at police station- Gulaoti, which was registered in his presence, on the basis of which, he proceeded for conducting the inquest. He further stated that he cannot recollect if he had recorded the statement of Mukhtayar and Sagar and had sent Sagar for medical examination on the report lodged by Mukhtiyar he had submitted a final report. On the basis of Case No. 144, under Section 394 IPC he had visited village-Ustara and after crossing village-Ustara a dead body was found kept in a buggi near old Dharamshala, where number of persons had collected. He took the dead body in his possession and conducted its inquest at about 3- 3.30 a.m. which concluded at 6 a.m. While preparing the inquest, the name of the deceased was disclosed to him by accused Rajaram son of Bhikki. After preparing the inquest he sealed the dead body and handed it over to the police constable, to be taken to the mortuary and thereafter he returned back to the police station. During inquest he was informed that the deceased died in an attempt to apprehend him.

50. He further stated that no evidence was given till 21.6.1978 as to who killed the deceased. He, for the first time, reached village-Barmadpur on 22.6.1978 at about 1.30 p.m. He prepared the site-plan on the pointing out of Badley, Ratiram, Ramphal at about 3 p.m. In the site-plan, the presence of the witnesses have not been shown. Even the place where the gathri is

said to have been kept has not been shown. He had not shown in the site-plan where Ramphal had sat to ease. He did not find any dragging mark also at the place of incident. Witness Surajveer had not pointed out any field of Rajaram to him. He further denied the suggestion that Exbt. Ka-19 to Ka-21 has been fictitiously prepared and no blood was taken from the place of incident.

51. During cross examination, he further categorically stated that "*गवाह बदले ने मुझे नही बताया था कि श्री चन्द और राजाराम मुल्जिमान के पिता का नाम था। यह भी नही बताया था कि यह घटना मुझे हरलाल ने बताई थी। यह भी नहीं बताया था कि जब मुल्जिमान आये तो प्यारे और वचन सिंह चक्की पर बैठे थे। यह भी नहीं बताया कि राजाराम और लाखन सिंह ने हरलाल से कहा था कि तुमने लड़की को धक्का मारा। इसने यह भी नही बताया कि हरलाल ने कह दिया था कि साथ चलने की जरूरत नहीं है इसने यह भी नही बताया कि कालीचरन के घर तक गये कोई नहीं मिला इसने यह भी नहीं बताया कि गाँव के कालीचरन के मकान तक गये थे। इसने मुझे यह भी नही बताया कि हमने मुल्जिमान से पूछ कि हरलाल को कहा छोडा इतने में उन्होनें गठरी रख दी। इतने में भगवान सिंह और श्री चन्द ने मुझे लाठी मारी यह भी नही बताया कि जब मैं गिर गया तो मुल्जिमान ने लाठी मारी। यह भी नही बताया कि मुल्जिमान गठरी लेकर उस्तरा की तरफ भाग गये। यह भी नही बताया कि मैं मुल्जिमान के चले जाने के बाद धीरे धीरे उठकर गाँव की तरफ चला गया और मेरा भान्जा सूरजवीर मेड पर बैठा मिला मैं उसके साथ बैठ गया और रात भर वहीं बैठा रहा और यह भी नहीं बताया था कि चांदनी की रोशनी थी। इस गवाह ने यह भी नही बताया था कि हमारी रिपोर्ट लिख दो थाने वालों ने कहा कि बैठ जाओ तुम्हारी लिख देगें थाने वालों ने हमारी रिपोर्ट नही लिखी।*

गवाह रतीराम ने मुल्जिमान के पिता के नाम नहीं बताये थे। गवाह रामफल मे मुझे यह नहीं बताया था कि चांदनी रात थी। यह भी नहीं बताया कि लाठी में लटका कर ले गये यह भी नही बताया था कि मुल्जिमान की वलदियत और सकूनत किया था। गवाह जीत सिंह ने मुल्जिमान की वलदियत नहीं बताई। इस गवाह ने मुझे यह भी नहीं बताया था कि चांदनी रात थी और पूर्ण मासी का दिन था और चन्द्रमा का दिन था।

गवाह सूरजवीर ने मुझे राजाराम की वलदियत नहीं बताई थी यह भी नहीं बताया कि चक्की का हिसाब मेरा भाई हरलाल करता था इसने मुझे यह भी नही बताया कि मुल्जिमानों के हाथों में लाठी थी। इन लोगों ने हम लोगों को गोलियां दी और मैनें हरलाल से लड़की के साथ कन्धा छूने वाली बात के लिये सफाई के लिये कहा। यह भी नही बताया कि कालीचरन के मकान की तरफ गये कोई नही मिला उसने यह भी नही बताया था कि हमें गुनगुनाहट सुनाई दी इसने यह भी नहीं बताया कि 4-5 मीटर से मुल्जिमान को देखा। इसने यह भी नही बताया था कि राजाराम के खेत में छिपे थे यह भी नही बताया कि गठरी रख दी इसने यह भी नही बताया कि पुलिस वालों ने हमें थाने के बाहर 11 बजे तक बिठाये रखा। इसने मुझे यह भी नहीं बताया था कि 11 बजे पुलिस वालों ने हरलाल की लाश को पोस्टमार्टम के लिये भेजा तो मेरा मामा उसी तांगे में बैठ कर जिसमें लाश भेजी जा रही थी बैठ गया।

गवाह प्यारे ने यह नही बताया था कि मैं बरमदपुर में सूरजवीर की चक्की पर काम किया करता था। उसने यह भी नही बताया था कि चक्की सूरजवीर की थी शीला लड़की का नाम भी नहीं बताया था। उसने यह भी नहीं बताया था कि शीला ने कहा था कि मैं अपने घर पर भी यह बताउंगी।"

52. After recording the statement of the said witnesses, statements of accused-respondents were recorded, in which surviving accused Shri Chand has clearly denied the prosecution story against him and has stated that instant case was instituted against him on account of enmity and parti-bandi.

53. Thereafter, statement of medical officer Dr. M.P. Singh, who had examined the injuries of accused Sagar on 20.6.1978 at 9.20 a.m. was recorded. He has pointed out the following injuries on his person of Sagar and has drawn the said injury report:-

(i) Abraded contusion 6 ½ c.m. x 4 ½ c.m. on right side forehead reddish in colour.

(ii) Abrasion 1 c.m. x 1 c.m. on right side reddish in color.

(iii) Abraded contusion 1 c.m. x ½ c.m. on the upper lip left side with lacerated wound ¼ c.m. x ¼ c.m. inner side of upper lip left side reddish in color.

(iv) Abraded contusion 5 c.m.x 5 c.m. on the right deltoid region of right arm reddish in color.

(v) Abraded contusion 5 c.m. x 5 c.m. on inner side of left arm middle part ? reddish in colour.

(vi) Contusion 7 c.m. x 3 c.m. on left axilla reddish in colour.

(vii) Lacerated wound 1 ½ c.m. x ½ c.m. x muscle deep on front side of left little finger middle

part.

(viii) Lacerated wound ½ c.m. x ½ c.m. x skin deep on back of left little finger middle part.

(ix) Contusion 5 c.m. x 3 c.m. on lateral side of left knee joint reddish in color.

The said injuries have been marked as Exbt. Kha-3. He further stated that said injuries could be caused on 19.6.1978 at about 11.30 p.m. and duration is half day old. During cross examination, he stated that injury No. 1 is on vital part of the forehead and out of the said marked injuries, only injury No. 2 and 8 could be superficial.

54. The trial court, on the above evidence led by the prosecution and the defence version given by the accused, has come to the conclusion that the prosecution has miserably failed to prove its case and has thus acquitted accused-respondents of all the charges framed against them.

55. Being aggrieved and dissatisfied by the said judgment and order, the present government appeal has been preferred by the State.

56. Learned Addl. Government Advocate for the State-appellants has submitted that evidence of Badley (P.W.-2), Ratiram (P.W.-3), Ramphal (P.W.-4), Jeet Singh (P.W.-5) and Surajveer (P.W.-6) coupled with medical evidence would show that the prosecution has proved its case beyond all reasonable doubt, yet the trial court, on the basis of surmises and conjectures, has illegally recorded the finding of acquittal against the accused-respondents, which is bad in law and is liable to be reversed.

57. Learned AGA has next submitted that from the evidence adduced during the course of trial, it is proved beyond all reasonable doubt that the accused-respondents in furtherance of their common intention with all the accused persons, had committed the instant offence and therefore, they are liable to be convicted for the offence charged with, however, the trial court completely misjudged the evidence and material available on record and has illegally recorded the finding of acquittal against the accused-respondents, which is bad in law and is liable to be reversed.

58. Learned AGA has further submitted that Ramphal (P.W.-4) has given eye witness account of the incident and has proved the prosecution story beyond all reasonable doubt, however, the trial court has illegally rejected his testimony and recorded the finding of acquittal against the accused-respondents, which is bad in law and is liable to be set aside.

59. Learned AGA has further submitted that even if the testimony of Ramphal (P.W.-4) is not relied upon by the trial court, yet from the attending facts and circumstances of the case as adduced by other prosecution witnesses, the chain of evidence led by the prosecution is complete and clearly establishes the guilt of the

accused-respondents, however, the trial court has illegally brushed aside the said circumstances and has illegally recorded the finding of acquittal against the accused-respondents, which is bad in law and is liable to be set aside.

60. Per contra, learned counsel for the accused-respondents has submitted that trial court has appreciated the material and evidence available on record in right perspective and by a well reasoned and detailed order and judgment has recorded the finding of acquittal against the accused-respondents, which by no stretch of imagination can be said to be perverse, illegal and impossible, therefore, the impugned order and judgment passed by the trial court is just, proper and legal and cannot be reversed.

61. Learned counsel for the accused-respondents has next submitted that the vital delay in lodging the first information report after the cross case has already been registered on behalf of the accused-respondents, creates a serious dent in the prosecution story, which is based on completely cooked up and concocted story as an after thought and as such, the trial court has rightly held that on the basis of evidence adduced against him in the cross case, it cannot be said that the prosecution has been able to prove its case beyond all reasonable doubt against the accused-respondents and as such, the trial court has rightly repelled the said testimony and recorded the finding of acquittal against the accused-respondents, which is just, proper and legal and do not call for any interference by this Court.

62. Learned counsel for the accused-respondents has next submitted that taking the entire evidence adduced during the course of trial and the case put forward by the defence, their case appears to be more probable and, therefore, the trial court taking a holistic view, has rightly recorded the finding of acquittal against the accused-respondent, which Judgment and Order does not suffer from any illegality or impropriety and cannot be reversed in view of well settled principle of law laid down by the Hon'ble Apex Court that an appeal against acquittal, where presumption in favour of the accused-respondents has further been reinforced, the appellate Court cannot interfere with the order of acquittal, unless it is pointed out that the finding recorded by the trial court is perverse, illegal and impossible and in the instant case, no perversity and illegality could be pointed out by the State, as such, the impugned order and judgment passed by the trial court is liable to be affirmed by dismissing the government appeal.

63. Having considered the rival submission made by the learned counsel for the parties and having gone through the record of this case, we find that there are two versions of the incident in question, one is as stated by the prosecution, in which, accused-respondents has been tried and the other by the defence on the basis of report lodged by Mukhtiar Singh father of co-accused Sagar. The prosecution story as stated in the instant case, is to be tested in the backdrop of the entire facts and circumstances of the case led during the course of trial.

64. When we go through the entire evidence adduced, we find that the instant case is primarily based on circumstantial evidence as most of the witnesses produced during the course of trial particularly Badley (P.W.-2), Ratiram (P.W.-3), Jeet Singh (P.W.-5), Surajveer (P.W.-6) and

Pyare Lal (P.W.-11) are not the eye witnesses of the incident and their testimony is primarily based on circumstantial evidence. Only Ramphal Singh (P.W.-4) is alleged to be the eye witness and is stated to have given an eye witness account of the incident, therefore, it would be apt to first test the reliability of the evidence adduced by P.W.-4-Ramphal Singh being an eye witness account. Ramphal Singh (P.W.-4), in his testimony, has stated that on the date of incident i.e. 19.6.1978 while he was easing in his field, he saw 6-7 persons forcibly taking away Har Lal towards village-Ustara. He further stated that Har Lal had bitten Sagarmal, consequent to which, Sagarmal asked Shri Chand to assault him, who is said to have assaulted him by a knife while other accused-respondents are said to have assaulted him by lathi and thereafter they wrapped Har Lal in a bed-sheet and took him away towards villlage-Ustara by hanging him on a lathi. In his testimony, the said witness states to have witnessed the entire evidence as narrated above but neither made any attempt to rescue the deceased nor even raised alarm to rescue him and simply after witnessing the incident went to his house. He further states that on the next day he came to know about the factum of killing of Har Lal by the accused persons, however, despite knowledge of the said fact he did not reveal his eye witness account to any of the family members of the deceased and remained silent, he not even tried to lodge any report of the incident and the said conduct of the P.W.-4 raises a big question mark about the truthfulness of his eye witness account, which renders him to be a highly doubtful witness not worth credence, more particularity in the circumstances that during his cross examination, he has admitted to have appeared as a prosecution witness in many of the police report cases and therefore, he can very well be said to be a pocket witness of the police. In the backdrop of the said facts and circumstances, we are of the opinion that it would not be vary safe to rely upon the uncorroborated testimony of P.W.-4 stating himself to be an eye witness of the incident as also held by the trial court, which finding by no stretch of imagination can be said to be illegal, perverse or impossible and as such, is also reiterated by us.

65. Now, if the eye witness account of the P.W.-4 as adduced during the course of evidence is disbelieved, then in our opinion the instant case would primarily be a case based on circumstantial evidence as argued by the counsel for the accused-respondents.

66. Before we proceed further it would be relevant to note here that the law with regard to conviction on circumstantial evidence has very well been crystalized in the judgment of this Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra**, 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 [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 [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 Crl 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."*

67. It is also 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.

68. Learned counsel further relied upon a case reported in **(2010) 8 SCC 593 G. Parshwanath Vs. State of Karnataka**, wherein it has been held as under :

> *"23. In cases where 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. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.*
>
> *24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."*

69. Now, if we examine the instant case in light of the settled law laid down by

the Hon'ble Apex Court in the case of circumstantial evidence, we find that in the instant case prosecution has relied upon the following circumstances. The prosecution story begins with the incident of Sheela, who is shown to be present at 5 p.m. on 19.6.1978 at the Wheat Grinding Mill of Har Lal for taking the flour, where he is said to have been pushed by Har Lal, consequent to which, Sheela hurled abuses to him and has left the place stating that she will inform his family members about the said incident. Consequent to the said incident, it is alleged by the prosecution that at about 7 p.m. Surajveer, Har Lal and Badley were sitting alongwith Pyare Lal and Bachan Singh, where accused-respondents Rajaram. Bhagwan Singh and Sagar armed with lathies came and questioned as to why he had pushed Sheela and started hurling abuses and on denial of the said incident by Har Lal, they took him away for giving clarification of the earlier incident.

70. The third part of the incident is that the aforesaid accused persons, namely, Rajaram, Bhagwan Singh and Sagar Singh had taken away Har Lal to the house of Kalicharan brother of Rajaram and thereafter being taken to village-Ustara kept in a bundle hanging on a lathi by the prosecution witnesses and as per the Investigating Officer, the discovery of blood from three different places on way from village-Barmadpur to village-Ustara.

71. Discussing the aforesaid circumstances, it would be apt to first analyse the truthfulness of the factum of Sheela visiting Wheat Grinding Mill of Har Lal, where she is said to have been pushed by him resulting in hurling of abuses and consequent incident.

72. It is admitted case of the prosecution that P.W.-2- Badley, who is maternal uncle of Surajveer and Har Lal, was running a Wheat Grinding Mill in village-Barmadpur, which was being run by deceased Har Lal and Surajveer. To prove the factum of taking away the flour from the Wheat Grinding Mill of Badley (P.W.-2), Surajveer (P.W.-6) had pointed out to an entry made in the register on 16.6.1978 relating to one Kalicharan, who is said to be the father of Sheela and brother of co-accused Rajaram. On the basis of said entry, it is tried to prove by the prosecution that Sheela had come to take the flour, which was given for grinding on 16.6.1978, however we analyse the said entry and on the basis of testimony of the witnesses, we find that even according to the prosecution own case, there are two Kalicharan's in the village Barmadpur, which has been admitted by P.W-3- Ratiram in his cross examination on the basis of which it cannot be certainly said that the entry made in the name of Kalicharan as pointed out in the register pertains to father of Sheela or the other Kalicharan stated to be son of Girdhari. Admittedly, there is no signature of Kalicharan found on the said register against the entry made therein. Further, the factum that the wheat was given for grinding on 16.6.1978, which is said to be being taken away on 19.6.1978 i.e. after about three days of its delivery, the three days gap in collecting the flour further creates some doubt in the veracity of the prosecution story as narrated. The factum of Sheela pushed at the Wheat Grinding Mill, has also not admittedly been witnessed by P-W.-2- Badley and P.W.-6-Surajveer, who even according to the prosecution own case, were present at the relevant time and were not simply told about the said factum by Har Lal, however, the said circumstance further become

doubtful from the circumstance that P.W.-2 Badley did not state this fact to the Investigating Officer in his statement recorded under Section 161 Cr.P.C. Further it is germane to point out here that if we carefully go through the contents of the FIR, we find that Sheela is shown to be the daughter of Shyami Gujar, which in his testimony has been changed to Kalicharan so as to corroborate entry shown to be made in the register.

73. Thus, only witness, who states about the visiting of Sheela at the Wheat Grinding Mill on the day of incident is Pyare Lal. The said Pyare Lal is admittedly the servant of deceased Har Lal and was brought by Surajveer, as such, he is highly partisan and interested witness.

74. It is further germane to point out here that Pyare Lal has not been mentioned as a witness in the FIR lodged by Surajveer on 22.6.1978. When we go through the testimony of Pyare Lal, we find that therein he has stated that apart from him, number of other villagers were also present at the Wheat Grinding Mill when the said incident is said to have taken place, however, no such person even Bachan Singh has not been examined by the prosecution to prove the said factum.

75. Furthermore, when we look into the testimony of P.W.-11- Pyare Lal, we find that although he was employed as a servant at the chakki but he is not witness of second part of the incident when the accused persons are said to have visited the Wheat Grinding Mill and there was some altercation between them and Har Lal, who is said to have been taken away by the accused persons though as per the testimony of P.W.2 Badley and P.W.-6 Surajveer he was shown to be present at the time of second incident, which further becomes doubtful from the circumstances that he does not accompany Surajveer and Badley to find out of his whereabouts when he did not return back till 9.30 p.m. In the backdrop of the said circumstance, we are of the opinion that testimony of Pyare Lal (P.W.-11) did not inspire much confidence as held by the trial court, which finding is just, proper and legal and do not call for any interference by this Court.

76. Thus, from the said facts and circumstances, the motive as pleaded by the prosecution has not been cogently and clearly established, which creates a serious dent in the prosecution story and makes it unreliable particularly in a case of circumstantial evidence.

77. Now, we may analyse the testimony of the witnesses to the extent of victim Har Lal being taken away by the accused-respondents from his chakki on the day of occurrence i.e. 19.6.1978, the witness of the said incident admittedly are Badley (P.W.-2) and Surajveer (P.W.-6). If we go through the testimony as stated by Surajveer and Badley that while he was sitting at the Wheat Grinding Mill at about 7 p.m., the accused persons, namely, Rajaram, Bhagwan Singh and Sagar armed with lathies reached at the chakki and started hurling abuses and questioned Har Lal about the earlier incident with Sheela and thereafter took away Har Lal for clarification, consequent thereto, he was done to death.

78. Admittedly, even according to the prosecution own case, three accused persons at the relevant time of taking away Har Lal were having lathies and on reaching there they started hurling abuses and questioned, rather rebuked, and

chastised Har Lal for his indecent behaviour with Sheela then in such circumstance, the prosecution story that Har Lal was taken away by the three accused persons without being followed by Badley and Surajveer so as to rescue him from any untoward incident, does not inspire our confidence and makes the prosecution story further doubtful. Apart from this, it is germane to point out here that even according to the prosecution own case, at the time of taking away Har Lal from the Wheat Grinding Mill, sole surviving accused-respondent Shri Chand was not present and, therefore, he cannot be saddled with the responsibility of taking away Har Lal from the place of incident and this aspect of the matter also makes the prosecution story doubtful qua accused-respondent Shri Chand.

79. The next question required to be examined is the factum of going of Har Lal in the company of accused-respondents on the way leading from village-Barmadpur to village-Ustara. In order to prove this fact, the prosecution has relied upon the testimony of Ratiram (P.W.-3), Ramphal (P.W.-4), Jeet Singh (P.W.-5), Badley (P.W.-2), Surajveer (P.W.-6), out of them, P.W.-2-Badley and Surajveer (P.W-6) in their testimony have stated that while making the search of Har Lal when they reached near the canal contributory (Rajbaha) away from the village- Barmadpur they saw four accused-respondents proceeding towards village-Ustara with a bundle hanging on a lathi, however, even according to the prosecution own case they had not seen as to what the accused-respondents were carrying in the bundle. Contrary to this Ratiram (P.W.-3) stated that while he was returning back to his house after easing, he saw 6-7 persons taking away Har Lal by pushing him, who were armed with lathies and on questioning them he was asked to mind his own business and on the next day he came to know that Har Lal has been done to death, however, when we test veracity of the statement of the said witness, we find that he is not at all a reliable witness. Had he witnessed the fact as narrated by him and on the very next day came to know about the murder of Har Lal, he would have certainly disclosed this fact to the family members of Har Lal, however as per his own statement he neither intervened at all to rescue Har Lal nor disclosed this fact to anyone except the Investigating Officer that too after three days of the incident, though admittedly he remained in the village during this period, which further creates a serious question mark about the reliability of the said witness as held by the trial court, which finding in our opinion is just, proper and legal and cannot be interfered with.

80. He further stated that there are two persons by the name of Kalicharan son of Girdhari and the other is the father of co-accused Shri Chand. This circumstance also creates doubt about the entry made in the register in the name of Kalicharan and as per his statement, it cannot be said with certainty that name of Kalicharan mentioned in the register is that Kalicharan father of Shri Chand. This circumstance further creates a serious doubt in the prosecution story and makes it unreliable.

81. So far as P.W.-4- Ramphal Singh is concerned, his testimony has already been discussed earlier and we are of the opinion that he is not a reliable witness at all. So far as P.W.-5- Jeet Singh is concerned, he appears to be a purely chance witness, who is said to have been returning back at the relevant time alongwith one Charan Singh from village-

Sherpur, where he had gone to purchase a buffalo. He is said to have been seen the accused standing under the mulberry tree, however, the contents of the said gathri has not been seen by the said witness nor he has seen deceased Har Lal in their company. He is said to have been witnessed the incident at about 10 p.m. in the night and no source of light has been mentioned. He further stated that the factum of witnessing the incident in moon light was disclosed to the Investigating Officer, however, if the Investigating Officer has not recorded it in his statement recorded under Section 161 Cr.P.C. then he cannot assign any reason for the same. He further stated that he is a relative of Badley and, therefore, obviously is an interested and partisan witness. He further states that on the very next day he came to know about the murder of Har Lal but he did not disclose this fact to anyone and went to sleep in his house, but did not lodge any report. Moreover so called Charan Singh, who is said to have been accompanying him witnessing the incident have not been produced at all so as to corroborate his testimony, in the absence of which we are of the opinion that it would not be vary safe to rely upon the uncorroborated testimony of P.W.-5, who is purely a chance witness.

82. Thus, from the testimony of P.W-5 also the prosecution story cannot be said to be proved beyond reasonable doubt as held by the trial court, which finding is just, proper and legal and do not call for any interference.

82. The next question is regarding recovery of blood stained earth by the Investigating Officer from three places, which is said to have been sent for chemical examination, however if we carefully go through the chemical examination report, we find that the blood found on the shirt and the blood stained earth marked as Exbts. Ka-1, 5, 8 and 9, no human blood is found and thus, this circumstance, also do not lead to any concrete link evidence to connect accused-respondents with the instant case. There is one more circumstance as stated by the Investigating Officer in his cross examination that a first information report was also lodged by Mukhtiar Singh father of Sagar in the intervening night between 19/20.6.1978 registered vide Case Crime No. 144, under Section 394 IPC and on the basis of said FIR, he had gone to village-Ustara, where he found the dead body near Dharamshala lying on a buggi and he had conducted inquest on the person of the deceased, however, no blood was found there and after conducting the inquest, he had handed over the corpse to the constable Khoob Chand and Bheem Singh for carrying it to the mortuary for the post-mortem.

83. Constable Khoob Chand has been examined as P.W.-8. Who, in his cross examination, has categorically stated that after the inquest when the corpse of Har Lal was handed over to him then he had straightway taken the body to the mortuary and did not brought it police station-Gulaoti, however when we go through the statement of P.W.-2- Badley and P.W-6-Surajveer, we find that they had stated that when they had gone at the police station to lodge the FIR, they had seen the corpse of Har Lal lying in the police station and tried to lodge the report but his report was not lodged and thereafter from the police station Gulaoti on a tonga dead body of Har Lal was sent for post-mortem, on which he also sat and went to the mortuary. This part of the prosecution story as stated in the statement of P.W.-2- Badley and P.W.-6-

Surajveer cannot be relied upon at all as according to the testimony of P.W.-8- constable Khoob Chand, it is evident that the dead body of Har Lal was not brought to the police station- Gulaoti at all, as such, the testimony of P.W.-2- Badley and P.W.-6- Surajveer that they saw the dead body of Har Lal lying inside police station- Gulaoti is nothing but there a pure imagination and as such, their testimony in this respect become highly doubtful and creates a serious dent in the prosecution story and makes both these witnesses wholly unreliable and not worth credence at all.

84. It is further germane to point out here that from the testimony of P.W.-2- Badley and P.W.-6- Surajveer, it is pointed out that they tried to lodge the report at the police station- Gulaoti on 20.6.1978 but their report was not lodged by the police personnels despite their repeated requests and, as such, Surajveer on way to Hapur had sent a telegram addressed to S.P. Bulandshahr clearly stating therein the name of the accused persons, however, if we carefully go through this telegram, we find that the name of accused-respondent Shri Chand has not been mentioned. Even in his telegram there is no allegation that on 19.6.1978 Shri Chand had visited his Wheat Grinding Mill alongwith accused-respondents Rajaram, Bhagwan and Sagar and had taken him away.

85. Thus, from the prosecution story itself it is evident that there is no allegation against accused-respondent Shri Chand of taking away the deceased Har Lal from his house. This circumstance also creates a serious doubt regarding the participation of the accused-respondent Shri Chand in causing the death of deceased Har Lal and this important missing link in the chain of circumstance rules out the participation of accused-respondent Shri Chand in the instant case.

86. It is further germane to point out here that the prosecution story also become doubtful from the circumstance that the first information report in the instant case has been lodged on 22.6.1978 i.e. after a delay of three days of the incident. When we go through his testimony we find that it is specific case of the P.W.-9- Head Constable Santpal Singh that neither on 19.6.1978 nor on 20.6.1978 Badley (P.W.-2) or Surajveer (P.W.-6) reached police station to lodge the report. He categorically stated that "जब थाने पर किसी Congnizable या non cognizable offence की इतला होती है उसकी रिपोर्ट तुरन्त दर्ज की जाती है। 19 या 20 जून सन् 78 को बदले या सूरज की हमारे थाने पर कोई रिपोर्ट दर्ज कराने के लिये नहीं आये।" This circumstance further creates a serious doubt about the truthfulness and veracity of the testimony of P.W.-2 Badley and P.W.-6 Surajveer and makes them highly doubtful witnesses. However, if we go through the testimony of P.W.-2 Badley and P.W.-6 Surajveer in this regard we find that they have tried to explain this delay by stating that on during night hours they had seen the accused-respondent carrying away something in a bundle (gathri) hanging on a lathi and when they questioned them about the whereabouts of Har Lal then they assaulted Badley by lathi and also made an attempt to assault Surajveer, however he ran away and thereafter both the said witnesses hid themselves the whole night on the boundary marks in the field of Rajaram on account of fear of the accused persons though the accused persons are said to have proceeded towards village- Ustara. The said factum of P.W.-2 Badley and P.W.-6 Surajveer hiding themselves the whole night in the field of Rajaram on account of

fear, in our opinion is too far fetched story, which in our opinion is hard to believe in the circumstance of the instant case and creates a serious dent about the truthfulness and veracity of their testimony. Moreover, the cosmetic manner in which P.W.-2 Badley and P.W.-6 Surajveer has tried to explain the delay in lodging the FIR is totally inconsistent with the testimony of P.W.-8 Khoob Chand, who categorically stated that after the inquest on the person of deceased Har Lal he had taken the dead body straightway to the mortuary for the post-mortem and did not bring it at all P.S. Gulaoti, which makes the otherwise testimony of P.W.-2 and P.W.-6 that he had seen the dead body of Har Lal inside the police station on 20.6.1978 and thereafter sent on a tonga to the mortuary for post-mortem at 11 a.m. on which P.W.-2 Badley is also said to have sat so as to reach the mortuary is nothing but a figment of imagination of P.W.-2 and P.W.-6 and makes them totally unreliable witnesses, which theory infact has been adopted just to explain the delay in lodging the FIR, which in our opinion has no legs to stand and difficult to believe by a man of ordinary prudence.

87. The testimony of P.W.-2 Badley and P.W.-6 Surajveer is further falsified by the statement of P.W.-9 Santpal Singh, who was the Head Moharrir at P.S. Gulaoti at the relevant time.

88. From the said facts and circumstances of the case, it is evident that the FIR has been lodged on 22.6.1978 and the delay in lodging the FIR has not been explained at all, which creates a serious dent to the prosecution story and makes it unreliable.

89. Thus, we find that number of circumstances alleged against accused-respondents has not been proved satisfactorily. The direct evidence of murder in the form of statement of Ramphal (P.W.-4) is not reliable at all. Motive has not been satisfactorily proved. The testimony of Badley and Surajveer is not at all reliable on material particulars and false story appears to have been cooked up by them in order to lend credence to the prosecution story. A vital delay in lodging the first information report has not been satisfactorily proved and by no stretch of imagination, the chain of circumstance can be said to be complete so as to record the finding of conviction against accused-respondent by reversing the finding of acquittal recorded by the trial court, which finding in our opinion do not suffer from any illegality, perversity or impossibility.

90. It is well settled principle of law that there is a presumption of innocence in favour of the accused-respondent Shri Chand, which further has been concretised by recording the finding of acquittal against the accused-respondents.

91. The law with regard to interference by the appellate court is very well crystalized. Unless the finding of acquittal is found to be perverse or impossible, interference with the same would not be warranted. Though, there are a catena of judgments on the issue, we will only refer to two judgments, which are as reproduced below:-

> "(i). In the case of ***Sadhu Saran Singh Vs. State of U.P. (2016) 4 SCC 397***, the Hon'ble Apex Court has held that:-
>
> *"In an appeal against acquittal where the presumption of innocence in favour of the accused*

is reinforced, the appellate Court would interfere with the order of acquittal only when there is perversity of fact and law. However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. Appellate Court, while enunciating the principles with regard to the scope of powers of the appellate Court in an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded."

(ii). Similarly, in the case of ***Harljan Bhala Teja Vs. State of Gujarat (2016) 12 SCC 665***, the Hon'ble Apex Court has held that:-

"No doubt, where, on appreciation of evidence on record, two views are possible, and the trial court has taken a view of acquittal, the appellate court should not interfere with the same. However, this does not mean that in all the cases where the trial court has recorded acquittal, the same should not be interfered with, even if the view is perverse. Where the view taken by the trial court is against the weight of evidence on record, or perverse, it is always open far the appellate court to express the right conclusion after re-appreciating the evidence if the charge is proved beyond reasonable doubt on record, and convict the accused."

92. The Hon'ble Apex Court in **Criminal Appeal No. 111113 of 2015 (Rajesh Prasad v. State of Bihar and Another)** has encapsulated the legal position covering the field after considering various earlier judgments and held as under:-

"29. After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (Chandrappa case [Chandrappa v. State of Karnataka, (2007) 4 SCC 415]

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

(i) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

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

(iii) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an

appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

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

(v) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not distrub the finding of acquittal recorded by the trial court."

93. Thus, it is beyond the pale of doubt that the scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused has to be exercised within the four corners of the following principles:-

(i). That the judgment of acquittal suffers from patent perversity;

(ii). That the same is based on a misreading/omission to consider material evidence on record;

(iii). That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

94. The appellate Court, in order to interfere with the judgment of acquittal, would have to record pertinent findings on the above factors, if it is inclined to reverse the judgment of acquittal rendered by the trial Court.

95. In our opinion, the trial court has passed a well reasoned and detailed order, which, in view of settled principle of law regarding reversal of acquittal, needs no interference by this Court. The view taken by the trial court cannot be said to be perverse, impossible and illegal and, as such, present Government Appeal filed by the State has no force and is accordingly **dismissed**.

96. Trial court's record be remitted back forthwith.

97. Let a copy of this judgment and order be forwarded to the court concerned alongwith the trial court record for the information and necessary compliance.

(2024) 8 ILRA 732
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2024

BEFORE

THE HON'BLE SIDDHARTH VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Government Appeal No. 2416 of 1997
&
Criminal Revision No. 1370 of 1997

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

Counsel for the Appellant:

Sri V.S. Misra, A.G.A., Sri Alok Ranjan Mishra, Sri G.S. Chaturvedi, Sri Samit Gopal, Sri Tej Pal, Sri V.S. Singh

Counsel for the Respondents:
Sri Devendra Dahma, Sri A.D. Giri, Sri Apul Mishra, Sri Lav Srivastava, Sri P.N. Mishra, Sri S.D.N. Singh

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 378 (3) - appeal against acquittal, Indian Penal Code, 1860 - Section 498 -A - Husband or relative of husband of a woman subjecting her to cruelty, 304 - B – Dowry Death , Indian Evidence Act, 1872 - Section 113-A - Presumption as to abetment of suicide by a married woman , Section 113-B - Presumption as to dowry death - Presumption of Innocence - The accused is presumed innocent until proven guilty , Presumption of Acquittal - The trial court's acquittal reinforces, reaffirms, and strengthens the presumption of innocence. (Para - 47)

(B) Indian Evidence Act, 1872 - Evidence Review in Acquittal Appeals & Importance of proof over suspicion - An appellate court has the power to review and re-appreciate evidence in an appeal against acquittal - Suspicion, howsoever grave cannot take the place of proof and the prosecution case to succeed has to be in the category of "must be" and not "may be" a distance to be covered by way of clear, cogent and unimpeachable evidence to rule out any possibility of wrongful conviction of the accused and resultant miscarriage of justice. (Para -47)

Acquittal of respondents under challenge - trial court acquitted respondents due to lack of evidence - Prosecution failed to prove demand of dowry and cruelty against deceased - Death of deceased not proven to be unnatural - benefit of presumption under Section 113-A and 113-B IPC not extended to prosecution side. (Para - 1 to 4)

HELD: - Trial court acquitted the appellants based on evidence on record, which was not based on surmises or contradictions. Trial court's acquittal verdict justified. Main grounds for acquittal were highly belated FIR, lack of allegations of dowry or matrimonial cruelty, doubtful circumstances surrounding viscera examination, and the inability to ascertain the cause of death in postmortem examination. Evidence regarding appellants' demand of dowry and matrimonial cruelty to be discrepancy and untrustworthiness, making it difficult to determine if the death was unnatural or homicidal. (Para - 45,46)

Government Appeal & Criminal Revision dismissed. (E-7)

List of Cases cited:

Khekh Ram Vs Himachal Pradesh, AIR SC 2018 5255

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

1. Instant Government Appeal and Criminal Revision have arisen out of same judgment and order dated 08.07.1997 passed by learned Additional Sessions Judge/ Special Judge, Aligarh in S.T. No.834 of 1993 State Vs. Ativeer Singh and three others and S.T. No. 642 of 1994 State Vs. Udai Pratap Singh, Case Crime No.62 of 1993, Police Station Sikandara Rau , then District Aligarh under Section 498-A and 304-B of IPC. By the impugned order learned trial court has disposed of both the connected sessions trial and acquitted all the accused persons namely Udai Pratap Singh, Ativeer Singh Chauhan, Smt. Vimlesh, Kumari, Archana and Ajai Pratap Singh for charges under sections 498-A and 304-B IPC.

2. From perusal of the record it appears that respondent No.1 Ativeer Singh died during the pendency of instant Criminal Government Appeal and Appeal was directed to be abated, qua respondent No.1 vide order dated 27.05.2015 passed

by this Court. Similarly respondent No.2 Smt. Vimlesh in instant Government Appeal also died during the pendency of appeal, and vide order dated 06.04.2022 the Government Appeal was directed to be abated in respect of said respondent No.2 Smt. Vimlesh. Thus the instant Government Appeal and Criminal Revision have been heard in respect of respondent Nos. 3,4, and 5 namely Kumari Archana, Ajai Pratap Singh and Udai Pratap Singh.

3. Heard learned A.G.A. Sri Rahul Asthana counsel for the appellant-State and Sri Gopal Swaroop Chaturvedi, learned Senior Counsel assisted by Sri Alok Ranjan Mishra, for appellant-State, learned Counsel appearing for Revisionist/complainant Sri Devendra Dhama Advocate was heard on behalf of respondent Nos.3 to 5.

4. Learned trial court recorded acquittal of the accused appellants with a finding that by prosecution evidence the allegation of demand of dowry and practicing cruelty against the deceased has not been proved. It is also not proved that death of deceased occurred in unnatural circumstances, therefore the benefit of presumption under Section 113-A and 113-B IPC cannot be extended to the prosecution side.

5. Feeling aggrieved by the impugned judgment and order Government Appeal may file on behalf of the State as Government Appeal No.2416 of 1997 State Vs. Ativeer Singh and others under Section 378(3) Cr.P.C. and subsequently a Criminal Revision was also filed by the informant/defacto complainant Narendra Pal Singh in Criminal Revision No.2717 of 1997 Narnedra Pal Singh Vs. Udai Pratap Singh and four others. As the said government appeal and criminal revision have arisen out of same relief has been sought therein. Both of these are being disposed of by this common judgment.

6. The factual matrix of the case in brief are that the informant Narendra Pal Singh who was posted as Chief Food Inspector in the office of Chief Medical Officer, Aligarh by moving a written report bearing dated 04.03.1993 with an averment that on 15.02.1993 he was busy in official work at around 3:00 pm. One Dr. Vyas who was posted in PHC Sikandara Rau as Incharge came to him and asked him to come alongwith him to Sikandara Rau, but due to rush of work he expressed his inability to move alongwith him, thereupon Dr. Vyas left his office at 05:00 pm. On same day at around 08:00 pm one Sri M.P. Sharma, Health Inspector Sikandara Rau came to him with some other person at his residence and asked him to go Sikandara Rau because his daughter's condition was serious. On hearing this the informant immediately asked one Bijendra Swaroop, Sanatory Supervisor to approach Sri M.P. Sharma and discern the real facts to which Sri M.P. Sharma informed said Bijendra Swaroop that the daughter of informant had passed away. No information was given to the informant regarding death of his daughter from her husband and inlaws. He got flabbergasted on hearing sudden death of his daughter and came to his residence at Agra and reached Sikandara Rau alongwith his wife and son at around 12:00 night. He visited the matrimonial place of his daughter where he found his daughter in dead condition. Her tongue was stucked between the teeth, her lips had become blue and blood was coagulated under the lips. When he asked about the state of things, they told that she was caught by light fever and was vomiting, but her in-laws avoided

to give true reasons of her death. Her daughter Alpana Singh was married to Udai Pratap Singh, son of Ativeer Singh Chauhan on 24.04.1992 at Kaushalpur, Agra at the place of informant, her husband and father-in-law had made several demands prior to the marriage and even after solemnization of marriage they were insisting to fulfill the shortage of dowry. The informant had already given Rs.75,000/- cash, valuables and ornaments in the marriage. The husband and in-laws of the deceased were continued to maintain the demand of Maruti Car even after marriage and due to non-fulfillment of demand of additional dowry they subjected her to maltreatment and cruelty. Father-in-law of the deceased asked the informant to get a Computer Center opened for husband of the deceased, as he was master in computer science, but due to financial constraints he could not fulfill his this demand also. He had purchased a plot in Agra in the name of his daughter Alpana and original deed was already handed over to the husband of the deceased. However, he was insisting that the said plot be transferred in his name, but deceased was not agreed upon this. He had informed the local police, the factum of her suspicious death and on his information, the police of Sikandara Rau had got the postmortem on the dead body of the deceased conducted on 16.02.1993. From postmortem report it was revealed that death of deceased was unnatural and suspicious, he firmly believed that his daughter was killed by her husband Udai Pratap Singh, father-in-law Ativeer Singh Chauhan, mother-in-law Vimlesh, brother in law Ajai and sister-in-law Kumari Archana (nanad) by administering poison to her in concerted manner. The police failed to take any action inspite of previous written report submitted to him by the informant, therefore, he had to file a written report with Superintendent of Police, on which FIR was lodged on 16.03.1993 at 09:20 am, which is exhibited as Ext. Ka-20 on record. The police investigated the case and recorded the statements of the witnesses sent the viscera of the deceased for chemical examination and submitted chargesheet against all the five named accused persons under Section 498-A and 304-B IPC.

7. In postmortem report dated 16.02.1993 no internal or external injury was found on person of the deceased. As cause of death could not be ascertained, viscera was preserved. In viscera examination report dated 04.03.1993 Aluminum Phosphide poison was found in chemical examination carried out at Forensic Science Laboratory, Agra.

8. The learned Chief Judicial Magistrate took cognizance of the offence after compliance of provisions under Section 307 Cr.P.C. committed to the court of session for trial.

9. Learned Special Judge, Aligarh framed charge under Sections 498-A and 304-B IPC against all the five accused persons on two different dates. The accused persons pleaded not guilty to it and claimed for trial.

10. The learned trial court examined PW1 Narendra Pal Singh complainant/father of the deceased, PW2 Veerpal Singh the mediator in the marriage of the deceased and Udai Pratap Singh, PW3 Kaushal Kumari mother of the deceased, PW4 Dr. R.P. Gupta who carried postmortem examination on the body of the deceased, PW5 Deputy S.P. Yashwant Singh the Investigating Officer, PW6 O.N.Dixit conducted inquest on person of

the deceased on 16.02.1993 and proved the inquest report as Ext. Ka-12. PW7 Constable Rajvir Singh carried the body of the deceased from place of inquest to postmortem house.

11. PW8 Head Constable H.C. Guru Prasad is author or Chik FIR dated 19.03.1993, time 08:20 hours and extracts of G.D. of P.S. Sikandara Rau regarding registration of case and proved the documents as Ext. Ka 18 and 19 respectively.

12. Learned trial judge recorded the statements of the accused persons under Section 313 Cr.P.C. after conclusion of prosecution evidence. The defence case was taken in statement of Ativeer Singh, the father-in-law of the deceased in which he stated that deceased died due to illness and he immediately informed the father of the deceased regarding her death. The deceased was happy in her matrimonial home and there was cordial relationship between complaint side and accused. This case was instituted only to blackmail the accused side. The accused Udai Pratap Singh has stated that he was under going studies in M.Sc. at Aligarh at the time of incident. Accused Ajai Pratap Singh stated that as informant was posted in Health Department, he manipulated the things and obtained wrong viscera report by tampering with the documents at Aligarh and Agra. Similar statements were also given by other accused persons. The defene examined Dr. Chandra Prakash as DW1 who testified that he treated the deceased on date of her death at Sikandara Rau Hospital at 11 to 12 hours in the day. On the request of Ativeer Singh, father-in-law of the deceased, he did not find any symptoms of poisoning on her person. She was unconscious, he found symptoms of Epileptic attack on patient and had given her treatment, Dr. Vyas was also there he visited the patient again on that day at 05:00 pm, but by the time he reached there, she collapsed.

13. DW2 Pravendra Pal Singh was Gram Pradhan of his village, he also played role of mediator in the marriage of deceased and husband and testified that Aplana Singh died due to illness.

14. DW3 Dr. V.R. Vyas testified that he was posted as Incharge at PHC Sikandara Rau on 15.02.1993 and was acquainted with the complainant and accused Ativeer Singh. He visited patient Alpana on the request of her father-in-law on 15.02.1993 at around 08:00 am and examined her. He also stated that he had treated the deceased Alpana Singh on fateful day in the morning at around 08:00 am and noticed symptoms of trampoline. He had noticed convulsion and nausea and on that basis he found that it is a case of Epileptic attack. He prescribed Epilepsy drugs to her and prescription was prepared by him on which Et. Kha 54 has been marked. He advised Ativeer Sigh at around 11:30 hours to her visited by Dr. Chandra Prakash Gupta, and Dr. Chandra Prakash Gupta visited the patient in his presence who also found it a case of Epilepsy and advised for requisite treatment. Thereafter he moved to Aligarh for personal work and Ativeer Singh told her to inform his Samdhi (Narendra Pal Singh DW1) regarding condition of his daughter and asked him to visit his place. He met M.P. Sharma at Aligarh and asked him to come to Sikandara Rau, he told him that his son will visit the place of his daughter, he did not treat the information seriously. In cross examination the witnesses stated that accused Ativeer Singh resided in a quarter in hospital compound at Sikandara Rau, he

was having official relations with him. On 15.02.1993 he had spoken to patient Alpana Singh about her Epilepsy history, whereupon she denied any epilepsy history. It would be wrong to say that she was unconscious, he stated that on administration of Aluminium Phosphide, the patient suffers from vomiting, drowsiness, chest pain and froth emerging from mouth.

15. DW4, Hitendra Pratap is nephew (sister's son of accused Ativeer Singh) has stated that he studied at the place of his maternal uncle (Ativeeer Singh) after Class V and he usually visits him now and then. He proved certain letters purportedly written by accused Udai Pratap Singh and proved his signature thereon, on which Ext. Kha 55 and Kha 56 was marked. He also proved letters as Ext. Kha-39 and 40 being written and signed by accused Archana Singh.

16. DW6 Dr. Salauddin stated that he was posted at Jain Medical College, Aligarh as Medical Officer, he filed death certificate of one patient Jai Kishore son of Harishankar resident of Maurya Nagar, P.S. Khair, District Aligarh being prepared in handwriting of Dr. Asif Hussain and stated that he was acquainted with writing of said doctor. Ext. Kha-1 was marked on said death certificate of Jail Kishore. He brought this death certificate from casualty ward of medical college, he also produced case sheet of said patient on which Casualty No.1994 Case No.1888/M/93 was entered. The witnesses stated that he signed this case sheet in place of C.M.O. This paper was also marked as Ext. Kha by DW4. According to witness the patient stated the he had consumed poison, both the doctors who prepared death certificate and case sheet of said patient Jai Kishore were alive. In case sheet, suspected poisoning case is written in death certificate of Jai Kishore, Aluminium Phosphide is written Aluminium Phosphide poison affects the respiratory system. In death certificate PCF is written which means peripheral circulatory failure.

17. DW7 Dr. Asif Hussain is author of death certificate of one deceased Jai Kishore aged about 24 years, who died on 13.02.1993 at 02:35 am at Medical College Aligarh, this certificate was also proved by evidence of Salauddin DW6. This was a case of Aluminium Phosphide poisoning. The witnesses has stated that he had given treatment to Jai Kishore along with his senior Dr. R.U. Khan and Dr. Mohd. (SIC). Aluminium Phosphide poison causes formation of gas.

18. DW8 Sri S C Sharma was accountant of T.B. Clinic Malkhan Singh Hospital Aligarh on the date of incident, he proved carbon copy of postmortem report of said Jai Kishore in absence of its author Dr. Vinay Kumar Yadav and filed copy of postmortem report dated 13.02.1993 which was in handwriting of Dr. Vinay Kumar Yadav. The witness stated that according to postmortem report the viscera of Jai Kishore was preserved in Jar No.25 and 26, on which Ext. Kha-24 was marked. The witness expressed ignorance about mode and manner of preservation of viscera.

19. Amongst prosecution witnesses PW1 Narendra Pal Singh is author of written report dated 16.03.1993 being its author and formed basis of lodging of chik FIR Ext. Ka-18. He also proved letter dated 06.07.1992 and 15.01.1993 having in handwriting of his deceased daughter Alpana, on which Ext. Ka- 1 and 2 was marked. He stated that she had received

education up to M.A., B.Ed. and he was acquainted with her handwriting and signature. He married his daughter Alpana to accused Udai Pratap Singh, on 29.04.1992 at his residence situated at Agra. She was send off to her matrimonial home after marriage and accused persons had refused to take her alongwith them initially due to non giving of Maruti car as per their demand, and they agreed to take her with them only on repeated request and ultimately assurance of the witness to fulfill their demand in future. She came back to her parental home after eight days of her Vidai. The witness and his son used to visit her on festive occasions and whenever any of his family member visit her, the accused person would tease them due to non-fulfillment of their demand of car. She had narrated the misbehavious and torture meted out to her by her in-laws due to demand of dowry. He repeatedly requested the accused persons to restrain from torturing her, but they did not relent. She only lived for 9 and half months after marriage.

20. On 15.02.1993 Dr. V.R. Vyas visited him at his office and asked him to come to Sikandara Rau, but did not disclose anything regarding his daughter and in the evening of that day at around 08:00 pm M.P. Sharma, Health Inspector Sikandara Rau visited him at his residence in Aligarh and told him that they should go to Sikandara Rau as condition of his daughter was serious. Subsequently Sri M.P. Sharma disclosed the factum of death of his daughter to his colleague of Vijendra Swaroop. He rushed to Agra alongwith Vijendra Swaroop to the place of accused persons at 12:30 in the night, where deadbody of his daughter was kept in the Varanda of their house. All the family members of Ativeer Singh were present there, but when he asked her for cause of death they avoided, and on further query they became apologetic to him. On hearing all these things he believed that death of his daughter was not natural and suspicious. He moved an application at P.S. Sikandara Rau which was written by his son Anil Kumar who is present, on which Ext. Ka-3 was marked. On this information inquest and postmortem examination on dead body of the deceased was carried out at the instance of police. He became shocked due to dowry death of his daughter, which he had to be admitted by doctors at Malkhan Singh Hospital where his son and wife were remained with him, due to his son illness none of his family members participate in postmortem and cremation of his daughter. He waited for 15 days for police action in the matter and when no police official visited him, he moved written report of the incident on 04.03.1993 through registered post to SSP Aligarh and other by police and administrative officers. The witness proved a typed copy of said written report bearing his signature, although the typed copy of the said written report was objected by counsel for the defence. In cross examination the witness stated that accused Ativeer Singh was serving at PHC Sikandara Rau on the post of Health Educational Officer, his one daughter was already married and the other daughter was Archana was unmarried. The witness was confronted with letter dated 04.01.1993 which he acknowledged to the writing of his son Anil, on which Ext. Kha-1 was marked and on which Ext. Kha-2 was marked during cross examination. A number of letters were produced before the witness during cross examination from the side of accused, which were written and signed by his family members on which Ext. Kha-3 to Ext. Kha 24 was marked. The witness acknowledged certain photographs

of deceased daughter Alpana Singh together with her female friends, husband and relatives. He was admitted in hospital for one day and next day he was discharged. He was told by police that viscera of his deceased daughter had been preserved and will be send for examination. He had got the written report typed at Civil Court Agra and signed it and send the report by registered post to Senior Superintendent of Police. He had send two written reports/applications to S.S.P. and on second application FIR was lodged. On report dated 16.02.1993 he requested for postmortem of the dead body of his daughter to ascertain the real cause of death. In that report no prayer was made to lodge an FIR, as he did not apprehend that her daughter was done away by administering poison to her. He thought that when police officials will undertake inquiry he would tell them the entire facts. He had not moved any application prior to 04.03.1993 for initiating actions against accused persons. He visited the police station only once between 16.03.1993 to 04.03.1993, the witness denied the defence suggestion that he had changed the viscera in collusion of doctor and staff of Malkhan Singh Hospital and when he become certain that viscera had been changed only then he moved an application for lodging an FIR bearing date 04.03.1993.

21. Dr. V.R. Vyas remained with him for three hours from the date of incident. During his travel from Sikandara Rau to Agra alongwith family after being apprised of death of his daughter, nobody stated that she was killed due to demand of dowry. The apprehension of dowry death occurred in his mind when he gave a report to the police on reaching the place of incident, but he did not narrate this fact in his first report, as he thought that the picture would be clear after postmortem examination. He had not written the allegation of demand of dowry or cruelty against the accused persons in first report. The witness also acknowledged his signature on inquest report. He had not told anything to Darogaji with regard to allegation of demand of dowry or causing death of his daughter by accused persons, as he was not in his senses at that time. On inquest report, opinion of Panchas is written in his writing, on which Ext. Kha-27 was marked. The police personnel told him that there was no visible injury on dead body. He is not certain as to who had administered poison to his daughter, but all the accused persons had poisoned him.

22. In Pradarsha Kha-3 he had made a request to S.O. Sikandara Rau to get postmortem examination of his daughter and he did not named any accused person. This application was moved on 16.02.1993 he thought that after postmortem examination he will reveal all the facts before police. Both the applications dated 04.03.1993 and 11.03.1993 filed by him were same. The investigating officer had recorded his statement after 1 ¼ months.

23. Veerpal Singh was mediator of marriage of his deceased daughter to whom daughter of the cousin of his brother-in-law was married. Ativeer Singh had stated regarding dowry objection just one month prior to the marriage before Veerpal Singh. He did not state this facts in both the applications dated 04.03.1993 and 11.03.1993. In these applications, he has not stated that his daughter would tell the fact of dowry harassment to him when she visited him. He had told this fact to investigating officer (C.O) that Veerpal Singh, was mediator in the marriage, but he

had not written this fact in his statement, he may not tell its reason. He has also not written this fact in his written reports that if he paid Rs.75,000/- in cash to accused persons in presence of Veerpal Singh, his deceased daughter had never asked him to refrain from interfering in family matters of accused. She never fell ill prior to marriage. It would be wrong to say that she died natural death, his daughter visited his place 4 to 5 times after marriage.

24. PW2 Veerpal Singh has stated that he is acquainted with accused persons as well as the informant. He mediated the marriage of Udai Pratap Singh and deceased Alpana. The accused Ativeer Singh told him that his son was posted as a teacher in Kasganj Degree College. He got the marriage of deceased and Udai Pratap Singh settled on getting consent of both sides. Ativeer Singh raised demand of dowry, prior to marriage in his presence and also demanded maruti car, to which Narendra Pal Singh expressed its inability. He met the deceased 1 to 2 times after marriage in Agra, and wherein she requested him to ask his father for maruti car as demanded by the accused side. He did not participate in Tilak Ceremony of deceased. The deceased had stated that the accused had fired the maid servant and she had to perform all household chores, the accused were demanding maruti car.

25. PW3 Smt. Kaushal Kumari, mother of the deceased who corroborated the statement in chief of PW1 in her sworn testimony before the Court and testified regarding demand of dowry, practicing of matrimonial cruelty, torture and causing of dowry death of deceased Alpana by accused persons. She stated that Veerpal Singh mediated the marriage of deceased and accused Udai Pratap Singh. Her husband told him that groom side was demanding Rs.75,000/- from him. It would be wrong to say that her daughter would often complain regarding stomach ache, she was her youngest child. Accused were pressurizing her husband to give them a car as dowry.

26. PW4 Dr. R.P. Gupta is author of postmortem report on dead body of the deceased, which is proved by his evidence as Ext. Ka-9. He stated that death of deceased might have occurred in the noon on 15.02.1993. The death occurred one day earlier to postmortem which was conducted by him on 16.02.1993 at Malkhan Singh Hospital, as cause of death could not be ascertained. He preserved viscera for chemical examination, no mark of external injury was seen. Both lungs were congested, stomach contains ounce watery matter, mucous membrane congested, spleen and kidney were congested, abdomen was distended, heart was partly filled, two ounce liquid matter was found in stomach. The viscera was preserved in Jar No.25 and 26. The witness also filed postmortem report of one Jai Kishore, which is authored by Dr. Vinay Kumar Yadav, who was posted in T.B. Hospital, which is situated in the compound of Malkhan Singh Hospital. In this postmortem report also it is stated that viscera was preserved in Jar No.25 and 26, on which Postmortem Report 117 of 1993 dated 13.02.1996 alongwith name and address of deceased is written. The witness filed a carbon copy of postmortem report of deceased Jai Kishore during his evidence, he stated that when the doctor finds it necessary to preserve viscera he takes jar from mortuary which is maintained by police hospital, the jar is kept in custody of pharmacist of police hospital. The person who was on duty had told him the number

of Jars as 25 and 26, he had signed the Register while deposing the Jar containing viscera nausea is found in case of Epileptic. It would be wrong to say that as M.P. Singh was subordinate to C.M.O. a tampering was done in viscera on asking of C.M.O and M.P. Singh. It would also be wrong to say that the witness had sent viscera of some other person in place of viscera of Alpana, he is not able to disclosed the name of staff to whom he deposited the jar. The number of jar containing viscera is entered at relevant time as disclosed by staff on duty. The number which is told by staff is entered on jar.

27. PW5 Deputy S.P. Yashwant Singh is investigating officer of the case and he has proved site plan of place of occurrence in his signature as Ext. Ka-10 and chargesheet being in his signature as Ext. Ka-11, these papers were prepared by SI O.N. Dixit on his dictation. The witness stated that witness Smt. Kaushal Kumari had not stated to him that when her husband visited his daughter to give gifts of Rakshabandhan they were pressurized for giving car. She has also not stated to him that when she visited her daughter her lips and nails became blue and tongue was stucked between the teeth. The witness reiterated the proceedings of investigation in his evidence.

28. PW6 SI O.N. Dixit carried out inquest on dead body of Alpana deceased on 16.02.1993 at 04:20 am at official residence of accused Atveer Singh in the campus of CSC Sikandara Rau. Witness proved inquest report Ext. Ka-12, Chalan Nash Ext. Ka-13, Photo Nash Ext. Ka-14 subsequent letters as Ext. Ka-15, letter to C.M.O. Ext. Ka-16, letter to R.I. as Ext. Ka-17 being in his handwriting and signature. The tongue of deceased was stucked between teeth. The parents of the deceased and accused persons were present during inquest proceedings.

29. PW7 Constable Rajvir Singh has stated that body was handed over to him for postmortem examination by S.I. O.N. Dixit for inquest proceedings and he who carried the dead body to postmortem house alongwith constable Mahaveer Singh.

30. PW8 Head Constable Guru Prasad is author of chick FIR, entries of GD for registration of Case vide Report No.9 time 19:20 dated 16.03.1993 and he has proved these documents by his evidence as Ext. Ka-18 and 19.

31. Learned A.G.A. appearing for the appellant-State and learned counsel for the revisionist Narendra Pal Singh submitted as under:-

(1) This is undisputed fact that deceased Alpana Singh died at the residence of her in-laws (appellant) in between 08:00 am to 05:00 pm as disclosed from the evidence of doctor V.R. Vyas who attended her at her residence in the hospital premises at about 08:00 am, and Dr. Chandra Prakash who also attended her learnt from the employees of the hospital that she died at 05:00 pm. This fact is also undisputed that she died nine and half months after the marriage.

(2) In the report dated 16.02.1993 lodged by N.P. Singh at P.S. Sikandara Rau, he did not mention the fact of demand of dowry by accused persons and consequent ill treatment and harassment meted out to her for not

fulfilling the demand of dowry. In his evidence PW1 N.P. Singh, has stated that he fulfilled all the demands of dowry except maruti car. He had also given the assurance to accused persons to fulfil their demand of maruti car, when the crop is reaped from the sale of agriculture proceeds. Although demand of maruti car was made prior to settlement of marriage and during marriage and also at the time of the departure of Alpana Singh after marriage, yet if continued after marriage. Further they put up a demand for establishing computer center for accused Udai Pratap Singh in lieu of maruti car. They also insisted that the plot at Agra lying in the name of Alpana Singh should be transferred in the name of Udai Pratap Singh.

(3) When the informant visited the place of accused persons and found dead body of his daughter, he notices unusual conduct of accused persons who touched his feet and requested him to excuse them, yet he was not sure at that time that her daughter was killed by them. The accused persons had even not informed the complainant even telephonically regarding ill health or subsequent death of deceased.

(4) The informant could not lodge a detailed report naming accused persons promptly at police station as he suffered mild attack due to unnatural and sudden death of his daughter and was admitted in the hospital and his wife and son had looked after him. Thus non mentioning of the fact of demand of dowry and cruelty in the report dated 16.03.1993 filed with S.H.O or in the request report becomes immaterial and insignificant on the facts of the case.

(5) The deceased died only within nine and half months of her marriage with the accused appellant Udai Pratap Singh in unnatural circumstances. There is no evidence that she was suffering from Epilepsy prior to her date of death and this story is cooked up by accused persons to create a defence. The letters produced on record which are proved to be written by the deceased reflect that she was being ill treated and harassed at her matrimonial home. These letters correspond to the time of demand of maruti car, opening of computer center for accused Udai Pratap Singh and transfer of the plot in the name of husband of deceased as appearing in FIR and evidence of parents of the deceased. The letters indicate that she was suffering from mental agony and was trying to conceal something from her parents due to fear of the appellants.

(6) There is absolutely nothing in the application dated 04.03.1993 moved by the informant to SSP which would suggest that legal advice was taken before moving this application. The contents of the letter as explained above are quite consistent and untie the truth and this version is explained by the wife of the complainant in her evidence.

(7) Omission of name of Veer Pal Singh (PW3) who was a middle man in the marriage, in FIR

as well as in statements of the parents of the deceased is insignificant as nothing could be elicited in cross examination of the witness which could suggest otherwise with regard to reliability of the witness.

(8) The prosecution has proved its case against appellant by cogent and trustworthy evidence of the informant N.P. Singh, his wife Kaushal Kumari and witness Veerpal Singh in support of the charge against accused persons with regard to demand of dowry practicing matrimonial cruelty and causing dowry death of deceased. However, the learned trial court has erroneously disbelieved the testimony of the witnesses of facts produced by prosecution and recorded a verdict of acquittal of accused persons from all charges taking hyper technical approach.

32. Per contra, learned counsel for private respondents/ accused persons submitted that the judgment of learned trial court is sound, well reasoned, based on logical conclusion and is coupled with proper appreciation of evidence on record.

33. He further submitted that the learned trial court has rightly given a finding that taking into consideration the evidence adduced from both sides the prosecution case becomes doubtful. Even the viscera examination report does not conclusively prove that it was in fact viscera of the deceased Alpana Singh which was examined by chemical examiner at Forensic Science Laboratory Agra. No allegation, whatsoever has been raised against appellants in first report dated 16.02.1993 lodged with P.S. concerned by the informant. It trite law that the verdict of acquittal should not be interfered with in appeal by appellate court where two views are possible, one in favour of of the accused and other suggesting his complicity in the offence. On account of verdict of acquittal by trial court, the presumption of innocence of the accused gets fortified. Neither the appellant/State nor the Revisionist /informant could make out a good case for this Hon'ble Court to interfere with the judgment and order passed by learned trial court.

34. We have considered the submissions made by learned counsel appearing for the parties and reappreciated the evidence on record in the light of grounds taken in present appeal and criminal revision preferred against verdict of the acquittal passed by learned trial court in respect of private respondents. The accused-respondents are husband and in-laws of the deceased. Alpana Singh, the daughter of first informant had died unfortunate death around nine and half months of her marriage with respondent No.4 Udai Pratap Singh. This is admitted fact that deceased and respondent No.4 Udai Pratap Singh were married according to Hindu rites and rituals on 29.04.1992 at the residence of informant Narendra Pal Singh who was posted as Chief Food Inspector in the office of C.M.O. in Aligarh, whereas accused persons were resident of Kasba Sikandara Rau which was also lying at the time of incident in district Aligarh. The marriage was solemnized in Agra at the private residence of the informant, wherein his family was settled. The unfortunate death of Alpana Singh occurred on 15.02.1993 any time between 08:00 am to 05:00 pm at town Sikandara Rau in the campus of CHC, where official residence of Ativeer Singh

the father-in-law of deceased was situated, as he was posted as Health Education Officer at Sikandara Rau district Aligarh.

35. The prosecution side produced PW1 Narendra Pal Singh, the informant and father of deceased, PW2 Veerpal Singh the mediator of the marriage of deceased and Udai Pratap Singh, PW3 Kaushal Kumari mother of the deceased, PW4 Dr. R.P. Gupta who conducted postmortem examination on dead body of the deceased on 16.02.1993 and proved her postmortem report by his evidence as Ext. Ka-9, he conducted postmortem examination in presence of Dr. S.N. Gupta and Ext. Ka-9 bears signatures of both the doctors. PW5 Yashwant Singh was Investigating Officer of the case, who was posted as Deputy Superintendent of Police at Sikandara Rau. PW6 SI O.N. Dixit carried out inquest proceedings on the dead body of the deceased on 16.02.1993 at the resident of Ativeer Singh Chauhan situated in CHC Campus Sikandara Rau. According to PW6 after completing inquest proceedings between 07:30 to 09:00 am on 16.02.1993 he filled up requisite police forms for postmortem examination on dead body and handed over the dead body in sealed condition to constables Rajveer Singh and Yashveer Singh. The dead body was moved from the place of inquest to district headquarter on 16.02.1993 at 12:30 pm according to chalan nash. The district headquarter was 40 kms from the place of inquest.

36. The postmortem on dead body was conducted on 16.02.1993 at 03:15 pm whereas it was received at postmortem house on 02:30 pm. In P.M. Report, postmortem number is marked as 135/1993. In postmortem report it is stated that cause of death could not be ascertained as no ante mortem injury was found on the body of the person of the deceased. Contents of viscera were preserved in Jar No.25 and 26. Postmortem examination of Jai Kishore son of Hari Shankar resident of Maurya Nagar, Khair District Aligarh was conducted on 13.02.1993 by Medical Officer T.B. Clinic Aligarh. Dr. Vinay Kumar Yadav and certified copy of his postmortem report has been filed by DW6.

37. DW8 Dr. SC. Sharma, on which Ext. Kha has been marked, in said postmortem report also viscera is shown to have been preserved in Jar No.25 and 26. However, there is difference of three days between postmortem of Jai Kishore and deceased in the present case namely Alpana Singh. Both were cases of suspected poisoning and viscera was preserved. The postmortem report of Jai Kishore bears Postmortem No.117/93. Jai Kishore died on 13.02.1993 at 02:30 am at J.N. Medical College, Aligarh. In viscera examination report the chemical expert from Forensic Science Laboratory, Agra has reported that in parts of viscera Aluminium Phosphide poison was found and on that basis the prosecution initiated on supposition that deceased Alpana was administered poison which resulted in her death, whereas both the jars in which viscera parts of deceased Alpana Singh and one Jai Kishore who is unconnected with present case were preserved, bore same number 25 and 26. The doctor V.R. Vyas (DW3) who attended the deceased on the day of incident has categorically stated that he did not find any symptoms of poisonings on her person and in his opinion symptoms of Epileptic attack were noticed on her body.

38. Learned trial court has analyzed the evidence regarding preservation and examination of viscera of

the deceased vis a vis said Jai Kishore who was also alleged to have consumed Aluminium Phosphoide poison, it raised doubt about veracity of prosecution case in the present case that deceased Alpana Singh was administered poison by the accused persons who are her husband and in-laws.

39. We find force in finding of learned trial court that as FIR in the case was lodged after much delay on 04.03.1993, it gave sufficient time to the informant who was posted in C.M.O. office in the same district to tamper with the material exhibits, in which viscera of deceased Alpana Singh and another person Jai Kishore were preserved, as both the jars co-incidentally bore same number and learned trial court also found force in defence version that in fact it were jars containing viscera of Jai Kishore, which were sent for chemical examination to F.S.L., Agra in the garb of viscera of deceased Alpana Singh and a favourable report was obtained that the viscera contained Aluminium Phosphide poison.

40. Learned trial court has rightly disbelieved the trust worthiness of viscera examination report of deceased Alpana, on which basis a case of homicidal death of deceased Alpana has been founded by prosecution in the case, and we find no perversity or error in finding of learned trial court on this count. Another Dr. (DW1) Chandra Prakash has also testified as defence witness that he was called by Ativeer Singh Chauhan (appellant) on 16.02.1993 at around 11 to 12 hours in the day to visit his daughter-in-law whose condition was serious. When he visited the deceased at the place of her in-laws in CHC Campus Dr. Vyas was also present there. He discussed the treatment given to the patient with doctor Vyas and he did not find any symptom of poisoning in patient Alpana Singh. He advised Dr. Vyas to give her injection calm-pose also and left the place after some time to visit the patients in his clinic.

41. Thus, neither the doctor who conducted postmortem examination on dead body of the deceased who appeared as prosecution witness nor defence witnesses doctor Vyas and Dr. Chandra Prakash who attended the deceased on the date of of incident when she was seriously ill have stated in their statement that they they found it suspected case of poisoning. Therefore, only on the basis of viscera examination report which is itself shrouded with suspicion, categorical finding cannot be recorded that the deceased was administered poison like Aluminium Phosphide which resulted in her death.

42. So far as allegation of demand of dowry by the appellants is concerned, the informant and his wife who appeared as witnesses are not consistent regarding nature and demand, at one place they have stated in their evidence that appellants were demanding maruti car from father of the deceased as additional dowry and at another place they stated that they were insisting and putting pressure on PW1 to open a computer center for the husband of the deceased who was a qualified person for his proper settlement and earning. At the third place, plea of demand of dowry is taken in evidence of witnesses of fact that the appellants were insisting that PW1 transfer the plot in the name of Udai Pratap Singh, the husband of the deceased, which was purchased by him in the name of his deceased daughter. Thus, case of demand of dowry is also not consistent. This fact is also noticeable that no allegation of

demand of dowry has been made by the informant in his first report lodged with police on 16.02.1993, in which he had only given information regarding death of his daughter and prayed for her postmortem examination and this first information formed the basis of conducting of inquest proceedings on 16.02.1993 between 07:30 to 09:00 am. This information was received at police station on 16.02.1993 at 04:20 am, which was entered in Report No.8 dated 16.02.1993 at G.D. of P.S. Sikandara Rau, District Aligarh.

43. The formal first information was lodged on the basis of written report Ext. Ka8 addressed to Senior Superintendent of Police, Aligarh bearing date 04.03.1993 on 16.4.1993. On the basis of this written report Chick FIR was lodged by DW8 Head Moharir Guru Prasad, marked as Ext. Ka-18 and case was registered vide G.D. No.19 time 09:20 hours dated 16.03.1993. Thus, a gap of one month between the incident and lodging of formal FIR gave ample time to witness PW-1, for embellishment after thought and concoction in FIR version and learned trial court has rightly disbelieved the evidence offered in support of accusation of demand of dowry and consequent matrimonial cruelty practiced by the appellants against the deceased.

44. A number of letters purportedly written by the deceased to her family members as well as some letters to her husband by her when she was at her parental place are filed on record. These letters were written by deceased to her between her marriage and death are placed on record, which are marked as Ext. Kha 1 to Ext. 54. Some photographs of the deceased, her husband and family members are also placed and proved on record, which are marked as material Ext. 1 to 10. In these photographs the deceased and husband appeared to be in cheerful and normal mode and nothing adverse can be discerned from them, even the letter of the deceased to her husband and in-laws suggest that relationship between deceased, her husband and in-laws were normal. Although in some letters she has raised some grievance with her father-in-law and also from her own father. There is no whisper of statement in these letters regarding any demand of dowry or any specific event of maltreatment meted out to deceased by her husband or in-laws.

45. Thus, after going through the judgment of the learned trial court and on re-appreciation of evidence on record, we find that the trial court was justified in regard to verdict of acquittal in respect of the appellants which is supported with evidence on record and cannot be held to be founded on surmises and conjectures and assumed contradictions as suggested from the side of State appellant and Revisionist the de facto complainant.

46. We find that the principal grounds which weighed with the trial court was according to the order of acquittal were that the FIR is highly belated and in first report filed by the informant with police just after arriving at the place of incident on hearing the death of his daughter at her matrimonial place, no allegations or accusation regarding demand of dowry or matrimonial cruelty, were mentioned therein. The circumstances in which viscera examined by the deceases surfaced or highly doubtful. The doctors who attended the deceased on the date of incident when she was seriously ill have unambiguously stated that they found no symptom of poisoning on her person, and cause of death

could not be ascertained in postmortem examination and on this factual situation it is difficult to hold that death of deceased was unnatural or homicidal. The learned trial court has found that the evidence regarding demand of dowry allegedly made by the appellants and matrimonial cruelty meted out to her by the appellants has rightly been found to be suffering from discrepancy and untrustworthiness.

47. The Hon'ble Supreme Court in **Khekh Ram Vs. Himachal Pradesh AIR SC 2018 5255**, dealtwith an appeal against conviction by the High Court of Himachal Pradesh reversing the verdict of acquittal of the appellant by the trial court. Hon'ble Court has held that appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law. There is nothing to curtail the power of the court to review the evidence and to come to its own conclusion in an appeal against acquittal. The appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principles of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. The Hon'ble Court further observed as under :-

" 23. It is a common place proposition that in a criminal trial suspicion however grave cannot take the place of proof and the prosecution to succeed has to prove its case and establish the charge by adducing convincing evidence to ward off any reasonable doubt about the complicity of the accused. For this, the prosecution case has to be in the category of "must be true" and not "may be true". This Court while dwelling on this postulation, in ***Rajiv Singh vs. State of Bihar and another*** *dilated thereon as hereunder:*

"66. It is well entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well established cannon of criminal justice is "fouler the 5 (2015) 16 SCC 369 crime higher the proof". In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.

67. The above enunciations resonated umpteen times to be reiterated in ***Raj Kumar Singh v. State of Rajasthan*** *as succinctly summarized in paragraph 21 as hereunder:*

21. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved and "will be

proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be"

and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense.

[Emphasis laid by the Court]

68. In supplementation, it was held in affirmation of the view taken in ***Kali Ram v. State of H.P.*** *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.*

69. In terms of this judgment, suspicion, howsoever grave cannot take the place of proof and the prosecution case to succeed has to be in the category of "must be" and not "may be" a distance to be covered by way of clear, cogent and unimpeachable evidence to rule out any possibility of wrongful conviction of the accused and resultant miscarriage of justice. For this, the Court has to essentially undertake an exhaustive and analytical appraisal of the evidence on record and register findings as warranted by the same. The above proposition is so well-established that it does not call for multiple citations to further consolidate the same."

48. In the light of the above stated dictum of Hon'ble Apex Court regarding scope of interference in Criminal Appeal against acquittal and re-appreciation of evidence adduced during trial and findings of learned trial court which are based thereon, we find no good grounds to interfere in verdict of acquittal recorded by learned trial court in respect of the private respondents. Consequently instant Government Appeal and connected Criminal Revision which has been preferred by the defacto complainant are devoid of merit and deserves to be **dismisse**d in the manner.

49. The instant government appeal and criminal revision preferred against the impugned judgment and order passed by learned trial court dated 25.04.1996 are dismissed and the impugned judgment and order passed by learned trial court are affirmed. The surviving respondents namely Kumari Archana, Ajai Pratap Singh and Udai Pratap Singh are directed to execute a persona bond and two sureties in the like amount to the satisfaction of the court concerned, in compliance of Section 437 A of Cr.P.C. within fifteen days of uploading of this judgment on website of this Hon'ble Court undertaking to appear before the High Court as and when such Court issues notice in respect of appeal or petition filed against this judgment.

(2024) 8 ILRA 749
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.08.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Sale/Trade Tax Revision No. 196 of 2013

M/S Sarswat Peroxides Pvt. Ltd.
...Revisionist
Versus
The Commissioner Commer. Tax U.P.
...Respondent

Counsel for the Revisionist:
Kunal Srivastava, Rajesh Kumar Verma

Counsel for the Respondent:
C.S.C.

Civil Law - U.P. Value Added Tax Act, 2008 - Sections 4, 59 - Controversy - Classification of goods and rate of levying VAT on the goods - Revisionist moved an application before Commissioner, Commercial Tax, seeking his opinion as to whether "vitamins and minerals pre-mix" would fall under the Entry 29 of Schedule II-A of Act, 2008 or under Entry 89 of "oars and minerals" - Commissioner rejected application, held that "vitamins and minerals pre-mix" would be categorized as "unclassified goods", liable to be taxed @ 12.5% - Revisionist preferred appeal - Appeal rejected - Impugned order - Held, according to Section 4 of Act, 2008 tax is levied on goods and not individually on raw material from which goods are prepared - Items given in Entry 29 are not goods which are being sought to be taxed in the present case, but it is the finished product which is "vitamins and minerals pre-mix", thus would not fall under the category of "chemicals" - Entry 41 defines the products which are used for alleviation of any disease or its symptoms, thus it would not fall under category of "drugs and medicines" - Entry 89 of Schedule II of Act, 2008, provides for raw "oars and minerals", thus it would not fall under category of "oars and minerals" . (Para 3, 4, 5, 10, 11, 12, 14, 15)

Revision is dismissed. (E-13)

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

1. Heard Sri Rajesh Kumar Verma, learned counsel for the revisionist as well as Sri Sanjay Sarin, learned counsel appearing for the opposite party.

2. Present revision has been preferred by the revisionist against order of Full Bench of the Commercial Tax Tribunal dated 10.07.2013 wherein they were adjudicating the appeal preferred by the revisionist against order of Commissioner, Commercial Tax, U.P. passed under Section 59 of the U.P. Value Added Tax Act, 2008 (hereinafter referred to as "the Act, 2008"). Controversy in the present case pertains to the goods produced by the revisionist which are categorized as "vitamins and minerals pre-mix".

3. It has been submitted by learned counsel for the revisionist that all around the opposite party were treating "vitamins and minerals" to be falling in the category of Entry 29 of Schedule II of the Act, 2008 under the heading "chemicals" and it was taxed @ 4%. Subsequently, it seems that some controversy arose with regard to classification of the goods produced by the revisionist and with regard to rate of levying Value Added Tax, on the said goods, due to which the revisionist moved an application under Section 59 of the Act, 2008 before the Commissioner, Commercial Tax, seeking his opinion as to whether "vitamins and minerals pre-mix" would fall under the Entry 29 of Schedule II-A of Act, 2008 or under the category of Entry 89 of "oars and minerals".

4. The Commissioner, Commercial Tax after due consideration of the submissions made on behalf of revisionist was of the view that "vitamins and minerals pre-mix" does not fall under the Entry 89 under the heading "ores and minerals" inasmuch as "ores and minerals" pertain to "raw material" and "vitamins and minerals pre-mix" could not fall under the category of Entry 89 and accordingly rejected the application of the revisionist and held that "vitamins and minerals pre-mix" would be categorized as "unclassified goods" liable to be taxed @ 12.5%.

5. The revisionist being aggrieved by order of the Commissioner, Commercial Tax dated 11.09.2012, preferred an appeal before the Commercial Tax Tribunal. The Tribunal upheld the view taken by the Commissioner, Commercial Tax and held that "vitamins and minerals pre-mix" does not fall under the category of "ores and minerals" or "drugs and medicines" and nor under the Entry 29 of "chemicals" and was liable to be taxed as "unclassified goods" and accordingly rejected the appeal preferred by the revisionist.

6. Before this Court also same arguments have been reiterated and it has been submitted that the revisionist produced mineral preparation named as "vitamins and minerals pre-mix" . Composition of 100gm of the said preparation is as follows :-

S. No.	***Name of Mineral and Vitamin***	***Chemical Name***	***Weight***	
1	*Minerals – Element Calcium*	*Calcium Carbonate*	*mg*	*160*
2	*Minerals – Element Iron*	*Ferrous Fumerate*	*7.2mg*	
3	*Vitamins – Vitamin – A*	*Retinyl Palmitate*	*200mcg*	
4	*Vitamins – Vitamin – B-1*	*Thiamine Hydrochloride*	*0.31mg*	
5	*Vitamins – Vitamin B-2*	*Riboflavin*	*5mg*	*0.3*
6	*Vitamins – Vitamin – 5*	*Nicotine Acid (Niacin)*	*8mg*	*3.8*
7	*Vitamins – Vitamin – C*	*Ascorbic Acid*	*mg*	*16*
8	*Vitamins – Vitamin – D*	*Free Folic Acid*	*Mcg*	*16*

7. Perusal of Schedule II of the Act, 2008 would indicate that Entry 29

pertain to "chemicals" has been defined as :-

> *29. Chemicals including caustic soda, caustic potash, soda ash, bleaching powder, sodium bicarbonate, sodium hydro sulplate, sulphate of alumina, sodium nitrate, sodium acetate, sodium sulphate, acid slurry, trisodium phosphate, sodium tripoly phosphate, sodium silicate, sodium meta silicate, carboxymethyle cellulose, sodium sulphide, acetic acid, sodium bisulphite, oxalic acid, sodium thiosulphate, sodium sulphite, sodium alginate, benzene, citric acid, diethylene glycol, sodium nitrate, hydrogen peroxide, acetaldehyde, pentaerythritol, sodium alpha olefin, sulphonate, sodium formate, chemical components and mixture and all other chemicals not specified alsewhere in this Schedule or any other Schedule*.
>
> While "oars and minerals" have been provided for in Entry 89 of Schedule II of Act, 2008.

8. Considering the case of the revisionist firstly as to whether "vitamins and minerals pre-mix" would fall under the category "chemicals". It is noticed that according to the revisionist the goods produced by him are termed as "vitamins and minerals pre-mix", which are made from certain chemicals including Calcium Carbonate, Di-calcium Phosphate, Potassium, Iodine, Sodium Banzol etc. which according to the revisionist are 'chemicals' and accordingly the goods are liable to be taxed treating them to the “chemicals”.

9. The arguments of the revisionist cannot be accepted considering the fact that even if the finished product namely "vitamins and minerals pre-mix" is made from chemicals which are its raw material, while the goods which is sought to be taxed under the Act, 2008 are not the raw material but the finished goods namely "vitamins and minerals pre-mix".

10. Section 4 of the Act, 2008 which a charging section clearly states that the *"tax payable on sale of goods under this Act, shall be levied and paid....."* accordingly tax is levied on the goods and not individually on the raw material from which the goods are prepared. Undisputedly, items given in Entry 29 are not the goods which are being sought to be taxed in the present case, but it is the finished product which is "vitamins and minerals pre-mix".

11. Accordingly, this Court is unable to accept contention of the revisionist that goods classified as "vitamins and minerals pre-mix" would fall under the category ‘chemicals’.

12. The second contention raised by the revisionist is as to whether "vitamins and minerals pre-mix" would fall under the category "drugs and medicines" as provided under Entry 41. Entry 41 also specifically in its contents excludes medicated soap, shampoo, antiseptic cream, face cream, massage cream, eye gel and hair oil etc. This entry very clearly defines the products which are used for alleviation of any disease or its symptoms.

13. The words “drugs” and “medicines” are used synonymously in common parlance. They have been defined in various English dictionaries as under :-

Merriam Webster

Drug – a substance used as a medication or in the preparation of medication.

Medicine – a substance or preparation used in treating disease, something that affects well-being.

Cambridge

Drug – any natural or artificially made chemical that is used as a medicine, a natural or artificially made substance, especially one that is illegal, which is taken for pleasure, to improve performance in an activity, or because someone is addicted.

Medicine – a drug that is used to treat illness or injury.

Collins

Drug – any substance used in the treatment, prevention, or diagnosis of disease, a chemical substance, such as a narcotic, taken for the effects it produces.

Medicine – any substance used in treating or alleviating the symptoms of disease.

Oxford

Drug – a medicine or other substance which has a physiological effect when ingested or otherwise introduced into the body. A substance taken for its narcotic or stimulant effects.

Medicine – a drug or other preparation for the treatment or prevention of disease.

14. From the above it is clear that "vitamins and minerals pre-mix" does not fall in the category of "drugs and medicines" nor has any material adduced either before the authorities below or before this Court that it would qualify for being classified as “drugs and medicines” and accordingly, there is no reason to accept the contention of the revisionist that "vitamins and minerals pre-mix" would fall under the category of "drugs and medicines".

15. Lastly, the argument of revisionist with regard to inclusion of "vitamins and minerals pre-mix" under "ores and minerals" as defined in Entry 89 of Schedule II of the Act, 2008, the said entry provides only for raw "oars and minerals", without mentioning "vitamins and minerals pre-mix" falling under the said entry, and hence it is clear that “vitamins and minerals pre-mix” would not fall under the category of “oars and minerals”.

16. For the aforesaid reasons, this Court does not find any infirmity in the order passed by the Additional Commissioner or the Tribunal that "vitamins and minerals pre-mix" would be termed as unclassified item and liable to be taxed as such.

17. In the light of discussion made above, the revision is **dismissed**. The substantial questions of law are decided against the revisionist and in favour of revenue.

(2024) 8 ILRA 753
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.08.2024

BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE JASPREET SINGH, J.

Special Appeal No. 372 of 2023

Subhash Chandra ...Appellant
Versus
Srikant Goswami & Ors. ...Respondents

Counsel for the Appellant:
Sri Sharad Pathak assisted by Sri Piyush Pathak

Counsel for the Respondents:
Sri Gaurav Mehrotra assisted by Sri Akber Ahmad, Sri Prashant Puri and Ms. Shhreiya Agarwal, Sri Santosh Kumar Tripathi

Special Appeal-Allahabad High Court Rules, 1952-Chapter VIII Rule 5-Contempt of Courts Act, 1971-Section 19(1)- Challenge to-Maintainability of an intra-court appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952-The respondents raised objections to the maintainability of the appeal as the Act bars appeals against orders disposing of or dropping contempt proceedings-The appellant claimed that the High Court's inherent power in contempt matters, being sui generis in nature, allow for an intra-court appeal-Held, no appeal lies against orders dismissing or dropping contempt proceedings without punishment-The Act is a self contained code, and general provisions for intra-court appeals under Allahabad High Court Rules, 1952, do not override this statutory limitation-Therefore, a contempt petitioner cannot file an appeal against an order where the court finds substantial compliance and dismisses the contempt petition.(Para 1 to 71)

If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases). (Para 57)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Jagdamba Prasad Vs Balgovind & ors. Neu. Cit. No. (2016) : AHC: 77023-DB

2. Hub Lal Yadav Vs Mahendra & ors. (2017) ADJ Online 0638

3. Ch. Shyam Sunder Vs Daw Dayal Khanna (1955) SCC OnLine All 186

4. Shah Babu Lal Khemji Vs J.D. Kania & anr. (1981) 4 SCC 8

5. Manohar Lal Vs Prem Shankar (1959) SCC OnLine All 130

6. Maninderjeet Singh Bitta Vs U.O.I. (2012) 1 SCC 273

7. Rajit Ram Yadav Vs St. of U.P. & ors.(2024) 7 ADJ 747 FB

8. Mednapore People's Coop. Vs Cunilal Nanda & ors.(2006) 5 SCC 399

9. C/M Madarsa Ehle-E-Sunnat Vs Prakash Singh & ors.(2016) SCC Online Alld. 34-38

10. C/M Smt. Dulhin Rajdhari Kunwari Kanya Jr. High Scl. Vs Dinesh Chandra Kannaujia & anr.(SAPL No. 303 of 2010)

11. Shivam Das Chandani & ors. Vs Prabhu N. Singh & ors.(2022) 3 ADJ 275 LB DB 03

12. Roop Singh Vs Shri Vinay Kumar Johari & ors.(2020) 8 ADJ 519 DB

13. Anil Kumar Gupta Vs Pawan Kumar Singh & ors.(2015) SCC OnLine All 3660

14. Amit Mohan Prasad Vs Naresh Babu Tiwari & ors.(SAPL No. 135 of 2022)

15. Ashwani Kumar Vs St. of U.P. & ors.MANU/UP/2577/2022

16. Alld. Bank Vs Canara Bank (2000) 4 SCC 406

17. Ashutosh Shrotiya & ors. Vs V.C. Dr. B.R. Ambedkar Univ. & ors.(2015) SCC Online Alld 8553 FB

18. Ram Kishan Fauji Vs St. of Haryana (2017) 5 SCC 533

19. Ajay Kumar Bhalla Vs Prakash Kumar Dixit (2024) SCC OnLine SC 1874

(Delivered by Hon'ble Jaspreet Singh, J.)

1. More often than not this Court is recurringly vexed with an issue of seminal importance relating to the maintainability of an intra-court appeal filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 (hereinafter referred to the 'Rules of the Court') from orders emanating from contempt proceedings.

2. This intra-court appeal too, has been filed by the appellant, who was the petitioner before the Contempt Court, being aggrieved by the order dated 10.07.2023 passed in Contempt Application (civil) 2200 of 2016 (Subhash Chandra Vs. Shri Srikant Goswami MD. U.P. Sahkari Gramin Vikas Ltd.) whereby the Contempt Court finally disposed of the contempt petition holding that there was substantial compliance of the judgment and order dated 10.08.2016 passed by the writ court and it also gave liberty to the contempt-petitioner that in case if he was aggrieved by the order of compliance dated 22.05.2024, he could approach the appropriate Forum.

3. Sri Gaurav Mehrotra, learned counsel for the respondents at the outset had raised a preliminary objection regarding maintainability of the instant intra-court appeal on the ground that in light of Section 19 (1) of the Contempt of Courts Act, 1971 (hereinafter referred to as "the Act of 1971), the contempt appeal will only lie against an order passed by the Contempt Court awarding a punishment to a contemnor. This necessarily implies that an appeal can only be filed by a person who is a respondent in the contempt proceedings and not by one who is petitioner in the contempt proceedings.

4. In the instant case, it is pointed out that since the Contempt Court found that substantial compliance of the order passed by the writ court had been made, hence, the Contempt Court did not find it worthwhile to proceed, consequently, the proceedings were dropped, leaving it open for the Contempt-petitioner, if aggrieved against the order of compliance to raise his grievance before the appropriate Forum.

5. It has further been urged that the Act of 1971 is a Special Act which envisages a Forum of appeal only in terms of Section 19 (1) of the Act of 1971 and it does not contemplate filing of an appeal against an order whereby the contempt proceedings are disposed of or dropped or dismissed. In such circumstances where the appeal in terms of Section 19 (1) of the Act of 1971 is not maintainable then the appellant herein in the garb of an intra-court appeal cannot invoke the jurisdiction of this Court to achieve something

indirectly which is prohibited by the Act of 1971, directly.

6. Sri Gaurav Mehrotra, learned counsel for the respondents has further urged that the only remedy which is available to the contempt-petitioner against an order refusing to initiate contempt proceedings, dropping contempt proceedings or dismissing contempt proceedings is to approach the Hon'ble Supreme Court of India in exercise of its jurisdiction under Article 136 of the Constitution of India.

7. It has also been submitted that since the object of the Act of 1971 is to regulate the manner in which the Contempt Court exercises its powers, which primarily inheres in every High Court by virtue of it being a court of record, and thus the Act of 1971 be treated as a special Act vis-a-vis the High Court Rules of 1952 which in this case be treated as the general law under which the intra-court appeal is filed.

8. The thrust of the submission is that once a special act which governs the subject and prohibits or restricts a right of appeal, which needless to say is a creature of a statute, then the general law must give way to the special law and for the aforesaid reason, the intra-court appeal against an order dismissing the contempt petition would not be maintainable.

9. It is further submitted that this issue has been raised before this Court in a number of cases and it has been consistently held that an intra-court appeal under Chapter VIII Rule 5 of the Rules of the Court against an order dismissing or disposing of contempt petition is not maintainable consequently the instant appeal be dismissed as not maintainable.

10. Sri Mehrotra, learned counsel for the respondents in order to buttress his submissions has relied upon the following decisions :- (i) Jagdamba Prasad Vs. Balgovind and 10 Others Neutral Citation No. - 2016:AHC:77023-DB; (ii) Sheo Charan Vs. Naval and Others 1997 SCC OnLine All 1136; (iii) Hub Lal Yadav Vs. Mahendra and Others 2017 ADJOnline 0638; (iv) Vinod Kumar Gupta and Another Vs. Sri Veer Bahadur Yadav, SDM and Another 2023(7) ADJ 107 (DB); (v) Midnapore Peoples Cooperative Vs. Chunni Lal Nanda and Others (2006) 5 SCC 399; (vi) D.N. Taneja Vs. Bhajan Lal and others (1988) 3 SCC 26; (vii) State of Maharasthra Vs. Mahboob S. Allibhoy and Another (1996) 4 SCC 411 (viii) Fuerest Day Lawson Ltd. Vs. Jindal Exports Ltd. (2011) 8 SCC 333.

11. Sri Sharad Pathak, learned counsel for the appellant responding and refuting the aforesaid preliminary objections has urged that the contempt proceeding which are initiated by the High Court is neither civil nor criminal in nature rather it is in exercise of its jurisdiction 'sui generis'. He further urges that the bar which is mentioned in Chapter VIII Rule 5 of the Rules of the Court is not attracted as an order passed by the Contempt Court is primarily an order passed by the High Court in exercise of its original jurisdiction which is inherent in the High Court by virtue of it being a court of record and thus an intra-court appeal is maintainable.

12. Sri Pathak taking his submissions forward has submitted that even if at all, it is assumed that an intra-court appeal may not be maintainable against an order dismissing the contempt petition but the fact still remains that if a Contempt Judge in any manner touches the

merit of the claim or issues fresh directions or dilutes a direction already issued then such part of the order cannot be treated to be an order passed in the contempt jurisdiction and thus that part of the order would be without jurisdiction and to that extent, an intra-court appeal would be maintainable.

13. Sri Pathak, has further submitted that a 'judgment' passed by a Court has certain well settled connotations in law. Even if at all, in cases where under the Rules of the Court, an intra-court appeal is not specifically provided then in such circumstances, the Court would be justified in taking recourse to the specific provisions in contemporaneous statutes. Elaborating his submissions, he urged that even though there was no provision which limits the exercise of original jurisdiction by the High Court in contempt proceedings but even if at all the Act of 1971 is considered to limit the exercise of jurisdiction to some extent in so far as filing of an appeal is concerned yet the same would not create an embargo for the High Court to take recourse to the Rules of the Court to effectively exercise its appellate jurisdiction and power which are rather widened by the Rules of the Court. He further contends that Section 19 of the Act of 1971 in no manner overrides or controls the powers of the High Court under Chapter VIII Rule 5 of the Rules of the Court and thus even if an appeal may not lie in terms of Section 19 of the Act of 1971 but an intra-court appeal would definitely be maintainable. He has heavily relied upon the decision of the Apex Court in ***Shah Babu Lal Khemji Vs. J.D. Kania and Another (1981) 4 SCC 8.***

14. Sri Pathak has further submitted that if the decision of the Apex Court in **Midnapore (Supra),** which is cited by the other side, is considered, it would reveal that the questions which were framed by the Apex Court have been clearly answered in Paragraph 11 which is to be read as a whole. He has further drawn the attention of the Court to Paragraph 11(V) of the **Midnapore (supra)** decision and it is urged that the Apex Court has clearly held that if the High Court for whatever reason decides an 'issue' or 'makes any direction relating to the merits of the disputes between the parties', in contempt proceedings, then the aggrieved party is not without a remedy. Such a party can challenge the same in an intra-court appeal if there is a provision for such an appeal.

15. It is thus submitted that the Apex Court has clarified that where the contempt Court touches the 'merit' or 'decides an issue' then an intra-court appeal would lie and in the instant case, the said proposition is being pressed into service to contend that the Contempt Court by entering into the question as to whether the compliance has been made or not has held that there is substantial compliance and this has diluted the order passed by the writ court in the first instance which stood affirmed up to the Apex Court. In these circumstances, where the Contempt Court has diluted the directions of the writ court, which was affirmed by the Apex Court and by holding that the Authorities had substantially complied with the order amounts examining the matter on merits, hence, such an order is definitely susceptible to challenge in an intra-court appeal.

16. Thus, for the aforesaid reasons, it is submitted that neither the rules of the Court prohibits the institution and

consideration of the intra-court appeal on merits nor there can be any embargo on the power of the Court to entertain an intra-court appeal arising out of contempt proceedings which are original in nature and can neither be termed as civil or criminal rather is sui generis.

17. Sri Pathak in support of his submissions has relied upon the following decisions:- (i) Ch. Shyam Sunder v. Daw Dayal Khanna, 1955 SCC OnLine All 186; (ii) Manohar Lal v. Prem Shanker, 1959 SCC OnLine All 130; (iii) Maninderjeet Singh Bitta Vs. Union of India, (2012) 1 SCC 273; (iv) Shah Babulal Khemji Vs. J.D. Kania and Another (1981) 4 SCC 8; (v)Rajit Ram Yadav Vs. State of U.P. and others: 2024 (7) ADJ 747 (FB); (vi) Mednapore Peoples' Cooperation Vs. Cunilal Nanda and Others (2006) 5 SCC 399; (vii) Special Deputy Director Vs. N. Vasudeva & Others (2007) 14 SCC 165; (viii) Committee of Management Madarsa Ehle-E-Sunnat Vs. Prakash Singh and Others (2016) SCC Online Allahabad 34-38; (ix) Anil Kumar Gupta Vs. Pawan Kumar Singh and Others 2015 SCC Online All 3660; (x) Daya Nand Sharma Vs. State of U.P. and Others 2022 SCC Online All 598; (xi) Amit Mohan Prasad Vs. Naresh Babu Tiwari & Others, Special Appeal No. 135 of 2022; (xii) Ashwani Kumar Vs. State of U.P. & Others MANU/UP/2577/2022.

18. The Court has heard the learned counsel for the parties at length and has also perused the material on record.

19. Before proceeding further, it will be relevant to notice an order in the instant case passed by a Coordinate Bench of this Court dated 22.04.2024 and the relevant portion of the said order reads as under:-

"Now, the order impugned herein has been passed by the High Court in exercise of its contempt jurisdiction under Section 12 of the Contempt of Courts Act, 1971 which is a central enactment. It is referable to entry 14 of the concurrent list, therefore, to this extent there is no difficulty i.e. if it is found that this is an order passed in exercise of criminal jurisdiction by the High Court, then, this appeal would fall within the exception made in Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952, however, if it is found that contempt jurisdiction exercised by the learned Judge of the High Court while passing the impugned order, does not fall within the meaning of the words "in the exercise of criminal jurisdiction" used in Chapter VIII Rule 5, then, the position would be different subject of course to there being other issues involved and authorities thereon as also the submissions to be made by the learned counsel for the parties.

The question is whether the aforesaid words- "in the exercise of criminal jurisdiction" refer to the jurisdiction exercised by the High Court on the criminal side under the Code of Criminal Procedure or any other law falling in the criminal field or would it include the exercise of contempt jurisdiction which is termed as quasi criminal proceeding/jurisdiction. Whether these words will include the quasi criminal jurisdiction of a contempt Court of the High Court."

20. In light of the tentative observations noted above, this Court will consider the nature of the proceedings exercised by the High Court in its contempt jurisdiction inter alia to adjudge the issue of maintainability of the instant appeal in light of the rival submissions.

21. At this stage, it will be apposite to take a glace at the relevant provisions of the Contempt of Courts Act, 1971, the Allahabad High Court Rules, 1952 which have an interplay and have some bearing on the controversy involved in the instant intra-court appeal.

22. For the ease of the reference, relevant provisions of the Contempt of Courts Act, 1971 are being reproduced hereinafter:-

> ***"2. Definitions***.—*In this Act, unless the context otherwise requires,—*
>
> ***(a)*** *"contempt of court" means civil contempt or criminal contempt;*
>
> ***(b)*** *"civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;*
>
> *(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which— (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of any court; or (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;*
>
> *(d) "High Court" means the High Court for a State or a Union territory, and includes the court of the Judicial Commissioner in any Union territory.*
>
> ***10. Power of High Court to punish contempts of subordinate courts***.— *Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of courts subordinate to it as it has and exercises in respect of contempts of itself: Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code, 1860 (45 of 1860).*
>
> ***11. 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.*
>
> ***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 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 the 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 purpose of sub-sections (4) and (5),—

(a) "company" means any 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.

***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;

(b) where the order or decision is that of a Bench, to the Supreme Court:

Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union territory, such appeal shall lie to the Supreme Court.

(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;

(b) in the case of an appeal to the Supreme Court, within sixty days, from the date of the order appealed against.

23. The High Court in order to regulate the presentation and hearing of contempt proceedings has framed rules contained in Chapter XXXV-E of the Rules of the Court, 1952 which read as under:-

***"1. Introduction** :- The Rules contained in this Chapter shall govern presentation and hearing of Contempt of Court cases coming to this High Court under the Contempt of Courts Act, 1971.*

***2. Nature of contempt to be indicated** :- Every application, reference or motion for taking proceedings under the Contempt of Courts Act, 1971 shall mention at the head whether it relates to the Commission of 'Civil Contempt' or 'Criminal Contempt'* :

Provided that, if there are allegations both of commission of Civil Contempt and Criminal Contempt against the same person/persons, two separate applications shall be moved, one dealing with Civil Contempt and the other with Criminal Contempt.

***3. Facts to be stated in the motion or reference:-** (1) Every such motion or reference made under Section 15 (1) of the Act shall contain in precise language the statement setting forth the facts constituting the contempt of which the person charged is alleged to be guilty and shall specify the date or dates on which the contempt is alleged to have been committed.*

(2) Every motion made by the Advocate General under sub-section (2) of Section 15 of the Act shall state the allegations of facts and the view of the informant that in relation to these facts contempt appears to have been committed of which the Court should take cognizance and take further action.

The motion should contain sufficient material to indicate why the Advocate General is inclined to move the court.

(3) (a) A petition for taking contempt of court proceedings shall be supported by an affidavit. In case of criminal contempt three copies of the application and the affidavit shall accompany the application :

Provided that if there are more than one opposite parties, the petition shall be accompanied by as many extra copies as there are opposite parties.

(b) When the petitioner relies upon any document or documents in his possession, he shall file the same along with the petition or a copy thereof as annexure to affidavit.

(c) A petition made under Section 15 (1) (b) of the Act shall also be accompanied by the consent in writing of the Advocate General and a copy thereof.

(4) Every petition is respect of criminal contempt, where it is not moved by the Advocate General and where the consent in writing of the Advocate General had not been obtained, and every petition in regard to criminal contempt of a subordinate court where no reference has been made by it and the petition is moved without the consent of the Advocate General shall clearly state the reasons why the consent in writing of the Advocate General could not be obtained and why the court has been approached to act suo motu.

***4. Civil and criminal contempt's presentation after stamp reporter** :- (a) Every case relating to civil contempt shall be presented before the Bench107 constituted for that purpose.*

(b) Every case of criminal contempt coming under Section 15 of the Act shall be presented before the Bench of not less than two Judges constituted for the purpose.

(c) provided that every case of contempt of Court presented before the Court shall bear the report of the Stamp Reporter as to sufficiency of Court-fee paid and also about limitation. References relating to contempt of court received on Administrative side from the subordinate courts shall, along with the office report with respect thereto, be laid before the Chief Justice, who shall have the discretion to file the same or to order that the same be laid before the Bench concerned, A [at Allahabad or Lucknow as the case might be] for further proceedings in connection with the case.

***5. Issuance of notice** :- Such allegations contained in the petition as appears to the Court to make out a prima facie case of contempt of Court against the person concerned, shall be reduced into charge or charges by the Court against such person, and notice shall be issued only with respect to those charges :*

Provided that the Court shall not issue notice if more than a year has elapsed from the alleged act of contempt of court.

***6. Documents accompanied notice** :- Where an order has been made directing that notice be issued to any person to*

show cause why he should not be punished for contempt of Court, a date shall be fixed for the hearing and a notice thereof in the prescribed form given to the person concerned. The notice of a criminal contempt shall also be served on the Government Advocate. The notice shall be accompanied by copies of the application, motion and the affidavit or a copy of the reference by a subordinate court as the case may be, and a copy of the charge or charges as framed by the court and shall require the person concerned to appear either in person or through counsel unless otherwise ordered before the Court at the time and on the date specified therein to show cause why he should not be punished for Contempt of Court. Notice of every proceeding under Section 15 of the Act shall be served personally on the person charged, unless the Court for reasons to be recorded directs otherwise.

7. Contempt in the presence of the Court *:- When it is alleged or appears to the Court upon its own view that a person has been guilty of contempt committed in its presence or hearing, the Court may cause such person to be detained in custody, and at any time before the rising of the Court, on the same day or as early as possible thereafter, shall—*

(a) cause him to be informed in writing of the contempt with which he is charged, and if such person pleads guilty to the charge, his plea shall be recorded and the Court may in its discretion, convict him thereon;

(b) if such person refuses to plead, or does not plead, or claims to be tried or the Court does not convict him, on his plea or guilt, afford him an opportunity to make his defence to the charge, in support of which he may file an affidavit on the date fixed for his appearance or on such other date as may be fixed by the court in that behalf;

(c) after taking such evidence as may be necessary or as may be offered by such person and after hearing him, proceed either forthwith or after the adjournment, to determine the matter of the charge; and

(d) make such order for punishment or discharge of such person as may be just.

8. Application for transfer of hearing to be placed before Chief Justice *:- Notwithstanding anything contained in Rule 7, where a person charged with contempt under that rule applies, whether orally or in writing to have the charge against him tried by some Judge other than the Judge or Judges in whose presence or hearing the offence is alleged to have been committed, and the court is of opinion that it is practicable to do so and that in the interest of proper administration of justice the application should be allowed, it shall cause the matter to be placed together with a statement of the facts of the case, before the Chief Justice for such directions as he may think fit to issue as respects the trial thereof.*

9. Detention of contemnor during pendency of the

proceedings *:- Pending the determination of the charge under clause (c) of Rule 7 the Court may direct that the person charged with contempt under section 14 of the Contempt of Courts Act, 1971, shall be detained in such custody as it may specify.*

10. Informant not to plead unless directed by the court:- *After giving information about the commission of contempt of court by any person or persons, the informant shall not have any right to appear or plead or argue before the Court unless he is called upon by the Court specially to do so.*

11. Bail in contempt case*:- When any person charged with contempt appears or is brought before the High Court and is prepared, while in custody or at any stage of the proceedings, to give bail, such person shall be released on bail, if a bond for such sum of money as the Court thinks sufficient is executed with or without sureties conditioned that the person charged shall attend at the time and place mentioned in the bond and shall continue to so attend until otherwise directed by the Court* :

Provided that the High Court may if it thinks fit, instead of taking bail from such person, discharge him on his executing a bond without sureties for his attendance as aforesaid, or without executing such bond :

Provided further that on the failure of a person to comply with the conditions of the bail bond as regards the time and place of attendance, the Court may refuse to release him on bail when on a subsequent occasion in the same case he appears before the Court or is brought in custody and every such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof.

The provisions of Sections 422 to 448 and 450 of the Code of Criminal Procedure, 1973, shall so far as may be, apply to all the bonds executed under the Rule.

12. Attachment of property and warrant of arrest in certain cases:- *The Court may, if satisfied that the person charged is absconding or likely to abscond or is keeping or is likely to keep out of the way to avoid service of the notice, order the attachment of his property of such value or amount as it may deem reasonable. In case of criminal contempt the Court may, in lieu of or in addition to the order of attachment of property, order issue of warrant of arrest of such person :*

Provided that, in case the Court considers it fit and expedient, it may issue warrant of arrest in the first instance.

Such warrant may be endorsed in the manner laid down in Section 71 of the Code of Criminal Procedure. The attachment referred to above shall be effected in the manner provided in the Code of Civil Procedure, 1908 for the attachment of property in execution of a decree for payment of money. If after such attachment, the person charged appears and shows to the

satisfaction of the Court that he did not abscond or keep out of the way to avoid service of the notice, the Court shall order the release of his property from attachment upon such terms as to costs or otherwise as it may think fit.

13. Paper book and issue of copies in contempt cases:- *The rules contained in the Rules of Court pertaining to grant of copies and charging process fees in criminal matters and preparation of paper book in contempt of Court cases and such other matters in respect of which no provision has been made in this Chapter, shall apply mutatis mutandis to the proceedings under this Chapter and the appeals coming under Section 19 of the Act. Similarly when proceedings are pending in subordinate Court, the Rules made by the High Court for conduct of business of such subordinate Courts shall apply to those proceedings.*

14. Costs *:- Where costs have been awarded by the Court in proceedings for contempt of court but have not been paid, the person entitled to them may apply to the Court for execution of the order. The application shall be accompanied by an affidavit stating the amount of costs awarded and the amount, remaining unpaid, and it shall be laid before the Court for orders. The Court may direct the Chief Judicial Magistrate to realise the amount due by himself or by any Magistrate subordinate to him. Such amounts shall be realised as if it were an amount of fine."*

24. The power of the intra-court appeal has been conferred on this Court by Chapter VIII Rule 5 of the Allahabad High Court Rules which reads as under:-

"Chapter VIII

[5. Special appeal *:- An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a Court subject to the superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction [or in the exercise of the jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award—*

(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or

(b) of the Government or any officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge.]"

25. Before considering the respective submissions of the parties, it will be appropriate to first notice the decisions cited by the respective parties.

26. The learned counsel for the appellant in support of his submissions had relied upon the decision of this Court in **Chaudhary Shyam Sunder (Supra)** where it has been held that the contempt proceedings are neither civil nor criminal but *sui generis*. A High Court punishes for contempt of court as a court of record in exercise of its inherent jurisdiction and the procedure that it adopts is not governed either by the Civil Procedure Code, 1908 (hereinafter referred to as C.P.C.) or by the Criminal Procedure Code, 1973 (hereinafter referred to as "Cr.P.C.).

27. The aforesaid authority may have limited applicability, inasmuch as, it can only be an authority for the fact that the contempt powers which the High Court exercises is on account of being a court of record and the proceedings are sui generis in that context. Moreover, the said decision is of the year 1955 whereas with the promulgation of the Contempt of Court Act, 1971, the situation has changed. Suffice to state that the aforesaid case may not have much precedential value as it does not deal with the issue as to whether against an order passed by the Contempt Court dropping the contempt proceedings, an intra-court appeal could be maintained.

28. The other decisions relied upon by the learned counsel for the appellant namely **Manohar Lal (Supra)** deals with the two classes of contempt as defined in Act of 1971 i.e. civil and criminal contempt but the said decision does not help the appellant on the issue of maintainability of an intra-court appeal arising out of contempt proceedings. Moreover, in **Maninderjeet Singh Bitta (Supra)** the Apex Court considered the principles which guide the exercise of judicial discretion in contempt jurisdiction. The relevant portion reads as under:-

> *"16. Now, we would examine certain principles of law which would normally guide the exercise of judicial discretion in the realm of contempt jurisdiction. "Contempt" is an extraordinary jurisdiction of the courts. Normally, the courts are reluctant to initiate contempt proceedings under the provisions of the 1971 Act. This jurisdiction, at least suo motu, is invoked by the courts sparingly and in compelling circumstances, as it is one of the foremost duty of the courts to ensure compliance with its orders. The law relating to contempt is primarily dissected into two main heads of jurisdiction under the Indian law: (a) criminal contempt, and (b) civil contempt. It is now well-settled and explained principle under the Indian contempt jurisdiction that features, ingredients, procedure, attendant circumstances of the case and the quantum of punishment are the relevant and deciphering factors.*
>
> *17. Section 12 of the 1971 Act deals with the contempt of court and its punishment while Section 15 deals with cognizance of criminal contempt. Civil contempt would be wilful breach of an undertaking given to the court or wilful disobedience of any judgment or order of the court, while criminal contempt would deal with the cases where by words, spoken or written, signs or any matter or doing of any act which scandalises, prejudices or interferes, obstructs or even tends*

to obstruct the due course of any judicial proceedings, any court and the administration of justice in any other manner. Under the English law, the distinction between criminal and civil contempt is stated to be very little and that too of academic significance. However, under both the English and Indian law these are proceedings sui generis.

18. While referring to Justice J.D. Kapoor's Law of Contempt of Court, 2nd Edn., 2010 which mentioned the Phillimore Committee Report—Report of the Committee on Contempt of Court, of which importantly the following passage can be noticed:

"4. In England and Wales most forms of contempt have been regarded as of criminal character, and as such, are called 'criminal contempts'. In Scotland contempt of court is not a crime nor is a distinction between 'criminal' and 'civil' contempts recognised. Scots law regards contempt of court as a chapter of a law sui generis. This difference of approach is of little more than academic significance in modern practice, but the Scottish explain certain peculiar elements in its operation and procedure. What is of particular importance is that it is a branch of the law in which breaches are investigated by a special and summary procedure and where, once established, they may be severely punished."

19. Under the Indian law the conduct of the parties, the act of disobedience and the attendant circumstances are relevant to consider whether a case would fall under civil contempt or criminal contempt. For example, disobedience of an order of a court simpliciter would be civil contempt but when it is coupled with conduct of the parties which is contemptuous, prejudicial and is in flagrant violation of the law of the land, it may be treated as a criminal contempt. Even under the English law, the courts have the power to enforce its judgment and orders against the recalcitrant parties.

20. In exercise of its contempt jurisdiction, the courts are primarily concerned with enquiring whether the contemnor is guilty of intentional and wilful violation of the orders of the court, even to constitute a civil contempt. Every party to lis before the court, and even otherwise, is expected to obey the orders of the court in its true spirit and substance. Every person is required to respect and obey the orders of the court with due dignity for the institution. The government departments are no exception to it. The departments or instrumentalities of the State must act expeditiously as per orders of the court and if such orders postulate any schedule, then it must be adhered to. Whenever there are obstructions or difficulties in compliance with the orders of the court, least that is expected of the government department or its functionaries is to approach the court for extension of time or clarifications, if called for. But, where the party neither obeys the orders of the court nor approaches the court making appropriate

prayers for extension of time or variation of order, the only possible inference in law is that such party disobeys the orders of the court. In other words, it is intentionally not carrying out the orders of the court. Flagrant violation of the court's orders would reflect the attitude of the party concerned to undermine the authority of the courts, its dignity and the administration of justice."

The aforesaid principles cannot be disputed but they do not help the appellant on the issue of maintainability of the instant appeal.

29. The learned counsel for the appellant has relied upon the decision of the Apex Court in Shah Babu Lal Khimji (Supra) to contend that even in case of an interlocutory order passed by a trial judge even then an appeal under Letters Patent will lie and that any special act will not override the powers conferred on the Court under the Letters Patent.

30. In the aforesaid case of **Khimji (supra**), the Apex Court considered the nuances of the word 'judgment' while noticing Clause 15 of the Letters Patent of the Bombay High Court. In this context, the Apex Court considered the provisions of the C.P.C. and Letters Patent and in para 78 and 79 held as under:-

"78. Thus, after considering the arguments of counsel for the parties on the first two limbs of the questions, our conclusions are:

"(1) That there is no inconsistency between Section 104 read with Order 43 Rule 1 and the appeals under the letters patent and there is nothing to show that the letters patent in any way excludes or overrides the application of Section 104 read with Order 43 Rule 1 or to show that these provisions would not apply to internal appeals within the High Court.

(2) That even if it be assumed that Order 43 Rule 1 does not apply to letters patent appeals, the principles governing these provisions would apply by process of analogy.

(3) That having regard to the nature of the orders contemplated in the various clauses of Order 43 Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even though the suit is kept alive and that these orders do possess the attributes or character of finality so as to be judgments within the meaning of clause 15 of the letters patent and hence, appealable to a larger Bench.

(4) The concept of the letters patent governing only the internal appeals in the High Courts and the Code of Civil Procedure having no application to such appeals is based on a serious misconception of the legal position."

79. This now brings us to the second important point which is involved in this appeal. Despite our finding that Section 104 read with Order 43 Rule 1 applies to letters patent appeals and all orders passed by a trial Judge under clauses (a) to (w) would be

appealable to the Division Bench, there would still be a large number of orders passed by a trial Judge which may not be covered by Order 43 Rule 1. The next question that arises is under what circumstances orders passed by a trial Judge not covered by Order 43 Rule 1 would be appealable to a Division Bench. In such cases, the import, definition and the meaning of the word "judgment" appearing in clause 15 assumes a real significance and a new complexion because the term "judgment" appearing in the letters patent does not exclude orders not falling under the various clauses of Order 43 Rule 1. Thus the serious question to be decided in this case and which is indeed a highly vexed and controversial one is as to what is the real concept and purport of the word "judgment" used in clause 15 of the letters patent. The meaning of the word "judgment" has been the subject-matter of conflicting decisions of the various High Courts raging for almost a century and in spite of such length of time, unfortunately, no unanimity has so far been reached. As held by us earlier it is high time that we should now settle this controversy once for all as far as possible."

Since the issue before the Apex Court was different in **Khimji (Supra)**, hence, the said decision also does not come to the aid of the appellant.

31. The learned counsel for the appellant has then relied upon a Full Bench decision of this Court in **Rajit Ram Yadav (Supra)** wherein one of us (Hon'ble the Chief Justice Arun Bhansali,) was a member. The Full Bench of this Court in **Rajit Ram Yadav (Supra)** was considering whether an intra-court appeal would lie against a judgment of learned Single Judge in writ proceedings under Article 226 of the Constitution of India preferred against an order passed by an Authority exercising Appellate or Revisional power under U.P. State Road Transport Corporation Employees (other than officers) Service Regulations, 1981. In the aforesaid backdrop, the Full Bench traced the legislative history of the Letters Patent as well as the provision of Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 and noticed the scope of the provisions and what orders can be made amenable to an appeal under Chapter VIII Rule 5. The Full Bench considered that the order passed by an officer or authority exercising Appellate or Revisional powers under the U.P. State Road Transport Corporation Employees (other than officers) Service Regulations, 1981 was passed in exercise of the Central Act, consequently, the special appeal was held to be maintainable. Thus, on account of different factual matrix, the said decision does not throw much light on the issue of maintainability of an intra-court appeal arising out of an order passed under the Contempt of Courts Act, 1971.

32. Learned counsel for the appellant has then relied upon the decision of the Apex Court in **Midnapore (supra)**. In so far as this decision is concerned, it has been relied upon by both the parties and this Court deems it appropriate to consider this case at a later stage.

33. The learned counsel for the appellant has in the same vein relied upon the decision of the Apex Court in **Special**

Deputy Director (Supra), a decision of Division Bench of this Court in **Madarsa Ehl-E-Sunnat (supra), Anil Kumar Gupta (supra)** and **Daya Nand Sharma (Supra)** to buttress his submissions that where the learned Single Bench decides an issue touching upon the merit of the matter, in such circumstances, it cannot be said that such directions or finding returned by the learned Single Bench would be within the scope of jurisdiction under Article 226/227 of the Constitution of India, hence, an intra-court appeal would be maintainable. Reliance has also been placed on the decision of the another Division Bench decision of this Court in **Amit Mohan Prasad (Supra)** to submit that when a contempt judge enters into the merits of the issue which was contentious then an intra-court appeal would be maintainable and so is the proposition laid by another Division Bench of this Court in **Ashwani Kumar (Supra).**

34. On the other hand, the learned counsel for the respondents has relied upon various Division Bench decisions of this Court, namely in **Jagdamba Prasad (supra), Sheo Charan (Supra), Hub Lal Yadav (supra) , Committee of Management Smt. Dulhin Rajdhari Kunwari Kanya Junior High School Vs. Dinesh Chandra Kannaujia and Another in Special Appeal No. 303 of 2010 decided on 27.07.2017 Vinod Kumar Gupta (Supra), Shivam Das Chandani and Others Vs. Prabhu N. Singh and Others; 2022 (3) ADJ 275 (LB) (DB) (03) and Roop Singh Vs. Sri Vinay Kumar Johri and Others; 2020 (8) ADJ 519 (DB)** to submit that an order passed by a Contempt Judge in exercise of its contempt jurisdiction whereby the contempt proceedings have been discharged cannot be made the subject matter of an intra-court appeal.

35. This aspect has been elaborately dealt with by a Division Bench of this Court in **Sheo Charan (supra)** and the said reasoning has been followed by the subsequent Division Bench decisions of this Court as mentioned in the preceding paragraphs. The relevant paragraphs 8, 9, 10 and 11 of **Sheo Charan (supra)** reads as under:-

> *"8. The right of appeal under any other law against a decision of a Court is also taken away if the statue, which has conferred the jurisdiction on the court, has itself provided for an appeal from such a decision. The reason is that the rule that when a jurisdiction is conferred on a court, it imports the ordinary incidents of the procedure of that court including the right of appeal from its decision will not apply if the statute which has conferred the jurisdiction has itself made provision for appeal from the decision of such court. As the Act has provided for appeal from order/decision given thereunder, an appeal under Rule 5 of Chapter VIII of the Rules from such a decision is barred. A Division Bench of this Court in Ved Prakash Kapoor and Ors. v. Kamla Prasad Rai Special Appeal No. 316 of 1995, decided on 23.4.1997, has also held that an appeal filed against an order passed under the Act is not maintainable under Rule 5 of Chapter VIII.*

9. The Contempt of Courts Act was enacted "to define and limit powers of certain courts in punishing contempt of courts and to regulate their procedure in relation thereto-" The Supreme Court in Pritam Pal v. High Court of Pritam Pal Vs. High Court of Madhya Pradesh, Jabalpur through Registrar, has held that after the enforcement of the Act, the procedure laid down therein will govern the contempt proceedings before the High Court. The relevant extract of said decision is reproduced below:

Prior to the Contempt of Courts Act, 1971, it was held that the High Court has inherent power to deal with a contempt of itself summarily and to adopt its own procedure, provided that it gives a fair and reasonable opportunity to the contemner to defend himself. But the procedure has now been prescribed by Section 15 of the Act in exercise of the powers conferred by Entry 14, List III of the Seventh Schedule of the Constitution. Though the contempt jurisdiction of the Supreme Court and the High Court can be regulated by legislation by appropriate Legislature under Entry 77 of List I and Entry 14 of List III in exercise of which the Parliament has enacted the Act, 1971, the contempt jurisdiction of the Supreme Court and the High Court is given a constitutional foundation by declaring to be "Courts of Record" under Articles 129 and 215 of the Constitution and, therefore, the inherent power of the Supreme Court and the High Court cannot be taken away by any legislation short of constitutional amendment.

The Act has defined "contempt", laid down procedure and has placed limitation on the powers of the courts. By Section 19, the Act has created a right of appeal from an order or decision of the court imposing punishment for contempt. There is no provision for appeal under the Act against the decision discharging the notice of contempt and/or dismissing the contempt petition. When statute provides for appeal and also lays down the orders/decisions against which such an appeal can be filed, the Legislature"s intention is that appeal against all other orders is barred. As Section 19 has provided for appeal against an order or decision imposing punishment for contempt, the right to file an appeal against all other orders has been taken away by the statute. The result is that the appeal against a decision, rejecting the contempt petition is not maintainable under Rule 5 of Chapter VIII also.

10. Two decision of Supreme Court in State of West Bengal and others Vs. Kartick Chandra Das and others, and Pritam Pal Vs. High Court of Madhya Pradesh, Jabalpur through Registrar, on which reliance has been placed by the learned Counsel for the Appellant are of no help to him. In State of West Bengal and Ors. v. Kartick Chandra Das and Ors. (supra), the question before the Supreme Court was whether Section 5 of the Limitation Act can be applied to an appeal filed against the order of single Judge

passed in contempt jurisdiction. Supreme Court answered the said question in affirmative. The submission of the learned Counsel for the Appellant is that as in the above case the appeal was filed under Letters patent against the order of single Judge passed in contempt jurisdiction and as the Supreme Court has held that Section 5 of the Limitation Act is applicable to the said appeal, it should be presumed that the Supreme Court has decided that appeal against the judgment of single Judge, rejecting the contempt petition is maintainable under Letters Patent/Rules of the Court. This submission cannot be accepted. The question involved in the present case regarding the maintainability of the appeal under the Letters Patent/Rules of the Court against the decision of single Judge rejecting the contempt petition was neither raised before the Supreme Court nor was it decided by it. Therefore, this decision is not an authority for holding that against the order rejecting the contempt case an appeal can be filed under Rules of the Court. Supreme Court in The State of Orissa Vs. Sudhansu Sekhar Misra and Others, has declared that:

A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it.

The same principle was reiterated in Ambica Quarry Works v. State of Gujarat and Ors., (1987) 1 SCC 213 Similar is the position with regard to the case of Pritam Pal Vs. High Court of Madhya Pradesh, Jabalpur through Registrar, In that case also the controversy involved in the present case was not here.

11. Learned Counsel for the Respondents has, however, submitted that as no appeal lies u/s 19 of the Act from the decision of single Judge, dismissing the contempt petition, the applicant will be rendered remediless, if his appeal under Rule 5 of Chapter VIII is not held maintainable. This submission is also devoid of merit. In State of Maharashtra Vs. Mahboob S. Allibhoy and another, the Supreme Court has reiterated the rule that a contempt proceeding is not a dispute between the two parties and such a proceeding is a matter between the Court and the person, who is alleged to have committed contempt. The relevant passage from the said judgment is as under:

It is well-known that contempt proceeding is not a dispute between two parties, the proceeding is primarily between the court and the person who is alleged to have committed the contempt of court. The person who informs the court or brings to the notice of the court that anyone has committed contempt of such court is not in the position of a prosecutor, he is simply assisting the court so that the dignity and the majesty of the court is maintained and upheld. It is for the court, which initiated the proceeding to

decide whether the person against whom such proceeding has been initiated should be punished or discharged taking into consideration the facts and circumstances of the particular case.

36. Similarly, a Division Bench decision of this Court in **Jagdamba Prasad (Supra)** has followed the aforesaid reasoning and held as under :-

"A bare perusal of the provision quoted above would got to show that an Appeal in question is to lie against any order or decision of High Court in exercise of its jurisdiction to punish for contempt and only when there is a order of punishment for contempt then only appeal shall lie as a matter of right and in no other contingency, appeal would lie as a matter of right.

Apex Court, in the case of Purshottam Dass Goel vs. B.S. Dhillon (1978) SCC (Cri.) 195 has also clarified the position that appeal lies only against order of punishment passed by High Court in exercise of its jurisdiction to punish for contempt and in other contingency, appeal in question would not lie. View to the similar effect has been expressed in the case of State of Maharashtra vs. Mahboob S. Allibboy 1996 (4) SCC 411; Midnapore People's Co-operative Bank Ltd. vs. Chunni Lal Nanda 2006 (5) SCC 399; Sujitendra Nath Singh Roy vs. State of W.B. in Civil Appeal No.7335 of 2011 decided on 13.03.2015.

Remedy by way of Appeal is a creation of statute and once legislature, in its wisdom, has choosen not to provide for any remedy of appeal against order passed by learned Single Judge dropping the proceedings, then in the garb of Chapter VIII Rule 5 of High Court Rules, appeal in question cannot be said to be maintainable specially when proceedings under the Contempt of Courts Act, 1971 are self contained. 'Contempt proceedings' are principally proceedings inter-se the Court and the Contemnor, the person who approaches the Court for initiation of Contempt Proceedings, has status of Complainant/Informant and nothing beyond the same. Complainant has not been provided for with any right to prefer Appeal against the order passed by learned Single Judge. Right of appeal has been conferred on the contemnor who has been punished under the Contempt of Courts Act, 1971, and in other contingency, Appeal is not at all provided for or is maintainable. What is not at all provided for in the 'Statute', same cannot be provided for by taking aid of any other statutory provisions, in view of this, as far as order that has been passed for dropping the proceedings is concerned, against the same appeal in question is not at all maintainable. This Court in the case of Smt. Subhawati Devi vs. R.K. Singh 2004 (3) AWC has already clarified the situation that Special Appeal would not lie, except for the circumstances when

the order passed by learned Single Judge falls within the purview of judgement for under Chapter VIII Rule 5 of High Court Rules. Relevant paras of said judgement reads as follows:

"29. Learned counsel for the appellant, however, submitted that even if an appeal does not lie under Section 19(1) of the Act, an appeal is still maintainable under Clause 10 of the Letters Patent read with Chapter VIII. Rule 5 of the Rules as the instant appeal has been categorised as Special Appeal.

30. Let us, therefore, consider whether this appeal is maintainable under Clause 10 of the Letters Patent read with Chapter VIII, Rule 5 of the Rules.

36. Keeping the above principle in mind, we now deal with the question as to whether an order or a decision of the learned Judge rejecting the application for contempt and refusing to punish for contempt amounted to a "judgment" within the meaning of Clause 10 of the Letters Patent. To answer this query, the question to be decided is as to whether such an order would determine any right or liability of the parties. In our view, in rejecting the application for contempt and discharging the notice of contempt, it cannot be said that to proceed or not to proceed against the alleged contemnor was a matter of discretion of the Court and the appellant cannot be said to have acquired any right to ask for discretion to be exercised in a particular manner. It may also be said, in this connection, that the right of appeal can be made available to an aggrieved party and an aggrieved party, for the purpose of proceeding for contempt, has been held to be only a party who has been punished for contempt. Therefore, it can be safely concluded that when the Court refuses to commit the alleged contemnor, it does not decide any right or liability arising between the parties. Therefore, we are of the view that an order passed rejecting an application for contempt is not appealable under Clause 10 of the Letter Patent read with Chapter VIII, Rule 5 of the Rules. We, however, make it clear that there may be cases where some orders or directions have been made in variation of the original order in which an appeal can be held to be maintainable in law. However, we also make it clear that for the purposes of holding that an appeal is maintainable in law or not, one has to deal with the facts of the particular case for reaching to a proper conclusion.

37. There may be another ground for holding that an appeal under Chapter VIII. Rule 5 of the Rules against an order discharging the contempt notice is not maintainable, in law. A Division Bench of this Court in Sheo Charan v. Naval and Ors., 1997 (2) UPLBEC 1215 : 1997 AWC 1909, has held that Section 19 of the Act has created a right of appeal from an order or decision of the Court imposing punishment for contempt. There is no provision for appeal under the Act against the decision

discharging the notice of contempt and/or dismissing the contempt petition. In view of the fact that the Act provides for appeal and also lays down the orders/decisions against such an appeal can be filed, the intention of the Legislature must be said to be that an appeal cannot be filed under Clause 10 or under Clause 15 read with Chapter VIII, Rule 5 of the Rules as the Contempt of Courts Act is a complete Code wherein provision for appeal has been specifically provided.

38. Under Chapter VIII, Rule 5 of the Rules appeal is provided before the Division Bench of this Court from a judgment not being a judgment specified therein, of one of the learned Judges of this Court. Therefore, the question that needs to be decided as to whether an appeal from a decision of the learned Judge made in the exercise of his power under the Act is maintainable even though the Act itself has provided for an appeal from such a decision. We are in full agreement with the views expressed by the Division Bench of this Court in Sheo Charan (supra), in which it has been clearly established that if the Statute, which has conferred the jurisdiction on the Court, itself lays down the procedure, and provides for appeal from its decision, the appeal can be filed only under and in accordance with such a statute. In such a case general right of appeal from a decision of the Court stands excluded by the statute, which has conferred the jurisdiction on the Court. Such being the position, we are, therefore, of the view that an appeal against a decision rejecting the contempt petition was not maintainable also under Chapter VIII. Rule 5 of the Rules. The same view has been expressed by a Division Bench of this Court in A.P. Verma and Ors. v. U.P. Laboratory Technicians Association, Lucknow and Ors., 1998 (3) AWC 2264 : (1998) 3 UPLBEC 2333, wherein it has been held that no appeal is maintainable under Chapter VIII, Rule 5 of the Rules of the Court against any order passed in a proceeding under the Contempt of Courts Act as it is a self contained Code.

39. We also express an opinion as already done that no appeal is maintainable under Clause 15 of the Letters Patent against an order refusing to initiate proceedings for contempt of Courts. Same view was also expressed by a Division Bench of Madras High Court in Shanta V. Bai v. Basnanti Builders, 1991 Cri LJ 3026, wherein it was held that no appeal was maintainable under Clause 10 or 15 of the Letters Patent against an order rejecting the application for contempt and discharging the contempt notice."

37. A similar view was expressed by another Division Bench of this Court in **Hub Lal Yadav (Supra)** wherein the earlier decisions of the Apex Court and the Division Bench of this Court was considered and the relevant portion reads as under:-

"In our opinion the submission made by learned

counsel for the appellant is based on misreasoning of the judgment in the case of Midnapore Peoples' Coop. Bank Ltd. and others (Supra). The Supreme Court has specifically noted that if any issue is decided on merits then such directions of the contempt court can always be examined in a proceedings under the Letters Patent Appeal. We are of the considered opinion that in the facts of the case there has been no direction or decision on the merits of issues raised in the contempt application.

Similarly in the case of Vinita M.Khanolkar (Supra), the Apex Court has held that an appeal would be maintainable unless it is excluded by the statute. In our opinion, the said judgment also does not assist the appellant in any manner.

We may also record that contempt proceedings are quasi criminal in nature and, therefore, the provisions of Chapter VIII, Rule 5 of Allahabad High Court Rules to the proceedings an order dismissing an application for contempt would not be attracted except when the contempt court decides to pass orders issuing directions in exercise of powers under the contempt of courts Act which order would be referable to the powers vested in the High Court under Article 226 of the Constitution of India rather than the contempt of courts Act."

38. Again this Court in **Vinod Kumar Gupta (Supra)** had the occasion to consider the issue of maintainability and after tracing the legislative history of the Contempt of Courts Act, 1971, it also considered the earlier decisions of the Apex Court on the said point and it held as under:-

"32. While applying the above noted judgment in the facts of the present case, now this Court has to bestow its anxious consideration as to whether the present intra-Court appeal is maintainable against the judgment and order of the learned Single Judge while declining to initiate contempt proceedings against the opposite parties.

33. As noticed above, the Hon'ble Apex Court and this Court has consistently held that an intra-Court appeal is not maintainable against the order of the learned Single Judge exercising contempt jurisdiction in a contingency, when the contempt proceedings are not being initiated. The reliance placed upon the judgment in the case of Durga Nagpal (supra) is misconceived and misplaced as in the said case, the Hon'ble Judges while exercising appellate jurisdiction were confronted with the situation where the contempt Court reviewed its own order after entertaining miscellaneous application for modification of the final judgment. The Division Bench opined that when accused are discharged and proceedings are closed, miscellaneous application for modification is not maintainable. In the said perspective, the Special Appeal was held to be maintainable. Since the present case originates from a judgment and order of the contempt Court declining to exercise

contempt jurisdiction, thus, the said judgment is of no aid to the appellants.

35. Accordingly, we are of the firm opinion that the present intra-Court appeal against the judgment and order of the learned Single Judge dated 17.3.2023 declining to initiate contempt proceedings is not maintainable under Chapter VIII Rule 5 of the Rules of the Court.

36. Accordingly, the intra-Court appeal is dismissed as not maintainable."

39. Now, the stage is set to examine the rival submissions of the respective parties keeping in mind the principles of law as laid down by the Apex Court and this Court in the cases, noticed above.

40. At the outset, it will be relevant to state that Article 215 of the Constitution of India confers jurisdiction on the High Court to punish for contempt. The powers of contempt are exercised and are regulated by the Contempt of Courts Act, 1971. In order to iron out the procedural creases relating to presentation and hearing of the contempt petitions, this Court has framed the rules in Chapter XXXV-E of the Allahabad High Court Rules, 1952.

41. The power to punish for contempt conferred on the High Court cannot be abridged or be taken away as it is inherent in the High Court by virtue of being a court of record.

42. The Contempt of Courts Act, 1971 provides for two classes of contempt and it defines civil contempt and a criminal contempt. By using the word civil contempt and criminal contempt it does not in any manner suggest that for initiating or taking the contempt proceedings to finality, the Court takes recourse to provisions of either C.P.C or Cr.P.C. Moreover, the provisions of C.P.C. and Cr.P.C. are generally applicable on the respective courts who exercise powers to decide cases as per the nature of the case in terms of the classical bifurcation of civil and criminal jurisdictions. Hence, it cannot be said that the High Court exercises civil jurisdiction nor can it be said that it exercises criminal jurisdiction while dealing with matters relating to contempt.

43. It will be gainful to refer to the word "quasi'. As per the **Black's Law Dictionary Eighth Edition** the term 'quasi' is explained as under:-

"QUASI. A Latin word frequently used in the civil law, and often prefixed to English words. It is not a very definite word. It marks the resemblance, and supposes a little difference, between two objects, and in legal phraseology the term is used to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are also intrinsic and material differences between them. It negatives the idea of identity, but implies a strong superficial analogy, and points out that the conceptions are sufficiently similar for one to be classed as the equal of the other." 74 C.J.S. Quasi, at 2 (1951)."

44. Similarly, in **P. Ramanatha Aiyar's Advanced Law Lexicon 5th Edition**, the word 'quasi' has been explained as under:-

"Quasi (lat.)As if, it were analogous to; seemingly not really This term is used in legal phraseology to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are also intrinsic differences between them.

The word "quasi" marks the resemblance, and supposes a little difference, between two objects.

Seemingly but not actually; in some sense; resembling; nearly.

A Latin word frequently used in the civil law, and often prefixed to English words. It is not a very definite word. It marks the resemblance, and supposes a little difference, between two objects, and in legal phraseology the term is used to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are also intrinsic and material differences between them. It negatives the idea of identity, but implies a strong superficial analogy, and points out that the conceptions are sufficiently similar for one to be classed as the equal of the other". 74 CJS Quasi, at 2 (1951).

"Not exactly'. [State of U.P. v. Raja Mahendra Pal, AIR 1999 SC 1786: (1999) 4 SCC 43, 56, para 8]

The expression "quasi" is always prefix to a noun, to mean that it signifies something that does not exactly comply with the definition of the noun, although it shares its quality and falls philosophically under the same head. The word 'quasi' itself is derived from Laitn Rules to means "similar to but not exactly". [Mad. High Court Advocates Association v. Secretary, T.N. Bar Council, AIR 2015 Mad 213, para 54]."

45. Since in contempt proceedings, the Court is invested with powers to punish which may include imprisonment and the Court while dealing with contempt proceedings also calls for a reply from the contemnor and thereafter considering the matter it frames charges and moreover the standard of proof is higher than required in civil cases, hence to some extent, the subject of contempt resembles criminal proceedings, hence, in some judicial decisions the powers of contempt is referred to as 'quasi criminal' but the fact remains that the Court does not take recourse to provisions of either the C.P.C. or the Cr.P.C.

46. Hence, it can be safely said that the proceedings under the Contempt of Courts Act, 1971 are not criminal in nature to exclude a challenge to an order passed in contempt proceedings by referring to such an order as having been passed in exercise of criminal jurisdiction as mentioned in Chapter VIII Rule 5 of the Rules of the Court so as to totally bar the invocation of provisions of the Special Appeal in contempt matters.

47. However, there is an exception, which is in a very narrow spectrum and has been explained by the Apex Court in Midnapore (supra) in Para 11 (V) and the same is being reproduced here for clarity:-

"11.(V.) If the High Court, for whatsoever reason, decides an

issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases).”

48. Thus, it cannot be said as an inflexible rule that an intra-court appeal in no circumstance can be maintained. If an order passed in contempt jurisdiction has the trappings of a final order and/or it has the impact of diluting, varying the original order by which the disputes between the parties have been decided on merits or the Contempt Court touches the merit or passes an order beyond its scope then in such cases an intra court appeal can be maintained.

49. There is yet another angle with which this issue of maintainability can be viewed. Both the Contempt of Courts Act, 1971 and the Allahabad High Court Rules, 1952 are special statutes and operate in different orbits.

50. The Allahabad High Court Rules, 1952 incorporated the provision for Special Appeal in Chapter VIII Rule 5 vide notification dated 06.11.1963 which was published in the Uttar Pradesh Gazette Part-II on 05.12.1964. The Contempt of Courts Act, 1971 was promulgated, which is a special statute as it regulates the powers to be exercised by the High Court for contempt matters. As already noticed above, the power to punish for contempt is inherent with the High Court being a court of record. Hence, the provisions of the Contempt of Courts Act can neither take away the power nor confer it on the High Court rather it is only to regulate the powers which the High Court already possesses in terms of Article 215 of the Constitution of India. Additionally, the rules for contempt jurisdiction were incorporate in the Rules of the Court under Chapter XXXV-E vide notification no. 6 dated 24.11.1976 published in the U.P. Gazette Part- II on 12.02.1977.

51. Thus, it would be seen that the provision providing for an intra-court appeal through the High Court Rules, results in creating a special forum. Whereas the contempt of Court Act also being a Central legislation and that too is a special Act, which is aided by the Rules under Chapter XXXV-E of the Rules of the Court. Hence, the provision i.e. for intra-court appeal and the Act of 1971 are special provisions. In this regard the law is well settled that in case if there are two special legislations operating or overlapping a field then the legislation subsequent in point of time shall prevail unless contrary intentions appears from the provisions of the two Acts.

52. In the instant case, it will be relevant to notice that though there is actually no inconsistency between Chapter VIII Rule 5 or the provisions of the Contempt of Courts Act, 1971 but nevertheless even if at all there would have been any inconsistency, yet it would be the subsequent special legislation and in this case, the Contempt of Courts Act, 1971 which would prevail.

53. This Court gainfully refers to the decision of the Apex Court in

Allahabad Bank Vs. Canara Bank (2000) 4 SCC 406 wherein the issue of two special laws and its interplay was considered and the relevant portion reads as under:-

> *"39. There can be a situation in law where the same statute is treated as a special statute vis-à-vis one legislation and again as a general statute vis-à-vis yet another legislation. Such situations do arise as held in LIC of India v. D.J. Bahadur [(1981) 1 SCC 315] . It was there observed:*
>
> *"... for certain cases, an Act may be general and for certain other purposes, it may be special and the court cannot blur a distinction when dealing with the finer points of law".*
>
> *For example, a Rent Control Act may be a special statute as compared to the Code of Civil Procedure. But vis-à-vis an Act permitting eviction from public premises or some special class of buildings, the Rent Control Act may be a general statute. In fact in Damji Valji Shah v. LIC of India [AIR 1966 SC 135] (already referred to), this Court has observed that vis-à-vis the LIC Act, 1956, the Companies Act, 1956 can be treated as a general statute. This is clear from para 19 of that judgment. It was observed:*
>
> *"Further, the provisions of the special Act, i.e., the LIC Act, will override the provisions of the general Act, viz., the Companies Act which is an Act relating to companies in general."*
>
> *(emphasis supplied)*
>
> *Thus, some High Courts rightly treated the Companies Act as a general statute, and the RDB Act as a special statute overriding the general statute.*
>
> *Special law v. special law*
>
> *40. Alternatively, the Companies Act, 1956 and the RDB Act can both be treated as special laws, and the principle that when there are two special laws, the latter will normally prevail over the former if there is a provision in the latter special Act giving it overriding effect, can also be applied. Such a provision is there in the RDB Act, namely, Section 34. A similar situation arose in Maharashtra Tubes Ltd. v. State Industrial and Investment Corpn. of Maharashtra Ltd. [(1993) 2 SCC 144] where there was inconsistency between two special laws, the Finance Corporation Act, 1951 and the Sick Industries Companies (Special Provisions) Act, 1985. The latter contained Section 32 which gave overriding effect to its provisions and was held to prevail over the former. It was pointed out by Ahmadi, J. that both special statutes contained non obstante clauses but that the*
>
> *"1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one". (SCC p. 157, para 9)*
>
> *Therefore, in view of Section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts."*

54. In the aforesaid backdrop, it would be seen that the legislature has in the Act of 1971 provided a forum of appeal only in respect of an order passed by the Contempt Court imposing punishment in terms of Section 19 of the Act of 1971. The legislature has consciously not provided for an appeal against an order dropping the contempt proceedings.

55. Thus, there can be no manner of doubt that an appeal under Section 19 of the Act of 1971 will only lie against an order of punishment and since the impugned order at hand does not qualify to be a punishment order, hence, it cannot be challenged in an appeal under Section 19 of the Act of 1971.

56. Now, it will be appropriate to examine as to whether the order impugned can be challenged in an intra-court appeal in light of the exception made by the Apex Court in **Midnapore (supra)**. In the said case, the questions formulated by the Apex Court for consideration have been noticed in paragraph 9 which reads as under:-

> *"(i) Where the High Court, in a contempt proceeding, renders a decision on the merits of a dispute between the parties, either by an interlocutory order or final judgment, whether it is appealable under Section 19 of the Contempt of Courts Act, 1971? If not, what is the remedy of the person aggrieved?*
>
> *(ii) Where such a decision on merits is rendered by an interlocutory order of a learned Single Judge, whether an intra-court appeal is available under clause 15 of the Letters Patent?*
>
> *(iii) In a contempt proceeding initiated by a delinquent employee (against the enquiry officer as also the Chairman and Secretary in charge of the employer Bank), complaining of disobedience of an order directing completion of the enquiry in a time-bound schedule, whether the court can direct (a) that the employer shall reinstate the employee forthwith; (b) that the employee shall not be prevented from discharging his duties in any manner; (c) that the employee shall be paid all arrears of salary; (d) that the enquiry officer shall cease to be the enquiry officer and the employer shall appoint a fresh enquiry officer; and (e) that the suspension shall be deemed to have been revoked?"*

57. Thereafter the Apex Court noticed the provisions of Section 19 of the Contempt of Courts Act, 1971 as well as its earlier decisions on the aforesaid point and in paragraph 11, it crystallized the answer to point (I) before it as under:-

> *"11. The position emerging from these decisions, in regard to appeals against orders in contempt proceedings may be summarised thus:*
>
> *I. An appeal under Section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.*
>
> *II. Neither an order declining to initiate proceedings for contempt, nor an order initiating*

proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases)."

58. Having noticed the the dictum of the Apex Court in **Midnapore (supra)** and to arrive at a conclusion whether in the instant case, the intra-court appeal is maintainable, it will be apposite to examine the nature and the content of the order passed by the learned Single Judge in contempt jurisdiction and the relevant portion of the said order dated 10.07.2023 disposing of the contempt petition is being reproduced hereinafter for ready reference:-

"6. I have considered the submissions advanced by learned counsel for the applicant and perused the order of compliance.

7. On perusal of the order of compliance, it is clear that the direction issued by this Court was to grant promotion to the applicant from the date his juniors have been granted promotion. At the relevant point of time, Shri R.P. Singh was holding the post of Deputy General Manager and the applicant was granted notional promotion on the said post.

8. In view of the above, there is substantial compliance of the judgment and order dated 10.8.2016. In case the applicant is aggrieved by the order of compliance dated 22.5.2023, he may approach before the appropriate Forum for redressal.

9. With the aforesaid observation, the contempt application is finally disposed of."

59. The submission of learned counsel for the appellant has been that since the order passed by the Writ Court dated 10.08.2016 contained a direction to the Competent Authority to consider and give notional promotion to the petitioner by considering his case from the date his juniors were promoted within a period of three months, this was assailed by the respondents before the Apex Court and the Special Leave Petition was dismissed on 11.07.2022, thus, the reasoning given by the Department while filing the affidavit of compliance and granting notional promotion to the appellant is in teeth of the decision given by the Writ Court which was affirmed by the Apex Court and in the aforesaid backdrop holding that there is substantial compliance amounts to interfering with the directions of the writ court and also recording that there is substantial compliance of the order passed by the writ court necessarily implies examining the case on merits and moreover, once the Contempt Court had dropped the contempt proceedings by recording that there is substantial compliance, this world necessarily amount to entering into the merits, hence, in light of the decision of the Apex Court in **Midnapore (supra)**, the intra-court appeal is maintainable.

60. So far as Special Appeals under Chapter VIII Rule 5 of the Rules of the Court are concerned, the same is governed by certain principles which have been elucidated by a Full Bench of this Court in **Ashutosh Shrotiya and others Vs. Vice Chancellor Dr. B.R. Ambedkar University and Others 2015 SCC Online Alld 8553 (FB)** wherein in paras 30 and 41 it has been laid down as under:-

"30. We now formulate the governing principles:

(i) The expression 'judgment' was advisedly not defined in the Letters Patents of various High Courts which conferred a right of appeal against a judgment of a single Judge to a Division Bench of that Court;

(ii) The expression 'judgment' is not to be construed in the narrower sense in which the expression 'judgment', 'decree' or 'order' is defined in the CPC, but must receive a broad and liberal construction;

(iii) Every order passed by a trial Judge on the Original side of a High Court exercising original jurisdiction or, for that matter, by a learned single Judge exercising the writ jurisdiction, would not amount to a judgment. If every order were construed to be a judgment, that would result in opening a flood of appeals and there would be no end to the number of orders which could be appealable under the Letters Patent;

(iv) Any interlocutory order, to constitute a judgment, must possess the characteristic of finality in the sense that it must adversely affect a valuable right of a party or decide an important aspect of the trial in an ancillary proceeding. In order to constitute a 'judgment', the adverse effect on a party must be direct and immediate and not indirect or remote;

(v) In order to constitute a judgment, an interlocutory order must : (a) decide a matter of moment; or (b) affect vital and valuable rights of the parties and must also work serious injustice to the party concerned:

(vi) On the other hand, orders passed in the course of the proceedings of a routine nature, would not constitute a judgment even if they result in some element of inconvenience or hardship to one party or the other. Routine orders which are passed by a single Judge to facilitate the progress of a case may cause some element of inconvenience or prejudice to a party but do not constitute a 'judgment' because they do not finally determine the rights or obligations of the parties. Procedural orders in aid of the progression of a case or to facilitate a decision are not judgments.

---------*****------*****------****------

41. The area which both the judgments in Shah Babulal Khimji ((1981) 4 SCC 8 : AIR 1981 SC 1786) and Midnapore Peoples' Co-op. Bank Ltd. ((2006) 5 SCC 399 : AIR 2006 SC 2190) leave open to be considered is whether the order Which is sought to be placed in issue in appeal, though passed at an interlocutory stage,' is of a nature that would affect the vital and valuable rights of parties and work serious injustice to the party concerned. An order, which has the consequence of adversely affecting the valuable rights of a party has the characteristics or trappings of finality and has, therefore, been held to be a 'judgement' which is amenable to the appellate jurisdiction. For the purpose of this proceeding, it would not be appropriate for the Court to draw an exhaustive catalogue of the circumstances in which an order of the learned single Judge declining to even take note of a prayer for interim relief may result in an irreversible situation or irretrievable injustice that would affect valuable and substantive rights of a party to the lis. Ultimately; as the Supreme Court held in the decision in Central Mine Planning and Design Institute, ((2001) 2 SCC 588 : AIR 2001 SC 883), whether the order is a final determination affecting vital and valuable Tights and obligations of the parties concerned has to be ascertained on the facts of each case. Evidendy, there is a clear category of cases where an order is purely of a processual nature in aid of the final progression of a case and which neither determines nor has the effect Of determining vital and substantive rights as between the contesting parties. The test to be applied is whether the order of me learned single Judge has trappings of finality in the sense mat the consequenceof the order is to affect vital and valuable rights of the parties and to cause or work serious injustice to the party concerned. The judgments of the Supreme Court, leave it open to the appellate court to determine in the facts of each case whether these tests which have been laid down consistently for defining the ambit of the expression 'judgment', are fulfilled in the facts of each case. The judgment in Ghisai Ram Krishak Vidyalaya Samiti, (2015 (2) ALJ 163) cannot be read as taking away the discretion of the appellate court and its

unquestioned jurisdiction to enquire into the maintainability of an appeal on the, tests which have been laid down by the Supreme Court."

61. This Court gainfully refers to a decision of the Apex Court in **Ram Kishan Fauji Vs. State of Haryana; (2017) 5 SCC 533** wherein principles relating to intra-court appeal were considered and it was observed as under:-

"that till a competent legislature takes away the power of the Letters Patent, the same can be exercised by the High Court. However, while exercising the power under the Letters Patent, it is imperative to see what is the nature of jurisdiction that has actually been provided in the Letters Patent. The exercise of jurisdiction has to be within the ambit and scope of the authority enshrined in the provision meant for intra-court appeal. While summarising the principles related to intra- court appeal as have been held in various pronouncements, the Hon'ble Apex Court concluded:

"42.1. An appeal shall lie from the judgment of a Single Judge to a Division Bench of the High Court if it is so permitted within the ambit and sweep of the Letters Patent.

2.2. The power conferred on the High Court by the Letters Patent can be abolished or curtailed by the competent legislature by bringing appropriate legislation.

42.3. A writ petition which assails the order of a civil court in the High Court has to be understood. in all circumstances, to be a challenge under Article 227 of the Constitution and determination by the High Court under the said article and, hence, no intra-court appeal is entertainable

42.4. The tenability of intra-court appeal will depend upon the Bench adjudicating the lis as to how it understands and appreciates the order passed by the learned Single Judge There cannot be a straitjacket formula for the same."

62. Significantly, this Court after it had reserved the present matter for judgment came across a three Judges Bench decision of the Apex Court in **Ajay Kumar Bhalla Vs. Prakash Kumar Dixit, 2024 SCC Online SC 1874** where a similar issue, as involved in the instant case, was considered.

63. To place the matter in a perspective, as seen from the facts of the case of **Ajay Kumar Bhalla (supra)**, it would reveal that the Division Bench of the Delhi High Court on 24th December, 2019 had issued certain directions directing the petitioner therein to be reinstated in service with all consequential benefits but without any back wages. It was also directed that the date of reinstatement would relate back to the date of the petitioner therein having been originally removed from service i.e. 06th July, 1995 for the purposes of pay fixation, seniority and all other consequential benefits and the consequential order was to be issued within eight weeks. Since it was not done, the petitioner before the Delhi High Court instituted a contempt proceedings and the Department promoted the petitioner therein

to the rank of Deputy Commandant on notional post w.e.f. 17th October, 2001.

64. The learned Contempt Judge in the said case vide its order dated 02nd June, 2023 held that the petitioner in the contempt proceedings was entitled to all promotions till the rank of I.G. from 2021 till the date of his retirement. The learned Single Judge thereon proceeded to record that there was willful disobedience of the directions issued by the Division Bench and held the contemnor to be guilty of Contempt of Court for willful disobedience of the order passed by the Division Bench and then it went on to grant an opportunity of six weeks to the contemnor to issue fresh orders granting promotion to the petitioner (therein) to the rank of I.G. to bring him at par with his immediate junior as per merit-cum-seniority list at the point of appointment. It is in the aforesaid context that a Letters Patent appeal came to be filed before the Division Bench of Delhi High Court which was dismissed on the ground that no contempt appeal under Section 19 of the Contempt of Courts Act, 1971 was maintainable as the learned Single Judge had not crystallized any right in favour of the respondents.

65. In the aforesaid backdrop, the Apex Court considered its earlier decision in **Midnapore (supra)** and held that an appeal under Section 19 of the Contempt of Courts Act, 1971 lies only against an order imposing punishment for contempt. The relevant portion of the said decision reads as under:-

> *" The Division Bench has lost sight of this aspect. The Division Bench, in paragraph 52, noted the submission of the respondent that the judgment of the Single Judge should not be construed as crystallizing any right in favour of the respondent and should only be confined to the question as to whether the appellants herein had committed a willful disobedience of the order of the Division Bench dated 24 December 2019. The Division Bench accepted this submission and observed that "in view of our understanding of the impugned judgment, as noted above, the learned Single Judge has not decided any dispute regarding the rights and obligations of the parties" other than adjudicating on the issue of contempt. The judgment of the Division Bench lost sight of the fact that whether the appeal was maintainable would have to be construed on a plain reading of the judgment of the Single Judge. Two aspects were covered by the judgment of the Single Judge :*
>
> *Firstly, a finding that the appellants were guilty of contempt of the order dated 24 December 2019; and*
>
> *Secondly, that the respondent was entitled to promotion to the rank of IG.*
>
> *The first aspect is not amenable to an appeal under Section 19 at the present stage. The finding that the respondent was entitled to promotion to the rank of IG would be amenable to an appeal in terms of the law laid down by this Court in Midnapore Peoples' Coop. Bank Ltd. (supra), more particularly in paragraph 11(V) which has been extracted above."*

66. Having noticed the legal position as derived from the cases referred to hereinabove, it would be relevant to note that when a matter comes before a Contempt Court dealing with a civil contempt then it has to look into and arrive at a prima facie satisfaction that the order passed by the writ court has been complied with or not. If the Contempt Court is of the view that the order of the writ court has not been complied with then necessarily it will have to call upon the contemnor to show cause why he may not be punished for contempt of court and in course of such proceedings if it finds that the cause shown is not sufficient then it can proceed to frame charges and after affording an opportunity for hearing to the contemnor may move on to pass appropriate orders which may include punishing the contemnor for contempt or even pardon him. In case if the Contempt Court finds that the order passed by the writ court has been complied with, it has the power to drop the proceedings for contempt of court.

67. There may be a case where the compliance may not have been made in its true sense but nevertheless even while proceeding to punish for contempt, it is necessary for the Contempt Court to record a subjective satisfaction that the disobedience and non-compliance is willful and deliberate. Even if there is non-compliance but if it is not willful and deliberate then it may not necessarily culminate in a punishment order.

68. In a case where the Court finds that there is substantial compliance and it does not propose to proceed any further, even then at least a subjective prima facie satisfaction has to be recorded to drop the contempt proceedings. In such a situation, it cannot be gainfully said that the Contempt Court while dropping the proceedings has entered into the merits or has decided an issue before it.

69. The pith and substance of the aforesaid discussion, the legal principles involved and circumstances when an appeal may lie under Section 19 of the Contempt of Courts Act, 1971 and when a Special Appeal may lie from an order passed in contempt jurisdiction can be summarized as under:-

(A) Section 19 (1) of the Contempt of Courts Act can be invoked only when the Contempt Court has exercised its jurisdiction to punish for contempt. The essence of this provision is to provide a remedy against decision where the court has taken a definitive action to penalize a contemnor. This includes orders that impose fines, imprisonment, or other punitive measures directly related to the contemptuous behavior. Interlocutory orders, which do not entail punishment for contempt, do not fall within the ambit of Section 19. Such orders may include directions to produce documents, file affidavits, or procedural directives necessary for the continuation of the contempt proceedings. These are routine judicial actions that facilitate the progress of the case but do not constitute a final determination on the issue of contempt. Routine orders passed during the pendency of contempt proceedings are also excluded from the scope of Section 19. These orders are typically procedural and administrative in nature, ensuring that the

proceedings move forward without addressing the substantive issues of the original case or the merits of the contempt.

(B) The crux of the matter lies in the nuanced interpretation of what constitutes "merit" within the context of contempt proceedings, as referenced by the Supreme Court in the Midnapore Peoples Cooperative Bank Limited case. The term "merit" has not been defined in a straight jacket formula, leading to varying interpretations. However, a cumulative reading of the judgments provide clarity on several key aspects. In the Midnapore case, the Supreme Court held that in contempt proceedings, it is inappropriate to adjudicate or decide any issue related to the merits of the dispute between the parties. This principle aims to ensure that contempt proceedings do not encroach upon the substantive rights of the parties involved in the original dispute. The focus of contempt jurisdiction is to uphold the dignity and authority of the court, not to resolve the underlying dispute. The term "merit" in this context refers to the substantive issues of the original case that led to the contempt proceedings. It encompasses the core legal and factual questions that were or are being contested in the original litigation.

(C) Special appeals from the order or judgment of a single judge bench in contempt cases hinge on the distinction between addressing the merits of the original dispute and the conduct constituting contempt. The primary responsibility of the Contempt Court is to determine whether contempt has occurred and to impose appropriate sanctions if it has. The merits of the original controversy are outside the domain of the contempt court. However, when the Contempt Court issues directions or discusses the merits of the original controversy, it oversteps its jurisdiction. In such cases, a special appeal would lie to the High Court. This ensures that the original substantive issues are not inadvertently decided within the limited scope of contempt proceedings, preserving the parties' rights to a fair adjudication of their dispute.

(D) The interpretation of each case depends on its specific facts and circumstances. Courts must carefully distinguish between orders that address the procedural aspects of contempt proceedings and those that encroach upon the substantive issues of the original case. This distinction is crucial to maintaining the integrity of contempt jurisdiction and ensuring that appeals under Section 19 of the Act of 1971 are appropriately limited to cases where punitive action for contempt has been taken.

Thus, Special appeals in contempt cases are warranted only when the Contempt Court oversteps its jurisdiction by addressing the merits of the original dispute, ensuring that the substantive rights of the parties are protected. The interpretation of each case must consider the specific facts and circumstances to uphold the

integrity of contempt jurisdiction and provide appropriate remedies for aggrieved parties.

70. If the impugned order is now tested on the anvil of the principles summarized above then it would reveal that the Contempt Court vide order impugned has neither touched the merit nor has decided any issue and it has not made any direction relating to the merits of the disputes between the parties. Hence, it cannot be canvassed that the Contempt Court overstepped its jurisdiction.

71. Thus, in the aforesaid facts and circumstances, this Court is of the firm view that the intra-court appeal is not maintainable. Accordingly, it is ***dismissed***. There shall be no order as to costs.

(2024) 8 ILRA 788
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-C No. 22076 of 2003

Roop Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anil Kumar Aditya

Counsel for the Respondents:
C.S.C.

Civil Law – Constitution of India,1950 – Article – 226, – UP Imposition of Ceiling on Land Holdings Act, 1976 – Section – 27, 27(4) & 27(6) - writ petition – challenging the impugned cancellation proceeding of Lease – St. granted leased of surplus land in year 1976 – St. initiated proceeding for cancellation of lease in year 1994 – court finds that, impugned order is based on the alleged fact that allottee has transferred the allotted plot in favour of another person without executing sale deed but petitioner has taken specific stand that he has never sold the property and he is in possession of the plot - cancellation proceeding is time barred u/section 27(6) of Ceiling Act, 1976 – no counter affidavit has been filed by the St. for last 21 years – held, ground taken for cancellation in the impugned order cannot be sustained on merit and in the light of law laid down by this court in Dinesh Kumar's Case impugned orders are liable to be set aside and lease executed in favour of the petitioner is hereby affirmed – writ petition, allowed. (Para – 10, 12, 13)

Writ petition allowed. (E-11)

List of Cases cited:

Dinesh Kumar Vs St. of U.P. & anr.– 2006 (2) ADJ 155 (Alld).

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard learned counsel for the petitioner and Mr. Shyam Singh, learned Standing Counsel for the State respondents.

2. Brief facts of the case are that petitioner was allotted lease of the surplus land declared under U.P. Imposition of Ceiling on Land Holdings Act, 1976 hereinafter referred as Ceiling Act. The proceeding for cancellation under Section 27 (4) of the Ceiling Act has been initiated by the State in the year 1994 and by ex-parte order dated 13.10.1995, the lease of the petitioner has been cancelled. Petitioner filed restoration application against the order dated 13.10.1995. The aforementioned restoration application was dismissed by the Commissioner vide order dated 4.4.2003 hence this writ petition filed on behalf of the petitioner for the following reliefs:-

" (i) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 4.4.2003 passed by respondent no.2 and the order dated 13.10.1995 passed by respondent no.3.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondents not to interfere in peaceful possession of the petitioner over the land in dispute."

3. This Court entertained the matter on 22.5.2003 and passed the following interim order:-

"Learned Standing Counsel appearing for the respondents prays for and is allowed one month's time to file counter affidavit. Rejoinder affidavit may be filed within two weeks thereafter.

List in first week of August, 2003.

In the meantime, the petitioner if not already dispossessed in pursuance of the order dated 13.10.1995 as confirmed by order dated 4.4.2003, shall not be dispossessed from the land in dispute."

4. No counter affidavit has been filed by State in spite of the time granted by this Court on 22.5.2003.

5. Learned counsel for the petitioner submitted that petitioner was granted lease in the year 1976 in respect to the land which was declared surplus in the ceiling proceeding. He further submitted that proceeding for cancellation has been initiated in the year 1994 which is barred by the provisions contained under Section 27 (6) of the Ceiling Act. He submitted that the ground of cancellation is also misconceived, as such, the impugned order passed by Commissioner cancelling the petitioner's lease is liable to be set aside. He further submitted that restoration application filed by petitioner has also been dismissed in arbitrary manner. He placed reliance upon the judgement of this Court reported in ***2006 (2) ADJ 155 (All) Dinesh Kumar Vs. State of U.P. and Another*** in order to demonstrate that cancellation proceeding under Section 27 (4) of the Ceiling Act cannot be initiated after the prescribed period of limitation as provided under Section 27 (6) of the Ceiling Act.

6. On the other hand, Mr. Shyam Singh, learned Standing Counsel for the State respondents submitted that there is no illegality in the impugned order. He further submitted that the ground for cancellation is mentioned in the order, as such, no interference is required in the matter. He further submitted that order for cancellation was passed in the year 1995 and the highly time barred restoration application has been filed by the petitioner which has rightly been dismissed by the Commissioner vide order dated 4.4.2003. He submitted that no interference is required in the matter and writ petition is liable to be dismissed.

7. I have considered the arguments advanced by learned counsel for the parties and perused the records.

8. There is no dispute about the fact that petitioner was granted lease in the year 1976 in respect to the land which has been declared surplus under the Ceiling Act. There is also no dispute about the fact

that proceeding for cancellation has been initiated after the prescribed period of limitation as provided under Section 27 (6) of the Ceiling Act and under the impugned order, petitioner's lease has been cancelled.

9. In order to appreciate the controversy involved in the matter, the perusal of Section 27 (6) of the U.P. Imposition of Ceiling on Land Holdings Act, 1976:-

> ***"Section 27 (6) of the Ceiling Act- (6) The Commissioner acting of his own motion under sub-section (4) may issue notice, and an application under that sub-section may be made, ?***
>
> ***6[(a) in the case of any settlement made or lease granted before November 10, 1980, before the expiry of a period of 7[seven years] from the said date, and ;***
>
> ***6(b) in the case of any settlement made or lease granted on or after the said date, before the expiry of a period of 8[five years from the date of such settlement or lease or up to November 10, 1987, whichever be later]"***

10. The perusal of the provisions as quoted above as well as the fact that proceeding for cancellation has been initiated after about 18 years, as such, the order for cancellation of petitioner's lease passed by the Commissioner cannot be sustained in the eye of law.

11. This Court has held that in the case of ***Dinesh Kumar (Supra)*** that time barred proceeding for cancellation under Section 27 (4) of the Ceiling Act cannot be entertained. The relevant paragraph Nos. 4,5 and 6 of the judgement are as follows:-

> ***" 4- Admittedly, the initial allotment of the plot was made by the Land Management Committee on 6.3.1976 and was approved by the Sub Divisional Officer on 19.11.1977, after which the name of the allottees had been entered in the revenue records. As such, the lease was granted in favour of the petitioner before November 10,1980. The specific condition of the petitioner is that under the aforesaid sub- Section (6) of Section 27, no notice for cancellation of the lease granted in favour of the petitioner could thus be issued after November 10, 1987. In the present case, the notice has been issued on 18.5.1993. As such the proceedings for cancellation of the lease granted in favour of the petitioner could not have at all been initiated after 10.11.1987. The specific averments to this effect have been made in paragraphs 22 and 23 (a) of the writ petition, to which there is no denial in the counter affidavit.***
>
> ***5. Even otherwise, in the impugned order it has been stated that the land which was allotted to the petitioner for agriculture use was being used for building houses and hence the lease was being cancelled. In the same order itself it has been mentioned that there is no construction on the said land and thus the very ground on which the notice had been issued to the petitioner on 18.5.1993 that buildings were***

being constructed on the said land does not have any basis.

6. For the foregoing reasons, the impugned order dated 22.1.2002, besides being without jurisdiction, is also not tenable in law on merits and is thus liable to be quashed. Accordingly, this writ petition stands allowed and the order dated 22.1.2002 passed by respondent no.2, the Additional Commissioner (Administration), Meerut Division, Meerut is quashed. There shall be no order as to costs."

12. The ground taken for cancellation in the impugned order is that petitioner Roopram has transferred the allotted plot in favour of one Manipal without executing sale deed but petitioner has taken specific stand in paragraph No. 12 of the writ petition that petitioner has never sold the property in dispute and petitioner is continuing in possession of the plot in dispute. No counter affidavit has been filed by State for the last 21 years, as such, there is no option except to decide the writ petition on merit. The ground taken for cancellation in the impugned order cannot be sustained on merit.

13. Considering the entire facts and circumstances of the case as well as the ratio of law laid down by this Court in ***Dinesh Kumar (Supra)***, the impugned orders dated 4.4.2023 and 13.10.1995 passed by respondent no.2 are liable to be set aside and the same are hereby set aside. Writ petition stands **allowed** and the lease executed in favour of the petitioner in the year 1976 is hereby affirmed.

14. No order as to costs.

(2024) 8 ILRA 791
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2024

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 24279 of 2024

C/m Grih Laxmi Sakhari Awas Samiti Ltd. & Ors. ...Petitioners

Versus

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

Counsel for the Petitioners:
Lavlesh Kumar Shukla, Sr. Advocate

Counsel for the Respondents:
Ayank Mishra, C.S.C., Nipun Singh

Civil Law - Uttar Pradesh Cooperative Societies Act, 1965 - Sections 31, 38(1), 38(2), 65, 66, 68, 69, 70, 71 - Removal of an officer of a co-operative society - Secretary and Chairman of the Society - Validity - Allegation of allotting flat without taking money from allottee - Proceeding initiated by respondent no. 2 is wholly without jurisdiction and arbitrary - No records of deposits being made by allottee in respect of flat allotted to her, there is no any evidence regarding cost of flat being deposited in account of Society – Legitimate notices were issued to allottee in respect of which a dispute had been raised by allottee which was later on referred to arbitration under Section 70 of Act, 1965, an Arbitrator was appointed and before whom arbitration proceedings are in progress - Under the circumstances, the proceedings initiated by respondent no. 2 u/s 38(1) of Act, 1965 on complaint made by allottee in respect of same dispute that has been referred to arbitration, is without jurisdiction, arbitrary and illegal - There is no material before the respondent to resort to drastic steps under aforesaid section – Impugned

orders dated 30.5.2024 and 4.7.2024 quashed. (Para 4, 6)

Writ petition is allowed. (E-13)

List of Cases cited:

1. C/M The Meerut Sahkari Avas Samiti & 2 Ors. Vs St. of U.P. & 4 Ors, 2024 (1) ADJ 371

2. Smt. Vandana Varma & ors.Vs St. of U.P. & Ors, 2019 (9) ADJ 125 (FB)

3. Narayan Govind Gavate Vs St. of Maharashtra, (1977) 1 SCC 133

4. Swadeshi Cotton Mills Vs Union of India, (1981) 1 SCC 664

5. Maya Devi Vs Raj Kumari Batra, (2010) 9 SCC 486

6. Union of India Vs Raj Grow Impex LLP, (2021) 18 SCC 601

(Delivered by Hon'ble Jayant Banerji, J.)

1. When the matter was last listed on 6.8.2024, the following order was passed :-

> "Heard learned counsel for the petitioners and Sri Ravi Anand Agarwal learned counsel appearing for the respondent No.2 & 3 who has produced another file containing original records.
>
> With the consent of the parties this matter was heard for final disposal.
>
> No counter affidavit has been called because the same does not appear to be required as the original record has already been produced and is available and the dispute is primarily one of jurisdiction of the respondent No.2 to pass the impugned orders.
>
> List on 22.08.2024 for delivery of judgment.
>
> Till that date, further proceedings consequent to the impugned orders, shall remain stayed.
>
> The files containing original records shall be returned back after the delivery of judgment."

2. This writ petition has been filed seeking the following reliefs:-

> "(i) Issue a suitable writ, order or direction in the nature of certiorari quashing the impugned orders dated 30.05.2024 and 04.07.2024 passed by the Additional Housing Commissioner/Additional Registrar, U.P. Avas Evam Vikas Parishad, Lucknow (Annexure Nos.4 and 7 to the writ petition).
>
> (ii) Issue a suitable writ, order or direction in the nature of mandamus commanding the respondents not to give effect to the impugned orders referred to above and stay all further proceedings consequent thereupon during the pendency of the writ petition.
>
> (iii) Issue a suitable writ, order or direction in the nature of mandamus commanding the respondents not to interfere in the peaceful functioning of the petitioners as Committee of Management of Grih Laxmi Sahkari Awas Samiti Ltd., District Gautam Buddh Nagar and its office bearers as President and Secretary respectively.
>
> (iv) Issue any other writ, order or direction which this

Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

(v) Award the cost of the writ petition."

3. By the impugned order dated 30.5.2024, the respondent no.2, the Additional Registrar of Cooperative Societies, in exercise of power under Section 38(1) of the Uttar Pradesh Cooperative Societies Act, 1965[1], directed the petitioner no.1- Committee of Management of Grih Laxmi Sahkari Awas Samiti Limited, Gautam Budh Nagar to remove the Secretary and Chairman of the Society[2] within one month from the posts occupied by them under intimation to the office.

By the other impugned order dated 4.7.2024, exercising power under Section 38(2) of the Act, 1965, the respondent no.2 has directed the petitioner no.2-Chairman and the petitioner no.3-Secretary of the Society to appear before him for purpose of affording them opportunity of hearing prior to their removal or removal and disqualification.

4. Briefly stated case of the petitioners is that the Society is registered under the Act, 1965 having its registered by-laws. The election of the Committee of Management of the Society was held in the month of February 2023, in which the petitioner no.2 was elected as Chairman and petitioner no.3 was appointed by the elected Committee of Management as Secretary of the Society under Section 31 of the Act, 1965. The respondent no.4, Smt. Kunta Devi, is stated to be a member of the Society and there is a dispute in respect of the Flat No. H-207 allotted/registered in the name of Smt. Kunta Devi, as a complaint had been received that the said flat was registered in her favour by the former Secretary of the Society, namely Smt. Sushila Saraswat, even without payment being made by Smt. Kunta Devi and without the same being deposited in the account of the Society. It is stated that even after the election in February 2023, the former Secretary, Smt. Sushila Saraswat, has not handed over papers of the Society. It is stated that the daughter of Smt. Sushila Saraswat is married to the son of respondent No.4, Smt. Kunta Devi.

Notice was issued by the petitioners requiring Smt. Kunta Devi to submit necessary evidence to show that actual payment for the flat was made by her and that the same was deposited in the account of the Society. For purpose of getting necessary information regarding deposit, a notice dated 4.5.2024 was also issued by the officiating Secretary to the aforesaid former Secretary, Smt. Sushila Saraswat. Under the circumstances, Smt. Kunta Devi applied to the Registrar, Housing Society for appointment of an Arbitrator under Section 70 of the Act, 1965 and by an order dated 27.5.2024, an Additional Commissioner/Registrar, Cooperative Housing Society was appointed as Arbitrator in that case. It is stated that the petitioners have appeared before the Arbitrator and they have been supplied necessary papers for submitting reply and next date was fixed by the Arbitrator.

5. In the meantime, respondent no.4, Smt. Kunta Devi, made a complaint before the respondent no.2 on which an inquiry was ordered by respondent no.2 and some inquiry report behind the back of the petitioners was submitted. It is stated that acting thereon, the impugned order dated

30.5.2024 was passed by respondent no.2 in arbitrary exercise of powers under Section 38(1) of the Act, 1965, which is without jurisdiction.

Thereafter, in a meeting of the Committee on Management of the Society held on 24.6.2024, it was resolved that given the fact that Smt. Kunta Devi had already approached the Arbitrator and the dispute between Smt. Kunta Devi and the Society is pending before the Arbitrator, the entire action against the elected Chairman and appointed Secretary is wholly unwarranted and the order dated 30.5.2024 is required to be reconsidered. It is stated that the resolution alongwith a covering letter was received in the office of respondent no.2 on 25.6.2024. It is stated that without duly considering the resolution of the Committee on Management and without considering that the dispute between the parties is pending before the Arbitrator, the other impugned order dated 4.7.2024 was passed.

6. The contention of learned counsel for the petitioners is that the proceeding initiated by respondent no. 2 under Section 38(1) of the Act 1965 is wholly without jurisdiction and arbitrary, inasmuch as for want of papers from the previous Secretary of the Committee of Management, and there being no record of deposits being made by Smt. Kunta Devi in respect of the flat allotted to her and nor there being any evidence with regard to the cost of the flat being deposited in the account of the Society, legitimate notices were issued to Smt. Kunta Devi in respect of which a dispute had been raised by Smt. Kunta Devi which was referred to arbitration under Section 70 of the Act, 1965 and an Arbitrator was appointed and before whom arbitration proceedings are in progress. It is stated that under the circumstances, the proceeding initiated by respondent no. 2 under Section 38(1) of the Act, 1965 on the complaint made by Smt. Kunta Devi in respect of the same dispute that has been referred to arbitration, is without jurisdiction, unwarranted, arbitrary and illegal. It is stated that there is no material before the respondent to resort to the drastic steps under Section 38 of the Act, 1965.

7. In view of the submissions made by the learned counsel for the petitioners, the respondent no.2 was directed to produce the original records pertaining to the case.

8. Learned counsel for the respondent no.2 has strongly urged that there were adequate materials before the respondent no.2 to resort to proceedings under Section 38(1) of the Act, 1965 for proceeding against the petitioner nos. 2 and 3. It is contended that it was not only the respondent no.4, Smt. Kunta Devi, who had complained, but other members of the Society had also leveled serious allegations against the Chairman of the Committee of Management because of which the respondent no.2 was justified in taking the proceedings. Learned counsel has referred to a letter dated 10.5.2024 on the original record allegedly sent by several members of the Society to the Principal Secretary voicing their complaints. Learned counsel has also placed reliance upon a judgment passed by a coordinate Bench of the Court in the matter of **C/M The Meerut Sahkari Avas Samiti & 2 Ors. vs. State of U.P. & 4 Ors.**[3] to contend that the scope of Section 38 of the Act, 1965 has been considered by the Court and that judgment is squarely applicable to the facts of the present case and, therefore, the respondent no.2 was

justified in proceeding under Section 38 of the Act, 1965 against the petitioners in the present case.

9. In the original record a complaint letter dated 2.4.2024 of Smt. Kunta Devi is on record, which, however, does not bear her signature. In that letter it is stated that she tried several times to sell her house, but the Secretary is creating hurdles in the way despite knowing that she is an aged lady and she requires to sell the house for money. In that letter, she also submitted her parawise reply to the letter that was stated to be sent by the Secretary of the Society.

10. A letter dated 4.4.2024 was sent by the respondent no.2 to the Cooperative Officer (Housing), Shri Arimardan Singh Gaur, in which it was stated that with reference to the letter of the respondent no.2 dated 20.2.2024 which was issued regarding the letter of 30.1.2024 of Smt. Kunta Devi for reconsideration of the matter of sale of her flat. On that, the Housing Commissioner had directed immediate inquiry and report alongwith a proposal. It was directed that the resolution with regard to the 'No Objection', be given within a period of three days but that resolution was not made available. This letter of 4.4.2024 further mentions that in the meanwhile, Smt. Kunta Devi's letter of 2.4.2024 was received by the office on which the Housing Commissioner had directed "*Pls. get the matter enquired and fix the responsibility and put up A.T.R. on file till 9.4.2024"*. It was, accordingly, directed that the needful be done within a period of three days and report be submitted before the respondent no.2.

In the complaint dated 5.4.2024 (page 66 of original record), the respondent no.4 reiterated her complaint made on 2.4.2024.

11. It is pertinent to mention here that on record at page no.21 is a letter dated 5.4.2024 sent by Shri Arimardan Singh Gaur, Cooperative Officer (Housing) to the Secretary of the petitioner-Society referring to the letter dated 4.4.2024 of the respondent no.2 regarding submission of the inquiry report. It is stated therein that there was a report required by the Housing Commissioner himself by 9.4.2024. It is stated in that letter that relatives of Smt. Kunta Devi are constantly complaining to the higher authorities as the matter was not being disposed of within a time frame and since Smt. Kunta Devi had become too old, the matter has become extremely sensitive. It was, therefore, stated that the letter be taken to be a notice and if immediate steps are not taken as per rules, then it should be assumed that the Secretary is deliberately delaying the issue and, accordingly, steps would be taken under the Act, 1965.

12. On page 23 of the original records is a letter dated 7.4.2024 of the Cooperative Officer (Housing) addressed to the respondent no.2 with reference to letter no.61/Sah./dated 4.4.2024. He referred to his letter dated 5.4.2024 issued to the Secretary of the Society whereby a report was sought. It was stated that even earlier, the Secretary and the Chairman of the Society were informed telephonically for speedy disposal of the matter but on every occasion the Secretary of the Society narrated some legal impediment, and that only after verification steps can be taken and, therefore, had refused to issue a 'No Objection Certificate'; whereas by the letter dated 5.4.2024, the respondent no.2 had asked for it being made available forthwith. It was stated that he has been informed by a

letter of the Chairman of the Society that the Secretary of the Society has gone abroad and only after his return in the following month, decision could be taken after due consideration.

It was further stated in the letter of 7.4.2024 that the Secretary of the Society by his letter dated 6.4.2024 has informed that Smt. Kunta Devi's flat was allotted previously for more than 10 years to the former Chairman of the Society, Shri R.C. Sharma, and in support of that, copies of two maintenance receipts had been submitted by him, but no other good evidence had been presented by him; further, photocopies of various letters exchanged with Smt. Kunta Devi had also been submitted; that no final conclusion is possible to be reached on the basis of those letters; in view of the talks with Chairman of the Society, it appeared that certain documents of Smt. Kunta Devi were not available on the record because of which repeatedly the Management of the Society was writing letters to Smt. Kunta Devi; that in the matter, given the advanced age of Smt. Kunta Devi, the Management of the Society ought to have acted sympathetically and acted with more alacrity for disposal of the matter; therefore, it appeared that the Management of the Society was not working with adequate urgency because of which the matter was pending for several months; the officer has directed the Management of the Society to dispose of the matter in a time bound manner and the Chairman of the Society has assured that he will make all efforts in that regard. However, in this letter of 7.4.2024, in the last paragraph, the officer wrote that in the aforesaid inquiry, the management of the Society was not giving adequate cooperation because of which the role of the management was suspicious. Therefore, recommendation was made for undertaking detailed inspection of the records of the Society under the provisions of Section 66 of the Act, 1965 so that the role of the management of the Society could be inquired into.

13. By a letter dated 19.4.2024 (page 121 of the original record), the petitioners wrote to the Cooperative Officer (Housing), who was conducting the inquiry, making detailed submissions with regard to the various irregularities existing in the Society which reflected wrong doings by the previous Committees of Management. This letter was in furtherance of a previous letter dated 8.4.2024 sent by the Society to the officer of the respondent no.2 in response to a letter dated 5.4.2024. It was stated that a letter was sent to Smt. Kunta Devi asking from her certain information within a period of three days but even till 18.4.2024, the response was awaited. The letter recorded the following :-

> (i) A list of 7 flats was submitted in which 5 flats were stated to be benami properties and all 7 of which were allotted to persons who were related to each other, whose bank accounts are more than 100 kms. away from their residence at Aligarh, Hathras and Mathura, in the Nainital Bank at Sector -18, Noida. It was stated that one Radha Raman is also the brother of one of the allottees, Smt. Sushila Saraswat, and her bank account is also in that bank branch even though she is a resident of Morena in Madhya Pradesh. Several points with regard to the discordance in the membership of the persons mentioned in the list

were noted. It was then stated that it is common knowledge that in Cooperative Housing Society, individuals flats are being allotted to several persons and the existing Management of the Society wants to avoid any stigma in this regard, but the Inquiry Officer and the higher authorities want to maintain the influence of Smt. Sushila Saraswat (the former Secretary of the Society) during the term of present Management. It was alleged, inter alia, that for handing over complete charge, repeated letters and personal requests of the petitioners were being ignored and opportunity was being granted to the former Secretary for manipulating the records. A direct allegation made was that at the instance of the authorities, Smt. Sushila Saraswat is selling off her benami flats in which the authorities are appearing as accomplice. It was stated that despite an unsigned complaint made by Smt. Kunta Devi, the Housing Commissioner himself took cognizance of the same and not only did he direct time bound action but has also directed to fix responsibility for not issuing a 'No Objection Certificate'. It was stated that it is not known that what the Additional Commissioner/Additional Registrar had done to ensure handing over charge from the former Secretary.

(ii) It was stated that from several sources, proof was found that the rent of the benami flats was being made directly in the Axis Bank Account No.918010038855435 of Smt. Sushila Saraswat. The details of the same were enclosed with the letter. No one had seen any of the allottees other than Smt. Sushila Saraswat and her daughter Ritu. During verification, the signature of each of them was made by another person, which was different from the signature made in the presence of the members of the Management. It was stated that in view of the unnecessary inference of the Additional Registrar, NOCs regarding transfer of six of the aforesaid flats had been given, in which till that point of time no dispute had surfaced. It was stated that the flat in question would also have been sold but for the reason that despite assurance, the tenant residing therein was not vacating the flat and the reasons for the same were inquired from which inquiry it emerged that there are some wrong doings regarding the ownership of that flat and, therefore, the tenant is not following the directions. The receipts of dues with regard to electricity and maintenance charges (of the flat) were not made available by Smt. Kunta Devi. As such, her ownership of the flat in question is suspicious and, therefore, giving of an NOC for the transfer of that flat would not be possible. It was stated that a conspiracy was reflected in the matter in view of the wrong doings of the former Secretary Smt. Sushila Saraswat, the details of which were mentioned in that letter.

14. The Cooperative Officer (Housing) submitted an inquiry report

dated 20.4.2024, which appears on page 123 of the original record, in which it was alleged that there was non-cooperation by the Committee of Management of the Society which was giving inappropriate response. It was also stated in that report that the relatives of Smt. Kunta Devi are constantly demanding that the Inquiry Officer should get a 'No objection Certificate' (from the Society) immediately, whereas the entire proceeding with regard to the membership has to be done at the level of the Committee of Management of the Society. At the level of the Inquiry Officer, no action could be taken till a proper resolution is not passed by the Committee of Management of the Society. It was stated in that report by the Inquiry Officer that both the parties were inappropriately pressurising him because of which his position has become very paradoxical. It was stated that for a proper inquiry, a committee be constituted. He recommended an inspection under Section 66 of the Act, 1965 so that the records of the Society could be inspected and the role of the Committee of Management could be properly investigated.

15. In another complaint letter dated 29.4.2024, which is on page 128 of the original record, Smt. Kunta Devi, the respondent no.4, apart from reiterating her previous complaint, also sought to give evidence in support of her claim and alleged that the Society is going to usurp her flat. In this letter, it was urged that steps be taken against the Committee of Management of the Society under Section 70 of the Act, 1965.

16. With reference to the inquiry report dated 20.4.2024, the respondent no.2 issued two letters dated 30.4.2024. One letter bears letter No.408/sah./30.4.2024 (on page 124 of the original record). In this letter, in exercise of powers under Section 66, Shri Anand Kumar Mishra, Assistant Housing Commissioner/Assistant Registrar and Shri Arimardan Singh Gaur, Cooperative Officer were nominated and directed to **undertake a detailed inspection and submit an inspection report within 15 days.**

There is also a letter dated 30.4.2024 bearing No.404/sah./30.4.2024 (appearing on page 126 of the original record) written by the respondent no.2 and addressed to Shri Anand Kumar Mishra, Assistant Housing Commissioner/Assistant Registrar and Shri Arimardan Singh Gaur, Cooperative Officer (Housing) directing them **to submit an inquiry report within seven days**. This letter refers to a complaint letter dated 2.4.2024 received from Smt. Kunta Devi against the petitioner-Society on which an order dated 4.4.2024 was passed directing the Cooperative Officer (Housing) aforesaid, to submit an inquiry report and that he, in turn, submitted an inquiry report dated 21.4.2024 (sic).

The respondent no.2 further wrote in that letter of 30.4.2024 that on the same subject, another complaint dated 5.4.2024 was received by the office and, therefore, seeing the seriousness of the matter, the photocopies of the aforesaid complaint letters were being enclosed with direction that **the facts reflected in the complaint be examined from the records of the Society and an inquiry report be submitted within seven days.**

17. Another letter is in the original record at page 129 bearing No. 477/Sah./ dated 1.5.2024 issued by respondent no.2 addressed to the aforesaid two members of the Inquiry Committee alongwith the

aforesaid letter dated 29.4.2024 (page 124 of original record) moved by Smt. Kunta Devi. It was directed that the matter be inquired **and an inquiry report be submitted within 7 days**.

18. A letter dated 3.5.2024 (page 132 of the original record) was sent by the petitioners to the respondent No. 2 which appears to have been received by him on 8.5.2024. It was stated in this letter that the flat in dispute belonged to the former Chairman of the Society till the year 2017, whose membership number is 22, but instead of transfer being made by him, a registered deed was executed in favour of Smt. Kunta Devi by the Society in September 2017. It was stated that Smt. Kunta Devi became a member of the Society in July 2012, but she has been making payments of the flat since the year 2005. It was further stated that in her undated application for membership of the Society, her annual income was reflected as NIL. It was stated that the allotment and possession letters are both without any dates. It was stated that despite bringing it to the notice of the Housing Commissioner as well as to the respondent No. 2, the charge of the records of the Society was not given to the existing Committee of Management. Therefore, the Society is not able to verify any statement. It was stated that if any payment had been made by way of any cheque or draft or online, the same could have been verified from the bank account statement of Smt. Kunta Devi. However, whether the sale consideration of the flat has been deposited in the bank account of the Society is suspect. It was, therefore, urged that pursuant to the letter of the Respondent No. 2 bearing no. 477/sah./dated 1.5.2024, the proceedings be expedited, or in view of the request made by Smt. Kunta Devi in her letter dated 29.4.2024, an Arbitrator be appointed under Section 70 of the Act, 1965.

On page 133 of the original record is another letter of the same date, i.e., 3.5.2024 written by the petitioners to the Respondent No. 2 with reference to his aforesaid letter no.477/sah./dated 1.5.2024. It was stated that pursuant to the previous letter dated 30.4.2024, Shri Anand Kumar Mishra had asked separate reports from the Society and from Smt. Kunta Devi on five points. On the next day, the respondent No. 2 constituted a two-member Inquiry Committee to conduct an inquiry in respect of the complaint letter, whereas Smt. Kunta Devi had requested for action under Section 70 of the Act. It was requested that the request made by Smt. Kunta Devi should not be ignored and orders be passed for which the Committee of Management has no objection. It was stated that in the proceedings under Section 70, the examination of the five points asked by the Assistant Registrar as well as the decision shall be forthcoming.

19. On page 143 of the original record is a letter dated 4.5.2024 sent by the petitioners to Smt. Sushila Saraswat (the former Secretary of the Society) with copies endorsed (i) to the respondent no.2, (ii) to Shri Arimardan Singh Gaur, and, (iii) to Smt. Kunta Devi, in which it was stated that the receipts of payments with regard to the disputed flat as verified by her were received by the Cooperative Officers (Housing) in which she had written that the amount has been received by the Society, even though no such endorsement was necessary; that the receipts were issued by her under her signature; but **since all the payments had been made in cash, therefore, proof of her having deposited the cash in the relevant bank account of**

the Society is required; that since the charge of crucial records had not been given, therefore, **there is no verification of the amount of Rs.26,62,110/- having been actually deposited in the bank account**; that since the matter related to the term of of Smt. Sushila Saraswat, therefore, it was required to be certified by her so that an NOC can be expeditiously issued to Smt. Kunta Devi. She was, therefore, asked to verify the deposits by giving a certificate, the format of which was enclosed with that letter.

However, soon thereafter by a letter dated 10.5.2024 (page 145 of the original record), a complaint purportedly signed by 12 other flat owners was sent to the Principal Secretary in the office of the Commissioner and Registrar Cooperatives, leveling serious allegations against the petitioners. A copy of this letter was received in the office of the respondent No. 2 on 17.5.2024.

By the letter bearing letter No. 766/Sah./ dated 17.5.2024 (page No. 146 of the original record), the respondent No. 2 referred to the inspection directed to be made under Section 66 and asked the two-member Inquiry Committee to include the facts mentioned in the complaint letter dated 10.5.2024 in their inspection under Section 66 and to submit their inspection report in the office as early as possible.

20. On page 214 of the original record is a letter dated 15.5.2024 of the petitioners received by the respondent No.2 on 24.5.2024, reiterating their previous stand. However, thereafter by means of a letter dated 29.5.2024 (page 218 of the original record) the aforesaid two-member Inquiry Committee comprising Shri Arimardan Singh Gaur and Shri Anand Kumar Mishra, submitted an Inquiry Report that is stated to be in response to the letter no.404/sah./dated 30.4.2024 and letter No.477/sah./dated 1.5.2024. Since this inquiry report is a relevant document for consideration of this case, it is quoted hereinbelow in its entirety :-

"पत्र सं०- 155/सह०/2024-25 गाजियाबाद/
दिनांक- 29-05-2024
सेवा में,

अपर आवास आयुक्त/ अपर निबन्धक,
उ०प्र० आवास एवं विकास परिषद्,
लखनऊ

महोदय,

कृपया अपने कार्यालय पत्रांक-404/सह०/ दिनांक-30.04.2024 एवं पत्रांक-477/सह०/ दिनांक-01.05.2024 का संदर्भ ग्रहण करने का कष्ट करें, जिसके माध्यम से गृहलक्ष्मी सहकारी आवास समिति लि०, ग्रेटर नोएडा, गौतमबुद्धनगर की सदस्या श्रीमती कुन्ता देवी के द्वारा की गयी शिकायत के सम्बन्ध में अधोहस्ताक्षरीद्वय को जांच अधिकारी नियुक्त करते हुए सात दिवस के अन्दर जांच आख्या उपलब्ध कराने विषयक निर्देश दिये गये हैं। उल्लेखनीय है कि प्रश्नगत प्रकरण में श्रीमती कुन्ता देवी के द्वारा गृहलक्ष्मी सहकारी आवास समिति लि०. गौतमबुद्धनगर के सचिव एवं अध्यक्ष के द्वारा उनके फ्लैट को हड़पने का प्रयास करने एवं अनापत्ति प्रमाणपत्र निर्गत न करने विषयक शिकायत की गयी है।

उपरोक्तानुक्रम में अवगत कराना है कि शिकायतकर्ता श्रीमती कुन्ता देवी के द्वारा अपने शिकायती पत्र के साथ संलग्न अभिलेखों के माध्यम से अवगत कराया गया है कि वे प्रश्नगत समिति के फ्लैट संख्या-एच-207 की रजिस्ट्रीशुदा मालकिन हैं और तत्कालीन सचिव के स्तर से उन्हें यथापेक्षित शेयर सर्टिफिकेट, आवंटन पत्र एवं कब्जा पत्र आदि सम्यक रूप से तत्समय ही निर्गत किये गये थे और वर्तमान में भी शिकायतकर्ता श्रीमती कुन्ता देवी उक्त फ्लैट की कब्जेदार हैं। अग्रेतर अवगत कराना है कि शिकायतकर्ता द्वारा विभिन्न स्तरों पर की गयी शिकायतों के माध्यम से अवगत कराया गया है कि गृहलक्ष्मी सहकारी आवास समिति लि०, गौतमबुद्धनगर के पदाधिकारीगण द्वारा जानबूझकर उनके फ्लैट को हड़पने की नीयत से उन्हें परेशान किया जा रहा है और उन्हें प्रश्नगत् फ्लैट को विक्रय करने की अनुमति प्रदान नहीं की जा रही है। अग्रेतर शिकायतकर्ता द्वारा अपने शिकायती पत्रों में यह उल्लेख किया गया है कि समिति प्रबन्धन द्वारा हर बार उनके फ्लैट ट्रान्सफर

के सम्बन्ध में बदल-बदल कर तर्क दिये जाते हैं कभी शिकायतकर्ता के हस्ताक्षर मेल न खाने, कभी शिकायतकर्ता की सदस्यता संख्या किसी और के नाम होने, कभी शिकायतकर्ता का फ्लैट संख्या-एच-207 किसी और के नाम होने, कभी बिजली का बिल और मेन्टीनेन्स की रसीद किसी और के नाम होने कभी धनराशि जमा नहीं होने, कभी समिति में जमा की गयी धनराशि समिति के बैंक खाते में जमा नहीं होने आदि की बातें कहकर फ्लैट विक्रय की अनुमति प्रदान नहीं की जा रही है। शिकायतकर्ता द्वारा अपने प्रार्थनापत्रों मे यह भी उल्लेख किया गया है कि उनकी उम्र लगभग 85वर्ष है और समिति प्रबन्धन द्वारा इन तकनीकी बिन्दुओं में उलझा कर उन्हें मानसिक रूप से प्रताड़ित किया जा रहा है।

उक्त के सम्बन्ध में जांचोपरान्त अवगत कराना है कि श्रीमती कुन्ता देवी को आवंटित फ्लैट संख्या-एच-207 को समिति की ओर से समिति के प्रतिनिधि श्री सुनील कुमार पुत्र श्री रमेश सिंह के द्वारा दिनांक-25.09.2017 को शिकायकर्ता के पक्ष में रजिस्टर्ड डीड निष्पादित की गयी थी। जांच दौरान यह प्रकाश में आया कि समिति प्रबन्धन द्वारा काफी अरसे से भिन्न-भिन्न कारणों से उनके फ्लैट के अन्तरण विषयक अनुरोध पर आपत्ति लगाकर फ्लैट अन्तरण की अनुमति प्रदान नहीं की जा रही है। उक्त के सम्बन्ध में जांच दौरान समिति स्तर से अवगत कराया गया कि श्रीमती कुन्ता देवी के फ्लैट आवंटन में कतिपय विसंगतियां हैं यथा श्रीमती कुन्ता देवी को आवंटित मेम्बरशिप नम्बर किसी और को भी आवंटित रही है। इसी प्रकार श्रीमती कुन्ता देवी द्वारा अपने फ्लैट के एवज में किये गये भुगतान की जो रसीदें बतौर साक्ष्य प्रस्तुत की गयी हैं, उन रसीदों से संगत धनराशि के समिति के खाते में जमा होने के प्रमाण उपलब्ध नहीं हैं। उल्लेखनीय है कि श्रीमती कुन्ता देवी द्वारा प्रस्तुत भुगतान के सम्बन्ध में रसीदों/साक्ष्यों का विवरण निम्नवत् है-

S. r. No.	Book /Receipt	Mode	Date	Rupees	Progressive
1.	3/448	Cash	01-09-2005	0,19,110	0,19,110
2.	6/754	Cash	31-05-2005	2,00,000	2,19,110
3.	6/772	Cash	07-08-2005	1,82,000	3,01,110
4.	4/518	Cash	29-06-2006	2,80,000	5,81,110
5.	5/639	Cash	23-03-2007	2,00,000	7,81,110
6.	5/669	Cash	23-03-2007	0,40,000	8,21,110
7.	6/715	Cash	27-10-2007	0,20,000	8,41,110
8.	5/699	Cash	27-11-2007	0,10,000	8,51,110
9.	6/701	Cash	05-12-2007	0,80,000	9,31,110
10.	6/722	Cash	29-01-2008	2,00,000	11,31,110
11.	6/727	Cash	12-02-2008	0,30,000	11,61,110
12.	6/743	Cash	12-05-2008	1,99,000	13,60,110
13	6/772	Cash	07-08-2008	102,000	14,62,110
14	6/779	Cash	28-08-20	0,80,000	15,42,110

			08		
15.	7/801	Cash	10-12-2008	2,00,000	17,42,110
16.	7/811	Cash	07-01-2009	0,70,000	18,12,110
17.	7/882	Cash	07-02-2009	0,50,000	18,62,110
18.	7/862	Cash	25-03-2009	1,00,000	19,62,110
19.	1789	Cash	07-12-2013	1,00,000	20,62,110
20.	1886	Cash	03-03-2014	1,00,000	21,62,110
21.	1894	Cash	24-03-2014	1,00,000	22,62,110
22.	2102	Cash	03-03-2015	2,00,000	24,62,110
23.	2110	Cash	12-03-2015	2,00,000	26,62,110

शिकायकर्ता श्रीमती कुन्ता देवी द्वारा प्रस्तुत की गयी रसीदों के सम्बन्ध में समिति स्तर से आपत्ति किये जाने पर समिति की तत्कालीन सचिव श्रीमती सुशीला सारस्वत के द्वारा उक्त रसीदों में यह अभियुक्त अंकित की गयी कि प्रश्नगत धनराशि समिति को प्राप्त हुई है। उक्त तथ्य से यह स्पष्ट है कि श्रीमती कुन्ता देवी द्वारा उक्त फ्लैट के लिये सम्यक भुगतान किया गया। यदि तत्कालीन सचिव के द्वारा उक्त फ्लैट के लिये सम्यक भुगतान किया गया। यदि तत्कालीन सचिव के द्वारा उक्त फ्लैट के एवज में प्राप्त की गयी धनराशि का दुर्विनियोग किया गया है तो उसके लिए सम्बन्धित सचिव एवं तत्कालीन प्रबन्ध कमेटी उत्तरदायी है। शिकायतकर्ता श्रीमती कुन्ता देवी के द्वारा अपने पत्रों में बार-बार यह उल्लेख किया गया है कि उनके द्वारा समिति में विधिवत् धनराशि जमा कर उक्त फ्लैट प्राप्त किया गया है और यदि तत्कालीन सचिव अथवा प्रबन्ध कमेटी के द्वारा उक्त फ्लैट के आवंटन में कोई अनियमितता की गयी है अथवा संगत अभिलेखों में कोई विसंगति है तो उसके लिए तत्कालीन प्रबन्धन और समिति सचिव उत्तरदायी हैं। वर्तमान प्रबन्ध कमेटी को उनके विरूद्ध यथौचित कानूनी कार्यवाही करनी चाहिये किन्तु वर्तमान प्रबन्ध कमेटी अनुचित रूप से उनके फ्लैट हस्तांतरण में बाधा उत्पन्न कर रही है।

उक्त के विश्लेषण से यह तथ्य प्रकाश में आया है कि समिति के पूर्व पदाधिकारियों द्वारा समिति अभिलेखों का सम्यक रख-रखाव नहीं किया गया है और न ही वर्तमान प्रबन्ध कमेटी को समिति अभिलेखों का चार्ज ही हस्तांतरित किया गया है। जिस कारण से वर्तमान सचिव/प्रबन्ध कमेटी के द्वारा प्रश्नगत् फ्लैट के अन्तरण में बार-बार पृच्छा की जा रही है। वर्तमान कमेटी को उक्त तथ्यों का संज्ञान रखते हुए उनके प्रार्थना पत्र पर विचार किया जाना चाहिये था किन्तु समिति सचिव एवं समिति अध्यक्ष के द्वारा असंगत प्रसंगों का उल्लेख करके श्रीमती कुन्ता देवी को अनापत्ति प्रमाण पत्र निर्गत नहीं किये जाने को सही साबित करने का प्रयास किया जा रहा है जो आपत्तिजनक है। समिति प्रबन्धन द्वारा समिति के अत्यंत वृद्ध सदस्य को नाहक परेशान किया जाना मानवीय गरिमा के भी प्रतिकूल है। यदि समिति के पूर्व पदाधिकारियों के द्वारा उक्त फ्लैट के आवंटन आदि में कोई अनियमितता की गयी है अथवा समिति को कोई क्षति पहुँचायी गयी है तो वर्तमान प्रबन्ध कमेटी से यह अपेक्षित था कि वह सम्बन्धित के विरूद्ध यथौचित विधिक कार्यवाही अमल में लाते हुये न्यायोचित कार्यवाही की जाती, किन्तु पूर्व प्रबन्ध कमेटी के किसी कृत्य के लिए किसी सदस्य को प्रताणित किया जाना उचित प्रतीत नहीं होता है। यदि वर्तमान प्रबन्ध कमेटी को शिकायतकर्ता श्रीमती कुन्ता देवी के प्रत्यावेदन से किंचित असहमति थी तो प्रश्नगत प्रकरण के सम्बन्ध में उ०प्र० सहकारी समिति अधिनियम-1965 की धारा-70 के अन्तर्गत मध्यस्थवाद योजित कर प्रकरण को निस्तारित किया जा सकता था, किन्तु समिति प्रबन्धन द्वारा वृद्ध सदस्या को अनापत्ति प्रमाण पत्र निर्गत किये जाने के विषय पर उत्पीड़न किया गया है।

उक्त के अतिरिक्त समिति के कतिपय अन्य सदस्यों के द्वारा वर्तमान प्रबन्ध कमेटी के विरूद्ध गम्भीर शिकायतें की गयी हैं, जिसमें मुख्य रूप से नियम विरूद्ध ढंग से ए०ओ०ए० का संचालन किया जाना, समिति के कूड़ेदान को समिति के बेसमेन्ट में रखकर समिति सदस्यों को परेशान करने एवं उनके स्वास्थ्य को क्षति पहुचाने, रेन वाटर हार्वेस्टिंग के स्थल पर मदर डेयरी की दुकान का

निर्माण कराकर उसे अत्यल्प किराए पर देकर समिति को क्षति पहुंचाने एवं रेनवाटर हार्वेस्टिंग को बाधित करने, समिति के कुछ बकाएदारों को बगैर बकाया धनराशि का भुगतान प्राप्त किये अनापत्ति पत्र निर्गत करते हुए समिति को आर्थिक क्षति पहुंचाने, मनमाने ढंग से समिति के मेन्टीनेन्स चार्ज में 50 प्रतिशत की वृद्धि कर देने, समिति सदस्यों से प्रति फ्लैट 50000 रू० की अतिरिक्त धनराशि वसूल करने, समिति की पार्किंग को अनुचित रूप से विक्रय करने तथा ग्रेटर नोएडा अथॉरिटी से स्वीकृत पार्किंग के नक्शे को मनमाने ढंग से तब्दील करने एवं समिति की जनरल बॉडी की मीटिंग नहीं आहूत करने विषयक तमाम शिकायतें की गयी हैं, जो अत्यंत गम्भीर हैं।

उक्त तथ्यों के आलोक में यह स्पष्ट परिलक्षित हो रहा है कि समिति के सचिव एवं समिति अध्यक्ष के द्वारा स्वेच्छाचारी ढंग से कार्य करते हुए समिति एवं समिति सदस्यों के हितों को गम्भीर क्षति पहुंचायी जा रही है। अतः उक्त दोनों व्यक्तियों के विरूद्ध उ०प्र० सहकारी समिति अधिनियम-1965 की धारा-38 के अन्तर्गत कार्यवाही किये जाने की संस्तुति की जाती है।

संलग्नक- यथोवत।

ह०अप० ह० अप०

(अरिमर्दन सिंह गौर) (आनन्द कुमार मिश्रा)

सहकारी अधिकारी (आवास)

सहायक आयुक्त / सहायक निबन्धक

गाजियाबाद।

मुख्यालय, लखनऊ।"

21. As is evident from the aforesaid inquiry report that barring the short narrative of allegations in the penultimate paragraph, the entire discussion is with regard to the dispute between Smt. Kunta Devi and the petitioner Society. It has been stated therein that if there was any irregularity with regard to the allotment of the flat by the former office bearers or if any loss has been caused to the Society, then it was required for the present Committee of Management to initiate appropriate legal proceedings separately but for the actions of the former Committee of Management, a member of the Society ought not to be harassed. It was then mentioned that if the present Committee of Management had any dispute with the representation of Smt. Kunta Devi then proceedings under sections 70 of the Act 1965 ought to have been filed which should have resolved the matter, but the management of the Society is harassing an aged member on the subject of issuance of 'No Objection Certificate'.

Only in the penultimate paragraph, there is an encapsulation of the allegations made in the aforesaid letter dated 10.5.2024 allegedly sent by certain members of the Society to the Principal Secretary/Housing Commissioner. Thereafter, abruptly it is noted that in light of the aforesaid facts it is clearly evident that Secretary and Chairman of the Society have seriously damaged the interest of the Society and its members. Therefore, against both the aforesaid officers of the Society, proceeding under Section 38 of the Act, 1965 was recommended to be taken.

22. It is pertinent to mention here that in the inquiry report dated 29.5.2024, there is no mention whatsoever of the letter no.408/Sah./dated 30.4.2024 issued by the respondent no.2 asking the two member Inquiry Committee to conduct an inspection under Section 66 of the Act, 1965 nor is there any reference to the letter no.766/Sah./dated 17.5.2024 asking the two member Inquiry Committee to undertake an inspection under section 66 of the Act, 1965 with regard to the matters including the complaint letter dated 10.5.2024. A perusal of the Inquiry Report dated 29.05.2024 reflects that it is one-sided and without taking into account the serious objections and observations made by the petitioners for not granting the NOC in favour of Smt. Kunta Devi for transfer of the disputed flat.

23. Thereafter, on the very next day, by means of a letter no.913/Sah./dated

30.5.2024, the impugned order was passed directing the Committee of Management under the provisions of sub-section (1) of Section 38 of the Act, 1965 to remove the Secretary and the Chairman from their posts within one month under information to the office of the respondent no.2. It is pertinent to mention here that even in this order, there is no reference to the office letter no.408/Sah./dated 30.4.2024 directing the two member Inquiry Committee to conduct an inspection under Section 66 of the Act, 1965 nor is there any reference to the letter no.766/Sah./dated 17.5.2024 issued by the respondent no. 2 to the two member Inquiry Committee regarding the inspection under Section 66 bringing to their notice the complaint letter dated 10.5.2024. A perusal of the impugned order of 30.5.2024 reflects that it is based on surmises and conjectures. However, the same shall be elaborated later.

24. By a letter dated 7.6.2024 that appears on page 290 of the original record, the petitioners acknowledged receipts of the impugned order dated 30.5 2024 but demanded copy of the inquiry report dated 29.5.2024.

25. On page no.293 of the original record is summon/notice dated 4.5.2024 (sic) pertaining to Case No.3/2024-2025 issued vide letter no. 91/P.A./A.Ni (vikas), Lucknow dated May 4, 2024 (sic) with copies address to the petitioners as well as Smt. Kunta Devi which is in respect of arbitration proceedings initiated by Smt. Kunta Devi against the petitioner Society. In the summon/notice, it is written that the Commissioner and Registrar (Cooperative) has appointed its signatory, Manoj Kumar, as Arbitrator by his letter dated 27.5.2024. In this notice, the date fixed was 25.6.2024.

Evidently, the date of issuance of the aforesaid summon/ notice is discordant with the date of appointment of Arbitrator.

26. On page 295 (as well as page 302) of the original record is letter dated 24.6.2024 of the petitioners to the Housing Commissioner/Registrar complaining that the order dated 30.5.2024 was passed by the respondent no.2 but till date, neither the inquiry report nor any evidence has been made available to them. Details of the work done by the Society were reflected in the letter. It was also mentioned in that letter that the complainant had initiated arbitration proceedings in which an Arbitrator was appointed on 27.5.2024 and, therefore, the inquiry report being filed on 29.5.2024 and on the very next date, i.e., 30.5.2024, the order being passed directing the Society to remove the Chairman and the Secretary, and service of that order on the very next day, i.e., 31.5.2024 through WhatsApp, was not called for. It was stated that on one disputed issue, proceedings in two forums cannot be taken. It was, therefore, requested that the order dated 30.5.2024 be reconsidered and the matter be kept in abeyance till the decision of the Arbitrator. It was stated that in the arbitration proceedings whatever be the decision of the Arbitrator, the Committee of Management would proceed according to that.

In the copy of the aforesaid letter dated 24.06.2024 appearing on page 302, the Housing Commissioner on 28.06.2024 ordered the respondent no.2 to take necessary action after conducting an inquiry and submit the same with the record within ten days.

27. By a letter no.1298/Sah./dated 2.7.2024 (page 303 of the original record),

the respondent no.2 wrote a letter to Shri Arimardan Singh Gaur, the Cooperative Officer (Housing) with reference to the letter of the petitioners dated 24.6.2024 directing to inquire into the facts and to submit a report along with the relevant proof/documents within 7 days.

28. However, by the impugned order issued vide letter no.1333/Sah./dated 4.7.2024 (page 305 of the original record), the respondent no.2 exercising powers under of Section 38 of the Act, 1965 directed the Secretary and the Chairman of the Society to appear on 19.7.2024 before him along with evidence. It is pertinent to mention here that even in this order, there is no reference to the proceedings ordered under Section 66 of the Act, 1965 by means of the letter no.408/Sah./dated 30.4.2024.

29. On page 310 of the original record is the letter dated 4.7.2024 sent by the petitioner no.2 to the respondent no.2 with reference to the order no.1333/Sah./dated 4.7.2024 under section 38(2) of the Act, 1965. It is stated in this letter that the inquiry report dated 29.5.2024 has not been provided on the basis of which the petitioners were charged. It was stated that during the inquiry proceedings, one of the inquiry committee member, Shri Anand Kumar Mishra, vide letter no.416 dated 30.4.2024 had asked information from the complaint Smt. Kunta Devi on 5 points which was imperative for verifying her ownership over Flat No. H-207. Accordingly, the information submitted by Smt. Kunta Devi alongwith a certified copy of the inquiry dated 29.5.2024 and other evidence, if any, on the basis of which the petitioners have been charged, be furnished at the earliest so that a response could be submitted. It was further stated in this letter of the petitioner dated 4.7.2024 that with regard to the order dated 30.5.2024 under Section 38(1), documents have been asked for under the provisions of the Right to Information Act but till now no information/document has been provided. It was alleged that the principles of natural justice were being violated and matters were being deliberately concealed.

30. However, on page 311 of the original record is an order issued by the respondent no. 2 bearing letter no.1513/Sah./Ghaziabad dated 16.7.2024 with reference to the office order no.408/Sah./dated 30.4.2024 with regard to the inspection being conducted under the provisions of Section 66 of the Act, 1965 stating that Shri Anand Kumar Mishra, Assistant Housing Commissioner has been reverted to his original department and, under the circumstances, the order no.408/Sah./dated 30.4.2024 is required to be amended. It is further mentioned that in the meanwhile, a complaint of Shri Sharad Chandra Agarwal and others has been received by a letter dated 10.5.2024 reflecting the irregularities by the management of the concerned Society; that therefore, the office order no.408/sah./dated 30.4.2024 was being partly amended and in place of Shri Anand Kumar Mishra, Shri Raj Kumar, Assistant Housing Commissioner/Assistant Registrar was nominated as Inquiry Officer, who was directed to include the complaint letter in the inspection under Section 66 and, after undertaking a detailed inspection, to submit an inspection report along with proof.

31. It is evident from the record that earlier, the single member Inquiry Committee had submitted a report vide letter no.29/Sah./Ghaziabad dated 20.4.2024 in which he had stated that he

was being inappropriately pressurized by both the sides and he had recommended an inspection under Section 66 of the Act, 1965 so that the records of the Society could be inspected and the role of the Committee of Management could be properly investigated. However, as noted above, the two orders, both dated 30.4.2024, were issued vide letter nos.404/sah. and 408/sah. directing the two member Inquiry Committee to conduct an inquiry within 7 days, as well as directing the same two member Inquiry Committee to conduct an inspection under Section 66 of the Act, 1965, respectively. There is also a letter bearing no.766/sah./dated 17.5.2024 issued by the respondent no. 2 to the two member Inquiry Committee enclosing the complaint letter dated 10.5.2024 directing that the same be included in the inspection under Section 66, and to submit a report expeditiously.

However, as noted above, neither in the inquiry report dated 29.5.2024 submitted by the two member Inquiry Committee nor in the impugned orders dated 30.5.2024 and 4.7.2024 passed by the respondent no. 2, is there any reference of the office letter no.408/Sah./dated 30.4.2024. The contents of the complaint letter dated 10.5.2024 find encapsulated in the inquiry report dated 29.5.2024 without it being stated whether any inspection of the records of the Society was conducted by the two member Inquiry Committee. It is pertinent to mention here that the report dated 20.4.2024 sent by Shri Arimardan Singh Gaur, Cooperative Officer (Housing) to the respondent no.2 bears letter no.29/sah./Ghaziabad dated 20.4.2024. However, in the letter/order issued by respondent no.2 being letter no. 404/sah./dated 30.4.2024, the date of the inquiry report is stated to be 21.4.2024, while in the office order issued by the respondent no.2 vide letter no.408/sah./dated 30.4.2024, the inquiry report of Shri Arimardan Singh Gaur is stated to bear letter no.20/sah./Ghaziabad dated 20.4.2024. Therefore, references to the same letter/inquiry report of Shri Arimardan Singh Gaur dated 20.4.2024 appearing differently in the two letters/orders issued by the respondent no.2 on the same day, i.e., 30.4.2024, may require explanation from the respondent no.2. The matter is confounded by the fact that the page numbering on the file in which the aforesaid letter/inquiry report dated 20.4.2024 appears, page no.119 has been struck off and instead page no. 123 has been mentioned. As a matter of fact, the page numbering in the original record is altered by correction on several pages.

32. Be that as it may, in the writ petition, which was submitted for reporting before the Stamp Reporter on 19.7.2024 and presented on 24.7.2024 after removal of defects raised by the Stamp Reporter, in paragraph 20, it has been stated that the alleged (inquiry) report dated 29.5.2024 has not been supplied to the petitioners.

33. The order impugned dated 30.5.2024 is vague and only reference has been made to the inquiry report dated 29.5.2024 without any discussion by the respondent no.2 that could reflect due application of mind to form an ‘opinion’ that the Secretary and the Chairman of the Society were acting fraudulently and causing serious damage to the interest of the Society and its members. Further, there appear to be no materials other than the report of the Inquiry Committee dated 29.05.2024 which Inquiry report reflects merely a dispute between the petitioners and Smt. Kunta Devi. Certain allegations

made in a letter dated 10.05.2024 are merely narrated in the Inquiry report without any examination, inquiry or inspection thereon. The inspection under Section 66 of the Act, 1965 that was allegedly ordered by the respondent no.2 was never undertaken by the Inquiry Committee prior to submitting its report dated 29.05.2024. Moreover, in the original record there is evidence of arbitration proceedings initiated by Smt. Kunta Devi against the petitioners under Section 70/71 of the Act, 1965 in respect of the same dispute which was raised by Smt. Kunta Devi and in which an arbitrator was appointed by the Commissioner and Registrar, Cooperatives by his order dated 27.05.2024, which was in the knowledge of the respondent no.2.

34. The authority of a Registrar under the provisions of the Act, 1965 are wide ranging but given the extent of autonomy conceived by the Act, 1965 to a Cooperative Society and its management, the regulation and intervention of the State are circumscribed by various provisions in the Act, 1965.

35. A Full Bench of this Court in the case of **Smt. Vandana Varma & Ors. vs. State of U.P. & Ors.**[4] stressed upon the fact that provisions of U.P. Act, 1965 are to be read in a manner so as to give more autonomy and independence to a Co-operative Society and its management, instead of intruding administrative control of administrative officer i.e. Registrar, even if not specifically provided, as it will impinge upon the concept of independent democratic autonomy of Co-operative Society. Only to the extent law specifically provides, attempt while making interpretation, should be towards autonomy and independence of Society and its management, than, bringing in, the element of control by Executive/Administrative Officers.

36. At this stage, it is pertinent to refer to certain provisions of the Act, 1965. Section 38 comes under Chapter IV which chapter deals with 'Management of Societies'. Under this chapter fall sections 28 to 38. Section 28 provides that the final authority of a Co-operative Society shall vest in the general body of its members in general meeting, subject to the provisions of the Act and the Rules. Section 29 provides the vesting of the management of every Cooperative Society in a duly constituted Committee of Management, the term of the Committee of Management, its election, appointment of interim Management Committee, ceasing of the existence of the Management Committee after expiry of its term, filling up casual vacancies etc.. Section 29-A enumerates special provisions for Primary Agricultural Co-operative Credit Societies, Central Co-operative Banks and Apex Bank. Section 30 provides for election, nomination or appointment of a Chairman and Vice-Chairman of every Cooperative Society and their responsibilities. Section 30-A deals with motion of no confidence against the Chairman or Vice-Chairman. Section 31 details the appointment and removal of a Secretary of every Cooperative Society, his emoluments and functions. Section 31-A is in relation to Apex Society and provides for appointment of Managing Director instead of Secretary and the duties and responsibilities of the Managing Director. Section 32 deals with holding of an Annual General Meeting, while Section 33 provides for holding of other General Meeting. Section 34 provide for nominees of the State Government on the Committee of Management of certain Cooperative

Societies. Section 35 deals with supersession or suspension of Committee of Management. Section 35-A provides for circumstances under which the Chairman and members of the Committee of Management are mandated to vacate their respective offices. Section 36 contains provisions for securing possession of record etc. where the outgoing member of the Committee of Management which is suspended or superseded under Section 35 or where the Society is ordered to be wound up under Section 72 and the outgoing members of the Committee of management fail to hand over charge of the records and properties of the Society. Section 37 empowers the Registrar to issue an order directing seizure and taking possession of books, records, funds and property of the Society on his satisfaction that they are likely to be tampered with or misappropriated or misapplied.

37. Section 38, in purported exercise of which the impugned orders have been passed by the respondent no.2, reads as follows:-

> **"38. Removal of an officer of a co-operative society-** (1) If in the opinion of the Registrar, any officer of a co-operative society has contravened or omitted to comply with, any provisions of this Act, the rules or the bye-laws of the society, or has forfeited his right to hold office, the Registrar may, without prejudice to any other action that may or can be taken against him, call upon the society to remove, within a specified period, such officer from the office held by him and where necessary also to disqualify him from holding any office under that society for a period not exceeding three years, whereupon the society shall, after affording opportunity of being heard to the officer concerned, pass such orders as it may deem fit.
>
> Provided that on the request of the Reserve Bank of India, the competent authority shall remove a Director or the Secretary/Chief Executive Officer of a Central Co-operative Bank or the Uttar Pradesh Co-operative Bank, who do not fulfill the criteria stipulated by the Reserve Bank of India after giving him an opportunity of being heard.
>
> (2) On the failure of the society to take action under sub-section (1), the Registrar may, after according opportunity of being heard to the officer and for reasons to be recorded and communicated to the person and the society concerned, remove, or remove and disqualify for a period not exceeding three years, the officer from holding any office under that society.
>
> (3) An officer removed under sub-section (1) or sub-section (2) shall, with effect from the date of communication of the order, cease to hold that office and, if disqualified, shall not be eligible to hold any office under that society for the period specified in the order."

38. Sub-section (1) of Section 38 of the Act, 1965 gives wide ranging power to the Registrar to direct the Society to remove such officer from the office held by him and, where necessary, also to disqualify him from holding any office under that Society for a period not

exceeding three years, in case the Registrar is of the opinion that any officer of a Co-operative Society has contravened or omitted to comply with any provisions of the Act, 1965, the rules or the bye-laws of the Society, or has forfeited his right to hold office. Therefore, the discretion has to be exercised by the Registrar which is reflected in the word "may", calling upon to Society to remove an officer from the office held by him where the Registrar is of such "opinion". Thereupon, **the Society is mandated to pass such orders, as it may deem fit, after affording opportunity of being heard to the officer concerned.**

39. It is noted that under Section 38(1), the Society is not mandated to comply with the "call upon" of the Registrar for removal of the officer, but it may pass such orders, as it may deem fit, after affording opportunity of being heard to the officer concerned. This aspect of this provision preserves the discretion and democratic functioning and autonomy of the Society.

40. Under sub-section (1) of Section 38, the opinion of the Registrar is subjective. At this stage, he is not exercising a judicial function, but, at the same time he is directing an electorate to take a specific action against two officers of the Society one of which is the Chairman of the Committee of Management. The Chairman is duly elected. Any such direction of the Registrar has to be given its full play if such direction is within the scope of his powers and, in case there are relevant materials before him. However, if such discretion is exercised by the Registrar in an unreasonable or perverse fashion, without taking into consideration admitted facts, so as to leave no doubt in the mind of a court that discretion has been exercised arbitrarily without consideration of the materials before him and / or by relying on materials that reflect only bare allegations, then after considering other attendant facts, the court may interfere in the matter. Moreover, the court would not hesitate to interfere where the mind of the Registrar has not been applied at all to what was necessary for him to consider.

41. In **Narayan Govind Gavate v. State of Maharashtra, (1977) 1 SCC 133**, the Supreme Court observed :-

> "10. It is true that, in such cases, the formation of an opinion is a subjective matter, as held by this Court repeatedly with regard to situations in which administrative authorities have to form certain opinions before taking actions they are empowered to take. They are expected to know better the difference between a right or wrong opinion than courts could ordinarily on such matters. Nevertheless, that opinion has to be based upon some relevant materials in order to pass the test which courts do impose. That test basically is: Was the authority concerned acting within the scope of its powers or in the sphere where its opinion and discretion must be permitted to have full play? Once the court comes to the conclusion that the authority concerned was acting within the scope of its powers and had some material, however meagre, on which it could reasonably base its opinion, the courts should not and will not interfere. There might, however, be cases in which the power is

exercised in such an obviously arbitrary or perverse fashion, without regard to the actual and undeniable facts, or, in other words, so unreasonably as to leave no doubt whatsoever in the mind of a court that there has been an excess of power. There may also be cases where the mind of the authority concerned has not been applied at all, due to misunderstanding of the law or some other reason, to what was legally imperative for it to consider."

42. In **Swadeshi Cotton Mills v. Union of India, (1981) 1 SCC 664**, the observations of the Supreme Court are :-

"59. We find merit in this contention. It cannot be laid down as a general proposition that whenever a statute confers a power on an administrative authority and makes the exercise of that power conditional on the formation of an opinion by that authority in regard to the existence of an immediacy, its opinion in regard to that preliminary fact is not open to judicial scrutiny at all. While it may be conceded that an element of subjectivity is always involved in the formation of such an opinion, but, as was pointed out by this Court in Barium Chemicals [Barium Chemicals v. Company Law Board, AIR 1967 SC 295 : 1966 Supp SCR 311 : 1966 Com Cas 639] , the existence of the circumstances from which the inferences constituting the opinion, as the sine qua non for action, are to be drawn, must be dimonstrable, and the existence of such "circumstances", if questioned, must be proved at least prima facie.

60. Section 18-AA(1)(a), in terms, requires that the satisfaction of the Government in regard to the existence of the circumstances or conditions precedent set out above, including the necessity of taking immediate action, must be based on evidence in the possession of the Government. If the satisfaction of the Government in regard to the existence of any of the conditions, (i) and (ii), is based on no evidence, or on irrelevant evidence or on an extraneous consideration, it will vitiate the order of "take-over", and the court will be justified in quashing such an illegal order on judicial review in appropriate proceedings. Even where the statute conferring the discretionary power does not, in terms, regulate or hedge around the formation of the opinion by the statutory authority in regard to the existence of preliminary jurisdictional facts with express checks, the authority has to form that opinion reasonably like a reasonable person.

61. While spelling out by a construction of Section 18-AA(1)(a) the proposition that the opinion or satisfaction of the Government in regard to the necessity of taking immediate action could not be the subject of judicial review, the High Court (majority) relied on the analogy of Section 17 of the Land Acquisition Act, under which, according to them, the Government's opinion in regard to the existence of the

urgency is not justiciable. This analogy holds good only up to a point. Just as under Section 18-AA of the IDR Act, in case of a genuine "immediacy" or imperative necessity of taking immediate action to prevent fall in production and consequent risk of imminent injury to paramount public interest, an order of "take-over" can be passed without prior, time-consuming investigation under Section 15 of the Act, under Section 17(1) and (4) of the Land Acquisition Act, also, the preliminary inquiry under Section 5-A can be dispensed with in case of an urgency. It is true that the grounds on which the Government's opinion as to the existence of the urgency can be challenged are not unlimited, and the power conferred on the Government under Section 17(4) of that Act has been formulated in subjective terms; nevertheless, in cases, where an issue is raised, that the Government's opinion as to urgency has been formed in a manifestly arbitrary or perverse fashion without regard to patent, actual and undeniable facts, or that such opinion has been arrived at on the basis of irrelevant considerations or no material at all, or on materials so tenuous, flimsy, slender or dubious that no reasonable man could reasonably reach that conclusion, the court is entitled to examine the validity of the formation of that opinion by the Government in the context and to the extent of that issue."

43. Formation of the opinion by the Registrar for exercising his discretion has to be done only along well recognized and sound juristic principles with a view to promoting fairness, induce transparency and aiding equity. [Ref: *Maya Devi vs. Raj Kumari Batra*[5]]

44. In the case of **Union of India vs. Raj Grow Impex LLP**[6], the Supreme Court, after considering several of its decisions, observed as follows:-

"126. Thus, when it comes to discretion, the exercise thereof has to be guided by law; has to be according to the rules of reason and justice; and has to be based on the relevant considerations. The exercise of discretion is essentially the discernment of what is right and proper; and such discernment is the critical and cautious judgment of what is correct and proper by differentiating between shadow and substance as also between equity and pretence. A holder of public office, when exercising discretion conferred by the statute, has to ensure that such exercise is in furtherance of accomplishment of the purpose underlying conferment of such power. The requirements of reasonableness, rationality, impartiality, fairness and equity are inherent in any exercise of discretion; such an exercise can never be according to the private opinion.

127. It is hardly of any debate that discretion has to be exercised judiciously and, for that matter, all the facts and all the relevant surrounding factors as also the implication of exercise of discretion either way have to be properly weighed and a balanced decision is required to be taken."

45. Therefore, the constitutional principles of non-arbitrariness, transparency and fairness, require that such solemn discretion is exercised by an administrative/statutory authority rationally and cautiously and is guided by law; it has to be according to the rules of reasons and justice; and has to be based on relevant considerations. The direction so made by such authority has to reflect due application of mind, having due regard to the fact that the Registrar seeks to call upon an electorate comprising of members of the Society to remove, and where necessary, disqualify the Chairman, who is an officer duly elected.

46. Section 66 of the Act, 1965 comes under Chapter VIII that deals with 'Audit, Inquiry, Inspection and Surcharge'. Under Chapter VIII, fall Sections 64 to 69. Section 65, 66, 68, and 69 which read as under:-

> **"65. Inquiry by Registrar**.- (1) The Registrar may, of his own accord, himself, or by a person authorised by him by order in writing, hold an inquiry into the constitution, working and financial condition of a co-operative society.
>
> (2) An inquiry of the nature referred to in sub-section (1) shall be held by the Registrar or by a person authorised by him in writing in this behalf on the application of-
>
> (a) a co-operative society to which the society concerned is affiliated ;
>
> (b) not less than one-third of the total members of the society ;
>
> (c) a majority of the members of the Committee of Management of the society.
>
> (3) The Registrar, or the person authorised by him under sub-section (1) shall, for the purposes of any inquiry under this section, have the following powers, namely-
>
> (a) he shall, at all times, have access to the books, accounts, documents, securities, cash and other properties belonging to or in the custody of the society and may summon any person in possession of, or responsible for the custody of any such books, accounts, documents, securities, cash or other properties, to produce the same at any place at the headquarters of the society or any branch thereof ;
>
> (b) he may summon any person who, he has reason to believe, has knowledge of any affairs of the society to appear before him at any place at the headquarters of the society or any branch thereof and may examine such person on oath ;
>
> (c) he may, notwithstanding any rule or bye-law specifying the period of notice for a general meeting of the society require the officers of the society to call a general meeting at such time and place at the headquarters of the society or any branch thereof and to determine such matters as may be directed by him, and where the officers of the society refuse or fail to call such a meeting, he shall have power to call it himself ; and
>
> (d) he may in the manner and for the purpose mentioned in clause (c) require to be called or himself call, a meeting of the Committee of Management.

(4) Any meeting called under clause (c) or clause (d) of sub-section (3) shall have the powers of the general meeting or meeting of the Committee of Management, as the case may be, under the bye-laws of the society and its proceedings shall be regulated by such bye-laws.

(5) When an inquiry is made under this section, the Registrar shall communicate the result of the inquiry to the society and, in the case of inquiry on an application under clause (a) of sub-section (2), also to the applicant co-operative society.

66. Inspection books and property of a co-operative society.- (1) The Registrar may of his own motion, or on the application of a creditor of a co-operative society, inspect or direct any person authorised by him by order in writhing in this behalf, to inspect books, cash and other property of the society :

Provided that no such inspection shall be made on the application of a creditor unless the applicant satisfies the Registrar that a debt is still due to him and that he has demanded payment thereof and has not received satisfaction within a reasonable time.

(2) The Registrar shall communicate the results of any such inspection –

(a) where the inspection is made of his own motion, to the society; and

(b) where the inspection is made on the application of a creditor; to the creditor and the society.

…..

68. Surcharge.- (1) If in the course of an audit, inquiry, inspection or the winding up of a co-operative society it is found that any person, who is or was entrusted with the organization or management of such society or who is or has at any time been an officer or an employee of the society, has made or caused to be made any payment contrary to this Act, the rules or the bye-laws or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has misappropriated or fraudulently retained any money or other property belonging to such society, the Registrar of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorized by him by an order in writing in this behalf to inquire into the conduct of such person :

Provided that no such inquiry shall be commenced after the expiry of twelve years from the date of any act or omission referred to in this sub-section.

(2) Where an inquiry is made under sub-section (1), the Registrar may, after affording the person concerned a reasonable opportunity of being heard, make an order of surcharge requiring him to restore the property or repay the money or any part thereof, with interest at such rate, or to pay contribution and costs or compensation to such an extent as the Registrar may consider just and equitable.

(3) Where an order of surcharge has been passed against a person under sub-section (2) for having caused any deficiency in the assets of the society by breach of trust or wilful negligence, or for having misappropriated or fraudulently retained any money or other property belonging to such society, such person shall, subject to the result of appeal, if any, filed against such order, be disqualified from continuing in or being elected or appointed to an office in any co-operative society for a period of five years from the date of the order of surcharge.

69. Registrar's power to order remedying of defects.- If as a result of audit held under section 64 or an inquiry under section 65, or an inspection under section 66, the Registrar is of opinion that the society is not working on sound lines, or its management is defective he may, without prejudice to any other action under this Act, make an order directing the society or its officers to take such action not inconsistent with this Act, the rules and the bye-laws as may be specified in the order to remedy the defects within the time specified therein."

47. Sections 70 and 71 fall under Chapter IX that deals with 'Settlement of Disputes', which read as follows:-

"70. Disputes which may be referred to arbitration.- (1) Notwithstanding anything contained in any law for the time being in force, if any dispute relating to the constitution, management or the business of a co-operative society other than a dispute regarding disciplinary action taken against a paid servant of a society arises-

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between a member, past member or any person claiming through a member, past member or deceased member, and the society, its Committee of Management or any officer, agent or employee of the society, including any past officer, agent or employee; or

(c) between the society or its committee and any past committee, any officer, agent or employee or any past officer, past agent or past employee or the nominee, heir or legal representative of any deceased officer, deceased agent or deceased employee of the society; or

(d) between a co-operative society and any other co-operative society or societies,

such dispute shall be referred to the Registrar for action in accordance with the provisions of this Act and the rules and no court shall have jurisdiction to entertain any suit or other proceeding in respect of any such dispute :

Provided that a dispute relating to an election under the provisions of this Act or rules made thereunder shall not be referred to the Registrar until after the declaration of the result of such election.

(2) For the purpose of sub-section (1), the following shall be deemed to be included in disputes relating to the constitution, management or the business of a co-operative society, namely-

(a) claims for amounts due when a demand for payment is made and is either refused or not complied with whether such claims are admitted or not by the opposite party ;

(b) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor or whether such debt or demand is admitted or not;

(c) a claim by a society for any loss caused to it by a member, officer, agent, or employee including past or deceased member, officer, agent or employee, whether individually or collectively and whether such loss be admitted or not ; and

(d) all matters relating to the objects of the society mentioned in the bye-laws as also those relating to the election of office-bearers.

(3) If any question arises whether a dispute referred to the Registrar under this section is a dispute relating to the constitution, management or the business of a co-operative society, the decision thereon of the Registrar shall be final and shall not be called in question in any court.

71. Reference of dispute to arbitration.- (1) On receipt of a reference under sub-section (1) of section 70, the Registrar may, subject to the provisions of the rules, if any-

(a) decide the dispute himself ; or

(b) refer it, for decision to an arbitrator appointed by him; or

(c) refer it, if the parties so request in writing, for decision to a board of arbitrators consisting of the three persons to be appointed in the prescribed manner.

(2) The Registrar may, for reasons to be recorded withdraw any reference made under clause (b) or (c) of sub-section (1) and refer it to another arbitrator or board of arbitrators or decide it himself.

(3) The Registrar, the arbitrator or the board of arbitrators, to whom a dispute is referred for decision under this section may, pending the decision of the dispute make such interlocutory orders including attachment of property as he or they may deem necessary in the interest of justice.

(4) The decision given by the Registrar, the arbitrator or the Board of Arbitrators under this section shall hereinafter be termed as award.

(5) The procedure to be followed by the Registrar, the Arbitrator or the Board of Arbitrators in deciding a dispute and making an award under this section shall be as may be prescribed."

48. Under the provisions of the Sections 65 and 66 of the Act, 1965, the

Registrar has powers to hold an inquiry and inspection either himself or through any person authorised by him order in writing. However, the inquiry contemplated under Section 65 is required to be held only on the application of :-

(a) a co-operative society to which the society concerned is affiliated;

(b) not less than one-third of the total members of the society; and

(c) a majority of the members of the Committee of Management of the society.

49. Section 66 of the Act, 1965 authorizes the Registrar, of his own motion or on the application of a creditor of the Cooperative Society, to inspect or direct any person authorized by him in writing in this behalf, to inspect books, cash and other properties of a Society. The Registrar is enjoined to communicate the results of any such inspection to the Society where the inspection is made of his own motion.

50. Under Section 69 of the Act, 1965, if as a result of any audit held under Section 64 or an inquiry under section 65, or an inspection under section 66, the Registrar is of opinion that the Society is not working on sound lines, or its management is defective, he may, without prejudice to any other action under this Act, make an order directing the Society or its officers to take such action not inconsistent with this Act, the rules and the bye-laws as may be specified in the order to remedy the defects within the time specified therein.

51. On a conspectus of the original record, and consideration of the inquiry report dated 29.05.2024 and the order dated 30.05.2024 as well as other materials on record of the writ petition, we find that the respondent no.2, who was required to exercise his discretional jurisdiction under Section 38 (1) of the Act, 1965 after due and independent application of mind and after considering relevant materials, has exercised the same with material irregularity and in excess of jurisdiction, arbitrarily, unreasonably, and unfairly. Moreover, not furnishing to the Society copies of the Inquiry Report and other documents examined by the Inquiry Committee, would render the mandatory hearing (as a consequence to any opportunity afforded to the officers) and deliberations of the Society directionless, precluding the Society from complying with the principles of natural justice at the time of affording opportunity of hearing to the officers. The aforesaid conclusions are due to the reasons stated above and collated below :-

a) In the order dated 30.05.2024 there appear no materials other than the report of the Inquiry Committee dated 29.05.2024 which Inquiry report reflects examination of an individual dispute between the petitioners and Smt. Kunta Devi.

b) The other allegations that are merely narrated in the Inquiry Report of 29.05.2024 pertain to a complaint dated 10.05.2024 allegedly made by some Society members, which have evidently not been examined by the Inquiry Committee under Section 66 of the Act, 1965 despite directions of the respondent no.2.

c) The dispute between the petitioners and Smt. Kunta Devi is subject matter of an arbitration

proceeding being case no.03/2024-25 under Section 70 / 71 of the Act, 1965 in which an arbitrator has been appointed by an order dated 27.05.2024 of the Commissioner / Registrar, Cooperative, which is pending.

d) Despite the respondent no.2 directing inspection under Section 66 of the Act, 1965 evidently no such inspection was conducted by the Inquiry Committee prior to submission of its report dated 29.05.2024 nor is any reference made in that report to the letter of the respondent no.2 to the Inquiry Committee directing the inspection. Therefore, mere existence of an individual dispute between the petitioners and Smt. Kunta Devi, which anyway is subject matter of a pending arbitration case, would not be construed as relevant material before the respondent no. 2 to reach its conclusion warranting action under Section 38(1).

e) Even though the inspection and inquiry were simultaneously directed to be conducted by means of two of his letters both dated 30.04.2024, the respondent no.2, without considering that the Inquiry Committee did not conduct inspection under Section 66 prior to submitting its report dated 29.05.2024, on the very next day passed the impugned order dated 30.05.2024 under Section 38 (1).

f) Given the fact that under Section 38 (1) of the Act, 1965 the electorate of the petitioner-Society has been called upon by the respondent no.2 to remove two officers, one of whom is duly elected (in the present case, the Chairman), the discretion of the Registrar is necessary to be exercised after due and independent consideration of the materials on record, due application of mind, without taking into account unexamined allegations, which has not been done in the present case.

g) The Inquiry Report dated 29.05.2024 alleges that the Chairman and Secretary of the Society are working arbitrarily and are seriously damaging the interests of the Society and its members. However, this inquiry report only reflects an individual dispute between the petitioners and one member of the Society, Smt. Kunta Devi. The allegations made in the complaint dated 10.05.2024 allegedly submitted by other Society members is merely narrated in this inquiry report without their examination or without any inspection conducted by the Inquiry Committee. Relying on such an inquiry report the respondent no.2 has concluded in his order of 30.05.2024 that the conduct of the Chairman and Secretary of the Society is fraudulent, biased and is altogether contrary to their responsibilities. In the same vein the respondent no.2 observes that 'prima facie' he is satisfied that the Chairman and Secretary are not fully discharging the duties of their office, are working against the provisions of the Act and Rules, and in such circumstances they have forfeited their right to hold their offices, and therefore, in the interest of the Society and its

members it is necessary to remove them from the posts held by them. Evidently, there were no materials before the respondent no.2 to initiate action under Section 38(1), rather he has based his discretion on irrelevant considerations which no reasonable man could reasonably arrive at given the facts and circumstances of the present case. As a matter of fact in the letters of the petitioners, as noted above, inter alia, serious allegations have been made with regard to non-deposit in the Society's bank account of the amounts received in cash towards the sale consideration of the disputed flat by the former Secretary, which under the facts and circumstances, where no inspection under Section 66 of the Act, 1965 has been conducted, or where the inquiry has not returned a categorical finding based on lawful considerations, could be a valid ground to deny NOC.

h) Neither the Inquiry Report dated 29.05.2024 nor other documents which were relied upon by the Inquiry Committee were supplied to the Society alongwith the impugned order / direction dated 30.05.2024 or even thereafter. These documents were necessary to be supplied because under Section 38(1) the society is mandated to pass such orders as it may deem fit after affording an opportunity of being heard to the officers. In the interest of the autonomy of a democratic Society, its members are required to be informed and supplied the materials relied upon by the Registrar to pass such an order of removal of officers and where necessary to disqualify them, so that the society can take an informed decision after considering the objections of such officers before passing such orders as the Society may deem fit. The Inquiry Report and other documents are materials that the Society would require to confront the officers while affording them opportunity of being heard.

52. The judgment of this court in the matter of **Meerut Sahkari Avas Samiti** relied upon by the learned counsel for the respondent no.2 observes that powers of the Society that is exercisable under Section 38(1) is with the general body of the Society and not the Committee of Management. Where a direction is given by the Registrar under Section 38(1), the Committee of Management is under obligation to call meeting of the general body of the Society for considering the directive of the Registrar. It was observed as follows:-

"23. Section 38, when we read it in its entirety we find that when action is initiated under sub-clause (1) of Section 38 by the Registrar by giving direction to the Society, it is the Society which has to take action after affording opportunity of being heard to the officer concerned. At this stage, the Registrar has nothing to do except for calling upon the Society to consider the action proposed and therefore, there is no requirement of giving notice or providing for observance of principle of natural justice. It is only the Society which is required to give opportunity of hearing to the officer concerned as

the decision, if any, is to be taken by the Society itself and not by the Registrar.

24. Sub-section (2) of Section 38 talks of the situation where despite direction given by Registrar, Society failed to comply with such direction and did not take any action against the "Officer" concerned, who is rendered disqualified to hold the office. In such eventuality, when Society has failed, sub-section (2) of Section 38 confers power upon Registrar to take action himself and to disqualify, remove or both, such "Officer" from the office. Under sub-section (2) of Section 38, when Registrar takes action on its own, he has to observe the principles of natural justice i.e. afford opportunity of hearing to "Officer" concerned and thereafter pass order which must be a reasoned one.

25. It is only in the second case, as contemplated in sub clause (2) of Section 38 where the Society fails to take any action, and the Registrar himself exercises the power of removal of the erring officer of the cooperative Society, sub clause (2) of Section 38 of the Act of 1965, stipulates that opportunity is to be given to the officer concerned.

26. In view of the discussion made above, we are of the considered opinion that the Registrar was not required to afford hearing to the officers at the stage of issuing direction to the Committee of Management to convene the meeting of general body to consider the removal of Chairman and the Secretary in accordance with provisions of Section 38 of the Act of 1965."

53. While we are in respectful agreement with the observations of the Bench in **Meerut Sahkari Avas Samiti**, however, they do not inure to the benefit of the respondent no.2 in the facts and circumstances of the present case. Though there is indeed no material on record to show that any meeting of the general body of the Society was called by the Committee of Management pursuant to the direction of the respondent no.2 under section 38(1), what we have examined and found in the present case is that while issuing the directions under Section 38(1) the respondent no.2 had not exercised his discretion judiciously. The discretion was exercised without due and independent application of mind, on the basis of irrelevant materials, unfairly, unreasonably and inequitably. Further, by the impugned order dated 30.05.2024, though the respondent no.2 directed the Committee of Management of the Society to take action under Section 38(1), however, the same is impermissible and such direction can only be construed to mean that the Committee of Management shall call a meeting of the General Body of the Society to consider the matter in the light of the mandate of Section 38(1).

Moreover, the learned Judges of the Bench in **Meerut Sahkari Avas Samiti** have observed that under the provision of Section 38(1), Registrar was not required to afford hearing to the officers at the stage of issuing direction to the Committee of Management to convene the meeting of general body to consider the removal, but only at the stage of proceedings under Section 38(2), to which we respectfully agree.

54. In view of the aforesaid, the impugned orders dated 30.05.2024 and 04.07.2024 passed by the respondent no.2 are quashed. The writ petition is, accordingly, **allowed**. This order is without prejudice to the powers and authority of the respondent no.2 to proceed against the petitioners in accordance with law and keeping in view the observations made above. It is made clear that any observations made herein are for purpose of adjudication of the case at hand and shall not be taken as an opinion of the court on merits of the case of either of the parties.

(2024) 8 ILRA 820
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Crl. Misc. Bail Application No. 28996 of 2024

Arman **...Applicant**

Versus

State of U.P. **...Opp. Party**

Counsel for the Applicant:
Sri Brijesh Kumar Pal

Counsel for the Opp. Party:
G.A.

Criminal Law - Bail - U.P. Gangster Act,1986 - Section 2/3 - The absence of legal aid to applicant is evident from fact that he could not file instant bail application almost one year after he has been enlarged on bail in all the three cases depicted in gang chart - Applicant has been in jail since 13.09.2020 - Applicant is financially destitute and belongs to marginalized section of society - Applicant could not approach High Court at an earlier point in time to seek his remedy of bail as he did not have access to legal aid nor was given legal advice earlier and also did not possess resources to file bail application - Directions given in Anil Gaur (infra) have been violated - Bail application allowed, learned trial court is directed to fix sureties after due application of mind in light of judgement rendered in Arvind Singh (infra). (Para 8, 20)

Allowed. (E-13)

List of Cases cited:

1. Arvind Singh Vs St. of U.P. Thru. Prin. Secy. Home Deptt. (Application u/s 482 No.2613 of 2023)

2. Anil Gaur @ Sonu @ Sonu Tomar Vs St. of U.P., 2022 SCC Online All 623

3. Ramu Vs St. of U.P., (Criminal Misc. Bail Application No. 17912 of 2019)

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

1. Matter is taken up in the revised call.

2. Supplementary affidavit filed by the learned counsel for the applicant is taken in the record.

3. By means of the bail application the applicant has prayed to be enlarged on bail in Case Crime No.93 of 2021 at Police Station-Etmadpur, District-Agra under Section 2/3 of the U.P. Gangster Act. The applicant is in jail since 13.09.2020.

4. The bail application of the applicant was rejected by the learned trial court on 09.07.2024.

5. The following arguments made by Shri Ali Jamal Khan, learned amicus curiae on behalf of the applicant, which could not be satisfactorily refuted by Shri Paritosh Kumar Malviya, learned AGA-I

from the record, entitle the applicant for grant of bail:

I. The applicant has been granted bail in the three criminal cases depicted in the gang chart, namely, (i) Case Crime No.219 of 2020 under Sections 363, 364-A, 302, 201, 34, 120B IPC, P.S. Etmadpur, District-Agra, (ii) Case Crime No.223 of 2020 under Section 307 IPC, P.S. Etmadpur, District-Agra and (iii) Case Crime No.225 of 2020 under Sections 379, 411, 414, 420, 467, 468, 471 IPC, P.S. Etmadpur, District-Agra.

II. The applicant has explained his criminal history.

III. 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 the applicant influencing witnesses, tampering with the evidence or reoffending.

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

7. Let the applicant-Arman 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.

8. 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.1**

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.

9. The District Legal Services Authority (DLSA), Agra shall ensure that appropriate legal aid is made available to the applicant for purposes of submitting sureties and completion of other formalities for being set forth at liberty.

10. Registry is directed to send a copy of this order to the District Legal Services Authority (DLSA), Agra for onward communication to the applicant who is in jail, and for assisting the applicant in the manner stated above.

11. Before parting, the Court would like to notice the other submissions made by Shri Ali Jamal Khan, learned amicus curiae on behalf of the applicant that the applicant has also been imprisoned in the two more criminal cases registered as Case Crime No.226 of 2020 under Section 3/25 of the Arms Act, P.S. Etmadpur, District-Agra and Case Crime No.225 of 2020 under Sections 379, 411 IPC, P.S. Malpura, District-Agra and has been granted bail in the aforesaid cases by the learned trial court. However, he has not been released on bail due to his inability to furnish sureties.

12. This appears to be a serious matter. The large number of the persons who belong to marginalized sections of the society or financially destitute are unable to arrange or provide sureties fixed arbitrarily by the learned trial courts. To deal with this situation the constitutional Courts have constantly held that the right of bail cannot be defeated by arbitrary surety demands. It is the responsibility of the learned trial court to apply their minds to the socioeconomic status of the accused and accordingly fix the sureties. The law has cautioned against determining sureties in a mechanical manner.

13 . This Court, while examining the issue pertaining to failure of accused persons to furnish sureties arbitrarily or mechanically fixed by the learned trial courts in **Arvind Singh (supra)** passed directions are extracted hereinunder:

"24. However despite unequivocal holdings of various constitutional courts the trial courts continue to adopt a rote response to a dynamic problem and approach the issue of fixation of sureties in a mechanical manner and neglect to make requisite enquiries as contemplated in the preceding parts of the judgment. The duties of the trial courts as well as other agencies while fixing sureties can be summed up as under:-

(1) In case a prisoner cannot arrange the sureties fixed by the trial court the former can make an application to the learned trial court for a lesser surety. Material facts relating to the socioeconomic status and roots in the community of the prisoner shall be stated in the application.

(2) Similarly it is bounden duty of the DLSA to examine the status of the prisoners who have been enlarged on bail but are not set at liberty within seven days of the bail order. In case the prisoners cannot arrange for sureties they may be advised and assisted to promptly move an application for refixation of the surety in light of this judgment.

(3) Once the prisoner makes such application the trial court shall make an enquiry consistent with this judgment and pass a reasoned order depicting consideration of relevant criteria for fixing sureties with utmost expedition.

(4) Every trial court is under an obligation to satisfy itself about the socioeconomic conditions of the prisoner and probability of absconding and his roots in the community and fix sureties commensurate with the same. The State authorities or other credible agencies as the court may direct to promptly provide the requisite details.

(5). In case the prisoner is from another State and is unable to produce local sureties, sureties from the prisoner's home district or any other place of his choice determined by the court of competent jurisdiction of the said district and State shall be accepted by the trial court.

(6) The prisoner/counsel may state the details of the socio-economic status of the prisoner in the bail application in the first instance. This will facilitate an expeditious consideration of the issue related to sureties.

26. The right of fundamental liberties of the applicant are being curtailed on account of his poverty and inability to arrange multiple sureties for cases instituted against him."

14. Further, this Court has also repeatedly directed that the right of bail of the applicant granted by this Court should not be not frustrated by arbitrary demands of sureties or onerous conditions which are unrelated to the socioeconomic status of the applicant.

15. It is noteworthy that this Court **in Arvind Singh (supra)** had directed the District Legal Services Authorities as well as the learned trial courts to examine the cases of those under trials who are not released on bail despite bail orders in view of onerous sureties demands made by the learned trial courts. The cases were required to be visited regularly by the learned trial courts.

16. As seen earlier this Court in **Arvind Singh (supra)** also directed the District Legal Services Authorities to provide legal aid to prisoners who are not able to enjoy the fruits of liberty granted by bail on account of their failure to provide the sureties fixed by the learned trial courts. The District Legal Services Authorities have to facilitate the said category of prisoners in filing their applications for recall of onerous surety demands.

17. The District Legal Services Authorities and the learned trial courts have not adhered to the aforesaid directions in the facts of this case.

18. The learned District Judge, Agra shall look into the matter and send a report to the Secretary, High Court Legal Services Committee, Allahabad High Court.

19. The Judicial Training and Research Institute (JTRI), Lucknow, U.P. was also issued directions to sensitize the learned trial courts to the need to apply their minds to relevant facts and the socioeconomic conditions of the accused before determining the sureties in light of this judgement and **Arvind (supra**).

20. The absence of legal aid to the applicant is also evident from the fact that he could not file this bail application almost one year after he has been enlarged on bail in all the three cases depicted in the gang chart. The applicant has been in jail since 13.09.2020. The applicant is financially destitute and belongs to a marginalized section of the society. The applicant was able to file the instant first bail application before this Court in the year 2024. The applicant could not approach this Court at an earlier point in time to seek his remedy of bail as he did not have access to legal aid nor was given legal advice to approach this Court earlier and also did not possess resources to file the instant bail application. It is also contended that the directions of this Court in **Anil Gaur @ Sonu @ Sonu Tomar v. State of U.P.**2 have been violated. [Also see: **Ramu v. State of U.P.3**

21. The applicant was a victim of "undeserved want" in light of **Anil Gaur (supra).** The denial of legal aid was caused by failure to implement the directions of this Court in **Anil Gaur (supra)** as well as **Ramu (supra).**

22. Registry is directed to send a copy of this order to the Secretary, High Court Legal Services Committee, Allahabad High Court as well as the Secretary, Uttar Pradesh State Legal Services Authority, Lucknow to prepare a report regarding compliance of the directions in **Arvind (supra).**

23. Registry is also directed to send a copy of this order to the Director, Judicial Training and Research Institute (JTRI), Lucknow, U.P. for compliance.

24. This Court appreciates the assistance rendered by Shri Ali Jamal Khan, learned amicus curiae, who addressed the Court on the merits of this case, and also made the relevant enquiries into the status of the other bail applications of the applicant where he has been enlarged on bail but he could not set forth at liberty on account of providing sureties.

25. The High Court Legal Services Committee shall consider the payment of usual remuneration to Shri Ali Jamal Khan, (A/A-518/2011) who represented the applicant as amicus curiae before this Court.

26. A copy of this order translated in Hindi shall be provided to the accused in jail through the District Legal Services Authority, Agra.

(2024) 8 ILRA 824
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Misc. Writ Petition No. 11443 of 2024

Canfin Homes Ltd. & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Amrendra Singh

Counsel for the Respondents:
G.A.

Criminal Law-The Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986-Sections 14(1), 16 & 17- That if a person interested in a property could not file a representation before the District Magistrate/Commissioner of Police u/s 15(1) of the Gangster Act for want of knowledge then he can file his objection before the Special Court even after reference of attachment order to Special Court u/s 16(1) of the Gangster Act and, in appropriate cases the Special Court after completion of the inquiry u/s 17 of the Gangster Act may also deliver the attached property to the interested person if he is found entitled to possession thereof-petitioners can file an application before the Special Court (Gangster Act) to claim their right over the property by showing that property was not the result of commission of crime by the accused but it was purchased through a bank loan, as the property in question was mortgaged to the bank, therefore, the bank is entitle to take its possession, as provided in Section 17 of the Gangster Act-Result Petition dismissed with liberty to petitioner to file their objection or claim before the Special Court (Gangster Act), Ghaziabad. (E-15)

List of Cases cited:

1. Prithvi Singh Vs St.of U.P. & ors.reported in 2022 (8) ADJ 29 (DB)

2. Mineral Area Development Authority & anr.Vs SAIL & anr. reported in 2024 SCC OnLine SC 1796

3. S.B.I. Vs Santosh Gupta & anr. reported in (2017) 2 SCC 538

4. M. Karunanidhi Vs U.O.I.reported in (1979) 3 SCC 431

5. R.S. Raghunath Vs St.of Karn. & anr. reported in (1992) 1 SCC 335

6. Commissioner of Income Tax Vs Hindustan Bulk Carriers reported in (2003) 3 SCC 57

7. Government of A.P. Vs J.B. Educational Society reported in (2005) 3 SCC 212

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

1. Heard Sri Amrendra Singh, learned counsel for the petitioners and Sri Ratan Singh, learned AGA for the State.

2. Present petition has been filed for the following relief:

"I. Issue a writ, order or direction in the nature of certiorari, for quashing the order of attachment dated 04.05.2023 passed by Police Commissioner, Ghaziabad in the case no. 09/23, u/s 14(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 in State Vs. Rakesh Sharma as much as it relates to the borrower/mortgagor's said property i.e. House no.78 Sector Delta-3, Greater Noida, Gautam Budh Nagar, Uttar Pradesh;

II. Direct the respondent no.3 to handover the physical possession of the said property to the petitioner. "

3. Contention of learned counsel for the petitioners is that petitioner no.1 is a housing finance company sponsored by Canara bank. The petitioner-finance company has granted a loan to one Rakesh Sharma to purchase house no.78 Sector Delta-3, Greater Noida, Gautam Budh Nagar, Uttar Pradesh and that the property was also mortgaged to the petitioners in lieu of the above loan facility extended to Rakesh Sharma. It is further submitted that against Rakesh Sharma, the Gangster Act was invoked, and a FIR was registered against him in case crime no.466 of 2022 and during that proceeding, the above property was attached by the Police Commissioner, Ghaziabad vide order dated 04.05.2023 u/s 14(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 (hereinafter referred to as the 'Gangster Act').

4. As the above property was already mortgaged to the bank, which is a secured creditor, the petitioners preferred Criminal Misc. Writ Petition No.3720 of 2024, immediately after the knowledge of the attachment order dated 04.05.2023. That writ petition was disposed of with a direction to Commissioner of Police, Ghaziabad, to consider the representation dated 08.09.2023 of petitioners against the attachment order dated 04.05.2023 and decide the same within 15 days from the date of production of the certified copy of this order.

5. It is further submitted that despite receiving a copy of the order dated 13.03.2024 passed by this Hon'ble Court in Criminal Misc. Writ Petition No.3720 of 2024, the respondent no.3 has not considered the representation of petitioner no.2, and he was simply informed by respondent no.3 vide letter dated 08.05.2024 that the final order regarding the property of Rakesh Sharma has been passed on 04.08.2023, u/s 15 of the Gangster Act and the matter has been referred to the Special Court (Gangster Act). Therefore, representation of petitioner no.2 cannot be considered at this stage. Learned counsel for the petitioners further submitted that the property in question was mortgaged to the bank, and the bank had already issued proceedings to recover its dues against the property in question (attached by respondent no.3), under the

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act, 2002') and petitioners being secured creditors will have first right over the property in question as the Act, 2002 is Central Act and same will prevail over the law made by the Legislature of the State in view of the Article 254 of the Constitution of India.

6. *Per contra*, learned AGA has submitted that at the time of deciding the Criminal Misc. Writ Petition No.3720 of 2024, petitioners had not informed the court about the order dated 04.08.2023 passed u/s 16 of the Gangster Act by which representation of the accused Rakesh Sharma was rejected and matter was referred to Special Court (Gangster Act) and at this stage, the Commissioner of Police has no authority to pass any order to release the property in question and petitioners have remedy to pursue their case before the Special Court (Gangster Act).

7. After hearing the submission of learned counsel for the parties and on perusal of the record, it appears that the impugned attachment order dated 04.05.2023 was passed by the Commissioner of Police, Ghaziabad, u/s 14(1) of the Gangster Act. Thereafter, after considering the representation of the accused, Rakesh Sharma, the final order was passed u/s 16 of the Gangster Act on 04.08.2023 and the matter was referred to the Special Court (Gangster Act). On the date of filing the Criminal Misc. Writ Petition No.3720 of 2024 by the petitioners, the matter had already been referred to the Special Court (Gangster Act) u/s 16 of the Gangster Act. As the matter was already referred to Special Court (Gangster Act), prior to passing the order dated 13.03.2024 in Criminal Misc. Writ Petition No.3720 of 2024, therefore, the Commissioner of Police has no authority to consider the representation of the petitioners regarding the release of the property in question. The petitioners were already informed by the Commissioner of Police vide order dated 08.05.2024 about the order dated 04.08.2023.

8. At present, the matter is pending before the Special Court (Gangster Act). Now, as per the Section 16(3) of the Gangster Act, Special Court will conduct an inquiry u/s 17 of the Gangster Act regarding the character of acquisition of property. Sections-16 & 17 of the Gangster Act are being quoted as under:

"16. Enquiry into the character of acquisition of property by court-

(1) Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such Court may, if it considers necessary or expedient in the interest of

justice so to do, order attachment of such property.

(3)(a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub- section (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3) the Court, shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 in respect of the following matters, namely :-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;

(e) issuing commission for examination of witness or documents;

(f) dismissing a reference for default or deciding it ex parte

(g) setting aside an order of dismissal for default or ex parte decision.

(5) In any proceedings under this section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence Act, 1872 (Act No.1 of 1872), notwithstanding.

"17. ***Order after inquiry****-If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise."*

9. From perusal of Section-16 of the Gangster Act, it is clear that when no representation is made or despite receiving representation u/s 16(1) of the Gangster Act, District Magistrate does not release the property u/s 15(2) of the Gangster Act then any aggrieved person by such refusal may make an application to special court u/s 16(2) of the Gangster Act to release such property after conducting inquiry.

10. Therefore, it is also clear from Section 16(3)(a) of the Gangster Act that

when the matter is referred by the District Magistrate to Special Court u/s 16(1) of the Gangster Act then any person whose interest appears to be involved in the case may also be heard by Special Court while conducting inquiry u/s 17 of the Gangster Act. From perusal of Section 16(3)(a) of the Gangster Act, it is amply clear that any person who is interested in the property has the right to appear before the court to establish his claim over the property and the Special Court u/s 16(3)(b) of the Gangster Act will hear the parties and after considering the evidence produced by the parties would decide whether property was acquired by the Gangster, as a result of Commission of offence or not. After the inquiry u/s 17 of the Gangster Act, if the Special Court does not release the property in favour of the Gangster, then the court can also deliver the same to a person who is entitled to possession.

11. The co-ordinate Bench of this court in the case of **Prithvi Singh Vs. State of U.P. And Others** reported in **2022 (8) ADJ 29 (DB)** considered the law relating interpretation of statute. Paragraph nos.10 to 18 **of Prithvi Singh's case (supra)** is being quoted as under:

"10. Before proceeding further it would be appropriate to take note of the principles of statutory interpretation as the decision of the question involved in the present case is directly dependant on the interpretation of the statutory provisions. For this purpose we have taken help of the book 'Principles of Statutory Interpretation' '13th Edition, 2012' written by Justice G. P. Singh (Former Justice of M. P. High Court).

11. One of the main basic principles of interpretation is that if meaning of words of statute are plain, effect must be given to it irrespective of consequences.

12. In Nelson Motis v. Union of India, AIR 1992 SC 1981, it has been observed that when the words of a statute are clear, plain or unambiguous, i.e., they are reasonably susceptible to only one meaning, the Courts are bound to give effect to that meaning irrespective of consequences.

13. In Kanailal Sur v. Paramnidhi Sadhu Khan, AIR 1957 SC 907, it was observed that if the words used are capable of one construction only then it would not be open to the Courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

14. In State of Uttar Pradesh v. Vijay Anand Maharaj, AIR 1963 SC 946, it was held that when a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself.

15. It is also a guiding rule of interpretation that language of the statute should be read as it is.

16. In Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd v. Custodian of Vested Forests, AIR 1990 SC 1747, it was observed that 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.

17. In Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230,

Supreme Court held that departure from the literal rule should be done only in very rare cases and ordinarily there should be judicial restraint in this connection.

18. Insofar as rule of 'regard to consequences' is concerned, the aforesaid book clearly provides that this rule has no application when the words are acceptable to only one meaning and no alternate construction is reasonably open. A reference may be made in this regard with citations noted above which provides that if meaning is plain, effect must be given to it irrespective of consequences."

12. In the present case, the petitioners have also made a representation u/s 15(1) of the Gangster Act before the respondent no.3 but same was submitted after passing of the order u/s 16 of the Gangster Act, even then their right to appear before the special court to claim their property on the ground that being finance company, they have preferential rights over the attached property which was hypothecated to the bank and the proceeding against the same was also issued under the Act, 2002 to recover the loan extended by the petitioners to the accused, Rakesh Sharma to purchase that property. Thus, the bank falls in the category of "any person aggrieved" as provided u/s 16(2) of the Gangster Act and in the category of "any other person whose interest appears to be involved in the case" as mentioned in Section-16(3)(a) of the Gangster Act.

13. **From the above analysis, this court holds that if a person interested in a property could not file a representation before the District Magistrate/Commissioner of Police u/s 15(1) of the Gangster Act for want of knowledge then he can file his objection before the Special Court even after reference of attachment order to Special Court u/s 16(1) of the Gangster Act and, in appropriate cases the Special Court after completion of the inquiry u/s 17 of the Gangster Act may also deliver the attached property to the interested person if he is found entitled to possession thereof.**

14. So far as the contention of learned counsel for the petitioner that the Act, 2002 being a Central Act will have overriding effect over the Gangster Act in view of Article 254 of the Constitution of India is concerned, to decide this issue, Articles 246 and 254 of the Constitution of India are being quoted as under:

"246. Subject-matter of laws made by Parliament and by the Legislatures of States

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List 1 in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament and subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the

matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the 'State List').

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List.

"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

15. From the perusal of Article 246 of the Constitution of India, it appears that it confers exclusive powers to Parliament to make laws with respect to any of the matter enumerated in Union List (List I) of the Seventh Schedule, and it also confers exclusive power to the State Legislatures with respect to the matters enumerated in the State List (List II), which is subject to the exclusive legislative power of Parliament. Issue of interpretation of Article 254 of the Constitution of India came into consideration before the Supreme Court in the case of **Mineral Area Development Authority & Another Vs. Steel Authority of India & Another** reported in **2024 SCC OnLine SC 1796**. While interpreting Article 254 of the Constitution of India, the nine Judges Bench in **Mineral Area Development Authority (supra)** observed **that issue of repugnancy arises only when both the legislatures are competent to legislate on the subject with respect of List-III and in case of conflict in other cases, answer lies in Article 246 of the Constitution of India, itself.** Paragraph nos.33, 34 and 35 of **Mineral Area Development Authority (supra) are being quoted as under:**

"*33. Article 254 clarifies that if the law made by a State legislature is repugnant to any provisions of a law made by Parliament with respect to any of the matters enumerated in List III, the law made by Parliament would prevail and the law made by the State legislature would be void to the extent of the repugnancy. The issue of repugnancy arises only when both the legislatures are competent to legislate on the subject with respect to List III. The*

issue of repugnancy does not arise if the legislations enacted by Parliament and the State legislatures deal with separate and distinct legislative subject matters. By virtue of Article 248, Parliament has exclusive legislative powers to make laws with respect to any of the matters not enumerated in List II or List III. However, how should courts deal with a situation where two legislations, enacted by Parliament and State legislature in pursuance of their respective legislative powers, appear to conflict with each other? The answer lies in Article 246 itself.

34. Article 246 incorporates the principle of federal supremacy. ***In Hoechst Pharmaceuticals (supra),*** *this Court held that the words "notwithstanding anything contained in clauses (2) and (3)" in Article 246(1) and the words "subject to clauses (1) and (2)" in Article 246(3) embody that principle. The principle postulates that in case of an inevitable conflict between Union and State powers, the Union's power of legislation over a subject enumerated in List I shall prevail over the State powers of legislation over a subject enumerated in List II and III. However, it is also settled that this principle cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and State Lists. Such a conflict must be an actual one and not a mere seeming conflict between the two entries in two lists.*

35. ***Hoechst Pharmaceuticals (supra)*** *laid down the following principles to resolve any direct conflict between the entries in List I and List II : (i) in case of seeming conflict, the two entries should be read together without giving a narrow and restricted reading to either of them; (ii) an attempt should be made to see whether the two entries can be reconciled so as to avoid a conflict of jurisdiction; and (iii) no question of conflict arises between two Lists if the impugned legislation in pith and substance appears to fall exclusively under one list and the encroachment upon the other list is incidental."*

16. The issue of repugnancy between the Central Act and the State Act has been explained in a number of statutory interpretations by G.P. Singh. The relevant extract from the Fourteenth Edition of G.P. Singh's principles of statutory interpretation is being quoted as under:

"*The question whether the legislature has kept itself within the jurisdiction assigned to it or encroached upon a forbidden field is determined by finding out the true nature and character or pith and substance of the legislation which may be different from its consequential effects. If the pith and substance of the legislation is covered by an entry within the permitted jurisdiction of the legislature any incidental encroachment in the rival field is to be disregarded. There is presumption of constitutionality of statute and hence, prior to determining whether there is any repugnancy between the Central Act and the State Act, it has to be determined whether both Acts laid to the same entry in the List III and whether there is a 'direct' or that a 'irreconcilable' conflict between two, applying the doctrine of, pith and substance."*

17. Similarly, from the perusal of the above quoted Article 254 of the Constitution of India, it is clear that the same is applicable where there is inconsistency between the law made by the Parliament and the State Legislature regarding any matter enumerated in Concurrent List (List III). Act 2002 is

referable to Entry 45 and 95 of the Union List (List I) and deals with the recovery of debt due to bank and financial institutions, which is the subject of the Union List. Similar issue came for consideration before the Hon'ble Supreme Court in the case of **State Bank of India Vs. Santosh Gupta & Anothers** reported in **(2017) 2 SCC 538,** wherein the dispute arose regarding the Act, 2002 and the transfer of property Act. Paragraph no.37 of the **Santosh Gupta's case (supra)** is being quoted as under:

"37. Applying the doctrine of pith and substance to Sarfaesi, it is clear that in pith and substance the entire Act is referable to Entry 45 List I read with Entry 95 List I in that it deals with recovery of debts due to banks and financial institutions, inter alia through facilitating securitisation and reconstruction of financial assets of banks and financial institutions, and sets up a machinery in order to enforce the provisions of the Act. In pith and substance, Sarfaesi does not deal with "transfer of property". In fact, insofar as banks and financial institutions are concerned, it deals with recovery of debts owing to such banks and financial institutions and certain measures which can be taken outside of the court process to enforce such recovery. Under Section 13(4) of Sarfaesi, apart from recourse to taking possession of secured assets of the borrower and assigning or selling them in order to realise their debts, the banks can also take over the management of the business of the borrower, and/or appoint any person as manager to manage secured assets, the possession of which has been taken over by the secured creditor. Banks as secured creditors may also require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom money is due or payable to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt. It is thus clear that the transfer of property, by way of sale or assignment, is only one of several measures of recovery of a secured debt owing to a bank and this being the case, it is clear that Sarfaesi, as a whole, cannot possibly be said to be in pith and substance, an Act relatable to the subject-matter "transfer of property".

18. The Constitution Bench of the Hon'ble Supreme Court **in M. Karunanidhi Vs. Union of India** reported in **(1979) 3 SCC 431** had considered the question of repugnancy and inconsistency between the Central Act and the State Act and held that, before any repugnancy can arise, the conditions which must be satisfied are:

(i) that there is a clear and direct inconsistency between the Central Act and the State Act;

(ii) that such an inconsistency is absolutely irreconcilable;

(iii) that inconsistency between the provision of two Acts is of such a nature so as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

19. The relevant paragraph no.24 of **M. Karunanidhi'**s case **(supra)** is being quoted as under:

"24. It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove

that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied:

1. That there is a clear and direct inconsistency between the Central Act and the State Act.

2. That such an inconsistency is absolutely irreconcilable.

3. That the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other."

20. In the case of **R.S. Raghunath Vs. State of Karnataka & Another** reported in **(1992) 1 SCC 335**, Hon'ble Supreme Court observed that the Court must ascertain the intention of Legislature by directing its attention not merely to the clauses to be construed, but to the entire statute; it must compare the clause with other parts of the law and the setting in which the clause to be interpreted occurs. The relevant paragraph no.12 of **R.S. Raghunath's** case **(supra)** is being quoted as under:

"12. Further, the influence of a non-obstante clause has to be considered on the basis of the context also in which it is used. In State of W.B. v. Union of India [(1964) 1 SCR 371 : AIR 1963 SC 1241] it is observed as under: (SCR p. 435)

"The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs."

It is also well settled that the Court should examine every word of a statute in its context and to use context in its widest sense. In Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. [(1987) 1 SCC 424] it is observed that: "That interpretation is best which makes the textual interpretation match the contextual." In this case, Chinnappa Reddy, J. noting the importance of the context in which every word is used in the matter of interpretation of statutes held thus: (SCC p. 450, para 33)

"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 the 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. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in

isolation. Statutes have to be construed so that every word has a place and everything is in its place."

If we examine the scope of Rule 3(2) particularly along with other General Rules, the context in which Rule 3(2) is made is very clear. It is not enacted to supersede the Special Rules."

21. Similarly, in the case **of Commissioner of Income Tax Vs. Hindustan Bulk Carriers** reported in **(2003) 3 SCC 57**, the Hon'ble Supreme Court again observed that the statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make it consistent enactment of the whole statute. The relevant paragraph no.18 of **Hindustan Bulk Carrier's** case **(supra)** is being quoted as under:

"18. The statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute."

22. The Hon'ble Supreme Court again in the case of **Government of A.P. Vs. J.B. Educational Society** reported in **(2005) 3 SCC 212** observed that there is no doubt that both Parliament and the State Legislature are supreme in their respective assigned fields. It is the duty of the Court to interpret the Legislation made by Parliament and the State Legislature in such a manner so as to avoid any conflict. However, if the conflict is unavoidable and the two enactments are irreconcilable, then by the force of non-obstante clause in Clause-1 of Article 246 of the Constitution of India, the Parliamentary Legislation would prevail, notwithstanding the exclusive power of the State Legislature to make a law with respect to the matter enumerated in the State List. The relevant paragraph no.10 of Educational Society's case (supra) is being quoted as under:

"10. There is no doubt that both Parliament and the State Legislature are supreme in their respective assigned fields. It is the duty of the court to interpret the legislations made by Parliament and the State Legislature in such a manner as to avoid any conflict. However, if the conflict is unavoidable, and the two enactments are irreconcilable, then by the force of the non obstante clause in clause (1) of Article 246, the parliamentary legislation would prevail notwithstanding the exclusive power of the State Legislature to make a law with respect to a matter enumerated in the State List."

23. From the above legal position, it is clear that the concept of "inconsistency" is found in Article 254 of the Constitution of India. Article 254 of the Constitution of India has a marginal note which speaks about the inconsistencies between the laws made by the Parliament and the laws made by the Legislatures of the State. The Article aforesaid goes on to State that if the law made by the State is repugnant to the law made by the Parliament, then the law made by the Parliament to the extent of repugnancy would prevail. The said Article, being a constitutional provision, deals with the complex subject of the quasi and federal structure we have in India.

24. In the present case, the question is regarding the repugnancy of the Act, 2002 and the Gangster Act. The subject of making criminal law is in Entry-I and its procedure in Entry-II of the

Concurrent List of the Constitution of India, wherein the Parliament and State Legislature are competent to legislate in view of Article 246 of the Constitution of India. The UP Gangster Act is criminal law and UP State Legislature is competent under Entry I and II of the Concurrent List to enact UP Gangster Act that provides penalties to gangster and also procedure to attach and confiscate the property of a gangster acquired through illegal means. However, Act 2002 is referable to Entry 45 and 95 of List I. For reference, Entry 45 and 95 of the Union List (List I) and Entry I and II of the Concurrent List (List III) are being quoted as under:

"Union List (List I)

Entry 45*-Banking*

Entry 95*-Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list; admiralty jurisdiction.*

Concurrent List (List III)

Entry I*- Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.*

Entry II*-Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution."*

25. The object of the Act, 2002 is to ensure that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstruction and without intervention of courts or Tribunals, while the object of the Gangster Act is to provide speedy and transparent procedure to punish the gangster, to establish an efficient recovery system with respect to the property of gangsters and incidental benefits acquired by them through crime. The conjoint reading of the Act, 2002 and Gangster Act shows that there is no overlapping between them.

26. **This court is of the view that Article 254 of the Constitution of India will apply only in those cases where there is inconsistency between the law made by the Parliament and law made by the Legislature of State on the subject of List-III (Concurrent List) but there is no inconsistency between the Act, 2002 and the Gangster Act, as object of the Act, 2002 and Gangster Act are different and both the Acts operate in different fields, and both Acts were enacted in different lists. (List I and List III).**

27. Now coming back to the controversy involved in present case, the inquiry, as per Section 16 of the Gangster Act, would be, whether the property purchased by the Gangster, as a result of commission of an offence under the Gangster Act and not the issue that who will have first right over that property. Therefore, the petitioners can file an application before the Special Court (Gangster Act) in case crime no.466 of 2022 to claim their right over the property by showing that property was not the result of commission of crime by the accused, Rakesh Sharma, but it was purchased through a bank loan, as the property in question was mortgaged to the bank,

therefore, the bank is entitle to take its possession, as provided in Section 17 of the Gangster Act.

28. In view of the above, the petitioners argument has no force. Accordingly present petition is **dismissed**. However, liberty is granted to the petitioners to file their objection or claim before the Special Court (Gangster Act), Ghaziabad, regarding House No.78 Sector Delta-3, Greater Noida, Gautam Budh Nagar, Uttar Pradesh and the court below will consider the same, in accordance with law, on its own merits.

(2024) 8 ILRA 836
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.08.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 1093 of 1983

Murari ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Daya Shankar Mishra, Sri Krishna Kapoor

Counsel for the Respondent:
A.G.A., Sri Chandra Bhan Kushwaha

Criminal Law - Indian Penal Code, 1860 - Section 302 - Punishment for murder- Code of Criminal Procedure, 1973 - Sections 161, 313 & 437(1) - Appeal against conviction - Imprisonment for life - As per FIR - On 06.07.1982, accused, serving in military had killed Phool Singh with his licensed gun - On the basis of information given by Ram Autar Singh (PW-2) and Dhanpal Singh, FIR was lodged by deceased brother (PW-1) - Charges framed - Held, PW-2, an eyewitness St.d he was accompanied by Dhanpal but Dhanpal was never produced in witness box - PW-2 assistance ought to have been taken while preparing site plan but that was not done - The site plan didn't show recovery of empty cartridges - PW-2 was present on that date, his St.ment was not recorded on same day - PW-5, St.d that PW-2 was never on the spot - Thus, PW-2 was a planted witness, never on the spot - Gun was not matched with empty cartridges, lying in military malkhana, no effort was made to get it, empty cartridges was not forensically examined - Prosecution's case doubtful regarding panchayatnama that Sub-Inspector was present during preparation of panchayatnama, but he had never signed, signed by PW-6 - He had signed on certain blank spaces, which shows he had signed subsequently - Absence of Sub-Inspector on date of preparation of inquest, established by St.ment of PW-4 - PW-1 St.d that dead body was taken to police station from the place of occurrence, but PW-4 St.d that dead body was not at the police station - Deceased was coming village side, accused was coming from outside the village and during incident they were face to face. (Para 2, 13, 14, 15, 16)

Appeal is allowed. (E-13)

List of Cases cited:

1. Jagdish & Anr. Vs St. of Har. reported in (2019) 7 SCC 711

2. Anand Ramachandra Chougule Vs Sidarai Laxman Chougala & ors.reported in (2019) 8 SCC 50

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

1. This appeal has been filed against the judgment and order dated 3.5.1983 passed by the Sessions Judge,

Budaun by which the appellant-Murari was convicted under section 302 I.P.C. and was sentenced to undergo imprisonment for life.

2. The brief facts of the case are that on 06.07.1982 when Phool Singh was allegedly murdered, a first information report was lodged on the same day by his brother Sheodan Singh alleging that Murari Lal, accused, son of Shankar who was serving in the Military and who was inimical to the deceased and the first informant and who had on earlier occasions also attempted to pick up fights with them, had killed Phool Singh when the latter was going from his village to Wazeerganj. Sheodan Singh has further stated in the first information report that he had got the first information report lodged when information was given to him by Ram Autar Singh and Dhanpal Singh at around 04:30 PM that Murari Lal with his licensed gun had fired upon the brother of Sheodan Singh namely the deceased Phool Singh and that the dead-body of Phool Singh was lying in the field of Dheemar. Upon hearing this, the first informant Sheodan Singh had gone to the spot and thereafter had gone to get the first information report lodged. Upon the first information report being lodged, investigation commenced and the Investigating Officer had prepared a recovery memo of the bloodstained soil and the plain soil and had marked it as Exhibit Ka-6. Thereafter, the five empty cartridges of 12 bore were also recovered from the spot and the memo was numbered as Exhibit Ka-7. Exhibit Ka-14 was a list of the articles which were recovered when the accused-Murari was being searched for. A Panchayatnama was prepared which was exhibited as Exhibit Ka-8 and the other documents were exhibited as Exhibits Ka-9; Ka-10 and Ka-11 and they accompanied the dead-body to the postmortem house. Upon the conclusion of the investigation, the police report was sent and the charges were framed against the accused-Murari under Section 302 of Indian Penal Code and thereafter when he had denied the charges, the trial had commenced and when the trial Court by its judgment and order dated 03.05.1983 had found the accused-Murari guilty for the offence under Section 302 I.P.C., the instant Criminal Appeal was filed.

3. The prosecution from its side had produced as many as six prosecution witnesses.

4. Sheodan Singh, brother of the deceased and the first informant, was produced as PW-1. He had stated in his statement before the Court that because of certain enmity with regard to keeping of pigs, the accused-Murari on 06.07.1982 at 04:00 PM had killed Phool Singh and this information was given to the PW-1 by Dhanpal Singh and Ram Autar Singh. He had proved the first information report. In his cross-examination, he had stated that he had not stated in his statement under Section 161 of Cr.P.C. that at 04:00 PM the deceased had started for Wazeerganj

from his village. He had stated that when he had reached the spot, he had found the five empty cartridges lying on the spot and that the place of incident was around one kilometer from the place of his residence. He had thereafter stated that after getting the first information report lodged, he had gone back to the place of incident. The Investigating Officer had come on his jeep. The dead-body thereafter was sealed and taken to the police station and the dead-body was thereafter lying on a dunlop outside the police station during the night. In the morning, the dead-body was taken to Budaun. Upon a question being asked that the report was ante timed, he denied. He had also denied the fact that the names of Ram Autar and Dhanpal were mentioned subsequently as an afterthought and he had specifically stated that Dhanpal and Ram Autar alone had come to give the information to him.

5. PW-2 Ram Autar Singh is the person who, it has been stated, had seen the incident and in his statement-in-chief he had stated that on the fateful day at 04:30 PM, he alongwith Dhanpal was coming from Wazeerganj to their village and Murari, the accused, was going ahead of them and was carrying a gun. At that point of time, Phool Singh was coming from the side of the village and as soon as Phool Singh reached near Murari-the accused, Murari fired from his gun 3-4 times and thereafter the accused, Murari ran away from the Eastern side. Upon a hue and cry being raised by the PW-2 and Dhanpal, a lot many villagers came on the spot. However, Dhanpal and Ram Autar went to the house of Sheodan to inform him about the incident. He has also stated that on that date, Gram Panchayat Elections were going on in Wazeerganj and counting was also going on and they had gone to Wazeerganj in connection with the counting of votes of their village. He has very categorically stated that Dhanpal had refused to come in the witness box. In his cross-examination, he has stated that Murari was not seen before a particular bhatta (brick kiln) and he was visible only after they had crossed that bhatta (brick kiln). When he saw the accused, Murari and the deceased, Phool Singh for the first time, they were just 3-4 steps away from each other and when Murari had attacked Phool Singh, the latter had fallen down and thereafter Murari had fired 3-4 shots and these fire shots were made from a very close distance. He has also stated that Murari had fired standing on the left side. He has stated that the village was around 250 meter from the place of incident and he has stated that when he reached near Phool Singh then he was lying on his left side in the West-East direction. When they had gone to inform Sheodan Singh, he was there in the village and after having given the information, the PW-2 has categorically stated that he came back to the spot. The Police had come on the spot at around 07:00 PM. The Police had not taken the evidence of PW-2 on that date i.e. on 06.07.1982. Sheodan Singh had reached the spot and thereafter the Investigating Officer

had also reached the spot. He had, however, left for his house from the place of incident. He, therefore, states that he did not know how the dead-body was removed from the spot. The next day, the Investigating Officer had recorded his evidence. He has stated that on the date of incident at around 09:00 to 10:00 AM, he had reached the spot where the counting of the ballot paper was going on and that after the counting of their village which had started at around 11:00 AM, he had returned and upon a question being asked as to whether the news of the incident had reached the place when the counting was going on, he had denied the same. He has very categorically stated that when he reached the spot he had found the five empty cartridges lying on the spot.

6. PW-3 is the doctor who had conducted the postmortem and has proved the postmortem report. He has spoken about the ante mortem injuries as were there on the dead-body.

7. PW-4 Head Constable Ramanand was the chick writer. He had stated that after the case was registered, the investigation was handed over to the Sub-Inspector Virendra Singh. In his cross-examination he has stated that on 06.07.1982 the dead-body was not lying on the police station and that D.C. Sharma, who allegedly as per the PW-5 was the Investigating Officer, was not present at the time when the panchayatnama was being prepared. He had come on the spot on 07.07.1982 at around 11:00 AM. He has also stated that the special report was sent at 12.05 hours on the same day when the first information report was lodged.

8. PW-5 is the Investigating Officer Virendra Singh. He has stated that when he had reached the spot, he had taken the statements of Sheodan Singh and had also prepared the site map on reaching the spot. He has stated that he had taken from the place of incident the bloodstained soil and the plain soil. He had also taken and kept in his custody the five empty cartridges of 12 bore from the spot in question. He has stated that Sub-Inspector D.C. Sharma had prepared the Panchayatnama on his instructions and in the presence of the Investigating Officer, the Panchayatnama which was exhibited as Exhibit Ka-8, the photo of the dead-body and the Challan with regard to the dead-body was prepared and exhibited as Exhibit Ka-9. The letter of Chief Medical Officer was exhibited as Exhibit Ka-11 and the document by which the dead-body was to be taken for post mortem was exhibited as Ka-12. The seal was exhibited as Exhibit Ka-13 and he had very categorically stated that all the exhibits Ka-8 to Ka-13 were signed by the Sub-Inspector D.C. Sharma in his presence. After having given the instructions for the preparation of the Panchayatnama, he had gone out for search of the accused. In his cross-examination, PW-5 has stated that where the dead-body was lying, there was also blood present. He has stated

that in the site plan, he had given out as to where the dead-body was lying. However, he has not stated as to where the blood was found in the site plan. He has very categorically stated that the site plan was prepared at the pointing of PW-1. He has also stated that he had not shown the place where the firing had taken place. He has thereafter stated that in the night of 06.07.1982 he had not recorded the statements of PW-2, Ram Autar and in fact he has very categorically stated that when he had reached the spot, Ram Autar was not present there.

9. PW-6 is the Sub-Inspector Roshan Lal who has stated that he had arrested the accused and he has also very categorically stated that apart from arresting the accused, he had not done any investigation. He has also stated that the firearm which was used in the incident was never sent for expert opinion. No report was called for and also no application was given before the Court for the examination of the firearm.

10. Heard Sri Daya Shankar Mishra, learned Senior Counsel assisted by Sri Chandrakesh Mishra and Sri Abhishek Mishra, learned counsel appearing for the appellant; Sri Arvind Kumar, learned AGA and Sri Chandra Bhan Kushwaha, learned counsel appearing for the first informant.

11. Sri Daya Shankar Mishra, learned Senior Counsel has submitted that the entire evidence if is taken in its totality, it would go to prove that a false case had been lodged against the accused and without looking to the evidence, the order of conviction had been passed. In effect, learned counsel for the appellant has made the following arguments :-

(i) Learned counsel for the appellant has stated that the PW-2, the alleged eye-witness, in fact was never there on the spot. He has submitted that if the statement of PW-2 is seen, then it becomes clear that he was accompanied by one Dhanpal but Dhanpal never appeared in the witness box. He has further submitted that PW-2 since had never arrived, his assistance was not taken while the site plan was being prepared. In the site plan neither the place from where the firing had taken place nor the place from where the blood-stained soil had been taken into custody was shown. Also, he has stated that nowhere had it been shown in the site plan where exactly the empty cartridges were recovered from. Learned counsel for the appellant states that the PW-2 had stated that he was there on the spot but his statement was never recorded. Further, learned counsel has invited the attention of the Court to the statement of PW-5 who has stated that in fact the PW-2 was never there on the spot. Further, learned counsel for the appellant has submitted that the PW-2 had stated that the deceased and the accused were face to face when the incident had occurred and, therefore, he has submitted that the Injury No.1 as was described in the

post-mortem report i.e. the entry wound of the gun-shot which was from behind the right arm, was never explained. Learned counsel for the appellant states that when the PW-2 had not seen the incident, he could not also graphically tell as to how the incident had occurred and, therefore, he could not explain the injury no.1 as was given in the post-mortem report which was that the entry wounds were from behind the right arm. Learned counsel submits that when the accused and the deceased were face to face and when the direct firing was done, then under no circumstances could the firearm injuries as have been shown as Injury No.1 could have occurred. Learned counsel for the appellant further states that probably the incident had occurred somewhere else and the injuries had taken place in some other manner but the dead body was brought to the place of incident and thereafter the story had been weaved around it. He states that if the deceased and the accused were 3-4 steps away then all the injuries would have had blackening and tattooing and in the instant case, he states that only Injury No.3 had blackening and tattooing and, therefore, the entire evidence of PW-2 becomes falsified. Learned Senior Counsel for the appellant further states that the presence of PW-2 is further falsified inasmuch as he has stated that the dead-body was lying on its side and that it was lying in the east-west direction whereas, it has been pointed out, that the PW-5 had stated that in fact the dead-body was lying on its back.

(ii) Learned Senior Counsel for the appellant further stated that when now the presence of PW-2 had been dislodged, he has submitted that even the motive was not so strong as to make the accused commit an offence as heinous as murder. He submits that motive is a double edged weapon and that there was a possibility that because there was some kind of enmity, the accused had also been implicated in the case.

(iii) Learned counsel for the appellant further laid stress upon the tardy investigation and has submitted that neither the Investigating Officer nor the prosecution and also even the Court did not make any attempt to connect the empty cartridges with the gun by which, it was alleged, the fire-shots were made. The gun was lying in the malkhana of the military as the appellant-accused was a military personnel and no effort was made to get the gun examined so that the empty cartridges would be matched with the gun. Learned counsel has invited the attention of the Court to the evidence as was led by PW-5 and PW-6 wherein it was stated that no effort was made to produce the gun before the Court or before any expert.

(iv) Learned counsel for the appellant has further stated that even the empty cartridges were not examined in any forensic laboratory.

(v) Learned counsel for the appellant has further invited the

attention of the Court to the statement of the PW-5 wherein he had stated that Exhibits Ka-8 to Ka-13 i.e. the panchayatnama and all the other documents which were required to accompany the panchayatnama when the body of the deceased was to proceed for the post-mortem were got prepared by one Sub-Inspector D.C. Sharma. However, he has invited the Court's attention to the Exhibit Ka-8 wherein he has shown that even though in the body of the panchayatnama it was mentioned that the Sub-Inspector D.C. Sharma was present at the time of the preparation of the panchayatnama but the signature of the Sub-Inspector D.C. Sharma was not present on the Exhibit Ka-8. Learned counsel has submitted that it was signed by PW-6 Roshan Lal who is a witness named in the charge-sheet. Learned counsel for the appellant, therefore, has stated that the entire case of the prosecution was a sham case. While the PW-2 definitely was not present, he has stated that the other investigation was also done in a manner which did not inspire any confidence. He has submitted that when the blank spaces were being filled up, the Sub-Inspector D.C. Sharma had put in his signature on Exhibit Ka-8. Learned counsel has, after having invited the attention of the Court to the fact that D.C. Sharma was not present on the spot, drew the attention of the Court to the statement of PW-4 at page 20 of the paper-book wherein PW-4, who was the chik writer, had stated that in fact D.C. Sharma came back to the police station only on 7.7.1982 at 11.00 AM. He, therefore, submitted that the Sub-Inspector D.C. Sharma was in fact never present at the spot and was elsewhere while the inquest was being carried out.

(vi) Learned counsel for the appellant has also invited the attention of the Court to the contradictions in the statements of prosecution witnesses wherein the PW-1 had stated that the dead body was taken to the police station from the place of occurrence but the PW-4 at page 20 of the paper-book had stated that on 6.7.1982 the dead body of the deceased was not there at the police station.

(vii) Learned counsel for the appellant has submitted that the incident is of the year 1982 and the appeal was filed in the year 1983. More than 41 years have elapsed and if the Court confirms the judgment of the trial Court then it may consider the imposition of the penalty, leniently.

(viii) Learned counsel for the appellant has further submitted that the PW-2 was the sole eye-witness and his evidence when was not corroborated by any other evidence and in fact was a shaky evidence then it was absolutely necessary that the Court should proceed with caution. In this regard, he has relied upon a judgment of the Supreme Court in **Jagdish & Anr. vs. State of Haryana reported in (2019) 7 SCC 711**. Since, learned counsel for the appellant has relied upon praragraph 8 of the judgment, the same is being reproduced here as under :-

"8. The question that arises to our mind is that in the mob assault by 13 persons who had surrounded the deceased at night, PW-1 was the sole eye-witness. Even if a light was burning some of them undoubtedly must have had their back to PW-1 making identification improbable if not impossible. The witness has been severely doubted both by the trail court and the High Court to grant acquittal to the other accused. Can the evidence of a solitary doubtful eye witness be sufficient for conviction? We may have a word of caution here. Conviction on basis of a solitary eye witness is undoubtedly sustainable if there is reliable evidence cogent and convincing in nature along with surrounding circumstances. The evidence of a solitary witness will therefore call for heightened scrutiny. But in the nature of materials available against the appellants on the sole testimony of PW-1 which is common to all the accused in so far as assault is concerned, we do not consider it safe to accept her statement as a gospel truth in the facts and circumstances of the present case. If PW-1 could have gone to the police station alone with her sister-in-law at an unearthly hour, there had to be an explanation why it was delayed by six hours. Given the harsh realities of our times we find it virtually impossible that two women folk went to a police station at that hour of the night unaccompanied by any male. These become crucial in the background of the pre-existing enmity between the parties leading to earlier police cases between them also. The possibility of false implication therefore cannot be ruled out completely in the facts of the case."

Learned counsel for the appellant has also relied upon a judgment of the Supreme Court in **Anand Ramachandra Chougule vs. Sidarai Laxman Chougala & Ors. reported in (2019) 8 SCC 50**, wherein it has been held that even if a certain case had not been taken up by the accused under section 313 Cr.P.C. then also the prosecution had to prove its case beyond all reasonable doubts. Learned counsel, therefore, submits that even if the appellant in his statement under section 313 Cr.P.C. had at one place stated that there was no enmity between the parties and at other place he had stated that he was implicated because of enmity then also the prosecution in fact had to prove its case on its own strength.

12. Sri Chandra Bhan Kushwaha, learned counsel for the first informant and learned AGA Sri Arvind Kumar have on the other hand tried to support the judgment and order dated 3.5.1983 which was assailed in the instant appeal. Learned counsel for the first informant has tried to explain the injuries on the back side of the right arm and he has drawn the attention of the Court to the site plan and has stated that in fact the deceased as also the PW-2 were coming from side of Wazeerganj and that in fact the accused had followed the deceased. Learned AGA as also learned counsel for the first

informant has further submitted that the PW-2 had given the eye-witness account and this eye-witness account could not have been lightly done away with and disbelieved.

13. Having heard learned counsel for the parties, we are definitely of the view that the investigation was done in the most shoddy manner possible. The PW-2 who allegedly was an eye-witness had, in his statement, stated that he was accompanied by one Dhanpal but Dhanpal was never produced in the witness box. Also, the Court finds that the PW-2 when was an eye-witness then his assistance ought to have been taken while preparing the site plan and that when that was not done, a doubt arises in the mind of the Court that PW-2 in fact had not seen the incident. Even the site plan which was prepared did not show as to where exactly from, the empty cartridges were recovered. Another aspect of the matter troubles the Court is that when PW-2 was throughout present on that very date then why his statement was not recorded by the police on that very day but was recorded on the next day. In fact, PW-5-the Investigating Officer Virendra Singh in his statement had stated that the PW-2 was never there on the spot. Also, we find that when the PW-2 describes the incident, he had stated that the deceased and the accused were face to face but upon looking at injury no.1, it cannot be said that the accused had fired the deceased while they were face to face. The gun shot injury was from behind the right arm. Also, when the PW-2 was stating that the firing was done from 3-4 steps distance then definitely all the injuries ought to have had blackening and tattooing. In the instant case, only Injury No.3 had blackening and tattooing. We are, thus, definitely of the view that the PW-2 was a planted witness and in fact was never there on the spot.

14. Also, we find that the motive as was alleged by the PW-1 was being misused for the purposes of implicating the accused as the motive which the PW-1 gives was a weak one and on the basis of that the conviction could not take place. The Court also finds that no effort was made to get the gun matched with the empty cartridges. The gun of the accused was lying in the military malkhana but no effort was made to get it and the empty cartridges forensically examined.

15. We also find that a very doubtful case had been taken by the prosecution by mentioning in the panchayatnama that the Sub-Inspector D.C. Sharma was throughout there in the preparation of the panchayatnama. The Court went through the original of the panachayatnama and found that D.C. Sharma had never signed on the panchayatnama. In fact the panchayatnama was always signed by Roshal Lal. D.C. Sharma only had signed on certain blank spaces which definitely shows that he had signed the panchayatnama subsequently. The absence of D.C. Sharma on the date of

preparation of the inquest further gets established upon the perusal of the statement of PW-4 - the chik writer who had stated that D.C. Sharma in fact had come to the police station only on the next day i.e. on 7.7.1982 at 11.00 AM.

16. The contradiction in the statements of the prosecutions witnesses were also very glaring. The PW-1 had stated that the dead body was taken to the police station from the place of occurrence but the PW-4 had stated that the dead body was not there at the police station ever. What is more, the Court is of the view that when PW-2 was the sole eye-witness and his statements had not been corroborated by the other witnesses present then the evidence of the sole eye-witness had to be examined properly and with caution. The argument of the learned counsel for the first informant that the site plan showed that the deceased was being followed by the accused and that the PW-2 was following them was evident from the site plan that the argument was fallacious. If the statement of PW-2 is looked into, it becomes evident that the deceased was coming from the side of the village and the accused was coming from outside the village and that they were face to face when the incident had occurred and, therefore, there is no substance in the argument made by learned counsel for the first informant. Also, we find that when the statement of PW-2 became unbelievable, it cannot be said that the Court had to rely compulsorily on the evidence of the PW-2.

17. Under such circumstances, the appeal stands allowed. The judgment and order dated 3.5.1983 is quashed and set-aside. The appellant is acquitted of the charges under section 302 IPC. Since the appellant is on bail, he need not surrender. His bail bonds and sureties are, therefore, discharge. The appellant is, however, directed to comply with the provisions of section 437(1) Cr.P.C. within a period of ten days from the date when the judgment is uploaded on the website of the High Court.

(2024) 8 ILRA 845
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.08.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 1403 of 1982

Karan Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri P.K. Tiwari. Sri Naresh Chandra Tripathi, Sri Raj Vardhan Dubey A.C., Sri Rajul Bhargava

Counsel for the Respondent:
D.G.A., Sri R.B. Sahai

Criminal Law - Indian Penal Code, 1860 - Sections 148, 307/149 & 302/149 - Appeal against conviction - Imprisonment for life - A FIR was lodged by Sub Inspector Balbir Singh (PW-1), St.d that

on an application given by Ram Bali (PW-3), the Sub Inspector alongwith Dharam Singh visited the village, accompanied by constables - They reached the village, it transpired that Amar Singh and Shamsher Singh, named in complaint, were hiding in house of Bihari, carrying fire arms - When police personnel reached, accused persons started firing, and in exchange of firing Sub Inspector Dharam Singh had died - Five accused ran away alongwith Bhairo Singh - Balwant Singh, while running away, got injured, ultimately died - St.ments of PW-2, PW-3 and PW-5 were same as PW-1 - From the St.ments of eye-witnesses it's not clear how Bhairo Singh, an outsider was recognized by police before FIR was lodged, his identification becomes doubtful – Prosecution story raises doubt, how police party knew the names of all accused persons, how they were related to each other and what was their parentage - Neither application produced in court nor recovered from clothes of deceased Sub-inspector - No evidence, how Bhairo Singh known to PW-1, other prosecution witnesses. (Para 3, 5, 8, 9, 13)

Appeal is allowed. (E-13)

List of Cases cited:

1. Amrik Singh Vs St. of Pun., (2022) 9 SCC 402

2. Kanan and others Vs St. of Kerala, (1979) 3 SCC 319

3. Rameshwar Singh vs. St. of J.& K., (1971) 2 SCC 715

4. Malkhan Singh & ors. Vs St. of M.P., (2003) 5 SCC 746

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

1. Instant Criminal Appeal has been preferred under Section 374 Cr.P.C. against the judgment and order dated 26.05.1982 passed by Special Judge, Additional Session Judge, "Dakaiti Prabhawit Chhetra Banda, in Sessions Trial No.318 of 1981, convicting the appellants under Sections 148, 307 read with 149 and under Section 302 read with section 149 I.P.C., whereby the accused appellants were convicted. For the charge under Section Section 148 IPC, they were sentenced to three years rigorous imprisonment. For the charge under Section 307/149 IPC they were sentenced to 7 years rigorous imprisonment and for the charge under Section 302/149 the appellants were sentenced to life imprisonment. In the impugned order dated 26.05.1982 all the sentences were directed to run concurrently.

2. Heard learned counsel for the appellants and Sri Amit Sinha learned A.G.A. for the State-respondents and perused the material available on record.

3. Upon an incident having taken place on 30.05.1981, a First Information Report was lodged by the Sub Inspector Balbir Singh stating that on an application given by one Ram Bali, the Sub Inspector Balbir Singh alongwith Dharam Singh had visited the village. These two Sub Inspectors were accompanied by Om Prakash Singh and Ram Narayan constables. When they started from their police station they passed through a village called Bhabhuwa where the police party was joined by constables Jagdev Singh,

Indu Khan and Jeevan Lal, and thereafter they reached the village Imiliha Purwa at around 10:30 am. The Sub Inspector Balbir Singh in an effort to investigate into the complaint made by Rambali questioned the villagers, and it so transpired that two of the persons who were named in the complaint namely Amar Singh and Shamsher Singh were hiding in a house of one Bihari Chamar. It also came to his knowledge that the two persons against whom the complaint was made by Rambli were carrying fire arms. When the police personnel reached the house of Bihari Chamar, the two accused persons namely Amar Singh and Ramesh Singh went out of the house and also hurled abuses on the police party and said that the members of the police party would be done away with. The police party as has been stated in the FIR hid behind a wall and started facing the bullets as were being fired by Amar Singh and Shamsher Singh and thereafter to protect themselves in their defence they also started firing. The Sub Inspector Dharam Singh very valiantly went into the enclosure where Amar Singh and Shamsher Singh were hiding and as he crossed the house where they were hiding, they were assailed by constant firing and S.I. Dharam Singh in the process got injured. It has been stated in the FIR that the bullet which was fired by Amar Singh, had actually hit the Sub Inspector Dharam Singh. The police party thereafter intensified its firing and entered the house and took out Dharam Singh from the house which he had entered, and Om Prakash Singh constable was instructed to arrange for a vehicle to take him to a hospital and thereafter the five accused namely Amar Singh, Karan Singh, Shamsher Singh and Vijay Singh who were residents of the village Rudauli, Police Bhaberi ran away alongwith Bhairo Singh who was a resident of village Turra, Police Station Bhadausa. However, Balwant Singh the sixth accused, while running away, got injured by the firing of the police and he hid himself in the house of Bihari. In an effort to oust him from the house, the Sub Inspector Balbir Singh put the house on fire, and thereafter Balwant came out of the house and was injured to such an extent that he also died.

4. Learned counsel for the appellant further submitted that the FIR was thereafter lodged by Sub Inspector Balbir Singh on 31.05.1981 and that was made an exhibit in the case. The police while investigating, prepared certain recovery memos with regard to the bullets etc. which were found on the spot and that recovery memo was exhibited as Ext. Ka-3. The revolver of Dharam Singh which had got damaged was also recovered and the recovery memo was exhibited as Ext. Ka-4. The plain soil and the soil with blood was also taken by the police and a recovery memo was also got prepared, which was exhibited as Ext. Ka-5. Ext. Ka-6 was with regard to the guns and bullets of the accused which were recovered from the spot. Since the house of Bihari was burnt, the ash was also kept as

evidence and the recovery memo which was prepared was exhibited as Ext. Ka-7. The dead body of the deceased Dharam Singh and Balwant were sent for postmortem and their report were also prepared.

5. Upon the completion of the investigation on 05.12.1981 charges were framed against Karan Singh, Shamsher Singh, Vijay Singh and Bhairo Singh under Sections 148, 307/149, and Section 302/149 IPC. The first informant Balbir Singh Rathore was produced as prosecution witness No.1 and similarly Om Prakash the other companion constable who was also an eyewitness was produced as PW2. Ram Bali on whose complaint the police party had gone to the house of the Bihari where allegedly Amar Singh and Shamsher Singh hid, was produced as PW3. Dr. Vikas Chandra who had done the postmortem on the dead body of the Dharam Singh was produced as PW-4. Another eyewitness Bhagwandeen from the public was produced as a prosecution witness 5. Dr. R.N. Mathur was the doctor who had done the postmortem on the dead body of Balwant as he was produced as PW6. Sri S.L. Pandey, who was the Sub Divisional Magistrate in whose presence the panchayatnama was prepared, was produced as prosecution witness 7. R.S. Singh was the Sub Inspector who had got the dead body of Dharampal for postmortem and he was produced as PW-8. Jawahar Lal the second Investigating Officer was produced as PW9. Since charges were framed against Karan Singh, Shamsher Singh, Vijay Singh and Bhairo Singh, on 05.12.1981 their trial was proceeded as Sessions Trial No.314 of 1981. However the trial of the accused Amar Singh was conducted in Sessions Trial No.354 of 1982. He was charged by the order dated 18.01.1983. The four accused Karan Singh, Shamsher Singh, Vijay Singh and Bhairo Singh upon their conviction on 26.05.1982 filed an Appeal No.1403 of 1982. The appellant Amar Singh was convicted by the judgment and order dated 09th of July 1984 and he filed Appeal No. 2022 of 1984 in this Court.

6. The appeal No. 2022 of 1984 abated on 12.01.2024, as the appellant Amar Singh had died. In Criminal Appeal No.1403 of 1982, since the appellant Nos. 1,2 and 3 namely Karan Singh, Shamsher Singh and Vijay Singh had died, the appeals had abated on two different dates namely 05.10.2007 and 12.01.2024. The appeal vis-a-vis Bhairo Singh alone was argued by Sri Naresh Chandra Tripathi, learned counsel for the appellant.

7. While arguing the appeal of Bhairo Singh being Criminal Appeal No.1403 of 1982, learned counsel for the appellant took the court through the statements of the prosecution witnesses. When the learned counsel for the appellant took us through the statement in chief of the PW1 namely Balbir Singh, the court found that PW1 had elaborately described the incident and had also stated in his statement in chief

the reasons as to why he had implicated the six accused persons. Through the statement in chief of PW1 the court was made aware again as to how on the application of Rambali, the police party comprising Balvir Singh, Dharam Singh, Om Prakash and Ram Narayan had started from the police station and while crossing village Bhabhuwa had also taken with them the constables Jagdev Singh, Indu Khan and Jeevan Lal. The incident ultimately occurred at the village Imiliha Purwa at 10:30 am. In the examination in chief PW1 has vividly described as to how the police party was given the information by an informer that the accused persons were hiding in the house of Bihari and that the accused were thereafter surrounded and in the exchange of firing the Sub Inspector Dharam Singh had died. In the cross-examination the PW1 has narrated as to how he had known the two accused persons chiefly Amar Singh and Shamsher Singh. He had stated that they were members of a notorious gang and that their registration number was D-72, and they were also involved in other similar cases. The PW1 had specifically stated that after he was posted in the relevant police station he had also visited the village around 14-15 days before the incident had occurred. With regard to the cross-examination done vis-a-vis Karan Singh, Shamsher Singh, Vijay Singh the PW1 was consistent with what he had stated in the statement in chief and he stood firm by all the statements made therein. However when the cross examination vis-a-vis Bhairo Singh was being done the PW1 had only stated that despite the fact that Bhairo Singh was of a different village namely village Turra of police station Bhadausa he had started living in the village were Amar Singh and Shamsher Singh were living and that he was a constant visitor there, and therefore he had correctly recognized him.

8. Since the learned counsel for the appellant had taken us to the statements of Om Prakash PW2, Rambali PW3 and Bhagwan Deen PW5, the court went through them and commonly found that they had also stated somewhat similar facts as were stated by PW1. However, from the statements of the eye-witnesses which were read out it is no-where clear that how exactly Bhairo Singh who was an outsider was recognized by the police party from before i.e. before the first information report was lodged.

9. Learned counsel for the appellant Sri N.C. Tripathi, has chiefly argued as follows:-

(i) Learned counsel for the appellant has stated that if the FIR was perused, then it becomes clear that the Sub Inspector Balbir Singh was as per the averments made in the FIR meeting the six accused persons namely Amar Singh, Karan Singh, Shamsher Singh, Vijay Singh and Bhairo Singh for the first time. However while getting the FIR lodged he had not only mentioned the names of all the accused persons, but had also mentioned the names of

their fathers. He also knew as to how Amar Singh and Karan Singh were real brothers and that they were the sons of Shripal. He also knew that Shamsher Singh and Vijay Singh were also real brothers and they were the sons of Shiv Mangal Singh. Learned counsel for the appellants also argued that it was difinitely not possible on the date when the FIR was being lodged to know the names of the appellants and also the names of their fathers, specially when Bhairo Singh was a resident of village Turra Police Station Bhadausa and was only occasionally visiting Amar Singh and Shamsher Singh, whose details were also vividly known to the police. Learned counsel for the appellants therefore states that a doubt would therefore arise, as to how the police party on the very first day knew the names of all the accused persons and also how they were related to each other and as to what was their parentage.

(ii) Learned counsel for the appellants thereafter has submitted that even if it was taken for granted that Amar Singh and Shamsher Singh were members of notorious gangs and that they were also having a registration number being D-72, it was not possible for the police party to have known the name of Bhairo Singh or to have recognized Bhairo Singh on the spot, specially when Bhairo Singh was not assigned any role.

(iii) Leaned counsel for the appellant further states that if the statement of eyewitness Bhagwan Deen is perused, it definitely becomes clear that he was an interested witness. Also the account of Om Prakash was only a reproduction of what the PW1 had stated.

(iv) Learned counsel for the appellant states that if the entire record is seen and also if the statements in chief and also the cross-examinations are seen, then one thing definitely comes out in the open and that is that the application of the Rambali was nowhere to be seen. The application of Rambali was the basis on which the police party had gone and that application was never produced in the court. Learned counsel for the appellant states that to cover this up PW1 and the PW2 had stated that the application was with Dharam Singh the Sub Inspector who had died. However learned counsel states that neither from his clothes nor from his belongings the application was ever recovered. Learned counsel for the appellant therefore states that the entire incident becomes a doubtful one and simply because the police party was knowing the names of the accused they were made accused in the case.

(v) Learned counsel for the appellant further states that for a moment it could have been said that Amar Singh and Shamsher Singh who were members of a notorious gang could have been recognized by the police, but definitely vis-a-vis Bhairo Singh an identification parade ought to have been undergone. In this regard, learned counsel for the appellant relied

upon the judgment of the Supreme Court reported in **(2022) 9 SCC 402 : Amrik Singh vs. State of Punjab** and submitted that it would be unsafe to convict an accused solely on the basis of his identification for the first time in the Court. Learned counsel for the appellant further to bolster his case with regard to the fact that the identification of the accused for the first time in Court was a weak piece of evidence, relied upon **(1979) 3 SCC 319 : Kanan and others vs. State of Kerala** and submitted that identification of the accused by a particular witness in Court raises a serious doubt and his testimony must be excluded. Still further he relied upon **(1971) 2 SCC 715 : Rameshwar Singh vs. State of Jammu and Kashmir** and submitted that if the accused was not previously known to the witness then an identification parade ought to have preceded the dock identification. Learned counsel for the appellant stated that though as per the decision of the Supreme Court in **(2003) 5 SCC 746 : Malkhan Singh and Ors. vs. State of Madhya Pradesh** evidence in Court was a substantive evidence but he submits, relying on the very same case law that if the recognition in the Court by the witness of the accused was not preceded by a test identification then the evidence would be categorized as a weak evidence. No or little weight should be attached to the evidence of identification in Court, which is not preceded by a test identification.

Learned counsel for the appellant therefore states that when the identification of Bhairo Singh itself becomes doubtful, then the appellant Bhairo Singh definitely could not have been implicated.

(vi) Learned counsel for the appellant states that the police, specially the PW1 had throughout stated that he used to occasionally visit the village of the accused persons and that he used to also see Amar Singh and Shamsher Singh and also he used to see that Bhairo Singh was visiting Amar Singh and Shamsher Singh, but learned counsel for the appellant states that no-where in the GD entry of the police station it was entered that PW1 was in fact visiting the village and that for what purpose he was visiting the village. Also nowhere was it stated as to what did he actually find out there.

(vii) Learned counsel for the appellant further states that if the panchayatnama of the Sub Inspector Dharam Singh is seen, then it becomes clear that the FIR was an ante dated FIR and he submits that when the panchayatnama was conducted at 01:35 pm, and the FIR itself was lodged on very same day at 03:00 pm, how the panchayatnama contained a Case Crime Number. Learned counsel for the appellant therefore states that everything further became doubtful.

(viii) Learned counsel for the appellant also submits that the entire investigation was a defective one, as

neither the ballistic expert report was called for nor the specimen of soil was at all sent to any forensic laboratory.

10. Learned counsel for the State Sri Amit Sinha assisted by Ms. Mayuri Mehrotra however has supported the judgment of the trial court dated 26.05.1982. He has submitted that the police was always knowing the criminals of the village, and therefore they always knew the names of the villagers. He has also stated that the incident could not be denied as Dharam Singh the Sub Inspector had died and also Balwant had died as had been stated in the FIR. He states that Balwant was the last person fleeing from the spot and he had therefore faced the bullets and therefore had died on the spot.

11. Learned counsel for the State further states that there was absolutely no reason for falsely implicating the accused persons. He further states that Bhairo Singh was on bail and he had been implicated in various criminal cases, the details of which were given and are reproduced here as under:-

1. Case Crime No.200 of 1994 under Sections 323/504/506 IPC and Section 3(1)10 of SC/SC Act.

2. Case Crime No.380 of 1994 under Section 376/506 of IPC and Section 3(1)12 of SC/ST Act.

3. Case Crime No.426 of 1994, under Sections 302 IPC and Section 3(1)12 of SC/ST Act.

4. Case Crime No.334 of 1999, under Sections 323/324 IPC.

5. Case Crime No.40 of 2000, under Sections 110 Cr.P.C.

12. Having heard the learned counsel for the parties, the Court finds that the appeal being Criminal Appeal No.1404 of 1982 vis-a-vis Karan Singh, Shamsher Singh, Vijay Singh has abated. The appeal was argued only vis-a-vis the appellant No.4 Bhairo Singh.

13. From the entire perusal of the record and the arguments advanced by the learned counsel for the parties, this Court is of the view that PW1, even if he was in the know of the names of Amar Singh and Shamsher Singh, it was definitely not possible for the PW1 to have known that Amar Singh and Karan Singh were the sons of Shripal and that Shamsher Singh and Vijay Singh were the sons of Shiv Mangal Singh. Also the Court is of the view that when Bhairo Singh was a resident of another village namely Turra and was of a different police station being Police Station Bhadausa, then how the PW1 came to know the name of Bhairo Singh and how he came to know that he was now living in village Bhudhauli under police station Baberi. The Court is definitely of the view that the incident did take place, as Dharam Singh the Sub Inspector had died from the side of the police and that Balawant while running away in the last had got injured by the firing of the police and had also died. However, the Court

definitely finds it doubtful that how Bhairo Singh was recognized in the absence of any identification parade and also when there was definitely no evidence on the record to have shown that Bhairo Singh was ever known to PW1 or to the other prosecution witnesses. So far as the criminal history was concerned it had no bearing on the decision of the instant appeal.

14. Under such circumstances, we are of the view that the implication of Bhairo Singh becomes doubtful, and therefore we are of the view that appellant Bhairo Singh be acquitted of the charges levelled against him. The appeal vis-a-vis appellant No.4 Bhairo Singh, therefore is **allowed.**

15. The impugned judgment and order dated 26.05.1982 passed by Special Judge, Additional Session Judge, "Dakaiti Prabhawit Chhetra Banda, in Sessions Trial No.318 of 1981, under Sections 148, 307 read with 149 and 302 read with 149 I.P.C. is set-aside, vis-a-vis the surviving appellant No.4 Bhairo Singh. He is acquitted from aforesaid charges. He need not surrender. The bail bonds are cancelled and the sureties are hereby discharged. The appeal vis-a-vis the appellant No.4 Bhairo Singh stands **allowed.**

16. Lower court record be sent back to court concerned for necessary compliance.

(2024) 8 ILRA 853
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2024

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Appeal No. 1736 of 1992

Suraj Din & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri S.D. Misra, Sri Arvind Kumar Srivastava, Sri Shashibind Kumar Srivastava

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 364 & 365 - Kidnapping or abducting with intent secretly and wrongfully to confine person - Appeal against conviction - Rigorous imprisonment - Code of Criminal Procedure, 1973 - Section 313 - Five named accused persons, were son-in-laws and close relatives of informant (PW-1), came to her house on 2.12.1988 at 6.00 a.m - Assaulted upon informant's husband (PW-2), abducted him in order to kill him - F.I.R. was lodged by informant on 4.12.1988 - During investigation, on pointing-out of Surajdin (accused) abductee was recovered from his house - Charges framed - Despite being PW-3, PW-4, as witness of incidence turned hostile, they affirmed incident of abduction - Admissible as evidence - PW-5, recovery witness of abductee turned hostile - Ocular evidence - Informant, as eye witness, in her St.ment named all the accused persons - Delay in lodging FIR explained - No inconsistency in entire testimony of PW-6 - Motive - Transfer of property of abductee in favour of two son-in-laws - Intention of accused persons was not to commit murder, but to confine abductee in the room of Surajdin, no injury to victim, no ransom was demanded

- No illegality in impugned order. (Para 2, 3, 19, 23, 30, 37, 39)

Appeal is partly allowed. (E-13)

List of Cases cited:

1. Mehraj Singh Vs St. of U.P., (1994) 5 SCC 188

2. Thulia Kali Vs St. of T.N. reported in (1972) 3 SCC 393

3. Kishan Singh through LRs Vs Gurpal Singh & ors. reported in (2010) 8 SCC 775

4. Koli Lakhmanbhai Chandabhai Vs St. of Guj., 1999 (8) SCC 624

5. Ramesh Harijan Vs St. of U.P. , 2012 (5) SCC 777

6. St. of U.P. Vs Ramesh Prasad Misra and anr.

7. Raj Bala Vs St. of Har. & ors. (Special Leave Petition (Crl.) Nos.4099-4100 of 2015)

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

1. Present criminal appeal has been preferred by the appellants against the judgement and order dated 1.9.1992 passed by the IInd Additional Sessions Judge, Fatehpur in Sessions Trial No.82 of 1989 (State vs. Surajdin and others), convicting and sentencing the appellants for the offence punishable under Section 365 IPC to undergo one year's rigorous imprisonment and a fine of Rs. 200/- with stipulation of default clause.

2. Brief facts of the case, as culled out from the record, are that five named accused persons Surajdin, Sri Narain, Lallu @ Ram Prasad, Ram Kishore and Shiv Shanker, who happens to be son-in-laws and close relatives of the informant, having grudge with the informant Smt. Laxmaniya on account of some land dispute came to her house on 2.12.1988 at about 6.00 a.m. when she alongwith her husband Ghasitey was warming before fire at the door of her house and made assault upon Ghasitey and abducted him in order to kill him. F.I.R. was lodged by Smt. Laxmaniya, wife of Ghasitey on 4.12.1988 at 9.15. a.m.

3. Investigation of the case proceeded. The Investigating Officer recorded the statements of the witnesses, inspected the spot and prepared site plan. Further, he arrested the accused Lallu and Surajdin and on pointing-out of Surajdin recovered Ghasitey from his (Surajdin) house in presence of Raghubir and Laxmi Narain and prepared recovery memo Ext. ka-5. He also recorded the statements of the recovery witnesses and thereafter handed over Ghasitey to the complainant by preparing the memo of supurdginama Ext. ka-7. After completing the investigation, charge-sheet Ext. ka-6 against the accused appellants was submitted. Concerned Magistrate took the cognizance and the case, being exclusively triable by Sessions Court, was committed to the Court of Sessions.

4. Accused persons appeared before the trial court and charge under Section 364 IPC was framed against them. Appellants denied the charge and claimed their trial.

5. Trial proceeded and to bring home the charge against the accused / appellants, prosecution has examined in all six witnesses, who are as follows:

1	Smt. Laxamaniya	PW-1(informant)
2	Ghasitey	PW-2(abductee)
3	Sheo Prasad	PW-3

4	SheoNarain	PW-4
5	LaxmiNarain	PW-5
6	S.I. Sitaram Shukla	PW-6

6. In support of oral version, following documents were filed and proved on behalf of the prosecution:

1	Written report	Ext. A-1
2	Chik F.I.R.	Ext. A-2
3	Carbon copy of G.D.	Ext. A-3
4	Site Plan	Ext. A-4
5	Recovery Memo	Ext. A-5
6	Charge sheet	Ext. A-6
7	Supurdginama	Ext. A-7

7. After conclusion of evidence, statements of accused appellants were recorded under Section 313 CrPC, wherein they pleaded their false implication and claimed the prosecution evidence to be false and concocted. Accused Surajdin denied that he had lodged any case before the Consolidation Officer in the name of Ghasitey raising objections in mutation proceedings. Further, since accused Lallu @ Ram Prasad committed default in appearance and his attendance could not be procured, his case was separated vide order dated 20.6.1992.

8. PW-1 – Smt. Laxmaniya, is the informant of the occurrence. She has supported the contents of the written report and also the entire prosecution case including the abduction of her husband.

9. PW-2 - Ghasitey is the abductee. He has stated the name of accused persons and the manner in which he was kidnapped by the miscreants.

10. PW-3 and PW-4 – Sheo Prasad and Sheo Narain, who, according to the prosecution version, are the witness of incident of abduction of Ghasitey by the accused persons but they did not support the prosecution version and therefore they were declared hostile by the prosecution.

11. PW-5 – Laxmi Narain is the recovery witness of the abductee but he denied that Ghasitey was recovered from the house of Surajdin on his pointing out. He was also declared hostile by the prosecution.

12. PW-6 Sub-Inspector Sita Ram Shukla, is the Investigating Officer of the case, who has proved the proceedings of investigation in his testimony and has proved the site plan Ext. ka-4, recovery memo Ext. ka-5, charge sheet Ext. ka 6 and supurdginama Ext. ka-7.

13. On the basis of aforesaid oral and documentary evidence, learned trial court recorded the conviction of the accused and sentenced them, as mentioned herein-above.

14. Heard Shri Arvind Kumar Srivastava, learned counsel for the appellants and the learned AGA for the State.

15. The impugned judgment and order has been assailed on various grounds by the learned counsel for the appellants.

16. It is submitted by the learned counsel for the appellants that the trial court has recorded the conviction of the appellants only on the basis of unreliable

and sketchy evidence adduced by the prosecution. It is further submitted that there is no eye witness of the alleged occurrence of abduction and the ocular evidence of the independent witnesses does not support the prosecution version. The only witness of the alleged incident of abduction is Smt. Laxmaniya, who is the wife of Ghasitey. She alongwith her husband Ghasitey kept grudge with the accused persons and they managed a false implication of the accused persons only for the sake of some property dispute. There was no cogent evidence on record that the accused Surajdin ever impersonated himself for Ghasitey and moved any application before the Tehsil Court on his behalf. It is also submitted that the present appellants were having no motive to commit the crime. F.I.R. in the matter was lodged belatedly without any plausible explanation thereof. The prosecution has miserably failed to prove the guilt of the accused appellants beyond reasonable doubt. The ingredients of offence under Section 364 IPC are completely missing from the scrutiny of prosecution evidence and that is why the trial court could not convict the appellants under Section 364 IPC and subsequently they were punished under Section 365 IPC and the evidence on record was never sufficient to hold the appellants guilty for any offence whatsoever. The trial court misread the facts and evidence on record and passed an illegal order warranting interference by this Court.

17. On the other hand, learned AGA vehemently opposed the defence version. It has been submitted that the incident of abduction is based upon the cogent and reliable eye witness account. PW-1 and PW-2 had absolutely no motive for the false implication of their own son-in-laws in a serious case of abduction. It is also submitted that the prosecution story is well proved beyond reasonable doubt on the basis of oral and documentary evidence and the appeal deserves to be dismissed.

18. I have considered the rival submissions made by the learned counsel for the parties and have gone through the entire record carefully.

19. Undoubtedly, in this matter the prosecution case rests upon ocular evidence. PW-1 Smt. Laxmaniya, the wife of the abductee, is the eye witness of the incident of abduction. She has proved the prosecution case as mentioned in the F.I.R. and in her examination-in-chief she had named all the five accused persons participating in the commission of the crime and the manner in which the victim was lifted and carried by them has also been explained by her. Admittedly, three of the accused persons facing trial Surajdin, Ram Kishore and Sri Narain are the son-in-laws of the informant Smt. Laxmaniya and the victim Ghasitey. She has further stated that her husband Ghasitey prior to the incident under reference had transferred his land in the name of Bhola and Sheo Nandan, the other son-in-laws of the informant. All the accused persons have been identified by her in the course of recording of her evidence before the trial court. The reason for animosity and grudge has also been explained by her and she states that after transfer of land in the name of Bhola and Sheo Nandan the other son-in-laws got angry and a forged case was also filed by accused persons Dayaram, Surajdin and Sri Narain in the name of her husband, which was confronted by Ghasitey, husband of the informant after appearing before the Court concerned. This witness has also proved the written report

Ext. ka-1. Delay in lodging the F.I.R. has also been explained by her that when her report was not lodged at police station Jahanabad, she came to Bindki and an application was got typed there and again it was given at police station Jahanabad. In her cross-examination no inconsistent statement has been given by her. Since three accused persons were her own son-in-laws, she could very well identify them. Moreover, the incident happened in the morning and the abductee and PW-1 were very well in a position to identify the accused persons.

20. PW-2 Ghasitey is the star witness from the prosecution side. He is the abductee and corroborating the testimony of PW-1 Smt. Laxmaniya, he has also explained the reason of animosity between both the sides. In his examination-in-chief he has also explained that Surajdin and Shiv Shanker having rifle came to his house alongwith three other accused persons and he was caught hold and thereafter abducted by them. He was brought to the house of Surajdin and locked in a room and he managed to be released from confinement when police came there. He has also explained that the police retrieved him from the house of Surajdin after unlocking the chain of the door. He has also stated that Surajdin and Sri Narain assaulted him with fist but however, none of the other co-accused persons made any assault upon him.

21. PW-3 Shiv Prasad and PW-4 Shiv Narain are said to be the eye witness of the incident of abduction, however, both are hostile witnesses. PW-3 categorically states that he did not see as to who was the person who took Ghasitey with him and he was not present in the village on that day. In the same manner PW-4 also states that some persons had abducted Ghasitey about two years back but he did not see any assailant. This witness has also been declared hostile by the prosecution and does not support the prosecution case in material terms.

22. PW-5 Laxmi Narain is the witness of factum of the recovery of the abductee from the house of Surajdin, but however, in his examination-in-chief he completely denies to be a witness of the incident of recovery of Ghasitey on the pointing of accused Surajdin. In his cross-examination he has stated that after receiving the information of recovery of Ghasitey, he went to police station Jahanabad alongwith Raghuvir and Laxmi Narain where the police obtained his signature over the recovery memo but he never knew as to what was written in it.

23 . PW-6 S.I. Sitaram Shukla is the Investigating Officer of this case and he also deposed on behalf of Head Moharrir Narendra Kumar Katiyar as a secondary witness and has proved the chik F.I.R. and registration G.D. as Ext. ka-2 and Ext. ka-3, respectively. This witness in his evidence has affirmed the investigation proceedings and also proved the site plan Ext. ka-4, recovery memo Ext. ka-5, charge sheet Ext. ka-6 and supurdginama Ext. ka-7. He has been tested in the cross-examination by the defence but his entire evidence is consistent on the point that abductee Ghasitey was recovered from the house of accused Surajdin. He has stated in the cross-examination that at the time of arrest of named accused Surajdin no public witness was present. There is no inconsistency in the entire testimony of PW-6 Investigating Officer.

24. The accused persons though in their statement under Section 313 CrPC have claimed that the entire prosecution

evidence is false and fabricated but to show their innocence they have not adduced any defence evidence.

25. In the earlier part of this judgment, it has been clarified that albeit there is a delay in lodging the F.I.R. but it must be kept into the mind that the informant - Smt. Laxmaniya is a rustic and illiterate lady and after abduction of her husband she was all alone and after wandering here and there she succeeded in lodging the F.I.R. when the application was given to the Dy. Superintendent of Police, Bindki, Fatehpur and on his order F.I.R. was lodged and that caused delay in lodging the F.I.R., hence, delay in lodging of the F.I.R. is well explained in the facts and circumstances of the case. Interestingly, the written report was typed on 2.12.1988 i.e. the same day when the incident of abduction happened. The F.I.R. has been lodged on the basis of written report Ext. ka-1 and since Ext.ka-1 was prepared on the same day when the incident occurred it rules out any deliberation or consultation before the lodging of the same. A prompt F.I.R., no doubt, strengthens the prosecution case and if delay in lodging the same is explained properly it helps the prosecution to prove its case beyond reasonable doubt.

26. In **Mehraj Singh Vs. State of U.P., (1994) 5 SCC 188,** while emphasising the importance of recording a prompt F.I.R., the Hon'ble Supreme Court observed as under :

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story."

27. In **Thulia Kali Vs. State of Tamil Nadu reported in (1972) 3 SCC 393** the Hon'ble Supreme Court held as under.

".....first information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the report can hardly be overestimated from the standpoint of the accused."

28. Similarly, in **Kishan Singh through LRs Vs. Gurpal Singh and others reported in (2010) 8 SCC 775** the Hon'ble Supreme Court held that *"Prompt and early reporting of the occurrence by the informant with vivid details gives assurance regarding truth of its version. In case, there is some delay in recording the FIR the complainant must give an explanation for the same. Undoubtedly, delay in lodging FIR does not make the complainant's case improbable when such delay is properly explained."*

29. In the facts of this case, it is also evident that the victim did not receive any injury. PW-2 in his deposition states that he was assaulted by fisting by Surajdin and Sri Narain but since the injuries might

not be serious or visible no medical examination was conducted in respect of the abductee of this case.

30. The motive of the incident has also been well explained by the prosecution. Although it is a case based on eye witness account wherein element of motive loses its significance but what the law requires is that if the prosecution claims any motive behind the crime, it must prove it. From the perusal and analysis of the evidence of PW-1 and PW-2 it is clear that the motive behind the incident, which was actually the transfer of property of the abductee in favour of his two son-in-laws, has been established by PW-1 and PW-2 and their evidence is consistent on the point of motive and also affirms the contents of the F.I.R. itself.

31. It is true that two independent witnesses of the incident of abduction PW-3 and PW-4 have been declared hostile but if the legal position with respect to the appreciation of evidence of a hostile witness is translated into the facts and circumstances of the case in hand, it is a trite law established in a catena of decisions that the entire testimony of a hostile witness cannot be discarded and the relevant part of his testimony, which is favourable to the prosecution, may be taken as admissible and relevant piece of evidence and the prosecution no doubt can rely upon it.

32. Hon'ble Apex Court ***in Koli Lakhmanbhai Chandabhai vs. State of Gujarat, 1999 (8) SCC 624*** has held that evidence of a hostile witness can be relied upon to the extent it supports the version of prosecution and it is not necessary that it should be relied upon or rejected as a whole.

33. ***Ramesh Harijan vs. State of U.P. , 2012 (5) SCC 777***, in another decision wherein the Hon'ble Apex Court has held that it is settled legal position that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced or washed off the record altogether.

34. In ***State of U.P. vs. Ramesh Prasad Misra and another ,*** 1996 AIR (Supreme Court) 2766, the Hon'ble Apex Court held that evidence of a hostile witnesses would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon.

35. From the above propositions of law, it is evident that the evidence of a hostile witness cannot be ignored totally and the relevant portion of his entire testimony may be taken into consideration. In this matter, PW-3, though declared hostile by the prosecution, in his examination-in-chief asserts that someone had abducted Ghasitey in the year 1988 in winters. Hence, this witness proves the incident of abduction and he also makes some positive statements in respect of relationship of the abductee and the accused persons. The husband of the informant - Smt. Laxmaniya was in fact abducted, as the prosecution claims, and this fact finds corroboration from the statement of PW-3 in his examination-in-chief and despite being hostile witness, the incident of abduction has been affirmed by this witness. In the same fashion the incident of abduction has also been proved

by PW-4. Despite being a hostile witness, he affirms the incident of abduction of Ghasitey, though he states that he did not see the assailants. Therefore, from the evidence of PW-3 and PW-4, the hostile witnesses, it is established that Ghasitey, husband of the informant Smt. Laxmaniya, was really abducted in the incident and this part of the evidence of PW-3 and PW-4 is admissible and relevant so far as the prosecution case is concerned.

36. In the same manner, PW-5, who is said to be the witness of recovery of the abductee, also states that some miscreants had abducted Ghasitey from his house, though the factum of recovery of Ghasitey from the house of the accused Surajdin is denied by him. It is significant to see that he has proved his signature over the memo of recovery of Ghasitey Ext. ka-5 but he denies the subject matter written therein.

37. The incident of recovery of Ghasitey and his supurdgi in favour of his wife, the informant, has been proved by PW-6, Investigating Officer. The memo of recovery has also been proved by him as Ext. ka-5 whereupon the signatures of Laxmi Narain PW-5 and Surajdin and T.I. of other witness Raghubir are visible. PW-6 has made a categorical statement that he had recovered the abductee before the witnesses Raghubir and Laxmi Narain. PW-6 further states that accused Surajdin was arrested at Amauli Khajua Tiraha, though there was no public witness present at that time. It is also pertinent to mention here that the place of incident of abduction has been shown as Ext. ka-4 site plan, which has been proved by PW-6. This document is in conformity with the version of F.I.R. and statements of PW-1 and PW-2. Hence, the place of occurrence is also certain and fixed in this matter, which further strengthens the prosecution case.

38. Hence, on the basis of oral and documentary evidence, the prosecution has proved its case beyond reasonable doubt, but however, conviction of accused persons under Section 365 IPC was recorded by the trial court and not under Section 364 IPC for which they were charged.

39. This Court has got an opportunity to go through the impugned judgment and order. The submission of the learned counsel for the appellants made before this Court and before the trial court as well expresses the plea that the intention of the accused persons for abducting Ghasitey was not to commit his murder. This submission ought to be seen in entirety of facts and circumstances of this case. The abductee Ghasitey was kept under confinement secretly and wrongfully in the room of Surajdin but he was never put in danger of life and further no ransom was demanded by the accused persons for the sake of his release. The victim was never abducted in order to murder or to be so disposed of as to be put in danger of being murdered. The prosecution evidence falls short of the required evidence to establish the offence under Section 364 IPC. In the entirety of the circumstances, as mentioned above, the trial court proceeded to record the conviction of the accused appellants not under Section 364 IPC but under Section 365 IPC. It was a case of mere abduction where the intention of the accused persons was only to cause the victim to be secretly and wrongfully confined and such offence comes under the purview of the definition of Section 365 IPC which says like this :

"365. Kidnapping or abducting with intent secretly and wrongfully to confine person.—

Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

40. At the same time, it is also desirable to have a glance upon the provisions of Section 364 IPC, which are as under :

"364. Kidnapping or abducting in order to murder.—

Whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

41. From the close scrutiny of the prosecution case and evidence, as discussed here-in-above, and in the light of the definitions, as mentioned here-in-above which include essential ingredients to establish an offence under Sections 364 IPC and 365 IPC, this Court finds that the trial court has committed absolutely no illegality in convicting the appellants under Section 365 IPC in place of Section 364 IPC.

42. Upon careful analysis and consideration of the settled legal position in the backdrop of the facts and circumstances of the present case, I am of the opinion that the conclusion arrived at by the learned trial court in the impugned judgment and order is in accordance with law and the evidence available on record. The impugned judgment is the result of the thoughtful consideration and cautious scrutiny of the evidence on record, oral as well as documentary. Thus, this Court is of the view that the prosecution has been able to establish the guilt of the accused appellants under Section 365 IPC beyond reasonable doubt and to the satisfaction of the judicial conscience of the Court.

43. The part of sentence is also under challenge and viewed by this Court cautiously. Awarding sentence in a matter is always a difficult task which requires balancing of various considerations. The principle of law is well settled that the principle of proportionality between the punishment and crime cannot be brushed aside and the sentence must be just and proper. No doubt the concept of proportionality permits of discretion to the Court but the same has to be guided by certain principles. Hon'ble Supreme Court in **Raj Bala vs. State of Haryana & Ors (passed in Special Leave Petition (Crl.) Nos.4099-4100 of 2015),** has observed that neither the personal perception of a Judge nor self adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. There can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. Similarly an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment. A Court while imposing sentence has to keep in view the various complex matters in mind. In respect of certain offences, sentence can be reduced by giving adequate special reasons but the special reasons have to rest on real special circumstances.

44. In the instant case, criminal machinery came into motion about 36 years ago and the present appeal has been pending for a long period of 32 years. There is nothing on record to show that the appellants are previous convict or having any criminal antecedents. Also the accused-appellants alone cannot be held responsible for long delay in disposal of this appeal. At present appellant no.1 Surajdin is 77 years old, appellant no.2 Ram Kishore is 57 years old, appellant no.3 Sri Naraina is 67 years old and appellant no.4 Sheo Shanker is 74 years old. It has been submitted and also finds support from the record that the appellants remained in custody for about one month. Neither any injury has been caused by the accused appellants to the abductee nor any ransom was demanded by them for the sake of his release. Hence, considering all aspects of the matter, in my view, no useful purpose would be served by sending accused-appellants in judicial custody at this stage, rather in the aforesaid special circumstances, it would be in the interest of justice if in lieu of one year's rigorous imprisonment they may be sentenced for the period already undergone by them in this case and also sufficient fine may be imposed upon them which would be an adequate punishment to them in the entire circumstances of this case. The appellants, who are old men at present should be repenting men.

45. Resultantly, the appeal is partly allowed. The conviction of the appellants for the offence under Section 365 IPC is upheld but the sentence of one year's rigorous imprisonment awarded by the trial court vide impugned judgment and order is converted into the period already undergone by them alongwith a fine of Rs. 2,000/- each. Appellants are on bail. They need not surrender. Their bail bonds are cancelled and sureties are discharged. The amount of fine shall be deposited within two months from today failing which the appellants will have to undergo for ten days simple imprisonment as default sentence.

46. A copy of this order alongwith trial court record be transmitted to the Sessions Judge, Fatehpur for necessary compliance.

(2024) 8 ILRA 862
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 2134 of 1983

Ratan Shanker @ Silloo ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Satish Trivedi, Sri Rajesh Kumar

Counsel for the Respondent:
D.A.G.A.

Criminal Law - Indian Penal Code, 1860 - Section 302/34 - Punishment for murder - Code of Criminal Procedure, 1973 - Section 313 - Appeal against conviction - Imprisonment for life - Incident occurred on 6.6.1982 at 6.20 pm, a FIR was lodged at 6.50 pm by informant (PW-1) - When deceased and informant were returning after seeing a movie by a bicycle, Shiv Singh and appellant along with two other persons surrounded them - Appellant and two other persons pulled down deceased from bicycle, Shiv Singh shot at him by his pistol - Informant along with PW-2 had gone to police station, returned with two constables at the site, deceased was taken

to hospital, but died on the same day - Motive was explained in FIR, there was enmity between them - Held, appellant along with Shiv Singh, co-accused were on the spot - PW-1 escaped and two unknown accused persons followed him makes no difference - Appellant was not involved in case which was lodged by co-accused against deceased and PW-1 - Appellant was not aware of any other criminal cases between co-accused and PW-1 and deceased - In other criminal cases appellant was out of them all, not been assigned any specific motive to do away with deceased – Role of appellant not come within purview of having common intention with co-accused, acquit him of all charges. (Para 2, 12, 14, 15)

Appeal is allowed. (E-13)

List of Cases cited:

Suresh vs. St. of U.P. reported in (2001) 3 SCC 673

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

1. This criminal appeal has been filed against the judgment and order dated 8.9.1983 passed by the VII Additional Sessions Judge, Kanpur by which the appellant Ratan Shankar @ Silloo was convicted for an offence under section 302/34 of the Indian Penal Code and was sentenced for life imprisonment.

2. When the alleged incident occurred on 6.6.1982 at 6.20 pm, a First Information Report was lodged at 6.50 pm by Chandra Mohan Singh. The first informant had reported that when he along with Sanjeev Tripathi-the deceased were returning after seeing a movie by a bicycle then the incident had occurred. He had stated that Sanjeev Tripathi was sitting on the rod of the bicycle and when they were going westwards on the Durga Devi Road, from behind them, Shiv Singh @ Jhallar and Ratan Shanker Dixit @ Silloo along with two other persons surrounded them. He mentioned that Ratan Shankar Dixit @ Sillu and two other persons pulled down Sanjeev from the bicycle and thereafter Shiv Singh @ Jhallar shot at him. The first informant abandoned the bicycle and ran towards the Jawahar Nagar Chowki and from there he came along with two constables at the site. The incident was evidenced by Devendra Sharma, Narendra Kumar Mishra and Ram Kishore. The two constables who had accompanied the first informant from the police station, took the injured Sanjeev Tripathi @ Sanju to the hospital on a rickshaw. In the FIR itself, the first informant had stated that he had gone to the police station along with Ram Kishore. Also in the FIR, he had mentioned about the motive behind the incident. He had stated that there was enmity between the deceased and the accused. Viz.-a-viz. Jhallar, he had stated that around two and half months earlier, Jhallar was stabbed by someone and Jhallar had a feeling that Sanjeev and the first informant Chandra Mohan had stabbed him and a case with regard to that incident was also lodged in the police station Nazeerabad.

3. After the FIR was lodged, the police got into action and started with the investigation. The bicycle and the slippers etc. were taken into custody and the recovery memo of was prepared which was exhibited as Exhibit Ka-5. Similarly, the plain soil and the soil with blood was also taken into custody and the recovery memo was also prepared which was exhibited as Exhibit Ka-6. The clothes which the deceased was wearing at the time of incident were also recovered and were exhibited as Exhibit-Ka-12. Thereafter the

post-mortem was conducted. It has been stated that the FIR was initially lodged under section 307 IPC but when the deceased passed away, the case was investigated under section 302 IPC read with section 34 IPC. The post-mortem was preceded by a panchayatnama. After the police had submitted its police report, the 7th Additional Sessions Judge, Metropolitan Area, Kanpur on 20.10.1982 framed the charges and when the charges were read over to the accused and when they denied them, the trial commenced.

4. The PW-1, the first informant had come to the witness box and had stated in his examination-in-chief the method in which the incident had occurred and also had stated the motive regarding which a mention was already there in the FIR. He has very categorically stated in his statement in chief that Silloo had held the handle of the bicycle and had pulled down Sanjeev and while Sanjeev was falling down, the other co-accused Shiv Singh @ Jhallar had shot at him by his country made pistol. Thereafter he has stated that the other two persons, who were present along with Shiv Singh and Ratan Shankar Dixit, had chased the first informant but as luck could have it, he escaped and had reached the police station. At the police station, he had met two constables who had come along with him to the place where Sanjeev was lying and the two policemen took Sanjeev to the hospital on a rickshaw. At the time when Sanjeev was being taken to the hospital, he was alive. Thereafter the first informant and Ram Kishore went to the police station Seesamau and got the FIR lodged. He had also proved the Tehrir which was exhibited as Exhibit Ka-1. He has stated that thereafter Sanjeev died on the same day. He has stated that as Sanjeev was very grievously hurt and there was a remote possibility that he would survive, he had not accompanied him to the hospital. In the cross-examination, he has stated that the accused had held the bicycle and thereafter after holding the collar of Sanjeev, they had pulled him down and while he was being pulled down from the bicycle, Shiv Singh and the other co-accused had fired on Sanjeev. He reiterates what he had stated in the examination in chief with regard to the fact as to how he had escaped from the site and how he got the FIR lodged. He had mentioned about Ram Kishore, Devendra and Narendra in the cross-examination upon a question being raised with regard to them. Even though he had mentioned that Ram Kishore was staying at Kahu Kothi, he did not know why he was at that point of time staying at Jawahar Nagar. Devendra and Narendra, it was stated, because they were afraid of giving evidence, they did not come in the witness box. With regard to the fact as to why the first informant had not called the doctor, he had stated that even though the deceased was his friend since childhood, because of the fact that he was afraid that it was a police case, he did not go to the doctor but went to the police. He admits in his cross-examination that he had not stated in the FIR that Sanju was pulled down by Ratan Shanker along with the two others from the bicycle. He has also stated that he had not mentioned in the FIR that the accused had held the handle of the bicycle.

5. PW-2 is the other eye-witness, Ram Kishore who has stated virtually what had been stated by the first informant. He gives the reason as to why he was staying at Jawahar Nagar despite the fact that his address was of Kahu Kothi. He has stated that when the first informant Chandra Mohan had run towards him i.e. the PW-2, then the two other co-accused had followed

Chandra Mohan. He had also stated upon being asked as to why he did not accompany the injured Sanjeev to the hospital, he stated that he had thought that Sanju had died on the spot and he did not consider it necessary to accompany him to the hospital.

6. PW-3-Ranveer Singh was Investigating Officer and has also proved the Chik FIR.

7. PW-4 SI Ramyagya Singh is the police officer who had proved the inquest and the other documents accompanying the dead body which were there when the body was sent for the post mortem.

8. PW-5 was a formal witness.

9. PW-6 was Constable Ramesh Chandra Sharma who had accompanied the first informant Chandra Mohan from chowki Jawahar Nagar to the place of incident. He had also carried the body from the place of incident along with the other Constable to the hospital and has also informed the Court the name of the other Constable who had accompanied him to the hospital and has given his name as Constable Shiv Prasad.

10. The two accused who were named in the FIR were apprehended and the trial had taken place against them only and the other two were never apprehended and the trial did not take place against them.

11. The two accused Ratan Shanker Dixit @ Silloo and Shiv Singh got their statements recorded under section 313 Cr.P.C. They denied the occurrence absolutely.

12. Sri Satish Trivedi, learned Senior Counsel assisted by Sri Ajay Kumar Pandey, learned counsel for the appellant submitted that the incident had in fact never occurred in the manner as was projected by the prosecution. Learned counsel for the appellant stated that both the accused Shiv Singh and Ratan Shankar Dixit were never there on the spot and in fact the PW-1 and PW-2 were brought up witnesses. Learned counsel for the appellant has very strenuously tried to convince the Court that in fact the first informant was not on the spot but had, after the incident occurred, come on the spot and thereafter had got the FIR lodged. Learned counsel for the appellant further stated that the PW-2 Ram Kishore Mishra was in fact a resident of Kahu Kothi and he never had any connection with Jawahar Nagar and, therefore, his presence was also very doubtful. Learned counsel for the appellant further stated that simply because the first informant and the deceased were named in an earlier criminal case which was lodged by the accused Shiv Singh @ Jhallar, they had implicated Shiv Singh @ Jhallar and Ratan Shankar Dixit @ Silloo. Learned counsel for the appellant further has drawn the attention of the Court to the contradiction in the statements of PW-3 when he stated that after Chandra Mohan extracted himself from the place of incident and had run westward towards the chowki, he had met Ram Kishore Mishra and thereafter both of them had gone together towards the police station but Ram Kishore Mishra states that when Chandra Mohan had run away from the place of incident then one of the two accused had actually followed him then Ram Kishore Mishra raised a hue and cry as to why they were following him. Upon this they ran away. Learned counsel for the appellant, therefore, states that in view of the

contradiction, the involvement of the accused becomes doubtful. Still further, learned counsel for the appellant has made an argument in the alternative and has submitted that even if it is taken that Shiv Singh @ Jhallar assailed the deceased Sanjeev Tripathi, the present appellant in the present appeal namely Ratan Shankar Dixit @ Silloo had absolutely no role so far as his involvement under section 302 IPC was concerned. Learned counsel for the appellant states that if the averments in the FIR are perused, it becomes clear that the role assigned to Ratan Shankar Dixit was only to the extent that he had pulled down the deceased Sanjeev Tripathi from the bicycle. Learned counsel for the appellant, therefore, states that after pulling down the deceased, whether there was a common intention being shared by the appellant Ratan Shankar Dixit with Shiv Singh was absolutely not known and there is no allegation to the effect that Shiv Singh and Ratan Sankar Dixit had, with a common intention, gone on the spot to murder Sanjeev Tripathi. Learned counsel for the appellant states that it was just possible that Ratan Shankar Dixit had pulled down the deceased to just give him a slap or two but he had no idea that in fact Shiv Singh was going to use his country made pistol which had actually been used and thereafter Sanjeev Tripathi had died. Learned counsel for the appellant further states that the act of murder by Shiv Singh was an individual act of Shiv Singh and Ratan Shankar Dixit had absolutely nothing to do with the actual murder.

13. Sri Amit Sinha, learned Additional Government Advocate assisted by Ms. Mayuri Mehrotra, however, has submitted that when the incident had occurred and the eye-witnesses had given their eye witness accounts, their evidence could not be brushed aside lightly. Learned AGA has further submitted that the sequence of events as has been narrated in the FIR was also corroborated by what was stated by the prosecution witnesses i.e. PW-1 and PW-2. PW-1 when had stated that he was accompanying the deceased and when their cycle was stopped it was but natural for him to get down the cycle and run away and therefore, it could not be said that if the PW-1 was left unharmed then in fact he was not there on the spot. Learned AGA has further stated that it mattered little if there was a minor contradiction in the statements of PW-1 and PW-2 and also it was of no consequence, virtually, if the PW-1 had given a slightly different account in the FIR from what he had stated in the examination-in-chief. Learned AGA has stated that if the first informant was being chased by two unknown accused persons and if that fact was not mentioned in the FIR and also in the statement-in-chief of the PW-1 and that it was only mentioned in the statement of PW-2 then it hardly made any difference. Learned AGA further stated that when the appellant Ratan Shankar Dixit was definitely there on the spot along with Shiv Singh and he had come alongwith Shiv Singh and also had escaped with Shiv Singh then the only conclusion was that there was a common intention being shared with Shiv Singh and in this regard learned AGA relied upon the judgement of Supreme Court **in Suresh vs. State of U.P.** reported in **(2001) 3 SCC 673.**

14. Having heard learned counsel for the appellant and learned AGA, this Court is of the view that if the statement of PW-1 and PW-2 are perused then the conclusion definitely is to the effect that the appellant alongwith Shiv Singh, co-

accused, who had filed Criminal Appeal No.2130 of 1983, definitely was at the place of incident. The Court has no doubt with regard to the fact that the appellant alongwith Shiv Singh was there. The statements made in the FIR coupled with the statements made by the PW-1 and PW-2 definitely go to establish that the appellant Ratan Shankar Dixit was there on the spot alongwith Shiv Singh. The minor contradictions with regard to how the first informant escaped and whether the two unknown accused persons were following him makes no difference. Still further the statement of PW-1 that he had immediately upon the occurrence of the incident approached the Chowki Jawahar Nagar and had come back with the two police personnel also appears to be a natural thing to happen. Still further, for the Police to have carried the injured to the hospital also appears to be a very natural thing. The fact that the other eye-witnesses Devendra Sharma and Narendra Kumar Mishra whose names find place in the FIR did not appear would also not affect the case inasmuch as they definitely were, as has been stated by the PW-1, afraid to appear in the witness-box and, therefore, the defence cannot get any advantage of their non-appearance in the witness box. However, what appeals to the Court is that nowhere in the FIR or in the evidence led, even an iota of mention was there about the fact that when the two accused Shiv Singh and Ratan Shankar Dixit along with the other persons had reached the place of incident, Ratan Shankar Dixit was sharing a common intention with Shiv Singh to murder Sanjev Tripathi. Ratan Shankar Dixit was definitely not involved in the case which was lodged by Shiv Singh @ Jhallar against the deceased Sanjeev Tripathi and first informant Chandra Mohan Singh. Ratan Shankar Dixit was also not aware of any other criminal cases which were there in between Shiv Singh and Chandra Mohan Singh and the deceased. In the evidence, there is a mention of other criminal cases as well, but Ratan Shankar Dixit was out of them all. He has definitely not been assigned any specific motive to do away with Sanjeev Tripathi.

15. Under such circumstances, to implicate Ratan Shankar Dixit along with Shiv Singh by saying that he had a common intention to murder Sanjeev Tripathi would be erroneous. The role of Ratan Shankar Dixit not having come within the purview of having a common intention with Shiv Singh, we consider it appropriate to acquit him of the charges under section 302 read with section 34 IPC. The appeal, therefore, stands allowed. Since the appellant is on bail, he need not surrender. His sureties and bail bonds are, therefore, discharged.

(2024) 8 ILRA 867
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.08.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 2421 of 2006

Smt. Manju ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri Raj Narayan Rastogi

Counsel for the Respondent:
G.A.

Criminal Law - N.D.P.S. Act, 1985 - Section 8C/21, 42, 50 - Challenged the conviction

and sentence - Appellant was apprehended with possession of heroin, without any legal authorization - The alleged inconsistencies regarding location of arrest are not material - Appellant were found in possession of heroin remains unshaken - Minor discrepancies in witness testimonies are not uncommon, do not discredit prosecution case, when testimonies are consistent and corroborated by other evidence - The failure to weigh seized substance at the recovery site does raise concerns, it does not undermine the fact that substance was narcotic in nature - Confirmed by forensic examination report - Trial court rightly observed that quantity was small, lapse in procedure does not negate the presence of illegal narcotics with appellant - Presence of independent witnesses would have strengthened prosecution's case, their absence does not invalidate the conviction - Testimony of police officers, if found credible, can form basis for conviction - Defense did not provide any substantive evidence to disprove prosecution's case or demonstrate that police fabricated the case against her - Sentence and fine awarded by trial court was appropriate - Appeal lacks merit, dismissed. (Para 3, 27, 28, 29, 30, 31)

Appeal is dismissed. (E-13)

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

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

2. This Criminal Appeal Under Section 374 (3) of the Criminal Procedure Code has been filed against the judgment and order dated 10.10.2006 passed by the Additional Sessions Judge, F.T.C. First, Lucknow in S.T. No. 246 A of 1999 arising out Crime Number 362 of 1999: State vs. Smt. Manju, by which the appellant has been convicted and sentenced under Section 8C/21 N.D.P.S. Act to imprisonment for the period already undergone and imposed a fine of Rs. 500/- with default stipulation.

3. The brief facts of the case are that the appellant was apprehended near the house of one Kanhaiya in Lucknow with possession of 40 and 24 small packets (pudiyas) of smack (heroin) respectively. The prosecution alleged that the appellants were found in possession of these illegal substances without any legal authorization, thus committing an offense under the NDPS Act.The trial court, after considering the evidence, including the testimonies of the prosecution witnesses (PWs), convicted the appellants. The trial court noted that although there were minor inconsistencies in the testimonies regarding the exact location of the arrest, the core facts remained consistent. The court also observed that the appellants failed to bring forth any credible defense against the charges.

4. Learned counsel for the appellant submits the appellant's counsel argued that the trial court erred in relying on contradictory evidence presented by the prosecution. The witnesses produced by the prosecution provided inconsistent statements, which the court failed to adequately scrutinize. The counsel highlighted that such contradictions should have created reasonable doubt regarding the guilt of the appellant

5. Learned counsel for the appellant further submits that the appellant's counsel contended that the prosecution's narrative was unnatural and not credible. It was argued that the sequence of events as presented by the prosecution did not align with normal human behavior or logic, thus casting

further doubt on the case. The prosecution's failure to present a coherent and believable account of the events weakens their case against the appellant.

6. learned counsel for the appellant further submits that The alleged incident occurred near a highly populated area close to government offices. Despite this, the police failed to involve any gazetted officers during the arrest and seizure, which is a mandatory requirement under Section 42 of the NDPS Act. The counsel argued that this non-compliance with procedural law was a significant lapse that vitiates the entire case.

7. learned counsel for the appellant further submits that the immediate reporting of the incident to higher authorities was not done, as mandated by the NDPS Act. The delay in communication and the method of reporting raise serious questions about the integrity of the prosecution's case. The counsel argued that the failure to adhere to this statutory requirement further weakens the prosecution's case.

8. learned counsel for the appellant further submits that the police did not comply with the requirements of Section 50 of the NDPS Act, which mandates that the accused be informed of their right to be searched in the presence of a gazetted officer or magistrate. The failure to inform the appellant of this right and obtain their consent renders the search and seizure illegal, making the evidence inadmissible.

9. learned counsel for the appellant further submits that the arrest and seizure took place in a densely populated area, yet no independent witnesses were produced to corroborate the police's version of events. This absence of independent witnesses raises serious doubts about the legitimacy of the arrest and the subsequent recovery of contraband.

10. learned counsel for the appellant further submits that the police officers did not take their own personal search before conducting the search of the appellant, which is a procedural safeguard to ensure the integrity of the search process. The failure to follow this procedure casts doubt on the legitimacy of the recovery of the contraband.

11. learned counsel for the appellant further submits that the police failed to properly document the seizure and recovery process, including obtaining the necessary signatures and seals from the officers involved. This lack of documentation raises concerns about possible tampering with the evidence.

12. learned counsel for the appellant further submits that the prosecution failed to produce key witnesses, such as the lady officer who conducted the search of the female appellant, in court. The non-production of these witnesses weakens the prosecution's case and suggests that the evidence against the appellant is not reliable.

13. learned counsel for the appellant further submits that the prosecution failed to establish a clear chain of custody for the contraband seized and did not provide proper forensic evidence to conclusively prove that the substance recovered was indeed a narcotic drug. The lack of credible forensic evidence creates reasonable doubt regarding the appellant's guilt.

14. learned counsel for the appellant further submits that the lower

court's conviction of the appellant was based on speculation and not on solid evidence. The prosecution's case was riddled with inconsistencies and procedural lapses, which should have led to the appellant's acquittal rather than conviction.

15. learned counsel for the appellant further submits that the lower court misapplied the law in convicting the appellant. The court failed to consider the legal principles established in relevant case law, such as the necessity of strict compliance with the procedural safeguards provided under the NDPS Act.

16. learned counsel for the appellant further submits that the prosecution failed to properly identify the appellant as the person in possession of the contraband. There was no proper identification parade or conclusive evidence linking the appellant to the alleged offense.

17. The Additional Government Advocate (AGA) submits that the prosecution's witnesses were credible and their testimonies consistent with the evidence presented. The contradictions highlighted by the defense were minor and did not affect the overall reliability of the prosecution's case.

18. The Additional Government Advocate (AGA) further submits that the police followed the procedures laid down in the NDPS Act. The failure to involve a gazetted officer or magistrate during the search was explained by the urgent nature of the operation, and the higher officers were informed as soon as possible.

19. The Additional Government Advocate (AGA) further submits that the recovery of contraband was lawful and properly documented. The substance recovered was tested and confirmed to be a narcotic, and the chain of custody was maintained throughout the process.

20. The Additional Government Advocate (AGA) further submits that the absence of independent witnesses does not automatically render the prosecution's case weak. The credibility of the police officers involved in the arrest and recovery should be considered, and the circumstances of the case did not permit the involvement of independent witnesses.

21. The Additional Government Advocate (AGA) further submits that the forensic examination of the contraband was conducted in accordance with established procedures, and the report confirmed the presence of a narcotic substance. The defense's allegations of tampering are unfounded.

22. The Additional Government Advocate (AGA) further submits that the NDPS Act imposes strict liability on those found in possession of narcotics, and the appellant was rightly convicted based on the evidence of possession. The procedural lapses, if any, do not outweigh the evidence of possession.

23. The Additional Government Advocate (AGA) further submits that the lower court correctly applied the law and convicted the appellant based on the evidence presented. The defense's arguments are attempts to discredit the prosecution's case without providing any substantial evidence to the contrary.

24. The Additional Government Advocate (AGA) further submits that the

importance of enforcing the NDPS Act strictly to combat drug offenses. The appellant's conviction serves as a deterrent to others involved in such activities and upholds the public interest in maintaining law and order.

25. The Additional Government Advocate (AGA) further submits that the importance of upholding the lower court's judgment to maintain the integrity of the judicial process and ensure that those involved in drug trafficking are duly punished. The appellant's arguments should not overshadow the substantial evidence of guilt presented in the case.

26. In this case, the appellant challenged the conviction and sentence imposed by the trial court. After a thorough review of the evidence, the submissions of both the appellant's counsel and the State, as well as an examination of the relevant legal principles, the following conclusions have been drawn:

The primary issues for determination before this Court are:

1. Whether the inconsistencies in the witness testimonies regarding the arrest location are material enough to vitiate the conviction.

2. Whether the failure to weigh the seized substance at the recovery site and the lack of independent witnesses affects the validity of the conviction.

3. Whether the sentence awarded by the trial court is appropriate and just.

27. The Court finds that the alleged inconsistencies regarding the location of arrest are not material. The core aspect of the prosecution's case—that the appellants were found in possession of heroin—remains unshaken. Minor discrepancies in witness testimonies are not uncommon and do not necessarily discredit the entire prosecution case, especially when the testimonies are otherwise consistent and corroborated by other evidence.

28. The failure to weigh the seized substance at the recovery site does raise concerns, but it does not undermine the fact that the substance was indeed narcotic in nature. The forensic examination report confirmed that the substance recovered was heroin. The trial court rightly observed that the quantity was small, and the lapse in procedure does not negate the presence of illegal narcotics with the appellants.

29. The Court notes that while the presence of independent witnesses would have strengthened the prosecution's case, their absence does not automatically invalidate the conviction. The testimony of the police officers, if found credible, can form the basis for a conviction under the NDPS Act. The defense did not provide any substantive evidence to disprove the prosecution's case or to demonstrate that the police fabricated the case against them.

30. Considering the appellants' socio-economic background and the fact that the quantity of heroin was small, the sentence awarded by the trial court—imprisonment for the period already undergone and a fine of Rs. 500/- each—was appropriate and just. The Court finds no reason to interfere with the sentence imposed by the trial court.

31 . After careful consideration of the evidence, the legal arguments presented, and the relevant case laws, this

Court finds that the appeal lacks merit. The trial court's findings were based on a proper appreciation of the evidence, and there were no legal or factual errors that warrant interference by this Court. The appeal is liable to be dismissed.

32. Accordingly, the Court upholds the conviction and sentence passed by the trial court and the appeal is **dismissed** and the judgment of the trial court is **affirmed.**

(2024) 8 ILRA 872
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.08.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 2582 of 1983

Dodraj & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
P.N. Misra, Raghuvansh Misra, Rahul Misra

Counsel for the Respondent:
A.G.A.

Criminal Law - Indian Penal Code, 1860 - 302/149, 147, 148 - Code of Criminal Procedure, 1973 - Section 313 - Juvenile Justice (Care and Protection of Children) Act, 2000 - Sections 7(A), 15(1)(d), 15(1)(g), 16 - Appeal against conviction - Imprisonment for life - A dacoity had taken place at house of accused Dodraj, and deceased Ram Prakash, brother of informant was named an accused and later acquitted of charge - On 05.07.1982, the deceased, informant (PW2), and Brij Lal (PW3) were going to town to get wheat grinded and to purchase other articles by a bullock cart - At 07:30 am, the appellants met them on way , armed with lathis and kanta - They abused deceased and attacked him - FIR was lodged by PW2 against all the accused - In the meantime, all accused have died, except present appellant no. 2 - Held, place of occurrence has been proved by evidence of witnesses of fact - Site Plan is proved by evidence of Investigating Officer (PW7) - Appellant has not taken any specific case in defence nor produce any defence evidence - Accused failed to prove contradiction in evidence of eye witnesses PW1, PW2, PW3, PW4, PW6 - PW1 proved injury report of witness PW3 - PW5, author of postmortem report proved that injuries found on deceased were sufficient to cause death - During the pendency of appeal, a plea of juvenality was taken by appellant, learned Sessions Judge observed that at the time of incident appellant was juvenile, sentence awarded to appellant for proved charges can't be sustained - No infirmity in impugned order, directions accordingly. (Para 6, 20, 26, 28, 29)

Appeal is disposed of. (E-13)

List of Cases cited:

Vinod Katara Vs St. of U.P. 2022 LiveLaw (SC) 757

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

1. Instant Criminal Appeal has been preferred under Section 374 Cr.P.C. against the judgment and order dated 22.10.1983 in St. No. 438 of 1982 State Vs. Dodraj and others, whereby the accused appellants Shree Ram, Ram Bahadur were convicted for charge under Section 302/149 IPC and Section 148 IPC, for which they were sentenced to imprisonment for life and one year rigorous imprisonment respectively and the remaining five accused persons Dodraj, Ram Swaroop, Neksoo,

Summeri alias Bhadain and Kallan alias Kalyan were convicted under Sections 147 and 302/149 IPC and each of them have been sentenced to six months rigorous imprisonment for charge under Section 147 IPC and life imprisonment for charge under Section 302/149 IPC. Both the sentences were directed to run concurrently.

2. The appellants were enlarged on bail vide order dated 27.10.1983 passed in instant appeal during the pendency of appeal. Appellants Dodraj, Ram Swaroop, Neksoo, Summeri alias Bhadain, Shree Ram and Kallan alias Kalyan have died during the pendency of appeal and appeal has been dismissed for these deceased appellants as having abated by various orders passed by this Court in the present appeal. Thus the appeal at present survives in respect of appellant Ram Bahadur only, and it has been argued in respect of appellant Ram Bahadur by the learned counsel for the parties.

3. This fact is noticeable that appellant No.2 Ram Bahadur, the sole surviving appellant moved an application before this Court with a prayer to consider his juvenality at the time of offence, as he was aged about 17 years at the time of incident. This Court heard learned counsel for the parties, on this application filed on behalf of appellant No.2 Ram Bahadur, wherein he claimed juvenality, and on 16.02.2022 passed an order to the effect that the application filed by the applicant/appellant alongwith all the documents be forwarded to the concerned session judge, and, in turn, the concerned sessions judge shall conduct an appropriate inquiry for determining the age of the appellant No.2. It is also directed in the said order the the concerned sessions judge, after conducting an appropriate inquiry in accordance with law, shall send his report before this Court.

4. In compliance of this Court's order dated 16.02.2022 a report dated 28.09.2022 alongwith lower court record has been received from District and Sessions Judge, Budaun, wherein it is stated that at the time of incident appellant Ram Bahadur was juvenile. There is nothing on record which could manifest that any appeal or revision was filed on behalf of State or defacto complainant. Interms this finding of juvenality recorded by learned Sessions Judge, the appellant would be treated as juvenile for the purposes of present criminal appeal.

5. Heard Sri Rahul Mishra, learned counsel for the appellants and Sri Rahul Asthana, learned AGA for the State.

6. The factual matrix of prosecution case in nutshell are that informant Ramavtar lodged an FIR by filing written report bearing dated 05.07.1982 at P.S. Ujhani, District Budaun, wherein he stated that there was enmity between his family members and accused Dodraj. A dacoity had taken place at the house of accused Dodraj, and for that dacoity deceased Ram Prakash who was brother of the informant was named an accused and he was challaned, his brother Ram Prakash acquitted of said charge of dacoity by court of session on 28.06.1982. On 05.07.1982 the deceased Ram Prakash, his brother Ramavtar PW2, and his father Brij Lal PW3 were going to Ujhani town to get wheat grinded and to purchase other articles for the Katha (a religious ceremony) by a bullock cart. At about 07:30 am they reached near railway line crossing which was very close to their

village, the accused Dodraj, Ram Swaroop, Neksoo, Summeri alias Bhadain, Ram Bahadur and Kallan alias Kalyan, met them on way who has come from other side and were armed with lathis and kanta. They stated that they abused Ram Prakash and they would kill him on that day. Ram Prakash ran towards fields to save him, but the accused persons chased him and attacked him in the field of Preetam by lathi and kanta (an incised weapon). The informant and his father raised alarm, whereupon passersby Ramphal, Anekpal, Munshi and Netram reached and cried what they were doing. The informant and his father moved forward to save Ram Prakash. The accused persons assaulted him and his father by lathi. The injured Ram Prakash fell down in the field and when the witnesses challenged the accused persons then they escaped towards railway-line. The occurrence was witnessed by the informant, his father and other witnesses. The informant and witnesses laid the injured in a tanga (horse cart) and took him at police station. The FIR was lodged under Section 147 IPC at P.S. concerned vide Crime No.289 of 1982, on same day i.e. 05.07.1982 at 11:30 am, in which all the seven accused are named.

7. The written report Ext. Ka-1 was scribed by Smt. Gayatri Devi and filed by the informant at police station under Sections 147, 148, 149, 307 of IPC.

8. Injured Ram Prakash died on account of worsening condition of Ram Prakash who had been brought to District Hospital Budaun where he died. A death information was sent to police station Ujhanai and the case converted from Section 307 IPC to Section 302 IPC, on the basis of death information memo received from district hospital. The inquest on body of the deceased was conducted on 05.07.1982 at 13:10 hours.

9. S.I. Sri V.S. Yadav of Police Station Kotwali Budaun was deputed to hold inquest on the dead body. He went to the district hospital Budaun and held an inquest on the dead body on 05.07.1982 at about noon time, in presence of the witnesses. He prepared inquest report Ext. Ka-7, Naksha Nash Ext. Ka-8, Chalan Nash Ext. Ka-9, letter to R.I. Ext. Ka-10, letter to C.M.O. Ext. Ka-11 and another letter requesting for postmortem examination on dead body of Ram Prakash. S.I. Sri V.S. Yadav also prepared sample seal and send the dead body for postmortem examination in sealed cover. For postmortem examination two constables Ramesh Chandra and Raghuveer Sahai of Police Station Kotwali, they were instructed to take the dead body to mortuary for postmortem examination.

10. Postmortem on the dead body was conducted by Dr. S.R. Gupta, PW5 on 05.07.1982 at 04:55 pm. The Medical Officer found the following ante-mortem injuries on the dead body:-

1. Incised wound 10 cm x 2 cm x bone deep on right side of dead, 4 cm behind the right ear, placed vertically above downward. Margins clear-cut.

2. Incised wound 4 cm x 1.25 cm x bone deep one cut on the central post of head, 2 cm outer to injury No.1.

3. Incised wound 6.5 cm x 1 cm x bone deep, part of scalp over head, muscle cut on left side of head. 6 cm lateral to injury No.3.

4. Multiple contusions (abraded) 11 cm x 1 cm on the right side of neck, just

below the mandible, 4 cm below the right ear standing up to back and frond.

5. Contusion 1 cm x 1 cm on the top of right shoulder.

6. Contusion multiple in an area of 19 cm x 4 cm on the ulnar border of left fore-arm, close to lateral aspect, 4 cm below the elbow.

7. Contusion 7 cm x 1.5 cm on the lateral border of lower third of left arm.

8. Contusion 7 cm x 2 cm on the lateral border of elbow.

9. Incised would 1 cm x 0.5 cm on the Palmer aspect.

10. Contusion 6 cm x 2 cm on the right calf.

11. Contusion 6 cm x 2 cm on the border of right forearm lower part with fracture of radius.

11. Besides these injuries, on internal examination the Medical Officer found clotted blood present below injuries Nos. 1 and 2. Right side temporal, parietal and occipital bones were fractured. Brain and membranes were cut and clotted blood was present there. Both chambers of the heart were empty. Two onces digested unidentified food material was found in stomach. According to the medical officer, the death was caused due to shock and hamorrhage as a result of ante-mortem injuries at about 11:30 am vide police papers. Dr. S.R. Gupta also prepared the postmortem examination report Ext. Ka-3.

12. Investigation of this case was conducted by S.I. S.S. Sharma, PW7. The case was registered in his presence at police station Ujhani. He recorded the statement of H.M. Rameshwar Dayal, who had written the FIR and the complainant Ram Avtar at the police station. Then he proceeded to the place of occurrence where he recorded the statements of the witnesses Munshi Shah, Anekpal and others. He made a local inspection and prepared site plan Ext. Ka-5. From the place of occurrence he obtained blood stained and simple earth and prepared its memo Ext. Ka-6. He arrested the accused persons Neksoo, Summeri and Kallan on 20.07.1982 and the remaining accused persons surrendered thereafter in the court. The I.O. submitted charge-sheet against those accused persons on 18.07.1982, 20.07.1982.

13. The case of all the seven accused persons named above was committed to court for session by Sri M.K. Bansal, Judicial Magistrate-II Budaun vide order dated 14.09.1982 for trial for charge under Sections 147, 148, 149 and 302 IPC. The charges against the accused persons were framed by learned Additional Sessions Judge on 27.01.1983.

14. The first charge against them recites that on or about 5th day of July, 1982 at about 07:30 am at the field of Pitambar near railway crossing of village Ulehtapur, Police Station Ujhani, District Budaun, these accused persons were members of an unlawful assembly, the common object of which was to commit the murder of Ram Prakash and at that time the accused persons were armed with deadly weapons namely lathis and kanta and committed riot, and thereby they committed an offence punishable under Section 148 IPC. The second charge against them narrates that on the aforesaid date

time and place in prosecution of the said common object of such unlawful assembly, the accused persons committed the murder of Ram Prakash having intentionally caused his death and thereby committed ana offence punishable under Section 302 read with section 149 IPC. The accused persons pleaded not guilty and claimed to be tried.

15. In order to prove its case the prosecution examined Dr. M.L. Verma, P.W.1 who deposed about the injuries of Ram Autar and Brijlal, PW2 and 3. Prosecution also examined Ram Autar PW2, his father Brijlal PW3, Ramphal PW4, and Nek Ram PW6. They are the eye witnesses and deposed about the incident. Prosecution also examined Dr. S.R. Gupta PW5 who had held an autopsy on the dead body. He has deposed abut the ante-mortem injuries and internal injuries found on the dead body and proved the postmortem examination report. Then the prosecution examined SI S.S. Sharma PW7 who had conducted the investigation. He has deposed about the investigation and proved the papers connected with the dead body prepared by the SI V.S. Yadav of Police Station Kotwali. He has also proved the FIR prepared by constable Rameshwar Dayal of police station Ujhani. Prosecution also filed a judgment in S.T. No.344/80 State Vs. Ram Prakash under Section 395/397 IPC and another judgment in Criminal Appeal No.135/81 Ext.Kha-14 and Ka15.

16. In defence the accused persons examined Dr. Smt. P.K. Agarwal D.W.1 Medical Officer Women's Hospital, Budaun. She deposed that the life of the accused Kallan was admitted in the hospital at 10:30 am on 05.07.82 and she gave birth to a dead child at 03:30 pm. Defence also examined Jigar Shan DW2 a Tanga Driver. He has deposed that about 1 ¼ year ago before sun set, he had taken Kallan and his wife in his tanga to the hospital of Jagat and then to the Women's Hospital at Budaun where he reached at about 09:00 am. The defence also filed a photo-stat copy of bed-head ticket Ext. Kha-1. Copy of judgment Ext. Kha-2, copy of charge sheet Ext. Kha-3, copy of statement of Ramphal in consolidation case Ext. Kha-4. Copy of bail order Ext. Kha-5. One voter list was was also filed which is not admissible in evidence because it is not a certified copy.

17. Learned trial court after hearing the submissions of learned counsel for the accused persons and learned counsel for the State scrutinized the entire evidence placed by the prosecution in defence on record and also considered the statement of the accused persons recorded under Section 313 Cr.P.C. as well as defence evidence adduced by accused persons. Learned trial court observed that the FIR appears to be prompt, there is nothing in the prosecution evidence to show that FIR was ante-time. Moreover there is motive for assault. It is admitted fact that prior to this murder a dacoity had taken place at the house of Dodraj accused and in that dacoity deceased Ram Prakash was prosecuted and acquitted on 29.06.1982, vide copy of impugned judgment exhibited as Ext. Ka-14.

18. Besides this there were cross cases under Section 307 IPC between the parties. Ramavtar has also stated on oath that Dodhraj was prosecuted for possession of illicit opium and in that also the accused Ram Prakash had appeared as a witness against him. All these litigation would give sufficient motive to the accused persons to

commit the murder of Ram Prakash. Under all these facts and circumstances, when the testimony of the prosecution witnesses is quite natural, independent and is in perfect harmony with the medical evidence and when it does not suffer from any material discrepancy, embellishment paddingup it must be believed to prove the guilt of the accused persons beyond reasonable doubt. The minor contradictions and inconsistency do not effect the broad features of the prosecution story relating to the assault on the deceased. The accused persons deserves to be convicted.

19. With the above findings, learned trial court convicted and sentenced the accused persons as stated above.

20. Learned counsel appearing for surviving appellant Ram Bahadur submitted that motive has been attributed to appellant Dodraj (since deceased), and the present appellant has been implicated in the case only to the fact that he is the son of Dodraj. In fact, appellants were implicated in the case due to previous enmity between deceased and appellants. The injuries of witnesses Ramavtar and Brijlal are of superficial in nature and not very significant, which could have suggested definite presence of the injured witnesses on the spot. This fact has emerged in evidence that appellant Neksoo and Dodraj are real brothers, Ram Swaroop and Kallan are sons of Neksoo, Ram Bahadur and Shree Ram are sons of Dodraj and Summeri alias Bhadain is son of Bodhan who was real brother of Neksoo and Dodraj. Therefore, all the family members of Dodraj are implicated in the case due to enmity.

21. He further submitted that the learned trial court failed to appreciate the defence evidence which includes DW1 Dr. P.K. Agarwal who deposed that wife of the accused Kallan was admitted in the hospital at 10:30 am on 05.07.1982, and she gave birth to a dead child at 03:30 pm. In this situation presence of appellant Kallan (since deceased) on the place of incident at 07:30 am was quite unnatural. Defence also examined DW2 Jigar Shah tanga driver who deposed that about 11/4 years ago before sunset he had taken Kallan and his wife in his tanga to the hospital of Jagat, and then to Women's Hospital at Budaun, where he reached at about 09:00 am. The defence also filed the photostat copy of Bed Head Ticket, Ext. Kha-1, copy of judgment Kha-2, copy of chargesheet Kha-3, copy of statement of Ramphal in consolidation case Ext. Kha-4 and copy of bail order Ext. Kha-5. The testimony of prosecution witnesses of fact is full of inconsistencies and contradictions and no weight can be attached thereon.

22. Learned counsel for the appellant also submitted that no money was recovered from the dead body of Ram Prakash and therefore it should not be believed that the deceased Ram Prakash , his father and brother were going to Ujhani to purchase essential articles for Katha ceremony and to get wheat grinded. PW2 Ramphal was cited as a witness in a criminal complaint by a person against Dodraj, he is a partisan and interested witness and can be cited as a professional witness PW4. No specific role has been attributed to present appellant in the offence, and he has been convicted and sentenced with the aid of Section 149 IPC.

23. Learned trial court has miserably failed to appreciate the evidence on record in proper perspective and committed error of fact and law by

convicting the surviving appellant with four accused persons. He lastly submitted that appellant has been declared juvenile in conflict of law at the time of offence by learned session court after due inquiry instituted under the directions of this Court, and even if his complicity in the offence is found to be proved by this Hon'ble Court, the appellant deserves to be dealt with under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000, and the sentence awarded to the appellant deserves to be set-aside.

24. Per contra, Learned A.G.A. vehemently supported the impugned judgment and order passed by learned trial court, whereby the appellant and co-accused have been convicted and sentenced for charge under Section 302/149 IPC and Section 148/147 I.P.C.

25. There is not infirmity, factual or legal error in the impugned judgment passed by trial court. However, learned A.G.A. did not dispute the contention of learned counsel for the appellant that he must be dealtwith under the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 and not under Indian Penal Code, so far as sentence/final order is concerned.

26. On reappraisal of evidence adduced by prosecution, and stand taken by the four accused persons under Section 313 Cr.P.C., we find that prosecution case in respect of present appellant has been duly proved by eyewitness account. PW2 Ramavtar, the informant who has also proved the written report as Ext. Ka-1. On the basis of lodging of FIR, place of occurrence has also been proved by evidence of witnesses of fact. PW3 Brijlal, who is also an injured witness. Site Plan Ext. Ka-5, is duly proved by evidence of Investigating Officer S.I. S.S. Sharma (PW7). The appellant Ram Bahadur has not taken any specific case in defence statement under Section 313 Cr.P.C., nor produce any defence evidence. He only stated that the witnesses have deposed against him due to his father Dodraj. The accused side has failed to prove illicit any material contradiction in evidence of eye witnesses PW1 M.L.Verma, PW2 Ramavtar, PW3 Brijlal, PW4 Ramphal, PW6 Netram. PW1 Dr. M.L.Verma proved injury report of witness Brijlal Varma (PW3). FIR in the case has been lodged within three houses of the incident and on facts of the case and keeping in view the enormity of crime, distance of police station and mode of conveyance no undue delay is found in lodging of FIR and rather it is lodged with utmost promptitude which strengthens its reliability.

27. Learned counsel for the appellants submits that evidence of injury reports of PW2 informant Ramavtar as Ext. Ka-2 and injury report of Brijlal PW-3 as Ext. Ka-1 and had stated that the injuries found on person of injured were likely to be caused on 05.07.1982, at around 07:30 am. That the injuries were found fresh at the time of examination, which was carried out on 05.07.1982, as police medico legal case at around 11:30 am.

28. PW5 Dr. Sita Ram Gupta, is author of postmortem report of deceased Ram Prakash, who proved postmortem report as Ext. Ka-4 by his evidence before the court. He opined in his sworn testimony before the court that injuries found on person of deceased Ram Prakash were sufficient to cause death. As many as 11 ante-mortem injuries were found on person of deceased at the time of examination.

Two ounce digested food was found in stomach, on internal examination right parietal, temporal and occipital bones were found to be broken and clotted blood was noticed in subdural space super, subarachnoid space clotted blood was also found and on other injuries. The deceased died on 05.07.1982 at 11:50 am in the hospital. No material contradiction could be suggested by defence in statements of witnesses of facts before the court from their previous statements recorded by the Investigating Officer, except the fact that PW2 Ramavtar has stated in general manner that seven named accused persons were armed with lathis and kanta. Whereas in evidence before the court he has specified that accused Shree Ram and Ram Bahadur weeded farsa and other accused persons were armed with lathis. Similar statement was given by PW3 Brijlal injured witness and also by PW4 Ramphal. PW6 Netram has also stated that all the seven accused persons were present before the court at the time of incident, assaulted the deceased Ram Prakash by lathis and kanta. Ram Prakash the witness has stated that when accused persons surrounded Ram Prakash who was travelling by a bullock cart and expressed their intent to kill Ram Prakash. He got down from the cart and ran towards the field, but accused persons surrounded him in the field of Preetam and attacked him with lathi and kanta, which caused him fatal injuries. Witnesses Ramavtar and Brijlal when rushed to save Ram Prakash, the accused also assaulted them by lathi.

29. Thus, we find no infirmity in approach of trial court in appreciation of evidence on record and application of law on the facts of the case. The judgment of learned trial court is based on strength of evidence on record and supported by cogent reasons which requires no interference, as far as recording of conviction of the appellant Ram Bahadur is concerned. However, this fact is noticeable that during the pendency of present appeal, a plea of juvenality was taken on behalf of appellant Ram Bahadur, and this Court vide order dated 16.02.2022 directed the concerned Sessions Judge to hold an inquiry regarding plea of juvenality of appellant No.2 Ram Bahadur and in compliance of directions of this Court, the learned Additional Session Judge held an inquiry regarding plea of juvenality raised by appellant No.2 Ram Bahadur, and his report dated 28.02.2022 stated that at the time of incident appellant Ram Bahadur was juvenile. Therefore, in terms of mandate of Juvenile Justice (Care and Protection of Children) Act, 1996, Juvenile Justice (Care and Protection of Children) Act, 2000 and Juvenile Justice (Care and Protection of Children) Act, 2015, the sentence awarded to the appellant for proved charges cannot be sustained. Section 16 of Juvenile Justice (Care and Protection of Children) Act, 2000 may be reproduced as under:-

"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 of 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 uch 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 under Section 15 of this Act.] ."

30. The Hon'ble Supreme Court in **Vinod Katara Vs. State of U.P. 2022 LiveLaw (SC) 757** observed in paragraph No.1 of the judgment that personal liberty of a person is one of the oldest concepts to be purported by national courts. As long ago as in 1215, the English Magna Carta provided that:- "No free man shall be taken or imprisoned.... but..... by law of the land."

In writ petition concerned, which was filed at the instance of a convict accused undergoing life imprisonment for the offences of murder, in which he invoked indulgence of Hon'ble Court under Article 32 of the Constitution, seeking appropriate directions to the respondent-State of U.P. to verify the exact age of the convict on the date of commission of the offence, as it was the case of the convict that on the date of the commission of the offence i.e. 10.09.1982 he was a juvenile aged around 15 years. The Medical Board subjected the applicant to the Xray's of the skull and sturnum. Upon medical examination of the writ applicant, the Medical Board gave its report dated 10.12.2021 certifying that on 10.09.1982 i.e. the date of the commission of alleged offence, the writ applicant could have been around 15 years of age as on the date of Medical Examination, the convict was around 56 years of age.

31. Hon'ble Supreme Court observed that under the 1986 Act, the age of juvenality was up to the 16th year. Section 7(A) of the 2000 Act has inserted by Act 33 of 2006 w.e.f. 22.08.2006 provided as follows:-

" ……7A. Procedure to be followed when claim of juvenility is raised before any Court.(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any Court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act. (2) If the court finds a person to be a juvenile on the date

of commission of the offence under subsection(1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

The claim of juvenility can thus be raised before any Court, at any stage, even after final disposal of the case and if the Court finds a person to be a juvenile on the date of commission of the offence, it is to forward the juvenile to the Board for passing appropriate orders, and the sentence, if any, passed by a Court, shall be deemed to have no effect. Even though the offence in this case may have been committed before the enactment of the Act of 2000, the petitioner is entitled to the benefit of juvenility under Section 7A of the Act of 2000, if on inquiry it is found that he was less than 18 years of age on the date of the alleged offence."

32. Hon'ble Court further observed in above stated judgment as under:-

20. On and with effect from 15.01.2016, the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short, "the 2015 Act") came into force which repealed the 2000 Act. While the appeal of the petitioner herein against his conviction and sentence was pending in the High Court, the 2000 Act came into force which repealed the Juvenile Justice Act, 1986. The 2000 Act inter alia raised the age of juvenility from 16 to 18 years and in terms of Section 20 of the 2000 Act, the determination of juvenility was required to be done in all pending matters in accordance with Section 2(1) of the 2000 Act.

21. The effect of Section 20 of the 2000 Act was considered in Pratap Singh v. State of Jharkhand, (2005) 3 SCC 551, and it was stated as under:"

31. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with a non obstante clause. The sentence "notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act are relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or the girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that court as if the 2000 Act has not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile."

22. In ***Bijender Singh v. State of Haryana , (2005) 3 SCC 685****, the legal position as regards Section 20 was stated in following words:"*

8. One of the basic distinctions between the 1986 Act and the 2000 Act

relates to the age of males and females. Under the 1986 Act, a juvenile means a male juvenile who has not attained the age of 16 years, and a female juvenile who has not attained the age of 18 years. In the 2000 Act, the distinction between male and female juveniles on the basis of age has not been maintained. The agelimit is 18 years for both males and females.

9. A person above 16 years in terms of the 1986 Act wasnot a juvenile. In that view of the matter the question whether a person above 16 years becomes "juvenile" within the purview of the 2000 Act must be answered having regard to the object and purport thereof.

10. In terms of the 1986 Act, a person who was notjuvenile could be tried in any court. Section 20 of the 2000 Act takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Juvenile Justice Board (in short "the Board") which shall pass orders in accordance with the provisions of the Act as if it has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision. A legal fiction as is well known must be given its full effect although it has its limitations. ……

11. ……..

12. Thus, by reason of legal fiction, a person, althoughnot a juvenile, has to be treated to be one by the Board for the purpose of sentencing, which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose."

23. In ***Dharambir v. State (NCT of Delhi), (2010) 5 SCC 344****, the determination of juvenility even after conviction was one of the issues and it was stated:"*

11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 142001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed.

12. Clause (l) of Section 2 of the Act of 2000 provides that "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. Section 20 also enables the court to consider and determine the juvenility of a person even after conviction by the regular court and also empowers the court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000."

24. Similarly, in ***Kalu v. State of Haryana , (2012) 8 SCC 34****, this Court summed up as under:"*

21. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 142001, when the Juvenile Act came into force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed."

25. It is thus well settled that in terms of Section 20 of the 2000 Act, in all cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the Court would continue and be taken to the logical end subject to an exception that upon finding the juvenile to be guilty, the Court would not pass an order of sentence against him but the juvenile would be referred to the Board for appropriate orders under the 2000 Act.

26. Thus, in view of the aforesaid discussion, we now proceed to consider the matter further keeping in view the 2000 Act.

".....39.5. The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in the 2000 Act are not defeated by the hypertechnical approach and the persons who are entitled to get benefits of the 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

39.6. Claim of juvenility lacking in credibility or frivolous claim of juvenility or patently absurd or inherently improbable claim of juvenility must be rejected by the court at the threshold whenever raised."

33. Now adverting to the facts of the present case, we have to consider the nature and scope of the final order which may be passed in respect of surviving appellant Ram Bahadur in terms of Section 16 of Juvenile Justice (Care and Protection of Children) Act, 2000. On perusal of Section 15(1)(g) and proviso to Section 16, it is crystal clear that the maximum period of detention in respect of a juvenile is 3 years as provided in Section 15(1) (g). The said section provides that where the Juvenile Justice Board is, an inquiry satisfied that the juvenile has committed an offence, then notwithstanding anything to

the contrary contained in any other law for the the time being in force, the Juvenile Justice Board may, if it thinks fit, make an order directing the juvenile to be sent to special home for a period of three years.

34. Section 15 of the Juvenile Justice (Care and Protection of Children) 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 thinks so 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, fo 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 recognized 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 i 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 he 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 institute on 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."

35. Considering the fact that the incident occurred way back in the year 1982, and the appellant who has been declared as juvenile in conflict of law in terms of Juvenile Justice (Care and Protection of Children) Act, 2000 by Sessions Court after due inquiry in its report dated 28.09.2022, his present age appears to be around 60 years, he cannot be sent to special home for any period up to maximum 3 years at this juncture.

36. Therefore, on giving due consideration to the nature and gravity of the offence, long pendency of appeal and a duration of 42 years between the offence and disposal of present appeal instituted by appellants, we find it just proper and expedient that the surviving appellant Ram Bahadur be dealtwith under the provisions of Section 15(1)(d) of Juvenile Justice (Care and Protection of Children) Act, 2000, and he may be directed to pay fine, as he is now an earning person.

37. The judgment and finding of conviction recorded by learned trial court in respect of surviving appellant Ram Bahadur is affirmed, but sentence is set-aside in the light of aforesaid discussion, as he has been found juvenile in conflict of law at the time of the offence which took place way back in the year 1982. On exercising the powers under Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000, we direct the appellant Ram Bahadur to pay Rs.50,000/- as fine in lieu of sentence and also as final order in terms of section 15(1)(d) of Act No.56 of 2000 as stated above, which will be deposited with High Court Mediation Center within two months of uploading of this judgment on the website of High Court.

38. Appeal is accordingly **disposed of**.

39. Let a copy of this judgment be forwarded to the learned Session Judge, Budaun for necessary action and compliance. The lower court record be sent back to court concerned for necessary action immediately.

(2024) 8 ILRA 885
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.08.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Criminal Appeal No. 4168 of 2019

Kishan Pratap Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Akhilesh Kumar Mishra, Sri Birendra Singh, Sri Kamlesh Kumar Tripathi, Sri Lal Mani Singh, Sri Ulajhan Singh Bind

Counsel for the Respondent:
G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 161 & 437(A) - Indian Penal Code, 1860 - Section – 302: - Appeal – against conviction & sentence – offence of murder – FIR, lodged against two accused – investigation - cause of death was ascertained as a result of throttling – during investigation, accused appellant come forward and made extra judicial confession that he had attempt rape on the deceased and later throttled her to death – relying upon the confession of accused appellant, investigation officer expunged the names of accused persons named in FIR - charge sheet u/s302 IPC – conviction – sentenced with Life imprisonment – Appeal – test of evidentiary value of extra judicial confession – court finds that, sheet anchor of the prosecution case to implicate the accused appellant is the extra judicial confession made by him as well as the testimony of PW-3 who is child witness (son of the deceased) – there is no other eye witness of incident – there was a serious lapse on part of the investigation officer in the mater – accused appellant who is the real brother of informant St.d that informant had an affairs with the lady with whom he later solemnized his second marriage within a month of the ghastly murder - in the light of the above defence evidence, it would not be safe to rely upon the informant alone to convict the accused – when we test the veracity of the St.ment of the informant bearing in mind the surrounding circumstances, which reflects adversely on the reliability of the informant, we do not find his testimony to be above doubt – held - Extra Judicial confession by its very nature is otherwise a weak piece of evidence – PW-3 is a child witness and it would be prudent and desirable to look for other evidence, for the purposes of corroboration, which is found lacking – and two other witnesses to the extra judicial confession have not supported the prosecution case and we otherwise suspect the credibility of the disclosure made by PW-1, apart from this, there is no other evidence to implicate the accused – in such circumstance, prosecution has succeeded in proving the guilt of accused appellant, beyond reasonable doubt, is consequently reversed – Appeal is allowed – conviction and sentence is set aside – direction issued accordingly. (Para – 30, 32, 33, 35, 36, 38, 39)

Appeal allowed. (E-11)

List of Cases cited:

Kalinga @ Kushal Vs St. of Karn. (2024 INSC 124),

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

1. This criminal appeal is preferred by the accused appellant Kishan Pratap Singh challenging the judgment and order dated 17.04.2019, passed by the Sessions Judge, Kannauj in Sessions Trial No.20 of 2011 (State of U.P. Vs. Kishan Pratap Singh), arising out of Case Crime No. 449 of 2010, under Section 302 IPC, Police Station–Tirva, District–Kannauj, whereby he has been sentenced to life imprisonment along with fine of Rs.20,000/- and in default of payment of fine to undergo six months rigorous imprisonment.

2. Informant in the present case is the husband of the deceased who gave a written report (Ex.Ka-1) on 05.10.2010 stating that he was in his general merchandise shop at the Plaza Market in Tirva. He received a phone call from his brother (accused appellant) that his children are weeping at the house and that he (informant) should go and enquire as to what is the matter. After closing the shop, informant came to his house at 10:15 p.m. and found the doors of his house open. Dead body of his wife was lying on the floor and her clothes were lying helter-skelter. Upon inquiry he found his wife

dead. Apprehension was expressed by the informant that due to enmity on account of a dispute relating to chabutra (platform) his wife may have been done to death by Anoop Singh and Deepu Singh. With these allegations the first information report came to be lodged under Section 302 I.P.C. as Case Crime No.449 of 2010. Anoop Singh and Deepu Singh were the persons shown as accused in the FIR registered at 23:30 p.m. on the date of incident i.e. 05.10.2010.

3. Investigation proceeded in the matter and the inquest started at 1:00 a.m. on 06.10.2010. The inquest witnesses include the accused appellant Kishan Pratap Singh along with others. The inquest witness opined that the death was homicidal and that postmortem be conducted to ascertain the cause of death. The body was sealed and sent to mortuary for conducting postmortem. The postmortem was conducted on 06.10.2010 at 12:30 p.m. wherein following injuries were found on the deceased:

"1-Abraded contusion 3 cm X 1-1/2 cm below the angle of the mandibular bone.

2- Abraded contusion 0.5 cm X 0.5 cm and is below injury no. 1.

3-Abraded contusion 0.5 cm X 0.5cm below Injury No. 2.

4- Abraded contusion 2 cm X 1 cm on left side of neck, 5 cm below the right ear.

5- Abraded contusion 1.5 cm X 1 cm just below right angle of mandibule.

6- Abraded contusion 1 cm X 0.5 cm medial to injury no. 5.

7- Abraded contusion 2 cm X 1 cm lateral to injury no. 5 .

8-Abraded contusion 1 cm X 1 cm on left elbow joint posterior aspect.

9- Abrasion 2 cm X 2 cm medial aspect of left hand, 4 cm below base of little finger.

10- Abrasion 1 cm X 1 cm and is 2 cm lateral to injury no.9."

The cause of death was ascertained as asphyxia as a result of throttling.

4. While investigation was pending in the matter, a second report was made by the informant on 25th of November, 2010 stating that accused appellant Kishan Pratap Singh came to him and confessed that he attempted rape on the deceased and later throttled her to death. In the attempt to commit rape several injuries were caused to the deceased and since he apprehended that the deceased will lodge a complaint about the incident to the informant, as such he had no option but to throttle the deceased, whereafter he fled. This extra judicial confession made by accused to the informant in the presence of P.W.-4 and P.W.-6 forms the basis of the second report dated 25.11.2010, which is exhibited during trial as Ex. Ka-3. The Investigating Officer relying upon this extra judicial confession expunged the name of Anoop Singh and Deepu Singh from the category of accused persons vide Parcha No.6, and submitted charge sheet under Section 302 I.P.C. against the accused appellant on 02.12.2010. The Magistrate took

cognizance of charge sheet and committed the case to the court of Session at Kannauj where the case got registered as Sessions Trial No.20 of 2011. The accused appellant was charged of offence under Section 302 I.P.C., which the accused denied and demanded trial.

5. During the course of trial following documentary evidences have been produced:-

"i. F.I.R., Ex.Ka.11, dt. 05.10.2010.

ii. Written Report, Ex.Ka.1, dt. 05.10.2010.

iii. Application, Ex.Ka.3, dt. 25.11.2010.

iv. Recovery Memo of pieces of bangle, Ex.Ka.7, dt. 06.10.2010.

v. P.M. Report, Ex.Ka.4, dt. 06.10.2010.

vi. Panchayatnama, Ex.Ka.2, dt. 06.10.2010.

vii. Charge-sheet, Ex.Ka.6, dt. 02.12.2010.

viii. Charge framed by Sessions Judge, dt. 17.02.2012.

ix. Note framed by Sessions Judge, dt. 17.02.2012."

6. Informant has been produced in evidence as P.W.-1 during trial. He has supported the prosecution case. He has verified both the reports made by him and has stated that the accused appellant confessed his guilt before him on 25.11.2010. During cross examination, the informant has admitted that soon after the murder of the deceased he re-married and is now living with his second wife. He has denied the suggestion that only to solemnize the second marriage he had himself killed his earlier wife (deceased).

7. Dr. Sunil Katyal, who has conducted the postmortem has been produced as P.W.-2. He has proved the postmortem report as per which the hyoid bone of the deceased was fractured and the cause of death was throttling.

8. P.W.-3 Vansh Pratap Singh is the three year old son of the deceased, who was about nine years of age when his statement was recorded during trial. P.W.-3 has supported the prosecution case according to which his mother was done to death by the accused uncle and that he saw the accused throttling his mother. The accused thereafter fled from the house. He has further stated that on the arrival of Police he had informed the I.O. that it was his uncle who had committed the murder of his mother. The police personnel however never met him thereafter and it was for the first time in court that he has specifically implicated the accused appellant. He clarified that within a month of the death of his own mother his second mother had arrived, who loves him.

9. P.W.-4 is Ashish Singh Chauhan, who allegedly was the person before whom extra judicial confession was made by the accused before P.W.-1. In the cross-examination P.W.-4 has however not supported the prosecution case and has stated that his signature were obtained on blank pages by the Police.

10. P.W.-5 is Smt. Yuvraj Kumari. She is the mother of the accused appellant

and the informant. She has not supported the prosecution case and is declared hostile.

11. P.W.-6 is Saurabh Singh, who is the brother of the deceased and the second witness of extra judicial confession of the accused. He too has not supported the prosecution case and has been declared hostile.

12. P.W.-7 is the retired Circle Officer Rajendra Dhar Dwivedi, who conducted the investigation in the matter. According to him, he recorded the statement of the informant on 06.10.2010. He also claims that additional Parcha No.1-A was issued by him during the course of investigation on 06.10.2010 itself. He has explained the steps taken by him during the course of investigation. The testimony of P.W.-7 shall be referred to a little later, when the fairness of investigation is examined by us.

13. P.W.-8 is Sub-Inspector Virendra Kumar. He is the Officer who conducted inquest and has proved the police papers.

14. The above materials produced during trial have been confronted to the accused, who has stated that he has been falsely implicated. In reply to question no.12, accused has stated that the informant solemnized second marriage with Smt. Sangita and that he had an affair with her during life time of deceased. He further stated that the Police started suspecting the informant of murdering his own wife whereafter the informant, in collusion with the Police, has falsely implicated him. The defence has also adduced testimony of Arvind Singh as D.W.-1. He is the other brother of the informant and the accused appellant. He has alleged that the informant had an affair with one Sangita and on account of his extra marital affair quarrel used to occur between the deceased and the informant. D.W.-1 claims that he used to mediate to resolve their differences. He has stated that informant married Sangita just after a month of the murder of his wife. He has asserted that accused appellant has no concern with the incident and has been falsely implicated by the informant.

15. The court of Session on the basis of evidence led in the matter has convicted the accused appellant for the aforesaid offence, aggrieved by which accused appellant has preferred the present appeal.

16. Learned counsel for the appellant submits that the prosecution evidence is not reliable particularly the extra judicial confession, which is absolutely concocted. Learned counsel further contends that this is a case in which the accused appellant has been falsely implicated by his own brother, after killing his wife so as to marry the lady with whom he was having an affair and to achieve his mischievous design he has manipulated evidence in connivance with the Police and falsely implicated the accused appellant. Learned counsel also urged that the testimony of P.W.-3 is wholly unbelievable inasmuch as if this witness had actually seen the incident in the manner claimed by him and informed his father and the Police there exists no reason for the prosecution to wait for almost 50 days to implicate the accused appellant in the matter. It is also contended that the version of extra judicial confession is a well thought out excuse invented by the informant in collusion with the Investigating Officer.

17. Learned A.G.A., on the other hand, submits that the evidence on record has been correctly appreciated by the court

of Session and the conviction of the accused appellant requires no interference.

18. We have heard Shri Kamlesh Kumar Tripathi, learned counsel for the appellant and Shri Pankaj Kumar Tripathi, learned A.G.A. for the State and have perused the materials on record.

19. The first version of the incident is based on the intimation of the informant given on 05.10.2010, as per which he received information from his brother (accused) on his mobile stating that his children are crying at home and that he should go and find out the reason. It is thereafter that the informant rushed to his house and saw the dead body of his wife. Apprehension was initially expressed against Anoop Singh and Deepu Singh of murdering the deceased on account of a dispute relating to chabutra (platform). The FIR with these allegations got registered at 11:30 p.m. on 05.10.2010. The inquest started at 01:00 a.m. in the night and was concluded by 04:00 a.m. on 06.10.2010. The inquest witnesses include the accused appellant also which shows that he was present at the time of inquest and had not fled, as was alleged by P.W.-3.

20. In the first information report or even at the stage of inquest there is nothing on record to suspect that it was the accused appellant who had committed the offence. This position clearly contradicts the version of P.W.-3, as per which he saw the accused appellant throttling the deceased and informed both his father and the Police about it.

21. The postmortem was conducted in which the cause of death was ascertained as throttling. As per the prosecution, the implication of the accused appellant surfaced only on the basis of an extra judicial confession made by the accused in the presence of the informant as well as Ashish Singh Chauhan and Saurabh Singh. Ashish Singh Chauhan and Saurabh Singh have been produced as P.W.-4 & P.W.-6, both of whom have not supported the theory of confession and have turned hostile. The only witness of extra judicial confession, therefore, is the informant himself.

22. The sheet anchor of the prosecution case to implicate the accused appellant is the extra judicial confession made by him on 25th of November, 2010 as well as the testimony of P.W.-3, who is the child witness and is the son of the deceased. At the time of the incident, P.W.-3 was around three years old. These two material evidences have been relied upon by the court of Session to hold the accused appellant guilty of offence under Section 302 I.P.C.

23. At this juncture, a serious question arises as to why the accused appellant was not apprehended on 06.10.2010 itself, if the only eye witness of the incident i.e. P.W.-3 had seen the accused appellant throttling the deceased and informed his father (informant) and the Police. Admittedly, there is no other eye witness account of the incident. We have perused the original records of investigation, from the perusal of which it does appear that the statement of P.W.-3 was recorded under Section 161 Cr.P.C. on 06.10.2010 itself and he had clearly disclosed the I.O. about the accused appellant having throttled his mother.

24. It is a matter of surprise that notwithstanding such information given by P.W.-3 to the I.O. and the informant no

steps in the course of investigation was taken against him. The accused appellant was neither arrested nor the prosecution investigated the role of the accused appellant in the crime. There is absolutely no explanation put-forth by the prosecution for not proceeding on the basis of disclosure made by P.W.-3. The serious lapse in not implicating/apprehending the accused appellant from 06.10.2010 on-wards, till the introduction of the version of alleged extra judicial confession made by the accused appellant on 25.11.2010 remains wholly unexplained. This lapse creates a serious dent in the prosecution case. Even during the course of arguments in this appeal learned A.G.A. has not been able to furnish any credible justification for not acting on the information of P.W.-3.

25. Only two inferences are available in the above situation. Either the disclosure made by P.W.-3 did not exist or the investigation was misdirected and there was a serious lapse on part of the Investigating Officer in the matter.

26. We shall take up the evidence of P.W.-3, first. In order to appreciate the testimony of P.W.-3, we have perused the original records relating to investigation of the case. The case diary has been perused by the Court. The first Parcha issued by the I.O. on 06.10.2010 mentions the recording of the statement of informant which is consistent with the information given by the informant to the Police and the consequential line of investigation.

27. Surprisingly, on the same day i.e. 06.10.2010 another parcha was issued by the Investigating Officer numbered as 1-A, before Parcha No.2. In the Parcha No.1-A, statement of P.W.-3 was recorded as per which it was the accused appellant who had throttled the deceased in the presence of P.W.-3. P.W.-3 in his testimony before the court has also stated that the accused appellant had throttled the deceased in his presence.

28. The fact that no action was taken by the I.O. on the information given by the P.W.-3 and that this line was not pursued during investigation casts a serious doubt upon the prosecution case. The possibility of this version having been planted, later, cannot be ruled out as it would be inconceivable that no action would be taken by the I.O. on such important information.

29. So far as the extra judicial confession is concerned, the two witnesses to it are P.W.-4 and P.W.-6, both of whom have turned hostile and have not supported the making of extra judicial confession. The informant in the present case is the only witness of extra judicial confession made by the accused. We are therefore required to test the evidentiary value of extra judicial confession allegedly made by the accused appellant to the first informant.

30. The evidence on record makes it clear that the informant remarried within a month of the ghastly murder of his wife. The defence witness D.W.-1 is the real brother of the informant as well as the accused appellant, who has stated that informant had an affair with the lady with whom he later solemnized his second marriage. D.W.-1 has also stated that there were often fight/quarrel between the deceased and the informant on account of the affair between the informant and the lady with whom the informant remarried soon after the death of his wife.

31. P.W.-3 as well as informant both have admitted the factum of remarriage of informant with Smt. Sangita.

In our considered opinion, remarriage of the informant within a month of the murder of his wife is not entirely natural. Remarriage is not expected in ordinary course of things within a month of the murder of the first wife. In the light of the defence evidence that informant had an affair during subsistence of earlier marriage, on account of which quarrel took place between the couple, it would not be safe to rely upon the informant alone to convict the accused.

32. When we test the veracity of the statement of the informant bearing in mind the surrounding circumstances, which reflects adversely on the reliability of the informant, we do not find his testimony to be above doubt.

33. Extra judicial confession by its very nature is otherwise a weak piece of evidence. Unless the attending circumstances are such that the extra judicial confession is found convincing, not much weight can be accorded to it. In view of the fact that the two other witnesses to the extra judicial confession have not supported the prosecution case, and we otherwise suspect the credibility of the disclosure made by P.W.-1, it would be impermissible for us to accept the extra judicial confession as a credible piece of evidence in support of the prosecution case.

34. Law regarding extra judicial confession has been settled by Hon'ble Supreme Court in Kalinga @ Kushal Vs. State of Karnataka by Police Inspector Hubli 2024 INSC 124. Relevant paras of the report are reproduced hereinafter:-

"14. The conviction of the appellant is largely based on the extra judicial confession allegedly made by him before PW-1. So far as an extra judicial confession is concerned, 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 Chandrapal v. State of Chattisgarh, this Court reiterated the evidentiary value of an extra judicial confession in the following words:

"11. At this juncture, it may be noted that as per Section 30 of the Evidence Act, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession. However, this court has consistently held that an extra judicial confession is a weak kind of evidence and unless it inspires confidence or is fully corroborated by some other evidence of clinching nature, ordinarily conviction for the offence of murder should not be made only on the evidence of extra judicial confession. As held in case of State of M.P. Through CBI v. Paltan Mallah, the extra judicial confession made by the co-accused could be admitted in evidence only as a corroborative piece of evidence. In absence of any substantive evidence against the accused, the extra judicial confession allegedly made by the co-accused loses its significance and there cannot be any conviction based on such extra judicial confession of the co-accused."

15. It is no more res integra that an extra judicial confession must be accepted with great care and caution. If it is not supported by other evidence on record, it fails to inspire confidence and in

such a case, it shall not be treated as a strong piece of evidence for the purpose of arriving at the conclusion of guilt. Furthermore, the extent of acceptability of an extra judicial confession depends on the trustworthiness of the witness before whom it is given and the circumstances in which it was given. The prosecution must establish that a confession was indeed made by the accused, that it was voluntary in nature and that the contents of the confession were true. The standard required for proving an extra judicial confession to the satisfaction of the Court is on the higher side and these essential ingredients must be established beyond any reasonable doubt. The standard becomes even higher when the entire case of the prosecution necessarily rests on the extra judicial confession."

35. Apart from the evidence in the nature of extra judicial confession and the testimony of P.W.-3, there is no other evidence to implicate the accused appellant in the present case. Argument of learned A.G.A. that the statement of P.W.-3 tallies with the injuries found on the deceased is absolutely fallacious, inasmuch as we have found that the possibility of the version of P.W.-3 having been introduced subsequently cannot be disbelieved. In that situation, it is but natural that version of P.W.-3 would be consistent with the medical evidence on record. Since we find that there is absolutely no explanation put-forth by the prosecution justifying the non-implication of accused appellant on the strength of the testimony of P.W.-3, till 25th of November, 2010, when the extra judicial confession surfaced, we disbelieve the testimony of P.W.-3.

36. P.W.-3 is a child witness and it would be prudent and desirable to look for other evidence, for the purposes of corroboration, which is found lacking. Testimony of a child witness is otherwise required to be examined with due care and cannot be taken on its face value.

37. In such circumstance no other evidence exists on record to implicate the accused appellant.

38. In view of the discussions and deliberations held above, we cannot endorse the finding of conviction and consequential sentence of the accused appellant by the court below, inasmuch as evidence of extra judicial confession as well as testimony of P.W.-3 have not been subjected to careful scrutiny by the court of Session. The finding that prosecution has succeeded in proving the guilt of accused appellant, beyond reasonable doubt, is consequently reversed.

39. For the reasons and discussions held above, this appeal succeeds and is allowed in part. The judgment and order dated 17.04.2019, passed by the Sessions Judge, Kannauj in Sessions Trial No.20 of 2011 (State of U.P. Vs. Kishan Pratap Singh), arising out of Case Crime No. 449 of 2010, under Section 302 IPC, Police Station– Tirva, District–Kannauj is set-aside.

40. The accused-appellant-Kishan Pratap Singh, who is reported to be in jail, shall be released, forthwith, unless he is wanted in any other case, subject to compliance of Section 437-A Cr.P.C.

(2024) 8 ILRA 894
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.08.2024

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Criminal Misc. Writ Petition No. 5205 of 2024

Siraj Ahmad Khan & Anr. ...Petitioners
Versus
The Addl. Chief Secy & Ors. ...Respondents

Counsel for the Petitioners:
Jyotiresh Pandey, Ashish Kumar Jain

Counsel for the Respondents:
G.A.

Criminal Law - U.P. Gangster and Anti Social Activities (Prevention) Act, 1986- FIR was lodged – immovable and moveable properties of petitioners attached- Commissioner of Police had followed due process - Petitioners failed to prove the legitimate source of income for the properties under Rule 37(4) of the Act–have right and statutory remedy under the Act- writ cannot be entertained surpassing the statutory remedy.

W.P dismissed. (E-9)

List of Cases cited:

1. Krishna Murari Agrawal @ Deepak Vs District Magistrate, Jhansi & ors.

2. Raj Kumar Shivhare Vs Director of Enforcement

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

1. Heard learned counsel for the petitioners, learned A.G.A. for the State/respondents and perused the record.

2. Having considered the facts, circumstances and submissions of learned counsel for the petitioners and learned A.G.A., we do not considered necessary it to call for the counter affidavit from the respondents.

3. By means of this writ petition, the petitioners have sought following main reliefs :-

"(i) to issue a writ, order or direction in the nature of Certiorari, for quashing the order dated 10.06.2024 passed by Respondent No.2, annexed with the petition as annexure No.1 & 2,

(ii) to issue a writ, order or direction in the nature of Mandamus, commanding the Respondent No.2 & 3, to release the seized properties attached by him,

(iii) to issue a writ, order or direction in the nature of Mandamus, to the Respondent No.2 & 3, to permit the Representative of the Petitioners, for taking the Mango Crop at the seized Agricultural Farm of the Petitioners,

(iv) to issue a writ, order or direction in the nature of Mandamus, to the Respondent No.2 & 3, for ensuring the videography of the Mango Orchard and Residential House at the time of the release."

4. The facts of the case, in short, are that informant Fareed Ahmad Khan lodged an F.I.R. with the contention that on 02.02.2024 at 15.30 hours, accused Siraj Ahmad @ Lallan Khan reached at the place of occurrence with his persons by Mahendra Thar vehicle and started threatening and abusing his family members. Accused Siraj Ahmad @ Lallan Khan who is an old history-sheeter was carrying a loaded rifle in his hands. Having

heard the noise, the cousin of the informant, namely, Munir Khan, who was present at his house, tried to pacify Siraj Khan but Siraj and his son Faraz Khan started exhorting by saying that kill all the family members. Thereafter, Siraj Khan opened fire on Hanjla Khan, who was the minor son of the informant. Having seen the occurrence, cousin of informant, Munir Khan tried to stop him but the accused fired upon him also. When his wife Farin Khan tried to stop them, then Faraj Khan snatched the gun from his father and shot fire at Farin Khan. Consequently, all the three persons died on the spot. He further submitted that above occurrence has been recorded in Camera, which was installed in his residence. Accordingly, an F.I.R. under Sections 302, 504, 506 I.P.C. vide Crime No.0030/2024 was registered at Police Station Malihabad, Lucknow against the accused persons. During investigation, Section 34 I.P.C. as well Section 27/30 of Arms Act were also added. As a result of investigation, prima facie, commission of offence was found. Consequently, the Investigating Officer has submitted charge sheet against named accused persons on 17.02.2024.

5. The S.H.O., Police Station Mall, Lucknow/Investigating Officer of the case submitted his report on 04.03.2024, which was forwarded by the Deputy Commissioner (Upayukt) of Police (West), Lucknow to Police Commissioner, Lucknow. Upon perusal of the report of S.H.O./Investigating Officer along with the documents annexed with the report, the fact came into knowledge of the Police Commissioner that the accused petitioner No.1-Siraj Khan @ Lallan Khan is a vicious offender and under his leadership, a well organized gang is being run. The accused/petitioner No.1 himself along with other members of his gang, is engaged in criminal activities. Infact the accused Siraj Khan was born in an ordinary family and he was brought up by his parents in normal ways. Desirous of lavish life, the accused entered into the field of crime. Thereafter, he established a well organized gang and to get the temporal pecuniary, material or other advantage for himself, started committing offences. The accused has committed offences like Mar-peet, abusing, loot, attempt to murder and murder, just to create his fear and terror in public. Feared by his terror, people could not dare to come forward to lodge complaints or to witness his activities. Petitioner No.2 Faraz Ahmad Khan is the active member of his father's gang and continuously involved in the criminal activities of his father. He has also developed his terror in the area. Further to get in the dispute of possession of land both the accused persons, i.e. Siraz and Faraz along with their companions committed murder of three persons on 02.02.2024 in day light. Consequently, the public order and general life of the people got disturbed. A case under Case Crime No.0030/2024, under Sections 302/504, 506, 34 IPC and Section 27/30 of Arms Act was registered against the above offence. The Commissioner of Police also mentioned in his order dated 10.06.2024 under the U.P. Gangster and Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as "the Act of 1986") that petitioner No.1 has acquired 35 piece of land having entire area 3.0779 Hectare having market value of Rs.3,66,00,000/-. He has also built a house No.57/602 situated in revenue village Begaria, Mohalla Adnan Palli, Dubagga, P.S. - Dubagga, Lucknow having area 55000 Sq.Ft. including covered area 17,000 Sq.Ft. having market value of Rs.25.00 Crores. He has also purchased a Mahindra Thar vehicle having registration No. UP 54

AC 9393 for the value of Rs.16.00 Lacs and also a S-Cross Smart Hybrid Car having registration No. UP 32 KX 6396 having value Rs.15,00,000/- which has wrongly been shown to be sold in the name of his brother-in-law Saifulla Khan, whereas the co-accused in above Crime No. 30 of 2024, petitioner No.2 - Faraz Ahmad Khan has acquired 27 immovable properties having total area 3.503 Hectare, whose value, according to the circle rate is Rs.87,58,000/- and the market value is approximately Rs.4,16,18,016/-. It has been alleged that that the above immovable properties have been gifted to petitioner No.2 by his father-petitioner No.1 and his mother Khusnuma Begum. Apart from that, motorcycle bearing UP 32 MY2437 (HF Delux), having value of Rs.50,000/- has been purchased by petitioner No.2. Petitioner No.2 is not having his separate income. The immovable properties which have been gifted to petitioner No.2 by his parents, they could not show their valid source of income as to how they purchased/acquired the aforesaid immovable properties which have been mentioned at Serial No.1 to 37 in the order dated 10.06.2024, all the above immovable properties have been purchased by petitioner No.1 in his and his wife's name, which subsequently have been gifted to petitioner No.2. Petitioner No.1 and his wife have not produced any documentary evidence of their income, and income tax returns of relevant years showing the income for purchase of the properties or details of bank account in which the amounts of income were deposited and from which the amount was used as consideration money. It has also been mentioned in the impugned order that although the petitioner No.2 has submitted the ITRs of Poland for the year 2022, but the same is required to be proved in accordance with law. The motorcycle which is registered in the name of petitioner no.2 has also been purchased by the income of crimes.

6. The Commissioner of Police, Lucknow in his above order has further mentioned that the accused petitioner No.1 - Siraj Ahmad Khan acquired the aforesaid properties which have total market value of Rs.28,97,00,000/-, and the value of the property which is in the name of petitioner No.2, its market value is Rs.4,16,18,016/- (immovable) and Rs.50,000/- (movable). The accused Siraj Ahmad Khan has acquired the above properties by the criminal activities and he and his family members are trying to sell out the above properties. As it has been apprised by the S.H.O., Police Station Mall, District - Lucknow. It has also been apprised to the Commissioner of Police, Lucknow that both the accused/petitioners were not having any known and valid source of income, therefore, the S.H.O., Police Station - Mall, Lucknow proposed to attach the above properties of both the accused/petitioners which were procured by them by the proceeds of crime. The Commissioner of Police, Lucknow having satisfied with the report of the S.H.O. of concerned Police Station, passed its two separate orders dated 07.03.2024 to attach the above mentioned properties of petitioners provisionally. The Commissioner of Police also appointed Tehsildar, Malihabad as receiver of the land of petitioner No.1 mentioned in order dated 07.03.2024 at Serial No.1 to 35 and for land of petitioner No.2 as mentioned in the order dated 07.03.2024 at serial no.1 to 27 and for the properties of petitioner No.1 mentioned at Serial Nos. 36 to 37 and property of petitioner No.2 mentioned at serial no.28, S.H.O., Police Station

Malihabad has been appointed as receiver. He also directed to provide a copy of the attachment order to accused Siraj Ahmad and Faraz Ahmad to enable them to submit their representation within three months of the service of the orders dated 07.03.2024.

7. Aggrieved by the order of provisional attachment, the petitioners had approached this Court vide Criminal Misc. Writ Petition No.2875 of 2024, challenging the order dated 07.03.2024, passed by the Police Commissioner under Section 14 (1) of the U.P. Gangster and Anti Social Activities (Prevention) Act, 1986. The Court after hearing the arguments of the petitioners as well as learned A.G.A. passed order dated 24.04.2024, which is reproduced herein below :-

"Heard learned counsel for the petitioners and learned A.G.A. for the State.

2. Petitioners have approached this Court challenging the order dated 7.3.2024 passed under Section 14(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 whereby the property of the petitioners is attached by the Commissioner of Police, Lucknow.

3. Learned counsel for the petitioners submits that the said order is passed without giving any opportunity of hearing to the petitioners. He further submits that on the said property, there are mango orchards and mangoes are ripping every day, which need to be taken off from trees, otherwise there would be huge loss to the petitioners.

4. Learned A.G.A. draws the attention of the Court to Section 15 of the said Act, which provides an opportunity of hearing to the claimant of the property to submit a representation before the authority concerned within a period of three months from the date of his getting knowledge of such attachment, on which the authority concerned is to pass appropriate orders taking into consideration the reply submitted by the claimant.

5. Learned counsel for the petitioners submits that the reply/representation would be filed by the petitioners within one week from today to the impugned order dated 7.3.2024.

6. The Commissioner of Police, Lucknow is expected to decide the said reply/representation of the petitioners within a period of three weeks thereafter in accordance with law by a reasoned and speaking order after giving opportunity of hearing to the petitioners.

7. With the aforesaid, present writ petition stands disposed of."

8. The petitioners after passing the orders dated 07.03.2024 submitted their representations, both dated 29.04.2024 to the Commissioner of Police, Lucknow with the prayer to review and recall the orders dated 07.03.2024 and for release of the properties seized and attached. The Court of Commissioner of Police, Lucknow after providing the opportunity of hearing to the counsel for the petitioners, considered the representation of the accused/petitioners and passed his detailed, well discussed and reasoned orders dated 10.06.2024. Vide orders dated 10.06.2024 in the matter of petitioner No.1, the Commissioner of Police, Lucknow has released the vehicle having registration No.UP32 KX 3696 in favour of Shaifulla Khan. So far as the other provisionally attached properties of both the petitioners are concerned, the Court of Commissioner of Police, Lucknow was not satisfied with the genuineness of the claim of the petitioners/accused persons made under sub Section (1) of Section 15

of the Act of 1986. The Court of Commissioner of Police, Lucknow confirmed the provisional attachment under Section 15 of the Act of 1986 as the petitioners could not satisfy the court regarding the source of acquisition of above properties. Accordingly, the Court referred the matter to the Court which was having jurisdiction to try the offence under the Act of 1986.

9. The Commissioner of Police, Lucknow in his orders dated 10.06.2024 also discussed that the petitioner - Siraj Ahmad @ Lallan Khan is engaged in criminal activities since 1973. He has history sheet No.11-A in his credit and has committed 18 criminal offences which have been mentioned in his criminal history. In the year 1984 and 1997, Case Crime No.200/1984, under Sections 394/323 IPC and Case Crime No.111/1997 under Section 307/504/323/506 IPC and Section 25 Arms Act at Police Station Malihabad have been registered against him. He has attached the properties which has been mentioned at serial No.1 to 37 in order dated 10.06.2024 against petitioner No.1 and properties at serial No. 1 to 28 in order dated 10.06.2024 passed against petitioner No.2, by the income of the crime. The properties in the name of petitioner No.2, were given to him by petitioner No.1 and his mother Khushnuma Begam. The petitioners could not show any evidence regarding the purchase of the attached properties, therefore, in the absence of any proof of source of income, it can be concluded that the above properties were obtained by the petitioners by the proceeds of crime as petitioner No.1 was engaged in criminal activities since 1973.

10. The petitioners have challenged the above order dated 10.06.2024 of Police Commissioner, Lucknow in the present writ petition.

11. Learned counsel for the petitioners have submitted that the order passed by the court of Police Commissioner, Lucknow is bad in the eyes of law, as the petitioners have not been provided the opportunity of hearing before the provisional attachment of the properties. There is nothing on record which may prove the ground for satisfaction of the Police Commissioner. The burden of proof was on Police Commissioner regarding "acquisition of property through proceeds of crime". There was sufficient income of the petitioners to purchase the properties as the two sons of petitioner No.1 are residing abroad have given money to purchase the properties. The petitioner No.2 also doing the business in Poland. He has submitted his income tax return for the year 2022, which proves that he earns the income. The Police Officers have wrongly shown 18 criminal cases in the credit of the petitioner as the crime number of the cases have not been mentioned in history sheet. The petitioner No.1 has submitted his supplementary written argument dated 13.05.2024 before the Police Commissioner, Lucknow in which he has mentioned that in Case Crime No.200/1984 and Case Crime No.111/1997, Police Station Malihabad, Lucknow, the petitioner No.1 was acquitted long back and regarding the criminal history, the petitioner No.1 has obtained a report/reply from the Police Station Malihabad, Lucknow under the Right to Information Act. Replying the question dated 21.03.2015 that "whether any criminal case is registered against the petitioner No.1 at Police Station - Malihabad", the S.H.O., Police Station Malihabad has informed that the

"information is Nil". Hence, it is wrong to say that 17 criminal cases are registered against him in Register No.8 and H.S. Khaka of Police Station Malihabad, Lucknow. As a base case of gang chart, only one case of 2024 has been mentioned against the petitioners and on the basis of that very case, neither the petitioners can be detained under the provisions of the Act of 1986, nor their properties can be attached under the provisions of the Act of 1986.

12. Learned A.G.A. has vehemently opposed the submissions of learned counsel for the petitioners and submitted that history sheet No.11-A is being maintained by the police against the petitioner No.1. There are 17 criminal cases mentioned in the history sheet, including heinous offences as mentioned in Chapter 16, 17 and 22 of the Indian Penal Code, 1860. The petitioner No.1 could not produce any order of the court showing his acquittal from the offence under Case Crime No.200/1984 and Case Crime No.111/1997. As per the working as prevailed till 1980, prior to the year 1980, except the year of offence, no crime number was being entered in the Register No.8, that is why the offence which have been mentioned at Serial No.12 to 15 in Register No.8 of Police Station, Malihabad, are not having case crime number, although the offences before 1980 as mentioned in Register No.8 and H.S. Khaka contains the sections of criminal law under which the criminal cases were registered against the petitioner No.1. In his application for information under the Right to Information Act, the petitioner No.1 has not prayed for the information from the record of history sheet. The petitioner No.1 has wrongly mentioned that in history sheet of Police Station Malihabad, no criminal case exists against him. Apart from the cases of Police Station Malihabad, the list of case history contains criminal cases which have been lodged against the petitioner No.1 at Serial No.1 to 11 belong to different Police Station of Lucknow and Hardoi. The same has not been denied by the petitioners specifically. The petitioners could not produce the source of income for acquiring the properties. They have not produced any certificate of their regular income, like proof of income tax for the relevant year of purchasing/acquiring the properties and ITRs of subsequent years, showing the income from agriculture/vegitation or from other sources. They could not produce the proof of transaction of money in their bank account from Poland at the stage of hearing of argument. After preliminary attachment as per rule 37(4) of the Act of 1986, the burden of proof was upon the petitioners to prove that the properties attached have not been acquired by the proceeds of crime committed by petitioner No.1. The petitioners could not submit any cogent and relevant proof before the Court of Commissioner of Police, Lucknow at the stage of hearing of their representation under Section 15 of the Act of 1986. The petitioners have statutory right for redressal of their grievance and to take part in the inquiry under Section 16 of the Act of 1986 before court concerned, as the grounds taken by learned counsel for petitioners, require appreciation of evidence. This Court has no jurisdiction to adjudicate the dispute by entering into the facts and evidence. Accordingly, the writ petition is liable to be dismissed.

13. We have heard learned counsel for the petitioners, learned A.G.A. for the State/respondents and perused the material brought on record.

14. Petitioners have challenged the validity of the orders dated 10.06.2024 in present writ petition. Vide orders dated

10.06.2024, the Court of Police Commissioner, Lucknow has confirmed the attachment of 35 immovable properties of petitioner No.1 and one residential house and one vehicle having registration No.UP54 AC 9393 and 27 immovable properties of petitioner No.2 and one motorcycle. The orders against both the petitioners were passed by the Commissioner of Police, Lucknow under Section 15 of the Act of 1986. The record indicates that before passing the above orders dated 10.06.2024, the Police Commissioner, Lucknow had passed orders dated 07.03.2024 for provisional attachment of the properties of the petitioners. The said orders were challenged by the petitioner before this Court in Criminal Misc. Writ Petition No.2875 of 2024. The court disposed of the said writ petition with a direction to the petitioners to approach the Court of Police Commissioner, Lucknow under Section 15 of the Act of 1986. This Court had also directed the Police Commissioner, Lucknow to provide an opportunity to the petitioners to submit their representations as well as to provide opportunity of hearing and decide the representations/replies by a reasoned and speaking order, in accordance with law. The order dated 24.04.2024 has not been challenged by the petitioners further and it has attained finality.

15. The record indicates that the petitioners have submitted their representation/counter reply on 29.04.2024 for review of the order dated 07.03.2024, written arguments as well as supplementary written arguments dated 13.05.202 and rejoinder reply dated 03.06.2024 against the parawise comments of S.H.O., Police Station Mall, District Lucknow dated 11.05.2024 before the Court of Police Commissioner, Lucknow. Accordingly, the Police Commissioner, Lucknow after providing the opportunity to submit representations and opportunity of hearing, passed the orders dated 10.06.2024. The orders dated 10.06.2024 contains the discussion in detail, the points of objections of petitioners against the attachment under Section 14 (1) of the Act of 1986. The Court of Police Commissioner, Lucknow passed reasoned and speaking orders after discussing the representations of petitioners properly.

16. Learned counsel for the petitioners has submitted that the Court has not provided any opportunity of hearing before passing the order under Section 14 of the Act of 1986. The provisions of Section 14 of the Act of 1986 reads as under :-

*"**14. Attachment of property** - (1) If the District Magistrate has reason to believe that any property, whether movable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.*

(2) The provisions of the Code shall mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under sub-section (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property."

17. The wording as mentioned by legislature in the above section provides

that if the District Magistrate/Police Commissioner has **reason to believe**, he may pass order for attachment of the property. The Police Commissioner has mentioned in his order dated 10.06.2024 that he perused the report of S.H.O., Police Station Mall dated 04.03.2024 which was forwarded by the Deputy Commissioner of Police (West), Lucknow and also the documents annexed with the report. It shows that S.H.O., Police Station Mall, Lucknow has given the report of the activities and properties of the accused persons/petitioner Siraj Ahmad @ Lallan Khan and his son Faraz Ahmad. The above report of S.H.O. was perused, considered and thereafter forwarded by Deputy Commissioner (Upayukt) of Police (West), Lucknow and the same was the basis of the orders dated 07.03.2024, which were passed by the Police Commissioner, Lucknow under Section 14 (1) of the Act, 1986. In other words, it can be said that the report of S.H.O., Police Station - Mall, Lucknow, which was forwarded by his senior police officer, the Deputy Commissioner (Upayukt) of Police (West), Lucknow, became the reason to believe that said properties of petitioners have been acquired by criminal activities and to pass the impugned orders by the Police Commissioner, Lucknow.

18. It has also been mentioned in the above orders that the accused persons and their family members are trying to transfer the properties which were acquired by them by the proceeds of crime, therefore, the Police Commissioner, Lucknow has passed the provisional attachment orders dated 07.03.2024. In Section 14 of the Act of 1986, no where it has been mentioned that before passing the order the District Magistrate/Police Commissioner shall require to provide an opportunity of hearing to the accused. It appears that the intention of the legislation was to prevent the immediate alienation of properties because if the opportunity of hearing is provided before passing the order under Section 14 (1) of the Act of 1986, the accused may get sufficient time to transfer the property, then in that case, a complication may come on surface in the proceeding under the Act of 1986. Therefore, it is wrong to say that it was mandatory for Police Commissioner to provide the opportunity of hearing to the petitioners before passing the orders under Section 14 (1) of the Act of 1986. It is also to be noted that challenging the orders dated 07.03.2024, the order of this Court dated 24.04.2024 passed in Criminal Misc. Writ Petition No.2873 of 2024 has attained finality.

19. The Commissioner of Police, Lucknow has passed orders dated 10.06.2024 under Section 15 of the Act of 1986. Provisions of Section 15 of the Act of 1986 reads as under :-

*"**15. Release of property** (1) Where any property is attached under Section 14, the claimant thereof may, within three months from the date of knowledge of such attachment, make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.*

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant."

20. It reflects from the orders dated 10.06.2024 that the Police Commissioner,

Lucknow has passed the order after providing sufficient opportunity of hearing and after considering the representations of the petitioners. The Court of Police Commissioner, Lucknow has discussed in detail the grounds as mentioned in the representations of the petitioners. The Court of Commissioner of Police, Lucknow has also mentioned that the petitioners could not submit any cogent and relevant documentary evidence to prove the source of money by which the properties under attachments were obtained by the petitioners. In this regard the provisions of Rule 37 (4) of the U.P. Gangster and Anti Social Activities (Prevention) Rules, 1986 provides that the burden of proof that the property attached has not been acquired by committing offence under the Act and the burden to show lawful source of acquisition of the property shall be on accused whose property in question is attached. In the light of above provision, the burden of proof of both the facts was on petitioners. The proviso to clause (3) of Rule 37, also provides a condition that the criminal cases enumerated in sub clauses (i) to (xxv) of clause (b) of Section 2 of the Act of 1986 should be registered against the petitioner No.1 and the property has been acquired by him by committing such offences. In this regard the Commissioner of Police, Lucknow has discussed in the impugned orders that the petitioner No.1 has been involved in the criminal activities since 1973 and his history sheet No.11-A is entered in Register No.8 of the Police Station - Malihabad. It shows the criminal history of petitioner No.1, and according to that entry total 17 cases are registered since 1974 to 1997 against the petitioner No.1. It has also been brought in the knowledge of Police Commissioner, Lucknow that petitioner No.2 could not submit any cogent and reliable evidence regarding his income to enable him to acquire the properties attached. The properties have been gifted to him by his mother and father (petitioner No.1), although he has submitted his ITR of Poland for the year 2022 but it requires proof. The petitioner No.2 could not show his regular income. The above facts, which have been brought before Police Commissioner also provide a ground for reason to believe that the petitioners have acquired the said properties by the proceeds of crime committed by petitioner No.1 regarding which the petitioners could not submit the documentary proof regarding source of income. Therefore, the orders dated 10.06.2024, passed by the Commissioner of Police, Lucknow cannot be termed arbitrary or baseless. It is in accordance with law, regarding which the Commissioner of Police, Lucknow has jurisdiction conferred in him by the legislation.

21. The further submission of learned counsel for the petitioners that the properties which were attached by the Commissioner of Police, Lucknow were in the names of the family members of the petitioner No.1 and there was no nexus between the commission of offence and acquisition of properties. Some of the properties are ancestral, some of the properties were purchased by the earnings of his sons, Ehraz Khan who is the citizen of Ireland and Shamail Khan who is the citizen of Poland and some property has been purchased by petitioner No.2 from his own income and further submission that the 18 criminal cases have wrongly been shown as registered against the petitioner No.1, the criminal history of petitioner No.1 is not true and the properties under attachment vide orders dated 10.06.2024 have not been obtained by the proceeds of

crime, these are the questions of facts and appreciation of evidence, which cannot be decided by this Court under writ jurisdiction.

22. On the above point, learned A.G.A. has placed reliance upon paragraph 4 of the judgment passed by a co-ordinate Bench of this Court in the case of ***Krishna Murari Agrawal alias Deepak Vs. District Magistrate, Jhansi and others, 2001 CRI. L.J. 949. Paragraph 4 reads as under :***

"4. The question whether the property attached has been acquired by a gangster as a result of the commission of an offence under U.P. Gangsters & Anti-Social Activities Prevention Act, 1986 is a pure question of fact. The claim of the petitioner that the property has not been acquired by commission of an offence or that it is an ancestral property can only be established by appraisal of the evidence. It will be open to the petitioner to lead oral and documentary evidence in support of his claim before the Special Judge (Gangsters Act) where the matter has been referred. Such appraisal of evidence is not possible in the present proceedings under Article 226 of the Constitution of India. The Act provides a complete machinery as against the decision of the Court an appeal lies under Section 18 of the Act."

23. The petitioners have right and statutory remedy under Section 16 of the Act of 1986 in which they will get the opportunity to prove that the properties which have been attached have not been acquired by petitioner No.1 by the commission of the crimes, and further if the petitioners are not satisfied by the order confirming attachment/order of the competent court under Section 17 of the Act of 1986, they shall get opportunity to file appeal under Section 18 of the Act of 1986. According to Section 20 of the Act of 1986, the provisions of the Act of 1986 shall have overriding effect over the inconsistent provisions of general law.

24. It has been held by Hon'ble Supreme Court in the case of ***Raj Kumar Shivhare Vs. Director of Enforcement (2010) 4 SCC 772*** that where a statutory forum is created by law for redressal of grievance and that too in a fiscal statue, a writ jurisdiction should not be entertained ignoring the statutory dispensation.

25. Having considered the legal aspect that extra ordinary remedy under Article 226 of the Constitution of India is not meant to circumvent the statutory remedies, the statutory provisions cannot be bypassed by this court under its supervisory jurisdiction under Article 226 of the Constitution of India.

26. In the light of above discussion, we decline to entertain the writ petition under Article 226 of the Constitution of India.

27. Accordingly, the writ petition is **rejected.** However, the petitioners shall have liberty to raise all the factual and legal issues before the court concerned under Section 16 of the Act of 1986.

(2024) 8 ILRA 903
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Misc. Writ Petition No. 12287 of 2024

Deepu & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Raul Mishra, Sri Sanjay Mishra

Counsel for the Respondents:
Sri Bhaiya Lal Yadav, G.A.

Petitioners seeks to quash FIR, registered under IPC and POCSO Act - incident occurred before the enforcement of the new criminal laws – FIR upheld under IPC – but investigation should follow the BNSS procedures- law is summarised as under:

- if an FIR is registered on or after 1.7.2024 for the offence committed prior to 1.7.2024, then FIR would be registered under IPC but the investigation will continue as per BNSS.
- In the pending investigation on 01.07.2024 (on the date of commencement of New Criminal Laws), investigation will continue as per the Cr.P.C. till the cognizance is taken and if any direction is made for further investigation - same will continue as per the Cr.P.C.
- The cognizance on the pending investigation on or after 01.07.2024 would be taken as per the BNSS and all the subsequent proceeding including enquiry, trial or appeal would be conducted as per the procedure of BNSS.
- The pending trial on 01.07.2024, if concluded on or after 01.07.2024 then appeal or revision -will be as per the BNSS.
- If any application is filed in appeal pending on 01.07.2024 then the procedure of Cr.P.C. will apply.
- If the criminal proceeding or chargesheet is challenged before the High Court on or after 01.07.2024, where the investigation was conducted as per Cr.P.C. then same will be filed u/s 528 of BNSS not u/s 482 Cr.P.C.

W.P disposed. (E-9)

List of Cases cited:

1. Hitendra Vishnu Thakur & ors. Vs St. of Mah. & ors.

2. Neena Aneja & anr.Vs Jai Prakash Assc. Ltd.

3. Arnesh Kumar Vs St. of Bihar

4. Social Action Forum for Manav Adhikar Vs U.O.I., Ministry of Law and Justice & ors.

5. Satendra Kumar Antil Vs Central Bureau of Investigation & anr.

6. Vimal Kumar & ors. Vs St. of U.P. & ors.

7. XXXX Vs St. of Union Territory of Chandigarh & anr.

8. Abdul Khadir Vs St. of Kerala

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

1. Personal affidavit of Superintendent of Police, Hamirpur filed today is taken on record.

2. Heard Sri Sanjay Mishra, learned counsel for the petitioners as well as Sri P.C. Srivastava, Additional Advocate General, assisted by Sri J.K. Upadhyay, Additional Government Advocate and Sri Bhaiya Lal Yadav, learned counsel for the informant.

3. The present writ petition has been preferred with the prayer to quash the impugned First Information Report dated 3.7.2024, registered as Case Crime No. 0271 of 2024, under Sections 376 (2)(n), 354, 147, 452, 504, 506 IPC and Section 4 POCSO Act, PS Maudaha, District Hamirpur, and for a direction to the respondents not to arrest the petitioners in pursuance of impugned First Information Report.

4. On 23.7.2024 the following order was passed:

" The impugned FIR dated 3.7.2024 is registered under the provision of Indian Penal Code and not under Bharatiya Nyaya Sanhita (BNS) which came into force on 1st July, 2024. The

Superintendent of Police, Hamirpur shall file an affidavit why the FIR has not been registered under Bharatiya Nyaya Sanhita (BNS)

Learned AGA for State submits that the victim is aged about 14 years and she was medically examined and seeks some time to get the instruction in this regard.

List again on 30.7.2024 as fresh."

5. In compliance with the above quoted order, learned AGA has filed a personal affidavit of the Superintendent of Police, Hamirpur. In the affidavit, it is mentioned that Bharatiya Nyaya Sanhita (B.N.S.) came into force on 1.7.2024 whereas the incident in question had taken place between 2.4.2024 to 28.6.2024, therefore, the first information report was lodged under the provisions of the Indian Penal Code (I.P.C.). It is also mentioned in the personal affidavit that in respect of the procedure after commencement of B.N.S.S., a circular dated 4.7.2024 was issued by the Police Technical Services Headquarters, Uttar Pradesh which provides that if any offence is committed prior to the enforcement of B.N.S., the FIR would be registered under the provisions of Indian Penal code, and procedure of investigation would be followed as per Bhartiya Nagrik Suraksha Sanhita (B.N.S.S.). The said circular dated 4.7.2024 issued by the Police Technical Services Headquarters, Uttar Pradesh is quoted as under:

पुलिस तकनीकी सेवायें मुख्यालय, उत्तर प्रदेश।

8वॉ तल, टावर-4, पुलिस मुख्यालय, अमर शहीद पथ, गोमतीनगर विस्तार, लखनऊ-226002

पत्र संख्याः टीएस-सीसीटीएनएस-06/2010(XXIV) दिनांकः जुलाई, 2024

सेवा में,

1. पुलिस महानिदेशक- पॉवर कारपोरेशन, सी०बी०सी०आई०डी०, उ०प्र० सतर्कता अधिष्ठान, उ०प्र०।

2. अपर पुलिस महानिदेशक- आर्थिक अपराध शाखा, रेलवे, एस०टी०एफ०, उ०प्र०।

3. समस्त पुलिस आयुक्त- उत्तर प्रदेश।

4. पुलिस महानिरीक्षक- ए०टी०एस०, ए०एन०टी०एफ०, उ०प्र०।

5. समस्त जनपदीय वरिष्ठ पुलिस अधीक्षक/ पुलिस अधीक्षक, उत्तर प्रदेश।

6. अपर पुलिस अधीक्षक, एस०आई०टी०, उ०प्र०।

विषयः- भारतीय न्याय संहिता-2023, भारतीय नागरिक सुरक्षा संहिता-2023 तथा भारतीय साक्ष्य अधिनियम-2023 के सफल क्रियान्वयन के सम्बन्ध में।

जैसा कि आप अवगत है कि प्रदेश में 03 नवीन अधिनियमों को दिनांक जुलाई 01, 2024 से लागू किया जा चुका है, जिसके क्रियान्वयन के क्रम में सीसीटीएनएस एप्लीकेशन के माध्यम से जी०डी० प्राथमिकी इत्यादि का पंजीकरण किया जा रहा है। चूँकि उक्त तीन अधिनियम अभी प्रख्यापित हुये है, थाना स्तर पर प्रपत्र दर्ज करते समय चयन किये जाने वाले अधिनियम के सम्बन्ध में संशय की सम्भावना हो सकती है।

अतः पुलिस महानिदेशक, उ०प्र० महोदय से प्राप्त अनुमोदन के क्रम में आपसे अनुरोध है कि थानों पर दर्ज हो रहे प्रपत्रों के सम्बन्ध में निम्नानुसार अधिनियम का चयन करने हेतु सर्वसम्बन्धित को अवगत कराने का कष्ट करें-

Date of occurrence of Crime	Date of Registration	Provisions of Laws to be applied	Procedural Law to be followed
01 जुलाई 2024 से पूर्व	01 जुलाई 2024 से पूर्व	IPC	CrPC
01 जुलाई 2024 से पूर्व	01जुलाई 2024 या उसके पश्चात	IPC	BNSS
01जुलाई 2024 या उसके पश्चात	01जुलाई 2024 या उसके पश्चात	BNS	BNSS
नोटः- एक से अधिक घटना की तिथि व दिनाँक होने की स्थिति में विस्तृत गाइडलाइन संलग्न।			

संलग्नकः SOP.

Signed by

Naveen Arora
Date 04.07.2024
अपर पुलिस महानिदेशक
तकनीकी सेवाएं मुख्यालय, उत्तर प्रदेश।

6. However, learned counsel for the petitioners has contended that the procedure mentioned in the above noted circular dated 4.7.2024 is incorrect for the offence occurred prior to the enforcement of the Bharatiya Nyaya Sanhita, 2023, because for this offence the F.I.R. is registered after enforcement of the Bharatiya Nyaya Sanhita, 2023 (hereinafter referred to as "BNS") as well as the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as "BNSS"), then the F.I.R. should be registered under the BNS.

7. To decide this issue, it would be relevant to quote Section 531 of BNSS as under:-

"531. ***Repeal and savings.*** *- (1) The Code of Criminal Procedure, 1973 is hereby repealed.*

(2) Notwithstanding such repeal—

(a) if, immediately before the date on which this Sanhita comes into force, there

is any appeal, application, trial, inquiry or investigation pending, then, such appeal,

application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure, 1973, as in force immediately before such commencement (hereinafter referred to as the said Code), as if this Sanhita had not come into force;

(b) all notifications published, proclamations issued, powers conferred, forms provided by rules, local jurisdictions defined, sentences passed and orders, rules and appointments, not being appointments as Special Magistrates, made under the said Code and which are in force immediately before the commencement of this Sanhita, shall be deemed, respectively, to have been published, issued, conferred, specified, defined, passed or made under the corresponding provisions of this Sanhita;

(c) any sanction accorded or consent given under the said Code in pursuance of which no proceeding was commenced under that Code, shall be deemed to have been accorded or given under the corresponding provisions of this Sanhita and proceedings may be commenced under this Sanhita in pursuance of such sanction or consent.

(3) Where the period specified for an application or other proceeding under the said Code had expired on or before the commencement of this Sanhita, nothing in this Sanhita shall be construed as enabling any such application to be made or proceeding to be commenced under this Sanhita by reason only of the fact that a longer period therefore is specified by this Sanhita or provisions are made in this Sanhita for the extension of time."

8. From the perusal of the above section, it is clear that, if any, investigation is pending on the date of repeal of Cr.P.C. then same will continue as per Cr.P.C. As per Section 157 Cr.P.C. (Section- 176 BNSS) investigation would start from the date of registration of F.IR., therefore if F.I.R. is registered before commencement of new criminal laws then the procedure of the investigation will continue as per the Cr.P.C. because investigation will be

deemed to be commenced on the date of registration of the F.I.R. However, in case the F.I.R. is registered after the commencement of new criminal laws for the offence committed prior to the enforcement of new criminal laws then the F.I.R. would be registered under the provision of I.P.C. as the I.P.C. is a substantive law which was prevalent at the time of committing the offence because as per Article 20 of the Constitution of India a person can be convicted of an offence for the violation of law enforced at the time of the commission of the act. Article 20 of the Constitution of India reads as under:-

"20. ***Protection in respect of conviction for offences****.- (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.*

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

9. However, the question arises, what would be the procedure of investigation, if the F.I.R. is registered after the commencement of new criminal laws for the offence committed prior to the enforcement of new criminal laws, as such investigation is not saved by Section 531(2)(a) of the BNSS to be conducted as per Cr.P.C. To decide this issue, it is relevant to consider Section 6 of General Clauses Act which provides effect of repealing of any Central Act or Regulation. Section 6 of General Clause Act, 1897 is being quoted as under;

"6. Effect of repeal.- Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, any any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

10. From the perusal of Section 6 of the General Clauses Act, it appears that the repeal of Cr.P.C. shall not affect any investigation, legal proceeding or remedy in respect of any liability, penalty or punishment accrued or incurred under the repealed Act and such investigation, legal proceeding or remedy will continue under the repealed Act. It is also clear from

Section-6 of the General Clauses Act, the repeal of I.P.C. or Cr.P.C. will not affect any right, liability accrued or incurred under the repealed Act. Therefore, despite repealing of IPC and Cr.P.C., liability to get punishment under IPC will continue and remedy like an appeal under Cr.P.C. will remain as it is but the forum of appeal being procedural in nature will be as per the B.N.S.S.

11. In the case of **Hitendra Vishnu Thakur & Others Vs. State of Maharashtra & Others reported in (1994) 4 SCC 602,** the Hon'ble Supreme Court considered the effect of repealed provision by way of amendment in pending cases and summarised the law relating to the effect of the amendment of procedural and substantive law. Hon'ble Supreme Court in the case of **Hitendra Vishnu Thakur (supra)** observed that while right to forum and limitation is procedural in nature, while right of appeal or right of action is substantive in nature and further observed that litigants have a vested right in substantive law but no such right exists in procedural law. Paragraph no.26 of the **Hitendra Vishnu Thakur (supra)** is being quoted as under:

"26. The Designated Court has held that the amendment would operate retrospectively and would apply to the pending cases in which investigation was not complete on the date on which the Amendment Act came into force and the challan had not till then been filed in the court. From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

12. Similarly, in the case of **Neena Aneja & Another Vs. Jai Prakash Associates Ltd**. reported in **(2022) 2 SCC 161,** Hon'ble Supreme Court again observed that the amendment on the matter of procedural law will be retrospective unless a contrary intention emerges from the statute. Relevant extract of paragraph no.72 of **Neena Aneja's** case **(supra)** is being quoted as under:

"72. In considering the myriad precedents that have interpreted the impact of a change in forum on pending proceedings and retrospectivity—a clear position of law has emerged : a change in forum lies in the realm of procedure. Accordingly, in compliance with the tenets of statutory interpretation applicable to procedural law, amendments on matters of procedure are retrospective, unless a contrary intention emerges from the statute……."

13. Effect of Repeal of I.P.C. and Cr.P.C. and enforcement of new Criminal Laws (BNS and BNSS) was also considered by the Punjab & Haryana High Court in the case of **XXXX Vs. State of Union Territory of Chandigarh and Another (CRM-M-31808-2024 dated 11.07.2024)** which was subsequently relied upon by the Kerela High Court in the case of **Abdul Khadir Vs. State of Kerala in Crl. Appeal No.1186 of 2024 dated 15 July, 2024** and observed that a fresh appeal or application or revision of the petitioner after the repeal of Cr.P.C. could be filed under the BNSS not under Cr.P.C. and remedial applications/petitions after 01.07.2024 could be filed only under BNSS not under the Cr.P.C. even though the offence was committed prior to 01.07.2024. Paragraph no.9 of the **XXXX Vs. State of Union Territory of Chandigarh (supra)** is being quoted as under:

"9. As a sequel to the above-said rumination, the following principles emerge:

I. The Code of Criminal Procedure, 1973 stands repealed w.e.f. 01.07.2024. Ergo; no new/fresh appeal or application or revision or petition can be filed under Code of Criminal Procedure, 1973 on or after 01.07.2024.

2. The provisions of Section 4 and Section 531 of BNSS, 2023 are mandatory in nature as a result whereof any appeal/application/revision/petition/trial/inquiry or investigation pending before 01.07.2024 are required to be disposed of continued, held or made (as the case may be) in accordance with the provision of Code of Criminal Procedure, 1973. In other words; any appeal/application/revision/petition filed on or after 01.07.2024, is required to be filed/instituted under the provision of BNSS 2023.

3. Any appeal/application/revision/petition filed on or after 01.07.2024 under the provisions of Cr.P.C., 1973 is non-maintainable & hence would deserve dismissal/rejection on this score alone. However, any appeal/application/revision/petition filed upto 30.06.2024 under the provisions of Cr.P.C., 1973 is maintainable in law. To clarify; in case any appeal/application/revision/petition is filed upto 30.06.2024 but there is defect (Registry objections, as referred to in common parlance) and such defect is cured/removed on or after 01.07.2024, such appeal/application/revision/petition shall be deemed to have been validly filed/instituted on or after 01.07.2024 and, therefore, would be non- maintainable.

4. Section 531 of BNSS shall apply to "revision", "petition" as also "petition of complaint" (ordinarily referred to as complaint before Magistrate) with the same vigour as it is statutorily mandated to apply to "appeal/application/trial/inquiry or investigation" in terms of Section 531 of BNSS."

14. From the above-discussed case, the following legal position is culled out:

(i) that amended/repealed procedural law will be applicable retrospectively unless otherwise provided in the new Act itself;

(ii) liability or right accrued under the repealed Act will not be affected and same will continue as if the repealing Act did not come into force;

(iii) procedure of investigation, trial, revision and appeal as well as a forum of remedy is part of procedural law, and the same will be applicable retrospectively unless otherwise provided in the new procedural law;

(iv) Litigants have no vested right in procedural law but has vested right in substantive law with accrued right or liability. The statute which not only changes the procedure but also creates new rights and liabilities, shall be construed to be prospective in nature unless otherwise provided.

15. From the above analysis it is clear that if any offence is committed prior to the enforcement of new criminal laws, then if the F.I.R. is registered after the enforcement of new criminal laws, then the same will be registered under the provision of I.P.C. in view of the Article 20 of the Constitution of India, but the procedure for the investigation will be as per the BNSS. Similarly, in case the offence is committed after the enforcement of new criminal laws and thereafter the F.I.R. is registered, then the investigation would be conducted as per the BNSS. However, in case the offence is committed prior to the enforcement of new criminal laws, and F.I.R. is also registered prior to the enforcement of new criminal laws then the procedure of investigation would be as per the Cr.P.C. in view of Section 531(2)(a) of the BNSS. Therefore, the procedure of investigation provided by the circular dated 7.4.2024 of the Police Technical Services Headquarter, U.P. is absolutely correct.

16. On the basis of above analysis, this Court is also summarising the law regarding effect of repealing the IPC and Cr.P.C. by BNS and BNSS respectively and same is being mentioned as below:

(i) If an FIR is registered on or after 1.7.2024 for the offence committed prior to 1.7.2024, then FIR would be registered under the provisions of IPC but the investigation will continue as per BNSS.

(ii) In the pending investigation on 01.07.2024 (on the date of commencement of New Criminal Laws), investigation will continue as per the Cr.P.C. till the cognizance is taken on the police report and if any direction is made for further investigation by the competent Court then same will continue as per the Cr.P.C.;

(iii) The cognizance on the pending investigation on or after 01.07.2024 would be taken as per the BNSS and all the subsequent proceeding including enquiry, trial or appeal would be conducted as per the procedure of BNSS.

(iv) Section 531(2)(a) of BNSS saved only pending investigation, trial, appeal, application and enquiry, therefore, if any trial, appeal, revision or application is commenced after 01.07.2024, the same will be proceeded as per the procedure of BNSS.

(v) The pending trial on 01.07.2024, if concluded on or after 01.07.2024 then appeal or revision against the judgement passed in such a trial will be as per the BNSS. However, if any application is filed in appeal, which was pending on 01.07.2024 then the procedure of Cr.P.C. will apply.

(vi) If the criminal proceeding or chargesheet is challenged before the High Court on or after 01.07.2024, where the investigation was conducted as per Cr.P.C. then same will be filed u/s 528 of BNSS not u/s 482 Cr.P.C.

17. Coming back to the facts of the case, it has been pointed out that in view of the statement of the victim recorded under Section 164 CrPC, Section 376 (2)(n) has been deleted and all other offences are punishable with imprisonment upto seven years.

18. Although the prayer for quashing of FIR has been made, but without insisting on the same, only submission is that all alleged offences are punishable with imprisonment upto seven years, therefore the police authorities are bound to follow the procedure laid down under Section 41-A Cr.P.C. The petitioners have been wrongly implicated and should not be arrested. Reliance has been placed on the judgement of Apex Court in **Arnesh Kumar Vs. State of Bihar, (2014) 8 SCC 273 and Social Action Forum for Manav Adhikar Vs. Union of India, Ministry of Law and Justice and others in Writ Petition (Civil) No. 73 of 2015 with Criminal Appeal No. 1265 of 2017 Writ Petition (Criminal) No. 156 of 2017 and in Satendra Kumar Antil vs. Central Bureau of Investigation and Another (2022) 10 SCC 51 and co-ordinate Division Bench of this Court in Vimal Kumar & 3 others Vs. State of U.P. & 3 others in 2021 (2) ACR 1147.**

19. We have gone through the impugned first information report and without interfering in the same, we are of the opinion that the guidelines framed by the Apex Court in the above noted judgement are equally applicable to the facts of the instant case.

20. Accordingly, the instant petition also stands **disposed of** in terms of the judgements as noted above.

21. Registrar (Compliance) is directed to send a copy of this order to the Director General of Police, Uttar Pradesh who will circulate the same to all the District Police Chiefs who will further sensitize the investigating officers under their supervision.

(2024) 8 ILRA 911
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.08.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Matters U/A 227 No.3555 of 2024

Mahant Bhagwati Prasad Chela Late Mahant Janki Das ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Vinay Misra, Amulya Pandey

Counsel for the Respondents:
G.A.

Arms Act,1959 -Police seized a revolver of the petitioner with live cartridges along with license book – on the basis of a false criminal case-revolver along with cartridges, bore and wooden sticks were returned but Petitioner's license book was not returned - petitioner's rights under Article 21 of the Constitution were violated. - Police had indeed misplaced the license book – admitted misconduct - Second license book issued by police .

W.P. partly allowed. (E-9)

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

1. Heard Shri Vinay Misra, learned Counsel for the petitioner, Dr. V.K. Singh, learned Government Advocate assisted by Shri Ashok Kumar Singh, learned A.G.A-I for the State-respondent Nos. 1 to 5 and perused the material placed on record.

2. This Court vide order dated 05.08.2024 had passed the following order:-

"Heard Shri Abhijit Pandey, learned Counsel for the petitioner, Dr. V.K. Singh, learned Government Advocate assisted by Shri Ashok Kumar Singh, learned A.G.A-I for the State-respondent Nos. 1 to 5 and perused the material placed on record.

This Court vide order dated 01.08.2024 had passed the following order:-

"Heard Sri Abhijeet Pandey, learned counsel for the petitioner and Dr. V.K. Singh, learned Government Advocate assisted by Sri Ashok Kumar Singh, learned A.G.A.-I for the State as well as perused the record.

The instant writ petition has been filed seeking following main reliefs:-

"I. Issue an order or direction thereby setting aside the order dated 08.02.2024 passed in Criminal Revision No.964 of 2024 (Mahant Bhagwati Prasad Das Vs. State) by which the Criminal Revision so preferred by the petitioner against the order dated 08.01.2024 passed by the Additional Chief Judicial Magistrate, Room No.19 was rejected upon wrong ascertainment of facts, contained as Annexure No.1 to this petition, in the interest of justice.

II. Issue an order or direction thereby setting aside the order dated 08.01.2024 passed by the Additional Chief Judicial Magistrate, Room No.19, Sultanpur by which the application dated 16.05.2023 so preferred by the petitioner for providing him his license book in its original which was being illegally kept by the local police from the date of alleged occurrence till the present was rejected, contained as Annexure No.2 to this petition, in the interest of justice.

III. Issue an order or direction to the concerned authorities for providing to the petitioner original copy of the license No.298 on which his revolver bearing No. H3767 is entered and which presently is being illegally kept back by the police authorities for no valid rhyme and reason, in the interest of justice."

Learned counsel for the petitioner submits that the police of Police Station Kadipur, District Sultanpur had seized a revolver of the petitioner bearing No. H3767 with twenty live cartridges alongwith license book illegally and with arbitrary manner on the basis of a false case shown against the petitioner bearing Case Crime No.550/2021, under Sections 147, 148, 149, 307, 323, 504, 506 I.P.C. and Section 3/25/27/30 of Arms Act registered at Police Station Kadipur, District Sultanpur.

He further submits that the petitioner being aggrieved by the illegal action of the police of Police Station Kadipur, District Sultanpur filed a release application before the learned Additional Civil Judge (J.D.) / Judicial Magistrate, Court No.26, Sultanpur for release of the revolver bearing no. H3767 and 20 live bullets alongwith the license book. The learned Magistrate vide order dated 24.02.2023 released the aforesaid revolver bearing No. H3767 alongwith 20 live cartridges, 6 empty cartridge 32 bore and six wooden sticks with the condition that

the petitioner shall give a surety of Rs.1,50,000/-. However, the license book of the petitioner was not released and no order was passed in the order dated 24.02.2023 by the learned Magistrate with regard to the license book.

He further submits that after the order dated 24.02.2023 was passed, the revolver no. H3767 alongwith 18 live cartridges and 6 empty cartridges 32 bore were released in favour of the petitioner by the police on 15.05.2023 in pursuance to the order dated 24.02.2023. However, the license book which was illegally seized by the police was not ordered by the learned Magistrate to be released. Thus, the petitioner moved an application before the learned Additional Chief Judicial Magistrate, Court No.19, Sultanpur on 16.05.2023 for release of the license book, which was seized by the concerned officer posted at that time at Police Station Kadipur, District Sultanpur.

He further submits that the police to save their conduct have given false statement that they have not seized any license book whereas it was a clear cut plea taken by the petitioner that the said license book was misplaced from the Malkhana and arbitrarily the entry was not made in the records. Thus, the learned Additional Chief Judicial Magistrate, Court No.19, Sultanpur vide order dated 08.01.2024 rejected the application of the petitioner.

He further submits that against the aforesaid order dated 08.01.2024, the petitioner preferred a Criminal Revision before the learned Additional Sessions Judge, Sultanpur, which was also dismissed by the learned Revisional Court vide order dated 08.02.2024.

Thus, he submits that the findings recorded by the learned Additional Chief Judicial Magistrate, Court No.19, Sultanpur as well as by the learned Revisional Court are perverse and without evidence on record as the petitioner has shown certified copy of the license book, which was filed alongwith the charge sheet by the Investigating Officer. A copy of the same is also filed as annexure no.21 of the affidavit filed in support of this petition, which was duly verified by the then Sub Inspector Vimal Kapoor, Police Station Kadipur, District Sultanpur with the stamp of the Police Station. Thus, it is crystal clear that the said license was with the police department and they after getting photostat copy of the license, filed it alongwith the charge sheet and the same was also part of the charge sheet. Thus, whatever the statement given before the learned trial court by the police that they had not seized license book, appears to be false and for misleading the court. He further submits that it is clear cut violation of Article 21 of the Constitution of India.

Accordingly, this Court is satisfied with the arguments as advanced by learned counsel for the petitioner that a conspiracy had been played by the police for misplacing the license book of the petitioner. The petitioner's license was earlier valid till 31.12.2018 and thereafter, it was extended till 31.12.2021, which contains the stamp of Police Station Kadipur, District Sultanpur on the photostat copy of the license. Thus, there is no doubt that the license book was with the police at the time of seizure and they filed the copy in the charge sheet as appears from the record.

Thus, it appears that the police want to unnecessarily harass the petitioner and they had misplaced the license book. As such, the act and conduct of the police of Police Station Kadipur, District Sultanpur appears to be very casual that

shows the negligence and casual approach adopted by the police.

Accordingly, this Court deems it appropriate that the Superintendent of Police, Sultanpur and Station House Officer of Police Station Kadipur, District Sultanpur alongwith the then Sub Inspector of Police Vimal Kapoor, Police Station Kadipur, District Sultanpur shall appear in person alongwith their explanation and records before this Court to justify their conduct about the copy of license filed at the time of filing of chargesheet, which contained at annexure no.21 of the affidavit filed alongwith this petition.

Put up this case on 05.08.2024 before this Court for further orders.

Till the next date of listing, the effect and operation of the order dated 08.02.2024 passed in Criminal Revision No.964 of 2024 (Mahant Bhagwati Prasad Das Vs. State) as well as the effect and operation of the order dated 08.01.2024 passed by the learned Additional Chief Judicial Magistrate, Room No.19, Sultanpur shall remain stayed in respect of the petitioner.

This case shall be treated as tied up or part heard to this Bench.

Let a copy of this order be provided to Dr. V.K. Singh, learned Government Advocate and Sri Ashok Kumar Singh, learned A.G.A.-I for the State for immediate onward communication to the Superintendent of Police, Sultanpur, Station House Officer, Police Station Kadipur, District Sultanpur and the then Sub Inspector of Police Vimal Kapoor, Police Station Kadipur, District Sultanpur to ensure their personal appearance before this Court alongwith their explanation on 05.08.2024.

Senior Registrar of this Court is also directed to communicate this order to the Superintendent of Police, Sultanpur immediately for necessary compliance."

In compliance of the order dated 01.08.2024 (quoted above) passed by this Court, the Superintendent of Police, District-Sultanpur, namely-Shri Somen Barma alongwith Station House Officer, Police Station-Kadipur, namely-Ashok Kumar Singh, and the then Sub Inspector posted at Police Station-Kadipur, namely-Vimal Kapoor are present before this Court in person.

Personal affidavits of all the officers present before this Court in person filed today by learned A.G.A.-I for the State-respondent Nos.1 to 5 are taken on record.

On query made by this Court to Superintendent of Police, Sultanpur regarding the laxity and misconduct on the part of his subordinates in the present case, on which he tendered unconditional apology and after perusing the photostat copy of the license book of the petitioner bearing License No.298/January/Sultanpur for Revolver No.H3767 duly attested and certified with Stamp of Police Station-Kadipur, District-Sultanpur and signed by the then Sub Inspector, namely-Vimal Kapoor, which was lastly renewed up to 31.12.2021, he submits that the same was deposited in the Maalkhana of Police Station-Kadipur, District-Sultanpur, this fact also been confirmed by the then Sub Inspector, namely-Vimal Kapoor but the license book got misplaced from the Maalkhana of Police Station-Kadipur, District-Sultanpur. He further stated that on the basis of one case bearing Case Crime No.550/2021, under Sections 147, 148, 149, 307, 323, 504, 506 I.P.C. and Section 3/25/27/30 of Arms Act registered at Police Station Kadipur, District Sultanpur the police of Police Station Kadipur, District Sultanpur had seized a

revolver of the petitioner bearing No. H3767 with twenty live cartridges alongwith license book. He further stated that learned Magistrate vide order dated 24.02.2023 released the aforesaid revolver bearing No. H3767 alongwith 20 live cartridges, 6 empty cartridge 32 bore and six wooden sticks with the condition that the petitioner shall give a surety of Rs.1,50,000/-. However, the license book of the petitioner could not be released as it got misplaced by his subordinates posted at Police Station-Kadipur, District-Sultanpur.

He further stated that he has taken strict actions against the officials responsible for the misconduct and laxity and further assured this Court that a duplicate copy of the license book shall be provided to the petitioner on the next date of listing as the details of the original license book is already available with the Police Station-Kadipur, District-Sultanpur, which has also been annexed with the petition as Annexure No.21. He also stated before this Court that the license book will be given to the petitioner after extending the due date up to 31.12.2024.

The then Sub Inspector, namely-Vimal Kapoor also made an agreement with the statements made by the Superintendent of Police, District-Sultanpur and submits that when the seizure was done by him, he deposited all the seized items with the In-charge of the Maalkhana of Police Station-Kadipur, District-Sultanpur but the license book got misplaced and rest of the articles/ammunition were returned back to the petitioner in compliance of the order dated 24.02.2023 passed by learned Additional Civil Judge (J.D.) / Judicial Magistrate, Court No.26, Sultanpur.

The Station House officer, Police Station-Kadipur, District-Sultanpur stated before this Court that after due investigation, he came to know that the said license book was deposited in the Maalkhana of the Police Station-Kadipur, District-Sultanpur but the same got misplaced from the Maalkhana of the concerned police station.

Dr. V.K. Singh, learned Government Advocate assisted by Shri Ashok Kumar Singh, learned A.G.A-I for the State-respondent Nos.1 to 5 also submit that as the officials concerned have tendered their apologies before this Court due to misconduct and laxity committed by them and assured this Court that they may be given some further time to prepare a duplicate license book of the petitioner with a renewed date up to 31.12.2024, which will be handed over to the petitioner on the next date of listing, thus, this court may grant them some time to prepare the same and hand it over to the petitioner on the next date fixed. They further submit that they will also assure that the officers concerned shall make all the endeavors to keep their assurances given by them to this Court.

After hearing learned Counsel for the parties, considering the assurances given by the officers present before this Court in person and after perusal of record, this Court finds that as it has been admitted by the officers concerned, that the license book of the petitioner got misplaced from the Maalkhana of Police Station-Kadipur, District-Sultanpur and the Superintendent of Police, District-Sultanpur has taken strict actions against his subordinates responsible for the misconduct and laxity, therefore, this Court does not want to express any opinion on the internal actions and investigations made by Superintendent of Police, District-Sultanpur in his capacity but this Court deems it proper to direct the officers concerned to provide the petitioner his

license book, which is necessary for keeping a weapon and the misconduct and laxity on the part of police officials has resulted in violation of Article 21 of the Constitution of India.

Thus, the Superintendent of Police, District-Sultanpur alongwith Station House Officer, Police Station-Kadipur, District-Sultanpur is directed to prepare a duplicate copy of the license book of the petitioner with a renewed date up to 31.12.2024 and hand it over to the petitioner on the next date of listing.

Accordingly, list/put up this case on 12.08.2024 before this Court for further orders.

This case shall be treated as part heard and tied up to this Bench.

On the next date of listing, the petitioner, namely-Mahant Bhagwati Prasad Chela Late Mahant Janki Das, the Superintendent of Police, District-Sultanpur, namely- Shri Somen Barma alongwith Station House Officer, Police Station-Kadipur, namely-Ashok Kumar Singh, and the then Sub Inspector posted at Police Station-Kadipur, namely-Vimal Kapoor shall remain present before this Court in person.

Till the next date of listing, the effect and operation of the order dated 08.02.2024 passed in Criminal Revision No.964 of 2024 (Mahant Bhagwati Prasad Das Vs. State) as well as the effect and operation of the order dated 08.01.2024 passed by the learned Additional Chief Judicial Magistrate, Room No.19, Sultanpur shall remain stayed in respect of the petitioner."

3. In compliance of the order dated 05.08.2024 (quoted above) passed by this Court, the Superintendent of Police, District-Sultanpur, namely-Shri Somen Barma alongwith Station House Officer, Police Station-Kadipur, namely-Ashok Kumar Singh P.No. 092140051, and the then Sub Inspector posted at Police Station-Kadipur, namely-Vimal Kapoor P.No. 982462100 and the petitioner, namey-Mahant Bhagwati Prasad, son of Late Kashi Prasad Pandey, Chela of Late Shri Mahant Janki Das are present before this Court in person.

4. Compliance affidavit filed today by learned A.G.A-I for the State-respondent Nos.1 to 5 on behalf of respondent No.3 is taken on record. Paragraph Nos.2, 3 and 4 of the compliance affidavit filed on behalf of respondent No.3 are reproduced hereinunder:-

"2. That it is respectfully submitted that in compliance of the order dated 05.08.2024 passed by the Hon'ble Court a second copy of the license book of petitioner bearing UIN Number 330270020986872015 License Number-LN 33027 A7 A 2 A 824 298/ KADIP-I having validity upto 31.12.2026 has been issued from the office of the District Magistrate, Sultanpur. A true copy of the second of license book is enclosed herewith as ***Annexure No.1*** *to this affidavit for kind perusal of the Hon'ble Court.*

3. That it is respectfully submitted that in compliance of the order passed by the Hon'ble Court, the deponent will put his appearance before the Hon'ble Court on 12.08.2024 and a true second copy of the license book will be submitted before Hon'ble Court at the time of hearing.

4. That it is respectfully submitted that the deponent has highest regard to the orders passed by the Hon'ble Court and duty bound to obey any orders passed by the Hon'ble Court."

5. The Superintendent of Police, District-Sultanpur has produced the true copy of the second Arm License Book of Revolver bearing No.H3767 of the petitioner before this Court for its perusal and to be handed over to the petitioner in original with an extended validity up to 31.12.2026.

6. This Court perused the original second Arm License Book of Revolver bearing No.H3767 of the petitioner produced before this Court by the Superintendent of Police, District-Sultanpur and directed him to hand it over to the petitioner in original. Thereafter, the second Arm License Book of Revolver bearing No.H3767 of the petitioner with an extended validity up to 31.12.2026 has been handed over to the petitioner, namely-Mahant Bhagwati Prasad, son of Late Kashi Prasad Pandey, Chela of Late Shri Mahant Janki Das in the open Court.

7. Learned Counsel for the petitioner as well as the petitioner, who is present before this Court in person submits before this Court that now the petitioner has no grievance to be redressed by this Court as he has got second Arm License Book of Revolver bearing No.H3767, thus, they submit that this petition may be disposed of in view of the above facts and circumstances of the case.

8. Dr. V.K. Singh, learned Government Advocate assisted by Shri Ashok Kumar Singh, learned A.G.A-I for the State-respondent Nos.1 to 5 also made an agreement with the submissions advanced by learned Counsel for the petitioner and submit that now the petitioner has no grievance and the same has been resolved by this Court with the best efforts of Superintendent of Police, District-Sultanpur, thus, they submit that this petition may be disposed of and the personal appearance of the officers present before this Court in person may be exempted till further orders of this Court.

9. After hearing learned Counsel for the parties and the parties who are present before this Court in person and after perusal of record, this Court finds that the Superintendent of Police, District-Sultanpur, namely-Shri Somen Barma has complied with the order dated 05.08.2024 in full spirit and has produced the second Arm License Book of Revolver bearing No.H3767 of the petitioner with an extended validity up to 31.12.2026 and the same has been handed over to the petitioner in the open Court today, thus, nothing remains to be adjudicated by this Court in this petition and the petitioner also submitted before this Court that he has no grievance left to be redressed by this Court.

10. Thus, in view of the above observations, this petition is hereby ***partly allowed*** and the order dated 08.01.2024 passed by Additional Chief Judicial Magistrate, Room No.19, Sultanpur is modified, accordingly.

11. It is further observed here that this Court is not passing any order on the misconduct and laxity on the part of the officers involved in this case and the Superintendent of Police, District-Sultanpur is at liberty to take appropriate action against the officers concerned, in accordance with law.

12. Personal appearance of the officers, who are present before this Court in person is exempted till further orders of this Court.

13. Consigned to record.

(2024) 8 ILRA 918
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters U/A 227 No. 3881 of 2024

Avadhaesh Kumar & Ors. ...Petitioners
Versus
Ghanshyam Mishra ...Respondent

Counsel for the Petitioners:
Rama Niwas Pathak

Counsel for the Respondent:
Narayan Dutt Mishra

Civil Law - Code of Civil Procedure,1908 - Order IV-A Rule 1-Impugned order - consolidated three civil suits under Order IV-A Rule 1 of the CPC - suits involved the same family property and parties - all the three suits relate to the same set of properties belonging to one family-all the parties belong to one family-title derived from common predecessors -parties to the suits are substantially the same-substantial similarity in issues also-When all the suits will be consolidated and decided together-it will be open for the parties to lead evidence in support of the issues involved in all the suits-will save the precious judicial time of the court - no prejudice will be caused to the petitioners by consolidation of the suits.

W.P dismissed. (E-9)

List of Cases cited:

1. Ramanand Vs Civil Judge (S.D.), Merta (Raj.) Citation: AIR 2017 (NOC) 668 (Raj.)

2. M/s Anurag and Co. & anr. Vs Add. District Judge & ors. AIR 2006 Rajasthan 119 2006 SCC OnLine

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

1. Heard Sri Rama Niwas Pathak, the learned counsel for the petitioners and Sri Amit Kumar Shukla, the learned counsel for the opposite parties.

2. By means of the instant petition filed under Article 227 of the Constitution of India, the petitioners have challenged validity of an order dated 20.01.2023 passed by the learned Civil Judge (Senior Division)/F.T.C., Faizabad in Original Suit No. 373/2001, whereby the trial court has allowed the application filed by the opposite parties for consolidation of Original Suits No. 21/2011 and 811/2014 with Original Suit No. 373/2001. The petitioners have also challenged validity of judgment and order dated 11.07.2024 passed by the learned Additional District & Sessions Judge, Court No. 8, Faizabad in Civil Revision No. 08/2023, whereby the revision filed against the order dated 20.01.2023 passed by the Civil Judge has been dismissed.

3. The opposite parties filed an application under Order IV-A C.P.C. for consolidation of the aforesaid three suits stating that all the suits are between the same set of parties regarding the same property in dispute and all the three suits can be consolidated and decided together. The petitioners filed objections against the application stating that Suit No. 373/2001 has been filed for the reliefs of declaration and perpetual injunction, Suit No. 21/2011 has been filed for cancellation of sale deed and Suit No. 811/2014 has been filed for cancellation of will and the subject matters and causes of action of all the three suits are different.

4. The learned Civil Judge had allowed the application for consolidation of all the three suits by the impugned order dated 20.01.2023 by recording that all the three suits relate to the properties of the same family. During pendency of Suit No. 373/2001, some portion of the property in dispute was transferred to some other members of the family, due to which the subsequent suits have been filed. The subject matters of all the three suits are interlinked and all the suits can be decided together, which will save the judicial time of the Court.

5. Accordingly, the trial court allowed the application for consolidation of the suits. The petitioners filed a revision against the order of consolidation of suits passed by the civil court which has been dismissed by means of the impugned order dated 11.07.2024 on the ground that all the three suits relate to the properties of the same family and they can be consolidated and decided together and that there is no illegality in the order passed by the trial court in consolidation of the suits.

6. While assailing validity of the aforesaid orders, the learned counsel for the petitioners has submitted that as the parties to the suits, cause of action for filing the suits and prayer sought are different, the suits cannot be consolidated. He has placed reliance on two judgments referred by the Rajasthan High Court in **Ramanand v. Civil Judge (S.D.), Merta (Raj.): AIR 2017 (NOC) 668 (RAJ.)** and **M/s Anurag and Co. & Anr. v. Add. District Judge & Ors.:** AIR 2006 Rajastahan 119 = 2006 SCC OnLine Raj 4.

7. Per contra, the learned counsel for the petitioners has submitted that although some of the parties to the suits are different, all the parties claim to have derived title from the common predecessors in interest. All of them belong to the same family and all the suits have been filed regarding properties belonging to one family. Although the prayers made in the three suits are different, all the suits relate to the same set of properties and, therefore, the learned trial court has not committed any illegality in consolidating the suits.

8. Order IV-A has been inserted in the Code of Civil Procedure by way of a State amendment made in the State of U.P.. This Order contains only one Rule, which is as follows: -

"R. 1. Consolidation of suits and proceedings.--*When two or more suits or proceedings are pending in the same Court, and the Court is of opinion that it is expedient in the interest of justice, it may by order direct their joint trial, whereupon all such suits and proceedings may be decided upon the evidence in all or any such suits or proceedings."*

9. The aforesaid Rule merely provides that two or more suits or proceedings pending in the same Court can be consolidated if the Court is of opinion that it is expedient in the interest of justice. If the suits are consolidated and tried jointly, the suits may be decided upon the evidence in all or any such suits. Order IV-A Rule 1 C.P.C. does not require that the suits can be consolidated only if the cause of action and the reliefs sought in all the suits is the same. Where the Court comes to the conclusion that plural suits are pending before it which are between the members of the same family deriving title from common predecessors in interest and the issues involved in the suits are interlinked, the Court can certainly order consolidation

of the suits as it will save the time of the Court, avoid a possibility of conflicting decisions in the suit and thereby serve the interests of justice.

10. The aforesaid Rule is not applicable in the State of Rajasthan and it was not in consideration in the cases relied upon by the learned Counsel for the petitioner. However, in **Anurag** (Supra), the Rajasthan High Court formulated the following general principles for consolidation of suits even in absence of a specific statutory provision in this regard:-

"28. The upshot of aforesaid discussion of judgment is that some of the relevant circumstances for consolidating the civil suits are as follows:-

(i) The parties are substantially the same.

(ii) Complete or even substantial and sufficient similarity of the issues arising for decision in two suits.

(iii) Common evidence is to be led, if parties are substantially the same, if only one party is common then burden of proof of facts in issue will be on different person and no common evidence can be led.

(iv) The consolidation in the aforesaid circumstances will fulfill the object of consolidation. Any other circumstances may be relevant then also the object of consolidation will be decisive for passing appropriate order."

11. In **Ramanand** (Supra), the Rajasthan High Court has decided the case on the basis of peculiar facts of the case and it had noted that 'it is succinct position of law that precedential verdicts are to be followed where the facts of the case are almost identical in nature or the question of law involved is identical'. In the case decided by the Rajasthan High Court, the trial court had rejected the application for consolidation of suits and the High Court also found that the parties to the suits and the documents forming basis of claims of the parties to the suit, were not the same and there was no possibility of conflicting judgments in separate suits. Keeping in view the aforesaid facts the Rajasthan High Court did not find any illegality in the order declining to consolidate the suits.

12. In the present case, all the three suits relate to the same set of properties belonging to one family. All the parties belong to one family and they claim to have derived title from common predecessors in interest. Therefore, the parties to the suits are substantially the same. There is substantial similarity in issues also. When all the suits will be consolidated and decided together, it will be open for the parties to lead evidence accordingly in support of the issues involved in all the suits, which will obviously save the precious judicial time of the court and prevent wastage of resources of the parties also. Therefore, no prejudice will be caused to the petitioners by consolidation of the suits.

13. In view of the foregoing discussion, I am of the considered view that the consolidation of all the three suits will be expedient in the interests of justice and the learned Civil Judge (Senior Division)/F.T.C., Faizabad has rightly ordered consolidation of the three suits. There is no illegality or error in the impugned order dated 20.01.2023 passed by the learned Civil Judge (Senior Division)/F.T.C., Faizabad in Original Suit No. 373/2021 and the judgment and order dated 11.07.2024 passed by the learned Additional District & Sessions Judge,

Court No. 8, Faizabad in Civil Revision No. 08/2023, warranting interference from this Court.

14. The petition lacks merit and the same is dismissed.

(2024) 8 ILRA 921
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Matters U/A 227 No.4067 of 2024

Anupam Sahkari Awas Samiti, Lko. Thru. Authorized Azadar Mirza ...Petitioner
Versus
A.D.J., Lko. & Ors. ...Respondents

Counsel for the Petitioner:
Syed Asaghar Mehdi

Counsel for the Respondents:

Civil Law - Code of Civil Procedure,1908 - Order 1, Rule 10 of the CPC – impugned order allowed Application file by the opposite party to be impleaded as an opposite party in the suit in question- opposite party claims that disputed party is his ancestral property and plaintiff claims it as his purchased property-opposite party is a necessary party-necessary and proper parties must be included in a case for fair adjudication. Impugned order legal.

W.P dismissed. (E-9)

List of Cases cited:

1. Gurmit Singh Bhatiya Vs kiran kant Robbins (2020) 13 SCC 773

2. Kasturi v. Uyyamperumal & Ors.

3. Kanaklata das and ors Vs Naba Kumar Das & ors., 2 SCC 352

4. Mohd. Hussain Gulam Ali Sharifi Vs municipal Corporation of Greater Bombay & ors., (2020) 14 SCC 392

5. Bombay International Airport Pvt. Ltd. Case Vs Regency Convention Center & hotels & ors., (2010) 7 SCC 417 SCC

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

1. याचिकाकर्ता के विद्वान अधिवक्ता श्री सैय्यद असगर मेहंदी को सुना तथा पत्रावली का अवलोकन किया।

2. भारतीय संविधान के अनुच्छेद 227 के अंतर्गत प्रस्तुत इस याचिका द्वारा याचिकाकर्ता ने मूल वाद संख्या 366 सन 2019 में अपर सिविल जज (अवर खण्ड), कक्ष संख्या 47, लखनऊ द्वारा पारित आदेश दिनांकित 10.10.2022 की वैधता को चुनौती दी है, जिसके द्वारा विपक्षी संख्या 3 द्वारा प्रस्तुत प्रार्थना-पत्र अंतर्गत आदेश 1 नियम 10 सपठित धारा 151 दीवानी प्रक्रिया संहिता का प्रार्थना - पत्र स्वीकार करते हुए वादी को निर्देशित किया गया कि शाने आलम को प्रतिवादी के रूप में पक्षकार बनाया जाय। याचिकाकर्ता ने उपरोक्त आदेश के विरुद्ध प्रस्तुत दीवानी पुनरीक्षण संख्या 62 सन 2023 में विद्वान अपर जनपद तथा सत्र न्यायाधीश, कक्ष संख्या 7, लखनऊ द्वारा पारित निर्णय तथा आदेश दिनांक 19.02.2014 की वैधता को भी चुनौती दी है, जिसके द्वारा उपरोक्त आदेश दिनांक 10.10.2022 पुष्ट कर दिया गया तथा पुनरीक्षण निरस्त कर दिया गया।

3. याचिकाकर्ता के विद्वान अधिवक्ता ने प्रारंभ में ही कहा कि उन्होंने अपर जनपद एवं सत्र न्यायाधीश को त्रुटिवश विपक्षी बना दिया है तथा विद्वान अधिवक्ता ने अपर जनपद एवं सत्र न्यायाधीश का नाम विपक्षीगण से हटाने का मौखिक अनुरोध किया, जिसे स्वीकार किया गया। याचिकाकर्ता के विद्वान अधिवक्ता को निर्देशित किया जाता है कि इस याचिका में उपरोक्त संशोधन तुरन्त समावेशित करें।

4. जिस वाद में पारित आदेश की वैधता को इस याचिका द्वारा चुनौती दी गयी है उसके वाद पत्र की प्रतिलिपि याचिका के साथ संलग्न नहीं की गयी है, जिससे वाद के तथ्यों का परीक्षण करने में असमर्थ है। विपक्षी संख्या 2 द्वारा प्रस्तुत प्रार्थना-पत्र अंतर्गत आदेश 1 नियम 10 सपठित धारा 151 दीवानी प्रक्रिया संहिता में यह कहा गया है कि याचिकाकर्ता ने वाद खसरा संख्या 316 क्षेत्रफल एक बीघा तेरह बिस्वा स्थित मोहल्ला रामगंज स्टेशन दौलतगंज परगना तहसील व जिला लखनऊ के संबंध में स्थायी निषेधाज्ञा के अनुतोष हेतु प्रस्तुत किया है। उपरोक्त संपत्ति विपक्षी संख्या 2 की पैतृक संपत्ति है जिसका वसीका विपक्षी संख्या 2 को प्राप्त हो रहा है। विपक्षी संख्या 2 का कथन है कि वादी वादग्रस्त संपत्ति का स्वामी अथवा अध्यासी नहीं है। उपरोक्त प्रार्थना-पत्र के विरुद्ध आपत्ति करते हुए याचिकाकर्ता की तरफ से कहा गया था कि याचिकाकर्ता ने संपत्ति मलका जहाँ से एक विक्रय पत्र दिनांक 26.12.1989 के माध्यम से खरीदी है तथा विपक्षी संख्या 2 बाद में आवश्यक पक्षकार नहीं है।

5. विद्वान अपर सिविल जज ने उक्त प्रार्थना पत्र पर पारित आदेश आदेश दिनांक 10.10.2022 में यह कहा कि विवादित संपत्ति के संबंध में वादी एवं विपक्षी संख्या 2 के द्वारा परस्पर विरोधी दावे किये जा रहे हैं इस कारण से विपक्षी संख्या 2 का हित भी वाद में विद्यमान है तथा सम्यक न्याय निर्णयन हेतु एवं वाद की बहुलता को रोके जाने हेतु विपक्षी संख्या 2 को भी वाद में पक्षकार बनाया जाना न्यायोचित होगा। पुनरीक्षण न्यायालय ने भी यह पाया कि विपक्षी संख्या 2 को पक्षकार न बनाने से विवादित संपत्ति के निमित्त वाद का निपटारा पूर्ण रूपेण नहीं हो पायेगा और वाद की बहुलता भी होगी तथा इस कारण विचारण न्यायालय के आदेश दिनांक 10.10.2022 में हस्तक्षेप की कोई आवश्यकता नहीं।

6. उपरोक्त आदेशों को वैधता को चुनौती देते हुए याचिकाकर्ता के विद्वान अधिवक्ता ने कहा कि डोमिनस लाइटिस के सिद्धान्त के अनुसार वादी को यह अधिकार है कि वह अपने विपक्षीगण को

चुनाव कर सके तथा उसे किसी भी पक्षकार को किसी अन्य पक्ष के विरुद्ध वाद लड़ने के लिए मजबूर नहीं किया जा सकता।

7. इस तर्क के समर्थन में याचिकाकर्ता के विद्वान अधिवक्ता ने **गुरमीत सिंह भाटिया बनाम किरन कान्त रॉबिनसन (2020) 13 SCC 773** तथा अन्य के निर्णय का आश्रय लिया। उपरोक्त प्रकरण में प्रार्थी ने संविदा के विनिर्दिष्ट अनुपालन हेतु एक वाद प्रस्तुत किया था, जिस वाद में तृतीय पक्ष पक्षकार नहीं था। वाद के लंबित रहने के दौरान तृतीय पक्ष ने वही संपत्ति, जिसके संबंध में वादी के पक्ष में एक विक्रय अनुबंध निष्पादित हो चुका था, क्रय कर ली। माननीय उच्चतम न्यायालय ने **Kasturi vs. Uyyamperumal (2005) 6 SCC 733** के निर्णय का आश्रय लिया जिसमें माननीय उच्चतम न्यायालय ने यह अवधारित किया था कि आदेश 1 नियम 10 दीवानी प्रक्रिया संहित में किसी व्यक्ति को पक्ष बनाने का प्रश्न तब तक नहीं उठ सकता, जब तक उस व्यक्ति का विवाद में कोई वैधानिक हित सम्मिलित नहीं है। प्रश्नगत प्रकरण के तथ्यों से यह स्पष्ट है कि विपक्षी संख्या 2 वादग्रस्त संपत्ति में अपना वैधानिक हित होने का दावा करता है, जिस दावे की सत्यता विपक्षी संख्या 2 को पक्षकार बनाकर और उसे साक्ष्य का अवसर देने के बाद ही निर्णीत की जा सकती है।

8. **कनकलता दास तथा अन्य बनाम नबा कुमार दास तथा अन्य (2018) 2 SCC 352** तथा **मो० हुसैन गुलाम अली शरीफी बनाम म्यूनिसिपल कॉर्पोरेशन ऑफ ग्रेटर बॉम्बे तथा अन्य (2020) 14 SCC 392** में माननीय उच्चतम न्यायालय ने यह अवधारित किया है कि पक्षकार वादी की इच्छा के विरुद्ध भी पक्ष बनाये जा सकते हैं तथा डोमिनस लाइटिस का सिद्धान्त आवश्यक पक्षकारों के पक्ष बनने के अधिकार को समाप्त नहीं करता है।

9. **बम्बई इण्टरनेशनल एयरपोर्ट प्रा० लि० बनाप रिजेंसी कन्वेंशन सेण्टर और होटल तथा अन्य (2010) 7 SCC 417 SCC** में माननीय उच्चतम न्यायालय ने यह सिद्धान्त प्रतिपादित किया कि पक्ष बनाये जाने के संबंध में सामान्य नियम यह है कि किसी वाद का वादी यह चुनाव कर सकता है कि वह किन व्यक्तियों के विरुद्ध वाद प्रस्तुत करना चाहता है तथा उसे ऐसे किस व्यक्ति के विरुद्ध मुकदमा लड़ने के लिए बाध्य नहीं किया सकता है, जिसके विरुद्ध वह कोई अनुतोष नहीं चाह रहा है। कोई व्यक्ति जो वाद में पक्षकार नहीं है, वादी की इच्छा के विरुद्ध पक्ष बनने का अधिकार रखता है, परन्तु यह सामान्य नियम आदेश 1 नियम 10 (2) दीवानी प्रक्रिया संहिता के प्रावधानों के अधीन है, जो आवश्यक अथवा उचित पक्षकारों को पक्ष बनाये जाने के संबंध में

प्रावधानित करता है। उपरोक्त नियम में प्राविधान है कि न्यायालय कार्यवाहियों को किसी भी प्रक्रम में या तो दोनों पक्षकारों में से किसी के आवेदन पर या उसके बिना और ऐसे निबंधनों पर जो न्यायालय को न्यायसंगत प्रतीत हो, यह आदेश दे सकेगा कि वादी के रूप में या प्रतिवादी के रूप में अनुचित तौर पर संयोजित किसी भी पक्षकार का नाम काट दिया जाय और किसी व्यक्ति का नाम जिसे वादी या प्रतिवादी के रूप में ऐसे संयोजित किया जाना चाहिए था या न्यायालय के सामने जिसकी उपस्थिति वाद में अंतर्वलित सभी प्रश्नों का प्रभावी तौर पर और पूरी तरह न्याय निर्णयन और निपटारा करने के लिए न्यायालय को समर्थ बनाने की दृष्टि से आवश्यक है, जोड़ दिया जाय।

10. माननीय उच्चतम न्यायालय ने **बम्बई इण्टरनेशनल एयरपोर्ट प्रा० लि०** के उपरोक्त निर्णय में यह कहा कि उपरोक्त प्राविधान यह स्पष्ट करता है कि न्यायालय कार्यवाही के किसी भी प्रक्रम में आवश्यक पक्षकारों को जोड़ने का आदेश पारित कर सकता है। यदि वह पक्ष आवश्यक या उचित पक्षकार हो। आवश्यक पक्षकार वह व्यक्ति होता है, जिसको वाद में पक्ष बनाना चाहिए था तथा जिसकी अनुपस्थिति में न्यायालय कोई प्रभावी आज्ञप्ति पारित नहीं कर सकता है। यदि किसी आवश्यक पक्षकार को पक्ष नहीं बनाया जाय तो वाद इस आधार पर निरस्त होने योग्य हो जाता है। उचित पक्षकार वह व्यक्ति होता है, जो यद्यपि आवश्यक पक्षकार नहीं है, तदापि वह एक ऐसा व्यक्ति है जिसकी उपस्थिति न्यायालय को पूर्ण प्रभावी तथा समुचित रूप से प्रकरण में सम्मिलित सभी विवादों को निर्णीत करने में न्यायालय को समर्थ बनाएगी, यद्यपि उस व्यक्ति के पक्ष में अथवा उसके विरुद्ध कोई आज्ञप्ति नहीं पारित होनी है। यदि कोई व्यक्ति आवश्यक अथवा उचित पक्ष न हो तो न्यायालय को ऐसे व्यक्ति को वादी की इच्छा के विरुद्ध वाद में पक्षकार बनाये जाने का क्षेत्राधिकार प्राप्त नहीं होता है।

11. उपरोक्त विधि व्यवस्था के दृष्टिगत जब विपक्षी संख्या 2 का हित वादग्रस्त संपत्ति में निहित होने का कथन किया गया है, जिस पर न्यायालय का निर्णय आना आवश्यक है, वह वाद में एक आवश्यक पक्षकार है तथा डोमिनस लाइटस के सिद्धान्त के आधार पर उसको वादी पक्षकार बनने से रोक नहीं सकता है।

12. उपरोक्त समीक्षा के आलोक में इस न्यायालय का यह मत है कि आलोच्य आदेश दिनांकित 19.02.2014 तथा 10.10.2022 में कोई त्रुटि नहीं है।

13. याचिका बलहीन है और तद्नुसार **निरस्त** की जाती है।

(2024) 8 ILRA 925
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters U/A 227 No.9021 of 2024

The Sinha Development Trust & Anr.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Nipun Singh, Sumit Suri

Counsel for the Respondents:
Dharmendra Singh Chauhan, C.S.C., Krishna Mohan Asthana

Civil Law- Petitioners filed Original Suit - for return of land and payment of compensation.- they have filed amendment application on 17.1.2024- at the stage of final hearing for formal amendment to ensure the return of land and compensation in favour of trust and not the private person- Application rejected on ground of delay and that no due diligence proved- proviso of Order VI Rule 17 of CPC inserted through amendment in 2002- would not be applicable to the suits, which are pending prior to the date of amendment, - this cannot be ground to reject the amendment application - Impugned order quashed.

W.P allowed. (E-9)

List of Cases cited:

St. Bank of Hyderabad Vs Town Municipal Council (2007) 1 SCC 765

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Supplementary affidavit filed today be taken on record.

2. Heard learned counsel for the petitioner, learned standing counsel for the respondent no.1 and Sri D.S. Chauhan, learned counsel for the respondent no.2.

3. Present petition has been filed for setting aside the impugned order dated 9.2.2024 passed by the learned Additional Civil Judge, S.D., New Court No.1, Moradabad in Original Suit No. 288 of 1991.

4. Learned counsel for the petitioner submitted that earlier petitioners have filed Original Suit No. 288 of 1991 before the trial Court for return of land and payment of compensation. He next submitted that at the stage of final hearing, they have filed amendment application on 17.1.2024 for formal amendment to ensure the return of land and compensation in favour of trust and not the private person, which was rejected vide order dated 9.2.2024 on the ground that it has been filed at very belated stage. He further submitted that though the due diligence of Order 6 Rule 17 of CPC inserted through amendment in 2002 has not been referred to any of the order, but the crux of impugned order is based upon the lack of due diligence.

5. He firmly submitted that in light of judgment of Apex Court in the case of ***State Bank of Hyderabad vs. Town Muncipal Council*** reported in ***(2007) 1 SCC 765,*** amended provision of Order 6 Rule 17 of CPC shall not be applicable to a suit, which was instituted prior to which pleadings have been exchanged.

6. He also pointed out that from the proposed amendment application, nature of suit would not be changed and in case suit is decreed, land or compensation whatsoever is the case, be vested in the

trust and not in the hands of ancestors of R.A.N. Sinha, who has created the trust, therefore, on both the grounds, impugned order is bad and liable to be set aside.

7. Sri D.S. Chauhan, learned counsel for the respondent no.2 could not dispute the legal as well as factual submissions so raised by the learned counsel for the petitioner.

8. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record.

9. There is no dispute on the point that Mr. R.A.N. Sinha has created the trust in the year 1973. Now the trust is having dispute with the respondent no.2 with regard to excess land acquisition. After amendment, in case suit is decreed either land or compensation as the case may be would be vested with the trust and not with the individual persons. Therefore, intention of filing of amendment is bonafide

10. I have perused the judgment of ***State Bank of Hyderabad (Supra).*** Relevant paragraph of the said judgment is quoted hereinbelow:-

"8. In view of the said provision there cannot be any doubt whatsoever that the suit having beeing filed in the year 1988, proviso to Order 6 Rule 17 of the Code shall not apply.

9. The High Court relied upon the said proviso and opined that having regard thereto the plaintiff was obligated to establish that in spite of due diligence it could not have raised the matter before commencement of the trial of the suit. The High Court evidently committed an illegality in relying upon the said provision."

11. From perusal of the aforesaid judgment, it is apparently clear that proviso of Order VI Rule 17 of CPC inserted through amendment in 2002, would not be applicable to the suits, which are pending prior to the date of amendment, therefore, this cannot be ground to reject the amendment application.

12. Therefore, under such facts and circumstances as well as law laid down by the Apex Court, the impugned order dated 9.2.2024 passed by the learned Additional Civil Judge, S.D., New Court No.1, Moradabad is hereby quashed and petition is **allowed**. Petitioners are directed to carry out necessary amendment within two weeks from today. Further, trial Court is also directed to decide the suit in accordance with law.

(2024) 8 ILRA 926
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.08.2024

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 2000751 of 2004

Rajan Agarwal ...Petitioner
Versus
United India Insurance Co. Ltd. ...Respondent

Counsel for the Petitioner:
Dr. R.K. Srivastava, Shailesh Kumar Singh, Sharad Kumar Srivastava

Counsel for the Respondents:
Anil K. Srivastava

Petitioner challenged his discharge and the disciplinary actions taken against him - enquiry was ex-parte - violated natural justice - petitioner was not provided a defence assistant despite his mental disorder - discharging the petitioner on medical grounds was illegal under Section 47 of the Disabilities Act - petitioner reinSt.d with all consequential benefits.

W.P allowed. (E-9)

List of Cases cited:

Anil Kumar Mahajan Vs U.O.I. & ors. civil Appeal No. 4944 of 2013 (arising out of SLP (C) No. 26400 of 2010)

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Sharad Kumar Srivastava, learned counsel for the petitioner and Ms. Vanya Bharadwaj, Advocate holding brief of Sri Anil Kumar Srivastava, learned counsel for the respondent.

2. By means of the present writ petition, the petitioner has prayed for the following reliefs :-

"A) Issue a writ, order or direction in the nature of CERTIORARI to quash the order dated 08.01.2004 passed by opposite party No.1 (Annexure No.19); Order dated 05.07.2002 passed by opposite party No.2 (Annexure No.17) and the order dated 16.12.2001 passed by opposite party No.3 (Annexure No.15).

A-(i) a writ, order or direction in the nature of certiorari quashing the impugned discharge orders dated 15.05.2005 discharging the petitioner from service of company on medical ground after summoning its original from the opposite parties.

A-(ii) a writ, order or mandamus commanding the opposite parties to pay arrear of salary to petitioner and interest on same at rate of 18% p.a. compounded annually.

B) Issue a writ, order or direction in the nature of MANDAMUS to directing the opposite parties to take any action in pursuance to impugned order.

C) Issue a writ, order or direction in the nature of MANDAMUS not to reduce the pay of the petitioner and further pay the petitioner the pay his salary in Grade I without treating him reverted.

D) Issue an appropriate direction to the opposite parties to pay the petitioner the allowances to the petitioner in Grade I of the Administrative Officer.

E) Issue an ad-interim order in favour of the petitioner.

F) Award the cost of the petition to the petitioner."

3. Brief facts of the case are that the petitioner is a Development Officer in United India Insurance Company Ltd., Lucknow, who was suffering from a disease of mental disorder. He was examined by the physicians of K.G.M.U. The diagnosis was that he was suffering from disease of Bipolar Affective Order. Vide order dated 13.9.1993, he was suspended for certain act of omission on this part and on 16.12.1993, charge-sheet was issued. Thereafter, on 4.4.1994, preliminary hearing was done.

4. The petitioner sought appointment of his defence assistant vide letter dated 18.4.1994. Subsequent selection of defence assistant could not materialise either on the ground of their illness or on the ground that companies did not permit them to act as the defence assistant.

5. On 25.8.1995, the enquiry officer conducted the enquiry without there being any defence assistant on behalf of the petitioner, who being a case of mental disorder and could not conduct his case. The enquiry officer submitted the enquiry report which did not contain any date.

6. The punishing authority awarded major punishment to the petitioner reducing him by three steps in scale in Grade-I and II, fitting the petitioner at a basic pay of Rs.5,050/- in the lower grade. The suspension period was not to be taken as period spent on duty, it is submitted by learned counsel for the petitioner.

7. The petitioner filed an appeal before the Assistant General Manager (respondent No.2), which was rejected on the basis of comments of respondent No.3 and without providing any opportunity of hearing to the petitioner. Thereafter, the petitioner filed a Memorial before the Chairman-cum-Managing Director of the Company, who rejected the same, filed under Rule 40.

8. Thereafter, the petitioner, by passing an order of discharge, was discharged from duties on the ground of medical with immediate effect.

9. Submission of learned counsel for the petitioner is that the enquiry was conducted without providing defence assistant to the petitioner, therefore his submission is that the enquiry is ex-parte in nature and same cannot be sustained in the eyes of law. Next submission is that on the basis of ex-parte enquiry report, the impugned orders have been passed, reducing the petitioner on minimum pay scale, therefore, the order being based on ex-parte enquiry report, is not sustainable in the eyes of law. He further submitted that the appeal filed against the order of punishment was rejected without considering the fact that the enquiry was ex-parte in nature without providing defence assistant to the petitioner, therefore, the appellate order also suffers from vices of principles of natural justice.

10. It is submitted that the impugned order of discharge is wholly without jurisdiction. No employee can be discharged on medical grounds. He placed reliance upon Section 47 (Non-discrimination in Government employment) of the Act known as the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

11. Learned counsel for the petitioner also placed reliance upon paragraph-20 of the judgment in the case of **Anil Kumar Mahajan Vs. Union of India & others [Civil Appeal No.4944 of 2013 arising out of SLP (C) No.26400 of 2010],** wherein Section 47 of the aforesaid Act of 1995 was considered.

12. On the other hand, Ms. Vanya Bharadwaj, Advocate invited attention of this Court on the enquiry report and submitted that time to time, defence assistant was changed due to which, no sanction was granted to the petitioner for appointment of defence assistant. She further submitted that enquiry was done after giving full opportunity to the petitioner to examine the witnesses and other relevant documents, therefore, her submission is that the enquiry is not ex-parte, it is after giving fullest opportunity to the petitioner. In regard to the discharge order, her submission is that on the ground of medical disabilities, the petitioner was

not able to perform his duties and Section 47 of the Act of 1995 is not attracted to the case in hand.

13. I have considered the rival submission advanced by learned counsel for the parties and perused the material on record as well as law report cited by petitioner's counsel.

14. For deciding the controversy involved in the present writ petition, provision of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is being quoted below :-

*"**47. Non-discrimination in Government employment** .-(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:*

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2)(2) No promotion shall be denied to a person merely on the ground of his disability:Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section"

15. Relevant paragraph-20 of the judgment rendered in the case of **Anil Kumar Mahajan (Supra)** is being quoted below :-

"20. It is informed at the bar that in normal course the appellant would have superannuated from service on 31st July, 2012. In that view of the matter, now there is no question of reinstatement of the appellant though he may be entitled for consequential benefits including arrears of pay. Having regard to the facts and finding given above, we have no other option but to set aside the order of compulsory retirement of the appellant dated 15th October, 2007 passed by the respondents; the order dated 22nd December, 2008 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in O.A.No.2784/2008 and the impugned order dated 20th April, 2010 passed by the High Court of Delhi in W.P.(C)No.2622/2010 and the case is remitted to the respondents with a direction to treat the appellant continued in the service till the date of his superannuation. The appellant shall be paid full salary minus the subsistence allowance already received for the period from the date of initiation of departmental proceeding on the ground that he was suffering from mental illness till the date of compulsory retirement. The appellant shall also be provided with full salary from the date of compulsory retirement till the date of superannuation in view of the first and second proviso to Section 47 of the Act, 1995. If the appellant has already been superannuated, he will also be entitled to full retiral benefits counting the total period in service. The benefits shall be paid to the appellant within three months, else the respondents will be liable to pay interest at the rate of 6% per annum from the date the amount was due, till the actual payment."

16. On perusal of the provision aforesaid as well as judgment relied upon by learned counsel for the petitioner, it is crystal clear that the person who attained disability during the service period, cannot be discharged on medical grounds, thus, in the opinion of the Court, discharge of the petitioner from service is wholly without jurisdiction and illegal in nature. The petitioner would have been engaged in some alternative service or if the post was not available, then on the basis of supernumerary post created for the said purpose.

17. In regard to the enquiry, which is conducted against the petitioner in discharge of duties, I perused the enquiry report, which is at page-48 and on its perusal, it is evident that the petitioner gave three names alternatively for its approval but the same was not approved and the enquiry proceeding continued without appointing the defence assistant in the matter of the petitioner.

18. On perusal of paragraph-2 of the enquiry report, it is crystal clear that the enquiry officer proceeded to conduct enquiry by giving notice to the petitioner who was not in a position to participate in the enquiry due to his mental disorder. On the basis of ex-parte enquiry report, without appointing defence assistant, the enquiry officer proceeded to submit the enquiry report to the punishing authority, who on the basis of ex-parte enquiry report, proceeded to pass the impugned order on 6.12.2001, whereby the petitioner has been penalised by reducing by three steps in scale in Grade-I and II, fitting the petitioner at a basic pay of Rs.5,050/- in the lower grade. Against the said order, the petitioner preferred an appeal before the Assistant General Manager (appellate authority), United India Insurance Company Ltd. (respondent No.2), who has nowhere considered that the petitioner was not provided the defence assistant during the course of enquiry, therefore, the enquiry was ex-parte in nature, the basis, which has been made to pass the impugned order.

19. In the memo of appeal, the petitioner took a specific ground in paragraph-C that in conducting the enquiry, three persons namely, Mr. S.S. Ahluwalia (Oriental Insurance Company), Mr. Sudhakar Tripathi (Oriental Insurance Company) and Mr. B.N. Seth (National Insurance Company) were contacted on different dates for being defence assistant for the petitioner, but the appellate authority has not take care in deciding the appeal and has rejected outrightly vide order dated 5.7.2002.

20. Thereafter, after dismissal of the appeal, the petitioner filed Memorial before the Chairman-cum-Managing Director, United India Insurance Company Ltd., 24, Whites Road, Chennai, which has also been rejected vide order dated 8.1.2004, which was communicated to the petitioner vide letter dated 4.2.2004. The Chairman-cum-Managing Director also did not consider the claim setup by the petitioner in his Memorial, therefore, the order passed by him also suffers from vices of principles of natural justice due to non-consideration of claim setup by the petitioner.

21. The ground of the respondents that the enquiry is not an ex-parte eniquiry and it is after giving fullest opportunity of hearing to the petitioner appears to be fallacious. On consideration, it is found that there is violation of principles of natural justice in not providing the defence assistant to the petitioner to setup his claim.

22. In regard to the discharge from service, the submission advanced by learned counsel for the respondent that on medical grounds, the employee can be discharged from service, I perused the provision contained under Section 47 of the Act of 1995 and the judgment relied upon by learned counsel for the petitioner. This argument also suffers from vices of non-consideration of the provisions contained under the aforesaid Act and the judgment relied upon.

23. After consideration of totality of facts and circumstances of the case, this Court is of the opinion that the impugned orders dated 08.01.2004 passed by opposite party No.1 (Annexure No.19), order dated 05.07.2002 passed by opposite party No.2 (Annexure No.17) and the order dated 6.12.2001 passed by opposite party No.3 (Annexure No.15) are hereby quashed. The writ petition succeeds and is **allowed**.

24. It is however provided that the petitioner shall be provided all consequential benefits, which are applicable to the post, which he was holding prior to initiation of disciplinary proceeding.

25. No order as to costs.

(2024) 8 ILRA 931
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2024

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Second Appeal No. 507 of 2024

Ramnath Singh ...Appellant
Versus
Parshuram Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri Pradeep Kumar Rai, Sri Praiyot Rai

Counsel for the Respondents:
Sri Harish Kumar Yadav

Civil Law - Code of Civil Procedure,1908 - Amended provisions of Order 41 Rule 1 CPC no longer requires the attachment of a copy of the decree in first appeals - the Allahabad High Court Rules, 1952 mandates the attachment of the decree in second appeals - when a single suit gives rise to multiple appeals, a single second appeal is sufficient - If multiple suits or counter-claims are involved, separate appeals must be filed – objection overruled regarding the filing of separate second appeals. (E-9)

List of Cases cited:

1. Bhagwan Sahai Vs Daryao Kunwar & anr. AIR 1963 Allahabad 2010

2. Jai Narain Har Narain & anr. Vs L. Bulaqi Das s/o L. Munna Lal AIR 1969 Allahabad 504

3. Khaleel Vs Aranjikkal Jamal Muhammed O.P. (C) Nos. 28 of 2016 & 32 of 2016, decided on 30.11.2017

4. M/S Ramnath Exports Pvt. Ltd. Vs Vinita Mehta & anr. (2022) 7 SCC 678

5. Sri Gangai Vinayagar Temple & anr. Vs Meenakshi Ammal & ors. (2015) 3 SCC 624

6. Narhari Vs Shankar AIR 1953 SC 419

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. The instant second appeal has been filed against the judgment and decree drawn by First Appellate Court in Civil Appeal No.26 of 2010 and Civil Appeal No.22 of 2010, and, additionally, part of the judgment passed by the trial court in Original Suit No.289 of 1984 has also been assailed.

2. The Stamp Reporting Section has endorsed a report regarding

requirement of filing separate second appeals arising out of each civil appeal.

3. Learned counsel for both parties have been heard at length against and in support of the said report and also on the point as to whether it is at all necessary to attach a copy of the decree of the first appellate court along with memo of second appeal, inasmuch as it is contended by Sri Prajyot Rai, learned counsel for the appellant, that it is not the requirement of law as per certain amended provisions of the Code of Civil Procedure, 1908. The Court, therefore, proceeds to deal with the said objection and contention.

4. The proceedings giving rise to instant appeal emanate from an Original Suit No.289 of 1984 instituted by the plaintiff-appellant against the defendant-respondents claiming decree of permanent prohibitory injunction. The suit was partly decreed in favour of the plaintiff-appellant. Aggrieved by that part whereby the plaintiff's claim was not accepted, he filed Civil Appeal No.26 of 2010, whereas against partial decree against them, the defendants filed Civil Appeal No.22 of 2010. Both the said civil appeals were consolidated and have been decided by a common judgment dated 18.03.2024 dismissing the suit of the plaintiff-appellant in toto. By the same judgment, a third Civil Appeal No.23 of 2010 filed by the respondents of this appeal and arising out of a different suit, i.e. Original Suit No.477 of 1984, was also dismissed, however, the present appellant has no concern with Civil Appeal No.23 of 2010 and has not challenged that decree. Whereas, Civil Appeal No.26 of 2010 was dismissed, the Civil Appeal No.22 of 2010 was allowed and the present appellant is aggrieved as such.

5. It is contended on behalf of appellant that in the aforesaid background of proceedings, it is neither necessary to file another appeal nor to attach copy of any separate decree. It is further contended that even requirement to attach decree of the first appellate court is not necessary. In support of his submission, learned counsel has placed reliance upon Full Bench judgment of this Court in **Bhagwan Sahai Vs. Daryao Kunwar and another: AIR 1963 Allahabad 2010** in which, a situation with regard to different decrees drawn by civil appellate court arising out of single suit and two suits, was dealt with after placing reliance upon the judgment of the Supreme Court in **Narhari Vs. Shankar, AIR 1953 SC 419**. He also placed reliance upon Five Judges' Full Bench decision of this Court in **Jai Narain Har Narain and another Vs. L. Bulaqi Das s/o L. Munna Lal: AIR 1969 (Ald) 504.**

6. It is vehemently argued with the aid of written synopsis that till 1859, in India, there was no uniform codified law for the procedures to be followed in Civil Courts. For the first time in 1859, an organized form of Civil Procedure Code was introduced by passing the Civil Procedure Code (Act VII of 1859). The Code of 1859 was amended from time to time and was replaced by the Civil Procedure Code, 1877. This Code of 1877 was amended in 1878 and 1879 and the third Civil Procedure Code was enacted in 1882, which replaced the previous one. The Code of 1882 was also amended several times and, ultimately, the present Code of Civil Procedure, 1908 came in existence on January 1, 1909. The C.P.C was again extensively amended in the year 1976 by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) which came into force on February 1, 1977 but the

amendments made were not sufficient and, therefore, with a view to adjudicate upon civil cases in an expeditious manner, Justice Malimath Committee was appointed and, in pursuance to the recommendations of the Committee, C.P.C was again amended in 1999 and 2002.

7. It is further contended that the object of the Code is to consolidate and amend the laws relating to the procedure of Court of Civil jurisdiction. It is a consolidated Code which contains all the laws relating to the procedure to be adopted by Courts of Civil jurisdiction. It is designed to facilitate justice and is not a penal enactment that prescribes punishments and penalties. The provisions of C.P.C. should be construed liberally and technical objections should not be allowed to defeat justice. A procedural law is always an aid of justice, not in contradiction or to defeat the very object which is sought to be achieved and the procedural law always remains subservient to the substantive law.

8. Further contention is that by Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), a proviso was added under Order 41 Rule 1; sub-rule (3) was also added. Further submission is that Order 41 Rule 1 CPC was further amended in the year 2002 by Section 31(i) of Act No. 46 of 1999 which came in effect from 01.07.2002. The word 'judgement' has been incorporated by means of the amendment for "decree appealed from and (unless the Appellate Court dispenses therewith) of the judgement on which it is founded".

9. Learned counsel for the appellant also refers to Section 32 of the Amendment Act No. 46 of 1999, which came with effect from 01.7.2002 and which reads as follows:

> "Any amendment made, or any provision inserted in the principal Act by a State Legislature or High Court before the commencement of this Act shall, except insofar as such amendment or provisions is consistent with the provisions of the principal Act as amended by this Act, stand repealed."
>
> It is, therefore, submitted that since Order 41, Rule 1 CPC stood amended, there may be one appeal against separate judgments and decrees if two or more suits have been tried together and a common judgment has been delivered. The memo shall be accompanied by the copy of the judgment only though, earlier, it was necessary to file the copy of the decree also.

10. It is vehemently argued that in view of the Amendment Act No. 46 of 1999, the second appeal is to be preferred against a judgment and the High Court Rules are in conflict with the Code and are merely for supplementing the Code/ Act but under no stretch of imagination, the provisions as contemplated under the Allahabad High Court Rules, can override the Code of Civil Procedure, 1908 as the same are in the teeth of Amendment Act No. 46 of 1999. It is further argued that if any State enactment/rules are in conflict with the Amended central Act, the provisions as contained in the central enactment will prevail if there is any inconsistency. Hence, the provisions contained in the Allahabad High Court Rules,1952 ceased to exist after 01.7.2002

by virtue of Section 32 of the Amendment Act No. 46 of 1999 which shall supersede the provisions as contemplated under Chapter V Rule 2 sub-rule (ii) in the Allahabad High Court, 1952 as the same are inconsistent with the central enactment. In support of his contention, learned counsel for the appellant has placed reliance upon a judgment of Kerala High Court in **Khaleel Vs. Aranjikkal Jamal Muhammed (in O.P. (C) Nos.28 of 2016 & 32 of 2016**, decided on 30.11.2017) and he submits that in case certain provisions made by State amendment are inconsistent with the amended Central Law, the State amendment shall cease to exist and it is the Central law that shall prevail.

11. Per contra, learned counsel for the respondents has placed reliance upon paragraphs no.6 and 7 of the judgment of Supreme Court in **M/S Ramnath Exports Pvt. Ltd. Vs. Vinita Mehta and another: (2022) 7 SCC 678**, which in fact note down contentions raised before Supreme Court, as under:-

> "6. Being aggrieved, the appellant preferred instant appeal and learned counsel present has contested the same on following grounds –
>
> a) The appellant had assailed the findings recorded by Trial Court by mentioning both the suit numbers alongwith payment of requisite court fee for the purpose of valuation on the basis of consolidated value of suits;
>
> b) The first appeal was admitted by High Court vide order dated 18.07.2008, but the same was dismissed after a decade without entering into the merits of the case;
>
> c) While admitting the appeal, notice was issued on CLMA, i.e., application to seek permission to file single appeal impugning the common judgment and two decrees, but without deciding the said application, the preliminary objections raised by the respondents has been maintained causing serious prejudice to it;
>
> d) The essence of rule of res-judicata is that the two proceedings should be so independent of each other that the trial of one cannot be confused with trial of other suit, but where two suits having common issue were tried together and disposed-off vide single judgment, can they be said to be two distinct and independent trials;
>
> e) In effect, only one judgment was passed in the trial and suits were not clubbed but were consolidated for all purposes;
>
> f) In support of the said contentions learned counsel would rely upon
>
> i. State of Andra Pradesh & Ors. Vs. B. Ranga Reddy (thru LR's) & Ors., (2020) 15 SCC 681;
>
> ii. Sri Gangai Vinayagar Temple & Anr. Vs. Meenakshi Ammal & Ors., (2015) 3 SCC 624;
>
> 7. Per contra, the counsel for the respondents has argued in support of the findings recorded in the impugned judgment and made the following submissions –
>
> a. The appellant unilaterally preferred single appeal and paid the Court fee on the basis of consolidated value of suits, whereas, separate Court fee was to

be calculated on each decree and affixed accordingly;

b. Appeal against decree in Civil Suit No.411 of 1989 can be filed before District Judge, having a limitation of 30 days as per Section 8 of Suits Valuation Act, 1887, whereas, looking to the valuation, appeal against decree in Civil Suit No.419 of 1993 lies before High Court having a limitation of 90 days. No such appeal against decree in Civil Suit No.411 of 1989 before District judge was preferred by appellant;

c. The judgment and decree passed in Civil Suit No.411 of 1989 has attained finality inter-se parties since it was not challenged within the prescribed period of limitation;

d. Consolidation of suits was done only for evidence and it does not mean that one appeal can be preferred since suits still retain their separate identity. Even assuming that the consolidation was for all purposes, yet the procedure for preferring an appeal cannot be waived or by-passed;

e. Since the day of notice in first appeal, objection has been raised for filing only one appeal and still the said defect was not rectified by the appellant;

f. Learned counsel placed reliance on following judgments to substantiate the submissions

i. Sri Gangai Vinayagar Temple & Anr. Vs. Meenakshi Ammal & Ors., (2015) 3 SCC 624;

ii. V. Natarajan Vs. SKS Ispat & Power Ltd. & Ors., Civil Appeal No.3327 of 2020)

iii. B. Santoshamma & Anr. Vs. D. Sarla & Anr., 2020 SCC OnLine SC 756;"

12. Further reliance has been placed upon paragraphs no.21 and 22 of the judgment in **Sri Gangai Vinayagar Temple and another Vs. Meenakshi Ammal and others: (2015) 3 SCC 624**, which read as under:-

"21. On the other hand, the verdict of Full Bench of the Allahabad High Court in Zaharia vs. Debia ILR (1911) 33 All 51 and decisions of the Calcutta High Court in Isup Ali vs. Gour Chandra Deb 37 Cal LJ 184: AIR 1923 Cal 496 and of the Patna High Court in Mrs. Getrude Oastes vs. Mrs Millicent D'Silva ILR 12 Pat 139 : AIR 1933 Pat 78 are of the contrary persuasion. These decisions largely proceeded on the predication that the phraseology "suit" is not limited to the Court of First Instance or Trial Court but encompasses within its domain proceedings before the Appellate Courts; that non-applicability of res judicata may lead to inconsistent decrees and conflicting decrees, not only due to multiplicity of decrees but also due to multiplicity of the parties, and thereby creating confusion as to which decree has to be given effect to in execution; that a decree is valid unless it is a nullity and the same cannot be overruled or interfered with in appellate proceedings initiated against another decree; that the issue of res judicata has to be decided with reference to the decrees, which are appealable

under Section 96 of the CPC and not with reference to the judgment (which has been defined differently), but with respect to decrees in the CPC; that non-confirmation of a decree in appellate proceedings has no consequence as far as it reaching finality upon elapsing of the limitation period is concerned in view of the Explanation II of Section 11, that provides that the competence of a Court shall be determined irrespective of any provisions as to right of appeal from the decision of such Court; and that Section 11 of the CPC is not exhaustive of the doctrine of res judicata, which springs up from the general principles of law and public policy.

22. Procedural norms, technicalities and processal law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the Courts by Section 151 of the CPC, as clarified by this Court in Chitivalasa Jute Mills vs. Jaypee Rewa Cement (2004) 3 SCC 85. In the instance of suits in which common Issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. Statutory law and processal law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the Tenant diligently filed an appeal against the decree at least in respect of O.S. 5/78, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all."

13. It is further sought to be argued that in case of non-filing of separate appeals, threat of resjudicata may also come into picture and that would create multiple complications.

14. Having heard learned counsel for the parties, first of all the Court deals with the submissions advanced by the learned counsel for the appellant as regards applicability of amended provisions of Order 41 Rule 1 CPC which were incorporated by the Amendment Act 1999 (46 of 1999). It may be noted that when a suit is decided by the court of first instance at district level, unless the judgment is passed by the District Judge or Additional District Judge, first appeal against the decree drawn would lie before the District Judge under Section 96 of the Code of Civil Procedure. In that event, memorandum of appeal shall be signed by the appellant or his pleader and shall be accompanied by a copy of the "judgment". Prior to amendment made by Act No.46 of 1999, requirement was to attach copy of the decree appealed from unless the appellate court could dispense with the said requirement. The requirement of filing judgment was already there which has been taken away by the amended provision.

15. As far as second appeals are concerned, by virtue of Order XLII Rule 1 CPC, provisions of Order XLI CPC shall, in so far as may be, applicable to the second appeals, i.e. appeals from appellate decree. For a ready reference, Order XLII Rule 1 CPC is reproduced as under:-

> **"1. Procedure**.- The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees."

16. Since a second appeal is filed against the appellate decree drawn by the first appellate court, even if applicability of Rule 1 of Order XLI is examined in the light of Rule 1 of Order XLII, as far as requirement of attaching or non-attaching decree appealed against, it would be worthwhile to mention that the procedure to file an appeal, either against the original decree or against the appellate decree, would be governed by the Allahabad High Court Rules, 1952, which have been framed in exercise of constitutional powers under Article 225 of the Constitution of India. Chapter IX contained in Part-II of the Rules speaks of "Civil Jurisdiction" and Rule 8 of Chapter IX needs a reference here in order to appreciate as to the requirement of documents to accompany memorandum of appeal. Rule 8 of Chapter IX reads as under:-

> **"8. Documents to accompany memorandum of appeal or revision application.-** Every memorandum of appeal or application for revision shall be accompanied by-
>
> (a) a copy of the decree or formal order against which the appeal or application is directed;
>
> (b) a copy of the judgment upon which such decree or formal order is founded;
>
> (c) a copy of the judgment of the Court of first instance where the appeal or application is directed against an appellate (or a revisional) decree or order;

17. It is, therefore, apparent that though amended Rule 1 of Order XLI CPC does not require attaching a copy of decree appealed from, there is no corresponding amendment made in High Court Rules, 1952 as far as requirement of annexing documents to a memorandum of appeal is concerned. Apparently, the decree or formal order against which appeal is directed, has to be mandatorily attached and that is why whenever such compliance

is not made by any appellant, a defect is reported by the Stamp Reporting Section to that effect. However, it is clarified that as per sub-rule (c) of Rule 8 of Chapter IX when a second appeal is filed, copy of decree of the court of first instance need not be annexed and annexing copy of the judgment of that court would suffice. The submission of learned counsel based upon Section 31 of the Amendment Act, 1999, therefore, cannot be accepted.

18. In so far as Section 32 of the Act, 1999, the provision has been mis-interpreted by the learned counsel of the appellant and it relates to any amendment inserted in the principal Act, i.e. Code of Civil Procedure, prior to amendment made in 1999, by a State Legislature or High Court before the commencement of the amendment Act and those amendments which are inconsistent with the provisions of the principal Act, i.e. CPC before amendment, shall stand repealed but, certainly, subject to savings described under sub-section (2) of Section 32. The repeal clause contained under Section 32 of the Act of 1999 cannot be stretched to the extent of superseding or nullifying the High Court Rules, 1952 enacted under constitutional powers conferred by Article 225 of the Constitution of India. Promulgation of High Court Rules, 1952 or any provision contained therein cannot be treated as "State Amendment" incorporated in the Code of Civil Procedure as applicable in the State of U.P. and argument of learned counsel for the appellant on that line has no substance. The judgment of Kerala High Court in **Khaleel (supra)** is also of no help to the appellant as there was no issue before the Kerala High Court as to whether a separate appeal would lie from every decree or whether, as per the concerned High Court Rules, the requirement of annexing decree drawn by the appellate court would stand dispensed with. The Kerala High Court was dealing with State amendments made in CPC and the judgment was given in that background.

19. At this Stage, it would be apt to refer definition of "decree" as contained in Section 2(2) of CPC, which reads as under:-

> "2(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within1*** section 144, but shall not include –
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default.
>
> Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

20. Here, reference of Order 8 Rule 6-A should also be made where filing of counter-claim by a defendant is contemplated. The provision reads as under:-

> "6-A(1) A defendant in a suit may, in addition to his right of

pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

21. In view of sub-rule (2) of Rule 6-A of Order 8, counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit and as per sub-rule (4), counter-claim shall be treated as a plaint and governed by the Rules applicable to plaints.

22. In view of the above discussion of legal position, it can safely be concluded that if a single suit gives rise to different first appeals, without there being any counter-claim or another consolidated suit, the decree drawn in the said single suit would conclusively determine rights of the parties and irrespective of two first appeals arising from the single judgment/ decree, necessity to file two separate second appeals would not arise. However, situation would be different if, either two suits are decided by a common judgment or there is a counter-claim in the single suit, in such event, there would be two decrees drawn by the court of first instance and if two first appeals are filed arising from such two decrees, certainly, there shall have to be two second appeals.

23. Now, coming to the necessity of filing a single or two appeals in the instant case, it may be noted that since decrees drawn in Civil Appeals No.26 of 2010 and 22 of 2010, either in toto or to some extent, have been challenged, in view of the decision of **Narhari (supra), Bhagwan Sahai (supra)** and **Jai Narain Har Narain (supra),** since there was a single suit and one trial, one finding and one decision, irrespective of the fact that two decrees may or could have been drawn up, there need not be two separate appeals. The threat of resjudicata as sought to be argued by the respondent's counsel in the light of judgments in **M/S Ramnath (supra)** and **Sri Gangai Vinayagar (supra)** has been dealt with by the Supreme Court observing that such question arises only when there are two suits but not when there is a single suit.

24. In view of the above discussion, this Court is of the considered opinion that the amended provisions of Rule 1 of Order XLI CPC do not directly or indirectly nullify or dispense with requirement of attaching certified copy of the decree drawn by the first appellate court

as per Rule 8 of Chapter IX of the High Court Rules, 1952. Since, in the instant case, consolidated judgment has been passed in two civil appeals arising from a single suit, the objection endorsed by the Reporting Section, as regards filing of two separate appeals, stands overruled and single second appeal, in the present case, is held to be maintainable, without there being necessity to file another second appeal from the same decree/ judgment.

25. The Stamp Reporting Section shall comply with the directions contained in paragraphs no.17 and 22 of this order while reporting other second appeals filed henceforth.

26. Registrar (Compliance) is directed to send a copy of this order to the Reporting Section to ensure compliance of the directions issued under this order.

27. **Put up as fresh on 31.08.2024.**

(2024) 8 ILRA 940
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2024

BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE VIKAS BUDHWAR, J.

Appeal U/S 37 of Arbitration & Conciliation Act 1996 No. 356 of 2024

Sanjit Singh Salwan & Ors. ...Appellants
Versus
Sardar Inderjit Singh Salwan & Ors. ...Respondents

Counsel for the Appellants:
Manish Goyal, Sr. Advocate, Utkarsh Birla, Aarushi Birla

Counsel for the Respondents:
Navin Sinha, Sr. Advocate, Naman Agarwal, Nipun Singh, Vinayak Mithal

Civil Law – The Arbitration and Conciliation Act, 1996 - Section 9 - Law of arbitration- appeal against order dismissing application for interim relief filed - arbitrability of trust-related issues under the Arbitration and Conciliation Act, 1996- whether disputes regarding the management and membership of the Guru Tegh Bahadur Charitable Trust, a public trust, could be resolved through arbitration- such disputes are non-arbitrable under Section 92 of the Code of Civil Procedure, which governs public charitable trusts- the arbitrator lacked jurisdiction- Commercial Court's decision to reject the application for interim relief under Section 9 of the Arbitration Act- appeal dismissed. (paras 31 to 33, 35, 38, 39, 41, 42, 43, 44, 47 and 49)

HELD:

Section 92 of CPC deals with the disputes of public charities/Trust created for public purpose or charitable or religious nature, wherein a complete procedure has been laid down for taking legal action. In order to attract the provisions of Section 92 of Code of Civil Procedure, three conditions have to be satisfied namely (i) The trust if created for charitable or religious nature; (ii) there was a breach of trust, or a direction of Court is necessary in the administration of said Trust; (iii)The relief claimed is one or the other of the reliefs enumerated in Sub-Section (1) of Section 92 of CPC. Further Sub-Section (2) of Section 92 provides with a non-obstante clause that no suit claiming any of the reliefs specified in Sub-Section (1) of Section 92 shall be initiated in respect of any of the Trust as referred thereto except in conformity with the provisions of Sub-Section (1) of Section 92. (para 31)

The bone of contention between the rival parties is whether the dispute is arbitrable, so as to invest the arbitrator the jurisdiction to decide the disputes of a Trust in the wake of the provisions of Section 92 of CPC. To test the said submission, we are required to have a quick survey of the disputes, which was referred to for

arbitration and the nature of the award itself and the submission of the learned counsel for the appellants that once the respondents herein got referred the dispute relatable to the Trust for arbitration, then they cannot object that the dispute was not arbitrable. (Para 35)

As regards the direction of the Arbitrator requiring the appellants herein not to pursue and withdraw the first information report dated 26.02.2022 being Case Crime No.43 of 2022 lodged against the respondents before P.S. Sadar Bazar, Meerut under Section 420 IPC and also not to give or file evidence before the criminal courts is also beyond the scope of arbitration being non-arbitrable. The position might have been different, in case parties would have approached the arbitrator expressing their sweet will that they would not pursue the criminal case, but such type of blanket directions could not have been issued by the Arbitrator. Hence the Arbitrator has exceeded its jurisdiction while passing an award on a subject, which is non-arbitrable. (Para 39)

In Vidya Drolia (supra), the Hon'ble Apex Court had laid down the four fold test in order to determine as to whether the dispute is arbitrable or not. (para 41)

Our view also stands fortified from Sub-Section (2) of Section 92 of CPC, which provides that no suits claiming any of the reliefs specified in Sub-Section (1) are to be instituted in respect of any Trust as referred to except in conformity with the provisions of Sub-section (1) of Section 92 of CPC. As regards the argument raised by learned Senior Counsel for the appellants that since the appellant-Trust is a public trust and it is not covered under the Trust Act 1882, therefore, the judgment in the case of Vimal Kishore Sahai (supra) would not be applicable and would not make much relevance, particularly when Section 92 itself provides for modality and forum for adjudication of the dispute relatable to the Trust. (Para 43)

Much emphasis had been laid upon Section 89 of the CPC so as to suggest that the same deals with the settlement of dispute outside the Court and amongst others, one of the mode is arbitration. It is contended that the said provision came to be inserted by virtue of Act No.46 of 1999, w.e.f. 01.07.2002, thus it would dilute the rigours of Section 92 of CPC, as it would be open for the parties to get adjudicated the disputes of the Trust through arbitration. The said contention cannot be accepted for the simple reason that Section 89 provides for settlement of disputes outside the Court either through arbitration, conciliation, mediation or judicial settlement including settlement through Lok Adalat, however, it is subject to the disputes which would not fall under the said category. Section 89 does not override Section 92, particularly when Section 92 CPC exclusively deals with the dispute relating to Trust. (Para 44)

The question regarding the maintainability of the proceedings under Section 9 of the A & C Act, 1996 is not being addressed by this Court in the present proceeding, particularly when the dispute relatable to the Trust itself was not arbitrable and the arbitrator had no competence to adjudicate the same. (Para 49)

Appeal dismissed. (E-14)

List of Cases cited:

1. Vidya Drolia & ors.Vs Durga Trading Corp., (2021) 2 SCC 1

2. Avitel Post Studioz Ltd. & ors.Vs HSBC PI Holdings (Mauritius) Ltd. (2024) 4 SCC 713

3. Vimal Kishore Shah & ors.Vs Jayesh Dinesh Shah & ors., (2016) 8 SCC 788

4. Chairman Madappa Vs M.N. Mahanthadevaru & ors., 1965 SCC Online SC 99

5. Sugra Bibi Vs Hazi Kummu Mia, 1968 SCC Online SC 99

6. Narain Sahai Aggarwal Vs Smt. Santosh Rani, 1997 SCC Online Del 575

7. Deccan Paper Mills Co. Ltd. Vs Regency Mahavir Properties & ors., (2021) 4 SCC 786

8. Interplay Between Arbitration Agreements under Arbitration & Conciliation Act, 1996 and Stamp Act, 1899, (2024) 6 SCC 1

9. Centrint Pharmaceuticals India Pvt. Ltd. Vs Hindustan Antibiotics Ltd. (2019) SCC Online Bom 1614

10. Devki Nandan Vs Murlidhar & ors., AIR 1957 (SC) 133,

11. New Moga Transport Compay Ltd. Vs United India Insurance Co. Ltd., (2004) 4 SCC 677

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Challenge in this appeal under section 37 of Arbitration and Conciliation Act, 1996 (in short A & C Act, 1996) is an order dated 24.05.2024 of the Commercial Court, Court No-II, Meerut in Arbitration Suit No. 25 of 2023 *(Sanjit Singh Salwan and Others v. Sardar Inderjit Salwan and Others)* whereby the application for interim relief filed by the appellants under Section 9 of the A & C Act, 1996 was rejected.

Facts

2. Briefly stated facts sans unnecessary details are that there happens to be a Trust by the name of Guru Tegh Bahadur Charitable Trust having its registered office at 227, West End Road, Meerut Cantt, Meerut (in short 'Trust') engaged in charitable activities since 1970. The said Trust also manages an institution by the name of Guru Tegh Bahadur Public School in Meerut, which according to the appellants has a strength of all most 1700 students who are being imparted education from Ist to XIIth classes. The Trust has original Trust Deed dated 15.10.1979 which stood amended in the year 2019. The appellants and the respondents claim to be the Trustees. Certain dispute arose between the Trustees with regard to membership and administration of the school which occasioned filing of Original Suit No. 227 of 2022 by the respondents herein *(Guru Tegh Bahadur Public School and Others v. Sardar Sanjit Singh Salwan and Others)* before the Court of Civil Judge (Senior Division), Meerut seeking injunction against the appellants from interfering in the management and operation of the School by the respondents herein.

3. On contest the said suit came to be dismissed on 13.04.2022 on an application preferred the Appellant Nos. 1, 2 and 3 under Order VII Rule 11 of the Code of Civil Procedure, 1908 (in short CPC) against which the respondents herein preferred Civil Appeal No. 16 of 2022 (Guru Tegh Bahadur Public School and Others v. Sardar Sanjit Singh Salwan and Others) before District Court, Meerut. It is further claimed that during the pendency of the appeal before the District Judge, Meerut, the parties took recourse to arbitration and one Sri Vipin Sodhi, an advocate at Meerut was appointed as sole arbitrator. Accordingly, an application was preferred on 07.07.2022 in the proceedings in Appeal No. 16 of 2022 in the Court of District Judge, Meerut with a prayer that since the sole arbitrator has entered into the reference and proceedings are going on, thus, the appeal be decided making it dependent upon the final award to be passed by the sole arbitrator.

4. Before the Arbitrator, the respondents herein (first party) raised 4 points, which are as under:

"Points raised by Sardar Inderjit Singh Salwan for and on behalf of First Party are as under:

(1) The other party Sandar Sanjit Singh Salwan and Smt. Mehar Salwan and Amandeep Singh Salwan were lawfully terminated from the Board of Trust of G.T.B. Charitable Trust. The meetings

dated 29.09.2020, 04.07.2021 and 29.01.2022 are valid. They have no right to be reinstated in the Trust.

(ii) Other party has no right to enter upon in school building to 27, West End Road, Meerut Cantt. or 76/1, Sky Line Building, Guru Nanak Nagar, Delhi Road, Meerut, or intervene into the day to day running of the said institutions or management of the Trust and School.

(iii) Other party shall withdraw the criminal case filed against the First Party in the shape of FIR dated 26.03.2022, Case Crime No. 43 of 2022, Police Station Sadar Bazaar, Meerut, under Section 420, 467 etc. IPC as the same is on false grounds and no offence committed.

(iv) The property of S. Inderjit Singh in shape of land of Sky Line Building 76/1, Guru Nanak Nagar, Delhi Road, Meerut owned by Sardar Inderjit Singh Salwan and building owned by Sky Line Promoters Pvt Limited, Managing Director Sardar Inderjit Singh Salwan is mortgaged with Piramal Capital and Housing Finance Ltd., Mangal Panday Nagar, Meerut, having its Main Office at Noida should be allowed to be released at the earliest."

5. The appellants (second party) also raised the following points:

"Points raised by Sardar Sanjit Singh Salwan and his family:

(i) The removal of Other Party from the Trust on 29.01.2022 should be recalled being not valid. The meeting dated 29.09.2020 and 04.07.2021 admitting new trustees Yashkaran Singh Salwan, Smt Ramanjit Kaur and Shri Ashu Jain is illegal and they be removed from post of Trustees.

(ii) The Other party has complete right to participate in the meeting of the Trust and to participate in management of the Trust and School and to see and intervene into day to day running of the said institutions, i.e., Trust and the School.

(iii) The First Party should withdraw suit No. 227 of 2022 (Guru Tegh Bahadur Public School and another v Sardar Sanjit Singh and others) now pending in the shape of Appeal No. 16 of 2022, Guru Tegh Bahadur Public School and another v Sardar Sanjit Singh and others in the Court of District Judge, Meerut.

(iv) The personal property/papers of the Other Party, Punjab Diesel, 99, Delhi Road, Meerut, mortgaged with Piramal Capital and Housing Finance Ltd. to be released.

(v) Joint signatures of Sardar Inderjit Singh Salwan and Sardar Sanjit Singh Salwan to be started in the operation of Bank accounts maintained with Punjab National Bank, 227, West End Road, Meerut Cantt. and ICICI Bank, 227, West End Road, Meerut and State Bank of India, Roorkee Road, Meerut Cantt.

(vi) School website showing details of trustees to be corrected.

6. The sole arbitrator passed an award dated 30.12.2022. Relevant extract whereof is being quoted hereinunder:

"Point no 1 of the party of First Part and Point of No 1 of Party of Other Part: *These points are pertaining to removal of Sardar Sanjit Singh Salwan, Smt Mehar Salwan and Sardar Amandeep Singh Salwan from the Trust. Sardar Inderjit Singh Salwan and others have asserted very strongly that the three cannot be re-reinstated because their acts had been effecting the working of the school and reputation and good will of the school. They were given thorough/lot of*

opportunities for rectification of their errors and acts.

On the contrary all the three Sardar Sanjit Singh Salwan and others very strongly asserted that they acted perfectly and diligently. They always acted for the betterment of the Trust and School and their removal is without any justification, reason and cause.

After considering the arguments of both the parties in the interest of the trust and families and considering the entire scenario, it is deemed proper that Sardar Sanjit Singh Salwan, Smt Mehar Salwan and Amandeep Singh Salwan to be reinstated in the Trust as trustees. They will always act for the betterment of the trust and School. Sardar Inderjit Singh Salwan to convey trust meeting at 227, West End Road, Meerut Cantt within 3 days from the date of submission of this award by both the parties before the District Judge, Meerut for reinstallation of all three parties as trustee in the Trust.

Regarding meetings dated 20.9.2020 and 4.7.2021 admitting new trustees Sardar Yashkaran Singh Salwan, Smt. Ramanjit Kaur and Shri Ashu Jain, Sardar Inderjit Singh Salwan very strongly objected to the same during proceedings and hearings and stated that said all three trustees are validly appointed shall always be trustees of the Trust and they shall not be removed. Before this tribunal no reason or because has been placed for their removal and why failed their appointments. Sardar Sanjit Singh Salwan, Smt Mehar Salwan and Amandeep Singh Salwan stated that they have every rights in the trust and in the meetings in which these three were admitted as new trustees, they were never called in the meetings. During the course of hearing Trustee Ashu Jain and Smt. Ramanjit Kaur of a mentally stated that they are not interested to continue as trustee of Trust due to personal reasons and other commitments and offered resignation. Accordingly S. Inderjit Singh accepted their resignations as Chairman and stated that matter shall be placed before Board so let it be accordingly.

Therefore, after hearing both the parties at length this Tribunal is of the opinion that Yashkaran Singh Salwan shall not be removed from the trustee of the trust. The Board of Trust in such event shall be as follows:

Sardar Inderjit Singh Salwan - President

Sardar Sanjit Singh Salwan Vice President

Smt Amarjeet Kaur Salwan - Secretary

Smt Mehar Salwan -Trustee

Shri Amandeep Singh Salwan - Trustee

Shri Yashkaran Singh Salwan - Trustee

The meeting dated 29.1.2022 is not a invalid and illegal meeting. Since Both Ashu Jain and Smt. Ramanjit Kaur have opted to resign from Trust, so it be placed before the Board of Trustees for acceptance in the next meeting to be held as above said.

Point no 2 of the Party of First Part and Other Party: *Party of first part asserted that the other party has no right to enter upon the school building 227, West End Road, Meerut Cantt or 76/1, Guru Nanak Nagar, Sky Line Building, Delhi Road, Meerut or intervene into the running of the said institutions. The other party strongly objected to the same and stated that since they are the trustees they have every right to enter upon into the trust/school building at 227, West End Road, Meerut Cantt. Though during course of hearing the other party have clearly accepted that Sky Line Building is owned*

by Sardar Inderjit Singh Salwan and as the firm Sri Guru Tegh Bahadur Public School dissolved on 31.3.2021 so they have no legal right to enter upon others' property. Other party has admitted that they will not enter into the Sky Line Building 76/1, Guru Nanak Nagar, Delhi Road, Meerut and will never intervene into the functioning of school run by Sardar Inderjit Singh or by his firm M/s G.T.B Public School.

Therefore, this Tribunal passed the award that Other Party Sardar Sanjit Singh Salwan, Smt Mehar Salwan and Amandeep Singh Salwan shall not enter into the premises 76/1, Guru Nanak Nagar, Sky Line Building, Meerut and they shall not intervene in any firm and the management, control and running of the school by Sardar Inderjit Singh Salwan under Firm Guru Tegh Bahadur Public School or under any other firm or Company formed by him in future.

It was accepted and informed by Both parties that No School Branch of trust is being run at Delhi Road, so there is no dispute.

Regarding the control and management of Guru Tegh Bahadur Charitable Trust and its school at 227, West End Road, Meerut Cantt, this Tribunal pass the following award.

The trust and the school shall be under the control and management of Sardar Inderjit Singh Salwan as Chairman of Trust and as Manager of the school for a period of six months from the date of this award. All decisions shall be taken by Sardar Inderjit Singh Salwan in the betterment of the school and trust.

Sardar Inderjit Singh Salwan and Sardar Sanjit Singh Salwan shall be the joint signatory of Bank account maintained with ICICI bank and Punjab National Bank, 227, West End Road, Meerut. P.N.B. Bank account shall be used for payment of salaries and wages, Government Liabilities, gratuity, electricity bills, telephone bills, diesel bills and Bank loan payment EMIs.

The bank account maintained with the State Bank of India Meerut Cantt shall be operated by exclusive signature of Sardar Inderjit Singh Salwan.

This arrangement for a period of six months only as above said within the period of six months Sardar Inderjit Singh Salwan will get the original paper of building 99, Delhi Road, Meerut belonging to the other party, released from the bank and accordingly on deposit of full money with the bank all other party shall resigned from the post of trustee from Guru Tegh Bahadur charitable trust and shall have no concern with the trust or school in any manner.

That if the first parties Sardar Inderjit Singh fails to get release the original paper of the other party from the bank within a period of six months as above said in that event on the expiry of six months immediately thereafter within four months, other party shall get release the original property papers of Sardar Inderjit Singh and Skyline company from the bank within the said four months period by depositing full money with the Bank. In such event and deposit of full money all the parties of the first part Shall resign from the post of trustee from the Guru Tegh Bahadur charitable trust and shall have no concern with the trust and school. The other party Sardar Sanjit Singh shall have complete control over the trust and school and shall be entitled to admit new trustees in according with the object of the trust and shall be managing that trust and the school.

That in case if both party fails to honour the judgement under the award, as per stipulated period as above said, in that

event for a period of six (6) months after that, things will continue in the same fashion and both Sardar Inderjit Singh and Sardar Sanjit Singh shall continue to run the school under joint signatures and will refer the matter to this Tribunal for adjudication of all or any disputes within the said period.

Point no 3 of the First Party: *This relates to the FIR dated 26.3.2022 being Case Crime No 43 of 2022 registered with Police of Police Station Sadar Bazar, Meerut under section 420 etc IPC. Matter of FIR relates to removal of Other party from trusteeship in the meeting dated 29.1.2022. Since this Tribunal without going into minute details has passed a award for reinstate of the other parties as Trustee of the Trust, therefore, there is no reason why FIR should continue. Sardar Sanjit Singh Salwan and others are hereby directed to withdraw the said FIR by moving application and affidavit before the police of P.S. Sadar, Meerut within 7 days from the date of submission of this copy of this award in the court of District Judge, Meerut and will not pressure the said FIR and will not give or file evidence. In case any default in submission of documents before Police, the other party shall not be entitled to benefits awarded under Point two above.*

Point No 4 of First Party and Other Party: *This pertains to release of their respective property papers. This Tribunal has already passed award regarding this point in Point no 2 above which shall form part and parcel of this award.*

Point No 5 of Other Party: *This pertains that the joint signatures of Sardar Inderjit Singh Salwan and Sardar Sanjit Singh Salwan to be stared in the operation of Bank accounts maintained with Punjab National Bank, 227, West End Road, Meerut Cantt and ICICI Bank 227, West End Road, and State Bank of India, Roorkee Road, Meerut. This Tribunal has already passed award regarding this point in point no. 2 above, which shall form part and parcel of this award.*

Point no 6 of other Party: *This relates to the Website of the School which should be corrected. Since this Tribunal has passed award regarding management and trusteeship so after submission of the copy of this award before the Court of District Judge, Meerut, Sardar Inderjit Singh Salwan shall correct the website. No other point has been raised by either of the party.*

Point No. 3 of Other Party: *This relates to withdrawal of suit and Appeal No. 16 of 2022, GTB Public School and others v S. Sanjit Singh and others pending before the Court of District Judge, Meerut. The parties are directed to file copy of this award jointly before the Court and get the appeal decided in view of award.*

This Tribunal has acted as Sole Arbitrator in this matter free of costs and has not charged any fees from either of the party."

7. According to the appellants, in terms of the award, they filed an application along with an affidavit for withdrawal of the first information report lodged on 26.03.2022 against the respondents before the Investigating Officer of the concerned police station. A compromise application was also filed under the joint signatures of the appellants and the respondents herein before the District Judge, Meerut in Civil Appeal No.16 of 2022. The District Judge, Meerut vide order dated 27.01.2023 decided the appeal in terms of the compromise/award. It is alleged that the respondents herein did not discharge their obligations while

clearing the dues with the Piramal Capital and Housing Finance Ltd, but in a malafide manner preferred an application dated 12.07.2023 before the sole Arbitrator complaining that due to non-filing of the closure report with respect to the first information report, the funds could not be arranged, creating an odd situation. The said application was contested by the appellants herein while filing their objections before the sole arbitrator. However, according to the appellants, the sole Arbitrator without serving any notice or affording any opportunity of hearing to the appellants proceeded to pass an exparte award dated 30.10.2023. The operative portion whereof is quoted hereinunder:-

"In view of above the application and objections are disposed of. It is made clear that the Other Party Sardar Sanjit Singh Salwan and others have clearly defaulted in their obligations as required under Point no. 3 of the award and they have permanently lost their rights given to them in Point no. 2 of the award i.e. time of 4 months to release property papers and deposit money with the Bank and get period of control and management of the. Trust as well as the School First party shall continue the control and management of the Trust and school in terms of the award dated 30.12. 2022 and shall make compliance of the award within the stipulated period as and when Final Report is accepted by the Court."

8. The appellants herein instituted proceedings under section 36 of A & C Act, 1996 for enforcement of the award dated 30.12.2022, which was registered as Execution Case No.8 of 2023. It is alleged that on the persuasion of the sole arbitrator, the appellants withdrew the Execution Case on 08.12.2023.

9. Since, repeated obstructions and hindrances were being created by the respondents in the functioning of the Trust and school, so the appellants instituted proceedings under section 9 of the A & C Act, 1996 before the Commercial Court, Meerut, which was registered as Arbitration Case No.25 of 2023 *(Sanjit Singh Salwan and Others v. Sardar Inderjit Salwan and Others)* seeking following reliefs:

"(A). That by an order of this Court in favour of the petitioners and against the opposite parties, the opposite party may be restrained from interfering in the applicants right to manage and running of the school Guru Teg Bahadur Public School, West End Road, Meerut and trust Guru Teg Bahadur Charitable, Meerut in any manner whatsoever, including but not limited to restrict their entry in Guru Teg Bahadur Public School, West End Road, Meerut premises.

(B) That the Manager State Bank of India, Meerut Cantt Branch be directed not take any school fees in Account Nos. 30195999322, 30133389047 and to change the authorized signatory in the said account from O.P.No.01 to the authorized appointed by the trust by a resolution passed by the applicant No.1 to 3.

(C) That the Manager Punjab National Bank, Sadar Branch be directed to allow the operation of the saving account No. 0318010100600013 of Guru Tegh Bahadur Public School only with the signature of applicant Sanjeet Singh.

(D) That any other relief which this Hon'ble Court may deem fit be awarded in favour of the petitioner."

10. On being noticed, the respondents herein preferred their objection on 11.01.2024.

11. The Appellants allege that they came to know about the award dated 30.10.2023 for the very first time when the same was filed along with the objection.

12. In the meantime, the Respondents herein approached the Arbitrator while initiating proceedings under section 17 of the A & C Act, 1996. On 21.01.2024, an order is stated to have been passed by the sole Arbitrator whereby the appellants were restrained from causing any hindrances or obstructions in the smooth operation of the school by the respondents herein.

13. Challenging the order dated 21.01.2024 passed under Section 17 of the A & C Act, 1996, the appellants preferred an Appeal under Section 37 of the A & C Act, 1996 before the Commercial Court, Meerut which came to be registered as Arbitration Appeal No.6 of 2024 *(Sanjit Singh Salwan v. Sardar Inderjit Singh Salwan and Others)*. Proceedings were also initiated under section 34 of the A & C Act, 1996 for setting aside the exparte award dated 30.10.2023, which was registered as Arbitration Case No.3 of 2024 (Sanjit Singh Salwan v. Sardar Inderjit Singh Salwan and Others). A stay application was also filed seeking interim relief.

14. Since the order dated 21.01.2024 passed under section 17 of the A & C Act, 1996 was continuing and the interim prayer sought in the proceedings under Section 34 of the A & C Act, 1996 was not being decided, so the appellants approached this Court while filing petition under Article 227 of the Constitution of India, bearing number '4218 of 2024 *(Sanjit Singh Salwan and Others v. Sardar Inderjit Singh Salwan and Others)*', which came to be decided on 18.04.2024 requiring the Commercial Court to decide the interim prayer of the appellants on the next date fixed i.e. 23.04.2024 and till disposal, status quo was directed to be maintained. Against the non-disposal of the proceedings under section 34 of the A & C Act, 1996, challenging the exparte award dated 30.10.2023, application under Article 227 bearing number '4221 of 2021(Sanjit Singh Salwan and Others v. Sardar Inderjit Singh Salwan and Others)' was preferred before this Court, which came to be decided on 18.04.2024 requiring the Commercial Court to ensure that appropriate orders are passed on the said application by 31.05.2024.

15. Thereafter on 24.05.2024, three orders came to be passed by the Commercial Court, (i) order in Arbitration Case No.25 of 2023 (Sanjit Singh Salwan and Others v. Sardar Inderjit Salwan and Others) rejecting the application purported under Section 9 of the A & C Act, 1996 holding that the disputes of Trust could not have been adjudicated by the arbitrator and thus, the award dated 30.12.2022 is nullity; (ii) order in Arbitration Case No.3 of 2024 *(Sanjit Singh Salwan v. Sardar Inderjit Singh Salwan and Others)* setting aside the exparte award dated 30.10.2023 observing that the disputes of the Trust are not arbitrable; and (iii) order in Arbitration Case No.06 of 2024 (Sanjit Singh Salwan v. Sardar Inderjit Singh Salwan and Others) setting aside the interim measure accorded to the respondents on 21.01.2024 on the premise that the disputes relatable to the Trust are non-arbitrable.

16. Questioning the order dated 24.05.2024 passed by the Commercial Court in Arbitration Suit No.25 of 2023 rejecting the application under Section 9 of the A & C Act, the present appeal has been preferred.

Arguments of learned counsels for the Appellants

17. Shri Manish Goyal, learned Senior Advocate assisted by Shri Utkarsh Birla and Ms. Aarushi Birla, learned counsel for the appellants has sought to argue that the order of the Commercial Court rejecting the application under Section 9 of the A & C Act, 1996, cannot be sustained for a single moment inasmuch as the Commercial Court has misconstrued the entire controversy and adopted an incorrect approach. Elaborating the said submission, it has been submitted that it is on the insistence of the respondents herein that the matter stood referred to the arbitrator and after hearing the parties (including the respondents herein), an award came to be passed on 30.12.2022, which has attained finality, as the same has not been challenged by either of the parties in proceedings under section 34 of the A & C Act, 1996. Since the hindrances and obstacles were created by the respondents, so the appellants had to take recourse to the proceedings under section 9 of the A & C Act, 1996 for interim measure, which in all eventualities was maintainable in view of the language employed in Section 9 of the A & C Act, 1996 that, a party can invoke the said proceedings before or during the arbitral proceedings or at any time after making of the award, but before it is enforced under Section 36 of the Act, 1996.

18. Submission is that the proceedings under Section 9 of the A & C Act, 1996 was initiated in furtherance of and in order to secure and preserve the movable and the immovable properties, which was subject matter of the dispute which stood adjudicated by virtue of the award dated 30.12.2022, thus it was not open for the Commercial Court in the proceeding under Section 9 of the A & C Act, 1996 to question the jurisdiction and the competence of the Arbitrator whose award remained unchallenged.

19. Argument is that the finding recorded in the order under challenge that the arbitrator is not vested with the jurisdiction to adjudicate the disputes of the Trust in view of the express bar contained under Section 9 of the CPC is misconceived besides being out of context, particularly when the disputes stood referred by the respondents herein. It is also submitted that the disputes which were referred for arbitration does not fall within the categories of non-arbitral disputes and Section 92 of the CPC has no application. Reference has also been made to Section 89 of the CPC so as to contend that with regard to settlement of disputes outside the Court amongst others, arbitration is also a mode for settlement of disputes.

20. While placing reliance upon the judgment in the case of **Vidya Drolia and Others v. Durga Trading Corporation, (2021) 2 SCC 1,** followed in the **Avitel Post Studioz Limited and Others Vs. HSBC PI Holdings (Mauritius) Limited (2024) 4 SCC 713,** it is contended that the case of the appellants does not come within the category of non-arbitral issues. Likewise the judgement in the case of **Vimal Kishore Shah and Others v. Jayesh Dinesh Shah and Others, (2016) 8 SCC 788** is distinguishable, particularly when, in the said case, the Trust in question was governed under the provisions of Trust Act, 1882. Reliance has been placed upon the judgment in the case of **Chairman Madappa v. M.N. Mahanthadevaru and Others, 1965 SCC Online SC 99, Sugra Bibi v. Hazi Kummu Mia, 1968 SCC Online SC 99, and Narain Sahai**

Aggarwal v. Smt. Santosh Rani, 1997 SCC Online Del 575 so as to contend that it is not necessary that all the disputes of the Trust are to be governed under Section 92 of the CPC, as there happens to be certain disputes, which do not fall within the parameters envisaged under Section 92 of the CPC. While driving force from the judgment in the case of **Deccan Paper Mills Company Limited v. Regency Mahavir Properties and Others, (2021) 4 SCC 786,** it is contended that besides the Civil Courts, the arbitrator has the competence to grant relief of specific performance and the rights so settled therein is judgment in personam and not in rem. Reference has also been made to the judgment in the case of **Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, (2024) 6 SCC 1**, so as to further contend that the Arbitration Act is a special law under the Contract Act and the same has primacy over the Stamp Act as well as the Registration Act.

21. It is thus prayed that the order of the Commercial Court rejecting the application under Section 9 of the A & C Act, 1996 be set aside and the appeal be allowed in toto.

Arguments of learned counsels for the Respondents

22. Countering the submission, learned Senior Counsel for the respondents Sri Navin Sinha, assisted by Sri Nipun Singh, Sri Vinayak Mitthal and Sri Naman Agarwal has submitted that the order of the Commercial Court rejecting the application under Section 9 of the A&C Act, 1996 does not call for any interference. It is submitted that after passing of the award dated 30.12.2022 by the sole arbitrator, the Execution Case No.8 of 2023 came to be filed by the appellants on 23.11.2023 under Section 36 of the A & C Act, 1996, however, the same stood withdrawn by the appellants on 08.12.2023. Thus, once the Execution Case stood withdrawn, and no liberty whatsoever, was accorded, then the proceedings under Section 9 of the A & C Act, 1996 was not maintainable.

23. Submission is that Section 9 of the A & C Act, 1996 though provides for interim measures by the Court, however, it is restricted to certain contingencies and once an award came to be passed and an execution application also got filed and thereafter withdrawn without any liberty, then the collateral proceedings in the garb and guise of Section 9 of the A & C Act, 1996 is nothing but an attempt to get the award enforced which is not maintainable in the eyes of law.

24. It is further submitted that the disputes which were referred to and adjudicated by the Arbitrator are non-arbitral beyond the competence of Arbitrator inasmuch as essentially the dispute was regarding removal and appointing of new Trustee as also regarding management of the Trust, for which the only recourse available to the aggrieved party is to invoke Section 92 of the CPC. Argument is that though Section 9 of A & C Act, 1996 provides for interim measures by the Courts, however, the same is restricted only to three contingencies, namely, (i) before, (ii) during the arbitration proceeding, (iii) at any time before making of the award, (iv) but before it is enforced in accordance with Section 36, therefore, once the award became enforceable and rather it was put to enforcement at the instance of the appellants while filing an execution case

and the same stood withdrawn, then the application under Section 9 by no eventualities would be maintained.

25. It is also contended that the basic reason attributable for withdrawing of the execution case was on account of objection raised by the respondents herein that the court-fees on the subject matter of the dispute referred to and decided in the award was liable to be paid by the appellants, but in order to wriggle out from the same, the execution application stood withdrawn and in the garb and in the guise of application under Section 9 of A & C Act, 1996, the award is being sought to be executed which is not permissible in the eyes of law. Reliance has been placed upon the judgment of the Bombay High Court in the case of **Centrint Pharmaceuticals India Pvt. Ltd. Vs. Hindustan Antibiotics Ltd. (2019) SCC Online Bom 1614.**

26. In nutshell, it is also submitted that the subject matter of dispute referred for arbitration and which was subject matter of award is clearly non-arbitrable as it pertains to the disputes of a public charity/ trust and thus, the only option available to the appellants was to take recourse to the proceedings under Section 92 of the CPC.

27. Argument is that though it was the respondents herein on whose insistence the matter stood referred to arbitration, but the same will not clothe the arbitrator with jurisdiction to adjudicate upon the dispute relatable to public charities particularly when, by the consent of the parties jurisdiction cannot be conferred.

28. It is also submitted that a bird's eye to the dispute adjudicated would reveal that Section 92 of the CPC stands applicable to the said dispute, and the same is not within the competence and jurisdiction of the arbitrator. It is accordingly, prayed that the appeal be dismissed in toto.

Analysis

29. We have given thoughtful consideration to the arguments of parties and perused the records carefully.

30. Before embarking an enquiry upon the tenability of the arguments of the rival parties, it would be apposite to extract provisions of Section 92 of the CPC:

"Public charities

(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the 2 [leave of the Court], may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree:

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in a trustee;

3 [(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property];

d) directing accounts and inquiries;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 (XX of 1863), 4 [or by any corresponding law in force in 5 [the territories which, immediately before the 1st November, 1956, were comprised in Part B States]], no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

6[(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied cy pres in one or more of the following circumstances, namely :

(a) where the original purposes of the trust, in whole or in part,

(i) have been, as far as may be, fulfilled; or

(ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust; or

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or

(c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

(e) where the original purposes, in whole or in part, have, since they were laid down,

(i) been adequately provided for by other means, or

(ii) ceased, as being useless or harmful to the community, of

(iii) ceased to be, in law, charitable, or

(iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust."

31. Section 92 of CPC deals with the disputes of public charities/Trust created for public purpose or charitable or religious nature, wherein a complete procedure has been laid down for taking legal action. In order to attract the provisions of Section 92 of Code of Civil Procedure, three conditions have to be satisfied namely (i) The trust if created for charitable or religious nature; (ii) there was a breach of trust, or a direction of Court is necessary in the administration of said Trust; (iii)The relief claimed is one or the other of the reliefs enumerated in Sub-Section (1) of Section 92 of CPC. Further Sub-Section (2) of Section 92 provides with a non-obstante clause that no suit claiming any of the

reliefs specified in Sub-Section (1) of Section 92 shall be initiated in respect of any of the Trust as referred thereto except in conformity with the provisions of Sub-Section (1) of Section 92.

32. To begin with, we are required to determine whether the Trust in question is a private or a public trust answering the definition of public charities. The appellants herein in Memo of Appeal in Ground no.D have come up with a stand that the Trust is a public charitable Trust. Ground No.D of the Memo of Appeal is reproduced hereinunder:-

"D. Because the Trust is a public and charitable trust, which is operating the school under the name of 'Guru Tegh Bahadur public School'. Therefore, the provisions of the Indian Trusts Act, 1882, do not apply to the present Trust. The learned Commercial Court lost sight of the fact that the Trust is not private in nature. It has nowhere been pleaded or argued by either party that the Indian Trusts Act, 1882, governs the Guru Tegh Bahadur Charitable Trust, nor has it been registered under the said Act."

33. The distinction between private and a public trust came up for consideration in the case of ***Devki Nandan Vs. Murlidhar and others, AIR 1957 (SC) 133,*** wherein the following was observed:-

"The distinction between a private and a public trust is that whereas the former the beneficiaries are specific individuals, in the latter, the general public or class thereof."

34. Admittedly as per original trust deed dated 15.10.1979, and amended Trust Deed of the year 2019, Guru Tegh Bahadur Charitable Trust is a Charitable Trust as the name suggests, is engaged in charitable activities in the field of education. Thus, the Trust answers the definition of a Public Trust.

35. The bone of contention between the rival parties is whether the dispute is arbitrable, so as to invest the arbitrator the jurisdiction to decide the disputes of a Trust in the wake of the provisions of Section 92 of CPC. To test the said submission, we are required to have a quick survey of the disputes, which was referred to for arbitration and the nature of the award itself and the submission of the learned counsel for the appellants that once the respondents herein got referred the dispute relatable to the Trust for arbitration, then they cannot object that the dispute was not arbitrable.

36. According to the respondents herein, who were termed as 'first parties' in the arbitration, Sardar Sanjeet Singh Salwan (appellant no.1), Sri Mehar Salwan (appellant no.2) and Sri Amardeep Singh Salwan (Appellant no.3) were lawfully terminated from the board of Trust of Guru Tegh Bahadur Charitable Trust and the meetings dated 29.09.2020, 04.07.2021, 29.01.2022 was valid. On the other hand, the point raised by the appellants herein (second party) was that their removal from the Trust on 29.01.2022 was illegal being invalid and the meeting held on 29.09.2020 and 04.07.2021 admitting new Trustees Yash Karan Singh Salwan, Smt. Ramanjeet Kaur and Anshul Jain is illegal and they are liable to be removed from the office of the Trustees.

37. The arbitrator proceeded to hold and directed that Sardar Sanjeet Singh Salwan (appellant no.1), Smt. Mehar Singh Salwan (appellant no.3) and Amandeep

Singh Salwan (appellant no.2) are to be reinstated as Trustees and as regards the meeting convened on 29.09.2020 and 04.07.2021, the arbitrator after hearing the parties had directed that Yash Karan Singh Salwan shall not be removed as a Trustee of the Trust and further directions were issued for constitution of the members of the Board of Trust. Certainly, the said dispute was beyond the scope of arbitration, particularly when the disputes relatable to removing any trustee and appointing a new trustee falls within the disputes categorized under Section 92 of CPC.

38. Point nos. 2, 3, 4 and 5 raised by the respondents herein (first party) before the sole arbitrator is with regard to the issue that the appellants (other party) had no right to enter the school building or to intervene in the day-to-day running of said institution and Management of the said Trust of the School. The appellants herein (other party) claimed absolute right to participate in the meeting of the Trust and to participate in the management of the Trust and the school and to intervene into the day-to-day running of the institution, trust and the school. The arbitrator proceeded to hold and direct that initially for a period of six months from the date of passing of the award, the bank account of the Trust and the School shall be operated under the joint signatures of Sardar Inderjeet Singh Salwan and Sardar Sanjeet Singh Salwan and the former would get released the papers of the property in question from the bank and in case Sri Sardar Inderjeet Singh Salwan fails to get the original papers released from the bank, then the other party Sardar Sanjeet Singh Salwan shall have complete control over the Trust and the school. The determination made in point nos. 2 to 5 in the award is indicative of the fact that the arbitrator has decided a non-arbitrable dispute which is subject matter of Section 92 of CPC, being issues of the management of the Trust which is clearly barred in the eyes of law.

39. As regards the direction of the Arbitrator requiring the appellants herein not to pursue and withdraw the first information report dated 26.02.2022 being Case Crime No.43 of 2022 lodged against the respondents before P.S. Sadar Bazar, Meerut under Section 420 IPC and also not to give or file evidence before the criminal courts is also beyond the scope of arbitration being non-arbitrable. The position might have been different, in case parties would have approached the arbitrator expressing their sweet will that they would not pursue the criminal case, but such type of blanket directions could not have been issued by the Arbitrator. Hence the Arbitrator has exceeded its jurisdiction while passing an award on a subject, which is non-arbitrable.

40. Further once FIR came to be lodged by the appellant against the respondents herein and the investigation stood commenced, then it transforms into a dispute in rem rather in personam, particularly when the offence committed is not only against the informant, but also against the State. The reliance placed upon the judgment in the case of *A. Ayyasamy (supra) and Avitel Post Studioz Ltd. (supra)* is wholly misplaced, particularly when in the said decision, the issue involved was that mere allegation of fraud and forgery would not exclude arbitration and it was held that the issue of fraud or forgery was quite complex and they denude the arbitrator to adjudicate the said issues. Here in the present case, the issue is not of fraud or forgery, but it is in relation to criminal

proceedings lodged against the respondents herein.

41. In **Vidya Drolia (supra),** the Hon'ble Apex Court had laid down the four fold test in order to determine as to whether the dispute is arbitrable or not. It was observed as under:-

"76. In view of the above discussion, we would like to propound a four-fold test for determining when the subject matter of a dispute in an arbitration agreement is not arbitrable:

76.1. (1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

76.2. (2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;

76.3. (3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and

76.4. (4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

76.5. These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will 60 help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable."

42. Plainly and simply, the disputes, which were adjudicated and which became the part and the parcel of the award falls within the purview and the rigours of Section 92 of the CPC, as it is beyond shadow of doubt that the award touches the issue of removal and induction of members of the Trust and also directions for management of the Trust.

43. Our view also stands fortified from Sub-Section (2) of Section 92 of CPC, which provides that no suits claiming any of the reliefs specified in Sub-Section (1) are to be instituted in respect of any Trust as referred to except in conformity with the provisions of Sub-section (1) of Section 92 of CPC. As regards the argument raised by learned Senior Counsel for the appellants that since the appellant-Trust is a public trust and it is not covered under the Trust Act 1882, therefore, the judgment in the case of *Vimal Kishore Sahai (supra)* would not be applicable and would not make much relevance, particularly when Section 92 itself provides for modality and forum for adjudication of the dispute relatable to the Trust.

44. Much emphasis had been laid upon Section 89 of the CPC so as to suggest that the same deals with the settlement of dispute outside the Court and amongst others, one of the mode is arbitration. It is contended that the said provision came to be inserted by virtue of Act No.46 of 1999, w.e.f. 01.07.2002, thus it would dilute the rigours of Section 92 of CPC, as it would be open for the parties to get adjudicated the disputes of the Trust through arbitration. The said contention cannot be accepted for the simple reason that Section 89 provides for settlement of disputes outside the Court either through arbitration, conciliation, mediation or

judicial settlement including settlement through Lok Adalat, however, it is subject to the disputes which would not fall under the said category. Section 89 does not override Section 92, particularly when Section 92 CPC exclusively deals with the dispute relating to Trust.

45. Though a feeble attempt was made by learned Senior Counsel for the appellants, while relying upon the judgments in the case **Chairman Madappa (supra)** and **Narain Sahai Aggarwal (supra)** while contending that it is not a hard and fast rule that all the disputes relating to or incidental to a Trust are to be dealt in terms of Section 92, as there are certain disputes, which though is of a Trust are beyond the scope of Section 92 of CPC. So far as the judgment in the case of Chairman Madappa (supra) is concerned, the same would not be of any aid or assistance to the appellants, particularly when in the said case, the dispute was relatable to disposal of a cattles for increasing the income of a Trust and it was held that for incidental trivial issues, no permission under Section 92 was required. However, in the present case in hand, the disputes are regarding the induction and removal of Trustees and also management, which obviously is within the purview of Section 92 of CPC. The judgment in the case of Narain Sahai Agarwal (supra) is also not applicable, as the said judgment also does not deal with the issue, which is engaging in the present proceeding.

46. As regards the submission of the learned Senior Counsel for the appellants that the respondents herein are estopped from raising the question of the competence of the arbitrator to adjudicate the disputes of the Trust is concerned, the same is neither here nor there. The Hon'ble Apex Court in the case of **New Moga Transport Compay Ltd. Vs. United India Insurance Company Ltd., (2004) 4 SCC 677** had the occasion to consider the issue whether by consent, acquicience or wavier at the end of any party can create a jurisdiction. It was observed as under:-

"By a long series of decisions it has been held that where two Courts or more have under the CPC jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in any one of such Courts is not contrary to public policy and in no way contravenes Section 28 of the Indian Contract Act, 1872. Therefore, if on the facts of a given case more than one Court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two Courts. But by an agreement parties cannot confer jurisdiction to a Court which otherwise does not have jurisdiction to deal with a matter. (See Hakam Singh v. M/s. Gammon (India) Ltd. (AIR 1971 SC 740} and M/s. Shriram City Union Finance Corporation Ltd. v. Rama Mishra (AIR 2002 SC 2402)."

47. The judgment in the case of *Interplay Between Arbitration Agreements (supra)* is also of no help, particularly when the question poised before the Hon'ble Supreme Court was with regard to a situation where the arbitration agreement was insufficiently stamped. The Hon'ble Apex Court came to the conclusion that an arbitration agreement being a special agreement, would prevail over the Contract Act, 1872 as well as Stamp Act, 1899. With regard to the judgment in the case of *Deccan Paper Mills Company Limited (supra),* there is no quarrel to the proposition that the Arbitrator is also

vested with a right to grant relief of specific performance same as Civil Courts and the adjudication so done is in personam and not in rem. What is understandable in the present case is that the issues which were referred to and adjudicated by the Arbitrator were the issues, which were triable by the Courts of law as per Section 92 of the CPC.

48. Interestingly, the issue that the dispute is not arbitrable also stands noticed in the order dated 24.05.2024 in Arbitration Case No.3 of 2024 while setting aside the award dated 30.10.2023 and Arbitration Case No.6 of 2024 wherein the interim relief granted to the respondents on 21.01.2024 in the proceeding under Section 17 of the A & C Act, 1996 was set aside.

49. The question regarding the maintainability of the proceedings under Section 9 of the A & C Act, 1996 is not being addressed by this Court in the present proceeding, particularly when the dispute relatable to the Trust itself was not arbitrable and the arbitrator had no competence to adjudicate the same.

50. Viewing the case from the four-corners of law, we are of the firm opinion that the order dated 29.05.2024 of the Commercial Court rejecting the proceedings under Section 9 of the A & C Act, 1996 cannot be said to be suffering from any illegality or infirmity, warranting interference in the present proceedings.

51. The appeal is accordingly dismissed.

(2024) 8 ILRA 957
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. 2nd Bail Application No. 17912 of 2019
With other cases

Ramu ...Applicant
Versus
State of U.P. ...Opposite Parties

Counsel for the Applicants:
Sri Abhishek Kumar Chaubey, Sri Ajay Kumar Pathak, Sri Rahul Pandey, Sri Sadrul Islam Jafri, Sri Ali Jamal, Sri Saumitra Dwivedi, Sri Tanzeel Ahmad, Sri Shivendra Raj Singhal, Sri Rajiv Lochan Shukla, Sri Kunal Shah, Sri Vinay Saran (Sr. Advocatre), Sri N.I. Jafri (Sr. Advocate), Sri Manish Tiwary (Sr. Advocate)

Counsel for the Opposite Parties:
Sri Ajatshatru Pandey, G.A.

Criminal Law-The Constitution of India, 1950-Article 14, 21 & 39A -The Code of Criminal Procedure, 1973 - Sections 304 & 439 -The Bharatiya Nagarik Suraksha Sanhita, 2023 - Section 341 - The Legal Services Authority Act, 1973 - General Rules Criminal-Rule 37 -The U.P.Jail Manual, 2022-Rule 439(a),412(a) & 434- The bail application of the applicant was heard for the first time on merits and he was enlarged on bail by this Court fourteen and a half years after his imprisonment---Trial not concluded----Prisoners belonging to the weaker sections of the society or facing circumstances of undeserved want or suffering from acute poverty or often do not have access to legal aid and consequently are unable to file bail applications for years on end----Statutory Schemes for Legal Aid under Legal Services Authorities Act, 1987, Section 304 Cr.P.C./ Section 341 of BNSS, 2023, General Rules (Criminal), Jail Manual Discussed----Duties of District Legal Services Authorities, High Court Legal Services Committee, St. Legal Services Authority, District Judges/Sessions judges, Jail

Superintendent/Competent Jail Authority, St. Government discussed.

Bail application allowed. (E-15)

List of cases referred:,

1. Maneesh Pathak Vs St. of U.P. 2023 SCC OnLine All 649

2. Anil Gaur @ Sonu @ Sonu Tomar Vs St. of U.P.2022 SCC OnLine All 623

3. Junaid Vs St. of U.P. & anr.2021 SCC OnLine All 463

4. Ajeet Chaudhary Vs St. of U.P. & anr.2021 SCC OnLine All 17

5. Gudikanti Narasimhulu & ors.Vs Public Prosecutor, High Court of Andhra Pradesh (1978) 1 SCC 240

6. Satender Kumar Antil Vs C.B.I.& anr.(2022) 10 SCC 51

7. Mohd. Muslim @ Hussain Vs St. (NCT of Delhi) Special Leave Petition (Criminal) No. 915 of 2023 (2023 SCC OnLine SC 352)

8. Javed Gulam Nabi Shaikh Vs St. of Mah. & anr.2024 SCC OnLine SC 1693

9. Monish Vs St. of U.P. & ors.2024 (6) ADJ 361

10. Anurudh Vs St. of U.P. Criminal Misc. Bail Application No. 4880 of 2024

11. Bhanwar Singh @ Karamvir Vs St. of U.P. 2023 SCC OnLine All 734

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

13. Olga Tellis Vs Bombay Municipal Corporation 1985 (3) SCC 545

14. Munn Vs Illinois 1877 (94) US 113

15. Kharak Singh Vs St. of U.P. AIR 1963 SC 1295

16. Maneka Gandhi Vs U.O.I. (1978) 1 SCC 248

17. Hussainara Khatoon (IV) Vs Home Secy., St. of Bihar (1980) 1 SCC 98

18. Queen-Empress Vs Pohpi & ors.ILR (1891) All 171 (FB)

19. M.H. Hoskot Vs St. of Mah. (1978) 3 SCC 544

20. Khatri & ors.(II) Vs St. of Bihar (1981) 1 SCC 627

21. Suk Das Vs Union Territory of Arunachal Pradesh (1986) 2 SCC 401

22. St. of Haryana Vs Raghubir Dayal (1995) 1 SCC 133

23. Ram Dhani & anr.Vs St. of U.P 2021 (1) ADJ 376

24. Mohd. Hussain @ Zulfikar Ali Vs. St. (Govt. of NCT of Delhi) (2012) 2 SCC 584

25. Manglu Vs St. of U.P 2018 SCCOnLine All 5751

26. S. Yuvaraj Vs St. rep. By The Inspector of Police, Gobichettypalayam 2023 SCC OnLine Mad 3035

27. Darpaon Potdrain Vs Emperor 1938 (39) Cri LJ 384

28. Ram Awadh Vs St. of U.P 1998 SCC OnLine All 1234

29. Ramanand @ Nandlal Bharti Vs St. of U.P. of U.P. 2022 SCC OnLine SC 1396 [Criminal Appeal No.65 of 2022]

30. Navtej Singh Johar Vs U.O.I. (2018) 10 SCC 1

31. Bhanwar Singh @ Karamvir Vs St. of U.P 2023 SCC OnLine All 734

32. Noor Alam Vs St. of U.P. 2024 (5) ADJ 766

33. Jitendra Vs St. of U.P. (Criminal Misc. Bail Application No.9126 of 2023)

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

1 The judgement is being structured in the following conceptual framework to facilitate the discussion:

<table>
<tr><td>I</td><td colspan="3">Introduction & Facts</td></tr>
<tr><td>II</td><td colspan="3">Submissions of learned counsels for the parties</td></tr>
<tr><td>III</td><td colspan="3">Denial of Legal Aid to the applicant and some cases of similarly situated prisoners</td></tr>
<tr><td>IV</td><td></td><td>A</td><td>Right to seek bail and scope of Bail Jurisdiction</td></tr>
<tr><td></td><td></td><td>B</td><td>Legal issues arising in the cases & Bail Jurisdiction</td></tr>
<tr><td>V</td><td></td><td>A</td><td>Legal Aid : General</td></tr>
<tr><td></td><td></td><td>B</td><td>Legal Aid : Article 39A of Constitution of India and Constitutional Law</td></tr>
<tr><td>VI</td><td colspan="3">Statutory Schemes for Legal Aid:-</td></tr>
<tr><td></td><td></td><td>A</td><td>Legal Services Authorities Act, 1987</td></tr>
<tr><td></td><td></td><td>B</td><td>Section 304 Cr.P.C./Section 341 of BNSS, 2023</td></tr>
<tr><td></td><td></td><td>C</td><td>General Rules (Criminal)</td></tr>
<tr><td></td><td></td><td>D</td><td>Jail Manual</td></tr>
<tr><td></td><td></td><td>E</td><td>Decision making process for grant of legal aid: Relevant considerations and availability of necessary information</td></tr>
<tr><td>VII</td><td colspan="3">Stand of the State Government : Instructions & Affidavits</td></tr>
<tr><td>VIII</td><td></td><td>A</td><td>Right to Legal Aid & Quality of Legal Aid</td></tr>
<tr><td></td><td></td><td>B</td><td>Right to Legal Aid & Right to seek Bail : A composite scheme</td></tr>
<tr><td>IX</td><td>Charter of Prisoners' Rights</td><td></td><td></td></tr>
<tr><td>X</td><td colspan="3">Duties of the magistrates/trial courts/DLSAs/jail authorities:-</td></tr>
<tr><td></td><td></td><td>A</td><td>Duties of the magistrates/trial courts</td></tr>
<tr><td></td><td></td><td>B</td><td>Duties of DLSAs</td></tr>
<tr><td></td><td></td><td>C</td><td>Duties of Secretary, HCLSC</td></tr>
<tr><td></td><td></td><td>D</td><td>Duties of Secretary, SLSA</td></tr>
<tr><td></td><td></td><td>E</td><td>Duties of District Judges/Sessions Judges</td></tr>
<tr><td></td><td></td><td>F</td><td>Duties of Jail Authorities</td></tr>
<tr><td></td><td></td><td>G</td><td>Duties of State Government</td></tr>
<tr><td></td><td></td><td>H</td><td>Registrar General of High Court</td></tr>
<tr><td></td><td></td><td>I</td><td>High Court</td></tr>
<tr><td>XI</td><td colspan="3">Right of fair & expeditious trial</td></tr>
<tr><td>XII</td><td colspan="3">Anil Gaur @ Sonu @ Sonu Tomar Vs. State of U.P.1</td></tr>
<tr><td></td><td></td><td>A</td><td>Post Script</td></tr>
<tr><td></td><td></td><td>B</td><td>Lessons drawn</td></tr>
<tr><td></td><td></td><td>C</td><td>The road ahead</td></tr>
<tr><td>XIII</td><td>Order in Bail Application</td><td></td><td></td></tr>
<tr><td>XIV</td><td>Acknowledgements of the role of the Bar and the State</td><td></td><td></td></tr>
<tr><td>XV</td><td>Appendix</td><td></td><td></td></tr>
</table>

2. Freedom's dawn held unlimited promise for all Indians.

"Bliss was it in that dawn to be alive,

But to be young was very heaven"2

3. The audacity of hope of the young Republic was matched by the scope of ambition of the newly adopted Constitution resolved to secure justice to all citizens3.

4. The reality of independence is more sombre for many Indian citizens. The plight of a class of prisoners that emerges from this discussion dims the ardour of the fateful stroke of the midnight hour of August 1947:

"ये दाग़ दाग़ उजाला, ये शब-गज़ीदा सहर
वो इन्तज़ार था जिस का, ये वो सहर तो नहीं"4

"This patchy light, this night-tormented dawn
What we waited for is not this morn"

I. Introduction & Facts:

5. In the simple facts of this case arise questions of highest constitutional significance. The bail application of the applicant was heard for the first time on merits, and he was enlarged on bail by this Court fourteen and a half years after his imprisonment. The trial has not concluded. The most consequential issues of the human condition located in the most inherent domain of the Indian Constitution also arise in the companion bail applications. On the morrow of 75th year of the Constitution, constitutional amnesia grips some spaces in the country. While the nation celebrates the Amrit Kaal of Azaadi, there is a class of Indian citizens who lead anonymized lives in the dark walls of prisons where the light of Constitutional liberties does not penetrate.

6. Briefly put the records disclose the following facts:

(a) The applicant was in jail since 14.02.2008.

(b) The first bail application was dismissed as not pressed on 15.11.2008.

(c) The second bail application was filed on 25.04.2019. (d) The matter was listed from time to time but the bail application was not pressed. On other dates the matter was not taken up for hearing.

(e) A listing application for expediting the hearing of the matter was filed on 07.08.2020.

7. The applicant was imprisoned on 14.02.2008 in connection with the criminal case registered as Case Crime No. 44 of 2008 under Sections 394/302 I.P.C. Police Station Jahangirabad, District Bulandshahar. This Court dismissed the first bail application of the applicant on 15.11.2008 by the following order:

"Sri Anil Raghav, learned counsel for the applicant states that the applicant does not want to press this bail application.

It is dismissed accordingly as not pressed."

8. The applicant filed his second bail application as an undertrial on 25.04.2019. The order sheet discloses that the application was heard on merits for the first time on 16.07.2022 and the applicant was enlarged on interim bail on date. Sureties imposed by the trial court could not be provided by the applicant due to his penurious condition and social exclusion. Hence the applicant was not set forth at liberty. This fact was brought to the notice of this Court. The surety demands were made commensurate to his socioeconomic status by this Court's order dated 21.07.2022. A fresh report was also called from the trial court. The report dated 15.02.2024 sent by the learned Additional Sessions Judge, Court No. 2, Bulandshahar records that the applicant has been set forth at liberty pursuant to the interim bail granted to the applicant by this Court.

9. Bail application was earlier argued by the learned counsel for the applicant. On later dates when the matter was taken up for hearing, none appeared on behalf of the applicant. This Court did not dismiss the bail application for non prosecution in view of the law laid down by this Court in

Maneesh Pathak vs. State of U.P.5 The Court appointed amicus curiae to represent the applicant at the hearing of the bail application.

II. Submissions of the learned counsels for the parties

10. Shri N. I. Jafri, learned Senior Counsel assisted by Shri Sadrul Islam Jafri, and Shri Ali Jamal, learned counsels, Shri Vinay Saran, learned Senior Counsel assisted by Shri Saumitra Dwivedi, and Shri Tanzeel Ahmad learned counsels, Shri Dharmendra Singhal learned Senior Counsel assisted by Shri Shivendra Raj Singhal learned counsel, Shri Manish Tiwary learned Senior Counsel assisted by Shri Atharva Dixit learned counsel, Shri Rajiv Lochan Shukla, learned counsel and Shri Kunal Shah learned counsel were requested to appear on behalf of the respective applicant as amicus curiae and to assist the Court on the constitutional issues arising in these cases.

Counsels in connected bail applications:

I. Shri Ashutosh Kumar Pandey, learned counsel for the applicant in Criminal Misc. Bail Application No. 16379 of 2024 **(Kamil Vs. State of U.P.);**

II. Shri Dileep Singh Yadav, learned counsel for the applicant in Criminal Misc. Bail Application No.14678 of 2024 **(Muneesh @ Khajanchi v. State of U.P.);**

III. Shri Istiyaq Ali, learned counsel assisted by Ms. Jagriti Pandey, learned counsel for the applicant in Criminal Misc. Bail Application No.14084 of 2024 **(Mumtaj v. State of U.P.);**

IV. Shri Uma Datta Tripathi, learned counsel for the applicant in Criminal Misc. Bail Application No.17643 of 2024 **(Vinesh v. State of U.P.);**

V. Shri Rajiv Lochan Shukla, learned amicus curiae assisted by Shri Kuldeep Kumar, learned counsel for the applicant in Criminal Misc. Bail Application No.18960 of 2024 **(Titu v. State of U.P.);**

VI. Shri Ram Krishna Mishra, learned counsel for the applicant in Criminal Misc. Bail Application No.6287 of 2024 **(Mintu v. State of U.P.);**

VII. Shri N. I. Jafri, learned Senior Counsel and Shri Vinay Saran, learned Senior Counsel assisted by Shri Satish Sharma on behalf of the applicant in Criminal Misc. Bail Application No. 21823 of 2024 **(Saleem @ Chhukali Vs. State of U.P.);**

VIII. Shri Irfan Ali, learned counsel assisted by Shri Ajit Kumar, learned counsel on behalf of the applicant in Criminal Misc. Bail Application No. 17888 of 2024 **(Pramod Kumar Vs. State of U.P.);**

IX. Shri Rajnish Kumar Srivastava, learned counsel on behalf of the applicant in Criminal Misc. Bail Application No. 19701 of 2024 **(Sunil Kumar Alias Chuhi Alias Sandeep Kumar Vs. State of U.P.).**

Shri Ashok Mehta, learned Additional Advocate General, Shri A. K. Sand, learned Government Advocate and Shri Paritosh Kumar Malviya, learned AGA-I have represented the State.

11. On similar facts and common legal issues learned amicus curiae and learned counsels for parties in this case and the companion bail applications made the following submissions:

I. The applicant belongs to a socially and economically marginalized

class of citizenry. He has no effective pairokar to conduct his case.

II. The applicant was not apprised of his right to seek bail by filing a second bail application and lacked access to legal aid to file the second bail application for more than one decade. (Periods of delay in the filing the bails vary in the respective case. In many cases there was inordinate delay in filing the first bail application for the same reasons).

III. The bail application of the applicant was not pressed diligently before this Court in the absence of an effective pairokar.

IV. Lack of legal literacy and denial of legal aid despite the entitlement of the applicant delayed recourse to the legal remedy of bail, and caused their6 unjustified incarceration.

V. Right of the applicant to legal aid which is a fundamental right evolved by constitutional law and also a statutory right vested in them by virtue of the Legal Services Authorities Act, 19877, and under Section 304 of Cr.P.C. has been violated.

VI. Members of the Bar also submit that this problem is faced by many prisoners in U.P. jails. The learned counsels also highlighted non compliance of the judgement of this Court in **Anil Gaur @ Sonu @ Sonu Tomar vs State of Uttar Pradesh8** in similar cases.

VII. Jail Superintendent has to discharge their9 duties under Regulation 439 (a) of the Jail Manual10. The aforesaid provision has been amended by Rule 412 (a) of the UP Jail Manual, 2022.

VIII. Submissions on merits were prefaced by contending that the applicant's inability to access legal aid raises legal and constitutional issues directly affecting the right to seek bail and the personal liberty of the applicant. The adjudication of these issues is within the scope of bail jurisdiction.

12. Shri Ashok Mehta, learned Additional Advocate General, assisted by Shri A.K. Sand, learned Government Advocate and Shri Paritosh Malviya, learned AGA-I referred the relevant statutes and constitutional law holdings on the right to legal aid and the right to bail to the Court.

13. Shri Ashok Mehta, learned Additional Advocate General representing the State emphatically contends that State is unequivocally committed to uphold the fundamental rights of prisoners to legal aid as propounded by the Supreme Court in various pronouncements and created by various statutory provisions. In particular it is submitted that the duties of jail officials under the Jail Manual to realize the aforesaid rights of prisoner are liable to be implemented in letter and spirit. The following submissions have also been made on behalf of the State:

I. The State Government is committed to providing legal aid to the deprived and eligible classes of prisoners and to uphold the law laid down by the Supreme Court in this regard.

II. The State Government have complied with its mandate under the LSA Act, 1987. Posts contemplated in the LSA Act, 1987 have been sanctioned and endeavours have been made to provide requisite infrastructure.

III. There is a need for strict compliance of the judgment of **Anil Gaur (supra)** by the concerned authorities upon whom directions were made.

IV. The learned courts have to faithfully implement their duties under Section 304 Cr.P.C. to provide legal aid to

prisoners who appear before them so that the bail application can be filed and heard without delay.

V. The Jail Superintendent under Regulation 439 (a) of the Jail Manual/Rule 412(a) of UP Jail Manual, 2022 have an obligation under law to make recommendations for grant of legal aid to prisoners to the DLSAs and trial courts respectively without delay.

VI. The State Government shall make endeavours to provide IT solutions and infrastructure to enable the competent State authorities to have easy access to all relevant information necessary to discharge their duties to provide legal aid to prisoners.

VII. The State Government shall ensure full coordination between different departments for the abovesaid purposes. The LR/Principal Secretary (Law), Government of UP, Director General (Prisons), Director General (Prosecution) and representative of Director General of Police have also been heard through video conferencing.

14. Learned Additional Advocate General has called attention to the instructions sent on behalf of the State and also the affidavits filed on behalf of the respective State authorities namely LR/Principal Secretary(Law), DG (Prisons) and Additional Director General of Police (Technical Services). It is submitted on the footing of the aforesaid affidavits that the State Government is making all out efforts to provide various facts and details pertaining to prisoners to the jail authorities in an auto-generated form to process grant of legal in an efficient manner.

III**. Denial of legal aid to the applicant and some cases of similarly situated prisoners**

15. From the submissions made by the learned amicus curiae and learned counsel for the applicant11 and the records of the cases these facts are most evident. The applicant had no access to legal aid for more than a decade (period varies in each case) which resulted in delay in filing of this bail application. The applicant is a financially destitute person belonging to a marginalized section of the society. The applicant does not have any pairokar to diligently prosecute his bail application before this Court due to which the case was not heard promptly. The accumulation of these circumstances of want paired with legal illiteracy and denial of legal aid prolonged the detention of the applicant and has led to a miscarriage of justice.

16. The failure of justice for want of legal aid in the instant case is not a one off. Denial of legal aid has many facets with varied consequences. Prisoners belonging to the weaker sections of the society or facing circumstances of undeserved want or suffering from acute poverty or often do not have access to legal aid and consequently are unable to file bail applications for years on end. The resulting deprivation of liberties of this class of prisoners due to lack of legal aid is a recurring feature which has been repeatedly brought to the notice of this Court.

17. The other set of cases are where a bail application is filed only to be left in the cold storage. In the latter cases no efforts are made to argue the matter or press for an early hearing. These prisoners have no contact with their counsels, and are not aware of the status of their bail applications. This class of prisoners does not have effective pairokars or means of oversight to ensure diligent prosecution of their bail applications. Some cases of

undertrials filing bail applications after long delays which were brought in the notice to the Court are depicted hereinunder as exemplars:

Sr. No.	Case Title	Particulars of Case	Under Sections	In Jail Since	Date of rejection of bail by trial court	Date of filing of bail before the High Court	Date of grant of bail by the High Court
1.	Krishna Kumar@ K.K. Vs State of UP	Criminal Misc. Bail Application No. 29984 of 2018	Sections 302, 201, 377 IPC	02.11.2011	25.07.2012	07.08.2018	20.12.2023
2	Akil Vs State of UP	Criminal Misc. Bail Application No. 31440 of 2023	Sections 147, 148,149, 452, 302,307, 34, 120B IPC	19.04.2012	13.07.2022	10.07.2023	Interim bail on 26.07.2023 Bail on 20.12.2023
3	Kanhaiya Pal Vs State of UP	Cri. Misc. Bail Application No. 47521 of 2023	Section 302 IPC	06.12.2013	05.03.2014	31.10.2023	25.01.2024
4	Vinesh vs State of U.P.	Criminal Misc. Bail Application No. 17643 of 2024	Sections 147, 148, 149, 302, 120-B IPC	30.04.2014	10.10.2022	30.04.2024	Interim Bail on 18.07.2024 Bail on 07.08.2024
5	Mukesh Vs. State of U.P.	Criminal Misc. Bail Application No. 12832 of 2024	Sections 147, 148, 149, 302, 506, 504, 120B IPC	02.01.2016	17.03.2021	11.03.2024	09.07.2024
6	Ramandeep Vs State of UP	Criminal Misc. Revision Defective No. 848 of 2023	Sections 420, 467, 468, 471 IPC	As per custody report, applicant is in jail for 5 years, 5 months and 3 days	Appeal was dismissed on 22.09.2022	03.01.2023	14.06.2023
7	Ramandeep Vs State of UP	Criminal Misc. Revision Defective No. 849 of 2023	Sections 406, 420, 467, 468, 471 IPC	As per custody report, applicant is in jail for 5 years, 10 months and 24 days	Appeal was dismissed on 23.09.2022	02.06.2023	14.06.2023
8	Ramandeep Vs State of UP	Criminal Misc. Revision Defective No. 850 of 2023	Sections 406, 420, 467, 468, 471 IPC	As per custody report, applicant is in jail for 4 years, 9 months	Appeal was dismissed on 23.09.2022	02.06.2023	14.06.2023
9	Mintu vs State of U.P.	Criminal Misc. Bail Application No. 6287 of 2024	Sections 302, 307, 394, 411, 34 IPC	03.05.2016	29.11.2023.	13.02.2024	Interim Bail on 24.7.2024 Bail on 07.08.20

							24
10	Daya Ram Vs. State of U.P.	Criminal Misc. Bail Application No. 13523 of 2024	Sections 302, 34 IPC	28.08.2016	31.10.2023	02.01.2024	15.07.2024
11	Akash Vs State of UP	Criminal Misc. Bail Application No. 38204 of 2022	Section 307 IPC	05.10.2016	22.07.2022	05.08.2022	11.01.2023
12	Sunil Kumar Alias Chuhi Alias Sandeep Kumar	Criminal Misc. Bail Application No. 19701 of 2024	Sections 394, 302, 412 IPC	10.10.2016	23.12.2022	23.04.2024	Interim Bail on 19.07.2024 Bail on 07.08.2024
13	Sanjeev Joshi Vs. State of U.P.	Criminal Mic. Bail Application No. 22230 of 2024	Sections 302, 120B, 506 IPC	25.12.2016	17.10.2022	02.05.2024	16.07.2024
14	Irshad vs State of UP	Criminal Misc. Bail App. 15389 of 2024	Sections 302, 452, 506, 34 IPC	06.02.2017	04.05.2023	16.04.2024	15.07.2024
15	Titu vs State of UP	Criminal Misc. Bail App. 18960 of 2024	Sections 302, 201 IPC	10.08.2017	01.02.2024	01.05.2024	Interim Bail on 19.07.2024 Bail on 07.08.2024
16	Ashik Vs. State of UP	Criminal Misc. Bail Application No. 12175 of 2024	Sections 302, 34, 504, 506	18.10.2017	06.01.2018	20.03.2024	15.07.2024
17	Rehan @ Rihan vs State of UP	Criminal Misc. Bail Application No. 20315 of 2024	Sections 302, 201 IPC	29.12.2017	29.04.2024	16.05.2024	08.07.2024
18	Matthu Kahar vs State of UP	Criminal Misc. Bail Application No. 24262 of 2024	Sections 376D, 506 IPC, Section 3(2) 5 S.C./S.T. Act and Section 5/6 POCSO Act	31.01.2018	22.04.2024	24.06.2024	30.07.2024
19	Arjun Nishad Vs State of UP	Criminal Misc. Bail Application No. 2187 of 2024	Section 302 IPC	22.05.2018	16.11.2023	17.01.2024	23.02.2024
20	Anand alias Lakkad vs State of U.P.	Criminal Misc. Bail Application No. 22386 of 2024	Section 341,307, 302,34 and 504 IPC	04.12.2018	25.03.2019	28.05.2024	19.07.2024
21	Sanjeev Vs State of UP	Criminal Misc. Bail Application No. 42220 of 2022	Section 498A, 304B, 323 I.P.C. and Section 3/4 of Dowry Prohibiti	10.06.2018.	04.01.2019	15.09.2022	Interim bail on 11.07.2023 bail on

			on Act				20.12.2023
22	Sachin Vs. State of UP	Criminal Misc. Bail Application No. 17484 of 2024	Sections 302, 120B, 34 IPC	22.09.2018	08.01.2024	26.04.2024	15.07.2024
23	Farookh @ Montu Vs State of UP	Criminal Misc. Bail Application No. 17291 of 2024	Sections 376(a)(b) IPC and 5/6 of POCSO Act	01.11.2018	21.02.2024	26.04.2024	30.05.2024
24	Ravi Kumar Gupta Vs. State of U.P.	Criminal Misc. Bail Application No. 53329 of 2023	Sections 147, 148, 149, 302, 120B, 34 IPC	02.11.2018	09.10.2023	06.12.2023	16.07.2024
25	Munna @ Jaheer Ansari Vs State of UP	Criminal Misc. Bail Application No. 1464 of 2023	Section 394 IPC	19.11.2018	16.11.2022	03.01.2023	17.01.2023
26	Bhawani Vs State of UP	Criminal Misc. Bail Application No. 29480 of 2023	Sections 363, 376 IPC and S. ¾ POCSO Act	28.11.2018	18.01.2023	28.06.2023	Interim bail 13.07.2023 Bail on 20.12.2023
27	Bijendra Singh Vs State of UP	Criminal Misc. Bail Application No. 51651 of 2022	Section 8/22 of NDPS Act	17.12.2018	26.05.2022	09.11.2022	05.01.2023
28	Sunita Vs State of UP	Criminal Misc. Bail Application No. 18902 of 2024	Sections 302, 201 IPC	29.12.2018	22.02.2023	08.05.2024	09.07.2024
29	Pramod Kumar vs State of UP	Criminal Misc. Bail Application No. 17888 of 2024	Sections 498-A, 304, 302 IPC	25.01.2019	16.02.2024	03.05.2024	Interim bail on 19.07.2024 Bail on 07.08.2024
30	Amarpal Vs. State of U.P.	Criminal Misc, Bail Application No. 21189 of 2024	Sections 498A, 302 IPC	20.03.2019	10.05.2024	20.05.2024	26.07.2024
31	Sanni Kumar Vs State of UP	Criminal Misc. Bail Application No. 14467 of 2024	Sections 323, 376, 506, 354A, 394, 411, 511 IPC	20.03.2019	23.02.2024	04.04.2024	22.05.2024
32	Kamlesh Prajapati Vs State of UP	Criminal Misc. Bail Application No. 10153 of 2024	Sections 363, 366, 376, 368, 109 IPC and S.3 / 4 POCSO Act and S.3(2)(v) SC/ST Act	01.05.2019	26.02.2020	04.03.2024	01.05.2024
33	Nurulhuda Vs State of UP	Criminal Misc. Bail Application No.	Sections 363, 366, 376D IPC and	24.06.2019	21.11.2023	05.01.2024	21.05.2024

		7583 of 2024	S. 5/6 of the POCSO Act				
34	Rupa Choursiya Vs State of UP	Criminal Misc. Bail Application No. 16716 of 2024	Sections 302, 201, 120B IPC	26.07.2019	22.09.2019	25.04.2024	09.07.2024
35	Mohit @ Nemu	Criminal Misc. Bail Application No. 252 of 2024	Sections 302, 201, 34 IPC	12.12.2019	27.09.2021	03.01.2024	23.07.2024
36	Dhanush Jogi Vs State of UP	Criminal Misc. Bail Application No. 17390 of 2021	Sections 147, 148, 149, 302, 201 IPC and 10/14 DAA Act	13.02.2020	20.03.2020	20.03.2021	Interim bail on 03.07.2023 Bail 20.12.2023
37	Pintu @ Pankaj Yadav Vs. State of U.P.	Criminal Misc. Bail Application No. 297 of 2024	Sections 323, 504, 506, 308, 304	27.07.2020	29.11.2023	03.01.2024	23.07.2024
38	Smt. Aneeta Vs. State of U.P.	Criminal Misc. Bail Application No. 12100 of 2024	Sections 302, 34 IPC	17.09.2020	19.02.2024	07.03.2024	23.07.2024
39	Kirshan vs State of UP	Criminal Misc. Bail App. 17810 of 2024	Sections 302, 34 IPC	24.08.2020	10.11.2020	01.05.2024	08.07.2024
40	Laxman vs State of UP	Criminal Misc. Bail App. 25159 of 2024	Sections 323, 504, 506, 325, 304 IPC	16.02.2021	23.01.2024	01.07.2024	30.07.2024
41	Indrajeet @ Bhole Vs State of UP	Criminal Misc. Bail Application No. 741 of 2024	Sections 363, 366, 376(3) IPC and S. ¾ POCSO Act	09.03.2021	04.04.2023	03.01.2024	27.05.2024
42	Usha Devi vs State of UP	Criminal Misc. Bail App. 20387 of 2024	Sections 302, 201, 120-B IPC	25.08.2021	02.03.2023	13.05.2024	08.07.2024
43	Ram Kishun Yadav @ Chaku @ Sanjay Yadav Vs State of UP	Criminal Misc. Bail Application No. 18349 of 2024	Sections 302, 201, 120B IPC	25.08.2021	15.03.2024	03.05.2024	02.07.2024
44	Laxman Harijan Vs State of UP	Criminal Misc. Bail Application No. 13442 of 2024	Sections 376AB, 506 IPC and S. 5M/6 of POCSO Act	08.11.2021	18.02.2022	28.03.2024	28.05.2024
45	Shiv karan Verma @ SikannaVs State of UP	Criminal Misc. Bail Application No. 35903 of 2022	Sections 354Kha, 504, 506 IPC and S. 9/10 of POCSO Act	15.01.2022	07.04.2022	08.08.2022	28.01.2023
46	Jyoti Prasad urf Daroga Vs State of UP	Criminal Misc. Bail Application No. 12316 of 2024	Sections 363, 376 IPC and S. ¾ of POCSO Act	02.03.2022	17.05.2022	21.03.2024	24.04.2024
47	Mohammad Wasim Vs State of UP	Criminal Misc. Bail Applicat	Sections 363, 366, 376, 323	08.06.2022	02.11.2022	06.06.2023	12.06.2023

		ion No. 26321 of 2023	IPC and S.3/4 POCSO Act				

Second bail or subsequent bails filed before this Court

Sr. No.	Case Title	Particulars of Case		Under Sections	In Jail Since	Date of rejection of bail by High Court	Date of filing of bail before the High Court	Date of grant of bail by the High Court
48	Saleem @ Chhukali Vs State of UP	Criminal Misc. Bail Application No. 21823 of 2024		Sections 302, 323, 504 IPC	20.06.2012	08.07.2022	28.05.2024	Interim bail on 01/08/2024 Bail on 07.08.2024
49	Mumtaz vs State of U.P.	Criminal Misc. Bail Application No. 14084 of 2024		Sections 302, 201 IPC	06.05.2015	09.02.2017	22-03-2024	Interim Bail on 18.07.2024 Bail on 07.08.2024
50	Gaurav @ Shilpi Vs State of UP	Criminal Misc. Bail Application No. 54898 of 2022		Section 302 IPC	07.10.2015	08.11.2022	24.11.2022	13.07.2023
51	Deepak Tiwari Vs. State of UP	Criminal Misc. Bail Application No. 21468 of 2024		Section 302 IPC	26.05.2016	18.11.2019	20.05.2024	05.08.2024
52	Jabbar Vs State of UP	Criminal Misc. Bail Application No. 2533 of 2023		Sections 363,366,328, 342,506,376-D IPC& 5/6 POCSO Act	08.08.2016	28.11.2017	12.01.2023	19.01.2024
53	Muneesh alias Khajanchi vs State of UP	Criminal Misc. Bail Application No. 14678 of 2024		Sections 302, 120-B	26.09.2016	20.07.2021	01.04.2024	Interim bail on 18.07.2024 Bail on 07.08.2024
Sr. No.	Case Title	Particulars of Case		Under Sections	In Jail Since	Date of rejection of bail by trial court	Date of filing of bail before the High Court	Date of grant of bail by the High Court
54	Abhimanyu Kol vs State of UP	Criminal Misc. Bail App. 17144 of 2024		Sections 302, 504, 506, 34 IPC	24.01.2017	08.07.2022	29.04.2024	08.07.2024

55	Lavkush Kol vs State of UP	Criminal Misc. Bail App. 35716 of 2023		Sections 302, 504, 506, 34 IPC	31.01.2017	12.01.2021	26.07.2023	21.2.2024
56	Lalit V. State of U.P.	Criminal Misc. Bail Application No. 20268 of 2024		Sections 302 307, 147, 148, 149 IPC	09.06.2018	28.07.2021	13.05.2024	16.07.2024
57	Gullan Alias Ajay vs State of UP	Criminal Misc. Bail App. 16618 of 2024		Sections 302, 504, 120-B IPC	21.01.2019	14.07.2022	16.04.2024	09.07.2024
58	Monu Kumar Jatav vs State of UP	Criminal Misc. Bail Application No. 6880 of 2024		Section 304 IPC	01.03.2019	21.07.2022	17-02-2024	02.08.2024
59	Kamil Vs. State of UP	Criminal Misc. Bail Application No. 16379 of 2024		Sections 364, 302, 201 IPC	12.04.2019	16.07.2021	19.03.2024	07.08.2024
60	Shivchandra Vs State of UP	Criminal Misc. Bail Application No. 16606 of 2024		Sections 323, 324, 504, 304 IPC	02.04.2020	01.09.2021	23.04.2024	09.07.2024

IV **A. Right to seek bail and scope of bail jurisdiction**

18. Right of bail is vested by virtue of Section 439 of Code of Criminal Procedure,197312 (and other provisions in various special statutes).

19. With coming of the Constitution and development of constitutional law, the statutory domain of bails was transformed into a constitutional jurisdiction. The right to seek bail is derived from statute but cannot be removed from constitutional oversight.

20. The right of bail has statutory origins but can never be isolated from its constitutional moorings. The right of consideration of bail is irretrievably embedded in the fundamental right of liberty enshrined under Article 21 of the Constitution of India by holdings of constitutional courts.

21. The aforesaid authorities establish the undeniable linkage between right of bail and fundamental right to personal liberty. Every prisoner has a fundamental right to file an application for bail before the competent court as per law and without delay. (See **Junaid v. State of U.P. and another13 & Ajeet Chaudhary v. State of U.P. and another14).**

22. The discussion has the benefit of good authorities which entrench the right of an accused to seek bail in the charter of fundamental rights assured by the Constitution of India. Bail jurisprudence was firmly embedded in the constitutional regime of fundamental rights in Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh15. Casting an enduring proposition of law in eloquent speech, V.R. Krishna Iyer, J. held:

"1. Bail or jail?" — at the pre-trial or post-conviction stage — belongs to the blurred area of the criminal justice system and largely hinges on the hunch of

the Bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right."

23. The Supreme Court in **Satender Kumar Antil v. Central Bureau of Investigation and another16** held that the delays in hearing of the appeal may also be considered as a sufficient cause for grant of bail in appropriate cases. Relevant paras are extracted hereunder:

"50. Sub-section (2) has to be read along with sub-section (1). The proviso to sub-section (2) restricts the period of remand to a maximum of 15 days at a time. The second proviso prohibits an adjournment when the witnesses are in attendance except for special reasons, which are to be recorded. Certain reasons for seeking adjournment are held to be permissible. One must read this provision from the point of view of the dispensation of justice. After all, right to a fair and speedy trial is yet another facet of Article 21. Therefore, while it is expected of the court to comply with Section 309 of the Code to the extent possible, an unexplained, avoidable and prolonged delay in concluding a trial, appeal or revision would certainly be a factor for the consideration of bail. This we hold so notwithstanding the beneficial provision under Section 436-A of the Code which stands on a different footing.

57. Thus, we hold that the delay in taking up the main appeal or revision coupled with the benefit conferred under Section 436-A of the Code among other factors ought to be considered for a favourable release on bail."

24. More recently the interplay of constitutional liberty assured under Article 21 and statutory right of bail of an undertrial prisoner was affirmed by the Supreme Court in **Mohd. Muslim @ Hussain Vs. State (NCT of Delhi)17.**

25. Lastly the Supreme Court in **Javed Gulam Nabi Shaikh v. State of Maharasthra and another18**, while iterating that delay in trials may also constitute a ground for grant of bail held:

"7. Having heard the learned counsel appearing for the parties and having gone through the materials on record, we are inclined to exercise our discretion in favour of the appellant herein keeping in mind the following aspects:

(i) The appellant is in jail as an under-trial prisoner past four years;

(ii) Till this date, the trial court has not been able to even proceed to frame charge; and

(iii) As pointed out by the counsel appearing for the State as well as NIA, the prosecution intends to examine not less than eighty witnesses.

8. Having regard to the aforesaid, we wonder by what period of time, the trial will ultimately conclude. Howsoever serious a crime may be, an accused has a right to speedy trial as enshrined under the Constitution of India.

9. Over a period of time, the trial courts and the High Courts have forgotten a very well settled principle of law that bail is not to be withheld as a punishment.

19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime."

26. Engagement of fundamental rights in bail jurisprudence is a constant in constitutional law.

IV.B Legal issues arising in the cases and bail jurisdiction

27. These questions arise for consideration in the facts of this bail application and in the companion bail applications. What is the nature and scope of the right to legal aid and the correlation between the right to legal aid and right to seek bail? What are the duties of magistrates, trial courts, District Legal Services Authorities19 and Jail authorities to secure the right to legal aid and the right to seek bail vested in the prisoners?

28. The determination of merits of the bail will be predicated by a discussion on the jurisdiction of this Court to address the aforesaid issues while deciding a bail application.

29. While sitting in bail determination, this Court is not denuded of its constitutional status. The High Court is a court of record and a constitutional court irrespective of the nomenclature of the jurisdiction it is exercising. Needless to add that the High Court always exercises its jurisdiction as per law.

30. The High Court while exercising bail jurisdiction always possesses the necessary powers to pass appropriate orders for dispensing fair justice and to realize the fundamental right of an accused to seek bail. While deciding bail applications the High Court exercises a composite jurisdiction of statutory powers and constitutional obligations. At times various legal issues which directly impinge on the fair administration of justice arise for determination before this Court in bail jurisdiction. The Court cannot neglect consideration of such issues when they arise in the bail jurisdiction. Issues relating to denial of legal aid arising in the instant case and companion bail applications directly impact the right of a prisoner to apply for bail. The powers to decide all relevant legal issues having a direct bearing on the right of bail are intended to be within the jurisdiction of the High Court unless a contrary ruling is made by this Court. Declining to decide such issues which are essential for fair administration of justice in bail jurisdiction would amount to abdication of the constitutional

obligations and statutory functions of this Court. To refuse the jurisdiction in such matters would amount to absolute denial of justice.

31. The judgements rendered by this Court in **Ajeet Chaudhary v. State of U.P. and another20, Junaid v. State of U.P. and another21, Monish v. State of U.P. and others22, Anil Gaur @ Sonu Tomar v. State of U.P.23 & Maneesh Pathak v. State of U.P.24, Anurudh Vs. Sate of U.P.25** enable the court in bail jurisdiction to decide the legal issues which impede the realization of the right to seek bail vested in the accused by statute, or infringe the personal liberties of the accused secured by the Constitution, or otherwise interfere in the fair administration of justice in bail jurisdiction. The legal issues were twined with the merits of the bail in the said cases as in the instant case and companion bail applications. It is a well accepted practice of Constitutional Courts while deciding bails to direct the trial courts to expedite the trial. This practice which is applied in facts and circumstances of a case also depicts the enlarged scope of bail jurisdiction.

32. While examining the scope of powers of this Court to decide legal issues in bail jurisdiction this Court in Aman @ Vansh v. State of U.P. and 3 others26 held as under:

"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 the said (sic) issues."

[Also see: i**. (Anil Gaur @ Sonu @ Sonu Tomar v. State of U.P.27) ii. (Bhanwar Singh @ Karamvir v. State of U.P.28) iii. (Noor Alam v. State of U.P.29)]**

V A. Legal Aid : General

33. Legal aid has to made accessible to prisoners who cannot approach the competent courts to seek bail due to their marginalized social condition, financial penury or other "circumstances of undeserved want". The task before this Court is to ensure grant of legal aid to the said class of citizens within the existing framework of laws and through the agencies, authorities and courts nominated for the said purpose.

V B. Legal Aid : Article 39A of the Constitution of India and Constitutional Law

34. The search for justice inspired our freedom struggle30, the promise to secure justice defines our Constitution. Redemption of the preambled promise to serve justice to all citizens has animated legislative endeavours and judicial discourse alike in the country.

35. The Constitutional Courts in India knew that understanding the significance of life was key to providing the security of justice. While interpreting Article 21 of the Constitution of India, the Supreme Court embraced life in all its breadth and profundity and eschewed a narrow interpretation.

36. A watershed moment came when the Supreme Court liberated life from the fetters of mere physical existence. While examining the meaning of life under Article 21 of the Constitution of India, the Supreme Court added meaning to life in the case of **Olga Tellis Vs. Bombay Municipal Corporation31**, when it cited the holdings of **Munn v. Illinois32 and Kharak Singh Vs. State of U.P.33** with approval and imbibed their ratio in our constitutional bloodstream:

"32….."Life", as observed by Field, J. in Munn v. Illino is means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in Kharak Singh Vs. State of U.P".

37. Article 21 was set on a career of constantly expanding boundaries and the ambit of life was progressively enlarged.

38. **Maneka Gandhi v. Union of India34** was a landmark in the law came wherein the Supreme Court brought "reasonable, fair and just" procedure to deprive a person of his liberty within the embrace of Article 21 of the Constitution of India.

39. **Hussainara Khatoon (IV) v. Home Secy., State of Bihar35** comprehended availability of legal aid to a prisoner for securing his liberation as an essential ingredient of "reasonable, fair and just procedure" by stating:

"6….It is now well settled, as a result of the decision of this Court in *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248] that **when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be "reasonable, fair and just". Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as "reasonable, fair and just". It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him.** …….Free legal services to the poor and the needy is an essential element of any "reasonable, fair and just" procedure. It is not necessary to quote authoritative pronouncements by Judges and Jurists in support of the view that without the service of a lawyer an accused person would be denied "reasonable, fair and just" procedure."

(emphasis supplied)

40. Liberty was assured to all citizens in the constitutional text, but justice is dear to many citizens in the real world. Inalienable constitutional rights may be severed by compelling socio economic disadvantages. Poverty, social exclusion and lack of legal aid can impede the course of justice. Article 39A of the Constitution of India removes the barriers to secure justice for all citizens.

41. Article 39A of the Constitution of India underscores the importance of

providing legal aid to serve equal justice to all citizens and states so:

"39A. EQUAL JUSTICE AND FREE LEGAL AID.

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

42**. Hussainara Khatoon (IV) (supra)** after referencing Article 39A of the Constitution of India propounded the law as under:

"7. We may also refer to Article 39-A the fundamental constitutional directive which reads as follows:

39-A. *Equal justice and free legal aid.*—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities." (emphasis added)

This article also emphasises that free legal service is an unalienable element of "reasonable, fair and just" procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. **The right to free legal services is, therefore, clearly an essential ingredient of "reasonable, fair and just", procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer."**

(emphasis supplied)

43. Historically speaking Allahabad High Court had pioneered the concept of legal aid as intrinsic to a fair trial in the fabled dissent of Syed Mahmood J. in **Queen-Empress v. Pohpi and others36.**

44. Denial of legal aid causes violation of fair, reasonable and just procedure, unjustified incarceration, and curtailment of liberty. Articles 14 and 21 of the Constitution of India which assure equality and protecting the life and liberty of a citizen respectively are engaged in these circumstances.

45. Laying down the jurisprudential foundations of the right of an accused to a lawyer at the pre trial stage, the Supreme Court in the landmark judgment of **Hussainara Khatoon (IV) (supra)** acknowledged that poverty and lack of awareness of right to obtain release on bail result in injustice to the poor:

"6. Then there are several undertrial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. **It is not uncommon to find that undertrial prisoners who are**

produced before the Magistrates are unaware of their right to obtain release on bail and on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the undertrial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the undertrial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pre-trial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation-wide legal service programme to provide free legal services to them.

(emphasis supplied)

Black, J., observed in *Gideon v. Wainwright* [372 US 335 : 9 L Ed 2d at 799] :

"Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

The philosophy of free legal service as an essential element of fair procedure is also to be found in the passage from the judgment of Douglas, J. in *Jon Richard Argersinger v. Raymond Hamlin* [417 US 25 : 25 L Ed 2d 530 at 535-36] :

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect

one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.

Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed .... The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case."

46. The need to rescue the credibility of the legal system and duties of the Government of India and the State Government to put a comprehensive legal service programme in place to restore the faith of the common man in the justice system was emphasized **in Hussainara Khatoon (IV) (supra):**

"9. **We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contract with the legal system have always been on the wrong side of the law. They have always come across "law for the poor" rather than "law of the poor". The law is regarded by them as something mysterious and forbidding- always taking something away from them and not as a positive and constructive social device for changing the socio economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community.** It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services.

….We would strongly recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the constitutional directive embodied in Article 39A."

(emphasis supplied)

47. The courts have a paramount duty to ensure that prisoners appearing in criminal proceedings have access to legal aid at all times. Courts cannot remain mute spectators when legal aid is denied to prisoners in legal proceedings before them.

48. The trial courts stand at a vantage point in these matters and are best circumstanced to understand the need of

legal aid of the prisoners appearing before them.

49. The importance of a lawyer's professional expertise in a criminal trial and the right of a prisoner to seek his liberation with the assistance of a lawyer's services in the court process were found to be integral to fair procedure in the criminal justice system by the Supreme Court in **M.H. Hoskot v. State of Maharashtra37 wherein it was held** :

"14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said: [Justice and Reform, Earl Johnson, Jr. p. 11]

"What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?"

(emphasis supplied)

50. The discussion in **Hoskot (supra)** also relied on various international authorities in point:

"15. Gideon's trumpet has been heard across the Atlantic. Black, J. there observed: [Processual Justice to the People, (May 1973) p. 69 (372 US at 344 : 9 L Ed 2d at 805)]

"Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That Government hires lawyers to prosecute and defendants who have the money hires lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

16. The philosophy of legal aid as an inalienable element of fair procedure is evident from Mr Justice Brennan's [Legal Aid and Legal Education, p. 94] well known words:

"Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness."

17. More recently, the U.S. Supreme Court, in Raymond Hamlin has extended this processual facet of Poverty Jurisprudence. Douglas, J. there explicated: [Jon Richard Argersinger v. Raymond Hamlin, 407 US 25 : 35 L Ed 2d 530 at 535-36 and 554]

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect.

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries but it is in ours. From the very beginning our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. (372 US at 344. 9 L Ed 2d at 805, 93 ALR 2d 733.)

Both Powell and Gideon involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty.

* * *

The court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed .... The court should consider the individual factors peculiar to each case. These, of course would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case."

(emphasis added)

18. The American Bar Association has upheld the fundamental premise that counsel should be provided in the criminal proceedings for offences punishable by loss of liberty, except those types of offences for which such punishment is not likely to be

imposed. Thus in America, strengthened by the Powell, Gideon and Hamlin cases, counsel for the accused in the more serious class of cases which threaten a person with imprisonment is regarded as an essential component of the administration of criminal justice and as part of procedural fair-play. This is so without regard to the sixth amendment because lawyer participation is ordinarily an assurance that deprivation of liberty will not be in violation of procedure established by law. In short, it is the warp and woof of fair procedure in a sophisticated, legalistic system plus lay illiterate indigents aplenty. The Indian socio-legal milieu makes free legal service, at trial and higher levels, an imperative processual piece of criminal justice where deprivation of life or personal liberty hangs in the judicial balance."

51. The Supreme Court in **Khatri and others (II) v. State of Bihar38** underscored the pervasive legal illiteracy in the country and cast an obligation on trial judges to provide free legal aid by expounding the law thus:

"5. That takes us to one other important issue which arises in this case. It is clear from the particulars supplied by the State from the records of the various judicial Magistrates dealing with the blinded prisoners from time to time that, neither at the time when the blinded prisoners were produced for the first time before the Judicial Magistrate nor at the time when the remand orders were passed, was any legal representation available to most of the blinded prisoners. The records of the Judicial Magistrates show that no legal representation was provided to the blinded prisoners, because none of them asked for it nor did the Judicial Magistrates enquire from the blinded prisoners produced before them either initially or at the time of remand whether they wanted any legal representation at State cost. The only excuse for not providing legal representation to the blinded prisoners at the cost of the State was that none of the blinded prisoners asked for it. The result was that barring two or three blinded prisoners who managed to get a lawyer to represent them at the later stages of remand, most of the blinded prisoners were not represented by any lawyers and save a few who were released on bail, and that too after being in jail for quite some time, the rest of them continued to languish in jail. It is difficult to understand how this state of affairs could be permitted to continue despite the decision of this Court in Hussainara Khatoon (IV) case[Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, (1980) 1 SCC 98 : 1980 SCC (Cri) 40 : (1979) 3 SCR 532] . This Court has pointed out in Hussainara Khatoon (IV) case [Under Article 32 of the Constitution] which was decided as far back as March 9, 1979 that the right to free legal services is clearly an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21 and the State is under a constitutional mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. It is unfortunate that though this Court declared the right to legal aid as a fundamental right of an accused person by a process of judicial construction of Article 21, most of the States in the country have not taken note of this decision and provided free legal services to a person accused of an offence. We regret this disregard of the decision of

the highest court in the land by many of the States despite the constitutional declaration in Article 141 that the law declared by this Court shall be binding throughout the territory of India. Mr K.G. Bhagat on behalf of the State agreed that in view of the decision of this Court the State was bound to provide free legal services to an indigent accused but he suggested that the State might find it difficult to do so owing to financial constraints. We may point out to the State of Bihar that it cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The State is under a constitutional mandate to provide free legal aid to an accused person who is unable to secure legal services on account of indigence and whatever is necessary for this purpose has to be done by the State. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the court in Rhem v. Malcolm [377 F Supp 995] "the law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty" and to quote the words of Justice Blackmum in Jackson v. Bishop [404 F Supp 2d 571] "humane considerations and constitutional requirements are not in this day to be measured by dollar considerations". **Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the Magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the Magistrate as also when he is remanded from time to time.**

6. But even this right to free legal services would be illusory for an indigent accused unless the Magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 per cent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. **The Magistrate or the Sessions Judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the Judicial Magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the**

blinded prisoners and hence none was provided. We would, therefore, direct the Magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicable situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. There may be cases involving offences such as economic offences or offences against law prohibiting prostitution or child abuse and the like, where social justice may require that free legal services need not be provided by the State."

(emphasis supplied)

52. The summit court in **Suk Das v. Union Territory of Arunachal Pradesh39** did not lose sight of the prevailing ground realities of social marginalization, financial destitution and legal illiteracy which cause denial of legal aid and also call into question the fairness of the criminal justice system in the country. The obligations cast on the trial courts in this regard were reiterated:

"6. But the question is whether this fundamental right could lawfully be denied to the appellant if he did not apply for free legal aid. Is the exercise of this fundamental right conditioned upon the accused applying for free legal assistance so that if he does not make an application for free legal assistance the trial may lawfully proceed without adequate legal representation being afforded to him? Now it is common knowledge that about 70 per cent of the people living in rural areas are illiterate and even more than that percentage of the people are not aware of the rights conferred upon them by law. Even literate people do not know what are their rights and entitlements under the law. It is this absence of legal awareness which is responsible for the deception, exploitation and deprivation of rights and benefits from which the poor suffer in this land. Their legal needs always stand to become crisis-oriented because their ignorance prevents them from anticipating legal troubles and approaching a lawyer for consultation and advice in time and their poverty magnifies the impact of the legal troubles and difficulties when they come. **Moreover, because of their ignorance and illiteracy, they cannot become self-reliant: they cannot even help themselves. The law ceases to be their protector because they do not know that they are entitled to the protection of the law and they can avail of the legal service programme for putting an end to their exploitation and winning their rights. The result is that poverty becomes with them a condition of total helplessness.** This miserable condition in which the poor find themselves can be alleviated to some extent by creating legal awareness amongst the poor. That is why it has always been recognised as one of the principal items of the programme of the

legal aid movement in the country to promote legal literacy. It would in these circumstances make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal aid would become merely a paper promise and it would fail of its purpose. This is the reason why in *Khatri (II) v. State of Bihar* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228 : (1981) 2 SCR 408] , **we ruled that the Magistrate or the Sessions Judge before whom an accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State**. We deplored that in that case where the accused were blinded prisoners the Judicial Magistrates failed to discharge their obligation and contented themselves by merely observing that no legal representation had been asked for by the blinded prisoners and hence none was provided. We accordingly directed "the Magistrates and Sessions Judges in the country to inform every accused who appear before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State" unless he is not willing to take advantage of the free legal services provided by the State. We also gave a general direction to every State in the country "to make provision for grant of free legal service to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situations," the only qualification being that the offence charged against an accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free legal representation. It is quite possible that since the trial was held before the learned Additional Deputy Commissioner prior to the declaration of the law by this Court in *Khatri (II) v. State of Bihar* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228 : (1981) 2 SCR 408] the learned Additional Deputy Commissioner did not inform the appellant that if he was not in a position to engage a lawyer on account of lack of material resources, he was entitled to free legal assistance at State cost nor asked him whether he would like to have free legal aid. But it is surprising that despite this declaration of the law in *Khatri (II) v. State of Bihar* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228 : (1981) 2 SCR 408] on December 19, 1980 when the decision was rendered in that case, the High Court persisted in taking the view that since the appellant did not make an application for free legal assistance, no unconstitutionality was involved in not providing him legal representation at State cost. **It is obvious that in the present case the learned Additional Deputy Commissioner did not inform the appellant that he was entitled to free legal assistance nor did he inquire from the appellant whether he wanted a lawyer to be provided to him at State cost. The result was that the appellant remained unrepresented by a lawyer and the trial ultimately resulted in his conviction. This was clearly a violation of the fundamental right of the appellant under Article 21 and the trial must accordingly be held to be vitiated on account of a fatal constitutional infirmity, and the conviction and sentence recorded against the appellant must be set aside."**

(emphasis supplied)

53. Prophetic words which fell on institutions with short memories.

VI. <u>Statutory Schemes for Legal Aid:</u>

VI A. Legal Services Authorities Act, 1987:

54. Free legal aid which was earlier exalted as a fundamental right by constitutional law is today enshrined as a statutory right in the LSA Act, 1987 and Section 304 Cr.P.C.

55. The LSA Act, 1987 was enacted in compliance with the Directive Principles of State Policy enshrined in Article 39-A of the Constitution of India and with the avowed object to provide "free and competent legal services (to the weaker sections of the society) to ensure that the opportunities of securing justice are not denied to any citizens by any reason of economic and any other disabilities".

56. Holdings of Constitutional Court form the backdrop of the LSA Act, 1987. The scheme of Legal Services Act, 1987 vests the right of legal aid in all prisoners and simultaneously cast an iron clad obligation on authorities created thereunder to ensure fruition of the aforesaid right. Various authorities including the State Legal Services Authorities and the District Legal Services Authorities have been created under the said Act to realize the beneficent legislative aim of providing legal aid to the weaker and deprived classes of the citizenry or those who suffer from other disabling circumstances which deny them access to legal aid.

57. Repeated instances of inordinate delays in filing of bails due to lack of access to legal aid were noticed by this Court in **Anil Gaur (supra).** These facts and the above stated legal setting formed the basis of the directions of this Court in **Anil Gaur (supra). Anil Gaur (supra)** made upon authorities created under the LSA Act, 1987 to provide legal aid to the said class of prisoners to apply for bail.

58. Section 12(e) of LSA Act, 1987 contemplates "circumstances of undeserved want" as one of the prerequisites or eligibility conditions for grant of legal aid. In Anil Gaur (supra) this Court interpreted the phrase "circumstances of undeserved want" in Section 12(e) of the LSA Act,1987 as conditions of "externalities."

59. Externalities are conditions of deprivation which are imposed by misfortune. Such conditions are caused by forces beyond the control of the victim, and the cure is not within the capacity of the victim. In the context of the LSA Act,1987 these "conditions of undeserved want" result in denial of legal aid to the prisoners. The very nature of externalities leaves the prisoners to their own devices and prevents them from approaching the District Legal Services Authorities. These externalities which operate to the detriment of the prisoners can be remedied by intervention of the statutory authorities. The authorities under the LSA Act, 1987 have to approach all the prisoners, identify the prisoners who are entitled to legal aid and provide them with the same. The District Legal Services Authorities have to proactively go to the prisoners and cannot wait for the prisoners to come to them. Similarly even prisoners who are represented by counsels/defence counsels at the trial court are liable to be approached by the DLSA in case they do not file bail applications in the appointed time frame.

60. Every accused is expected to file a bail application in a reasonable time frame. [Suggested timeline was provided in **Anil Gaur(supra)].** Delay in filing of a bail application leads to a prima facie presumption that the prisoner has no access to legal aid. When a bail application is not filed in the indicated period in the timeline, the District Legal Services Authority has to apprise the prisoners of their right to seek bail and suo moto required to make enquiries into the need for legal aid and facilitate the filing of the bail application. (See Anil Gaur(supra)). The concept of District Legal Services Authorities processing legal aid only after receipt of application from the victims of "undeserved want" or declining to commence enquiry into need for legal aid merely because the prisoner is represented by a counsel/defence counsel at the trial is liable to be discarded in respect of persons imprisoned in jails.

VI B. Section 304 Cr.P.C./ Section 341 of BNSS, 2023

61. The legislature was cognizant of the importance of the right of legal aid for prisoners who for various reasons are unable to engage a lawyer and the need to provide for a mode of implementation of the right. Section 304 Cr.P.C. vests the right of legal aid in a prisoner and casts a duty upon the Courts to secure the said right. The right to free legal aid, the responsibility of the courts and the Government as stated in Section 304 of Cr.P.C. is extracted below:

"304. Legal aid to accused at State expense in certain cases.-(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for-

(a) the mode of selecting pleaders for defence under sub- section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fees payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub- sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session."

62. The legislative intent is clear from a plain reading of the provision and the word "shall" which prefaces the duty of the court to assign a pleader.

63. The provision shall be interpreted in light of the settled canons of statutory interpretation. The word 'shall' employed in the statute depicts the legislative intent of giving the provision mandatory force **[See: State of Haryana Vs. Raghubir Dayal40, and Ram Dhani And Another Vs. State of U.P.41]**

64. In view of the phraseology or words employed by the legislature in Section 304 Cr.P.C. and the holdings of Constitutional Courts discussed earlier, this court finds that the provision is mandatory in character and defines the imperative obligations of the trial courts. Under Section 304 Cr.P.C., the duty of the trial

courts is to grant of legal aid to needy/eligible prisoners (appearing before them) commences from the pre trial stage. In light of the constitutional law backdrop and the authorities in point discussed earlier "Court of Session" in Section 304 Cr.P.C. shall mean all trial courts and magistrates.

65. Section 304 Cr.P.C. which has been referenced and interpreted in this judgement shall also mean to include Section 341 of Bharatiya Nagarik Suraksha Sanhita, 202342. The newly introduced provision under the BNSS, 2023 which corresponds to Section 341 of BNSS, 2023 is extracted hereinunder:

" Legal aid to accused at State expense in certain cases.

341. (1) Where, in a trial or appeal before a Court, the accused is not represented by an advocate, and where it appears to the Court that the accused has not sufficient means to engage an advocate, the Court shall assign an advocate for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for—

(a) the mode of selecting advocates for defence under sub-section (1);

(b) the facilities to be allowed to such advocates by the Courts;

(c) the fees payable to such advocates by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session."

66. The provision is analogous/pari materia with Section 304 Cr.P.C. insofar as it relates to the duties of the courts to engage an advocate for an accused in need of legal aid. The duties of the courts flowing from Section 304 Cr.P.C. as interpreted in this judgement shall also apply to the duties of the courts contemplated in Section 341 of BNSS, 2023.

67. The right to legal aid exists whenever the applicant is produced before the magistrate or trial court and not only at the start of the trial.

68. The duty of the trial court under Section 304 Cr.P.C./ Section 341 of BNSS, 2023 extends to apprise every prisoner of the right to seek bail, and to provide legal aid to a needy accused to file a bail application before the competent court. The phrase "where it appears to the trial court" envisages that the magistrate trial court should apply their mind to germane facts and make relevant enquiries to determine the need for legal aid of the accused appearing before them. Various relevant facts including the details/information enumerated in **Appendix-Ii** have to be factored in by the trial courts while examining the need of legal aid of a prisoner.

69. While making the aforesaid enquiry under Section 304 Cr.P.C./Section 341 of BNSS, 2023 the trial court may consider the material in the record and may also requisition relevant details/information from various authorities like the public prosecutor, police authorities, District Legal Services Authority, Secretary High Court Legal Services Committee, jail authorities, High Court Registry.

80. Many of the said details are already available on the web resources/in auto-generated form with various institutions which can be legally accessed.

81. The said authorities (including police authorities, jail authorities, DLSA, Secretary HCLSC) are liable to cooperate with the trial courts and provide the demanded information with promptitude. Any delay on part of the trial courts or the said authorities will defeat the purpose of legal aid.

82. Proper coordination between different wings of governance and IT facilities will be needed to enable the trial courts to retrieve the said information with ease to execute the mandate of Section 304 of Cr.P.C./ Section 341 of BNSS, 2023.

83. The right of legal aid under Section 304 Cr.P.C./ Section 341 of BNSS, 2023 will be effectuated when enquiries of such nature are made by the learned trial court at every trigger event in the time line provided in this judgment and appropriate action is taken by the trial court. (See: Paras 111,112,113,114).

84. The narrative will be fortified by authorities in point handed down by constitutional courts. The cases discussed hereinunder shall apply in equal measure to grant of legal aid by trial courts to prisoners for seeking bail.

85. The appellant in **Mohd. Hussain @ Zulfikar Ali v. State (Govt. of NCT of Delhi)43,** was a foreign national who did not have a defence counsel and was tried and convicted by the trial Court. Upon examining the facts of the case and after considering the relevant provisions of Cr.P.C., the Supreme Court in **Mohd. Hussain @ Zulfikar Ali (supra)** opined that the appointment of an effective a counsel is a prerequisite of a fair trial and laid down the law as follows:

"11. The appellant was initially assisted by a learned counsel employed by the learned Sessions Judge. However, in the midway, the learned counsel disappeared from the scene, that is, before the conclusion of the trial. It is apparent from the records that he was not asked whether he is able to employ counsel or wished to have the counsel appointed. When the parties were ready for the trial, no one appeared for the accused. The court did not appoint any counsel to defend the accused. Of course, if he had a defence counsel, I do not see the necessity of the court appointing anybody as a counsel. **If he did not have a counsel, it is the mandatory duty of the court to appoint a counsel to represent him.**

(emphasis supplied)

12. The record reveals that the evidence of 56 witnesses, out of the 65 witnesses examined by the prosecution in support of the indictment, including the eyewitnesses and the investigating officer, were recorded by the trial court without providing a counsel to the appellant**. The record also reveals that none of the 56 witnesses were cross-examined by the appellant-accused. It is only thereafter, the wisdom appears to have dawned on the trial court to appoint a learned counsel on 4-12-2003 to defend the appellant. The evidence of the prosecution witnesses from 57 to 65 was recorded in the presence of the freshly appointed learned counsel, who thought it fit not to cross-examine any of those witnesses. Before the conclusion of the trial, she had filed an application to cross-examine only one prosecution**

witness and that prayer in the application had been granted by the trial court and the learned counsel had performed the formality of cross-examining this witness. I do not wish to comment on the performance of the learned counsel, since I am of the view that "less said the better". In this casual manner, the trial, in a capital punishment case, was concluded by the trial court.

(emphasis supplied)

23. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result, the accused charged with a serious offence must not be stripped of his valuable right of a fair and impartial trial. To do that, would be negation of concept of due process of law, regardless of the merits of the appeal. **The Criminal Procedure Code provides that in all criminal prosecutions, the accused has a right ot have the assistance of a counsel and the Criminal Procedure Code also requires the court in all criminal cases, where the accused is unable to engage counsel, to appoint a counsel for him at the expenses of the State. Howsoever guilty the appellant upon the inquiry might have been, he is until convicted, presumed to be innocent. It was the duty of the court, having these cases in charge, to see that he is denied no necessary incident of a fair trial.**

(emphasis supplied)

24**. In the present case, not only was the accused denied the assistance of a counsel during the trial but such designation of counsel, as was attempted at a late stage, was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. The court ought to have seen to it that in the proceedings before the court, the accused was dealt with justly and fairly by keeping in view the cardinal principles that the accused of a crime is entitled to a counsel which may be necessary for his defence, as well as to facts as to law.** The same yardstick may not be applicable in respect of economic offences or where offences are not punishable with substantive sentence of imprisonment but punishable with fine only. **The fact that the right involved is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our judicial proceedings, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of a counsel was a denial of due process of law. It is equally true that the absence of fair and proper trial would be violation of fundamental principles of judicial procedure on account of breach of mandatory provisions of Section 304** CrPC.

(emphasis supplied)

26. The learned counsel for the respondent State, Shri Attri contends that since no prejudice is caused to the accused in not providing a defence counsel, this Court need not take exception to the trial concluded by the learned Sessions Judge and the conviction and sentence passed against the accused. I find it difficult to accept the argument of the learned Senior Counsel. The Criminal Procedure Code ensures that an accused gets a fair trial. It is essential that the accused is given a reasonable opportunity to defend himself in the trial. He is also permitted to confront the witnesses and other evidence that the prosecution is relying upon. He is also allowed the assistance of a lawyer of his choice, and if he is unable to afford one, he is given a lawyer for his defence. The right to be defended by a learned counsel is a

principal part of the right to fair trial. If these minimum safeguards are not provided to an accused; that itself is "prejudice" to an accused."

86. In **Manglu Vs. State of U.P.44** rendered by the Allahabad High Court the appellant/prisoner was not represented by a counsel when he was produced before the Court from jail custody before the court and when he was charged. Upon consideration of authorities in point and the provisions of Cr.P.C. this Court **in Manglu (supra)** held:

"21. From perusal of the aforesaid provisions of law as well as the law laid down by Hon'ble the Supreme Court in the above judgments, now it is clear that right to legal aid to indigent and poor person is implicit in the right of guarantee as provided under Article 21 of the Constitution of India. An accused is entitled to avail the aforesaid right of free legal aid at the first instance that is at the time of his production before the Magistrate and/or Sessions Judge. The Magistrate and Sessions Judge are legally bound to inform the accused about the said right and it is imperative for them to engage a lawyer on behalf of the accused on the first day, at the State cost. Rule 37 of the General Rule (Criminal), 1977 framed by Allahabad High Court makes it imperative upon the Sessions Judge to engage a counsel on behalf of the accused persons on the first date on which the case has come before it, if the charge against him is such that a capital sentence is possible. It is also clear that if there is any violation of aforesaid law and the judgments, then the same will vitiate the trial as the same is not in accordance with the procedure established by the law.

24. It is not out of place to mention that the under Section 227 of the Code of Criminal Procedure, the accused persons has a right to be released by filing an application for discharge and for that purpose, the accused persons has a right to be heard by learned Additional Sessions Judge before framing the charge. In this background of the case, the aforesaid valuable right of the accused has been denied in this case. We further find that by doing so, the learned Additional Sessions Judge had violated the mandatory provisions of Rule 37 of General Rule (Criminal), 1977, which makes it imperative for the learned Additional Sessions Judge to engage a lawyer for defending the accused if the charge against him is such that a capital sentence is possible. As noticed above, in this case charge-sheet has been submitted in this case under Section 302 of the Indian Penal Code in which capital sentence is possible."

87. After citing relevant provisions of the Constitution and the Cr.P.C., the Madras High Court spoke in similar terms regarding the precious right to legal aid of a prisoner in **S. Yuvaraj Vs. State rep. By The Inspector of Police, Gobichettypalayam45 :**

"16. 'Hearing' a person, who is accused of having committed certain offences should not be a 'mere hearing'. Hearing him without the assistance of a legally trained person is like hearing a deaf and dumb person. It will not be giving him a 'reasonable opportunity'. It will be an 'empty formality'. It will be negation of principles of natural justice. Thus, Article 22(1) Constitution of India provides right to accused persons to be defended by a lawyer of their choice.

17. Assuring their constitutional right to legal representation enshrined in Article 22(1), Section 303 Cr.P.C. has been inserted in the New Code of Criminal Procedure,1973. It provides for right of accused to be defended by a lawyer of his choice. Article 22 (1) read with Article 21 and Section 303 Cr.P.C. reiterates a facet of human right of the accused persons. It is really a matter of 'access to justice'.

18. Such right cannot be denied nor deprived due to financial constraints. Thus, a duty is cast on the State to provide legal assistance, legal aid to the needy. Section 304 Cr.P.C. is for providing legal aid to persons more particularly who are facing trial in a Sessions Court. This has also been strengthened by the introduction of Article 39-A in the Constitution through the 42 Amendment.

19. It is pertinent here to mention that in 1981, in Khatri (II) case relating to the infamous Bhalpur blinding of prisoners in certain Bihar jail, Hon'ble Apex Court directed all the Magistrates and the Sessions Judges to inform the accused persons of their constitutional right to be defended by a lawyer. But, in practice, this mandate has been observed much in breach than observance."

88. The duty to appoint lawyers cast upon the trial courts is not merely an empty procedural formality but a judicial act with serious repercussions. The need to appoint counsels of marked ability was emphasized by the Patna High Court in **Darpaon Potdrain v. Emperor46:**

"10…We desire to make some remarks about the defence of prisoners who are too poor to instruct lawyers on their own account. To see whose duty it is to select lawyers to defend at the expenses of the Crown should not treat the selection as a matter of patronage for the benefit of the lawyer so appointed. The selection should be made from among young men of marked ability. We have frequently observed that the persons actually appointed, do their work very badly and conspicuous opportunities for cross examination and obvious arguments are entirely ignored…"

89. In the same vein a Division Bench of this Court emphasised the duties of the courts while coming to the following conclusions in **Ram Awadh v. State of U.P.47 :**

"14. The requirement of providing counsel to an accused at the State expense is not an empty formality which may be not by merely appointing a counsel whatever his calibre may be. When the law enjoins appointing a counsel to defend an accused, it means an effective counsel, a counsel in real sense who can safeguard the interest of the accused in best possible manner which is permissible under law. An accused facing charge of murder may be sentenced to death or imprisonment for life and consequently his case should be handled by a competent person and not "by a novice or one who has no professional expertise. **A duty is cast upon the Judges before whom such indigent accused are facing trial for serious offence and who are not able to engage a counsel, to appoint competent persons for their defence. It is needless to emphasis that a Judge is not a prosecutor and his duty is to discern the truth so that he is able to arrive at a correct conclusion**. A defence lawyer plays an important role in bringing out the truth before the Court by cross-examining the witnesses and placing relevant materials or evidence. The absence of proper cross-examination may at times result in miscarriage of justice and the

Court has to guard against such an eventuality."

(emphasis supplied)

VIC. General Rules (Criminal)

90. Rule 37 of General Rules (Criminal) casts a duty on the committing magistrate to enquire into the fact as to whether the accused has engaged a counsel and as regards his means to do so. The provision is extracted hereinbelow:

"37. When counsel should be engaged for accused—In anycase which comes before a court of session, the court may engage counsel to defence the accused person if—

(a) the charge against him in such that a capital sentence is possible, and

(b) it appears that he has not engaged counsel and is not possessed of sufficient means to do so."

To enable the Session court to arrive at a decision as regards the second condition in the preceding paragraph, the committing magistrate shall in such case make enquires from the accused at the time of commitment and after making such other enquiries as may be necessary, report within a month of the commitment order to the court to which the commitment is made whether the accused is possessed of sufficient means to engage counsel. Each case must be decided on its merits and no hard and fast rule as to insufficiency of means should be applied. The sessions court in making its decision shall not be bound by the report of the committing Magistrate.

Counsel appointed under this rule, shall be furnished with the necessary papers free of cost and allowed sufficient time to prepare for the defence."

91. Rule 37 of General Rules (Criminal) has to be interpreted in light of the right to legal aid propounded by the Supreme Court and the right to seek bail enunciated by constitutional courts as discussed earlier. A narrow interpretation will not be consistent the intent of the provision. Rule 37 of the General Rules (Criminal) enjoins upon every magistrate to also examine the need for legal aid for seeking bail and for his defence at the trial of every accused appearing before them48. The task will be performed by the magistrate whenever the accused appears and also in consonance with the trigger events in the timeline drawn up in the latter part of the judgement.

VI D. Jail Manual

92. Jail manual does not merely confer policing duty on the jail officials. The Jail Manual contemplates that jail officials are the protectors of the rights of prisoners under their watch. Duties of jail officials for ensuring access to legal aid to the prisoners are provided in the Jail Manual. The relevant provisions are extracted hereinunder:

"439(a). Whenever an undertrial prisoner is detained in jail for an undue long period the Superintendent shall address the District Magistrate or the Sessions Judge, as the case may be, with a view to the speedy disposal of his case or the exercise by him of the power of releasing the prisoner on bail."

93. The aforesaid provision was substituted and Rule 412(a) of UP Jail Manual, 2022 was introduced which is extracted hereinunder:

"412. Precautions against undue detentions—(a) Whenever an

undertrial prisoner is detained in jail for an unduly long period the Superintendent shall address the District Magistrate and the Chief Judicial Magistrate or the Sessions Judge, as the case may be, with a view to the speedy disposal of his case or the exercise by him of the power of releasing the prisoner on bail."

94. The manner of the communication with the legal adviser for a fulsome legal consultation with the prisoner are provided for in Rule 434 of UP Jail Manual, 2022 which is reproduced hereinunder:

"434**. Written communications from undertrials for legal advisers**—Any bonafide written communication prepared by an undertrial prisoner as instructions to his legal adviser shall be forwarded to that legal adviser and the Superintendent shall not disclose the contents of the communication or any portion thereof to any other person.

The following facilities shall be extended to all undertrial prisoners—

(a) Legal defence,

(b) Signing Vakalatnama,

(c) Delegation of power-of-attorney,

(d) Execution of will,

(e) Applications for legal aid at Government cost as per provisions of law,

(f) Other applications to Courts,"

95. The importance of the duties of the Jail Superintendent defined in Regulation 439(a) of the Jail Manual/ Rule 412(a) of UP Jail Manual, 2022 read with Rule 434 of Jail Manual, 2022 lies in the fact that they have a direct bearing on realization of the fundamental rights of life and liberty guaranteed to each prisoner under Article 21 of the Constitution of India.

96. Regulation 439(a) of the Jail Manual/ Rule 412(a) of UP Jail Manual, 2022 read with Rule 434 of Jail Manual, 2022, mandates the Jail Superintendent to be alert to prolonged imprisonment of any prisoner. The phrase "unduly long period" has to be read in light of the suggested timeline of events discussed in the later part of the narrative (see paras 111,112,113,114) Thereafter the Jail Superintendent is under an obligation of law to apply their49 mind to all relevant aspects of the case and make a recommendation to the Sessions Judge/DLSA for grant of legal aid to process the bail application of the said prisoner. Some of the relevant facts and issues which have to be factored in while making the said recommendation for grant of legal aid are depicted in Appendix-I. In absence of such details the Jail Superintendent will be hampered in performing the duties under Regulation 439(a) of the Jail Manual/ Rule 412(a) of UP Jail Manual, 2022 read with Rule 434 of Jail Manual, 2022.

97. Similarly, the Rule 434 of the UP Jail Manual, 2022 contemplates effective consultations of undertrial prisoners with their legal advisers. Legal advisors may include the legal aid counsel provided by the DLSA or the trial court as the case may be. Rule 434 of the Jail Manual, 2022 also embraces bail applications. Prisoners at times cannot arrange for documents required for filing the bail application due to their imprisonment. The prisoners have to be assisted by the Jail Superintendent to obtain the said documents as per law.

VI E. Decision making process for grant of legal aid: Relevant considerations and availability of necessary information:

98. The process of grant of legal aid contemplates a personal interface or the

interaction of each prisoner with the magistrates, trial courts, DLSAs and jail authorities. Further while processing grant of legal aid to prisoners the magistrates, trial courts, DLSAs, jail authorities also need to consider relevant facts and germane issues. Some of the facts which the learned trial courts, learned magistrates, DLSAs and the jail authorities are liable to consider in the aforesaid process are depicted in Appendix I. Absent consideration of relevant facts or lack of easy accessibility to such factual details may vitiate the process of grant of legal aid.

99. Many a time the aforesaid factual details of the prisoners (whose case for grant of legal aid is under examination) are not readily available with the learned trial courts or DLSAs or the jail authorities. Individually the task of gathering such information for each prisoner by the trial court/DLSA or the jail authority may prove to be a time consuming and cumbersome exercise. The said factual information by its nature is voluminous and requires regular updation. Regular updation of such information entails collection and processing of large amounts of data. Such vast amounts of information can be managed more efficiently by use of IT. IT solutions/digital platforms can an auto generate the said information in respect of each prisoner in every jail. The responsibility falls on the State Government to provide all relevant and updated details (including those appended in Appendix-I) in an auto generated form to the Jail Superintendents.

100. The State Government may establish appropriate coordination with the High Court. Such auto-generated information/data can be shared with District Legal Services Authorities, magistrates and trial courts in consultation with the High Court.

101. A lot of the data and information (depicted in Appendix I) which is required in the aforesaid process is already available on various digital platforms/digital interfaces being administered by different courts and authorities. The criminal history of each accused is available with the police authorities in an auto generated form with the U.P. Police. As per the standard operating procedures the police authorities are also required to update the status of bail applications pending in different courts. The said procedures need to be strictly implemented. The updated status of all bail applications are posted on the High Court website which is accessible to all.

102. The data already available on official digital platforms can be consolidated and upgraded to include various relevant facts and details. Digital infrastructure/I.T. platforms of this nature will enhance the capacity of the trial courts, DLSAs and jail authorities to process the grant of legal aid to prisoners in an efficient manner.

VII. Stand of the State Government : Instructions & Affidavits

103. Instructions sent by the State Government departments to the learned AGA are taken in the record. The said instructions disclose that the criminal case details of the accused are available with the police (CCTNS) which are shared with ICJS portal and the data is accessible to all pillars. The instructions also state that various coordination meetings are held under the Chairmanship of DGP, Chief Secretary, Govt. of UP regularly and requirements can be highlighted by each pillar. The said instructions also suggests

that the prosecution/court need to update bail applications on relevant portals.

104. The affidavits have been filed on behalf of LR/Principal Secretary (Law), DG (Prisons), and Additional Director General of Police (Technical Services), Government of UP. in a connected bail application (Criminal Misc. Bail Application No. 16379 of 2024, Kamil Vs. State of UP) are most encouraging and depict a supportive and positive role of the Government. The affidavits also acknowledge that a number of details including Appendix-I which are required for determining the need for legal aid and to process the bail applications of needy prisoners are also available on the web portals which are administered by the various stakeholders. Regular coordination meetings are also being proposed to ensure that said information can be smoothly accessed by the pillars i.e. departments/courts/jails.

105. From the instructions and affidavits filed by the State authorities and the submissions of learned Additional Advocate General assisted by the learned GA and learned AGA-I it is evident that the State authorities consider themselves as stakeholders and not adversaries in the controversy. The State Government/authorities have owned up to their responsibilities in regard to prisoners in need of legal aid and have acknowledged the requirement to make relevant information available to the Jail Superintendents for processing grant of legal aid to prisoners.

106. The State Government through the Law Remembrancer (L.R.)/Principal Secretary (Law), Government of Uttar Pradesh Lucknow, Additional Chief Secretary (Home), Government of Uttar Pradesh Lucknow, Director General of Police, Government of Uttar Pradesh Lucknow, Director General (Prosecution), Government of Uttar Pradesh Lucknow, Director General (Prisons), Government of Uttar Pradesh Lucknow shall take necessary and urgent steps to provide the details of every prisoner (including those in Appendix-I) to the jail authorities and to upgrade the jail infrastructure for the said purpose.

VIII A. Right to Legal Aid & Quality of Legal Aid

107. The Constitutional Courts have not been oblivious to the wide variations in the quality of legal aid and competence of defence counsels representing the prisoners.

108. The role of the court is not limited to be mere appointment of the counsel for the accused. While appointing counsels for the accused the courts have to be alert to the benchmark standards of professional expertise, diligence and integrity required for effective prosecution of the case on behalf of an accused. Furthermore the court also has to ensure that the said threshold standards are duly adhered to by the counsels at all times during the criminal proceedings. Faithful discharge of these functions by the courts not only subserves the legislative intent of Section 304 Cr.P.C./ Section 341 of BNSS, 2023 but also fulfils the constitutional guarantees of a fair trial assured to every accused. [Also see: Supreme Court in **Ramanand @ Nandlal Bharti v. State of U.P. of U.P.50]**

VIIIB**. Right to Legal Aid and Right to seek Bail : A Composite Scheme**

109. Right to seek bail and the right to legal aid are part of an integrated scheme comprising of holdings of constitutional law and enactments of the legislature. Infact the right to seek bail has a symbiotic relationship with the right of legal aid.

110. The right to seek bail will be an illusion till the right to legal aid becomes a reality. This particularly so for a large number of prisoners belonging to marginalized classes of the citizenry and those suffering from "circumstances of undeserved want" or facing other disabling conditions which prevent them to file bail applications for lack of legal aid. Providing legal aid to this category of citizens is a prerequisite for realizing their right to seek bail and bringing their fundamental rights and liberties to fruition.

111. Failure to file a bail application51 on a timely basis gives rise to an inference that the prisoner could not approach the Court for grant of bail due to lack of access to legal aid. An obligation is cast on the trial courts/Magistrates, the DLSAs and the jail authorities to proactively and independently examine the need of each prisoner for legal aid at each trigger event in a timeline proposed below. [Also see Anil Gaur(supra)]. The presumption about the need of the said class of legal aid will exist till such enquiry is completed. Thereafter legal aid shall be provided to every eligible prisoner/accused to apprise them52 of the right to seek bail and to file a bail53 application before the competent court. The enquiry into the need for legal aid shall be made by the magistrate, trial courts, District Legal Services Authorities, Jail Superintendents without waiting for an application from the prisoners seeking legal aid and irrespective of the fact whether the accused/prisoner is represented through a counsel before the trial court or has been provided a defence counsel before the trial court.

(emphasis supplied)

112. A suggested timeline of events to trigger the magistrates/trial courts, District Legal Services Authorities and the jail authorities respectively to examine the issue of grant of legal aid to advise a prisoner to file a bail application and to help process the bail application are depicted below:

SUGGESTED TIMELINE OF TRIGGER EVENTS FOR ENQUIRY INTO NEED FOR LEGAL AID

1.	Time period since the imprisonment when the bail application should be filed before trial court	3 months
3 months	xTime period when the bail application should be filed before High Court after rejection of the bail application by the trial court	6 months
3.	Time period of filing subsequent bail applications after rejection of earlier bail application by the High Court. (The process will be repeated after the time gap).	1 year Or if advised at a prior period in time.
4.	Time period for bail application after earlier bail application was dismissed for non prosecution	One week

113. Trigger event is the point in the above suggested time line when enquiry has to be made by the trial court, District Legal Services Authority or the jail authority or the Secretary, High Court Legal Services Committee into the need for legal aid of a prisoner. Thereafter the District Legal Services Authorities or the jail authority or the trial court or the magistrate shall provide legal aid to every eligible prisoner to file the bail application54. The said authorities/courts respectively shall mandatorily and

independently examine the case for grant of legal aid to the each prisoner.

114. It is reiterated that the above said time line is only suggestive in nature and may be shortened by trial courts/magistrates, DLSAs, Secretary, HCLSC or the jail authorities as the case may be in the facts and circumstances of each case or by means of a rule made in that regard.

115. Fundamental rights defined in the constitution are multi faceted. Often concomitant rights are derived from the constitutional text of the Fundamental Rights and evolved in holdings of constitutional country. At times concomitant rights are inalienable from the respective Fundamental Rights. The concomitant rights of the right to legal aid and right to seek bail which bring both the fundamental rights to fruition are enumerated below. The integration of various concomitant rights in the Constitutional right to life under Article 21 of the Constitution is evident from the case literature in point. In **Navtej Singh Johar v. Union of India55,** the Supreme Court referencing the importance of concomitant rights in the effectuation of the Right to Life under the Constitution held:

"483….. In the evolution of its jurisprudence on the constitutional right to life under Article 21, this Court has consistently held that the right to life is meaningless unless accompanied by the guarantee of certain concomitant rights including, but not limited to, the right to health... The right to health is understood to be indispensable to a life of dignity and well-being, and includes, for instance, the right to emergency medical care and the right to the maintenance and improvement of public health. [*CESC Ltd. v. Subhash Chandra Bose, (1992) 1 SCC 441 : 1992 SCC (L&S) 313; Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42 : 1995 SCC (L&S) 604; Paschim Banga Khet Mazdoor Samityv. State of W.B., (1996) 4 SCC 37; Society for Unaided Private Schools of Rajasthan v. Union of India, (2012) 6 SCC 1 : 4 SCEC 453; Devika Biswas v. Union of India, (2016) 10 SCC 726; Common Cause v. Union of India, (2018) 5 SCC 1.]"*

116. In wake of the preceding discussion, various facets of the right to seek bail and right to legal aid which are entrenched by Articles 14 and 21 of the Constitution of India and also vested by statutes can be summed up as follows:

(a) Every prisoner has a right to promptly seek bail from the competent court. This right includes the right to file subsequent bail applications after rejection of the earlier bail applications.

(b) Every prisoner has to be apprised of the right to seek bail at various stages of the criminal law process/ trigger events in the suggested time line by the magistrate, trial court, DLSA and superintendent of jail (A suggestive time line has been drawn up in the preceding part of the narrative, See: Paras 111,112,113,114)

(c) Every eligible prisoner is entitled to legal aid to file a bail application56 at every such stage/ trigger events in the suggested time line. (A suggestive time line has been drawn up in the preceding part of the narrative, See: Paras 111,112,113,114). The said stages in the timeline are the "trigger events" for the learned trial courts, magistrates and DLSAs to process the grant of legal aid to each prisoner.

(d) Every prisoner has a right to timely and updated information about the status of their57 bail application.

(e) Every prisoner has a right to be informed of the steps taken by their counsel/DLSA for effective and diligent prosecution of the bail application to ensure its early hearing.

(f) Delay in filing and hearing of the bail application frustrates the right to legal aid and defeats the right to seek bail.

117. Various statutes contain provisions for grant of legal aid to prisoners. Several statutory authorities/Courts under the respective statutes are vested with the powers and charged with the duties to provide legal aid to eligible persons. The overarching intent of different statutes is to undertake multipronged efforts to provide legal aid to needy prisoners. The task before this Court is to distil the statutory duties of the courts and authorities under the said enactments and to create concert between them to achieve the statutory aims.

IX. Charter of Prisoners' Rights

118. The rights of prisoners distilled in para 116 shall be called the "Charter of Prisoners' Rights". The aforesaid paragraph 116 (alongwith those mentioned therein) shall be translated in Hindi (alongwith the other paragraphs mentioned therein) and posted at every barrack in every jail. The Charter shall be read out to the prisoners on national festivals like August 15, October 2 and January 26.

X. Duties of the magistrates / trial courts / DLSAs / jail authorities :

119. In wake of the preceding discussion it can be safely stated that an ironclad obligation is made by law upon the learned magistrate, learned trial courts, DLSAs and jail authorities to realize the rights of a prisoner to legal aid and to seek bail. The duties of the magistrates/trial courts/DLSAs/HCLSC/jail authorities are summed up as follows:

A. The duties of the magistrate/trial courts:

I. The learned trial court/learned magistrate shall examine whether the accused/prisoner appearing before them58 has been apprised of the right to file a bail application at different stages or trigger events in the suggested timeline and whether such right has been exercised (See: Paras 111,112,113,114 of this judgment) and the eligibility of said accused for legal aid.

II. The learned magistrate/learned trial court after the above consideration at the occurrence of the trigger event or expiration of the time limit in the suggested time frame (see: Paras 111,112,113,114) shall make a finding on the need/eligibility of the prisoner for legal aid and exercise either of the following options:

a) The learned magistrate or learned trial court shall send a requisition to the District Legal Services Authority or the Secretary, High Court Legal Services Committee to provide legal aid to the prisoner to apprise them of the right to seek bail59 and to file the bail application before the competent court.

b) The learned magistrate or learned trial court may pass orders for grant of legal aid to the accused/prisoner for the above said purpose.

III. There are many prisoners who face trial in a district court but are lodged in a jail in another district. The learned magistrate/trial court shall recommend grant of legal aid to the District Legal Services Authorities of either district.

Alternatively the learned magistrate or learned trial court, can pass

orders for grant of legal aid to the accused/prisoners.

IV. To process the need for legal aid the learned magistrate/learned trial court can rely on the materials in the record, and may also seek the necessary information (suggested details in Appendix-I) from any competent authority which can furnish the said information including Public Prosecutor/ State, Police authorities, District Legal Services Authorities, Jail authorities, High Court Registry or official websites which can be legally accessed. (At a later stage the said details shall be made available to the learned magistrate/ learned trial court in an auto-generated form by the competent authorities).

V. The learned magistrate/ learned trial court may take any other step or measure to realize the rights of prisoners to legal aid and to seek bail respectively and to implement this judgement.

VI. The learned magistrate/learned trial court shall examine the need of legal aid irrespective of whether such prisoner is represented by a local counsel at the trial or has been provided with a defence counsel.

VII. After the rejection of any bail application the learned trial court/learned magistrate are directed to ensure that the trial process is expedited in strict adherence to provisions of Section 309 Cr.P.C. and in conformity with fundamental principle of fair trial. In doing so the trial court shall be guided by the law laid down by this Court in **Bhanwar Singh @ Karamvir Vs. State of U.P.60 and Noor Alam Vs. State of U.P.61.**

B**. Duties of District Legal Services Authorities:**

120. In wake of the preceding discussion the duties of the District Legal Services Authorities are summed up as follows:

I. The District Legal Services Authorities shall maintain records of each prisoner containing all information required for determining the need of a prisoner for legal aid and to file a bail application before the competent court. A suggested framework of such details is appended as appendix-I which can assist the District Legal Services Authorities to perform its functions.

II. As of now the DLSAs may utilize the available resources like Allahabad High Court Website, obtain information from authorities and "any other official resources/digital platforms" they can lawfully access.

III. The task of gathering the aforesaid factual details (Appendix-I) is undoubtedly a time consuming exercise. The DLSAs may also need additional resources. The DLSAs may consider feasibility of taking the assistance of para legal volunteers and law students for collecting the said factual details. The DLSAs may also make local innovations with the existing resources to create the database of the said details. (Appendix-I) (At a later stage the said details shall be made available to the DLSA in an auto generated form by the competent authorities).

IV. To inform every prisoner of their62 right to legal aid to file a bail63 at different stages/proposal timeline/trigger events (as discussed earlier in Paras 111,112,113,114).

V. To provide legal aid to every eligible prisoner at different stages/trigger events in the proposed time lines (as discussed in Paras 111,112,113,114) to file

the bail64 application before the competent court.

VI. To ensure relevant documents and informations and other requisite assistance are provided to legal aid counsels and assist in any other manner to facilitate the filing of the bail application.

VII. To update the said prisoners on their status of the bail applications.

VIII. To constantly oversee diligent prosecution and steps taken by the legal aid counsel to ensure an early hearing of the bail application so filed and keep a record of the same.

IX. To ensure proper coordination with the learned trial courts, HCLSC and District Jail Authorities.

X. To strictly comply with the directions issued in **Anil Gaur (supra)** in the case of prisoners whose cases are pending in other district and in this case.

XI. To take any other step or measure to realize the rights of prisoners to legal aid and to seek bail respectively and to implement this judgement and the judgment in **Anil Gaur (Supra).**

[Note: Also see para 111]

C. Duties of Secretary, High Court Legal Services Committee:

121. In wake of the preceding discussion the duties of the Secretary, High Court Legal Services Committee are summed up as follows:

I. Secretary, High Court Legal Services Committee shall ensure proper coordination with the District Legal Services Authority and jail authorities to comply with the directions in **Anil Gaur (supra)** as well as this case.

II. To facilitate filing of the bail application and to ensure that the bail applications65 filed through legal aid counsels before the High Court are diligently prosecuted.

III. To provide necessary support (if needed) to all DLSAs to gather the details appended as Appendix-I.

IV. To take any other step or measure as deemed fit to implement the judgement of this Court in Anil Gaur (supra) as well as this case

D. Duties of Secretary, State Legal Services Authority:

122. In wake of the preceding discussion the duties of the Secretary, State Legal Services Authority are summed up as follows:

A. To take steps as deemed fit to implement the directions of this Court in **Anil Gaur (supra)** and this case.

E. Duties of District Judges/Sessions judges:

123. In wake of the preceding discussion the duties of the District Judges/Sessions judges are summed up as follows:

I. Every learned Sessions Judge/District Judge shall regularly supervise the implementation of the directions of this Court in Anil Gaur (supra) and this judgement as well and constantly alert the respective learned magistrates, learned trial judges, DLSAs and jail authorities to their mandatory duties as outlined in this judgement and Anil Gaur (supra) and hold them to account if required.

II. In every district the District Judge shall support and guide the DLSA to gather the aforesaid details depicted in Appendix I from avoidable legal sources.

All authorities shall abide by the directions of the learned District Judge in this regard. Local innovations at the district level will play a prominent role in collecting the said information (Appendix I) in a quick time frame66. It is open to the learned Sessions Judge/District Judge to look into the feasibility of taking the assistance of para legal volunteers and law students to achieve this task.

III. To take status reports from DLSA, magistrates, trial judges at least once in three months.

IV. Every learned Sessions Judges/District Judges shall take steps to ensure coordination between trial courts, DLSA, Secretary SLSA, jail authorities, police authorities, district administration, Secretary HCLSC and High Court Registry for effective implementation of this judgment.

V. It is open to every learned District Judge/Sessions Judge to devise or evolve procedures and take any other steps to support effective implementation of the directions of this Court in Anil Gaur (supra) and this judgment in letter and spirit.

VI. This procedure shall be followed till the High Court and the State Government are in a position to provide I.T. solutions/digital infrastructure providing auto-generated the information for readily accessing the said details (including in Appendix I).

F. Duties of Jail Superintendent/Competent Jail Authority :

124. In wake of the preceding discussion the duties of the Jail Superintendent/competent jail authority in every district are summed up as follows:

I. Shall maintain records of each prisoner in the respective jails containing various details and information required for determining the need of the prisoner for legal aid and to file bail applications before the competent courts. A suggestive framework of such details is appended as Appendix-I.

II. To coordinate with District Legal Services Authorities and Secretary High Court Legal Services Committee.

III. To inform every prisoner of their right to legal aid to file a bail67 at different stages/proposal timeline/trigger events (as discussed earlier in Paras 111,112,113,114), and the Charter of Prisoners' Rights.

IV. To send requisition to DLSA and the Secretary, HCLSC to facilitate filing of the bail applications of needy/eligible prisoners at different stages /timelines/trigger events (discussed earlier in Paras 111,112,113,114) through the legal aid counsel.

V. To assist legal aid counsel in securing all relevant details and documents from lawful sources for filing the bail application like criminal history of the respective accused and the status of other criminal cases pending against them.

VI. To ensure that full and updated status of the bail applications of each prisoner as available on the High Court website is made accessible to them.

VII. To implement the mandate of Regulation 439(a) of the Jail Manual/ Rule 412(a) of UP Jail Manual, 2022 read with Rule 434 of Jail Manual, 2022 in light of this judgement.

VIII. To make arrangements for video conferencing of prisoners and their counsels (particularly High Court counsels) in tandem with DLSA/Secretary HCLSC.

IX. To submit a bimonthly report regarding compliance of these directions to the Director General of Prisons. The Director General of Prisons shall prepare a detailed report on a quarterly basis depicting compliance of the directions issued in this judgment.

X. To take any other step or measure to realize the rights of prisoners to legal aid and to seek bail respectively and to implement this judgement.

G. Duties of the State Government:

I. The State Government through Law Remembrancer (L.R.)/Principal Secretary (Law), Government of Uttar Pradesh Lucknow, Additional Chief Secretary (Home), Government of Uttar Pradesh Lucknow, Director General of Police, Government of UP, Director General (Prosecution), and Director General (Prisons), Government of Uttar Pradesh, Lucknow to take steps in coordination with each other to provide the details of every prisoner comprised in Appendix-I to this order and any other relevant information to the Jail Superintendent/competent jail authority in every district of the State to facilitate the process of grant of legal aid and to file bail application of prisoners from jail.

II. The State Government through Law Remembrancer (L.R.)/Principal Secretary (Law), Government of Uttar Pradesh Lucknow, Additional Chief Secretary (Home), Government of Uttar Pradesh, Director General of Police, Director General (Prosecution) and Director General (Prisons), Government of Uttar Pradesh make efforts to develop I.T. solutions to provide the relevant information (including details in Appendix-I) in an auto generated form to the Jail Superintendent/competent jail authorities of every district. The said IT solutions/platform may be shared with the DLSAs, magistrates and the trial courts.

III. The State Government shall ensure that the different departments of the State work in tandem to achieve the aforesaid task of realizing the fundamental rights of disadvantaged prisoners as discussed in this order.

IV. The State Government through Law Remembrancer (L.R.)/Principal Secretary (Law), Government of Uttar Pradesh, Lucknow, Additional Chief Secretary (Home), Government of Uttar Pradesh, Lucknow shall examine the quarterly reports submitted by the Director General (Prisons) as regards providing legal aid in terms of the directions in this judgement and to take appropriate action thereon.

V. The State Government through Law Remembrancer (L.R.)/Principal Secretary (Law), Government of Uttar Pradesh Lucknow, Additional Chief Secretary (Home), Government of Uttar Pradesh Lucknow, Director General of Police, Director General (Prosecution) and Director General (Prisons), Government of Uttar Pradesh, Lucknow take any other action to facilitate the implementation under Rule 412 of the Jail Manual, 2022 by Jail Superintendent in light of this judgement.

Suggestions to facilitate the realization of fundamental rights of prisoners and implementation of the legislative mandate of LSA Act, 1987 and Section 304 Cr.P.C., Rule 37 of General Rules (Criminal) as determined in this judgement

I. The implementation of this judgment as well as Anil Gaur (supra) has to be made by the respective magistrates, trial courts, and DLSAs and the Jail

Superintendent/competent jail authority of the district, and Secretary HCLSC. However systemic support from the High Court, State Government will facilitate the realization of fundamental rights of prisoners and faithful implementation of the legislative mandate of Section 304 Cr.P.C., LSA Act, 1987, Rule 37 of General Rules (Criminal) and Regulation 439 (a) of the Jail Manual/ Rule 412(a) of UP Jail Manual, 2022 read with Rule 434 of Jail Manual, 2022 by the concerned courts and authorities respectively.

H. Registrar General of High Court: Suggestive measures to the learned Registrar General of High Court for effective implementation of the rights of the accused persons as discussed in this judgment. (Note: These are only suggestive measures and not directions)

I. To render all assistance to the learned magistrates/ trial courts/DLSAs for obtaining the current details as are currently available with the High Court in respect of every prisoner suggested in Appendix-I from the existing infrastructure and IT resources.

II. To provide infrastructural support system including digital infrastructure and IT solutions to the learned magistrates, learned trial courts, DLSAs as may be required for effective implementation of the directions in this judgement and in order to realize the fundamental rights of the prisoners to legal aid for seeking bail from the competent court.

III. The capacity of the magistrate, trial courts and the DLSAs to provide legal aid to prisoners will be greatly enhanced if relevant details (including those suggested in Appendix-I) are made available to them in an auto generated form. Steps may be taken to achieve this goal.

IV. To establish necessary coordination with the State Government to implement the judgment including sharing of relevant information on existing IT Platforms being administered by the State pillars/verticals.

V. The Registrar General may implement the above directions only if necessary permissions/directions on the administrative side are forthcoming.

I. High Court

I. To frame Rules to facilitate filing of Jail Bails (in the manner of Jail Appeals).

XI. Right to fair and expeditious trial:

125. The right to a speedy trial has been exalted as a fundamental right in constitutional law. **Hussainara Khatoon and others (I) v. Home Secretary, State of Bihar68** recognized the right of speedy trial of a prisoners flowing from Article 21 of the Constitution of India “to be implicit in the broad sweep” of Article 21 of the Constitution.

126. The legislature was also cognizant of the need to continue the trial proceedings if necessary on a day to day basis until all witnesses in attendance has been examined. Section 309 Cr.P.C. may be extracted with profit:

“309. Power to postpone or adjourn proceedings-

(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun,

the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(2). If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time: Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.]

Explanation 1.- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.- The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

127. When the bail application of an accused/prisoner is rejected by the trial court, the obligation to expedite the trial of such accused becomes much stronger. This Court in **Bhanwar Singh (supra) & Jitendra v. State of U.P.69** had examined one of the persisting causes for delays in the trial. The cause which arose for consideration in **Bhanwar Singh @ Karamvir (supra) & Jitendra (supra)** was the inability of the police authorities to serve summons and execute coercive measures taken out by the courts to compel appearances of the witnesses on a timely basis. In this context this Court had issued various directions to make the police authorities accountable to the courts for their failure to serve summons or execute coercive measures to compel appearance of witnesses. The Director General of Police, Government of U.P. as well as Principal Secretary (Home), Government of U.P. had taken out relevant orders in compliance of judgements of **Bhanwar Singh @ Karamvir (supra) & Jitendra (supra)** which included nomination of nodal police officials for every district in U.P. who are charged with the duty to complete the aforesaid tasks with promptitude. The trial courts are also vested with the duty to ensure strict compliance of the judgements of this Court **in Bhanwar Singh @ Karamvir (supra) & Jitendra (supra).**

128. The other cause for delay in trial which also a widespread problem was the lawyers' abstaining from work on account of strike calls and declining to examine witnesses on the appointed dates before the trial court. The attempt was made to address the problem by calling the Bar Council of Uttar Pradesh to clear its stand on the subject. Upon consideration of the aforesaid stand of the Bar Council of Uttar Pradesh which supported the cause of

justice against striking lawyers, various directions were issued in **Noor Alam Vs. State of U.P.70.** The judgement of **Noor Alam (supra)** is also liable to be implemented strictly by the trial court in the aforesaid cases.

XII. Anil Gaur @ Sonu @ Sonu Tomar Vs. State of U.P. A. Post Script

129. In **Anil Gaur (supra)** it was observed "Injustice is the birthmark of a slave nation. Justice is the birthright of a free people and our Constitution says they shall have it."

130. Thereafter upon noticing repeated instances of miscarriages of justice due to denial of legal aid Anil Gaur (supra) recorded the distress of the Court:

"59. The failure of justice in the said cases was occasioned by poverty, social exclusion, legal illiteracy, impersonal administration and denial of legal aid." "For them the glorious dawn of the 75th year of independence has lost the sheen of freedom's ideals and the substance of the republic's promise."

131. However, the Court regrets to say that substantial improvement in the state of the prisoners cannot be seen despite a clear mandate of the legislature in the LSA Act, 1987 and explicit directions of this Court in Anil Gaur (supra) to the concerned authorities under the said Act.

132. Violation of directions in Anil Gaur (supra) causing prolonged imprisonment of prisoners of this class has come to light in a larger number of cases. The concerned DLSAs were also noticed from time to time on the need to work scrupulously for realizing the rights of prisoners as per the mandate of the LSA Act, 1987 and directions in Anil Gaur (supra). Non compliance or at any rate lack of effective implementation of the directions in Anil Gaur (supra) has caused manifest injustices, "upon which it is difficult to speak, and impossible to be silent"71. Exactions of injustice can be more severe than the curse of poverty. Prompt implementation of the directions in Anil Gaur (supra) (as well as in the instant case) and accountability for failure have to go hand in hand if the legislative object of legal aid for prisoners is to be achieved and their constitutional rights are to be realized.

133. This Court in Anil Gaur (supra) after noticing the grave consequences of failure to provide legal aid to prisoners suffering from conditions of want or other disabling circumstances had called for institutional introspection:

"61. All stakeholder institutions have to pause and reflect. The judiciary too have to turn the searchlights inwards. The courts have the power to judge, but cannot escape the judgement of the nation's collective conscience. Independence of judiciary is strengthened by honest introspection and self correction."

134. But the preceding narrative goes to show that much more needs to be done. Hence apart from renewing the call for introspection within the institution, this Court would now insist on a system of accountability in the institution.

135. Many prisoners of this class who are forgotten by fellow Indians and go unheard by the courts and remain unwept by their72 families would even question the meaning of life:

"ज़िंदगी से बड़ी सज़ा ही नहीं
और क्या जुर्म है पता ही नहीं" 73

136. The fate of these voiceless prisoners is a muted indictment of the system. If the silent indictment by the disadvantaged is not heeded, the vocal censure of history will impose heavy forfeits. The facts of these cases and those discussed by way of exemplars will shock the conscience of any court and give good reason to go back to the founding ideals of the Republic and the first principles of judicial ethics.

137. The Supreme Court has exalted the rights of prisoners to legal aid and to seek bail in constitutional law discourse and irretrievably embedded them in the charter of fundamental rights. The legislature took cognizance of the plight of undertrials belonging to marginalized sections of the society living under circumstances of destitution and want. The farsighted legislative enactments contain comprehensive schemes to reach legal aid to such citizens and secure justice to them.

138. The State Government too rose to the occasion by sanctioning the post of DLSA in every district and by emphasizing its commitment to implement the LSA Act, 1987 and judgments of the Supreme Court.

139. The conditions of service of judicial officers in the State are most exemplary. The salary scales, perks of judicial office, conditions of service and the environment of functioning provide the most conducive support systems to serve fair justice to all citizens. Infact they never had it so good! After being so well provided for by the Government and protected under the Constitution no excuse for failure is good enough. Infact the stakes cannot be higher and failure is not an option. Availability of wherewithal and absence of results can be compared to the instance cited in " In the Service of Free India" by B. D. Pande.74 The systemic inability to implement the directions in Anil Gaur (supra) has to be recognized and redressed urgently.

140. Aspiring to perks of office and savouring the privileges of power are the attributes of an entitlement culture and not the elements of the judicial ethos. Judicial ideals put power in the service of justice and employ office to uphold the law. The hallmark of judicial values is to serve and not to be.

141. The citizens' faith in the judiciary has elevated judicial decision making to a high moral ground. But trust of the citizenry and respect of the Government bring great responsibility to the judiciary. Judicial decision making has to be alert to pitfalls which can vitiate the judicial process.

142. When judicial conscience is not shocked at the denial of right of legal aid to prisoners, or when apathy to the legislative mandate informs judicial functioning, or when the holdings of Constitutional Courts are violated with impunity a crisis point will be reached. The situation will result in miscarriages of justice which will bring discredit to the process of the courts. In that event the judiciary will have to yield the moral high ground and the foundations of a just State shall be shaken.

143. This Court is not assessing blame and the same is not remit of this discussion. The purpose of these observations is to shine light on the task before various institutional stakeholders.

The stakeholders have to ensure that the luminous legislative mandates of the LSA Act, 1987 and Section 304 Cr.P.C., Rule 37 of General Rules (Criminal) and the laudable object of Regulation 439 (a) of the Jail Manual/ Rule 412(a) of UP Jail Manual, 2022 read with Rule 434 of Jail Manual, 2022 and the radiant vision of the holdings of the Supreme Court putting the plight of disadvantaged prisoners at the summit of constitutional goals are not frustrated for some want in the judicial system or deficiency in the administration of prisons.

B. Lessons Drawn

144. Hearing of the connected bail applications and also those referenced in the narrative gave valuable insights in the impediments faced by prisoners of the deprived classes to file bail applications.

145. Many prisoners of this class are unable to provide details of their criminal history without assistance. However, explanation of criminal history is a sine qua non for deciding a bail application. Criminal antecedents cannot be neglected from consideration by the courts while deciding bail applications of the accused. The right to seek bail of such prisoners cannot be postponed indefinitely for want of updated criminal history. This presents a dilemma to the courts and poses a challenge to the legal aid framework. The situation can be remedied by concerted actions of various statutory agencies and the State authorities. The State shall ensure that such details are always available with the jail authorities and provided to the prisoners/their legal counsel.

146. During the course of various hearing of bail applications, responses of the DLSAs regarding failure to comply with Anil Gaur (supra) highlight various systemic deficiencies which need correction. The said DLSA reports variously justified denial of legal aid to the said class of prisoners on the following grounds:

i. No application for grant of legal aid was filed by the prisoner before the DLSA.

ii. The prisoner had engaged a private counsel at the trial court.

iii. A defence counsel/legal aid counsel had been appointed to represent the prisoner at the trial proceedings.

iv. The legal aid counsels had met the prisoners during jail visit but no demand for legal aid was made by the prisoner.

147. I am afraid, the responses or the aforesaid justifications tendered by the DLSAs in various cases for not providing legal aid show a complete misreading of the judgement of this Court in Anil Gaur (supra) and a misconception of their own duties under the LSA Act, 1987 and right of legal aid propounded in holdings of the Supreme Court. As held earlier the DLSAs shall independently examine the need for legal aid for every prisoner without waiting for an application from such prisoner or being influenced by the fact that the prisoner has a private counsel or has been provided with a defence counsel in the trial court.

148. I would hasten to act that none of the observations should be construed as an adverse comment on any judicial officer. Rather these should be examined in the context of systemic infirmities which call for corrective measures.

149. In matters of liberty each moment is an eternity. There is not time to lose. This is a most opportune moment for

this Court to reaffirm that circumstances of want cannot deny Indian citizens fair justice and the fruits of liberty under the Indian Constitution. The Constitution of India holds the irrevocable guarantee of equal justice to all citizens, and all institutions of governance bear the inflexible resolve to redeem the pledge.

C. The Road Ahead

150. There is an urgent need for the JTRI, Lucknow and the learned District Judges to study the aforesaid systemic faults in depth and create appropriate programmes for learned magistrates, trial judges and DLSAs to sensitize them to their statutory duties towards under trial prisoners and to their obligations to bring the fundamental rights of the aforesaid class of prisoners (as discussed in this judgment) to fruition.

151. The power of superintendence conferred upon the High Court by Article 227 of the Constitution of India contemplates the role of a benign guardian for the High Court which has to provide the necessary support systems through administrative measures and other guidance as may be deemed fit.

152. Upgradation of digital infrastructure and creation I.T. solutions and digital platforms for autogenerating the requisite information and facts (including those depicted in Appendix I) will play a critical role in achieving the task of processing legal aid to needy prisoners. Only when the magistrates, trial courts, DLSAs and jail authorities have smooth access to the said information can the legislative aims of Section 304 Cr.P.C., the Legal Services Authority Act, 1987 and the Jail Manual be achieved in letter and spirit.

153. The facts of the cases and the fate of the prisoners which have been examined go to the heart of constitutional values and the raison detre of the High Courts. In view of the matter being of great moment, a copy of this judgment be respectfully placed before the pater familias the Hon'ble Chief Justice of High Court of Judicature at Allahabad.

XIII. Order in Bail Application

154. Matter is taken up in the revised call.

155. By means of this bail application the applicant has prayed to be enlarged on bail in Case Crime No. 44 of 2008 at Police Station Jahangirabad, District Bulandshahar under Sections 394/302 IPC.

156. The applicant is on interim bail granted by this Court on 16.07.2022.

157. The following arguments made by learned amicus curiae on behalf of the applicant, which could not be satisfactorily refuted by learned AGA from the record, entitle the applicant for grant of bail:

I. The applicant has been falsely implicated in the instant case.

II. The applicant was not named in the FIR.

III. No incriminating article has been recovered from the applicant.

IV. The applicant does not have any motive to commit the offence.

V. Prosecution evidence does not connect the applicant with the offence.

VI. The applicant is a law abiding citizen who cooperated with the police investigations and had joined the trial.

VII. The applicant never influenced any witness or tampered with the evidence.

VIII. The applicant never adopted any dilatory tactics or impeded the process of the trial.

IX. The trial is on foot. The trial is moving at a snail's pace and is not likely to conclude anytime in the near future. The applicant is not responsible for the delay in the trial.

X. The applicant has already undergone more than 14 years of imprisonment as an undertrial.

XI. The trial is not likely to conclude soon due to heavy docket of the trial court.

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

XIII. 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.

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

159. Let the applicant- **Ramu** be released on bail in the aforesaid case crime number based on personal bond and sureties given earlier before the learned trial court at the time the applicant was released on interim bail. No further sureties will be demanded from the applicant. 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.

Copy of this order:-

160. Registry shall forthwith ensure service of copy of this order on:

I. Secretary, High Court Legal Services Committee

II. Director, JTRI, Lucknow

III. All District Judges (for circulation amongst the trial courts, DLSAs in the respective judgeships)

IV. Secretary, State Legal Services Authority

161. Government Advocate to ensure copy of this judgement on:

I. Law Remembrancer (L.R.)/Principal Secretary (Law), Government of Uttar Pradesh Lucknow,

II. Additional Chief Secretary (Home), Government of Uttar Pradesh Lucknow,

III. Director General of Police, Government of Uttar Pradesh Lucknow,

IV. Director General (Prosecution), Government of UP

V. Director General (Prisons), Government of Uttar Pradesh Lucknow

162. A Hindi translated copy of this order shall be provided to the accused in the respective jails through the concerned District Legal Services Authority.

XIV. Acknowledgements of the role of the Bar & and the State:

163. The discussion cannot conclude without acknowledging the role of the Bar and other stakeholders.

164. In the highest traditions of this Court and the profession, the learned Senior Counsels with their assisting counsels, learned amicus curiae and learned counsels on behalf of the respective applicants have argued with ability and scholarship.

165. This Court would like to record appreciation of the assistance rendered by Shri Ashok Mehta, learned Additional Advocate General, assisted by Shri A.K. Sand, learned Government Advocate and Shri Paritosh Kumar Malviya, learned AGA-I.

166. The Court also commends the positive approach of the State Government in the matter and its genuine concern for providing all support to the disadvantaged class of prisoners to enable them to realize their rights to legal aid and to seek bail from the competent courts.

(2024) 8 ILRA 1008
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal No. 184 of 2013

U.P. Rajya Bhandaran Nigam Ltd. Lko. & Ors. ...Appellants

Versus

U.P. Purva Sainik Kalyan Nigam Ltd. Lko. ...Respondent

Counsel for the Appellants:
Rakesh K. Chaudhary

Counsel for the Respondent:
Amrendra Nath Tripathi, Nirmit Srivastava, Pankaj Patel, Pratap Shanker, Suyash Manjul, Vibhanshu Srivastava

Civil Law–Law of Arbitration- Arbitration and Conciliation Act, 1996 - Sections 37(1)(b), 34 & 43 - application under Section 34 dismissed- Section 43 of Act,1996 read with Limitation Act, 1963-claim beyond limitation-Section 7(4) (c) of the Act, 1996-respondent-claimant filed its claim for unpaid wages before the sole arbitrator-learned arbitrator allowed the claim and counter-claim-no arbitral agreement between the parties-section 2(b) read with Section 7 of the Act, 1996-definition of arbitration agreement-merely because an arbitration clause is not in the arbitration, it cannot be said that the dispute cannot be settled through arbitration and it is without jurisdiction-Section 4 of the Act, 1996-waiver of right to object-Section 16 of the Act, 1996-competence of Arbitral Tribunal to rule on its jurisdiction- plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the St.ment of defence-objection regrading limitation to be taken at first instance-both parties provided equal opportunity- no violation of Section 18 of the Act,1996-Appeal dismissed. (Paras 17, 18, 19, 20, 21, 23, 25, 32 and 33)

HELD:
According to the aforesaid Section 7, the Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The agreement shall be in writing and arbitration agreement is in writing if it is contained in a document signed by the parties, an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement or an exchange of St.ments of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. Therefore merely because an arbitration clause is not in the arbitration, it cannot be said that the dispute cannot be settled through arbitration

and it is without jurisdiction, if it can be inferred in terms of Section 7 and the intention of parties to settle their disputes through arbitration are discernible form the same. (para 17)

The Hon'ble Supreme Court, in the case of Mahanagar Telephone Nigam Ltd. Vs Canara Bank & ors.(Supra), considering the provisions of Section 7 of the Act of 1996 has held that the arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The intention of the parties must be inferred from the terms of the contract, conduct of the parties and correspondence exchanged to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad-idem and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract. The meaning of a contract must be gathered by adopting a common sense approach and must not be allowed to be thwarted by a pedantic and legalistic interpretation. (Para 18)

It was only after the arbitration proceedings were decided and the claim as well as the counter claim were allowed, when Application under Section 34 of the Act of 1996 was preferred before the District Judge, this issue was raised. Learned District Judge after considering the pleadings of the parties and the law held that the jurisdiction and existence of Arbitration Clause is the preliminary issue, which may have been raised before the High Court, who has been pleased to appoint the Arbitrator and moreover the judgment passed by the High Court appointing the Arbitrator has not been challenged before the Hon'ble Supreme Court and when no appeal has been filed, this issue cannot be allowed to be raised now for the first time in this court, which has been entertaining objection in petition under Section 34 of the Act of 1996. This court is of the view that it has rightly been held by the learned District Judge because once the right of this plea was waived and sole Arbitrator was got appointed by the consent of the appellants and thereafter also despite pleaded in the St.ment of claim no objection was raised in the St.ment of defence, rather the counter claim was preferred and contested, this plea could not have been raised and rightly rejected. (Para 23)

The Second argument of learned counsel for the appellants-opposite parties is that the claims raised by the respondent-claimant were beyond limitation in view of Section 43 of the Act of 1996, according to which the provisions of limitation Act 1963 are applicable, which provides the limitation of 3 years for such claim, is misconceived and not tenable for the reason that this objection was not taken by the appellants-opposite parties either before the High Court or before the Arbitrator, rather the counter claim was filed and contested before the learned Arbitrator. Any such objection should have been taken at the very first instance. Even otherwise this objection is not available to the appellants-opposite parties because they themselves raised a counter claim, pursued the same and the counter claim has also been allowed. The Delhi High Court, in the case of M/s. Raj Kishan & Co. Vs National Thermal Power Corp.; 2012 SCC OnLine Del 4799 has held that the plea of limitation is not open to the petitioner to raise at this stage as the same was never raised before the Arbitral Tribunal. (Para 25)

The learned District Judge after considering the pleadings of the parties and the award has recorded a finding that the Hon'ble Arbitrator has committed no wrong in awarding interest at the rate of 18% per annum from the date of acceptance of final report. Moreover, costs, as granted by the Hon'ble Arbitrator to both the parties, and expenses of the witnesses also cannot be said to be excessive because the Hon'ble Arbitrator has very meticulously gone through the record while awarding expenses of the witnesses of both the parties. This Court after going through the records and the findings recorded by the Hon'ble Arbitrator and the learned District Judge does not find any illegality or error in the findings recorded by the learned Arbitrator and the District Judge. Learned counsel for the appellants-opposite parties also could not point out any error or illegality in the said findings or as to how it is against public policy. (Para 32)

The arguments of learned counsel for the appellants-opposite parties that the award is not

sustainable as the parties have not been treated equally as different costs have been awarded to both the parties, therefore there is violation of Section 18 of the Act of 1996. Section 18 of the Act 1996 provides that the parties shall be treated with equality and each party shall be given a full opportunity to present his case. Therefore in view of Section 18 the equal opportunity is required to be provided to both the parties to present their case. Though this plea does not appear to have been taken before the learned District Judge while filing the application under Section 34 of the Act of 1996, however perusal of the award indicates that equal opportunity has been provided to both the parties before passing the award, which has not been denied. Defence of the appellants-opposite parties and the counter claim raised by him has properly been considered and dealt with in the award on the basis of pleadings, evidence and material on record, therefore merely on the basis of different costs awarded to both the parties it cannot be said that the parties have not been treated equally. The costs and interest including the claim and counter claim have been awarded according to the claims made by the parties, therefore the other contentions of learned counsel for the appellant-opposite parties are not tenable and repelled accordingly. (Para 33)

Appeal dismissed. (E-14)

List of Cases cited:

1. Yeswant Deorao Deshmukh Vs Walchand Ramchand Lothari; 1950 Supreme Court Reports 852

2. The United Commercial Bank Ltd. Vs Their Workmen; 1951 Supreme Court Reports 380

3. Kiran Singh & ors.Vs Chaman Paswan & ors.; 1954 AIR 340

4. Judgment and order dated 13th of January 2020 passed by Hon'ble Supreme Court in K.Lubna & ors.Vs Beevi & ors.; Civil Appeal Nos.2442-2443 of 2011

5. M/s. B and T AG Vs Ministry of Defence; 2023 LiveLaw (SC) 466

6. Mahanagar Telephone Nigam Ltd. Vs Canara Bank & ors.; (2020) 12 SCC 767

7. U.O.I. Vs Pam Development Private Ltd.; (2014) 11 SCC 366

8. M/s. Raj Kishan & Co. Vs National Thermal Power Corp.; 2012 SCC OnLine Del 4799

9. M/s. Raj Kishan & Co. Vs National Thermal Power Corp.; 2012 SCC OnLine Del 4799

10. National Insurance Co. Ltd. Vs Boghara Polyfab (P) Ltd; (2009) 1 SCC 267

11. Connecticut Fire Insurance Co. Vs Kavanagh; (1892) A.C. 473

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

1. Heard, Shri Rakesh K.Chaudhary, learned counsel for the appellants alongwith Shri Aditya Pandey, Advocate and Shri Vibhanshu Srivastava, learned counsel for the respondents.

2. This First Appeal under Section 37(1)(b) of the Arbitration and Conciliation Act, 1996 (here-in-after referred as Act of 1996) has been preferred against the judgment and decree dated 16.09.2013 passed in Regular Suit No.17 of 2011; U.P.Rajya Bhandaran Nigam Ltd. and others Versus U.P. Purva Sainik Kalyan Nigam Ltd. by the District Judge, Lucknow and to set aside the award dated 16.01.2011 passed by the sole Arbitrator in Arbitration Case No.28 of 2008; U.P. Purva Sainik Kalyan Nigam Ltd. Versus the Managing Director, U.P. Rajya Bhandaran Nigam Limited and others by allowing the application under Section 34 of the Arbitration and Conciliation Act, 1996 (here-in-after referred as the Act of 1996).

3. Learned counsel for the appellants submitted that there was no

Arbitration Agreement between the parties and it could not have been even by consent of parties, therefore the arbitration could not have been held and the judgment and award passed by the sole Arbitrator is without jurisdiction. He further submitted that even the claims raised by the respondent-claimant were beyond limitation in view of Section 43 of the Act of 1996, according to which the provision of Limitation Act 1963 (36 of 1963) are applicable which provides the limitation of three years for such claims, therefore the same could not have been considered and the claim was liable to be dismissed on this ground alone. He further submitted that the impugned judgment and award made by the sole Arbitrator is against the public policy in view of Section 31(7) (a) and 31(8) of the Act of 1996. Learned counsel for the appellants further submitted that the award is also not sustainable as the parties have not been treated equally as different costs have been awarded to both the parties, therefore there is violation of Section 18 of the Act of 1996. Learned counsel for the appellants further submitted that on account of theft, the appellants had suffered loss for which the First Information Report was also lodged. The correspondences show that the action was taken by the respondent against the Guards, therefore the bills were rightly withheld, which could not have been directed to be paid.

4. On the basis of above learned counsel for the appellant submitted that since the arbitration proceedings are without jurisdiction, therefor the impugned judgment and award passed by the sole Arbitrator and the judgment and order passed by the District Judge on Application under Section 34 of the Act of 1996 are not sustainable and the same are liable to be set aside. Learned counsel for the appellants relied on **Yeswant Deorao Deshmukh Versus Walchand Ramchand Lothari; 1950 Supreme Court Reports 852, The United Commercial Bank Ltd. Versus Their Workmen; 1951 Supreme Court Reports 380, Kiran Singh and others Versus Chaman Paswan and others; 1954 AIR 340, Judgment and order dated 13th of January 2020 passed by Hon'ble Supreme Court in K.Lubna and others Versus Beevi & others; Civil Appeal Nos.2442-2443 of 2011 and M/s. B and T AG versus Ministry of Defence; 2023 LiveLaw (SC) 466.**

5. Per contra, learned counsel for the respondents submitted that the Sole Arbitrator was appointed with the consent of the appellants and no objection in this regard was taken before the Arbitrator. The appellants not only consented for appointment of Arbitrator but made a counter claim also before the Arbitrator, therefore the appellant cannot raise this objection after disposal of arbitration proceedings and it cannot be said that the proceedings are without jurisdiction in view of Section 7(4)(c) of the Act of 1996. He further submitted that no denial of notice for appointment of Arbitrator was ever made, rather the claims were raised and the Arbitrator was appointed by this court with the consent of the appellants. He further submitted that the claim of the respondent was also admitted by the appellants, therefore, the issues were made only on counter claim. He further submitted that the plea of limitation is also not available to the appellants as it was not taken at the threshold, when the Arbitrator was appointed by this court with the consent of the appellants for appointment of the Arbitrator. Even otherwise the claim was admitted and the counter claim was also made and contested, which has also

been allowed. He further submitted that since the claim of the respondent was accepted by the appellants and the Sole Arbitrator while awarding the claim and the counter claim provided for set off in the award, therefore the appellants had done the summer salt and taken the aforesaid pleas. He further submitted that the cost has been awarded according to the claims, therefore the Hon'ble Arbitrator had rightly provided for the set off and no deduction has been made in the costs claimed by the appellants. The claim and counter claim have been awarded after affording sufficient opportunity, in accordance with law, therefore the plea of unequal treatment is also misconceived and not tenable including the other contentions.

6. On the basis of above, learned counsel for the respondent submitted that there is no illegality or infirmity in the arbitration proceedings and the judgment and award passed by the Sole Arbitrator as well as the judgment and order passed on the application under Section 34 of the Act of 1996 filed by the appellants. The appeal has been filed on misconceived and baseless grounds. It is liable to the dismissed. Learned counsel for the respondent relied on **Mahanagar Telephone Nigam Limited Versus Canara Bank and others; (2020) 12 SCC 767, Union of India Versus Pam Development Private Limited; (2014) 11 SCC 366 and M/s. Raj Kishan & Company Versus National Thermal Power Corporation; 2012 SCC OnLine Del 4799.**

7. I have considered the submissions of learned counsel for the parties and perused the records.

8. The parties had entered into an agreement on 10.08.2001 for providing Security Personnel at Air Strip, Prithviganj, Pratapgarh by the Kalyan Nigam i.e. the respondent for protection of food grains belonging to Rajya Bhandaran Nigam i.e. the appellants. The said agreement was renewed from time to time. According to clauses 13, 14 and 16 of the said agreement the Kalyan Nigam was liable to indemnify the Bhandara Nigam for any loss and damages caused to it on account of negligence of the Security Guards deputed by Kalyan Nigam. On 04.02.2002 the fact of theft of 204 cover tops worth Rs.4,85,724/- belonging to Bhandaran Nigam came into the knowledge of Bhandaran Nigam and it was informed to Kalyan Nigam on 06.02.2002. The First Information Report of the said occurrence was lodged in the concerned Police Station, who submitted the final report on 18.04.2002, which was not accepted by the learned Magistrate concerned and the police was directed to re-investigate the matter. After re-investigation, the final report was again submitted by the Police which was accepted on 16.05.2005 by the Magistrate concerned. Accordingly Bhandaran Nigam suffered a loss of Rs.4,85,724/- due to negligence of Kalyan Nigam employees. The claim of the appellants is also that Bhandaran Nigam had decided to shift their stock from Hawai Patti, Prithviganj, Pratapgarh, but the employees of Kalyan Nigam caused obstruction in shifting of stock. Therefore the Bhandaran Nigam had to employ the guards from Industrial Security and Training Force, who after great difficulties, could shift the stock, therefore it had to suffer the extra expenditure of Rs.3,62,825/- due to illegal and wrongful activities of Kalyan Nigam for shifting their stock. As the Kalyan Nigam did not indemnify the loss suffered by the Bhandaran Nigam, the wage bills submitted by the Kalyan Nigam to the Bhandaran

Nigam on 01.05.2003, 02.06.2003, 01.07.2003, 01.08.2003, 01.09.2003 and 10.09.2003 for the total sum of Rs.6,67,193.20 remained unpaid.

9. The respondent preferred Arbitration Application No.28 of 2008; U.P. Purva Sainik Kalyan Nigam Limited through the Managing Director Versus the Managing Director, U.P. Warehouse Corporation Limited, Lucknow and another before this court for appointment of an Arbitrator. This court, by means of the order dated 05.12.2008, with the consent of learned counsel for the appellant appointed Sri K.L.Sharma, J. (Former Judge of this Court) as Arbitrator in the matter subject to his convenience and consent.

10. In pursuance of the aforesaid order passed by this court and the consent of the sole Arbitrator, he commenced the proceedings after notice to the parties. The respondent-claimant filed his claim for Rs.6,67,193.23 as the unpaid wages of security service rendered to the opposite party no.2 since April 2003 till September 2003 claiming that the respondents provided the security personnel to the opposite party no.2 in terms of the agreement entered into between the parties on 10.08.2001, but the wages of the Security Personnel was paid upto March 2003 only, whereas Security Personnel remained on duty till September 2003 and wage bills dated 1st May, 2003, 2nd June, 2003, 1st July, 2003, 1st August 2003, 1st September 2003 and 10th September 2003 were not paid by the opposite party no.2 despite repeated reminders and notices. It was further alleged that the appellant-opposite parties admitted the claim of the respondent for a sum of Rs.6,67,193.23 and alleging theft of 204 cover tops in their legal notice made a counter claim of Rs.8,08,959.95. Since the appellant-opposite party no.2 neither paid the admitted amount of wage bills nor nominated an Arbitrator to decide the dispute the respondent-claimant moved an Arbitration Application before the Lucknow Bench of Allahabad High Court under Section 11 of the Act of 1996 and consequently the Arbitrator was appointed with the consent of appellant-opposite parties.

11. The appellants-opposite parties filed a joint statement of defence admitting the claim of the respondent-claimant for payment of the wages on account of the security services rendered from April 2003 till the date of terms of the agreement i.e. 09.09.2010. However appellants-opposite parties made a counter claim of Rs.8,48,969.95 also as against the claim of Rs.6,67,193.23 made by the respondent-claimant and imposed the liability on the respondent-claimant to return Rs.1,81,776.72 to the appellants. The appellants-opposite parties alleged in support of the counter claim, firstly that 204 cover Tops worth Rs.4,85,724/- were stolen from the Hawai Patti, Prithvi Ganj, Pratapgarh due to negligence of the security personnel of the Kalyan Nigam and secondly, the appellants have suffered a loss of Rs.3,63,245.95 on account of the hindrance and obstacles caused by the security personnel by preventing the shifting of food stocks from the site to another site and for employing police force and taking the security services from Industrial Security force.

12. The respondent-claimant filed a replication to the joint statement of defence denying its liability for the alleged theft claim and also the alleged losses denying any negligence or hindrance etc.,

caused by security personal employed by Kalyan Nigam during the period from April 2003 till their actual dis-engagement.

13. On the basis of the pleadings of the parties, documents placed on record and after hearing the 9 points for determination were made by the Tribunal, which are extracted here-in-below:-

"(I) Whether the Annexure C-1 of the statement of defence filed by the O.Ps. is false, fake and fabricated document ? If so, its effect ?

(II) Whether the O.P. received 150 cover tops on 2.5.2002, 100 cover tops on 22.5.2002 and 149 cover tops on 30.5.2002, at their Air Strip Prithviganj in District Pratapgarh ?

(III) Whether there was alleged fheft of 204 cover tops from the site of Air Strip, Prithviganj on or before 4.2.2002 ? If so, its value?

(IV) Whether the alleged theft of cover Tops was due to the negligence of the Security Staff ? If so, its effect and liability ?

(V) Whether the security staff of the claimant created any obstacle or hindrance in the shifting of the stores by the staff of the O.P.? If so, whether the O.P. suffered expenditure/loss of Rs.3,63,245.95 due to the delayed shifting?

(VI) Whether the claimant is liable to pay the value of the allegedly stolen cover Tops according to para 16 of the contract of security services dated 10.8.2001 executed between the parties? If so, its effect?

(VII) Whether the claimant is entitled to get interest on unpaid wages of security staff with effect from April 2003? If so, at what rate and at what amount and for what period?

(VIII)Whether the claimant is entitled to costs of the arbitral proceedings?

(IX) To what relief is the claimant entitled?"

14. After affording opportunity of evidence and hearing, the learned Arbitrator allowed the claim as well as the counter claim. Being aggrieved, the same was challenged under Section 34 of Act of 1996 before the District Judge, Lucknow by the appellant-opposite parties. The District Judge, after considering the grounds raised by the appellant-opposite parties, pleadings and evidence on record and affording opportunity dismissed the application/objection. Hence this appeal has been filed.

15. The first ground taken by learned counsel for the appellants -opposite parties is that since there was no arbitral agreement between the parties, therefore the whole arbitration proceedings are without jurisdiction and not sustainable in the eyes of law. It is not in dispute that the agreement dated 10.08.2001 entered into between the parties does not contain the arbitration clause, whereas the contention of learned counsel for the respondent is that since there was no objection in the various correspondence made in this regard and counter claim was also raised and the learned Arbitrator was appointed by this court by means of the order dated 05.12.2008 passed in Arbitration Application No.28 of 2008 with the consent of the appellants and thereafter not only the claim was admitted, but a counter claim was also filed and decided and no such plea was ever raised, therefore it cannot be taken at this stge.

16. Section 2(b) of the Act of 1996 defines the arbitration agreement,

according to which, Arbitration agreement means an agreement referred to in section 7. Section 7 of the Act of 1996 provides the Arbitration Agreement, which is extracted here-in-below:-

" 7. Arbitration agreement.—(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in-

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."

17. According to the aforesaid Section 7, the Arbitration Agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The agreement shall be in writing and arbitration agreement is in writing if it is contained in a document signed by the parties, an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement or an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. Therefore merely because an arbitration clause is not in the arbitration, it cannot be said that the dispute can not be settled through arbitration and it is without jurisdiction, if it can be inferred in terms of Section 7 and the intention of parties to settle their disputes through arbitration are discernable form the same..

18. The Hon'ble Supreme Court, in the case of **Mahanagar Telephone Nigam Limited Versus Canara Bank and others (Supra),** considering the provisions of Section 7 of the Act of 1996 has held that the arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The intention of the parties must be inferred from the terms of the contract, conduct of the parties and correspondence exchanged to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad-idem and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract. The meaning of a contract must be gathered by adopting a common sense approach and must not be allowed to be thwarted by a pedantic and legalistic interpretation. The relevant portions of paragraph 9 are extracted here-in-below:-

"The existence of a valid arbitration agreement

9. A valid arbitration agreement constitutes the heart of an arbitration. An arbitration agreement is the written agreement between the parties, to submit their existing, or future disputes or differences, to arbitration. A valid arbitration agreement is the foundation stone on which the entire edifice of the arbitral process is structured. A binding agreement for disputes to be resolved through arbitration is a sine qua non for referring the parties to arbitration.

9.1. Section 7 defines "arbitration agreement" and reads as follows:

……...

9.2. The arbitration agreement need not be in any particular form. What is required to be ascertained is the intention of the parties to settle their disputes through arbitration. The essential elements or attributes of an arbitration agreement is the agreement to refer their disputes or differences to arbitration, which is expressly or impliedly spelt out from a clause in an agreement, separate agreement, or documents/correspondence exchanged between the parties.

9.3. Section 7(4)(b) of the 1996 Act, states that an arbitration agreement can be derived from exchange of letters, telex, telegram or other means of communication, including through electronic means. The 2015 Amendment Act inserted the words "including communication through electronic means" in Section 7(4)(b). If it can prima facie be shown that parties are ad idem, even though the other party may not have signed a formal contract, it cannot absolve him from the liability under the agreement [*Govind Rubber Ltd. v. Louis Dreyfus Commodities Asia (P) Ltd.*, (2015) 13 SCC 477 : (2016) 1 SCC (Civ) 733] .

9.4. Arbitration agreements are to be construed according to the general principles of construction of statutes, statutory instruments, and other contractual documents. The intention of the parties must be inferred from the terms of the contract, conduct of the parties, and correspondence exchanged, to ascertain the existence of a binding contract between the parties. If the documents on record show that the parties were ad idem, and had actually reached an agreement upon all material terms, then it would be construed to be a binding contract. The meaning of a contract must be gathered by adopting a common sense approach, and must not be allowed to be thwarted by a pedantic and legalistic interpretation. [*Union of India v. D.N. Revri & Co.*, (1976) 4 SCC 147]

9.5. A commercial document has to be interpreted in such a manner so as to give effect to the agreement, rather than to invalidate it. An "arbitration agreement" is a commercial document inter partes, and must be interpreted so as to give effect to the intention of the parties, rather than to invalidate it on technicalities.

9.6. In *Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd. [Khardah Co. Ltd. v. Raymon & Co. (India) (P) Ltd.*, (1963) 3 SCR 183 : AIR 1962 SC 1810] , this Court while ascertaining the terms of an arbitration agreement between the parties, held that : (AIR p. 1820, para 30)

"30. ... If on a reading of the document as a whole, it can fairly be deduced from the words actually used therein, that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term. The terms of a contract can be express or implied from what has been expressed. It is in the ultimate analysis a question of construction of the contract." (emphasis supplied)

9.7. In interpreting or construing an arbitration agreement or arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law. This Court in *Enercon (India) Ltd. v. Enercon GmbH* [*Enercon (India) Ltd. v. Enercon GmbH*, (2014) 5 SCC 1 : (2014) 3 SCC (Civ) 59] , held that a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate the disputes between them. Being a commercial contract, the arbitration clause cannot be construed with a purely legalistic mindset, as in the case of a statute.

9.8. In this case, MTNL raised a preliminary objection that there was no arbitration agreement in writing between the parties, at this stage of the proceedings. We will first deal with this issue. The agreement between MTNL and Canara Bank to refer the disputes to arbitration is evidenced from the following documents exchanged between the parties, and the proceedings:

9.8.1. The minutes of the meeting dated 27-3-2001 was convened by the Cabinet Secretariat, wherein all three parties were present and participated in the proceedings. The Committee on Disputes, in the meeting dated 16-12-2008 expressed the view that all the three parties should take recourse to arbitration in view of the different interlinked transactions between them. Canara Bank suggested that to expedite the arbitration, it should be conducted under the Arbitration and Conciliation Act, 1996. This was accepted by MTNL, and no objection was raised.

9.8.2…….

9.8.3…….

9.8.4…….

9.9. The agreement between the parties as recorded in a judicial order, is final and conclusive of the agreement entered into between the parties. [*State of Maharashtra v. Ramdas Shrinivas Nayak*, (1982) 2 SCC 463 : 1982 SCC (Cri) 478. See also *Chitra Kumari v. Union of India*, (2001) 3 SCC 208] The appellant MTNL after giving its consent to refer the disputes to arbitration before the Delhi High Court, is now estopped from contending that there was no written agreement to refer the parties to arbitration.

9.10. An additional ground, for rejecting the preliminary objection raised by MTNL is based on Section 7(4)(c) of the Arbitration and Conciliation Act, 1996. Section 7(4)(c) provides that there can be an arbitration agreement in the form of exchange of statement of claims and defence, in which the existence of the agreement is asserted by one party, and not denied by the other. [*Savitri Goenka v. Kanti Bhai Damani*, 2009 SCC OnLine Del 177 : (2009) 1 Arb LR 320] In the present case, Canara Bank had filed its statement of claim before the arbitrator, and MTNL filed its reply to the statement of claim, and also made a counterclaim against Canara Bank. The statement of claim and defence filed before the arbitrator would constitute evidence of the existence of an arbitration agreement, which was not denied by the other party, under Section 7(4)(c) of the 1996 Act. In view of the aforesaid discussion, the objection raised by MTNL is devoid of any merit, and is hereby rejected."

19. Section 4 of the Act of 1996 provides the waiver of right to object, which is extracted here-in-below:-

"4. Waiver of right to object.— A party who knows that—

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object."

20. Section 16 of the Act of 1996 provides the competence of arbitral tribunal to rule on its jurisdiction. Sub Section (2) of Section 16 provides that a plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, which is extracted here-in-below:-

"16. Competence of arbitral tribunal to rule on its jurisdiction.—(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,—

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

21. The Hon'ble Supreme Court, in the case of **Union of India Versus Pam Development Private Limited (Supra),** has held that Section 16(2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence and the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the court and he is deemed to have waived the right to objection with regard to the lack of jurisdiction of the Arbitral Tribunal. The relevant paragraph 18 is extracted here-in-below:-

18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in *BSNL v. Motorola India (P) Ltd.* [(2009) 2 SCC 337 : (2009) 1 SCC

(Civ) 524] Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows: (SCC p. 349, para 39)

"39. Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived."

22. Adverting to the facts of the present case admittedly the appellant-opposite parties had admitted the claim of the respondent-claimant in the correspondences and the Arbitrator was appointed with the consent of the appellants-opposite parties by this court and no objection in this regard was taken by the appellants, therefore the agreement recorded in judicial order is final and conclusive. Even after appointment of Arbitrator, when the claim was filed before the Arbitrator it was specifically pleaded in the claim that despite the observations made by this court in Writ Petition No.2197 of 2007(MB); U.P. Purva Sainik Kalyan Nigam Limited Versus State of U.P. and others passed on 6th of April, 2007 no Arbitrator was appointed and despite legal notice no payment was made and the counter claim was also made and the Arbitrator has been nominated by this court in Arbitration Application No.28 of 2007, but no objection to the same was raised in statement of defence, rather the counter claim was made by the appellants-opposite parties and thereafter the matter was contested before the learned Arbitrator. Therefore not only no objection was given for the appointment of Arbitrator but the claim was contested and counter-claim was also raised without any demur, therefore the exchange of correspondence and statement of claims and defence and conduct of parties indicates that there was agreement between the parties to settle their disputes through arbitration therefore the appellant-opposite parties are estopped from raising any objection in this regard.

23. It was only after the arbitration proceedings were decided and the claim as well as the counter claim were allowed, when Application under Section 34 of the Act of 1996 was preferred before the District Judge, this issue was raised. Learned District Judge after considering the pleadings of the parties and the law held that the jurisdiction and existence of Arbitration Clause is the preliminary issue, which may have been raised before the High Court, who has been pleased to appoint the Arbitrator and moreover the judgment passed by the High Court appointing the Arbitrator has not been challenged before the Hon'ble Supreme Court and when no appeal has been filed, this issue cannot be allowed to be raised now for the first time in this court, which has been entertaining objection in petition under Section 34 of the Act of 1996. This court is of the view that it has rightly been held by the learned District Judge because once the right of this plea was waived and sole Arbitrator was got appointed by the

consent of the appellants and thereafter also despite pleaded in the statement of claim no objection was raised in the statement of defence, rather the counter claim was preferred and contested, this plea could not have been raised and rightly rejected.

24. Learned counsel for the appellant-opposite parties relied on the view of one of Hon'ble Mr.Justice Fazl Ali expressed in the case of the **United Commercial Bank Ltd. Versus Their Workmen (Supra)** in which he has observed that it was said that Rule 12 was ultra vires for two reasons; firstly, it shows that a 'vacancy' for the purposes of the proceedings before the Tribunal can be caused and need not always be a permanent one, as suggested on behalf of the appellants and secondly, what is more important, that a 'vacancy' does not affect the jurisdiction of the remaining members to continue the proceedings, for it is settled law that consent cannot given jurisdiction in respect of a subject matter though it might cure a mere irregularity. The Hon'ble Judge observed that it appears to me to be unnecessary to inquire into this side issue. Therefore this issue has not been examined by the Hon'ble Supreme Court in the said case in the facts and circumstances of the case, therefore it is not of any assistance in the facts and circumstances of this case for the reason that the appellant-opposite parties have not only consented for adjudication of the dispute through Arbitrator and appointment of Arbitrator, but admitted the claim of the respondent-claimants and raised a counter claim also and contested without any objection at the appropriate stage, which were considered by the learned Arbitrator and decided, therefore the appellants-opposite parties have waived their right, therefore it cannot be raised at this stage.

25. The Second argument of learned counsel for the appellants-opposite parties is that the claims raised by the respondent-claimant were beyond limitation in view of Section 43 of the Act of 1996, according to which the provisions of limitation Act 1963 are applicable, which provides the limitation of 3 years for such claim, is misconceived and not tenable for the reason that this objection was not taken by the appellants-opposite parties either before the High Court or before the Arbitrator, rather the counter claim was filed and contested before the learned Arbitrator. Any such objection should have been taken at the very first instance. Even otherwise this objection is not available to the appellants-opposite parties because they themselves raised a counter claim, pursued the same and the counter claim has also been allowed. The Delhi High Court, in the case of **M/s. Raj Kishan & Company versus National Thermal Power Corporation; 2012 SCC OnLine Del 4799** has held that the plea of limitation is not open to the petitioner to raise at this stage as the same was never raised before the Arbitral Tribunal.

26. Learned counsel for the appellants-opposite parties in this regard has relied on **M/s. B and T AG Versus Ministry of Defence (Supra)** in which the Hon'ble Supreme Court has held that statutory time period for enforcement of a claim which was three years cannot be defeated on the ground that the parties were negotiating, but it is not of any assistance to learned counsel for the appellant-opposite parties in the facts and circumstances of the case for the reason that in the present case the parties were not only negotiating but they had proceeded further and the appellants-opposite parties had admitted the claim of the respondent-claimant and

also raised the counter claim neither only in the negotiations but before the learned Arbitrator also. Therefore once the Arbitration proceedings were decided and even claim of the appellants-opposite parties was allowed they cannot raise this objection.

27. Learned District Judge after considering the plea of limitation raised by the appellants-opposite parties and the law laid down by the Hon'ble Supreme Court has rightly held that the point of limitation was not raised by the petitioner before the Hon'ble Arbitrator nor before the High Court at the time of appointment of Arbitrator, hence for the first time it cannot be allowed to be raised before the court.

28. The Hon'ble Supreme Court, in the case of **National Insurance Company Limited Versus Boghara Polyfab (P) Ltd; (2009) 1 SCC 267,** has held that the Chief Justice or the designated Judge will have the right to decide the preliminary aspects which includes the existence or otherwise of a live claim, therefore once this plea was not taken before the High Court at the time of appointment of Arbitrator and thereafter before the Arbitral Tribunal, it is not open to the appellants-opposite parties to take before the court.

29. The Hon'ble Supreme Court, in the case of **Yeswant Deorao Deshmukh Versus Walchand Ramchand Kothari (Supra),** relied by learned counsel for the appellants-opposite parties has held that if the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious, as the question of the applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final court of appeal. The Hon'ble Supreme Court has relied on the observations of Lord Watson in **Connecticut Fire Insurance Co. Versus Kavanagh; (1892) A.C. 473,** in which it has been said that when a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. Thus if the basic pleadings have been made then this plea could have been raised. Similar view has been taken by the Hon'ble Supreme Court in the case of **K.Lubna and others Versus Beevi and others (Supra).** But in the present case there are no such pleadings were made or raised either before this court at the time of appointment of the Arbitrator, rather the consent was given or it was raised before the Arbitrator at the relevant stage in terms of statutory provisions, therefore it is of no assistance to the appellants-opposite parties.

30. Similarly the case of **Kiran Singh and others Versus Chaman Paswan and others (Supra)** relied by learned counsel for the appellants-opposite parties is not applicable on the facts and circumstances of the present case in view of discussions made here-in-above.

31. The third argument of learned counsel for the appellants-opposite parties is that the impugned judgment and award made by the sole Arbitrator was against the public policy in view of Section 31(7)(a) and 31(8) of the Act of 1996. Section 31(7)(a)of the Act 1996 provides that unless otherwise agreed by the parties, an arbitral award for payment of money may include in the sum for which the award is made interest, at such rate as it deems

reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. Section 31(8) provides that the costs of an arbitration shall be fixed by the arbitral tribunal in accordance with Section 31A. Section 31A provides regime for costs, which is in the discretion of the Arbitral Tribunal. The Arbitral Tribunal after considering the pleadings of the parties and evidence on record and claim of the parties has allowed the interest and the costs as claimed by the parties.

32. The learned District Judge after considering the pleadings of the parties and the award has recorded a finding that the Hon'ble Arbitrator has committed no wrong in awarding interest at the rate of 18% per annum from the date of acceptance of final report. Moreover, costs, as granted by the Hon'ble Arbitrator to both the parties, and expenses of the witnesses also cannot be said to be excessive because the Hon'ble Arbitrator has very meticulously gone through the record while awarding expenses of the witnesses of both the parties. This Court after going through the records and the findings recorded by the Hon'ble Arbitrator and the learned District Judge does not find any illegality or error in the findings recorded by the learned Arbitrator and the District Judge. Learned counsel for the appellants-opposite parties also could not point out any error or illegality in the said findings or as to how it is against public policy.

33. The arguments of learned counsel for the appellants-opposite parties that the award is not sustainable as the parties have not been treated equally as different costs have been awarded to both the parties, therefore there is violation of Section 18 of the Act of 1996. Section 18 of the Act 1996 provides that the parties shall be treated with equality and each party shall be given a full opportunity to present his case. Therefore in view of Section 18 the equal opportunity is required to be provided to both the parties to present their case. Though this plea does not appear to have been taken before the learned District Judge while filing the application under Section 34 of the Act of 1996, however perusal of the award indicates that equal opportunity has been provided to both the parties before passing the award, which has not been denied. Defence of the appellants-opposite parties and the counter claim raised by him has properly been considered and dealt with in the award on the basis of pleadings, evidence and material on record, therefore merely on the basis of different costs awarded to both the parties it cannot be said that the parties have not been treated equally. The costs and interest including the claim and counter claim have been awarded according to the claims made by the parties, therefore the other contentions of learned counsel for the appellant-opposite parties are not tenable and repelled accordingly.

34. In view of above and considering the over all facts and circumstances of the case this court is of the view that the impugned judgment and order dated 16.09.2013 has rightly been passed in accordance with law by the District Judge, Lucknow dismissing the objection of the appellants-opposite parties against the award dated 16.01.2011 passed by the sole Arbitrator in Arbitration Case No.28 of 2008, which does not call for any interference by this court. This First Appeal has been filed on misconceived and baseless grounds, which is liable to be dismissed.

35. The appeal is, accordingly, **dismissed**. No order as to costs.

(2024) 8 ILRA 1023
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2024

BEFORE

THE HON'BLE VIPIN CHANDRA DIXIT, J.

First Appeal From Order No. 52 of 2024

Ashok Kumar Katiyar ...Appellant
Versus
Charan Jeet Singh & Ors. ...Respondents

Counsel for the Appellant:
Sri Shivam Shukla, Sri Sushil Kumar Shukla

Counsel for the Respondents:
Sri Komal Mehrotra, Sri Rahul Sahai

Civil Law –Civil Procedure Code,1908 - Section 151 - First Appeal- against order granting temporary injunction Order 39 Rule 1 and 2 read with CPC- plaintiff no. 1 has purchased the suit property through registered sale deed-plaintiff in possession-memorandum of undertaking-defendant under obligation to transfer petrol pump in favour of plaintiff after completing formalities-no efforts made by him-ex-parte interim order granted in favour of plaintiff-Section 12A of Commercial Court Act-pre-litigation mediation and settlement-mandatory where in suit no urgent relief is required-instant case is distinct-urgent relief was required-defendant was interfering in the possession of petrol pump-remedy to file application under Order 39 Rule 4- against ex parte interim order is available-present appeal not maintainable-dismissed. (paras 9 to 12)

HELD:

Section 12A (1) provides that pre-institution mediation is mandatory, where in the suit there is no urgent interim relief is required, but in the present case, as the defendant is interfering in operation of petrol pump and there was an urgent need of interim relief, the provisions of Section 12A are not attracted in the present case. (para 10)

Since the interim injunction was granted by the learned trial court is ex-parte, the defendant-appellant has a remedy to file application for vacating / recalling of ex-parte injunction order under Order 39 Rule 4 C.P.C. Statutory remedy is available to the defendant-appellant to approach the trial court by filing application for vacating the ex-parte order. (Para 11)

From a bare perusal of Order 39 rule 4 C.P.C., it is apparent that the defendant has a remedy to move application for setting aside the ex-parte order. Since, the appellant has a statutory remedy under Order 39 Rule 4 C.P.C. to file such application for setting aside the ex-parte injunction order, the present appeal on behalf of defendant-appellant is not maintainable and is liable to be dismissed. (Para 12)

Appeal dismissed. (E-14)

List of Cases cited:

M/s. Patil Automation Pvt. Ltd. & ors. Vs Rakheja Engineers Pvt. Ltd. reported in 2022 (10) SCC 1

(Delivered by Hon'ble Vipin Chandra Dixit, J.)

1. This first appeal from order has been filed on behalf of defendant-appellant against the order dated 28.08.2023, passed by Commercial Court, Kanpur Nagar, in Commercial Suit No. 46 of 2023 (Charan Jeet Singh and others vs. Ashok Kumar Katiyar and another) by which temporary injunction was granted in favour of plaintiffs on the application filed under Order 39 rule 1 & 2 read with Section 151 C.P.C. (Paper No. 6-C). The defendant-appellant was restrained to interfere in peaceful possession of plaintiffs-respondents over property no. 117/A-1, situated at Arazi Nos. 594, 595 and 596 in village Barsaitpur Tehsil & District Kanpur

Nagar. The defendant was also restrained to interfere in operation of petrol pump, its bank account and to maintain status quo in respect of suit property.

2. Heard Sri Sushil Kumar Shukla, learned counsel for the appellant, Sri Rahul Sahai, learned counsel for the respondents and perused the record.

3. Brief facts of the case are that the defendant-appellant was the owner and in possession of property no. 17/A-1, situated over Arazi Nos. 594, 595 and 596 in village Barsaitpur Tehsil & District Kanpur Nagar. The defendant-appellant has sold 700 sq. yards (585.27 sq. meter) land of the aforesaid property to the plaintiff along with petrol pump through registered sale deed on 24.02.2020. The possession of petrol pump had already been handed over by defendant appellant to the plaintiff-respondent no. 1 on 19.10.2019. A memorandum of undertaking was executed between the parties on 27.06.2019. It was agreed between the parties that the plaintiff-respondent no. 1 will pay Rs. 6,25,00,000/- to the defendant-appellant as sale consideration. The plaintiff no. 1 had already paid Rs. 1,00,00,000/- at the time of execution of memorandum of undertaking and the remaining amount was agreed to pay at the time of execution of sale deed. It was also agreed that defendant-appellant will transfer petrol pump to the plaintiff no. 1 after completing formalities with Hindustan Petroleum. The defendant-appellant had sent legal notice to the plaintiff no. 1 in the month of December, 2019 admitting therein that he received Rs. 2,23,00,000/- and Rs. 4,02,00,000/- is still outstanding. The sale deed in respect of petrol pump as well as suit property was executed by defendant-appellant in favour of plaintiff-respondent no. 1 on 24.02.2020 and possession was also handed over to the plaintiff-respondent no. 1.

4. The petrol pump is being run by plaintiff, but defendant-appellant has failed to complete the formalities for transfer of petrol pump in favour of plaintiff and demanding extra Rs. 1,00,00,000/-, whereas, entire sale consideration has already been paid by the plaintiff at the time of execution of sale deed.

5. The plaintiffs-respondents have filed suit for injunction seeking direction that the defendant-appellant may be directed to transfer the petrol pump in pursuance of sale deed dated 24.02.2020 in favour of plaintiff after completing formalities with Hindustan Petroleum. It is further prayed in the suit that the defendant-appellant and his agents may be restrained from interfering in peaceful possession of plaintiff-respondent no. 1 in respect of suit property. The plaintiffs-respondents have also moved an application for interim injunction under Order 39 rules 1 & 2 read with Section 151 C.P.C. (Paper No. 6C). The trial court after considering the fact that petrol pump along with suit property has already been purchased by plaintiff-respondent no. 1 through registered sale deed on 24.02.2020 and he is in possession over the same, has granted ex-parte injunction in favour of plaintiffs-respondents vide order dated 28.08.2023, which is impugned in the present appeal.

6. It is submitted by learned counsel for the defendant-appellant that the plaintiff had failed to pay the remaining amount in terms of memorandum of undertaking dated 27.06.2019. It is further submitted that as per memorandum of undertaking the

plaintiff-respondent no. 1 was required to pay Rs. 6,25,00,000/- and only Rs. 1,00,00,000/- was paid at time time of memorandum of undertaking dated 27.06.2019 and Rs. 4,00,00,000/- was paid at the time of execution of sale deed. Rs. 1,25,00,000/- is still unpaid by the plaintiffs. It is further submitted that the present suit has been filed by the plaintiff-respondent no. 1 on altogether incorrect facts only to save the unpaid amount. The plaintiffs-respondents by concealing the material facts have filed suit for injunction and they did not approach the trial court with clean hands. The trial court has also erred in granting ex-parte injunction in favour of plaintiffs-respondents. The plaintiffs were required to make efforts for mediation and settlement before filing of suit in view of Section 12 A of Commercial Court's Act, 2015, but without exhausting the remedy of pre-institution mediation, the present suit was filed. He has placed reliance on the judgment of Hon'ble Apex Court in the case of ***M/s. Patil Automation Private Limited and others vs. Rakheja Engineers Private Limited*** reported in ***2022 (10) SCC 1***.

7. On the other hand, learned counsel appearing for plaintiffs-respondents submits that the entire sale consideration has already been paid by the plaintiff-respondent no. 1 to the defendant no. 1 at the time of execution of sale deed. The plaintiff-respondent no. 1 is in possession over the suit property. It is further submitted that the trial court after considering the entire evidence and materials adduced by the plaintiff-respondent no. 1 has recorded the finding regarding prima-facie case in favour of plaintiff-respondent no. 1 as the suit property was purchased by the plaintiff after payment of agreed sale consideration. The possession of suit property was already handed over to plaintiff-respondent no. 1 and he is in possession over the same. The petrol pump is now operated by the plaintiffs and the trial court has rightly passed the order dated 28.08.2023 granting interim injunction in favour of plaintiff-respondent no. 1. The learned trial court has recorded the finding that the plaintiff is in possession over the suit property and is operating petrol pump. The trial court after its satisfaction has passed the temporary injunction in favour of plaintiffs-respondents. Lastly, it is submitted that the appeal against the ex-party injunction is not maintainable under Order 43 Rule 1(r) C.P.C. The defendant-appellant has right to file application for vacating / recalling of ex-parte injunction order in view of Order 39 Rule 4 C.P.C. The provisions of Section 12A of Commercial Court Act are also not applicable, as the plaintiff required urgent interim relief against the defendant-appellant.

8. Considered the submissions of learned counsel for the parties and perused the record.

9. It is admitted fact that the plaintiff no. 1 has purchased the suit property through registered sale deed dated 24.02.2020 and is in possession over the same. The petrol pump in question is operated by the plaintiffs. As per memorandum of undertaking, the defendant is required to transfer the petrol pump in favour of plaintiff no. 1 after completing formalities with Hindustan Petroleum. The defendant has not made any efforts to complete the formalities with Hindustan Petroleum to transfer the petrol pump in favour of plaintiff no. 1. The trial court after recording its satisfaction that prima-facie case is in favour of plaintiffs has

passed ex-parte interim injunction in favour of plaintiffs vide order dated 28.08.2023.

10. So far as pre-litigation mediation and settlement is concerned, the defendant-appellant has not taken any such ground in the memo of appeal. Section 12A(1) of Commercial Court Act is reproduced herein below :-

*"**12A. Pre-Institution Mediation and Settlement.**-- (1) A suit, which does not contemplate any urgent interim relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation in accordance with such manner and procedure as may be prescribed by rules made by the Central Government."*

From the bare perusal of Section 12A(1), it is apparent that it is applicable where urgent interim relief is not required. Record shows that the defendant was interfering in functioning of petrol pump and there was an urgent need of interim injunction.

The Hon'ble Apex Court in the case of ***M/s. Patil Automation Private Limited and others vs. Rakheja Engineers Private Limited (supra)*** has held that mediation is mandatory, where the plaintiff does not contemplate urgent interim relief. Relevant paragraph no. 72 is reproduced herein below :-

"72. We may sum-up our reasoning as follows:

The Act did not originally contain Section 12A. It is by amendment in the year 2018 that Section 12A was inserted. The Statement of Objects and Reasons are explicit that Section 12A was contemplated as compulsory. The object of the Act and the Amending Act of 2018, unerringly point to at least partly foisting compulsory mediation on a plaintiff who does not contemplate urgent interim relief. The provision has been contemplated only with reference to plaintiffs who do not contemplate urgent interim relief. The Legislature has taken care to expressly exclude the period undergone during mediation for reckoning limitation under the Limitation Act, 1963. The object is clear. It is an undeniable reality that Courts in India are reeling under an extraordinary docket explosion. Mediation, as an Alternative Dispute Mechanism, has been identified as a workable solution in commercial matters. In other words, the cases under the Act lend themselves to be resolved through mediation. Nobody has an absolute right to file a civil suit. A civil suit can be barred absolutely or the bar may operate unless certain conditions are fulfilled. Cases in point, which amply illustrate this principle, are Section 80 of the CPC and Section 69 of the Indian Partnership Act. The language used in Section 12A, which includes the word 'shall', certainly, go a long way to assist the Court to hold that the provision is mandatory. The entire procedure for carrying out the mediation, has been spelt out in the Rules. The parties are free to engage Counsel during mediation. The expenses, as far as the fee payable to the Mediator, is concerned, is limited to a one-time fee, which appears to be reasonable, particularly, having regard to the fact that it is to be shared equally. A trained Mediator can work wonders. Mediation must be perceived as a new mechanism of access to justice. We have already highlighted its benefits. Any reluctance on the part of the Court to give Section 12A, a mandatory interpretation, would result in defeating the object and intention of the Parliament. The fact that the mediation can become a non-starter, cannot be a reason to hold the provision not mandatory.

Apparently, the value judgement of the Law-giver is to give the provision, a modicum of voluntariness for the defendant, whereas, the plaintiff, who approaches the Court, must, necessarily, resort to it. Section 12A elevates the settlement under the Act and the Rules to an award within the meaning of Section 30(4) of the Arbitration Act, giving it meaningful enforceability. The period spent in mediation is excluded for the purpose of limitation. The Act confers power to order costs based on conduct of the parties."

Section 12A(1) provides that pre-institution mediation is mandatory, where in the suit there is no urgent interim relief is required, but in the present case, as the defendant is interfering in operation of petrol pump and there was an urgent need of interim relief, the provisions of Section 12A are not attracted in the present case.

11. Since the interim injunction was granted by the learned trial court is ex-parte, the defendant-appellant has a remedy to file application for vacating / recalling of ex-parte injunction order under Order 39 Rule 4 C.P.C. Statutory remedy is available to the defendant-appellant to approach the trial court by filing application for vacating the ex-parte order. The provisions of Order 39 Rule 4 C.P.C. are reproduced herein below :-

"4. Order for injunction may be discharged, varied or set aside. - Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order:

[Provided that if in an application for temporary injunction or in any affidavit supporting such application, a party has knowingly made a false or misleading statement in relation to a material particular and the injunction was granted without giving notice to the opposite party, the Court shall vacate the injunction unless, for reasons to be recorded, it considers that it is not necessary so to do in the interest of justice:

Provided further that where an order for injunction has been passed after giving to a party an opportunity of being hears, the order shall not be discharged, varied, or set aside on the application of that party except where such discharge, variation or setting aside has been necessitated by a change in the circumstances, or unless the Court is satisfied that the order has been caused undue hardship to that party.]"

12. From a bare perusal of Order 39 rule 4 C.P.C., it is apparent that the defendant has a remedy to move application for setting aside the ex-parte order. Since, the appellant has a statutory remedy under Order 39 Rule 4 C.P.C. to file such application for setting aside the ex-parte injunction order, the present appeal on behalf of defendant-appellant is not maintainable and is liable to be dismissed.

13. The first appeal from order is accordingly, **dismissed**.

(2024) 8 ILRA 1027
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.08.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE DR. GAUTAM CHOWDHARY, J.

Government Appeal Defective No. 182 of 2024

State of U.P. ...Appellant
Versus
Sandeep Vishwakarma ...Respondent

Counsel for the Appellant:

Sri Ashutosh Kumar Sand

Counsel for the Respondent:

Criminal Law – Indian Penal Code, 1860 - Sections 363, 366 & 376 - The Protection of Children from Sexual Offences Act, 2012 - Section 3/4 - Juvenile Justice (Care and Protection of Children) Act 2015 - Section 94 -Appeal against acquittal - determination of the victim's age, with conflicting evidence from school records and a matriculation certificate-trial court's preference for the school record indicating the victim was a major, supported by the Supreme Court's precedent that such presumptions are rebuttable-no grounds to interfere with the trial court's acquittal-prosecution failed to prove its case beyond a reasonable doubt- Appeal dismissed. (Paras 12, 13, 16, 18, 19 and 21)

HELD:

. The submission of learned State Counsel cannot be accepted. First and foremost it is to be borne in mind that the presumption stipulated under Section 94 of the Act 2015 is not conclusive and is rebuttable. This position has been clarified by the Supreme Court in Rishipal Singh Solanki Vs State of Uttar Pradesh and others 2022 (8) SCC 602. (Para 16)

On the basis of elaborate analysis of the evidence placed on record before the trial Court, the Court has returned the finding that the prosecution has failed to establish its case beyond all reasonable doubt. We have been taken through the Judgement of trial Court and we find that neither any triable issue is raised before us nor any perversity or contradiction is shown in the judgement of acquittal, which may persuade us to grant leave to assail the Judgement of acquittal. Law is otherwise settled that where the view taken by the trial judge to acquit the accused is a permissible view, the appeal Court would not interfere only because a different view could be taken in the matter. (Para 21)

Appeal dismissed. (E-14)

List of Cases cited:

1. Rishipal Singh Solanki Vs St. of U. P. & ors. 2022 (8) SCC 602

2. Narain Chetan Ram Chowdhary Vs St. of Mah. reported in 2023 Live Law (SC) 244

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Dr. Gautam Chowdhary, J.)

ORDER ON DELAY CONDONATION APPLICATION NO: 01 OF 2024

1. Delay in filing the appeal has been explained to the satisfaction of the Court.

2. Delay in filing the leave to appeal is condoned.

3. The delay condonation application is, accordingly allowed.

ORDER ON CRIMINAL MISC. (LEAVE TO APPEAL) APPLICATION

4. This appeal is by State alongwith an application for grant of leave to challenge the judgment of acquittal dated 06.02.2024, passed by Special Judge (Juvenile Court) Room No.1/Additional Sessions Judge, Mau in Special Sessions No. 26 of 2017 (State Vs. Sandeep Vishwakarma) arising out of Case Crime No. 159 of 2017 under Sections 363, 366, 376 I.P.C. and Section 3/4 of POCSO Act, 2012 Police Station Ranipur, District Mau.

5. As per the prosecution case, on 23.04.2017 at about 07:30 P.M. when the informant's daughter aged about 17 years had gone to ease herself two youngsters came on a bike and took her away. The passerby informed about it to the informant. The victim was in touch with the accused Sandeep Vishwakarma from

before and when the informant made necessary inquiry from the accused-opposite party, he did not inform anything to the father of the victim. On pressure being exerted, he said that the victim is with her friend and he would bring her back. On such assurance, he left his house on a motor cycle bearing registration no. UP54U-0438 and disappeared. The accused-opposite party had extended threats to the elder daughter of the informant and therefore doubt was expressed in the written report that the accused-Sandeep Vishwakarma along with his mother and brother has enticed the minor victim. On the basis of such written report, F.I.R. came to be lodged against the accused-opposite party in Case Crime No. 159 of 2017 under Sections 363, 366 I.P.C. and Section 7/8 of POCSO Act. The investigation proceeded in the matter and ultimately the victim was recovered. On the basis of her statement charge sheet was submitted against the accused-opposite party under Sections 363, 366, 376 I.P.C. read with Section 3/4 of POCSO Act. Cognizance in the matter was taken and the case was committed to the Court of Sessions. Charges were framed against the accused-opposite party in the above sections. The accused-opposite party denied the accusations made against him and consequently the trial proceeded.

6. At the stage of trial, the informant has been produced as P.W.1. The victim has appeared as P.W.2 and Dr. Mamta Sharma, who conducted medical examination of the victim has been produced as P.W.3 and other witnesses are formal police personnels. Various documentary evidence including the medical examination report, supplementary medical report were filed in the case.

7. The prosecution evidence was confronted to the accused-opposite party for recording his statement under Section 313 Cr.P.C. The accused denied the evidence and has termed the evidence to be false and has pleaded his innocence. The accused-opposite party lastly submitted that the victim had come to his house on her own accord; she was major on the date of incident and he has been falsely implicated. He further stated that the victim has studied in primary institution at Akbarpur from Class-1 to 3 and he shall produce relevant evidence to prove the majority of victim.

8. The trial Court has taken up the issue of minority of the victim at the outset. There are two sets of evidence placed on record. From the side of the prosecution High School certificate of the victim has been produced wherein her date of birth is recorded as 08.05.2000. The prosecution case is that the victim was admitted in her school for the first time in Class-4 and she had not studied in any school from Class-1 to 3. On the strength of the High School certificate it was urged by the prosecution that such evidence being admissible and relevant in terms of Section 94 (2) of the Juvenile Justice (Care and Protection of Children) Act 2015 (hereinafter to be referred to as "the Act of 2015) the victim ought to be treated as a minor.

9. On the contrary, the other evidence on record adduced by the defence witnesses is in the form of original school record of the Government Primary Institution where the victim studied from Class 1 to Class-3. The officiating Principal of the Government Primary institution has been produced in evidence where the victim had studied from Class 1 to Clsss-3. Original records were produced during trial to show that the victim was admitted on 28.07.2005

in the school and her name finds place at serial no. 179 of the scholars' register. She was promoted to Class-2 on 15.05.2006 and again to Class-3 on 30.05.2007. She was then admitted to Class-4 on 20.05.2008 but as she absented thereafter her name was struck off from the school rolls on 30.07.2009. The officiating Principal has produced the above records as also the original record wherein the date of birth of victim at the time of her admission to class-1 was recorded as 05.06.1998. It has further come in evidence that no transfer certificate was issued by the said institution where the victim studied up till Class-3. The testimony of defence witness, in this regard, has not been seriously questioned.

10. The victim in her statement before the Court however, disclosed her date of birth as 08.05.2000. She further claimed that her first admission in the school was in Class-4 and she had not studied in any previous school from Class 1 to Class-3.

11. The trial Court on the basis of evidence on record has accepted the defence version according to which, date of birth of the victim is 05.06.1998. For arriving at such conclusion, the Court has taken into consideration Section 94 (2) of the Juvenile Justice (Care and Protection of Children) Act 2015 which provides for presumption and determination of age where there is doubt in that regard. Section 94 of the Juvenile Justice (Care and Protection of Children) Act 2015 provides for presumption and determination of age is reproduced hereinafter:-

"94(1) 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.

12. Section 94 (2) of Act 2015 provides where the committee or the board has reasonable ground to doubt whether a

person brought before it is child or not, it shall undertake the process of age determination by seeking evidence specified in clauses (i), (ii) and (iii). Clause (i) provides date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; in the absence thereof, birth certificate given by a corporation or a municipal authority and in the absence thereof, medical evidence is to be relied upon for determination of age.

13. The provision, therefore clearly lets out a scheme priortising the evidence to be relied upon in a given case. At the top of the ladder is the date of birth certificate from the school or matriculation certificate or equivalent certificate from the concerned examination board. In the facts of the present case, we find that date of birth issued from the school where the victim was first admitted to Class-1 has been duly produced and exhibited during trial as per which, her date of birth is 05.06.1998. The other evidence is in the form of matriculation certificate. The matriculation certificate records the date of birth of victim as 08.05.2000. The basis for recording the date of birth in matriculation certificate is the date of birth of the victim recorded for the first time in Class-4. No explanation is furnished or any evidence adduced for recording the date of birth of victim in Class-4. The victim herself has stated that she has not studied in any school from Class-1 to Class-3 and that she was admitted in the school only in Class-4.

14. The trial Court has given preference to the date of birth of the victim recorded in Class-1 over her date of birth recorded in the matriculation certificate. The Court has found no reasons to disbelieve the defence evidence of victim's admission in Class-1 in the Government Primary Institution where her year of birth is 1998. The victim's explanation that she studied in no school from Class-1 to Class-3 has not been found reliable by the Court. The Court has doubted the victim's version that she did not attend any school uptill Class-3.

15. Learned A.G.A. submits that once the matriculation certificate is produced in evidence it was not open for the Court to have ignored it or to have admitted in evidence any other material for determination of age of victim in view of Section 94 of the Act 2015.

16. The submission of learned State Counsel cannot be accepted. First and foremost it is to be borne in mind that the presumption stipulated under Section 94 of the Act 2015 is not conclusive and is rebuttable. This position has been clarified by the Supreme Court in **Rishipal Singh Solanki Vs. State of Uttar Pradesh and others 2022 (8) SCC 602**. In para 33.3 and 33.4 of the report, the Court has held as under:-

33.3 That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the court to discharge the initial burden. However, the documents mentioned in Rules 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 the JJ Act, 2015 shall be sufficient for prima facie satisfaction of the court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

33.4 The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite party.

17. The view in **Rishipal Singh (supra)** has been reiterated by the Supreme Court in **Narain Chetan Ram Chowdhary Vs. State of Maharashtra** reported in **2023 Live Law (SC) 244**. In para 37 the Court has observed as under:-

37. In the cases of Ramdeo Chauhan (supra), Sanjeev Kumar Gupta vs State of Uttar Pradesh and Another [(2019) 12 SCC 370], Parag Bhati (supra), Manoj (supra), Babloo Pasi vs State of Jharkhand and Another [(2008) 13 SCC 133] and Birad Mal Singhvi (supra), different Benches of this Court came to findings as regards reliability of the documents upon applying mind and none of these authorities lay down that the certificate of date of birth by the school authorities based on admission register of the school will not be acceptable for an inquiry under Section 9(2) of the 2015 Act. On the other hand, in the order of priority in the aforesaid provision, the date of birth certificate by the school authority has been given the pre-eminence. Though the heading of the said section reads "presumption and determination of age", the section itself does not specify that the date of birth certificate by the school would only lead to presumption. The way the provision thereof has been framed, the documents referred to in the first two sub-clauses of sub-section (2) of Section 94 of the 2015 Act, if established in the order of priority, then the dates reflected therein has to be accepted to determine the age of the accused or convict claiming to be a juvenile on the date of commission of the offence. In the event the document referred to in Section 94 (2) (i) is there, the inquiring body need not go to the documents referred to in sub-clause (ii) thereof. The only caveat, implicit thereto, which has been sounded by several decisions of this Court, is that the document must inspire confidence. But lack of inspiration of the age determining authority must come for some cogent reason and ought not to be sourced from such body's own perception of age of the juvenile-claimant.

18. If the argument of learned State Counsel is accepted then the moment matriculation certificate of victim is produced by the prosecution there would be no scope for the accused to show that the basis of age in the matriculation certificate is not reliable. This approach will restrict the right of the accused to prove his innocence by producing legally admissible evidence. It will also impede the right of accused to a fair trial. The approach suggested by the State Counsel, for such reasons, cannot be accepted.

18. Section 94 (2) (i) of the Act 2015 places the date of birth certificate from the school or the matriculation or equivalent certificate from the concerned examination Board in the same category. It would therefore be open for the Court to admit defence evidence with regard to reliability of the date of birth entry in the matriculation certificate as has been done herein.

19. The statute accords recognition to the date of birth certificate from the school at par with the matriculation certificate. Where the date of birth in the above two records are distinct it would be permissible for the Court to evaluate the evidence on record and accept one at the cost of other. In this case, we find that original records of the first school where the victim was admitted in Class-1 has been produced and is found reliable. The basis of date of birth in the matriculation certificate is not disclosed and the victim's version that she attended no school from Class-1 to Class-

3 has not been found convincing and reliable. In our opinion, the view taken by the trial judge to accept the date of birth certificate from the school by overlooking the matriculation certificate is clearly a permissible view on the basis of evidence on record. The approach of the trial judge is otherwise in keeping with the well settled principle that the accused is to be presumed innocent till he is proven guilty. The approach of the trial judge is consistent with the principles of a fair trial since the accused is given the opportunity to produce evidence and rebut the presumption which otherwise arises on a matriculation certificate by virtue of Section 94 (2) (i) of the Act 2015.The finding of the trial judge that victim on the date of incident was major is thus sustained.

20. So far as the allegation with regard to victim having been enticed or subjected to sexual assault is concerned, the evidence on record clearly shows that the victim in her statement recorded under Section 161 and 164 Cr.P.C. has categorically stated that she had gone with the accused-opposite party on her own volition. The victim at the relevant point of time was studying in Intermediate in V.D.P. Intermediate College and she was in touch with the accused-opposite party for the last more than a year. She has admitted that she left with the accused-opposite party on his motor cycle and thereafter travelled to various places, including by train to Mumbai for more than six days. The victim remained with the accused-opposite party at Mumbai and physical relations were voluntarily formed by the victim with the accused-opposite party. It is only after return to Mau and coming in contact with her parents that the victim took a contrary stand by asserting that she was forcibly taken by the accused-opposite party and was subjected to sexual assault. The trial Court has examined the evidence on record and the subsequent change in her version has been found inconsistent with the evidence placed on record. In the medical examination also, the victim was found major. No injury either external or internal was found on the victim. The victim had clearly stated before the Magistrate under Section 164 Cr.P.C. that physical relations were established with her consent by the accused-opposite party therefore, the fact that victim's hymen was found ruptured could not have been construed as an evidence supporting the prosecution case.

21. On the basis of elaborate analysis of the evidence placed on record before the trial Court, the Court has returned the finding that the prosecution has failed to establish its case beyond all reasonable doubt. We have been taken through the Judgement of trial Court and we find that neither any triable issue is raised before us nor any perversity or contradiction is shown in the judgement of acquittal, which may persuade us to grant leave to assail the Judgement of acquittal. Law is otherwise settled that where the view taken by the trial judge to acquit the accused is a permissible view, the appeal Court would not interfere only because a different view could be taken in the matter.

22. In that view of the matter, we find no good ground to interfere in the matter so as to grant leave to appeal to the State in order to assail the Judgement of acquittal.

23. Application for grant of leave to appeal is, accordingly, refused and the appeal consequently fails and is dismissed.

(2024) 8 ILRA 1034
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.08.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ - C No. 1213 of 2023

Mithilesh Kumar Chaudhary ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Krishna Lal Yadav, Aparna Sinha

Counsel for the Respondents:
C.S.C., Atul Kumar Dwivedi

A. Education Law – Cancellation of admission in Ph.D. – Students cannot be made to suffer for the fault of the management of the university. (Para 13)

While granting the admission if the academic body has acted inattentively and mechanically, then they cannot be allowed to take the plea that the admission was never valid and that the petitioners were ineligible from the very inception and knowing the ineligibility they applied for admission. The respondents cannot be allowed to cancel the admission at their own convenience at any time of the year without considering the fact that if they cancel the admission after the session has started then the entire year of the petitioners will be spoiled. (Para 14)

The respondents cannot be allowed to take advantage of their own wrong and cannot be permitted to take the plea that under the prospectus they had the power to cancel the admission of ineligible student and the principle of estoppel will operate against them. (Para 14)

B. The petitioners cannot be penalised for the negligence of authorities. It is important to appreciate that the petitioners in the facts and circumstances cannot be accused of making any false statement or suppressing any relevant fact before anybody. (Para 14)

In the present case, once the University has granted admission and permitted petitioner to continue for five long years and his Ph.D. course is on the verge of completion, it is now not open for the University to restrain petitioner from completing his course. Even presuming some irregularity did occur at the time of admission in Ph.D. course, the same cannot now be made the basis for denying petitioner from completing his course. Learned counsel for respondent University could not show from record that petitioner has in any manner misrepresented or played fraud or otherwise was maliciously involved in the said admission process and the decision was taken by the authorities of University in exercise of its powers. Thus, the respondent University cannot restrain petitioner from completing his Ph.D. course and is bound to consider his application for extension of period by one year as per rules. (Para 15)

Writ petition allowed. (E-4)

Precedent followed:

1. Rajendra Prasad Mathur Vs Karnataka University, 1986 Supp SCC 740 (Para 12)

2. Ashok Chand Singhvi (Para 13)

3. Abha George (Para 14)

Present petition challenges the order dated 06.10.2022 passed by the Departmental Research Committee of the Dr. Shakuntala Misra National Rehabilitation University, Lucknow by which the admission of the petitioner in the Ph.D. course of Sociology has been cancelled. He has also challenged the orders dated 13.12.2022 and 23.01.2023 passed by Research Degree Committee and by the Registrar, respectively, communicating the aforesaid order.

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

1. Heard Shri Krishna Lal Yadav, learned counsel for the petitioner, learned Standing Counsel on behalf of respondent no.1 and Shri Sudeep Seth, learned Senior Advocate assisted by Shri Atul Kumar Dwivedi, learned counsel on behalf of respondent no.2 to 5.

2. By means of the present petition, the petitioner has challenged the order dated 06.10.2022 passed by the Departmental Research Committee of the Dr. Shakuntala Misra National Rehabilitation University, Lucknow by which the admission of the petitioner in the Ph.D. course of Sociology has been cancelled. He has also challenged the orders dated 13.12.2022 and 23.01.2023 passed by Research Degree Committee and by the Registrar, respectively, communicating the aforesaid order with regard to the cancellation of the admission in Ph.D.

3. It has been submitted by counsel for the petitioner that the petitioner is a law graduate having passed his LL.B. in the year 2014, B.Sc. in 2001 and M.Sc. in 2010 and thereafter had applied for pursuing Ph.D. (Sociology) from Dr. Shakuntala Misra National Rehabilitation University, Lucknow. He participated in the Ph.D. Entrance Test, 2016 where a provisional Admit Card was also issued, and according to the petitioner, he has passed Ph.D. Entrance Examination and was called for counseling on 23.08.2016, and subsequently, he was declared qualified. He completed all the formalities with regard to his admission in Ph.D. Sociology course. It is not in dispute that the petitioner is in 1st year Ph.D. Sociology course since 2016 and it is only in 2021 when the petitioner approached the Supervisor to submit the research related report and sought extra time, the Supervisor refused to accept the report and asked the petitioner to wait until further information is received with regard to the completion of his research work. Since October, 2021, the petitioner was not allowed to pursue and complete his Ph.D. and in this regard, he has made representation to the Head of the Department Sociology, the Registrar and the Vice-chancellor of the aforesaid University. It is in the aforesaid circumstances, when the petitioner was not being permitted to pursue his Ph.D., he had filed a writ petition before this Court being Writ - C No.1086 of 2023 which was dismissed as withdrawn with liberty to file afresh and subsequently, the petitioner filed another petitioner being Writ - C No.242 of 2023 which was disposed of by the Coordinate Bench of this Court by means of order dated 13.01.2023 directing the Vice-Chancellor, Dr. Shakuntala Misra National Rehabilitation University, Lucknow to decide the representation with regard to the grievance of the petitioner.

4. In compliance of the order dated 13.01.2023, the representation of the petitioner was decided by the impugned order which was communicated to the petitioner. In the impugned order dated 06.10.2022, it has been stated that the petitioner was admitted in the Ph.D. Sociology without being duly selected and in this regard, he has been repeatedly asked to submit an affidavit, which he has not furnished and accordingly, a decision has been taken. The said decision was forwarded to the Research Degree Committee, who has approved the cancellation of admission of the petitioner.

5. By means of order dated 13.12.2022, the Registrar of the University has communicated that the Research

Degree Committee has approved the decision taken by the Departmental Research Committee pertaining to the cancellation of admission of the petitioner and lastly, by means of the order dated 23.01.2023, the Vice-Chancellor intimated the petitioner with regard to the cancellation of his admission.

6. It has been submitted by counsel for the petitioner that the petitioner was duly selected for Ph.D. course in the entrance exam conducted by the University in 2016. In support of his submissions, the copy of the provisional Admit Card as well as information regarding Ph.D. scholars enrolled in academic session 2016-17 has been annexed indicating that the petitioner has been duly enrolled in the Ph.D. for the academic Session 2016-17.

7. The respondent - University has put in appearance and vehemently opposed the present writ petition. It has been submitted that as per the material available with the respondent University, the petitioner was not qualified for Ph.D. Entrance Examination and has managed the admission in the Ph.D. though back door. It has been submitted that with regard to the admission, the petitioner was directed to submit an affidavit but he has not submitted the required affidavit. and his name was not mentioned in the final select list and his admission has been cancelled in the year 2022.

8. It is on the strength of the aforesaid facts that the impugned orders passed by the authorities of the respondent University cancelling the admission, have been supported and prayed for rejection of the writ petition and accordingly, it was submitted that the admission of the petitioner was in violation of the Ph.D. Regulations, 2009 issued by the University Grants Commission.

9. Considering the aforesaid facts, this Court had made a query from the respondents to indicate as to what took them five years from ascertaining as to whether the petitioner was not qualified in the entrance examination and as to how, he was pursuing his Ph.D. course for more than five years in the respondent University.

10. With regard to the said query, no satisfactory explanation is forthcoming.

11. After hearing the counsel for the parties and perused the record, it is noticed that according to the petitioner, he appeared in the entrance examination conducted by the respondent University for admission to the Ph.D. courses. The petitioner has also annexed a copy of the information regarding Ph.D. scholars pertaining to the academic year 2016-17 where the name of the petitioner is occurring in the list pertaining to the Department of Sociology at Serial No.3. It is also not in dispute that since the date of admission, till passing of the impugned order sometime in 2022, the petitioner has been pursuing his Ph.D. Course.

12. Now coming to the judgments referred to by counsel for petitioner, in the case of **Rajendra Prasad Mathur (supra)** the dispute was with regard to cancellation of admission to the B.E. Course. The High Court allowed the writ petition and the Supreme Court while dismissing the appeals held that:

"8. We accordingly endorse the view taken by the learned Judge and affirmed by the Division Bench of the High

Court. But the question still remains whether we should allow the appellants to continue their studies in the respective engineering colleges in which they were admitted. It was strenuously pressed upon us on behalf of the appellants that under the orders initially of the learned Judge and thereafter of this Court they have been pursuing their course of study in the respective engineering colleges and their admissions should not now be disturbed because if they are now thrown out after a period of almost four years since their admission their whole future will be blighted. Now it is true that the appellants were not eligible for admission to the engineering degree course and they had no legitimate claim to such admission. ***But it must be noted that the blame for their wrongful admission must lie more upon the engineering colleges which granted admission than upon the appellants. It is quite possible that the appellants did not know that neither the Higher Secondary Examination of the Secondary Education Board, Rajasthan nor the first year BSc examination of the Rajasthan and Udaipur Universities was recognised as equivalent to the Pre-University Examination of the Pre-University Education Board, Bangalore.*** *The appellants being young students from Rajasthan might have presumed that since they had passed the first year BSc examination of the Rajasthan or Udaipur University or in any event the Higher Secondary Examination of the Secondary Education Board, Rajasthan they were eligible for admission.* ***The fault lies with the engineering colleges which admitted the appellants because the Principals of these engineering colleges must have known that the appellants were not eligible for admission and yet for the sake of capitation fee in some of the cases they granted admission to the appellants. We do not see why the appellants should suffer for the sins of the managements of these engineering colleges. We would therefore, notwithstanding the view taken by us in this Judgment, allow the appellants to continue their studies in the respective engineering colleges in which they were granted admission. But we do feel that against the erring engineering colleges the Karnataka University should take appropriate action because the managements of these engineering colleges have not only admitted students ineligible for admission but thereby deprived an equal number of eligible students from getting admission to the engineering degree course****. We also endorse the directions given by the learned Judge in the penultimate paragraph of his Judgment with a view to preventing admission of ineligible students." (emphasis added)*

13. Further, in the case of **Ashok Chand Singhvi (supra)**, where the facts were similar to the current case, the Court observed that students cannot be made to suffer for the fault of the management of the university. The relevant paragraphs of the judgment are as follows:

"14. It is urged by Mr Mehrotra, learned counsel appearing on behalf of the respondents, that the appellant could not be admitted and his admission was illegal. ***There may be some force in the contention of the learned Counsel, but when all facts were before the University and nothing was suppressed by the appellant, would it be proper to penalise the appellant for no fault of his? The admission of the appellant was not made through inadvertence or mistake, but after considering even all objections to the***

same, as raised by the said Officer-in-Charge, Admissions, in his note. The appellant was communicated with the decision of the Dean as approved by the Vice-Chancellor admitting him to the Second Year BE course. *The appellant deposited the requisite fees and started attending classes when he was told that his admission was directed to be put in abeyance until further orders without disclosing to him any reason whatsoever.*

15. It is curious that although the admission to the BE degree course of the University is governed by statutes of the University and admission rules, the said resolution of the Syndicate dated 13-12-1970 has also been kept alive. Neither the Dean nor the Vice-Chancellor was aware of the true position, namely, as to whether the said resolution had become infructuous in view of the statutes and the admission rules. A teacher candidate is likely to be misled by the said resolution. It is the duty of the University to see that its statutes, rules and resolutions are clear and unambiguous and do not mislead bona fide candidates. The University should have revoked the said resolution in order to obviate any ambiguity in the matter of admission or included the same in the statutes as part of the admission rules.

16. When the appellant made the application beyond the last date, his application should not have been entertained. But the application was entertained, presumably on the basis of the said resolution of the Syndicate. The appellant also brought to the notice of the Dean the said resolution and also the implementation of the same by admitting seven teacher candidates.

17. It is submitted on behalf of the University that it was through mistake that the appellant was admitted. We are unable to accept the contention. It has been already noticed that both the Dean and the Vice-Chancellor considered the objections raised by the Officer-in-Charge, Admissions, and thereafter direction for admitting the appellant was made. ***When after considering all facts and circumstances and also the objections by the office to the admission of a candidate, the Vice-Chancellor directs the admission of such a candidate such admission could not be said to have been made through mistake. Assuming that the appellant was admitted through mistake, the appellant not being at fault, it is difficult to sustain the order withholding the admission of the appellant****. In this connection, we may refer to a decision of this Court in Rajendra Prasad Mathur v. Karnataka University [1986 Supp SCC 740] . In that case, the appellants were admitted to certain private engineering colleges for the BE degree course, although they were not eligible for admission. In that case, this Court dismissed the appeals preferred by the students whose admissions were subsequently cancelled and the order of cancellation was upheld by the High Court. At the same time, this Court took the view that the fault lay with the engineering colleges which admitted the appellants and that there was no reason why the appellants should suffer for the sins of the management of these engineering colleges. Accordingly, this Court allowed the appellants to continue their studies in the respective engineering colleges in which they were granted admission. The same principle which weighed with this Court in that case should also be applied in the instant case. The appellant was not at fault and we do not see why he should suffer for the mistake committed by the Vice-Chancellor and the Dean of the Faculty of Engineering." (emphasis added)*

14. The said judgments have been followed and a similar approach is adopted by the Delhi High Court in the case of **Abha George (supra),** the Delhi High Court was of the opinion that:

"18. In Javed Akhtar case [Javed Akhtar v. Jamia Hamdard, 2006 SCC OnLine Del 1504] , a Coordinate Bench of this Court considered a case where the petitioners' candidature was accepted for appearing in the entrance examinations, and they were admitted to the institution concerned. Their admissions were cancelled after they had attended the classes for one month. The facts of the case are very similar to the present case. The question framed by the court was in the following terms:

"21. ? This is not disputed that the petitioners filled the forms for appearing in the entrance examination and gave their correct date of birth. The forms of the petitioners were considered and they were allowed to appear in the examination. After their names appeared, they were called for counselling and after verifying the documents and certificates of the petitioners, they were given admission. The petitioners were issued identity cards after accepting the fees for the course from them and the petitioners were allowed to attend classes for a month and thereafter by communication dated 8-8-2006 the admission of the petitioners have been cancelled. ***Whether Respondent 1 can be allowed to cancel the admission midterm in the facts and circumstances, when the petitioners have not concealed any thing nor produced any documents to mislead Respondent 1? Whether Respondent 1 will be estopped from cancelling the admission of the petitioners in the facts and circumstances?"*** *[Emphasis supplied]*

19. The court answered the question thus:

"38. Therefore, ***while granting the admission if the academic body has acted inattentively and mechanically, then they cannot be allowed to take the plea that the admission was never valid and that the petitioners were ineligible from the very inception and knowing the ineligibility they applied for admission. The respondents cannot be allowed to cancel the admission at their own convenience at any time of the year without considering the fact that if they cancel the admission after the session has started then the entire year of the petitioners will be spoiled*** *as the petitioners would not be in a position to take admission in any other college/university. If this fact of their ineligibility for admission was conveyed to them at the very start they would have taken admission in some other college/university.*

39. In such situation, in view of the decision in Sangeeta Shrivastava v. U.N. Singh [Sangeeta Shrivastava v. U.N. Singh, 1979 SCC OnLine Del 202], ***the petitioners cannot be penalised for the negligence of authorities. It is important to appreciate that the petitioners in the facts and circumstances cannot be accused of making any false statement or suppressing any relevant fact before anybody.*** *They clearly mentioned their date of birth in the application form for admission, and are not guilty of any fraud or misrepresentation. It was the duty of the university to have scrutinised the application form and the certificates thoroughly before granting admission to the petitioners and permitting them to attend the classes and not having done so they cannot cancel the admission thereafter. By accepting the application form and subsequently granting admission*

representation was made by the respondents that the petitioners' were eligible for admission and the petitioners' acting upon the same took admission and thus the petitioners' suffered a detriment. Had the respondents not made the representation that the application had been approved and granted admission the petitioners' would have applied and taken admission else where. Therefore the respondents are estopped from pleading that the petitioners were not entitled to a seat from the inception and that the admission is void ab initio and that the admission without fulfilment of the eligibility criteria is a nullity.

40. In the facts and circumstances of the case ***the respondents cannot be allowed to take advantage of their own wrong and cannot be permitted to take the plea that under the prospectus they had the power to cancel the admission of ineligible student*** *and the principle of estoppel will operate against them. The respondents are estopped from cancelling the admission of the petitioners' and further from preventing them from pursuing the 'pre tib' course in the present facts and circumstances." [Emphasis supplied]*

20. Applying these authorities in the present case, it appears that the petitioners' documents were accepted by the respective centres of Aiims, despite the fact that their qualifying examination results were declared one week later than stipulated in the prospectus. The petitioners have prosecuted their studies for almost two months prior to issuance of the impugned OM dated 18-10-2021. There is no allegation that the petitioners had misrepresented or concealed any information from Aiims ?indeed, there cannot be, as the qualifying examination was conducted by Aiims itself. Applying the observations of the Supreme Court in Rajendra Prasad Mathur case [Rajendra Prasad Mathur v. Karnataka University, 1986 Supp SCC 740] , in the present case also, the blame lies more upon the institution than the petitioners. The candidates applied; their results were declared by Aiims, New Delhi; those results were submitted to the regional centres to which they have been assigned, and they were granted admission. Their admissions were cancelled after they had spent almost two months on the course. The judgment of this Court in Javed Akhtar case [Javed Akhtar v. Jamia Hamdard, 2006 SCC OnLine Del 1504] , in fact, goes further to hold that an academic institution cannot be permitted to cancel admissions after the course had started, at any time during the year, due to prejudice that would be caused to the candidates who were admitted as they would by then be unable to take admission in any other university to which they may have been admitted."

15. Law is, thus, well settled on the issue involved. Once, the University has granted admission and permitted petitioner to continue for five long years and his Ph.D. course is on the verge of completion, it is now not open for the University to restrain petitioner from completing his course. Even presuming some irregularity did occur at the time of admission in Ph.D. course, the same can not now be made the basis for denying petitioner from completing his course. Learned counsel for respondent University could not show from record that petitioner has in any manner misrepresented or played fraud or otherwise was maliciously involved in the said admission process and the decision was taken by the authorities of University in exercise of its powers. Thus, this Court finds that the respondent University cannot restrain petitioner from completing his

Ph.D. course and is bound to consider his application for extension of period by one year as per rules.

16. This Court further finds that the country is making its best efforts to grow from a developing nation to a developed one. Repeatedly, it is said that to become a developed nation huge research work is required to be conducted within the Country. Now, when the students are pursuing their research work and are at the verge of completion it is highly improper to restrain them from completing their research on legal technicalities. The country is in dire need of research work. Petitioner has put more than five years in his Ph.D. course and is on the verge of submitting the same. Now denial of benefit of said research work to the nation in itself would be a huge loss. In the said circumstances also this Court is inclined to exercise its discretionary jurisdiction in favour of petitioner and against the respondent University.

17. In the given facts and circumstances of the case, the writ petition is **allowed** and the orders dated **13.12.2022 and 23.01.2023 passed by Research Degree Committee and the Registrar,** respectively, are **quashed** and a mandamus is issued to the respondent University to consider the application of petitioner for extension of one year after five years of Ph.D. course and permit him to submit fees in accordance with law. Such a decision shall be taken and communicated to the petitioner by the respondent University within a period of 15 days and accordingly petitioner shall be permitted to complete his Ph.D. course in accordance with law.

(2024) 8 ILRA 1041
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 23.08.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ - C No. 7092 of 2024

Ascent Education Trust, Kanpur
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ram Raj, Gokul Seth, Hanumant Lal Srivastava, Rishabh Raj

Counsel for the Respondents:
C.S.C.

A. Revenue Law – Recovery and penalty against payment of deficient stamp duty – Indian Stamp Act,1899 - Section 56(1-A) - According to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. In some cases, lawyers can make decisions without consulting the client. While in others, the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights. (Para 8)

Admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. (Para 8)

The admission in the present case was not regarding a matter of law or legal conclusions. If the lawyer assessed that there was no chance

of success of the entire appeal and he decided to restrict his prayer for waiver of the penalty, it cannot be said that he acted absolutely without any authority and that might be the reason as to why the petitioner did not initiate any proceedings against his Advocate who had given the concession. (Para 14)

B. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course, **a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.** (Para 12)

The petitioner cannot be permitted to dispute before this Court the correctness of the happenings recorded by the appellant authority i.e. Commissioner Lucknow Division, Lucknow in the impugned order 09.05.2024 to the effect it had been submitted by the learned counsel for the petitioner that the petitioner was willing to pay the deficient amount of stamp duty and he was confining his prayer for waiver of the penalty. However, it will be open for the petitioner to move an appropriate application before the Commissioner for disputing the correctness of the averments recorded in the impugned order and in case any such application is filed by the petitioner, the Commissioner shall decide the same expeditiously, without granting any unnecessary adjournment to any of the parties. (Para 15)

Writ petition disposed off. (E-4)

Precedent followed:

1. Himalayan Coop. Group Housing Society Vs Balwan Singh & ors., (2015) 7 SCC 373 (Para 8)

2. St. of Mah. Vs Ramdas Shrinivas Nayak, (1982) 2 SCC 463 (Para 11)

3. Bhavnagar University Vs Palitana Sugar Mill (P) Ltd., (2003) 2 SCC 111 (Para 12)

4. Roop Kumar Vs Mohan Thedani, (2003) 6 SCC 595 (Para 12)

Precedent cited:

1. Sree Surya Developers & Promoters Vs N. Sailesh Prasad, (2022) 5 SCC 736 (Para 4)

2. B.L. Sreedhar & ors. Vs K.M. Munireddy (Dead) & ors., (2003) 2 SCC 355 (Para 3)

3. Gurpreet Singh Vs Chatar Bhuj Goel, (1988) 1 SCC 270 (Para 6)

Present petition challenges the validity of an order dated 12.12.2022 passed by the Collector, Unnao, holding that the petitioner has paid a deficient stamp-duty on a sale-deed dated 17.07.2017 executed in its favour and ordering recovery of a sum of Rs. 15,24,220/- towards deficient stamp-duty and an equal amount as penalty. Also, challenges the validity of an order dated 09.05.2024 passed by the Commissioner, Lucknow Division, Lucknow, dismissing the petitioner's appeal u/s 56 (1-A) of the Indian Stamp Act filed against the aforesaid order passed by the Collector.

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

1. Heard Sri Rishabh Raj Advocate, the learned counsel for the petitioner and Sri Hemant Kumar Pandey, the learned Standing Counsel representing all the opposite parties.

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 12.12.2022 passed by the Collector, Unnao, holding that the petitioner has paid a deficient stamp-duty on a sale-deed dated 17.07.2017 executed in its favour and ordering recovery of a sum of Rs. 15,24,220/- towards deficient stamp-duty and an equal amount as penalty. The petitioner has also challenged the validity of an order dated 09.05.2024 passed by the Commissioner, Lucknow Division, Lucknow, dismissing the petitioner's appeal under Section 56 (1-A) of the Indian Stamp Act filed against the aforesaid order passed by the Collector.

3. The learned Standing Counsel has raised a preliminary objection that in the order dated 09.05.2024 passed by the Commissioner Lucknow Division, Lucknow, it is recorded that it was stated on behalf of the petitioner-appellant that the penalty of Rs. 15,24,220/- imposed by the Collector, Unnao be waived and the appellant was ready to deposit the amount of deficient stamp duty i.e. Rs. 15,24,220/-. He has submitted when the order was passed accepting the offer made on behalf of the petitioner itself, it is not open for the petitioner to turn around and challenge the validity of the order. In support of his support of his submission, the learned Standing Counsel relied upon a judgment of Hon'ble Supreme Court in the case of **B. L. Sreedhar and others Vs. K.M. Munireddy (Dead) and others**: (2003) 2 SCC 355, wherein it has been held that: -

"13. Estoppel is a rule of evidence and the general rule is enacted in Section 115 of the Indian Evidence Act, 1872 (in short "the Evidence Act") which lays down that when one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing. (See Sunderabai v. Devaji Shankar Deshpande AIR 1954 SC 82.)

14. "Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth" — Co Litt 352(a), cited in Ashpitel v. Bryan [(1863) 3 B & S 474 : 122 ER 179 : 32 LJQB 91] B & S at p. 489; Simm v. Anglo American Telegraph Co. [(1879) 5 QBD 188 : 49 LJQB 392 : 42 LT 37 (CA)] , per Bramwell, L.J. at p. 202; Halsbury, Vol. 13, para 488. So there is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue, whether in reality it be true or not. Estoppel, or conclusion, as it is frequently called by the older authorities, may therefore be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. (Halsbury, Vol. 13, para 448) The rule on the subject is thus laid down by Lord Denman, in Pickard v. Sears [(1837) 6 Ad & El 469 : 112 ER 179] Ad & E at p. 474 : ER p. 181

"But the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;"

"The whole doctrine of estoppel of this kind, which is a fictitious statement treated as true, might have been founded in reason, but I am not sure that it was. There is another kind of estoppel — estoppel by representation — which is founded upon reason and it is founded upon decision also." Per Jessel, M.R. in General Finance & Co. v. Liberator [(1878) 10 Ch D 15 : (1874-80) All ER Rep Ext 1597 : 39 LT 600] , Ch D at p. 20.

See also in Simm v. Anglo American Telegraph Co. [(1879) 5 QBD 188 : 49 LJQB 392 : 42 LT 37 (CA)] , QBD at p. 202 where Bramwell, L.J. said "An estoppel is said to exist where a person is compelled to admit that to be true which is not true, and to act upon a theory which is contrary to the truth."

15. On the whole, an estoppel seems to be when, in consequences of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts. Estoppel is based on the maxim allegans contraria non est audiendus (a party is not to be heard to allege the contrary) and is that species of presumption juries et de jure (absolute or conclusive or irrebuttable presumption), where the fact presumed is taken to be true, not as against all the world, but against a particular party, and that only by reason of some act done, it is in truth a kind of argumentum ad hominem."

4. The learned Standing Counsel has also relied upon a decision in the case of **Sree Surya Developers & Promoters v. N. Sailesh Prasad**: (2022) 5 SCC 736, wherein the Hon'ble Supreme Court referred to some precedents and held that the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. A party to a consent decree based on a compromise to challenge the compromise decree on the ground that the decree was not lawful i.e. it was void or voidable has to approach the same court, which recorded the compromise and a separate suit challenging the consent decree has been held to be not maintainable.

5. Replying to the aforesaid objection raised by the learned Standing Counsel, Sri. Rishabh Raj, the learned counsel for the petitioner has submitted that the aforesaid observations were made by the Hon'ble Supreme Court in the light of the factual background where the validity of the consent decree passed under Order XXIII C.P.C. Rule 3 C.P.C. was under challenge, which is not the case here.

6. Learned counsel for the petitioner has relied upon a decision of Hon'ble the Supreme Court in the case of **Gurpreet Singh Vs. Chatar Bhuj Goel**: (1988) 1 SCC 270 wherein Hon'ble Supreme Court held that: -

"10. Under Rule 3 as it now stands, when a claim in suit has been adjusted wholly or in part by any lawful agreement or compromise, the compromise must be in writing and signed by the parties and there must be a completed agreement between them. To constitute an adjustment, the agreement or compromise must itself be capable of being embodied in a decree. When the parties enter into a compromise during the hearing of a suit or appeal, there is no reason why the requirement that

the compromise should be reduced in writing in the form of an instrument signed by the parties should be dispensed with. The court must therefore insist upon the parties to reduce the terms into writing."

7. Learned counsel for the petitioner has submitted that in the present case, neither was an agreement of compromise signed between the parties, nor has any decree been passed on the basis of any compromise. Therefore, the decision in the case of **Sree Surya Developers and Promoters** (Supra) will not apply to the facts of the present case. The learned Counsel for the petitioner has submitted that the petitioner has not given in writing that it was foregoing the challenge to the imposition of additional stamp-duty.

8. The learned Counsel for the petitioner also relied upon a decision of Hon'ble Supreme Court in the case of **Himalayan Coop. Group Housing Society Vs. Balwan Singh and others**: (2015) 7 SCC 373 wherein Hon'ble Supreme Court has held that: -

"32. Generally, admissions of fact made by a counsel are binding upon their principals as long as they are unequivocal; where, however, doubt exists as to a purported admission, the court should be wary to accept such admissions until and unless the counsel or the advocate is authorised by his principal to make such admissions. Furthermore, a client is not bound by a statement or admission which he or his lawyer was not authorised to make. A lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed. We hasten to add neither the client nor the court is bound by the lawyer's statements or admissions as to matters of law or legal conclusions. Thus, according to generally accepted notions of professional responsibility, lawyers should follow the client's instructions rather than substitute their judgment for that of the client. We may add that in some cases, lawyers can make decisions without consulting the client. While in others, the decision is reserved for the client. It is often said that the lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights."

9. The learned Counsel for the petitioner has submitted that the petitioner had not instructed its Counsel to forego the challenge to imposition of additional stamp-duty and it is not bound by the concession given by the Counsel.

10. I have considered the aforesaid submissions advance by the learned counsel for the parties and the case law relied upon by them. I now proceed to refer to some precedents which are relevant for the present case.

11. In **State of Maharashtra v. Ramdas Shrinivas Nayak**: (1982) 2 SCC 463, the High Court had recorded a concession made by the learned Counsel for the State of Maharashtra. The Counsel intervened and protested before the Hon'ble Supreme Court that he never made any such concession and invited the Hon'ble Supreme Court to peruse the written submissions made by him in the High Court. Rejecting this contention, the Hon'ble Supreme Court held that: -

"4. ...We are afraid that we cannot launch into an enquiry as to what transpired in the High Court. It is simply not done. Public policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation." [Per Lord Atkinson in Somasundaram Chetty v. Subramanian Chetty, AIR 1926 PC 136] We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. [Per Lord Buckmaster in Madhu Sudan Chowdhri v. Chandrabati Chowdhrain, AIR 1917 PC 30] That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment."

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

"61. ...We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhu Sudan Chowdhri v. Chandrabati Chowdhrain [AIR 1917 PC 30 : 21 CWN 897] .) That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in

question the very fact of making the concession as recorded in the judgment."

12. The Hon'ble Supreme Court reiterated the above mentioned principle in **Roop Kumar v. Mohan Thedani**, (2003) 6 SCC 595 by stating that: -

"11. ... It is to be noted that the parties agreed before the High Court that instead of remanding the matter to the trial court, it should consider materials on record and render a verdict. After having done so, it is not open to the appellant to turn around or take a plea that no concession was given. This is clearly a case of sitting on the fence, and is not to be encouraged. If really there was no concession, the only course open to the appellant was to move the High Court in line with what has been said in State of Maharashtra v. Ramdas Shrinivas Nayak [(1982) 2 SCC 463 : 1982 SCC (Cri) 478] . In a recent decision Bhavnagar University v. Palitana Sugar Mill (P) Ltd. [(2003) 2 SCC 111 : 2002 AIR SCW 4939]…"

13. So far as the petitioner's contention based on the judgment in the case of **Himalayan Coop. Group Housing Society** (Supra) is concerned, in the aforesaid case it has been held that generally, admissions of fact made by a counsel are binding upon the client as long as they are unequivocal but the client or the court is not bound by the lawyer's statements or admissions as to matters of law or legal conclusions. The admission in the present case was not regarding a matter of law or legal conclusions. The Hon'ble Supreme Court has held that in some cases, lawyers can make decisions without consulting the client, while in others, the decision is reserved for the client. The lawyer can make decisions as to tactics without consulting the client, while the client has a right to make decisions that can affect his rights. Therefore, if the lawyer assessed that there was no chance of success of the entire appeal and he decided to restrict his prayer for waiver of the penalty, it cannot be said that he acted absolutely without any authority and that might be the reason as to why the petitioner did not initiate any proceedings against his Advocate who had given the concession.

14. In view of the aforesaid discussion, I am of the considered view that the petitioner cannot be permitted to dispute before this Court the correctness of the happenings recorded by the appellant authority i.e. Commissioner Lucknow Division, Lucknow in the impugned order 09.05.2024 to the effect it had been submitted by the learned counsel for the petitioner that the petitioner was willing to pay the deficient amount of stamp duty and he was confining his prayer for waiver of the penalty. However, it will be open for the petitioner to move an appropriate application before the Commissioner Lucknow Division, Lucknow for disputing the correctness of the averments recorded in the impugned order and in case any such application is filed by the petitioner, the Commissioner, Lucknow Division, Lucknow shall decide the same expeditiously, without granting any unnecessary adjournment to any of the parties.

15. The writ petition is ***disposed off*** in light of the aforesaid observations.

(2024) 8 ILRA 1047
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.08.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE MANJIVE SHUKLA, J.

Writ - C No. 11037 of 2024

M/S Hi Tech Pipe Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Ronak Chaturvedi, Swati Agrawal Srivastava

Counsel for the Respondents:
C.S.C., Sanjay Kumar Om

A. Public Law – Blacklisting of contractors/firm by governmental or public authorities – An order of blacklisting is accordingly required to be passed taking into consideration all aspects and should not be passed in a casual and cavalier manner as the same has an impact on the person for which such blacklisting is done. The entire concept of blacklisting is required to be seen in a holistic manner and what has to be appreciated that an order of blacklisting/debarment of a particular firm is in the nature of punishment which carries with civil consequences for a firm. (Para 7)

In the present case, it was imperative upon the respondent authorities to consider the reply given by the petitioner in totality and the mere rejection by using the term "reply is not satisfactory" is uncalled for and cannot be accepted. (Para 8)

Writ petition allowed. (E-4)

Precedent followed:

A.K. Construction Comp. Vs U.O.I. & ors., Writ-C No. 20223 of 2024, decided on 09.07.2024 (Para 6)

Present petition challenges order dated 23.01.2024, passed by the Executive Director, State Water and Sanitation Mission, U.P., Lucknow whereby petitioner has been debarred from making any supply to any project of Jal Jeevan Mission.

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

1. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Ronak Chaturvedi, learned counsel appearing for the petitioner, learned Standing Counsel appearing for Respondent No.1 and Sri Sanjay Kumar Om, learned counsel appearing for Respondents No.2 and 3.

2. Petitioner through this writ petition has challenged the order dated 23.1.2024 passed by the Executive Director, State Water and Sanitation Mission, U.P., Lucknow whereby petitioner has been debarred from making any supply to any project of Jal Jeevan Mission.

3. Learned Senior Advocate appearing for the petitioner has argued that while passing the impugned order dated 23.1.2024 the Executive Director has not considered the reply submitted by the petitioner at all and only this much has been said that petitioner's reply has not been found satisfactory. He further argues that vide order dated 23.1.2024 petitioner firm has been debarred from making supply for an indefinite period whereas the Hon'ble Supreme Court in catena of judgments had categorically held that debarment or blacklisting cannot be done for an indefinite period.

4. On the other hand, Sri Sanjay Kumar Om, learned counsel appearing for the contesting respondents submits that reply submitted by the petitioner to the show cause notice has not been found satisfactory and therefore, the impugned order has been passed. He further submits that the impugned order cannot be termed as an order for blacklisting for an indefinite period as the term of State Water and Sanitation Mission itself shall come to an end on 31.12.2024.

5. We have considered the rival arguments advanced by the learned counsels appearing for the parties and we

find that before passing the impugned order dated 23.1.2024 petitioner was issued a show cause notice, to which petitioner submitted a detailed reply and also made a request for re-testing of pipes supplied by the petitioner. The reply submitted by the petitioner has not been considered at all while passing the impugned order dated 23.1.2024 and only this much has been said that the reply submitted by the petitioner has not been found satisfactory. We are of the view that once proper reply was submitted, it was obligatory on the respondents to consider the entire reply and thereafter by recording reasons the order of blacklisting/debarment could have been passed. We also find that the impugned order dated 23.1.2024 proceeds to debar the petitioner firm for an indefinite period as it is the routine phenomenon that the term of the Schemes/Missions is extended from time to time.

6. This Court in **A.K. Construction Company v. Union of India and Others** (Writ-C No.20223 of 2024 decided on July 19, 2024), after examining the Supreme Court judgment in M/s Kulja Industries Limited -v- Chief Gen. Manager W.T. Proj. BSNL & Ors. (Civil Appeal No. 8944 of 2013), has held as follows:

14. Upon a perusal of the relevant paragraphs above, it is evident that the judgement brings forward several critical principles concerning the judicial scrutiny of decisions to blacklist contractors by governmental or public authorities. First, the inherent power to blacklist a contractor is vested in the entity awarding the contract, typically the State or its instrumentalities. This authority does not necessarily require explicit statutory authorisation but must conform to fairness and reasonableness. It is also to be noted that any governmental or public authority's decision to blacklist a contractor is open to judicial review, ensuring adherence to natural justice principles, particularly audi alteram partem and the doctrine of proportionality. This means courts can examine such decisions to ensure they are just and balanced. Further, before blacklisting a contractor, the entity must provide a fair hearing, allowing the contractor to present their case and defend against the allegations or reasons for blacklisting. The decision to blacklist must also be reasonable, fair, and proportionate to the gravity of the alleged offence or breach, avoiding arbitrariness or discrimination. Additionally, actions by State authorities, including blacklisting decisions, must pass the reasonableness test under Article 14 of the Indian Constitution, which ensures equality before the law and prevents arbitrary State actions. Furthermore, precedents and legal standards established in prior judicial decisions, such as Erusian Equipment & Chemicals Ltd. -v- State of W.B., reported in (1975) 1 SCC 70 and subsequent cases like Radha krishna Agarwal and Ors. -v- State of Bihar & Ors., reported in (1977) 3 SCC 457, shed light on the legal framework guiding the judicial review of blacklisting decisions. These principles collectively aim to ensure that the power to blacklist is exercised judiciously, upholding fairness, reasonableness, and proportionality while safeguarding contractors' rights to a fair hearing and defense.

7. The entire concept of blacklisting is required to be seen in a holistic manner and what has to be appreciated that an order of blacklisting/debarment of a particular firm is in the nature of punishment which carries with civil consequences for a firm. An

order of blacklisting is accordingly required to be passed taking into consideration all aspects and should not be passed in a casual and cavalier manner as the same has an impact on the person for which such blacklisting is done.

8. In light of the same, we are of the view that it was imperative upon the respondent authorities to consider the reply given by the petitioner in totality and the mere rejection by using the term "reply is not satisfactory" is uncalled for and cannot be accepted.

9. In view of the aforesaid reasons, this writ petition is allowed. The order dated 23.1.2024 is quashed with liberty to respondents to pass fresh order after considering the reply submitted by the petitioner.

(2024) 8 ILRA 1050
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2024

BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ - C No. 15996 of 2022

Smt. Madhubala Jaiswal ...Petitioner
Versus
Real Estate Appellate Tribunal & Ors. ...Respondents

Counsel for the Petitioner:
Pankaj Jaiswal

Counsel for the Respondents:
Anuj Pratap Singh, Ashish Agrawal, Mohd. Afzal, Wasim Masood

A. Real Estate Law – Allotment of land - As per the doctrine of *"commodum ex injuria sua nemo habere debet",* it is settled law that no party can take advantage of their own fault. (Para 33)

No one can be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. A wrong doer ought not to be permitted to make profit out of his own wrong. (Para 38)

The authorities cannot be allowed to take undue advantage of their own default in failure to act in accordance with law within a reasonable time. (Para 39)

In the present case, the undisputed fact remains that the respondent no. 3-UPSIDA allocated the plot to the petitioner without holding proper title, resulting in a delay of nearly four years to acquire the title. This delay was obviously not attributable to the petitioner but solely due to the actions and internal issues of respondent no. 3. Therefore, respondent no. 3 cannot take advantage of the delay or default that they themselves caused and ask for interest to be paid for that period. (Para 40)

The only bone of contention before the Court is **whether the UPSIDA is entitled to levy interest on the remaining balance due from the petitioner during the period in which the delay was attributable to UPSIDA itself.** According to the terms of the allotment letter, the petitioner was required to pay 25% of the total premium amount within 30 days of the allotment, following which UPSIDA was obligated to execute the lease deed in favour of the allottee. In this instance, despite the petitioner having paid 80% of the premium amount, UPSIDA failed to execute the "Conveyance Deed" or hand over possession until January 25, 2021, due to internal issues within UPSIDA. (Para 41)

B. In the interest of justice, there cannot be a discrepancy in the rate of interest applied. It is unjustifiable for UPSIDA to impose an interest rate of 14%, later reduced to 12%, for the period of delay, which is solely attributable to UPSIDA, caused by its own

actions. The 14% interest rate was originally stipulated for instances where the allottee opted for installment payments which the petitioner did not opt for. If UPSIDA offers a 6% interest rate to individuals, for withdrawing from the agreement, in all fairness, it cannot charge 14% or 12% interest from those who remain committed to the agreement. Moreover, **there is no provision in the allotment letter for charging interest if the default is on UPSIDA's part.** (Para 41)

A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate" at the same time. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. Therefore, UPSIDA cannot take unjust benefit from its own delay and must rectify the interest rate accordingly. (Para 42)

The established legal principle that no party should get benefit for their own wrong applies in the present case. Accordingly, respondent No. 3, UPSIDA, is directed to correct the unjust imposition of interest and to comply with appropriate legal standards. They may only charge interest @ 6% on the outstanding amount. Upon the petitioner paying the outstanding amount along with 6% interest rate for the period from the date of allotment of plot, respondent no.3 is obligated to execute the lease deed and complete all other formalities within 2 weeks thereafter. (Para 44)

Regarding the interest on the 80% premium amount paid by the petitioner, this matter is currently pending before the RERA Appellate Authority. The petitioner is entitled to pursue the issue for interest or damages for the period during which the payment was made, and the property could not be enjoyed by her. (Para 43)

Writ petition disposed of. (E-4)

Precedent followed:

1. M.K. Shah Engineers & Contractors Vs St. of M.P., (1992) 2 SCC 594 (Para 33)

2. Mrutunjay Pani Vs Narmada Bala Sasmal, AIR 1961 SC 1353 (Para 34)

3. Kusheshwar Prasad Singh Vs St. of Bihar, (2007) 11 SCC 447 (Para 35)

4. Nirmala Anand Vs Advent Corporation (Pvt.) Ltd. & ors., (2002) 5 SCC 481 (Para 37)

5. Municipal Committee Katra & others Vs Ashwani Kumar, Civil Appeal No(s), 14970-71 of 2017, decided on 09.05.2024 (Para 38)

Precedent distinguished:

1. Rajaram Maurya Vs St. of U.P. & ors., Writ-C No. 32291 of 2022, Neutral Citation No. 2023:AHC:41120-DB (Para 16)

2. U.P. Industrial Development Authority Vs Raja Ram Maurya, Special Leave to Appeal No. 12196-12197 of 2023 (Para 16)

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Pankaj Jaiswal, learned counsel for the petitioner, Shri H.N. Singh, learned Senior Counsel assisted by Shri Ashish Agrawal, learned counsel appears for the U.P. State Industrial Development Authority.

FACTUAL MATRIX OF THE PRESENT CASE:

2. Uttar Pradesh State Industrial Development Authority1 launched a scheme of residential plot in 'Saraswati-Hi Tech City Naini, Allahabad'. The petitioner who is 75 years old lady, made an Application No. 1693 on 18.09.2016 for allotment of plot and had deposited Rs. 1,95,930/- as Registration amount. The petitioner was found to be successful and was allotted a plot No. B 440 (measuring 200 Sq. Meter) on 18.02.2017 and the cost of plot was fixed at Rs. 36 lakhs. The allotment letter was issued on 18.02.2017, wherein it was stated that 25% of the total premium of plot after adjusting registration amount is to be deposited within 30 days.

3. From the record it emerges that the condition in the allotment letter was that the allottee while participating has to deposit Rs. 1,93,320/- as registration amount and after he/she was found successful in getting the allotment, the allottee would be required to pay 25% of the total premium amount within 30 days (which was amounting Rs. 7,01,680/-). The allotment also provided the facility of instalment, but, it carried an interest of 14% per annum on remaining premium chargeable from the date of allotment, payable in 12 half yearly installments alongwith interest on first day of January & July each year. Rebate of 2% was also admissible in case the payments due are made on or before the prescribed date if there are no arrears of dues.

4. The petitioner instead of depositing 25% (which was Rs. 7,01,680/-) of the said total amount, has deposited around Rs. 29 lakhs which was approximately 80% of the total amount of the premium, without seeking benefit of instalments which was offered in the allotment letter. So far as the possession of the plot as per the allotment letter is concerned, it was to be delivered to the allottees after payment of 25% of the total premium of plot (after adjusting earnest money/registration amount).

5. As per the terms and condition of the allotment, the petitioner was promised to get possession by July 2017, but the same was not given to the petitioner. Aggrieved with the same, the petitioner approached Real Estate Regulatory Authority2 on 05.11.2017 and RERA vide order dated 27.02.2018 directed the respondent No. 3-UPSIDA for delivering the possession, however, no order was passed for the interest on the delayed period. Hence, the petitioner filed an appeal No. 100 of 2020 before the Real State Appellate Tribunal, Lucknow within time and after admission of appeal, Tribunal fixed date for hearing, but due to lockdown in Corona period, it was informed to the petitioner that the hearing would be conducted through Video conferencing. It is claimed that no link was provided in spite of several requests, hence, the petitioner could not appear. The matter kept pending before the RERA Appellate Authority.

6. On 03.09.2019, an office order was issued by the UPSIDA, whereby the allottees were given option if they want to quit from the project, they can take back their deposited money with 6 percent interest per annum, or in case they want to continue under the scheme they will have to pay the remaining premium amount and other charges as per the original allotment order.

7. It transpires that there was some issue between UPSIDA and the State Government and the State Government for some internal reason did not executed the Conveyance Deed in favour of UPSIDA, as a result, they were also not in position to further execute the Conveyance Deed and hand over possession to the allottees. It seems that ultimately the State Government executed the Conveyance Deed on 23.01.2021 in favour of UPSIDA, and hence the delay in executing the sale deed by UPSIDA in favour of the petitioner was not on account of respondent No. 3, but was on account of State Government.

8. It was somewhere in 2022, the Respondent No. 3 sent a letter informing that they were in position to execute the sale deed, but at the same time, they asked

the petitioner to pay (14% - 2% =12%) interest on the balance amount from the date of allotment till the date of payment.

9. Aggrieved by the action that respondent no. 3 has not handed over the possession of land in time and thereafter, asking for heavy interest for the delayed period, petitioner instituted the present writ petition under Article 226 of the Constitution of India seeking for the following relief:-

"(i). issue a writ, order or direction in the nature of mandamus commanding (a) UPSIDA to pay delay period interest on the amount paid (Rs. 29 lakhs), at the same rate which respondent no. 3 is charging from allottees in case of default, from July 2017 (promised date of possession) till the date of possession.

(b) Appellate Tribunal to hear the petitioner and decide the matter on merit.

(c) Appellate Tribunal to provide all the orders passed in the matter of petitioner and to provide video link for hearing.

(ii). issue any other suitable writ, order or direction as this Hon'ble Court may deem fit and proper under the circumstances of the case.

(iii). Award cost of the writ petition in favour of petitioner.

(iv) issue a writ order or direction in the nature of mandamus for directing respondent no. 3 to provide possession of plot no. B-440.

(v) issue a writ order or direction in the nature of certiorari for quashing of order dated 08.06.2022 upto payment of interest of Rs. 535967 + Rs. 53552 & GST of Rs. 64762.50."

ARGUMENTS OF THE PETITIONER

10. Shri Pankaj Jaiswal, learned counsel for the petitioner submitted that while entertaining the present writ petition, the Court had taken a serious view and given show cause to the respondent as to why the possession of the plot has not been delivered to the petitioner so far and why this Court should not direct for payment of exemplary compensation to the petitioner for the said default. Order dated 08.07.2022 passed by the coordinate Bench is reproduced herein under:-

"The petitioner claims to have deposited Rs. 29 lacs so far under the allotment order issued in her favour by the erstwhile owner, i.e., the U.P.S.I.D.C. (now U.P.S.I.D.A.). The total amount payable under the allotment was a sum of Rs. 36 lacs approximately. The petitioner was entitled to possession of the plot upon deposit of 25 percent of the premium amount, whereas she has deposited almost 80 percent of the amount, still possession has not been delivered to her so far. On the other hand, the respondents have imposed interest upon the petitioner in respect of the remaining amount.

We call upon respondent no.3 to show cause as to why possession of the plot has not been delivered to the petitioner so far and why this Court should not direct for payment of exemplary compensation to the petitioner for the said default and also recommend for action being taken against the person responsible for the delay.

Sri Ashish Agarwal, learned counsel appearing on behalf of respondent no.3 shall communicate the instant order to the respondent for due compliance.

List as fresh on 22.7.2022."

11. He further submitted that after filing of the present writ petition UPSIDA had taken a decision on 08th June, 2022,

which was received by the petitioner on 17.06.2022 and thereafter the same has been brought before this Court by way of amendment application. UPSIDA vide letter dated 08th June, 2022 called upon the petitioner to complete the formalities for execution of lease deed. The letter requires the petitioner to deposit balance premium amount of Rs. 7,56,452/- and interest amounting to Rs. 5,35,967/- as well as lease rent and GST @ 18% apart from certain other charges.

12. The petitioner submits that she is ready and willing to take possession of the plot and will also pay the balance amount at the time of execution of sale deed.

13. The submission of the petitioner is that the respondent no. 3 cannot put the petitioner to double loss, in as much as, firstly the possession of land was not handed over to her in time and secondly the Authority is penalising her by asking for heavy interest for delayed payment.

14. The petitioner submitted that the Respondent No. 3 cannot take benefit of their own fault. It came to light that the Respondent No. 3 did not have the "Conveyance Deed" for the land which was allotted to the petitioner, hence, they were not in position to execute the deed. It is not open for the UPSIDA to charge heavy interest rate for a period for which they were on the fault.

ARGUMENT OF RESPONDENT NO. 3.

15. Mr. H.N. Singh, learned Senior Advocate assisted by Shri Ashish Agarwal learned counsel for the Respondent No. 3 submits that UPSIDA has floated a scheme of plot allotment in the year 2017 and the plot was allotted to the petitioner as per the allotment condition. The petitioner was supposed to pay 25% of the total premium, in lieu thereof, the petitioner had paid 80% of the said amount within a month. Due to of some internal problem between UPSIDA and the State Government, the "Conveyance Deed" could not be executed earlier. It was only on 23.01.2021 the "Convenience Deed" was executed in favour of the UPSIDA. However, it was on 03.09.2019 when UPSIDA had issued an order, whereby an option was given, if the allottees want to withdraw the money the same will be returned to them with 6% interest per annum after deducting the processing charges and the second option was for those who would like to continue in the project and are ready to wait, would pay the allotment premium along with interest as stated in the allotment letter.

16. Shri H.N. Singh, learned Senior Counsel has placed reliance on judgment passed by the Division Bench of this Court on 17.02.2023 in the matter of **Rajaram Maurya vs. State of U.P. and 3 others**3 and submitted that this Court had allowed the UPSIDA to repay the entire deposits along with interest at the rate of 8% per month which was subsequently reduced to 6% by the Supreme Court vide judgement and order dated 04.07.2023 in the matter of **U.P. Industrial Development Authority vs. Raja Ram Maurya**4, hence the petitioner can withdraw the said amount alongwith 6% interest.

17. Learned Senior Counsel submitted that on the basis of the said office order, the petitioner opted to continue under the scheme and as such is liable to pay interest on the remaining amount and hence an interest is being

charged @ 12 % per annum and accordingly, the respondent on 08.06.2022 called upon the petitioner to deposit the remaining outstanding premium amount which was Rs. 7,56,452/- along with interest of Rs. 5,35,967/- which comes out to Rs. 12,92,419/- and once this amount is deposited, then the respondent No. 3-UPSIDA would hand over the possession and execute the sale deed in favour of the petitioner.

18. Learned counsel for the respondent no. 3 further submitted that the petitioner is bound to pay the interest as per the provisions of Sections 55, 56 and 73 of the Contract Act.

ISSUES BEFORE THE COURT

19. Heard the submission advanced by learned counsel for the parties and perused the record.

20. The issue that thus arises for consideration in the instant petition is whether UPSIDA, which is State within the meaning of Article 12 of the Constitution of India, is acting in a fair manner. Admittedly, in the advertisement, there was no disclosure that UPSIDA did not have "Conveyance Deed" in its favour and that its title was still inchoate. A very relevant information was thus withheld from the public at large. This had resulted in large number of persons applying under the scheme unaware of the defect in the title of UPSIDA. Again, it kept accepting money without apprising the applicants of the defects in its title. It also failed to deliver possession even after receipt of more than 25 % of the premium amount, which is complete breach of the obligation under the allotment letter.

21. The other question which arises is whether in the above background facts, UPSIDA can charge interest from the allottees on the balance premium amount even when they had defaulted in delivering of possession in terms of the allotment letter. The petitioner has been deprived of use and enjoyment of the plot, to which she was entitled to, as soon as she deposited 25 percent of the total amount. Alternatively, even if, UPSIDA was entitled to realize interest on the remaining amount, what should be proper compensation to be awarded to the petitioner.

22. By the order dated 22.07.2022, this Court has framed the basic issues which are as follows :

(i) Whether UPSIDA, which is State within the meaning of Article 12 of the Constitution of India is acting in a fair manner while accepting the money without disclosing the actual condition of the title?

(ii) Whether UPSIDA has failed to deliver the possession even after receipt of 25% of premium amount in complete breach of the obligation under the allotment letter?

(iii) Whether there is justification of charging the interest on the balance amount inspite of failing to deliver the possession on deposit of 80% premium through letter dated 08.06.2022 when the UPSIDA itself is in default in delivering the possession in terms of allotment letter ?

(iv) Whether alternatively, even if, UPSIDA was entitled to realize interest on the remaining amount, what should be proper compensation to be awarded to the petitioner?

ANALYSIS BY THIS COURT

23. This Court vide order dated 22.07.2022, has observed that:-

"Before we proceed to decide these larger issues, we give one opportunity to the Chief Executive Officer of U.P.S.I.D.A. to revisit the entire matter and file his personal affidavit on all the aspects noted above."

24. Thereafter, personal affidavit of C.E.O., UPSIDA was filed on 03.08.2022, however, contrary to the order dated 22.07.2022 Respondent No. 3 did not revisit the entire matter and in response to the 3rd Issue, the C.E.O. in his personal affidavit stated that parties are bound with the agreement and hence they are liable to pay the interest, even if there was delay in executing the conveyance deed.

25. The UPSIDA has taken a decision not to charge penal interest and since the petitioner has deposited 80% of the Premium amount, hence, 2% rebate would be given on the contractual rate of interest and only demanded interest of Rs. 4,64,406/- on the balance amount @ 12% per annum (14% - 2% = 12%).

26. Yet another personal affidavit was filed on 15.09.2022 by C.E.O.-respondent no. 3 of UPSIDA and it was brought to the notice that the UPSIDA on 01.08.2019, in it's 33rd meeting, has taken a decision to grant opportunity to the allottees to take money back with interest at the rate of 6%. However, no decision was taken on Issue no. 3, on the issue of charging of interest on the balance amount.

27. Thereafter, the respondent No. 3-UPSIDA filed another affidavit, wherein, they took a stand that despite having deposited entire cost of the land to the State Government, the State Government failed to execute the "Conveyance Deed" in favour of the UPSIDA, as a result, respondent No. 3 could not hand over the possession to the allottees or executed the sale deed in their favour.

28. The allotment letter dated 18.02.2017 by which a plot of 200 Sq. Meter was allotted in favour of the petitioner and the petitioner was supposed to pay 25% of the premium amount of the plot, clearly stipulates that after payment of 25% of the premium amount, the respondent No. 3 was supposed to hand over the possession and execute the lease deed. However, in instant case the petitioner who is 75 years old lady had deposited 80% of the total premium amount, but inspite of that neither the sale deed was executed nor the possession of the plot was given by UPSIDA.

29. In the affidavit of UPSIDA it has been admitted that because of some internal dispute between UPSIDA and State Government, the "Conveyance Deed" for the said land was not executed by the State Government till 25.01.2021.

30. Though an option of exit was given to the petitioner, but she chose to stay in the project, and tacitly agreed to adhere the terms of the allotment letter.

31. Therefore, the argument raised by Respondent No. 3 that the instant issue is covered by judgment of Division Bench passed in Writ -C No. 32291 of 2022 is incorrect, as in that case the plot allotted was in low lying area and the allottee wanted a change to a different and better plots, however the facts of that case was different from this case. It was not the case in that scheme, that UPSIDA had no title to

pass on to the allottees. Since the issue raised in Writ-C No. 32291 of 2022 is different from the instant writ petition, hence the judgment passed by the Division Bench in that case is not applicable herein and distinguishable on facts.

ISSUE OF WHETHER ONE CAN TAKE ADVANTAGE OF ITS OWN FAULT

32. In this case, now the question before us is as to whether the respondent no. 3 can take advantage of their own fault as they were not even in a position to hand over the possession. However they are charging the interest for the period in which infact respondent no. 3 was in default.

33. As per the doctrine of "**commodum ex inijuria sua nemo habere debet**", it is settled law that no party can take advantage of their own fault. The Hon'ble Supreme Court in the matter of **M.K. Shah Engineers and Contractors vs. State of M.P.**5 has held as follows:-

"17. No one can be permitted to take advantage of one's own wrong……..A closer scrutiny of clause 3.3.29 clearly suggests that the parties intended to enter into an arbitration agreement for deciding all the questions and disputes arising between them through arbitration and thereby excluding the jurisdiction of ordinary civil courts. Such reference to arbitration is required to be preceded by a decision of the Superintending Engineer and a challenge to such decision within 28 days by the party feeling aggrieved therewith. The steps preceding the coming into Operating of the arbitration clause though essential are capable of being waived ***and if one party has by its own conduct or the conduct of its officials, disabled such preceding steps being taken, it will be deemed that the procedural prerequisites were waived. The party at fault cannot be permitted to set up the bar of non-performance of prerequisite obligation so as to exclude the applicability and Operating of the arbitration clause."*** **(emphasis supplied)**

34. In **Mrutunjay Pani v. Narmada Bala Sasmal**6, the Hon'ble Supreme Court observed as under:

"5…….The same principle is comprised in the Latin maxim commodum ex injuria sue nemo habere debet, that is, convenience cannot accrue to a party from his own wrong. To put it in other words, no one can be allowed to benefit from his own wrongful act."

35. Hon'ble Supreme Court in the matter of **Kusheshwar Prasad Singh vs. State of Bihar and others**7 has held as follows:-

*"12. ……..The appellant is right in contending that final statement statement ought to have been issued immediately or in any case within "reasonable time". The authority cannot neglect to do that which the law mandates and requires doing. By not issuing consequential final settlement under Section 11(1) of the Act, the authority had failed to discharge its statutory duty. Obviously, therefore, the appellant is justified in urging that such d****efault in discharge of statutory duty by the respondents under the Act cannot prejudice him.*** *To that extent, therefore, the grievance of the appellant is well founded.*

13. ……..The appellant, therefore, is right in contending that the authorities cannot be allowed to take undue

advantage of their own default in failure to act in accordance with law and initiate fresh proceedings.

X X X X

16. It is settled principle of law that a man cannot be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, "a wrongdoer ought not to be permitted to make a profit out of his own wrong."

(emphasis supplied)

36. In **Broom's Legal Maxims (10th Edn.), p.191** it has been stated as follows:-

"It is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

37. Hon'ble Supreme Court in the matter of **Nirmala Anand vs. Advent Corporation (Pvt.) Ltd. And others**8 has held that the respondents cannot take advantage of their own wrong and that would amount to unfair advantage.

38. Recently Hon'ble Supreme Court in the matter of **Municipal Committee Katra & Ors vs. Ashwani Kumar**9, has also considered that no one can be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. A wrong doer ought not to be permitted to make profit out of his own wrong. Relevant para nos. 18 and 19 of the judgement are being reproduced herein for ready reference:-

"18. The situation at hand is squarely covered by the latin maxim 'nullus commodum capere potest de injuria sua propria', which means that no man can take advantage of his own wrong. This principle was applied by this Court in the case of ***Union of India v. Maj. Gen. Madan Lal Yadav, (1996) 4 SCC 127*** *observing as below: -*

"28. ...In this behalf, the maxim nullus commodum capere potest de injuria sua propria — meaning no man can take advantage of

his own wrong — squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123(2). In Broom's Legal Maxim (10th Edn.) at p. 191 it is stated:

"... it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is

based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure."

The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted

therein that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof,

the author has placed reliance on another maxim frustra legis auxilium invocat quaerit qui in legem committit. He

relies on Perry v. Fitzhowe [(1846) 8 QB 757 : 15 LJ QB 239] . At p. 192, it is

stated that if a man be bound to appear on a certain day, and before that day the obligee puts him in prison, the bond is void. At p. 193, it is stated that "it is moreover a sound principle that

he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned". At p. 195, it is further stated that "a wrong doer ought not to be permitted to make a

profit out of his own wrong". At p. 199 it is observed that "the rule applies to the extent of undoing the advantage gained where that

can be done and not to the extent of taking away a right previously possessed".

19. It is beyond cavil of doubt that no one can be permitted to take undue and unfair advantage of his own wrong to gain favourable interpretation of law. It is a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned. To put it differently, 'a wrong doer ought not to be permitted to make profit out of his own wrong'. The conduct of the respondent-writ petitioner is fully covered by the aforesaid proposition.

39. Hon'ble Supreme Court in catena of judgments starting right from **M.K. Shah Engineers** (supra), **Mrutunjay Pani** (supra), **Kusheshwar Prasad Singh** (supra), **Nirmala Anand** (supra) and **Municipal Committee Katra** (supra) has throughout held that the authorities cannot be allowed to take undue advantage of their own default in failure to act in accordance with law within a reasonable time.

40. In the present case, the undisputed fact remains that the respondent no. 3-UPSIDA allocated the plot to the petitioner without holding proper title, resulting in a delay of nearly four years to acquire the title. This delay was obviously not attributable to the petitioner but solely due to the actions and internal issues of respondent no. 3. Therefore, respondent no. 3 cannot take advantage of the delay or default that they themselves caused and ask for interest to be paid for that period.

CONCLUSION

41. The only bone of contention before the Court is whether the UPSIDA is entitled to levy interest on the remaining balance due from the petitioner during the period in which the delay was attributable to UPSIDA itself. According to the terms of the allotment letter, the petitioner was required to pay 25% of the total premium amount within 30 days of the allotment, following which UPSIDA was obligated to execute the lease deed in favour of the allottee. In this instance, despite the petitioner having paid 80% of the premium amount, UPSIDA failed to execute the "Conveyance Deed" or hand over possession until January 25, 2021, due to internal issues within UPSIDA. Consequently, it is unjustifiable for UPSIDA to impose an interest rate of 14%, later reduced to 12%, for the period of delay, which is solely attributable to UPSIDA, caused by its own actions. The 14% interest rate was originally stipulated for instances where the allottee opted for installment payments which the petitioner did not opt for. In the interest of justice, there cannot be a discrepancy in the rate of interest applied. If UPSIDA offers a 6% interest rate to individuals, for withdrawing from the agreement, in all fairness, it cannot charge 14% or 12% interest from those who remain committed to the

agreement. Moreover, there is no provision in the allotment letter for charging interest if the default is on UPSIDA's part.

42. A party cannot be permitted to "blow hot and cold", "fast and loose" or "approbate and reprobate" at the same time. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. Therefore, UPSIDA cannot take unjust benefit from its own delay and must rectify the interest rate accordingly.

43. Regarding the interest on the 80% premium amount paid by the petitioner, this matter is currently pending before the RERA Appellate Authority. The petitioner is entitled to pursue the issue for interest or damages for the period during which the payment was made, and the property could not be enjoyed by her. This aspect remains open for adjudication, and we are not addressing it in this judgement.

DIRECTIONS BY THE COURT

44. In view of the aforementioned considerations, it is evident that the respondents cannot capitalize on their own defaults to the detriment of the petitioner. The established legal principle that no party should get benefit for their own wrong applies in the present case. Accordingly, respondent No.3, UPSIDA, is directed to correct the unjust imposition of interest and to comply with appropriate legal standards. They may only charge interest @ 6% on the outstanding amount. Upon the petitioner paying the outstanding amount along with 6% interest rate for the period from the date of allotment of plot, respondent no.3 is obligated to execute the lease deed and complete all other formalities within 2 weeks thereafter.

45. With the above direction, the instant writ petition is **disposed of**.

46. No order as to cost.

(2024) 8 ILRA 1060
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ - C No. 22299 of 2024

M/s AM Infratech Proprietorship Firm, New Delhi ...Petitioner
Versus
DFCCIL & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manu Khare

Counsel for the Respondents:
Sri Vaibhav Tripathi, Sri Ashish Mishra

A. Public Law – Rejection of Tender – Interpretation of tender document - Scope of writ jurisdiction with regard to interpretation of the tender documents and interference by the Court is required to be minimal and only when this Court finds an extremely arbitrary action or a malafide action, the Court would interfere. (Para 6)

In the present case, Hon'ble Court did not find any malafide intention by the authorities. Furthermore, the interpretation being taken by the respondent authorities appeared to be a reasonable one, and therefore, this Court did not replace the said interpretation with its own opinion. (Para 7) (E-4)

Precedent followed:

Rhetoric Technologies Pvt. Ltd. Through Authorized Representative anr. Vs State of U.P.

Through Principal Secretary Transport Sectt. & ors., 2023 SCC OnLine All 50 (Para 5)

Present petition challenges order of rejection of technical bid, dated 12.06.2024 and order rejecting appeal against the rejection, dated 25.07.2024.

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

1. Vakalatnama filed by Shri Ashish Mishra on behalf of respondent No. 3 is taken on record.

2. Heard Shri Manu Khare appearing on behalf of the petitioner, Shri Vaibhav Tripathi on behalf of respondent Nos. 1 and 2 and Shri Ashish Mishra, on behalf of respondent No. 3.

3. This is an application under Article 226 of Constitution of India, wherein the petitioner is aggrieved by rejection of its technical bid by the respondents vide order dated June 12, 2024. Subsequent to filing of the writ petition, the petitioner was also provided with a letter dated July 25, 2024 whereby the appeal against the rejection of its tender was also rejected. The relevant part of the order is delineated below:

"As per clause 1.3.12 (page no. 24 of 344) of tender document,

Right of DFCCIL to Deal with Tenders:- 1.3.12(b): "The authority for the acceptance of the tender will rest with the DFCCIL. It shall not be obligatory on the said authority to accept the lowest tender or any other tender and no tenderer(s) shall demand any explanation for the cause of rejection this/their tender nor the DFCCIL undertake to assign reasons for declining to consider or reject any particular tender or tenders".

In the view of above, DFCCIL is not bound to give detailed explanation about rejection of tenderers. However, considering importance of your firm and better future prospect of your firm, sincerity and better transparency, your satisfaction, unersigned would like to inform that, your offer did not had offer letter complete i.e. form-1 as per para 1.3.2(b) nor having any supporting document regarding experience to carryout electrical work in terms of clause 1.5.2 of tender document.

Hence, your offer was not found in order as per tender conditions for above floated tender & accordingly your offer was rejected by DFCCIL. Your EMD is going to returned shortly.

This is for kind information please."

4. Counsel on behalf of the petitioner has submitted that as per Clause 1.5.2 of the tender documents, it was required only to provide the name of the Associate Electrical Contractor and was not required to provide the legally enforceable agreement duly signed by the Associate Electrical Contractor nor was it required to provide the experience of the Associate Electrical Contractor at the time of submission of the same. This argument has been negated by counsel appearing on behalf of the respondent authorities who submit that by a corrigendum issued on March 28, 2024 certain queries of the bidders were answered by the respondents. The relevant extract of the same is provided below:

Query of Bidder	**DFCCIL reply**
…… …….…..	…… ….. …

Please clarify: i. Whether MOU with associated other contractor's (Lift/AC/FIRE) is to submitted with bidding documents or at the time of start of relevant work.	…… ... (i) All instruction already given in the Bid document under Article 3, obligations of the contractors and all required documents to be submitted with bidding documents only.

5. Counsel on behalf of respondents has also relied upon the judgment of Division Bench of Allahabad High Court in ***Rhetoric Technologies Pvt. Ltd. Through Authorised Representative and another vs. State of U.P. Through Principal Secretary Transport Sectt. and others***, 2023 SCC OnLine All 50, to submit that interpretation of the bid document and corrigendum issued therein would have to be as per the author of the bid documents and the courts are not to interpret the same under normal circumstances.

6. After hearing the counsel appearing on behalf of the parties and perusing the relevant documents, we are of the view that scope of writ jurisdiction with regard to interpretation of the tender documents and interference by the Court is required to be minimal and only when this Court finds an extremely arbitrary action or a malafide action, the Court would interfere. Paragraphs No. 18 and 26 of judgement in ***Rhetoric Technologies Pvt. Ltd. (supra)*** are delineated below:

"18. In ***Municipal Corporation Ujjain and Another V. B.V.G. India Ltd and others****, 2018 5 SCC 462, the Supreme Court had observed that the High Court should not ordinarily interfere with the judgement of expert consultants on the issue of technical qualifications of a bidder when the consultant had taken into consideration various factors including basis of non-performance of the bidder. It is not open to the Court to independently evaluate technical bids and financial bids of the parties as an Appellate Authority for coming to its own conclusion in as much as unless thresholds of malafide intention to favour someone or bias, arbitrariness, irrationality or perversity are met. The Court observed that if the decision is taken purely in public interest, the Courts ordinarily should exercise judicial restraint.*

* * *

* * *

26. The learned Standing Counsel appearing on behalf of the State Respondents has placed reliance upon judgement rendered by the Supreme Court in ***N.G. Projects Ltd versus Vinod Kumar Jain and others*** 2022 (6) SCC 127; and paragraphs 13, 14, 15 and 23 thereof. The Supreme Court observed that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. With regard to the interpretation of terms of the contract and the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer and by the employer. The Courts should not use a magnifying glass while scanning the

tenders and make every small mistake appear like a big blunder. In fact, the Courts must give "fair play in the joints" to the Government and Public Sector Undertakings in matters of contract. The Courts must also not interfere where such interference would cause unnecessary loss to the public exchequer and while entertaining the writ petition and/or granting the stay which may ultimately delay the execution of public projects, it must be remembered that it might seriously impede the execution of the projects and disable the State and or its agencies/instrumentalities from discharging their Constitutional and legal obligation towards the citizens. It was observed by the Supreme Court that the High Court should be extremely careful and circumspect in exercise of the discretion while entertaining such petitions and/or while granting stay in such matters. The Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tender. The Court does not have the expertise to examine the terms and conditions of the present economic activities of the State and this limitation should be kept in view. The Courts should be even more reluctant in interfering with the contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The Court should only examine as to whether the decision making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is a total arbitrariness or that the tender has been granted in a malafide manner, the Court should relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional cost on the State and is also against public interest. Any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for the larger public good."

7. In the present case, we are unable to assist the petitioner as we do not find any malafide intention by the authorities. Further more, the interpretation being taken by the respondent authorities appears to be a reasonable one, and therefore, this Court would not replace the said interpretation with its own opinion.

8. In view of above, we do not find any reason to interfere in the orders passed by the Authorities.

9. The writ petition is **dismissed**.

(2024) 8 ILRA 1063
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.

Writ - C No. 22679 of 2013

Vinod Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Smt. Anita Tripathi, Miss Bushra Maryam, Ms. Sufia Saba

Counsel for the Respondents:
C.S.C., Ms. Seema Agarwal

A. Service Law – Jurisdiction - Industrial Disputes Act, 1947 - Section 10(1)(d) r/w 2(a) - Court or Tribunal would have the jurisdiction if the parties resided within its

jurisdiction or if the subject matter of the dispute substantially arose within its jurisdiction. (Para 6)

The jurisdiction of a Tribunal would lie at the place where the cause of action had arisen and if a particular workman had been transferred to a particular place then the jurisdiction would be at the transferred place. (Para 8)

When the petitioner was transferred out from Agra to Bedar (Karnataka) on 5.9.2002 and when his services were terminated for his deeds at Bedar (Karnataka) then definitely, even if the termination order was served in Uttar Pradesh, no cause of action would arise in Uttar Pradesh. The territorial jurisdiction would lie with the Industrial Tribunal at Karnataka. In the instant case, the Court finds that the Tribunal had found that the termination had taken place in Karnataka and just because the order was served in Uttar Pradesh the jurisdiction would not lie with the Tribunal at Uttar Pradesh. So far as the argument raised by the petitioner that **the Tribunal could not go behind the reference is concerned, suffice it to say that definitely a Tribunal had no power/authority/jurisdiction to go behind the reference but when the matter went to the root of the case i.e. whether the reference itself was not made by the appropriate government then the Tribunal could have very well looked into the question of jurisdiction.** (Para 15)

Writ petition dismissed. (E-4)

<u>Precedent followed</u>:

1. National Engineering Industries Ltd. Vs St. of Raj. & ors., 2000 (1) SCC 371; 1999 LawSuit (SC) 1310 (Para 5)

2. Indian Cable Co. Ltd. Vs Its Workmen, 1962 (4) FLR 444 (Para 6)

3. Lalbhai Tricumlal Mills Ltd. Vs Dhunubhai Motilal Vin & ors., AIR 1955 Bom 463 (Para 7)

4. Ratnesh Mishra Vs Presiding Officer Industrial Tribunal (I), Allahabad & ors., decided on 05.08.2008, Civil Misc. Writ Petition No. 7530 of 1996 (Para 8)

5. General Manager, North-eastern Railway, Gorakhpur & ors. Vs Jamait Ram Khatnani & ors., decided on 05.02.1971, Civil Misc. Writ Petition No. 8341 of 1971 (Para 9)

6. Salora International Ltd. Vs Prescribed Authority (Payment of Wages Act) & ors., decided on 03.09.2014, Writ – C No. 453331 of 2008 (Para 9)

7. Pottery Mazdoor Panchayat Vs Perfect Pottery Co. Ltd. And another, 1979 (3) SCC 792 (Para 10)

8. Indian Cable Co. Ltd. Vs Its workmen, 1962 FLR 444 (Para 11)

9. Paritosh Kumar Pal Vs St. of Bihar & ors., 1984 Lab. IC 1254 (FB) (Para 12)

10. Ravindra Kumar Vs D.M., Agra & ors., 2005 (1) UPLBEC 118 (Para 14)

Present petition order dated 19.11.2012, where the respondent no. 2 i.e. the Presiding Officer, Industrial Tribunal-IV, Agra, passed an order holding that it had no jurisdiction to decide the case as the termination had taken place in Bedar (Karnataka).

(Delivered by Hon'ble Siddhartha Varma, J.)

1. The petitioner was appointed on the post of medical representative in the company known as M/s Tamilnadu Dada Pharmaceutical Limited. The service of the petitioner was confirmed on the post of Medical Representative on 28.10.1991 in the Agra region.

2. Thereafter, the company M/s Tamilnadu Dada Pharmaceutical Industries Limited was merged in the company known as M/s Sun Pharmaceutical Industries Limited and the petitioner

became an employee of the company into which the employer company had merged i.e. he became an employee of M/s Sun Pharmaceutical Industries Limited.

3. On 5.9.2002, the petitioner was transferred to Bedar (Karnataka). On 16.11.2002, as luck would have it, the respondent no. 3 the Employer Company, terminated the services of the petitioner. Aggrieved thereafter, the petitioner raised an industrial dispute which was referred by the Government of Uttar Pradesh on 23.3.2006. The reference was to following effect:

"क्या सेवायोजकों द्वारा श्री विनोद कुमार सिंह, मेडिकल रिप्रेजेन्टेटिव की सेवायें दिनांक 16.11.2002 से समाप्त किया जाना उचित तथा/अथवा वैधानिक है? यदि नहीं, तो संबंधित श्रमिक क्या हितलाभ/उपशम पाने का अधिकारी है, एवं अन्य किन विवरणों सहित।"

4. The respondent no. 3 raised the question of jurisdiction with regard to the reference before the Tribunal at Uttar Pradesh and on 19.11.2012, the respondent no. 2 i.e. the Presiding Officer, Industrial Tribunal-IV, Agra, passed an order holding that it had no jurisdiction to decide the case as the termination had taken place in Bedar(Karnataka).

5. Learned counsel for the petitioner Ms. Bushra Maryam has submitted that the respondent no. 2, the Presiding Officer, Industrial Tribunal - IV, Agra, could not have gone behind the reference and for this purpose, learned counsel for the petitioner, has relied upon a judgement of the Supreme Court reported in **1999 LawSuit(SC) 1310 : National Engineering Industries Ltd. vs. State of Rajasthan and others**. This citation can also be found in 2000 (1) SCC 371. In this judgement, she has specifically relied upon paragraphs no. 26 and 28 and, therefore they are being reproduced here as under:

"26. There can be many splinter groups each forming a separate trade union. Under Section 4 of the Trade Unions Act, 1926 any seven or more members of a trade union can get the trade union registered under that Act. If every trade union having few members is to go on raising a dispute and the State Government making reference again and again the very purpose of settlement is defeated. Once there is a representative union, which in the present case, is the Labour Union, it is difficult to see the role of the Workers' Union. If there are number of trade unions registered under the Trade Unions Act, 1926 not entitled to be registered as representative unions and they raise disputes, industrial peace would be a far cry. Under Section 2(0000)9 of the Rajasthan Act 'representative union' means a union for the time being registered as a representative union under the Rajasthan Act (Rajasthan Act XXXIV of 1950). Under Section 9-D1010 of the aforesaid Rajasthan Act any Union which has for the whole of the period of at least three months during the period of six months immediately preceding the calendar month in which it so applies under this section a membership of not less than fifteen per cent of the total number of workmen employed in unit of an industry may apply in the prescribed form to the Registrar for registration as a Representative Union. Then under Section 9-FI111 registration of a representative union can be cancelled on various grounds mentioned therein and one of such grounds is if, after holding such an inquiry, if any, as the Registrar deems fit he is satisfied that the registered union is being conducted not bona fide in the interest of the workmen but in the interest of the

employers to the prejudice of the interest of the workmen. We have already quoted Section 9-E as to how a representative union is to be registered. Proviso to that Section makes it clear that if there are two or more unions fulfilling the criteria laid down in Section 9-D and apply for registration then the union having the largest membership of the employees has to be registered. As to what is representative union is not defined in the Act but in common parlance it would mean that it represents all the workers. It is not the case of the Workers' Union that registration of the Labour Union is liable to be cancelled on any ground whatsoever. Notice given by Workers' Union under sub-section (2) of Section 19 of the Act is obviously invalid as it did not represent majority of the persons bound by the settlement nor it is a representative union. In this view of the matter it is not necessary for us to consider what were the demands raised by the Workers' Union in its character which were not covered by the tripartite settlement.

9. 2(0000) 'Representative Union' means a Union for the time being registered as a representative Union under the Act.

10. 9-D. Application for registration- Any Union which has for the whole of the period of at least three months during the period of six months immediately preceding the calendar month in which it so applies under this section a membership of not less than fifteen per cent of the total number of workmen employed in unit of an industry may apply in the prescribed form to the Registrar of registration as Representative Union.

11. "9-F. Cancellation of registration- The Registrar shall cancel the registration of a Union-

(a) if, after holding such an inquiry, if any, as he deems fit he is satisfied-

(i)....

(ii)....

(iii) that the registered Union is being conducted not bona fide in the interests of the workmen but in the interest of employers to the prejudice of the interests of workmen; or

(iv)....

(b) If its registration under the Indian Trade Unions Act, 1926 (Central Act XVI of 1926) is cancelled.

28. Industrial Tribunal is the creation statute and it gets jurisdiction on the basis of reference. It cannot go into the question on validity of the reference. Question before the High Court was one of jurisdiction which it failed to consider. A tripartite settlement has been arrived at among the management, Labour Union and the Staff Union. When such a settlement is arrived at it is a package deal. In such a deal some demands may be left out. It is not that demands, which are left out, should be specifically mentioned in the settlement. It is not the contention of Workers' Union that tripartite settlement is in any way mala fide. lt has been contended by the Workers' Union that the settlement was not arrived at during the conciliation proceedings under Section 12 of the Act and as such not binding on the members of the Workers' Union. This contention is without any basis as the recitals to the tripartite settlement clearly show that the settlement was arrived at during the conciliation proceedings.

6. Further, learned counsel for the petitioner has relied upon a judgement of the Supreme Court reported in **1962 (4) FLR 444** which was a dispute between Indian Cable Co. Ltd and Its workmen. Learned counsel for the petitioner has relied upon this judgement and submitted that a Court or Tribunal would have the

jurisdiction if the parties resided within its jurisdiction or if the subject matter of the dispute substantially arose within its jurisdiction.

7. Still further, learned counsel for the petitioner has relied upon a judgement passed in **Lalbhai Tricumlal Mills Ltd. vs. Dhunubhai Motilal Vin and Ors.** reported in **AIR 1955 Bom 463** and has specifically relied upon the judgement for the proposition as to what would be the jurisdiction of a Labour Court.

8. Learned counsel for the respondent no. 3, in reply, has submitted that the jurisdiction of a Tribunal would lie at the place where the cause of action had arisen and if a particular workman had been transferred to a particular place then the jurisdiction would be at the transferred place. In this regard, learned counsel for the petitioner has relied upon a judgement dated 5.8.2008 passed in **Civil Misc. Writ Petition No. 7530 of 1996 (Ratnesh Mishra vs. Presiding Officer, Industrial Tribunal (I), Allahabad and others)** and has submitted that the law was settled with regard to the jurisdiction of the Tribunal and that the jurisdiction would lie at the place where the cause of action had arisen i.e. the place where the person had been transferred and was working.

9. Learned counsel for the respondent has also relied upon a judgement of this High Court dated 5.2.1971 passed in **Civil Misc. Writ No. 8341 of 1971 (General Manager, North-eastern Railway, Gorakhpur and others vs. Jamait Ram Khatnani and others)** and has submitted that the jurisdiction would be in the Tribunal which has jurisdiction over the territorial area in which the workman was working. Similar is the law which has been laid down in a judgement of another learned Single Judge dated 3.9.2014 passed in **Writ - C No. 453331 of 2008 (Salora International Ltd. vs. Prescribed Authority (Payment of Wages Act) and others.**

10. Still further, learned counsel for the respondents relied upon a judgement reported in **1979 (3) SCC 792 : (Pottery Mazdoor Panchayat vs. Perfect Pottery Co. Ltd. And another)** and in this judgement, he relied upon specifically paragraphs no. 11 and 16 which are being reproduced here as under:-

"11. Having heard a closely thought out argument made by Mr Gupta on behalf of the appellant, we are of the opinion that the High Court is right in its view on the first question. The very terms of the references show that the point of dispute between the parties was not the fact of the closure of its business by the respondent but the propriety and justification of the respondent's decision to close down the business. That is why the references were expressed to say whether the proposed closure of the business was proper and justified. In other words, by the references, the Tribunals were not called upon by the Government to adjudicate upon the question as to whether there was in fact a closure of business or whether under the pretence of closing the business the workers were locked out by the management. The references being limited to the narrow question as to whether the closure was proper and justified, the Tribunals by the very terms of the references, had no jurisdiction to go behind the fact of closure and inquire into the question whether the business was in fact closed down by the management.

16. We are, therefore, of the view that the High Court was right in coming to the conclusion that the two Tribunals had

no jurisdiction to go behind the references and inquire into the question whether the closure of business, which was in fact effected, was decided upon for reasons which were proper and justifiable. The propriety of or justification for the closure of a business, in fact and truly effected, cannot raise an industrial dispute as contemplated by the State and Central Acts.

11. Learned counsel for the respondent no. 3 has relied upon **1962 FLR 444 : Indian Cable Co. Ltd vs. Its workmen,** which has also been relied upon by the learned counsel for the petitioner, and has submitted that a Court or Tribunal would have the jurisdiction if the parties reside within the jurisdiction or if the subject matter of the dispute substantially arose within its jurisdiction.

12. Learned counsel for the respondent no. 3 has also relied upon a judgement of the Full Bench of the Patna High Court in **Paritosh Kumar Pal v. State of Bihar and Ors.** reported in **1984 Lab. IC 1254 (FB)** in which he specifically relied upon paragraphs no. 24, 25, 26 and 30 and has submitted that wherever the cause of action would arise the jurisdiction would lie.

13. Learned counsel for the respondent no. 3 stated that if a Company had business all over the country then also the cause of action to a particular jurisdiction would arise only if the cause of action arose within its territorial jurisdiction and the reference in a case under the Industrial Disputes Act, 1947, could be made under Section 10(1)(d) read with 2(a) by the Government which was the proper Government under the statute.

14. Learned counsel for the respondent no. 3 has also submitted that no cause of action could arise to a person if the order by which he was aggrieved was served at the place where he was residing after termination of his services. For this purpose, learned counsel for the respondent relied upon **2005 (1) UPLBEC 118 : Ravindra Kumar vs. District Magistrate, Agra and others.**

15. Having heard Ms. Bushra Maryam, learned counsel for the petitioner and Sri H.N. Singh, Senior Counsel, assisted by Ms. Seema Agrawal, learned counsel for the respondent no. 3, this Court is of the view that when the petitioner was transferred out from Agra to Bedar(Karnataka) on 5.9.2002 and when his services were terminated for his deeds at Bedar (Karnataka) then definitely, even if the termination order was served in Uttar Pradesh, no cause of action would arise in Uttar Pradesh. The territorial jurisdiction would lie with the Industrial Tribunal at Karnataka. In the instant case, the Court finds that the Tribunal had found that the termination had taken place in Karnataka and just because the order was served in Uttar Pradesh the jurisdiction would not lie with the Tribunal at Uttar Pradesh. So far as the argument raised by the learned counsel for the petitioner that the Tribunal could not go behind the reference is concerned, suffice it to say that definitely a Tribunal had no power/authority/ jurisdiction to go behind the reference but when the matter went to the root of the case i.e. whether the reference itself was not made by the appropriate government then the Tribunal could have very well looked into the question of jurisdiction.

16. Under such circumstances, the writ petition being devoid of merit is being

dismissed. No interference is warranted in the order dated 19.11.2012 passed by the respondent no. 2, the Presiding Officer, Industrial Tribunal – IV, Agra.

17. The writ petition is, accordingly, dismissed.

(2024) 8 ILRA 1069
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ - C No. 24199 of 2020

M/S Mishra Automobiles ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Akhilesh Kumar Kalra, Shreya Chaudhary

Counsel for the Respondent:
A.S.G., Manish Jauhari

A. Marketing and Dealership Law – Weights and Measures – Cancellation of license - Marketing Dealership Guideline, 2012: Clause 5.1.4 - Mere presence of foreign elements does not ipso facto show intention unless there is evidence to show that the foreign components are capable of or in fact affecting the fair dispensation of fuel.

Provision 5.1.4 of MDG Guidelines is substantially penal in nature and its essential ingredients, prima facie, consist of:

1. The finding of the foreign objects in the dispensing unit, which is only a ground for inquiry and inspection.
2. Intention of manipulating the delivery.

In the present case, there is no evidence w.r.t. the second necessary ingredient, which is 'intention of manipulating the delivery' and also the inquiry fell short of returning any finding as to show any such manipulation. Therefore, the petitioner cannot be said to have violated 5.1.4. of the MDG Guidelines. (Para 17)

Firstly, it is not the case of the respondent Oil Company that there was any shortfall of the delivery, coupled with the fact that even the OEM has never reported, the result of the foreign body attached to the pulsar card and secondly, the benefit of doubt of the seal being intact during the time of inspection has to be given to the petitioner as the foreign component cannot be inserted without breaking the seal of the dispensing unit. Therefore, reading the inspection report dated 05.05.2017 wherein, it has clearly been found that the delivery was found to be correct, coupled with the fact that the seals were broken in the presence of the inspecting team leads to have irrebuttable conclusion that the seals were intact and there was no short supply of the fuel and consequently, in the aforesaid circumstances, it cannot be concluded that there was intention to manipulate the delivery, and hence any violation of Clause 5.4.1. of the MDG Guidelines. (Para 18)

Writ petition allowed. (E-4)

Present petition assails the order of the Dispute Resolution Panel dated 10.02.2020 as well as order of cancellation dated 21.06.2017.

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

1. Heard Ms. Aadya Antya, learned counsel for the petitioner and Shri Manish Jauhari, learned counsel on behalf of respondents no.3 to 5.

2. The petitioner is an authorized dealer of the Indian Oil Corporation Ltd. since 1990 and has been operating a retail outlet. He is licensed dealer of Indian Oil Corporation Ltd. and selling Petroleum products from the retail outlet at Sector - G,

Aliganj, Lucknow. It has further been stated that the retail outlet has four dispensing units, two of which have been installed by Gilbarco and Tatsno and the third Dispensing Unit has been installed by M/s Midco and fourth unit has been installed by L&T Company. It has been submitted by counsel for the petitioner that on 29.04.2017 around 7:00 PM, an inspection team had inspected the applicant's retail outlet after taking permission from Weights & Measures Department and the delivery of petrol was found to be proper and further inspection was carried out after breaking the seal installed by the Weights & Measures Department and two pulsar cards were removed from the dispensing units and were taken by the inspecting team and sent to the Original Equipment Manufacturer (hereinafter referred to as "**OEM**") for seeking the report. It is stated that the OEM, namely, M/s Midco submitted the report on 11.05.2017, which is as under: :-

(1) Foreign components were found on the pulsar cards. These foreign components do not belong to Midco standard components.

(2) Three points (JP1, JP2 and JP3) in the pulsar cards PCBs are shortened by using additional wire.

3. On receiving the said information that the pulsar cards had foreign components, the matter was duly considered by the respondents Oil Company and the petitioner was subjected to a show cause notice on 20.05.2017. A copy of the report submitted by M/s Midco was annexed along with the show cause notice. Apart from the said report, the respondent Oil Company had also sought a clarification from OEM as to whether mere finding of foreign components of the pulsar card would tantamount to manipulation in the delivery. It is only in response to the query of the respondent Oil company that on 15.05.2017 the OEM stated that "any tampering/additional fitting in pulsar will tantamount to manipulation of delivery.

4. The petitioner duly replied to the show cause notice denying the allegations made against him and stated that the delivery of petrol dispensed from the retail outlet were checked during the inspection and was found to be correct and no irregularities or tampering were found in the dispensing unit. It was further stated that the dispensing unit which was inspected had seal intact and accordingly submitted that there was no evidence of tampering of the dispensing unit by the licensee and also that the quantity of petrol dispensed from units was also not short which finding is also mentioned in the inspection report, accordingly, denied the said allegations.

5. Considering the response of the petitioner, by means of order dated 21.06.2017, the Chief Divisional Retails Sales Manager, Lucknow Division Office rejected the response of the petitioner and cancelled his retail license.

6. It was stated that as per report of the OEM, Foreign component was found in the pulsar cards and the additional fittings tantamount to manipulation of delivery and consequently, order for cancellation was passed. The petitioner being aggrieved by the order of cancellation dated 21.06.2017, had preferred an appeal before the Dispute Resolution Panel which also did not find favour and dismissed the appeal of the petitioner.

7. The present writ petition has been preferred by the petitioner assailing the

order of the Dispute Resolution Panel dated 10.02.2020 as well as the order of cancellation dated 21.06.2017.

8. Counsel for the petitioner has submitted that the impugned orders passed by the respondents are illegal and arbitrary inasmuch as the petrol outlet of the petitioner is running since 1990 without any complaint. He has further submitted that on the date of the inspection, the seals of the dispensing units were found to be intact and the dispensing units had been dispensing the exact quantity of the petroleum products, but merely because the pulsar cards which were attached inside the dispensing unit were reported to have certain foreign objects attached to it and consequently, merely on account of the report of the OEM, it has been held that the petitioner has violated Clause 5.1.4 of the Marketing Dealership Guideline, 2012 (hereinafter referred to as "**MDG**") and merely on the basis of said assumption the license of the petitioner has been cancelled. He had submitted that there was no material available with the respondents to have come to a conclusion that there was firstly tampering with the dispensing unit by the petitioner nor is there any evidence of short supply of the diesel or petrol from the dispensing units and consequently, the proceedings initiated by the respondents as well as subsequent cancellation and rejection of his appeal are illegal and arbitrary and without any application of mind and consequently, deserves interference by this Court in exercise of power under Article 226 of the Constitution of India.

9. Counsel for the respondent, on the other hand, has vehemently opposed the writ petition. He has not disputed the facts of the case but submits that merely because the report of the OEM indicates that foreign body was found in the pulsar cards is sufficient in itself to invite proceedings for cancellation of the retail license of the petitioner in exercise of power under Clause 5.1.4 of the MDG. He further submits that due opportunity of hearing was given to the petitioner inasmuch as all the offending materials as well as opportunity of hearing was given to the petitioner prior to cancellation and also that he had exercised his right of filing an appeal where all the contentions raised by the petitioner was duly considered and consequently, submits that there is no reason for this Court to interfere in the present case where the licensee has been found to have manipulated the pulsar cards which in ordinary course of nature would tantamount to interfering with the supply of the dispensing unit.

10. I have heard the counsel for the parties and perused the record.

11. The facts as narrated above are not in dispute inasmuch as the dispensing unit of the petitioner were duly inspected by the joint team, including officials of the respondent Oil Company on 29.04.2017. It is not in dispute that the seals affixed by the Weights & Measures Department were found to be intact and also that according to the petitioner, the supply from the dispensing unit was also found to be normal. The pulsar cards were subsequently sent to the OEM for the report inasmuch as the pulsar cards are installed by the OEM and second hand pulsar cards are installed in the machines, which have been removed from early dispensing units installed in other retail outlets. They are rectified and all the rectifications and soldering marks on the pulsar cards are supposed to be duly monitored and profiled

by OEM and the photographs are kept by them. Whenever subsequently, a pulsar card is sent for inspection, they compare the last photograph taken from the pulsar card from which they determine as to whether any fresh soldering marks or any foreign component has been attached to the pulsar cards. The Oil Company on its behalf relies totally on the report of the OEM to determine whether there has been manipulation in the pulsar cards and also that whether such a manipulation would result in short supply of the oil.

12. In the present case, the OEM submitted the report on 11.05.2017 and only stated that the foreign component was found in the pulsar cards and these foreign components do not belong to the OEM. There was no findings return as to the nature of the foreign components or as to whether the foreign components could have resulted in short supply of the petroleum products. It is in these circumstances, it seems that the respondent Oil Company itself was not satisfied with the OEM report and sought a clarification especially in this regard as to whether the foreign components attached to the pulsar cards would result in short supply of petroleum products dispensed from the said unit and whether the said manipulation could result in short delivery. It is on seeking of the said clarifications, the OEM had reported that any tampering / additional fitting in the pulsar cards will tantamount to manipulation of delivery.

13. From the aforesaid, it is clear that the OEM had merely reported the finding of a foreign object on the pulsar cards. Even in the previous report dated 11.05.2017 their finding was limited only to the findings of foreign component in the pulsar card and even when subsequent clarification was sought by the respondent Oil Company, they merely stated that such an additional component would tantamount to manipulation of delivery. To consider as to whether the findings of the OEM, as stated above, would amount to violation of Clause 5.1.4 of the MDG Guidelines, it is necessary to quote the said rule itself which reads as under:

"5.1.4 ADDITIONAL / UNAUTHORIZED FITTINGS / GEARS FOUND IN DISPENSING UNITS / TAMPERING WITH DISPENSING UNIT

Any mechanism / fittings / gear found fitted in the dispensing unit with the intention of manipulating the delivery.

Removal, replacement / manipulation of any part of the Dispensing Unit including microprocessor chip / electronic parts / OEM software will be deemed as tampering of the dispensing unit.

In case of this irregularity sales from the concerned dispensing unit to be suspended, DU sealed. Samples to be drawn of all the products and send to lab for testing."

14. From the aforesaid provision, it is clear that when any mechanisms, fitting, gear found fitted in dispensing unit with the intention of manipulation of delivery would amount to invite proceedings under the said sections and lead to cancellation of the license. Therefore, from a bare reading of Clause 5.1.4 of the MDG Guidelines, it is clear that any mechanism or fitting in the dispensing unit should result in manipulation of delivery or such additional fitting should at least the capable of manipulating the delivery. There is no dispute with regard to the fact that the

foreign component was in fact found on the pulsar cards but the dispute in the present case is only with regard to the fact that as to whether discovery of a foreign component on the pulsar card would automatically lead to the conclusion that same has been installed with an intention of manipulation of delivery. In the present case, the peculiar facts are that seals of the dispensing units were intact at the time inspection. The foreign component found in the pulsar card has been reported by the OEM. Thee is no clear finding that such foreign component would led to the short supply of diesel in its original report dated 11.05.2017 or in subsequent clarification issued on 17.05.2017.

15. To return a finding with regard to the intention of manipulating the delivery, the basic fact which has to be established that the installation of the foreign component had in fact led to manipulating the delivery meaning thereby that on installation of foreign component on the pulsar cards, the dispensing unit had dispensed lesser quantity of fuel than it was supposed to dispense.

16. We do not agree with the submission of the counsel for the respondent that mere finding of the foreign component of the pulsar cards is sufficient in itself to come to a conclusion that the same has been done with an intention to manipulate the delivery. In case there is manipulation in delivery meaning thereby short supply of the fuel dispensed from the dispensing unit is a question of fact and can not be assumed. Only when it is established that the dispensing unit had in fact dispensed lesser quantity of fuel, coupled with the fact that foreign component was found in the pulsar card, can a person be held responsible for violating provisions of 5.1.4 of the MDG Guidelines and consequential cancellation of his license can be done. Apart from finding a foreign component on the Pulsar Cards there should have been categorical finding with regard to the intention to manipulate the delivery.

17. On perusal of the relevant provision i.e. 5.1.4 of MDG Guidelines, it is found to be substantially penal in nature and its essential ingredients, prima facie, consist of:

(1) The finding of the foreign objects in the dispensing unit, which is only a ground for inquiry and inspection.

(2) Intention of manipulating the delivery.

Mere presence of foreign elements does not ipso facto show intention unless there is evidence to show that the foreign components are capable of or in fact affecting the fair dispensation of fuel.

In the present case, there is no evidence with regard to the second necessary ingredient, which is 'intention of manipulating the delivery' and also the inquiry fell short of returning any finding as to show any such manipulation. Therefore, the petitioner cannot be said to have violated 5.1.4 of the MDG Guidelines.

18. In the aforesaid circumstances, firstly, it is not the case of the respondent Oil Company that there was any shortfall of the delivery, coupled with the fact that even the OEM has never reported, the result of the foreign body attached to the pulsar card and secondly, the benefit of doubt of the seal being intact during the time of inspection has to be given to the petitioner as the foreign component cannot be inserted without breaking the seal of the dispensing unit. Counsel for the respondent

also could not confirm as to whether the foreign component can be inserted on pulsar card without breaking the seals. Therefore, reading the inspection report dated 05.05.2017 wherein in paragraph 2, it has clearly been found that the delivery was found to be correct, coupled with the fact that in paragraph-5, it has been stated that seals were broken in presence of the inspecting team leads to have irrebuttable conclusion that the seals were intact and there was no short supply of the fuel and consequently, in the aforesaid circumstances, it cannot be concluded that there was intention to manipulate the delivery, and hence any violation of Clause 5.4.1. of the MDG Guidelines.

19. In light of the above, this Court impugned orders of cancellation as well as the appeal are arbitrary and accordingly set aside. The writ petition stands **allowed**.

20. Consequences to follow.

(2024) 8 ILRA 1074
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2024

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

Writ - C No. 25324 of 2023

C/M, Shri Shanker Inter College, Mathura & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Rahul Sahai, Sri Saumitra Anand

Counsel for the Respondents:
C.S.C., Sri Namit Srivastava, Ms. Parul Srivastava, Sri Prabhakar Awasthi

A. Societies Law – Societies Registration Act, 1860 - Section 4-B, 25(2) - An Authorized Controller not appointed u/Clause 7, but otherwise, will not be empowered to hold the elections and any elections held by such an Authorized Controller would be in violation of the Scheme of Administration.

Clause 7 of the Scheme of Administration (Scheme) of the Institution provides that elections for constituting the Committee of Management (Committee) of the Institution and to elect its office bearers are to be held one month before the term of the existing Committee expires and in case elections are not held within the prescribed time the Regional Joint Director of Education (Regional J.D.), on the recommendations of the D.I.O.S., may appoint an Authorized Controller who shall expeditiously hold the elections to constitute the Committee and to elect its office bearers. (Para 22)

In the present case, the Authorized Controller was not appointed u/Clause 7 of the Scheme of Administration. The appointment was not on the recommendations of the D.I.O.S. or for the reason that the elections of the Committee of Management and its office bearers had not been held within the time prescribed in the Scheme of Administration. **The appointment of the Authorized Controller was a consequence of the interim order dated 07.08.2006 passed by this Court in Writ-C No. 42354 of 2006. The appointment was only an interim arrangement which came to an end when Writ-C No. 42354 of 2006 was dismissed by this Court vide its order dated 08.05.2012, albeit on the ground that the petition had become infructuous.** The appointment of an Authorized Controller as a consequence of an interim order passed by this Court would not metamorphose into an appointment u/Clause 7 of the Scheme of Administration and empower him to hold elections excluding the elected Committee of Management merely because the Authorized Controller continued to function even after Writ-

C No. 42354 of 2006 was dismissed vide order dated 8.5.2012. (Para 23)

B. The Committee of Management whose term has expired is not prohibited from holding elections to constitute a fresh Committee of Management if no Authorized Controller has been appointed u/clause 7 of the Scheme. (Para 24)

The Authorized Controller functioning in the Institution was not empowered to hold the elections, and the elections held by the petitioners on 02.01.2022 cannot be invalidated merely on the ground that the term of the Committee of Management which held the elections, had expired. (Para 25)

C. The elections of a Committee of Management of an Institution governed by Act, 1921 are not held by the Assistant Registrar u/s 25(2) of the Act, 1860 and any such elections would be contrary to the Scheme of Administration and illegal. The order of the Court cannot be read as suggesting an illegality. The order of the Court has to be interpreted and read as directing the Assistant Registrar to hold the elections of the governing body of the Society and not of the Committee of Management of the Institution. (Para 26)

D. Section 4-B(3) of the Act, 1860 requires that the list of members of the general body of the Society filed with the Registrar shall be signed by two office bearers and two executive members of the Society.

Section 4-B was incorporated in Act 1860 through the Societies Registration (Uttar Pradesh Amendment) Act, 2011. In view of Section 5(b) of the Uttar Pradesh General Clauses Act, 1904 the Amendment Act came in operation on the date it was published in Official Gazette, i.e., on 09.10.2013. The list of 67 members claimed by petitioner No. 2 to be the valid list of members of the General Body of the Society and on which the elections dated 02.01.2022 were held was accepted by the Deputy D.M. vide his order dated 08.03.2013, i.e., before Section 4-B came in operation.

In view of Section 4-B(3), the list could have been filed for registration u/s 4-B after the elections were held. The elections to elect the governing body of the Society were held on 19.05.2019 u/s 25(2) of the Act, 1860 and the list of elected office bearers of the Society, which included the petitioner No. 2 as Manager, was registered on 06.01.2022. The list of 67 members of the General Body of the Society as certified by order dated 08.03.2013 of the Deputy D.M., could have been submitted before the concerned Registrar for registration u/s 4-B of the Act, 1860 after fulfilling the requirement of Section 4-B(3) and thus after 06.01.2022.

The elections to constitute the Committee of Management of the Institution and also to elect its office bearers were held on 02.01.2022. Further, u/s 4-B (1) and (2) of the Act, 1860 the list of members of the general body of the Society is to be filed with the Registrar either at the time of registration of the Society or at the time of renewal of the Society or when there is any change in the list of members on account of induction, removal, registration or death of any member, the modified list shall be filed with the Registrar within one month from the date of change. **It is not the case of respondent No. 5 or the Regional Level Committee that the situation in the present case was covered either by Section 4-B(1) or Section 4-B(2) of the Act, 1860. Apparently, the elections cannot be rejected on the ground that the list of members on which the elections were held was not registered u/s 4-B of the Act, 1860.** (Para 28)

The list of 67 members of the General Body of the Society as produced by the petitioner was accepted by the Deputy D.M. vide his order dated 08.03.2013. It is also evident from the letter dated 19.08.2013 that an attested copy of the list of 67 members of the General Body of the Society was sent by the Deputy D. M. to the Deputy Registrar. It was on the basis of the said list that elections of the governing body of the Society were held and the said elections were recognized by the Registrar and the list of elected office bearers was registered vide order dated 06.01.2022.

E. The Regional Level Committee could not have rejected the claim of the petitioner on the ground that the said list was not available in the office of the Registrar and had not been supplied to the Regional Level Committee.

In case the said list is not on record and not at present either in the office of the Deputy D.M. or in the office of the Registrar, Firms, Societies and Chits, the contents of the said list can be decided only on evidence to be led by the interested parties in any litigation instituted for the said purpose before the appropriate court of fact. The fact that the list was accepted by the Deputy D.M. vide his order dated 08.03.2013 cannot be denied. (Para 29)

F. While deciding any dispute regarding elections of the Committee of Management, the Regional Level Committee only, prima facie, decides the validity of the elections. While exercising its power u/s 16-A(7), the Regional Level Committee only enquires as to whether the parties claiming elections of the Committee of Management or its office bearers are not rank trespassers trying to take over the Committee of Management. The Regional Level Committee does not decide the validity of the elections as a court. The order of the Regional Level Committee is not final and is subject to orders passed by a court.

In the present case, the petitioners claim to have been elected in the elections dated 09.04.2003, which was accepted by the then education authorities. The General Body of the Society elects the Committee of Management of the Institution. The elections of the governing body of the Society by the same General Body which participated in the elections dated 02.01.2022 has been acknowledged and recognized by the Deputy Registrar vide his order dated 06.01.2022. The writ petition challenging the order dated 06.01.2022 passed by the Deputy Registrar is still pending and no interim orders have been passed in the said writ petition. The claim of the petitioners regarding the elections dated 02.01.2022 was, prima facie, established and could not have been rejected by the Regional Level Committee. (Para 30)

The order dated 03.06.2023 passed by the Regional Level Committee rejecting the elections dated 02.01.2022 set up by the petitioner is contrary to law. The D.I.O.S. is directed to ensure that petitioner No. 2 as Manager of the Committee of Management of the Institution is handed over the charge of the Institution within 15 from today. (Para 31, 34)

Writ petition allowed. (E-4)

Precedent followed:

1. Navin Kumar Singh Vs D.I.O.S. Budaun & ors., 1997 (1) AWC-76 (Para 19)

2. Committee of Management, Shri Gandhi Inter College Vs Deputy Director of Education, 1989 (87) ALJ-214 (Para 19)

3. Committee of Management, Arya Kanya Inter College, Sikandra Rau, Aligarh Vs Secretary, Arya Kanya Inter College, Sikandra Rau, Aligarh, 1998 (34) ALR 625 (Para 19)

4. Committee of Management Sunehri Lal Bal Mukund Inter College & ors. Vs Regional Level Committee & ors., 2009 (8) ADJ 435 (Para 19)

5. Amanullah Khan Vs St. of U.P., 2009 (2) ADJ 298 (Para 19)

6. Bhagwan Kaushik Vs St. of U.P. & ors., 2006 (5) AWC 4997 ALL (Para 19)

7. Committee of Management Vikas Inter College and others Vs St. of U.P. & ors., 2011 (3) ESC 1859 (All). (Para 20)

Present petition challenges the order dated 03.06.2023, passed by the Regional Level Committee and the consequential order dated 17.06.2023, passed by the D.I.O.S., Mathura.

(Delivered by Hon'ble Salil Kumar Rai, J.)

1. Shri Saumitra Anand, Advocate, representing the petitioners, Standing Counsel representing respondent Nos. 1 to 4 and Shri Prabhakar Awasthi, Advocate, representing respondent No. 5 were heard on 13.3.2024 when the judgement in the case was reserved.

2. Shri Shanker Vidyalaya Shiksha Samiti, Palso, District-Mathura (hereinafter referred to as, 'Society') is a Society registered under the Societies Registration Act, 1860 (hereinafter referred to as, 'Act, 1860') and runs Shri Shanker Inter College, Palso, Mathura (hereinafter referred to as, 'Institution'), which is a recognized Institution as defined under the Uttar Pradesh Intermediate Education Act, 1921 (hereinafter referred to as, 'Act, 1921') and is governed by the Act and Regulations made thereunder. The Institution is also within the grant-in-aid list of the State Government and is also governed by The Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (hereinafter referred to as, 'Act, 1971').

3. A joint reading of the bye-laws of the Society and the Scheme of Administration of the Institution shows that the Committee of Management of the Institution is elected by the members of the general body of the Society from amongst themselves. The office bearers of the Committee of Management of the Institution are elected by the elected members of the Committee of Management from amongst themselves. The term of the Committee of Management is five years and Clause 7 of the Scheme of Administration provides that the elections of the Committee of Management of the Institution and its office bearers are to be held one month before the term of the existing Committee of Management expires. The Scheme of Administration further provides that in case the elections of the Committee of Management and its office bearers are not held within the time prescribed, the Regional Joint Director of Education may, on the recommendations of the District Inspector of Schools (hereinafter referred to as, 'D.I.O.S.'), appoint an Authorized Controller in the Institution and the Authorized Controller shall, as soon as possible, hold the elections of the Committee of Management. Clause 22 of the Scheme of Administration, under the heading Emergency Provisions, empowers the State Government to appoint, on the recommendations of either the Society or the Director of Secondary Education, an Administrator in the Institution and on the appointment of such Administrator, the Committee of Management of the Institution shall stand suspended. Clause 22 further provides that the Administrator can dissolve the Committee of Management of the Institution and remove its office bearers. Clause 22 (7) and (8) provide that the State Government can any time remove the Administrator appointed by it or appoint another Administrator and in case the Administrator is removed or his term expires and no successor to such Administrator is appointed, the Committee of Management shall stand restored.

4. The dispute in the present petition relates to the elections of the Committee of Management of the Institution and the genesis of the dispute is in the rival elections set up in 2003.

5. At this stage, it would be relevant to note that the dispute between the petitioner No. 2 and respondent No. 5 is

also regarding the valid list of members of the general body of the Society. The petitioner No. 2 claims that the list of 67 members of the general body submitted by him before the relevant authority is the valid list while the respondent No. 5 claims that the list submitted by him containing 126 members is the valid list of members of the general body. The different lists submitted by the parties do not contain the name of the other party, i.e., the list submitted by respondent No. 5 does not contain the name of petitioner No. 2 and the list submitted by petitioner No. 2 does not contain the name of respondent No. 5. In other words, the petitioner denies that respondent No. 5 is a member of the general body of the Society and similarly the respondent No. 5 also denies that petitioner No. 2 is a member of the general body of the Society.

6. In 2003 two rival claims were set up by the petitioner and respondent No. 5 claiming themselves to be the validly elected Manager of the Committee of Management of the Institution. Respondent No. 5 claimed that the elections of the Committee of Management of the Institution and its office bearers were held on 3.4.2003 in which he was elected as Manager while petitioner No. 2 claimed that the elections were held on 9.4.2003 in which petitioner No. 2 was elected as Manager. The respondent No. 5 and the petitioner submitted their claims before the D.I.O.S. for attestation of their signatures as Manager. As rival claims were set up, the dispute was referred to the Regional Level Committee which, vide its order dated 26.8.2003, recognized the elections dated 9.4.2023 set up by petitioner No. 2 and consequently the D.I.O.S. vide his order dated 30.8.2023 attested the signatures of petitioner No. 2 as the Manager. The orders dated 26.8.2003 and 30.8.2003 were challenged by respondent No. 5 through Writ Petition No. 44781 of 2003, which was allowed by this Court vide its order dated 8.11.2005. By its order dated 8.11.2005, the Court remanded back the matter to the Regional Level Committee for a fresh decision on merits and also directed that till any decision is taken by the Regional Level Committee, status quo with regard to the management of the Institution as existing on the date of the order shall continue. The Regional Level Committee reconsidered the matter and vide its order dated 30.5.2006 again accepted the claim of the petitioner. The order dated 30.5.2006 passed by the Regional Level Committee was again challenged by the respondent No. 5 through Writ-C No. 42354 of 2006. In Writ-C No. 42354 of 2006, this Court vide its order dated 7.8.2006 stayed the operation of the order dated 30.5.2006 passed by the Regional Level Committee and further directed that a person appointed by the Regional Joint Director of Education, Agra shall manage the affairs of the Institution.

7. Meanwhile, elections to elect the governing body of the Society and its office bearers was also held and the petitioner No. 2 was elected as the Secretary/Manager of the governing body of the Society. The Deputy Registrar, Firms, Societies and Chits, District-Mathura vide his order dated 25.4.2006 registered the list of elected office bearers of the Society. The order dated 25.4.2006 was challenged by respondent No. 5 through Writ-C No. 24940 of 2006. Writ-C No. 24940 of 2006 was dismissed by this Court vide order dated 5.5.2006 on ground of availability of alternative remedy of filing a civil suit. Consequently, Original Suit No. 781 of 2006 was instituted by

respondent No. 5 for a decree declaring the order dated 25.4.2006 to be null and void and also for a decree declaring that the list of 67 members claimed by petitioner No. 2 to be the valid list of members of the general body of the Society was not a valid list of members.

8. In 2012, Writ-C No. 21161 of 2012 was filed in this Court seeking a writ of mandamus commanding the authorities to hold the elections of the Committee of Management of the Institution. With the consent of the counsel for the parties the petition was disposed of by order dated 8.5.2012. In its order dated 8.5.2012, the Court directed that the Sub-Divisional Magistrate of the area where the Institution was situated shall determine the electoral college on the parameters of Section 15 of the Act, 1860 and thereafter in exercise of authority vested under Section 25(2) of the Act, 1860 the Assistant Registrar shall hold the elections of the Committee of Management within next two months and thereafter the Committee of Management so elected shall be handed over charge. On the same date, vide its order dated 8.5.2012, this Court dismissed Writ-C No. 42354 of 2006 as infructuous on the ground that the tenure of the Committee of Management of the Institution had come to an end. Relevant extracts from the order dated 8.5.2012 passed in Writ-C No. 21161 of 2012 and Writ-C No. 42354 of 2006 are reproduced below :-

Writ-C No. 21161 of 2012

"Parties to the dispute have agreed that in order to settle the dispute, no reliance would be placed on the order of the Assistant Registrar passed on earlier occasion, and both the parties to the dispute have requested that the Sub-Divisional Magistrate of the area concerned, wherein the institution in question is situated be asked to hold the elections of the Committee of Management. The parties have also agreed that writ petition No.42354 of 2006 be decided together, by dismissing the same as having rendered infructuous, as tenure of the Committee of Management, dispute of which is involved therein, has run out, and membership issue is to be decided afresh without being influenced by earlier proceedings.

Consequently, writ petition No.42354 of 2006 is dismissed as infructuous by a separate order of the date, and writ petition 21161 of 2012 is disposed of with direction that Sub-Divisional Magistrate of the area concerned where institution in question is situated, shall determine the electoral college on the parameters of Section 15 of the Societies Registration Act, 1860 and thereafter on the strength of electoral college so determined in exercise of authority vested under Section 25 (2) of the said Act elections of the Committee of Management shall be held by the Assistant Registrar, Firms, Societies and Chits, within next two months from the date of receipt of a certified copy of this order, and thereafter the Committee of Management so elected shall be handed over charge."

Order date :- 8.5.2012"

Writ-C No. 42354 of 2006

"Present writ petition has been filed by Jagdish Prasad Jain, claiming himself Manager of Sri Shankar Inter College, Palson, Mathura, questioning the validity of decision dated 30.05.2006, wherein Regional Committee had proceeded to accord approval to the elections dated 09.03.2003 and refused to accord approval to the elections dated 03.04.2003. On presentation of writ petition, an interim order had been passed, and at present, this is accepted position that

tenure of the said Committee of Management has come to an end, rendering the present writ petition as infructuous.

Consequently, present writ petition is dismissed as infructuous.

Order date :- 8.5.2012".

9. In compliance of the order dated 8.5.2012 passed by this Court in Writ-C No. 21161 of 2012, the Deputy District Magistrate passed an order dated 8.3.2013 determining the electoral college of the Society in which he accepted the list of 67 members submitted by the petitioner and rejected the list of 126 members submitted by respondent No. 5. The order dated 8.3.2013 passed by the Deputy District Magistrate was challenged by respondent No. 5 through Writ-C No. 23300 of 2013 which was dismissed by this Court vide its order dated 26.4.2013. In its order dated 26.4.2013 this Court noted that respondent No. 5 had already instituted Original Suit No. 781 of 2008 challenging the order dated 25.4.2006 passed by the concerned Registrar recognizing the elections of the petitioner as the Manager of the governing body of the Society and, therefore, the respondent had the remedy to also challenge in the pending suit the determination of the electoral college by the Deputy District Magistrate. The relevant extract of the order dated 26.4.2013 passed by this Court dismissing Writ-C No. 23300 of 2013 is reproduced below :-

"From paragraphs 15 and 16 of the present writ petition it is apparently clear that the petitioner has already filed Civil Suit No. 781 of 2008 in terms of the order passed by the High Court dated 05.05.2006 in Writ Petition No. 24940 of 2006, wherein the issue of membership and right of Devendra Singh to be a member of the society are under consideration.

Under the order impugned the Prescribed Authority has determined the electoral college for the purposes of holding the elections of the society as well as of the Committee of Management of the institution. Petitioners are not satisfied.

In my opinion the petitioners are at liberty to seek such further relief in the pending suit against the determination of the electoral college, as may be necessary.

It goes without saying that the order passed under the Societies Registration Act be it by the Assistant Registrar or the Prescribed Authority, are always subject to the orders to be passed in the civil suit. If the petitioner makes appropriate application it shall be considered at the earliest possible by the Civil Court.

Writ petition is dismissed with the observations made."

10. Consequently, the respondent No. 5 amended his plaint instituting Original Suit No. 781 of 2008 seeking further relief to declare that the order dated 8.3.2013 passed by the Deputy District Magistrate, Mathura was null and void and further the list of 67 members submitted by petitioner No. 2 and accepted by the Deputy District Magistrate in his order dated 8.3.2013 was not a valid list of the members of the general body of the Society. It has been stated in the writ petition, and the said fact has not been denied in the counter affidavit, that Original Suit No. 781 of 2008 was dismissed by the trial court for want of prosecution vide order dated 7.9.2021 and no restoration application has been filed for recalling the order dated 7.9.2021 and for restoring the suit to its original number.

11. In the meantime, as a consequence of the order dated 8.3.2013 passed by the Deputy District Magistrate, proceedings to elect the governing body of the Society were started. A letter dated 19.8.2013 was sent by the Deputy District Magistrate, Mathura to Deputy Registrar, Firms, Societies and Chits, Agra annexing the attested photo copy of the list of members. On the receipt of the said list the Deputy Registrar passed an order dated 28.1.2019 for holding the elections under Section 25(2) of the Act, 1860. The order dated 28.1.2019 was again challenged by respondent No. 5 in this Court through Writ-C No. 14869 of 2019 in which this Court vide its order dated 29.4.2019 has sought information as to whether any list of members finalized under Section 4-B of the Act, 1860 was available with the Registrar of the Societies. Writ-C No. 14869 of 2019 is still pending before this Court.

12. It has been stated in the writ petition that the elections to elect the governing body of the Society and its office bearers were held under Section 25(2) of the Act, 1860 on 19.5.2019 in which the petitioner No. 2 was elected as Manager/Secretary of the governing body of the Society. The list of elected office bearers of the Society submitted by petitioner No. 2 as a consequence of the elections held on 19.5.2019 has been registered by the Deputy Registrar, Firms, Societies and Chits, District-Agra vide his order dated 6.1.2022 and a certificate dated 25.11.2021 has been issued at the instance of petitioner No. 2 renewing the registration of the Society for a period of five years w.e.f. 13.7.2020. It has been stated in the writ petition that the order dated 6.1.2022 passed by the Deputy Registrar has been challenged in this Court through Writ-C No. 14288 of 2022 by an individual claiming himself to be a life member of the governing body of the Society and the said writ petition is pending in this Court, but no interim order has been passed in the same.

13. In the meantime, elections to constitute the Committee of Management of the Institution and also to elect its office bearers were also held by petitioner No. 2 on 2.1.2022 in which the petitioner No. 2 was elected as manager. The necessary documents regarding elections were submitted by petitioner No. 2 before the D.I.O.S, Mathura for getting his signatures attested as Manager. The D.I.O.S. vide his order dated 28.2.2022 attested the signatures of the petitioner as Manager of the Committee of Management subject to final decision in Writ-C No. 14869 of 2019.

14. Aggrieved by the order dated 28.2.2022 passed by the D.I.O.S., Mathura, the respondent No. 5 filed a representation dated 27.4.2022 before the Regional Level Committee pleading that the elections held on 2.1.2022 as claimed by petitioner No. 2 were contrary to the orders dated 8.5.2012 passed in Writ-C No. 21161 of 2012 and in Writ-C No. 42354 of 2006 and the elections of the Committee of Management of the Institution could have been held only by the Authorized Controller who was appointed as a consequence of the interim order dated 7.8.2006 passed by this Court in Writ-C No. 42354 of 2006 and was managing the affairs of the Institution even after dismissal of the writ petition by this Court vide its order dated 8.5.2012. The representation filed by respondent No. 5 was not decided by the Regional Level Committee, therefore, the respondent No. 5 filed Writ-C No. **30199 of 2022** complaining against the delay by the Regional Level Committee in deciding his

representation and this Court vide its order dated 31.10.2022 directed the Regional Level Committee, Agra Region, District-Agra to pass appropriate orders on the representation of respondent No. 5. It was clarified in the order dated 31.10.2022 that this Court had not expressed any opinion either regarding the jurisdiction of the Regional Level Committee to entertain the representation of the petitioner or regarding the merits of the claim made by the petitioner which had to be decided by the Regional Level Committee.

15. The Regional Level Committee by its order dated 3.6.2023 decided the representation of respondent No. 5 and set aside the order dated 28.2.2022 passed by the D.I.O.S. whereby the D.I.O.S had attested the signatures of petitioner No. 2. In its order dated 3.6.2023, the Regional Level Committee has derecognized the elections dated 2.1.2022 and has also rejected the claim of the petitioner on the basis of the aforesaid elections. In its order dated 3.6.2023, the Regional Level Committee has rejected the elections dated 2.1.2022 on the ground that the elections were contrary to law because they were held by a Committee of Management whose term had expired, and an Authorized Controller had been appointed and was functioning in the Institution and, also because the elections were not held in accordance with the order dated 8.5.2012 passed by this Court in Writ Petition No. 21161 of 2012. The Regional Level Committee has reasoned that in accordance with the order dated 8.5.2012, the elections were to be held by the Assistant Registrar. In its order dated 3.6.2013, the Regional Level Committee has also taken note of different correspondences by the Assistant Registrar which indicate that no list of members of the society has been registered under Section 4-B of the Act, 1860 and that no list of 67 members of the Society was appended to the order dated 8.3.2023 passed by the Sub-Divisional Magistrate.

16. Consequential order dated 17.6.2023 has been passed by the D.I.O.S., Mathura directing that the Authorized Controller previously appointed in the Institution shall manage the affairs of the Institution.

17. The order dated 3.6.2023 passed by the Regional Level Committee and the consequential order dated 17.6.2023 passed by the D.I.O.S., Mathura have been challenged in the present writ petition.

18. A counter affidavit has been filed by respondent No. 5 to support his contention that the list of 67 members of the Society claimed by petitioner No. 2 to be the valid list was a not a valid list of members and the election held on the basis of the aforesaid list was not a valid election. In his counter affidavit, the respondent no. 5 has annexed different documents showing correspondences between State officers, especially between the Deputy Registrar, Firms, Societies and Chits, District-Agra and the Regional Joint Director of Education, Agra Region, District-Agra, and also a letter to the respondent by the Deputy Registrar which reveal that the original copy of the list of 67 members claimed by petitioner No. 2 and declared as valid list by the Deputy District Magistrate in his order dated 8.3.2013 was not available in the office of the Deputy Registrar and no such list had been registered under Section 4-B of the Act, 1860. The letter states that no certified copy of list of members of the general body of the Society was supplied to the office of the Deputy Registrar alongwith the order

dated 8.3.2013 passed by the Deputy District Magistrate. On the basis of the aforesaid correspondences it has been pleaded in the counter affidavit that the claim of the petitioner regarding the elections dated 2.1.2022 was false and the elections allegedly electing the petitioner as Manager of the Committee of Management of the Institution were not held on the list of members certified or accepted by the Deputy District Magistrate in his order dated 8.3.2013.

19. Challenging the order dated 3.6.2023 passed by the Regional Level Committee and the consequential order dated 17.6.2023 passed by the D.I.O.S., Mathura, the counsel for the petitioner has argued that the elections of the Committee of Management of the Institution and its office bearers can not be challenged by a sole member therefore the representation of respondent No. 5 was not maintainable. It was argued that for the aforesaid reason the order dated 3.6.2023 passed by the Regional Level Committee is without jurisdiction. It was further argued that the appointment of Authorized Controller came to an end after the order dated 8.5.2012 passed by the Court dismissing Writ-C No. 42354 of 2006 and consequently the Committee of Management of the Institution elected in 2003 and recognized by order dated 30.5.2006 stood revived and the said Committee was empowered to hold and conduct the elections and the Authorized Controller could not have held the elections. It was argued that the Regional Level Committee has erred in rejecting the elections on the ground that they were held by a Committee of Management whose term had expired. It was argued that challenge by respondent No. 5 to the order dated 8.3.2013 passed by the Deputy District Magistrate had been rejected by this Court and Original Suit No. 781 of 2008 challenging the order dated 8.3.2013 has also been dismissed for non-prosecution. It was argued that the order dated 8.3.2013 passed by the Deputy District Magistrate has not been stayed by any court and, therefore, the elections on the basis of the list accepted by the Deputy District Magistrate can not be set aside or rejected. It was argued that the list of members of the general body of the Society accepted by the Deputy District Magistrate vide his order dated 8.3.2013 was not required to be registered under Section 4-B of the Act, 1860 and could not have been so registered as on the relevant date Section 4-B was not incorporated in the Act, 1860. It was argued that in its order dated 3.6.2023, the Regional Level Committee has misread the order dated 8.5.2012 passed in Writ Petition No. 21161 of 2012 while concluding that the elections set up by the petitioner was not held in accordance with the aforesaid order. It was argued that for the aforesaid reasons, the order dated 3.6.2023 passed by the Regional Level Committee rejecting the elections dated 2.1.2022 on the ground that the term of the Committee of Management of the Institution which held the elections had expired and elections were not held in accordance with the order dated 8.5.2012 passed in Writ-C No. 21161 of 2012 is contrary to law. It was argued that the order dated 3.6.2003 passed by the Regional Level Committee and the consequential order dated 17.6.2023 passed by the D.I.O.S., Mathura are liable to be quashed. In support of his contention, the counsel for the petitioner has relied upon the following judgements of this Court :-

(A) Navin Kumar Singh Vs. D.I.O.S Budaun and Others 1997(1) AWC-76,

(B) Committee of Management, Shri Gandhi Inter College Vs. Deputy Director of Education, 1989 (87) ALJ-214,

(C) Committee of Management, Arya Kanya Inter College, Sikandra Rau, Aligarh Vs. Secretary, Arya Kanya Inter College, Sikandra Rau, Aligarh, 1998 (34) ALR 625,

(D) Committee of Management Sunehri Lal Bal Mukund Inter College and Others Vs. Regional Level Committee and Others, 2009 (8) ADJ 435,

(E) Amanullah Khan Vs. State of U.P. and Others

2009(2) ADJ 298; and

(F) Bhagwan Kaushik Vs. State of U.P. and Others

2006 (5) AWC 4997 ALL

20. Rebutting the argument of the counsel for the petitioner, the counsel for respondent No. 5 has supported the order dated 3.6.2023 passed by the Regional Level Committee and the reasons given in the same. It was argued that no list of valid members of the general body of the Society has been registered by the concerned Registrar under Section 4-B of the Act, 1860 and, therefore, the elections held on 2.1.2022 were illegal and have been rightly rejected by the Regional Level Committee. It was argued that an Authorized Controller was appointed in the Institution and was functioning as such on 2.1.2022 on which date there was no elected Committee of Management functioning or managing the affairs of the Institution. It was argued that, in accordance with Clause 7 of the Scheme of the Administration, the elections of the Committee of Management and its office bearers had to be held by the Authorized Controller. It was argued that the elections dated 2.1.2022 claimed by the petitioners were not held in accordance with the order dated 8.5.2012 passed by this Court in Writ-C No. 42354 of 2006 and for the aforesaid reasons, the order dated 3.6.2023, rejecting the elections set up by the petitioner, was according to law. It was further argued that the term of the Committee of Management allegedly elected on 9.4.2003 and initially recognized by the Regional Level Committee on 26.8.2003 had obviously expired by 2.1.2022 and, therefore, by virtue of Clause 7 of the Scheme of Administration the said Committee of Management was not authorized to hold the elections and the elections had to be held by the Authorized Controller. It was argued that for the aforesaid reasons, there is no illegality in the order dated 3.6.2023 and the petition lacks merit and is liable to be dismissed. In support of his contention the counsel for the respondent has relied on the judgement of this Court delivered in **Committee of Management, Gramin Vikas Inter College and Others Vs. State of U.P. and Others, 2011 (3) ESC 1859 (All).**

21. I have considered the submissions of the counsel for the parties.

22. Clause 7 of the Scheme of Administration of the Institution provides that elections for constituting the Committee of Management of the Institution and to elect its office bearers are to be held one month before the term of the existing Committee of Management expires and in case elections are not held within the prescribed time the Regional Joint Director of Education, on the recommendations of the D.I.O.S., may appoint an Authorized Controller who shall expeditiously hold the elections to constitute the Committee of Management and to elect its office bearers. Clause 7 of the Scheme of Administration

only enables the Regional Joint Director of Education to appoint, on the recommendations of the D.I.O.S., an Authorized Controller in the Institution. It is not obligatory for the D.I.O.S. to recommend to the Joint Director for appointment of an Authorized Controller and it is also not obligatory for the Joint Director to appoint an Authorized Controller if such a recommendation is made by the D.I.O.S. However, if an Authorized Controller is appointed under Clause 7 of the Scheme of Administration, it is only he who would have the power to hold the elections of the Committee of Management of the Institution and its office bearers. An Authorized Controller not appointed under Clause 7, but otherwise, will not be empowered to hold the elections and any elections held by such an Authorized Controller would be in violation of the Scheme of Administration.

23. In the present case, the Authorized Controller was not appointed under Clause 7 of the Scheme of Administration. The appointment was not on the recommendations of the D.I.O.S. or for the reason that the elections of the Committee of Management and its office bearers had not been held within the time prescribed in the Scheme of Administration. The appointment of the Authorized Controller was a consequence of the interim order order dated 7.8.2006 passed by this Court in Writ-C No. 42354 of 2006. The appointment was only an interim arrangement which came to an end when Writ-C No. 42354 of 2006 was dismissed by this Court vide its order dated 8.5.2012, albeit on the ground that the petition had become infructuous. The appointment of an Authorized Controller as a consequence of an interim order passed by this Court would not metamorphose into an appointment under Clause 7 of the Scheme of Administration and empower him to hold elections excluding the elected Committee of Management merely because the Authorized Controller continued to function even after Writ-C No. 42354 of 2006 was dismissed vide order dated 8.5.2012.

24. An anomalous situation may develop if the proposition that the Committee of Management whose term had expired can not hold the elections to constitute a fresh Committee of Management and the elections can be held only by an Authorized Controller, is accepted. The State authorities may not appoint any Authorized Controller in the Institution, as it is not obligatory on them to appoint an Authorized Controller even after the term of the Committee of Management has expired, therefore, no elections to constitute a fresh Committee of Management will ever be held in the said Institution. For the said reason, the Committee of Management whose term has expired is not prohibited from holding elections to constitute a fresh Committee of Management if no Authorized Controller has been appointed under clause 7 of the Scheme of Administration.

25. In view of the aforesaid, the Authorized Controller functioning in the Institution was not empowered to hold the elections, and the elections held by the petitioners on 2.1.2022 can not be invalidated merely on the ground that the term of the Committee of Management which held the elections, had expired. For the said reasons, the opinion of the Regional Level Committee that the elections held on 2.1.2022 can not be recognized because they were held by a Committee of Management whose term had expired is contrary to law.

26. The opinion of the Regional Level Committee that the elections of the

Committee of Management of the Institution had to be held by the Assistant Registrar in accordance with the orders of the Court is also not correct. A reading of the order dated 8.5.2012 passed by this Court in Writ-C No. 21161 of 2012 shows that it refers to Section 25(2) of the Act, 1860. The elections of a Committee of Management of an Institution governed by Act, 1921 are not held by the Assistant Registrar under Section 25(2) of the Act, 1860 and any such elections would be contrary to the Scheme of Administration and illegal. The order of the Court can not be read as suggesting an illegality. The order of the Court has to be interpreted and read as directing the Assistant Registrar to hold the elections of the governing body of the Society and not of the Committee of Management of the Institution.

27. A reading of the order dated 3.6.2023 shows that the Regional Level Committee has rejected the elections dated 2.1.2022 also on the ground that the list of members of the general body of the Society which was also the electoral college for the elections dated 2.1.2022 had not been registered under Section 4-B of the Act, 1860. The said opinion is also not in accordance with law for reasons given subsequently.

28. Section 4-B(3) of the Act, 1860 requires that the list of members of the general body of the Society filed with the Registrar shall be signed by two office bearers and two executive members of the Society. Section 4-B was incorporated in Act 1860 through the Societies Registration (Uttar Pradesh Amendment) Act, 2011. The Amendment Act, 2011 does not itself specify the date from which it shall come in operation. The Amendment Act received the assent of the President on September 28, 2013 and was published in the Uttar Pradesh Gazette on 9th October, 2013. In view of Section 5(b) of the Uttar Pradesh General Clauses Act, 1904 the Amendment Act came in operation on the date it was published in Official Gazette, i.e., on 9th October, 2013. The list of 67 members claimed by petitioner No. 2 to be the valid list of members of the General Body of the Society and on which the elections dated 2.1.2022 were held was accepted by the Deputy District Magistrate vide his order dated 8.3.2013, i.e., before Section 4-B came in operation. In view of Section 4-B(3), the list could have been filed for registration under Section 4-B after the elections were held. The elections to elect the governing body of the Society were held on 19.5.2019 under Section 25(2) of the Act, 1860 and the list of elected office bearers of the Society, which included the petitioner No. 2 as Manager, was registered on 6.1.2022. The list of 67 members of the General Body of the Society as certified by order dated 8.3.2013 of the Deputy District Magistrate, could have been submitted before the concerned Registrar for registration under Section 4-B of the Act, 1860 after fulfilling the requirement of Section 4-B(3) and thus after 6.1.2022. The elections to constitute the Committee of Management of the Institution and also to elect its office bearers were held on 2.1.2022. Further, under Section 4-B (1) and (2) of the Act, 1860 the list of members of the general body of the Society is to be filed with the Registar either at the time of registration of the Society or at the time of renewal of the Society or when there is any change in the list of members on account of induction, removal, registration or death of any member, the modified list shall be filed with the Registrar within one month from the date of change. It is not the case of respondent No. 5 or the Regional Level

Committee that the situation in the present case was covered either by Section 4-B(1) or Section 4-B(2) of the Act, 1860. Apparently, the elections can not be rejected on the ground that the list of members on which the elections were held was not registered under Section 4-B of the Act, 1860.

29. The list of 67 members of the General Body of the Society as produced by the petitioner was accepted by the Deputy District Magistrate vide his order dated 8.3.2013. The fact that the list produced by petitioner No. 2 was accepted by the Deputy District Magistrate is also admitted by respondent No. 5 as would be evident from his conduct in instituting Writ-C No. 23300 of 2013 challenging the order dated 8.3.2013. The respondent No. 5 also amended his plaint in Original Suit No. 781 of 2006 praying for a declaration that the order dated 8.3.2013 passed by the Deputy District Magistrate was null and void and the list of 67 members of the General Body submitted by petitioner No. 2 and accepted by the Deputy District Magistrate was not a valid list of members of the General Body. It is also evident from the letter dated 19.8.2013 of the Deputy District Magistrate addressed to the Deputy Registrar that an attested copy of the list of 67 members of the General Body of the Society was sent by the Deputy District Magistrate to the Deputy Registrar. It was on the basis of the said list that elections of the governing body of the Society were held and the said elections were recognized by the Registrar and the list of elected office bearers was registered vide order dated 6.1.2022. The order dated 6.1.2022 has been challenged in Writ-C No. 14288 of 2022 which is still pending and no interim order has been passed in the said writ petition. In case the said list is not on record and not at present either in the office of the Deputy District Magistrate or in the office of the Registrar, Firms, Societies and Chits, the contents of the said list can be decided only on evidence to be led by the interested parties in any litigation instituted for the said purpose before the appropriate court of fact. The fact that the list was accepted by the Deputy District Magistrate vide his order dated 8.3.2013 can not be denied. The Regional Level Committee could not have rejected the claim of the petitioner on the ground that the said list was not available in the office of the Registrar and had not been supplied to the Regional Level Committee.

30. While deciding any dispute regarding elections of the Committee of Management, the Regional Level Committee only, *prima facie*, decides the validity of the elections. While exercising its power under Section 16-A(7), the Regional Level Committee only enquires as to whether the parties claiming elections of the Committee of Management or its office bearers are not rank trespassers trying to take over the Committee of Management. The Regional Level Committee does not decide the validity of the elections as a court. The order of the Regional Level Committee is not final and is subject to orders passed by a court. In the present case, the petitioners claim to have been elected in the elections dated 9.4.2003, which was accepted by the then education authorities vide their different orders referred in the earlier paragraphs of the judgement. The said orders were challenged in this Court but have not been set aside. The General Body of the Society elects the Committee of Management of the Institution. The elections of the governing body of the Society by the same General Body which participated in the elections

dated 2.1.2022 has been acknowledged and recognized by the Deputy Registrar vide his order dated 6.1.2022. The writ petition challenging the order dated 6.1.2022 passed by the Deputy Registrar is still pending and no interim orders have been passed in the said writ petition. The claim of the petitioners regarding the elections dated 2.1.2022 was, prima facie, established and could not have been rejected by the Regional Level Committee.

31. For the aforesaid reasons, the order dated 3.6.2023 passed by the Regional Level Committee rejecting the elections dated 2.1.2022 set up by the petitioner is contrary to law.

32. In light of the reasons given above, and because I have considered the order passed by the Regional Level Committee on merits, I have not considered the submission of the counsel for the petitioner regarding maintainability of the representation submitted by respondent No. 5 before the Regional Level Committee as the same is not required.

33. For the aforesaid reasons, the order dated 3.6.2023 passed by the Regional Level Committee and the consequential order dated 17.6.2023 passed by the D.I.O.S., Mathura are contrary to law and are liable to be quashed and are hereby quashed. The order dated 28.2.2022 passed by the D.I.O.S., Mathura is restored.

34. The D.I.O.S. is directed to ensure that petitioner No. 2 as Manager of the Committee of Management of the Institution is handed over the charge of the Institution within fifteen days from today.

35. With the aforesaid directions, the writ petition is ***allowed***.

36. Let this order be communicated to the District Inspector of Schools, Mathura by the Registrar (Compliance) within one week from today.

(2024) 8 ILRA 1088
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ - C No. 33663 of 2007

The U.P.S.R.T.C. ...Petitioner
Versus
Hari Shankar Verma ...Respondent

Counsel for the Petitioner:
Vivek Mishra, Ayush Mishra, Mukesh Kumar Singh, Ramanuj Pandey, Sunil Kumar Misra

Counsel for the Respondent:
Dinesh Chandra Srivastava, Dr. Rajesh Kumar Srivasta, Lalit Kumar, S.C.

A. Labour Law – U.P. Industrial Dispute Act,1947 - Section 17-B - Mere quotation of wrong provision of interim order will not make the interim order redundant. An order passed by competent court, interim or final, has to be abided without any reservation and if such order is violated, the Court may refuse the party violating such order to hear him on merit. (Para 16)

There is no dispute about the fact that Labour Court vide impugned award reinstated the respondent No. 1 in service with 50% of back wages and other allowances from the date of dismissal of service upto the date of reinstatement in service withholding two annual increments permanently. There is also no dispute about the fact that this Court has passed the conditional interim order dated 26-07-2007 but petitioner has not reinstated the respondent No. 1 who ultimately expired on 3-09-2015. Writ petition filed by petitioner is liable

to be dismissed due to non-compliance of the condition mentioned in the interim order. There is also no dispute about the fact that petitioner has filed modification application on 18-03-2021 in respect to the interim order dated 26- 07-2007 and 23-02-2021. (Para 13, 16)

There is no illegality in the impugned award. (Para 15)

Considering the peculiar facts and circumstances of the case, the writ petition is dismissed with following direction:

i. Petitioner shall release the arrears of 50% of back wages of deceased-respondent No. 1 in favour of respondent No. 1/ 1 to 1/ 4 from the date of termination (11-04-1991) to the date of passing of interim order dated 26-07-2007 within period of two months from today.

ii. Petitioner shall release the arrears of full wages of deceased-respondent No. 1 from the date of passing of interim order dated 26-07-2007 till the date of his death (3- 09-2015) within period of 3 months from today.

iii. In case of non-payment of arrears of wages in aforementioned period, the petitioner shall pay interest to the respondent Nos. 1/1 to1/4 at the rate of 6% per annum on the aforementioned amount. (Para 17)

Writ petition dismissed with directions. (E-4)

Precedent followed:

Prestige Ltd. Vs S.B.I., (2007) 8 SCC 449 (Para 16)

Precedent cited:

1. Tufani Yadav Vs St. of U.P. & ors., Writ – C No. 32426 of 2019 (Para 10)

2. M/s Hindalco Industries Ltd. Vs St.of U.P. & ors., Writ – C No. 15450 of 2019, judgment dated 18.01.2024 (Para 10)

3. U.P. State Road Transport Corporation & anr. Vs Mohan Singh & ors., Writ Petition No. 6444 of 2010, judgment dated 17.05.2023 (Para 10)

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Sunil Kumar Mishra, learned Counsel for the petitioner and Dr. Rajesh Kumar Srivastava, learned Counsel for respondent No. 1/1 to 1/4.

2. Brief facts of the case are that respondent No.1 was appointed on the post of Conductor in the petitioner/Corporation in the year 1980. On 12-11-1988, respondent No. 1 was driving bus number USY-8753 on Khurja-Haridwar route. The bus was checked and 12 passengers were alleged to be found traveling without ticket and in the checking made on 25-03-1989 in the aforementioned bus and 4 passengers were again alleged to be found traveling without ticket. In disciplinary proceeding, charge sheet was issued to respondent No.1 and reply was submitted by respondent No.1. The Disciplinary Authority/ Regional Manager vide order dated 14-04-1991 passed the order of removal of service of respondent No.1. An industrial dispute raised by respondent No.1 was referred for adjudication vide reference order dated 23-08-1993 as to whether the order of removal of service of respondent No.1/Hari Shankar Verma Conductor dated 11-04-1991 is just and legal. The aforementioned reference was registered as Adjudication Case No.462 of 1993 before Labour Court (Ist) U.P. Lohia Nagar, Ghaziabad. Petitioner/ employer and respondent No.1 filed their written statement as well as oral and documentary evidences in support of their cases. Vide award dated 1-12-2006 as published on 23-02-2007 reinstated the respondent No.1 in service with 50% of

back wages and other allowances from the date of dismissal of service upto date of reinstatement in service withholding two annual increments permanently. Hence this writ petition on behalf of petitioner for following relief.

"(i) to issue a writ, order or direction in the nature of certiorari quashing the impugned award/judgment and order dated 21.03.2007 (Annexure 5 to the writ petition) in Adjudication Case No.462 of 1993 passed by labour CourtI Ghaziabad."

3. This court vide interim order dated 26-07-2007 entertained the matter and stayed the execution of the impugned award dated 1-12-2006 provided petitioner ensure compliance of section 17-B of the U.P. Industrial Dispute Act.

4. During pendency of the writ petition, respondent No. 1/Hari Shankar Verma has expired on 3-9-2015 accordingly, two sons, widow and a daughter have been substituted as respondent Nos. 1/1 to 1/4 respectively in the writ petition.

5. A counter affidavit along with application for vacation of interim order was filed on behalf of respondent No.1/1 to 1/4 to the writ petition stating specifically in paragraph No. 21 of the counter affidavit that deceased respondent No.1 has filed an application for his joining in the corporation in pursuance of the impugned award of labour court as well as interim order dated 26-07-2007 passed by this court in the instant writ petition. The copy of application for joining filed by deceased-respondent No.1 before employer along with affidavit stating that deceased-respondent No.1 was not in any employment is annexed as Annexure No. CA-1 to the counter affidavit dated 2-12-2015.

6. No rejoinder affidavit has been filed on behalf of petitioner to the counter affidavit dated 2-12-2015.

7. This court dismissed the instant writ petition for non-prosecution on 25-10-2017 but on restoration application of the petitioner the order dated 25-10-2017 was recalled vide order dated 27-05-2019.

8. This court on 23-02-2021 passed another order which runs as follows.

"This Court while entertaining the petition on 26.7.2007 has passed the following order:

"Petitioner is permitted to implead Labour Court-I, U.P. Ghaziabad through Presiding Officer as respondent no.2 during the course of the day.

Learned Standing Counsel represents respondent no.2 Sri D.C. Srivastava, Advocaate has accepted notice on behalf of respondent no.1. They pray for and are granted three weeks time to file counter affidavit. Rejoinder affidavit may be filed within a week thereafter.

List on 18th September, 2007.

It is contended that the workman was employed as Conductor in U.P. State Road Transport Corporation, Ghaziabad and on two occasions he was caught carrying bus with passengers, who were travelling without ticket. After departmental proceedings, his service were brought to an end. Orders passed by the employers in that regard have been set aside under the impugned award on hyper technical ground without referring to departmental proceedings, and were pleaded before the Labour Court.

Petitioner has made out a prima facie case for grant of an interim order.

Till the next date of listing execution of the impugned award dated 1st December, 2006 passed in Adjudication Case No.462 of 1993 shall remain stayed provided the petitioner to ensure compliance of Section 17-B of the U.P. Industrial Disputes Act."

Nothing has been brought on record as to whether Section 17-B of the U.P. Industrial Disputes Act has been complied with by the petitioner or not.

Learned counsel for the petitioner at this stage seeks time to file affidavit regarding compliance of the order of this Court.

List this case on 24.3.2021 to enable Regional Manager, UPSRTC to file an affidavit showing compliance of Section 17-B of the U.P. Industrial Disputes Act.

It is made clear that in the event of non compliance of the order dated 26.7.2007, the Court would take serious view of the matter.

List this case on 18.3.2021."

9. In pursuance of the order dated 23-2-2021, petitioner/Employer filed a Civil Miscellaneous Modification Application No. 14 of 2021 dated 18-03-2021 for modification of the interim order dated 26-07-2007 as well as affidavit of compliance of the order dated 23-02-2021. Respondent No. 1/1 to 1/4 have filed their counter affidavit to the modification application as well as compliance affidavit filed by petitioner/Employer.

10. Learned Counsel for the petitioner/Corporation submitted that respondent No.1 was habitual in carrying the passenger without ticket but Labour Court has illegally ordered for reinstatement with 50% of back wages. He further submitted that respondent No. 1 was held guilty in the disciplinary proceeding for carrying passengers without ticket but Labour Court has illegally held that Respondent No. 1 is to be reinstated in service. He further submitted that Labour Court has failed to consider the oral and documentary evidence adduced by the parties in support of their cases. He placed following two judgments passed by this Court in support of his argument.

1. Writ C No. 32426 of 2019

Tufani Yadav Vs. State of U.P. and 2 others

With

Writ C No. 15450 of 2019

M/S Hindalco Industries Limited Vs. State of U.P. and 3 others

Judgment dated 18-01-2024

2. Writ Petition No. 6444 of 2010

U.P. State Road Transport Corporation and another Vs. Mohan Singh and others

Judgment dated 17-05-2023.

11. On the other hand, learned counsel for respondent No. 1/1 to 1/4 submitted that respondent No. 1 was performing his duty as conductor in the U.P. Roadways since 1980. He submitted that domestic inquiry was conducted against the respondent No. 1 in illegal and arbitrary manner accordingly, punishment imposed against the respondent No. 1 was also illegal. He submitted that Labour Court has rightly exercised his jurisdiction for reinstatement in service with 50% of back wages, withholding two annual increments permanently. He submitted that in spite of the conditional interim order of this Court, petitioner has not reinstated the respondent No.1 since 26-07-2007 and

respondent No.1 has expired also on 3-09-2015, as such writ petition filed by petitioner is liable to be dismissed with costs. He further submitted that deceased-respondent No. 1 tried his best for joining in pursuance of the impugned award but petitioner have not reinstated the deceased-respondent No. 1 in spite of the interim order passed by this Court in the instant petition filed by petitioner himself. He submitted that Labour Court has passed the impugned award in just and proper manner, as such there is no illegality in the impugned award even on merit.

12. I have considered the argument advanced by learned counsel for the parties and perused the record.

13. There is no dispute about the fact that Labour Court vide impugned award reinstated the respondent No. 1 in service with 50% of back wages and other allowances from the date of dismissal of service upto the date of reinstatement in service withholding two annual increments permanently. There is also no dispute about the fact that this Court has passed the conditional interim order dated 26-07-2007 but petitioner has not reinstated the respondent No. 1 who ultimately expired on 3-09-2015. There is also no dispute about the fact that petitioner has filed modification application on 18-03-2021 in respect to the interim order dated 26-07-2007 and 23-02-2021.

14. The perusal of the relevant finding of fact recorded by Labour Court while passing the impugned award will be necessary which is as under:

"न्यायालय प्रथम उत्तर प्रदेश, गाजियाबाद

अभिनिर्णय विवाद संख्या 462/93

मैं उत्तर प्रदेश राज्य सड़क परिवहन निगम खुर्जा द्वारा सहायक क्षेत्रीय प्रबन्धक (2) मै0 उ0प्र0 राज्य सड़क परिवहन निगम गाजियाबाद द्वारा क्षेत्रीय प्रबन्धक तथा उनके श्रमिक श्री हरिशंकर वर्मा पुत्र श्री गेंदा लाल निवासी मोहल्ला सराय शेष आलम, खुर्जा जिला बुलन्द शहर के मध्य उत्पन्न औद्योगिक विवाद।

उपस्थिति

सावंत सिंह .... पठासीन अधिकारी

पक्षकारों के प्रतिनिधियों के नाम

1. सेवायोजक पक्ष की ओर से ..... श्री पी0डी0 वर्मा

2. श्रमिक पक्ष को जोर से ..... श्री सर्वेश कुमार

3. उद्योग-परिवहन निगम

4. जिला-बुलन्दशहर

दिनांकः 01-12-04

अवार्ड

1. अपर सभायुक्त, गाजियाबाद के सन्दर्भित संख्या 4262/67/गा0वा0 (सन्दर्भ) सीपी0 वाद संख्या 20/92 दिनांक 23/8/93 के द्वारा अभिनिर्णय हेतु इस श्रम न्यायालय को प्रेषित किया गया है औद्योगिक विवाद का विवरण निम्नवत हैः-

1. क्या सेवायोजको द्वारा अपने श्रमिक श्री हरिशंकर वर्मा पुत्र गेंदा लाल पद परिचालक की सेवाये दिनांक 11-4-91 से समाप्त किया जाना उचित तथा वैधानिक हेतु यदि नहीं तो संबंधित श्रमिक किस हित लाभ/क्षति पूर्ति प्राप्त करने का अधिकारी है, अन्य किस विवरण सहित।

.....

.....

.....

.....

.....

.....

.....

12. श्रमिक श्री तरफ यह भी तर्क प्रस्तुत किया गया है कि मय दिनांक 12-11-88 और 25-3-89 को बस को पेश किया गया उस समय यह नियम था कि हर एक सवारी परि-चालक से उसकी सीट पर ही जाकर टिकट लेगी। निरीक्षण के दौरान यह नहीं पाया गया कि श्रमिक ने किसी भी सवारी से पैसा ले लिया था और टिकट नहीं दिया था यह कि बस खतौली से थोड़ी दूर ही चली थी और बस को चेक कर लिया गया था। निरीक्षणकर्ताओं ने बिना टिकट यात्रीयों के टिकट बना दिये थे और उनके द्वारा धनराशि निगम कोष खतौली में जमा करा दी गयी थी उस प्रकार कोई आर्थिक हानि नहीं हुई है। श्रमिक की सेवा समाप्ति का आदेश प्रदर्श ई-13 बहुत ज्यादा कठोर है। न्यायालय दण्डादेश प्रदर्श-13 को संसोधन करने में सक्षम है। परिचालक की सेवा समाप्ति उचित तथा वैधानिक नहीं मानी जा सकती। इस संबंध में विधि व्यवस्था प्रस्तुत की गयी हैः-

(1) एफ0एस0आर0 19881571 पृष्ट 719 (माननीय उच्चतम न्यायालय)

(2) एफ0एस0आर0 19961721 पेज 41 (मा0 इला0 उच्च न्यायालय)

13- उपरोक्त तर्क के खण्डन में सेवायोजक पक्ष की तरफ से यह तर्क प्रस्तुत किया गया है कि यह परिचालक का कर्तव्य था कि खतौली से बस को तभी आगे चलाना चाहिए था जब सारी सवारियों की टिकट बना दी होती। श्रमिक का इरादा यात्रियों को बिना टिकट ले जाने का था और अगर बस चेक नहीं होती तब श्रमिक बिना टिकट यात्रियों से पैसा लेकर अपने पास रख सकता था और इस प्रकार निगम को आर्थिक हानि पहुँचायी जा सकती थी। श्रमिक की सेवा समाप्ति उचित है और सन्दर्भ निरस्त किये जाने योग्य है। इस

संबंध में निम्न विधि व्यवस्था प्रस्तुत की गयी हैः-

(1) 1998 सुप्रमी कोर्ट केसेज (एल एण्ड एस) पेज 11941 मा0 इला0 उच्च न्यायालय। उपरोक्त विधि व्यवस्था का लाभ सेवायोजक पक्ष को नहीं पहुँचता है क्योंकि उपरोक्त विधि व्यवस्था में दिये गये तथ्य प्रस्तुत संदर्भ में दिये गये तथ्यों से भिन्न है। प्रस्तुत विधि व्यवस्था के अनुसार श्रमिक की एक बार पहले भी सेवा समाप्त की गयी थी और उसे पुनः सेवा में लिया गया था और बाद में श्रमिक को पुनः सेवा से पृथक कर दिया गया था। इस प्रकार पुनः सेवा समाप्ति को माननीय उच्चतम न्यायालय ने उचित ठहराया था।

14. पत्रावली पर उपलब्ध साक्ष्य एवं प्रतिनिधियों के तर्कों को ध्यान रखते हुए वे इसी निष्कर्ष पर पहुँचता हूँ कि श्रमि से विरूद्ध पारित दण्डादेश प्रदर्श-13 एकदम कठोर है। दण्डादेश संशोधित किये जाने योग्य है। श्रमिक की दिनांक 11.4.91 से सेवा समाप्ति उचित तथा वैधानिक नहीं है। प्रस्तुत संदर्भ की वाब्दा यही निर्णीत किया जाता है कि दण्डादेश प्रदर्श ई-13 संशोधित किया जाता है। श्रमिक की पुरानी सेवा के क्रम में बहाल किया जाये। श्रमिक की केवल दो वार्षिक वेतन वृद्धि स्थायी तौर पर रोक ली जाये। श्रमिक के केवल दो वार्षिक वेतन वृद्धि स्थायी तौर पर रोक ली जाये। श्रमिक सेवा समाप्ति की तिथि से सेवा में बहाल किये जाने की अवधि का वेतन तथा अन्य भत्तों का केवल 50% पाने का अधिकारी होगा।

0अप0

1.12.06

(सावंत सिंह)

पीठासीन अधिकारी।"

15. Perusal of the finding of fact recorded by Labour Court as quoted above fully demonstrate that there is no illegality in the impugned award.

16. It is also material that in spite of the interim order dated 26-07-2007 passed by this Court in the instant petition filed by petitioner themselves, the petitioner has not reinstated the respondent No. 1 in service and respondent No. 1 has expired on 3-9-2015, as such, writ petition filed by petitioner is also liable to be dismissed due to non-compliance of the condition mentioned in the interim order. Mere quotation of wrong provision of interim order will not make the interim order redundant. Hon. Apex Court in case reported in **(2007) 8 SCC 449 Prestige Ltd. v. State Bank of India** has held that an order passed by competent court, interim or final, has to be abided without any reservation and if such order is violated, the Court may refuse the party violating such order to hear him on merit.

17. Considering the peculiar facts and circumstances of the case to the effect that respondent No. 1 was not reinstated in service in spite of the interim order dated 26-07-2007 passed in the instant petition

and ultimately respondent No. 1 has expired on 3-09-2015, **the writ petition is dismissed with following direction:**

(i). Petitioner shall release the arrears of 50% of back wages of deceased-respondent No. 1 in favour of respondent No. 1/ 1 to 1/ 4 from the date of termination (11-04-1991) to the date of passing of interim order dated 26-07-2007 within period of two months from today.

(ii). Petitioner shall release the arrears of full wages of deceased-respondent No. 1 from the date of passing of interim order dated 26-07-2007 till the date of his death (3-09-2015) within period of 3 months from today.

(iii). In case of non-payment of arrears of wages in aforementioned period, the petitioner shall pay interest to the respondent Nos. 1/1 to1/4 at the rate of 6% per annum on the aforementioned amount.

18. No order as to costs.

(2024) 8 ILRA 1095
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ - C No. 36298 of 2016

State of U.P. ...Appellant
Versus
Presiding Officer Labour Court & Anr. ...Respondents

Counsel for the Appellant:
C.S.C.

Counsel for the Respondents:
Bushra Maryam, Shekhar Srivastav, Shekhar Srivastava

A. Labour Law – Retrenchment/ Termination - U.P. Industrial Disputes Act, 1947 - Section 6-N - It is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments. (Para 13)

Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service.

The perusal of finding of facts recorded by the Labour Court on all the issues fully demonstrates that respondent No.2/workman was appointed in the petitioner-department and worked up to 28.9.1998. And further demonstrate that **petitioner-department is Industry** and **there was relation of employer and employee between the petitioner and respondent No.2/workman** who has **worked for more than 240 days in the Calendar Year,** as such, **the services cannot be terminated without compliance of the provisions contained under U.P. Industrial Disputes Act. Respondent No.2/workman was not in any gainful employment after termination of his service**, as such, the Labour Court has rightly reinstated the petitioner in service and awarded 50% of the backwages from the date of termination till the date of reinstatement of service. (Para 13)

Writ petition dismissed. Awarded arrears of 50% of backwages. (E-4)

Precedent followed:

1. Assistant Engineer Rajasthan Development Corporation Vs Geetam Singh, 2013 STPL 84 SC (Para 5)

2. Rajasthan State Ganga Nagar as Mills Ltd. Vs State of Rajasthan & anr., 2004 (8) SCC 161 (Para 5)

3. Himanshu Kumar Vidhyarthi & ors. Vs State of Bihar & ors., SLP (C) No. 7957 of 1996 (Para 5)

4. The Bangalore Water Supply & Sewerage Board etc. Vs A. Rajappa & ors. etc. (Para 6)

5. Des Raj & ors. Vs St. of Pun. & ors., AIR 1988 SC (Para 6, 10)

6. St. of U.P., through Executive Engineer, Nichali Ganga Nahar, Phoolpur, Kanpur Vs The Labour Court (II), U.P. Kanpur & anr. (Para 6)

7. St. of U.P. Through Executive Engineer, Tubewell Division-I, Bareilly Vs Presiding Officer, Labour Court, U.P., Bareilly & anr. (Para 6)

8. St. of U.P. Through Principal Secretary, Irrigation, Lucknow & ors. Vs Labour Court, Gorakhpur, U.P. & anr. (Para 6)

9. Eng.-In-Chief Irrigation Dept., Lucknow & ors. Vs Shiv Nath, 2024 (181) FLR 239 (Para 6)

10. R.M. Yellatti Vs The Assistant Executive Engineer, (2006) 1 UPLBEC 213 (Para 6)

11. Hiralal & ors. Vs Badkulal & ors., AIR 1953 SC 225 (Vol. 40 C.N. 54) (Para 6)

12. Management of S.B.I. Vs V.M. Mahapurush (Para 6)

13. Sant Ram Vs Rajinder Lal & ors., AIR 1978 Supreme Court 1601 (Para 6)

14. Sita Ram & ors. Vs Motilal Nehru Farmers Training Institute, 2008 (117) FLR 1191 (Para 6)

15. Indian Overseas Bank Vs I.O.B. Staff Canteen Worker's Union & anr., (2000) 4 SCC 245 (Para 6)

16. M/s. Hindustan Tin Works Pvt. Ltd., Vs The Employees of M/s. Hindustan Tin Works Pvt. Ltd. & ors., AIR 1979 SC 75 (Para 6)

17. Harjinder Singh Vs Punjab State Warehousing Corporation, 2010 (124) FLR 700 (Para 6)

18. Ddepali Gundu Surwase Vs Kranti Junior Adhyapak & ors., 2013 (139) FLR 541 (Para 6)

19. Bhuvanesh Kumar Dwivedi Vs M/s. Hindalco Industries Ltd., 2014 (142) FLR 20 (Para 6)

20. Mackinon Mackenzie & Comp. Ltd. Vs Mackinnon Employees' Union, 2015 (145) FLR 184 (Para 6)

21. Jayantibhai Raojibhai Patel Vs Municipal Council, Narkhed & ors., 2019 LawSuit (SC) 1506

22. Armed Forces Ex Officers Multi Services Co-Operative Society Ltd. Vs Rashtriya Mazdoor Sangh (Intuc), 2022 (175) FLR 544 (Para 6)

Present petition challenges award dated 30.10.2015, published on 05.4.2016, passed by the Presiding Officer, Labour Court, Meerut.

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Prabhakar Tripathi, learned Standing Counsel for the petitioner/ State and Ms. Bushra Maryam, learned counsel assisted by Mr. Baquer Mehdi, learned counsel for respondent no.2.

2. Brief facts of the case are that respondent no.2 raised the industrial dispute which was referred for adjudication vide reference order dated 16.1.2006 with respect to termination of service of respondent no.2/ workman with effect from 29.9.1998. The aforementioned reference was registered as adjudication case No. 205/ 2006. Respondent no.2/ workman

filed his written statement (Paper No. 5-A) stating that he was working on the post of Chowkidar in department of petitioner since 1986 and worked up to 28.9.1998. It was also stated in the written statement that with effect from 29.9.1998, the service of the petitioner was orally terminated without complying the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947. It was also mentioned in the written statement that respondent no.2 had worked for more than 240 days in a calendar year. Petitioner/ employer had also filed his written statement (Paper No. 9-A) stating that department is a Government department and provisions of U.P. Industrial Disputes Act are not applicable. It was also stated in the written statement that respondent no.2/ workman had never been employed in the department and there was no master and servant relationship between them. It was also stated that there was no question of termination of service of respondent no.2 with effect from 29.9.1998 as he never worked in the department. Respondent no.2/ workman filed his reply to the written statement of the petitioner/ employer. Respondent no.1/ Labour Court considering the evidence on record decided the dispute vide award dated 30.10.2015 which was published on 5.4.2016 by which respondent no.2/ workman was reinstated in service and 50% of the backwages was awarded from the date of termination of service till the date of reinstatement. Hence this writ petition on behalf of the petitioner for the following relief:-

"Issue a writ, order or direction in the nature of Certiorari quashing the impugned award dated 30.10.2015 published on 05.4.2016 (Annexure No.1 to the writ petition) passed by the Presiding Officer, Labour Court, Meerut (respondent No.1)"

3. This Court vide order dated 9.8.2016 entertained the matter and granted interim protection to the effect that effect and operation of the impugned award dated 30.10.2015 shall be kept in abeyance provided petitioner reinstates the respondent no.2 within period of one month from today and continues to pay current wages as per law. On 4.10.2016, this Court granted one month further time to learned counsel for the respondents to file counter affidavit and extended the interim order.

4. In pursuance of the aforementioned order dated 9.8.2016 and 4.10.2016, the parties have exchanged their affidavit.

5. Learned Standing Counsel for the State/ petitioner submitted that respondent no.2 had never worked in the petitioner- department therefore there was no question for retrenchment/ termination of service of respondent no.2. He further submitted that there was no relation of employer and employee between Department and respondent no.2, as such, provisions of the U.P. Industrial Disputes Act, 1947 are not applicable in the matter. He further submitted that Madhya Ganga Canal Construction Division and Development is department of State Government and is not an industry, as such, the impugned award is wholly illegal. He further submitted that Labour Court has placed reliance on the document which were filed by workman although the same were not proved by his evidence, as such, the award is illegal. He further submitted that impugned award has been passed in violation of principle of natural justice. He further submitted that Labour Court has shifted the burden of proof upon the petitioner to prove that respondent no.2/ workman is not an employee of the petitioner. He further submitted that no

adverse inference can be drawn against the employer on his failure to produce the documents in his possession. He submitted that Labour Court relying on the question of 240 days continousworking has passed the impugned award recording finding that there is violation of Section 6-N of the Industrial Disputes Act which is not in accordance with law. He further submitted that in any case, the award for 50% of the back wages to the respondent no.2/ workman is against the ratio of law laid down by Hon'ble Apex Court in the case of ***Assistant Engineer Rajasthan Development Corporation Vs. Geetam Singh 2013 STPL 84 SC***. He further submitted that petitioner- Department is a Government Department, as such, the reinstatement of the workman is not proper rather in any case, compensation can be awarded in favour of respondent no.2/ workman. He further placed reliance upon the judgement of Hon'ble Apex Court reported in ***2004 (8) SCC 161 Rajasthan State Ganga Nagar as Mills Ltd. Vs. State of Rajasthan and Another*** in support of his argument. He further placed another judgement of Hon'ble Apex Court dated 26.3.1997 passed in ***SLP (C) No. 7957 of 1996 Himanshu Kumar Vidhyarthi and Others Vs. State of Bihar and Others*** in order to demonstrate that department of the Government cannot be treated to be industry when appointment are regulated by the statutory rules. He finally submitted that writ petition be allowed and impugned award be set aside.

6. On the other hand, Ms. Bushra Maryan assisted by Mr. Baquer Mehdi, learned counsel for respondent no.2 submitted that respondent no.2/ workman was working as chowkidar in the petitoner-department since 1986 and worked up to 28.9.1998. She further submitted that Labour Court has rightly decided the dispute reinstating the petitioner in service with 50% of the backwages. She further submitted that petitioner/ Irrigation Department is an industry, as such, there is no illegality in the impugned award. She further submitted that respondent no.2/ workman have filed an application before the Labour Court for summoning certain documents from the petitioner- Department but the same were not produced by the petitioner-Department accordingly Labour Court has rightly drawn the adverse inference against the petitioner- Department. She further submitted that Labour Court has summoned the attendance register and payment register from the petitioner- Department which they failed to produce. She submitted that order sheet before the Labour Court was signed by respondent no.2/ workman as well as employer, as such, it cannot be argued that impugned award has been passed in violation of principles of natural justice. She further submitted that Labour Court has no power to review the award passed on merit hence the review application filed by petitioner- Department was not maintainable, as such, the same was rightly rejected by the Labour Court. She submitted that issues framed by Labour Court has rightly been decided in favour of respondent no.2/ workman on the basis of oral and documentary evidences adduced by the respondent no.2/ workman. She placed three compilation the judgement of Hon'ble Apex Court as well as of this Court on the point as to whether the Irrigation Department is an industry or not, as to whether the adverse inference will be withdrawn for non-production of material documents as well as on the point of awarding backwages which are as under:-

i). Whether Irrigation department is an industry or not ?

1. The Bangalore Water Supply & Sewerage Board etc. v/s A. Rajappa and others etc.

2. Des Raj and others v/s State of Punjab and others

3. State of U.P., through Executive Engineer, Nichali Ganga Nahar, Phoolpur, Kanpur v/s The Labour Court (II), U.P. Kanpur and another

4. State of U.P. Through Executive Engineer, Tubewell Division-I, Bareilly v/s Presiding Officer, Labour Court, U.P., Bareilly and another

5. State of U.P. Through Principal Secretary, Irrigation, Lucknow and others v/s Labour Court, Gorakhpur, U.P. and another

6. Eng.-In-Chief Irrigation Dept., Lucknow and others v/s Shiv Nath"

ii). Whether adverse inference will be withdrawn for non-production of documents ?

"i). [(2006) 1 UPLBEC 213] R.M. Yellatti v/s The Assistant Executive Engineer

ii). (AIR 1953 Sup. Court 225 (Vol. 40 C.N. 54) Hiralal and others v/s Badkulal and others

iii) Management of State Bank of India v/s V.M. Mahapurush

iv). AIR 1978 Supreme Court 1601 (Sant Ram v/s Rajinder Lal and others

v). [2008 (117) FLR 1191] Sita Ram and others v/s Motilal Nehru Farmers Training Institute

vi). [(2000) 4 SCC 245] Indian Overseas Bank v/s I.O.B. Staff Canteen Worker?s Union and another"

iii) Grant of backwages in the case of reinstatement of workman ?

1.AIR 1979 SC 75 (M/s. Hindustan Tin Works Pvt. Ltd., v/s The Employees of M/s. Hindustan Tin Works Pvt. Ltd. And others)

2. [2010 (124) FLR 700] Harjinder Singh v/s Punjab State Warehousing Corporation

3. [2013 (139) FLR 541] Ddepali Gundu Surwase v/s Kranti Junior Adhyapak and others

4. [2014 (142) FLR 20] Bhuvanesh Kumar Dwivedi v/s M/s. Hindalco Industries Ltd.

5. [2015 (145) FLR 184] Mackinon Mackenzie & Company Ltd. v/s Mackinnon Employees? Union

6.[2019 LawSuit(SC) 1506] Jayantibhai Raojibhai Patel v/s Municipal Council, Narkhed & Ors.

7. [2022 (175) FLR 544] Armed Forces Ex Officers Multi Services Co-Operative Society Ltd. v/s Rashtriya Mazdoor Sangh (Intuc)

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 industrial dispute raised by respondent No.2 was referred for adjudication vide order dated 16.1.2006 with respect to termination of service of respondent No.2 w.e.f. 29.9.1998. There is also no dispute about the fact that Labour Court vide impugned award dated 30.10.2015 as published on 5.4.2016 reinstated the respondent No.2 with 50% of the backwages from the date of termination till the date of reinstatement in service.

9. The point of determination which are involved in the writ petition are as follows :-

i) Whether irrigation department is Industry or not ?

ii) Whether respondent No.2/ workman was appointed on the post of Chowkidar in the petitioner department and worked for more than 240 days in a calendar year ?

iii) Whether respondent No.2/workman was in employment anywhere else during the period of termination to the date of reinstatement ?

iv) To what relief respondent No.2/Workman will be entitled ?

10. In order to decide the point of determination No. i) as to whether the irrigation department is industry or not, the perusal of ratio of law laid down by the Hon'ble Apex Court as well as by this Court which has been cited by learned counsel for respondent No.2 are relevant.

The perusal of paragraph Nos.21, 22, 23, 24 & 25 of the judgment rendered in ***Engineer-in-Chief Irrigation Department, Lucknow and Others vs. Shiv Nath; 2024 (181) FLR 239*** will be relevant which are as under :-

"21. Further, Hon'ble the Supreme Court in the case of Des Raj Etc. Vs. State of Punjab and others reported in MANU/SC/0124/1988MANU/SC/0124/1988 : AIR 1988 SC had considered the tests laid down in various earlier judgments of the Apex Court itself, culminating in the judgment in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and others, reported in MANU/SC/0257/1978MANU/SC/0257/1978 : 1978:INSC:41 : 1978(2) SCC 213 and thereafter had arrived at a conclusion that the Irrigation Department falls within the definition of Industry within the meaning of Section 2(j) of the I.D. Act. It was held that the view taken down in Des Raj's case was the better in point of law and hence it is the view in Des Raj's case which was directed to be followed. Once it was so held and also that the work of the Irrigation Department of the State of Punjab and the material placed before the Supreme Court including the written submissions filed on behalf of the concerned petitioners that the irrigation department of the State of Maharashtra was discharging the same or similar functions as the Irrigation Department of the State of Punjab, it was held that the projects of the Irrigation Department or work connected with that of the State of Maharashtra, on the same tests as applied by the Apex Court in Des Raj's case would fall within the definition of an industry for the purpose of Section 2(j) of the I.D. Act.

22. The Hon'ble Supreme Court in the case of Executive Engineer, State of Karnataka Vs. K. Somasetty had relied upon the case of Union of India Vs. Jai Narain Singh, MANU/SC/1530/1995MANU/SC/1530/1995 : (1995) Supp 4 672, to hold that Irrigation Department is not an "Industry". No reasons were ascribed for coming to the said conclusion, as has also observed by the Bombay High Court in the case of Special Land Acquisition Officer Vs. Municipal Corporation, MANU/ MH/0304/ 1988MANU/ MH/0304/1988 : AIR 1988 Bom 9 and relied upon the case of Des Raj. This Court is in agreement with the said observations on this count and hence hold that the Irrigation Department is an "Industry" within the meaning of Section 2(f) of the U.P. Industrial Disputes Act, 1947.

23. It is noticed that undisputedly, the workmen has worked along with petitioner from from 15.07.1986 to 31.12.1991 and according to the muster roll produced by him before the Industrial Tribunal, he had worked for 332 days in 1991. There is no denial of the

fact that the provisions of Section 6(N) of Industrial Disputes Act were not complied with by the petitioner inasmuch as neither notice was given to him nor salary in lieu of notice and consequently there was gross violation of provisions of Section 6(N).

24. In view of above discussions, the contention of the State to the effect that Irrigation Department does not fall within the definition of "Industry" or that provisions of Act of 1947 are not applicable, does not have any force and is hereby rejected. Even, the Labour Court, in the impugned award has also given the same interpretation after relying upon the judgments in the case of Des Raj and etc. (supra) and other authorities. I do not find any error in the view taken by Tribunal necessitating interference by this Court under Article 227 of the Constitution of India.

25. The writ petition is bereft of merits and is accordingly dismissed."

The Labour Court has also decided this issue holding that Irrigation Department is an industry.

Considering the aforementioned facts and circumstances, the point of determination No.1 is answered that Irrigation Department is an industry.

11. In order to consider the point of determination No. ii), the perusal of finding of facts recorded by the Labour Court while passing the impugned award will be relevant which is as under :-

"समक्ष : पीठासीन अधिकारी, श्रम न्यायालय,
उत्तर प्रदेश, मेरठ।

उपस्थित

श्री विजेन्द्र पाल सिंह . पीठासीन अधिकारी

अभिनिर्णय वाद संख्या: ***205/2006***

कर्मकार की ओर से ***2011 LLR 1079 (S.C.) Bhilwara Dugdh Utpadak Sahakari S. Ltd. Vs Vinod Kumar Sharma Dead by LRs & Ors.*** की व्यवस्था प्रस्तुत की जिसमें कहा गया है कि श्रम न्यायालय से सम्बन्धित नियम कर्मकारों की सुरक्षा के लिए बनाये गये है तथा कर्मकार बारगेनिंग करने की स्थिति में नहीं है तथा यह कहा गया कि सेवायोजकों द्वारा ऐसे बहुत तरीके अपनाये गये है जिससे की कर्मकार को उनके अधिकारों से वंचित किया जा सके और यह कहा जा सके कि सम्बन्धित श्रमिक उनके यहां कार्यरत कर्मकार नहीं है बल्कि यह किसी अन्य का कर्मचारी है तथा दैनिक वेतन भोगी अथवा छोटे समय के लिए कार्यरत कैजुअल कर्मकार है जबकि वह वास्तव में सेवायोजकों के यहां नियमित कर्मचारी के रूप में काम कर रहा है और माननीय उच्चतम न्यायालय द्वारा ऐसी व्यवस्था को रोकने का आदेश दिया जिससे कि उनका शौषण रोका जा सके तथा यह व्यवस्था यहां पूर्ण रूप से लागू होती है क्योकि सेवायोजक यह कहकर आये है कि उनके यहां पी०के० एन्टर प्राईजेज के माध्यम से राजू नाम का व्यक्ति कार्यरत था परन्तु वह इस बात को सिद्ध नहीं कर पाये और पी०के० एन्टर प्राईजेज के नाम से कार्यरत राजू का नाम भी उनकी लिस्ट में अंकित नहीं है और ऐसी दशा में यही माना जायेगा कि सेवायोजकों द्वारा कर्मकार को उनके विधिक अधिकारों से वंचित रखने के लिए विभिन्न तरीके अपनाये गये है तथा यह वर्तमान केस में भी कर्मकार द्वारा रिजरवेशन स्लिप चार्ज लिस्ट, सामान मंगाने की लिस्ट आदि प्रपत्र दाखिल किये गये है जिनपर श्री रमाकान्त

रस्तोगी के हस्ताक्षर बताये है और उन पेपरों को सिद्ध किया गया है तथा श्री पी०के० सिंघल द्वारा यह बात स्वीकार की गई है कि सम्बन्धित कर्मकार उनके मकान में रहा लेकिन यह अनाधिकृत रूप से मकान पर काबिज था लेकिन यह स्वीकार किया कि उन्होंने निष्कासन का बाद दायर न किया जबकि इस साक्षी का यह कथन है अनाधिकृत व्यक्ति के विरूद्ध केस दर्ज कराते है और यह सब तथ्य है कि इस बात को प्रर्दर्शित करते है कि सम्बन्धित कर्मकार सेवायोजकों के यहां कार्यरत था और विभाग द्वारा जानबूझ कर कागज दाखिल नहीं किये तथा चार्ज लिस्ट अवर अभियन्ता व दूसरे चौकीदार रामकुमार के हस्ताक्षर डब्लू०डब्लू०-1 श्री राजकुमार उर्फ राजू द्वारा बताये गये है परन्तु इन दोनों साक्षीगणों की सेवायोजकों द्वारा परीक्षित नहीं किया और ऐसी परिस्थितियों में यह ही माना जायेगा कि उन दोनों के हस्ताक्षर इन पेपरों पर मौजूद है केवल एडमिशन से बचने के लिए उन्हे सेवायोजकों द्वारा उन्हें प्रस्तुत नहीं किया गया तथा केस की परिस्थितियों के हिसाब से यही निष्कर्ष निकलता है कि सेवायोजक व राजकुमार उर्फ राजू के बीच मालिक व नौकर का सम्बन्ध स्थापित है और वाद बिन्दु तद्नुसार निर्णीत किया जाता है।

उक्त कागजात सेवायोजकों पर थे जो उसने प्रस्तुत नहीं किए तब उसके विरुद्ध निष्कर्ष निकाला जाएला।

इस प्रकार उपरोक्त साक्ष्य परिस्थिति व विधि व्यवस्थाओं से स्पष्ट है कि कर्मकार ने सेवायोजकों के यहां सेवा समाप्ति से से पूर्व लगभग ***11-12*** वर्ष कार्य किया और सेवायोजकों द्वारा हाजरी व भुगतान रजिस्टर होते हुए रिबटल में दाखिल नहीं किया और इस प्रकार सेवायोजकों के विरुद्ध निष्कर्ष निकला जायेगा और यही माना जायेगा कि सम्बन्धित कर्मकार सेवायोजकों के यहां ***240*** दिन से अधिक सेवा समाति से पूर्व से कार्य कर रहा और बाद बिन्दु तदनुसार निर्णीत किया जाता है।"

The perusal of finding of fact recorded by Labour Court as to whether respondent No.2/workman was appointed in the petitioner department and worked for more than 240 days in Calendar Year is fully proved. Accordingly, point of determination No. ii) is answered in favour of respondent No.2 that he was appointed in the petitioner - department and worked for more than 240 days in a Calendar Year.

12. In order to consider the point of determination No.iii), the perusal of finding of fact recorded by the Labour Court will be also relevant which is as under : -

वाद बिन्दु सं0 3

इस प्रकरण में सम्बन्धित कर्मकार की ओर से यह तर्क दिया गया कि वह सेवा समाप्ति के बाद से आज तक बेरोजगार है और उसने अपने को सेवा में रखने के लिए काफी प्रयास किये लेकिन उसे नौकरी नहीं मिली सेवायोजकों की ओर से लिखित कथन में इस तथ्य का प्रतिकार नहीं किया गया तथा प्रकरण में सम्बन्धित कर्मकार राजकुमार का बयान ***23***-सी० अंकित किया गया तथा उसने अपने बयान में कहा है कि मैं सेवा समाप्ति की तिथि से आजतक बेरोजगार हूँ और मेने नौकरी ढूंढने की कोशिश की लेकिन मुझे नौकरी नहीं मिली तथा

प्रतिपरीक्षण में यह कहा कि मेरे घर का खर्च सभी भाई मिलकर चलाते है तथा अन्य कोई बात सेवायोजकों की ओर से इस बारे में नहीं पूछी तथा ऐसी परिस्थतियों में सम्बन्धित कर्मकार ने सेवा समाप्ति के बाद से बेरोजगार रहने और अन्य कोई कार्य न मिल पाने के बारे में साक्ष्य दिया है और इस बारे में आवश्यक तत्व अभिवचनों में भी किये है। लेकिन सेवायोजकों की ओर से इस बारे में कोई साक्ष्य नहीं दिया गया तथा यह सेवायोजकों की जिम्मेदारी थी कि उस समय जबकि कर्मकार ने अपने कथन में यह तथ्य अंकित किया है कि वह सेवा समाप्ति के बाद से बेरोजगार है तब यह सेवायोजकों की जिम्मेदारी थी कि वह इस बारे में साक्ष्य प्रस्तुत करे कि सम्बन्धित कर्मकार सेवा समाप्ति के बाद से लाभप्रद नियोजन है तथा यह सेवायोजकों की ही जिम्मेदारी है कि इस बारे में अपना साक्ष्य प्रस्तुत करे कि कर्मकार सेवा समाप्ति के बाद से लाभप्रद नियोजन में है जैसाकि माननीय उच्चतम न्यायालय ने अपनी व्यवस्था ***Bhuvnesh Kumar Dwivedi Vs M/s Hindalco Industries Ltd. 2014 L.I.C. 2643*** की व्यवस्था में दिया है और सेवायोजक इस तथ्य को सिद्ध नहीं कर पाये और वाद बिन्दु तदनुसार अभिनिर्णीत किया जाता है और यही माना जायेगा कि कर्मकार सेवा समाप्ति के बाद से लाभप्रद नियोजन में नहीं है।"

The perusal of the finding recorded by the Labour Court, as quoted above, fully demonstrate that respondent No.2/workman was not in any gainful employment from the date of termination till the date of reinstatement. Accordingly the point of determination No.iii) is answered that respondent No.2/workman was not in any gainful employment during the period of termination of service till the reinstatement.

13. In order to consider the point of determination No.iv), the perusal of finding of facts recorded by the Labour Court on all the issues fully demonstrates that respondent No.2/workman was appointed in the petitioner-department and worked up to 28.9.1998. The perusal of the finding of fact further demonstrate that petitioner-department is Industry and there was relation of employer and employee between the petitioner and respondent No.2/workman who has worked for more than 240 days in the Calendar Year, as such, the services cannot be terminated without compliance of the provisions contained under U.P. Industrial Disputes Act. The finding of fact further demonstrates that respondent No.2/workman was not in any gainful employment after termination of his service, as such, the Labour Court has rightly reinstated the petitioner in service and awarded 50% of the backwages from the date of termination till the date of reinstatement of service.

On the point of awarding the backwages, the ratio of law laid down by Hon'ble Supreme Court in the case of **Deepali Gundu Surwase (Supra)** as cited by learned counsel for respondent No.2/workman will be relevant for perusal which is as under :-

"33. The propositions which can be culled out from the aforementioned judgments are:

i) In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

ii) The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the Court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

iii) Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the Court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averments about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

iv) The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

v) The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

vi) In a number of cases, the superior Courts have interfered with the award of the primary adjudicatory authority on the premise that finalization of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the

principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-a-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works Private Limited v. Employees of Hindustan Tin Works Private Limited (supra).

vii) The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal (supra) that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three Judge Benches referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

The perusal of another judgment of the Apex Court in the case of **Allahabad Bank (Supra)** in which the earlier case of the Apex Court in **Deepali Gundu Surwase (Supra)** was also considered will be relevant which is as under :-

"36. Therefore, even applying the ratio laid down in various decisions, we do not think that the employee could be granted anything more than what the High Court has awarded.

37. As we have pointed out at the beginning, the total period of service rendered by the Officer-employee before his dismissal from service, was about 15 years, from 1974 to 1989 and he attained the age of superannuation in February, 2013, meaning thereby that he was out of employment for 24 years. The High Court has taken this factor into consideration for limiting the back wages only to 50% and we find that the High Court has actually struck a balance. We do not wish to upset this balance. Therefore, the Special Leave Petition of the Officer-employee is also liable to be dismissed.

38. Accordingly, both the Special Leave Petitions are dismissed, no costs."

The point of determination No.iv) is answered accordingly that grant of 50% of the backwages from the date of termination of service till the date of reinstatement is just and proper in the facts and circumstances of the case.

14. Considering the entire facts and circumstances of the case, no interference is required against the impugned award dated 30.10.2015, as published on 5.4.2016, passed by respondent No.1. The writ petition is dismissed and petitioner - department is directed to release the arrears of 50% of the backwages within period of two months from today, otherwise, interest @ 6% per annum will be charged against the petitioner for delayed payment of awarded amount to respondent No.2/workman. The payment which has been made to the respondent no.2/ workman in compliance of interim order dated 14.9.2017 passed in connected Writ C No. 42879 of 2017 shall be adjusted by the authorities while making payment to respondent no.2 under this order.

15. No order as to costs.

(2024) 8 ILRA 1106
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.08.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ - C No. 1000448 of 2010

C/M Madarsa Ehle Sunnat Sirajul Uloom Sultanpur ...Petitioner

Versus

State of U.P. ...Respondent

Counsel for the Petitioner:
Dr. L.P. Misra, G.M. Kamil

Counsel for the Respondent:
C.S.C., Ausaf Ahmad Khan, M.B. Singh

A. Societies Law – U.P. Societies Registration Act, 1860 - Section 3(2)(Ka) and (kha) - 12-D sub Clause 2 - The amendments made in the Act vide Act No. 52/75 are prospective in nature. Prior to the date of amendment Section 12-D (1) or section 12 of the Act do not in any way confer a power upon the Assistant Registrar to cancel the registration, which has been granted to a society in the same name prior to the date of enforcement of S.3(2)(a) under U.P. Act No. 52/75.

There was no restriction under the Societies Registration Act, 1860 prohibiting the registration of a new society, in the year 1973 with the same name vis-a-vis the name of the society, which was earlier registered in the year 1964, Therefore, there was no occasion for the Assistant Registrar to exercise the power u/s 12-D (1) of the Act of 1860 for cancelling the registration of the petitioner society on the pretext that there was restriction for registration of a society in the same name and style as that of an earlier registered society. (Para 18)

The amended statutory provisions of 3(2)(a) have no application in the facts of the present case and as a consequent thereto to the orders passed by the Assistant Registrar dated 12.3.1992 and that of passed by the Commissioner dated 7.4.1993 cannot be legally sustained. (Para 19)

B. Power to refuse the registration of the society cannot be enlarged to the extent so as to confer a power upon the Registrar to cancel the registration of the society with the same name. No incidental power can be culled out from the provisions of Section 3 as were applicable in the year 1973, nor any inherent power can be read from any other provisions of the Societies Registration Act, 1860. (Para 20)

Apart from certain special statutes which entitle companies or persons to the exclusive use of a name or a mark, such as the Companies Act or the Trade Marks Act, a man has no exclusive proprietary rights in a fancy name or title, and normally and principally, it is in relation to the user of a name associated with a certain businesses or trading concern or some profession that the Court affords protection and grants an injunction restraining the adoption and use of such a name by another when the Court is satisfied that damage has been caused or there is tangible risk or possibility of a damage resulting from confusion caused in the public mind or in other words by reason of the public being deceived by the use of such name. (Para 21)

C. Only Courts of law have been conferred a power to grant an injunction restraining the adoption and use of the same name when the Court is satisfied that damage has been caused or there is tangible risk or, possibility of a damage resulting from confusion caused in public mind, or the public being deceived by the use of the identical name and style.

It is established beyond doubt that it is for the respondents to have initiated suitable Civil Injunction Proceedings, if they had any

apprehension of misuse of the name of the respondent by the subsequent society being registered. The claim, if any, so pleaded would be adjudged by the Civil Court, on the basis of evidence led and the extent of damage/loss, which may be caused. However, they cannot be permitted to invoke the authority of the Registrar himself to cancel the registration. (Para 22)

Writ petition allowed. (E-4)

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

1. Heard Dr. L.P. Mishra, learned counsel appearing for the petitioner, Shri S.K. Khare, learned Standing Counsel appearing for the State-respondent nos. 1 to 4 and perused the material available on record.

2. It has been submitted by learned counsel for petitioner that one society under the name of "Edara Madarsa Ahle-Sunnat Sirajul-Uloom Latifiya, Nihalgarh, Post Jagdishpur, District Sultanpur" was registered on 08.08.1973 but its registration was not renewed subsequently and also that no educational institution was run by the said society.

3. It is not in dispute that the Manager of the aforesaid society along with certain other members had moved an application for registration of another society under the name & style of "Madarsa Ahle-Sunnat Sirajul-Uloom Latifiya, which was duly registered on 17.10.1974. The subsequent society had a similar name as the previous society except that the word "Edara" was not included in the name of the subsequent society, which is the petitioner's society. Educational institutions were established by the petitioner-society and recognition was also granted to them on 17.6.1977 and even permanent recognition was granted by the State of U.P. for the purpose of grant-in-aid on 06.08.1979.

4. It is the aforesaid circumstances that respondent no. 5 made a complaint on 12.5.2009 to the Deputy Registrar, Firms Societies and Chits, U.P. Faizabad stating that the name of the petitioner-society was the same as the previous society, namely, "Edara Madarsa Ahle-Sunnat Sirajul-Uloom Latifiya" and accordingly, sought cancellation of its registration. It is on the complaint made by respondent no. 5 that proceedings under Section 12-D sub Clause 2 of the U.P. Societies Registration, Act, 1860 were instituted and the petitioner society was put under notice seeking the response to the complaint made by respondent no. 5. The petitioner had duly opposed the averments made in the complaint and submitted that the previous society, namely, "Madarsa Ahle-Sunnat Sirajul-Uloom Latifiya, was a defunct society, inasmuch as, its registration was never renewed after 1975 till the year 2009. In any view of the matter, the previous society was not running any institution and even otherwise, it is stated that the name of the petitioner society was materially different from the name of the previous society, inasmuch as the word "Edara" was not included in the name of the petitioner-society.

5. The Deputy Registrar by means of order dated 28.08.2009 was of the view that the same person was responsible for registering the previous society on 30.7.1973 while second society was also registered on the application given by Mohd. Hanif Azmi, who was the Manager and he was aware of the similarity in the said name and he had concealed the fact about the registration of the first society and due to the said fact, it was found that

there was violation of Section 3 (2) (Ka) and (Kha) of the Societies Registration, Act, 1860 and accordingly, cancelled the registration of the petitioner-society while exercising its power under Section 12-D (1) (C) of the U.P. Societies Registration Act, 1860.

6. Being aggrieved by the aforesaid order, the petitioner had filed an appeal before the Commissioner, Faizabad Division, Faizabad, which was also rejected by means of order dated 13.01.2010 upholding the order of the Deputy Registrar, against which, the present writ petition has been filed.

7. Learned counsel for petitioner has firstly submitted that the Deputy Registrar as well as the Commissioner had wrongly invoked the powers under Section 3 (2) (Ka) & (Kha) of the Societies Registration Act to cancel the registration of the society of the petitioner institution. He submits that the provisions of Section 3 (2) were incorporated by the legislature and came into effect only on 10.10.1975 by the amending Act No. 52/75 while undoubtedly the petitioner society was registered previously on 17.10.1974. Accordingly, at the relevant time, the statutory bar of Section 3 (2) of the Act of 1860 was not available and accordingly, it was submitted that the Deputy Registrar has exceeded its jurisdiction and passed illegal and arbitrary order while cancelling the registration of the petitioner.

8. He has further submitted that even considering the provisions of 3 (2) (Ka) & (Kha) of the Act of 1860, it would be clear that statutory bar is only with regard to registration of the second society whose name is identical with that of any other society previously registered under the Act. In this regard, he submits that there is no doubt that the previous society had the word "Edara" included in the said name while the petitioner society does not include the word "Edara" and consequently, the name of petitioner society is not identical and accordingly, the bar created under Section 3 (2) (b) of the Act of 1860 would not be available to the authorities to cancel the registration of the petitioner. It has also been submitted that since the date of registration, the society is getting its renewal whenever required continuously.

9. Learned Standing Counsel on the other hand has opposed the writ petition but could not dispute the facts of the said case.

10. This Court has considered the rival submissions of learned counsel for the parties and perused the material available on record.

11. It is noticed that one society by the name of "Edara Madarsa Ahle-Sunnat Sirajul-Uloom Latifiya" was duly registered on 8.8.1973 and the same person had moved a subsequent application on 15.10.1974 for registration of the petitioner society which was registered on 17.10.1974 by the name of "Madarsa Ahle-Sunnat Sirajul-Uloom Latifiya". The Societies Registration Act, 1860 was amended in Uttar Pradesh by the Act of 52/75 effective from 10.10.1975 specifically modifying Section 3 regarding the registration process for societies. The amendment clarifies that there was no restriction for registration of the society with an identical name to another previously registered society as of 1973.

12. The issue before this Court is as to whether the order dated 28.08.2009 passed by the Deputy Registrar, Firms

Societies and Chits, U.P. Faizabad as well as order passed by the Commissioner, Faizabad Division, Faizabad dated 13.01.2010 cancelling the registration of the petitioner society were legally sustainable?

13. It has also been submitted on behalf of the petitioner that the orders passed by the Deputy Registrar and by the Commissioner proceeded on misconception of fact as well as law, inasmuch as, at the time when the new society was registered in the similar name and style as that of the earlier society, there was no restriction for the second society to be registered with the similar or identical name and style as of the earlier society. The restriction in this regard has been brought about by the amendment to Section 3 (2) (a) which has been added by the Act of 52/75 with effect from 10.10.1975. It is therefore, submitted that there was no illegality or infirmity in the registration of the new society in the similar name and style as of the earlier society, which was registered on 8.8.1973.

14. On behalf of the respondents, it has been fairly submitted that at the time of registration of the petitioner society, there was no restriction in registration of two societies with the same name and style. The amendment in this regard has been enforced by the Act No. 52/75. It has also been submitted that there is an inherent power/ jurisdiction refuse to recognize the registration of the society in the same name and style, inasmuch as, the same would necessarily lead to confusion and would seriously prejudice the activities of the earlier society and therefore, under the said inherent power, the Deputy Registrar has also power to cancel the registration granted to the subsequent society in the same name and style that as of the earlier society, which was registered on 8.8.1973.

15. For the purposes of appreciating the controversy, it would be relevant to refer the provisions of Section 3 of the Societies Registration, Act, 1860, as were applicable in the year 1973, which are quoted here-in-below:-

"3. Registration and fees.--Upon such memorandum and certified copy being filed, the Registrar shall certify under his hand that the society is registered under this Act, There shall be paid to the Registrar for every such registration a fee of fifty rupees or such smaller fee as (the State Government) may, from time to time, direct ; and all fees so paid shall be accounted for to (the State Government)".

16. Reference may also be had to the provisions of Section 3 as were amended in the State of Uttar Pradesh vide Act No. 52/75 and the said amendments were enforced w.e.f. 10.10.1975. The said amended Section 3 in the State of U.P. reads as follows :

"In its application to the State of Uttar Pradesh, for Section 3, substitute the following section, namely :

"3. (1) Upon such memorandum and certified copy being filed along with particulars of the address of the Society's office which shall be in registered address, by the Secretary of the Society on behalf of the persons subscribing to the memorandum, the Registrar shall certify under his hand that the society is registered under this Act. There shall be paid to the Registrar for every such registration a fee of one hundred rupees (or such smaller fee

as the State Government may notify in respect of any class of societies) :

Provided that the Registrar may, in his discretion, issue public notice or issue notice to such persons as he thinks fit inviting objections, if any, against the proposed registration and consider all objections that may be received by him before registering the society.

(2) Notwithstanding anything in Sub-section (1) the Registrar shall refuse to register a society, if after giving it an opportunity of showing cause against such refusal, he is satisfied that—

(a) the name of the society is identical with that if any other society previously registered under this Act;

(b) the name of the society sought to be registered uses any of the words, namely, 'union', 'State', 'Land Mortgage', 'Land Development', 'Co-operative Gandhi', 'Reserve Bank' or any words expressing or implying the sanction, approval or patronage of the Central or any State Government or any word which suggests or is calculated to suggest any connection with any local authority or any corporation or body constituted by or under any law for the time being in force or is such as is otherwise likely to deceive the public or the members of any other society previously registered under this Act."

17. From the aforesaid amendment, it is apparently clear that in the year 1973 there was absolutely no restriction under the Societies Registration Act, 1860 with regard to the registration of a society with identical name and style as that of other society previously registered.

18. In view of the aforesaid, there was no restriction under the Societies Registration Act, 1860 prohibiting the registration of a new society, in the year 1973 with the same name vis-a-vis the name of the society, which was earlier registered in the year 1964, Therefore, there was no occasion for the Assistant Registrar to exercise the power under **Section 12-D (1) of the Societies Registration Act, 1860** for cancelling the registration of the petitioner society on the pretext that there was restriction for registration of a society in the same name and style as that of an earlier registered society. The amendments made in the Act vide Act No. 52/75 are prospective in nature. Prior to the date of aforesaid amendment Section 12-D (1) or section 12 of the Act do not in any way confer a power upon the Assistant Registrar to cancel the registration, which has been granted to a society in the same name prior to the date of enforcement of section 3 (2) (a) under U.P. Act No. 52/75.

19. In the opinion of the Court, the aforesaid amended statutory **provisions of 3 (2) (a)** have no application in the facts of the present case and as a consequent thereto to the orders passed by the Assistant Registrar dated 12.3.1992 and that of passed by the Commissioner dated 7.4.1993 cannot be legally sustained.

20. At this stage it would be appropriate to consider to the contention raised by the petitioner with regard to the inherent power of the Assistant Registrar to refuse the registration to a society by the same name coupled with the incidental power to cancel the registration of a society, if granted, by him in the same name. In the opinion of the Court, no such incidental power can be culled out from the provisions of Section 3 as were applicable in the year 1973, nor any such inherent power can be read from any other provisions of the Societies Registration

Act, 1860. Power to refuse the registration of the society cannot be enlarged to the extent so as to confer a power upon the Registrar to cancel the registration of the society with the same name.

21. It is true that apart from certain special statutes which entitle companies or persons to the exclusive use of a name or a mark, such as the **Companies Act or the Trade Marks Act**, a man has no exclusive proprietary rights in a fancy name or title, and normally and principally, it is in relation to the user of a name associated with a certain businesses or trading concern or some profession that the Court affords protection and grants an injunction restraining the adoption and use of such a name by another when the Court is satisfied that damage has been caused or there is tangible risk or possibility of a damage resulting from confusion caused in the public mind or in other words by reason of the public being deceived by the use of such name."

22. It is, thus, clear that only Courts of law have been conferred a power to grant an injunction restraining the adoption and use of the same name when the Court is satisfied that damage has been caused or there is tangible risk or, possibility of a damage resulting from confusion caused in public mind, or the public being deceived by the use of the identical name and style. This power to grant injunction against the use of same name and style as recognised by the Courts of law is based upon a cause established by the plaintiff of likelihood damage/confusion to be caused in the mind of the public. Thus, it is established beyond doubt that it is for the respondents to have initiated suitable Civil Injunction Proceedings, if they had any apprehension of misuse of the name of the respondent by the subsequent society being registered. The claim, if any, so pleaded would be adjudged by the Civil Court, on the basis of evidence led and the extent of damage/loss, which may be caused. However, they cannot be permitted to invoke the authority of the Registrar himself to cancel the registration.

23. In such circumstances, order dated 28.08.2009 passed by the Deputy Registrar, Firms Societies and Chits, U.P. Faizabad as well as order dated 13.01.2010 passed by the Commissioner, Faizabad Division, Faizabad, cannot be legally sustained and are, hereby, quashed.

24. The writ petition is, accordingly, allowed.

(2024) 8 ILRA 1111
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.08.2024

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Application U/s 482 No. 556 of 2014

Ram Bux & Ors. ...Applicants
Versus
The State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Vipin Kumar Mishra

Counsel for the Respondent:
G.A., Jitendra Bahadur Singh

Criminal Law - Criminal Procedure Code,1973 -Section 473 - charge sheet filed after more than three and a half (3½) years from the date of N.C.R.- the said charge sheet ought to have been construed as a complaint and the investigating officer to be a complainant u/s 2(d) of Cr.P.C.,-therefore, taking a

cognizance of offence after three and a half (3½) years by the learned Magistrate is barred by limitation u/s 468 (2)(c) -cognizance of the offence after three years from the date of offence which are punishable with maximum sentence of one year and two years respectively- no occasion to condone the delay u/s 473 Cr.P.C. before taking cognizance impugned order is without jurisdiction.

Application allowed. (E-9)

List of Cases cited:

1. M/S. Pepsi Foods Ltd. & anr.Vs Special Judicial Magistrate & ors., 1998 (5) SCC 749

2. Sarah Mathew Vs Inst., Cardio Vascular Diseases & ors., 2014 (1) SCC 721

3. P.K. Choudhury Vs Commander, 48 Brtf (Gref), 2008 SCC Online SC 510

4. Rakesh Kumar Sharma Vs St. of U.P. & anr., 2007 ADJ 478

(Delivered by Hon'ble Om Prakash Shukla, J.)

1. Heard Shri Vipin Kumar Mishra, learned Counsel for the applicants and Shri Arvind Kumar Tripathi, learned A.G.A.-I for the State respondent.

2. The applicants by invoking the inherent powers of this Court under Section 482 of Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') have challenged the summoning order dated 07.12.2013 passed by Judicial Magistrate-III, Faizabad in Case No.1197/2012, State Vs. Ram Ajore & others, arising out of N.C.R. No. 85 of 2008, under Sections 323, 504, 506 I.P.C., Police Station Gosainganj, District Faizabad as well as the impugned charge sheet dated 10.04.2012, submitted in N.C.R. No.85/2008, under Sections 323, 504, 506 I.P.C. along with the entire proceedings of Case No.1197/2012.

3. Briefly stating, the story put forth by the prosecution is that as the complainant was on his way to his house from the field he was abused by the applicants and one Ram Ajore with fists and kicks in front of the house of Hari Ram. Further it has been alleged that the complainant was threatened and even when his wife came to save him, she was also beaten by them which led to the lodging of N.C.R. No. 85 of 2008 on 03.09.2008 under Sections 323, 504 and 506 I.P.C.

4. Although, learned Counsel for the applicants has disputed the aforesaid facts and claimed that the applicants as well as opposite party no.2/complainant belonged to the same village, there was partibandi and the story put forth is concocted and false. However, the fulcrum of the argument of the learned Counsel for the applicants are two fold; firstly, he has argued that Explanation appended to Section 2(d) of Cr.P.C. provided that a report made by the police officer in a case which discloses, after investigation, commission of a non-cognizable offence shall be deemed to be a complaint and the Investigating Officer, who has made the said report, shall be deemed to be a complainant and as such the same ought to have been proceeded as per procedure laid down for treating the same as a complaint and no cognizance could have been taken on the said report treating the same as a police report as has been sought to be done in the impugned summoning order dated 07.12.2013. The second leg of argument addressed by the learned Counsel for the applicants is relating to limitation for taking cognizance by the Magistrate in view of Section 468 of Cr.P.C. According to learned Counsel, admittedly, the Investigating Officer has filed a report and a cognizance of the same has been taken by

the learned Magistrate after expiry of more than three and a half (3½) years for an offence which prescribes the minimum punishment of one year. Thus, according to him, the said cognizance is clearly barred by limitation under Section 468 Cr.P.C. and the present impugned summoning order as well as the entire proceedings is bad in law specially when there is no compliance or application of Section 473 Cr.P.C. relating to explanation for condoning the delay.

5. It has been pointed out by learned Counsel for the applicants that while entertaining the present application, the entire proceedings in Case No.1197/2012 was stayed by a Co-ordinate Bench of this Court vide order dated 14.02.2014.

6. Learned Additional Government Advocate, on the other hand, opposed the submissions made by the learned Counsel for the applicants.

7. Having heard the learned Counsel for the parties and gone through the record available before this Court, this Court finds that charge-sheet in N.C.R. No. 85 of 2008 has been filed by the Investigating Officer under Sections 323, 504 and 506 I.P.C. So far as the offence under Section 323 I.P.C. is concerned, maximum punishment that could be awarded for the offence is one year and fine up to Rs.1000/-, whereas for the offence under Sections 504 and 506 I.P.C. is concerned, the maximum punishment awarded is of two years respectively.

8. First & foremost, it has to be understood that cognizance indicates the point when a Court takes judicial notice of an offence with a view to initiating process in respect of the offence. Cognizance is entirely different from initiation of proceedings, rather it is the condition precedent to the initiation of proceedings by the Court. Cognizance is taken of the case and not of a person. Under Section 190 of Cr.P.C., it is the application of mind to the averments in the complaint that constitute cognizance. The stage of process is not relevant for the purpose of computing limitation under Section 468 of Cr.P.C.

9. It is not disputed that the offences under Sections 323, 504 and 506 I.P.C. are non-cognizable, hence in view of the Explanation to Section 2 (d) of Cr.P.C. a case could not proceed as a State case and it has to proceed as a complaint case. That Explanation of 2(d) of Cr.P.C. reads as under :-

> *"Explanation.—A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant."*

10. Thus, in view of the said explanation, charge-sheet submitted by the Investigating Officer, after investigation, disclosing commission of non-cognizable offence is to be deemed to be a complaint and a police officer, who submitted the report, has to be deemed to be a complainant. In other words, the charge sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint and the procedure prescribed for claiming a complaint case shall be applicable to the case.

11. In the present case, the learned Magistrate, instead of treated the charge

sheet submitted by the Investigating Officer as a complaint, took cognizance of it as a State case by the impugned summoning order dated 07.12.2013, which is not permissible under law.

12. Further issuance of process of summons is not an empty formality. The Hon'ble Supreme Court in the case of **M/S. Pepsi Foods Ltd. & Anr vs Special Judicial Magistrate & Ors. : 1998 (5) SCC 749** has held that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set in motion as a matter of course for alleged offence. It would be apt to take note of para 28 of the aforesaid judgment, which reads as thus :-

> *"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. it is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."*

13. In the present case, this Court finds that the learned Magistrate did not even care to note that as to whether the offences, for which the charge-sheet has been filed by the police, is as to whether cognizable or not, so to expect that there had been any application of mind would be a misnomer. Apparently, the summoning order dated 07.12.2013 seems to have been issued in a routine manner, which cannot withstand the parameters of Sections 203/204 of Cr.P.C. and is liable to be set aside.

14. Further, there is another aspect of the matter. At this stage, it would be apt to refer to the provisions of Sections 468, 469 and 473 Cr.P.C., which read thus:-

> ***"468. Bar to taking cognizance after lapse of the period of limitation.—***
>
> *(1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.*
>
> *(2) The period of limitation shall be- (a) six months, if the offence is punishable with fine only;*
>
> *1. Provisions of this Chapter shall not apply to certain economic offences, see the Economic Offences (Inapplicability*

of Limitation) Act, 1974 (12 of 1974), s. 2 and Sch. 191(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year; (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. [(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]

469. Commencement of the period of limitation*.—(1) The period of limitation, in relation to an offender, shall commenc—*

(a) on the date of the offence; or (b) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier; or (c) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

(2) In computing the said period, the day from which such period is to be computed shall be excluded;

473. Extension of period of limitation in certain cases*— Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice."*

15. Section 468 Cr.P.C. clearly mandates that no Court shall take cognizance of an offence after the period of limitation of three years if the offence is punishable with imprisonment for a term exceeding one year, but not exceeding three years. Further, Section 469 Cr.P.C. also makes it amply clear that the period of limitation, in relation to an offender shall commence on the date of the offence.

16. In the present case, the date of offence of reporting of N.C.R. is of 03.09.2008 and the impugned charge sheet has been filed on 10.04.2012 and the learned Magistrate has issued the summons on 07.12.2013. Apparently, the charge sheet itself has been filed after more than three and a half (3½) years from the date of N.C.R. and since the said charge sheet ought to have been construed as a complaint and the investigating officer to be a complainant in view of Explanation of Section 2(d) of Cr.P.C., therefore, taking a cognizance of offence after three and a half (3½) years by the learned Magistrate is barred by limitation as per Section 468 (2)(c) of Cr.P.C.. Further, it is neither case of the parties that any application under

Section 473 Cr.P.C. has been filed or that the learned Magistrate has passed any order under Section 473 Cr.P.C. justifying the issuance of the impugned summoning order dated 07.12.2013.

17. The Hon'ble Supreme Court in the case of **Sarah Mathew Vs. Inst., Cardio Vascular Diseases & Ors., 2014 (1) SCC 721** had an occasion to consider the scope and ambit of Sections 468 and 473 Cr.P.C. The Hon'ble Supreme Court observed as under :-

> *"In view of the above, we hold that for the purpose of computing the period of limitation under Section 468 of the Cr.P.C. the relevant date is the date of filing of the complaint or the date of institution of prosecution and not the date on which the Magistrate takes cognizance. We further hold that Bharat Kale which is followed in Japani Sahoo lays down the correct law. Krishna Pillai will have to be restricted to its own facts and it is not the authority for deciding the question as to what is the relevant date for the purpose of computing the period of limitation under Section 468 of the Cr.P.C."*

18. A similar view has been take by Hon'ble the Supreme Court in the case of **P.K. Choudhury Vs. Commander, 48 Brtf (Gref), 2008 SCC Online SC 510.** The relevant paragraph of the decision reads as under :-

> *"As an option to get the appellant tried in a ordinary criminal court had been exercised by the respondent, there cannot be any doubt whatsoever that all the pre-requisites therefor in regard to the period of limitation as also the necessity to obtain the order of sanction were required to be complied with.*
>
> *A Court of law cannot take cognizance of an offence, if it is barred by limitation. Delay in filing a complaint petition therefore has to be condoned. If the delay is not condoned, the court will have no jurisdiction to take cognizance. Similarly unless it is held that a sanction was not required to be obtained, the court's jurisdiction will be barred."*

19. Even in the case of **Rakesh Kumar Sharma Vs. State of U.P. and another, 2007 ADJ 478** specifically para nos.5 and 6, a Co-ordinate Bench of this Court has considered the matter wherein FIR was lodged under Section 307 I.P.C., but subsequently charge sheet was submitted under Section 504 I.P.C. The Court concluded that it should not be proceeded as a police case which is barred under the Explanation of Section 2(d) of Cr.P.C. The relevant para nos. 5 and 6 are reproduced hereinafter :-

> *"5. He submitted that in the present case originally the F.I.R. was lodged under Section 307 I.P.C., but after investigation the Investigating Officer came to the*

conclusion that no offence under Section 307 I.P.C. was made out and only a case under Section 504 I.P.C. was made out against the applicant and so a charge-sheet under Section 504 I.P.C. was submitted against the applicant. He contended that in view of the aforesaid Explanation to Section 2(d) Cr.P.C. the case could not proceed as a police case in respect of an offence punishable under Section 504 I.P.C. because the offence under Section 504 I.P.C. is non-cognizable and so the case could proceed only as a complaint case in view of the aforesaid Explanation.

6. The above contention of the learned Counsel for the applicant is correct. I, therefore, allow this application under Section 482 Cr.P.C. to this extent that the cognizance taken by the Magistrate in the case on the basis of the report of the police for the offence punishable under Section 504 I.P.C. and the orders passed by him for issuing warrant against the applicant are hereby quashed. The Magistrate shall not proceed with the case as a State case but he shall proceed with it as a complaint case as provided in the Explanation to Section 2(d) Cr.P.C. and he shall follow the procedure prescribed for hearing of a complaint case."

20. In view of the settled law, the learned Magistrate-III, Faizabad ought to had not proceeded on the police report without applying judicial mind inasmuch as all the offences as mentioned in the N.C.R. as non-cognizable and proper course of the action for the Magistrate was to treat the matter as complaint under the provisions as enshrined under Explanation to Section 2(d) Cr.P.C. Further the Magistrate could not have taken cognizance of the offence after three years from the date of offence as the offences alleged under Sections 323, 504, 506 I.P.C. are punishable with maximum sentence of one year and two years respectively. Further perusal of the impugned order shows that the learned Judicial Magistrate-III had no occasion to condone the delay in terms of Section 473 Cr.P.C. before taking cognizance, therefore, the impugned order is without jurisdiction.

21. This being the position, this Court is of the considered view that the instant application deserves to be allowed.

22. Consequently, the summoning order dated 07.12.2013, passed by Judicial Magistrate-III, Faizabad in Case No.1197/2012, *State Vs. Ram Ajore & others*, under Sections 323, 504, 506 I.P.C., Police Station Gosainganj, District Faizabad and all other consequential proceedings emanating therefrom are quashed.

23. The application is **allowed**.

(2024) 8 ILRA 1117
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/s 482 No. 4472 of 2020
With
Application U/s 482 No. 5674 of 2020

Naseem Khan ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Vijay Singh Sengar, Sri Mohd. Shahibe Alam Khan, Sri Wahid Jamal

Counsel for the Respondent:
G.A.

Criminal Law –Indian Penal Code,1860 - Sections 147, 279, 323, 427, 504 & 506 - The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1)(r) and (s) -alleged road rage incident lacked evidence of intentional caste-based abuse- investigation was cursory, with no evidence of prior acquaintance-no intent to insult based on caste-no independent witnesses were examined- charge sheet and proceedings quashed- application allowed. (Paras 10,11 and 12)

HELD:
Above referred statement does not disclose that applicants were prior acquainted or they got knowledge during occurrence that complainant and co-passenger belongs to SC/ST that there was an intention to insult them being SC/ST, therefore, basic ingredients of Section 3(1)(Da)(Dha) of SC/ST Act are absolutely missing. (para 10)

The Investigating Officer has in a very cursory and casual manner investigated the case without ascertaining that basic ingredients of Section 3(1)(Da)(Dha) of SC/ST Act was prima facie made out or not. (Para 11)

In view of above, Court also takes note that it was case of road rage and there was no injury report placed on record. Court also takes note that source of name of applicants as referred in statement were independent persons allegedly present at the place of occurrence, however, none of independent witness was examined during investigation which also indicates that investigation was conducted in a very cursory manner. No attempt was taken for conducting identification parade. (Para 12)

Application allowed. (E-14)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. These applications are heard qua to surviving applicants. They are aggrieved by impugned charge sheet dated 27.06.2019 as well as entire proceedings of SST No. 34/2019 (State vs. Faheem and others) arising out of Case Crime No. 204/2019 under Sections 147, 279, 323, 427, 504, 506 IPC and 3(1)(r) and (s) of SC/ST Act, Police Station- Jalaun, District- Jalaun, pending before Special Judge (SC/ST Act), Jalaun at Orai.

2. Trial Court took cognizance of offence on 27.11.2019 and applicants were summoned by order of date though above referred both orders are not specifically challenged though it might fall within 'further entire proceedings'.

3. S/Sri Mohd. Shahibe Alam Khan and Wahid Jamal, learned advocates for applicants have submitted that it was a case of road rage. Complainant has alleged that he was driving an ALTO car along with co-passenger and there was traffic jam during which applicant (Faheem) who was driving Tavera without looking at rear side, reversed his Tavera and hit the ALTO car on its front side and when it was objected, said Faheem called other applicants and not only assaulted complainant and co-passenger but also damaged his car and hurled caste abuses as well.

4. This Court has passed following order on 04.02.2020 -:

> "The applicant, by means of this application under Section 482 Cr.P.C., has invoked the inherent jurisdiction of this Court with prayer to quash the charge

sheet No. 01 of 2019, dated 27.06.2019 as well as entire proceeding of S.S.T. No. 34 of 2019 (State Versus Faheem and others), arising out of Case Crime No. 204 of 2019, under Sections 147, 279, 323, 427, 504, 506 I.P.C. and 3(1) Da, Dha SC/ST Act, Police Station Jalaun, District Jalaun.

Heard learned counsel for applicant, learned A.G.A. for State and perused the record.

Ms. Divya Ojha, Advocate, holding brief of Sri Vijay Singh Sengar, learned counsel for applicant argued that from the very perusal of first information report, it is apparent that no abuse or assault is with intention to assault or abuse because of being a member of scheduled caste or scheduled tribe community. It was a case of road rage, wherein no such question arises. Moreso, complainant himself has written in its F.I.R. that he was not aware of accused persons, rather upon making query from the persons present thereat, he could gather the name of driver and other accused persons, leaving behind 7 to 8 others, involved in it. Thereafter, no identification parade for fixation of identity by Investigating Officer was conducted and applicant has been implicated and charge sheeted, as above, for his no fault.

The matter requires hearing on merit.

Learned A.G.A. has accepted notice on behalf of opposite party No. 1.

Issue notice to opposite party No. 2 returnable at an early date.

Steps be taken within ten days.

Opposite party no. 2 may file counter affidavit within four weeks. Learned A.G.A. may also file counter affidavit within the same period. Rejoinder affidavit, if any, may be filed within two weeks thereafter.

List in the week commencing 13th April, 2020.

Till the next date of listing, no coercive action shall be taken against the applicant in the above mentioned case."

5. Learned advocates for applicants have submitted that applicants have no prior acquaintance with complainant and co-passenger travelling in ALTO, therefore, there was no chance that he could know their caste, as such, basic ingredients of Section 3(1)(Da)(Dha) of SC/ST Act are not made out since there is a requirement that there must be intentionally insult, however, such intention was absolutely missing since the applicants had no knowledge that complainant and his co-passenger belongs to SC/ST.

6. Learned advocates have further submitted that name of applicants were disclosed allegedly on basis of information given by independent person, however, none of independent witnesses was examined during investigation. The I.O. has also not able to ascertain names of 7-8 unknown persons and that complainant and his associate was not legally medical examined.

7. Aforesaid submissions were opposed by Sri R.K. Mishra, learned AGA for State that investigation was conducted in a fair manner. Statement of complainant was recorded who has supported the prosecution case though it has not been denied that no independent witness was examined despite occurrence was allegedly took place in public place and name of applicants were also disclosed by public as well as that there was no evidence that applicants were prior acquainted with complainant and co-passenger and applicants knew that they belong to SC/ST. No identification parade was conducted for identification of assailants.

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

9. I have carefully perused statement of the complainant and for reference, same is quoted below -:

"26.4.2019/ बयान वादी .....बदरियाफत श्री राजेश आनन्द उम्र 40 वर्ष पुत्र श्री नानक चन्द वर्मा नि० मु० शिवपुरी उरई थाना कोतवाली उरई जिला जालौन मो० नं0 9515153139 ने पूछने पर प्रथम सूचना रिपोर्ट का समर्थन करते हुए बताया कि दिनांक 25.4.19 को रात्रि करीब 11.30 मिनट पर माधौगढ अपने पेट्रोल टैंक से अपनी गाडी आल्टो कार नं० यूपी 92के-0263 से उरई जा रहा था कि कोंच चौराहे पर सडक निर्माण की वजह से जाम लगा हुआ था मेरे सामने यू०पी० 77एस-3115 तवेरा गाडी खडी थी जिसके चालक ने गाडी जगह मिलने पर गाडी बैक किया व सामने से मेरी गाडी में टक्कर मार दी तो मैने उससे कहा कि आप को इतनी बडी गाडी नहीं दिखाई दे रही है। जिस पर उसने जाति सूचक शब्दो में गाली गलौच देना शुरू कर दिया मैने कहा कि गाली क्यो दे रहे हो तो बोला अभी बताता हूँ और फोन करके अपनी साथी 1-नौशाद पुत्र स्व० शाकिर 2-नसीम पुत्र हकीम उल्ला 3-आमिर पुत्र हकीम उल्ला 4-रियाज पुत्र मुन्ना 5-सारूख पुत्र नाकिर 6-सरताज नाऊ 7-7-8 लोग नाम पता अज्ञात लोगो को बुलाकर मेरे व मेरे साथी शीबू पुत्र सलीम के साथ गाडी से खींचकर मारपीट करने लगे व मेरे गाडी के दाहिने साईड के गेट के दोनो व पीछे का शीशा ईटा मारकर तोड दिये व जाते समय बोले अगर कही बताया तो जान से मार देगे उक्त लोगो के जाने के बाद मैने आस पास के लोगो से पता किया तो पता चला कि गाडी का चालक फहीन,व उसके साथी नौसाद पुत्र स्व० शाकिर, नसीम व आमिर पुत्रगण हकीम उल्ला, रियाज पुत्र मुन्ना, साहरूख पुत्र नाकिर, सरताज नाऊ व सात आठ लोगो और थे जिनके नाम पता नहीं जानते जिन्हे सामने आने पर पहचान सकता हूँ। इन सभी लोगो ने ही मेरे गाडी के शीशे ईटो से तोडे व मेरे साथ के साथ मारपीट की जिससे कपडे भी फट गये मै कोरी जाति का हूँ। मेरे द्वारा घटना की रिपोर्ट दिनांक 26.04.2019 को थाना कोतवाली जालौन में दर्ज करा दी गयी है। यही मेरा बयान है।"

10. Above referred statement does not disclose that applicants were prior acquainted or they got knowledge during occurrence that complainant and co-passenger belongs to SC/ST that there was an intention to insult them being SC/ST, therefore, basic ingredients of Section 3(1)(Da)(Dha) of SC/ST Act are absolutely missing.

11. The Investigating Officer has in a very cursory and casual manner investigated the case without ascertaining that basic ingredients of Section 3(1)(Da)(Dha) of SC/ST Act was prima facie made out or not.

12. In view of above, Court also takes note that it was case of road rage and there was no injury report placed on record. Court also takes note that source of name of applicants as referred in statement were independent persons allegedly present at the place of occurrence, however, none of independent witness was examined during investigation which also indicates that

investigation was conducted in a very cursory manner. No attempt was taken for conducting identification parade.

13. In aforesaid circumstances, this Court finds that present is a fit case where inherent powers of this Court could be invoked, hence, impugned charge sheet dated 27.06.2019 arising out of Case Crime No. 204/2019 under Sections 147, 279, 323, 427, 504, 506 IPC and 3(1)(r) and (s) of SC/ST Act, Police Station- Jalaun, District- Jalaun as well as further proceedings of SST No. 34/2019 (State vs. Faheem and others) including cognizance and summoning order pending before Special Judge (SC/ST Act), Jalaun at Orai are hereby quashed.

14. Application is, accordingly, **allowed**.

15. Registrar (Compliance) to take steps.

(2024) 8 ILRA 1121
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.08.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application U/s 482 No. 5465 of 2024

Asad Ali @ Munna & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Anand Mani Tripathi, Pragati Tiwari, Yugal Kishor Tripathi

Counsel for the Respondents:
G.A., Anand Prakash Singh

Criminal Law - Criminal Procedure Code,1973 -Section 319 - was preferred by the prosecution-allowed by impugned order-and summoned the accused-The case of the applicants is based upon the 'evidence' collected by the I.O. during investigation-"the word "evidence" in Section 319 CrPC means only such evidence as is made before the court-"while exercising the powers under Section 319 CrPC - the court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.

Application rejected. (E-9)

List of Cases cited:

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

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

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

4. Manjeet Singh Vs St. of Har. & ors., (2021) 18 SCC 321

5. Sukhpal Singh Khaira Vs St. of Punj., (2023) 1 SCC289

6. Yashodhan Singh & ors.Vs St. of U. P. & ors., (2023) LiveLaw (SC) 576 : 2023 INSC 652

7. Yashodhan Singh & ors. Vs St. of U. P. & ors.4235 of 2022

8. Jogendra & ors.Vs St. of Bihar & anr., reported in (2015) 9 SCC 244

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Heard Sri A. M. Tripathi and Sri Yugal Kishor Tripathi, learned counsel for the applicants, and Sri S. P. Tiwari, learned A.G.A. for the State and Sri Anand Prakash Singh, learned counsel for opposite party No. 2.

2. By means of the present application u/s 482 CrPC, the applicants have assailed the order dated 23.05.2024, passed by Additional Sessions Judge, Court No.1, Pratapgarh (in short 'trial court'), in Sessions Trial No. 486 of 2019 (State Vs. Ashraf and Ors), arising out of Case Crime No. 306 of 2018, under Section 147, 148, 149, 302, IPC, Police Station- Antu, District- Pratapgarh. The order under challenge dated 23.05.2024 has been passed by the trial court in exercise of power under Section 319 CrPC.

3. Brief facts of the case are to the effect that an F.I.R. was lodged by the informant/eye-witness/opposite party No. 2 namely Chandan Singh (PW-1) on 14.08.2018, which was registered as Case Crime No. 306 of 2018, under Section 147, 148, 149, 302 IPC. As per the allegations levelled in the F.I.R., the deceased, father of the opposite party No. 2, was assaulted by Asad Ali @ Munna, Bablu, Mahroj, Awadhesh Kumar, and an unknown person. The deceased namely Harishchandra Singh succumbed to the gunshot injury. As per the F.I.R., the incident is of 14.08.2018 at about 09:00 a.m..

4. After the aforesaid, the Investigating Officer (in short "I.O.") carried out the investigation and the I.O., after due investigation, submitted the charge sheet against Ashraf, Imran Khan, Kalam, Segu @ Mujib and Irfan under Section 302, & 120-B IPC.

5. The trial court, taking note of the evidence available on record, framed the charges against the above named accused persons, in relation to which the charge sheet prepared on 30.11.2018 was submitted by the I.O. and additional charge sheet prepared on 03.02.2019 was also submitted and on thereafter the charges were framed on 22.03.2021/23.03.2021, as appears from the impugned order dated 23.05.2024, and upon denial of charges, the accused namely Ashraf, Imran Khan, Kalam, Segu @ Mujib and Irfan were put to trial.

6. Before the trial court, the statement(s) of Chandan Singh (PW-1)/informant/eye witness/opposite party No. 2, Suneel Ranjak (PW-2), Vahid Khan (PW-3), Dhirendra Yadav (PW-4) and Anuj Singh (PW-5) were recorded.

7. On the basis of the evidence/ statements of above-named witnesses, an application under Section 319 CrPC dated 12.01.2024 was preferred from the side of the prosecution.

8. The trial court, after considering the evidence/ statement of informant/eye witness/opposite party No. 2 namely Chandan Singh, allowed the application under Section 319 CrPC dated 12.01.2024 vide order dated 23.05.2024, under challenge, and summoned the accused namely Asad Ali @ Munna, Akhtar Ali @ Bablu, Mahroj and Awadh Kumar Mishra to face the trial under Sections 147, 148, 149 and 302 IPC, in regard to whom the I.O. had submitted the report dated 11.09.2018 under Section 169 Cr.P.C.. The relevant portion of the order 23.05.2024 is extracted herein-under:

> *"3. Heard and perused the records. First information report in this case i.e. case crime no. 306/2018 was lodged on 14.08.2018 at 11.05 by informant Chandan against accused persons Asad Ali @ Munna, Akhtar Ali @ Bablu, Mahroj and Awadh Kumar*

Mishra and one unknown with the averment that on 14.08.2018 at about 9 A.M. informant and his father Harish Chandra had come to Chaukhad Pure Anti by motorcycle and when they were returning by making some payment to Raju Pradhan and when they reached near Chaukhad Pure Anti primary school then suddenly assailants came on two motor cycle and they sho: at the father of the informant and caused his death and after that assailants left the scene. Informant has also narrated in the first information report that there is one case pending in the court against accused Asad ali for attempting to murder of the father of the informant and in that case Asad ali was pressurizing the father of informant to compromise and when father of the informant did not get ready to compromise then the named accused persons have committed this offence. After the registration of the F.I.R. this case was investigated and investigating officer submitted report u/s 169 Cr.P.C. against accused persons Asad Ali @Munna, Bablu, Mahroj and Awadh Kumar Mishra in the first information report and submitted charge sheet against accused persons Asraf, Imran Khan, Kalam, Sebu @ Mujeeb and Irfaan u/s 302, 120B, P.S. Antoo, district Pratapgarh.

4. After submission of the charge sheet against above named accused persons learned Special Judge SC/ST Act, Pratapgarh framed charges against them on 02.02.2021/23.03.2021 and proceeded for trial. During trial prosecution examined informant Chandan Singh as PW-1, witness Suneel Ranjak PW-2, Vahid Khan PW-3, Dhirendra Yadav PW-4, Anuj Singh PW-5 and on the basis of the evidence of these witnesses moved an application dated 12.01.2024 u/s 319 Cr.P.C. Informant PW-1 Chandan Singh has given statement in his examination-in-chief that accused persons Awadh Kumar, Asad ali, Mahroj and Bablu are the real culprits and they have committed the offence of the murder of the informant's father. Witness PW-1 has named the accused persons, above named, in his examination in chief and has given the testimony that the accused persons Awadh Kumar, Bablu, Mahroj and Asad, came at the place of incident and they open fired there and Asad Ali shot dead the father of the informant in his chest and by that way committed the offence of murder with the assistance of the other co-accused persons. At the time of the incidence Awadh Kumar and Asad ali fired at the father of the informant and their bullet hit the father of the informant and accused persons Bablu and Mahroj were there on their motorcycle and they were intimidating the others for not to come near them and after commission of the crime all the accused persons fled away on their motorcycles. Thus PW-1 has supported its Tehreer in his evidence. PW-1 has been cross-examined in length by the accused persons but he has not made otherwise statement in his cross-examination which could disown

the accused persons named in the application u/s 319 Cr.P.C.

5. Section 319 Cr.P.C. provides 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.*

6. Section 319 provides the trial court, if evidence against any person whose name is not included in the charge sheet comes before the court, may summon that person as accused to face the trial. In the case in hand the proposed accused persons named in the application u/s 319 Cr.P.C. are named in the first information report and informant is the eye-witness of the case. As per the prosecution case informant was accompanied with his father on motorcycle and the proposed accused persons murdered the father of the informant by firing fire arms at him.

7. It is well entrenched law that for summoning a person u/s 319 Cr.P.C. as accused court has to consider two points, firstly that whether the prima facie evidence against that person is of graver nature then framing of the charge or not and secondly whether the material available on records, if not rebutted, then whether those material will be sufficient to convict the persons.

8. Hon'ble Supreme Court has held in ***Hardeep Singh Vs. State of Punjab [(2014) 3 SCC 92]*** *that for summoning a persons u/s 319 Cr.P.C. the nature of the evidence should be of greater quality than what is required for framing of the charge and secondly court has to consider that whether the quality of the evidence is such that if not rebutted then the accused might be convicted only on the basis of those evidences.*

9. Hon'ble Supreme Court has held in ***Labhuji Amritji Thakor and ors. Vs. State of Gujarat [Crl. Appeal no. 1349/23018 decided on 13.11.2018]*** *that for summoning a person u/s 319 Cr.P.C. court must be satisfied that there must be an evidence on the record which is, if unrebutted, sufficient to convict the accused persons.*

10. Hon'ble Supreme Court has recently held in ***Juhur and ors. Vs. Kareem and ors. [Crl. Appeal no. 549/2023 decided on 21.02.2023]*** *that for summoning a person as accused u/s 319 Cr.P.C. court has to consider on the evidence on the records only on that basis court has to decide that whether the proposed accused can be summoned as accused in the case or not.*

11. In the case in hand informant has named the proposed accused persons in the first information report and has given the trustworthy evidence before the court in his examination in chief and in the cross-examination that the proposed accused persons are

the real culprits and they have committed the murder of the father of the informant.

12. At this stage the evidence of PW-1 is such that if the evidence of PW-1 is not rebutted by the proposed accused persons that will be sufficient to convict proposed accused persons, the informant is the eye-witness of this case and it has also been brought on the record that another case of attempt to murder of the father of the informant was already pending against the proposed accused Asad Ali at the time of incident. Thus, the eye account of the whole case has been candidly laid down by the informant before the court and the motive for the offence is also associated against proposed accused person Asad Ali. The other co-accused Awadh, Bablu and Mahroj were present at the place of incidence at the time of the commission of the crime and they also have actively participated in the commission of the crime.

Hence on the basis of above discussions court is satisfied that proposed accused persons Asad Ali @ Munna, Akhtar Ali @ Bablu, Mahroj and Awadh Kumar Mishra should be summoned for the trial u/s 147,148,149,302 I.P.C.

ORDER

Hence application u/s 319 Cr.P.C. dated 12.01.2024 is allowed. Proposed accused persons Asad Ali @ Munna, Akhtar Ali @ Bablu, Mahroj and Awadh Kumar Mishra are hereby summoned as accused u/s 319 Cr.P.C. to face trial u/s 147, 148, 149, 302 I.P.C.

It is to be noted here that the trial of these newly summoned accused persons named above shall be conducted separately under another case number and they will not be tried with the S.T. 486/2019 as this S.T. has proceeded far away and if these newly accused will be clubbed with the old case then the already running S.T. 486/2019 will retreat back to its initial stage and that will cause the delay of justice to the accused persons whose trial is going on under S.T. 486/2019.

The newly summoned accused persons Asad Ali @ Munna, Akhtar Ali @ Bablu, Mahroj and Awadh Kumar Mishra are directed to appear before the court on 04.06.2024. Office is directed to separate records for them and issue summon against them."

9. A perusal of the above extracted/ quoted portion of the order under challenge dated 23.05.2024 reflects that the trial court for the purposes of summoning the accused, named above, considered and relied upon the evidence/ statements of eye witness/PW-1 made before the it and also the contents of the F.I.R. lodged by this witness.

10. In the aforesaid background of the case, the present application has been filed.

11. Challenging the order dated 23.05.2024, Sri Tripathi, learned counsel for the applicants, in nutshell, made following submissions:

(i) As per the story narrated in the F.I.R., the informant and deceased both were on the same motorcycle and this story was improved by PW-1 while making the statement before the trial court as according to the statement before the trial court the deceased and informant/PW-1 were on different motorcycles and while passing the order under challenge dated 23.05.2024 on an application preferred by the prosecution under Section 319 CrPC, the trial court has not considered this aspect of the case.

(ii) The I.O. after due investigation collected the evidence i.e. CCTV footage, the certificate/letter from the company, attendance sheet and Call Detail Report (C.D.R.) and based upon the same, the I.O. was of the view that the applicants were not present at the place/ situs of crime and therefore the I.O. submitted the report in terms of Section 169 CrPC exonerating the applicants and all these evidence were ignored by the trial court while passing the order dated 23.05.2024 on an application preferred under Section 319 CrPC. Thus, the trial court erred in fact and law both.

(iii) According to the judgment(s) of the Constitution Bench of the Hon'ble Apex Court in the case of **Hardeep Singh Vs. State of Punjab**, reported in **(2014) 3 SCC 92**, and **Brijendra Singh and Others Vs. State of Rajasthan**, reported in **(2017) 7 SCC 706**, the trial court should record its subjective satisfaction while passing the order under Section 319 CrPC and the trial court is under obligation to take note of evidence which includes the entire evidence collected by the I.O. during investigation.

(iv) PW-5 is the real brother of Chandan Singh (PW-1/informant-eye witness) and thus he is an interested witness and his testimony should be considered in terms of the principles settled by the Hon'ble Apex Court in this regard and further PW-5 appears to be a planted witness and his presence at the place of crime, as he indicated before the trial court while making statement, is doubtful because as per his statement recorded during the course of investigation in terms of Section 161 CrPC, he was informed on phone and thereafter he reached the place/ situs of crime.

12. The relevant para(s) of the affidavit filed in support of application, under consideration, referred in regard to the aforesaid, are reproduced herein-under:

"13. That thereafter, the investigating officer, during investigation recorded the necessary information at that time, post mortem conducted, the several applications/tehrir has been prepared by the complainant, due to which the matter required proper investigation. A copy of relevant C.D. parcha is being annexed herewith as Annexure No.8, to this petition.

14. That the investigating officer also recorded the statement of alleged eye witness namely Mohd. Mahfooz son of Koshib and

alleged eye witness Mohd. Rizwan son of Altaf, they have given proper statement to the investigating officer. A copy of statements of eye witness namely Mohd. Mahfooz and Mohd. Rizwan are being collectively annexed herewith as Annexure No.9, to this petition.

15. That the investigating officer, during the investigation has come to the knowledge that one accused Imran Khan son of Rizwan, who is in jail in Crime No.324/2019 and Crime No. 326/2018 and has full knowledge about the alleged occurrence, then the investigating officer recorded his statement in jail and disclosed the correct prosecution story and arrested one co-accused Ashraf son of Mohd. Azeez, who has giving their statement on 20.08.2018. A copy of statement of Imran Khan and statement of co-accused Ashraf are being annexed herewith as Annexure No.10 and 11, to this petition.

16. That thereafter, the investigating officer reached the correct facts of the alleged occurrence and fairly examine the statement of co-accused Ashraf and found correct then also recorded the statement of further witnesses.

17. That the investigating officer also recorded the statement of witness namely Mohd. Aslam son of Mohd. Habib and Arif Ali son of Safeek and also recorded the statement of independent witness Dhirendra Yadav and Shrawan Kumar Pandey and Mahfooz Khan, in which they are clearly stated that the applicants/petitioners are falsely implicated in the matter and they have not committed any crime. The copy of statement of witnesses namely Mohd. Aslam, Arif Ali and indepedent witnesses namley Dhirendra Yadav and Shrawan Kumar Pandey and Mahfooz Khan are being collectively annexed herewith as Annexure No.12, to this petition.

18. That thereafter investigating officer come to the conclusion at the time of alleged occurrence, the petitioners are not present, they are falsely implicated in the present case, due to old enmity, then he further recorded the statement of witnesses namely Rafeek Ahmad son of Taufeek, Arif Ali son of Safeek and Ubedullah son of Abibullah and Ahmad Ali son of Nazab Ali and Mohd. Aslam son of Mohd. Habib and Rafeek Ahmad son of Abdul Hameed, in which they are clearly given their statement that the petitioners/applicants are falsely implicated due to village party bandi and old enmity. The copy of statement of witnesses namely Rafeek Ahmad son of Taufeek, Arif Ali son of Safeek and Ubedullah son of Abibullah and Ahmad Ali son of Nazab Ali and Mohd. Aslam son of Mohd. Habib and Rafeek Ahmad son of Abdul Hameed are being collectively annexed herewith as Annexure No.13, to this petition.

19. That thereafter, the investigating officer visited the house of applicant Asad Ali @ Munna and recorded the statement of his wife Qamrul Nisha and wife of Babloo, Rehana Bano and daughter Sama Parveen, in which, they are clearly stated that at the

time of alleged occurrence, the petitioner no.3 Mafroz present in Gurgaon city, then the investigating officer collect the CCTV footage from Gurgaon city and also taking evidence from company Manager, in which the petitioner no.3 doing job at Gurgaon.

The aforesaid facts mentioned in CD parcha No.11 and CD No.28. A copy of CD parcha No.11 and CD parcha no.28 alongwith letter-pad of the company with attendance sheet and CCTV footage are being collectively annexed herewith as Annexure No.14, to this petition.

20. That the investigating officer during the investigation collected the call details at the time of alleged occurrence of all concerned persons, in which it has been found the location and details of applicants are different from the alleged occurrence place. A copy of report of P.S. Antu alongwith call details parcha and details of location are being collectively annexed herewith as Annexure No.15, to this petition.

21. That the investigating officer during investigation found that the four persons namely Asad Ali @ Munna, Bablu @ Akhtar Ali, Mafroz son of Asad Ali and Awadhesh Kumar Mishra falsely implicated in the alleged occurrence, in which the Asad Ali @ Munna is in jail, then he sent report to concerned Magistrate, under section 169 Cr.P.C. on 11.09.2018. A copy of report dated 11.09.2018 is being annexed herewith as Annexure No.16, to this petition.

22. That on the basis of report dated 11.09.2018, under section 169 Cr.P.C., the petitioner no.1 Asad Ali @ Munna falsely implicated, then the concerned Magistrate accepted the report and passed released order on 11.09.2018. A copy of release order dated 11.09.2018 is being annexed herewith Annexure No.17, to this petition.

23. That thereafter, the investigating officer prepared the charge-sheet against the accused persons namely Ashraf, Imran Khan and Kalam on 30.11.2018, under section 302, 120-B IPC. A copy of charge-sheet dated 30.11.2018 is being annexed herewith as Annexure No.18, to this petition.

24. That the investigating officer filed supplementary charge-sheet against two accused persons namely Shebu @ Mujeeb Ahmad and Irfan on 03.02.2019. Thereafter the investigating officer completed the investigation on 07.12.2020 by CD Parcha No.12, in which, no allegations against the petitioners. A copy of supplementary charge-sheet and CD Parcha No.12 are being collectively annexed herewith as Annexure No.19, to this petition.

***

33. That the investigating officer by perusal of CCTV footage certificate issued by the concerned company and by perusal of the call details and location and also considering the statement of eye witnesses submitted the charge-sheet, in which the name of the petitioners were not found at the

time of occurrence and the matter proceed for trial.

34. That the opp. party no.2 with the malafide intention, only harass the petitioners after taking legal advice due to old enmity and village party bandi moved application under section 319 Cr.P.C., despite the facts the P.W.2 namely Sunil Razzak, P.W.3 namely Wahid Khan and P.W.4 namely Dhirendra Yadav not supported the version of the prosecution and the charge-sheet submitted by the investigating officer in fair and proper manner."

13. Opposing the present application, learned A.G.A. Shri S. P. Tiwari and Shri Anand Prakash Singh, Advocate, learned counsel for the opposite party no. 2 stated that the trial court has not committed any illegality or irregularity in passing the order under Section 319 CrPC. It is stated that the trial court in terms of the various pronouncements on the issue is under obligation to consider the evidence led before it and not the evidence collected by the investigating officer during investigation. In the instant case, the trial court took note of the contents of the F.I.R. and the evidence/ statement of PW-1, an informant and eye-witness, and after considering the statement of PW-1 and contents of F.I.R., the trial court observed that if the evidence/ statement of PW-1 is not rebutted, then it would be a case of conviction, which is the requirement of law, and accordingly, no interference in the order under challenge dated 23.05.2024 is required by this Court. It would be apt to indicate that the cause of death is gunshot injury and this is not in issue.

14. Considered the aforesaid and perused the record.

15. Before proceedings, on merits of the case, it would be apt to indicate that the principles related to dealing with an application under Section 319 Cr.P.C. or exercising power under Section 319 Cr.P.C. have already been settled in various pronouncements by the Hon'ble Apex Court and accordingly, this Court is not inclined to refer the judgments passed by this Court.

16. In the case of **Hardeep Singh (supra)**, the Hon’ble Apex Court on the issue involved herein observed as under:

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

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would

lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

Subsequently, the Hon'ble Apex Court in the case of **Brijendra Singh (supra)** considered the expression 'evidence' and after considering the language couched under Section 319 Cr.P.C. as also the expression 'evidence', the Hon'ble Apex Court observed as under:

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh case may be recapitulated: power under Section 319 CrPC can be exercised by the trial court at any stage during the trial i.e. before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some "evidence" against such a person on the basis of which evidence it can be gathered that he appears to be guilty of the offence. The "evidence" herein means the material that is brought before the court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the court under Section 319 CrPC and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO

found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 km. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 CrPC to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that the appellants' plea of alibi was correct.

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

17. In the case of **Rajesh and Others Vs. State of Haryana**, reported in **(2019) 6 SCC 368**, the Hon'ble Apex Court considered the observations made in the cases of **Hardeep Singh (surpa)** and Brijendra Singh (supra) as also the expression 'evidence' and also various other pronouncements on the issues related to summoning the accused in exercise of power under Section 319 Cr.P.C., which is apparent from the following portion of the report:

"3.5. Relying upon the decision of this Court in Brijendra Singh v. State of Rajasthan [Brijendra Singh v. State of Rajasthan, (2017) 7 SCC 706 : (2017) 4 SCC (Cri) 144] , it is

vehemently submitted by Shri Basant, learned Senior Advocate appearing on behalf of the appellants that, as observed by this Court, merely on the basis of the deposition of the complainant and some other persons, with no other material to support their so-called verbal/ocular version, no person can be arrayed as an accused in exercise of powers under Section 319 CrPC. It is submitted by the learned Senior Advocate appearing on behalf of the appellants that, as observed by this Court in the aforesaid decision, such an "evidence" recorded during the trial is nothing more than the statements which was already there under Section 161 CrPC recorded at the time of investigation of the case. Relying upon the aforesaid decision, it is vehemently submitted by the learned Senior Advocate appearing on behalf of the appellants that, in any case, the learned Magistrate was bound to look into the evidence collected by the investigating officer during investigation which suggested that the accused were not present at the time of commission of the offence. It is submitted that, in the present case, the learned Magistrate on the applications submitted by the SHO in fact discharged the appellant-accused herein and allowed the applications submitted by the SHO in which it was categorically stated that the appellants are innocent and that they were not present at the time of the incident. It is submitted that therefore the High Court has erred in dismissing the revision petition and confirming the order passed by the learned Magistrate in summoning the appellant-accused herein to face the trial for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 IPC, which was passed in exercise of powers under Section 319 CrPC.

***

6. While considering the aforesaid question/issue, few decisions of this Court are required to be referred to and considered.

6.1. The first decision which is required to be considered is a decision of the Constitution Bench of this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] which has been consistently followed by this Court in subsequent decisions.

6.2. In Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , this Court had the occasion to consider in detail the scope and ambit of the powers of the Magistrate under Section 319 CrPC the object and purpose of Section 319 CrPC, etc. In the said case, the following five questions fell for consideration before this Court : (SCC p. 112, para 6)

"6. ... 6.1.(i) What is the stage at which power under Section 319 CrPC can be exercised?

6.2.(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?

6.3.(iii) Whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

6.4.(iv) What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

6.5.(v) Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

6.3. While considering the aforesaid questions, this Court observed and held as under : (Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , SCC pp. 114-17, 123 & 125-26, paras 12-14, 17-19, 22, 47 & 53-56)

"12. Section 319 CrPC springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.

13. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?

14. The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of CrPC and the judgments that have been relied on for the said purpose. The controversy centres around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.

***

17. Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the charge-sheet filed under Section 173 CrPC or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full

effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot-free by being not arraigned in the trial in spite of the possibility of his complicity which can be gathered from the documents presented by the prosecution.

19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence.

***

22. In our opinion, Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial.

***

47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) CrPC can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 CrPC, and committing the matter if it is exclusively triable by the Sessions Court. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Sections 207 to 209 CrPC is forbidden, by express provision of Section 319 CrPC, to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session.

***

53. It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power under Section 319 CrPC cannot be exercised. ...

54. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor could the legislature have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the

prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 CrPC.

55. Accordingly, we hold that the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained hereinabove.

56. ... What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 CrPC acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 CrPC is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 CrPC at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses are being recorded."

6.4. While answering Question (iii), namely, whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial, this Court, in the aforesaid decision has observed and held as under : (Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , SCC pp. 126-27 & 131-32, paras 58-59, 78 & 82-85)

"58. To answer the questions and to resolve the impediment that is being faced by the trial courts in exercising of powers under Section 319 CrPC, the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that come up before

the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have been committed. The material should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319 CrPC indicate that the material has to be "where ... it appears from the evidence" before the court.

59. Before we answer this issue, let us examine the meaning of the word "evidence". According to Section 3 of the Evidence Act, "evidence" means and includes:

'(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the court; such documents are called documentary evidence.'

***

78. It is, therefore, clear that the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation.

***

82. This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is 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. ...

84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 CrPC. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

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

(emphasis in original)

6.5. While answering Question (ii), namely, whether the word "evidence" used in Section 319(1) CrPC means as arising in examination-in-chief or also together with cross-examination, in the aforesaid decision, this Court has observed and held as under : (Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , SCC pp. 132-34, paras 86-92)

"86. The second question referred to herein is in relation to the word "evidence" as used under Section 319 CrPC, which leaves no room for doubt that the evidence as understood under Section 3 of the Evidence Act is the statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act, which also includes the document and material evidence in the Evidence Act. Such evidence begins with the statement of the prosecution witnesses, therefore, is evidence which includes the statement during examination-in-chief. In Rakesh [Rakesh v. State of Haryana, (2001) 6 SCC 248 : 2001 SCC (Cri) 1090] , it was held that : (SCC p. 252, para 10)

'10. ... It is true that finally at the time of trial the accused is to be given an opportunity to cross-examine the witness to test its truthfulness. But that stage would not arise while exercising the court's power under Section 319 CrPC. Once the deposition is recorded, no doubt there being no cross-examination, it would be a prima facie material which would enable the Sessions Court to decide whether powers under Section 319 should be exercised or not.'

87. In Ranjit Singh [Ranjit Singh v. State of Punjab, (1998) 7 SCC 149 : 1998 SCC (Cri) 1554] , this Court held that : (SCC p. 156, para 20)

'20. ... it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers.'

88. In Mohd. Shafi [Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889] , it was held that the prerequisite for exercise of power under Section 319 CrPC is the satisfaction of the court to proceed against a person who is not an accused but against whom evidence occurs, for which the court can even wait till the cross-examination is over and that there would be no illegality in doing so. A similar view has been taken by a two-Judge Bench in Harbhajan Singh v. State of Punjab [Harbhajan Singh v. State of Punjab, (2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135] . This Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2009) 16 SCC 785 : (2010) 2 SCC (Cri) 355] seems to have misread the judgment in Mohd. Shafi [Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889] , as it construed that the said judgment laid down that for the exercise of power under Section 319 CrPC, the court has to necessarily wait till the witness is cross-examined and on complete appreciation of evidence, come to the conclusion whether there is a need to proceed under Section 319 CrPC.

89. We have given our thoughtful consideration to the diverse views expressed in the aforementioned cases. Once examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence.

90. As held in Mohd. Shafi [Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889] and Harbhajan Singh [Harbhajan Singh v. State of Punjab, (2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135] , all that is required for the exercise of the power under Section 319 CrPC is that, it must appear to the court that some other person also who is not facing the trial, may also have been involved in the offence. The prerequisite for the exercise of this power is similar to the prima facie view which the Magistrate must come to in order to take cognizance of the offence. Therefore, no straitjacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion and, if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s). It is essential to note that the section also uses the words "such person could be tried" instead of should be tried. Hence, what is required is not to

have a mini-trial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact, it is this mini-trial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub-section (4) of Section 319 CrPC, the person would be entitled to a fresh trial where he would have all the rights including the right to cross-examine prosecution witnesses and examine defence witnesses and advance his arguments upon the same. Therefore, even on the basis of examination-in-chief, the court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. In fact, examination-in-chief untested by cross-examination, undoubtedly in itself, is an evidence.

91. Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 CrPC, the person sought to be arraigned as an accused, is in no way participating in the trial. Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross-examine the witness(es) prior to passing of an order under Section 319 CrPC, as such a procedure is not contemplated by CrPC. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(es) is obliterating the role of persons already facing trial. More so, Section 299 CrPC enables the court to record evidence in absence of the accused in the circumstances mentioned therein.

92. Thus, in view of the above, we hold that power under Section 319 CrPC can be exercised at the stage of completion of examination-in-chief and the court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence."

(emphasis in original)

6.6. While answering Question (iv), namely, what is the degree of satisfaction required for invoking the power under Section 319 CrPC, this Court after considering various earlier decisions on the point, has observed and held as under : (Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , SCC p. 138, paras 105-06)

105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the

circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

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

(emphasis in original)

6.7. While answering Question (v), namely, in what situations can the power under Section 319 CrPC be exercised : named in the FIR, but not charge-sheeted or has been discharged, this Court has observed and held as under : (Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , SCC pp. 139 & 141, paras 112 & 116)

"112. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation, the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to

separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 CrPC without resorting to the provision of Section 319 CrPC directly.

***

116. Thus, it is evident that power under Section 319 CrPC can be exercised against a person not subjected to investigation, or a person placed in Column 2 of the charge-sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 CrPC without taking recourse to provisions of Section 300(5) read with Section 398 CrPC."

6.8. Considering the law laid down by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the Court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

6.9. In S. Mohammed Ispahani v. Yogendra Chandak [S. Mohammed Ispahani v. Yogendra Chandak, (2017) 16 SCC 226 : (2018) 2 SCC (Cri) 138] , SCC para 35, this Court has observed and held as under : (SCC p. 243)

"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 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."

6.10. Thus, 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 the FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in the FIR but not implicated in the charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

7. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that, in the facts and circumstances of the case, neither the learned trial court nor the High Court have committed any error in summoning the appellants herein to face the trial along with other co-accused. As observed hereinabove, the appellants herein were also named in the FIR. However, they were not shown as accused in the challan/charge-sheet. As observed hereinabove, nothing is on record whether at any point of time the complainant was given an opportunity to submit the protest application against non-filing of the charge-sheet against the appellants. In the deposition before the Court, PW 1 and PW 2 have specifically stated against the appellants herein and the specific role is attributed to the appellant-accused herein. Thus, the statement of PW 1 and PW 2 before the Court can be said to be "evidence" during the trial and, therefore, on the basis of the same and as held by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , the persons against whom no charge-sheet is filed can be summoned to face the trial. Therefore, we are of the opinion that no error has been committed by the courts below to summon the appellants herein to face the trial in exercise of power under Section 319 CrPC."

18. In the case of **Manjeet Singh Vs. State of Haryana & Ors**., reported in **(2021) 18 SCC 321**, after considering the various pronouncements on issues related to exercising the powers under Section 319 Cr.P.C. including the judgments passed in the case of **Hardeep Singh (supra)** and **Brijendra Singh (supra),** concluded as under:

"15. The ratio of the aforesaid decisions on the scope and ambit of the powers of the court under Section 319CrPC can be summarised as under:

15.1. That while exercising the powers under Section 319CrPC and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished.

15.2. For the empowerment of the courts to ensure that the criminal administration of justice works properly.

15.3. The law has been properly codified and modified by the legislature under CrPC

indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law.

15.4. To discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished.

15.5. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial.

15.6. Section 319CrPC allows the court to proceed against any person who is not an accused in a case before it.

15.7. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency.

15.8. Section 319CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial.

15.9. The power under Section 319(1)CrPC can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion.

15.10. The court can exercise the power under Section 319CrPC only after the trial proceeds and commences with the recording of the evidence.

15.11. The word "evidence" in Section 319CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents.

15.12. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319CrPC is to be exercised and not on the basis of material collected during the investigation.

15.13. If the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319CrPC and can proceed against such other person(s).

15.14. That if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319CrPC can be exercised.

15.15. That power under Section 319CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not to wait till the said evidence is tested on cross-examination.

15.16. 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 FIR but not implicated in the charge-sheet has gone, in that case also, the court is still not powerless by virtue of Section 319CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses).

15.17. While exercising the powers under Section 319CrPC the court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.

16. Applying the law laid down in the aforesaid decisions to the facts of the case on hand we are of the opinion that the learned trial court as well as the High Court have materially erred in dismissing the application under Section 319CrPC and refusing to summon the private respondents herein to face the trial in exercising the powers under Section 319CrPC. It is required to be noted that in FIR No. 477 all the private respondents herein who are sought to be arraigned as additional accused were specifically named with specific role attributed to them. It is specifically mentioned that while they were returning back, Mahindra XUV bearing no. HR 40A 4352 was standing on the road which belongs to Sartaj Singh and Sukhpal. Tejpal, Parab Saran Singh, Preet Samrat and Sartaj were standing. Parab Sharan was having lathi in his hand, Tejpal was having a gandasi, Sukhpal was having a danda, Sartaj was having a revolver and Preet Singh was sitting in the jeep. It is specifically mentioned in the FIR that all the aforesaid persons with common intention parked the Mahindra XUV HR 40A 4352 in a manner which blocks the entire road and they were armed with the weapons.

17. Despite the above specific allegations, when the charge-sheet/final report came to be filed only two persons came to be charge-sheeted and the private respondents herein, though named in the FIR, were put/kept in Column 2. It is the case on behalf of the private respondents herein that four different DSPs inquired into the matter and thereafter when no evidence was found against them the private respondents herein were put in Column 2 and therefore the same is to be given much weightage rather than considering/believing the examination-in-chief of the appellant herein. Heavy reliance is placed on Brijendra Singh [Brijendra Singh v. State of Rajasthan, (2017) 7 SCC 706 : (2017) 4 SCC (Cri) 144] .

18. However none of DSPs and/or their reports, if any, are part of the charge-sheet. None of the DSPs are shown as witnesses. None of the DSPs are investigating officer. Even on considering the final report/charge-sheet as a whole there does not appear to be

any consideration on the specific allegations qua the accused, the private respondents herein, who are kept in Column 2. Entire discussion in the charge-sheet/final report is against Sartaj Singh only.

19. So far as the private respondents are concerned only thing which is stated is:"During the investigation of the present case, Shri Baljinder Singh, HPS, DSP Assandh and Shri Kushalpal, HPS, DSP Indri found accused Tejpal Singh, Sukhpal Singh, sons of Gurdev Singh, Parab Sharan Singh and Preet Samrat Singh sons of Mohan Sarup Singh caste Jat Sikh, residents of Bandrala innocent and accordingly Sections 148, 149 and 341IPC were deleted in the case and they were kept in Column 2, whereas challan against accused Sartaj has been presented in the Court."

20. Now thereafter when in the examination-in-chief the appellant herein — victim — injured eyewitness has specifically named the private respondents herein with specific role attributed to them, the learned trial court as well as the High Court ought to have summoned the private respondents herein to face the trial. At this stage it is required to be noted that so far as the appellant herein is concerned he is an injured eyewitness. As observed by this Court in State of M.P. v. Mansingh [State of M.P. v. Mansingh, (2003) 10 SCC 414 : (2007) 2 SCC (Cri) 390] (para 9); Abdul Sayeed v. State of M.P. [Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262] ; State of U.P. v. Naresh [State of U.P. v. Naresh, (2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216] , the evidence of an injured eyewitness has greater evidential value and unless compelling reasons exist, their statements are not to be discarded lightly. As observed hereinabove while exercising the powers under Section 319CrPC the court has not to wait till the cross-examination and on the basis of the examination-in-chief of a witness if a case is made out, a person can be summoned to face the trial under Section 319CrPC.

21. Now so far as the reasoning given by the High Court while dismissing the revision application and confirming the order passed by the learned trial court dismissing the application under Section 319CrPC is concerned, the High Court itself has observed that PW 1 Manjeet Singh is the injured witness and therefore his presence cannot be doubted as he has received firearm injuries along with the deceased. However, thereafter the High Court has observed that the statement of Manjeet Singh indicates over implication and that no injury has been attributed to either of the respondents except that they were armed with weapons and the injuries concerned are attributed only to Sartaj Singh, even for the sake of arguments if someone was present with Sartaj Singh it cannot be said that they had any common intention or there was meeting of mind or knew that Sartaj would be firing. The aforesaid reasonings are not sustainable at all.

22. At the stage of exercising the powers under Section 319CrPC, the court is not required to appreciate and/or enter on the merits of the allegations of the case. The High Court has lost sight of the fact that the allegations against all the accused persons right from the very beginning were for the offences under Sections 302, 307, 341, 148 & 149IPC. The High Court has failed to appreciate the fact that for attracting the offence under Section 149IPC only forming part of unlawful assembly is sufficient and the individual role and/or overt act is immaterial. Therefore, the reasoning given by the High Court that no injury has been attributed to either of the respondents except that they were armed with weapons and therefore, they cannot be added as accused is unsustainable. The learned trial court and the High Court have failed to exercise the jurisdiction and/or powers while exercising the powers under Section 319CrPC.

23. Now so far as the submission on behalf of the private respondents that though a common judgment and order was passed by the High Court in Satkar Singh v. State of Haryana [CRR No. 3238 of 2018 reported as Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782 sub nom Satkar Singh v. State of Haryana] at that stage the appellant herein did not prefer appeal against the impugned judgment and order passed by the High Court in Manjeet Singh v. State of Haryana [Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782 [Ed. : This also disposed of CRR No. 3238 of 2018 by a common judgment and order]] and therefore this Court may not exercise the powers under Article 136 of the Constitution is concerned the aforesaid has no substance. Once it is found that the learned trial court as well as the High Court ought to have summoned the private respondents herein as additional accused, belated filing of the appeal or not filing the appeal at a relevant time when this Court considered the very judgment and order in Satkar Singh v. State of Haryana [CRR No. 3238 of 2018 reported as Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782 sub nom Satkar Singh v. State of Haryana] cannot be a ground not to direct to summon the private respondents herein when this Court has found that a prima facie case is made out against the private respondents herein and they are to be summoned to face the trial.

24. Now so far as the submission on behalf of the private respondents that though in the charge-sheet the private respondents herein were put in Column 2 at that stage the complainant side did not file any protest application is concerned, the same has been specifically dealt with by this Court in Rajesh [Rajesh v. State of Haryana, (2019) 6 SCC 368 : (2019) 2 SCC (Cri) 801] . This Court in the aforesaid decision has specifically observed 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 as who were named in the FIR but not implicated in the charge-sheet has gone, in that case also, the court is still not powerless by virtue of Section 319CrPC.

25. Similarly, the submission on behalf of the private respondents herein that after the impugned judgment and order passed by the High Court there is much progress in the trial and therefore at this stage power under Section 319CrPC may not be exercised is concerned, the aforesaid has no substance and cannot be accepted. As per the settled proposition of law and as observed by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , the powers under Section 319CrPC can be exercised at any stage before the final conclusion of the trial. Even otherwise it is required to be noted that at the time when the application under Section 319CrPC was given only one witness was examined and examination-in-chief of PW 1 was recorded and while the cross-examination of PW 1 was going on, application under Section 319CrPC was given which came to be rejected by the learned trial court. The order passed by the learned trial court is held to be unsustainable. If the learned trial court would have summoned the private respondents herein at that stage such a situation would not have arisen. Be that as it may, as observed herein powers under Section 319CrPC can be exercised at any stage from commencing of the trial and recording of evidence/deposition and before the conclusion of the trial at any stage.

26. In view of the above and for the reasons stated above, the impugned judgment and order [Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782 [Ed. : This also disposed of CRR No. 3238 of 2018 by a common judgment and order]] passed by the High Court and that of the learned trial court dismissing the application under Section 319CrPC submitted on behalf of the complainant to summon the private respondents herein as additional accused are unsustainable and deserve to be quashed and set aside and are accordingly quashed and set aside. Consequently the application submitted on behalf of the complainant to summon the private respondents herein is hereby allowed and the learned trial court is directed to summon the private respondents herein to face the trial arising out of FIR No. 477 dated 27-7-2016 in Sessions Case No. 362 of 2016 for the offences punishable under Sections 302, 307, 341, 148 & 149IPC."

19. The Constitution Bench of the Hon'ble Apex Court in the case of **Sukhpal Singh Khaira Vs. State of Punjab**, reported in (2023) 1 SCC 289, decided on 05.12.2022, answered the questions on the subject in issue in following paras which read as under:

"38. For all the reasons stated above, we answer the questions referred as hereunder:

39.(I) Whether the trial court has the power Under Section 319 of Code of Criminal Procedure 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 of Code of Criminal Procedure 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 of the Code of Criminal Procedure 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 Code of Criminal Procedure?"

41.1. If the competent court finds evidence or if application Under Section 319 of Code of Criminal Procedure 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 of Code of Criminal Procedure 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 (i) 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 of Code of Criminal Procedure 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 319 of Code of Criminal Procedure, 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.

41.12. If, in that circumstance, the decision is to hold a separate trial in case of the summoned 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."

20. After the aforesaid judgment, the issue was again considered by the Hon'ble Supreme Court in the case of **Yashodhan Singh and Others Vs. State of U. P. and Others**, reported in **(2023) LiveLaw (SC) 576 : 2023 INSC 652.**

21. It would be apt to indicate that before this Court at Allahabad, **Yashodhan Singh and Others** preferred a **Criminal Revision No. 4235 of 2022 (Yashodhan Singh and 6 Others Vs. State of U. P. and Others)** challenging the order passed by the trial court in exercise of power under Section 319 Cr.P.C. The order was challenged, in nutshell, on the ground that the trial court did not considered the evidence collected by the I.O. during investigation based upon which the I.O.

exonerated them. In this case also, the reliance was placed on the judgment passed by the Hon'ble Apex Court in the case of **Brijendra Singh (supra)**. This Court dismissed the petition vide order dated 03.01.2023.

22. The order dated 03.01.2023 was assailed by **Yashodhan Singh and Others** before the Hon'ble Apex Court. Before the Hon'ble Apex Court also, the reliance was placed on the judgment of Brijendra Singh (supra).

23. The Hon'ble Apex Court considered the various pronouncements including the judgment passed in the case of **Hardeep Singh (supra), Brijendra Singh (supra), Sukhpal Singh Khair (supra) and Jogendra and Others Vs. State of Bihar and Anr., reported in (2015) 9 SCC 244**, wherein the Hon'ble Apex Court observed that opportunity to the proposed accused is required, and thereafter dismissed appeal filed by **Yashodhan Singh and Others**. The relevant paras as referred are reproduced hereinunder:

> *"22. The relevant paragraphs in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] can be crystallised as under:*
>
> *22.1. The Constitution Bench of this Court was concerned with three aspects : firstly, the stage at which powers under Section 319CrPC can be invoked; secondly, the materials on the basis whereof the invoking of powers under Section 319CrPC can be justified; and thirdly, the manner in which powers under Section 319CrPC have to be exercised. While answering the five questions referred to the Constitution Bench in para 117, it was concluded as under : (Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , SCC pp. 141-42)*
>
> *"117. We accordingly sum up our conclusions as follows:*
>
> *Questions (i) and (iii)*
>
> *— What is the stage at which power under Section 319CrPC can be exercised?*
>
> *AND*
>
> *— Whether the word "evidence" used in Section 319(1)CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?*
>
> *Answer*
>
> *117.1. In Dharam Pal case [Dharam Pal v. State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159 : AIR 2013 SC 3018] , the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such cognizance can be taken under Section 193CrPC and the Sessions Judge need not wait till "evidence" under Section 319CrPC becomes available for summoning an additional accused.*
>
> *117.2. Section 319CrPC, significantly, uses two expressions that have to be taken note of i.e. (1)*

inquiry (2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202CrPC, and under Section 398CrPC are species of the inquiry contemplated by Section 319CrPC. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319CrPC, and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

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.

Question (iv)—What is the nature of the satisfaction required to invoke the power under Section 319CrPC to arraign an accused? Whether the power under Section 319(1)CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

Answer

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 [Ed. : The conclusion of law as stated in para 106, p. 138 c-d, may be compared:"Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction". See also especially in para 100 at p. 136 f-g.] . 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.

Question (v)—Does the power under Section 319CrPC extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

Answer

117.6. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319CrPC provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398CrPC has to be complied with before he can be summoned afresh."

22.2. While answering the questions aforesaid, this Court observed in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] that if the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subject-matter of trial. It was pertinently observed by this Court that the desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence.

22.3. While distinguishing a trial from an enquiry, it was observed by this Court that trial follows an inquiry and the purpose of the trial is to fasten the responsibility upon a person on the basis of facts presented and evidence led. Emphasising on the word "course" used in Section 319CrPC, it was observed that the said power can be invoked under the said provision against any person from the initial stage of inquiry by the court up to the stage of conclusion of the trial. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences. Thus, the power under Section 319(1)CrPC can be exercised at any time after the charge-sheet is filed before the pronouncement of judgment, except during the stage of Sections 207/208CrPC, committal, etc.

22.4. Elaborating the nuances of Section 319CrPC, it was further observed in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] that what is essential for the purpose of Section 319CrPC is that there should appear some evidence against a person not proceeded against; the stage of the proceedings is irrelevant. Section 319CrPC is an empowering provision particularly where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well.

22.5. It was further observed that circumstances which lead to the inference being drawn up by the court for summoning a person under Section 319 arise out of the availability of the facts and material that come up before the court. The material should disclose complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence.

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 unrebutted, 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.

22.9. This Court further observed that 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. Hence, the degree of satisfaction for summoning the original accused and the accused summoned subsequently during the course of trial is different.

22.10. It was further observed by this Court that a person, whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the main part of the charge-sheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193CrPC can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled. However, a person who has already been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation, the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Therefore, the court must keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming

him at the behest of someone or for such other extraneous considerations.

22.11. This Court further observed that it has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398CrPC without resorting to the provision of Section 319CrPC directly. Section 398CrPC is in the nature of a revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. However, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by Sections 300(5) and 398CrPC. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319CrPC can be exercised.

23. From the aforesaid observations of the Constitution Bench of this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86], it is noted that an inquiry is contemplated as against a person who has been discharged prior to the commencement of the trial in terms of Section 227CrPC as extracted above but on an inquiry, if it appears that there is evidence against such a discharged person, then power under Section 319CrPC can be exercised against such a discharged person. This clearly would mean that when a person who is not discharged but is to be summoned as per Section 319CrPC on the basis of satisfaction derived by the court on the evidence on record, no inquiry or hearing is contemplated. This would clearly indicate that principle of natural justice and an opportunity of hearing a person summoned under 319 CrPC are not at all contemplated. Such a right of inquiry would accrue only to a person who is already discharged in the very same proceeding prior to the commencement of the trial. This is different from holding that a person who has been summoned as per Section 319CrPC has a right of being heard in accordance with the principles of natural justice before being added as an accused to be tried along with other accused.

24. Further, when a person is summoned as an accused under Section 319CrPC which is based on the satisfaction recorded by the trial court on the evidence that has emerged during the course of trial so as to try the person summoned as an accused along with the other accused, the summoned accused cannot seek discharge. It is necessary to state that discharge as contemplated under Section 227CrPC is at a stage prior to the commencement of the trial and immediately after framing of charge but when power is exercised under Section 319CrPC to summon a person to be added as an accused in the trial to be tried along with other accused, such a person cannot seek discharge as the court would have exercised the power

under Section 319CrPC based on a satisfaction derived from the evidence that has emerged during the evidence recorded in the course of trial and such satisfaction is of a higher degree than the satisfaction which is derived by the court at the time of framing of charge.

25. The learned Senior Counsel Shri S. Nagamuthu strenuously contended that a person summoned in exercise of power under Section 319CrPC must be given an opportunity of being heard before being added as an accused to the trial to be tried along with the other accused and that such person must have an opportunity of filing an application seeking discharge. The same are clearly not envisaged in view of the judgment in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and hence the said contentions are rejected.

26. Moreover, there is no finality attached to Section 319CrPC. It only indicates commencement of trial qua the added accused. The rationale is that a person need not be heard before being added on or arrayed as an accused. Reference to and reliance placed upon opportunity of hearing to a complainant in the form of protest petition when a closure report is filed is wholly misplaced because there is finality in a closure report; therefore the complainant is given an opportunity.

27. In Sukhpal Singh Khaira [Sukhpal Singh Khaira v. State of Punjab, (2023) 1 SCC 289 : (2023) 1 SCC (Cri) 454] , a Constitution Bench of this Court of which one of us was a member (Nagarathna, J.), adumbrated on the meaning of the expression "conclusion of trial" in the context of Section 319 read with other allied sections of CrPC and after referring to several decisions of this Court including Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] answered the question referred to as under : (Sukhpal Singh Khaira case [Sukhpal Singh Khaira v. State of Punjab, (2023) 1 SCC 289 : (2023) 1 SCC (Cri) 454] , SCC pp. 311-13, paras 39-41)

24. Reverting to the present case. Upon due consideration of the facts of the case indicated in earlier part of this judgment and the observations made in the judgments of the Hon'ble Apex Court, referred above, this Court is of the view that the applicants have no case and no interference by this Court in the order dated 23.05.2024 passed by the trial Court in exercise of power under Section 319 Cr.P.C. is required. It is for the following reasons:

(i) The case of the applicants is based upon the 'evidence' collected by the I.O. during investigation.

(ii) On the aforesaid, the Hon'ble Apex Court in the case of **Hardeep Singh (supra)** in para 78 observed that "*the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in*

relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation". and thereafter in para 85 it has been observed that "in view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. The "evidence" is thus, limited to the evidence recorded during trial." and subsequently, in the case of **Rajesh and Others (supra)** in para 6.8 held that *"Considering the law laid down by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the Court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial."* and thereafter, in the case of **Manjeet Singh (supra)** observed as under:

> *"15.11. The word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents.*
>
> *15.12. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation."*

(iii) Thus, in view of above, the trial Court has not committed any illegality in not considering the evidence collected by the I.O. during investigation.

(iv) The CCTV footage, the certificate/letter from the company, attendance sheet and Call Detail Report (C.D.R.), the basis of opinion of the I.O. that the applicants were not present at the place of crime and therefore submitted the report in terms of

Section 169 Cr.P.C., were rightly not considered by the trial Court in view of aforesaid as also for the reason that the same have not yet been exhibited before the trial Court. It is in view of the fact that in this regard, there is no pleading.

(v) The order dated 23.05.2024, in issue, of the trial Court is based upon the testimony/statement of Chandan Singh (PW-1), an eye witness and informant, as also the contents of the F.I.R. dated 14.08.2018, the basis of pending Session Trial No. 486 of 2019, and as such the submissions for causing interference in the order dated 23.05.2024 on the basis of testimony/statement of other witnesses have no force.

(vi) As per the contents of the F.I.R. dated 14.08.2018 lodged by Chandan Singh (PW-1), the PW-1 was present at the place of crime i.e. near Chaukhad Pure Anti Primay School and accused persons namely Asad Ali @ Munna, Bablu, Mahroj and Awadhesh Kumar (all the applicants herein) came there on two motorcycles and they opened fire and on account of gun shot injuries Harish Chandra, father of PW-1, expired and this witness namely Chandan Singh (PW-1), an informant and eye witness, in his examination-in-chief, with some improvement (which could not be considered at this stage in view of settled proposition that an FIR is not an encyclopedia disclosing all facts and details relating to offense and FIR is not even considered to be a substantive piece of evidence and can be only used to corroborate or contradict the informant's evidence in Court as also that while exercising the powers under Section 319 CrPC the court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial), reiterated the story narrated in the F.I.R. dated 14.08.2018 and in cross-examination also remained intact in this regard. This witness PW-1 in the FIR as also before the Court, after commencement of the trial, in his statement in regard to Asad Ali @ Munna (applicant no. 1 herein) indicated the motive to commit the offense. According to PW-1, in examination-in-chief as also in cross-examination, the accused/applicants opened the fire and caused fire arm injuries. The injuries indicated in post-mortem are extracted herein-under:

"1) Fire arm injury L/w size about 1x1 cm deep to bone present on right arm pit 8 cm lateral from right nipple, wounds margin are inverted and tattoing seen size about 1x1 cm.

2) Fire arm injury L/W size about .5 x .5 cm deep to bone 5 cm below from the previous wound, wound margin are inverted & tattaing seen around the wound.

3) Fire arm injury L/W size about 1 x 1 cm deep to bone present on posterolateral side of right side arm wound margin are inverted, blacknening and tattoing seen around the wound size about 1.5 x 1.5cm.

4) L/W size about 1.5 x 1.5 cm deep to bone present on postero medial side of right arm, wound margin are everted.

5) Fire arm injury L/W size about 1 x 1 cm deep to bone 7 cm below the left clavicle wound margin are inverted. Blacknening and taking seen around the wound size about 1.5 x 1.5 cm.

6) L/W size about 1.2 x 1.2 cm deep to bone 18 cm lateral to left nipple wound margines are everted. As per x-ray shows 2 bullets and one pellet, 1st bullet found at right side of 1st lumber ventebra and 2nd bullet found at left kidney

(7) 1 pellet found at right upper chest 4 cm below right clavicle.

(vii) So far, the requirement of recording satisfaction while exercising power under Section 319 Cr.P.C. is concerned, in view of above said, this Court is of the view that on this aspect of the case as also the order dated 23.05.2024 is not liable to be interfered by this Court as the trial Court to the view of this Court has recorded its satisfaction as would appear from the following para of the impugned order:

"At this stage the evidence of PW-1 is such that if the evidence of PW-1 is not rebutted by the proposed accused persons that will be sufficient to convict proposed accused persons, the informant is the eye-witness of this case and it has also been brought on the record that another case of attempt to murder of the father of the informant was already pending against the proposed accused Asad Ali at the time of incident. Thus, the eye account of the whole case has been candidly laid down by the informant before the court and the motive for the offence is also associated against proposed accused person Asad Ali. The other co-accused Awadh, Bablu and Mahroj were present at the place of incidence at the time of the commission of the crime and they also have actively participated in the commission of the crime.

(viii) The discrepancies, as alleged, that as per FIR the informant/eye-witness/PW-1 namely Chandan Singh and dead Harish Chandra were on one motorcycle and as per statement of PW-1 before the trial Court that both were on different motorcycles, is a subject matter of trial. It is for the reason that as per settled view "while exercising the powers under Section 319 CrPC the court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial."

25. For the reasons recorded herein-above, this Court finds no force in the application. It is accordingly **rejected**.

26. Interim order, if any, stands vacated.

(2024) 8 ILRA 1160
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Application U/s 482 No. 17673 of 2024

Smt. Vandana Malviya ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Shashi Kant Shukla

Counsel for the Respondent:
Aditya Gupta, Aditya Malviya, G.A., Harshit Gupta

Criminal Law – Indian Penal Code,1860 - Sections 323, 504, 506 419 & 420 - applicant sold property based on a General Power of Attorney (GPA) that was later revoked by her brother-allegations of cheating and dishonest inducement were not substantiated-no evidence of dishonest intent at the time of executing the GPA or thereafter-disputes over the distribution of sale proceeds should be resolved through civil proceedings, not criminal-summoning order and criminal proceedings quashed- Application allowed. (Paras 8, 15, 20 and 22)

HELD:
Learned counsel for both parties have interpreted relevant clause of said GPA in their favour, however, no much resistance was made at the behest of counsel for complainant that even prima facie on basis of material before Magistrate concerned, no case is made out under Sections 323, 506 IPC. (Para 8)

There is no material on record that share of proceeds was handed over to complainant and his brothers. Counsel for both parties have interpreted clauses of GPA in their favour and as already observed the interpretation of GPA can be done only in civil proceedings on basis of evidence and not in criminal proceedings. It has already been observed earlier that on basis of contents of complaint and statements even prima facie no ingredients of offence under Sections 323, 506 IPC are made out. Therefore, only consideration left is, whether on basis of material available and rival submissions ingredients of Section 420 IPC are made out or not as well as whether requisite reasons were assigned while passing impugned summoning order as required under Section 204 Cr.P.C. (Para 15)

As referred above, Section 420 IPC provides cheating and dishonest inducement of property. Therefore, the allegation would have substance only when the complainant had put a case that applicant has dishonestly induced three brothers to execute GPA. Subsequent dishonest, if any, would depend on basis of clauses of GPA. Since on face of it there is ambiguity on the issue of share of proceeds of sale deeds, therefore, for said purpose civil remedy is appropriate remedy. In this regard para 38 of a judgment passed by Supreme Court in C. Subbiah alias Kadambur Jayaraj & ors. Vs Superintendent of Police & ors., 2024 SCC OnLine SC 935 is relevant and the same is reproduced hereinafter….(Para 20)

In view of above, impugned order dated 16.01.2024 passed under Section 204 Cr.P.C. also does not take note of clauses of GPA and in a very cursory manner only on ground that proceeds of sale deeds were not shared to applicant, applicant was summoned under Section 420 IPC also. Therefore, as discussed above, ingredients of Section 420 IPC were not made out as well as ingredients of Section 323, 506 IPC are also not made out. (Para 22)

Appeal dismissed. (E-14)

List of Cases cited:

C. Subbiah alias Kadambur Jayaraj & ors. Vs Superintendent of Police & ors., 2024 SCC OnLine SC 935

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Heard Sri Shashi Kant Shukla, learned counsel for applicant, learned AGA for State and Sri Aditya Gupta, Advocate for Opposite Party No. 2.

2. In the present case there are few undisputed facts that applicant is the sister of complainant. She has two other brothers also. Complainant and his two brothers have executed a registered General Power of Attorney (hereinafter referred to as "GPA") on 05.07.2021 in favour of present applicant to sale out share of scheduled property situate in Uttarakhand. Relevant Clause 10 of GPA is reproduced hereinafter:

> *"10. To sell our share in the said Scheduled Property in whole or in parts, to any person(s), to execute proper sale deed(s), to present the same for registration, before the concerned Sub-Registrar of Assurances, to admit the execution thereof, to receive sale consideration by cheque/ demand draft/ RTGS/ bank transfer in her name or in our names and to handover the possession to the purchaser(s) on site and to issue receipt thereof."*

3. Further, undisputedly applicant has sold some part of scheduled properties by different sale deeds. Later on only complainant has executed a registered cancellation deed of GPA on 21.12.2021. It is also not under much dispute that even thereafter on basis of GPA applicant had sold some part of scheduled property by different sale deeds (from 30.11.2021 to 30.12.2021 as many as five sale deeds were executed on basis of GPA). It is the case of applicant that as soon as she came to know about cancellation of GPA she does not further execute any sale deed on basis of said GPA.

4. In aforesaid circumstances, only complainant, and not his two other brothers, filed a criminal complaint against applicant under Sections 323, 504, 506 419, 420 IPC on 19.04.2023. Relevant paragraphs of complaint are mentioned hereinafter:

> *"3. यह कि परिवादी व प्रभात मालवीय व प्रवीण मालवीय ने मिलकर अपनी सगी बहन श्रीमती वंदना मालवीय पत्नी श्री प्रियदर्शन मालवीय नि0 31ए जवाहर लाल नेहरू रोड थाना जार्जटाउन प्रयागराज को दिनांक 8-7-2021 को मुख्तारेआम नियुक्त कर दिये तदुपरान्त प्रार्थी को एक भी रूपया अदा नही की लिहाजा तनहा मुख्तारे आम निरस्तीकरण दिनांक 21-12-2021 को अपना सम्पूर्ण हक व हिस्सा के बावत मुख्तारे आम का निरस्तीकरण किया जो आराजियात के हक व हिस्से मे 11 व्यक्तियो का हक व हिस्सा था जिसमे मेरी माता श्रीमती लीला देवी मालवीय का 1/11 हक व हिस्सा है प्रार्थी भी 1/3 हिस्से का मालिक है जिसके बावत पंजीकृत मुख्तारे आम निष्पादन व निरस्तीकरण किया।*
>
> ***4- यह कि उक्त भूमि का सम्पूर्ण भाग1/11 का विक्रय वर्तमान समय में किया जा चुका है व प्रार्थी के हक व हिस्से को विक्रयपत्र कर दिया जिसके बावत प्रार्थी ने अभियुक्ता श्रीमती वन्दना मालवीय को एक विधिक नोटिस दिनांक 27.9.2022 को भेजी गयी जिसका उत्तर अभी तक नही दिया गया और न ही प्रार्थी का रूपया नियमानुसार नोटिस जो मु० 22,52,060/-रूपया बैनामे के अनुसार होता है विक्रयमूल्य का एक भी रूपया अदा नहीं किया बल्कि गाली गुप्ता व धमकी बराबर दे रही है।***
>
> *5- यह कि परिवादी के जब नोटिस का जवाब अभियुक्ता ने नहीं दिया तब अपने हक व हिस्से का पैसा मॉगने गया तो अभियुक्ता प्रार्थी के साथ मारपीट की एवं प्रार्थी को धक्का मारकर घर से बाहर निकाल दिया इस प्रकार अभियुक्ता प्रार्थी के साथ धोखाधडी व जालसाजी करके सारी सम्पत्ति को विक्रय कर दी है जो कि एकदम गलत है। उपरोक्त अभियुक्ता*

श्रीमती वन्दना मालवीय परिवादी के साथ धोखाधड़ी व अमानत में खमानत किया है।"

5. In pursuance of above complaint statement of complainant was recorded under Section 200 Cr.P.C. as well as statements of witnesses were also recorded under Sections 202 Cr.P.C. and they are reproduced hereinafter:

"बयान परिवादी अन्तर्गत धारा 200 द०प्र०सं०

नाम पंकज मालवीय पिता स्वं० प्रहलाद नारायण पता 58/44 त्रिपोलिया बहादुरगंज, थाना जार्जटाउन ने सशपथ बयान कि मेरे मां के नाम देहरादून के हक जमीन थी। जिसमें ज्वाइट बेन्चर से बेचा गया। मां के देहान्त के बाद हम 3 भाई बहन थे हमारे ही प्रियदर्शन मालवीय आर०टी०ओ० बरेली के पद से रिटार्यड हुए थे। बहन वन्दना मालवीय के पक्ष में एक मुख्तारे आम 8-7-2021 को हम तीनो भाइयो ***ने बहन के पक्ष में निष्पादित किया। उस वायदे के साथ में जमीन को बेचकर हम सबको पैसा दिया जावे लेकिन आज तक एक भी पैसा नहीं मिला मांगने पर मेरी बहन वन्दना एवं बहनोई प्रियदर्शन नहीं देते है और धमकी देते है।*** *सभी बैनामे का दस्तावेज फाइल में दाखिल है। मैं रिटायर आदमी हूँ बीमार हूँ। मैंने कही और मुकदमा नहीं किया है। मेरा शेयर 1/3 22 लाख 52 हजार के लगभग होता है।*

बयान अन्तर्गत धारा 202 सी०आर०पी०सी०

नाम व पता- अजय पाठक पुत्र भरत लाल पाठक, निवासी त्रिपोलिया चौक, इलाहाबाद ने बहलफ बयान किया कि- मैं व पंकज मालवीया एक साथ पढ़ते थे तथा मोहल्ले के पड़ोसी है। हम लोगों से अच्छे संबंध है। पंकज मालवीय कुल तीन भाई एक बहन है। भाई क्रमशः पंकज मालवीय प्रभावत मालवीय व प्रवीण मालवीय व बहन श्रीमती बंदना मालवीय है, जिनकी शादी जवाहर लाल नेहरू रोड थाना-जार्जटाउन, प्रयागराज में अपने पति व बच्चो के साथ निवासी करती है। तथा पंकज मालवीय की तबियत खराब रहती थी, जिस कारण उनकी बहन ने सभी भाइयों से राय मशविरा लेकर उत्तराखंड की भूमि की देखरेख व विक्रय हेतु राय मशविरा लेकर अपने हक में यानी इनकी बहन वंदना मालवीय ने अपने हक में मुख्तार-ए-आम लिया, जो इन लोगों की माता श्रीमती लीलादेवी मालवीया का हक व हिस्सा था, उनकी मृत्युपरांत तीनो भाईयो का नाम अंकित हो चुका है। तदनुसार इनकी बहन दि० 08-07-21 को उत्तराखंड वाली भूमि का मुख्तार-ए-आम नियुक्त होने के बाद सम्पूर्ण भूमि विक्रय कर दी है, जिसका साक्ष्य सम्पूर्ण बैनामा पत्रावली में उपलब्ध है। तथा मेरे सामने उत्तराखंड की भूमि का मुख्तार-ए-आम नियुक्त किए थे, जिसके बाबत एक भी रूपया अदा नहीं किए थे, तथा जार्जटाउन जाने पर पंकज मालवीय को गाली गुप्ता व मार-पीट तथा पैसा देने से इंकार करते है।

बयान अन्तर्गत धारा-202 सी०आर०पी०सी०

नाम व पता-अनिल कुमार रस्तोगी पुत्र स्व० लाभचन्द्र रस्तोगी 148, गाडीवान टोला, इलाहाबाद ने बहलफ बयान किया कि-मैं पंकज मालवीय को भली-भॉति जानता हूँ वो 50/44 त्रिपोलिया बहादुरगंज प्रयागराज में रहते है। हमारा व पंकज मालवीया से बचपन से दोस्ती है और बराबर आना-जाना रहता है, तथा इसकी सगी बहन श्रीमती बंदना मालवीया ने दि० 08-07-21 को पंजीकृत मुख्तार-ए-आम पंकज मालवीय व प्रभात मालवीय व प्रवीर्ण मालवीय ने मिलकर पंजीकृत मुख्तारनामा नियुक्त किए जो मेरे समक्ष अपने सगी बहन वंदना मालवीय के हक में नियुक्त किए थे कि मेरी उत्तराखंड की भूमि को देखरेख व विक्रय हेतु दिया गया था, लेकिन इनकी बहन ने संपूर्ण भूमि विक्रय कर दिया, जिसमें पंकज मालवीया को एक भी रूपया अदा नहीं किया। हम लोग प्रतिदिन एक साथ बैठते है तथा इनके सगी बहन बंदना मालवीया के यहां गए तो उन्होंने पैसा देने से साफ इंकार कर दिया तथा पंकज मालवीया को भद्दी-2 गाली देते हुए अपने घर से बाहर निकाल दिया तथा विक्रया पत्र का सम्पूर्ण बैनामा साथ में संलग्न किया है।"

6. Chief Judicial Magistrate, Prayagraj vide impugned order dated 16.01.2024 summoned present applicant to face trial under Sections 323, 506, 420 IPC. Relevant part of impugned order is reproduced hereinafter:

"From perusal of documents, it transpires that a General Power of Attorney was executed by the complainant and his two brothers in favour of Vandana Malwiya on 08.07.2021 authorising her to execute sale deeds and receive consideration in her name or in the name of the brothers. This General Power of Attorney was cancelled by the complainant on 21.12.2021. The complainant has also filed copies of various sale deeds executed by Vandana Malwiya after the cancellation of the General Power of Attorney stating that the General Power of Attorney has not been revoked by its executants. ***The complainant has stated that he has not been given his share of the consideration by Vandana Malwiya and filed his bank statements in support thereof. A bare perusal of the bank statements show that no money was received from Vandana Malwiya. The complainant has also stated that Vandana Malwiya had threatened him and also beat him.***

The evidence produced on record prima facie suggest that Vandana Malwiya had committed cognizable offences u/s 420, 323, 506 IPC. Hence, sufficient grounds exist to summon the accused.

<u>*Order*</u>

Vandana Malwiya is summoned u/s 420, 323, 506 IPC in complaint case no. 928/2023. The complainant shall take appropriate steps within 10 days. The office shall thereafter issue process. Fix 27.02.2024."

7. The reasons assigned to summon applicant in aforesaid impugned order was that according to GPA share of proceeds of sale deeds was required to be given to applicant as well as his two brothers, however, with dishonest intention applicant though executed number of sale deeds but has not handed over share of proceeds thereof to complainant and his brothers.

8. Learned counsel for both parties have interpreted relevant clause of said GPA in their favour, however, no much resistance was made at the behest of counsel for complainant that even prima facie on basis of material before Magistrate concerned, no case is made out under Sections 323, 506 IPC.

9. So far as offence under Section 420 IPC is concerned, said Section is quoted hereinafter:

"420. Cheating and dishonestly inducing delivery of property*.—Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

10. Learned counsel for applicant submits that GPA was executed by three brothers including complainant in favour of their sister, i.e., applicant. In entire complaint or statements recorded before Magistrate, no allegation was made that GPA was itself executed on dishonest inducement of applicant. Even the GPA was revoked only by complainant and not by his two other brothers. Even other two brothers have not produced as witnesses under Section 202 Cr.P.C.

11. Learned counsel for applicant further submits that only allegation made in complaint as well as in the statements is that the proceeds of sale deeds were usurped by applicant and its due share was not given to complainant as well as his two brothers. However, for that relevant clauses of GPA has to be interpreted but the same can be done in civil suit and not in criminal proceedings.

12. Learned counsel appearing for complainant has referred the contents of complaint as well as statements that despite a specific clause in GPA due share of complainant from proceeds of various sale deeds was not handed over, thus the applicant has committed an offence of cheating. He also refers the details of different sale deeds executed by applicant on basis of GPA and total proceed thereof was around Rs. 7 crores. Various notices were issued to applicant, however, terms of GPA were violated with dishonest intention.

13. Heard learned counsel for parties and perused the material available on record.

14. Undisputed facts have already been referred above that complainant and his two brothers have executed a GPA in favour of applicant, i.e., their sister, to sell out the scheduled property. Applicant has executed various sale deeds on basis of GPA even after its revocation at the behest of complainant.

15. There is no material on record that share of proceeds was handed over to complainant and his brothers. Counsel for both parties have interpreted clauses of GPA in their favour and as already observed the interpretation of GPA can be done only in civil proceedings on basis of evidence and not in criminal proceedings. It has already been observed earlier that on basis of contents of complaint and statements even prima facie no ingredients of offence under Sections 323, 506 IPC are made out. Therefore, only consideration left is, whether on basis of material available and rival submissions ingredients of Section 420 IPC are made out or not as well as whether requisite reasons were assigned while passing impugned summoning order as required under Section 204 Cr.P.C.

16. It has already been referred above that there is no allegation against applicant that she has induced complainant and his two brothers with dishonest intention to execute a registered GPA in her favour. Therefore, only consideration left is, whether after GPA was executed and on basis of it various sale deeds were executed by applicant, she with an dishonest intention, does not part away due share of complainant and his two brothers from proceeds of sale deeds.

17. In this regard contents of revocation of deed of GPA executed by complainant on 21.12.2021 would be

relevant and relevant part thereof is mentioned hereinafter:

> *"विदित हो कि किन्ही अपरिहार्य कारणों से मुझ मुकिर का तालमेल अपनी सगी बहन मुख्तारआम श्रीमती वन्दना मालवीय पत्नी श्री प्रियदर्शन मालवीय पुत्री स्व० प्रहलाद नारायण मालवीय से नहीं बन पा रहा है जिस कारण मैं मुकिर सम्पत्ति उपरोक्त में निहित अपने हक व हिस्से के बाबत किसी प्रकार को कोई अधिकार अपनी सगी बहन मुख्तारआम श्रीमती वन्दना मालवीय पत्नी श्री प्रियदर्शन मालवीय पुत्री स्व० प्रहलाद नारायण मालवीय को नहीं देना चाहता हूँ इसलिए मैं मुकिर पंजीकृत मुख्तारआम दिनांकित **08.07.2021**ई० के तहत सम्पत्ति उपरोक्त में निहित अपने हक व हिस्से के बाबत अपनी सगी बहन मुख्तारआम श्रीमती वन्दना मालवीय पत्नी श्री प्रियदर्शन मालवीय पुत्री स्व० प्रहलाद नारायण मालवीय को दिये गये समस्त अधिकार जरिये इस मुख्तारनामा निरस्तीकरण निरस्त करता हूँ।"*

18. Aforesaid reasons assigned for revocation of GPA does not indicate that reason for it was the dishonest intention developed with applicant after sale deeds were executed for not sharing the due share, if any, from proceeds of sale deeds to complainant and his brothers. Therefore, even till date of revocation of GPA, i.e., 21.12.2021, there was no allegation of dishonest intention of applicant. The criminal complaint was filed on 19.04.2023, i.e., after a substantial period of about two and half years and appears to be only due to reason to put pressure on applicant supposedly on ground that negotiations were failed. Complainant has not challenged any sale deed or has not filed any civil suit so that clauses of GPA, now revoked, can be interpreted on basis of rival submissions.

19. At this stage, I have carefully perused the statement of complainant recorded under Section 200 Cr.P.C. that it talks about assurance only and nothing has been mentioned about any clauses of GPA that it was provided therein that proceeds of sale deeds have to be shared amongst the complainant and his brothers.

20. As referred above, Section 420 IPC provides cheating and dishonest inducement of property. Therefore, the allegation would have substance only when the complainant had put a case that applicant has dishonestly induced three brothers to execute GPA. Subsequent dishonest, if any, would depend on basis of clauses of GPA. Since on face of it there is ambiguity on the issue of share of proceeds of sale deeds, therefore, for said purpose civil remedy is appropriate remedy. In this regard para 38 of a judgment passed by Supreme Court in **C. Subbiah alias Kadambur Jayaraj and Others vs. Superintendent of Police and Others, 2024 SCC OnLine SC 935** is relevant and the same is reproduced hereinafter:

> ***"38. It is thus clear that from the complaint, there is no such allegation therein which can persuade the Court to hold that the intention of the accused appellants was to defraud the complainant right from the inception of the transactions. The accused appellants have unquestionably, passed on some plots as well as part profits from the land deals to the complainant but the dispute is regarding the quantification of profits and full satisfaction of the share claimed by the complainant proportional to the investments made by him."***

21. In aforesaid circumstances, this Court is of the considered opinion that complainant has failed to make out a case even prima facie that applicant has dishonestly induced complainant and his brothers to execute GPA or even thereafter. Even otherwise, at the stage of revocation of GPA, at the behest of applicant, there was no reference of any dishonest intention. The only grievance left with complainant is that proceeds of sale deeds were not shared. However, for that an interpretation of clauses of GPA would be required, which cannot be done in criminal proceedings and for that civil remedy appears to be the best remedy.

22. In view of above, impugned order dated 16.01.2024 passed under Section 204 Cr.P.C. also does not take note of clauses of GPA and in a very cursory manner only on ground that proceeds of sale deeds were not shared to applicant, applicant was summoned under Section 420 IPC also. Therefore, as discussed above, ingredients of Section 420 IPC were not made out as well as ingredients of Section 323, 506 IPC are also not made out.

23. In the result, application is allowed. Impugned summoning order dated 16.01.2024 passed by Additional Chief Judicial Magistrate, Room No. 7, Prayagraj in Complaint Case No. 628 of 2023 (Pankaj Malviya vs. Smt. Vandana Malviya), under Sections 420, 323, 506 IPC, Police Station George Town, District Allahabad as well as further proceedings thereof are also hereby quashed.

(2024) 8 ILRA 1166
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.08.2024

BEFORE

THE HON'BLE RAJAN ROY, J.

Election Petition No. 3 of 2024

Maneka Sanjay Gandhi ...Petitioner
Versus
Rambhual Nishad & Ors. ...Respondents

Counsel for the Petitioner:
Prashant Singh Atal, Amit Jaiswal Ojus Law, Dr. Pooja Singh, Vijay Vikram Singh

Counsel for the Respondents:

Civil Law– The Representation of People Act, 1951 - Sections 81 & 86 -Code of Civil Procedure,1908 - Order VII Rule 11 (d) - Election petition-petitioner challenged the election of the returned candidate-Sultanpur Lok Sabha Constituency- of - election petition filed beyond the 45-day limit prescribed by Section 81 of the Representation of People Act, 1951- Section 86 mandates dismissal of petitions not complying with Section 81- no provision allows for condonation of delay- petition found to be time-barred- dismissed. (Paras 4, 5, 6, 8, 9, 10 and 16)

HELD:
Hon'ble the Supreme Court opined in the said case that the applicability of the provisions of the Limitation Act by virtue of Section 29 (2) thereof is to be judged not from the terms of the limitation Act but by the provisions of the Act relating to filing of election petition and their trial to ascertain as to wherein it is complete code in itself which does not admit application of any provisions of the Limitation Act mentioned in Section 29 (2) of that Act. (para 9)

Referring to various earlier decisions of Hon'ble Supreme Court of India including those wherein it has been held that the Act 1951 was a complete Code and also taking into consideration various amendments made by the Legislature in the said Act, especially Section 81 thereof, and the earlier existing Section 85 which empowered the Election Commission in its discretion to condone the delay in

presentation of the election petition and also taking into consideration the decision of Hon'ble the Supreme Court in the case of Charan Lal Sahu Vs Nand Kishor Bhatt; 1973 (2) SCC 530 wherein it had been held that there is no question of any common law right to challenge an election as such any discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes and if no such discretion was conferred in respect of any of these matters none can be exercised under any general law or any principles of equity and if for non-compliance of the provisions of Section 82 and 117 which is mandatory, the election petition has to be dismissed under Section 86 (1) of the Act 1951, presentation of election petition within the period prescribed in Section 81 of the Act 1951 would be equally mandatory, non-compliance of which visits the penalty of the petition being dismissed, it was held, for all the reasons mentioned, therein that provisions of Section 5 of the Limitation Act do not govern the filing of election petitions or their trial. (Para 10)

From the aforesaid discussion it is apparent that the Limitation Act, 1963, especially Section 5 thereof, is not applicable to election petitions. In fact, the applicability appears to be specifically excluded in view of the provision of Section 86 (1) of the Act 1951 which makes it mandatory for the High Court/ Election Judge to dismiss the election petition if it is not in conformity with the provision of Section 81 of the Act 1951. (Para 16)

Petition dismissed. (E-14)

List of Cases cited:

1. Vidyacharan Shukla Vs Khubchand Baghel & ors.; (1964) 6 SCR 129

2. Hukumdev Narain Yadav Vs Lalit Narain Mishra; (1974) 2 SCC 133

3. Hari Shanker Tripathi Vs Shiv Harsh & ors.; (1976) 1 SCC 897

4. Mangu Ram Vs Municipal Corporation of Delhi; (1976) 1 SCC 392

5. Bengal Chemists & Druggists Assn. Vs Kalyan Chowdhury; (2018) 3 SCC 41

6. Krishnamoorthy Vs Sivakumar & ors.; (2015) 3 SCC 467

7. U.O.I.Vs Assn. for Democratic Reforms & anr.; (2002) 5 SCC 294

8. People's Union for Civil Liberties (PUCL) & anr. Vs U.O.I.& anr.; (2003) 4 SCC 399

9. Lily Thomas Vs U.O.I. & ors.; (2013) 7 SCC 653

10. Resurgence India Vs Election Commission of India & anr.; (2014) 14 SCC 189

11. Public Interest Foundation & ors. Vs U.O.I.& anr.; (2019) 3 SCC 224

12. N. Balakrishnan Vs M. Krishnamurthy; (1998) 7 SCC 123

13. Gopal Sardar Vs Karuna Sardar; (2004) 4 SCC 252

14. Charan Lal Sahu Vs Nand Kishor Bhatt; 1973 (2) SCC 530

15. K. Venkateswara Rao & anr.v. Bekkam Narasimha Reddi & ors.; AIR 1969 SC 872

16. Harishankar Tripathi Vs Shiv Harsh & ors., 1976 (1) SCC 897

17. Suman Devi Vs Manisha Devi & ors., 2018 (9) SCC 808

18. Lachhman Das Arora Vs Ganeshi Lal & ors.; 1999 (8) SCC 532

19. Thampanoor Ravi Vs Charupara Ravi & ors.; (1999) 8 SCC 74

20. Election Petition No. 7 of 2022 (Sheshmani Nath Tripathi (S.N. Tripathi In Short) Vs Shri Dinesh Rawat, The Returned Candidate

(Delivered by Hon'ble Rajan Roy, J.)

1. Heard Mr. Siddharth Luthra, learned Senior Advocate assisted by Mr. Prashant Singh Atal, Mr. Amit Jaiswal, Dr. Pooja Singh and Mr. Vijay Vikram Singh for the election-petitioner.

2. This Election Petition has been filed by the petitioner-Maneka Sanjay Gandhi challenging election of the returned candidate-Rambhual Nishad as Member of Parliament from Sultanpur 38-Lok Sabha constituency and that the same be declared as null and void and be set aside.

3. It is admitted case of the petitioner herein that the returned candidate was elected on 04.06.2024 and the result of was declared on 06.06.2024. This election petition has been filed on 27.07.2024.

4. As per Section 81 of the Representation of People Act, 1951 (hereinafter referred as 'Act 1951') such an election petition can be filed within 45 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 dates of their election are different, the later of those two dates.

5. The election petition has apparently been filed beyond the period of 45 days prescribed in Section 81 of the Act 1951. Section 86 of the Act 1951 provides that the High Court shall dismiss an election petition which does not comply with the provision of Section 81 or Section 82 or Section 117 of the Act 1951.

6. Apparently, Section 86 (1) of the Act 1951 referred hereinabove is mandatory and in the event an election petition is filed beyond the period of 45 days prescribed in Section 81 of the Act 1951 the High Court does not have any option but to dismiss the election petition in view of provision contained in Section 86 (1) of the Act 1951. There is no provision under the Act 1951 which permits condonation of such delay and extension of the limitation proscribed in Section 81 of the Act 1951 on any ground.

7. On being confronted, Mr. Luthra who joined the proceedings through Video Conferencing and argued the election petition submitted that the law has evolved and now Section 33-A has been added in the Act 1951 which requires a disclosure by the candidate about the criminal cases against him. The said provision gives a corresponding right to the elector etc. to information with regard to the person whom he is required to vote for. This right, according to him, is in fact part of the constitutional right as held in various decisions and in this context he relied upon decisions of Hon'ble Supreme Court of India in ***Vidyacharan Shukla vs. Khubchand Baghel and others; (1964) 6 SCR 129, Hukumdev Narain Yadav vs. Lalit narain Mishra; (1974) 2 SCC 133, Hari Shanker Tripathi vs. Shiv Harsh and Others; (1976) 1 SCC 897, Mangu Ram vs. Municipal Corporation of Delhi; (1976) 1 SCC 392, Bengal Chemists & Druggists Assn. vs. Kalyan Chowdhury; (2018) 3 SCC 41, Krishnamoorthy vs. Sivakumar and others; (2015) 3 SCC 467, Union of India vs. Assn. for Democratic Reforms and another; (2002) 5 SCC 294, People's Union for Civil Liberties (PUCL) and another vs. Union of India and another; (2003) 4 SCC 399, Lily Thomas vs. Union of India and others; (2013) 7 SCC 653, Resurgence India vs. Election Commission of India and another; (2014) 14 SCC 189, Public Interest Foundation and others vs. Union of India and another; (2019) 3 SCC 224, N. Balakrishnan vs. M. Krishnamurthy;***

(1998) 7 SCC 123 and Gopal Sardar vs. Karuna Sardar; (2004) 4 SCC 252. Relying upon the same, he also contended that much water has flown down the river and the law has evolved immensely since the decision in the case of ***Hukumdev Narain Yadav*** (supra) and the said decision as also the later decisions following it had not taken into consideration the insertion of Section 33-A in the Act 1951 and its impact. His submission was that the returned candidate had not disclosed four criminal cases pending against him and had submitted a false affidavit. It was also his submission that limitation should not legalize such illegal non-disclosures, as, ultimately the election was to the Parliament of India and considering the consequences on the functioning of the polity this by itself should be a ground for entertaining the election petition and for this Court to decide the same on merits.

8. The issue which has arisen in this election petition is no longer res integra. A three Judge Bench of Hon'ble Supreme Court of India in the case of Hukumdev Narain Yadav (supra) had the occasion to consider the same. Question of applicability of Section 5 of the Limitation Act to an election petition was specifically an issue before the Supreme Court in the said case, apart from other issues involved. It is, therefore, fruitful to refer to relevant extracts of the said judgment, especially as the Supreme Court also considered the provision of Section 86 (2) of the Act 1951 and its impact on the election petition in the said context. It held as under:

> *"16. In K. Venkateswara Rao and Anr. v. Bekkam Narasimha Reddi & Ors.; AIR 1969 SC 872 to which we shall refer more fully later, Vidyacharan Shukla's case (supra) was attempted to be pressed into service, but this Court repelled it and observed at pp. 688-689:*
>
> *"In our view, the situation now obtaining in an appeal to this Court from an order of the High Court is entirely different. There is no section in the Act as it now stands which equates an order made by the High Court under Section 98 or Section 99 to a decree passed by a Civil court subordinate to the High Court. An appeal being a creature of a statute, the rights conferred on the appellant must be found within the four corners of the Act. Sub-Section (2) of the present Section 116-A expressly gives this Court the discretion and authority to entertain an appeal after the expiry of the period of thirty days. No right is however given to the High Court to entertain an election petition which does not comply with the provisions of Section 81, Section 82 or Section 117."*
>
> *17. Though Section 29(2) of the Limitation Act has been made applicable to appeals both under the Act as well as under the Code of Criminal Procedure, no case has been brought to our notice where Section 29(2) has been made applicable to an election petition filed under Section 81 of the Act by virtue of which either Sections 4, 5 or 12 of the Limitation Act has been attracted. Even assuming that where a period of limitation has not been fixed for election petitions in the Schedule to the Limitation Act which is different from that fixed under Section 81 of the Act, Section*

29 (2) would be attracted, and what we have to determine is whether the provisions of this section are expressly excluded in the case of an election petition. It is contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. As usual the meaning given in the Dictionary has been relied upon, but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. The provisions of Section 3 of the Limitation Act that a suit instituted, appeal preferred and application made after the prescribed period shall be dismissed are provided for in Section 86 of the Act which gives a peremptory command that the High Court shall dismiss an election petition which does not comply with the provisions of Sections 81, 82 or 117. It will be seen that Section 81 is not the only section mentioned in Section 86, and if the Limitation Act were to apply to an election petition under Section 81 it should equally apply to Sections 82 and 117 because under Section 86 the High Court cannot say that by an application of Section 5 of the Limitation Act, Section 81 is complied with while no such benefit is available in dismissing an application for non-compliance with the provisions of Sections 82 and 117 of the Act, or alternatively if the provisions of the Limitation Act do not apply to Section 82 and Section 117 of the Act, it cannot be said that they apply to s. 81. Again, s. 6 of the Limitation Act which provides for the extension of the period of limitation till after the disability in the case of a person who is either a minor or insane or an idiot is inapplicable to, an election petition. Similarly, Sections. 7 to 24 are in terms inapplicable to the proceedings under the Act, particularly in respect of the filing of election petitions and their trial."

9. Hon'ble the Supreme Court opined in the said case that the applicability of the provisions of the Limitation Act by virtue of Section 29 (2) thereof is to be judged not from the terms of the limitation Act but by the provisions of the Act relating to filing of election petition and their trial to ascertain as to wherein it is

complete code in itself which does not admit application of any provisions of the Limitation Act mentioned in Section 29 (2) of that Act.

10. Referring to various earlier decisions of Hon'ble Supreme Court of India including those wherein it has been held that the Act 1951 was a complete Code and also taking into consideration various amendments made by the Legislature in the said Act, especially Section 81 thereof, and the earlier existing Section 85 which empowered the Election Commission in its discretion to condone the delay in presentation of the election petition and also taking into consideration the decision of Hon'ble the Supreme Court in the case of ***Charan Lal Sahu vs. Nand Kishor Bhatt; 1973 (2) SCC 530*** wherein it had been held that there is no question of any common law right to challenge an election as such any discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes and if no such discretion was conferred in respect of any of these matters none can be exercised under any general law or any principles of equity and if for non compliance of the provisions of Section 82 and 117 which is mandatory, the election petition has to be dismissed under Section 86 (1) of the Act 1951, presentation of election petition within the period prescribed in Section 81 of the Act 1951 would be equally mandatory, non-compliance of which visits the penalty of the petition being dismissed, it was held, for all the reasons mentioned, therein that provisions of Section 5 of the Limitation Act do not govern the filing of election petitions or their trial.

11. It also considered the plea that if the petitions were to be dismissed allegation of serious corrupt practices cannot be inquired into and purity of the elections cannot be maintained and found the answer to this plea in the judgment of Justice G.K. Mitter in ***K. Venkateswara Rao and Anr. v. Bekkam Narasimha Reddi & Ors.; AIR 1969 SC 872*** wherein his Lordship opined that this is however a matter which can be set right only by the Legislature. It is worthy of note that although the Act has been amended on several occasions, a provision like Section 86(1) as it now stands has always been on the statute book but whereas in the Act of 1951 the discretion was given to the Election Commission, to entertain a petition beyond the period fixed if it was satisfied as to the cause for delay no such saving clause is to be found now. The legislature in its wisdom has made the observance of certain formalities and provisions obligatory and failure in that respect can only be visited with a dismissal of the petition.

12. Their Lordships also took into consideration that since the decision in ***K. Venkateswara Rao (supra)*** decided in August, 1968, though the Parliament has made certain amendments in the Act 1969, it has not considered it necessary to amend the Act to confer, on persons challenging the election, benefits similar to those available to them under the proviso to the repealed Section 85 of the Act 1951, for, as it did not want delays to occur in the disposal of election petitions as in the past. Under the repealed Section 85 there was a provision for condonation of delay in filing election petition but there is no such provision in the Act 1951 existing as of now.

13. It is not out of place to mention that in ***Hukumdev Narain Yadav (supra)***, Hon'ble the Supreme Court also considered the constitution bench judgment in the case of Vidyacharan Shukla (supra).

14. ***Hukumdev Narain Yadav*** (supra) has been followed in various later decisions such as ***1976 (1) SCC 897 (Harishankar Tripathi vs. Shiv Harsh and others); 2018 (9) SCC 808 (Suman Devi vs. Manisha Devi and others).***

15. Another three Judge Bench of Hon'ble the Supreme Court in ***Lachhman Das Arora vs. Ganeshi Lal and others; 1999 (8) SCC 532*** construed the provisions of Section 81 (1) of the Act 1951 and has held as under:

> *"7. On its plain reading, Section 81(1) lays down that an election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101 of the Act to the High Court by any candidate at such election or by an elector 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. The Act is a special code providing a period of limitation for filing of an election petition. No period for filing of an election petition is prescribed under the Indian Limitation Act. The Act insofar as it relates to presentation and trial of election disputes is a complete code and a special law. The scheme of the special law shows that the provisions of Sections 4 to 24 of the Indian Limitation Act do not apply. If an election petition is not filed within the prescribed period of forty-five days, Section 86(1) of the Act, which provides that the High Court shall dismiss an election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117, is straightaway attracted."*

This decision has been followed in the subsequent decision in **Suman Devi (supra).**

16. From the aforesaid discussion it is apparent that the Limitation Act, 1963, especially Section 5 thereof, is not applicable to election petitions. In fact, the applicability appears to be specifically excluded in view of the provision of Section 86 (1) of the Act 1951 which makes it mandatory for the High Court/Election Judge to dismiss the election petition if it is not in conformity with the provision of Section 81 of the Act 1951.

17. It is not out of place to mention that the High Court while hearing an election petition operates as an Authority under Article 329 (b) of the Constitution of India whose jurisdiction is circumscribed by the statutory provisions contained in the Act 1951. The legal position in this regard has been settled by a three Judge Bench in the case of ***Thampanoor Ravi vs. Charupara Ravi and Others; (1999) 8 SCC 74***. The said judgment has been followed by a Division Bench of this Court on a reference made by a learned Single Judge in the context of an election petition

bearing ***Election Petition No. 7 of 2022 (Sheshmani Nath Tripathi (S.N. Tripathi In Short) vs. Shri Dinesh Rawat, The Returned Candidate***. The High Court while hearing an election petition does not function as a Constitutional Court per se nor does it have extraordinary constitutional or inherent powers as has been held in ***Thampanoor Ravi (supra)*** and the Division Bench of this Court in ***Sheshmani Nath Tripathi (supra)***, therefore, the contention of Mr. Luthra that the violation of constitutional right to right to information should be considered is not acceptable. Unless and until the election petition is maintainable and is not barred by limitation, the merits of the matter cannot be considered. In fact such a plea has already been considered in Hukumdev Narain Yadav (supra) with reference to opinion of Justice Mitter in ***K. Venkateswara Rao's*** case as already referred earlier.

18. For all these reasons, this election petition being barred by Section 81 read with Section 86 of the Act 1951 and Order VII Rule 11(d) of the Code of Civil Procedure is liable to be dismissed. It is accordingly ***dismissed***.

(2024) 8 ILRA 1173
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.08.2024

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Government Appeal No. 387 of 2024

State ...Appellant
Versus
Shivakant Bajpai ...Respondent

Counsel for the Appellant:
Alok Ranjan Mishra

Counsel for the Respondent:
Manjul Mishra

Criminal Law – Criminal Procedure Code, 1973 - Section 378(3) - The Railways Act, 1989 - Sections 154 & 174 - Appeal against acquittal- allegedly damaging a railway boom lock post with a truck- lack of corroborative evidence for the alleged extra-judicial confession- Section 25 Indian Evidence Act-Section 313 CrPC- need for independent corroboration of such confessions- trial court's acquittal was justified- States's prayer to leave for appeal refused- Appeal dismissed. (Paras 7 to 12, 20, 24, 26, 29, 31 and 32)

HELD:
Considering the oral and documentary evidence on record adduced by the prosecution, the trial court opined that out of the four witnesses examined by the prosecution, PW-1 is the only witness who had seen the occurrence and rest of the witnesses are formal witnesses. Discussing the averments made by PW-1 in his evidence, the trial court has quoted the relevant statements made by him wherein he states that during investigation no identification parade of the accused was conducted by the Investigating Officer and the driver, who fled away after the incident, is not identifiable by him even today. (para 20)

The confession allegedly made by the accused respondent falls within the category of 'extra judicial confession' and the law on the subject has been clarified by the Hon'ble Apex Court in a catena of decisions and the principle that emerges out as essence from the various decisions is that the extra judicial confession can be accepted and can be made the basis of conviction if it passes the test of credibility and such confession should inspire confidence and the Court must find out whether there are other cogent circumstances on record to corroborate it. (Para 24)

This Court cannot lose sight of the fact that in this case the alleged extra judicial confession made by the accused respondent is surrounded by suspicious circumstances because the owner

of the vehicle, who is said to have taken the accused respondent with him to disclose the fact that he was the person who was driving the offending vehicle at the time of the incident, was not chosen to be produced as a witness by the prosecution and hence from the very inception the alleged confession made by the accused respondent falls under the shadow of suspicion. In these circumstances it appears that only to show the good work, the R.P.F. officials falsely roped the accused respondent in this case. Hence, the alleged extra judicial confession, which is not supported by any cogent independent evidence, loses its importance and its credibility becomes doubtful in the case like this. (Para 26)

The learned trial Court has given logical and plausible findings in the impugned judgement and has rightly concluded that the prosecution has miserably failed to prove its case beyond reasonable doubt. The judgment and order of the trial court under judicious scrutiny is just and proper and carries no perversity therein, hence it does not warrant any interference by this Court. The reasoning adopted by the learned Trial Judge is based upon proper application of judicial mind. No illegality or infirmity is found in the impugned judgment and order and it needs no interference by this Court in exercise of its power under Section 378 CrPC. (Para 31)

Appeal dismissed. (E-14)

List of Cases cited:

1. Balakishan A. Devidayal Vs St. of Mah., (1980) 4 SCC 600

2. State Vs Shivendra Pratap Singh, 1979 SCC Online All 377

3. Jafarudheen & ors. Vs St. of Kerala, 2022 SCC Online SC 495

4. Mohan alias Srinivas @ Seena @ Tailor Seena Vs St. of Karn., (2022) 12 SCC 619

5. Atley Vs St. of U.P., 1955 Cri. LJ 1653

6. Bannareddy Vs St. of Karn., (2018) 5 SCC 790

7. Ramesh Babulal Doshi Vs St. of Guj., (1996) 9 SCC 225

8. Subramanya Vs St. of Karn., (2023) 11 Supreme Court Cases 255

9. Pakkirisamy Vs St. of T.N. (1997) 8 SCC 158

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

Ref : Criminal Misc. Application (Leave to Appeal)

1. The present government appeal under Section 378 (3) CrPC has been filed against the impugned judgement and order dated 25.4.2023 passed by the Additional Chief Judicial Magistrate, Northern Railway, Bareilly in Criminal Case No. 592 of 2013, arising out of Case Crime No.101 of 2013 under Sections 154 and 174 of the Railways Act, 1989, Police Station R.P.F. Post Shahjahanpur, Moradabad Division, Northern Railway whereby accused-respondent was acquitted.

2. Heard Shri Alok Ranjan Mishra, learned Standing Counsel appearing for the Government of India at length. None is present for the accused-respondent.

3. The prosecution story, in nutshell, is that boom lock post of the Railway Department was broken by a Truck bearing Registration No. UP26-9171 being driven by its driver in a rash and negligent manner and the driver of the said Truck fled away from the place of occurrence but the Truck was taken into possession by the police. F.I.R. as Case Crime No.101 of 2013 under Sections 154 and 174 of the Railways Act, 1989 was lodged. After investigation, the police report was submitted to the court for trial. Copies of necessary papers were given to

the accused and his statement under Section 251 CrPC was recorded wherein he denied the incident. Trial started and during trial, the prosecution produced as many as four prosecution witnesses. In addition to this, the prosecution has also produced number of documents, which were duly exhibited and proved during trial. Accused respondent in his statement recorded under Section 313 CrPC denied the factum of incident and the truthfulness of prosecution evidence. The learned Magistrate after thrashing the evidence and critically analysing them has come to the conclusion that the prosecution has failed to establish the case beyond reasonable doubt and, therefore, the accused Shiva Kant Bajpayee was set at liberty and was acquitted.

4. Aggrieved with the said judgement and order, the instant Government Appeal under Section 378 (3) Cr.P.C. on behalf of the State through D.S.C./ R.P.F. Moradabad Division / appellant has been filed.

5. Learned Counsel appearing for the appellant State submitted that in this case the appellant had confessed his guilt before the officer of R.P.F. conducting an enquiry and the said confession is not hit by the provisions of Section 25 Evidence Act, as the officer of R.P.F. does not fall into the category of 'Investigating Officer' and his status is not the same as it is in a case of Police Officer investigating the case and hence his confession made before the officer of the R.P.F. is admissible in evidence and his confessional statement in this case cannot be excluded from the category of 'evidence'. It is further submitted that since the trial court totally ignored the confessional statement made by the accused himself, which was fully admissible in evidence, the findings of acquittal of the accused respondent is illegal and not sustainable. It is also submitted that on the basis of other oral and documentary evidence on record the prosecution has established and proved its case beyond reasonable doubt but the trial court failed to appreciate the evidence in its true perspective and acquitted the accused respondent by wrong appreciation of the evidence available on record. Findings recorded by the trial court in the impugned judgment and order are illegal and perverse warranting interference by this Court.

6. In support of his submissions, learned counsel for the appellant - State placed reliance upon a decision of Hon'ble Supreme Court in **Balakishan A. Devidayal vs. State of Maharashtra, (1980) 4 SCC 600** and a decision of this Court in **State vs. Shivendra Pratap Singh, 1979 SCC Online All 377**.

7. Since it is a an appeal against the acquittal, it will be relevant to note the principles of law laid down by the Apex Court with regard to the appreciation of evidence and approach to be adopted while dealing with an appeal against acquittal.

8. In **Jafarudheen and others vs. State of Kerala, 2022 SCC Online SC 495**, reiterating the principle on the subject the Hon’ble Apex Court reminded to the Courts as extracted below:

> *“25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.PC, the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal*

adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters."

9. In **Mohan alias Srinivas alias Seena alias Tailor Seena vs. State of Karnataka, (2022) 12 SCC 619**, the Hon'ble Apex Court held as hereunder:

"20. Section 378 CrPC enables the State to prefer an appeal against an order of acquittal Section 384 CrPC speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with a case of an acquittal.

10. In **Atley v. State of U.P., 1955 Cri. LJ 1653**, the approach of the appellate court while considering a judgment of acquittal was discussed and it was observed that unless the appellate court comes to the conclusion that the judgment of the acquittal was perverse, it could not set aside the same.

11. The Hon'ble Apex Court in the case of **Bannareddy v. State of Karnataka, (2018) 5 SCC 790**, has considered the power and jurisdiction of the High Court while interfering in an appeal against acquittal and held as under :

"26. The High Court should not have re-appreciated the evidence in its entirety, especially when there existed no grave infirmity in the findings of the trial Court. There exists no justification behind setting aside the order of acquittal passed by the trial Court, especially when the prosecution case suffers from several contradictions and infirmities".

12. In **Ramesh Babulal Doshi vs. State of Gujarat, (1996) 9 SCC 225**, the Hon'ble Apex Court observed vis-a-vis the powers of an appellate court while dealing

with a judgment of acquittal and held like this :

> *"7. While sitting in judgment over an acquittal the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions."*

13. In the light of the submissions made by learned counsel for the appellant / State, I have carefully gone through the evidence available on record, analysis and appreciation thereof and conclusion arrived at by the trial court in the impugned judgment and order dated 25.4.2023.

14. It is a case where boom lock post of the Railway Department was hit by a Truck being driven by its driver in a rash and negligent manner and the driver of the said Truck fled away from the place of occurrence and subsequently the registered owner of the said Truck Vijay Kumar Singh brought him in person to the outpost Sitapur, where he is said to have admitted his guilt.

15. PW-1-Mahesh Prasad - Gateman/ kantewala is the eye witness of this case but this witness has admitted before the trial court that the driver of the ruck fled away from the spot and he cannot identify him even if he comes before him. He has fairly conceded that during investigation no identification parade of the accused was conducted by the Investigating Officer and even today he is unable to identify the truck driver.

16. PW-2 - S.K. Vidhyarthi / S.S.E. Signal is the Railway Officer, who made a joint inspection of the place of occurrence alongwith R.P.F. police officials. He is a formal witness, who proves memo of recovery of the truck Ext. ka-1, inspection report Ext. ka-3, site plan Ext. ka-4 but at the same time on the basis of documentary evidence he also establishes the factum of collusion of the Truck with the boom lock post.

17. PW-3 S.I. Akhilesh Kumar Yadav working in R.P.F. though has made some statements regarding the facts of this case but as a matter of fact he is not an eye witness of the incident and is a formal witness and his evidence on the facts of the incident is an outcome what he received from the gate-man. F.I.R. of this case was lodged against unknown driver. This witness himself has enquired into the matter. He proves the registration G.D. Ext. ka-5 and corroborates the evidence of PW-2 by identifying his own signatures on Ext. ka-1, Ext. ka-3 and Ext. ka-4. He also proves the fact that one person alongwith the owner of the offending vehicle Vijay Kumar Singh came to the outpost on 28.2.2013 and confessed his quilt as to he himself was driving the offending vehicle at the time when it collided with the boom lock post. He further states that subsequently, the accused was arrested and memo of arrest was prepared which is Ext. ka-6. This witness further proves copy of

G.D. as Ext. ka-7, the confessional statement of the offending driver recorded in the presence of owner of the vehicle Vijay Kumar Singh as Ext. ka-8. The statement of Vijay Kumar Singh has also been proved by this witness as Ext. ka-9. After technical inspection, the offending vehicle was given in the supurdgi of the owner thereof and the memo thereof has been proved as Ext. ka-10 by this witness. After completing the investigation, a complaint was submitted to the Court which has also been proved by him as Ext. ka-11. Further he has fairly conceded that after taking the accused into custody, no identification of the accused was performed by the gate man Mahesh Prasad.

18. PW-4 - Constable Vipin Kumar Sharma is also said to be a witness of fact but a perusal of his deposition shows that he is not an eye witness of the incident but he came to the spot after the incident took place. He has identified his signatures over Ext.ka-1 and Ext. ka-6.

19. The genuineness of technical inspection report in respect of the offending vehicle has been admitted by the learned counsel for defence, which is Ext. ka-12.

20. Considering the oral and documentary evidence on record adduced by the prosecution, the trial court opined that out of the four witnesses examined by the prosecution, PW-1 is the only witness who had seen the occurrence and rest of the witnesses are formal witnesses. Discussing the averments made by PW-1 in his evidence, the trial court has quoted the relevant statements made by him wherein he states that during investigation no identification parade of the accused was conducted by the Investigating Officer and the driver, who fled away after the incident, is not identifiable by him even today.

21. In these circumstances even if the documentary evidence produced by the prosecution is taken to be genuine, the Court cannot shut its eyes to the fact that in the statement under Section 313 CrPC a total denial to the incident is found on the part of the accused respondent. He has averred that he never collided with the railway gate by driving any Truck nor committed any offence, as alleged. The trial court in these circumstances has opined that the statements of the accused respondent and the owner of the vehicle, allegedly recorded by the R.P.F. official, which are produced in evidence as Ext. ka-8 and Ext. ka-9 respectively require corroboration by some other evidence. Even if the submissions made by the learned counsel for the appellant is taken to be true that a confessional statement was recorded by the driver before the R.P.F. official which is admissible in evidence, the question arises as to whether the accused is liable to be convicted only on the basis of his alleged confession made before the R.P.F. official or any further special sparking test was needed to prove the guilt of the accused. To take a statement of an accused as an admissible piece of evidence is one thing but whether this evidence has been corroborated by some other cogent piece of evidence before being acted upon is a quite different thing, particularly in a situation where in his statement under Section 313 CrPC rendered before the Court of law, the accused claims his innocence and states the same in his statement under Section 251 CrPC as well and thereby categorically denies as to he, in any way, was the author of the crime. The prosecution was under obligation to prove by any cogent corroborative piece of

evidence that the accused respondent had confessed his guilt before the R.P.F. official.

22. So far as the decisions relied upon by the learned State Counsel appearing for the appellant-State are concerned, in **Balakishan A. Devidayal case (supra),** it has been held by the Hon'ble Apex Court as under :

> *"58……in the light of the above discussion, it is clear that an officer of the RPF conducting an enquiry under Section 8 (1) of, the 1966 Act has not. been invested will all the powers of an officer-in-charge of a police station making an Investigation under Chapter XIV of the Code. Particularly, he has no power to initiate prosecution by filing a charge-sheet before the Magistrate concerned under Section 173 of the Code, which his been held to be the clinching attribute of an investigating 'police officer'. Thus, judged by the test laid down in Badku Jyoti Savant's case, which has been consistently adopted in the subsequent, decisions noticed above, Inspector Kakade of the RPF could not be deemed to be a 'police officer, within the meaning of Section 25 of the Evidence Act, and therefore, any confessional or incriminating statement recorded by him in the course of an inquiry under Section 8 (1) of the 1966 Act, cannot be excluded from evidence under the said section.*

23. In **State vs. Shivendra Pratap Singh case** (supra) this Court held as under :

> *"4……The main point to be decided in this appeal therefore, is whether the confessional statement Ex Ka-17 is hit under Section 162 Cr.P.C. The learned Assistant Government Advocate has placed reliance on the case of State v Durga Prasad, AIR 1974 SC 2136 in which it was held that the enquiry under Sec. 8 (i) of the Railway Property (Unlawful Possession) Act, 1966 by an officer of the Railway Protection Force cannot be deemed to be an investigation for the purposes of Sec. 162 Cr.P.C. In that case the officer of the R. P. F. making enquiry had obtained the signatures of the witnesses on their statements and the argument was that he had committed flagrant violation of Sec. 162 Cr.P.C. and the entire trial was vitiated because those statements had been brought on the record and had been put to the witnesses in the examination-in-chief. Hon'ble Supreme Court held, overruling the decision of the High Court that the trial was not vitiated even though such- statements signed by the witnesses had been brought on the record. The order of acquittal was set aside and the order of conviction recorded by the Sessions Judge was restored. This decision is dated 28-3-74 while the learned Magistrate had decided the present case on 11-7-73 when this decision was not available. In that judgment their Lordships referred to the earlier decision in the case of Radhu Joti Savant v. State, AIR 1966 SC 1746. It was a case under the Central Excise and Customs Act. The provisions of Section 21 (i)*

(ii) of that Act and the provisions of Sec. 8 (i) and (ii) of the Railway Property (Unlawful Possession) Act were held to be identical in material respects. In the earlier decision it was held that the confession made by an accused before the Central Excise Officer was not hit under Section 25 of the Indian Evidence Act as it would not be deemed to have been recorded under Section 162 CrPC. By referring to the earlier decision of 1966 their Lordships made it abundantly clear that the same principles would apply to a confessional statement made under R. P. (U. P.) Act even though they were not actually considering confessional statement. They were only considering the statements of witnesses recorded by the enquiry officer after obtaining their signatures. In the light of this decision of the Hon. Supreme Court there can be no doubt that the view taken by the learned Magistrate on the point of Section 162 CrPC is erroneous ami the confessional statement (paper no. A-6) Ex. 17 cannot be hit by Sec. 162 CrPC."

24. The confession allegedly made by the accused respondent falls within the category of 'extra judicial confession' and the law on the subject has been clarified by the Hon'ble Apex Court in a catena of decisions and the principle that emerges out as essence from the various decisions is that the extra judicial confession can be accepted and can be made the basis of conviction if it passes the test of credibility and such confession should inspire confidence and the Court must find out whether there are other cogent circumstances on record to corroborate it.

25. In **Subramanya vs. State of Karnataka, (2023) 11 Supreme Court Cases 255**, the Hon'ble Apex Court explaining the law on the subject held as under :

"54. Extra judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. It is considered to be a weak piece of evidence as it can be easily procured whenever direct evidence is not available. In order to accept extra judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra judicial confession is voluntary, it can be acted upon to base the conviction."

"55. Considering the admissibility and evidentiary value of extra judicial confession, after referring to various judgments, in Sahadevan and Another v. State of Tamil Nadu, (2012) 6 SCC 403, this Court held as under:-

"15.1. In Balwinder Singh v. State of Punjab [1995 Supp (4) SCC 259 : 1996 SCC (Cri) 59] this Court stated the principle that: (SCC p. 265, para 10)

"10. An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extra-judicial confession is surrounded by suspicious

circumstances, its credibility becomes doubtful and it loses its importance."

26. This Court cannot lose sight of the fact that in this case the alleged extra judicial confession made by the accused respondent is surrounded by suspicious circumstances because the owner of the vehicle, who is said to have taken the accused respondent with him to disclose the fact that he was the person who was driving the offending vehicle at the time of the incident, was not chosen to be produced as a witness by the prosecution and hence from the very inception the alleged confession made by the accused respondent falls under the shadow of suspicion. In these circumstances it appears that only to show the good work, the R.P.F. officials falsely roped the accused respondent in this case. Hence, the alleged extra judicial confession, which is not supported by any cogent independent evidence, loses its importance and its credibility becomes doubtful in the case like this.

27. The observation made by the Hon'ble Supreme Court in **Pakkirisamy vs. State of T.N. (1997) 8 SCC 158** is relevant in the circumstances of this case, which is as under :

"8..... It is well settled that it is a rule of caution where the court would generally look for an independent reliable corroboration before placing any reliance upon such extra-judicial confession."

28. The evidence of R.P.F. officials as prosecution witnesses to prove the extra judicial confession allegedly made by the accused / respondent cannot be taken as a reliable piece of evidence as none of the witnesses has seen him committing the crime. When the accused himself denies of any of the confessional statements made before R.P.F. officials by him and the owner of the vehicle, who is said to have taken the accused with him to the R.P.F Officers, has not come forward to depose the aforesaid fact before the trial court, the accused could not be convicted on the basis of the testimony of highly interested witnesses and in this way the prosecution lacks an independent reliable corroboration of the so-called extra judicial confession made by the accused.

29. This Court also takes cognizance of this fact that the prosecution evidence was not explicitly clear that the so-called extra judicial confession made by the accused respondent was voluntarily and true and made in a fit state of mind and in the event of such omission made on the part of the prosecution to prove the aforesaid factum of confession by some corroborative reliable piece of evidence, the extra judicial confession cannot be relied upon by this Court. In fact the confession made by an accused requires to be proved like any other fact. It is a weak type of evidence and although there is no absolute rule that it can never be the basis of a conviction but ordinarily such confession should be corroborated by some other material evidence to enable the Court to satisfy itself in regard to voluntariness and truthfulness of the confession and the corroborative evidence thereof.

30. Moreover, this fact cannot be lost sight of that Vijay Kumar Singh, the owner of the vehicle, was not produced by the prosecution as a witness to prove his statement which was given by him before the R.P.F. officials. For want of such substantial evidence, the trial court

correctly found that the accused respondent is entitled to get benefit of doubt. The trial court has elaborately discussed the oral and documentary evidence on record and reached the right conclusion and committed no mistake in recording the acquittal of the accused respondent.

31. The learned trial Court has given logical and plausible findings in the impugned judgement and has rightly concluded that the prosecution has miserably failed to prove its case beyond reasonable doubt. The judgment and order of the trial court under judicious scrutiny is just and proper and carries no perversity therein, hence it does not warrant any interference by this Court. The reasoning adopted by the learned Trial Judge is based upon proper application of judicial mind. No illegality or infirmity is found in the impugned judgment and order and it needs no interference by this Court in exercise of its power under Section 378 CrPC.

32. Thus, the application moved by the appellant - State to grant leave to appeal for the reasons discussed here-in-above is not liable to be allowed and the said prayer is refused.

Re : Government Appeal

1. Since the application for grant of leave to appeal has been disallowed, the government appeal is also not liable to be admitted and same is **dismissed** at this stage.

2. This Court is thankful to learned Advocate and Mr. Akash Verma, Research Associate of this Court for ably assisting the Court.

(2024) 8 ILRA 1182
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 01.08.2024

BEFORE

THE HON'BLE MAYANK KUMAR JAIN, J.

Original Suit No. 1 of 2023
Alongiwith other connected cases

Bhagwan Shrikrishna Virajman & Ors.
...Plaintiffs
Versus
U.P. Sunni Central Waqf Board & Ors.
...Defendants

Counsel for the Plaintiffs:
Sri Prabhash Pandey, Sri Pradeep Kumar Sharma

Counsel for the Defendants:
Sri Gulrez Khan, Sri Hare Ram, Sri Nasiruzzaman, Sri Punit Kumar Gupta

A. Chronicle of facts-Shri Krishna is believed to have been born at Katra Keshav Dev, Mathura, over 5000 years ago- A temple at this site was historically constructed and reconstructed by various Hindu rulers, including Shri Brajnabha (great-grandson of Shri Krishna), Chandragupta Vikramaditya, and Raja Veer Singh Bundela- temple was demolished multiple times by invaders like Mahmud Ghaznavi, Sikandar Lodi, and Aurangzeb, the latter constructing a mosque (Shahi Idgah) over the temple ruins in 1670- In 1815, Raja Patnimal purchased the 13.37 acres of Katra Keshav Dev land in a public auction conducted by the British-His legal heirs-maintained ownership, affirmed through multiple suits and decrees till 1935- In 1951, Shree Krishna Janmabhoomi Trust was created by industrialist Jugal Kishore Birla- In 1964, Sewa Sansthan, a distinct entity with no legal claim over the land, filed Civil Suit No. 43/1967 against the Trust Shahi Idgah- A compromise decree was passed on 20.07.1973 and 07.11.1974 in favour of maintaining status quo between the structures, allegedly without authority from the lawful trust- Multiple suits and

appeals followed questioning the validity of this compromise, its legality, and its binding effect. (Para 13)

B. Statutes involved- Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 2(a), Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 2(g), Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 2(j), Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 3, Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 39, Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 39(2), Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 4, Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 6, Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 6(2), Ancient Monuments And Archaeological Sites And Remains Act, 1958 - Section 9; Ancient Monuments Preservation Act, 1904 [repealed] - Section 3, Ancient Monuments Preservation Act, 1904 [repealed] - Section 3(3); Code of Civil Procedure, 1908 (CPC) - Order VI Rule 13; Code of Civil Procedure, 1908 (CPC) - Order VI Rule 17; Code of Civil Procedure, 1908 (CPC) - Order VII Rule 11; Code of Civil Procedure, 1908 (CPC) - Order VII Rule 11 (d); Code of Civil Procedure, 1908 (CPC) - Order VII Rule 11(d); Code of Civil Procedure, 1908 (CPC) - Order VII Rule 13; Code of Civil Procedure, 1908 (CPC) - Order VII Rule 7; Code of Civil Procedure, 1908 (CPC) - Order XIV Rule 2; Code of Civil Procedure, 1908 (CPC) - Order XXIII Rule 3; Code of Civil Procedure, 1908 (CPC) - Order XXIII Rule 3-A, Code of Civil Procedure, 1908 (CPC) - Order XXIII Rule 3A; Code of Civil Procedure, 1908 (CPC) - Order XXIII Rule XXIII; Code of Civil Procedure, 1908 (CPC) - Order XXVI Rule 10; Code of Civil Procedure, 1908 (CPC) - Order XXVI Rule 9; Code of Civil Procedure, 1908 (CPC) - Order XXXIX Rule 1; Code of Civil Procedure, 1908 (CPC) - Order XXXIX Rule 2; Code of Civil Procedure, 1908 (CPC) - Order XXXIX Rule 2-A, Code of Civil Procedure, 1908 (CPC) - Section 151; Code of Civil Procedure, 1908 (CPC) - Section 9; Code of Civil Procedure, 1908 (CPC) - Section 92; Constitution Of India - Article 226, Constitution Of India - Article 25, Constitution Of India - Article 26; Electricity Act, 2003 - Section 135; Indian Evidence Act, 1872 [repealed] - Section 90; Indian Penal Code 1860, (IPC) [repealed] - Section 116; Limitation Act, 1963 - Section 17, Limitation Act, 1963 - Section 17 (1), Limitation Act, 1963 - Section 17(1), Limitation Act, 1963 - Section 2 (j), Limitation Act, 1963 - Section 23, Limitation Act, 1963 - Section 3; Places Of Worship (special Provisions) Act, 1991 - Section 2 (b), Places Of Worship (special Provisions) Act, 1991 - Section 2 (c), Places Of Worship (special Provisions) Act, 1991 - Section 2(b), Places Of Worship (special Provisions) Act, 1991 - Section 2(c), Places Of Worship (special Provisions) Act, 1991 - Section 3, Places Of Worship (special Provisions) Act, 1991 - Section 4, Places Of Worship (special Provisions) Act, 1991 - Section 4 (1), Places Of Worship (special Provisions) Act, 1991 - Section 4 (2), Places Of Worship (special Provisions) Act, 1991 - Section 4(1), Places Of Worship (special Provisions) Act, 1991 - Section 4(2), Places Of Worship (special Provisions) Act, 1991 - Section 4(3), Places Of Worship (special Provisions) Act, 1991 - Section 6, Places Of Worship (special Provisions) Act, 1991 - Section 7; Specific Relief Act 1963 - Section 34, Specific Relief Act 1963 - Section 5, Specific Relief Act 1963 - Section 6; Specific Relief Act, 1877 [repealed] - Section 42; St.s Reorganisation Act 1956 - Section 126; Uttar Pradesh Ancient And Historical Monuments And Archaeological Sites And Remains Preservation Act, 1956 - Section 3; Uttar Pradesh Muslim Waqfs Act, 1960 - Section 6; Wakf Act, 1954 [repealed] - Section 16, Wakf Act, 1954 [repealed] - Section 5, Wakf Act, 1954 [repealed] - Section 69 (2); Waqf Act, 1995 - Section 108-A, Waqf Act, 1995 - Section 108A, Waqf Act, 1995 - Section 112, Waqf Act, 1995 - Section 3(r), Waqf Act, 1995 - Section 4, Waqf Act, 1995 - Section 5,

Waqf Act, 1995 - Section 5 (2), Waqf Act, 1995 - Section 6, Waqf Act, 1995 - Section 6(1), Waqf Act, 1995 - Section 6(5), Waqf Act, 1995 - Section 7, Waqf Act, 1995 - Section 7(1), Waqf Act, 1995 - Section 7(2), Waqf Act, 1995 - Section 83, Waqf Act, 1995 - Section 83(1), Waqf Act, 1995 - Section 83(5), Waqf Act, 1995 - Section 85, Waqf Act, 1995 - Section 86, Waqf Act, 1995 - Section 89, Waqf Act, 1995 - Section 90, Waqf Act, 1995

C. Scope of Order VII Rule 11 of the CPC-cause of action-bundle of facts-plaintiffs must prove to succeed- facts pleaded in the plaint reveal cause of action as averred in their plaints- defence of the defendant or the written St.ment filed on their behalf need not be considered- only the averments made in the plaint are to be considered at the time of the disposal of such application- prima facie it appears that a valid cause of action arose to the plaintiffs to institute suits. (paras 170, 172, 178 and 179)

HELD:

A cause of action is a bundle of facts, which the plaintiffs must prove, to succeed in their suits. A cause of action is constituted on the basis of various facts averred in the plaint. (para 170)

Perusal of the respective plaints, as a whole, goes to show that the historical background of the matter, averments made in the plaints about the title, ownership and possession of Raja Patnimal of Benaras and his legal heirs over the property of Katra Keshav Dev measuring 13.37 acres, several rounds of subsequent litigations establishing the title and possession of suit property in their favour, the execution of sale deed in favour of Mahamana Pandit Madan Mohan Malviya & ors., creation of the Janmabhoomi Trust by Late Sri Jugal Kishore Birla, institution of Suit No.43 of 1967 by Sewa Sansthan, the compromise dated 12.10.1968 entered into between the parties, construction of superstructure known as 'Shahi Idgah Masjid' by the defendants, and execution of certain documents from time to time which are brought on record by plaintiffs, are bundle of facts which indicate that the plaintiffs have a cause of action to institute present suits. All these peculiar facts and circumstances constitute a cause of action as averred in their respective plaints. (Para 172)

It is a settled law that the defense of the defendant or the written St.ment filed on their behalf need not be considered and only the averments made in the plaint are to be considered at the time of the disposal of such application. (Para 178)

I am of the considered view that after perusal of the plaints, as a whole and meaningfully, documentary evidence brought on record and oral arguments advanced by the learned Counsel for the parties, prima facie it appears that a valid cause of action arose to the plaintiffs to institute the suits. At this stage, it cannot be assumed that the plaints do not disclose a cause of action as agitated by the learned Counsel for the defendants. (Para 179)

D. Bar under the Limitation Act, 1963-Articles 58 and 59 of the Limitation Act, 1963-relief of declaration can be sought within three years-averments made in the plaint disclose illusory cause of action-date of knowledge-question of limitation is directly related to the cause of action-cause of action, being the mixed question of fact and law-can be examined on the basis of evidence led by parties during trial- e plea of limitation can be decided based on the pleadings of the parties after framing an issue under Order VI Rule 13 of the CPC-mixed question fact and law-on the question of limitation, the plaints cannot be rejected at the threshold. (paras 180,189, 190, 191, 194 and 195)

HELD:

The aforesaid recital about the name of the trust and description of the property of Katra Keshav Dev clearly shows that Suit No. 43 of 1967 was filed by concealing the true facts by its plaintiffs. Sewa Sansthan was not the owner and was not in possession of the property of Katra Keshav DeVs It misrepresented itself as the owner and Zamindar and in possession of entire area of 13.37 acres land known as Katra Keshav DeVs Further the property was endowed to the Janmabhoomi Trust and not to Sewa Sansthan by the trust deed dated 09.03.1951. The property endowed to the Janmabhoomi

Trust was mentioned in the trust deed by metes and bounds. (Para 189)

Conclusively, Suit No. 43 of 1967 was not filed by its plaintiffs by disclosing their true identity and their status qua the property. Since the property of Katra Keshav Dev was endowed to the Janmabhoomi Trust and it was never transferred or vested in Sewa Sansthan, therefore, the plaintiffs in the said suit had no right or authority, either to file the suit or to enter into the compromise dated 12.10.1968 and to concede two bighas land of the temple to the defendants. (Para 190)

In the case in hand, the question of limitation is directly related to the cause of action. The cause of action, being the mixed question of fact and law, as averred in the plaints can only fuller and finally be examined on the basis of the evidence led by the parties during the trial. (Para 191)

The plea of limitation can be decided based on the pleadings of the parties after framing an issue under Order VI Rule 13 of the CPC. On the basis of the chain of events as averred in the plaints, at this stage, when the maintainability of the suit is challenged by the defendants, the question of limitation cannot be determined without framing an issue and taking the evidence of the parties. Since the question of limitation is a mixed question of fact and law, therefore, on the question of limitation, the plaints cannot be rejected at the threshold. (para 194)

E. Bar under Order XXIII Rule 3A of the CPC- Suit No. 43 of 1967 was filed in 1967- compromise was entered on 12.10.1968- title and the possession of Shahi Masjid Idgah were settled on the basis of the terms of such compromise- provisions of Order XXIII Rule 3A of the CPC would apply- decree is challenged by any of the parties already arrayed in the suit-plaintiffs not party to the suit in which compromise was reached- e plaintiffs are strangers to the proceedings in Suit No.43 of 1967- express bar imposed under the provisions of Order XXIII Rule 3A of the CPC does not apply. (paras 196, 200 and 202)

HELD:

The provisions of Order XXIII Rule 3A of the CPC would apply where the decree is challenged by any of the parties already arrayed in the suit. Had the compromise dated 12.10.1968 been challenged by the parties to Suit No.43 of 1967, the subsequent suit brought by the parties to that suit would have been barred by the provisions under Order XXIII Rule 3A of the CPC. (para 200)

Since the plaintiffs are strangers to the proceedings in Suit No.43 of 1967, therefore, the express bar imposed under the provisions of Order XXIII Rule 3A of the CPC does not apply. Hence, I am of the view that the suits of the plaintiffs are not barred by the provisions contained under Order XXIII Rule 3A of the CPC. (Para 202)

F. Bar under the Places of Worship (Special Provisions) Act, 1991-Sections, 3, 4, 6 and 7 of Act of 1991- Act of 1991 does not define religious character- 'religious character of the place of worship' has to be determined-for applicability of the Act of 1991- averments made in the plaint-documents filed on behalf of the plaintiffs in support of their plaints-determinative factor to decide religious character of the property- religious character of the property can only be determined- basis of the facts and circumstances of the case-basis of the evidence to be led by the parties during the trial- Section 4(3)(a) of Act of 1991 expressly bars the applicability of the provision of sub-Section (1) and (2) of Section 4- any place of worship, which is an ancient and historical monument or an archaeological site or remains covered by the Act of 1958 or any other law for the time being in force- principle of 'first in existence' or 'prior in existence' is the determinative factor for deciding the applicability of the provisions of the Act of 1991- 'once a temple, always a temple' is a judicially recognized principle of law- determination of the religious character of the suit property is a mixed question of fact and law- religious character of the property has to be determined after framing of the issues on the basis of the pleadings of the

parties- suits of the plaintiffs do not appear to be barred under any provision of the Act of 1991. (paras 217, 218, 219, 220, 224 , 225, 226, 227, 228, 23, 232 and 233)
HELD:

The Act of 1991 does not define 'religious character'. To attract the provisions of this Act, the 'religious character of the place of worship' has to be determined. This Act does not bar determination of question of fact as to the religious character of a particular place of worship by the Court. The religious character of the place of worship is the determinative factor for deciding the applicability of the provisions of the Act of 1991 over a property. (Para 217)

The averments made in the plaint as well as the documents filed on behalf of the plaintiffs in support of their plaints can also be a determinative factor to decide the religious character of the property. The sale deed dated 08.02.1944, executed by Rai Krishna Das and Rai Anand Krishna in favour of Mahamana Pt. Madan Mohan Malviya & ors.and, the trust deed dated 09.03.1951, creating a trust in the name of Shree Krishna Janmbhoomi Trust by late Jugal Kishore Birla to construct a lofty temple over the property can be taken into consideration during the trial to determine the religious character of the suit property. The documents relating to Suit No. 43 of 1967, the compromise dated 12.10.1968 entered into between the parties in the aforesaid suit, entry in revenue records, facts relating to historical backgrounds as referred to hereinbefore, certain notifications, information obtained through RTI by the plaintiffs, entries in the records of Municipal Corp. of Mathura and Vrindavan are brought on record by the plaintiffs in their respective suits. All these documents are related to the suit property and are in support of the subsequent developments which had taken place from time to time. These documentary evidence can be taken into consideration for determination of the religious character of the property and are subject to evidence led by the parties during the trial. (Para 218)

The religious character of the property can only be determined on the basis of the facts and circumstances of the case and on the basis of the evidence to be led by the parties during the trial. There is a rival claim of the parties about the nature and use of the suit property. The defendants claim it to be a mosque, while the plaintiffs claim that since time immemorial, the property has been worshipped as a temple of Lord Shree Krishna. (Para 220)

Section 4(3)(a) of Act of 1991 expressly bars the applicability of the provision of sub-Section (1) and (2) of Section 4, to any place of worship, which is an ancient and historical monument or an archaeological site or remains covered by the Act of 1958 or any other law for the time being in force. (Para 224)

This Court finds substance in the argument of the plaintiffs that the principle of 'first in existence' or 'prior in existence' is the determinative factor for deciding the applicability of the provisions of the Act of 1991. The arguments of learned Senior Counsel, Sri C. S. Vaidyanathan, that 'once a temple, always a temple' is a judicially recognized principle of law and learned Counsel, Sri Satyaveer Singh, that 'resolution always stays alive' (संकल्प ह मेशा जिंदा रहता है, और यह क भी मेरता नहींहै) are also indicative of the religious character of the property as temple. (Para 228)

The Court also find substance in the argument that the provisions contained in Section 39(2) of the Act of 1958 and entries made in Seventh Schedule of the Constitution of India are important aspects to be considered as one of the factors with regard to non-applicability of the provisions of the Act of 1991 over the suit property at this stage. (para 231)

In view of the above discussion, this Court is of the opinion that under the facts and circumstances of the case, the determination of the religious character of the suit property is a mixed question of fact and law. The religious character of the property has to be determined after framing of the issues on the basis of the pleadings of the parties, and after taking documentary and oral evidence to be led by the parties during the trial. (Para 232)

This Court is also of the opinion that on the basis of the averments made in the plaints and

the documents brought on record and further considering the arguments advanced on behalf of the rival parties, at this stage, the suits of the plaintiffs do not appear to be barred under any provision of the Act of 1991. (Para 233)

G. Bar under the Waqf Act, 1995-Sections 3(r), 4, 5 of the Act, 1995- defendants have not brought on record any information to corroborate- suit property was ever called as 'Idgah Masjid Aalmgiri'- defendants defined as a trust and not waqf- during several rounds of litigation- nowhere it was pleaded that the suit property was a waqf property-notification dated 25.02.1994- at this stage it cannot be assumed that the suit property was notified as a 'waqf property' under this Notification- amendment in Section 6 of the Act of 1995, for substituting the phrase 'any person interested therein' with 'any person aggrieved' is prospective in nature and is effective from 01.11.2013-Waqf Tribunal has no jurisdiction to decide these suits- suits are not barred under any provision of the Act of 1995. (paras 244, 246, 247, 248, 256, 257, 261, 262, 263 and 264)

HELD:

The defendants have not brought on record any information to corroborate that the suit property was ever called as 'Idgah Masjid Aalmgiri'. Almost all the plaints have described the defendants to be a trust and not as waqf. Even in their application under Order VII Rule 11 of the CPC, the defendants have not mentioned the waqf number. (para 246)

The present superstructure came into existence on the basis of the compromise dated 12.10.1968. It is also to be taken into consideration that during several rounds of litigation, prior to institution of Suit No. 43 of 1967 nowhere it was pleaded that the suit property was a waqf property. (para 247)

In view of the foregoing observation and the averments made in the plaint, prima facie, it appears that the Notification dated 25.02.1944 does not relate to the suit property. Thus, at this stage it cannot be assumed that the suit property was notified as a 'waqf property' under this Notification. (Para 248)

In view of the above, it appears that the Waqf Tribunal has no jurisdiction to decide the issues involved in the present suits. Since, there is no admission on the part of the plaintiffs that the suit property is a waqf property, therefore, question of jurisdiction does not arise at this stage. (Para 261)

Documentary evidence corroborating the averments made in plaints are brought on record by the plaintiffs. Whereas, except for the Notification dated 25.02.1944, no other evidence is filed by the defendants. The evidence filed by the plaintiffs and the notification filed by the defendants are subject to evidence to be led by the parties during the trial. (Para 262)

It is also to be noted that the sale deed dated 8.2.1944 and trust deed dated 9.3.1951 are more than 30 years old documents. Therefore, as per Section 90 of the Evidence Act, 1872, their genuineness may be presumed, unless rebutted by the defendants. (Para 263)

In view of the above, considering the facts and circumstances of the case, averments made in the plaint and the legal proposition referred by the rival parties, it cannot be assumed that the suit property is a waqf property. All the facts and circumstances of the case are subject to appreciation of oral and documentary evidence to be led by the parties during the trial. Therefore, at this stage I am of the view that the suits are not barred under any provision of the Act of 1995. (Para 264)

H. Bar under the Specific Relief Act, 1963- no relief of possession sought- Section 34 of the Specific Relief Act, 1963-perusal of plaints- plaintiffs nowhere have admitted lawful possession of the defendants over the suit property- plaintiffs claim that they were in possession since time immemorial- defendants claim the existence of the mosque only from 1669, when Aurangzeb constructed the mosque over the suit property- constructive possession of the deity over the land from the time immemorial- legality and validity of the compromise dated 12.10.1968 are questions of fact that can only be proved by the evidence to be led during the trial-

question whether the suit is barred by Section 34 of the Specific Relief Act,1963- cannot be decided at this stage without taking and appreciating the evidence of the parties to be led during the trial- suits of the plaintiffs are not barred by provisions of Section 34 of the Specific Relief Act,1963- plaints in all the suits of the plaintiffs disclose a cause of action and they do not appear to be barred by any provisions of the Waqf Act, 1995; the Places of Worship (Special Provisions) Act, 1991; the Specific Relief Act, 1963; the Limitation Act, 1963 and Order XIII Rule 3A of the Code of Civil Procedure Code, 1908. (paras 268, 270, 271, 273, 274 and 275)

HELD:

Perusal of the plaints goes to show that the plaintiffs nowhere have admitted lawful possession of the defendants over the suit property. It is the case of the plaintiffs that pursuant to illegal, fraudulent and void ab initio compromise dated 12.10.1968, two bigha land, within the area of Katra Keshav Dev, which was a part of the temple, was conceded to the defendant. Suit No. 43 of 1967 was filed on the basis of fraud and misrepresentation. Therefore, the decree was also based on fraud and misrepresentation. It was obtained to defeat the interest of the deity. Hence, any illegal construction carried out pursuant to the compromise dated 12.10.1968 is not admitted to the plaintiffs. (Para 268)

As per the averments made in the plaints, the plaintiffs claim that they were in possession since time immemorial and mere demolition of the temple by the intruders, did not result in their ouster as they contined to be in possession over the suit property from time to time and from regime to regime. The defendants claim the existence of the mosque only from 1669, when Aurangzeb constructed the mosque over the suit property. (para 270)

It is to be taken into consideration that Aurangzeb did not construct the mosque on the vacant land. It is the case of the plaintiffs that Aurangzeb partially demolished the temple and constructed a superstructure, which is called as Shahi Masjid Idgah. The defendants did not claim their possession prior to 1669. In contrast, the plaintiffs have averred in their respective plaints that Brijnabha, the great grandson of Lord Shree Krishna constructed a temple at Katra Keshav Dev 5000 years ago. (Para 271)

The plaintiffs have claimed the relief for cancellation of judgement and decree dated 20.07.1973 and judgment and decree dated 07.11.1974 passed in Suit No. 43 of 1967. Therefore, it cannot be assumed that the plaintiffs have admitted the lawful possession of the defendants over the suit property. (para 272)

The constructive possession of the deity over the land from the time immemorial and the legality and validity of the compromise dated 12.10.1968 are questions of fact that can only be proved by the evidence to be led during the trial. The question that the suits of the plaintiffs are barred by Section 34 of the Specific Relief Act,1963 can only be decided after framing a proper issues on the basis of the pleadings of the parties during the trial after taking and appreciating evidence led by the parties. What relief can and can not be granted has to be decided by this Court on the basis of the pleadings and evidence available on record. Beside this, the plaintiffs have claimed several reliefs such as cancellation, declaration, mandatory injunction as well as for possession which are subject to evidence to be led during the trial. The question whether the suit is barred by Section 34 of the Specific Relief Act,1963 cannot be decided at this stage without taking and appreciating the evidence of the parties to be led during the trial. (Para 273)

In view of the foregoing discussions, in my opinion, it appears that the suits of the plaintiffs are not barred by provisions of Section 34 of the Specific Relief Act,1963. (para 274)

On reading of the plaints as a whole and in a meaningful manner, perusal of the material placed on records, consideration of the arguments advanced by the rival parties, and settled legal propositions, I conclude that the plaints in all the suits of the plaintiffs disclose a cause of action and they do not appear to be barred by any provisions of the Waqf Act, 1995; the Places of Worship (Special Provisions) Act, 1991; the Specific Relief Act, 1963; the

Limitation Act, 1963 and Order XIII Rule 3A of the Code of Civil Procedure Code, 1908. (Para 275)

All Applications rejected. (E-14)

List of Cases cited:

1. R K Roja Vs U S Rayudu (2016) 14 SCC 275

2. Dahiben Vs Arvindbhai Kalyanji Bhanusali, (2020) 7 SCC 366

3. Azhar Hussain Vs Rajiv Gandhi, AIR 1986 SC 1253

4. Saleem Bhai Vs St. of Mah., AIR 2003 SC 759

5. T. Arivandadam Vs T.VS Satyapal, AIR 1977 SC 2421

6. Umesh Chandra Saxena Vs Administrator General & ors., AIR 1999 ALL. 109

7. Archana Kanaujia Vs Pooja Educational and Social Development Trust & ors., 2021 ILR 10 ALL. 576

8. M Satyanayaran Murthy Died Vs K Ramalinga Swami Naidu Died, by the Andhra Pradesh High Court in Second Appeal No.1023 of 2005

9. Ram Saran & ors.Vs Ganga Devi, AIR 1972 SC 2685

10. Vasantha (Dead) through LRs Vs Rajlakshmi @ Rajam (Dead) through LRs, 2024 SCC Online SC 132

11. Rashid Wali Beg Vs Farid Pindari (2022) 4 SCC 414

12. Board of Waqf West Bengal Vs Anis Fatima Begum, (2010) 14 SCC 588

13. P.VS Gururaj Reddy Vs P. Neeradha Reddy & ors.; 2015(8) SCC 331

14. Kuldeep Singh Pathania Vs Bikram Singh Jaryal; 2017 (5) SCC 347

15. Shaukathussain Mohammed Patel Vs Khatunben Mohammedbhai Polara; 2019(10) SCC 226

16. Mayar (H.K.) Ltd. & ors.Vs Owners & Parties, Vs Parties, Vessel M.VS Fortune Express & ors.2006(3) SCC 100

17. Kamla & ors.Vs K.T. Eshwara Sa & ors.2008 (12) SCC 661

18. Srihari Hanumdas Totala Vs Hemant Vithal Kamath 2021 (9) SCC 99

19. M/s Crescent Petroleum Ltd. Vs M V Monchegorsk & anr., AIR (2000) BOM 161

20. Popat and Kotecha Property Vs St. Bank of India Staff Assoc., (2005) 7 SCC 510

21. C Natarajan Vs Aashim Bhai, (2007) 14 SCC 183

22. Asma Latif & anr.Vs Shabbir Ahmad & ors., Civil Appeal No. 9695 of 2013

23. U.P. Sunni Waqf Board Vs Ancient Idol of Swayambhoo Lord Vishveshwar & ors., 2023 AHC 239874

24. Anjuman Intezamia Masjid Vs Rakhi Singh, 2023 SCC Online All 208

25. Archaeological Survey of India Vs St. of M.P. & ors., (2014) 12 SCC 34

26. U P Sunni Central Waqf Board Vs Ancient Idol of Swayambhu Lord Vishweshwar, 2023 SCC Online Allahabad 2760

27. Assistant Excise Commissioner, Kottayam & ors.Vs Esthopian Cherian & anr., 2021 (10) SCC 210

28. Most ReVs P.M.A. Metropolitan Vs Moran Mar Marthoma, 1995 Supp (4) SCC 286

29. Salem Muslim Burial Ground Protection Committee Vs St. of T.N. & ors., Civil Appeal Nos. 7467-7470 of 2014

30. Punjab Waqf Board Vs Sham Singh Harika, (2019) 4 SCC 688

31. Daya Singh & anr. Vs Gurudev Singh (dead) by LRS & ors., (2010) 2 SCC 194

32. A.A. Gopalakrishnan Vs Cochin Devaswom Board, (2007) 7 SCC 482

33. Indian Bank Vs Satyam Fibbers (India) Pvt. Ltd., 1996 (5) SCC 550

34. A V Papayya Sastry & ors.Vs Govt of A.P. & ors., 2007 (4) SCC 221

35. Chandro Devi Vs U.O.I., 2017 (9) SCC 469

36. Bilkis Yakub Rasool Vs U.O.I. & ors., 2024 SCC OnLine SC 25

37. Srimati Suraj Kumari Vs District Judge Mirzapur & ors., AIR 1991 Alld 75

38. Balkrishna Savalram Pujari & ors.Vs Shri Dhyaneshwar Maharashtra Sansthan & ors.AIR 1959 SC 78

39. Khair Mohammad & ors.Vs Jannat & ors., AIR 1940 Lah 359

40. Mosque, & ors. Vs Shiromani Gurudwara Prabandhak Committee, AIR 1938 Lah 369

41. M. Siddiq Vs Mahendra Suresh Das, 2020 (1) SCC 1

42. Deity Sri Pabuji Maharaj Vs Board of Revenue, 2023 SCC OnLine Raj 1690

43. Board of Muslim Waqf Vs Radha Krishan,1979 SCC (2) 468

44. Triloki Nath Singh Vs Anirudh Singh, Civil Appeal No. 3961 of 2010

45. Shyamlal Ranjan Mukherjee Vs Nirmal Ranjan Mukherjee, Civil Misc. Writ Petition No. 56447 of 2003

46. Shriomani Gurudwara Prabandhak Committee Vs Somnath Das, Devkinandan Vs Murlidhar, 1957 AIR 133

47. St. of M.P. Vs Pujari Utthan Avam Kalyan Samiti, CA No. 4850/2021

48. Mukundji Maharaj Vs Parshottam Lal Ji, AIR 1957 ALL 77

49. K Santhel Kumar Vs Principal Secretary to Government, W.P. No.18190/ 2021

50. Salim D Agboatwala & ors.Vs Shamalji Oddhavaji Thakkar & ors., AIR 2021 SC 502

51. Swami Atmanand Vs Ram Krishna Tapovanam, AIR 2005 SC 2392

52. Church of Christ Charitable Trust & Educational Charitable Society Vs Ponniamman Educational Trust, (2012) 8 SCC 706

53. A.B.C. Laminart (P) Ltd. Vs A.P. Agencies, (1989) 2 SCC 163

54. Thankamma George Vs Lilly Thomas & anr., 2024 SCC OnLine SC 1673

55. Saranpal Kaur Anand Vs Praduman Singh Chandhok, (2022) 8 SCC 401

(Delivered by Hon'ble Mayank Kumar Jain, J.)

1. Heard S/Sri C.S. Vaidyanathan, learned Senior Counsel, Hari Shanker Jain, Vishnu Shanker Jain, assisted by Ms. Mani Munjal and Mr Parth Yadav, Rahul Sahai, learned Senior Counsel, Anil Kumar Airi, learned Senior Counsel, Mahendra Pratap Singh, Saurabh Tiwari, Ajay Kumar Singh, Hare Ram Tripathi, Prabhash Pandey, Pradeep Kumar Sharma, Vinay Sharma, Gaurav Kumar, Siddharth Srivastava, Anil Kumar Singh, Ashish Kumar Srivastava, Ashvanee Kumar Srivastava, Satyaveer Singh, Dr. Dharmesh Chaturvedi, Arya Suman Pandey, Rama Nand Gupta, Harshit Gupta, Saurabh Basu, Gopal Srivastava, Anil Kumar Bisen, Ajay Pratap Singh, Rana Singh, Amit Kumar, Naman Kishore Sharma, Jawahar Yadav, Kumar Beenu Singh, Aniruddh Tiwari, Ugrasen Kumar Pandey, Radhey Shyam Yadav, Brahm Kumar Tiwari, Mayank Singh, Tejas Singh, Alok Dubey, Kumar Anish, A. K. Malviya, Amitabh Trivedi, Rajesh Kumar Shukla, Mrs. Rama Goyal Bansal and Mrs. Reena N Singh, learned Counsel for the plaintiffs. S/Sri Rajendra Maheshwari, Advocate and Ashutosh Pandey, appearing in person.

Mrs. Tasneem Ahmadi, S/Sri Mehmood Pracha, Nasiruzzaman, Pranav Ojha, Hare Ram Tripathi, Manoj Kumar Singh, Afzal Ahmad, Tanveer Ahmad and Imran, learned Counsel for the defendants.

2. Original Suits No.1 to 18 of 2023, which were filed by respective plaintiffs before the Court of Civil Judge (Senior Division), Mathura, stand transferred to this Court, pursuant to order dated 26.05.2023 passed by this Court in Transfer Application (Civil) No.88 of 2023 **(Bhagwan Shrikrishna Virajman and 7 Others vs. U.P Sunni Central Waqf Board and 3 Others).**

3. Original Suits No.17 and 18 of 2023, stand transferred to this Court, pursuant to order dated 16.11.2023 passed in Original Suit No.1 of 2023 on the basis of the report submitted by the District Judge, Mathura.

4. Vide order dated 06.10.2023 passed by Hon'ble the Chief Justice, Allahabad High Court, these suits were nominated to this Bench.

5. Committee of Management, Trust Alleged Shahi Masjid Idgah1 and U.P. Sunni Central Waqf Board2, arrayed as defendants in OSUT No.1 of 2023 **(Bhagwan Shrikrishna Virajman At Katra Keshav Dev Khewat No. 255 and 7 Others vs. U.P. Sunni Central Waqf Board And 3 Others)**, have filed applications (numbered as A-17, A-18 and A-37) under Order VII Rule 11 (d) read with Section 151 of the Civil Procedure Code, 19083 inter alia, praying to reject the plaints as suit filed by the plaintiffs is barred by the provisions of various statutes.

6. During the pendency of the above applications, an application under Order XXVI Rules 9 and 10 read with Section 151 of the CPC was moved on behalf of the plaintiffs in OSUT No.1 of 2023 for appointment of a panel of three advocates as commission, seeking the following relief:-

> *"A. Appoint a commission consisting of three advocates with direction to submit report in the light of the averment made in the suit and in this application and that entire commission proceeding be photographed and video-graphed and the report be submitted in the time provided by the Hon'ble Court;*
>
> *B. Police protection may be directed to be provided by the District administration and to maintain law and order situation during the survey proceeding."*

7. The matter was heard by this Court on the following issues:-

> a. Whether an application for rejection of plaint should be decided prior to the application for appointment of a commission.
>
> b. Application for appointment of commission under Order XXVI Rules 9 and 10 of the CPC. (Application No.130 C)

8. This Court, vide its order dated 14.12.2023, concluded that an application for appointment of commission can be decided first in order and, therefore, allowed such application. It was also observed that the modalities and composition of the commission would be

decided after hearing learned Counsel for the parties for such purpose.

9. Aggrieved by this order, the Committee filed a Special Leave petition No.481/2024: Committee of Management, Trust Shahi Masjid Idgah Vs Bhagwan Shrikrishna Virajman & Ors. Following orders were passed by the Hon'ble Apex Court:

> *"Legal issues arise for consideration including the question in the light of judgment passed by this Court in Civil Appeal No.9695 of 2013 titled "Asma Lateef & Anr. vs. Shabbir Ahmad & Ors."*
>
> *The proceedings before the High Court will continue. However, the Commission will not be executed till the next date of hearing."*

10. Thus, the proceedings in respective suits were taken up. OSUT No. 01, 02, 04, 05, 06, 07, 08, 09, 11, 12, 13, 14, 15, 16, and 18, were consolidated by this Court under Order IV-A of the CPC, vide its order dated 11.01.2024. **OSUT No.01 of 2023 was made as leading case**. OSUT No.03, 10, and 17 were not consolidated.

11. The Committee and the Waqf Board, arrayed as defendants in respective suits, filed applications under Order VII Rule 11(d), read with Section 151 of CPC in most of the cases and in some cases, applications under Order VII Rule 11 of the CPC, read with Section 151 of the CPC, which are numbered as A-17, A-18, A-37 in OSUT No.1 of 2023; C-57 and C-69 in OSUT No.2 of 2023; C-20 and C-45 in OSUT No.4 of 2023; 14-Ka and A-14 in OSUT No.5 of 2023; A-20, A-30 and A-32 in OSUT No.6 of 2023; A-16 and A-39 in OSUT No.7 of 2023; A-21, A-22 and C-23 in OSUT No.9 of 2023; A-9 in OSUT No.11 of 2023; C-30 and C-49 in OSUT No.12 of 2023; C-36 and A-46 in OSUT No.13 of 2023; C-18 and C-23 in OSUT No.14 of 2023; C-12 and C-22 in OSUT No.15 of 2023; A-7, A-17 and A-18 in OSUT No.16 of 2023; A-14 in OSUT No.17 of 2023; and A-7 in OSUT No.18 of 2023).

The aforesaid applications, include the applications moved in the Court of Civil Judge, Senior Division, Mathura.

12. It is averred in the applications that the plaint is liable to be rejected since it does not disclose any cause of action and the suits of the plaintiffs are barred under certain statutes.

13. For proper appreciation of facts to decide the maintainability of suits under Order VII Rule 11 read with Section 151 of CPC, it would be germane to summarize the facts set out by the plaintiffs in their respective plaints. They are as under: -

> i. Lord Shree Krishna is the incarnation of Lord Vishnu. He took birth in human form on the day of Ashtami, Krishna Paksha in Bhadrapad month about 5132 years ago during Dwaparyug in the prison (Karagaar) at Mathura in Virishni Kingdom ruled by King Kans. The place was known as '**Katra Keshav Dev'**. Hindu devotees have been worshipping the birthplace of Lord Shree Krishna for a considerably long time. The property of Katra Keshav

Dev is vested in the deity Lord Shree Krishna for thousands of years. The birthplace of Lord Shree Krishna is a religious and cultural heritage of India. Crores of Hindu devotees have been worshipping Lord Shree Krishna across the world for thousands of years. The devotees feel the divine presence of Lord Shree Krishna at **Shree Krishna Janmabhoomi, Mathura**. They receive the bounty and blessings of Lord Shree Krishna by offering their prayers.

ii. Shri Brajnabha, the great grandson of Lord Shree Krishna constructed the first temple at the Janamsthan (the birthplace of Lord Shree Krishna) about 5000 years ago. It was demolished by Muslim invaders and was rebuilt and renovated by Hindu devotees from time to time. In 400 A.D., Chandra Gupta Vikramaditya renovated it by raising a glorious temple to commemorate Lord Shree Krishna.

iii. In 1017, intruder Mahmood Ghaznavi demolished this tem- ple. During the reign of Maharaja Vijayapal Deva, ruler of Mathura, in 1150 A.D., a Hindu Jatt namely, Jajjan @ Jujj Singh renovated and constructed the temple. This temple was again de-molished by intruder Sikander Lodhi during his reign from 1489 to 1517 A.D.

iv. During the reign of Raja Veer Singh Bundela of Orchha in 1618, a 250 feet high temple was constructed with financial outlay of Rs.33 lakhs. A fortified boundary was also raised around the temple.

v. In 1669-70, Aurangzeb, the Mughal ruler, partially demolished the temple and forcibly constructed a lofty mosque which was named as '**Idgah Mosque'**. Idols of the temples were brought to Agra and buried under the steps of Begum Shahi Mosque to be continually trodden upon. The recital of such demolition finds place in paras 95-96 of the book titled "Massir-i-Alamgiri" by the scribe of Aurangzeb, Saqi Mustad Khan which are quoted here:-

"During this month of Ramzam (1080 A.H./13th January – 11st February 1670) abounding in miracles, the Emperor, as the promoter of justice and over thrower of mischief, as a knower of truth and destroyer of operation, as the zephyr of the garden of victory and the reviver of the faith of the Prophet, issued orders for the demolition of the temple situated in Mathura, famous as the Dehra of Keshao Rai."

"In a short time, by the great exertions of his officers, the destruction of this strong foundation of infidelity was accomplished.

The idols, large and small, set with costly jewels, which had been set up in the temple, were brought to Agra, and buried under the steps of the mosque of the Begam Sahib, in order to be constantly trodden upon. The name of Mathura was changed to Islamabad."

vi. Jadunath Sarkar, a renowned Indian Historian authored "*Historical Essays*" wherein he wrote:-

"the richly jeweled deities were taken to Agra, where they were placed beneath the footsteps leading to the Nawab Begum Sahib's (Jahanara's) mosque so they could be trampled under the feet of Muslims. At that time, the name of Mathura was also changed to Islamabad for having destroyed the very foundation of deity worship. ... The grandest shrine of Mathura, i.e. Kesav Rai's Mandir, built at the cost of Rs.33 lacs by the Bundela Raja Birsingh Dev, was razed to the ground and reduced to rubbles in January, 1670, a huge mosque built on the site. The idols were brought to Agra and buried under the footsteps of Jahanara's mosque that they might be constantly trodden on by the Muslims going into pray."

vii. The excerpt from the book 'Anecdotes of Aurangzeb' by Shri Jadunath Sarkar, reads thus:-

"Meanwhile, Aurangzeb had begun to give free play to his religious bigotry. In April, 1669, he ordered the Provincial Governors to destroy the Mandirs and Schools of Brahmins ... And to utterly put down the teaching and religions practices of the infidels. The wandering Hindu Saint Udhav Bairagi was confined in Police lock up. The Vishwanath Mandir at Benares was pull down in September 1669."

viii. After winning the battle of Govardhan, Marathas became the rulers of the entire area of Agra and Mathura. They removed the structure of the Mosque and restored/renovated the temple at the birthplace of Lord Shree Krishna at Katra Keshav Dev. The entire land of Agra and Mathura was declared as *nazool* land.

ix. In 1803, the East India Company conquered the areas of Mathura and Agra by defeating the Marathas and the became the ruler of this area. The land of Agra and Mathura continued to be treated as *nazool* land.

x. In 1815, the land measuring **13.37 acres of Katra Keshav Dev** was put for an auction sale by the British Government. Raja Patnimal of Benaras purchased the land and acquired the possession and ownership of the land. Thereafter, several cases were filed by the Muslims questioning the auction sale, ownership, and possession of Raja Patnimal, but all were dismissed.

xi. In the settlement map of 1860, the above property was described as Katra Keshav Dev.

xii. In different Court proceedings, six decrees were passed in favour of Raja Narsingh Das, the descendant of Raja Patnimal in respect of the above property. Civil Suit No. 76 of 1920 was filed by the Muslims claiming that plaintiffs were not in possession. It was held that the disputed land did not belong to the Mosque and the Hindu defendants were rebuilding the temple on such land. The suit was dismissed.

Against this judgment and order, First Appeal No.236 of 1921 was also dismissed.

xiii. Rai Kishan Das, the heir of Raja Patnimal, instituted Civil Suit No. 517 of 1928. The ownership and the possession of the plaintiff were decided in their favour. Second Appeal No.691 of 1932 was decided by this Court on 02.12.1935. Raja Patnimal and his heirs were affirmed to be the rightful owners of the property. It was also held that Muslims had no right over any part of the suit property.

xiv. Rai Kishan Das and Rai Anand Krishna, executed sale deed dated 08.02.1944 of the land situated in Katra Keshav Dev in favour of Mahamana Pandit Madan Mohan Malviya, Goswami Ganesh Dutt and Bhikenlal Ji Aattrey for a consideration of Rs. 13,400/-, which was paid by Sri Jugal Kishore Birla. Thus, the title and possession were transferred to the purchasers.

xv. Civil Suit No. 4 of 1946 was filed on behalf of the Committee against Mahamana Pandit Madan Mohan Malviya and others, questioning the validity of the sale deed dated 08.02.1944, *inter alia*, claiming the right of '*pre-emption'*. The suit was dismissed based on a compromise directing that the judgment dated 02.12.1935 passed by this Court in Second Appeal No. 691 of 1932, would be binding upon the parties.

xvi. Shri Jugal Kishore Birla, to fulfill his pledge and to construct a lofty and glorious temple at the birthplace of Lord Shree Krishna situated in the Katra Keshav Dev, created a trust in the name of '**Shree Krishna Janmabhoomi Trust**'[4] on 21.02.1951 through a registered trust deed dated 09.03.1951. The entire property was dedicated and vested in the Janmabhoomi Trust. It was also decided that the Janmabhoomi Trust would impart spiritual and religious education. Movable and immovable property of the Janmabhoomi Trust shall be used only for the Janmabhoomi Trust and no person will have any personal interest. The Janmabhoomi Trust property would not be sold or pledged.

xvii. Unfortunately, the Janmabhoomi Trust failed to perform its duty to secure, preserve and protect the Janmabhoomi Trust property. It became defunct in 1958.

xviii. A society known as '**Shree Krishna Janamsthan Sewa Sangh'**[5] was formed on 01.05.1958. After 1977, the word 'Sangh' was substituted with 'Sansthan'. Sewa Sansthan was a separate entity from the Janmabhoomi Trust. It had no power or jurisdiction to act on behalf of the Janmabhoomi Trust. The property vested in the Janmabhoomi Trust was never transferred, entrusted, vested, dedicated or given in any manner to Sewa Sansthan.

xix. Several other litigations filed by Intezamia Committee of Masjid and other Muslims, claiming their title over various portions of Katra Keshav

Dev were dismissed, including subsequent appeals.

xx. The Committee and other Muslims filed Civil Suit no. 361 of 1959 against the plaintiffs, alleging that certain properties entered in the assessment register of the water tax of Municipality of Mathura have been purchased by them through different sale deeds in 1955 from certain Muslims residing in Katra Keshav Dev. They used to refer it as Katra Idgah. All the suits were dismissed and it was held that Trust Masjid Idgah was not the owner of the property and had no right to execute the sale deed.

xxi. Some Muslims were residing in Katra Keshav Dev. They raised sheds (chapper) and other temporary construction. The Hindu authority at that time revoked their license and directed them to remove the material and to deliver the possession.

xxii. Civil Suit No.210 of 1964 was filed in the Court of Munsif, Mathura on 16.05.1964 titled as '**Shree Krishna Janamsthan Seva Sangh, Mathura also known as Shree Krishna Janambhumi Trust Mathura and ors. v. Trust Masjid Idgah under the alleged Committee of Management and ors.**' Shri Bhagwan Das Bhargava verified the plaint in the capacity of Joint Secretary of the plaintiff.

xxiii. The plaint of the aforesaid suit was returned to the plaintiff on 06.09.1967 for its presentation before a competent Court. In turn, it was filed in the Court of Civil Judge, Mathura, and was registered as Suit No. 43 of 1967 **'Shree Krishna Janamsthan Seva Sangh, Mathura also known as Shree Krishna Janambhumi Trust Mathura and ors. v. Trust Masjid Idgah under the alleged Committee of Management and ors.'**

xxiv. In the above suit, it was averred that the plaintiffs were the owner, Zamindar and in possession of the entire Khewat no. 255, area of the 13.37 acres known as Katra Keshav Dev. They were regularly paying taxes. The execution of sale deed dated 08.02.1944 in favour of Mahamana Pt. Madan Moham Malviya and others was admitted. It was averred that Seth Jugal Kishore Birla created a trust known as 'Shree Krishna Janmabhoomi Trust' but it was wrongly averred that this trust was registerd in the name of 'Shri Krishan Janamsthan Sewa Sangh'. Further, it was also wrongly averred that Shri Jugal Kishore Birla endowed the entire rights and interests in the property through a trust deed dated 21.02.1951 to the plaintiffs of that suit.

xxv. In the aforesaid suit, the following relief was claimed:-

"That a decree for possession of the land after removal of the super-structures detailed below, and more particulars delineated in the site plan hereto, be passed in favour of the plaintiff and against the defendants, and the defendants be given time as may be fixed by the court for the removal of the superstructures and in case they failed to remove the

superstructures the same may be ordered to be removed in execution proceedings through the Court Amin."

xxvi. In the above suit, a fraudulent and illegal compromise was entered into between Sewa Sansthan and the Committee, under the alleged permission of the Waqf Board. The compromise was filed on 12.10.1968. The suit was decided vide judgment and decree dated 20.07.1973 and 07.11.1974 in terms of the compromise. The terms of the compromise deed were as follows:

(i) There was dispute between Shri Krishna Janamsthan Seva Sangh and Trust Shahi Masjid Idgah and certain Muslims Ghosi etc. who claimed to be tenants of trust Shahi Masjid or licensee and many civil and criminal cases were pending.

(ii) The defendant has obtained permission of the Waqf Board communicated through express letter No.2876/43 (Two Thousand Seventy Six/Forty Three) - C-VAD-DHARA dated 9.9.1968 (Nine Nine Nineteen Sixty Eight) and the meeting dated 8.10.1968 (Eight Ten Nineteen Sixty Eight) they have adopted the agreement and authorized to Mohammad Shahmir Masih and Abdul Gaffar Advocate to represent them.

(iii) The Northern and Southern wall of the "Kachhi Kurshi" of the Idgah be extended on the East upto the Railway line by Trust Shahi Masjid Idgah.

(iv) The Trust Shahi Masjid Idgah shall get vacated the inhabitant Muslim Ghosis, etc. outside the wall on North and South side and deliver to Shri Janmsthan Sewa Sangh and will have no concern with its ownership and it will deemed to be the property of first party. Shree Krishna Janmsthan Sewa Sangh will have no concern with the ownership of the land within the Northern walls and it will be deemed to be the property of second party.

(v) That the land on the Western-Northern Corner of "Kachchi Kursi" of Idgah is of Shree Krishna Janmsthan Sewa Sangh and has been shown by A, B, C, D in the plan, and Trust Shahi Masjid Idgah will rectangularise its "Kachchi Kursi" and it will be deemed to be its property.

(vi) By 15th (Fifteen) October, 1968 (Nineteen Sixty Eight) Trust Shahi Masjid Idgah will remove the rubble of stairs on Southern side which is subject of the litigation, and Shree Krishna Janmsthan Sewa Sangh will have possession over that land.

(vii) After getting possession of houses Ghosis, Muslim inhabitants etc. outside the Northern and Southern walls the possession will be delivered to Shree Krishna Janmsthan Sewa Sangh by Trust Shahi Masjid Idgah by 15th (Fifteen) October, 1968 (Nineteen Sixty Eight) and only thereafter it will construct the walls etc. Trust Shahi Masjid Idgah will not affix any door, window, or grill in these walls or the walls of "Kachchi Kursi"

towards the Shree Krishna Janmsthan Sewa Sangh and neither it will open any drain or water outlet toward Shree Krishna Janmsthan Sewa Sangh. Similarly, Shree Krishna Janmsthan Sewa Sangh will also not do any such work.

(viii) Shri Krishna Janmsthan Seva Sangh, will at its own cost, divert the water of the outlets of Idgah on the Western side, towards the Shri Krishna Janmsthan Seva Sangh on the "Kachchi Kursi" of Idgah, by fixing pipes at its own cost and thereafter by constructing a masonry drain at its own cost reach the water towards the East upto Eastern door of the Masjid upto the edge of the "Kachchi Kursi". Trust Shahi Masjid Idgah will have no objection in fixing the pipes in the walls of Masjid Idgah. Representative of Trust Shahi Masjid Idgah will accompany during completion of this work and his advise will be accepted.

(ix) Shri Krishna Janmsthan Seva Sangh after acquisition, will deliver, to Trust Shahi Masjid Idgah, the land which will fall in front of the Idgah inside the North and South walls, from the railway land which Shri Krishna Jansthan Seva Sangh is getting acquired; and it will be deemed to be the property of Second Party.

(x) The land in front of the "Kachchi Kursi" towards East shown by E, F, G, H, I, J, K, L and A, B, C, D on the Western-North corner, which Shri Krishna Janmsthan Sevasangh has relinquished in favour of Trust Shahi Masjid Idgah; has been shown by oblique lines in the annexed plan.

(xi) Both the parties shall file compromise in accordance with this Agreement, in all the cases pending on behalf of both the parties, after fulfillment of all the conditions of the Agreement.

(xii) That in case any party does not adhere to the conditions of this Agreement; both the parties will have a right to have it enforced through Court of law or whatever manner it may possible. The other party will have no objection to it and will not be entitled to object."

xxvii. Sewa Sansthan had no power or authority to file Suit No.43 of 1967 since it had no proprietary or ownership right in the property of Katra Keshav Dev. The suit was not filed by or on behalf of the Janmabhoomi Trust. It was neither the plaintiff nor the defendant in the said suit. Thus, the compromise entered into between Sewa Sansthan and the Committee is illegal and void ab initio. The Janmabhoomi Trust was not a party to the compromise dated 12.10.1968. Thus, the terms of compromise dated 12.10.1968 are not binding upon the deity and the devotees.

xxviii. The true fact will come out before the Court after excavation that the Karagaar of Kans, where the birthplace of Lord Shree Krishna lies beneath the constructions raised by the Committee. The Committee and

Sewa Sansthan entered into a compromise due to political reasons and created an artificial Karagaar.

xxix. The Committee or any other member of Muslim community, do not derive any right, title or interest and cannot continue in possession based on illegal, fraudulent and void ab initio compromise dated 12.10.1968.

xxx. The compromise dated 12.10.1968 entered between Sewa Sansthan and the Committee and the decree passed in Civil Suit No.43 of 1967, is null and void for the reasons below:

a. Sewa Sansthan and the Janmabhoomi Trust are separate legal entities. Sewa Sansthan had no right, interest, power whatsoever over suit property. The Janmabhoomi Trust is the owner of the entire property of Katra Keshav Dev by virtue of trust deed dated 09.03.1951.

b. The suit was not filed by the Janmabhoomi Trust.

c. Creation of the Janmabhoomi Trust by Late Jugal Kishore Birla, the entrustment of the entire property vested in the Janmabhoomi Trust, dismissal of suits filed by the Muslims claiming ownership and possession by the Civil Court and the decree operating in favor of the Hindus, have been admitted in the suit.

d. Sewa Sansthan conceded the property to the Committee beyond the scope of this suit. Both the parties knew that Sewa Sansthan was not the owner of the property and could not enter into a compromise.

e. No compromise could be entered beyond the scope of the decree passed by this Court in Second Appeal No.691 of 1932. The terms of the decree dated 02.12.1935 have been violated.

f. The Janmabhoomi Trust was non-functional, and the compromise had been fraudulently entered to defeat the rights of the deity.

g. The Committee and Sewa Sansthan played fraud upon the Court.

xxxi. The construction raised by the defendants pursuant to the said compromise over the suit property is liable to be removed and possession of the same has to be handed over to the plaintiffs.

xxxii. An application was filed for leave to institute suit under Section 92 of the CPC before the learned District Judge, Mathura, inter alia, praying to remove defendants no. 1 to 6 from trusteeship, for direction to furnish accounts of trust properties, to set up a scheme for carrying out the object of the trust and to dissolve Sewa Sansthan. This application was rejected vide judgment and order dated 06.05.1994 passed by the then learned District Judge.

xxxiii. First Appeal No.199 of 1996 was also dismissed on 23.09.1997 by this Court, holding that the entire property of Katra Keshav Dev vested in the Janmabhoomi Trust. Sewa Sansthan was not the trustee of the trust property. It cannot represent the Janmabhoomi Trust. Trustees were not made parties and the

application under Section 92 of the CPC was, thus, not maintainable.

xxxiv. On the basis of the above observations, it was held that the Waqf Board, the Committee or any member of Muslim Community have no right and interest in the property situated in the Katra Keshav Dev.

xxxv. The chain of historical developments, execution of sale deed, trust deed, and legal proceedings since 1618 upto the decision of First Appeal No.199 of 1996 by this Court, are matter of record.

xxxvi. No part of the property situated in Katra Keshav Dev is a waqf property. Neither any Muslim nor body/trust/society/board of the Muslims ever claimed any part of it as a waqf property. It was never claimed that the property of Katra Keshav Dev has been registered and notified in the official gazette under the U.P. Waqf Act, 1936, the U.P. Waqf Act, 1960, the Wakf Act, 1923, the Central Wakf Act, 1954 or under Section 5 of the Waqf Act, 1995. Therefore, the construction in question within the property, cannot be a mosque. The members of the Committee have encroached upon the land of the deity. Therefore, they cannot claim any right over the land against the true owner. The defendants cannot have any right over the property in question based on adverse possession.

xxxvii. The provisions of the Places of Worship (Special Provision) Act, 19916, do not apply in this case.

xxxviii. The deity, Lord Shree Krishna Virajman, is the owner and in possession of the entire land of Katra Keshav Dev. The deity is recorded as the owner in the municipal record of Mathura Vrindavan Nagar Nigam and not Masjid Idgah. All the taxes are being paid on behalf of the deity and not by the Committee.

xxxix. A superstructure has been raised which is being called as alleged ‘Shahi Masjid Idgah’ in pursuance of an illegal compromise dated 12.10.1968. The deity is in symbolic possession of the land encroached by defendants no.1 and 2.

xl. Since there was no Shebait, pujari or manager to protect the interest of deity, therefore, no one took care of the land and property of the deity at Katra Keshav Dev. Sewa Sansthan captured the property of the Janmabhoomi Trust and worked against the interest of the deity. They had no power or authority to concede approximately two bighas of land of Katra Keshav Dev to the Committee. Thus, Sewa Sansthan betrayed the deity and devotees.

xli. The deity is a perpetual minor. Since 1958, the Janmabhoomi Trust, which was responsible for looking after the interest of the deity, became non-functional, therefore, cause of action is accruing every day. When the plaintiffs went to Mathura for darshan of Lord Shree Krishna, they were shocked to see that a mosque was standing over the birthplace of Lord Shree Krishna. The plaintiffs and other members

met with the members of the Committee and asked them to remove the construction raised by them over the temple and its land. They were shown a copy of the compromise dated 12.10.1968 qua Suit No.43 of 1967 which was filed after the approval of the Waqf Board. They refused to remove the construction so raised.

xlii. The plaintiffs sent a notice under Section 89 of the Waqf Act, 19957 to the Waqf Board, which was duly served upon them, but no reply was given by the Waqf Board.

xliii. The Committee, its supporters, workers and members of the Muslim community are not allowing the members of the Hindu community to enter the premises for darshan and pooja of Lord Shree Krishna. The right of plaintiffs and other devotees is being continuously frustrated, as their right guaranteed under Article 25 of the Constitution of India, is being violated. The right to religion conferred by Article 25 of the Constitution of India is subject to morality, public order or health. Therefore, the State or any citizen cannot be permitted to promote anything immoral, affecting public order or the sentiments of the spiritual life of a citizen.

xliv. The cause of action is accruing against the wrong committed by the defendants every day. It further accrued when plaintiffs came to know about the compromise dated 12.10.1968 and the decree passed by the Civil Court. The cause of action further arose after the expiry of two months' notice when no action was taken by the Waqf board for removal of encroachment from the land in question, and it is accruing every day.

Reliefs claimed by the plaintiffs in the respective plaints:

14. The plaintiffs instituted respective suits, seeking, inter alia, relief of cancellation of judgment and decree, declaration, mandatory and prohibitory injunction and handing over the vacant possession of the suit property to the plaintiffs by removing the existing superstructure. The reliefs claimed by plaintiffs are enumerated hereunder: -

(a) Decree the suit in favour of plaintiffs and against the defendants canceling the judgment and decree dated 20.07.1973 and judgment and decree dated 07.11.1974 and passed in Civil Suit No. 43 of 1967 by Civil Judge, Mathura;

(b) Declare that the judgment and decree dated 20.07.1973, judgment and decree dated 07.11.1974 passed in Civil Suit No.43 of 1967 by Civil Judge, Mathura is not binding on the plaintiffs;

(c) Decree the suit for declaration, that land measuring 13.37 acres of Katra Keshav Dev vests in the deity Lord Shree Krishna Virajman;

(d) Decree the suit for mandatory injunction in favour of the plaintiffs and against the defendants no.1 and 2 directing

them to remove the construction raised by them encroaching upon the land within the area of Katra Keshav Dev City Mathura and to handover vacant possession to Shri Krishna Janmbhoomi Trust within the time provided by the Hon'ble Court;

(e) Decree the suit for prohibitory injunction restraining defendants no.1 and 2, their workers, supporters, men, attorneys and every person acting under them from entering into premises of 13.37 acres land at Katra Keshav Dev City and District Mathura;

15. In OSUT No.17 of 2023: Bhagwan Sri Krishna (Thakur Keshav Ji Mahraj) Virajman at Shree Krishna Janam Bhoomi & others vs. Anjuman Islamia Committee of Shahi Masjid, which is not consolidated with other suits, the following relief is claimed:

A. A declaration that the entire premises of Shri Krishna Janam Bhumi at Mathura, as described and delineated by red color boundaries in Schedule "A" belongs to the Plaintiff Deities be passed in favour of the Plaintiffs and against the Defendants including the entire Muslim Community of Mathura; and

B. A perpetual Injunction against the Defendants including muslim community of Mathura prohibiting them from interfering with, or raising any objection to, or placing any obstruction in the construction of the new Temple building at Shri Krishan Janmabhoomi, Mathura after demolishing and removing the existing buildings and superstructures etc. situate thereat, in so far as it may be necessary or expedient to do so for the said purpose be granted; and

C. By means of Permanent Prohibitory Injunction in favour of the Plaintiff and against defendant no. 1 to 6, their followers, men, workers, supporters and any other person acting under them including the entire Muslim Community of Mathura be restrained from entering the suit property; and

D. By means of Permanent Prohibitory injunction in favour of the Plaintiffs and against the defendant no. 1 to 6, their followers, men, workers, supporters and any other person acting under them including the entire Muslim Community of Mathura be restrained from interfering peaceful performance of Puja and other rituals and worship of Deity by devotees of Lord Shri Krishna at the superstructure and the structure beneath thereof; and

E. Cost of the suit against such defendants who object to the grant of relief to the plaintiffs; and

F. Any other relief to which the plaintiffs may be found entitled."

16. Copy of following documents are filed by the plaintiffs in their respective plaints:-

(a) Sale deed dated 08.02.1944 executed by Rai Krishan Das and Rai Anand

Krishan in favour of Pandit Mahamana Madan Mohan Malviya and others.

(b) Trust deed dated 09.03.1951 relating to the Shree Krishna Janmabhoomi Trust created by Late Shri Jugal Kishore Birla.

(c) Plaint related to Suit No. 43 of 1967 (Shree Krishna Janamb hoomi Seva Sangh, Mathura also known as Shree Krishna Janmabhoomi Trust Mathura and ors. v. Trust Masjid Idgah)

(d) Compromise deed dated 12.10.1968 in Suit No. 43 of 1967.

(e) Decree in Suit No. 43 of 1967.

(f) Khewat Chausala relating to Khewat No. 255.

(g) Electricity bill of the premise.

(h) Municipal record of the premise.

(i) Information obtained in R.T.I Act, 2005.

17. The Committee and the Waqf Board, have filed applications under Order VII Rule 11(d) read with Section 151 of the CPC, inter alia, praying to reject the plaints, as the suits filed by the plaintiffs are barred under provisions of the following Statutes:-

i. Sections 3, 4, 6, and 7 of the Places of Worship (Special Provisions) Act, 1991;

ii. Section 58 of the Limitation Act, 1963;

iii. Section 34 of the Specific Relief Act, 1963;

iv. Sections 6, 85, and 108-A of the Waqf Act, 1995; and

v. Order XXIII Rule 3A of the CPC.

Arguments by the defendants' Counsel:

(i) Scope under Order VII Rule 11 of the CPC:

18. Mrs. Tasneem Ahmadi, learned Counsel submitted that under Order VII Rule 11 of the CPC, the plaints are liable to be rejected because they do not disclose any cause of action and suits of the plaintiffs are barred by aforementioned statutes.

19. Learned Counsel submitted that the plaints do not disclose a reliable cause of action. An illusory cause of action is created by the plaintiffs. The plaints' averments are vague and are not supported by any cogent material. Duty is cast upon the Court to determine whether the plaint discloses a cause of action by scrutinizing the averments made in the plaint. The plaint must be read meaningfully. To decide the application for rejection of plaint, the defense taken by the defendants in their written statements is not required to be considered. Moreover, the defendants cannot be asked to file written statements.

20. It is further submitted that the remedy under Order VII Rule 11 of the CPC is an independent and a special remedy. 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 action should be terminated on any of the grounds contained in the provisions. If any of the conditions enumerated in the provision is satisfied, it would be necessary to put an

end to the sham litigation, so that further judicial time of the Court is not wasted.

21. Learned Counsel further argued that 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 respondents.

22. In support of her contentions that written statement is not required to be filed by the defendants prior to application for rejection of the plaint, Mrs. Ahmadi placed reliance upon the decision of the Hon'ble Apex Court in the case of **R K Roja vs. U S Rayudu** (2016) 14 SCC 275. The relevant paragraph is extracted here under: -

> *"5. Once an application is filed under Order 7 Rule 11 CPC, the court has to dispose of the same before proceeding with the trial.* ***There is no point or sense in proceeding with the trial of the case, in case the plaint (election petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement****. In case the application is rejected, the defendant is entitled to file his written statement thereafter."*
>
> *(Emphasis supplied)*

Learned Counsel also placed reliance upon Dahiben v. Arvindbhai Kalyanji Bhanusali, (2020) 7 SCC 366, wherein it was observed as under:-

> *"23.15.* ***The provision of Order 7 Rule 11 is mandatory in nature****. It states that the plaint "shall" be rejected if any of the grounds specified in clauses (a) to (e) are made out.* ***If the court finds that the plaint does not disclose a cause of action, or that the suit is barred by any law, the court has no option, but to reject the plaint.****"*
>
> *(Emphasis supplied)*

In addition to above, reliance is also placed on the following decisions:-

a) **Azhar Hussain vs. Rajiv Gandhi**, AIR 1986 SC 1253

b) **Saleem Bhai vs. State of Maharashtra**, AIR 2003 SC 759

c) **T. Arivandadam vs. T.V. Satyapal**, AIR 1977 SC 2421

d) **Umesh Chandra Saxena vs. Administrator General and others**, AIR 1999 ALL. 109

e) **Archana Kanaujia vs. Pooja Educational and Social Development Trust and others**, 2021 ILR 10 ALL. 576.

(ii) Bar under the Limitation Act, 1963:

23. It is vehemently argued on behalf of the defendants that the suits of the plaintiffs are barred by certain provisions of the Limitation Act,1963. The terms of the

compromise dated 12.10.1968 were such that it led to visible physical changes on the ground which were carried out between 1968 and 1974 and could not have been hidden from the plaintiffs. The decree was drawn up in Suit No.43 of 1967. It was agreed between the parties to the suit that the northern and southern walls of 'Kachchi Kursi' of the Idgah be extended on the east up to the railway line by the Committee. Further, it was also agreed that the plaintiffs will divert the water of the outlet of Idgah on western side towards Sewa Sansthan on the Kachchi Kursi by fixing pipes and thereafter, by constructing a masonry drain, flow the water towards the eastern door of the Masjid up to the edge of Kachchi Kursi. These changes were visible and the plaintiffs cannot claim ignorance about the compromise which they would have known of, by exercise of reasonable diligence therefore, the cause of action, if any, would have arisen at that time. However, present suits have been filed after a span of almost 50 years.

24. It is further contended that the prayer seeking declaration that decree dated 20.07.1973 and 07.11.1974, be not binding on the plaintiffs for alleged certain reasons, is also hit by the provisions of the Limitation Act, 1963. The prayer seeking a declaration that the compromise is null and void, is also barred by the Limitation Act,1963.

25. Learned Counsel for the defendants placed reliance upon the observations made by the Hon'ble Apex Court in **Dahiben case** (supra). Relevant paragraphs are extracted hereunder:

"4. The Limitation Act, 1963 prescribes a time-limit for the institution of all suits, appeals, and applications. Section 2 (j) defines the expression "period of limitation" to mean the period of limitation prescribed in the Schedule for suits, appeals or applications. Section 3 lays down that every suit instituted after the prescribed period, shall be dismissed even though limitation may not have been set up as a defense. If a suit is not covered by any specific article, then it would fall within the residuary article.

26. Articles 58 and 59 of the Schedule to the 1963 Act, prescribe the period of limitation for filing a suit where a declaration is sought, or cancellation of an instrument, or rescission of a contract, which reads as under:

Description of suit	***Period of limitation***	***Time from which period begins to run***
58. To obtain any other declaration.	*Three years*	*When the right to sue first accrues*
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."*

The period of limitation prescribed under Articles 58 and

59 of the 1963 Act is three years, which commences from the date when the right to sue first accrues."

26. Reliance is also placed on the decision rendered in the case of **M Satyanayaran Murthy Died vs. K Ramalinga Swami Naidu Died**, by the Andhra Pradesh High Court in Second Appeal No.1023 of 2005. The relevant paragraphs are extracted herein below:

"25. The general principle, which also manifest itself in Section 17 of the Limitation Act, is that every person is presumed to know his own legal right and title in the property and if he does not take care of his own right and title to the property, the time for filing the suit based on such a right of title to the property is not prevented from running against him. The provisions of Section 17(1) embody fundamental principles of justice and equity viz., that a party should not be penalized for failing to adopt legal proceedings when the facts or the documents have been willfully concealed from him and also that a party who had acted fraudulently should not be given the benefit of limitation running in its favour by virtue of such frauds. *However, it is important to remember that Section 17 does not defer the starting point of limitation, because the defendant has committed a fraud. Section 17 does not encompass all kinds of frauds, but specific situations covered by clause (a) to (d) to Section 17 (1) of Limitation Act. Section 17 1(b) and (d) encompass only that fundamental documents or acts of concealment of documents which have the effect of suppressing knowledge entitling the party to pursue his legal remedy.* ***Once a party becomes aware of antecedents facts necessary to pursue legal proceedings, the period of limitation commences****. Therefore, in the event that plaintiff makes out a case that falls within any one or more of four clauses to sub section 1 to section 17 of Limitation Act, the period of Limitation for filing the suit shall not began to run until the plaintiff or applicant has discovered the fraud/ mistake or could with reasonable diligence have discovered it or if the document is concealed till the plaintiff has the means of producing the concealed document or compelling its production a fortiori.*

26. ***Diligence is a word of common parlance means attention, carefulness and persistence in efforts of doing something****. The Hon'ble Apex Court in Chander Kanta Bansal Vs. Rajinder Singh Anand case in reference to proviso to Order 6 Rule 17 of the Code defined diligence as according to Oxford Dictionary, the work diligence means careful and persistent application or effort."*

(Emphasis Supplied)

(iii) Bar under the Specific Relief Act, 1963:

27. Learned Counsel for the defendants submitted that the challenge to the compromise in Suit No. 43 of 1967 is

hit by the provisions of Order XXIII Rule 3A of the CPC. The said challenge admits the factum of the possession of the Committee over Shahi Masjid Idgah. The plaintiffs did not seek the relief of possession, therefore, the suit is barred by the proviso of Section 34 of the Specific Relief Act,1963. The plaintiffs are not in possession of the suit property. The plaintiffs have filed the suit seeking reliefs for declaration and injunction only and have not sought a decree of possession. Mere declaration of title is not enough. Plaintiffs have to seek delivery of possession. Since no relief for delivery of possession is claimed, therefore, relief of injunction cannot be granted. The ancillary relief claimed by the plaintiffs does not fall under the provisions of Sections 5 and 6 of the Specific Relief Act, 1963. The plaintiffs must have sued for recovery of possession. It is also submitted that since the Committee is in possession over the suit property, therefore, further relief would be recovery of possession and suit for declaration of title is not maintainable.

28. Learned Counsel placed reliance on the decision of the Hon'ble Apex Court in **Ram Saran and others vs. Ganga Devi**, AIR 1972 SC 2685. The relied upon para is quoted as under :-

> ***"4. … … ... The plaintiffs have not sought possession of those properties. They merely claimed a declaration that they are the owners of the suit properties. Hence the suit is not maintainable****. In these circumstances, it is not necessary to go into the other contention that the suit is barred by limitation."*
>
> *(Emphasis Supplied)*

Reliance is also placed on Vasantha (Dead) through LRs vs. Rajlakshmi @ Rajam (Dead) through LRs, 2024 SCC Online SC 132. The attention of the Court is drawn to the following paragraphs:

> ***"51. … … ... in Vinay Krishna v. Keshav Chandra (2-Judge Bench), this Court while considering Section 42 of the erstwhile Specific Relief Act, 1877 to be pari materia with Section 34 of SRA, 1963 observed that the plaintiff's not being in possession of the property in that case ought to have amended the plaint for the relief of recovery of possession in view of the bar included by the proviso.***
>
> *52. This position has been followed by this Court in Union of India v. Ibrahim Uddin (2-Judge Bench), elaborated the position of a suit filed without the consequential relief. It was observed:*
>
> *"55. The section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.*
>
> ***56. In Ram Saran v. Ganga Devi [(1973) 2 SCC 60] this Court had categorically held that the suit seeking for declaration of title of ownership but where possession is not sought, is hit by the proviso of Section of the Specific Relief Act, 1963 and, thus, not maintainable.*** *In Vinay Krishna v. Keshav Chandra [1993 Supp (3) SCC 129] this Court dealt*

with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. (See also Gian Kaur v. Raghubir Singh [(2011) 4 SCC 567)

57. In view of the above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief."

(Emphasis Supplied)

(iv) Bar under the Waqf Act, 1995:

29. It is argued that the suit property, which is a waqf property, is a matter of public record. The jurisdiction of the Civil Court is barred under certain provisions of the Act of 1995. According to Section 6, the suit may be instituted before the Waqf Tribunal. Given the provisions contained in Section 85, the jurisdiction of Civil Court, Revenue Court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter is barred. Such dispute shall be determined by the Waqf Tribunal. It is further submitted that Section 108-A of the Act of 1995 overrides any other law for the time being in force.

30. The learned Counsel placed heavy reliance upon the judgment of the Hon'ble Apex Court rendered in **Rashid Wali Beg vs. Farid Pindari** (2022) 4 SCC 414, and submitted that the jurisdiction to decide every dispute in relation to a waqf property lies only with the Waqf Tribunal and not with the Civil Court. Relevant paragraphs are extracted as under:-

"42. A conjoint reading of Sections 6, 7 and 85 would show that the bar of jurisdiction of Civil Court contained in Section 6(5) and Section 7(2) is confined to Chapter II, but the bar of jurisdiction under Section 85 is all pervasive. This can be seen from the following distinguishing features:

42.1. Section 6(5) bars the institution or commencement of a suit or other legal proceeding in a court "in relation to any question referred to in sub-section (1)". Sub-section (1) of Section 6 speaks only about two questions, namely, whether a particular property specified as a waqf property in the list of waqfs is a waqf property or not and whether a waqf is Shia waqf or Sunni waqf.

42.2. Section 7(2) bars any court, tribunal or other authority from staying any proceeding before the Waqf Tribunal, in respect of a waqf, on the only ground of pendency of any suit, application or appeal or other proceeding. Section 7(2) specifically relates to the proceedings under Section 7 and not to any other proceeding. This is clear by the use of the words, "no proceeding under this Section". Section 7(1) again deals only with two questions, namely, whether a particular property specified as waqf property in the list of waqfs is a waqf property or not and whether a waqf specified in the list is a Shia waqf or Sunni waqf. Therefore, the bar under Section 7(2) is also

confined only to these two questions, on account of the use of the words, "no proceeding under this Section".

42.3. While Sections 6(1) and 7(1) speak only about two questions which are germane to the matters covered by Chapter II of the Act alone, Section 85 speaks: (i) about any dispute, question or other matter relating to any waqf or waqf property and (ii) about "other matter which is required by or under this Act to be determined by a Tribunal".

42.4. A major distinguishing feature between Sections 6(1) and 7(1) on the one hand and Section 83 on the other hand is that the dispute, question or other matter referred to in Sections 6 and 7 are confined only to what is included in the list of waqfs prepared under Section 4 and published under Section 5. The words "specified ... in the list of waqfs" found in Sections 6(1) and 7(1), are conspicuous by their absence in Section 83(1). Therefore, it is clear that Sections 6 and 7 speak only about two categories of cases, but Section 83 covers the entire gamut of possible disputes in relation to any waqf or waqf property."

... ...

45. Interestingly, the basis of the decision in Ramesh Gobindram [Ramesh Gobindram v. Sugra Humayun Mirza Wakf, (2010) 8 SCC 726 : (2010) 3 SCC (Civ) 553] was removed through an amendment under Act 27 of 2013. As we have stated elsewhere, Ramesh Gobindram [Ramesh Gobindram v. Sugra Humayun Mirza Wakf,] sought to address the question whether a Waqf Tribunal was competent to entertain and adjudicate upon disputes regarding eviction of persons in occupation of what are admittedly waqf properties. Since this Court answered the question in the negative, Section 83(1) was amended by Act 27 of 2013 to include the words, "eviction of tenant or determination of rights and obligations of the lessor and lessee of such property".

... ...

*47. **The upshot of the above discussion is that the basis of Ramesh Gobindram [Ramesh Gobindram v. Sugra Humayun Mirza Wakf] now stands removed through Amendment Act 27 of 2013**. In fact, when Ramesh Gobindram [Ramesh Gobindram v. Sugra Humayun Mirza Wakf] was decided, Sections 6(1) and 7(1) enabled only three categories of persons to approach the Waqf Tribunal for relief. They are, (i) the Board; (ii) the mutawalli of the waqf; or (iii) any person interested therein. However, the Explanation under Section 6(1) clarified that the expression "any person interested therein" shall include every person, who, though not interested in the waqf, is interested in the property. But by Act 27 of 2013 the words, "any person interested" were substituted by the words, "any person aggrieved", meaning thereby that even a non-Muslim is entitled to invoke the jurisdiction of the Tribunal. Due to the substitution of the words "any*

person aggrieved", Act 27 of 2013 has deleted the Explanation under 6(1). This amendment has also addressed the concern expressed in Ramesh Gobindram [Ramesh Gobindram v. Sugra Humayun Mirza Wakf, (2010) 8 SCC 726 : (2010) 3 SCC (Civ) 553] (in para 21 of the SCC report) whether a non-Muslim could be put to jeopardy by the bar of jurisdiction, merely because the property is included in the list of waqfs. We must point out at this stage that the Explanation under sub-section (1) of Section 6, as it stood at the time when Ramesh Gobindram [Ramesh Gobindram v. Sugra Humayun Mirza Wakf] was decided, already took care of this contingency, but was omitted to be brought to the notice of this Court."

(Emphasis Supplied)

Reliance is also placed on the judgment of **Board of Waqf West Bengal vs. Anis Fatima Begum**, (2010) 14 SCC 588. The relied upon paragraphs are reproduced hereunder:-

"7. The dispute in the present case relates to a wakf. In our opinion, ***all matters pertaining to wakfs should be filed in the first instance before the Wakf Tribunal constituted under Section 83 of the Wakf Act, 1995 and should not be entertained by the civil court or by the High Court straightaway under Article 226 of the Constitution of India. It may be mentioned that the Wakf Act, 1995 is a recent parliamentary statute which has constituted a Special Tribunal for deciding disputes relating to wakfs****. The obvious purpose of constituting such a Tribunal was that a lot of cases relating to wakfs were being filed in the courts in India and they were occupying a lot of time of all the courts in the country which resulted in increase in pendency of cases in the courts. Hence, a Special Tribunal has been constituted for deciding such matters.*

… … ...

10. Thus, the Wakf Tribunal can decide all disputes, questions or other matters relating to a wakf or wakf property. The words "any dispute, question or other matters relating to a wakf or wakf property" are, in our opinion, words of very wide connotation. Any dispute, question or other matters whatsoever and in whatever manner which arises relating to a wakf or wakf property can be decided by the Wakf Tribunal.

… … ...

11. Under Section 83(5) of the Wakf Act, 1995 the Tribunal has all powers of the civil court under the Code of Civil Procedure, and hence it has also powers under Order 39 Rules 1, 2 and 2-A of the Code of Civil Procedure, 1908 to grant temporary injunctions and enforce such injunctions. Hence, a full-fledged remedy is available to any party if there is any dispute, question or other matter relating to a wakf or wakf property."

(Emphasis Supplied)

(v) Bar under the Places of Worship (Special Provisions) Act, 1991:

31. Mrs. Tasneem Ahmadi, learned Counsel, submitted that the relief claimed in the present suit, inter alia, seeks removal of the Shahi Idgah Mosque and handing over of vacant possession of the same to the Janmabhoomi Trust thereby, converting a religious place for offering prayers by the Muslim community to one for offering prayers to Lord Shree Krishna. The same is barred by the spirit of the legislation expressed through the preamble as well the provisions contained in Sections 3, 4, 6 and 7 of the Act of 1991 which bars the conversion of places of worship as they existed on 15th August, 1947.

32. It is submitted that it is an admission on the part of the plaintiffs, as averred in their plaints, that Shahi Idgah Mosque was constructed by Aurangzeb, therefore, the 'religious character' of the place of worship as mosque is evident. On the basis of the terms of the compromise, the suit property was a mosque even on the date of the compromise, therefore, the provisions of the Act of 1991 are squarely applicable.

33. Learned Counsel referred to certain paragraphs of the plaints of the respective original suits and submitted that the existence of the mosque is admitted from 1669-70. The mosque has been in existence ever since. It is also an admitted fact that the property was used as a mosque. In Notification No.1465/1133M dated 25.11.1920, issued by Lt. Governor, United Province and Notification No. UP1669-M1133 dated 27.12.1920, existence of the mosque is recognized. It is also admitted that the Committee was in possession of the suit property. The place on which the mosque was in existence, was continuously utilized and is still being utilized as a mosque.

34. Learned Counsel for the defendants further submitted that since the Ancient Monument Preservation Act, 19048 was repealed by Section 39 of the Ancient Monuments and Archaeological Sites and Remains Act, 19589, therefore, declaring the suit property as a protected monument is insignificant.

35. Sri Afzal Ahmad, learned Counsel appearing on behalf of the Waqf Board submitted that the object to legislate the Act of 1991 was that the legislation did not want to open a Pandora's box. It was the intention of the legislation that communal peace and harmony should be maintained between the communities in the country. Every inch of this country is a pious land, and every dispute would amount to the opening up of Pandora's box.

(vi) Bar under Order XXIII Rule 3A of the CPC:

36. Mrs. Ahmadi submitted that Order XXIII Rule 3A of the CPC expressly imposes a bar that no suit shall lie to set aside a decree on the ground that the compromise on which, the decree is based, was not lawful. The compromise was entered on 12.10.1968 in Suit No. 43 of 1967. The suit was decided vide judgment and decree, dated 20.07.1973 and judgment and decree, dated 07.11.1974. In the compromise deed, the title and the possession of Shahi Masjid Idgah were decided on the basis of the compromise arrived between the parties to the suit.

37. Mr. Afzal Ahmad, learned Counsel submitted that the plaint is cleverly drafted by the plaintiffs. The defendants, Shree Krishna Janmabhoomi Trust, Mathura and Shree Krishna Janamsthan Sewa Sansthan, are in

collusion with the plaintiffs. So far as the sanctity of the compromise dated 12.10.1968 is concerned, respected personalities have joined as plaintiffs to Suit No. 43 of 1967. They put their signatures on the compromise deed. Therefore, it cannot be assumed that the compromise is based on fraud and misrepresentation.

38. He further submitted that an Idgah is not a Masjid. There are different kinds of mosques in which, prayer is offered by Muslims. The suit property is a waqf property which is duly registered by Mutwalli. It was created by an unregistered deed 400 years ago. At that time, the Act of 1995 was not enacted. Therefore, the property was not registered as a waqf. The Government Gazette of United Province dated 26.02.1944 lists the suit property at Sl. No. 43 as 'Idgah Masjid Aalmgiri'. Names of mutwalli were entered as Abdulla Khan, Fathe Nusrat, Salimulla etc.

ARGUMENTS BY THE PLAINTIFFS:

(i) Scope under Order VII Rule 11 of the CPC:

39. Learned Counsel for the plaintiffs Sri Vishnu Shankar Jain submitted that it is well established that the plaint can be rejected at the threshold under Order VII Rule 11 of the CPC, only when it appears to the Court that the averments made in the plaint are barred by any law or do not disclose any cause of action. He further submitted that the case of the plaintiffs is not barred under any law as alleged by the learned Counsel for the defendants.

40. He submitted that the plaintiff 'Bhagwan Shree Krishna Virajman' is a perpetual minor. Plaintiff no.2 is 'Asthan', Shree Krishna Janmabhoomi, which itself is a deity, being the birthplace of Lord Shree Krishna. It can exercise every right available to a juridical person. It has every right to protect and to recover its lost property through Shebait. If the Shebait is negligent, it can file a suit in the Court of law through the next friend. The present suit is filed by the deity and Asthan to recover their lost property.

41. It is submitted that the place of birth of Lord Shree Krishna lies beneath the present structure raised by the Committee. Lord Shree Krishna was born in the Karaagar of Kans. The entire area is known as Katra Keshav Dev. Under the Hindu law, property once registered in the deity, shall continue to be vested in deity.

42. He took the Court through the chronological events leading up to the institution of the present suit, which are as summarized in para 13 of this order.

43. Further, it is contended:-

43.1 That Sewa Sansthan had no authority to file Suit No.43 of 1967. Sewa Sansthan had no right, authority or propriety to enter into compromise with the Committee and to concede two bigha land of the property of the Janmabhoomi Trust to the defendants. The property vested in the Janmabhoomi Trust was never transferred, dedicated, vested or entrusted to Sewa Sansthan. Suit No.43 of 1967 was filed by Sewa Sansthan, misrepresenting itself to be competent to file the suit, concealing the facts and committing fraud with the Court.

The compromise dated 12.10.1968 is, therefore, fraudulent, illegal and void ab initio. Plaintiffs/idol/deity were neither party to Suit No.43 of 1967, nor to the compromise dated 12.10.1968, therefore, it is not binding upon the plaintiffs/idol/deity. Pursuant to the said compromise, a superstructure was raised, and certain physical changes were carried out by the defendants over the property.

43.2 That the birthplace of Lord Shree Krishna lies beneath the illegal superstructure which is a sacred place for Hindu devotees. The Hindu devotees are offering prayer, aarti and other ritual ceremonies on regular basis since time immemorial. Before partial demolition of the temple in 1669-70 by the Mughal Ruler Aurangzeb, a temple of Lord Shree Krishna was existing over the suit property since time immemorial. Before 1669-70, no mosque was existing.

43.3 That in the garb of the alleged compromise, the defendants have illegally encroached upon the land of the temple of Lord Shree Krishna. The plaintiffs have every right to offer worship and carry out religious activities in the temple of Lord Shree Krishna. In several rounds of litigation, it was categorically held that the suit property lies in Katra Keshav Dev measuring 13.37 acre and there was a temple of Lord Shree Krishna since time immemorial.

43.4 That when the plaintiffs visited Mathura for darshan of Lord Shree Krishna on the given dates in their respective plaints, they became aware about the existence of the so called super structure known as Shahi Masjid Idgah on the sacred birthplace of Lord Shree Krishna, for the first time. Upon further enquiry, they came to know about the compromise, dated 12.10.1968 entered between the parties to Suit No. 43 of 1967 pursuant to which the superstructure was raised by the defendants.

44. He further submitted that there are historical events which took place between 1618 and 1951. The Court can take judicial notice of some references made in the historical books which corroborate the averments made in the plaint by the plaintiffs. All these facts and circumstances indicate that a valid cause of action arose before the plaintiffs to file present suits.

45. To buttress his arguments, learned Counsel for the plaintiffs placed reliance upon various decisions of the Hon'ble Apex Court, enumerated as under:-

a) **Saleem Bhai vs State of Maharastra**; 2003(1) SCC 557

b) **P.V. Gururaj Reddy vs P. Neeradha Reddy and Others**; 2015(8) SCC 331

c) **Kuldeep Singh Pathania vs Bikram Singh Jaryal**; 2017 (5) SCC 347

d) **Shaukathussain Mohammed Patel vs Khatunben Mohammedbhai Polara**; 2019(10) SCC 226

e) **Mayar (H.K.) Ltd. & Ors. Vs Owners & Parties, vs Parties, Vessel M.V. Fortune Express & Ors**. 2006(3) SCC 100

f) **Kamla and Others vs K.T. Eshwara Sa and Others** 2008 (12) SCC 661

g) **Srihari Hanumdas Totala vs Hemant Vithal Kamath** 2021 (9) SCC 99

46. Learned Counsel for the plaintiffs relied upon the observations made by the Hon'ble Apex Court in **Saleem Bhai** (supra), which are extracted as under:-

> *"9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application there under are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the Court as well as procedural irregularity. The High Court, however, did not advert to these aspects."*

47. Reliance has also been placed upon the decision of the Supreme Court rendered in the case of **P.V. Gururaj Reddy** (supra). Relevant paragraph is extracted here in below:

> *"5. Rejection of the plaint under Order 7 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 7 Rule 11, 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 7 Rule 11, 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 the trial."***
>
> *(Emphasis supplied)*

48. Sri Anil K Airi, learned Senior Counsel, assisted by Shri Hare Ram Tripathi, submitted that to decide the application for rejection of plaint under Order VII Rule 11 of the CPC, no amount of evidence is to be taken into consideration. The written statement of the defendants should not be considered. Whenever an application for rejection of plaint is allowed, the plaintiff becomes remedy less.

49. It is further contended that in the present suits, the title is not under challenge. The area of 13.37 acres is also not under challenge. It is not disputed that the entire property was vested in the Janmabhoomi Trust by Late Jugal Kishore Birla. The title of the plaintiffs over the suit property is established. Since the title is not disputed by the defendants, it has attained finality in favour of the plaintiffs.

50. It was also argued that the facts and circumstances averred in the plaint relate to certain historical developments, execution of documents as well as the cause of action that arose to the plaintiffs. All these essential questions are to be decided during the trial on the basis of the evidence led by the parties. The Court has to take judicial notice of certain facts. Therefore, at this stage, when an application for rejection of plaint is being heard, the above essential ingredients cannot be decided.

51. Sri Rahul Sahai, learned Senior Counsel submitted that while exercising the power under Order VII Rule 11 of the CPC, the Court has to act with utmost caution. Rejection of plaint, at the threshold, entails very serious consequences for the plaintiffs, therefore, this power has to be exercised in exceptional circumstances. The Court has to be absolutely sure that on a meaningful reading of the plaint, it does not make out any case. The exercise of this power would not be justified merely because the averments made in the pleadings are highly improbable or which may be difficult to believe.

52. He further submitted that the trial is a rule and the benefit, if any, will go in favour of the plaintiffs. The plaint discloses a valid cause of action on the basis of the facts averred in the plaint. The facts which constitute the cause of action are always subject to evidence to be led by the parties during the trial. Merely on the basis of oral arguments, it cannot be assumed that the cause of action is illusory and the plaint is cleverly drafted.

53. Sri Sahai, placed reliance upon the judgment rendered in **M/s Crescent Petroleum Limited vs. M V Monchegorsk and another**, AIR (2000) BOM 161. The relevant paragraph is reproduced here under-

> *"5.....*
>
> *19 ".....It is settled law that the plaint can be rejected as disclosing no cause of action if the Court finds that it is plain and obvious that the case put forward is unarguable. In my view the phrase "does not disclose a cause of action" has to be very narrowly construed.* ***Rejection of the plaint at the threshold entails very serious consequences for the plaintiff. This power has, therefore, to be used in exceptional circumstances. The Court has to be absolutely sure that on a meaningful reading of the plaint it does not make out any case.*** *The plaint can only be rejected where it does not disclose a cause of action or where the suit appears from the statements made in the plaint to be barred by any provision of the law.* ***While exercising the power of rejecting the plaint, the Court has to act without most caution. This power ought to be used only when the Court is absolutely sure that the plaintiff does not have an***

arguable case at all. The exercise of this power though arising in civil procedure, can be said to belong to the realm of criminal jurisprudence and any benefit of the doubt must go to the plaintiff, whose plaint is to be branded as an abuse of the process of the Court, This jurisdiction ought to be very sparingly exercised and only in very exceptional cases. The exercise of this power would not be Justified merely because the story told in the pleadings was highly improbable or which may be difficult to believe."

(Emphasis Supplied)

54. Sri Saurabh Tiwari, learned Counsel submitted that the disputed question cannot be decided at the time of consideration of an application under Order VII Rule 11 of the CPC. No amount of evidence or merit of the controversy can be considered at this stage.

55. Sri Satyaveer Singh, learned Counsel, submitted that the provision under Order VII Rule 11 of the CPC are to be read with the provision of Order XIV Rule 2 of the CPC. The factual and legal aspects of the matter can only be decided by framing issues based on the evidence to be led by the parties during the trial. Further, the registered sale deed, dated 8.2.1944, executed by the descendant of Raja Patnimal in favour of Mahamana Pandit Madan Mohan Malviya and others, and the trust deed dated 09.03.1951 are still in existence. These documents are neither challenged before nor declared null and void by any competent Court of law. These documents are 30 years old. Therefore, the genuineness of the document is to be presumed under Section 90 of the Indian Evidence Act, 1872. This presumption is unrebutted, since no contrary documentary evidence has been adduced by the defendants. He referred to the trust deed as '*a document of resolution (Sankalp)*'. **The resolution can never be changed. The resolution always stays alive (संकल्प हमेशा जिंदा रहता है, और यह कभी मरता नहीं है).**

56. Learned Senior Counsel, Sri C. S. Vaidyanathan, assisted by Sri Ajay Kumar Singh, submitted that while deciding the application under Order VII Rule 11 of the CPC, only the averments of the plaint are material and can be taken into consideration. The plaint has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The pleadings in the plaint have to be taken as correct at their face value in its entirety. It is a trite law that the plaint has to be read as a whole, particular plea cannot be considered in silos.

57. He placed reliance on the decisions rendered by the Hon'ble Apex Court in **Popat and Kotecha Property vs. State Bank of India Staff Association**, (2005) 7 SCC 510 and **C Natarajan vs. Aashim Bhai**, (2007) 14 SCC 183.

58. He further submitted that at the stage of deciding an application under Order VII Rule 11 of the CPC, the averments made in the written statement, or the case of the defendants do not have to be considered at all.

59. Sri Vinay Sharma, learned Counsel as well as Sri Ashutosh Pandey (one of the plaintiffs in person) submitted that so far as the applicability of the judgment of ***Asma Latif & Anr. Vs Shabbir Ahmad & ors***, Civil Appeal No. 9695 of

2013 is concerned, it does not support the argument of the defendants. Relevant paragraph is extracted as under:-

> *"39. Although not directly arising in the present case, we also wish to observe that the question of jurisdiction would assume importance even at the stage a court considers the question of grant of interim relief. Where interim relief is claimed in a suit before a civil court and the party to be affected by grant of such relief, or any other party to the suit, raises a point of maintainability thereof or that it is barred by law and also contends on that basis that interim relief should not to be granted, grant of relief in whatever form, if at all, ought to be preceded by formation and recording of at least a prima facie satisfaction that the suit is maintainable or that it is not barred by law. Such a satisfaction resting on appreciation of the averments in the plaint, the application for interim relief and the written objection thereto, as well as the relevant law that is cited in support of the objection, would be a part of the court's reasoning of a prima facie case having been set up for interim relief, that the balance of convenience is in favour of the grant and non-grant would cause irreparable harm and prejudice. It would be inappropriate for a court to abstain from recording its prima facie satisfaction on the question of maintainability, yet, proceed to grant protection pro tem on the assumption that* ***the question of maintainability has to be decided as a preliminary issue under Rule 2 of Order XIV, CPC. That could amount to an improper exercise of power. If the court is of the opinion at the stage of hearing the application for interim relief that the suit is barred by law or is otherwise not maintainable, it cannot dismiss it without framing a preliminary issue after the written statement is filed but can most certainly assign such opinion for refusing interim relief. However, if an extraordinary situation arises where it could take time to decide the point of maintainability of the suit and non-grant of protection pro tem pending such decision could lead to irreversible consequences****, the court may proceed to make an appropriate order in the manner indicated above justifying the course of action it adopts. In other words, such an order may be passed, if at all required, to avoid irreparable harm or injury or undue hardship to the party claiming the relief and/or to ensure that the proceedings are not rendered infructuous by reason of non-interference by the court."*
>
> *(Emphasis supplied)*

(ii) Bar under the Places of Worship (Special Provisions) Act, 1991:

60. Sri C S Vaidyanathan, learned Senior Counsel, assisted by Sri Ajay Kumar Singh, contended that the provisions of the Act of 1991 are not applicable since the temple of Lord Shree Krishna was existing over the suit property for the last 5000 years. The property had always been treated as the temple of Lord Shree

Krishna. Regular *puja, aarti* and other religious rituals were performed by the Hindu devotees. Merely demolition by intruders and converting the property into an alleged Mosque or Idgah does not adversely affect the religious character of the place of worship as a temple. Learned Senior Counsel impressed that '***once a temple, always a temple'*** is a judicially recognized principle of law and therefore, the religious character of the deity cannot be lost even by destruction. He placed reliance on the following observation made by the Hon'ble Apex Court in the case **of M. Siddiq v. Suresh Das** (2020) 1 SCC 1 (Ayodhya Case). The extract of the relevant paragraphs are reproduced here under :-

> *"148. The idol constitutes the embodiment or expression of the pious purpose upon which legal personality is conferred.* ***The destruction of the idol does not result in the termination of the pious purpose and consequently the endowment. Even where the idol is destroyed, or the presence of the idol itself is intermittent or entirely absent, the legal personality created by the endowment continues to subsist.***
>
> *... ... ...*
>
> *"154....The idol, as a representation or a "compendious expression" of the pious purpose (now the artificial legal person) is a site of legal relations.* ***This is also in consonance with the understanding that even where an idol is destroyed, the endowment does not come to an end. Being the physical manifestation of the pious purpose, even where the idol is submerged, not in existence temporarily, or destroyed by forces of nature, the pious purpose recognised to be a legal person continues to exist."***
>
> *(Emphasis Supplied)*

61. Learned Senior Counsel further argued that Section 2 (b) and (c) of the Act of 1991 define 'conversion' and 'place of worship' respectively. The 'religious character' is not defined in the Act of 1991. It is the Court who has to find out from the facts and circumstances of each case as to the religious character of the place of worship. The religious character has never changed, and the property of Katra Keshav Dev is the birth place of Lord Shree Krishna 'Keshav Dev'. Raising of alleged Mosque does not change the religious character of the temple.

62. Learned Counsel Shri Vishnu Shankar Jain, submitted that foreign invaders, Sikandar Lodhi and Mahmood Gaznavi, during their reign, demolished the temple of Lord Shree Krishna. The Mughal ruler Aurangzeb, in 1669, constructed a superstructure that was named as Mosque after the partial demolition of the temple of Lord Shree Krishna. Several Hindu signs, like, **'Sheshnag'**, '**sacred lotus flower'** etc., exist in the suit property. Hindu rulers always worshipped and paid homage to the birthplace of Lord Shree Krishna, which lies beneath the present structure. Every inch of Katra Keshav Dev is devoted to Lord Shree Krishna and to the Hindu community. The property is being continuously used for prayer, offering *puja, aarti* and performing other religious activities. The religious character of a temple is not destroyed by performing any other mode of worship.

63. He explained that the provisions of the Act of 1991 will apply to

the religious buildings such as temple, mosque, church or gurudwara. To attract the provisions of the Act of 1991, the 'religious character' of the place of worship has to be determined. The Act of 1991 does not bar the determination of question of fact as to the religious character of a particular place of worship. The plaintiffs have every right to establish the religious character of the subject building which is a question of fact. The religious character of the suit property shall be determined on the basis of the oral, documentary, scientific and expert evidence to be led by the plaintiffs during the trial. The plaintiffs would prove that the suit property is a Hindu temple and the entire property of Katra Keshav Dev is vested in the deity.

64. It is also submitted that on the contrary, Muslims are required to prove the existence of the mosque over the suit property to determine the religious character as a Mosque, and that a valid waqf was created by a Wakif being the owner of the property. It is also to be proved that the property was dedicated to a waqf and a valid waqf deed was executed relating to the suit property.

65. It is vehemently argued by Shri Jain that the principles of 'first in existence' or 'prior in existence' is of paramount consideration for determining the right to worship at a particular place where two communities claim the right to worship. He further contended that Section 4 of the Act of 1991 declares that the religious character of a place of worship as existing on 15th Day of August 1947 shall continue to be the same as it existed on that day. The religious character of a place of worship is the determinative factor for deciding the applicability of Section 4 of the Act of 1991. The religious character of the place in question is Hindu. There are various Hindu deities like '**Sheshnag**', '**sacred lotus flower'** etc., on the property in dispute. The entire property of Katra Keshav Dev measuring 13.37 acres vests in the deity '***Bhagwan Shree Krishna Virajman'***.

66. Shri Satyaveer Singh, learned Counsel submitted that the illegal construction of superstructure in the place of temple and the construction carried out pursuant to illegal and fraudulent compromise dated 12.10.1968 cannot be termed as admission on the part of the plaintiffs. There is a factual dispute about the demolition of temple of Lord Shree Krishna from time to time and raising of the superstructure by the defendants which exists even today. The fact that the compromise dated 12.10.1968 is illegal, without authority and void ab initio has to be decided on the basis of the evidence to be led by the parties during the trial.

67. He further submitted that the character of the suit property has always remained as birthplace of Lord Shree Krishna and did not change despite construction of illegal superstructure on it. The entire suit property is in symbolic possession of the plaintiffs. The devotees are worshipping, performing pooja and arti, treating the superstructure as 'Garbh Grah', the birthplace of Lord Shree Krishna. Aarti is being performed five times a day. Devotees are performing 'parikrama' around composite and compounded property, therefore, the religious character of the suit property is a temple. In view of the rival claim of the parties about the nature and usage of the property, religious character needs to be determined by evidence to be led by parties during the

trial. It cannot be decided at this stage and the plaint cannot be rejected.

68. Reliance is placed on the judgments of **U.P. Sunni Waqf Board vs Ancient Idol of Swayambhoo Lord Vishveshwar & Ors.**, 2023 AHC 239874 and **Anjuman Intezamia Masjid vs Rakhi Singh,** 2023 SCC Online All 208.

69. Sri Ashutosh Pandey, one of the plaintiffs appearing in person, submitted that near the eastern side of the superstructure, an old well which is called '*Krishna Koop'* is existing since time immemorial. The Hindu devotees visit this place to perform 'Mundan Ceremony' of their children. It is believed that their children will be blessed with the divine of Lord Shree Krishna. '*Pooja*' and '*Aarti*' are also being performed regularly at this place. Every year, after the Holi festival, the Hindu devotees perform '*Basoda Puja'* at the '*Krishna Koop'*. On the festival of '*Janamashtami*', millions of Hindu devotees assemble at the site to offer worship. They perform 'puja 'and 'aarti' at a large scale, facing the alleged illegal super structure believing it as 'Garbh Graha' of Lord Shree Krishna.

70. Sri Hari Shankar Jain, learned Counsel assisted by Shri Prabhash Pandey, vehemently argued that Section 4(3)(a) of the Act of 1991 provides that the provisions of Sub sections (1) and (2) will not apply to any place of worship which is an ancient and historical monument or an archaeological site, or remains covered by the Act of 1958 or any other law for the time being in force. Section 3 of the Act of 1904, provides that the Central Government by notification in the official gazette would declare an ancient monument to be a protected monument. The Lieutenant Governor, United Province, Agra and Oudh, vide its Notification Number 1465/1133-M, dated 25th November, 1920 declared the place of the temple at Katra Keshav Dev, an ancient monument as a protected monument. The notification reads thus:

> *"In exercise of the powers conferred by Section 3, sub-section (1) of the Ancient Monuments Preservation Act (VII of 1904), his Honour the Lieutenant-Governor of the United Province of Agra and Oudh is hereby pleased to declare the Under mentioned ancient Monument to be protected monuments within the meaning of the Act and to direct that no one shall destroy, remove, alter or efface in any manner or build on or near the site of monuments without having first obtained permission from the Government or its authorized officers.*
>
> *2. Any objection to the above proposal received in writing by the Local Government within one month from the date of this notification will be taken into consideration.*

Sl. No.	*Name and description of monument*	*District*	*Locality*
37	*The portion of Katra mound which are not in the position of nazul tenants on*	*Muttra*	*Kosi on Muttra and Bharatpur road, 9 miles from Muttra.*

	which formerly stood a temple of Keshav Deva which was dismantled and the site was utilized for the mosque of Aurangzeb .		

71. He further submitted that the State of U.P. enacted 'The U.P. Ancient and Historical Monuments, and Archaeological Sites and Remains Act, 1956'10. The State of Uttar Pradesh, exercising its power under Section 3 of State Act, adopted the Act of 1904. Section 3 of the State Act of 1956 provides thus:

> *"3. The provisions of the ancient Monuments Preservation Act,1904, as set out in Schedule I with the modifications mentioned in Schedule II, are hereby re-enacted and shall apply and be always deemed to have applied to ancient and historical monuments and archaeological sites and remains in Uttar Pradesh."*

72. On the basis of the above, he contended that the provisions of the Act of 1904 were made applicable in the State of Uttar Pradesh. Therefore, by this enactment, the Act of 1904 was adopted, reinforced, borrowed and implemented. Since a notification was issued in the year 1920, and the property was declared as a protected monument, therefore, the alleged notification issued in 1944 has no force.

73. The Public Works Department, State of U.P. issued Notification No. 1669/1133M dated 27.12.1920, wherein at Sr. No. 37, temple at Katra Keshav Dev, which is the subject property in this case, is mentioned, therefore, the temple situated at Katra Keshav Dev was confirmed to be a 'protected monument of national importance'.

74. He then contended that the notification issued on 25.11.1920 by the Lt. Governor, United Province is enforceable and applicable in the present case. The temple situated at Katra Keshav Dev was declared as national monument as well as a protected monument by the United Province and thereafter, by the State Government. Given the above, the subject building is covered by notification dated 25.11.1920, therefore, the provisions of Act of 1991 would not be applicable.

75. During the argument, Shri Jain filed 'List of Monuments of National Importance in Uttar Pradesh'. In this list, at Serial No. 219, the similar entry finds place which is quoted in the notification dated 25.11.1920. The same is reproduced below:

Sl. No.	*Name of Monument/ Site*	*Locality*	*District*
219	*Portions of Katra Mound which are not in the possession of Nazul tenants on which*	*Mathura*	*Mathura*

	formerly stood a temple of Keshavadeva which was dismantled and the site utilized for the mosque of Aurangzeb.		

76. It is emphasised that the matters relating to ancient historical monuments and archaeological sites have been distributed among three lists under the Seventh Schedule of the Constitution of India. List I-Union List of Seventh Schedule, at Entry No.67, mentions *ancient and historical monuments and records, and archaeological sites and remains, to be of national importance*. List II-State List, Entry No.12 mentions *libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.* Similarly, Entry no.40 of List-III, Concurrent List mentions *archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.*

77. efuting the arguments advanced by learned Counsel for defendants that the Act of 1904 was repealed by Section 39 of the Act of 1958, Shri Jain vehemently argued that the Act of 1904 was never repealed. He referred to Section 39(2) of the Act of 1958, which reads thus:-

> *"The Ancient Monuments Preservation Act, 1904, shall cease to have effect in relation to ancient and historical monuments and archaeological sites and remains declared by or under this Act to be of national importance, except as respect to things done or omitted to be done before the commencement of this Act".*

78. Shri Jain placed reliance upon the decision of the Hon'ble Apex Court rendered in the case of **Archaeological Survey of India vs. State of Madhya Pradesh and others**, (2014) 12 SCC 34. Relevant paragraph is extracted here under:-

> *"48. It is to be noted that the 1958 Act was enacted for the preservation of ancient and historical monuments and archaeological sites. Vide Section 39, the 1958 Act repealed the Ancient and Historical Monuments and Archaeological Sites and Remains (Declaration of National Importance) Act, 1951 and Section 126 of the States Reorganisation Act, 1956.* ***The enactment is a comprehensive legislation dealing with the meaning of "ancient monuments" and "owner" in Sections 2(a) and 2(g) respectively. Under Section 2(j) "protected monument" means any monument which is declared to be of national importance under the 1958 Act. Section 3 specifically declared certain ancient monuments to be deemed to be of national importance which were so declared under the previous enactment of 1951.*** *Further*

Section 4 of the Act empowered the Central Government to declare certain monuments to be of national importance. Section 9 provides that if any owner fails or refuses to enter into an agreement under Section 6 for maintenance, the Central Government may make an order on any or all matters covered under Section 6(2) of the Act and the same shall be binding on the owner. ***It is thus to be noted that the 1958 Act replaced the 1951 Act and covered only the ancient monuments which were declared to be of national importance.*** *Since the Central Government has not declared the said Bade Baba Temple to be an ancient monument vide the 1913 and 1914 Notifications under the 1904 Act, and nor was it declared to be of national importance even under the 1951 Act, the same fell outside the purview of the 1958 Act as well."*

(Emphasis Supplied)

79. It is vehemently argued that the application under Order VII Rule 11 of the CPC is not maintainable since the property was declared as 'protected monument of national importance'. He submitted that till date State ASI /Central ASI is the custodian of the property.

80. It is further argued that it is specifically averred in the respective plaints that even though destruction and restoration of the temple took place, there was no dispute on the property being the birthplace of Lord Shree Krishna till 1669. The dispute commenced in 1669, when the Mughal ruler Aurangzeb ordered his men to demolish the majestic temple and replaced it with a superstructure which was named as 'Shahi Idgah Masjid'. This fact indicates that before the demolition of the temple by Aurangzeb, the temple of Lord Shree Krishna was in existence. The religious character of the suit property was that of a Hindu Temple prior to its demolition.

81. Heavy reliance is placed on **U P Sunni Central Waqf Board vs. Ancient Idol of Swayambhu Lord Vishweshwar**, 2023 SCC Online Allahabad 2760. This Court observed that:

"161. Another point canvassed by plaintiffs' counsel to the non-applicability of Section 3, 4(1) and 4(2) is on the basis of non obstante clause contained in Sub-Section (3) of Section 4, that Section 4 (1) and 4(2) will not apply to any conversion of place effected before such commencement by acquiescence. The bar contained in Section 3, 4 (1) and 4 (2) is negatived by Sub-Section (3) (d) of Section 4, as the forcible act of Mughal Emperor in demolishing part of temple, and thereafter raising illegal construction would not affect the maintainability of suit.

162. ***The Act of 1991 is not an absolute bar upon the parties approaching the courts after its enforcement seeking their right as to place of worship or defining religious character of any place of worship. Sub-Section (3) of Section 4 enumerates certain cases in which the parties can approach the court for redressal of their grievance. Sub-Section (3)(d) is one of those case, where conversion has taken place much***

before the commencement of the Act and a party had not approached the court, the acquiescence or silence would not bar the action of such party.

163. As "religious character" has not been defined under the Act, and ***the place cannot have dual religious character at the same time, one of a temple or of a mosque, which are adverse to each other. Either the place is a temple or a mosque****.*

… … …

167. Thus, I find that religious character of the disputed place as it existed on 15.08.1947 is to be determined by documentary as well as oral evidence led by both the parties. Unless and until the court adjudicates, the disputed place of worship cannot be called as a temple or mosque.

… … …

184. The Act does not define "religious character", and only "conversion" and "place of worship" have been defined under the Act. ***What will be the religious character of the disputed place can only be arrived by the competent Court after the evidences are led by the parties to the suit****. It is a disputed question of fact, as only part and partial relief has been claimed of entire Gyanvapi compound which comprises of settlement plot Nos.9130, 9131 and 9132.*

185. Either the Gyanvapi Compound has a Hindu religious character or a Muslim religious character. It can't have dual character at the same time. The religious character has to be ascertained by the Court considering pleadings of the parties, and evidences led in support of pleadings. No conclusion can be reached on the basis of framing of preliminary issue of law. The Act only bars conversion of place of worship, but it does not define or lays down any procedure for determining the religious character of place of worship that existed on 15.08.1947."

(Emphasis Supplied)

82. Learned Counsel for the plaintiffs next contended that merely by asserting that a particular property is a mosque, will not deprive the Hindus from exercising their right over the religious place which is being worshipped for ages as a sacred place, as the birthplace of Lord Shree Krishna. He further submitted that if a statue of Hindu idol is placed inside the mosque, it shall not become a temple. Similarly, if Namaz is offered inside the temple, it will not become a mosque. It is submitted that the religious character of the property shall remain the same for which, it was constructed.

83. It is also contended that pursuant to an illegal and void ab initio compromise, the superstructure came into existence in 1968, whereas the Janmabhoomi Trust was created prior to this erection. Therefore, none of the provisions of the Act of 1991 would apply. The creation of the Janmabhoomi Trust is a matter of fact which would be proved by the evidence during the trial.

84. It is then contended that the plaintiffs have right under Article 25 of the Constitution of India, to regain, hold and

manage the property belonging to and possessed by the deity Lord Shree Krishna Virajman, measuring 13.37 acres in Katra Keshav Dev. Under the Hindu Law property once vested in the deity shall continue to be the deity's property. The property vested in the deity is never lost and it can be regained and re-established whenever it is freed, found or recovered from the clutches of invaders, ultras or hoodlums.

85. No mosque was in existence at the time of the auction sale in 1815. A small, dilapidated structure was existing at the corner of Katra Keshav Dev which was called a mosque by Muslims. On the basis of the compromise dated 12.10.1968, a superstructure was raised which is being called as Shahi Masjid Idgah. The deity is the owner and in symbolic possession over the land encroached by defendants no.1 and 2. Sewa Sansthan acted against the interest of the deity and without any power or authority, conceded two bighas land of Katra Keshav Dev to the Committee.

(iii) Bar under the Waqf Act, 1995:

86. Sri C. S. Vaidyanathan, learned Senior Counsel, made a straightforward argument that in the present matter, no question relating to the waqf, waqf property or any issue regarding which, the Waqf Tribunal has jurisdiction, arises. Moreover, if at all any such question arises, that cannot be decided at this stage. The provisions of Act of 1995 are not applicable to any property of Hindu or any religion other than Muslim. Jurisdiction of Civil Court is not barred under the Act of 1995 where the dispute involves a question over which, the Waqf Tribunal does not have jurisdiction to decide. He vehemently argued that the Waqf Tribunal cannot decide a question relating to the nature of the property because of a settled judicial principle 'once a temple, always a temple'. Question as to whether the temple/deity's land is capable of being taken by force, the perpetual character of deity as minor and its consequences, can only be decided by the Civil Court.

87. Learned Senior Counsel submitted that so far as the notification containing the list of waqf of 1944 is concerned, it does not provide any specification of the property such as its area, survey number, description etc. The portion of the suit property which is alleged to be a waqf property, is not identifiable. In the said notification, the details are referred as 'Mutawalli' and not 'Waqif'. All these disputed issues are subject to evidence to be led during the trial. Therefore, it cannot be decided at this stage.

88. He argued that no survey was conducted and the procedure as contemplated under Section 6 of the U. P. Muslim Waqf Act, 1960 was not followed. Therefore, it cannot be said that the suit property was ever notified as a waqf property. The disputed property has never been known as 'Idgah Masjid Aalmgiri', therefore, it appears that the notification of 1944 relates to some other property and not the suit property.

89. Shri Hari Shankar Jain, learned Counsel submitted that as per Section 1(2) of the Waqf (Amendment) Act, 2013, it is provided that it shall come into force on such date as the Central Government may, by notification, in the official gazette appoint. The said amendment was made effective from 01.11.2013. By way of the said amendment in Section 6 of the Act of

1995, the words 'any person interested' were substituted with the words 'any person aggrieved'. Similarly, in Section 7 of the Act of 1995, the words 'or any person interested', were substituted with 'or any person aggrieved.'

90. Shri Jain, advanced his arguments that this amendment is prospective in nature. He relied upon the judgment of ***Assistant Excise Commissioner, Kottayam and Ors. Vs Esthopian Cherian & another***, 2021 (10) SCC 210 and, submitted that there is a profusion of judicial authority on the proposition that a rule or law cannot be considered as retrospective unless it expresses a clear manifest intention to the contrary. It is an established rule that unless a contrary intention appears, legislation is presumed not to be intended to have retrospective operation. The law passed today cannot apply to the events of the past.

91. Shri Jain further submitted that in view of the amended provisions and the judgment referred above, the arguments advanced by learned Counsel for the defendants that any aggrieved person should approach the Waqf Tribunal for settlement of a dispute about the waqf property cannot be accepted. He further submitted that the suit property, which is situated in Katra Keshav Dev Virajman measuring 13.37 acres, was never a waqf property. The property was never dedicated to a waqf. No aukaf was appointed. No deed was ever executed to entrust the property to any kind of waqf. The entire land of Katra Keshav Dev is vested in the deity, which is being managed by the Janmabhoomi Trust. The defendants have to prove that a valid waqf was created by the Waqif, who had the ownership of the property, and is claimed to be a Mosque.

92. It is further submitted that since a notification was issued in the year 1920 and the property was declared as protected monument, therefore, the alleged notification issued in 1944 has no force. The said notification is *ultra vires* because the Act of 1904 was a Central Act. Notification issued by U.P. Government cannot have any adverse effect on the notification issued under the Central Act in the year 1904. Therefore, alleged notification dated 26.2.1944, is void ab initio, ultra vires and has no force.

93. Sri Vishnu Shanker Jain, learned Counsel contended that in the Hindu Law, the property in question is a place where Bhagwan Vishnu took 'Avtar' as Lord Krishna. He is a "Swayambhu" deity and the place where the Lord descended is Asthan. Therefore, both are worshipped by the Hindu devotees. No person of Muslim community is the owner of any inch of the land of Katra Keshav Dev, including the suit property. Only the owner of the property can dedicate the property to create a valid waqf. Under the Muslim Law, there must be unconditional and permanent dedication of the property to the Allah by a waqf deed.

94. To buttress his arguments, learned Counsel relied upon ***Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma, 1995 Supp (4) SCC 286. The relevant paragraph reads as under:***

> *"89. The conclusions thus reached are:*
>
> ***1. (a) The civil courts have jurisdiction to entertain the suits for violation of fundamental rights guaranteed under Articles 25 and 26 of the Constitution of India and suits.***

(b) The expression 'civil nature' used in Section 9 of the Civil Procedure Code is wider than even civil proceedings, and thus extends to such religious matters which have civil consequence.

(c) Section 9 is very wide. In absence of any ecclesiastical courts any religious dispute is cognizable, except in very rare cases where the declaration sought may be what constitutes religious rite.

2. Places of Worship (Special Provisions) Act, 1991 does not debar those cases where declaration is sought for a period prior to the Act came into force or for enforcement of right which was recognised before coming into force of the Act.

(Emphasis Supplied)

95. Sri Jain vehemently argued that it is specifically averred in the plaint that no part of the property of Katra Keshav Dev is a waqf property. Neither any Muslim, nor body, trust, society, board of Muslims had ever claimed any part of Katra Keshav Dev as a waqf property. The Committee or any Muslim party has never claimed that the property of Katra Keshav Dev had been registered and notified in the official gazette as a waqf property under the Muslim Waqfs Act, 1936, the U. P. Muslim Waqf Act, 1960, the Mussalman Wakf Act, 1923, the Wakf Act, 1954 or under Section 5 of Act of 1995. The defendants did not file any document or notification issued under any of the above enactments along with the application.

96. Sri Anil Kumar Singh, learned Senior Counsel, appearing for the plaintiffs, submitted that the suit property was never dedicated to auqaf. Neither notice was issued, nor any inquiry was conducted with the owner of the property, '*Bhagwan Shree Krishna Lala Virajman*', the deity. No preliminary survey of auqaf was carried out. No report after such survey and inquiry is available. The report must necessarily include nature, object of each waqf and the gross income of the said property. It is specifically averred that in the year 1669-70, during the month of Ramadan, Aurangzeb, the Mughal ruler illegally encroached upon the temple which was constructed by Raja Veer Singh Bundela and started using it as a Mosque. Therefore, no waqf was created since the temple was illegally encroached upon. It cannot be said that the suit property is a waqf property.

97. Learned Counsel relied upon the provisions contained in Section 4 of the Act of 1995 and submitted that for the purpose of preliminary survey of auqaf, the State Government by a notification in the official gazette may appoint for the State a Survey Commissioner of auqaf. The Survey Commissioner, shall after making inquiry submit its report about the existence of auqaf to the State Government. Such report shall contain the nature and object of the waqf, gross income of the property, amount of land revenue, cess, rates and taxes payable, remuneration of Mutawalli, and expenses incurred in the realization of the income.

98. He further submitted that neither the auqaf was ever appointed for the management of the suit property nor a survey was conducted. The recommendations of the survey were never forwarded to or examined by the Waqf Board. The State Government never issued any notification declaring the suit property

to be a waqf property as required under Section 5 of the Act of 1995.

99. He further submitted that the Act of 1995 is not applicable to non-Muslim or non-Islamic people and on the properties belonging to them. The property which belongs to the deity of any non-Islamic religion, can never be a waqf property. Apart from Islamic property, any religious property belonging to any class of assets, land, building, tenancies, tax can never be a waqf property.

100. Mrs. Reena N. Singh, learned Counsel, submitted that the ingredients of a waqf as provided under Section 3(r) of the Act of 1995 are not fulfilled to indicate that the suit property is a waqf property. No property exists in the name of any Mosque/Idgah as waqf in the revenue records. Therefore, no waqf or any waqf deed is in existence. Information under the Right To Information Act, 2005 was obtained from Sub-Divisional Magistrate, Sadar Mathura. It is reported that there is no entry in the revenue records relating to any property named as 'Shahi Idgah'. Further, it was reported that in Khasra/Khewat, the name of Shahi Idgah Masjid does not find place. In Khasra no.825, in the column 'Abadi' the name of the owner as '***Sri Thakur Krishna Janmabhoomi Khewat 255'*** is entered. This report establishes that in the revenue records, names of Shahi Idgah and Mosque do not exist.

101. It is further submitted that in the report card of Shahi Masjid Idgah with 'WAQF ID UP-510057' the column of 'Name of the document (s)/certificate (s)' submitted in registration of Waqf is found to be blank. The column 'inspection done' indicates 'No'. This information is available on the website of Waqf Asset Management System (WAMSI). Since mandatory requirements as provided under Sections 4 and 5 of the Act of 1995 were not completed, it cannot be assumed that the suit property is a waqf property.

102. It is contended that so far as the nomination made at Serial No. 43 in the list of Sunni Aukaf, annexed with the Notification of 1944, is concerned, the nature of the waqf property is mentioned as Idgah and Mosque. The nature of both the entities of Idgah and Mosque are different. It is also submitted that the United Province Muslim Waqf Act, 1936 was repealed by U.P. Muslim Waqf Act, 1960. This Act was then repealed by the U.P. (Second) Repealing Act, 2021, therefore, the Waqf List of 1944 is non-est.

103. Learned Counsel relied upon the judgment of ***Salem Muslim Burial Ground Protection Committee Versus State of Tamil Nadu and Ors***, Civil Appeal Nos. 7467-7470 of 2014. The relevant paragraph is quoted hereunder:-

> *"32. A plain reading of the provisions of the above two Acts would reveal that the notification under Section 5 of both the Acts declaring the list of the wakfs shall only be published after completion of the process as laid down under Section 4 of the above Acts, which provides for two surveys, settlement of disputes arising thereto and the submission of the report to the State Government and to the Board. Therefore, conducting of the surveys before declaring a property a waqf property is a sine qua non. In the case at hand, there is no material or evidence on record that*

before issuing notification under Section 5 of the 16 Waqf Act, 1954, any procedure or the survey was conducted as contemplated by Section 4 of the Act. ***In the absence of such a material, the mere issuance of the notification under Section 5 of the Act would not constitute a valid wakf in respect of the suit land.*** *Therefore, the notification dated 29.04.1959 is not a conclusive proof of the fact that the suit land is a wakf property. It is for this reason probably that the appellant Committee had never pressed the said notification into service up till 1999."*

(Emphasis supplied)

104. Reliance is placed upon the judgment of the Hon'ble Apex Court in **Punjab Waqf Board Vs. Sham Singh Harika**, (2019) 4 SCC 688. She further added that before issuance of notification under Section 5 (2) of the Act of 1995, a notice to person affected is necessary to be issued by the Waqf Board and, if no such notice is issued, any notification so issued is not binding. The suit property is vested in the name of Hindu deity, therefore, it cannot be converted into a waqf property.

105. Sri Vinay Sharma, learned Counsel submitted that so far as the question as to whether the property is a waqf property is concerned, this question cannot be decided at this stage. Since as per the provision of Act of 1995 certain legal requirements are to be followed to declare a property to be a waqf property, therefore, this fact can only be decided on the basis of the evidence to be led by the parties during the trial. No evidence is brought on record by the defendants that any survey was conducted under Section 4 of the Act of 1995 and that the State Government issued a notification declaring the suit property to be a waqf property.

106. Shri Ashutosh Pandey, one of the plaintiffs, appearing in person, submitted that no document of title is brought on record by the defendants. The electricity bill is also being paid by the plaintiffs. An FIR under Section 135 of the Electricity Act, 2003 was lodged against the defendants regarding theft of electricity on the suit property and a fine was also imposed upon them. The possession of the defendants over the property in issue is not admitted by the plaintiffs. The Hindu devotees are offering prayers at '*Krishan Koop'* situated in the Idgah Campus. The defendants failed to show from where they have derived the property. He further submitted that the cause of action, the question of title and possession, the legality of the compromise decree and the construction raised pursuant to alleged compromise are questions of fact, which can only be adjudicated upon by leading oral and documentary evidence by the parties after framing of issues.

107. It is also submitted that the subject property in no way, is a waqf property because no waqf was ever created and no waqf deed was executed showing the dedication of the said property to the Almighty. The Waqf Board is arrayed as defendant because they had accorded permission to the defendant, the Committee, to enter into fraudulent and illegal compromise dated 12.10.1968. The provisions of Sections 6, 85 and 108-A of the Act of 1995 or any other provision of this Act do not apply to the suit property. There are historical, religious, traveller accounts and other evidence to prove that the subject property was a temple

commonly known as temple of Keshav Dev.

(iv) Bar under the Limitation Act,1963:

108. Sri Vishnu Shankar Jain, learned Counsel contended that the suit is not barred by any provisions of the Limitation Act,1963. It is specifically averred that the cause of action is accruing every day. When the plaintiffs visited Mathura for the darshan of Lord Shree Krishna, on the dates as mentioned in their respective plaints, they were shocked to see that a mosque was standing over the birthplace of Lord Shree Krishna. The plaintiffs and other members met the members of the Committee and asked them to remove the illegal construction raised by them over the temple land. They were handed over a copy of the compromise dated 12.10.1968 qua Suit No. 43 of 1967. The Waqf Board refused to remove the construction raised by them. Thereafter, the plaintiffs sent a notice under Section 89 of the Act of 1995 to the Waqf Board which was duly served upon them but no reply was received.

109. He then contended that the cause of action is accruing against the wrongs committed by the defendants every day. It further accrued when plaintiffs came to know about the compromise dated 12.10.1968 and the decree passed by the Civil Court. Further, the cause of action arose after the expiry of 2 months' notice when no action was taken by the Waqf Board for removal of encroachment on the suit property. Therefore, the period of limitation would run from the date of knowledge as contemplated in Article 59 of the Limitation Act,1963. Part IV of the Limitation Act,1963 deals with suits relating to decrees and instruments. Article 59 deals with the description of suit to cancel or set aside an instrument or decree or for the rescission of a contract. The period of limitation is three years. The time from which the period of limitation begins to run is when the facts entitling the plaintiffs to have the instrument or decree canceled or set aside or the contract rescinded first became known to them.

110. Shri Jain laid emphasis upon these provisions and vehemently argued that the plaintiffs filed the suits within the period of limitation from the date of knowledge about the illegal construction raised by the defendants as well when they came to know about the void-ab-initio and fraudulent compromise entered into between Sewa Sansthan and the Committee in 1968.

111. Shri Rahul Sahai, learned Senior Counsel, submitted that the provisions of Sections 56, 58, 59, 64, 65 and 113 of the Limitation Act, 1963 are not applicable. When the plaintiffs visited the suit property on a given date as mentioned in the clause of accrual of cause of action, first time they came to know that defendants no. 1 and 2, had illegally and unlawfully, encroached upon the land of the deity on the basis of compromise dated 12.10.1968. They are offering Namaz on this place. The plaintiffs came to know about the fact that the Janmabhoomi Trust was negligent in protecting the suit property. Immediately thereafter, when the prayer to remove the said illegal structure was turned down by defendants no. 1 and 2, they filed the present suit within the period of limitation. The present suit is a title suit and not a suit for conversion of the property.

112. He placed reliance upon the decision of the Hon'ble Apex Court

rendered in the case of **Daya Singh & another vs. Gurudev Singh (dead) by LRS & ors**., (2010) 2 SCC 194. The question before the Hon'ble Apex Court was whether the suit was barred by Section 58 of Limitation Act, 1963 since the parties entered into the compromise in 1972 and the suit was filed on 21.8.1990. The Hon'ble Apex Court observed as under :-

> *"16. Keeping these principles in mind, let us consider the admitted facts of the case. In Para 16 of the plaint, it has been clearly averred that the right to sue accrued when such right was infringed by the defendants about a week back when the plaintiffs had for the first time come to know about the wrong entries in the record-of-rights and when the defendants had refused to admit the claim of the plaintiffs. Admittedly, the suit was filed on 21-8-1990.* ***According to the averments made by the plaintiffs in their plaint, as noted herein-above, if this statement is accepted, the question of holding that the suit was barred by limitation could not arise at all. Accordingly, we are of the view that the right to sue accrued when a clear and unequivocal threat to infringe that right by the defendants when they refused to admit the claim of the appellants i.e. only seven days before filing of the suit. Therefore, we are of the view that within three years from the date of infringement as noted in Para 16 of the plaint, the suit was filed. Therefore, the suit which was filed for declaration on 21-8-1990, in our view, cannot be held to be barred by limitation.***
>
> ***17. Therefore, the courts below including the High Court had proceeded entirely on a wrong footing that the cause of action arose on the date of entering into the compromise and, therefore, the suit was barred by limitation; whether or not the compromise decree was acted upon and whether delivery of possession had taken place has to be decided by the trial court before it could come to a proper conclusion that the suit was barred by limitation.***
>
> *18. In this view of the matter, we do not find any ground to agree with the findings of the High Court that the suit was barred by time because of its filing after 18 years of entering into the compromise.* ***The question of filing the suit before the right accrued to them by compromise could not arise until and unless infringement of that right was noticed by one of the parties****. The High Court in the impugned judgment, in our view, had fallen in grave error in holding that the suit was barred by time and had ignored to appreciate that the rights of the appellants to have the revenue record accrued first arose in 1990 when the appellants came to know about the wrong entry and the respondents failed to join the appellants in getting it corrected. In our view, the High Court was not justified in holding that mere existence of a wrong entry in the revenue records does not, in law, give rise to a cause of action within the meaning of Article 58 of the Act. No other point was urged*

before us by the learned counsel for the parties."

(Emphasis Supplied)

113. Learned Senior Counsel Shri Anil Kumar Airi, assisted by Shri Hare Ram Tripathi, vehemently argued that Article 59 of the Limitation Act, 1963 provides a period of limitation of three years to cancel or to set aside an instrument or decree or for the rescission of a contract. It is specifically averred in the plaint that the cause of action further accrued on 16.01.2020 when the plaintiffs came to know about the compromise dated 12.10.1968 and decree passed thereon, by the Civil Court. The relief is not barred by the Limitation Act, 1963 as period of limitation starts from the date of knowledge as provided under Article 59 Part IV of the Limitation Act, 1963. The plaintiffs have also prayed a decree of declaration to the effect that decree dated 20.07.1973 and 07.11.1974 passed in Civil Suit No. 43 of 1967 by Ld. Civil Judge, Mathura are not binding on the plaintiffs.

114. Sri Vinay Sharma, learned Counsel, submitted that the provisions of Sections 56, 58, 59, 64, 65 and 113 of the Limitation Act, 1963 are not applicable to the plaintiffs because when the plaintiffs visited the suit property, first time, they came to know that defendants no. 1 and 2 had illegally and unlawfully, encroached upon the land of the deity on the basis of compromise dated 12.10.1968. The question of limitation cannot be decided at the stage of disposal of application under Order VII Rule 11 of CPC.

(v) Bar under the Specific Relief Act, 1963:

115. Shri C. S. Vaidyanathan, learned Senior Counsel, contended that the disputed property is dedicated to the temple and the idol is in constructive possession at all times. The deity/idol has possession and title over the property, therefore, the suit for mandatory injunction is not barred by any provision of the Specific Relief Act, 1963.

116. It is next contended on behalf of the plaintiffs that it is alleged by the defendants that plaintiffs have simply filed the suits for declaration and injunction without seeking relief for possession, as defendant, the Committee, is in possession. On this count, it is submitted that the construction in question has been valued and proper Court fees has been paid. It is one of the reliefs claimed by the plaintiffs that the suit of the plaintiffs be decreed against the defendants directing them to remove the illegal construction raised by them encroaching upon the land within the area of Katra Keshav Dev, Mathura and to hand over vacant possession to the Janmabhoomi Trust within the time provided by the Court. Therefore, the suits are not barred under any provision of the Specific Relief Act, 1963.

117. Reliance has been placed upon the decision of the Hon'ble Apex Court rendered in the case of ***A.A. Gopalakrishnan v. Cochin Devaswom Board***, (2007) 7 SCC 482. The Hon'ble Apex Court observed as under:

"10. The properties of deities, temples and Devaswom Boards, require to be protected and safeguarded by their trustees/archakas/shebaits/employees. Instances are many where persons entrusted with the duty of managing and safeguarding the properties of temples, deities and Devaswom Boards have usurped

and misappropriated such properties by setting up false claims of ownership or tenancy, or adverse possession. This is possible only with the passive or active collusion of the authorities concerned. Such acts of "fences eating the crops" should be dealt with sternly. The Government, members or trustees of boards/trusts, and devotees should be vigilant to prevent any such usurpation or encroachment. It is also the duty of courts to protect and safeguard the properties of religious and charitable institutions from wrongful claims or misappropriation."

(Emphasis Supplied)

118. It is next contended that the plaintiffs never admitted lawful possession of the defendants over the suit property. It is the case of the plaintiffs that pursuant to illegal, fraudulent and void ab initio compromise dated 12.10.1968 two bigha land within the area of Katra Keshav Dev, which was always a part of the temple, was conceded to the Committee. Since all the constructions were illegally raised pursuant to the aforesaid illegal compromise, therefore, it would not be prudent to say that the possession of the defendants over the property is admitted to the plaintiffs.

119. It is also submitted that since the subject building is a protected monument, therefore, the decree dated 7.11.1974, based on compromise, is null and void, non-est and inoperative. Thus, no question for any person to seek relief of possession arises at all.

(vi) Bar under Order XXIII Rule 3A of the CPC:

120. Sri Vishnu Shanker Jain, learned Counsel for the plaintiffs, while referring to the provisions of Order XXIII Rule 3A of the CPC submitted that the provisions apply where a compromise has been entered into between competent parties. Sewa Sansthan did not have any right to file Suit No.43 of 1967 and to enter into any compromise relating to the property of the deity with anyone. He contended that it is the case of the plaintiffs that Rai Krishan Das and Rai Anand Krishan, the heirs of Raja Patnimal executed registered sale deed on 8.2.1944 for a consideration of Rs.13,400/- in favour of Mahamana Pt. Madan Mohan Malviya and two others. Said consideration was paid by Late Jugal Kishore Birla. The title and the possession of 13.37 acres land of Katra Keshav Dev was transferred to them. Sri Jugal Kishore Birla had taken a pledge to construct a glorious temple at Katra Keshav Dev, glorifying the birthplace of Lord Shree Krishna. He created the Janmabhoomi Trust on 21.2.1951. The Trust Deed was registered on 9.3.1951. He dedicated the entire land of Katra Keshav Dev to the deity Lord Shree Krishna Virajman. Thus, the entire land situated in Katra Keshav Dev was dedicated, vested and transferred to the Janmabhoomi Trust. No trustee had individual right over this property. Unfortunately, the Janmabhoomi Trust failed to perform its duty to secure, preserve and protect the Janmabhoomi Trust property. The Janmabhoomi Trust has been defunct since 1958.

121. Sri Jain, further submitted that since the entire property of Katra Keshav Dev vested in the Janmabhoomi Trust, Sewa Sansthan was not the owner and in possession over the suit property. Therefore, it had no right or authority to enter into compromise dated 12.10.1968 in

Civil Suit No.43 of 1967 with the Committee. The decree passed in Civil Suit No.43 of 1967 based on illegal compromise is null and void ab initio. It was well within the knowledge of Sewa Sansthan and the Committee that Sewa Sansthan was not the owner of the property of Katra Keshav Dev and not competent to enter into a compromise. Thus, they committed fraud and misrepresented before the Court.

122. It is further submitted that the Janmabhoomi Trust and the deity were not parties to Suit No. 43 of 1967 as well as to the compromise dated 12.10.1967. No Shebait or next friend to the deity was appointed to protect the interest of the idol. Sewa Sansthan is a separate legal entity from the Janmabhoomi Trust. Suit No.43 of 1967 was filed by Sewa Santhan and not by the Janmabhoomi Trust. Sewa Sansthan had no authority over the property to concede valuable property to the Committee. The compromise was entered into between the parties to defeat the interest of the deity. Since the plaintiffs are strangers to the proceedings of Suit No.43 of 1967, therefore, the provisions contained under Order XXIII Rule 3A of the CPC do not apply. The decree dated 7.11.1974 is not binding upon the plaintiffs. The present suits filed by the plaintiffs, as next friend of the deity *Lord Shree Krishna Virajman*, are not barred under Order XXIII Rule 3A of the CPC.

123. Sri Jain further contended that an application under Section 92 of the CPC was filed in the Court of District Judge, Mathura on 7.5.1993, titled as **Lord Shree Krishna vs. Vamdeo Ji Maharaj (Chairman), Shree Krishna Janamsthan Sewa Sangh Mathura**. A permission was sought to institute a suit, with a prayer to remove defendants no.1 to 6 of the said suit from the trusteeship, for direction to furnish the account of the trust property, to set up a scheme for carrying out the object of the trust and to dissolve Sewa Sansthan. The said application was rejected, vide order dated 06.05.1994. Against this, First Appeal No.199 of 1996 was dismissed by this Court, vide its judgment and order dated 23.02.1997. It held that the entire property of Katra Keshav Dev measuring 13.37 acres had vested in the Janmabhoomi Trust and that Raja Patnimal was the owner of the property. The entire property of Katra Keshav Dev was purchased by Mahamana Pt Madan Mohan Malviya, Goswami Ganesh Dutt and Professor Bhikhanlal Attrrey through registered sale deed executed on 8.2.1944. They became the owner and in possession of the said property. It was also held that Sewa Sansthan was not the trustee of the Janmabhoomi Trust property, therefore, it could not represent the Janmabhoomi Trust. Since the trustees were not made parties, therefore, application under Section 92 of the CPC was found to be not maintainable.

124. It is further contended that in Suit No.43 of 1967, it was admitted that the entire property was vested in the Janmabhoomi Trust by virtue of trust deed executed on 21.02.1951. Late Jugal Kishore Birla had created the Janmabhoomi Trust. The civil suit filed by certain Muslims claiming ownership and possession over the suit property had been dismissed by the Civil Court and the decree was operating in favour of Hindus.

125. To buttress his argument, learned Counsel for the plaintiffs placed reliance upon the decision of the Hon'ble Apex Court in **Indian Bank vs. Satyam Fibbers (India) Pvt. Ltd**., 1996 (5) SCC

550. Relevant paragraph is extracted as under:

> ***"30. Forgery and fraud are essentially matters of evidence which could be proved as a fact by direct evidence or by inferences drawn from proved facts."***
>
> *(Emphasis Supplied)*

126. He also relied upon the judgment in ***A V Papayya Sastry and others vs. Govt of A.P. and others***, 2007 (4) SCC 221, where it has been held that:

> ***"22. 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 est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as 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."***
>
> ***… … ...***
>
> ***"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."***
>
> ***(Emphasis Supplied)***

127. Reliance is thereafter, placed upon the decision rendered by the Hon'ble Apex Court in the case of **Chandro Devi vs. Union of India**, 2017 (9) SCC 469. Relevant paragraph is extracted here under:-

> ***"6…….There can be no dispute with the proposition that if there is fraud, which leads to passing of a judgment, then fraud vitiates all actions taken consequent to such fraud and this would mean that the judgment would be set aside. However, before setting aside the judgment, we must come to the conclusion that the action was fraudulent."***
>
> *(Emphasis Supplied)*

128. Learned Counsel also placed reliance upon a decision in **Bilkis Yakub Rasool v. Union of India and Others**, 2024 SCC OnLine SC 25, wherein it has been held that:-

> ***"194. Further, fraud can be established when a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii), recklessly, being careless about whether it be true or false. While suppression of a material document would amount to a fraud on the Court, suppression of material facts vital to the decision to be rendered by a court of law is equally serious. Thus, once it is held that there was a fraud in judicial proceedings all advantages gained as a result of it have to be withdrawn. In such an eventuality, doctrine of res judicata or doctrine of binding precedent would not be attracted since an order obtained by fraud is non est in the eye of law."***
>
> ***… … ...***
>
> ***197. A Division Bench of this Court comprising Justice B. R. Gavai and Justice C.T. Ravikumar placing reliance on the***

dictum in S.P. Chengalvaraya Naidu, held in Ram Kumar v. State of Uttar Pradesh, AIR 2022 SC 4705, that a judgment or decree obtained by fraud is to be treated as a nullity."

(Emphasis Supplied)

129. It is further submitted that the plaintiffs are seeking decree of declaration to the effect that the judgments and decree, dated 20.7.1973 and 7.11.1974 are not binding on the plaintiffs. The provisions under Order XXIII Rule 3A of the CPC are applicable on such decree which is passed on the basis of compromise between the parties to the suit and it has validly been entered between two competent parties. Therefore, the plaint is not liable to be rejected under Order XXIII Rule 3A of the CPC.

130. Learned Counsel placed reliance upon the decision of this Court in **Srimati Suraj Kumari vs. District Judge Mirzapur & Ors.**, AIR 1991 Alld 75. It is observed that:-

"22. The petitioner's second submission regarding the applicability of Order XXIII Rule 3A 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 XXIII Rule 3A of the Code cannot be read dehors its earlier provision of the same chapter.*** *The said provision is only a part of the entire chapter of Order XXIII of the Code which prescribes provisions or withdrawals and adjustment of the suit.* ***Order XXIII Rule 3 of the Code provides for a situation where the parties have arrived at a compromise. Order XXIII Rule 3 & Rule 3A of the Code 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."***

(Emphasis Supplied)

131. He further relied upon a judgment of the Hon'ble Apex Court in ***A.A. Gopalakrishnan v. Cochin Devaswom Board***, (2007) 7 SCC 482 : 2007 SCC OnLine SC 914:-

"Order 23 Rule 3 CPC deals with compromise of suits. Rule 3-A provides that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. ***We are of the considered view that the bar contained in Rule 3-A will not come in the way of the High Court examining the validity of a compromise decree, when allegations of fraud/collusion are made against a statutory authority which entered into such compromise. While it is true that decrees of civil courts which have attained finality should not be interfered with***

lightly, challenge to such compromise decrees by an aggrieved devotee, who was not a party to the suit, cannot be rejected, where fraud/collusion on the part of officers of a statutory board is made out."

(Emphasis Supplied)

132. It is submitted that the judgment and decree passed on the basis of the compromise between the parties in Suit No.43 of 1967 is challenged in the present suits. As per the provisions contained in Order XXIII and Rule 3A of the CPC, no suit shall lie to set aside a decree on the ground that the compromise on which, the decree is based was not lawful. Since the plaintiffs were not parties to the suit, the compromise dated 12.10.1968, is not binding upon them. The provision of Order XXIII Rule 3A of the CPC do not apply.

133. Sri Anil Kumar Airi, learned Senior Counsel, assisted by Sri Hare Ram Tripathi, submitted that the title of Raja Patnimal over the property is undisputed. The area of the property situated at Katra Keshav Dev, measuring 13.37 acres, is also not challenged. It is submitted that the averments made in the plaint about historical development, execution of sale deed in favour of Mahamana Pt. Madan Mohan Malviya and two others and creation of the Janmabhoomi Trust, are based on the documentary evidence.

134. It is next submitted that according to the provisions contained in Sections 90 of the Indian Evidence Act, 1872 there is a presumption about the genuineness of the documents, the dedication of the property and execution of the registered trust deed about the suit property. Therefore, Order VII Rule 11 of the CPC cannot wash out the claim of the plaintiffs. In 1951, the Janmabhoomi Trust was created and its creation cannot be challenged because it was a public trust. Once a trust, always a trust. The Court is always the protector of the rights and the existence of a perpetual minor. Once the property was vested in the Janmabhoomi Trust, no one could have filed a suit or taken any action against it.

135. The compromise decree was obtained on the basis of fraud and misrepresentation and as the plaintiffs were not the parties either in Original Suit No.43 of 1967 or in the illegal compromise, therefore, it can be challenged by the plaintiffs through present proceedings. The suits of the plaintiffs are not barred under the provisions of Order XXIII Rule 3A of the CPC. The compromise dated 12.10.1968 entered into between Sewa Sansthan and the Committee and decree passed in Civil Suit No.43 of 1967 are not binding on the devotees of 'Bhagwan Shree Krishan'. The parties to Suit No.43 of 1963, with a view to defeat the interest of deity and devotees, fraudulently entered into compromise on 12.10.1968. The present suit is filed by plaintiffs as next friend of deity of Lord Shree Krishna, which is not barred under Order XXIII Rule 3A of the CPC.

136. Learned Counsel for the plaintiffs in the remaining suits adopted the arguments made on behalf of the plaintiffs in their respective cases.

REPLY BY LEARNED COUNSEL FOR THE DEFENDANTS.

137. Learned Counsel for the defendants, in reply, submitted that the Act of 1991 bars conversion of places of

worship as they existed on 15.08.1947. The preamble of the aforesaid Act is quoted thus:

> *"An act to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship as it existed on the 15th day of August,1947, and for matters connected there with or incidental thereto."*

138. It is further submitted that the argument of the learned Counsel for the plaintiffs that the provisions of the Act of 1904 are applicable over the suit property, cannot be accepted as there is no mention of the said Act of 1904 in the Act of 1991. The present suit admits continuous possession and use of the mosque by the Committee and the said mosque is in existence even today. The terms of the compromise are admitted in the suit and the existence of mosque prior to 1968 and continuing as such after the compromise is admitted. The notification of Public Works Department of 1920 also indicates that a mosque was in existence at the time of issuance of such notification. It establishes that the site has been utilized as a mosque prior to 1920 and continues to be so, till today. Therefore, the bar under the Act of 1991 and the Limitation Act,1963 shall apply.

139. She further submitted that the Act of 1904 ceased to have effects, therefore, its provisions are not applicable and the suit property is a waqf property. The suit property (Mosque) has been notified under the list annexed with the notification of 1944 as a waqf property, therefore, the suit is barred by the provisions of the Act of 1995. The plaintiffs have arrayed Waqf Board as a defendant, thus treating the suit property as a waqf property.

140. She further submitted that it is averred in the respective plaints that the mosque was built by Aurangzeb in 1669-70. It is also averred that after partial demolition of the pre-existing temple, at the site, a superstructure was raised which was named as 'Shahi Idgah Masjid'. Thus, the religious character of disputed property as Idgah Mosque has been admitted by the plaintiffs. Therefore, it is not required to determine the religious character of the structure by leading evidence. The possession of the defendant over the said mosque on the date of filing of the suits is admitted. It is also admitted in the plaint that the mosque existed prior to and after independence. By way of the present suits, plaintiffs are asking for a change of the said religious character by converting an existing mosque into a temple. It is also admitted by the plaintiffs that judgment dated 2.12.1935 held that Kacchi Kursi was to be treated as a part of Masjid.

141. It is then contended that the argument raised by the plaintiffs that the religious character is not defined in the Act of 1991 and the religious character of the structure is to be determined by leading evidence, is fallacious. The religious character of a place stands determined by nomenclature defined in Section 2 (c) of the Act of 1991.

142. It is submitted that the reliance placed on the judgment of **Anjuman Intezamia Masjid vs. Rakhi Singh**, (supra) is incorrect as the said judgment is not applicable to the present case.

143. Insofar as the argument made on behalf of the plaintiffs that the bar under

Section 4(1) and (2) is negated by sub-section (3) (d) is concerned, it is submitted that Section 4(3)(d) of the Act of 1991 protects all the conversions that may have taken place by acquiescence thereby making it clear that such conversion will not be tested on the touchstone of religious character of the said place of worship as existed on 15.8.1947.

144. The existence of compromise entered into between the parties to Suit No.43 of 1967 is averred by the plaintiffs in their respective plaints. The decree was passed in accordance with the compromise entered into between the parties and the suit was decreed, vide its judgment and orders dated 20.07.1973 and 07.11.1974. Certain modification/constructions were carried out pursuant to that compromise. These constructions were carried out in 1968 and were within the knowledge of the plaintiffs since they have made specific averments in their plaints. Basis the averments made in the plaint, it is an admission on the part of the plaintiffs that they were ousted in 1968, thus the cause of action would commence from the date of such ouster. The alleged ouster in 1669-70 would not give the plaintiffs continuous cause of action as the alleged wrongful act of encroachment was complete on the date of ouster.

145. The plaintiffs have no continuing cause of action and their rights were extinguished at the time of alleged encroachment and raising of superstructure. In spite of having knowledge of visual changes carried out at the suit property, the plaintiffs did not take any action for more than 50 years. The changes made by the defendants were complete in nature and, therefore, it cannot be said that the plaintiffs had no cause of action since 1968.

146. Gazette Notification dated 26.2.1944, along with the list of Aukaf under the United Province Muslim Act, 1936 indicate subject matter mosque as a waqf property. Therefore, changing of religious character of mosque to that of a temple would be barred by the Act of 1991. No mixed question of fact and law arises in view of the said admission and documents placed on record.

147. There is no pleading regarding the Act of 1904 or the Act of 1958 in the plaints. The plaintiffs have not been able to show any notification under the Act of 1958 issued by the Central Government in respect of Idgah Mosque therefore, the said Act is not applicable.

148. It is further submitted that the judgment in ***Archaeological Survey of India Vs. State of M.P. & Ors. (supra)***, relied upon by the plaintiffs is not applicable. Reliance is placed on the following observation:

> *"In order to attract the applicability of 1958 Act, declaration in respect of a monument has to be made by the Central Government under Section 4 of 1958 Act. Section 4 of the 1958 Act, provides that where the Central Government is of the opinion that any ancient monument or archaeological site and remains not included in Section 3 is of national importance, it may, by notification in the Official Gazette, give two months' notice of its intention to declare such monument to be of national importance".*

149. It is further submitted that the judgment of ***U P Sunni Central Waqf***

Board vs. Ancient Idol of Swayambhu Lord Visheshwar, 2023 SCC Online Allahabad 2760, is not applicable. It is nowhere observed in this judgment that the applicability of the Act of 1991 requires a trial.

150. Learned Counsel submitted that there is no pleading of fraud and misrepresentation regarding compromise dated 12.10.1968 in the plaints. Section 17 of the Limitation Act, 1963 provides that limitation will not stop running if the plaintiffs could have discovered the fraud with a reasonable diligence. Therefore, the cause of action is not, as alleged in plaint, continuing on the date of filing of the suit. The limitation would run from 1968 and the plaints are thus, barred by the Limitation Act,1963.

151. Learned Counsel relied upon the judgment of **Balkrishna Savalram Pujari & others vs. Shri Dhyaneshwar Maharashtra Sansthan & others** AIR 1959 SC 78. Reliance is placed on the following paragraphs:

> ***"… … ... If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. … … …***
>
> *... ... ... .Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guravs as hereditary worshipers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. ... ...*
>
> *... ... ...Can it be said that, after the appellants were evicted from the temple in execution of the said decree, the continuance of their dispossession was due to a recurring act of tort committed by the trustees from moment to moment?* ***As soon as the decree was passed and the appellants were dispossessed in execution proceedings, their rights had been completely injured, and though their dispossession continued, it cannot be said that the trustees were committing wrongful acts or acts of tort from moment to moment so as to give the appellants a cause of action de die in diem… … ...where the wrongful act complained of amounts to ouster, the resulting injury to the right is complete at the date of the ouster and so there would be no scope for the application of 23 in such a case… … ..."***
>
> *(Emphasis Supplied)*

Further, reliance is placed on ***Khair Mohammad and others vs. Jannat & ors***, AIR 1940 Lah 359 . The following paragraph is referred –

> ***"… … ... Where the injury complained of is complete on a certain date, there is no "continuing wrong" even though the damage caused by that injury might continue.***
>
> ***In such a case the cause of action to the person injured arises, once and for all, at the time when the injury is inflicted, and the fact that the effects of the injury are felt by the aggrieved person on subsequent occasions, intermittently or even continuously, does not make the injury a "continuing wrong" so as***

to give him a fresh cause of action on each such occasion. … … …"
(Emphasis Supplied)

The judgment of ***Mosque, & ors vs. Shiromani Gurudwara Prabandhak Committee***, AIR 1938 Lah 369 is also referred. Reliance is placed on the following paragraph:

> *"… … … In this aspect of the question, the defendants' refusal to allow the Mahomedans to pray on the site of the mosque could not constitute a "continuing wrong" within the meaning of Section 23 of the Lim. Act. For when all rights of Mahomedans in the mosque were extinguished and the Sikhs became the owners of the building, the "right to pray" in the mosque was also extinguished and in refusing that right to the plaintiffs the defendants cannot be held to be guilty of any wrong, much less a "continuing" one … … …"*

152. It is submitted that in the above referred judgment, it is observed that, if the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. The cause of action regarding visiting of temple is illusionary to avoid bar of limitation, while it is admitted in the plaint that Aurangzeb had constructed the mosque in 1669.

153. Since the plaintiffs claim themselves to be the next friend of the deity and the Asthan as well the devotees and worshippers of Lord Shree Krishna, an irresistible inference is drawn that the plaintiffs would be visiting Mathura regularly to worship Lord Shree Krishna. But they abstained themselves from raising any grievance against the admitted physical changes that were carried out to the suit property since 1968.

154. Insofar as the submission on behalf of the plaintiffs that the deity/idol is a perpetual minor and is thus not bound by limitation is concerned, it is submitted that such analogy has been negated by the Supreme Court in **M. Siddique vs. Mahant Suresh Das, (supra)** (Ayodhya Judgment). Reliance is placed on the following observation :-

> ***"544. The analysis of the legal position on the applicability of the law on perpetual minority by S.U. Khan, J. commends itself. Based on the judicial precedents analysed above, it is an established position that a deity cannot on the ground of being a perpetual minor stand exempted from the application of the Limitation Act. The submission which was urged by Mr C.S. Vaidyanathan is contrary to the jurisprudence of close to a century on the issue. We follow the line of precedents emanating from the Privy Council, this Court and several High Courts noted earlier. The applicability of the law of limitation cannot be ruled out on the basis of the theory of perpetual minority."***
> *(Emphasis Supplied)*

155. With respect to the argument advanced by the plaintiffs that 'Asthan

Shree Krishan Janmabhoomi Katra Keshav Dev Khewat No. 255 in Mauja Mathura Bazar, city and district Mathura' is a juristic person, therefore, it would not be hit by the bar of limitation. Mrs. Ahmadi rebutted that it is illegally claimed to be 'Asthan'. The said proposition that Asthan is a juristic person has also been negated by the Hon'ble Apex Court in ***M. Siddiq vs. Mahant Suresh Das (supra) (Ayodhya Case).*** Reliance is placed on the following observations –

> *"249. It is for all the reasons highlighted above that the law has till today yet to accept the conferral of legal personality on immovable property. Religiosity has moved hearts and minds. The Court cannot adopt a position that accords primacy to the faith and belief of a single religion as the basis to confer both judicial insulation as well as primacy over the legal system as a whole. From Shahid Gunj to Ayodhya, in a country like ours where contesting claims over property by religious communities are inevitable, our courts cannot reduce questions of title, which fall firmly within the secular domain and outside the rubric of religion, to a question of which community's faith is stronger.*
>
> ***250. On a consideration of all the factors outlined above, it is thus held that the second plaintiff in Suit No. 5 — "Asthan Shri Ram Janam Bhumi" is not a juristic person."***
>
> *(Emphasis Supplied)*

156. It is submitted that only if Shebait is minor, he can avail the benefit of exemption from the Limitation Act, 1963. The learned Counsel relied upon the judgment of ***M. Siddiq vs. Mahendra Suresh Das***, 2020 (1) SCC 1 and referred to the following paragraph:-

> ***"It is established position that a deity cannot on the ground of being a perpetual minor stand exempted from the application of the Limitation Act,1963. The applicability of law of limitation cannot be ruled out on the basis of the theory of perpetual minority, therefore, no mixed question of fact and law arises as the law lays down that deity is bound by limitation."***
>
> *(Emphasis Supplied)*

157. She further rebutted that the judgments relied upon on behalf of the plaintiffs in the case of Popat and Kotecha vs. State Bank of India Staff Association, (2005) 7 SCC 510 and **Deity Sri Pabuji Maharaj vs. Board of Revenue**, 2023 SCC OnLine Raj 1690 are not applicable.

158. It is submitted that there is no pleading regarding the U.P. Muslim Waqf Act, 1936 in the plaints. Section 112 of the Act of 1995 saves all action taken under the Waqf Act, 1954 and Section 69 (2) of the Waqf Act, 1954 saves all action taken under the State Acts, including the U.P. Muslim Waqf Act, 1936. It is also submitted that it is wrong to say that in view of notification of 1920 issued under the Act of 1904, the structure could not have been notified as a waqf property in 1944. Now, in 2023, the plaintiffs are raising a dispute that structure is not a waqf property. The submission of the plaintiff that the property is vested in the name of deity/idol and cannot be converted into a waqf property is a dispute,

which is covered under Section 85 of the Act of 1995. The plaintiffs being 'person aggrieved' have to approach the Waqf Tribunal as the jurisdiction of the Civil Court is barred. The same will be governed by the law in present, i.e. the Act of 1995 along with its amendments of 2013, since the suit was filed after the commencement of the said Act. No mixed question of law or fact arises.

159. It is submitted that the judgment of ***Board of Muslim Waqf Vs. Radha Krishan***,1979 SCC (2) 468 is not applicable in the present case as it relates to the Waqf Act, 1954. The words 'any person interested' have been replaced with 'any person aggrieved' in the Act of 1995. The judgment of ***Rashid Wali Beg vs. Farid Pindari & Ors.*** (supra) has interpreted Section 85 of the Act of 1995. The judgment of ***Ramesh Govind Ram vs. Sugra Humayun Mirza Wakf*** (supra) is no more a good law since its basis was removed by the Waqf (Amendment) Act, 2013. The judgment of **UP Sunni Central Waqf Board Vs. Ancient Idol of Swayambhoo Lord Vishweshwar** (supra), is not applicable in the present case. The judgment of ***Most. Rev. P.M.A. Metropolitan vs. Moran Mar Marthoma*** (supra) is not applicable since only a part of minority judgment is referred and the part of majority judgment has not been referred.

160. It is submitted that as per the provision contained in Order XXIII Rule 3A of the CPC, no suit shall lie, to set aside the decree on the ground that the compromise on which the decree is based was not lawful. If the compromise entered in 1968 is to be set aside, it can only be done by filing an application in the same proceeding seeking a relief of setting aside or modification of the decree. No exception is incorporated in the provisions contained in Order XXIII Rule 3A of the CPC regarding those who are not parties to the compromise being able to maintain a suit to challenge the same. Therefore, the suit is barred under Order XXIII Rule 3A of the CPC.

161. It is submitted that the reliance placed on the judgment of ***Rejeev Gupta*** (supra) is misplaced. The Hon'ble Apex Court in ***Triloki Nath Singh vs Anirudh Singh***, Civil Appeal No. 3961 of 2010, held that a stranger to the compromise cannot challenge the same under Order XXIII Rule 3A of the CPC. Reliance is placed on the following paragraph:-

> *"16. By introducing the amendment to the Civil Procedure Code (Amendment 1976) w.e.f. 1st February, 1977, the legislature has brought into force Rule 3A to order XXIII, which creates bar to institute the suit to set aside the decree on the ground that the compromise on which decree is based was not lawful. The purpose of effecting a compromise between the parties is to put an end to the various disputes pending before the Court of competent jurisdiction once and for all.*
>
> ... ...
>
> ***22….Merely because the appellant was not party to the compromise decree in the facts of the present case, will be of no avail to the appellant, much less give him a cause of action to question the validity of the compromise decree passed by the High Court by way of substantive suit before the Civil Court to declare it as***

fraudulent, illegal and not binding on him. Assuming, he could agitate about the validity of the compromise entered into by the parties to the partition suit, it is only the High Court, who had accepted the compromise and passed decree on that basis, could examine the same and no other court under proviso to Rule 3 of Order 23 CPC."

(Emphasis Supplied)

162. Learned Counsel referred to proviso to Section 34 of Specific Relief Act, 1963 and submitted that so far the relief of possession is concerned, it is claimed for issuance of mandatory injunction against the defendants. The suits are not for recovery of possession under Sections 5 and 6 of the Specific Relief Act, 1963 therefore, the same are barred by proviso to Section 34 of the Specific Relief Act, 1963 and deserve to be rejected as admittedly, the plaintiffs have not claimed 'further relief' as contemplated therein. The relief of injunction cannot be regarded as further relief. Reliance is placed on the judgment of the Hon'ble Apex Court in ***Vasantha Vs. Rajalakshmi*** (supra).

163. It is submitted that the reference given by learned Counsel Mrs. Reena N Singh, on behalf of the plaintiffs to the judgments ***Shyamlal Ranjan Mukherjee vs. Nirmal Ranjan Mukherjee***, Civil Misc. Writ Petition No. 56447 of 2003, ***Shriomani Gurudwara Prabandhak Committee vs. Somnath Das, Devkinandan vs Murlidhar***, 1957 AIR 133, ***State of Madhya Pradesh vs. Pujari Utthan Avam Kalyan Samiti***, CA No. 4850/2021, ***Mukundji Maharaj vs Parshottam Lal Ji***, AIR 1957 ALL 77, ***K Santhel Kumar vs Principal Secretary to Governmen***t, W.P. No.18190/ 2021, ***Salim D Agboatwala & Ors. vs Shamalji Oddhavaji Thakkar & Ors.***, AIR 2021 SC 502, ***Salim Muslim Burial Ground Protection Committee vs Tamil Nadu & Ors.***, (supra) and ***Swami Atmanand vs Ram Krishna Tapovanam***, AIR 2005 SC 2392, is misplaced since the observations made by the Court in each of the aforesaid cases are not applicable to the present case.

164. It is also submitted that so far as the entries in municipal and revenue records are concerned, they are immaterial since revenue records are only for financial purposes to collect the revenue and are not the proof of the title.

Determination:

165. Having heard the learned Counsel for the parties, after perusing the material available on record and the submissions made by both the sides, I now proceed to dispose of the applications moved by the defendants.

(i) Scope of Order VII Rule 11 of the CPC:

166. Mrs. Ahmadi, learned Counsel for the defendants argued that the plaints do not disclose a reliable cause of action. To decide an application under Order VII Rule 11 of the CPC, the averments made in the plaints are to be scrutinized by the Court to arrive at a conclusion that the plaintiffs have a valid cause of action. For this purpose, the plaint is to be read meaningfully and the defense taken by the defendants is not required to be considered. The Court is fully empowered to dismiss the suit summarily at the threshold without conducting a trial, if the Court is satisfied that the plaint is

liable to be rejected. The provisions contained in Order VII Rule 11 of the CPC are mandatory in nature. If on a meaningful reading of the plaint, the Court finds that any ground specified in clauses (a) to (e) is made out, the Court is bound to reject the plaint.

167. On the other hand, learned Counsel for the plaintiffs submitted that the power under Order VII Rule 11 of the CPC should be exercised sparingly and cautiously by the Court. The plaint can only be rejected when it appears to the Court that the averments made in the plaint do not disclose a cause of action or are barred by any law. The plaint has to be construed as it stands without any addition or subtraction of words or its apparent grammatical sense. The pleadings in the plaint have to be taken as correct value in its entirety. It is also submitted that the averments made in the plaint have to be read as a whole. On the basis of the averments made in the plaint, in all other situations, the claim should be adjudicated during the course of the trial. When an application for rejection of the plaint is allowed, the plaintiff becomes remediless. Rejection of the plaint at the threshold entails very serious consequence for the plaintiffs, therefore, this power should be exercised in exceptional circumstances only. The facts, which constitute a cause of action, are always subject to the evidence to be led by the plaintiffs during the trial.

168. During their arguments, learned Counsel for the plaintiffs took this Court through historical developments, subsequent rounds of litigations and events leading to cause of action giving rise to present suits.

169. It would be imperative to quote provisions contained in Order VII Rule 11 and Section 151 of the CPC as under:

> ***Order VII Rule 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 cor rect 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.*

Section 151 of the CPC provides:-

151. Saving of inherent powers of Court. —*Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*

170. A cause of action is a bundle of facts, which the plaintiffs must prove, to succeed in their suits. A cause of action is constituted on the basis of various facts averred in the plaint.

171. It is one of the arguments of the plaintiffs that in the present suits, the title is not under challenge. The area of the property situated in Katra Keshav Dev, measuring 13.37 acres, is also not under challenge. It is not disputed that the entire property was vested in the Janmabhoomi Trust by late Shri Jugal Kishore Birla. The title of the plaintiffs over the suit property, is established.

172. Perusal of the respective plaints, as a whole, goes to show that the historical background of the matter, averments made in the plaints about the title, ownership and possession of Raja Patnimal of Benaras and his legal heirs over the property of Katra Keshav Dev measuring 13.37 acres, several rounds of subsequent litigations establishing the title and possession of suit property in their favour, the execution of sale deed in favour of Mahamana Pandit Madan Mohan Malviya and others, creation of the Janmabhoomi Trust by Late Sri Jugal Kishore Birla, institution of Suit No.43 of 1967 by Sewa Sansthan, the compromise dated 12.10.1968 entered into between the parties, construction of superstructure known as 'Shahi Idgah Masjid' by the defendants, and execution of certain documents from time to time which are brought on record by plaintiffs, are bundle of facts which indicate that the plaintiffs have a cause of action to institute present suits. All these peculiar facts and circumstances constitute a cause of action as averred in their respective plaints.

173. Pertinent to note that certain documents are filed by the plaintiffs in support of their averments in the plaint such as the sale deed dated 08.02.1944, the trust deed dated 09.03.1951, revenue and municipal records, electricity bills, documents related to several rounds of litigation, notice. The cause of action, averments made in the plaints, as well as the execution of the document are always subject to evidence to be led by the parties during the trial.

174. **In Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust**, (2012) 8 SCC 706, the Hon'ble Apex Court observed as under:-

"13. While scrutinising the plaint averments, it is the bounden duty of the trial court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words cause of

action. A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue."

(Emphasis Supplied)

175. In **A.B.C. Laminart (P) Ltd. v. A.P. Agencies**, (1989) 2 SCC 163, it was observed by the Hon'ble Apex Court:-

"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."

(Emphasis Supplied)

176. In **Srihari Hanumdas Totala v. Hemant Vithal Kamath** (supra), the Hon'ble Apex Court observed that:-

"17. Order 7 Rule 11(d) CPC provides that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law". Hence, in order to decide whether the suit is barred by any law, it is the statement in the plaint which will have to be construed. The Court while deciding such an application must have due regard only to the statements 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.

177. In ***Popat and Kotecha Property v. State Bank of India Staff Assn.,*** (supra), the Hon'ble Apex Court has observed that:-

"10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.

1. Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the

objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13."

(Emphasis Supplied)

178. It is a settled law that the defense of the defendant or the written statement filed on their behalf need not be considered and only the averments made in the plaint are to be considered at the time of the disposal of such application.

179. I am of the considered view that after perusal of the plaints, as a whole and meaningfully, documentary evidence brought on record and oral arguments advanced by the learned Counsel for the parties, prima facie it appears that a valid cause of action arose to the plaintiffs to institue the suits. At this stage, it cannot be assumed that the plaints do not disclose a cause of action as agitated by the learned Counsel for the defendants.

(ii) Bar under the Limitation Act, 1963:

180. Learned Counsel for the defendants vehemently argued that the suits of the plaintiffs are barred under certain provisions of the Limitation Act, 1963. The existence of the mosque constructed by Aurangzeb is an admission on the part of the plaintiffs since 1669-70 as averred in the plaint. Ever since, the property is being utilized as a Mosque and Namaz is being offered regularly. It is also contended that pursuant to the compromise dated 12.10.1968, certain visible physical changes were carried out at the spot which were well within the knowledge of the plaintiffs. Therefore, the cause of action, if any, had arisen between 1968 to 1974. It is also asserted that these physical developments could not have been hidden from the plaintiffs. The plaintiffs cannot claim ignorance about the compromise which they could have known by exercise of reasonable diligence. The relief seeking declaration that the decree dated 20.07.1973 and 07.11.1974 be not binding upon the plaintiffs for certain alleged reasons is also hit by the Limitation Act,1963. Articles 58 and 59 of the Limitation Act, 1963 provide period of limitation as three years to obtain any declaration and to cancel or set aside an instrument or decree or for the rescission of a contract. Whereas, present suits are instituted by the plaintiffs after a span of more than 50 years.

181. It is also contended that the averments made in the plaints disclose an illusory cause of action, created by the plaintiffs. The plaint is cleverly drafted. It is averred by the plaintiffs that on a particular date, they visited the property for darshan of Lord Shree Krishna at Mathura. They were shocked to see that a mosque was standing there. They requested the members of the Committee to remove the construction over temple land. They were shown the copy of compromise dated 12.10.1968. The defendants refused to remove the construction. The chain of events, as pleaded in the plaints, amounts to

creation of an illusory cause of action. Further, no cogent evidence has been brought on record to support such illusory cause of action.

182. Learned Counsel for the plaintiffs refuted the arguments advanced by the learned Counsel for the defendant and submitted that they came to know about superstructure for the first time, when they visited Mathura for darshan of Lord Shree Krishna. It was only then that they came to know for the first time about the alleged illegal and fraudulent compromise dated 12.10.1968. The Waqf Board had illegally accorded permission to the Committee to enter into fraudulent and void ab initio compromise. The plaintiffs sent a notice under Section 89 of the Act of 1995, which was duly served upon them. It is also submitted that continuing wrong and cause of action is accruing everyday against the wrongs committed by the defendants. Therefore, the period of limitation would begin from the date of knowledge about the facts mentioned above.

183. The relevant provisions contained in Articles 58 and 59 of the Limitation Act, 1963 are extracted as under:-

"Part III – Suits relating to declarations.

58	*To obtain any other declaration*	*Three years*	*When the right to sue **first accrues***

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."***

184. Based on the pleadings averred in the respective plaints, it appears that the plaintiffs came to know for the first time about the existence of the superstructure constructed by the defendants at the property of Katra Keshav Dev when they visited Mathura for darshan of Lord Shree Krishna on the given date as mentioned in the clause of the cause of action in their respective plaints. It was only then, they came to know about the alleged and fraudulent compromise dated 12.10.1968. Thereafter, they requested the defendants to remove the superstructure, but the defendants refused to do so. The refusal by the defendants to remove the superstructure is also one of the facts relating to the accrual of cause of action to the plaintiffs.

185. The compromise dated 12.10.1968 is also challenged by the plaintiffs, inter alia, on the grounds that Sewa Sansthan had no authority to file Suit No.43 of 1967. It misrepresented itself to be the owner and in possession over the property of Katra Keshav Dev. Perusal of the plaint of Suit No. 43 of 1967 (*Shree*

Krishna Janamsthan Seva Sangh, Mathura also known as Shree Krishna Janambhumi Trust Mathura and ors. v. Trust Masjid Idgah under the alleged Committee of Management and ors.) goes to show that Sewa Sansthan misrepresented the fact and averred that the Janmabhoomi Trust was registered as Shri Krishna Janamsthan Sewa Sangh and the entire property of Katra Keshav Dev was endowed to the said trust.

186. It is also averred by the plaintiffs of the present suit, that the suit property, which was dedicated to the Janmabhoomi Trust, was never vested or transferred to Sewa Sansthan after the Janmabhoomi Trust became defunct in 1958. The Janmabhoomi Trust was always in existence and the property of Katra Keshav Dev always remained to be vested in it. Sewa Sansthan had no authority to concede the land vested in the deity to the defendants pursuant to the alleged illegal, fraudulent and void ab initio compromise.

187. A plain reading of the plaint of Suit No.43 of 1967 supports the arguments of the learned Counsel for the plaintiffs. The suit was titled as Shri Krishna Janamasthan Sewa Sangh, Mathura also known as Shri Krishna Janambhumi Trust, Mathura v. Trust Masjid Idgah and Ors. It would be imperative to reproduce the relevant paragraphs of the plaint of Suit No. 43 of 1967, which read thus:

> ***"1. That the plaintiff is the owner and Zamindar and in possession of entire Khewat No. 255 present, which is Khewat No. 291 old, present area 13.37 acre known as Katra Keshavdeo*** *situated in Mauza Mathura Bangar which was included in Nagla Mallpura.*
>
> *... ... ...*
>
> *4. That Seth Jugal Kishore Birla* ***created a Trust known as Shri Krishna Janambhumi Trust which has been registered under Act XXI of 1860 in the name of Shri KRISHNA JANAMSTHAN SEWA SANGH*** *and the names of President and other office holders and members of the Sangh are given above along with the name of the Plaintiff and the* ***said Seth Jugal Kishore Birla endowed the entire rights and interests in the aforesaid property by the Trust Deed dated 21.2.1951 to the Plaintiff."***

188. Copy of the trust deed dated 21.02.1951, by which the Janmabhoomi Trust was created, is also brought on record by the plaintiffs. Perusal of this document reveals that the trust was created in the name of 'Shree Krishna Janmabhoomi Trust' and not as 'Shri Krishna Janamsthan Sewa Sangh'. The description of the property of Katra Keshav Dev endowed to the Janmabhoomi Trust is referred in the trust deed as:

> ***"3.*** *इस ट्रस्ट की संपत्ति कटरा केशव देव अथवा श्री कृष्ण जन्मभूमि होगी । जिसका क्षेत्रफल* ***13.37*** *एकड़ है, जो मथुरा के पश्चिमी भाग में स्थित है, जिसके पूर्व बॉम्बे वडोदरा सेंट्रल इंडिया रेलवे लाइन, पश्चिम केशव देव नाम का वर्तमान मंदिर, उत्तर नजूल जमीन और दक्षिण उफतादा जमीन व कच्चा रास्ता है ।"*
>
> ***"3. The property of this trust will be Katra Keshav Dev or Shree Krishna's birthplace, whose area is 13.37 acres, which is situated in the western part of Mathura, east of which is Bombay***

Vadodara Central India Railway Line, west is the existing temple named Keshav Dev, north is Nazool land and south is Uftada land and kutcha road."

189. The aforesaid recital about the name of the trust and description of the property of Katra Keshav Dev clearly shows that Suit No. 43 of 1967 was filed by concealing the true facts by its plaintiffs. Sewa Sansthan was not the owner and was not in possession of the property of Katra Keshav Dev. It misrepresented itself as the owner and Zamindar and in possession of entire area of 13.37 acres land known as Katra Keshav Dev. Further the property was endowed to the Janmabhoomi Trust and not to Sewa Sansthan by the trust deed dated 09.03.1951. The property endowed to the Janmabhoomi Trust was mentioned in the trust deed by metes and bounds.

190. Conclusively, Suit No. 43 of 1967 was not filed by its plaintiffs by disclosing their true identity and their status qua the property. Since the property of Katra Keshav Dev was endowed to the Janmabhoomi Trust and it was never transferred or vested in Sewa Sansthan, therefore, the plaintiffs in the said suit had no right or authority, either to file the suit or to enter into the compromise dated 12.10.1968 and to concede two bighas land of the temple to the defendants.

191. In the case in hand, the question of limitation is directly related to the cause of action. The cause of action, being the mixed question of fact and law, as averred in the plaints can only fuller and finally be examined on the basis of the evidence led by the parties during the trial.

192. In the case of **Thankamma George vs Lilly Thomas and Another**, 2024 SCC OnLine SC 1673, the Hon'ble Apex Court has observed that:-

"15.1 The words "when the right to sue first accrues" have been interpreted and held by this Court in Smt. Neelam Kumari v. U.P. Financial Corporation. The starting point for the limitation in the case of setting aside sale deeds has two limbs: the date of execution and the date of knowledge. There is no difficulty in applying the period of limitation expiring three years from the date of execution, provided that the Appellant had knowledge of Ex. A-5 on the date of registration and the right to sue first accrued...."

193. In **Saranpal Kaur Anand v. Praduman Singh Chandhok**, (2022) 8 SCC 401, the Hon'ble Apex Court held that:-

"... ... ...14. The word "diligence" read with the word "reasonable" in the context of Section 17(1) of the Limitation Act is subjective and relative, and would depend upon circumstances of which the actor called upon to act reasonably, knows or ought to know. *Vague clues or hints may not matter. Whether the plaintiff/applicant had the means to know the fraud is a relevant consideration. It is manifest that Section 17(1) of the Limitation Act does not protect a party at fault for failure to exercise reasonable diligence when the circumstances demand such exercise and on exercise of which the plaintiff/applicant could have*

discovered the fraud. When the time starts ticking subsequent events will not stop the limitation. The time starts running from the date of knowledge of the fraud/mistake; or the plaintiff/applicant when required to exercise reasonable diligence could have first known or discovered the fraud or mistake. In case of a concealed document, the period of limitation will begin to run when the plaintiff/applicant had the means of producing the concealed document or compelling its production."

(Emphasis Supplied)

194. The plea of limitation can be decided based on the pleadings of the parties after framing an issue under Order VI Rule 13 of the CPC. On the basis of the chain of events as averred in the plaints, at this stage, when the maintainability of the suit is challenged by the defendants, the question of limitation cannot be determined without framing an issue and taking the evidence of the parties. Since the question of limitation is a mixed question of fact and law, therefore, on the question of limitation, the plaints cannot be rejected at the threshold.

195. In view of the foregoing discussions, I am of the considered opinion that the suits of the plaintiffs are not barred under any provisions of Limitation Act, 1963.

(iii) Bar under Order XXIII Rule 3A of the CPC:

196. It is submitted on behalf of the defendants that insofar as the bar under Order XXIII Rule 3A of the CPC is concerned, Suit No. 43 of 1967 was filed in 1967. The compromise was entered on 12.10.1968. The title and the possession of Shahi Masjid Idgah were settled on the basis of the terms of such compromise. Therefore, challenge to the compromise can be made in the same proceedings and not by filing present suits. The provisions contained under Order XXIII Rule 3A of the CPC imposes an express bar to such proceedings.

197. Per contra, learned Counsel for the plaintiffs have submitted that the deity/idol/Asthan was not impleaded as party either to Suit No.43 of 1967 or in the compromise dated 12.10.1968. Since the diety is a perpetual minor, no permission from a competent Court was obtained to file Suit no.43 of 1967, as the next friend of the deity or to enter into the compromise dated 12.10.1968. The Court is always a custodian of the interest and welfare of the deity. The entire proceedings of Suit No. 43 of 1967 and the construction raised pursuant to the compromise dated 12.10.1968 are based on fraud and misrepresentation and, therefore, they are illegal and void ab initio. The plaintiffs have also claimed the relief to declare the judgment and decree dated 20.07.1973, and judgment and decree dated 07.11.1974 passed in Civil Suit No.43 of 1967, to be not binding on the plaintiffs.

198. Order XXIII Rule 3A of the CPC provides thus:

"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."*

199. Perusal of the trust deed dated 09.03.1951, created by Late Shri Jugal Kishore Birla in the name of the

Janmabhoomi Trust reveals that the entire property of Katra Keshav Dev, measuring 13.37 acres, was dedicated and vested in the Janmabhoomi Trust. One of the objectives to create Janmabhoomi Trust was to construct a glorious temple of Lord Shree Krishna at his birthplace. Suit No.43 of 1967 was filed subsequent to the creation of the Janmabhoomi Trust. Similarly, perusal of the copy of the plaint relating to Suit No. 43 of 1967 as well as the compromise deed dated 12.10.1968 demonstrates that the Janmabhoomi Trust and deity/ idol were not arrayed as parties to the suit. To represent and to protect the interest of the idol, being a perpetual minor, no shebait or next friend was appointed by the Court. It is not disputed that the deity is a perpetual minor. The Court is always a custodian of the rights and the interest of a perpetual minor. Sewa Sansthan is a distinct legal entity from the Janmabhoomi Trust. No documentary evidence is brought on record, which may indicate that the property of the Janmabhoomi Trust was transferred, dedicated, or vested to Sewa Sansthan.

200. The provisions of Order XXIII Rule 3A of the CPC would apply where the decree is challenged by any of the parties already arrayed in the suit. Had the compromise dated 12.10.1968 been challenged by the parties to Suit No.43 of 1967, the subsequent suit brought by the parties to that suit would have been barred by the provisions under Order XXIII Rule 3A of the CPC.

201. In **Srimati Suraj Kumari Vs. District Judge Mirzapur and others** (supra), this Court observed that:-

> ***"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 right is not barred by the said provision. Order XXIII Rule 3A of the Code cannot be read de horse its earlier provision of the same chapter****……..Order XXIII Rule 3 & Rule 3A of the Code 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 is passed the compromise decree."***
>
> *(Emphasis Supplied)*

202. Since the plaintiffs are strangers to the proceedings in Suit No.43 of 1967, therefore, the express bar imposed under the provisions of Order XXIII Rule 3A of the CPC does not apply. Hence, I am of the view that the suits of the plaintiffs are not barred by the provisions contained under Order XXIII Rule 3A of the CPC.

(iv) Bar under the Places of Worship (Special Provisions) Act, 1991:

203. Mrs. Tasneem Ahmadi, learned Counsel for the defendants, submitted that the suits of the plaintiffs are barred under Sections 3, 4, 6 and 7 of the Act of 1991. As per the averments made in the respective plaints, it is an admission that Shahi Idgah Mosque was constructed by Aurangzeb in 1669-70 and it is existing since then. The property continues to be utilized as a mosque even today. The suit property was a mosque on the date of

compromise as per the terms therein. Even under Notification No. 1465/1133M dated 25.11.1920 issued by Lieutenant Governor, United Province and Notification No.1669-M1133 dated 27.12.1920, the existence of mosque was recognized. It is noted in the aforesaid notification dated 25.11.1920 that the site is utilized for the mosque of Aurangzeb. Thus, the religious character of the property is evident to be a mosque on the basis of the aforesaid notification as well as the admission of the plaintiffs in their plaints. The religious character is to be determined on the basis of nomenclature of the place of worship. The possession and utilization of the property as mosque by Muslims indicate the religious character of the suit property. Therefore, no mixed question of fact and law is involved.

204. It is also submitted that the relief claimed by the plaintiffs, inter alia, seeking removal of the Shahi Idgah Mosque and handing over the vacant possession to the Janmabhoomi Trust amounts to conversion of a religious place for offering prayers by the Muslim community to one for offering prayer by the Hindu devotees.

205. Per contra, learned Counsel for the plaintiffs averred that the temple of Lord Shree Krishna was in existence since 5000 years. Regular puja, aarti and other religious rituals are being performed there. The religious character of the property was always a temple. '***Once a temple always a temple'*** is a judicially recognized principle of law. Mere demolition of the temple by intruders from time to time and raising constructions over the property as a mosque does not change the religious character of the property. Unlawful possession of the defendant over the property can never be treated to be an admission.

206. It is also submitted that the religious character is not defined in the Act of 1991. The determination of the religious character of the suit property shall be proved on the basis of oral, documentary, scientific and experts' evidence to be led during the trial. The birthplace of Lord Shree Krishna lies beneath the present structure. Every inch of the land of Katra Keshav Dev is devoted to Lord Shree Krishna and the Hindu community. Historical background and subsequent developments about the suit property are reiterated.

207. It is also submitted that near the eastern side of the superstructure, an old well which is called as 'Krishna Koop' is existing since time immemorial. This place is visited by the Hindu devotees to perform Mundan ceremony of their children. *Puja, aarti* and other religious rituals are also being performed by them. After the festival of Holi, '*Basoda puja'* at '*Krishna Koop'* is performed every year.

208. It is also submitted that the provisions of the Act of 1991 are not applicable to any place of worship, which is an ancient and historical monument or an archaeological site or remains covered by the Act of 1958. Section 3 of the Act of 1904 provides that the Central Government, by notification in the official gazette, may declare an ancient monument to be a protected monument. In Notification No. 1465/1133-M, dated 25.11.1920, Lt. Governor, United Province, Agra and Oudh declared the place of the temple at Katra Keshav as a 'protected monument'.

209. The aforesaid notification reads thus:

> *"In exercise of the powers conferred by Section 3, sub-section (1) of the Ancient Monuments Preservation Act (VII of 1904), his Honour the Lieutenant-Governor of the United Province of Agra and Oudh is hereby pleased to declare the Under mentioned ancient Monument to be protected monuments within the meaning of the Act and to direct that no one shall destroy, remove, alter or efface in any manner or build on or near the site of monuments without having first obtained permission from the Government or its authorized officers.*
>
> *2. Any objection to the above proposal received in writing by the Local Government within one month from the date of this notification will be taken into consideration.*

Sr. No	*Name and description of monument*	*District*	*Locality*
37.	*The portion of Katra mound which are not in the position of nazul tenants on which <u>formerly stood a temple of Keshav Deva</u> which was dismantled and the site was utilized for the mosque of Aurangzeb.*	*Muttra*	*Kosi on Muttra and Bharatpur road, 9 miles from Muttra.*

210. Thus, Notification dated 25.11.1920, demarcated the portion of Katra mound as protected monument. It is worthwhile to note that the said notification records that the temple of Keshav Dev existed there and was dismantled to be utilized as a mosque of Aurangzeb. Further, Notification No.1669/1133-M dated 27.12.1920, issued by Lt. Governor, United Province under Section 3(3) of the Act of 1904, declared this area to be 'protected monument of national importance'.

211. The preamble of the Act of 1991, reads thus:

> *"An Act to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place worship as it existed on the 15th Day of August, 1947, and for matters connected therewith or incidental thereto".*

212. Sections 3, 4, 6 and 7 of the Act of 1991 provide thus:

> ***"3. Bar of conversion of places of worship**. No person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of*

a different religious denomination or any section thereof.

4. Declaration as to the religious character of certain places of worship and bar of jurisdiction of courts, etc.

(1) It is hereby declared that the religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as existed on that day.

(2) If, on the commencement of this Act, any suit, appeal or other proceeding with respect to the conversion of the religious character of any place of worship, existing on the 15th day of August, 1947, is pending before any court, tribunal or other authority, the same shall abate, and no suit, appeal or other proceeding with respect to any such matter shall lie on or after such commencement in any court, tribunal or other authority: Provided that if any suit, appeal or other proceeding, instituted or filed on the ground that conversion has taken place in the religious character of any such place after the 15th day of August, 1947, is pending on the commencement of this Act, such suit, appeal or other proceeding shall be disposed of in accordance with the provisions of sub-section (1).

(3) Nothing contained in sub-section (1) and sub-section (2) shall apply to,

(a) any place of worship referred to in the said sub- sections which is an ancient and historical monument or an archaeological site or remains covered by the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958.) or any other law for the time being in force;

(b) any suit, appeal or other proceeding, with respect to any matter referred to in sub-section (2), finally decided, settled or disposed of by a court, tribunal or other authority before the commencement of this Act;

(c) any dispute with respect to any such matter settled by the parties amongst themselves before such commencement;

(d) any conversion of any such place effected before such commencement by acquiescence;

(e) any conversion of any such place effected before such commencement which is not liable to be challenged in any court, tribunal or other authority being barred by limitation under any law for the time being in force.

6. Punishment for contravention of section 3.

6. (1) Punishment for contravention of section 3. Whoever contravenes the provisions of section 3 shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

(2) Whoever attempts to commit any offence punishable under sub- section (1) or to cause such offence to be committed and in such attempt does any act towards the commission of the offence shall be punishable with the punishment provided for the offence.

(3) Whoever abets, or is a party to a criminal conspiracy to commit, an offence punishable under sub-section (1) shall, whether such offence be or be not committed in consequence of such abetment or in pursuance of such criminal conspiracy, and notwithstanding anything contained in section 116 of the Indian Penal Code, (45 of 1860.) be punishable with the punishment provided for the offence.

***7. Act to override other enactments**. The provisions of this 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 law other than this Act."*

213. Section 2(b) of the Act of 1991 defines 'conversion' as :-

(b) "conversion", with its grammatical variations, includes alteration or change of whatever nature;

214. Section 3 of the Act of 1991 bars conversion of the place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof.

215. Section 4 provides declaration as to the religious character of certain places of worship which existed on 15th day of August, 1947 and bars jurisdiction of the Court.

216. Section 2(c) of the Act of 1991 defines the phrase 'place of worship' to mean a Temple, Mosque, Gurudwara, Church, Monastery or any other place of public religious worship of any religious denomination or any section thereof, by whatever name called.

217. The Act of 1991 does not define 'religious character'. To attract the provisions of this Act, the 'religious character of the place of worship' has to be determined. This Act does not bar determination of question of fact as to the religious character of a particular place of worship by the Court. The religious character of the place of worship is the determinative factor for deciding the applicability of the provisions of the Act of 1991 over a property.

218. The averments made in the plaint as well as the documents filed on behalf of the plaintiffs in support of their plaints can also be a determinative factor to decide the religious character of the property. The sale deed dated 08.02.1944, executed by Rai Krishna Das and Rai Anand Krishna in favour of Mahamana Pt. Madan Mohan Malviya and others and, the trust deed dated 09.03.1951, creating a trust in the name of Shree Krishna Janmbhoomi Trust by late Jugal Kishore Birla to construct a lofty temple over the property can be taken into consideration during the trial to determine the religious character of the suit property. The documents relating to Suit No. 43 of 1967, the compromise dated 12.10.1968 entered into between the parties in the aforesaid suit, entry in revenue records, facts relating to historical backgrounds as referred to hereinbefore, certain notifications, information obtained through RTI by the plaintiffs, entries in the records of Municipal Corporation of

Mathura and Vrindavan are brought on record by the plaintiffs in their respective suits. All these documents are related to the suit property and are in support of the subsequent developments which had taken place from time to time. These documentary evidence can be taken into consideration for determination of the religious character of the property and are subject to evidence led by the parties during the trial.

219. Besides this, excerpts from the historical books, as referred to by the plaintiffs in their plaints, historical essays authored by Sri Jadunath Sarkar, '*Anecdotes of Aurangzeb'* and description made by the scribe of Aurangzeb named Saqi Mustad Khan in his book "Massir-i-Alamgiri", seem to be significant literature, which can also be a determinative factor about the religious character of the property.

220. The religious character of the property can only be determined on the basis of the facts and circumstances of the case and on the basis of the evidence to be led by the parties during the trial. There is a rival claim of the parties about the nature and use of the suit property. The defendants claim it to be a mosque, while the plaintiffs claim that since time immemorial, the property has been worshipped as a temple of Lord Shree Krishna.

221. In the present proceedings, the question of religious character is a mixed question of facts and law. This Court is of the opinion that the religious character of the suit property cannot be determined, at this stage. It can only be decided by framing issues on the basis of the pleadings of the parties and after taking oral and documentary evidence to be led during the trial.

222. So far as the arguments of the learned Counsel for the defendants are concerned, it is an admission by the plaintiffs that the suit property is a mosque constructed by Aurangzeb in 1669-70, which is utilized as a mosque ever since and that there is an admission of possession of the defendants over the suit property, the averments made in the respective plaints by the plaintiffs shall also be taken into consideration for determination of the religious character of the suit property.

223. It is averred by the plaintiffs that Shri Brajnabha, the great grandson of Lord Shree Krishna constructed the first temple of Lord Shree Krishna at the Janamasthan about 5000 years ago. Thereafter, it was rebuilt, renovated, demolished from time to time, but the religious character of the property remained as temple. The Hindu devotees continued to offer worship and prayer since then. The historical background and subsequent developments, including several rounds of litigation, which ended in favour of Hindu devotees, holding their title and possession, creation of the Janmabhoomi Trust, performing '*Basoda Puja'* at the '*Krishna Koop*' to the eastern side of the superstructure, assembly of millions of Hindu devotees everyday to offer prayer and aarti and other religious activities carried out at the birthplace of Lord Shree Krishna, treating it as *Garbh Grah*, *prima facie*, indicate about the religious character of the property as a Hindu temple.

224. Section 4(3)(a) of Act of 1991 expressly bars the applicability of the provision of sub-Section (1) and (2) of Section 4, to any place of worship, which is an ancient and historical monument or an

archaeological site or remains covered by the Act of 1958 or any other law for the time being in force.

225. Notification No.1465/1133 under the Act of 1904 is brought on record by the plaintiffs. Vide this notification, the portion of Katra mound on which, formerly stood a temple of Keshav Dev which was dismantled and the site is utilized for the mosque of Aurangzeb is declared as ancient monument to be a protected monument. It was further notified that no one shall destroy, remove, alter, or efface, in any manner, or build near the site of monument without any permission obtained from the Government or its Authorized Officer.

226. *Prima facie*, this notification indicates that in 1920, the property which was an ancient monument was declared to be a protected monument. During the arguments, a list of monuments of national importance of Uttar Pradesh was also brought on record. Serial no.219 of such list referrs to *"the portion of Katra mound, which are not in the possession of Nazul tenants on which, formerly stood a temple of Keshav Dev which was dismantled and the site utilized for the mosque of Aurangzeb*". Therefore, the bar imposed under section 4(3)(a) of the Act of 1991 for non-applicability of the provisions of the Act, appears to be squarely applicable to the suit property.

227. The above notification indicates the existence of a temple of Keshav Dev prior to its demolition. After the demolition, the site was utilized as the mosque of Aurangzeb. The demolition of the temple of Lord Shree Krishna, during the regime of Aurangzeb, is pleaded by the plaintiffs. It is also to be noted that the defendants did not say anything about the existence of mosque prior to 1669-70, whereas it is the case of the plaintiffs that Sri Brijnabha, the great grandson of Lord Shree Krishna constructed a magnificent temple at the site of Katra Keshav Dev 5000 years ago. Further, the trust deed dated 9.3.1951 clearly corroborates the existence of the temple of Lord Shree Krishna on the property at the time of the creation of the Janmabhoomi Trust.

228. This Court finds substance in the argument of the plaintiffs that the principle of 'first in existence' or 'prior in existence' is the determinative factor for deciding the applicability of the provisions of the Act of 1991. The arguments of learned Senior Counsel, Sri C. S. Vaidyanathan, that '***once a temple, always a temple'*** is a judicially recognized principle of law and learned Counsel, Sri Satyaveer Singh, that '***resolution always stays alive'*** **(संकल्प हमेशा जिंदा रहता है, और यह कभी मरता नहीं है)** are also indicative of the religious character of the property as temple.

229. In **U.P. Sunni Central Waqf Board Vs. Ancient Idol of Swayambhoo Lord Vishweshwar**, (supra), a Coordinate Bench of this Court observed about the applicability of the Act of 1991, to a place of worship. The relevant paragraphs are extracted here as under:

> *161. Another point canvassed by plaintiffs' counsel to the non-applicability of Section 3, 4 (1) and 4 (2) is on the basis of non obstante clause contained in Sub-Section (3) of Section 4, that Section 4 (1) and 4(2) will not apply to any conversion of place effected before such commencement by acquiescence. The bar contained in Section 3, 4 (1) and 4 (2) is*

negatived by Sub-Section (3) (d) of Section 4, as the forcible act of Mughal Emperor in demolishing part of temple, and thereafter raising illegal construction would not affect the maintainability of suit.

162. The Act of 1991 is not an absolute bar upon the parties approaching the courts after its enforcement seeking their right as to place of worship or defining religious character of any place of worship. Sub-Section (3) of Section 4 enumerates certain cases in which the parties can approach the court for redressal of their grievance. Sub-Section (3)(d) is one of those case, where conversion has taken place much before the commencement of the Act and a party had not approached the court, the acquiescence or silence would not bar the action of such party.

163. As "religious character" has not been defined under the Act, and the place cannot have dual religious character at the same time, one of a temple or of a mosque, which are adverse to each other. Either the place is a temple or a mosque.

... ...

167. Thus, I find that religious character of the disputed place as it existed on 15.08.1947 is to be determined by documentary as well as oral evidence led by both the parties. Unless and until the court adjudicates, the disputed place of worship cannot be called as a temple or mosque.

... ...

184. The Act does not define "religious character", and only "conversion" and "place of worship" have been defined under the Act. What will be the religious character of the disputed place can only be arrived by the competent Court after the evidences are led by the parties to the suit. It is a disputed question of fact, as only part and partial relief has been claimed of entire Gyanvapi compound which comprises of settlement plot Nos.9130, 9131 and 9132.

185. Either the Gyanvapi Compound has a Hindu religious character or a Muslim religious character. It can't have dual character at the same time. The religious character has to be ascertained by the Court considering pleadings of the parties, and evidences led in support of pleadings. No conclusion can be reached on the basis of framing of preliminary issue of law. The Act only bars conversion of place of worship, but it does not define or lays down any procedure for determining the religious character of place of worship that existed on 15.08.1947. "

230. Refuting the arguments made on behalf of the defendants that the Act of 1904 was repealed by Section 39 of the Act of 1958, Sri Hari Shanker Jain, learned Counsel submitted that the Act of 1904 was never repealed in view of the provision contained in Section 39(2) of the Act of 1958, which reads thus:

"The Ancient Monuments Preservation Act, 1904, shall cease

*to have effect in relation to ancient and historical monuments and archaeological sites and remains declared by or under this Act to be of national importance**, except as respect to things done or omitted to be done before the commencement of this Act.**"*

(Emphasis supplied)

231. The Court also find sybstance in the argument that the provisions contained in Section 39(2) of the Act of 1958 and entries made in Seventh Schedule of the Constitution of India are important aspects to be considered as one of the factors with regard to non-applicability of the provisions of the Act of 1991 over the suit property at this stage.

232. In view of the above discussion, this Court is of the opinion that under the facts and circumstances of the case, the determination of the religious character of the suit property is a mixed question of fact and law. The religious character of the property has to be determined after framing of the issues on the basis of the pleadings of the parties,and after taking documentary and oral evidence to be led by the parties during the trial.

233. This Court is also of the opinion that on the basis of the averments made in the plaints and the documents brought on record and further considering the arguments advanced on behalf of the rival parties, at this stage, the suits of the plaintiffs do not appear to be barred under any provision of the Act of 1991.

(v) Bar under the Waqf Act, 1995:

234. Learned Counsel for the defendants advanced her arguments in two folds. Firstly, the suit property is a waqf property and secondly, being the waqf property, the suits of the plaintiffs are barred under Sections 6, 85 and 108-A of the Act of 1995.

235. During the arguments, learned Counsel filed the copy of Supplement to the Government Gazette Notification dated 26.02.1944, Part VIII, issued by the Secretary, Sunni Central Board of Waqfs, United Provinces, Lucknow. This notification contains list of Sunni Waqf, to which according to the report of the Commissioner of Waqf, the provision of U.P. Muslim Waqfs Act XIII of 1936 applies. The relevant entry from such list is reproduced hereunder:-

Sr. No.	***Name of Waqif***	***Name Present Waqf Mutavalli***	***Nature of Waqf property***
43	*Eidgah Masjid Aalmgiri*	*Abdulla Khan & Fathe Nusrat & Salimulla etc.Deeg Darwaja Dist. Mathura*	*Eidgah & Masjid etc.*

236. On the basis of the aforesaid notification, the learned Counsel vehemently argued that the suit property was notified by the United Province on 26.02.1944 as a waqf property. Names of Mutawalli Abdulla Khan, Fathe Nusrat, Salimulla etc. are mentioned therein. This notification deals with the suit property.

237. It is further contended that according to the provision contained in Section 85 of the Act of 1995, the jurisdiction of the Civil Court, Revenue Court and any other authority in respect of any disputed question or other matter relating to any waqf, waqf property or other matter shall be determined by the Waqf Tribunal. Section 108-A of the Act of 1995, overrides any other law for the time being in force. To bolster her arguments learned Counsel referred to paragraphs no. 42, 45 and 47 of the decision of the Hon'ble Apex Court in **Rashid Wali Beg vs. Farid Pindari** (supra).

238. Per contra, learned Counsel for the plaintiffs rebutted the claim and submitted on behalf of the plaintiffs that the suit property is not a waqf property. The Waqf Tribunal cannot decide a question relating to the nature of the property. Since the suit property is a temple of Lord Shree Krishna since time immemorial, the character of the deity as perpetual minor and its consequence can only be decided by this Court. The above referred notification does not contain any specification of the property such as its area, survey number, description, boundaries, identification etc. It is also submitted that the suit property was never known as *'Idgah Masjid Aalmgiri'* and therefore, this notification does not deal with the suit property. All these questions require leading and appreciation of evidence and this issue cannot be decided at this stage.

239. It is also argued on behalf of the plaintiffs that the suit property was never dedicated to 'Aukaf'. Neither a notice was issued nor any inquiry was conducted with the owner of the property, i.e. the deity. Since, no survey was conducted, therefore, no report of such survey was available. The property was always a temple, therefore, it could not be dedicated or vested in a waqf. The temple of Lord Shree Krishna, existing on the land of Katra Keshav Dev, was illegally and forcibly demolished and encroached upon, under the orders of Aurangzeb. Subsequently, a mosque was constructed over the land of the temple. Under these circumstances, the suit property cannot be notified as a waqf property by the above notification. Mandatory compliance with Sections 4, 5 & 6 of the Act of 1995 was not made to constitute a valid waqf. The averments made in the plaint also indicate that suit property was always a place of worship for the Hindu devotees. No entry as *'Shahi Masjid Idgah'* was made in the revenue or in municipal records.

240. It is further contended that this notification cannot be considered to be a conclusive proof to demonstrate that the suit property was notified as a waqf property. Particulars of the waqf are not disclosed. The State Government never issued any notification on the basis of the report of the Waqf Board. The U.P. Muslim Act, 1936 was repealed by the U.P. Muslim Waqfs Act, 1960 which was thereafter, repealed by the U.P. (Second) Repealing Act, 2021. Therefore, the waqf list of 1944 is *non-est.* Whether a property is a waqf property or not, it cannot be decided at this stage without taking the evidence of the parties.

241. The definition of 'Waqf' is provided under Section 3(r) of the Act of 1995. Relevant provisions of the Act of 1995 are extracted hereunder:-

*3(r) **'Waqf'** means the permanent dedication by any person, of any movable or immovable property for any purpose*

recognised by the Muslim law as pious, religious or charitable and includes—

(i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;

(ii) a Shamlat Patti, Shamlat Deh, JumlaMalkkan or by any other name entered in a revenue record;

(iii) "grants", including mashrat-ul-khidmat for any purpose recognised by the Muslim law as pious, religious or charitable; and

(iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognised by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognised by Muslim law,

and "waqif" means any person making such dedication;

242. Sections 4 and 5 of the Act of 1995, lay down the procedure for construction of a Waqf. which read thus :-

4. Preliminary survey of auqaf.—

(1) The State Government may, by notification in the Official Gazette, appoint for the State a Survey Commissioner of Auqaf and as many Additional or Assistant Survey Commissioners of Auqaf as may be necessary for the purpose of making a survey ofauqaf in the State.

(1A) Every State Government shall maintain a list of auqaf referred to in sub-section (1) and the survey of auqaf shall be completed within a period of one year from the date of commencement of the Wakf (Amendment) Act, 2013 (27 of 2013), in case such survey was not done before the commencement of the Wakf (Amendment) Act, 2013:

Provided that where no Survey Commissioner of Waqf has been appointed, a Survey Commissioner for auqaf shall be appointed within three months from the date of such commencement.

(2) All Additional and Assistant Survey Commissioner of Auqaf shall perform their functions under this Act under the general supervision and control of the Survey Commissioner of Auqaf.

(3) The Survey Commissioner shall, after making such inquiry as he may consider necessary, submit his report, in respect of auqaf existing at the date of the commencement of this Act in the State or any part thereof, to the State Government containing the following particulars, namely:—

(a) the number ofauqaf in the State showing the Shia auqaf and Sunniauqafseparately;

(b) the nature and objects of each waqf;

(c) the gross income of the property comprised in each waqf;

(d) the amount of land revenue, cesses, rates and taxes payable in respect of each waqf;

(e) the expenses incurred in the realisation of the income and the pay or other remuneration of the mutawalli of each waqf; and

(f) such other particulars relating to each waqf as may be prescribed.

(4) The Survey Commissioner shall, while making any inquiry, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:—

(a) summoning and examining any witness;

(b) requiring the discovery and production of any document;

(c) requisitioning any public record from any court or office;

(d) issuing commissions for the examination of any witness or accounts;

(e) making any local inspection or local investigation;

(f) such other matters as may be prescribed.

(5) If, during any such inquiry, any dispute arises as to whether a particular waqf is a Shia waqf or Sunni Waqf and there are clear indications in the deed of waqf as to its nature, the dispute shall be decided on the basis of such deed.

(6) The State Government may, by notification in the Official Gazette, direct the Survey Commissioner to make a second or subsequent survey of waqf properties in the State and the provisions of sub-sections (2), (3), (4) and (5) shall apply to such survey as they apply to a survey directed under sub-section (1):

Provided that no such second or subsequent survey shall be made until the expiry of a period of ten years from the date on which the report in relation to the immediately previous survey was submitted under sub-section (3)

Provided further that the waqf properties already notified shall not be reviewed again in subsequent survey except where the status of such property has been changed in accordance with the provisions of any law.

5. Publication of list of auqaf.—

(1) On receipt of a report under sub-section (3) of section 4, the State Government shall forward a copy of the same to the Board.

(2) The Board shall examine the report forwarded to it under sub-section (1) and fordward it back to the Government within a period of six months for publication in the Official Gazette a list of Sunni auqaf or Shiaauqaf in the State, whether in existence at the commencement of this Act or coming into existence thereafter, to which the report relates, and containing such other particulars as may be prescribed.

(3) The revenue authorities shall—

(i) include the list of auqaf referred to in sub-section (2), while updating the land records; and

(ii) take into consideration the list of auqaf referred to in sub-section (2), while deciding mutation in the land records.

(4) The State Government shall maintain a record of the lists published under sub-section (2) from time to time.

243. Suffice to mention here that if it is assumed that under the notification of 1944, the suit property was notified as a waqf property, then the dispute should have been filed before the Waqf Tribunal in 1964. Institution of Suit No. 43 of 1967 before the Civil Court regarding the property of Katra Keshav Dev and its decision on the basis of the compromise dated 12.10.1968, *prima facie*, indicate that the property notified as waqf property under the above notification was not the suit property.

244. Perusal of the plaint of Suit No. 43 of 1967 goes to show that the suit was filed against several defendants including 'Trust Masjid Idgah under the alleged Committee of Management consisting of defendants no. 2 to 12 situated at Deeg Darwaza, Mathura'. The suit was filed on 16.05.1964. It clearly shows that the status of Masjid Idgah was addressed as **'trust'** and not as a **'waqf**

property'. If the suit property was notified as waqf property by the notification dated 26.02.1944, the waqf should have been arrayed as one of the defendants.

245. It would not be out of place to mention here that in the present suits, the Waqf board is arrayed as one of the defendant merely because challenge lies to compromise dated 12.10.1968 which was entered by the Committee pursuant to permission accorded by the Waqf board and not because the suit property is admitted to be a waqf property.

246. The defendants have not brought on record any information to corroborate that the suit property was ever called as *'Idgah Masjid Aalmgiri'*. Almost all the plaints have described the defendants to be a trust and not as waqf. Even in their application under Order VII Rule 11 of the CPC, the defendants have not mentioned the waqf number.

247. The present superstructure came into existence on the basis of the compromise dated 12.10.1968. It is also to be taken into consideration that during several rounds of litigation, prior to institution of Suit No. 43 of 1967 nowhere it was pleaded that the suit property was a waqf property.

248. In view of the foregoing observation and the averments made in the plaint, *prima facie*, it appears that the Notification dated 25.02.1944 does not relate to the suit property. Thus, at this stage it cannot be assumed that the suit property was notified as a 'waqf property' under this Notification.

249. Now I proceed to take up the question of jurisdiction of this Court as raised by learned Counsel for the defendants.

250. The relevant provisions of the Act of 1995 are quoted here as under:-

6. Disputes regarding auqaf.— *(1) If any question arises whether a particular property specified as waqf property in the list of auqaf is waqf property or not or whether a waqf specified in such list is a Shia waqf or Sunni waqf, the Board or the mutawalli of the waqf or* ***any person aggrieved*** *may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final:*

Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of auqaf:

Provided further that no suit shall be instituted before the Tribunal in respect of such properties notified in a second or subsequent survey pursuant to the provisions contained in sub-section (6) of section.

... ...

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any waqf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(4) The list of auqaf shall, unless it is modified in pursuance of a decision of the Tribunal under sub-section (1), be final and conclusive.

(5) On and from the commencement of this Act in a State, no suit or other legal proceeding shall be instituted or commenced in a court in that State in relation to any question referred to in sub-section (1).

...

***85. Bar of jurisdiction of civil courts**.—No suit or other legal proceeding shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under this Act to be determined by a Tribunal.*

...

***108-A. Act to have overriding effect.**—The provisions of this Act shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.*

251. The learned Counsel for defendants heavily relied upon the judgement of **Rashid Wali Beg vs Farid Pindari** (supra) and submitted that the jurisdiction to decide every dispute in relation to a waqf property lies only with the Waqf Tribunal and not with the Civil Court.

252. On the contrary, the plaintiffs in their plaint have averred that the suit property has always been a Hindu property. Evidently, the plaintiffs have nowhere acknowledged the existence of any waqf.

253. To fully appreciate the decision rendered in the case **Rashid Wali Beg (supra)**, by the Hon'ble Apex Court, it would be appropriate to extract the relevant paragraphs which read thus :-

4. The case of the first respondent herein-plaintiff was that the suit property originally belonged to one Mirza Abid Ali Beg; that during his lifetime he created a Waqf-al-Aulad; that during his lifetime, Mirza Abid Ali Beg was the mutawalli; that after his lifetime, his elder daughter became the mutawalli; that thereafter, the younger daughter Smt Afzal Jahan Begum became the mutawalli; that the said Afzal Jahan Begum was the grandmother of the plaintiff; that the father of the plaintiff led a wayward life, forcing the grandmother to deliver possession of the property to the plaintiff, authorising him to maintain the properties and utilise the income thereof for the maintenance of the family; that after taking possession, the plaintiff constructed shops on the land and let them out to tenants; that after sometime, the grandmother of the plaintiff appointed the father of the plaintiff as the mutawalli; that there were criminal proceedings between the plaintiff and his father; that on 18-12-2010, the defendants brought building materials and started digging foundation in the land behind the shops, at the instigation of the father of the plaintiff; that though the plaintiff gave a police complaint, they were indifferent, emboldening the defendants to raise a boundary wall in a portion of the land and that, therefore, the plaintiff was constrained to file a suit for

mandatory and perpetual injunction.

5. After entering appearance in the suit, the appellant herein who was the first defendant, filed a written statement admitting the existence of the waqf and waqf property. Thereafter, he took out an application under Order 7 Rule 11 CPC for rejection of plaint, on the simple ground that the civil court has no jurisdiction to try a suit relating to what is admittedly a waqf property. The said application was allowed by the Civil Judge, Senior Division, Malihabad and the suit was dismissed.

... ...

8. Therefore, the only question that arises for our consideration in this appeal is as to whether a suit for permanent injunction in respect of a waqf property is maintainable in a civil court or not."

254. In the above case, it is evident that a written statement admitting the existence of waqf and the waqf property preceded the application under Order VII Rule 11 of the CPC. Therefore, the Hon'ble Apex Court observed that the only question that arose for their consideration was whether a suit for permanent injunction in respect of a waqf property is maintainable in a Civil Court.

255. After taking into consideration the entire legislative history, the Hon'ble Apex Court observed that:-

"32. A cumulative reading of Sections 86, 89 and 90 would show that the bar of jurisdiction under Section 85 is not total and omnipotent and that there may be cases which could still be entertained by civil courts. In fact, Section 93 which prohibits the mutawalli from entering into a compromise with the opposite party in any suit, also refers to "court". Section 93 reads as follows:

"93. Bar to compromise of suits by or against mutawallis.— No suit or proceeding in any court by or against the mutawalli of a waqf relating to title to waqf property or the rights of the mutawalli shall be compromised without the sanction of the Board."

34. In view of the language employed in Sections 83 and 85, coupled with the reference to civil courts in Sections 86, 90 and 93, it appears that the question of bar of jurisdiction of the civil court, has been left by the lawmakers to the vagaries of judicial opinion and this has given rise to conflicting decisions, to some of which, we shall now turn our attention.

... ...

57. Thus the Act itself has created some confusion, leaving the rest to the courts to compound the conundrum. Sadly, the Amendment Act 27 of 2013 also did not address the problem fully."

(Emphasis Supplied)

256. Thus, the Hon'ble Apex Court came to a conclusion that there is no

absolute bar on the jurisdiction of the Civil Court given the language employed in Section 83 and 85 read with Section 86, 90 and 93 of the Act. Therefore, at this stage, it cannot be concluded that the judgement of **Rashid Wali Beg (supra)** is applicable to the facts and circumstances of the present case.

257. This Court finds substance in the arguments made by the learned Counsel Sri Hari Shanker Jain that amendment in Section 6 of the Act of 1995, for substituting the phrase 'any person interested therein' with 'any person aggrieved' is prospective in nature and is effective from 01.11.2013.

258. Reliance is placed by the learned Counsel for the plaintiffs on **Radha Kishan case** (supra) which is a Full Bench decision rendered by the Hon'ble Apex Court. The relevant paragraphs are extracted herein below:

> *"32. In the present case, the Respondents 1 and 2 who are non-Muslims, contended that they are outside the scope of sub-section (1) of Section 6, and consequently, they have no right to file the suit contemplated by that sub-section and, therefore, the list of wakfs published by the Board of Wakfs under sub-section (2) of Section 5 cannot be final and conclusive against them under sub-section (4) of Section 6. It was urged that Respondents 1 and 2 were wholly outside the purview of sub-section (1) of Section 6 and they must, therefore, necessarily fall outside the scope of the enquiry envisaged by sub-section (1) of Section 4, as the provisions contained in Sections 4, 5 and 6 form part of an integrated scheme. The question that arises for consideration, therefore, is as to who are the parties that could be taken to be concerned in a proceeding under sub-section (1) of Section 6 of the Act, and whether the list published under sub-section (2) of Section 5 declaring certain property to be wakf property, would bind a person who is neither a mutawalli nor a person interested in the wakf.*
>
> *33. The answer to these questions must turn on the true meaning and construction of the word "therein" in the expression "any person interested therein" appearing in sub-section (1) of Section 6. In order to understand the meaning of the word "therein" in our view, it is necessary to refer to the preceding words 'the Board or the mutawalli of the wakf'.* ***The word 'therein' must necessarily refer to the "wakf" which immediately precedes it. It cannot refer to the "wakf property". Sub-section (1) of Section 6 enumerates the persons who can file suits and also the questions in respect of which such suits can be filed. In enumerating the persons who are empowered to file suits under this provision, only the Board, the mutawalli of the wakf, and "any person interested therein", thereby necessarily meaning any person interested in the waqf, are listed. It should be borne in mind that the Act deals with wakfs, its institutions and its properties. It would, therefore, be logical and reasonable to infer that its provisions empower only***

those who are interested in the wakfs, to institute suits.

... ...

39. It follows that where a stranger who is a non-Muslim and is in possession of a certain property his right, title and interest therein cannot be put in jeopardy merely because the property is included in the list. Such a person is not required to file a suit for a declaration of his title within a period of one year. The special rule of limitation laid down in proviso to sub-section (1) of Section 6 is not applicable to him. In other words, the list published by the Board of Wakfs under sub-section (2) of Section 5 can be challenged by him by filing a suit for declaration of title even after the expiry of the period of one year, if the necessity of filing such suit arises".

(Emphasis Supplied)

259. In **Salim Muslim Burial Ground Protection Committee vs. State of Tamilnadu and others** (supra), it is observed that:

" 32. A plain reading of the provisions of the above two Acts would reveal that the notification under Section 5 of both the Acts declaring the list of the wakfs shall only be published after completion of the process as laid down under Section 4 of the above Acts, which provides for two surveys, settlement of disputes arising thereto and the submission of the report to the State Government and to the Board. Therefore, conducting of the surveys before declaring a property a wakf property is a sine qua non. *In the case at hand, there is no material or evidence on record that before issuing notification under Section 5 of the Wakf Act, 1954, any procedure or the survey was conducted as contemplated by Section 4 of the Act. In the absence of such a material, the mere issuance of the notification under Section 5 of the Act would not constitute a valid wakf in respect of the suit land. Therefore, the notification dated 29.04.1959 is not a conclusive proof of the fact that the suit land is a wakf property. It is for this reason probably that the appellant Committee had never pressed the said notification into service up till 1999".*

(Emphasis Supplied)

260. In **Punjab Waqf Board vs. Shyam Singh Harika** (supra), the Hon'ble Apex Court observed that:

"28. This Court noticed in the aforesaid judgment that there is a cleavage in the judicial opinion expressed on the question of jurisdiction of the Wakf Tribunal by the different High Courts in the country. High Courts have taken the view that jurisdiction of the Wakf Tribunal is wide enough to entertain and adjudicate upon all kinds of disputes which relate to any wakf property

"24. … A plain reading of the above would show that the civil court's jurisdiction is excluded only in cases where the matter in dispute is required under the Act to be determined by the Tribunal. The words "which is required by or under this Act to be determined by a Tribunal" holds the key to the question whether or not all disputes concerning the wakf or wakf property stand excluded from the jurisdiction of the civil court.

***

28. Section 85 of the Act clearly bars jurisdiction of the civil courts to entertain any suit or proceedings in relation to orders passed by or proceedings that may be commenced before the Tribunal. It follows that although Section 85 is wider than what is contained in Sections 6 and 7 of the Act, the exclusion of jurisdiction of the civil courts even under Section 85 is not absolute. It is limited only to matters that are required by the Act to be determined by a Tribunal. So long as the dispute or question raised before the civil court does not fall within the four corners of the powers vested in the Tribunal, the jurisdiction of the former to entertain a suit or proceedings in relation to any such question cannot be said to be barred."

... ...

33. After the judgment of this Court in Ramesh Gobindram [Ramesh Gobindram v. Sugra Humayun Mirza Wakf, (2010) 8 SCC 726 : there are several two-Judge judgments of this Court either following Ramesh Gobindram judgment or distinguishing the same on one or other reasons. This Court in Bhanwar Lal v. Rajasthan Board of Muslim Wakf elaborately noticed the judgment of Ramesh Gobindram case. This Court ultimately in the facts of that case held that since the suit was filed much before the enforcement of the Act i.e. 1-1-1996, in view of the dictum laid down in Sardar Khan v. Syed Najmul Hasan, (2007) 10 SCC 727] , the civil court where the suit was filed shall continue to have jurisdiction. In para 30 following has been laid down:-

"30. The suit is for cancellation of sale deed, rent and for possession as well as rendition of accounts and for removal of trustees. However, pleadings in the suit are not filed before us and, therefore, the exact nature of relief claimed as well as the averments made in the plaint or written statements are not known to us. We are making these remarks for the reason that some of the reliefs claimed in the suit appeared to be falling within the exclusive jurisdiction of the Tribunal whereas for other reliefs the civil court would be competent. Going by the ratio of Ramesh Gobindram, suit for possession and rent is to be tried by the civil court. However, the suit pertaining to removal of trustees and rendition of accounts would fall within the domain of the Tribunal. Insofar as relief of cancellation of sale deed is concerned this is to be tried by the civil court for the reason that it is not covered by Section 6 or 7 of the Act whereby any jurisdiction is conferred upon the Tribunal to decide such an issue. Moreover, relief of possession, which can be given by the civil court, depends upon the question as to whether the sale deed is valid or not. Thus, the issues of sale deed and possession are inextricably mixed with each other. We have made these observations to clarify the legal position. Insofar as the present case is concerned, since the suit was filed much before the Act came

into force, going by the dicta laid down in Sardar Khan case, it is the civil court where the suit was filed will continue to have the jurisdiction over the issue and the civil court would be competent to decide the same."

(Emphasis Supplied)

261. In view of the above, it appears that the Waqf Tribunal has no jurisdiction to decide the issues involved in the present suits. Since, there is no admission on the part of the plaintiffs that the suit property is a waqf property, therefore, question of jurisdiction does not arise at this stage.

262. Documentary evidence corroborating the averments made in plaints are brought on record by the plaintiffs. Whereas, except for the Notification dated 25.02.1944, no other evidence is filed by the defendants. The evidence filed by the plaintiffs and the notification filed by the defendants are subject to evidence to be led by the parties during the trial.

263. It is also to be noted that the sale deed dated 8.2.1944 and trust deed dated 9.3.1951 are more than 30 years old documents. Therefore, as per Section 90 of the Evidence Act, 1872, their genuineness may be presumed, unless rebutted by the defendants.

264. In view of the above, considering the facts and circumstances of the case, averments made in the plaint and the legal proposition referred by the rival parties, it cannot be assumed that the suit property is a waqf property. All the facts and circumstances of the case are subject to appreciation of oral and documentary evidence to be led by the parties during the trial. Therefore, at this stage I am of the view that the suits are not barred under any provision of the Act of 1995.

(vi) Bar under the Specific Relief Act, 1963:

265. Mrs. Tasneem Ahmadi, learned Counsel for the defendants submitted that the suits of the plaintiffs are barred by Section 34 of the Specific Relief Act, 1963. The plaintiffs did not seek the relief of possession in their plaints. It is an admission on part of the plaintiffs they are not in possession over the suit property. Present suits have been filed for granting a decree for declaration and injunction. Mere declaration of title is not enough. Since no relief for delivery of possession is sought, therefore, relief of injunction cannot be granted. The ancillary relief claimed by the plaintiffs does not fall under the provisions of Sections 5 and 6 of the Specific Relief Act, 1963.

266. Per contra, it is submitted on behalf of the plaintiffs that the suit property is a temple and idol is in constructive possession at all times. The plaintiffs have claimed relief that the suits of the plaintiffs be decreed against the defendants directing them to remove the illegal constructions raised by them, encroaching upon the land within the area of Katra Keshav Dev, Mathura and to hand over vacant possession to the Janmabhoomi Trust within the time provided by the Court.

267. Section 34 of the Specific Relief Act, 1963 provides that:-

34. Discretion of court as to declaration of status or right.

'Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

268. Perusal of the plaints goes to show that the plaintiffs nowhere have admitted lawful possession of the defendants over the suit property. It is the case of the plaintiffs that pursuant to illegal, fraudulent and void ab initio compromise dated 12.10.1968, two bigha land, within the area of Katra Keshav Dev, which was a part of the temple, was conceded to the defendant. Suit No. 43 of 1967 was filed on the basis of fraud and misrepresentation. Therefore, the decree was also based on fraud and misrepresentation. It was obtained to defeat the interest of the deity. Hence, any illegal construction carried out pursuant to the compromise dated 12.10.1968 is not admitted to the plaintiffs.

269. Perusal of the relief clauses of the respective plaints reveals that the relief of decree of mandatory injunction is claimed by the plaintiffs. It is also claimed that the defendants be directed to remove the constructions raised by them as shown in the site plan within the area of Katra Keshav Dev, Mathura and to hand over vacant possession to the Janmabhoomi Trust. Applicable Court fee is also paid by the plaintiffs for this relief.

270. As per the averments made in the plaints, the plaintiffs claim that they were in possession since time immemorial and mere demolition of the temple by the intruders, did not result in their ouster as they contined to be in possession over the suit property from time to time and from regime to regime. The defendants claim the existence of the mosque only from 1669, when Aurangzeb constructed the mosque over the suit property.

271. It is to be taken into consideration that Aurangzeb did not construct the mosque on the vacant land. It is the case of the plaintiffs that Aurangzeb partially demolished the temple and constructed a superstructure, which is called as Shahi Masjid Idgah. The defendants did not claim their possession prior to 1669. In contrast, the plaintiffs have averred in their respective plaints that Brijnabha, the great grandson of Lord Shree Krishna constructed a temple at Katra Keshav Dev 5000 years ago.

272. The plaintiffs have claimed the relief for cancellation of judgement and decree dated 20.07.1973 and judgment and decree dated 07.11.1974 passed in Suit No. 43 of 1967. Therefore, it cannot be assumed that the plaintiffs have admitted the lawful possession of the defendants over the suit property.

273. The constructive possession of the deity over the land from the time immemorial and the legality and validity of the compromise dated 12.10.1968 are questions of fact that can only be proved by the evidence to be led during the trial. The question that the suits of the plaintiffs are barred by Section 34 of the Specific Relief Act,1963 can only be decided after framing a proper issues on the basis of the pleadings

of the parties during the trial after taking and appreciating evidence led by the parties. What relief can and can not be granted has to be decided by this Court on the basis of the pleadings and evidence available on record. Beside this, the plaintiffs have claimed several reliefs such as cancellation, declaration, mandatory injunction as well as for possession which are subject to evidence to be led during the trial. The question whether the suit is barred by Section 34 of the Specific Relief Act,1963 cannot be decided at this stage without taking and appreciating the evidence of the parties to be led during the trial.

274. In view of the foregoing discussions, in my opinion, it appears that the suits of the plaintiffs are not barred by provisions of Section 34 of the Specific Relief Act,1963.

Conclusion:

275. On reading of the plaints as a whole and in a meaningful manner, perusal of the material placed on records, consideration of the arguments advanced by the rival parties, and settled legal propositions, I conclude that the plaints in all the suits of the plaintiffs disclose a cause of action and they do not appear to be barred by any provisions of the Waqf Act, 1995; the Places of Worship (Special Provisions) Act, 1991; the Specific Relief Act, 1963; the Limitation Act, 1963 and Order XIII Rule 3A of the Code of Civil Procedure Code, 1908.

276. Therefore, the applications for rejection of plaints moved by defendants no.1 and 2 in respective suits, numbered as A-17, A-18 and A-37 in OSUT No.01 of 2023; C-57 and C-69 in OSUT No.02 of 2023; C-20 and C-45 in OSUT No.04 of 2023; 14-Ka and A-14 in OSUT No.05 of 2023; A-20, A-30 and A-32 in OSUT No.06 of 2023; A-16 and A-39 in OSUT No.07 of 2023; A-21, A-22 and C-23 in OSUT No.09 of 2023; A-9 in OSUT No.11 of 2023; C-30 and C-49 in OSUT No.12 of 2023; C-36 and A-46 in OSUT No.13 of 2023; C-18 and C-23 in OSUT No.14 of 2023; C-12 and C-22 in OSUT No.15 of 2023; A-7, A-17 and A-18 in OSUT No.16 of 2023; A-14 in OSUT No.17 of 2023; and A-7 in OSUT No.18 of 2023, are liable to be rejected.

277. Accordingly, all the aforesaid applications are hereby **rejected**.

278. Valuable assistance rendered by my Research Associate, Ms Varnika Srivastava, is appreciated.

279. Put up on **12.8.2024** at **2:00 pm**, for issues.

(2024) 8 ILRA 1273
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2024

BEFORE

THE HON'BLE ARUN BHANSALI, C.J.
THE HON'BLE VIKAS BUDHWAR, J.

P.I.L. (Civil) No. 756 of 2024

Sachin Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rakesh Pandey, Sr. Advocate, Umesh Vats

Counsel for the Respondents:
Manish Goyal, AAG, A.K. Goyal, A.C.S.C., Shashi Prakash Rai, Shobhit Mohan Shukla

Civil Law –Public Interest Litigation-Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officers Service Rules, 2004-The Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officers(First Amendment) Service Rules, 2023-writ of quo warranto sought-appointment and promotion of one Arvind Kumar Rai in Uttar Pradesh Zila Panchayat Monitoring Cell-his initial *ad hoc* appointment and subsequent regularisation-tested by the court on anvil of consistency with statutory rules and government orders-petitioner failed to demonstrate illegality- petition dismissed. (Paras 22, 23, 26, 27 and 28)

HELD:

The bone of contention is whether it was open for the St. Government to have made the fifth respondent regular on 18.07.2006 post enforcement of the Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officer Service Rules, 2004 on the face of the provisions contained under Rule 3(k) of Rules, 2004. Evidently, at the time when the fifth respondent was appointed as Engineer on ad hoc basis on 17.10.1992 against the temporary post created of Engineer on 30.03.1992, there were no statutory rules in force, meaning thereby, that the selections and the condition of services were to be governed by Government Orders issued from time to time. Apparently, the posts which were temporary in nature for a Ltd. period till 28.02.1993 vide Government Order dated 30.03.1992 was made permanent on 14.10.1998 which stands recited in the Government Order dated 06.11.1998. The fifth respondent prior to the enforcement of the 2004 Rules was made regular on 29.11.2000. Though the Rule 3(h) defines member of service, a person substantively appointed under the rules or the rules or orders in force prior to commencement of the rules to the post in the cadre of the service and Rule 3(k), substantive appointment means an appointment not being an ad hoc appointment on the post in the cadre of the service made after selection in accordance with the procedure prescribed for the time being by the executive instructions issued by the Government. However, the same would not in any manner whatsoever invalidate any proceedings or action taken by the St. Government while conferring benefit particularly when the 2004 rules came into effect from 12.07.2004. (Para 22)

A Division Bench of this Court in the case of Anil Kumar Verma Vs U.P. St. Industrial Development Corp. Ltd. 2014 (8) ADJ 152 had exercised its jurisdiction while issuing a writ of quo warranto setting aside the appointment/promotion of a Chief Engineer in U.P. St. Industrial Development Corp.. (Para 27)

Nevertheless we are of the firm opinion that the selection, appointment and promotion of the fifth respondent on the post of Engineer, Deputy Director, Superintending Engineer and Additional Charge as Chief Engineer is in consonance and conformity with the Statutory Rules and the Government Orders issued from time to time and the writ petitioner has miserably failed to show any illegality committed by the respondents.(Para 28)

Petition dismissed. (E-14)

List of Cases cited:

1. Gambhirdan K. Gadhvi Vs St. of Guj., 2022 (5) SCC 179

2. Professor (Dr.) Sreejith P.S. Vs Dr. Rajasree M.S., 2022 (4) SCT 711

3. Premchandran Keezhoth & ors.Vs The Chancellor Kannur University & ors.., AIR 2024 SC 135

4. B. Srinivasa Reddy Vs Karnataka Urban Water Supply & Drainage Board Employees' Assn. & ors., 2006 (11) SCC 731

5. Central Electricity Supply Utility of Odisha Vs Dhobei Sahoo & ors., 2014 (1) SCC 161

6. Arun Kumar Agrawal Vs U.O.I. & ors., 2014 (2) 609

7. Renu & ors.Vs District and Sessions Judge, Tis Hazari Courts, Delhi & anr.reported in 2020 (14) SCC 50

8. Anil Kumar Verma Vs U.P. St. Industrial Development Corp. Ltd. 2014 (8) ADJ 152

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Shri Rakesh Pandey, Senior Advocate assisted by Shri Umesh Vats, learned counsel for the petitioner, Shri Manish Goyal, learned AAG and Shri A.K. Goyal, learned counsel for the State-Respondents as well as Shri Shobit Mohan Shukla and Shri Shashi Prakash Rai, learned counsel for Respondent No. 5.

2. A joint statement has been made by the learned counsels for the rival parties that the pleadings have been exchanged and they do not propose to file any further affidavits and the writ petition be decided at the fresh stage. With the consent of the parties, the writ petition is being decided at the first stage.

Facts:

3. The fact of the case as discernible from the record are that the State Government in order to review the functioning of the Zila Panchayat and to strengthen them issued a Government Order dated 30.03.1992 constituting "Zila Panchayat Monitoring Cell" for reviewing and monitoring the financial and physical achievements of Zila Parishads and Zila Panchayats of the State of Uttar Pradesh. In order to man the Monitoring Cell, several posts were created namely, three post of Deputy Director, two posts of Engineer, two posts of Karya Adhikari, two posts of Senior Clerk, three post of Stenographer and one post of Peon. Since the Monitoring Cell was newly born thus post which stood sanctioned was temporary for the period till 28.02.1993. In order to regulate the procedure for the selections of the incumbents who were to man the newly created post, the State Government issued an office order dated 01.04.1992. As regards, the posts of engineer which were two in number is concerned, the same was to be filled through a selection committee constituted by the State Government from the eligible candidates who had the qualification of Bachelor of Engineering (Civil). The fifth respondent after being subjected to the selections conducted by the selection committee was issued an appointment order dated 17.10.1992 appointing him on the post of Engineer (Civil) on ad hoc basis in the pay scale of Rs. 2200-75-2800 EB 100-4000.

4. Pleadings reveal that the proceedings were initiated for making the temporary post as permanent, on 14.10.1998 with the concurrence Governor of the State of Uttar Pradesh, an order came to be issued according approval for making the temporary posts which stood created by virtue of the Government order dated 30.03.1992 as permanent. Thereafter on 29.11.2000, an office order came to be issued by the Deputy Secretary, Panchayati Raj Anubhag-II, Uttar Pradesh, U.P. Government wherein the fifth respondent along with 9 others were made regular. In the meantime in exercise of the powers conferred by proviso to Article 309 of the Constitution of India, the Rules by the name of "Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officers Service Rules, 2004" (in short 'Rule 2004') came to be enacted which was gazetted on 12.07.2004, Rule 5 of the said Rules provided for recruitment, according to which, the post of Deputy Director was to be filled up 33-1/2 % by promotion through the selection committee from amongst substantively appointed engineer who had completed eight years of service as such on the first day of the recruitment, 33-1/2 % by promotion through selection committee from amongst substantively appointed

Karya Adhikari who had completed 8 years of service as such on the first day of recruitment and 33-1/2% by promotion through the selection committee from amongst substantively appointed medical officers who have completed eight years of service on the first day of recruitment. As regards, the post of engineer, the same was to be filled up by direct recruitment through Commission. On 18.07.2006 an order came to be passed by the Principal Secretary/ Chief Secretary Panchayati Raj Civil Secretariat, U.P. Lucknow whereby the fifth respondent services was made regular while substituting the word "ad hoc" as recited in the order dated 17.10.1992 as 'regular'. On 25.02.2013, an order came to be passed by the Principal Secretary/ Additional Chief Secretary Panchayati Raj Civil Secretariat, U.P. Lucknow whereby the fifth respondent was accorded promotion on the post of Deputy Director in the pay scale of Rs. 15600-33100 GP 6600.

5. On 10.04.2023, the State Government in exercise of the powers conferred under Rule 4 (1) of the Rules, 2004 proceeded to restructure the cadres while converting the post of Deputy Director (Technical) to the post of Executive Engineer (Civil) and two post of Medical Officer and one post of Deputy Director, Medical Officer was surrendered and in its place, one post of Superintending Engineer (Civil) and one post of Chief Engineer (Level-II) was created. On 30.06.2023, the Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officers (first Amendment) Service Rules, 2023 (in short 'Amendment Rules, 2023') came to be notified amending the 2004 Rules, whereby one post of Chief Engineer (Civil), one post of Superintending Engineer (Civil), two post of Executive Engineer (Civil) one post of Deputy Director (Karya Adhikari), two post of Engineer and two post of Karya Adhikari was created. Rule 5 also stood amended whereby for recruitment on the post of Executive Engineer (Civil), the same was to be made by promotion through selection committee amongst substantively appointed Engineer of Zilla Panchayat Monitoring Cell who have completed at least 7 years of service as such on the first day of recruitment, Superintending Engineering (civil) by promotion through selection committee from amongst substantively appointed Executive Engineer of Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officers Cadre who have completed total 15 years of substantive service on the first day of the year of recruitment including minimum 6 years of service as Executive Engineer followed by Chief Engineer (Level-II), by promotion through selection committee from amongst substantively appointed Superintending Engineer on the first day of selection year who have completed a total of 25 years of substantive service Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officers Cadre. The fifth respondent thereafter by virtue of an order dated 14.07.2023 was promoted on the post of Superintending Engineer (Civil) in the pay scale of Rs. 1,23,100-2,15,900 (Pay Matrix Level 13) on probation till 31.08.2024 followed by an order on the same day whereby he was assigned additional charge of Chief Engineer (Civil) (Level-II) without any monetary benefits. The fifth respondent is stated to superannuate on 31.08.2024.

6. The writ petitioner herein who claims to be elected as a member of Zila Panchayat, Etawah and continuing since

July, 2021 has filed the present Public Interest Litigation (Writ of Quo Warranto) seeking following reliefs:

> "A. Issue writ, order or direction in the nature of Quo Warranto to declare the appointment of respondent No.5 Shri Arvind Kumar Rai as Deputy Director, Superintending Engineer & Chief Engineer in the Uttar Pradesh Zila Panchayat Monitoring Cell, Lucknow as void ab initio.
>
> B. Issue any other appropriate writ, direction and order directing the respondents to recover from respondent No.5 Shri Arvind Kumar Rai all consequential benefits of the post with retrospective effect that have been extended to him by virtue of his illegal appointments on the post of Deputy Director, Superintending Engineer and Chief Engineer in the Uttar Pradesh Zila Panchayat Monitoring Cell, Cell, Lucknow.
>
> C. Issue a writ, order or direction which this Hon'ble Court may deem just and proper in the nature and circumstances of the case.
>
> D. To award the cost of the writ petition."

7. The present writ petition was entertained on 15.05.2024 while issuing notice to the fifth respondent and seeking response from the respondents.

8. A counter affidavit has been filed by the State official respondents as well as the Respondent No. 5 and supplementary counter affidavit has also been filed to which rejoinder affidavits have been filed.

Argument of learned counsels for the writ petitioner

9. Shri Rakesh Pandey, Senior Advocate assisted by Shri Umesh Vats, learned counsel for the writ petitioner has sought to argue that the appointment of fifth respondent, Arvind Kumar Rai as Deputy Director, Superintending Engineer & Chief Engineer in the Uttar Pradesh Zila Panchayat Monitoring Cell, Lucknow is void ab initio inasmuch as the entire selection criteria has been tailored in order to confer undue benefits upon him. Elaborating the said submission, it is being sought to be argued that the appointment of the fifth respondent on the post of Engineer in the Monitoring Cell was on Ad hoc basis that too against a temporary post which was to be in existence till 28.02.1993 from the issuance of the Government order dated 30.03.1992. It is submitted that in the year 2004, the Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officers Service Rules, 2004 came to be enforced and in view of Rule 3(k), the appointment of the fifth respondent by no stretch of imagination can be said to be legal as appointment was made on ad hoc basis and thus there was no question of making him regular on 18.07.2006. It is also contended that once the fifth respondent was made regular on the post of Engineer (civil) on 18.07.2006 then, 8 years of substantive service was required for being promoted on the post of Deputy Director whereas on 25.02.2013 when the fifth respondent granted promotion on the post of Deputy Director, he did not have 8 years of substantive service. It is also submitted that on 10.04.2023, an office order came to be issued for restructuring of the cadre strength of various posts but there was no post sanctioned as Deputy Director (Technical) while converting the same as

Executive Engineer (Civil) giving a room to the fifth respondent thus, it is a classic example of undue favouritism. It is also the submission of learned Senior Counsel for the writ petitioner that Rules were amended in order to confer undue benefit to the fifth respondent whereby the post of Superintending Engineer (Civil) and post of Chief Engineer (Civil) was created and thereafter promotion was accorded to the fifth respondent on 14.07.2023 on the post of Superintending Engineer (Civil) and in order to perpetuate illegality, a dedicated avenue of promotion was created in favour of the fifth respondent while giving him the additional charge of Chief Engineer (Civil) Level-II in order to promote him on regular basis while dispensing with the minimum working as Superintending Engineer (Civil) while making it 25 years of substantive service in the Zila Panchayat Monitoring Cell Gazetted Officers Cadre. In nutshell, the submission is that at different stages manoeuvring and manipulating has been done in order to give unjust benefits to the fifth respondent as the Rules have been framed in order to suit the circumstances which would be in favour of the fifth respondent. During the course of the argument, a document has been forwarded to the Court dated 23.08.2024 whereby charge has been handed over to the fifth respondent on the post of Chief Engineer (Civil) (Level II).

11. Reliance has also been placed upon the judgement in the case of ***Gambhirdan K. Gadhvi v. State of Gujarat, 2022 (5) SCC 179, Professor (Dr.) Sreejith P.S. v. Dr. Rajasree M.S., 2022 (4) SCT 711*** and the judgment in the case of ***Premchandran Keezhoth and Ors. v. The Chancellor Kannur University and Ors., AIR 2024 SC 135*** so as to contend that a writ of quo warranto is maintainable, in case, the appointment is void ab initio and a person who is usurping the post has no authority under law to hold the same. It is, therefore, prayed that the writ petition be allowed in toto and appointment of the fifth respondent be set aside.

Argument of the learned counsel for the respondent

12. Countering the submission of the learned Counsel for the petitioner, Shri Manish Goyal, learned AAG assisted by Shri A.K. Goyal for the State-respondents has sought to argue that the Public Interest Litigation couched as writ of quo warranto is not maintainable since the fifth respondent does not hold a public office. It is also submitted that the present writ petition is actuated by malicious intent other than bona fide, particularly, in view of the fact that the writ petitioner as per his own saying is the member of the Zila Panchayat, Etawah and being aggrieved against the monitoring being done with regard to the affairs of the Zila Panchayat it became a basis for filing of the present writ petition. Reliance has also been placed upon the judgement in the case of ***B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Assn. And Others, 2006 (11) SCC 731, Central Electricity Supply Utility of Odisha v. Dhobei Sahoo and Others, 2014 (1) SCC 161 and Arun Kumar Agrawal v. Union of India and Others, 2014 (2) 609*** so as to contend that the present proceedings are not maintainable at the behest of the writ petitioner. On merits, it has been submitted that the entire pleadings set forth in the writ petition at the instance of the writ petitioner, centres around favouritism and manoeuvring in order to give undue benefits to the fifth respondent, however,

the records explicitly depicts that the Monitoring Cell stood created on administrative exigency on 30.03.1992 whereby besides the post of Engineer various other posts were created followed by the modalities, according to which, selections were to be made for various posts on 01.04.1992 and in the line with the same, the fifth respondent after being subjected to selection committee was accorded appointment on the post of Engineer on ad hoc basis on 17.10.1992 and on 14.10.1998, the temporary post stood converted into regular and on 06.11.1998, a Government order also came to be issued in that regard pursuant whereto on 29.11.2000, the fifth respondent along with others were made regular and post enactment of the 2004 Rules after completing 8 years of service as Engineer, the fifth respondent was promoted on the post of Deputy Director on 25.02.2013.

13. Owing to the need for cadre restructuring which is permissible in view of Rule 4(1) of the 2004, Rules, the cadre restructuring was done whereby consequent to the surrendering of certain post, the post of Executive Engineer, Superintending Engineer (Civil) and Chief Engineer Level-II was created and after the enforcement of Uttar Pradesh Zila Panchayat Monitoring Cell, Gazetted Officers (First Amendment), Rules 2023, the fifth respondent was granted promotion post completion of 6 years of service as Executive Engineer on the post of Superintending Engineer (civil) on 14.07.2023 and since he was senior-most on the post on completion of 25 years of substantive service in the Monitoring Cell, he was assigned the additional charge of Chief Engineer Level II without any monetary benefits.

14. Submission is that in absence of challenge to the Statutory Rules/ Government Order/ Appointment and promotion orders issued in favour of the fifth respondent, the writ petitioner cannot succeed, particularly, when the orders and the Rules are intra vires and within the competence of the State Government issued in administrative exigencies which is unquestionable.

15 . Additionally, it has been argued that the fifth respondent is to superannuate on 31.08.2024 and it is not a case wherein the writ petitioner was not aware about the movement of the fifth respondent as he being the member of the Zila Panchayat since 2021 cannot be said to be ignorant in this regard.

16. Lastly, it has been contended that it is the domain and the province of the State Government to create avenues from promotion and to accord placement and once it is not the case of the writ petitioner that the fifth respondent does not possess eligibility/ qualification then the entire challenge sans merit. Therefore, the writ petition be dismissed.

Argument of learned counsel for respondent No. 5

17. Sri Shobhit Mohan Shukla along with Sri Shashi Prakash Rai, have adopted the arguments of learned AAG while adding that there is no illegality in selection, appointment and promotion of the fifth respondent on the post of Engineer, Deputy Director, Superintending Engineer and Chief Engineer (Level-II). It is also submitted that whatever benefits have been extended to the fifth respondent they are as per the statutory rules and the Government Orders issued from time to time and in absence of challenge to the

same, the writ petitioner is not entitled for any relief.

18. Before delving into the tenability of the arguments of the rival parties, it would be apposite to quote the Government Order/office order and the statutory rules:

Statutory Rules/ Documents

"Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officer's Service Rules, 2004"

3. Definitions- In these rules, unless there is anything repugnant in the subject or context-

(h) - Member of the Service' means a person substantively appointed under these rules or the rules or orders in force prior to the commencement of these rules to a post in the cadre of the service;

(k) Substantive appointment' means an appointment, not being an ad hoc appointment, on a post in the cadre of the service, made after selection in accordance with the Rules and, if there were no rules, in accordance with the procedure prescribed for the ime being by executive instructions issued by the Government;

Cadre of Service. - (1) The strength of the service and each category of posts therein shall be such as may be determined by the Government from time to time.

(2) The strength of the service and of each category of posts therein shall, until orders varying the same are passed under sub-rule (1), be as given below:

Sl. No.	Name of Post	Number of Posts		
		Permanent	Temporary	Total
1.	Deputy Director	3	-	3
2.	Engineer	2	-	2
3.	Karya Adhikari	2	-	2
4.	Medical Officer (Allopathic and Ayurvedic or Homeopathic)	2	-	2

Provided that-

(i) the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post, without thereby entitling any person to compensation; or

(ii) The Governor may create such additional permanent o temporary post as he may consider proper.

5. Source of recruitment. - Recruitment to the various categories of posts in the service shall be made from the following sources:-

1) Deputy Director (i) 33-1/2 per cent by promotion through the↑ Selection Committee from amongst substantively appointed Engineers who have completed eight years service as such on the first day of the year of recruitment.

(ii) 33-1/2 per cent by promotion through the Selection Committee from amongst substantively appointed Karya Adhikari who have completed eight years service as such on the first day of the year of recruitment.

(iii) 33-1/2 per cent by promotion through the Selection Committee from amongst substantively appointed Medical Officers (Allopathic and Ayurvedic or Homeopathic) who have completed eight years service as such on the first day of the year of recruitment.

(2) Engineer By direct recruitment through the Commission.

The Utter Pradesh Zila Panchayat Monitoring Cell Gazetted Officers (First Amendment) Service Rules, 2023

4.(1) The strength of service and each category of posts therein shall be such as may be determined by the Government from time to time.

(2) The strength of service and each category of posts therein shall, until orders varying the same are passed under sub nule (1), be as given below:

Sl. No.	Name of Post	Number of Posts		
		Permanent	Temporary	Total
1.	Chief Engineer (civil)	-	01	01
2.	Superintending Engineer (civil)	-	01	01
3.	Executive Engineer (Civil)	01	-	01
4.	Deputy Director (Karya Adhikari)	01	-	01
5.	Engineer	02	-	02
6.	Karya Adhikari	02	-	02

Provided that-

(i) the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post without thereby entitling any person to compensation; or

(ii) the Governor may create such additional permanent or temporary post as he/she may consider proper.

5. Recruitment to the various category of posts in the service shall be made from the following sources:-

(1) **Karya Adhikary** - By direct recruitment through the Commission.

(2**) Engineer** - By direct recruitment through the Commission.

(3) **Deputy Director** - By promotion through the Selection Committee from amongst substantively appointed Karya Adhikaris who have completed eight years service as such on the first day of the year of recruitment.

(4) **Executive Engineer (Civil)** - By promotion through the Selection Committee from amongst substantively appointed Engineers of Zila Panchayat Monitoring Cell, who have completed at least seven years service as such on the first day of the year of recruitment.

(5) **Superintending Engineer (Civil)** - By promotion through the Selection Committee from amongst substantively appointed Executive Engineers of Zila Panchayat Monitoring Cell Gazetted Officer Cader, who have completed Total fifteen years substantive service on the first day of the year of recruitment including minimum six years service as Executive Engineer.

(6**) Chief Engineer (Civil) (level-II)** - By promotion through Selection Committee from amongst the substantively appointed Superintending Engineers on the first day of selection year, who have completed a total of 25 years of substantive service in the Zila Panchayat Monitoring Cell Gazetted Officer Cader."

संख्याः 5446/33-2-98-83जी/91

प्रेषक,

डा० ओम प्रकाश,

सचिव,
उत्तर प्रदेश शासन।

सेवा में,

उप सचिव/ प्रभारी अधिकारी,
जिला पंचायत अनुश्रवण कोष्ठक,
पंचायती राज विभाग,
उ०प्र० शासन।

पंचायती राज अनुभाग-2 लखनऊः
दिनांक 06 नवम्बर, 1998

विषयः- जिला पंचायत अनुश्रवण कोष्ठक, पंचायती राज विभाग, उ०प्र० शासन के अन्तर्गत अस्थायी पदों का स्थायीकरण।

महोदय,

उपर्युक्त विषय पर मुझे आपसे यह कहने का निदेश/निर्देश हुआ है कि श्री राज्यपाल महोदय जिला पंचायत अनुश्रवण कोष्ठक, पंचायती राज विभाग, उ०प्र० शासन के अन्तर्गत संलग्नक में उल्लिखित अस्थायी पदों को दिनांक 14-10-98 से स्थायी पदों में परिवर्तित किये जाने की सहर्ष स्वीकृति प्रदान करते हैं।

2- उक्त पदों के पदधारकों को शासन द्वारा समय-समय पर जारी किये गये आदेशों के अनुसार मंहगाई एवं अन्य भत्ते, जो अनुमन्य हो, भी देय होंगे।

3. मुझे यह भी कहने का निदेश/निर्देश हुआ है कि उक्त अस्थायी पदों के दिनांक 14-10-98 से स्थायी पदों में परिवर्तित हो जाने के फलस्वरूप संलग्नक के कालम-6 में उल्लिखित शासनादेश संख्या 4181/33-2-98-83जी/91 दिनांक 27 अगस्त, 1998 को जिसमें इन पदों को वर्ष 1998 में दिनांक 28-2-99 तक अस्थायी रूप से चलते रहने की स्वीकृति प्रदान की गयी थी, इस सीमा तक संशोधित माना जायेगा कि उक्त पदों की निरन्तरता केवल दिनांक 28-2-99 तक के लिये दी गयी थी।

उपर्युक्त पदों पर होने वाला व्यय आय-व्ययक के अनुदान संख्या-14 के अन्तर्गत लेखा शीर्षक 2515-अन्य ग्राम्य विकास कार्यक्रम-आयोजनेत्तर-101-पंचायती राज-800-अन्य व्यय-06-जिला पंचायत अनुश्रवण कोष्ठक की सुसंगत प्राथमिक इकाईयों के नामे डाला जायेगा।

प्रमाणित किया जाता है कि इन पदों का स्थायीकरण कार्यालय-ज्ञाप संख्याः ए-2-797/दस-87-24(12)-86 दिनांक 25 मई, 1987 में निहित सभी शर्तों की पूर्ति के बाद किया जा रहा है।

भवदीय
ह०
(डा० ओम प्रकाश)
सचिव।

उत्तर प्रदेश शासन
पंचायती राज अनुभाग-2
सं०- 4445/33-2-2000-83जी/91
लखनऊः दिनांकः 29 नवम्बर, 2000

कार्यालय ज्ञाप

जिला पंचायतों की वित्तीय एवं भौतिक उपलब्धियों की समीक्षा करने, उन पर प्रभावी नियन्त्रण रखने एवं जिला पंचायतों का सुदृढीकरण किये जाने के उद्देश्य से शासनादेश संख्या 1969बी / 33-2-92-83जी/91, दिनांक 30.03.1992 द्वारा सचिव, पंचायती राज के प्रशासकीय नियन्त्रणाधीन जिला पंचायत अनुश्रवण कोष्ठक का गठन किया गया था। इस शासनादेश के अन्तर्गत सृजित पदों को शासनादेश संख्या 5446/33-2-90-83जी/91, दिनांक 06 नवम्बर, 1998 द्वारा स्थायी किया जा चुका है। शासन के कार्यालय ज्ञाप संख्या 1995बी/ 33-2-92-83जी/91, दिनांक 01 अप्रैल, 1992 द्वारा जारी कार्यकारी आदेशों के अन्तर्गत विभिन्न पदों पर कोष्ठक के नियुक्ति किये गये निम्नलिखित अधिकारियों एवं कर्मचारियों को उनकी दीर्घकालीन संतोषजनक सेवाओं को दृष्टिगत रखते हुए नीचे अंकित सूची के कालम-3 में अंकित पदों पर तात्कालिक प्रभाव से स्थायी किया जाता है। ये अधिकारी/कर्मचारी चूंकि कोष्ठक के लिए हैं अतः इनकी नियुक्ति/तैनाती केवल कोष्ठक के लिए ही रहेगी।

उत्तर प्रदेश जिला पंचायत अनुश्रवण कोष्ठक की समाप्ति पर यह पद स्वतः समाप्त हो जायेंगे।

क्र०सं०	अधिकारी/कर्मचारी का नाम	द नाम
1	श्री अरविन्द कुमार	अभियन्ता

	राय	
2	श्री प्रवीण कुमार	अभियन्ता
3	श्री प्रदीप कुमार गुप्ता	कार्य अधिकारी
4	श्रीमती पुष्पलता पालीवाल	कार्य अधिकारी
5	श्री विजय प्रकाश श्रीवास्तव	वरिष्ठ लिपिक
6	श्री कमलेश चन्द्र पाण्डेय	वरिष्ठ लिपिक
7	श्री सन्तोष कुमार	आशुलिपिक
8	श्री कृष्ण चन्द्र चौधरी	आशुलिपिक
9	श्री राजेश कुमार	आशुलिपिक
10	श्री राम सुखी	चपरासी

भवदीय
ह०
(बी०बी० सिंसह)
उप सचि□व

Analysis

19. We have heard the learned counsel for the parties and perused the record carefully.

20. The facts are not in issue. It is not in dispute that the Monitoring Cell came to be created by virtue of the Government Order dated 30.03.1992 for reviewing the financial and the physical achievements and to have control over the Zila Panchayat. It is also not in dispute that several posts stood created including the post of Deputy Director (three in number) and Engineer (two in number) respectively. In order to regulate the procedure according to which selections are to be made for various posts an office order came to be issued on 01.04.1992 with respect to various posts including Engineer (two posts) to be filled through selection committee amongst the candidates who have to their credit their Bachelor of Engineering (Civil).

21. Records reveal that the fifth respondent faced the selection Committee and he was accorded appointment on the post of Engineer on ad hoc basis in the pay scale of Rs. 2200-75-2800-ev-100-4000. On 14.10.1998, the State Government declared the post which were to be made temporary pursuant to the Government Order dated 30.03.1992 to be regular and a Government Order also came to be issued on 06.11.1998. On 29.11.2000, the fifth respondent was made regular along with the others on the post of Engineer thereafter, the Uttar Pradesh Zila Panchayat Monitoring Cells Gazetted Officer Service Rules, 2004 came to be gazetted on 12.07.2004. A consequential order was passed in favour of the fifth respondent on 18.07.2006 whereby the word "ad hoc basis" was substituted with the word ‘regular’ implying that the fifth respondent was made regular.

22. The bone of contention is whether it was open for the State Government to have made the fifth respondent regular on 18.07.2006 post enforcement of the Uttar Pradesh Zila Panchayat Monitoring Cell Gazetted Officer Service Rules, 2004 on the face of the provisions contained under Rule 3(k) of Rules, 2004. Evidently, at the time when the fifth respondent was appointed as Engineer on ad hoc basis on 17.10.1992 against the temporary post created of Engineer on 30.03.1992, there were no statutory rules in force, meaning thereby, that the selections and the condition of services were to be governed by Government Orders issued from time to time. Apparently, the posts which were temporary in nature for a limited period till

28.02.1993 vide Government Order dated 30.03.1992 was made permanent on 14.10.1998 which stands recited in the Government Order dated 06.11.1998. The fifth respondent prior to the enforcement of the 2004 Rules was made regular on 29.11.2000. Though the Rule 3(h) defines member of service, a person substantively appointed under the rules or the rules or orders in force prior to commencement of the rules to the post in the cadre of the service and Rule 3(k), substantive appointment means an appointment not being an ad hoc appointment on the post in the cadre of the service made after selection in accordance with the procedure prescribed for the time being by the executive instructions issued by the Government. However, the same would not in any manner whatsoever invalidate any proceedings or action taken by the State Government while conferring benefit particularly when the 2004 rules came into effect from 12.07.2004.

23. To put it otherwise, the law does not contemplate vacuum as in case, there is no statutory rules then the Government Orders would govern the condition of the services. As regards the challenge raised to the promotion of the fifth respondent on the post of Deputy Director is concerned, the same is meritless inasmuch once the appointment of the fifth respondent on the post of Engineer followed by according regular status has not been questioned, then the benefits which will flow from Rule 5(1) of the 2004 Rules, for promotion on the post of Deputy Director after completing 8 years of service as Engineer. The entire challenge has been based upon the fact that the fifth respondent was accorded regular status on 18.07.2006 and, thus, he did not complete 8 years of substantive service while being accorded promotion as Deputy Director on 25.02.2013. The said argument is fallacious as the fifth respondent was accorded regular status on 29.11.2000 and the said document was not placed on record with the writ petition, however, it stood available on record only by means of a counter affidavit filed by the State-respondents treating the date 29.11.2000 as the date of regular status accorded to the fifth respondent, the natural consequences would be that in view of Rule 5(1) of the 2004 rules the fifth respondent becomes eligible for being promoted as Deputy Director.

24. With regard to the submissions advanced on behalf of the writ petitioner that the promotion accorded to the fifth respondent on the post of Superintendent Engineer (Civil) is tailor made just in order to give undue benefits while framing the rules to suit him is also thoroughly misplaced particularly when the State Government in terms of Rule 4 of the 2004 rules is competent to re-structure the cadre while varying the cadre strength of different post. It is not necessary that Rules are to be framed, however, the same can be done through administrative Orders as the same is an exigency which is required as and when the same stands occasioned. On 10.04.2023 an office order came to be issued by the State Government whereby for the various posts Executive Engineer and Chief Engineer Level-II cadre re-structuring was done whereby the post of Deputy Director (Technical) was converted into the post of Executive Engineer (Civil) and two posts of Medical Officer and one post of Deputy Director, Medical Officer was surrendered and in its place a post of Superintendent Engineer (Civil) and Chief Engineer (Level-II) was created. Since the fifth respondent had to his credit

substantive service of more than 15 years as an Executive Engineer of the Zila Panchayat Monitoring Cell Gazetted Officer cadre and out of which 6 years as Executive Engineer, the fifth respondent was accorded promotion as Superintendent Engineer (Civil) on 14.07.2003 and thereafter accorded additional charge as Chief Engineer (Level-II) without monetary benefits in the wake of the fact that he had 25 years of substantive service in Zila Panchayat Monitoring Cell Gazetted Officer as per the amendments made in the Amendment Rules, 2023. Neither the 2004 rules nor the 2023 amendment rules have been questioned in the present writ petition. Nonetheless this Court is not required to intervene and come to the rescue of the writ petitioner particularly when there is no challenge to the competency of the State Government in issuing Government Orders and the statutory rules in question.

25. As regards the contention raised on behalf of the writ petitioner that the office order dated 10.04.2023 speaks of the post of Deputy Director (Technical) which is not a sanctioned post is concerned, the same is also of no merit particularly when the factum of the creation of the post of Deputy Director (Technical) stood noticed in the proceedings initiated by the writ petitioner questioning the promotion of one Sri Praveen Kumar in Writ Petition No. 3966(S/B) of 2016 (Arvind Kumar Rai Vs. State of U.P. decided on 04.10.2016 against which review is also stood dismissed on 29.11.2018. This Court does not find it appropriate to delve into the said issue particularly when the issue regarding the appointment of the fifth respondent and claim for promotion as Deputy Director stood noticed in the said writ petition.

26. So far as the contention raised by the learned counsel for the respondents that the present proceedings which have been titled as public interest litigation couched as writ of quo warranto is not maintainable as the fifth respondent does not hold a public office suffice it to say that the Hon'ble Supreme Court in the case of ***Renu and others Vs. District and Sessions Judge, Tis Hazari Courts, Delhi and another reported in 2020 (14) SCC 50*** wherein the following was observed.-

> "Where any such appointments are made, they can be challenged in the court of law. The quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the judiciary a weapon to control the executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office who might be allowed to continue either with the connivance of the executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warrant, he has to satisfy the court that the office in question is a public office and is held by a usurper without legal authority, and

that inevitably would lead to an enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not. For issuance of writ of quo warranto, the Court has to satisfy that the appointment is contrary to the statutory rules and the person holding the post has no right to hold it. (Vide University of Mysore v. C.D. Govinda Rao, Kumar Padma Prasad v. Union of India, B.R. Kapur v. State of T.N., Mor Modern Coop. Transport Society Ltd. v. State of Haryana, Arun Singh v. State of Bihar, Hari BanshLal v. Sahodar Prasad Mahto and Central Electricity Supply Utility of Odisha v. Dhobei Sahoo."

27 A Division Bench of this Court in the case of **Anil Kumar Verma Vs. U.P. State Industrial Development Corporation Ltd. 2014 (8) ADJ 152** had exercised its jurisdiction while issuing a writ of quo warranto setting aside the appointment/promotion of a Chief Engineer in U.P. State Industrial Development Corporation.

28. Nevertheless we are of the firm opinion that the selection, appointment and promotion of the fifth respondent on the post of Engineer, Deputy Director, Superintending Engineer and Additional Charge as Chief Engineer is in consonance and conformity with the Statutory Rules and the Government Orders issued from time to time and the writ petitioner has miserably failed to show any illegality committed by the respondents.

29. Accordingly, the writ petition being devoid of merits is liable to be dismissed and is **dismissed**.

(2024) 8 ILRA 1286
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Sale/Trade Tax Revision No. 274 of 2018
With other connected cases

The Commissioner, Commercial Tax, U.P. Lucknow ...Revisionist
Versus
M/S Emami Ltd. ...Respondent

Counsel for the Revisionist:
Mr. Manish Goyal, Addl. A.G. assisted by Mr. Bipin Kumar Pandey, Addl. C.S.C.

Counsel for the Respondent:
Mr. S.K. Bagaria, Sr. Advocate assisted by Mr. Kumar Ajit Singh & Mr. Rahul Agarwal

A. Tax Law – Classification – The Uttar Pradesh Value Added Tax Act, 2008- Section 58 - All the revision petitions involve the common question of law as to whether, under the facts and circumstances of the case, the Commercial Tax Tribunal was legally justified in holding that Boro-Plus Antiseptic Cream (hereinafter referred to as the 'BPAC') is a medicated ointment and covered under entry no. 41 of Schedule II Part (A).

There is a stark difference between chargeability and exemption. It is to be noted that in the event of chargeability, the interpretation favouring the Assessee needs to be adopted, while in the case of exemption, the position is the opposite. If two views are possible in interpreting a charging section, the one favouring the Assessee needs to be adopted. (Para 24, 27)

The onus to prove the chargeability of a particular item in a provision other than the provision chosen by the Assessee falls squarely on the revenue. The burden of

proof shifts on the Revenue to show a particular item is taxable in the manner claimed by them. (Para 25, 28)

In present case, the revenue's argument that the inclusion of medicated ointment as a drug and cosmetic under Entry 41 of Schedule 11 of the Act is an exemption is completely misplaced. It is to be noted that whether BPAC falls within Entry 41 is in relation to chargeability in a particular schedule and not that of an exemption. It is trite law that an item would be classified as a residuary item only when it does not fall in any other classification. In the present case, using tools of interpretation, the Tribunal has categorically held that BPAC would fall within Entry 41 of Schedule II. The burden of proof was upon the revenue to indicate that the said classification made by the Tribunal was absolutely incorrect and without any basis in law. (Para 28)

In legal and administrative proceedings, the burden of proof is a fundamental principle that ensures fairness. When the Revenue seeks to reclassify goods, it must provide evidence that substantiates its position. Here, the Department's inability to produce any evidence suggests either a lack of basis for their claim or a failure in their administrative processes. Thereby, the Department's claim for reclassification lacks credibility and cannot be upheld. (Para 29)

B. Marketing or advertising cannot dictate tax classification. Objective assessment is placed over subjective interpretation. It is not on the basis of what the petitioner advertises to attract customers that its liability to pay duty under a particular tariff item be fastened. The same can only be set on the facts and the circumstances and determination on the basis of those facts and circumstances as disclosed by the records. (Para 35)

In the present case, the Revenue's argument that the Respondent itself markets BPAC as an 'antiseptic cream' is not a sound argument. **Marketing or advertising of a product, while influential in shaping consumer perceptions and driving sales, cannot and should not determine the classification of a product for taxing purposes. Taxation laws and regulations have been designed to categorise products based on their intrinsic properties, intended use, and the benefits they provide rather than the promotional strategies employed by manufacturers.** Advertising, by nature, is aimed at emphasising certain attributes of a product to attract consumers, which may include both factual information and marketing hyperbole. Thereby, relying on advertising alone to classify a product would lead to inconsistent and potentially misleading tax categorisations, as marketing strategies can vary widely between companies and over time.

The Respondent successfully demonstrated before the authorities that BPAC is fundamentally a medicated ointment. This conclusion was reached through detailed evidence that relied upon the composition, properties, and therapeutic benefits of BPAC. This left no room for doubt about BPAC's classification as a medicated ointment, which is essential for its appropriate tax treatment under Entry 41. These details go on to establish BPAC as a medicated ointment because they offer a factual basis for its classification, independent of any advertising claims. (Para 21, 34)

C. Scope of revisional jurisdiction - The scope of revisional jurisdictional, is primarily focused on questions of law, jurisdictional errors, or procedural irregularities. The High Court, in a revision petition, must refrain from engaging in a de novo inquiry into factual matters already adjudicated upon by the Tribunal unless compelling grounds warranting such intervention are made. It is well settled that the Tribunal is the last fact-finding body and that this Court, in revision, would not go into an enquiry with regard to the factual aspects that have been decided by the Tribunal. In the exercise of revisional jurisdiction, the High Court has a Ltd. mandate, which is confined to only the questions of law and not the questions of fact. (Para 39, 40, 42)

The concept of perversity in legal contexts refers to a situation where a decision or finding is so unreasonable or contrary to the evidence that no reasonable person could have arrived at it. When dealing

with administrative and judicial reviews, including tax and regulatory matters, perversity is a crucial ground upon which decisions can be challenged or revised. However, for perversity to be successfully invoked, certain legal thresholds and evidentiary standards must be met. Here, the Revenue has not articulated any specific grounds of perversity in its pleadings or submissions. (Para 43)

D. Simply disagreeing with the Tribunal's decision without substantiating such disagreement with concrete evidence or legal arguments does not meet the threshold for invoking perversity. Perversity would require demonstrating that the Tribunal's findings were not based on a rational assessment of the evidence or that they ignored relevant legal principles or material facts. Neither was any evidence produced by the Department before the assessing officer, Commissioner, Commercial Tax and the Tribunal nor was any evidence produced before this Court to controvert the evidence produced by the respondents. (Para 43)

E. Importance of interpreting legislative provisions as a whole, ensuring that both inclusive and exclusive clauses are harmonised. This aspect in particular is indispensable when it comes to understanding 20 Entry 41, where the conjunction "but" introduces an exception, which specifically includes medicated ointments regardless of the exclusion of other similar products. (Para 9)

F. Words and Phrases – (1) *"but"* - The conjunction "but" serves as an important tool to ensure certain items remain within the regulatory framework despite general exclusions. In the instant case, Entry 41 delineates the scope of products classified under drugs and medicines, specifically excluding certain items such as medicated soap, shampoo, antiseptic cream, face cream, massage cream, eye gel, and hair oil. However, it explicitly includes "medicated ointments", among other items like vaccines, syringes, and dressings. A careful construction of Entry 41 showcases a deliberate legislative intent to classify products based on their medicinal properties and usage, establishing that specific therapeutic items are included for beneficial tax treatment. **The clear separation of excluded and included items brings out the distinct nature and purpose of the products, with "medicated ointments" being recognised for their essential therapeutic roles.** (Para 10)

The term "but" is used to place forward an exception to the preceding exclusions, implying that although several items have been excluded, medicated ointments are specifically included here. "But", in Entry 41, is parallel with terms like "expect", "nevertheless", and "however," which indicate an exception to the list of exclusions preceding the same. (Para 11, 12)

(2) Principle of *noscitur a sociis* - This expression simply means that "the meaning of a word is to be judged by the company it keeps." This principle suggests that the meaning of a word is known from the accompanying words, implying that the context provided by surrounding terms can clarify ambiguous expressions. In Entry 41, the inclusion of items like medicated soaps, shampoos, face creams, and massage creams, all of which are cosmetics and toilet preparations, provides a clear context for interpreting "antiseptic cream." This interpretation ensures consistency and avoids any arbitrary or inconsistent classification that might arise from interpreting "antiseptic cream" in isolation. (Para 13)

Taking into consideration on the above rules of interpretation, specifically in relation to taxing statutes, it can be St.d that even though antiseptic creams are excluded from Entry 41, medicated ointments would be included due to the use of the word "but". The word "but" is a clear indication that the legislature intended to include, as an exception, medical ointment, even though certain medicated ointments may be categorised as antiseptic creams. If a product is more than just an antiseptic cream and qualifies as a medicated ointment, it will be included in Entry 41. (Para 15)

Revision petitions dismissed. (E-4)

Precedent followed:

1. Commissioner Commercial Taxes U.P. Vs Singhal Bros. Hathras, 2006 (43) STR 579 (Para 4(a))

2. Godrej Sara Lee Ltd. Vs Assistant Commissioner (CT) INT LTU Secunderabad Division, Hyderabad & anr., 2017 (106) VST 97 (Para 4(d))

3. Commissioner of Central Excise, Nagpur Vs Sri Baidyanath Ayurved Bhawan Ltd., 2009 (12) SCC 419 (Para 4(d))

4. CTT Vs Kartos International Ltd., 2011 NTN (Vol 146) 17 (Para 4(j))

5. Commissioner of Customs (Import) Mumbai Vs M/s. Dilip Kumar & Co. & ors., 2018 (9) SCC 1 (Para 4(k))

6. Heinz India Pvt. Ltd. Vs St. of Kerala & ors., (2017) 104 VST 292 (Ker.) (Para 4(nn))

7. M/s. Hamdard Waqf Laboratories Vs Commissioner of Commercial Tax, 2018 NTN (67) 160 (Para 4(o))

8. M/s. Johnson and Johnson Ltd. Vs Commercial Tax Officer, (2017) 105 VST 227 (Para 4(p))

9. Triveni Glass Ltd. Vs Commissioner of Trade Tax, U.P., 2023 SCC OnLine SC 1295 (Para 4(z))

10. Heinz India Ltd. Vs St. of Kerala, 2023 SCC OnLine SC 561 (Para 4(z))

11. Collector of Customs Vs Swastic Woollens (P) Ltd., 1988 Supp SCC 796 (Para 5(i))

12. Sardar Gurmej Singh Vs Sardar Pratap Singh Kairon, AIR 1960 SC 122 (Para 5(j))

13. Rohit Pulp and Paper Mills Vs CCE, (1990) 3 SCC 447 (Para 5(l))

14. HPL Chemicals Ltd. Vs CCE, (2006) 5 SCC 208 (Para 5(m))

15. St. of M.P. Vs Marico Industries, (2016) 14 SCC 103 (Para 5(m))

16. Hindustan Ferrodo Vs CCE, (1997) 2 SCC 677 (Para 5(m))

17. Union of India Vs Garware Nylons, (1996) 10 SCC 413 (Para 5(m))

18. Commissioner, Trade Tax, UP Vs National Cereal, (2005) 3 SCC 366 (Para 5(n))

19. Commissioner of Customs Vs Dilip Kumar & Co., (2018) 9 SCC 1 (Para 5(o))

20. M/s Blue Star Vs U.O.I., 1980 (6) ELT 280 (Para 5(r))

21. Hindustan Unilever Ltd. Vs Collector of Central Excise, 2000 (121) ELT 451 (Para 36)

22. The St. of Andhra Pradesh & ors. Vs M/s Himani Ltd. & ors., TRC 166/2004 (Para 38)

23. Hindustan Petroleum Corp. Ltd. Vs Dilbahar Singh, (2014) 9 SCC 78 (Para 41)

Precedent distinguished:

1. Cadbury India Ltd. Vs Commissioner, Commercial Tax, Uttarakhand, 2019(65) GSTR-283 (Para 4(ag))

2. Kantaru Rajeevaru (Sabarimala Temple Review – 5J) Vs Indian Young Lawyers Assn., (2020) 2 SCC 1 (Para 4(ae), 33)

3. Spencer & Co. Ltd. Vs Vishwadarshan Distributors (P) Ltd., (1995) 1 SCC 259 (Para 4(ae), 33)

4. St. of Karnataka Vs St. of T.N., (2016) 10 SCC 617 (Para 4(ae), 33)

5. M.T. Khan & ors. Vs Govt. of A.P. & ors., (2004) 2 SCC 267 (Para 4(w), 32)

6. U.O.I. & anr. Vs Hansoli Devi & ors., (2002) 7 SCC 273 (Para 4(w), 32)

7. St. of Gujarat Vs Patel Ramjibhai Dana, (1979) (3) SCC 347 (Para 4(w), 32)

8. Balram Kumawat Vs U.O.I. & ors., (2003) 7 SCC 628 (Para 4(w), 32)

9. Quebec Railway, Light Heat and Power Co. Ltd. Vs Vandry & ors., AIR (1920) PC 181 (Para 4(w), 32)

10. M/s. Paras Pharmaceuticals Ltd. Vs Commissioner, Trade Tax, U.P. Lucknow, 2007 NTN (Vol. 33) 313 (Para 4(a), 31)

11. N M/s. Balaji Agency Vs Commissioner of Sales Tax, U.P., 1994 (19)-STJ-150 (Para 4(a), 30)

Present revision petitions have been preferred by The Commissioner, Commercial Tax (hereinafter referred to as the 'Revisionist') u/s 58 of the U.P.V.A.T., 2008 (hereinafter referred to as 'the Act') against the orders dated June 8, 2018, October 8, 2018, October 8, 2018, July 17, 2020, November 1, 2022, and April 28, 2023, passed by the Commercial Tax Tribunal, U.P., Lucknow (hereinafter referred to as the 'Tribunal').

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

1. The instant revision petitions have been preferred by The Commissioner, Commercial Tax (hereinafter referred to as the 'Revisionist') under Section 58 of the Uttar Pradesh Value Added Tax, 2008 (hereinafter referred to as 'the Act') against the orders dated June 8, 2018, October 8, 2018, October 8, 2018, July 17, 2020, November 1, 2022, and April 28, 2023, passed by the Commercial Tax Tribunal, U.P., Lucknow (hereinafter referred to as the 'Tribunal'). All the revision petitions involve the common question of law as to whether, under the facts and circumstances of the case, the Commercial Tax Tribunal was legally justified in holding that Boro-Plus Antiseptic Cream (hereinafter referred to as the 'BPAC') is a medicated ointment and covered under entry no. 41 of Schedule II Part (A).

2. As the issue involved in all the revision petitions is common, the said petitions are being decided by a common order.

3. The factual matrix in all the revision applications is also similar. Accordingly, I have outlined the factual matrix of only one case (STRE No. 274 of 2018) below:

a. The instant revision petition pertains to the rate of tax to be levied on the sale of BPAC.

b. The Assessing Authority in the instant case had levied tax on BPAC at the rate of 14% after categorising it as an 'unclassified item'.

c. Being aggrieved by the aforesaid assessment order passed by the Assessing Authority, M/s Emami Ltd. (hereinafter referred to as the 'Respondent') preferred an appeal before the First Appellate Authority which was dismissed vide order dated July 26, 2016.

d. The Respondent then filed an appeal before the Tribunal which was allowed vide order dated June 8, 2018. The Tribunal held that BPAC falls within the category of 'medicated ointment' and hence is liable to be taxed at the rate of 5% under the heading 'drugs and medicines' in Entry 41 Schedule II.

e. Hence, the instant revision petition has been preferred by the Revisionist against the order dated June 8, 2018, passed by the Tribunal.

CONTENTIONS BY THE REVISIONIST

4. Learned counsel appearing on behalf of the Revisionist has made the following submissions:

a. BPAC has been sold by the Respondent for a long time, and prior to 2018, it has always been assessed as a cosmetic by this Court. Reliance is placed upon the judgments of this Court in **M/s. Balaji Agency -v- Commissioner of Sales Tax, U.P. reported in 1994 (19)-STJ-150, M/s. Paras Pharmaceuticals Limited -v- Commissioner, Trade Tax, U.P. Lucknow reported in 2007-NTN-(Vol-33)-313, and Commissioner Commercial Taxes U.P. -v- Singhal Bros. Hathras, reported in 2006 (43) STR 579**.

b. The instant matter relates to the assessment year 2012-13. With effect from October 11, 2012, antiseptic cream has been excluded from the entry of 'drug and medicines' in Entry 41 Schedule II. Therefore, it is liable to be classified and taxed as an 'unclassified item'.

c. This Court on a previous occasion has held that BPAC is a medicament. The commodity is being sold by the Respondent as an antiseptic cream and the legislature has excluded antiseptic cream from the category of 'drugs and medicines'.

d. The Hon'ble Supreme Court in **Godrej Sara Lee Ltd. -v- Assistant Commissioner (CT) INT LTU Secunderabad Division, Hyderabad and Anr.** reported in **2017 (106) VST 97** has held that the goods referred to in an 'exclusion clause' are to be excluded from the ambit of that entry. Furthermore, the Hon'ble Supreme Court in **Commissioner of Central Excise, Nagpur -v- Sri Baidyanath Ayurved Bhawan Ltd.**, reported in **2009 (12) SCC 419**, has held that a specific entry must prevail over a general entry.

e. In the instant case, BPAC has been specifically excluded from Entry No. 41 and hence it is liable to be taxed as an 'unclassified item'.

f. Efforts of the Respondent are to reduce the rate of tax by arguing that BPAC is to be classified as a 'medicated ointment'. However, the Respondent itself sells BPAC as an antiseptic cream and advertises the same on electronic media as an antiseptic cream.

g. The respondent has specifically advertised that "Millions of users believe in Boroplus- India's number one **antiseptic cream**…". According to the respondent, the fact that BPAC is a 'medicated ointment' is not advertised or mentioned.

h. The Tribunal has wrongly concluded that the authorities below have ignored the contents mentioned in the drug licence and have decided the classification of BPAC based on the prescription on the packet.

i. Common parlance has always been accepted by the Hon'ble Supreme Court for the determination of nature and character of goods. BPAC is being purchased by the consumers for its regular use without any prescription of the doctor. Consumers never use it to cure any disease. On the other hand, a 'medicated ointment' is always used for an ailment and its use

comes to the end when the ailment comes to the end. Hence, BPAC cannot be held to be a 'medicated ointment'.

j. The Hon'ble Supreme Court in **CTT -v- Kartos International Ltd. reported in 2011 NTN (Vol 146) 17** has held that classification of any commodity cannot be made on its scientific and technical meaning. It is only the common parlance meaning of the commodity which should be taken into consideration for the purpose of determining the tax liability.

k. The Tribunal has held that if the Revenue wants to classify any product in a particular entry, the burden of proof lies with the Revenue. This observation is against the law laid down by the Hon'ble Supreme Court in Commissioner of Customs (Import) Mumbai -v- M/s. Dilip Kumar and Company and Ors., reported in 2018 (9) SCC 1, wherein it was propounded that if any exemption or reduction is claimed, the burden shifts on the Assessee to prove the basis for claiming the said exemption or reduction. Therefore, the burden of proof falls on the Respondent in the instant case.

l. Once the legislature had consciously excluded antiseptic cream from the category of 'drugs and medicines' then the fact that the commodity has been manufactured after obtaining a drug license does not matter. Consumers purchase a good after looking at its use and consumption, not the conditions mentioned in the drug license.

m. The First Appellate Authority has rightly pointed out that survey report has been obtained by the Respondent on his own from a little local area despite the fact that BPAC is sold throughout the State. At the time of survey, no information was given to the Department.

n. In **Heinz India Pvt. Ltd. -v- State of Kerala and Ors.** reported in **(2017) 104 VST 292 (Ker)**, the Kerala High Court has held that since medicated talcum powder has been included in the category of cosmetic, it is to be taxed as a cosmetic and not as a medicine although it is a medicated talcum powder.

o. This Court in **M/s. Hamdard Waqf Laboratories -v- Commissioner of Commercial Tax** reported in **2018 NTN (67) 160** has held that at the time of determining the rate of tax, common parlance test as well as trade understanding and popular meaning of goods is a determining factor.

p. The High Court of Rajasthan in **M/s. Johnson and Johnson Ltd. -v- Commercial Tax** Officer reported in **(2017) 105 VST 227** has held that for the purpose of levy of tax under sales tax law or value added tax law, classification under central excise is not binding nor the manufacturing of goods under drug license is binding.

q. The Hon'ble Supreme Court in **Baidyanath Ayurved (supra)** held that 'Baidyanath Dant Manjan' is liable to be taxed as an unclassified item even though the same was manufactured under a

drug license issued by the competent authority.

r. In the instant case, antiseptic cream has been excluded from the schedule and hence the same is liable for taxation as an 'unclassified item'.

s. Once the product that is 'antiseptic cream' stood excluded from Part-A of Schedule – II and did not fall either in Schedule – I or Schedule – III or Schedule – IV or in any other entry of Schedule – II in either Part-A or Part-B, the product 'antiseptic cream' was thus classified under Schedule – V in terms of Section 4(1)(d) of the Act by the Revenue.

t. There is a clear diversion made by the legislature which is for a definitive purpose. The classification entry was amended in terms of Section 4 of the Act whereby 'antiseptic cream' was specifically excluded. The Revisionist discharged its burden by placing on record the fact that there has been amendment in the schedule and this fact was duly noted by the Assessing Officer, Appellate Authority and the Tribunal. The Revisionist has established that it has taken the product out from the ambit of a particular classification. The burden of the Revisionist thus stood discharged, and therefore, all the authorities cited by the Respondent to the effect that the Revisionist did not discharge its burden of classification are of no relevance.

u. It is also necessary to note that exclusion is of a specific product that is 'antiseptic cream' which is not being considered by the legislature as a drug or medicine. 'Antiseptic cream' is a specialised entry, which has been excluded from the entry of drugs and medicines and hence it cannot be included in the general entry of medicated ointment. 'Medicated ointment' is a term of general import whereas the term 'antiseptic cream' is very specific. The term of general import then will give way to the term of specific import. Tested on the touchstone of the principle 'generalia specialibus non derogant', 'antiseptic cream' will prevail over the general term 'medicated ointment' and under the circumstances the whole entry is to be read and cannot be dissected in the manner the Respondent wants it to be read. Therefore, drugs and medicines exclude 'antiseptic cream' even though there are other medicated ointments on the market that may be included under drug or a medicine.

v. It is a settled principle of law that no word of legislature can be made otiose through judicial interpretation. If the legislature has employed a certain term it is to be given its due meaning and the entry has to be read plainly as it stands. The cardinal principle of interpretation is that words are to be given their clear and plain meaning as they stand in the statute.

w. If the Respondent's argument is accepted then the term 'antiseptic cream' will become redundant as it will be included in 'medicated ointment'. Under the circumstances, applying the

principles of interpretation, Entry 41 of Part-A of Schedule-II of the Act is to be read as it stands and 'antiseptic cream' stands excluded from Entry 41 even though it includes other medicated ointments. Reliance is placed upon the judgments of the Hon'ble Supreme Court in **Balram Kumawat -v- Union of India and Ors**. reported in **(2003) 7 SCC 628, M.T. Khan and Ors. -v- Govt. of A.P. and Ors.** reported in **(2004) 2 SCC 267**, **Union of India and Anr. -v- Hansoli Devi and Ors.** reported in **(2002) 7 SCC 273, and State of Gujarat -v- Patel Ramjibhai Dana reported in (1979) (3) SCC 347** and the judgment of the Privy Council in **Quebec Railway, Light Heat and Power Co. Ltd. -v- Vandry and Ors. reported in AIR (1920) PC 181.**

x. In the instant case, the Respondent is claiming to be classified under Part-A of Schedule-II of the Act and is claiming to be covered under Entry-41 whereas it stands already classified under Schedule-V of the Act. As a consequence, the Respondent is claiming to be entitled to pay a reduced rate of tax by taking aid of the fact that it falls under a different head. Where the Assessee claims to pay a lower rate of tax, the burden falls on the Assessee to establish that they are liable to pay a lower rate of tax under a different head. Therefore, the primary burden is to be discharged by the Respondent in the instant case and not by the Revenue.

y. The Respondent never put to challenge the amendment introduced by the notification dated October 10, 2012 by filing a separate writ petition. Therefore, the notification dated October 10, 2012 by which the amendment was made by the state legislature remains operative and is binding on the Respondent.

z. There is a difference between exemption and classification. Under Section 7 of the Act, the provisions for exemption are contained and the goods that stand exempted find due mention in Schedule – I of the Act. Classification and exemptions are two different aspects but when it comes to exemption and payment of reduced rate of tax, the principles applicable would be the same namely the burden will be on Assessee to claim payment at a reduced rate of tax. Reliance is placed on the judgments of the Hon'ble Supreme Court in **Commissioner of Customs (Import), Mumbai -v- Dilip Kumar and Company and Ors. (supra), Triveni Glass Limited -v- Commissioner of Trade Tax, U.P.** reported in **2023 SCC OnLine SC 1295, Heinz India Limited -v- State of Kerala** reported in **2023 SCC OnLine SC 561, and Commissioner of Central Excise -v- Shree Baidyanath Ayurved Bhawan (supra).**

aa. The order passed by the Tribunal suffers from perversity in as much as it relies upon extraneous material and does not take into consideration any material as prescribed under the law. Hence

the finding holding BPAC to be an ointment is perverse.

ab. BPAC fails to qualify as an Ayurvedic drug and also fails to qualify as a patented or proprietary medicine. In light of the non-consideration of the same, the order of the Tribunal is rendered perverse.

ac. Instead of considering compliance with the requirements prescribed by law for a product to qualify as an Ayurvedic Drug or a patented or proprietary medicine, the Tribunal has instead erroneously relied upon extraneous and irrelevant material that was produced by the Respondent to support its claim.

ad. When the statute itself provided for authoritative texts that were to be relied upon along with the requirements that were to be satisfied by the Assessee, the Tribunal was bound to analyse the claim of the Respondent strictly in accordance with these statutory requirements.

ae. The Tribunal was bound by Article 144 of the Constitution of India and while applying the twin test it was supposed to consider the authoritative texts relating to Ayurvedic Drug or Ayurvedic proprietary medicine. The said principle could not have been deviated from by the Commercial Tax Tribunal. Reliance in this regard is placed upon the judgments of the Hon'ble Supreme Court in **Kantaru Rajeevaru (Sabarimala Temple Review – 5J) -v- Indian Young Lawyers Assn.** reported in **(2020) 2 SCC 1, Spencer & Co. Ltd. -v- Vishwadarshan Distributors (P) Ltd.** reported in **(1995) 1 SCC 259, and State of Karnataka -v- State of T.N.** reported in **(2016) 10 SCC 617.**

af. The core issue is that whether from the evidence that was led by the Respondent with respect to BPAC, the formulation was antiseptic or not. There is no discussion by the Tribunal of the formulation of an antiseptic. For qualifying as a drug or medicine it is antiseptic quality or its properties that are to be considered as relevant factors. The vehicle to carry antiseptic property or quality will be irrelevant. It is a well-known fact that all ointments are creams but all creams are not ointments. However, no finding in this regard has been returned by nor any evidence has been led before the Tribunal. For common parlance, 'antiseptic' is not understood as medicine.

ag. The proper approach in the instant case would be to remand the matter and give opportunity to both the parties to bring fresh material on record and to lead evidence so that proper conclusion may be drawn by the Tribunal. Reliance is placed upon the judgment of the High Court of Uttarakhand in **Cadbury India Ltd. -v- Commissioner, Commercial Tax, Uttarakhand** reported in **2019(65) GSTR-283** wherein in a nearly identical situation, the High Court of Uttarakhand had remanded the matter to the tribunal.

ah. In view of the aforesaid contentions, the instant Revision is prayed to be allowed.

CONTENTIONS BY THE RESPONDENT

5. Learned Senior Counsel appearing for the Respondent has made the following submissions:

a. BPAC is manufactured by the respondent under Ayurvedic system of medicine under a drug license issued by the Drug Licensing Authority under the provisions of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as the 'Drugs Act') and the Drugs Rules, 1945 (hereinafter referred to as the 'Drugs Rules').

b. All raw materials used in the manufacture of BPAC are mentioned in the authoritative books on Ayurvedic system of medicine specified in the 1st schedule to the Drugs Act. In the Drug License, details of all ingredients along with their medicinal properties and names of authoritative Ayurvedic books are mentioned.

c. The composition and packing of BPAC was also approved by the designated statutory authority which administers and regulates the Drugs Act. The Drug License inter alia mentioned the following:

"Product Name: Boroplus Healthy Skin Antiseptic Cream

(For External Use only)

Category: Ointment – Ayurvedic Medicine

Ayurvedic Raw Materials, their botanical names, quantities Curing/medicinal properties of each raw material

Book Reference (name and page number of concerned authoritative book)

Direction of Use"

d. On the tubes/packs of BPAC, the product name Boroplus Healthy Skin Antiseptic Cream is mentioned. It is further declared as under:

"Ayurvedic Medicine Ointment. FOR EXTERNAL USE ONLY"

"A preventive, curative and healing Ayurvedic ointment for dry skin diseases, cuts, scratches, minor burns, wounds, cold sores, chapped skin, furuncle, impetigo and intertrigo."

e. The label also contains the pictorial illustration of various medicinal uses of the product viz., moisturises the skin, cures minor cuts and wounds, protects skin from dryness, heals cracked foot, softens chapped skin and lips and prevents nappy rash.

f. By the amendment dated October 11, 2012, antiseptic cream was excluded from drugs and medicines but medicated ointment was included. Thus, the entry made a distinction between antiseptic cream and medicated ointment. The Tribunal considered meaning of both the said expressions and held that from the evidence it was clear that antiseptic cream and medicated ointment have different characteristics. In the drug licence also, BPAC was categorised as "ointment – Ayurvedic medicine".

g. As per the expert evidence of Shri Loknath Pramanik (formerly Additional Director, Drugs Control and Member, Pharmacist Council of India), BPAC is "an ointment with approximately 67% oil ingredient and 10% water content and the

balance being active ingredients and excipients. Moreover, BPAC is occlusive in nature which is the property of an ointment". As per various authoritative publications such as British Pharmacopoeia, International Journal of Pharmaceutics, Remington's Pharmaceutical Manufacturing (Part V) and other publications cream and ointment are two different items. Comparatively, in cream the quantity of water is much more whereas in ointment the quantity of water is much less as compared to the quantity of oil. Due to this reason, cream spreads easily on the skin and skin absorbs the same quickly and easily. As against this, ointment is a greasy product and does not spread on the skin easily nor is it absorbed easily by the skin.

h. As per the drug licence of BPAC, the quantity of oil is much more than the quantity of water and it has been specifically categorised as "ointment". It has already been established in the earlier proceedings that BPAC is a medicine having all the required drugs and properties of medicine. Consequently, the said product is a "medicated ointment" and is classifiable under Entry 41.

i. The findings about nature and characteristics of BPAC were given by the Additional Commissioner (Appeal) and the Tribunal relied on undisputed and uncontroverted documents and evidence produced by the Respondent. The Revenue did not produce any evidence whatsoever to the contrary. The Tribunal's findings in the order dated June 8, 2018 and in other orders following the said order, were pure findings of fact and these were given on appreciation of documents and evidence on record and the same does not give rise to any question of law so as to warrant interference of this Court under Section 58 of the Act. Reliance is placed on the judgement of the Hon'ble Supreme Court in **Collector of Customs v. Swastic Woollens (P) Ltd**. reported in **1988 Supp SCC 796**.

j. Entry 41 excludes 7 named items, that is, medicated soap, shampoo, antiseptic cream, face cream, massage cream, eye jell and hair oil. Immediately after such exclusion, the entry says "**but including …….medicated ointments**". The said entry 41 has to be read as a whole and no part thereof can be rendered meaningless or otiose. The entry after excluding some items, uses the conjunction "but" and then specifically includes "medicated ointments". On plain and unambiguous language, the entry provides that irrespective of exclusions, medicated ointment is included. The expression "but" is synonymous with "except" or "nevertheless" and is by way of exception to what has gone before. It clearly indicates that what follows the said expression is an exception to that which has gone before. Consequently, on a plain reading of the entry itself, medicated ointment is specifically covered and "taken in" under the said Entry 41. This construction also follows from the normal

dictionary meanings of the expression "but" which are "nevertheless, however, except, with the exception of, excepting that, yet, still" etc. Reliance is placed upon the judgement of the Constitution Bench of the Hon'ble Supreme Court in **Sardar Gurmej Singh versus Sardar Pratap Singh Kairon** reported in **AIR 1960 SC 122**.

k. Drugs and medicines may be of hundreds of types and varieties. These may also be available in various forms for external use and application. Such drugs and medicines have not been excluded from Entry 41. On the other hand, medicated ointment is specifically covered by the entry. It was never the intention in amending Entry 41 to exclude any drugs and medicines simply due to their being in the form of an ointment. The expression "medicated ointment" is not qualified and it covers all types and varieties of medicated ointments. Nothing is excluded from the scope and ambit of "medicated ointment". If the goods are medicated ointment, these may have various medicinal properties and some of these may be antiseptic in nature but due to any such reason, these do not cease to be "medicated ointment". No such limitation or restriction can be imposed on the expression "medicated ointment" used in Entry 41. The entry cannot be amended or recast by the Departmental authorities.

l. Without prejudice to the aforesaid, it is submitted that in any case, the expression antiseptic cream in the said exclusion category in Entry 41 is to be read ejusdem generis with other excluded items such as medicated soaps or shampoo or antiseptic cream or face cream or massage cream etc. which are all primarily cosmetics and toilet preparations. The principles of ejusdem generis as well as noscitur a sociis squarely apply to the said exclusion clause which comprises different items mentioned above in which a common thread is running through all such excluded items, namely, that these are primarily cosmetics and toilet preparations. In support of this submission reliance is placed on the judgement of the Hon'ble Supreme Court in **Rohit Pulp and Paper Mills vs CCE** reported in **(1990) 3 SCC 447.**

m. The dispute in the instant case relates to classification of goods for the purposes of applying the rate of tax. It is not a case of any exemption from tax or interpretation of any exemption notification. As per the Respondent, BPAC is classifiable under Entry 41 of Schedule II whereas according to the Department it is classifiable under the residuary entry as unclassified item under Schedule V. Both the said schedules carry different rates of tax. Classification is a matter of chargeability. If the Department intends to classify the goods differently than that claimed by the Assessee, burden of proof is squarely upon the Department. In the instant case, in support of its submissions about the goods being covered by Entry 41, voluminous

evidence was produced by the Respondent and nothing was controverted by the Department by producing any evidence. The Department did not produce any evidence at all and the burden of proof was not discharged by it. Reliance is placed upon the judgments of the Hon'ble Supreme Court in **HPL Chemicals Ltd. -v- CCE** reported in **(2006) 5 SCC 208, State of MP -v- Marico Industries** reported in **(2016) 14 SCC 103, Hindustan Ferrodo -v- CCE** reported in **(1997) 2 SCC 677, and Union of India -v- Garware Nylons** reported **in (1996) 10 SCC 413**.

n. Notifications issued under provisions fixing rate of tax are not exemption notifications but are charging provision and this legal position is also covered by the judgement of the Hon'ble Supreme Court in Commissioner, Trade Tax, UP -v- National Cereal reported in (2005) 3 SCC 366.

o. Strictly without prejudice to the aforesaid, even assuming that two views are possible relating to classification of BPAC, since it is a matter of chargeability, the view favourable to the Assessee is to be applied. The position is however different in relation to interpretation of exemption notifications which is not the position in the present case. This principle of law was recently reiterated by the Constitution Bench of the Hon'ble Supreme Court in Commissioner of Customs -v- Dilip Kumar & Co. reported in (2018) 9 SCC 1.

p. Principles relating to classification of Ayurvedic drugs and medicines are well settled by the judgements of the Hon'ble Supreme Court. The twin tests are as to whether the commodity is known as a medicament in common parlance and as to whether the ingredients used in the product are mentioned in the authoritative Ayurvedic books. Both the said tests are satisfied in respect of BPAC. In support of common parlance test, the respondent produced a whole lot of documents and evidence including certificates and affidavits from medical shops, Ayurvedic doctors, dermatologists, hospitals and dispensaries, consumers, survey reports, clinical trial reports, communications from Government of India, Ministry of Health and Family Welfare. The respondent also produced writings on the tube and packing of the said product clearly declaring it to be Ayurvedic medicated ointment. Therapeutic and curative properties of the goods are clear from the drug license and other materials mentioned including the certificates and affidavits of doctors and medical practitioners. All the ingredients of the product are mentioned in authoritative Ayurvedic books mentioned in the Schedule I to the Drugs Act. It is also well settled that the factors such as there being no requirement of a prescription or availability of the goods across the counter in the shops or percentage of active ingredients are not material.

q. The goods have always been marketed by the respondent as medicament and by emphasising the medicinal properties. On each tube and pack, the goods are described as "Ayurvedic medicine - ointment", and their healing, curative and prophylactic properties and details of the ailments for which it can be used are mentioned. It is clearly declared that it is "a preventive, curative and healing Ayurvedic ointment" for various diseases and ailments, as mentioned on the tube. Voluminous evidence was produced in support of the submission that in common parlance, BPAC is treated, regarded and dealt with as a medicament.

r. As per the respondent, tax cannot be levied by the revisionist merely on the basis of the suggestive aspect of the picture found in the label. Reliance has been placed on the judgement of the Bombay High Court in the case of **M/s Blue Star -v- UOI** reported in **1980 (6) ELT 280**, where it was held that it is not on the basis of what the petitioner advertises to attract customers that its liability to pay duty under a particular tariff item be fastened. The same can only be set on the facts and the circumstances, and determination on the basis of those facts and circumstances as disclosed by the records.

s. The proposition that specific entry will prevail over general entry is not in dispute. However, no such issue arises in the instant case. In the instant case, there is no competition between a specific entry and a general entry. On the other hand, even though the goods are covered by Entry 41 by specific inclusion, the Revenue seeks to classify the goods under residual entry in Schedule V of the Act. Thus, the issue is that when there is a specific entry covering the goods, whether the residual entry can at all be invoked and the legal position in this regard is well settled by the judgements of the Hon'ble Supreme Court.

t. In light of the aforesaid, the instant revision petition needs to be dismissed by this Court.

ANALYSIS AND CONCLUSION

6. I have heard the learned counsel appearing for the parties and perused the materials on record.

7. First and foremost, the issue lies at the centre of the instant dispute is with regard to the statutory interpretation of Entry 41 to Schedule II of the Act.

8. Entry 41, as effective from October 11, 2012, reads as follows:

> *"Drugs and Medicines* ***excluding*** *medicated soap, shampoo,* ***antiseptic cream****, face cream, massage cream, eye jel and hair oil* ***but including*** *vaccines, syringes and dressings,* ***medicated ointments****, light liquid paraffin of IP grade; Chooran; sugar pills for medicinal use in homeopathy; human blood components; C.A.P.D. Fluid; Cyclosporin."*

9. In the case of ***Sardar Gurmej Singh (supra)***, the Hon'ble Supreme Court shed light on the importance of interpreting

legislative provisions as a whole, ensuring that both inclusive and exclusive clauses are harmonised. This aspect in particular is indispensable when it comes to understanding Entry 41, where the conjunction "but" introduces an exception, which specifically includes medicated ointments regardless of the exclusion of other similar products. Relevant paragraphs are extracted below:

> *"5. It is an elementary rule that construction of a section is to be made of all the parts together and not of one part only by itself, and that phrases are to be construed according to the rules of grammar. So construed the meaning of the clause is fairly clear. The genus is the "revenue officer", and the "including" and "excluding" clauses connected by the conjunction "but" show that the village accountants are included in the group of revenue officers, but the other village officers are excluded therefrom. If X includes A but excludes B, it may simply mean that X takes in A but ejects B. It is not necessary in this case to consider whether the inclusive definition enlarges the meaning of the words "revenue officers", or makes them explicit and clear viz. that the enumerated officers are within the fold of "revenue officers"; for in either construction the village accountants would be revenue officers. But we cannot accept the argument that what is excluded was not part of that from which it is excluded, and that lambardars were not revenue officers and yet had to be excluded by way of abundant caution. If so, it follows that the village officers, who included lambardars, were excluded from the group of revenue officers, with the result that they are freed from the disqualification imposed by the provisions of the said clause."*

10. The Supreme Court in ***Sardar Gurmej Singh (supra)*** further stated that the use of the conjunction "but" serves as an important tool to ensure certain items remain within the regulatory framework despite general exclusions. In the instant case, Entry 41 delineates the scope of products classified under drugs and medicines, specifically excluding certain items such as medicated soap, shampoo, antiseptic cream, face cream, massage cream, eye gel, and hair oil. However, it explicitly includes "medicated ointments", among other items like vaccines, syringes, and dressings. A careful construction of Entry 41 showcases a deliberate legislative intent to classify products based on their medicinal properties and usage, establishing that specific therapeutic items are included for beneficial tax treatment. The clear separation of excluded and included items brings out the distinct nature and purpose of the products, with "medicated ointments" being recognised for their essential therapeutic roles.

11. It is important to understand that the conjunction "but" has been used in Entry 41 not only because of a mere linguistic choice but because it is a vital factor with regard to delineating inclusions and exclusions within the same legislative framework. The term "but" is used to place forward an exception to the preceding exclusions, implying that although several items have been excluded, medicated

ointments are specifically included here. This construction in particular makes it evident that the exclusion of antiseptic creams does not unintentionally exclude products with similar applications but different compositions and therapeutic intents, such as medicated ointments.

12. The term "but" has played an important role in legislative language wherein it has introduced exceptions and elucidated the scope of regulatory provisions. "But", in Entry 41, is parallel with terms like "expect", "nevertheless", and "however," which indicate an exception to the list of exclusions preceding the same. This usage is in consonance with standard dictionary meanings and legal interpretations, assuring that what follows the conjunction has been intentionally included despite previous exclusions. Accordingly, the inclusion of medicated ointments is a deliberate and clear legislative choice, ensuring these products are not inadvertently excluded due to their therapeutic importance. The Tribunal's reading of Entry 41 is in tandem with this interpretation, thereby recognising the specific inclusion of medicated ointments as a critical aspect of the entry, providing them with the appropriate tax treatment and regulatory recognition. The Tribunal, in the impugned judgement, held that BPAC's composition and medicinal properties merit its inclusion under medicated ointments.

13. Reference can also be made to the principle of noscitur a sociis. This principle suggests that the meaning of a word is known from the accompanying words, implying that the context provided by surrounding terms can clarify ambiguous expressions. In Entry 41, the inclusion of items like medicated soaps, shampoos, face creams, and massage creams, all of which are cosmetics and toilet preparations, provides a clear context for interpreting "antiseptic cream." This interpretation ensures consistency and avoids any arbitrary or inconsistent classification that might arise from interpreting "antiseptic cream" in isolation.

14. The principle of noscitur a sociis in the context of taxing statutes was explained by the Hon'ble Supreme Court in ***Rohit Pulp (supra).*** Relevant paragraphs are extracted below:

> *"12. The principle of statutory interpretation by which a generic word receives a limited interpretation by reason of its context is well established. In the context with which we are concerned, we can legitimately draw upon the "noscitur a sociis" principle. This expression simply means that "the meaning of a word is to be judged by the company it keeps." Gajendragadkar, J. explained the scope of the rule in State of Bombay v. Hosptial Mazdoor Sabha [(1960) 2 SCR 866 : AIR 1960 SC 610 : (1960) 1 LLJ 251] in the following words: (SCR pp. 873-74)*
>
> *"This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. The same rule is thus interpreted in "Words and Phrases" (Vol. XIV, p.*

207): "Associated words take their meaning from one another under the doctrine of noscitur a sociis, the philosophy of which is that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim ejusdem generis". In fact the latter maxim "is only an illustration or specific application of the broader maxim noscitur a sociis". The argument is that certain essential features of attributes are invariably associated with the words "business and trade" as understood in the popular and conventional sense, and it is the colour of these attributes which is taken by the other words used in the definition though their normal import may be much wider. We are not impressed by this argument. It must be borne in mind that noscitur a sociis is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined word correspondingly wider. It is only where the intention of the legislature in associating wider words with words of narrower significance is doubtful, or otherwise not clear that the present rule of construction can be usefully applied. It can also be applied where the meaning of the words of wider import is doubtful; but, where the object of the legislature in using wider words is clear and free of ambiguity, the rule of construction in question cannot be pressed into service."

This principle has been applied in a number of contexts in judicial decisions where the court is clear in its mind that the larger meaning of the word in question could not have been intended in the context in which it has been used. The cases are too numerous to need discussion here. It should be sufficient to refer to one of them by way of illustration. In Rainbow Steels Ltd. v. CST [(1981) 2 SCC 141 : 1981 SCC (Tax) 90] this Court had to understand the meaning of the word 'old' in the context of an entry in a taxing traffic which read thus:

"Old, discarded, unserviceable or obsolete machinery, stores or vehicles including waste products....."

Though the tariff item started with the use of the wide word 'old', the court came to the conclusion that "in order to fall within the expression 'old machinery' occurring in the entry, the machinery must be old machinery in the sense that it has become non-functional or non-usable". In other words, not the mere age of the machinery, which would be relevant in the wider sense, but the condition of the machinery analogous to that indicated by the words following it, was considered relevant for the purposes of the statute."

15. By reading "antiseptic cream" in similar lines with other excluded items like medicated soaps, shampoos, face creams, and massage creams, it is obvious that these items share a common

characteristic as cosmetics and toilet preparations. Taking into consideration on the above rules of interpretation, specifically in relation to taxing statutes, I am of the view that even though antiseptic creams are excluded from Entry 41, medicated ointments would be included due to the use of the word "but". The word "but" is a clear indication that the legislature intended to include, as an exception, medical ointment, even though certain medicated ointments may be categorised as antiseptic creams. If a product is more than just an antiseptic cream and qualifies as a medicated ointment, it will be included in Entry 41.

16. The issue that now requires to be answered is whether BPAC is to be classified as a medicated ointment or not. The Tribunal, in all its wisdom, after examining relevant evidence and the difference between antiseptic creams and medicated ointments, came to the conclusion that BPAC falls under the ambit of 'medicated ointment', which would qualify it for claiming the benefit of exclusion under Entry 41. The relevant portion is extracted below:

> *"From the above description it is evident that on the basis of 'base' and 'vehicle', cream and ointments are two separate things. According to the available material, oil quantity is more than water in ointment, whereas oil is less than water in cream. This is why cream easily spreads on skin and skin easily absorbs cream, whereas ointment is greasy and sticky and hard to spread on skin. Ointment is not absorbed by skin easily. In the license, issued to the appellant, the disputed product Boroplus antiseptic cream is placed in the category of ointment. If we look at ingredients of the product mentioned in the drug license, it shows that oil is more than water in the disputed product.*
>
> ***
>
> *Therefore, from the above evidence and material it is established that Boroplus antiseptic cream manufactured by appellant firm is an 'Ointment'. Since it has already been established that the disputed product contains medicinal properties; hence, it falls in the category of "medicated ointment" and is included in the SI. No. 41 of Schedule 2 Part A and tax with additional tax @ 5% is payable on it."*

17. It is clear from a perusal of the Tribunal's order that its findings were based on a meticulous examination of evidence presented before it, particularly focusing on the difference between antiseptic creams and medicated ointments. The differences between antiseptic creams and medicated ointments as highlighted by the Tribunal are discussed below:

a. Relying on Remington Part 5, Pharmaceutical Manufacturing Page 176 and British Pharmacopoeia 2012 Vol. – 3, The Tribunal outlined ointments are semisolid preparations for external application to the body and that therapeutically ointments function as protective and emollients for the skin but are used primarily as vehicles or basis for the topical application of medical substances. The Tribunal further highlighted that ointments are formulated to provide preparations that are immiscible, miscible or emulsifiable with the skin secretion. Furthermore, Hydrophobic ointments and water-emulsifying ointment are intended to be applied to the skin or certain mucous membranes for emollient protective, therapeutic or prophylactic purposes where a degree of occlusion is desired. Contrary to the same, The Tribunal highlighted relying on British Pharmacopoeia 2012 – 23 that creams are intended to be applied to the skin or certain mucous membranes for protective, therapeutic or prophylactic purposes especially where and occlusive effect is not necessary unlike ointments.

b. Relying on International Journal for Pharmaceutics, the Tribunal highlighted that a topical dose from the dermatological application which contains greater than 50% hydrocarbons, waxes, PEG as the vehicle and less than 20% water and volatiles is an ointment. On the other hand, an application which contains either less than 50% hydrocarbons waxes, PRG or more than 20% water on and volatiles is cream.

c. Further, based on the information contained on the website of a famous American pharma company Walgreens, the Tribunal pointed out that a cream is preparation of a medication for topical use on the skin with a water base whereas an ointment is a preparation of medication for topical use that contains oil base. It was also highlighted that ointments have a higher concentration of oil compared to cream."

18. As far as BPAC is concerned, the Tribunal placed reliance on the expert opinion of Shri. Loknath Pramanik who had served as Additional Director, Drugs Control, Government of West Bengal and the Member of Pharmacy Council of India and was on the date of Tribunal's judgment a technical consultant in regulatory matter of drugs and cosmetics:

"Thus, I would like to conclude that BPHSAC having >50% oil contains and <20% water content is an ointment with approx. 67% oil ingredients and 10% water content and balance active ingredients and excipients. Moreover, BPHSAC is occlusive in nature which is the property of an ointment. The drug license of the product is also granted under the category of ointment. The word "Ointment" is also clearly written on the level of the product."

19. BPAC has been marketed primarily as an antiseptic cream, emphasising its role in preventing and

treating minor skin infections. However, if one were to take a closer look at its composition, it would reveal that the same contains multiple active ingredients typically found in medicated ointments. The key ingredients consist of neem, tulsi, and aloe vera. These possess various antimicrobial, anti-inflammatory, and healing properties, which are often leveraged in medicated treatments for various skin conditions. Not only are these ingredients antiseptic, but also therapeutic, thereby effectively addressing a broad spectrum of skin issues, including dryness, rashes, and minor burns. The presence of these medicinal components suggests that BPAC offers more than just antiseptic action; it provides a multi-faceted approach to skincare, aligning it more closely with the properties of medicated ointments.

20. Antiseptic creams, in general, are limited to preventing infections in minor cuts and scrapes. However, BPAC is advertised for a wide range of applications, including the treatment of dry skin, cracked heels, minor burns, and even as a daily moisturiser. This broad spectrum of uses is characteristic of medicated ointments, which are designed to treat specific skin conditions with therapeutic benefits. BPAC's ability to soothe, heal, and protect the skin from various ailments indicates its formulation is intended for more than just antiseptic purposes. By providing hydration, reducing inflammation, and promoting healing, BPAC functions similarly to medicated ointments that deal with chronic skin issues and overall skin health.

21. The Respondent successfully demonstrated before the authorities that BPAC is fundamentally a medicated ointment. This conclusion was reached through detailed evidence that relied upon the composition, properties, and therapeutic benefits of BPAC. The evidence presented included ingredient analysis, the proportion of oil versus water, and the medicinal properties of its components like neem, tulsi, and aloe vera. These ingredients are known for their antimicrobial, anti-inflammatory, and healing properties, thus establishing BPAC as a product with multiple therapeutic uses beyond mere antiseptic functions. This left no room for doubt about BPAC's classification as a medicated ointment, which is essential for its appropriate tax treatment under Entry 41.

22. The onus was on the Revenue to disprove the Respondent's claim and establish that BPAC is solely an antiseptic cream. To meet this burden, the Revisionist needed to provide compelling evidence that BPAC's primary and exclusive function was antiseptic in nature. This required a detailed analysis and presentation of the product's composition and therapeutic effects, demonstrating that any additional benefits were either negligible or ancillary to its antiseptic properties. However, the Revisionist failed to provide such evidence. The absence of contrary evidence from the Revisionist means that the Tribunal's findings, based on the Respondent's robust evidence, stand unchallenged and are not perverse. This failure underscores the critical importance of meeting the burden of proof in legal and regulatory disputes.

23. The Revenue's inability to produce evidence that exclusively supports BPAC's classification as an antiseptic cream significantly weakens its argument. In regulatory and tax disputes, the party challenging the existing classification must provide substantial evidence to support its

claims. The Revenue's failure to do so in this case leaves the Respondent's evidence unrefuted and the Tribunal's findings intact.

24. In **Dilip Kumar (supra)**, the Hon'ble Supreme Court highlighted the distinction between provisions relating to chargeability and exemption. The Hon'ble Supreme Court further espoused that even if two views are possible in interpreting a charging section, the one favouring the Assessee needs to be adopted. Relevant paragraphs are extracted below:

> *"14. We may, here itself notice that the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption notification is too obvious to require any elaboration. Nonetheless, in a nutshell, we may mention that, as observed in Surendra Cotton Oil Mills case [Collector of Customs & Central Excise v. Surendra Cotton Oil Mills & Fertilizers Co., (2001) 1 SCC 578] , in the matter of interpretation of charging section of a taxation statute, strict rule of interpretation is mandatory and if there are two views possible in the matter of interpretation of a charging section, the one favourable to the Assessee need to be applied. There is, however, confusion in the matter of interpretation of exemption notification published under taxation statutes and in this area also, the decisions are galore [See: Sun Export Corpn. v. Collector of Customs, (1997) 6 SCC 564; CCE v. Abhi Chemicals and Pharmaceuticals (P) Ltd., (2005) 3 SCC 541; CCE v. Parle Exports (P) Ltd., (1989) 1 SCC 345 : 1989 SCC (Tax) 84; Commr. of Customs v. Konkan Synthetic Fibres, (2012) 6 SCC 339; Collector of Customs v. Swastic Woollens (P) Ltd., 1988 Supp SCC 796 : 1989 SCC (Tax) 67; Commr. of Customs v. Reliance Petroleum Ltd., (2008) 7 SCC 220.].*
>
> ***
>
> *24. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocents might become victims of discretionary decision-making. Insofar as taxation statutes are concerned, Article 265 of the Constitution ["265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law."] prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because the State cannot at their whims and fancies burden the citizens without authority of law. In other words, when the competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the legislature."*

25. In ***National Cereal (supra)***, the Hon'ble Supreme Court held that onus to proof chargeability under a different

provision lies with the Revenue. Relevant paragraph is extracted below:

> *"12. The notifications by which the rate of tax has been fixed in respect of foodgrains makes it clear that the definition of foodgrains in the notifications is wider than that in Section 14 of the Central Sales Tax Act, 1956. It must be remembered that the notifications are not exception notifications but contain charging provisions. As such the onus to prove that the malted barley does not fall within foodgrains or cereals was on the Revenue. They have failed to discharge the onus. Both the Tribunal and the High Court have concurrently found that malted barley is a foodgrain or cereal for the purposes of the three notifications for reasons that cannot be discarded as perverse. We therefore see no reason to interfere with their conclusion."*

26. In ***Marico Industries (supra)***, the Hon'ble Supreme Court held that the burden of proof shifts on the Revenue to show a particular item is taxable in the manner claimed by them. Relevant paragraph is extracted below:

> *"25. The stand of the Assessee before the authorities was that it is not a chemical. It is not sold or used for that purpose. It is a starch manufactured by using Tapioca roots. The Revenue, per contra, without any material brought on record, put it in the category of a chemical. In Union of India v. Garware Nylons Ltd. [Union of India v. Garware Nylons Ltd., (1996) 10 SCC 413] it has been held that the burden of proof is on the Taxing Authorities to show that the particular case or item in question is taxable in the manner claimed by them. Elucidating further, the Court has held that there should be material to enter appropriate finding in that regard and the material may be either oral or documents and it is for the Taxing Authority to lay evidence in that behalf even before the first adjudicating authority. Revive instant starch is used while washing the clothes. In common parlance it is not regarded and treated as a chemical or a bleaching powder. If the very substance or product would have a chemical composition, then only it would make the said substance a chemical within the meaning of Entry 55. Needless to say, the purpose and use are to be taken note of. Common parlance test has to be applied. If the Revenue desired to establish it as a chemical, it was obligatory on its part to adduce the evidence. As is manifest, no evidence has been brought on record by the Revenue that it is a chemical. Therefore, it can safely be concluded that it is not a chemical."*

27. The above three Supreme Court judgements clearly laid down the principle that there is a stark difference between chargeability and exemption. It is to be noted that in the event of chargeability, the interpretation favouring the Assessee needs to be adopted, while in the case of exemption, the position is the opposite.

28. The Supreme Court, in **National Cereal's case (supra)**, has clearly held that the onus to prove the chargeability of a particular item in a provision other than the provision chosen by the Assessee falls squarely on the revenue. In our present case, the revenue's argument that the inclusion of medicated ointment as a drug and cosmetic under Entry 41 of Schedule 11 of the Act is an exemption is completely misplaced. It is to be noted that whether BPAC falls within Entry 41 is in relation to chargeability in a particular schedule and not that of an exemption. It is trite law that an item would be classified as a residuary item only when it does not fall in any other classification. In the present case, using tools of interpretation, the Tribunal has categorically held that BPAC would fall within Entry 41 of Schedule II. The burden of proof was upon the revenue to indicate that the said classification made by the Tribunal was absolutely incorrect and without any basis in law.

29. The failure of the Revenue to produce any evidence to support its claim of reclassification is crucial and to be noted. In legal and administrative proceedings, the burden of proof is a fundamental principle that ensures fairness. When the Revenue seeks to reclassify goods, it must provide evidence that substantiates its position. This evidence might include expert opinions, industry standards, or specific legislative provisions that justify the reclassification. Here, the Department's inability to produce any evidence suggests either a lack of basis for their claim or a failure in their administrative processes. Thereby, the Department's claim for reclassification lacks credibility and cannot be upheld.

30. The judgments relied upon by the Revenue do not advance its case in any manner. The judgment in ***Balaji Agency (supra)*** is notably outdated and pertained to a dealer where the decision was primarily based on the lack of evidence presented by the dealer. This is a critical point, as the absence of substantive evidence in ***Balaji Agency (supra)*** significantly undermines its applicability as a precedent for the instant case involving BPAC, wherein adequate evidence has been produced by the Respondent. Furthermore, the legal landscape concerning the classification of medicaments has evolved considerably since 1994, with several landmark judgments by the Hon'ble Supreme Court providing greater clarity and detailed guidelines on such classifications. These advancements in legal interpretation and the development of relevant jurisprudence were not available to this Court during the Balaji Agency case, rendering its findings irrelevant in the current context. The Tribunal's comprehensive review of the evidence regarding BPAC's composition, therapeutic properties, and intended use starkly contrasts with the scenario in the Balaji Agency, where the absence of evidence was a decisive factor. Therefore, relying on Balaji Agency to argue for BPAC's reclassification disregards the significant differences in the evidentiary records and the evolution of legal standards pertaining to the classification of medicinal products.

31. Similarly, the judgment in ***Paras Pharmaceuticals (supra)*** does not advance the Revenue's case also. Firstly, the judgment did not pertain to BPAC, and the specific facts and products involved in Paras Pharmaceuticals were distinct from those concerning BPAC. The relevance of legal precedents hinges on the similarity of

facts and the specific legal issues addressed. In ***Paras Pharmaceuticals (supra)***, the decision was again influenced by a lack of evidence, a fact explicitly noted in the last two paragraphs of the judgment. This critical detail emphasises the limited applicability of Paras Pharmaceuticals as a precedent for the current dispute over BPAC's classification, where the Tribunal made its determination based on a well-documented evidentiary record presented by the Respondent.

32. In the judgements of **M.T. Khan -v- Govt. of A.P.** reported in **(2004) 2 SCC 267, Union of India -v- Hansoli Devi** reported in **(2002) 7 SCC 273, State of Gujarat -v- Patel Ramjibhai Danabhai** reported in **(1979) 3 SCC 347, Quebec Railway, Light, Heat and Power Company Limited -v- Vandry** reported in **1920 SCC OnLine PC 10 and Balram Kumawat -v- Union of India** reported in **(2003) 7 SCC 628**, the facts stated therein are very different from those present in this case. The overarching rationale behind the judgments relied upon by the revisionist is to respect and implement the clear and unambiguous language of legislative texts, reflecting the intent of the lawmakers. The golden rule of literal interpretation serves as a foundational principle, ensuring that the judiciary does not overstep its role by reinterpreting or rewriting laws based on subjective perceptions of justice. It is also important to acknowledge the need for purposive interpretation in circumstances where a literal reading would thwart the legislative intent or lead to unreasonable outcomes. However, we are not joining issues with the same for these judgments do not help the revisionist and only reiterate the general principles.

33. In the judgements of **Kantaru Rajeevaru (Sabarimala Temple Review-5 J.) -v- Indian Young Lawyers Assn.** reported in **(2020) 2 SCC 1, Spencer & Co. Ltd. -v- Vishwadarshan Distributors (P) Ltd.** reported in **(1995) 1 SCC 259 and State of Karnataka -v- State of T.N.** reported in **(2016) 10 SCC 617,** the facts stated therein are very different from those present in this case. The main justification behind the judgments relied upon by the revisionist is that the Tribunal is bound by Article 144 of the Constitution of India and while applying the twin test it has to consider the authoritative text relating to Ayurvedic Drug or Ayurvedic proprietary medicine. The extensive scope of Article 144 of the Indian Constitution has been reiterated in the aforementioned judgements. Further, they have clarified that "authorities" encompass both judicial and non-judicial bodies, affecting any entity with power over citizens. Ultimately, an emphasis has been laid on the Supreme Court's role as the definitive constitutional interpreter, whose orders must be upheld by all authorities, reinforcing the rule of law. One need not join issue with the principles in the above judgements. However, it is to be noted that these principles do not in any manner assist the revisionist in deciding the present case, as the legal interpretation required in the present case is distinct and has been dealt with by me in the preceding paragraphs.

34. The Revenue's argument that the Respondent itself markets BPAC as an 'antiseptic cream' is not a sound argument. Marketing or advertising of a product, while influential in shaping consumer perceptions and driving sales, cannot and should not determine the classification of a product for taxing purposes. Taxation laws and regulations have been designed to categorise products based on their intrinsic properties, intended use, and the benefits

they provide rather than the promotional strategies employed by manufacturers. Advertising, by nature, is aimed at emphasising certain attributes of a product to attract consumers, which may include both factual information and marketing hyperbole. Thereby, relying on advertising alone to classify a product would lead to inconsistent and potentially misleading tax categorisations, as marketing strategies can vary widely between companies and over time. To put forth an example, a product marketed as a beauty cream might have significant medicinal properties that qualify it as a medicament. However, if its classification were to be done solely on the marketing strategies, its true nature and intended therapeutic use could be overlooked. The detailed descriptions on the packaging, which highlight BPAC's healing, curative, and prophylactic properties, are important to consider because they provide concrete information about the product's intended use and medicinal value. These details go on to establish BPAC as a medicated ointment because they offer a factual basis for its classification, independent of any advertising claims.

35. The principle that marketing or advertising cannot dictate tax classification has been laid down in several cases that place objective assessment over subjective interpretation. In the case of **M/s Blue Star -v- UOI (supra)**, the Bombay High Court was considering the classification of "walk-in coolers". The department had, in that case, classified the product to the detriment of the assessee. The Bench therein held that it is not on the basis of what the petitioner advertises to attract customers that its liability to pay duty under a particular tariff item be fastened. The Court stated that the same can only be set on the facts and the circumstances and determination on the basis of those facts and circumstances as disclosed by the records. The relevant paragraph is extracted below:

> *"…In any event, what the petitioner may advertise by way of attracting customers can be no criterion for adjudicating upon the issue whether our duty is payable under a particular tariff item. In other words, payment of duty under a particular tariff item must depend upon the facts of the case and not on the advertisement gimmick of the advertiser. Thus, it is not on the basis of what the petitioner advertises to attract customers, can its liability to pay duty under a particular tariff item be fastened but on the facts and circumstances actually existing and on a determination whether on the basis of those facts and circumstances as disclosed by the record the case would fall within the provisions of Tariff Item No. 29A(1) or not…"*

36. Similarly, the Custom, Excise and Gold Tribunal, Mumbai, in the case of **Hindustan Unilever Ltd. -v- Collector of Central Excise**, reported in **2000 (121) ELT 451** stated that advertisements are merely the manufacturer's tools for selling their products. The relevant paragraph is extracted as follows:

> *"….Advertising is a potent weapon in the manufacturer's armoury. In the present days of consumerism, a wit has defined advertising as a craft of selling product (1) which is not worth buying (2) which the consumer*

does not want and (3) which he cannot afford to buy…"

37. Tax authorities and judicial bodies are tasked with ensuring that classifications reflect the true nature and function of products to maintain fairness and consistency in taxation. This approach prevents companies from manipulating tax liabilities through strategic advertising and ensures that products are taxed based on their actual use and benefits. In the case of BPAC, the extensive evidence provided by the respondent, which details the product's medicinal properties and its recognition as a therapeutic ointment in common parlance, sets its usage as a medicated ointment on stone. This is substantiated by the legal requirement that mandates products to be classified on the basis of their intrinsic characteristics and, thereby, removes any possibility of undue influence being used in marketing or advertising tactics whatsoever.

38. In the case of **The State of Andhra Pradesh and Others -v- M/s Himani Limited and Others (TRC 166/2004)**, the Bench comprising of Hon'ble P. Sam Koshy and Hon'ble N. Tukaramji, JJ., dealt with a case wherein the petitioner had filed eleven tax revision cases, against the common order passed by the Sales Tax Appellate Tribunal, Hyderabad (STAT). The entire dispute primarily revolved around six products being manufactured and marketed by the two sister companies, namely M/s Himani Limited and M/s Emami Limited. The products in question were Navaratan Oil, Gold Turmeric Ayurvedic Cream, Nirog Dant Power Lal, Boroplus Antiseptic Cream, Boroplus Prickly Heat Powder, and Sonachandi Chavanprash. The issue that was put forth before the High Court of Telangana was whether the products would fall under Entry 36 or Entry 37 of the Central Goods and Services Tax Act and Telangana Goods and Services Tax Act. If the products were to fall under the classification of cosmetics, then they would become leviable for GST at a rate of 20%. Otherwise, if the products were to be treated as drugs within Entry 37, then they would be leviable of duty at the rate of only 10%. Here, too, the Court had to deal with whether or not BPAC was to be considered a cosmetic or a medicated ointment. The Court, in its judgement, stated that the cream cannot be brought under the ambit of being a cosmetic simply because it can only be used for its medicinal value and is not otherwise capable of being used as a cosmetic or toiletry product. It is not a medicated good either because those, too, serve a purpose beyond their intended medicinal uses. The Court further added that BPAC is "preventive in nature and has curative and healing ayurvedic ointment", which is prescribed for several skin disorders. Thereby, the Court held that there was no reason that warranted their interference and upheld the judgement of the Sales Tax Appellate Tribunal, Hyderabad, dated March 31, 2004.

39. It is well settled that the Tribunal is the last fact-finding body and that this Court, in revision, would not go into an enquiry with regard to the factual aspects that have been decided by the Tribunal. In the exercise of revisional jurisdiction, the High Court has a limited mandate. The scope of revisional jurisdictional, is primarily focused on questions of law, jurisdictional errors, or procedural irregularities. The High Court, in a revision petition, must refrain from engaging in a de novo inquiry into factual matters already adjudicated upon by the

Tribunal unless compelling grounds warranting such intervention are made.

40. The limited revisional jurisdiction under the Act is confined to only the questions of law and not the questions of fact. Section 58 of the Act has been extracted below:

> ***"58. Revision by High Court in special cases.***—*(1) Any person aggrieved by an order made under sub-section (7) or sub-section (8) of Section 57, other than an order under sub-section (4) of that section summarily disposing of the appeal, may, within ninety days from the date of service of such order, apply to the High Court for revision of such order on the ground that the case involves any question of law.*
>
> *(2) The application for revision under sub-section (1) shall precisely state the question of law involved in the case, and it shall be competent for the High Court to formulate the question of law or to allow any other question of law to be raised.*
>
> *(3) Where an application under this section is pending, the High Court may, on an application in this behalf, stay recovery of any disputed amount of tax, fee or penalty payable, or refund of any amount due under the order sought to be revised:*
>
> *Provided that no order for stay or recovery of such disputed amount shall remain in force for more than thirty days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned.*
>
> *(4) The High Court shall, after hearing the parties to revision, decide the question, of law involved therein, and where as a result of such decision, the amount of tax, fee or penalty is required to be determined afresh, the High Court may send a copy of the decision to the Tribunal for fresh determination of the amount, and the Tribunal shall thereupon pass such orders as are necessary to dispose of the case in conformity with the said decision.*
>
> *(5) All applications for revision of orders passed under Section 57 in appeals arising out of the same cause of action in respect of an assessment year shall be heard and decided together:*
>
> *Provided that where any one or more of such applications have been heard and decided earlier, if the High Court, while hearing the remaining applications, considers that the earlier decision may be a legal impediment in giving relief in such remaining applications, it may recall such earlier decision and may thereafter proceed to hear and decide all the applications together.*
>
> *(6) The provisions of Section 5 of the Limitation Act, 1963, shall mutatis mutandis, apply to every application, for revision under this section.*
>
> *Explanation.—For the purpose of this section, the expression "any person" includes the Commissioner and the State Government."*

41. A Constitution Bench of the Supreme Court in ***Hindustan Petroleum***

Corporation Limited -v- Dilbahar Singh, reported in ***(2014) 9 SCC 78***, expounded on the scope of revisional jurisdiction. Relevant paragraphs have been extracted below:

> *"31. We are in full agreement with the view expressed in Sri Raja Lakshmi Dyeing Works [Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259] that where both expressions "appeal" and "revision" are employed in a statute, obviously, the expression "revision" is meant to convey the idea of a much narrower jurisdiction than that conveyed by the expression "appeal". The use of two expressions "appeal" and "revision" when used in one statute conferring appellate power and revisional power, we think, is not without purpose and significance. Ordinarily, appellate jurisdiction involves a rehearing while it is not so in the case of revisional jurisdiction when the same statute provides the remedy by way of an "appeal" and so also of a "revision". If that were so, the revisional power would become coextensive with that of the trial court or the subordinate tribunal which is never the case. The classic statement in Dattonpant [Dattonpant Gopalvarao Devakate v. Vithalrao Maruthirao Janagaval, (1975) 2 SCC 246] that revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the Code but, at the same time, it is not wide enough to make the High Court a second court of first appeal, commends to us and we approve the same. We are of the view that in the garb of revisional jurisdiction under the above three rent control statutes, the High Court is not conferred a status of second court of first appeal and the High Court should not enlarge the scope of revisional jurisdiction to that extent.*
>
> *32. Insofar as the three-Judge Bench decision of this Court in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] is concerned, it rightly observes that revisional power is subject to well-known limitations inherent in all the revisional jurisdictions and the matter essentially turns on the language of the statute investing the jurisdiction. We do not think that there can ever be objection to the above statement. The controversy centres round the following observation in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] , "... that jurisdiction enables the court of revision, in appropriate cases, to examine the correctness of the findings of facts also…." It is suggested that by observing so, the three-Judge Bench in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] has enabled the High Court to interfere with the findings of fact by reappreciating the evidence. We do not think that the three-Judge Bench has gone to that extent in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] . The observation in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3*

SCC 131] that as the expression used conferring revisional jurisdiction is "legality and propriety", the High Court has wider jurisdiction obviously means that the power of revision vested in the High Court in the statute is wider than the power conferred on it under Section 115 of the Code of Civil Procedure; it is not confined to the jurisdictional error alone. However, in dealing with the findings of fact, the examination of findings of fact by the High Court is limited to satisfy itself that the decision is "according to law". This is expressly stated in Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] . Whether or not a finding of fact recorded by the subordinate court/tribunal is according to law, is required to be seen on the touchstone whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence or overlooking and ignoring the material evidence altogether or suffers from perversity or any such illegality or such finding has resulted in gross miscarriage of justice. Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] does not lay down as a proposition of law that the revisional power of the High Court under the Rent Control Act is as wide as that of the appellate court or the appellate authority or such power is coextensive with that of the appellate authority or that the concluded finding of fact recorded by the original authority or the appellate authority can be interfered with by the High Court by reappreciating evidence because Revisional Court/authority is not in agreement with the finding of fact recorded by the court/authority below. Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] does not exposit that the revisional power conferred upon the High Court is as wide as an appellate power to reappraise or reassess the evidence for coming to a different finding contrary to the finding recorded by the court/authority below. Rather, it emphasises that while examining the correctness of findings of fact, the Revisional Court is not the second court of first appeal. Ram Dass [Ram Dass v. Ishwar Chander, (1988) 3 SCC 131] does not cross the limits of Revisional Court as explained in Dattonpant [Dattonpant Gopalvarao Devakate v. Vithalrao Maruthirao Janagaval, (1975) 2 SCC 246] ."

(Emphasis added)

42. There is a presumption of finality attached to judgments and orders passed by Appellate Authorities and the High Courts should not lightly disturb such judgments unless there are compelling reasons to do so. Revisional jurisdiction is not intended to be a mechanism for relitigating cases or reopening settled matters. High Courts cannot ordinarily interfere with factual findings arrived at by lower courts or tribunals unless such findings are perverse, based on no evidence, or suffer from a manifest error of law. Revisional jurisdiction does not empower High Courts to reevaluate factual evidence or substitute

their own findings for those of the lower courts or tribunals. Revisional jurisdiction is aimed at correcting jurisdictional errors and excesses of law.

43. The concept of perversity in legal contexts refers to a situation where a decision or finding is so unreasonable or contrary to the evidence that no reasonable person could have arrived at it. When dealing with administrative and judicial reviews, including tax and regulatory matters, perversity is a crucial ground upon which decisions can be challenged or revised. However, for perversity to be successfully invoked, certain legal thresholds and evidentiary standards must be met. Here, the Revenue has not articulated any specific grounds of perversity in its pleadings or submissions. Perversity would require demonstrating that the Tribunal's findings were not based on a rational assessment of the evidence or that they ignored relevant legal principles or material facts. Neither was any evidence produced by the Department before the assessing officer, Commissioner, Commercial Tax and the Tribunal nor was any evidence produced before this Court to controvert the evidence produced by the respondents. Simply disagreeing with the Tribunal's decision without substantiating such disagreement with concrete evidence or legal arguments does not meet the threshold for invoking perversity.

44. As a last-ditch effort, the Revenue had argued to remand the matter back to the Tribunal by placing reliance on the judgment in **Cadbury India (supra)**. The judgement in **Cadbury India (supra)** was delivered in a scenario where adequate evidence was not led by the Assessee before the relevant tribunal. This context is highly important when making an attempt to understand why the decision in **Cadbury India (supra)** does not support the Revenue's case in the instant matter. In **Cadbury India (supra)**, the lack of sufficient evidence presented by the Assessee necessitated further examination and led to the remanding of the case. The tribunal needed a more comprehensive evidentiary basis to make an informed decision about the classification of the goods in question. Consequently, the High Court's decision to remand the matter was appropriate in that context, aiming to ensure that all relevant facts and evidence were adequately considered. In the instant case, however, the Tribunal's decision was not made in a vacuum but was grounded in substantial and persuasive evidence that supported the classification of BPAC as a medicated ointment. The Respondent had established beyond doubt that BPAC is a medicated ointment, and no contrary evidence was presented by the Revisionist to challenge this classification effectively. The principles of judicial efficiency and finality also argue against remanding a matter when the evidence has been thoroughly considered and no new facts have emerged to challenge the established findings.

45. In light of the aforesaid, I find no reason to interfere with the findings of the Tribunal, and accordingly, the instant revision petitions are dismissed. The questions of law framed in all the revision petitions are answered in favour of the assessee and against the Revenue. There shall be no order as to the costs.

(2024) 8 ILRA 1317
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Criminal Revision No. 83 of 2024
With
Criminal Revision No. 5926 of 2023

Awadesh Singh ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Varun Srivastava, Sri Vishnu Bihari Tewari

Counsel for the Opposite Parties:
Sri Ashwani Kumar Yadav, G.A.

Criminal Law –Criminal Procedure Code,1973 - Section 125 - The Hindu Adoption and Maintenance Act, 1956 - Sections 18, 20,23 & 24 - Family Courts Act, 1984 - maintenance awarded under CrPC under challenge by both the parties- of - whether the daughter, having attained majority, was entitled to maintenance under Section 125 CrPC- an unmarried daughter is not entitled to maintenance under Section 125 Cr.P.C. after attaining majority unless she is unable to maintain herself due to physical or mental abnormality- Family Court's order granting maintenance-upheld- Family Court has jurisdiction under both Section 125 Cr.P.C. and Section 20 of the Hindu Adoptions and Maintenance Act, 1956- which allows maintenance for an unmarried daughter until marriage- both revisions dismissed- future modification under Section 127 Cr.P.C.-in case of change of circumstances. (Paras 27, 29, 30, 34, 38, 39, 40, 44, 45, 46, 50 and 51)

HELD:
The first of the definition is general, applicable to one and all. According to this definition the provision for the five necessary wants is maintenance. These wants are food, clothing, residence, education, and medical attendance and treatment. This is a healthy concept of maintenance. The satisfaction of these wants is the minimum necessity of civilized homo sapiens, so that a man may not live, in the words of B. Mukherjee, J., "the life of a dog" (Kiran Bala Vs Bankim Chandra, AIR 1967 Cal 603, 605). (para 30)

Section 20(3) of Hindu Adoptions and Maintenance Act, 1956 is nothing but recognition of principles of Hindu Law regarding maintenance of children and aged parents. Section 20(3) now makes it statutory obligation of a Hindu to maintain his or her daughter, who is unmarried and is unable to maintain herself out of her own earnings or other property. (Para 34)

Section 488 Cr.P.C. (old) Section 125 (new) sought to inhibit negligence of woman and children with intent to serve a social purpose. The provision provided for summary proceeding to enable a deserted wife or helpless child, legitimate or illegitimate, to get urgent relief. The laws are nothing but collective consciousness of community. It is in the interest of the community and social order that woman and child who are neglected be maintained and should be provided a forum to obtain urgent relief to enable them to sustain. (Para 38)

In Nanak Chand's case the question arose as to whether by virtue of Section 4 of Act, 1956, the provision of Section 488 Cr.P.C. shall be overridden. In the above case Supreme Court explained the provisions of Section 488 Cr.P.C. as well as Section 20 of the Act, 1956. Supreme Court held that there is no inconsistency between Section 488 Cr.P.C. and the Hindu Adoptions and Maintenance Act and both can stand together. Supreme Court further held that Section 488 Cr.P.C. provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. (Para 40)

After enactment of Family Courts Act, 1984, a Family Court shall also have the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX of Cr.P.C. relating to order for

maintenance of wife, children and parents. Family Courts shall have the jurisdiction only with respect to city or town whose population exceeds one million, where there is no Family Courts, proceedings under Section 125 Cr.P.C. shall have to be before the Magistrate of the First Class. In an area where the Family Court is not established, a suit or proceedings for maintenance including the proceedings under Section 20 of the Act, 1956 shall only be before the District Court or any subordinate Civil Court. (Para 45)

There may be a case where the Family Court has jurisdiction to decide a case under Section 125 Cr.P.C. as well as the suit under Section 20 of Act, 1956, in such eventuality, Family Court can exercise jurisdiction under both the Acts and in an appropriate case can grant maintenance to unmarried daughter even though she has become major enforcing her right under Section 20 of Act, 1956 so as to avoid multiplicity of proceedings.(Para 46)

In the present case, the order impugned has been passed by the family court exercising jurisdiction under Family Courts Act, 1984. The family court has jurisdiction for trying cases both under Section 125 Cr.P.C. as well as under Section 20 of the Act of 1956. (Para 50)

In case of Abhilasha Vs Parkash (supra), the Supreme Court has held that an unmarried daughter has right of maintenance under Section 125 Cr.P.C. till she attains majority or is covered by the exception as carved out in the Section 125 Cr.P.C. The Supreme Court, however, declined to interfere with the order impugned before the Supreme Court for the reason that the proceedings were in the aforesaid case before Judicial Magistrate First Class and not before family court. The Judicial Magistrate First Class has no jurisdiction to entertain an application under Section 20 of the Act of 1956. The Supreme Court also granted liberty to the appellants before the Supreme Court to take recourse Sub-clause (3) of Section 20 of the Act of 1956, if so advised, for claiming any maintenance against her father. (Para 51)

Both Revision Applications dismissed. (E-14)

List of Cases cited:

1. Rajnish Vs Neha & ors.in Criminal Appeal No. 703 of 2020 (arising out of SLP(Crl) No. 950 of 2018) decided on 04.11.2020 and also repored in MANU/SC/0833/2020

2. Dharmarajan Vs Narayanan, (2001) 1 HLR 126 (Ker)

3. In re, AIR 1941 FC 72: 1941 FCR 72

4. Kiran Bala Vs Bankim Chandra, AIR 1967 Cal 603, 605

5. Arunachala Vs Anandayammal (AIR 1933 Mad 688: (1933) 56 Mad 913: 34 Cri LJ 950)

6. St. of Haryana & ors.Vs Santra (Smt.), (2000) 5 SCC 182:(AIR 2000 SC 1888)

7. Nanank Chand Vs Chandra Kishore Aggarwal & ors., (1969) 3 SCC 802

8. Yamunabai Anantrao Adhav Vs Anantrao Shivram Adhav & anr., (1988) 1 SCC 530

9. Kirtikant D. Vadodaria Vs St. of Guj. & anr., (1996) 4 SCC 479

10. Kiran Bala Saha plaintiff Vs Bankim Chandra Saha defendant reported in AIR 1967 Calcutta 603 (V 54 C 128)

11. Jagdish Jugtawat Vs Manju Lata & ors.reported in (2002) 5 SCC 422

12. Abhilasha Vs Parkash & ors.reported in 2020 CrLJ 4770 SC

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Criminal Revision No. 83 of 2024 has been filed by husband/revisionist against the judgment and order dated 26.09.2023 passed by Principle Judge, Family Court, Hathras in Case No. 656 of 2009 (Smt. Urmila and another v. Awadhesh Singh) in proceedings under Section 125 Cr.P.C. granting maintenance

of Rs. 25,000/- per month to the wife Smt. Urmila and Rs. 20,000/- per month to the daughter Km. Gauri Nandini from the date of order

2. Criminal Revision No. 5926 of 2023 has been filed by the wife and daughter against the judgment and order dated 26.09.2023 passed by Principle Judge, Family Court, Hathras in Case No. 656 of 2009 (Smt. Urmila and another v. Awadhesh Singh) in proceedings under Section 125 Cr.P.C. initiated by the wife and daughter for enhancement of the maintenance as awarded by the order dated 16.09.2023.

3. Since both the revisions are against the same order, they are being decided together.

4. Heard Sri Vishnu Bihari Tewari, learned counsel for the revisionist in Criminal Revision No. 83 of 2024 and for the opposite party in Criminal Revision No. 5926 of 2023 and Sri Ashwani Kumar Yadav, learned counsel for the opposite party in Criminal Revision No. 83 of 2024 and for the revisionist in Criminal Revision No. 5926 of 2023.

5. Brief facts of the case are that an application under Section 125 Cr.P.C. was filed by Smt. Urmila and Km. Gauri Nandini aged about 4 years under the guardianship of her mother Smt. Urmila against Awdhesh Kumar Singh for maintenance on 05.10.2009. As per the aforesaid application, Smt. Urmila was married to Awdhesh Kumar Singh on 26.01.1992 as per the Hindu Rites. After marriage, Smt. Urmila was treated badly by her husband and in-laws. After one and a half year of the marriage, husband Awdhesh Kumar Singh filed a divorce petition being Case No. 381 of 1993 under Section 13 of Hindu Marriage Act. Couple was blessed with one daughter namely Km. Gauri Nandani - applicant No.2 in the original application. It was further alleged that Smt. Urmila and her daughter were ill treated by the husband and his family members and ultimately she was thrown out of her matrimonial home along with her daughter on 09.02.2009. It was also alleged that the husband Awdhesh Kumar Singh was a permanent lecturer in D.A.V. Degree College, Kanpur and was earning about Rs. 81,000/- per month at the time of making the application. The applicant - wife had no means to maintain herself and her daughter and therefore, a prayer was made to award maintenance from the date of being turned out from the matrimonial home to the tune of Rs. 35,000/- per month. This application was filed on 05.10.2009.

6. The application was contested by the husband by filing the written statement denying the averments made in the application except for the birth of daughter and that the husband was employed as lecturer in D.A.V. Degree College, Kanpur. It was stated in the objections that the wife and his family members used to pressurize the husband to live separately from his parents and wife treated the husband with cruelty and therefore, an application for divorce was filed by the husband. Allegations of cruelty were denied and it was also stated that the applicant is M.A. passed and was taking tutions and earning about Rs. 8,000/- per month. It was also stated that the applicant had left the matrimonial home on 10.01.2010 and she had taken all the jewellery along with her. It had also been stated in the objections that the husband had taken a policy of Rs. 4,00,000/- in the name of his daughter and the premium of

Rs. 18748/- was being paid by the father. After deduction of tax and G.P.F. carry home salary of the husband was Rs. 56,000/- per month. The objections were filed by the husband/revisionist on 09.07.2010.

7. The application under Section 125 Cr.P.C. was allowed by the Judicial Magistrate, Court No. 3, Hathras by its judgment and order dated 31.01.2013 awarding maintenance of Rs. 20,000/- per month to the wife and Rs. 10,000/- to the daughter. Against the order dated 31.01.2013, two revisions were were filed, one by the husband and other was by the wife. Both the revisions were allowed by the order dated 09.10.2013 passed by Additional Session Judge, Court No. 2, Hathras and order dated 31.01.2013 was set-aside and the matter was remanded for rehearing after providing opportunity of hearing to both the sides. The order dated 09.10.2013, was challenged by the wife and daughter Smt. Urmila and Km. Nandani before this Court in Criminal Misc. Writ Petition No. 25465 of 2013 (Smt. Urmila and another v. Awdhesh Kumar Singh). The writ petition so filed by Smt. Urmila was disposed of by this Court by order dated 17.02.2022 with a direction to the parties to appear before the trial court in compliance of order dated 09.10.2013 and trial court was directed to decide the matter expeditiously as early as possible in accordance with law without granting unnecessary adjournment to either of the parties preferably within a period of six months. It was also directed by the writ court that till final decision of the application, the respondent husband should pay month to month maintenance amount pursuant to the order passed by the trial court i.e. Rs. 30,000/- per month as had been ordered by this Court vide interim order dated 20.12.2013. It was also directed by this Court that the amount already paid by the respondent husband would also be adjusted in the final payment of the maintenance.

8. During pendency of application, an amendment was sought by the wife that maintenance amount be increased to Rs. 70,000/- for herself and Rs. 30,000/- for the daughter.

9. The application under Section 125 Cr.P.C. was allowed by the Principle Judge, Family Court, Hathras awarding Rs. 25,000/- per month to the wife and Rs. 20,000/- to the daughter as maintenance from the date of order, hence, the present revision.

10. Criminal Revision No. 5926 of 2023 has been filed by the wife and daughter for enhancement of the maintenance amount.

11. Since the facts and the order impugned is common in both the Criminal Revisions, this Court taking the Criminal Revision No. 83 of 2024 as the leading case.

12. It has been contended by the learned counsel for the revisionist, that the opposite party no. 3 Km. Gauri Nandini (daughter) was born on 25.06.2005 and had attained the age of majority on 25.06.2023 before the order impugned dated 26.09.2023. The court below had erred in law awarding maintenance to the daughter who was major on the date of order and was not entitled to maintenance in view of the provisions of the Section 125 Cr.P.C. Learned counsel for the revisionist relied upon the judgment of the Apex Court in case of Abhilasha v. Parkash and others

reported in 2020 CrLJ 4770 SC wherein the Supreme Court has held that unmarried daughter who has attained majority and is not suffering any mental or physical abnormality, is not entitled to claim maintenance under Section 125 Cr.P.C.

13. Learned counsel for the revisionist has also contended that as both the parties has not filed affidavit disclosing their assets and liability, the objective assessment of approximate amount to be awarded towards maintenance, is not possible and the amount awarded towards maintenance is excessive. In this regard, learned counsel for the revisionist has also relied upon the judgment and order passed by Supreme Court in Case of Rajnish v. Neha and others in Criminal Appeal No. 703 of 2020 (arising out of SLP(Crl) No. 950 of 2018) decided on 04.11.2020 and also repored in MANU/SC/0833/2020.

14. Before proceeding with the matter, it would be appropriate to look into the provisions of Section 125 Cr.P.C. as under:

"125. Order for maintenance of wives, children and parents.- *(1) If any person having sufficient means neglects or refuse 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 port of each month's allowance 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 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 the 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."

15. There is no dispute that the opposite party no. 3 daughter was born on 25.06.2005 and has attained majority on 25.06.2023. The order impugned has been passed on 26.09.2023 awarding maintenance of Rs. 20,000/- from the date of order to the opposite party no. 3. Date of birth of opposite party no. 3 has not been denied by the opposite parties and from the perusal of the application under Section 125 Cr.P.C. filed by the opposite parties on 05.10.2009, it is apparent that opposite party no. 3 has been alleged to aged about four years on 05.10.2009 which confirms the date of birth of the opposite party no. 3 and the fact that prior to passing of the order impugned, the opposite party no. 3 has attained majority.

16. Per contra, learned counsel appearing for the opposite party wife and

daughter contended that the trial court has rightly passed the order awarding maintenance to the wife and daughter. It has been further contended that this Court should not interfere in the order passed by the court below even if it comes to the conclusion that in proceedings under Section 125 Cr.P.C., the court below could not have awarded maintenance to the daughter after she attained majority as the daughter is entitled for maintenance till she is married in view of the provisions contained in Section 20 of the Hindu Adoption and Maintenance Act, 1956 (herein after referred to as the Act of 1956). No exception should be taken to the judgment and order passed by the court below on combined reading of provisions of Section 125 Cr.P.C. and Sub clause (3) of Section 20 the Act of 1956. It is further contended since daughter is entitled for maintenance under the Act of 1956, no useful purpose would be served in setting aside the order passed by the court below and relegating the daughter to move an application under the provisions of Section 20 and Sub-clause (3) of Act of 1956 for the same relief which have already been granted in the proceedings under Section 125 Cr.P.C.

17. Learned counsel for the respondent next contended that the maintenance awarded by the court below was on lower side as the revisionist/husband is employed as a permanent teacher in a degree college. It has been further contended that the court below erred in law in awarding maintenance from the date of order and it ought to have awarded maintenance from the date of application. Maintenance awarded to the wife and daughter be enhanced considering the income of the revisionist/husband.

18. Before considering the rival submissions of the parties, it will be useful to note the provisions of Act of 1956 regarding maintenance of wife and daughter.

19. Section 18 of the Act of 1956 contemplates maintenance of wife which is quoted as under:

18.Maintenance of wife.- (1) Subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance-

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of willfully neglecting her;

(b) If he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) if he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separately.

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

20. Section 20 of the Act of 1956 contemplates maintenance of children and aged parents and the same is quoted as under:

20. Maintenance of children and aged parents.- (1) Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

(2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

(3) The obligation of a person to maintain his or her aged or infirm parent or a daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his own earning or other property.

21. Section 23 of the Act of 1956 provides for amount of maintenance and the same is quoted as under:

23. Amount of maintenance.- (1) It shall be in the discretion of the court to determine whether any, and if so what, maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the considerations set out in sub-section (2) or sub-section (3), as the case may be, so far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to-

(a) the position and status of the parties;

(b) the reasonable wants of the claimant;

(c) if the claimant is living separately, whether the claimant is justified in doing so;

(d) the value of the claimant's property and any income derived from such property, or from the claimant's own earning or from any other source;

(e) the number of persons entitled to maintenance under this Act.

(3) In determining the amount of maintenance, if any, to be awarded to a dependent under this Act, regard shall be had to-

(a) the net value of the estate of the deceased after providing for the payment of his debts;

(b) the provision, if any, made under a Will of the deceased in respect of the dependent;

(c) the degree of relationship between the two;

(d) the reasonable wants of the dependant;

(e) the pas relations between the dependant and the deceased;

(f) the value of the property of the dependent and any income derived from such property; or from his or her earning or from any other source;

(g) the number of dependents entitled to maintenance under this Act.

22. Section 24 of the Act of 1956 provides that no person is entitled to claim maintenance if he or she has ceased to be Hindu by conversion to any other religion.

23. Some persons are unable to earn their livelihood due to their tender years, old age, some mental drawback or some social inhibition. Law imposes in their interest the obligation of maintaining them on some other persons. In other words, these persons are given the right to obtain maintenance from some other persons.

24. Every legal system has fixed an age before attaining which no person is regarded competent to settle his legal status. On completing that age he is made sui juris, legally competent and free to take decisions about his status. The law takes upon its own shoulders the responsibility of safeguarding the interests on the court or an authority of State to carry out that responsibility.

25. The duty to maintain the dependents has been lent the sanction of religion. The Dayabhaga has quoted Manu:

"Maintenance of the group of dependants opens the way to heaven. If this group is troubled, it leads to hell. Therefore, efforts should be made to maintain it." भरणं पोष्यवर्गस्य प्रशस्तं स्वर्गसाधनम्। नरकं पीड़ने चास्य तस्मात् यत्नेन त भरेत्।। Manu in Dayabhaga, II:23. Not found in the Manusmriti.

26. In Classical Hindu Law prior to codification, a Hindu male was always held morally and legally liable to maintain his aged parents, a virtuous wife and infant child. Hindu Law always recognised the liability of father to maintain an unmarried daughter. In this context, we refer to paragraph 539 and 543 of Mulla- Hindu Law- 22nd Edition, which is as follows:

"539. Personal liability; liability of father, husband and son- A Hindu is under a legal obligation to maintain his wife, his minor sons, his unmarried daughters, and his aged parents whether he possesses any property or not. The obligation to maintain these relations is personal in character and arises from the very existence of the relation between the parties.

27. Under Hindu law the right to or the obligation of maintenance is founded on two grounds: relationship and property. A is entitled to get maintenance from B.

(a) If A has a particular kind of relationship with B. On this basis the minor son and unmarried daughter are entitled to maintenance from his or her father, aged parents from their son and the wife from her husband. It has been put in the mouth of Manu by the Mitakshara that a man should maintain his aged parents, chaste wife and minor son (i.e. child) even by doing a hundred such deeds which are not prescribed for him. वृद्धौ च माता पितरौ साध्वी भार्या सुतः शिशुः। अप्यकार्य शतं कृत्वा भर्तव्या मनूरब्रवीत्।। Quoted by Mit. On Yaj. I: 224. The word अकार्य has been translated as 'misdeeds'. (see Mayne's HINDU LAW

AND USAGE, 14th Edn., p. 1153, S. 722) it is submitted that the translation is not correct.

The word अकार्य does not mean misdeed- those action which are wrong or injurious to others. It means those actions which are not properly his act according to the Shastras as a member of a particular Varna or Ashrama etc. For example, if a Brahman is unable to make sufficient means for the support of his family or parents by the professions of a teacher or priest (which are prescribed for him as a Brahman), he can take to agriculture, business or service etc. (which are not prescribed for him).

(b) If B has any such property out of which A is entitled to get maintenance. If B is not possessed of that property, he has no duty to maintain A, although he may be possessed of immeasurable wealth. In fact, this is not the right unto B, this is the right unto the property which is charged with the maintenance of A and which is at present owned or managed or controlled by B. For example, a karta of a joint Hindu family is bound to maintain all the members of the joint family because he is the manager of the joint family property: He has no obligation to give maintenance out of his separate or personal property to those members on the ground of relationship.

28. During the British period, three Acts were passed which affected directly or indirectly the right to maintenance of a female Hindu.

(1) Hindu Widows' Remarriage Act, 1856. It provided that all rights and interests which a widow had in her husband's property by way of maintenance, ceased upon her remarriage (Dharmarajan v. Narayanan, (2001) 1 HLR 126 (Ker). This Act is repealed by the Hindu Widows' Remarriage (Repeal) Act, 1983.

(2) Hindu Women's Rights to Property Act, 1937. This Act conferred the right of inheritance upon the widow of a Hindu, his son's widow and his son's son's widow. Before that she had only the right to maintenance from those who inherited her husband's property, instead of the right of inheritance from her husband. The Act did not expressly abolish her right of maintenance but the effect of giving the right of inheritance to her was that her right to maintenance lost its basis. This Act did not extend to agricultural land (Hindu Women’s Right to Property Act, 1937, In re, AIR 1941 FC 72: 1941 FCR 72). She was, therefore, entitled to get maintenance from those who inherited the agricultural land from her husband. The Act is now repealed by the Hindu Succession Act, 1956 (HSA Section 31).

(3) Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946. This Act gave a Hindu wife the right to live separately from her husband and also to get maintenance from him on certain grounds. The Act now stands repealed by the Hindu Adoption and Maintenance Act, 1956 (HAMA Section 29) because the provisions of that Act have been assimilated in Section 18 of the HAMA.

29. Sub section (b) of Section 3 of Act of 1956 defines maintenance which is as under:

“(a)….

(b) “maintenance” includes-

(i) in all cases, provision for food, clothing, residence, education and medical attendance and treatment;

(ii) in the case of an unmarried daughter also the reasonable expenses of and incident to her marriage;

(c) ……..”

30. The first of the definition is general, applicable to one and all. According to this definition the provision for the five necessary wants is maintenance. These wants are food, clothing, residence, education, and medical attendance and treatment. This is a healthy concept of maintenance. The satisfaction of these wants is the minimum necessity of civilized *homo sapiens*, so that a man may not live, in the words of B. Mukherjee, J., "the life of a dog" (Kiran Bala v. Bankim Chandra, AIR 1967 Cal 603, 605).

This definition of maintenance is more humane than the understanding of maintenance before it. Earlier provision for the satisfaction of three wants was considered sufficient as maintenance. For example, the Madras High Court has held in *Arunachala v. Anandayamm*al (AIR 1933 Mad 688: (1933) 56 Mad 913: 34 Cri LJ 950), that maintenance includes nothing more than appropriate food, clothing and lodging.

31. The inclusion of provision for education and medical assistance and treatment by Act of 1956 in definition of maintenance has definitely enlarged the concept of maintenance of other laws, personal and local, e.g. Section 125 Cr.P.C.

32. The second part of the definition of maintenance applies only to the case of an unmarried daughter. In addition to the provision for the necessary wants as mentioned above, her maintenance includes the reasonable expenses of and incident to her marriage.

33. Muslim Law also recognises the obligation of father to maintain his daughters until they are married. Referring to Mulla’s Principle of Mohammedan Law, Supreme Court in State of Haryana and Others Vs. Santra (Smt.), (2000) 5 SCC 182:(AIR 2000 SC 1888) in paragraph 40 held:-

“40. Similarly, under the Mohammedan Law, a father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. [See: Mulla's Principles of Mohammedan Law (19th Edn.) page 300].....”

34. Section 20(3) of Hindu Adoptions and Maintenance Act, 1956 is nothing but recognition of principles of Hindu Law regarding maintenance of children and aged parents. Section 20(3) now makes it statutory obligation of a Hindu to maintain his or her daughter, who is unmarried and is unable to maintain herself out of her own earnings or other property.

35. Section 20 of Hindu Adoptions and Maintenance Act, 1956 cast a statutory obligation on a Hindu to maintain his daughter who is unmarried and unable to maintain herself out of her own earnings or other property. As noted above, Hindu Law prior to enactment of Act, 1956 always obliged a Hindu to maintain unmarried daughter, who is unable to maintain herself. The obligation, which is cast on the father

to maintain his unmarried daughter, can be enforced by her against her father, if she is unable to maintain herself by enforcing her right under Section 20.

36. The Act, 1956 was enacted to amend and codify the law relating to adoptions and maintenance among Hindus. A bare perusal of Section 125(1) Cr.P.C. as well as Section 20 of Act, 1956 indicates that whereas Section 125 Cr.P.C. limits the claim of maintenance of a child until he or she attains majority. By virtue of Section 125(1)(c), an unmarried daughter even though she has attained majority is entitled for maintenance, where such unmarried daughter is by reason of any physical or mental abnormality or injury is unable to maintain itself. The Scheme under Section 125(1) Cr.P.C., thus, contemplate that claim of maintenance by a daughter, who has attained majority is admissible only when by reason of any physical or mental abnormality or injury, she is unable to maintain herself.

37. In the Code of Criminal Procedure, 1898, Section 488 Cr.P.C. was the provision governing the maintenance of wife or legitimate or illegitimate child of any person. Section 488(1) Cr.P.C. provided:

"488(1). If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or 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, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."

38 . Section 488 Cr.P.C. (old) Section 125 (new) sought to inhibit negligence of woman and children with intent to serve a social purpose. The provision provided for summary proceeding to enable a deserted wife or helpless child, legitimate or illegitimate, to get urgent relief. The laws are nothing but collective consciousness of community. It is in the interest of the community and social order that woman and child who are neglected be maintained and should be provided a forum to obtain urgent relief to enable them to sustain.

39. Supreme Court in Nanank Chand Vs. Chandra Kishore Aggarwal and Others, (1969) 3 SCC 802 had occasion to consider the provision of Section 488 Cr.P.C., 1898 in reference to provisions of Hindu Adoptions and Maintenance Act, 1956, which provided for overriding effect of Act. Section 4 of the Act, 1956 is to the following effect:

"Section 4. Overriding effect of Act- Save as otherwise expressly provided in this Act,-

(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

40. In Nanak Chand's case the question arose as to whether by virtue of Section 4 of Act, 1956, the provision of Section 488 Cr.P.C. shall be overridden. In the above case Supreme Court explained the provisions of Section 488 Cr.P.C. as well as Section 20 of the Act, 1956. Supreme Court held that there is no inconsistency between Section 488 Cr.P.C. and the Hindu Adoptions and Maintenance Act and both can stand together. Supreme Court further held that Section 488 Cr.P.C. provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. Following was laid down in paragraph 4:

"4.....The learned Counsel says that Section 488 Cr.P.C., insofar as it provides for the grant of maintenance to a Hindu, is inconsistent with Chapter III of the Maintenance Act, and in particular, Section 20, which provides for maintenance to children. We are unable to see any inconsistency between the Maintenance Act and Section 488, Cr.P.C. Both can stand together. The Maintenance Act is an act to amend and codify the law relating to adoptions and maintenance among Hindus. The law was substantially similar before and nobody ever suggested that Hindu Law, as in force immediately before the commencement of this Act, insofar as it dealt with the maintenance of children, was in any way inconsistent with Section 488, Cr.P.C. The scope of the two laws is different. Section 488 provides a summary remedy and is applicable to all persons belonging to all religions and has no relationship with the personal law of the parties. Recently the question came before the Allahabad High Court in Ram Singh v. State, AIR 1963 All 355 , before the Calcutta High Court in Mahabir Agarwalla v. Gita Roy [1962] 2 Cr. L.J.528 and before the Patna High Court in Nalini Ranjan v. Kiran Rani, AIR 1965 Pat 442. The three High Courts have, in our view, correctly come to the conclusion that Section 4(b) of the Maintenance Act does not repeal or affect in any manner the provisions contained in Section 488, Cr.P.C."

41. Supreme Court in Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another, (1988) 1 SCC 530, held that personal law applicable to the parties cannot altogether be excluded from consideration in proceeding under Section 125 Cr.P.C.

42. In Yamunabai's case (supra), the question involved was as to whether a Hindu woman who is married after coming into force of Hindu Marriage Act, 1955 to a Hindu male having a living lawfully wedded wife, can maintain an application for maintenance under Section 125 Cr.P.C. Supreme Court in the above case held the marriage of Yamunabai to be null and void from its very inception. In the above context, Supreme Court referred to provision of Hindu Marriage Act, 1955 to find out marital status. In paragraphs 5 and 6, following was laid down:

"5. It has been contended on behalf of the appellant that the term 'wife ' in Section 125 of the Code should be given a wider and extended meaning so as to include therein not only a lawfully wedded wife but also a woman married in fact by performance of necessary rites or following the procedure laid down under the law. Relying upon the decision of Supreme Court in Mohd. Ahmed khan v. Shah Bano Beghum, 1985 Cri LJ 875 it was argued that the personal law of the parties to a

proceeding under Section 125 of the Code should be completely excluded from consideration. The relationship of husband and wife comes to an end on divorce, but a divorcee has been held to be entitled to the benefits of the section, it was urged, and therefore applying this approach a woman in the same position as the present appellant should be brought within the sweep of the section. We are afraid, the argument is not well founded. A divorcee is included within the section on account of Clause (b) of the Explanation. The position under the corresponding Section 488 of the code of 1898 was different. A divorcee could not avail of the summary remedy. The wife's right to maintenance depended upon the continuance of her married status. It was pointed out in Shah Bano's case that since that right could be defeated by the husband by divorcing her unilaterally under the Muslim Personal Law or by obtaining a decree of divorce under any other system of law, it was considered desirable to remove the hardship by extending the benefit of the provisions of the section to a divorced woman so long as she did not remarry, and that was achieved by including Clause (b) of the Explanation. Unfortunately for the appellant no corresponding provision was brought in so as to apply to her. The legislature decided to bestow the benefit of the Section even on an illegitimate child by express words but none are found to apply to a de facto wife where the marriage is void ab initio.

6. The attempt to exclude altogether the personal law applicable to the parties from consideration also has to be repelled. The section has been enacted in the interest of a wife, and one who intends to take benefit under Sub-section (1)(a) has to establish the necessary condition, namely, that she is the wife of the person concerned. This issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes her status on relationship with reference to the personal law that an application for maintenance can be maintained. Once the right under the section is established by proof of necessary conditions mentioned therein, it cannot be defeated by further reference to the personal law. The issue whether the section is attracted or not cannot be answered except by the reference to the appropriate law governing the parties. In our view the judgment in Shah Bano's case does not help the appellant.

It may be observed that for the purpose of extending the benefit of the section to a divorced woman and an illegitimate child the Parliament considered it necessary to include in the section specific provisions to that effect, but has not done so with respect to women not lawfully married."

43. It is to be noted that in the above case personal law was looked into to find out as to whether an application filed by the appellant Yamunabai claiming to be his wife was maintainable or not. Another judgment which needs to be noted is Kirtikant D. Vadodaria Vs. State of Gujarat and Another, (1996) 4 SCC 479. The question which came for consideration before Supreme Court Court was as to whether expression "mother" used in clause (d) of sub-section (1) of Section 125 Cr.P.C. includes stepmother. Supreme Court referring to Section 125 Cr.P.C. as well as provision of Section 20 of Act, 1956 held that stepmother can claim maintenance from her stepson provided she is widow of her husband, if living, and also incapable of maintaining and supporting her.

44. The Calcutta High Court in case of Kiran Bala Saha plaintiff v. Bankim Chandra Saha defendant reported in AIR

1967 Calcutta 603 (V 54 C 128) has held that the Court should take notice of subsequent events that post suit events as they are called and to mould its relief so as to shorten litigation, preserve the rights of the parties and thus, best subserve the end of justice. In paragraph no. 22 of the judgment of Calcutta High Court has held as under:

"22……. The obvious answer to an approach as this appears to be that it is the duty of the Court, which still retains control of the judgment, to take notice of subsequent events, post-suit events as they are called, and to mould its decree so as to shorten litigation, preserve the rights of parties, and thus best subserve the ends of justice. What to say of the primary court, as mine is even a court of appeal is to take notice of facts which may have arisen subsequently, provided that such action causes no prejudice to either party. Here I see no prejudice, no possibility of prejudice even, to the defendant, because the facts I take notice of are all in the realm of admissions. The proposition I go by is supported by a crowd of decisions. To mention but a few, here are they: (1) Ram Ratan Sahu v. Mohant Sahu, (1907) 6 Cal LJ 74, (2) Ramyad Sahu v. Bin-deshwari Kumar Upadhay, (1907) 6 Cal LJ 102, (3) Rai Charan Mondal v. Biswanath Mondal. 20 Cal LJ 107 = (AIR 1915 Cal 103). (4) Annapurna Dasi v Sarat Chandra Bhatta-charjee , (5) Raja Kamala Ranjan Roy v. Baijnath Bajoria, (1949) 53 Cal WN 329, (6) Surinder Kumar v. Gian Chand 1958 SCA 412=(AIR) 1957 SC 875). On the contrary, if I do not take notice of such subsequent facts--and admitted facts at that--the result will be multiplicity of proceedings either in the shape of a fresh suit or a petition under Section 25 of the Hindu Adoptions and Maintenance Act 78 of 1956 for increase of the maintenance I grant. That augurs no good for either of the spouses."

45. After enactment of Family Courts Act, 1984, a Family Court shall also have the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX of Cr.P.C. relating to order for maintenance of wife, children and parents. Family Courts shall have the jurisdiction only with respect to city or town whose population exceeds one million, where there is no Family Courts, proceedings under Section 125 Cr.P.C. shall have to be before the Magistrate of the First Class. In an area where the Family Court is not established, a suit or proceedings for maintenance including the proceedings under Section 20 of the Act, 1956 shall only be before the District Court or any subordinate Civil Court.

46. There may be a case where the Family Court has jurisdiction to decide a case under Section 125 Cr.P.C. as well as the suit under Section 20 of Act, 1956, in such eventuality, Family Court can exercise jurisdiction under both the Acts and in an appropriate case can grant maintenance to unmarried daughter even though she has become major enforcing her right under Section 20 of Act, 1956 so as to avoid multiplicity of proceedings.

47. In case of Jagdish Jugtawat v. Manju Lata and others reported in (2002) 5 SCC 422, the facts of the case were that the respondent No.3 was a minor unmarried girl of the petitioner. The wife of the petitioner, i.e., mother of respondent No.3 filed an application under Section 125 Cr.P.C. claiming maintenance @ Rs.500/- per month to each of the applicant, which was granted by the Family Court. A

revision was filed before the High Court assailing the order contending that the respondent No.3, Kumari Rakhi was entitled to maintenance only till she attains majority and not thereafter. High Court although accepted the legal position that under Section 125 Cr.P.C., a minor daughter is entitled to maintenance from her parents only till she attains majority but declined to interfere with the orders passed by the Family Court taking the cue from Section 20(3) of the Hindu Adoptions and Maintenance Act. The facts of the case and observations of the High Court have been made in the paragraph 2 of the judgment, which is to the following effect:-

"2. The Petitioner is the father of Kumari Rakhi, Respondent 3 herein, who is a minor unmarried girl. Considering the application filed under Section 125 of the Criminal Procedure Code by Respondent 1, wife of the Petitioner and mother of Respondent 3, claiming maintenance for herself and her two children, the Family Court by order dated 22.7.2000 granted maintenance @ Rs.500 per month to each of the Applicants. The Petitioner herein filed a revision petition before the High Court assailing the order of the Family Court on the ground, inter alia, that Respondent 3 was entitled to maintenance only till she attains majority and not thereafter. Considering the point the learned Single Judge of the High Court accepted, the legal position that under Section-125, CrPC, a minor daughter is entitled to maintenance from her parents only till she attains majority, but declined to interfere with the order passed by the Family Court taking the cue from Section 20(3) of the Hindu Adoptions and Maintenance Act under which the right of maintenance is given to a minor daughter till her marriage. The learned Single Judge was persuaded to maintain the order of the Family Court with a view to avoid multiplicity of proceedings. The relevant portion of the judgment of the High Court is quoted here:

"Thus, in view of the above, though it cannot be said that the order impugned runs counter to the law laid down by the Hon'ble Supreme Court, the provisions of Section 125 CrPC are applicable irrespective of the personal law and it does not make any distinction whether the daughter claiming maintenance is a Hindu or a Muslim. However, taking an overall view of the matter, I, with all respect to the Hon'ble Court, am of the candid view that the provisions require literal interpretation and a daughter would cease to have the benefit of the provisions under Section 125 CrPC on attaining majority, though she would be entitled to claim the benefits further under the statute/personal law. But the Court is not inclined to interfere, as the order does not result in miscarriage of justice, rather interfering with the order would create great inconvenience to Respondent 3 as she would be forced to file another petition under sub-section (3) of Section 20 of the Act of 1956 for further maintenance etc. Thus, in order to avoid multiplicity of litigations, the order impugned does not warrant interference."

48. The question which came for consideration before Supreme Court in Jagdish Jugtawat's case has been noted in paragraph 3 of the judgment which is to the following effect:

"3. In view of the finding recorded and the observations made by the learned Single Judge of the High Court, the only question that arises for consideration

is whether the order calls for interference. ....."

49. Supreme Court answered the question noticed in paragraph 3 as above in paragraph 4 in the following words:

"4. Applying the principle to the facts and circumstances of the case in hand, it is manifest that the right of a minor girl for maintenance from parents after attaining majority till her marriage is recognized in Section 20(3) of the Hindu Adoptions and Maintenance Act. Therefore, no exception can be taken to the judgment/order passed by the learned Single Judge for maintaining the order passed by the Family Court which is based on a combined reading of Section 125, Code of Criminal Procedure and Section 20(3) of the Hindu Adoptions and Maintenance Act. For the reasons aforestated we are of the view that on facts and in the circumstances of the case no interference with the impugned judgment order of the High Court is called for."

50. In the present case, the order impugned has been passed by the family court exercising jurisdiction under Family Courts Act, 1984. The family court has jurisdiction for trying cases both under Section 125 Cr.P.C. as well as under Section 20 of the Act of 1956.

51. In case of Abhilasha v. Parkash (supra), the Supreme Court has held that an unmarried daughter has right of maintenance under Section 125 Cr.P.C. till she attains majority or is covered by the exception as carved out in the Section 125 Cr.P.C. The Supreme Court, however, declined to interfere with the order impugned before the Supreme Court for the reason that the proceedings were in the aforesaid case before Judicial Magistrate First Class and not before family court. The Judicial Magistrate First Class has no jurisdiction to entertain an application under Section 20 of the Act of 1956. The Supreme Court also granted liberty to the appellants before the Supreme Court to take recourse Sub-clause (3) of Section 20 of the Act of 1956, if so advised, for claiming any maintenance against her father.

52. Since, in the present case, the order has been passed by the family court which has jurisdiction to entertain the application under Section 125 Cr.P.C. as well as application under Sub-clause (3) of Section 20 of Act of 1956, no purpose will be served in interfering with the revision and relegating the daughter to move a fresh application before the same court under different provision of law i.e. Section 20(3) of Act of 1956, and therefore, I am not inclined to interfere with the order and consequently, the revision No. 83 of 2023 fails and is **dismissed.**

53. So far as the revision No. 5926 of 2023 filed by the wife and daughter is concerned, the amount of maintenance awarded by the court below appears to be just as no new material was brought before this Court, requiring interference by this Court. Therefore, I am of the view that no interference is required with the order impugned at the behest of wife and daughter i.e. revisionist and consequently, revision No.5926 of 2023 is also **dismissed**. However, dismissal of this revision will not come in the way of revisionists to claim suitable modification of the order in view of the provisions of Section 127 Cr.P.C. or to get the amount of maintenance enhanced by moving an appropriate application before the Family

Court under relevant provision of law, if so advised, on the subsequent facts, which may be brought to the knowledge of the court below.

(2024) 8 ILRA 1334
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE MOHD. AZHAR HUSAIN IDRISI, J.

Criminal Misc. Writ Petition No. 5280 of 2023
And
Criminal Misc. Writ Petition No. 2140 of 2023

Ravi Mohan & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Himadri Batra, Sr. Advocate

Counsel for the Respondents:
G.A., Subir Lal, Swetashwa Agarwal

Allegations of siphoning off of the funds, the informant company and the companies of accused - in a joint venture, have taken loan from DMI Finance and raised the construction. As there are allegations of forging documents and extending threat to the Directors of the informant company which are disputed by the accused on basis of defence documents which cannot be taken in consideration at this stage as well as the F.I.R. qua accused cannot be quashed at this stage. Informant company wanted to avoid repayment of loan. Mediation proceedings failed. Considering the facts, Criminal Misc. 5280 of 2023 as well as Criminal Misc. Writ Petition No. 2140 of 2023 are decided. In the later petition, the impugned order as well as the impugned F.I.R. are quashed.

Whereas, the former petition stands dismissed. (E-9)

List of Cases cited:

1. M.N.G. Bharateesh Reddy Vs Ramesh Rangnathan & anr., (2022) 16 SCC 210

2. Lalit Chaturvedi & ors.Vs St. of Uttar Pradesh & anr., 2024 SCC OnLine SC 171

3. Maksud Saiyed Vs St. of Guj. & ors., (2008) 5 SCC 668

4. Thermax Limited & ors.Vs K.M. Johny & ors., (2011) 13 SCC 412

5. Priyanka Shrivastava & anr. Vs St. of U.P. & ors., (2015) 6 SCC 287

6. Babu Venkatesh & ors.Vs St. of Karn. & ors., (2022) 5 SCC 639

7. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 355

8. Priti Saraf Vs St. (NCT of Delhi) (2021) 16 SCC 142

9. Court in Trisuns Chemical Industry Vs Rajesh Agarwal & ors., (1999) 8 SCC 686

10. Court in Shri Krishna Agencies Vs St. of A.P., (2009) 1 SCC 69

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. By this judgment, Criminal Misc. 5280 of 2023 as well as Criminal Misc. Writ Petition No. 2140 of 2023 are decided as both the petitions arise out of same impugned First Information Report dated 21.11.2022 registered as Case Crime No. 486 of 2022 at Police Station – Sector 113, Commissionerate, Gautam Buddha Nagar, Uttar Pradesh under Sections 406, 409, 420, 467, 468, 471, 504 and 506 of IPC as well as the impugned order passed by the Chief Judicial Magistrate, Gautam Buddh Nagar dated 17.12.2022 directing to register the F.I.R.

2. It is worth noticing that these petitions are pending since 2023 and a coordinate Bench of this Court reserved the judgment on 25.7.2023. However, subsequently on 25.9.2023, the case was again relisted for arguments. Thereafter, the case was listed before another Bench and vide order dated 8.4.2024, the arrest of the petitioners was stayed. On 27.7.2024, again the case was listed before another Bench which passed an order of rescuel and as per the order of Hon'ble the Chief Justice dated 29.7.2024, this case is directed to be listed before this Bench.

3. Arguments were heard and judgment was reserved on 22.08.2024.

4. It is also worth noticing that though detailed petitions as well as detailed replies have been filed relying upon the number of documents and arguments were heard at length from both the sides, however, in view of the settled principle of law that a petition for quashing of F.I.R. is to be decided on the contents of the F.I.R., this judgment is based upon the documents relied upon by the informant as noticed in the impugned order dated 17.12.2022 passed by the Chief Judicial Magistrate, Gautam Buddh Nagar directing the police to register the F.I.R. as well as the contents of the F.I.R. and the affidavit filed by the informant in response to the quashing petitions.

5. Brief facts of the case are that the informant-M/s Abhi Compusoft Private Limited (hereinafter referred to as "informant company") filed a complaint under Section 156 (3) Cr.P.C. before the Chief Judicial Magistrate, Gautam Buddh Nagar. In the complaint, eight persons were nominated as accused who are referred to as A-1 to A-8 as per the memo of the parties in the complaint as well as name of the accused in the F.I.R. in the same sequence.

6. The complaint which forms basis of registration of the impugned F.I.R. reads as under :

"न्यायालय श्रीमान अपर मुख्य न्यायिक मजिस्ट्रेट प्रथम, गौतमबुद्धनगर

प्रार्थना-पत्र संख्या- 586/22 सन्-2022

हर्षित सिंह पुत्र स्व० श्री अजीत सिंह, निवासी- फ्लैट संख्या-1101, आनन्द टावर,गृह प्रवेश सोसायटी, सेक्टर-77, नोएडा, जनपद गौतमबुद्धनगर (उ०प्र०)। ... प्रार्थी

बनाम

1. रवि मोहन सेठी, चेयरमैन ओमेगा इन्फोविजन प्रा०लि० स्टेलर ग्रुप, निवासी- ए-44, सेक्टर-17, नोएडा, गौतमबुद्धनगर (उ०प्र०)।

2. अक्षय मोहन सेठी पुत्र रवि मोहन सेठी, निवासी- ए-44, सेक्टर-17, नोएडा, गौतमबुद्धनगर (उ०प्र०)।

3. हिमांशू माथुर, पुत्र जसवन्त कुमार माथुर, पता गोल्फ लिंक्स, वी-33, पाकेट-ए, महरौली, गाजियाबाद (उ०प्र०)।

4. अरविन्द कुमार सिंह, पुत्र सरजू प्रसाद सिंह, पता एच-402, प्लाट संख्या-जीएच-02, स्टेलरजीवन, सेक्टर-1, हबीबपुर, ग्रेटर नोएडा-वेस्ट, गौतमबुद्धनगर (उ०प्र०)।

5. शिवाशीष चटर्जी, पुत्र नामालूम, प्रतिनिधि डी०एम०आई० फाइनेन्स कम्पनी प्रा०लि० एक्सप्रेसवे, बिल्डिंग फ्लोर 9 व 10 बहादुर शाह जफर, मार्ग नई दिल्ली-110002

6. युवराज चाणक्य सिंह पुत्र नामालूम, प्रतिनिधि डी०एम०आई० फाईनेन्स कम्पनी प्रा०लि०, एक्सप्रेसवे, बिल्डिंग फ्लोर 9व 10 बहादुर शाह जफर, मार्ग नई दिल्ली-110002

7. विवेक गुप्ता, प्रतिनिधि डी०एम०आई फाइनेन्स कम्पनी प्रा०लि०, एक्सप्रेसवे, बिल्डिंग फ्लोर 9 व 10 बहादुर शाह जफर, मार्ग नई दिल्ली 110002

8. पुनिन्दर भाटिया, प्रतिनिधि डी०एम०आई फाइनेन्स कम्पनी प्रा०लि०,एक्सप्रेसवे, बिल्डिंग फ्लोर 9 व 10 बहादुर शाह जफर, मार्ग नई दिल्ली-110002

... अभियुक्तगण

अं० धारा-406,409,420,467, 468,471,504,506 आईपी०सी०

थाना- सेक्टर-113,नोएडा।

प्रार्थना-पत्र अन्तर्गत धारा- 156(3)

सीआरपी०सी०ः-

श्रीमान जी,

निवेदन है कि मैं प्रार्थी हर्षित सिंह, पुत्र स्व० श्री अजीत सिंह, मैसर्स अभी कम्पूसाफ्ट प्रा०लि० का डायरेक्टर हूँ तथा फ्लैट संख्या-1001, आनन्द टावर, गृह प्रवेश सोसायटी, सेक्टर-77, नोएडा, जिला गौतमबुद्धनगर का निवासी हूँ। प्रार्थी की कम्पनी को मार्च-2017 में स्क्वायर इन्फ्रास्ट्रक्चर प्रा०लि० कम्पनी ने 85 प्रतिशत शेयर आवंटित किये तथा तथा 10 प्रतिशत शेयर प्रार्थी की कम्पनी के डायरेक्टर श्री अभिषेक यश त्यागी के परिचित स्टेलर ग्रुप के चेयरमैन श्री रवि. मोहन सेठी पुत्र नामालूम व अक्षय मोहन सेठी पुत्र रवि मोहन सेठी निवासी- ए-44, सेक्टर-17, नोएडा को भई आवंटित किये तथा 05 प्रतिशत शेयर कम्पनी के पूर्व निदेशक श्री विजय कुमार जैन एवं श्री अरिहन्त जैन के पास रहे। स्क्वायर इन्फ्रास्ट्रक्चर प्रा०लि० कम्पनी भू-खण्ड संख्या-11 व 12 क्षेत्रफल 10002.50 वर्ग मीटर, सेक्टर-127, नोएडा की आवंटी थी। स्क्वायर इन्फ्रास्ट्रक्चर प्रा०लि० कम्पनी के 85 प्रतिशत शेयर आवंटित होने के बाद उक्त वर्णित भू-खण्ड संख्या-11 व 12 क्षेत्रफल 10002.50 वर्ग मीटर, सेक्टर-127, नोएडा पर भी प्रार्थी की कम्पनी ने कब्जा ले लिया, तभी उक्त भू-खण्डों पर आफिस बिल्डिंग प्रोजेक्ट बनाने हेतु रवि मोहन सेठी व अक्षय मोहन सेठी द्वारा जाइन्ट वेन्चर के प्रस्ताव के साथ श्री अभिषेक यश त्यागी से मुलाकात की गयी। उन्होंने बताया कि उनके ग्रुप को इस कार्य में महारत हासिल है और उनके पार्टनर डी०एम०आई फाइनेन्स प्रा०लि० एक्सप्रेस बिल्डिंग, थर्ड फ्लोर, 9-10, बहादुर शाह जफर मार्ग, नई दिल्ली-110002, से लोन भी मिल सकता है यदि उनकी कुछ शर्ते मान ली जायें। तभी डी०एम०आई फाइनेन्स प्रा०लि० कम्पनी के अधिकृत प्रतिनिधि शिवाशीष चटर्जी पुत्र नामालूम, युवराज चाणक्य सिंह पुत्र नामालूम, विवेक गुप्ता पुत्र नामालूम व पुनिन्दर भाटिया पुत्र नामालूम ने साजिश करके रवि मोहन सेठी, अक्षय मोहन सेठी, हिमांशी माथुर के साथ मिली-भगत करके रवि मोहन सेठी एवं अक्षय मोहन सेठी के माध्यम से श्री अभिषेक यश त्यागी को यह विश्वास दिलाया कि यदि बैंकिंग के अधिकृत हस्ताक्षरी व मैसर्स स्क्वायर प्रा०लि० कम्पनी के बोर्ड मैनेजमेन्ट के समस्त अधिकार स्टेलर ग्रुप की मैसेर्स ओमेगा इन्फोविजन को दे दिये जायें, तो डी०एम०आई फाईनेन्स कम्पनी 55 करोड रूपये का लोन दे देगी, जिसकी वापसी का प्रबन्ध भी स्टेलर ग्रुप द्वारा किया जायेगा, प्रोजेक्ट के पहली फेज का निर्माण 18 माह में पूर्ण किया जायेगा, निर्माण के दौरान ही बड़ी-बड़ी कम्पनियों को चढ़वाने के एग्रीमेंट करवाने का बिजनस प्लान दिया गया तथा इस फेज की बिल्डिंग से ही 2 करोड़ रूपये प्रति माह की आमदनी का प्रलोभन भी दिया गया। श्री अभिषेक यश त्यागी ने इन लोगों की बात पर विश्वास कर लिया और स्टेलर ग्रुप की कम्पनी ओमेगा इन्फोविजन प्रा०लि० व स्क्वायर इन्फ्रास्ट्रक्चर प्रा०लि० के साथ दिनांक 23.05.2018 को शेयर होल्डर्स एग्रीमेन्ट निष्पादित किया, जिसमें प्रार्थी की कम्पनी ने स्टेलर ग्रुप की कम्पनी ओमेगा इन्फोविजन प्रा०लि० को उक्त भू-खण्ड पर बिल्डिंग बनाने हेतु डी०एम०आई फाइनेन्स प्रा०लि० से लोन लेने की बातचीत प्रारम्भ करने एवं आगे की कार्यवाही करने हेतु अधिकृत किया, कम्पनी का मेनेजमेंट दिया तथा निर्माण के लिए कान्ट्रेक्टर तय करने का अधिकार दिया। इसी क्रम में रवि मोहन सेठी, अक्षय मोहन सेठी, हिमांशु, माथुर, अरविन्द कुमार सिं व डी०एम०आई फाइनेन्स प्रा०लि० के अधिकृत प्रतिनिधियों शिवाशीष चटर्जी, युवराज चाणक्य सिंह, विवेक गुप्ता व पुनिन्दर भाटिया के आश्वासनो पर श्री अभिषेक यश त्यागी ने अपनी अभी कम्पूसाफ्ट प्रा०लि० कम्पनी के 85 प्रतिशत शेयर होल्डर होने के बावजूद भी 10 प्रतिशत शेयर होल्डर सेट्लर ग्रुप की कम्पनी ओमेगा इन्फोविजन प्रा०लि० के चेयरमैने रवि मोहन सेठी व निदेशक अक्षय मोहन सेठी के कहने पर हिमांशु माथुर व अरविन्द कुमार सिंह को स्क्वायर इन्फ्रास्ट्रक्चर प्रा०लि० के समस्त अधिकार दे दिये, तभी रवि मोहन सेठी, अक्ष्य मोहन सेठी, हिमांशु माथुर, अरविन्द कुमार सिंह व डी०एम०आई फाइनेन्स प्रा०लि० के अधिकृत प्रतिनिधियों शिवाशीष चटर्जी, युवराज चाणक्य सिंह, विवेक गुप्ता व पुनिन्दर भाटिया ने एक फर्जी एवं कूटरचित दस्तावेज डी०एम०आई फाइनेन्स प्रा०लि० कम्पनी का फाइनल सेंक्शन लेटर दिनांकित 02.05.2018 तैयार किया तथा एक फर्जी एवं कूटरचित वर्क आर्डर दिनांक 02.04.2018 की तिथि में तैयार करके मैसर्स की-स्टोन डवलपर्स प्रा०लि० को 53,55,70,000/- रूपये में बिल्डिंग बनाने का कान्ट्रेक्ट तय करके एक फर्जी एवं कूटरिचत पत्र जारी कर दिया, जिसकी जानकारी प्रार्थी को तब हुई जब इन लोगो ने एग्रीमेन्ट के अनुसार कार्य नही किया। स्टेलर ग्रुप के निदेशक रवि मोहन सेठी, अक्षय मोहन सेठी, हिमांशु माथुर व अरविन्द कुमार सिंह ने वर्ष 2018 में ही कोटेक महिन्द्रा बैंक, सेक्टर-16, नोएडा में खाता खोला तथा डी०एम०आई फाइनेन्स प्रा०लि० कम्पनी से मार्च-2020 तक 58 करोड रूपये उक्त खाते में विभिन्न किस्तों में ट्रांसफर कराया तथा सितम्बर, अक्टूबर 2021 में भारत सरकार द्वारा कोविड-19 महामारी के दौरान शुरु की गयी ई०सी०एल०जी०एस० स्कीम (इमरजेन्सी क्रेडिट लाइन गारण्टी स्कीम) के तहत 09 करोड़ 80 लाख रूपये अतिरिक्त उक्त कोटेक महिन्द्रा बैंक खाते में डी०एम०आई फाइनेन्स प्रा०लि० कम्पनी से ट्रांसफर करा लिये। उक्त

मोहन सेठी, अक्षय मोहन सेठी, हिमांशु माथुर व अरविन्द कुमार सिंह ने बिल्डिंग बनाने का कार्य पूरा नही किया, जो कि उनको 18 महीने में पूरा करना था तथा फर्जी कागजात तैयार करके नोएडा प्राधिकरण से कम्पलीशन प्रमाण – पत्र भी ले लिया तथा 67 करोड़ 80 लाख रूपये डी०एम०आई फाइनेन्स प्रा०लि० से प्राप्त कर लिया। प्रार्थी को ज्ञात हुआ कि मैसर्स की-स्टोन डवलपर्स प्रा०लि० के एम०डी० रवि मोहन सेठी व डायरेक्टर हिमांशु माथुर ही हैं तथा हिमांशु माथुर व अक्षय मोहन सेठी सागर टेक्नोसिटी प्रा०लि० कम्पनी के डायरेक्टर हैं तथा सागर टेक्नोसिटी प्रा०लि० में स्टेलर ग्रुप व डी०एम०आई ग्रुप आपस में पार्टनर हैं। लोन की शर्तो के अनुसार मैसर्स की-स्टोन प्रा०लि० अथवा डी०एम०आई फाईनेन्स प्रा०लि० को लोन से प्राप्त धनराशि से कोई भी भुगतान नही किया जा सकता था परन्तु डी०एम०आई फाईनेन्स प्रा०लि० एवं स्टेलर ग्रुप के इन लोगों की मिलीभगत से यह घपला होता रहा। डी०एम०आई फाइनेन्स प्रा०लि० के प्रतिनिधि शिवाशीष चटर्जी, युवराज चाणक्य सिंह, विवेक गुप्ता, पुनिन्दर भाटिया, रवि मोहन सेठी, अक्षय मोहन सेठी, हिमांशु माथुर व अरविन्द कुमार सिंह ने साजिश करके फर्जी एवं कूटरचित दस्तावेज तैयार करके 67 करोड़ 80 लाख रूपये स्क्वायर इन्फ्रास्ट्रक्चर प्रा०लि० कम्पनी के खाते में ट्रांसफर करके गबन कर लिया है तथा एग्रीमेंटके अनुसार बिल्डिंग का कार्य पूरा नही किया है। इन लोगों की शुरु से ही बुरी नियत प्रार्थी की कम्पनी की जमीन हड़पने की थी और इनकी मिलीभगत के तहत रवि मोहन सेठी ने बिना लोन के डिफाल्ट हुऐ जमीन हड़पने के लिए अपनी ओर से ही अपने पार्टनर डी०एम०आई प्रा०लि० को पत्र लिख दिया जिससे इनकी मंशा साफ दिखाई पड़ती है। जब प्रार्थी ने दिनांक 05.11.2022 को इनसे कहा कि आपने 67 करोड़ 80 लाख रूपये कहां खर्च किये हैं, क्योंकि बिल्डिंग अभी अधूरी है, तो इन्होंने प्रार्थी को जाने से मारने व बुरा अंजाम भुगतने की धमकी दी, जिसकी सूचना प्रार्थी ने तुरन्त थाना हाजा पर दी, किन्तु उन्होंने कोई कार्यवाही नही की, जिससे प्रार्थी व उसके परिवार को जान माल का खतरा उत्पन्न हो गया है। प्रार्थी द्वारा श्रीमान पुलिस आयुक्त गौतमबुद्धनगर को भी एक प्रार्थना-पत्र रजिस्टर्ड डाक के माध्यम से प्रेषित किया गया, किन्तु उस पर भी कोई कार्यवाही नही की गई है। विवश होकर प्रार्थी माननीय न्यायालय के समक्ष प्रार्थना-पत्र प्रस्तुत कर रहा है।

अतः श्रीमान जी से विनम्र निवेदन है कि स्टेलर ग्रुप की कम्पनी ओमेगा इन्फोविजन प्रा०लि० के चेयरमैने रवि मोहन सेठी, अक्ष्य मोहन सेठी, हिमांशू माथुर, अरविन्द कुमार सिंह व डी०एम०आई फाईनेन्स कम्पनी के शिवाशीष चटर्जी, युवराज चाणक्य सिंह, विवेक गुप्ता व पुनिन्दर भाटिया के विरूद्ध फर्जी एवं कूटरचित दस्तावेज तैयार करके 67 करोड़ 80 लाख रूपये हड़पने व प्रार्थी को जान से मारने की धमकी देने के जुर्म में प्रार्थी की रिपोर्ट दर्ज कर कानूनी कार्यवाही करने की कृपा करें।

दिनांकः- 13/12/2022

प्रार्थी

हर्षित सिंह "

7. The Court of Chief Judicial Magistrate, Gautam Buddh Nagar on 17.12.2022 passed the following order :

"दिनांकः 17-12-2022

पत्रावली पेश हुई। प्रार्थना पत्र अन्तर्गत धारा-156(3) दं०प्रसं० पर आवेदक के विद्वान अधिवक्ता को पूर्व नियत तिथि सुना गया। पत्रावली का
सम्यक अवलोकन किया।

आवेदक हर्षित सिंह द्वारा प्रार्थना पत्र मय शपथ-पत्र अन्तर्गत धारा-156(3) दं०प्र०सं० में संक्षेपतयह कथन किया गया है कि प्रार्थी हर्षित सिंह मैसर्स अभी कम्पूसाफ्ट प्रा०लि० का डायरेक्टर हूँ। प्रार्थी की कम्पनी को मार्च-2017 में स्क्वायर इन्फ्रास्ट्रक्चर प्रा०लि० कम्पनी ने 85 प्रतिशत शेयर आवंटित किये तथा 10 प्रतिशत शेयर प्रार्थी की कम्पनी के डायरेक्टर श्री अभिषेक यश त्यागी के परिचित स्टेलर ग्रुप के चेयरमैने श्री रवि मोहन सेठी पुत्र नामूलम व अक्षय मोहन सेठी पुत्र रवि मोहन सेठी निवासी-ए-44, सैक्टर 17, नोएडा को भी आवंटित किये तथा 05 प्रतिशत शेयर कम्पनी के पूर्व निदेशक श्री विजय कुमार जैन एवं श्री अरिहन्त जैन के पास रहे। प्रार्थी की कम्पनी ने कब्जा ले लिया, तभी उक्त भू-खण्डों पर आफिस बिल्डिंग प्रोजेक्ट बनाने हेतु रवि मोहन सेठी व अक्षय मोहन सेठी द्वारा जाइन्ट वेन्चर के प्रस्ताव के साथ श्री अभिषेक यश त्यागी से मुलाकात की गयी व मैसर्स स्क्वायर प्रा०लि० कम्पनी के बोर्ड मैनेजमेन्ट के समस्त अधिकार स्टेलर ग्रुप की मैसर्स ओमेगा इन्फोविजन को दे दिये। स्टेलर ग्रुप की कम्पनी ओमेगा इन्फोविजन प्रा०लि० व स्कवायर इन्फ्रास्ट्रक्चर प्रा०लि० कम्पनी के साथ दिनांक 25.05.2018 को शेयर होल्डर्स एग्रीमेन्ट निष्पादित किया, जिसमें प्रार्थी की कम्पनी ने स्टेलर ग्रुप की कम्पनी ओमेगा इन्फोविजन प्रा०लि० को उक्त भू-खण्ड पर बिल्डिंग बनाने हेतु डी०एम०आई फाईनेन्स प्रा०लि० से लोन लेने की बातचीत प्रारम्भ करने एवं आगे की कार्यवाही करने हेतु अधिकृत किया। कम्पनी का फाइनल सेक्शन लेटर दिनांकित 02.05.2018 तैयार किया तथा एक फर्जी एवं कूटरचित वर्क आर्डर दिनांक 02.04.2018 की तिथि में तैयार करके मैसर्स की-स्टोन डवलपर्स प्राधिकरण को 53,55,70,000/रूपये में बिल्डिंग

बनाने का कान्ट्रेक्ट तय करके एक फर्जी एवं कूटरचित पत्र जारी कर दिया। एवं साजिश करके फर्जी एवं कूटरचित दस्तावेज तैयार करके 67 करोड़ 80 लाख रूपये इन्फ्रास्ट्रक्चर प्रा०लि० कम्पनी के खाते में ट्रांसफर करके गबन कर लिया है तथा एग्रीमेंट के अनुसार बिल्डिंग का कार्य पूरा नही किया है।

संबंधित थाने की आख्या के अनुसार प्रार्थना पत्र अन्तर्गत धारा-156(3) दं०प्र०सं० में कथित तथ्यों के सन्दर्भ में कोई अभियोग पंजीकृत नही है।

कथन के समर्थन में वादी के आधार कार्ड की छाया प्रति व पुलिस आयुक्त को दिये गये प्रार्थनापत्र की छाया प्रति व रजिस्टर्ड डाक की रसीद, शेयर होल्डर्स एग्रीमेन्ट दिनांक 23.05.18 की प्रतिलिपि फाईनेन्स सेक्शन लेटर्स दिनांक 2.05.2018 की प्रतिलिपि की स्टोन डवलपर्स प्रा०लि० को जारी वर्क आर्डर दिनांक 2.04.18 की प्रतिलिपि, बैंक स्टेटमेन्ट व इत्यादि दस्तावेज प्रस्तुत किये गये हैं।

प्रस्तुत प्रकरण में प्रार्थी द्वारा प्रार्थना -पत्र में किए गए अभिकथनों से प्रस्तुत प्रकरण में प्रथम दृष्टया संज्ञेय अपराध के तत्व उद्घटित होता है। मामले में प्रथम सुचना रिपोर्ट पंजीकृत कराकर विवेचना कराया जाना न्यायोचित एवं विधिसम्मत प्रतीत हो रहा है। तद्नुसार प्रार्थी द्वारा प्रार्थनापत्र अन्तर्गत धारा 156(3) दण्ड प्रक्रिया संहिता स्वीकार किए जाने योग्य है।

आदेश

आवेदक द्वारा प्रस्तुत प्रार्थनापत्र अन्तर्गत धारा-156(3) दण्ड प्रक्रिया संहिता स्वीकार किया जाता ***सम्बन्धित थानाध्यक्ष, थाना-सैक्टर-113, नोएडा*** *को आदेशित किया जाता है कि वह प्रस्तुत प्रकरण में सुसंगत धाराओं में अभियोग पंजीकृत कर विधिनुसार अन्वेषण कराना सुनिश्चित करे।* ***आदेश के अनुपालन की सूचना अन्दर सात दिवस न्यायालय में प्रस्तुत करे"***

8. Two sets of petitioners i.e. A-1 to A-4 have filed Criminal Misc. Writ Petition No. 5280 of 2023 and A-5 to A-8 have filed Criminal Misc. Writ Petition No. 2140 of 2023. Counter affidavits on behalf of informant company are also filed. Both the parties have also submitted their written submissions.

9. Heard Sri Gopal Swaroop Chaturvedi learned Senior Advocate, Sri Dileep Kumar, learned Senior Advocate assisted by Mr. Vipul Ganda and Mr. Vinayak Mittal, learned counsel for the petitioners in Criminal Misc. Writ Petition No. 2140 of 2023 and Sri Manish Tiwari assisted by Ms. Himadri Batra, learned counsel for the petitioners in Criminal Misc. Writ Petition No. 5280 of 2023. We have also heard Mr. Swetashwa Agarwal and Sri Subir Lal, learned counsel for the informant and learned A.G.A. for the State.

10. Learned Senior counsel for the petitioners in Criminal Misc. Writ Petition No. 2140 of 2023 has argued that petitioner (A-5) is the Vice President of DMI Finance Private Limited (herein after referred to as 'DMI/lender company'). Petitioners (A-6 to A-8) are the Joint Managing Directors, Head of real estate of the lender company.

11. Learned Counsel for the petitioners in Criminal Misc. Writ Petition No. 5280 of 2023 has submitted that petitioner (A-1) is the Director of Omega Infovision Private Limited and Chairman of Stellar Group. Whereas petitioners (A-2 to A-4) are the are the former Directors of Square Infrastructure Private Limited (Borrower Company).

12. The undisputed facts as emerged from the F.I.R. are as under :

A. The informant company took over 85% shareholding of M/s Square Infrastructure Private Limited in the name of M/s Abhi Compusoft Private Limited. 10% shares were allotted to (A-1) who was Director, Omega Infovision Private Limited and Chairman of Stellar Group and remaining 5% shares remained with the former Directors of M/s Square Infrastructure Company Limited i.e. Arihant Jain and Vijay Kumar Jain. The Company- Square Infrastructure Private Limited was allotted plot No. 11 & 12

having area of 10002.50 sq. metres in Sector 127, NOIDA, Uttar Pradesh.

B. Informant company and the accused in their capacity of office bearers of their respective company came with a proposal of joint venture of construction for which, the DMI/lender company agreed to provide finance.

C. A work order dated 2.4.2018 was executed and M/s Keystone Developers Private Limited (Contractor Company) was allotted the work order and amount of Rs.53,55,70,000/- for construction of the building on the name of Square Infrastructure Private Limited (Borrower Company).

D. On 23.5.2018, a share holders agreement as relied upon by informant in the impugned order and F.I.R. was entered into between the parties for construction of building.

A sanction letter dated 2.5.2018 of DMI Finance was also executed between informant company and (A-1 to A-8) who also signed a formal agreement on 23.5.2018 and the aforesaid amount was transferred in favour of the borrower company. The work order was to be executed by the contractor company.

E. It is also an admitted case that during construction period, due to Covid 19, the government floated an Emergency Credit Line Guarantee Scheme (hereinafter referred to as 'ECLGS') and additional amount of Rs.9,80,00,000/- was transferred by DMI Finance in the account of the creditor company as per a subsequent loan agreement dated 28.06.2021 executed between the parties.

13. The F.I.R. has been registered on the following grounds :

(i) In premeditated conspiracy hatched by DMI/ Lender Company and the Contractor Company, the work order was awarded to their subsidiary company even before the formal loan agreement was signed with the informant company and undue benefit has been given to the creditor company.

(ii) Sanction letter dated 2.4.2018 is also a forged document as the work order has been allotted prior to the sanctioning of the loan.

(iii) The amount of loan under the agreement dated 23.5.2018 was transferred to Omega Infovision Priviate Limited which is a subsidiary of Stellar Group and the same is in violation of the clause in the loan agreement "End Use Restriction" which mandated that funds are to be used for the project construction and development only.

(iv) Despite transfer of additional funds by DMI Finance, no actual construction was performed at the project site and the additional amount was misappropriated by the lender company.

(v) Threats were extended to Directors of the informant company.

14. In view of the facts as noticed from the F.I.R. itself, the learned senior counsel for the petitioners (A-5 to A-8) has argued that the accused persons are in fact Managing Director/Directors of DMI Finance which has parted away huge amount of money to the creditor company and with a mala fide intention not to repay the loan, the present F.I.R. has been registered by the informant company though the construction has been completed and the completion certificate has been issued by NOIDA Development Authority and it is admitted case of the informant company that the possession of the plot was handed over to the informant company at the time of transfer of 85% shares as stated in the F.I.R. itself.

15. Reliance is placed upon the photograph of the projects wherein specific stand is taken by the petitioner that informant company itself is having its office on the entire seventh floor of the building which stands completed.

16. It is thus argued that the allegation in the F.I.R. that the amount financed by DMI Finance which belong to (A-5 to A-8) was never used for construction of the building which was still lying incomplete, is palpably wrong as the informant company has adopted a novel method not to repay the loan amount by invoking the criminal proceedings against the petitioners.

17. It is next argued that the second ground taken in the F.I.R. that the work order was issued prior to the sanctioning of the loan, do not not disclose commission of any offence as present F.I.R. has been registered only after completion of the construction. It is submitted that it is only after the work order was allotted, the cost of construction was estimated, and thereafter the loan got sanctioned with the consent of the informant company.

18. Learned counsel has referred to the sanction letter dated 2.4.2018 and agreement dated 23.5.2018 relied upon by the informant itself in the F.I.R. to submit that the same has been signed by the authorized representative of informant company as well. It is argued that once this agreement was acted upon between the parties and the construction was raised with the consent of the informant, the registration of the F.I.R. with the allegation that this agreement is an outcome of fraud, is patently wrong.

19. It is next argued that allegation that DMI Finance has sanctioned the loan on higher rate of interest i.e. 16% also does not constitute any offence as rate of interest was agreed on between the parties. It is submitted that the DMI Finance is a non banking finance company and the rate of interest was agreed between the parties under a written agreement for which, the informant has civil rights.

20. It is next argued that from the bare perusal of the F.I.R., no offence under Section 420 of IPC is made out as DMI Finance has only advanced loan which has to be repaid by the informant company, once the same has been utilized by the informant company and construction is completed. No offence under Sections 406 & 409 of IPC is made out.

21. It is also argued that even no offence under Sections 467, 468 & 471 of IPC is made out as allegation that the work order dated 2.4.2018 was issued by Square Infrastructure Private Limited to its subsidiary Stellar Group called M/s Keystone Developer as a contractor whereas shareholder agreement was executed on 23.5.2018 also do not constitute any such offence. The work order dated 2.4.2018 was within the knowledge of the informant company which executed the shareholder agreement on 23.5.2018.

22. It is submitted that after the construction has been completed, the informant company cannot raise an argument that work order dated 2.4.2018 is a forged document as completion certificate is admittedly issued by the Authority.

23. The Counsel further submits that offence under Section 504 & 506 of IPC are also not made out as there are general allegations of passing derogatory or

insulting comments or extending threat to the informant and these allegations do not relate to (A-5 to A-8).

24. It is next argued that there is arbitration clause 11.1 in the loan agreement which is executed by the borrower company, guarantors, promoters as well as the DMI Finance. Clause 11.1 clearly provides that any dispute arising out of the agreement will be referred to sole arbitrator to be appointed by the lender company.

25. It is submitted that a purely commercial transaction is converted into criminal litigation just to put pressure on the petitioners.

26. Learned counsel has referred to the judgment of the Supreme Court in **M.N.G. Bharateesh Reddy vs. Ramesh Rangnathan and another, (2022) 16 SCC 210** wherein the Supreme Court has held as under :

"12. The ingredients of the offence of cheating are spelt out in Section 415 of the IPC. Section 415 is extracted below:

"415. Cheating *— Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat". Explanation — A dishonest concealment of facts is a deception within the meaning of this section."*

13. The ingredients of the offence under Section 415 emerge from a textual reading. Firstly, to constitute cheating, a person must deceive another. Secondly, by doing so the former must induce the person so deceived to :

(i) deliver any property to any person; or (ii) to consent that any person shall retain any property; or (iii) intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived and such an act or omission must cause or be likely to cause damage or harm to that person in body, mind, reputation or property.

14. Section 420 deals with cheating and dishonestly inducing delivery of property. It reads as follows:

"420. Cheating and dishonestly inducing delivery of property *– Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being capable of converting into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

15. In Hridaya Ranjan Prasad Verma v. State of Bihar4 , a two-judge bench of this Court interpreted sections 415 and 420 of IPC to hold that fraudulent or dishonest intention is a precondition to constitute the offence of cheating. The relevant extract from the judgment reads thus:

"14. On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced

fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

15. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent 4 (2000) 4 SCC 168 4 conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed." (emphasis supplied)

16. In Dalip Kaur v. Jagnar Singh5 a two-judge bench of this Court held that a dispute arising out of a breach of contract would not amount to an offence of cheating under section 415 and 420. The relevant extract is as follows:

"9. The ingredients of Section 420 of the Penal Code are: *"(i) Deception of any persons; (ii) Fraudulently or dishonestly inducing any person to deliver any property; or (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit."*

10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Penal Code. (See Ajay Mitra v. State of M.P. [(2003) 3 SCC 11 : 2003 SCC (Cri) 703])" (emphasis supplied)

17. Applying the above principles, the ingredients of Sections 415 and 420 are not made out in the present case. The grievance of the first respondent arises from the termination of his services at the hospital. The allegations indicate that there was an improper billing in respect of the surgical services which were rendered by the complainant at the hospital. At the most, the allegations allude to a breach of terms of the Consultancy Agreement by the Appellant, which is essentially in the nature of a civil dispute.

18. The allegations in the complaint are conspicuous by the absence of any reference to the practice of any deception or dishonest intention on behalf of the Appellant. Likewise, there is no allegation that the complainant was as a consequence induced to deliver any property or to consent that any person shall retain any property or that he was deceived to do or omit to do anything which he

would have not done or omitted to do if he was not so deceived. The conspicuous aspect of the complaint which needs to be emphasized is that the ingredients of the offence of cheating are absent in the averments as they stand.

19. Section 405 of the IPC deals with criminal breach of trust and reads as follows:

"405. Criminal breach of trust *– Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made 5 (2009) 14 SCC 696 5 touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust"." The offence of criminal breach of trust contains two ingredients: (i) entrusting any person with property, or with any dominion over property; and (ii) the person entrusted dishonestly misappropriates or converts to his own use that property to the detriment of the person who entrusted it.*

20. In Anwar Chand Sab Nanadikar v. State of Karnataka6 a two-judge bench restated the essential ingredients of the offence of criminal breach of trust in the following words:

"7. The basic requirement to bring home the accusations under Section 405 are the requirements to prove conjointly (1) entrustment, and (2) whether the accused was actuated by the dishonest intention or not misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime."

21. In Vijay Kumar Ghai v. State of West Bengal7 another two-judge bench held that entrustment of property is pivotal to constitute an offence under section 405 of the IPC. The relevant extract reads as follows:

"28. "Entrustment" of property under Section 405 of the Penal Code, 1860 is pivotal to constitute an offence under this. The words used are, "in any manner entrusted with property". So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of "trust". A person who dishonestly misappropriates property entrusted to them contrary to the terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code."

22. None of the ingredients of the offence of criminal breach of trust have been demonstrated on the allegations in the complaint as they stand. The first respondent alleges that the Appellant caused breach of trust by issuing grossly irregular bills, which adversely affected his professional fees. However, an alleged breach of the contractual terms does not ipso facto constitute the offence of the criminal breach of trust without there being a clear case of entrustment. No element of entrustment has been prima facie established based on the facts and circumstances of the present matter. Therefore, the ingredients of the offence of criminal breach of trust are ex facie not made out on the basis of the complaint as it stands."

27. Reliance has also been placed on the decision in **Lalit Chaturvedi and Others Vs. State of Uttar Pradesh and another, 2024 SCC OnLine SC 171**, wherein, the Supreme Court has held as under :

5. This Court, in a number of judgments, has pointed out the clear distinction between a civil wrong in the form of breach of contract, non-payment of money or disregard to and violation of the contractual terms; and a criminal offence under Sections 420 and 406 of the IPC. Repeated judgments of this Court, however, are somehow overlooked, and are not being applied and enforced. We will be referring to these judgments. The impugned judgment dismisses the application filed by the appellants under Section 482 of the Cr. P.C. on the ground of delay/laches and also the factum that the chargesheet had been filed on 12.12.2019. This ground and reason is also not valid.

6. In "Mohammed Ibrahim v. State of Bihar"4, this Court had referred to Section 420 of the IPC, to observe that in order to constitute an offence under the said section, the following ingredients are to be satisfied:—

"18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows:

(i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission;

(ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.

19. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived

(i) to deliver any property to any person, or

(ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security)."

7. Similar elucidation by this Court in "V.Y. Jose v. State of Gujarat"5, explicitly states that a contractual dispute or breach of contract per se should not lead to initiation of a criminal proceeding. The ingredient of 'cheating', as defined under Section 415 of the IPC, is existence of a fraudulent or dishonest intention of making initial promise or representation thereof, from the very beginning of the formation of contract. Further, in the absence of the averments made in the complaint petition wherefrom the ingredients of the offence can be found out, the High Court should not hesitate to exercise its jurisdiction under Section 482 of the Cr. P.C. Section 482 of the Cr. P.C. saves the inherent power of the High Court, as it serves a salutary purpose viz. a person should not undergo harassment of litigation for a number of years, when no criminal offence is made out. It is one thing to say that a case has been made out for trial and criminal proceedings should not be quashed, but another thing to say that a person must undergo a criminal trial despite the fact that no offence has been made out in the complaint. This Court in V.Y. Jose (supra)

placed reliance on several earlier decisions in "Hira Lal Hari Lal Bhagwati v. CBI"6, "Indian Oil Corporation v. NEPC India Ltd."7, "Vir Prakash Sharma v. Anil Kumar Agarwal"8 and "All Cargo Movers (I) (P) Ltd. v. Dhanesh Badarmal Jain"9.

8. Having gone through the complaint, which was registered as an FIR and the assertions made therein, it is quite clear that respondent no. 2/complainant - Sanjay Garg's grievance is regarding failure of the appellants to pay the outstanding amount, in spite of the respondent no. 2/complainant - Sanjay Garg's repeated demands. The respondent no. 2/complainant - Sanjay Garg states that the supplies were made between the period 01.12.2015 and 06.08.2017. The appellants had made the payments from time to time of Rs. 3,76,40,553/- leaving a balance of Rs. 1,92,91,358/-.

9. We will assume that the assertions made in the complaint are correct, but even then, a criminal offence under Section 420 read with Section 415 of the IPC is not established in the absence of deception by making false and misleading representation, dishonest concealment or any other act or omission, or inducement of the complainant to deliver any property at the time of the contract(s) being entered. The ingredients to allege the offence are neither stated nor can be inferred from the averments. A prayer is made to the police for recovery of money from the appellants. The police is to investigate the allegations which discloses a criminal act. Police does not have the power and authority to recover money or act as a civil court for recovery of money.

10. The chargesheet also refers to Section 406 of the IPC, but without pointing out how the ingredients of said section are satisfied. No details and particulars are mentioned. There are decisions which hold that the same act or transaction cannot result in an offence of cheating and criminal breach of trust simultaneously.10 For the offence of cheating, dishonest intention must exist at the inception of the transaction, whereas, in case of criminal breach of trust there must exist a relationship between the parties whereby one party entrusts another with the property as per law, albeit dishonest intention comes later. In this case entrustment is missing, in fact it is not even alleged. It is a case of sale of goods. The chargesheet does refer to Section 506 of the IPC relying upon the averments in the complaint. However, no details and particulars are given, when and on which date and place the threats were given. Without the said details and particulars, it is apparent to us, that these allegations of threats etc. have been made only with an intent to activate police machinery for recovery of money.

11. It is for the respondent no. 2/complainant - Sanjay Garg to file a civil suit. Initiation of the criminal process for oblique purposes, is bad in law and amounts to abuse of process of law.

28. Counsel for petitioner has further relied upon the decision in Maksud **Saiyed Vs. State of Gujarat and others, (2008) 5 SCC 668** wherein, the Supreme Court has held as under :

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. *The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned*

Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

14. It will bear repetition to state that throughout the complaint petition, no allegation had been made as against any of the respondents herein that they had anything to deal with personally either in discharge of their statutory or official duty. As indicated hereinbefore, in the prospectus, a bona fide mistake had been committed. The fact that such a mistake had been committed stands accepted. In any event, the statement that the matter was pending before DRT instead and place of the City Civil Court, Ahmedabad, per se, cannot be said to be defamatory as the fact that a suit was pending for recovery of the huge amount is neither denied nor disputed. Whether such a suit was maintainable and/or is ultimately to be decreed or disposed of is a question which has to be gone into in the suit itself. A criminal court cannot even take that factor into consideration. The High Court considered the matter at some great details. Having analysed the materials placed before it, it was held:

"... It was, therefore, stated that there was no suppression or concealment of any facts and it did not amount to criminal breach of trust and cheating on the part of the Bank as alleged by the complainant. The said export bills under L/C were negotiated by the Bank under the provisions of UCPDC 500 1995 Revision. The Bank has also informed vide its letter dated 8-2-2005 to M/s SBI Capital Markets Ltd. It was stated therein that the Bank has not concealed or suppressed any material fact against the interest of the public at large and investors in particular. The bona fide misdescription in setting out the nature of claim was unintentional. It was further stated that the material particulars like the amount of claim, date of filing and name of the Company was correctly mentioned. The misdescription did not materially influence/affect the decision of the investors/public...."

It was furthermore opined:

"It appears to the Court that the learned Chief Judicial Magistrate has not applied his mind while passing the order under Section 156(3) of the Criminal Procedure Code directing the police to investigate in the matter. The impugned order, on the face of it, reveals that he has not gone through the complaint. He has stated in the order that Accused 1 to 10 are Manager and Branch Manager of Dena Bank. As a matter of fact, Accused 1 was the Ex-Chairman and Managing Director of Dena Bank, and Accused 2 was the Executive Director. Accused 3 to 10 are Directors of Dena Bank. None of these persons are Managers or Branch Manager. Despite this, the learned Chief Judicial Magistrate has mentioned in his order that they are Managers or Branch Managers. With regard to the prospectus he has simply stated that the Bank has issued prospectus for its public issue and at p. 87 false informations were given so as to cause damage to the Company and to jeopardise the reputation of the Company.

Despite the fact that the litigations are pending before the civil court he has mentioned about non-returning of export bills, etc. On these facts he has passed order under Section 156(3) of the Criminal Procedure Code, directing PSI, Sayajiganj Police Station to make inquiry in the matter."

The approach of the High Court, with respect, is entirely correct. 15. This Court in Pepsi Foods Ltd. v. Special Judicial Magistrate [(1998) 5 SCC 749 : 1998 SCC (Cri) 1400] held as under: (SCC p. 760, para 28)

"28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinise the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

The learned Magistrate, in our opinion, shall have kept the said principle in mind."

29. Counsel has lastly relied upon the decision in **Thermax Limited and Others vs. K.M. Johny and others, (2011) 13 SCC 412** wherein the Supreme Court has held as under :

"49. ***The entire analysis of the complaints with reference to the principles enunciated above and the ingredients of Sections 405, 406, 420 read with Section 34 IPC clearly show that there was inordinate delay and laches, the complaint itself is inherently improbable and contains the flavour of civil nature and taking note of the closure of*** *earlier three complaints that too after thorough investigation by the police, we are of the view that the Magistrate committed a grave error in calling for a report under Section 156(3) of the Code from the Crime Branch, Pune. In view of those infirmities and in the light of Section 482 of the Code, the High Court ought to have quashed those proceedings to safeguard the rights of the appellants. For these reasons, the order passed by the Judicial Magistrate, First Class, Pimpri in CC No. 12 of 2002 on 20-8-2007 and the judgment of the High Court dated 11-1-2008 [WP (Cri) No. 1622 of 2007 order dated 11-1-2008 (Bom)] in Criminal Writ Petition No. 1622 of 2007 are set aside. The complaint filed by Respondent 1 herein is quashed."*

30. Learned counsel has also relied upon the decision in **Priyanka Shrivastava and Another Vs. State of U.P. and Others, (2015) 6 SCC 287** wherein the Supreme Court has held as under :

"27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of

allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position does not matter, for nobody is above law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C. and also there is a separate procedure under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

28. Issuing a direction stating "as per the application" to lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the learned Magistrate. It also encourages the unscrupulous and unprincipled litigants, like the respondent no.3, namely, Prakash Kumar Bajaj, to take adventurous steps with courts to bring the financial institutions on their knees. As the factual exposition would reveal, he had prosecuted the earlier authorities and after the matter is dealt with by the High Court in a writ petition recording a settlement, he does not withdraw the criminal case and waits for some kind of situation where he can take vengeance as if he is the emperor of all he surveys. It is interesting to note that during the tenure of the appellant No.1, who is presently occupying the position of Vice-President, neither the loan was taken, nor the default was made, nor any action under the SARFAESI Act was taken. However, the action under the SARFAESI Act was taken on the second time at the instance of the present appellant No.1. We are only stating about the devilish design of the respondent No.3 to harass the appellants with the sole intent to avoid the payment of loan. When a citizen avails a loan from a financial institution, it is his obligation to pay back and not play truant or for that matter play possum. As we have noticed, he has been able to do such adventurous acts as he has the embedded conviction that he will not be taken to task because an application under Section 156(3) Cr.P.C. is a simple application to the court for issue of a direction to the investigating agency. We have been apprised that a carbon copy of a document is filed to show the compliance of Section 154(3), indicating it has been sent to the Superintendent of police concerned.

29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.

……..xx……..xxx……..xx

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 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 the Parliament in its wisdom has made such a provision to protect the secured creditors or any of its officers, and needles to emphasize, the legislative mandate, has to be kept in mind."

31. It is argued that the accused A-5 to A-8 who are the office bearers of DMI Finance have been falsely roped in the F.I.R. just to put pressure on them and the Magistrate has passed the impugned order without application of judicial mind.

32. Learned counsel has also relied upon the decision in **Babu Venkatesh and Others vs. State of Karnataka and others, (2022) 5 SCC 639** where in the Supreme Court while relying upon its earlier judgment in **State of Haryana vs. Bhajan Lal, 1992 Supp (1) SCC 355** has held as under :

18. It could thus be clearly seen that, the said complaint dated 10th September 2019, was filed almost after a period of two years from the date of institution of suits by the appellant Nos. 2 and 3, and almost after a period of one and a half year from the date on which written statement was filed by respondent No. 2.

19. It will be relevant to refer to the following observations of this court in the case of State of Haryana and Others v. Bhajan Lal and Others, which read thus.

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

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

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

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

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

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

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

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.

103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

20. It could thus be seen that, though this court has cautioned that, power to quash criminal proceedings should be exercised very sparingly and with circumspection and that too in the rarest of rare cases, it has specified certain category of cases wherein such power can be exercised for quashing proceedings.

21. We find that in the present case, though civil suits have been filed with regard to the same transactions and though they are contested by the respondent No. 2 by filing written statement, he has chosen to file complaint under Section 156 (3) of the Cr.P.C. after a period of one and half years from the date of filing of written statement with an ulterior motive of harassing the appellants. We find that, the present case fits in the category of No. 7, as mentioned in the case of State of Haryana v. Bhajan Lal."

33. The Counsel has thus argued that the accused (A-5 to A-8) whose company, DMI Finance, has provided loan to the project has to recover back their loan amount and in fact the DMI Finance has filed a petition before the N.C.L.T., Delhi and on the very next date when the F.I.R. was registered, they withdrew the petition with right to revive the same as the informant company, in order to avoid its liability to repay the loan, has given the civil dispute a colour of criminal litigation.

34. Learned counsel for petitioners in Criminal Misc. Writ Petition No.5280 of 2023 has argued that on 4.4.2017, two directors of the informant company, namely Himanshu Mathur and Arvind Kumar Singh were brought on the board of M/s Square Infrastructure Pvt. Ltd. and on 31.1.2018, Deepak Malhortra was also inducted on the Board of the aforesaid company and, therefore, there were three directors / nominee of the informant company. It is submitted that the work order dated 2.4.2018 prepared in the name

of M/s Keystone Developers Pvt. Ltd. company of accused (A-1 to A-4) and DMI Finance Pvt Ltd. was approached which is a Non Banking Finance Company for loan which was sanctioned on 2.5.2018 for Rs.55 Crores at the rate of 16% interest for construction of Phase-I.

35. Learned counsel laid emphasis upon this sanction letter dated 2.5.2018 was acknowledged by Deepak Malhotra of informant company as per a written declaration and, therefore, it does not lie in the mouth of the informant company that any misrepresentation or fraud is committed.

36. It is further argued that the loan agreement was signed on 23.5.2018 in conformity with sanction letter dated 2.5.2018 and Rs.55 Crore loan was disbursed to M/s Square Infrastructure Pvt. Ltd. by mortgaging the project land and on the personal guarantee of Akshay Sethi (A-2) and corporate guarantee of Stellar Ventures Pvt. Ltd. which is petitioner group's company and M/s Keystone Developers Pvt. Ltd. (contractor company, also a Petitioner's group company).

37. Learned counsel also laid emphasis that the loan agreement dated 23.5.2018 was duly signed by Deepak Malhotra on behalf of informant company as Promoter-2 and Abhishek Tyagi in personal capacity as Promoter-1 who is also director of the informant company and M/s Square Infrastructure Pvt. Ltd. also signed the loan as Promoter-3.

38. It is also argued that the additional loan in Emergency Credit Line Guarantee Scheme (ECLGS) of Government of India, during Covid-19 for Rs.9.80 Crore was taken from DMI Finance Pvt Ltd.and both informant company and borrower company signed the letters dated **28.6.2021** and second loan agreement dated 30th September, 2021 were signed by the informant company through Deepak Malhotra. It is submitted that Phase-I/ Tower-I was completed by M/s Keystone Developers Pvt. Ltd. and occupancy certificate was given by Noida Development Authority on 13.1.2022. The informant company is running its office on the 7th Floor in Tower-A since then and is in possession. It is further argued that the petitioners' company also infused additional funds of Rs.28.095 Crore to M/s Square Infrastructure Pvt. Ltd. in order to make payment of interest on the loan for the some time, however despite request petitioners' company refused to infuse any fund into M/s Square Infrastructure Pvt. Ltd. despite repeated letters.

39. It is further argued that since the informant company even on completion of Phase-I/ Tower-A did not repay the loan amount, DMI Finance Company issued notice of default and on 23.11.22 DMI Finance Company filed a application under Section 7 of IBC before NCLT, New Delhi for default in payment of Rs.2,91,17,377/- against SIPL and immediately thereafter the FIR was registered by the informant company. It is submitted that the mediation proceedings initiated by DMI Finance Company failed because the director of the informant company did not appear in the proceedings.

40. It is argued that the allegation that the official of DMI Finance (accused A-5 to A-8) have colluded or conspired with accused (A-1 to A-4) in preparing a fake and fraudulent sanction letter dated 2.5.2018, is palpably wrong and is a misleading the statement in the FIR as

informant company acted upon this sanction letter and by using the said letter entered into a loan agreement on 23.5.2018 and actual amount of loan Rs.55 Crore was disbursed to SIPL. It is submitted that each and every page of sanction letter dated 2.5.2018 and the loan agreement dated 23.5.2018 is signed by the informant company through its director Deepak Malhotra.

41. It is next argued that the allegation in the FIR that the work order dated 2.4.2018 is fake and fraudulent work order is also a misleading and mischievous statement in the FIR as the informant company in the FIR has admitted that all the rights for constructions were given by the informant company to Omega Infovision Pvt. Ltd. under a shareholder agreement and the construction was executed at the spot and the completion certificate was issued and the informant company is running its office from Tower-A which is in possession of informant company and, therefore, the allegations in the FIR are apparently false.

42. It is also argued that there is no diversion or siphoning off of the fund as alleged in the FIR as the amount has been utilized for construction and occupancy certificate is already obtained by the informant company.

43. It is submitted that the allegation in the FIR that the account was opened in Kotak Mahendra Company in 2018 is factually incorrect as the account was opened in 2013 in ING Vysya Bank by previous directors and this bank merged with Kotak Mahindra Bank. Since the account was opened prior to March, 2017, the accused (A-1 to A-4) have no role.

44. Learned counsel argued that the allegation of threat or the intimidation to the informant – Harshit Singh are vague and or mere allegation without specifying any such action. He next argued that the shareholder agreement dated 23.5.2018 which is referred to in the FIR provides Clause 5.1 and 7.1 as under :-

"Clause 5.1 *of the SHA, it is provided that OIPL through its nominees/ employees etc. shall have the exclusive right to undertake all development, construction, building, sale and leasing of the Project on behalf of SIPL, including appointment of any contractor etc. as it may deem fit.*

Clause 7.1 *it is specifically provided that the parties agree that the Company (SIPL) may avail loan facility from DMI Finance Pvt. Ltd. (DMI) in such terms and conditions including amount of the loan, interest rate, tenure etc. as may be mutually agreed between the Company (SIPL) and DMI for construction and development of the Project and Petitioners' company OIPL or its nominee/ employee shall have the unconditional right to negotiate the terms thereof on behalf of the Company ".*

45. It is thus argued that the FIR has been registered in order to avoid repayment of loan by the informant company by adopting a novel method of converting the civil proceedings to the FIR.

46. The informant company has filed counter affidavit in both the petitions.

47. In the counter affidavit to the Criminal Misc. Writ Petition No.2140 of 2023 (Puninder Bhatia and 3 others Vs. State of U.P. and others) the allegation levelled in the FIR are reiterated.

It is submitted that on 31.3.2017, the informant company acquired 85% shareholding of M/s Square Infrastructure

Pvt. Ltd. and 10% share was acquired by Omega Infovision Pvt. Ltd. of accused (A-1 to A-4) being a subsidiary of Stellar Group.

48. On 31.1.2018, one Deepak Malhotra was nominated as Director of M/s Square Infrastructure Pvt. Ltd. The allegation in the FIR that on 2.4.2014 a work order was issued in favour of M/s Keystone Developers Pvt. Ltd., though the shareholding agreement was formally signed by the company on 23.5.2018 and, therefore, the work order dated 2.4.2018 show that it was a premeditated plot of the accused persons in collusion with each other.

49. It is also submitted that on 2.5.2018, loan was sanctioned by DMI Finance Pvt Ltd. in favour of M/s Square Infrastructure Pvt. Ltd. and a loan agreement was signed on 23.5.2018 for a loan amount of Rs.55 Crores for construction of Phase-I of the Project. It is also submitted that Stellar Group of companies signed a deed of guarantee. Certain terms and conditions in clause of agreements are also detailed in the counter affidavit.

50. It is also submitted that the accused persons in collusion with the petitioner have siphoned off loan amount received under ECLGS to their subsidiary companies in violation of Clause 2.15 “End Use Restriction”.

51. In the counter affidavit to the Criminal Misc. Writ Petition No.5280 of 2023 (Ravi Mohan and 3 Others Vs. State of U.P. and 3 Others), similar stand is taken. In written submissions, it is submitted on behalf of informant company that offence under Section 420 IPC is made out as (A-1 to A-4) has fraudulently misrepresented and induce the informant company having 85% of the shareholding to enter into a joint venture of construction of Phase I.

52. On such misrepresentation, informant company transferred the rights of management and banking etc. to the company of minority shareholders i.e. accused (A-1 to A-4) who came in possession of the land of the informant company.

53. It is next submitted that the offence under Section 406 & 409 IPC is made out as till October, 2020 the loan of Rs.55 Crores was disbursed out of which major amount was transferred to M/s Keystone Developers Pvt Ltd. against “end use restriction” of agreement.

54. The project was partly completed up to 30.6.2021. Thereafter, under ECLGS scheme of Government, accused (A-1 to A-4) acquired additional loan of Rs.9.8 crores in October, 2021 from DMI Finance Pvt Ltd. (accused A-5 to A-8). However, accused (A-1 to A-4) transferred the money to their subsidiary company in violation of loan conditions thereby committing breach of trust and misappropriation of public money.

55. It is submitted that the offence under Sections 467, 468 and 471 IPC is made out as the work order dated 2.4.2018 was executed by M/s Square Infrastructure Pvt. Ltd. issuing the work to its subsidiary company of Stellar Group called M/s Keystone Developers Pvt Ltd. as contractor though there was no agreement between informant company and Omega Infovision Pvt. Ltd. till 23.5.2018 when a formal agreement was signed and thus the accused

has forged the sanction letter of DMI Finance Pvt Ltd.

56. It is also argued that offence under Sections 504 and 506 IPC are made out as on 5.11.2022, the representative of Omega Infovision Pvt. Ltd. threatened and abused the director of informant company. It is also argued that the matter involves disputed facts which cannot be adjudicated in the writ jurisdiction regarding the plea of civil dispute.

57. It is submitted that since the fraud is committed by the accused, they cannot seek protection under the garb of a plea that it is a civil or commercial dispute.

58. Reliance is placed on the decision of Supreme Court in ***Priti Saraf Vs. State (NCT of Delhi) (2021) 16 SCC 142***, the Supreme Court has observed as under :-

"31. In the instant case, on a careful reading of the complaint/FIR/charge-sheet, in our view, it cannot be said that the complaint does not disclose the commission of an offence. The ingredients of the offences under Sections 406 and 420 IPC cannot be said to be absent on the basis of the allegations in the complaint/FIR/charge-sheet. We would like to add that whether the allegations in the complaint are otherwise correct or not, has to be decided on the basis of the evidence to be led during the course of trial. Simply because there is a remedy provided for breach of contract or arbitral proceedings initiated at the instance of the appellants, that does not by itself clothe the court to come to a conclusion that civil remedy is the only remedy, and the initiation of criminal proceedings, in any manner, will be an abuse of the process of the court for exercising inherent powers of the High Court under Section 482 CrPC for quashing such proceedings.

32. We have perused the pleadings of the parties, the complaint/FIR/charge-sheet and orders of the Courts below and have taken into consideration the material on record. After hearing learned counsel for the parties, we are satisfied that the issue involved in the matter under consideration is not a case in which the criminal trial should have been short-circuited. The High Court was not justified in quashing the criminal proceedings in exercise of its inherent jurisdiction. The High Court has primarily adverted on two circumstances, (i) that it was a case of termination of agreement to sell on account of an alleged breach of the contract and (ii) the fact that the arbitral proceedings have been initiated at the instance of the appellants. Both the alleged circumstances noticed by the High Court, in our view, are unsustainable in law. The facts narrated in the present complaint/FIR/charge-sheet indeed reveal the commercial transaction but that is hardly a reason for holding that the offence of cheating would elude from such transaction. In fact, many a times, offence of cheating is committed in the course of commercial transactions and the illustrations have been set out under Sections 415, 418 and 420 IPC".

59. Reliance is placed on the decision of Supreme ***Court in Court in Trisuns Chemical Industry Vs. Rajesh Agarwal and Others, (1999) 8 SCC 686***, the Supreme Court has observed as under :-

"9. We are unable to appreciate the reasoning that the provision incorporated in the agreement for referring the disputes to arbitration is an effective substitute for a criminal prosecution when

the disputed act is an offence. Arbitration is a remedy for affording reliefs to the party affected by breach of the agreement but the arbitrator cannot conduct a trial of any act which amounted to an offence albeit the same act may be connected with the discharge of any function under the agreement. Hence, those are not good reasons for the High Court to axe down the complaint at the threshold itself. The investigating agency should have had the freedom to go into the whole gamut of the allegations and to reach a conclusion of its own. Pre-emption of such investigation would be justified only in very extreme cases as indicated in State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335]".

60. Reliance is also placed on the decision of Supreme ***Court in Court in Shri Krishna Agencies Vs. State of A.P., (2009) 1 SCC 69***, wherein the Supreme Court has observed that criminal proceedings cannot be quashed solely because the dispute was referred to Arbitration and that Arbitration proceedings had taken place thereafter.

61. Learned A.G.A. has also addressed the arguments on similar line as raised by the counsel for the informant.

62. After hearing the counsel for the parties, as observed earlier, in view of the settled principle of law that while deciding a petition either under Section 482 of Cr.P.C. or under Section 226/227 of Constitution of India, the High Court cannot look into the defence documents set up by the accused persons and has to decide whether any offence are made out or not from the contents of the F.I.R., this Court has only relied upon contents of F.I.R., the four documents relied in the F.I.R. and the counter affidavit of the informant.

Criminal Misc. Writ Petition No. 2140 of 2023

There is merit so far as Criminal Misc. Writ Petition No. 2140 of 2023 is concerned for the following reasons :

A. From the bare perusal of the F.I.R., the case of the informant is that in March, 2017, the informant company i.e. M/s Abhi Compusoft Private Limited acquired 85% shares of Square Infrastructure Private Limited. The Square Infrastructure Private Limited was the owner of a plot in Sector 127, NOIDA, Uttar Pradesh and the possession was handed over to the informant company. Later on 2.4.2018, M/s Keystone Developers Private Limited was given the work to construct Phase-I of the project and in this regard, on 2.5.2018, DMI Finance (A-5 to A-8) made an offer of providing loan. On 23.5.2018, a share holder's agreement was entered into between the accused side as well as the informant side. It is also admitted in the F.I.R. that as per the agreement, the DMI Finance (A-5 to A-8) transferred a loan of Rs.55 Crores and construction was started. Later on, during Covid-19 period, under ECLGS Scheme of the Government, another amount of Rs.9.80 Crores was provided by DMI Finance in the company of the accused (A-1 to A-4). At the end of the F.I.R., it is stated that the construction is not completed and all the accused persons have committed the offence of misappropriation of the loan amount.

B. From the bare perusal of the F.I.R. and the documents relied upon by the informant in the F.I.R. itself, there is no allegation that DMI Finance (A-5 to A-8) was part of any conspiracy as alleged by

the informant. The case of DMI Finance is clear that on 2.5.2018 a loan sanction letter was issued which was acted upon by the informant company as a shareholder's formal agreement was executed on 23.5.2018 under the signatures of the informant company as well as the other accused and DMI Finance (A-5 to A-8), according to which, the DMI Finance transferred Rs.55 Crores in favour of companies of co-accused (A1 to A4) from 2018 onwards and additional amount of Rs.9.80 Crores as per the subsequent agreement in the year 2021. Thus, the DMI Finance has no role in the inter se dispute between the informant company and the companies of accused (A-1 to A-4) even from the bare perusal of the F.I.R.

C. It is a candid case of DMI Finance (A-5 to A-8) that when the informant company failed to repay the instalments of loan, various recovery notices were given and a petition was filed before the N.C.L.T., Delhi and immediately thereafter, the present F.I.R. has been registered and thus, the said petition was withdrawn with liberty to revive. Thus, DMI Finance is taking its legal recourse for recovery of the loan amount.

D. The case set up by the other co-accused (A-1 to A4) is that their company has paid an amount of Rs. 28.09 crores for making payment of interest but despite request, the informant company has refused to infuse any fund towards M/s Square Infrastructure Private Limited (borrower company) which has to repay the loan to DMI Finance.

On specific Court query whether the informant company has repaid any amount towards loan to DMI Finance, learned counsel for the informant could not rebut the allegation of the petitioner. It is worth noticing that neither in the F.I.R. it is stated that the informant company is repaying the instalments of loan nor any such document is relied upon in the F.I.R. Even in the counter affidavit filed by the informant to the writ petitions filed by the accused (A-5 to A-8), there is no whisper about the repayment of loan by the informant company. Therefore, in view of the judgment in **Priyanka Srivastava's Case (Supra)**, it is apparent that the informant company has roped in the officer bearers of DMI Finance (A-5 to A-8) as a ploy and a novel method not to make repayments of loan, thereby, converting their civil liability into a criminal prosecution which is apparently mala fide.

It is admitted case of the informant company that in F.I.R. itself that DMI Finance has transferred loan amount of Rs.55 Crores with effect from 2018 onward and additional loan amounting Rs.9.80 Crores from 2021 onwards.

E. The case set up by accused (A-1 to A-4) is that the entire construction of Phase-I is completed and Tower-A is errected and completion certificate was issued by NOIDA Development Authority on 13.1.2022 and informant company is running its office from 7th Floor and is in possession of the property. Therefore, the registration of the F.I.R. in the year 2022 and prosecution of the accused (A-5 to A-8), after the completion of the project and taking over the possession, is nothing but misuse of process of law as the informant company wants to avoid repayment of loan.

F. It is worth noticing that when this petition was filed, on the request of both the parties, the matter was referred for mediation and admittedly, from the informant side, one of the directors initially attended the mediation proceedings but as he failed to appear subsequently, the mediation proceedings failed. This also reflect bent of mind of the informant company not to repay the loan amount.

G. From the bare perusal of the F.I.R., the ingredients of offence under Section 405 and 420 of IPC are not made out against the DMI Finance (A-5 to A-8). The allegations of extending threat relates to the office bearers of Omega Infovision Private Limited and not against the office bearers of DMI Finance (A-5 to A-8) as per F.I.R. itself and, therefore, no offence under Section 504 and 506 of IPC is made out.

H. The two letters, the first sanction letter of DMI Finance dated 2.5.2018 and second, the shareholders' agreement dated 23.5.2018 can not be held to be forged document as informant itself has acted upon these documents after understanding contents and signing the same and have actually taken benefit, in terms of these two documents as loan amount of Rs. 55 Crores and Rs. 9.80 Crores was disbursed to the informant and the companies of accused (A-1 to A-4). Once the informant company itself has signed these documents and after acting upon the same has taken the huge amount of loan from DMI Finance (A-5 to A-8), the lodging of F.I.R. on the ground that these are forged documents is misuse of process of law and is a novel way to avoid repayment of loan by the informant company and, therefore, offence under Sections 467, 468 and 471 is not made out against the petitioners (A-5 to A-8) in view of the decisions in **M.N.G. Bharateesh Reddy Case and Lalit Chaturvedi and Others' Case (Supra).**

I. There is yet another aspect which the Chief Judicial Magistrate while passing the impugned order did not notice that the dispute is of civil nature and from 2018 to 2022 when the F.I.R. was registered, the informant itself was acting upon the same and taking loan installments from the DMI Finance and after four years, the present F.I.R. has been registered against the DMI Finance (A-5 to A-8) as well as the other co-accused and, therefore, the impugned order passed by the Chief Judicial Magistrate directing registration of the F.I.R. against accused (A-5 to A-8) is not sustainable in the eyes of law in view of the judgment of Supreme Court in **Thermax Limited and Others' Case (Supra).**

J. In view of the **Priyanka Shrivastava's Case (Supra),** once the DMI Finance has resorted its remedy before the NCLT, New Delhi for recovery of the loan and even mediation proceedings have been initiated, converting those proceedings into criminal litigation at the instance of the informant who is the beneficiary of the loan agreement and has not repaid any amount of loan to DMI Finance, their prosecution is mala fide and not maintainable.

K. In view of the guidelines laid down by the Supreme Court in **Bhajan Lal's Case (Supra),** it is a fit case to quash the impugned F.I.R. and consequential proceedings against the petitioners (A-5 to A-8) as from the allegations made in the F.I.R., even taken on the face value and accepted in its entirety, no prima facie offence is made out. Even as per the uncontroverted allegations in the F.I.R., it is the informant company which is the defaulter of the loan amount provided by the DMI Finance vide the two agreements which has been relied upon by the informant in the F.I.R. itself. Therefore, the prosecution of the petitioners (A-5 to A-8) is apparently mala fide.

Criminal Misc. Writ Petition No. 5280 of 2023

63. So far as petitioners (A-1 to A-4) in Criminal Misc. Writ Petition No. 5280 of

2023 are concerned, no case is made out for quashing qua them. As noticed above, the informant company and the companies of accused (A-1 to A-4), in a joint venture, have taken loan from DMI Finance and raised the construction. There are serious allegations of siphoning off of the funds by the accused (A-1 to A-4) in their subsidiary companies and extending threat to the Directors of the informant company and also forging some documents. Therefore, in view of the **Bhajan Lal's Case (Supra),** this Court finds that the F.I.R. qua accused A-1 to A-4 cannot be quashed at this stage as there are allegation which are disputed by accused (A-1 to A-4) on basis of defence documents which cannot be taken in consideration at this stage.

64. Accordingly, Criminal Misc. Writ Petition No. 2140 of 2023 is allowed. The impugned order dated 17.12.2022 passed by the Chief Judicial Magistrate, Gautam Buddh Nagar directing to register the F.I.R. against the officer bearers of DMI Finance (A-5 to A-8) as well as the impugned F.I.R. i.e. Case Crime No. 486 of 2022 at Police Station – Sector 113, Commissionerate, Gautam Buddha Nagar, Uttar Pradesh under Sections 406, 409, 420, 467, 468, 471, 504 and 506 of IPC and all consequential proceedings qua accused (A-5 to A-8) namely Puninder Bhatia, Yuvraj Chankakya Singh, Vivek Gupta and Shivashish Chatterjee are hereby quashed.

65. The Criminal Misc. Writ Petition No. 5280 of 2023 stands dismissed.

(2024) 8 ILRA 1358
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Criminal Misc. Writ Petition No. 12522 of 2024

Smt. Ujala & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Arvind Kumar, Sri Vidya Sagar Rajbhar

Counsel for the Respondents:
G.A.

A. Criminal Law – Indian Penal Code, 1860 - Sections 363 & 366 - Writ petition-quashing of FIR - victim has not supported prosecution version in her statement under Section 164 Cr.P.C.-parties have married each other-consented physical relationship-victim is major as per ossification test report-Fir quashed-petition allowed. (paras 8 and 9)
HELD:
In view of the above discussion, we are of the considered view that from the first information report, no offence under Section 366 IPC is made out, in as much as, both the petitioners are major and petitioner no.1 had left her home with petitioner no.2 willingly and is living with him as a married woman. (para 8)

B. Filing of statement recorded under Section 164 Cr.P.C.-while challenging FIR-practice deprecated-statement ought not be made available-till the filing of chargesheet-Investigating Officers directed not to supply copy of statements recorded u/s. 164 CrPC(now Section 183 BNSS) to any person during investigation. (Paras 13, 14 and 15)
Held:
This Court has noticed that in a number of cases, the statements recorded u/s 164 Cr.P.C. are being filed by the accused/petitioners before this Court while challenging FIR under Article 226 of the Constitution of India. This practice has been strictly deprecated by the Hon'ble Apex Court in the case of 'State of Karnataka Vs

Shivam (2014) 8 SCC 913 as well as in A. Vs State of U.P. & anr.(2020) 10 SCC 505. Hon'ble Apex Court in the above-mentioned cases clearly observed that accused or any other person has no right to receive copy of statements recorded u/s 164 Cr.P.C. until cognizance is taken by the concerned court / Magistrate on chargesheet / police report filed u/s. 173 Cr.P.C. It was also observed by the Apex Court that immediately after recording statement u/s 164 Cr.P.C., copy of the same be given to Investigating Officer with specific direction that contents of such statement should not be disclosed to any person till chargesheet / police report u/s 173 Cr.P.C. is filed. (Para 13)

It is further directed that the Investigating Officers shall not supply copy of the statements recorded u/s 164 Cr.P.C. (now section 183 BNSS) to any person during investigation. (Para 15)

Petition allowed. (E-14)

List of Cases cited:

1. Criminal Misc. Writ Petition No. 17046 of 2022 (Smt. Juli Kumari & anr. Vs St. of U.P. & ors.) decided on 05.12.2022

2. St. of Karn. Vs Shivam (2014) 8 SCC 913

3. A. Vs St. of U.P. & anr.(2020) 10 SCC 505

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

1. Supplementary affidavit as well as compliance affidavit filed today are taken on record.

2. Heard Sri Vidya Sagar Rajbhar, learned counsel for the petitioners and Sri Ghanshyam Kumar, learned AGA-I for the State respondents and perused the record.

3. The present writ petition has been preferred with the prayer to quash the impugned First Information Report dated 27.6.2024, registered as Case Crime No. 0211 of 2022, under Sections 363, 366 IPC, P.S. Bardah, District Azamgarh and for a direction to the respondents not to arrest the petitioners in pursuance of impugned First Information Report.

4. Pursuant to the orders of this Court dated 24.7.2024 and 08.8.2024, learned A.G.A. has filed compliance affidavit annexing therewith copy of the statement of the victim/petitioner no.1 herein recorded u/s 164 Cr.P.C. and the case diary showing the ossification test report.

5. According to the statement of victim/petitioner no.1 herein recorded u/s 164 Cr.P.C. the victim has not supported the prosecution version and has categorically stated that she left her home willingly with Arvind, petitioner no.2 herein and they have married each other as well and there was consented physical relationship. As per the ossification test report, the victim is aged above 18 years and below 22 years.

6. Reliance has been placed by learned counsel for the petitioners on a judgement and order dated 5.12.2022 passed by this Court in Criminal Misc. Writ Petition No. 17046 of 2022 **(Smt. Juli Kumari and another vs. State of UP and 2 others)** to submit that under identical circumstances the petition was allowed and FIR therein was quashed.

7. The aforesaid order dated 5.12.2022 passed in Criminal Misc. Writ Petition No. 17046 of 2022 **(Smt. Juli Kumari and another vs. State of UP and 2 others)** is quoted as under:

"Heard learned counsel for the petitioners and learned AGA.

Present writ petition has been preferred for quashing the FIR dated 25.10.2022 being Case Crime No.0475 of 2022 under Section 366 IPC, P.S. Saurikh, Distt. Kannauj and for a direction to respondents not to arrest the petitioners pursuant to aforesaid FIR.

Placing reliance on the Aadhar Card of the victim girl showing her date of birth as 1.1.2004, it is submitted by the learned counsel for the petitioners that the petitioner no.1 is a major girl aged about more than 18 years on the date of incident.

The present petition has been filed with the declaration, jointly by both the petitioners no.1 & 2 that the petitioner no.1 had left her paternal home out of her own sweet will and being a major girl, she is free to take her choice to perform marriage with the petitioner no.2.

The present petition, however, has been filed on the assertion that no offence under Section 366 IPC is made out as the petitioner no.1 is a major girl. The entire criminal case lodged by the respondent no.3 is nothing but an abuse of the process of the law.

Learned counsel for the petitioners has further contended that in view of the aforesaid facts and circumstances, the impugned FIR is liable to be quashed in view of the Supreme Court's judgment in ***Kavita Chandrakant Lakhani vs. State of Maharashtra & Anr*** *reported in* ***AIR 2018 SC 2099,*** *wherein it was held that to constitute an offence under Section 366 IPC, it is necessary for the prosecution to prove that the accused induced the complainant woman or compelled by force to go from any place, that such inducement was by deceitful means, that such abduction took place with the intent that the complainant may be seduced to illicit intercourse and/or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. Mere abduction does not bring an accused under the ambit of this penal section. So far as charge under Section 366 IPC is concerned, mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. Unless the prosecution proves that the abduction is for the purposes mentioned in Section 366 IPC, the Court cannot hold the accused guilty and punish him under Section 366 IPC.*

As regards the age of the victim girl, as indicated in the Aadhar Card appended as Annexure No.2 to the writ petition, no dispute has been raised by learned AGA. It is, thus, clear that both the petitioners are major. The fact that the present writ petition has been filed with the declaration by the victim girl and that she is living voluntarily in the company of the petitioner no.2, is supported with the signature of the victim girl on the Vakalatnama. Once the age of the victim girl is not in dispute, the petitioners no.1 & 2 cannot be made accused for committing offence under Section 366 IPC as victim had left her home in order to live with the petitioner no.2.

We make it clear that the question in the present petition is not about the validity of marriage of two individuals i.e. petitioners no.1 & 2. Rather, the issue is about the life and liberty of two individuals in choosing a partner or their right to freedom of choice as to with whom they would like to live.

In view of the above discussion, we are of the considered view that from the first information report no offence under Section 366 IPC is made out, inasmuch as, both the petitioners are major and the petitioner no.1 has come up with the categorical stand that she had left her home with the petitioner no.2 willingly and is living with him as a married woman.

In view of the above, the writ petition succeeds and is allowed. The FIR dated 25.10.2022 being Case Crime No.0475 of 2022 under Section 366 IPC, P.S. Saurikh, Distt. Kannauj as well as all consequential proceedings are hereby quashed.

We, however, clarify that while deciding the present petition, we have not looked into the validity of marriage of the petitioners."

8. In view of the above discussion, we are of the considered view that from the first information report, no offence under Section 366 IPC is made out, in as much as, both the petitioners are major and petitioner no.1 had left her home with petitioner no.2 willingly and is living with him as a married woman.

9. In view of the above, the writ petition succeeds and is **allowed**. The First Information Report dated 27.6.2024, registered as Case Crime No. 0211 of 2022, under Sections 363, 366 IPC, P.S. Bardah, District Azamgarh as well as all consequential proceedings are hereby quashed.

10. We, however, clarify that while deciding the present petition, we have not looked into the validity of marriage of the petitioners.

11. Since this order has been passed in absence of respondent no. 4, she shall be at liberty to file a recall application for recalling of this order within six weeks, in case any false case has been represented before this Court.

12. This Court finds that in the supplementary affidavit filed today, learned counsel for the petitioners has annexed the copy of the statement recorded u/s 164 Cr.P.C. as well as the copy of the ossification test report.

13. This Court has noticed that in a number of cases, the statements recorded u/s 164 Cr.P.C. are being filed by the accused/petitioners before this Court while challenging FIR under Article 226 of the Constitution of India. This practice has been strictly deprecated by the Hon'ble Apex Court in the case of **'State of Karnataka vs. Shivam (2014) 8 SCC 913** as well as in **A. vs. State of U.P. and another (2020) 10 SCC 505.** Hon'ble Apex Court in the above mentioned cases clearly observed that accused or any other person has no right to receive copy of statements recorded u/s 164 Cr.P.C. until cognizance is taken by the concerned court / Magistrate on chargesheet / police report filed u/s. 173 Cr.P.C. It was also observed by the Apex Court that immediately after recording statement u/s 164 Cr.P.C., copy of the same be given to Investigating Officer with specific direction that contents of such statement should not be disclosed to any person till chargesheet / police report u/s 173 Cr.P.C. is filed. Para 16 and 17 of **'A. vs. State of U.P.'** (supra) is quoted as under :

"16. It was, thus, directed by this Court that a copy of the statement of the victim recorded under Section 164 CrPC be handed over by the Judicial Magistrate concerned to the investigating officer with

a specific direction that the contents of such statement under Section 164 CrPC should not be disclosed to any person till charge-sheet/report under Section 173 CrPC was filed.

17. The scheme of the relevant provisions of CrPC shows that after the conclusion of the investigation, an appropriate report under Section 173 CrPC is to be filed by the police giving information as required by Section 173. In terms of Section 190 CrPC, the Magistrate concerned may take cognizance of any offence inter alia upon a police report. At the stage of exercise of power under Section 190 CrPC, as laid down by this Court in a number of decisions, the notable being the decision in Bhagwant Singh v. State, the Magistrate may deem fit that the matter requires further investigation on certain aspects/issues and may pass appropriate direction. It is only after taking of the cognizance and issuance of process that the accused is entitled, in terms of Sections 207 and 208 CrPC, to copies of the documents referred to in the said provisions."

14. Therefore, this Court also strictly deprecates this practice of annexing the statement of the victim recorded u/s 164 Cr.P.C. by the accused-petitioners and further is of the view that concerned Magistrates / courts should not issue certified copies of the statement recorded u/s 164 Cr.P.C. as deprecated by the Hon'ble Apex Court to any person till cognizance is taken on the charge-sheet / police report. This Court also observes that even lower courts are issuing certified copies of the statements recorded u/s 164 Cr.P.C. (now section 183 BNSS) which is legally not permissible.

15. We, therefore, direct the Registrar General of this Court to bring this order in the knowledge of Hon'ble the Chief Justice so that if it is found appropriate, a circular may be issued to the District Courts of the State of U.P.

16. It is further directed that the Investigating Officers shall not supply copy of the statements recorded u/s 164 Cr.P.C. (now section 183 BNSS) to any person during investigation.

17. Copy of this order be sent to Director General of Police, U.P. by the Govt. Advocate who shall in turn circulate the same to all the police stations of the district for its compliance.
