THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

*****

सत्यमेव जयते

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Chief Justice: Hon'ble Mr. Justice Arun Bhansali	
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32. Hon'ble Mr. Justice Pankaj Bhatia	64. Hon'ble Mr. Justice Sameer Jain

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(2024) 2 ILRA 9
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, A.C.J.

Arbitration and Conciliation Application U/S 11(4) No. 42 of 2023

M/s. Neelkanth Construction ...Applicant
Versus
U.O.I. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Chandra Shekhar Singh

Counsel for the Opposite Parties:
A.S.G.I., Sri A.K. Saxena, Sri Awadhesh Kumar Saxena, Sri Abhijeet Saxena

Civil Law - Arbitration and Conciliation Act, 1996 - Section 11(6) - Instant application u/s 11(6) of Act, 1996 filed by applicant seeking appointment of Arbitrator in terms of Clauses 63 and 64 of General Conditions of Contract, 2014 of Indian Railways, in relation to disputes arising from contract - Record reveals that on 04.07.2022, applicant issued notice to opposite parties, detailing claims and seeking release of payments towards losses and damages, along with performance guarantee, EMD, security deposits, etc., further prayed for appointment of arbitrator for consideration of claims without delay - Opposite parties, vide reply dated 23.09.2022, referred applicant's claims and observed that same was not sustainable in view of cancellation of contract under Clause 61(1) - It is evident from respondents' stand that they flatly refused reference of dispute to arbitrator, treating claim as 'excepted matter' - In such circumstances, applicant's prayer for appointment of arbitrator cannot be rejected on ground of non-compliance with prescribed procedure for invoking arbitration clause - Application allowed, arbitrator appointed. (Para 2, 21 to 23)

Writ petition allowed. (E-13)

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1. Vidya Drolia & ors. Vs Guj. Informatics Ltd., (2021) 2 SCC 1, (Paras 153, 154)

(Delivered by Hon'ble Manoj Kumar Gupta, A.C.J.)

1. Heard Sri Chandra Shekhar Singh, learned counsel for the applicant and Sri Abhijeet Saxena, Advocate holding brief of Sri Awadhesh Kumar Saxena, for the opposite parties.

2. The instant application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') has been filed by the applicant for appointment of an Arbitrator in terms of Clauses 63 & 64 of the General Conditions of Contract 2014, Indian Railways, in respect of disputes and differences arising out of the contract dated 07.08.2017.

3. The letter of acceptance dated 03.04.2017, accepting the proposal of the applicant stipulated that General Conditions of Contract 2014 and Indian Railways Unified Standard Specification (materials and works) (Vol. I & II) 2010 Rules, up to date special conditions attached shall apply to the contract.

4. It is not in dispute between the parties that Clause 64.(3) regulates the appointment of Arbitrator and the same is extracted below: -

"64.(3) : Appointment of Arbitrator:

64.(3)(a)(i): In cases where the total value of all claims in question added together does not exceed ₹ 25,00,000/- (Rupees twenty five lakh only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM.

64.(3)(a)(ii): In cases not covered by the Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than three names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest to eneral Manager at least 2 names out of the panel for appointment as Contractor's nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the Contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of Contractor's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA Grade of other departments of the Railway for the purpose of appointment of arbitrator.

5. Clause 63, which is also relevant, is as follows:-

"63. Matters Finally Determined By The Railway : All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall, within 120 days after receipt of the contractor's representation, make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) to (xiii)(B) of Standard General Conditions of Contract or in any Clause of the Special Conditions of the Contract shall be deemed as 'excepted matters' (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of the Arbitration Clause."

6. The main objection of opposite parties is that the contract was determined under Clause 61.1 and since the matter is not referable to Arbitrator being 'excepted

matter', therefore, the application deserves to be rejected.

7. Clause 61.(1) is as follows:

"61.(1) Right Of Railway To Determine The Contract : *The Railway shall be entitled to determine and terminate the contract at any time should, in the Railway's opinion, the cessation of work becomes necessary owing to paucity of funds or from any other cause whatever, in which case the value of approved materials at site and of work done to date by the Contractor will be paid for in full at the rate specified in the contract. Notice in writing from the Railway of such determination and the reasons therefor shall be conclusive evidence thereof."*

8. Along with the counter affidavit, the opposite parties have brought on record a letter dated 30.09.2020 issued by Assistant Divisional Engineer, Chhapra. The subject matter of the letter is the letter of Principal Chief Engineer, Eastern Railways dated 17.08.2020. It states that the site at which the applicant was given contract for construction of limited height subway (LHSW), the water table is high, therefore, it was not possible to execute the work. Therefore, the applicant was called upon to stop the work. It is also mentioned that he may submit his final bill as per the contract so that the claim can be disposed of.

9. It is contended on the basis of the aforesaid communication that there was determination of contract under Clause 61.(1).

10. Learned counsel for the applicant submitted that under the contract, the power to determine the contract was with Divisional Railway Manager and not with the Assistant Divisional Engineer Chhapra, who had issued the communication. It is also submitted that after the said communication, the opposite parties themselves required the applicant to complete the work of launching by 09.06.2022 and 14.06.2022 and therefore, it amounts to waiver of the notice. In support of his statement, he has placed reliance on a communication dated 19.09.2022 by Senior Divisional Manager-II, Varanasi addressed to the applicant.

11. Learned counsel for the opposite parties submitted that firstly the said communication does not amount to waiver of notice as the applicant was repeatedly asked to stop the work. Alternatively, it is submitted that the applicant had not laid claim before the General Manager in terms of the conditions of the contract and had straightway invoked the arbitration clause, therefore, the application deserves to be rejected.

12. On the other hand, learned counsel for the applicant submits that the claim was duly made before the Chief General Manager vide notice dated 04.07.2022 but the same was rejected by the opposite parties by communication dated 23.09.2022. They also declined to refer the matter to the arbitrator on the ground that it was ‘excepted matter’ under Paragraph 64.(1).

13. Learned counsel for the applicant submitted that the respondents themselves waived the notice under Clause 61.(1), inasmuch as, they not only extended the period for completion of work, but also issued specific directions to the applicant to undertake various works under the contract on specified dates. In this regard, it is

submitted that by letter dated 17.9.2021, the contract was extended from 1.4.2021 to 31.12.2021. By letter dated 6.4.2021, the Senior Section Engineer (Works), North Eastern Railway, Chapra, directed the applicant to get soil testing done. By letter dated 19.9.2022, the applicant was directed to undertake the launching work which was one of the important stages of construction of LHSW. It is urged that the aforesaid act of the respondents clearly amounts to waiver of notice under Clause 61.(1).

14. I have considered the rival submissions and perused the material on record.

15. It is clear from the rival contentions that the main dispute between the parties is – whether the claim of the applicant is arbitrable or not; whether it would fall under the 'excepted matter' as notice under Clause 61 was duly given or the said notice having been waived, the bar relating to non-arbitrability of certain matters under Clause 63 would not apply.

16. It is not disputed that the respondents served the applicant with notice dated 30.9.2020. Although it does not specifically refers to Clause 61.(1), but its tenor would definitely bring it within the ambit of Clause 61.(1). The respondents, however, have not disputed that after service of the said notice, they themselves extended the period for completion of work from 1.4.2021 to 31.12.2021 by letter dated 17.9.2021. It is also not disputed that by letter dated 6.4.2021, the Senior Section Engineer (Works), North Eastern Railway, Chapra required the applicant to get the soil tested. The specific case of the applicant is that the opposite parties themselves kept on issuing directions from time to time to the applicant to execute various works under the contract. On 5.5.2022, the opposite parties informed the applicant that he can carry out launching work at the site on 9.6.2022 and 14.6.2022. This fact is admitted to the respondents in their letter dated 19.9.2022. The opposite parties also asked for evidence from the applicant to prove payment of any money for mobilizing machinery and workmen for the said purpose to consider his claim in this behalf. The opposite parties at the same time, have also taken a stand that despite their repeated reminders to the applicant not to carry on further work at the site, the applicant himself insisted on doing the work.

17. The rival contentions regarding arbitrability, in my view, cannot be decided in the instant proceedings. Its adjudication requires appreciation of evidence. The scope of judicial review in deciding issue of arbitrability is very limited. The position of law in this regard has been succinctly laid down by Supreme Court in **Vidya Drolia and Others vs. Gujarat Informatics Limited1**. The principles laid down therein are as follows: -

"153. Accordingly, we hold that the expression "existence of an arbitration agreement" in Section 11 of the Arbitration Act, would include aspect of validity of an arbitration agreement, albeit the Court at the referral stage would apply the prima facie test on the basis of principles set out in this judgment. In cases of debatable and disputable facts, and good reasonable arguable case, etc., the Court would force the parties to abide by the arbitration agreement as the Arbitral Tribunal has primary jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability.

154. Discussion under the heading "Who Decides Arbitrability?" can be crystallised as under:

154.1. Ratio of the decision in Patel Engg. Ltd. on the scope of judicial review by the Court while deciding an application under Sections 8 or 11 of the Arbitration Act, post the amendments by Act 3 of 2016 (with retrospective effect from 23-10-2015) and even post the amendments vide Act 33 of 2019 (with effect from 9-8-2019), is no longer applicable.

154.2. Scope of judicial review and jurisdiction of the Court under Sections 8 and 11 of the Arbitration Act is identical but extremely limited and restricted.

154.3. The general rule and principle, in view of the legislative mandate clear from Act 3 of 2016 and Act 33 of 2019, and the principle of severability and competence-competence, is that the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. The Court has been conferred power of "second look" on aspects of non-arbitrability post the award in terms of sub-clauses (i), (ii) or (iv) of Section 34(2)(a) or sub-clause (i) of Section 34(2)(b) of the Arbitration Act.

154.4. Rarely as a demurrer the Court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The Court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the Court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

(emphasis in original and supplied)

18. In the said judgment, it has been observed that while deciding issue of arbitrability, the Court under Section 11(6) has a very limited power, confined to cases where there is not even a vestige of doubt that the claim is non-arbitrable2.

19. In the instant case, having regard to the nature of rival contentions and the evidence before me, it cannot be said that the claim is outrightly non-arbitrable. In my view, it cannot be decided at this stage, as it involves deciding debatable questions of fact, therefore, the issue should be left open to be decided by the arbitrator.

20. One more contention of the opposite parties is that the applicant has not invoked the mechanism provided under the agreement and had straightaway sought appointment of arbitrator. Therefore, the application deserves to be rejected.

21. The record reveals that the applicant had given notice on 4.7.2022 to the opposite parties, specifying each claim and requesting the respondents to honour the same and release not only the payment for the loss and damages suffered by the applicant, but also release performance guarantee, EMD, security deposits, etc. It

was further prayed that an arbitrator be appointed at the earliest to consider the claims without delay.

22. The said notice was replied to by the opposite parties on 23.09.2022 wherein they have referred to all the claims made by the applicant and thereafter observed that the aforesaid claims are not sustainable in view of the fact that the contract was cancelled under Clause 61.(1).

23. It is clear from the stand of the respondents that the opposite parties had flatly refused to refer the dispute to the arbitrator as in their view, the claim fell under the 'excepted matter'. Once that was the stand of the opposite parties, the prayer of the applicant for appointment of arbitrator by this Court cannot be rejected on the ground that the applicant has not followed the procedure prescribed for invoking the arbitration clause.

24. Accordingly, the application is **allowed.**

25. This Court proposes the name of Sri Shashi Kant Gupta, retired Judge of this Court, for being appointed as Arbitrator. His address is 9, Elgin Road (in front of Heart Line Hospital), Civil Lines, Prayagraj (U.P.), Mobile No. 9415216833.

26. Let the consent of Sri Shashi Kant Gupta be obtained by the office in terms of the provisions contained in Section 11(8), read with Section 12(1) of the Act by sending a letter to him.

27. In case, the proposed arbitrator does not give his consent or makes disclosures in terms of sub-section (1) of Section 12, the application will be listed before the Court for the limited purpose of proposing name of alternate arbitrator.

28. The arbitrator shall be entitled to fees and expenses as per IV Schedule of the Act.

(2024) 2 ILRA 14
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.02.2024
BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 494 of 2013

Om Prakash ...Revisionist
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionist:
R.P. Mishra, Sushil Kumar Singh

Counsel for the Opposite Party:
Govt. Advocate, Alok Singh, Uma Kant Pandey

Criminal Law - Indian Penal Code, 1860 - Sections 302/34, 323/34 & 504 - Juvenile Justice (Care and Protection of Children) Rules, 2007 - Rule 12(3)(a)(iii) - F.I.R. named four accused including revisionist, who are pattidars of complainant - Incident arose out of petty dispute when, upon altercation, accused assaulted complainant's father and grandfather - Revisionist, armed with pistol, fired at complainant's father with intention to kill, causing injury on his neck, due to which he died - When complainant attempted to apprehend him, revisionist struck him with butt of pistol and fled inside his house - Co-accused, armed with sticks, assaulted complainant & ors., during which revisionist sustained injuries - Trial court framed charges - Revisionist's St.ment recorded wherein he disclosed his age 28 years - Defence evidence

commenced with DW-1 examined, followed by additional St.ment of revisionist, in which he again disclosed same age - He moved application claiming juvenility, admitting he reduced his age to 28 years in his St.ment - Clearly emerges that revisionist, by deliberately reducing his age, seeks to evade legal consequences of alleged offence of murder - Such admission is important, cannot be ignored - Entry of revisionist's year of birth in Parivar Register, made by public servant in discharge of official duty, constitutes valid certificate of birth - Since year of birth certified by Panchayat record, recourse to medical examination for age determination was unwarranted, trial court rightly declined to accept claim based on medical report - Revision lacks merit, dismissed. (Para 27, 28, 30, 33)

Revision dismissed. (E-13)

List of Cases cited:

1. Pawan Kumar Vs St. of U.P.& Others : 2023 SCC OnLine SC 1492

2. Pratap Singh Vs St. of Jharkhand & anr.AIR 2005 SC 2731

3. St. of Jammu & Kashmir (Now U.T. of Jammu & Kashmir) & Others Vs Shubam Sangra: 2022 SCC OnLine SC 1592

4. Ashwani Kumar Saxena Vs St. of M.P., (2012) 9 SCC 750, (Paras 32, 34, 41)

5. Abuzar Hossain Vs St. of W.B., (2012) 10 SCC 489, (Para 39.1 to 39.6)

6. Rishipal Singh Solanki Vs St. of U.P., (2022) 8 SCC 602, (Paras 33.3, 33.6, 33.9 to 33.11)

7. St. of Jammu & Kashmir (Now U.T. of Jammu & Kashmir) & Others Vs Shubam Sangra: 2022 SCC OnLine SC 1592, (Para 72)

8. Pawan Kumar Vs St. of U.P., 2023 SCC OnLine SC 1492, (Para 38)

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

(Application Nos. 80656 & 80654 of 2020)

1. The applications seek recall of the order dated 05.07.2019 whereby the revision was dismissed in default, as well as conondation of delay in filing the application for recall of the order dated 05.07.2019.

2. It has been stated in the affidavitss filed in support of the applications that clerk of the counsel for the revisionist had inadvertently omitted to mark the case in the cause list and, therefore, the revisionist's counsel could not appear when the case was taken up and the revision was dismissed for non-prosecution. As the counsel was not aware about the listing of the case, the fact of its dismissal could not be known to him, which has resulted in a delay in filing application for recall of the order.

3. Cause shown in the affidavits for delay in filing the recall application as well as for non-appearance of the counsel for the revisionist is sufficient. Accordingly, both the applications are allowed.

4. The revision is restored to its original number.

(Order on Revision)

1. Heard Sri Sushil Kumar Singh Advocate, the learned counsel for the revisionist, Sri Anurag Verma, the learned A.G.A. I for the State and Sri Himanshu Shukla holding brief of Sri Alok Singh, the learned counsel for the opposite party No.2.

2. By means of the instant revision filed under Section 53 of the Juvenile

Justice (Care & Protection of Children) Act, 2000, the revisionist has assailed validity of the order dated 28.09.2013 passed by the Additional Sessions Judge IV, Sultanpur in Sessions Trial No.398 of 2000, State versus Paanchu & Others, arising out of Crime No.410 of 2000 under Sections 323, 504, 302 IPC, Police Station Koorebhar, District Sultanpur, whereby the revisionist's plea that he was a juvenile at the time of the incident and he should be tried accordingly, has been rejected.

3. An interim order was passed in the revision on 24.10.2013 providing that the trial Court may proceed with the trial, but the judgment will not be delivered. The revision was dismissed for want of prosecution on 05.07.2019 and the interim restraint on delivery of judgment in trial also came to an end. The learned Counsel for the revisionist has made a request for urgent hearing of the revision as the trial Court has fixed 26.02.2024 for delivery of judgment. Accordingly, the case was taken up out of its turn and submissions of the learned Counsel were heard immediately after restoration of the revision.

4. Case Crime No. 410 of 2000 was registered at 02:15 a.m. on 13.08.2000 against 4 persons, including the revisionist, stating that the accused persons are pattidars of the complainant, i.e. the complainant and the accused persons are descendents of a common ancestor. Due to a dispute that had started by some children having urinated in a lane, the accused persons started assaulting the complainant's father and grand-father. The revisionist was armed with a pistol and the other persons were carrying sticks. The complainant, his mother and several other persons reached the spot upon hearing the hue and cry. The revisionist fired a shot with the intention to kill the complainant's father. The bullet hit the complainant's father on his neck and he died resultantly. The complainant caught hold of the revisionist whereupon the latter hit on his face with the butt of the pistol, ran inside his house and locked himself up from the inside. The other accused persons had assaulted the complainant and other persons with sticks and the revisionist had also suffered some injuries from sticks.

5. The police submitted a charge sheet under Sections 302, 504 and 325 I.P.C. The trial Court framed charges under Sections 302/34, 323/34 and 504 I.P.C. The trial proceeded and 10 prosecution witnesses were examined. The statements under Section 313 Cr.P.C. were recorded on 31.03.2010, wherein the revisionist told his age to be 28 years. DW-1 was examined on 09.10.2012. After closure of defence evidence, additional statement under Section 313 Cr.P.C. was recorded on 15.01.2013 and in that statement also, the revisionist again told his age to be 28 years.

6. On 26.06.2013, the revisionist filed an application stating that in his statement under Section 313 Cr.P.C. recorded on 15.01.2013, he had stated his age by reducing it to 28 years. He had not received any education in any school and as per age told by himself in the Court, he was juvenile on the date of the incident, i.e. on 12.08.2000 and he should be tried accordingly.

7. The revisionist was examined by a Medical Board, which gave its report dated 24.08.2011 stating that the revisionist had claimed his age to be 28 years but the board was of the opinion that the revisionist was aged about 30 years.

8. The prosecution opposed the application on the ground that the incident in question giving rise to the case took place on 12.08.2000, the revisionist was arrested on 13.08.2000 and he was medically examined on the same day. His medical examination report dated 13.08.2000 mentions his age to be 25 years. The Doctor who had examined him had been examined as PW-3 and he stated that at the time of the incident the accused was aged 25 years. As per the evidence available on record, the revisionist was major on the date of the incident and he had filed the application for causing delay in disposal of the proceedings.

9. The complainant also opposed the application stating that the revisionist had got prepared a false report regarding his age whereas he was aged 36 years.

10. The trial Court examined the Gram Panchayat Adhikari as CW-1, who produced a copy of the Parivar Register as Exhibit – 1, which mentions the year of birth of the revisionist to be 1976 and the entry in Parivar Register was made long ago. The trial Court held that even if the date of birth of the revisionist is taken to be 31.12.1976, i.e. the last date of the year, at the time of the incident the age of the revisionist would be 23 years 7 months 11 days.

11. Assailing the validity of the order passed by the trial Court, the learned counsel for the revisionist has submitted that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 was applicable at the relevant time and it provided that where no educational certificate was available in support of his date of birth and there was no birth certificate issued which may certify the date of birth of the revisionist, his age has been determined through the medical examination conducted by a board of Doctors, which has opined his age to be about 30 years as on 24.08.2013, from which the revisionist's age at the time of incident come about 17 years.

12. Relying upon a decision of Hon'ble Supreme court in the case of **Pawan Kumar versus State of Uttar Pradesh & Others :** 2023 SCC OnLine SC 1492**,** the learned counsel for the revisionist has submitted that in the aforesaid circumstances, the medical report should be accepted and he should be treated as a juvenile at the time of the incident and he should be tried accordingly.

13. The learned counsel for the revisionist has also relied upon the judgment of the Hon'ble Supreme court in the case of **Pratap Singh versus State of Jharkhand & Another :** AIR 2005 SC 2731, which has been relied on in Pawan Kumar (supra).

14. *Per contra*, Sri Anurag Verma, the learned A.G.A. I has relied upon a decision of the Hon'ble Supreme Court in the case of **State of Jammu & Kashmir (Now U.T. of Jammu & Kashmir) & Others vs Shubam Sangra:** 2022 SCC OnLine SC 1592

15. Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 reads as under:

"7A. Procedure to be followed when claim of juvenility is raised before any Court-

(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a

juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any Court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

16. From a reading of Section 7A, it becomes obvious is that whenever a claim of juvenility is raised, an inquiry has to be made and such inquiry would take place by receiving evidence which would be necessary, so as to determine the age of such person.

17. The procedure to be followed for the determination of age is provided under Rule 12(3)(b) of the 2007 Rules, which reads as:

"12. Procedure to be followed in determination of age.*—(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining—*

(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

and,

while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."

18. Sub-clause (3) of the aforesaid Rule clearly mandates that while conducting an inquiry about the juvenility of an accused, the Juvenile Justice Board would seek evidence by obtaining the matriculation or equivalent certificates and in the absence whereof the date of birth certificate from the school first attended and in absence whereof the birth certificate given by a corporation or a Municipal

authority or a Panchayat. It is made clear by sub-clause (b) that only in the absence of the aforesaid three documents, medical information would be sought from a duly constituted Medical Board which will declare the age of the juvenile or child. Thus, it is only in the absence of the aforesaid documents that the Juvenile Justice Board can ask for medical information/ossification test.

19. In **Ashwani Kumar Saxena v. State of M.P.,** (2012) 9 SCC 750, the Hon'ble Supreme Court held that: -

*"32."Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only i**n the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable.** In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.*

34.Age determination inquiry contemplated under the JJ Act and the 2007 Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion, etc. ***There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a corporation or a municipal authority or a panchayat may not be correct. But court, Juvenile Justice Board or a committee functioning under the JJ Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the court, the Juvenile Justice Board or the committee need to go for medical report for age determination.***

* * *

41. This Court in Babloo Pasi v. State of Jharkhand (2008) 13 SCC 133 held, in a case where the accused had failed to produce evidence/certificate in support of his claim, medical evidence can be called for. The Court held that:

"22. ... The medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence."

This Court set aside the order of the High Court and remitted the matter to the Chief Judicial Magistrate heading the Board to redetermine the age of the accused."

(Emphasis supplied)

20. In the present case, the Gram Panchayat Adhikari has produced a copy of the Parivar Register which mentions the year of birth of the revisionist to be 1976 and the entry in Parivar Register was made long ago. This document is prepared and

kept during the normal course of business. As per the law laid down in **Ashwani Kumar Saxena** (Supra) the court is not expected to go behind this document to examine the correctness of the entry, more particularly, when there is no allegation that the Parivar Register has been fabricated or manipulated. In these circumstances, there was no need for medical examination of the revisionist for ascertaining his age.

21. It is also relevant to note of the provisions contained in Sections 35 and 114 of the Evidence Act, which provide as follows: -

"35. Relevancy of entry in public record or an electronic record], made in performance of duty.*—An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record or an electronic record is kept, is itself a relevant fact.*

* * *

114. Court may presume existence of certain facts.*—The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

Illustrations

The Court may presume—

* * *

(e) that judicial and official acts have been regularly performed;

(f) that the common course of business has been followed in particular cases;

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it—

as to illustration (e)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances;

as to illustration (f)—the question is whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances;

* * *

22. Thus the entry made in the Parivar register stating the year of birth of the revisionist, which was made by a public servant in the discharge of his official duty, is itself a relevant fact for deciding the age of the revisionist and it has to be presumed that the official act of preparation of Parivar Register was performed in a regular manner and the entries in the register are correct. It has to be presumed that the common course of business has been followed in preparation, maintenance and production of the Parivar register.

23. Where the accused is an uneducated person and he has no educational certificate, the court has to obtain the birth certificate given by a corporation or a municipal authority or a panchayat, which cannot be an affidavit, but it has to be a certificate **or document**. The question of obtaining medical opinion from a duly constituted Medical Board would arise only if the abovementioned documents are unavailable.

24. In **Abuzar Hossain v. State of W.B.,** (2012) 10 SCC 489, the Hon'ble Supreme Court summarized the legal position in this regard in the following words: -

"39.1. A claim of juvenility may be raised at any stage even after the final disposal of the case. It may be raised for the first time before this Court as well after the final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in the appeal court.

39.2. For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

39.3. As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility ***but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12.*** *The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh and Pawan these documents were not found prima facie credible while in Jitendra Singh the documents viz. school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.*

39.4. An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of the age of the delinquent.

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."

(Emphasis supplied)

25. In **Rishipal Singh Solanki v. State of U.P.**, (2022) 8 SCC 602 it was held that: -

"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.

* * *

33.6. That ***it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.***

* * *

33.9. That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

33.10. Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the court or the JJ Board provided such public document is credible and authentic as per the provisions of the Evidence Act viz. Section 35 and other provisions.

33.11. Ossification test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

(Emphasis supplied)

26. In **State of Jammu & Kashmir (Now U.T. of Jammu & Kashmir) & Others vs Shubam Sangra:** 2022 SCC OnLine SC 1592, it was held that: -

"72. Thus, it is no doubt true that if there is a clear and unambiguous case in favour of the juvenile Accused that he was a minor on the date of the incident and the documentary evidence at least prima facie establishes the same, he would be entitled to the special protection under the Juvenile Justice Act. However, ***when an Accused commits a heinous and grave crime like the one on hand and thereafter attempts to take the statutory shelter under the guise of being a minor, a casual or cavalier approach while recording as to whether an Accused is a juvenile or not cannot be permitted as the courts are enjoined upon to perform their duties with the object of protecting the confidence of a common man in the institution entrusted with the administration of justice.*** *As observed by this Court in Parag Bhati (supra), the benefit of the principle of benevolent legislation attached to the Juvenile Justice Act would thus be extended to only such cases wherein the Accused is held to be a juvenile on the basis of at least prima facie evidence inspiring confidence regarding his*

minority as the benefit of the possibilities of two views in regard to the age of the alleged Accused who is involved in grave and serious offence which he is alleged to have committed and gave effect to it in a well-planned manner reflecting his maturity of mind rather than innocence indicating that his plea of juvenility is more in the nature of a shield to dodge or dupe the arms of law, cannot be allowed to come to his rescue."

(Emphasis supplied)

27. When we examine the facts of the present case in light of the law laid down by the Hon'ble Supreme Court in the above mentioned cases, what we find is that the offence was committed at about 10:00 p.m. on 12.08.2000. The F.I.R. was lodged at 02:15 a.m. on 13.08.2000, i.e. after about 4 hours since the occurrence, alleging that the accused persons and the complainant are descendents of a common ancestor and due to a petty dispute, the revisionist had fired a shot from a pistol with intention to kill the complainant's father which hit him on his neck, due to which he died. The revisionist is alleged to have hit the complainant with the butt of his pistol when the latter had caught hold of him and thereafter the revisionist had ran inside his house and locked himself up from inside. The offence was undoubtedly the most heinous offence and as the parties are descendents of a common ancestor, there appears to be no reasonable probability of misidentification of the miscreant and also regarding knowledge of the age of the revisionist to the complainant and his family members.

28. The trial Court framed charges under Sections 302/34, 323/34 and 504 I.P.C. The trial proceeded and 10 prosecution witnesses were examined. The statements under Section 313 Cr.P.C. were recorded on 31.03.2010, wherein the revisionist told his age to be 28 years. DW-1 was examined on 09.10.2012. After closure of defence evidence, additional statement under Section 313 Cr.P.C. was recorded on 15.01.2013 and in that statement also, the revisionist told his age to be 28 years. Thereafter he filed the application dated 26.06.2013 taking the plea of juvenility and he has himself stated in the application that in his statement under Section 313 Cr.P.C. recorded on 15.01.2013, he had stated his age by reducing it to 28 years.

29. Although there is no bar in a plea of juvenility being raised at a belated stage, when such a plea is raised belatedly in a case involving commission of murder of a relative, the Court has to deal with the matter with more care and caution and has to take into consideration all the relevant facts and circumstances. The age of the revisionist told by himself at time of his medical examination conducted on 13.08.2000, i.e. immediately after the incident and his arrest, was 25 years. There can be difficulty in ascertaining whether a person is juvenile or not from a mere physical appearance when his age is somewhere around 18 years but a 25 years old man can be reasonably assessed to be a major from his appearance. Had the revisionist claimed himself to be a juvenile at that stage, his age correct could have been ascertained immediately, but he chose not to claim juvenility.

30. In his statement recorded under Section 313 Cr.P.C. on 31.03.2010, he claimed himself to be aged 28 years and the revisionist has stated in the application claiming himself to be a juvenile that in his statement under Section 313 Cr.P.C. recorded on 15.01.2013, he had stated his

age by reducing it to 28 years. This clearly establishes that the revisionist is trying to avoid the necessary legal consequences of alleged commission of an offence of murder by stating his age by reducing the same. This important admission of the revisionist made in the application cannot be ignored.

31. The revisionist was arrested on 13.08.2000 and he was medically examined on the same day. His medical examination report dated 13.08.2000 mentions his age to be 25 years. The Doctor who had examined him has been examined as PW-3 and he stated that at the time of the incident the accused was aged 25 years.

32. The Gram Panchayat Adhikari has produced a copy of the Parivar Register as Exhibit – 1, which mentions the year of birth of the revisionist to be 1976 and the entry in Parivar Register was made long ago. The trial Court held that even if the date of birth of the revisionist is taken to be 31.12.1976, i.e. the last date of the year, at the time of the incident the age of the revisionist would be 23 years 7 months 11 days.

33. The term "birth certificate given by a corporation or a municipal authority or a panchayat" occurring in Rule 12 (3) (a) (iii) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 need not be interpreted in a hyper-technical manner so as to mean and include a document titled "birth certificate" only. The entry of the revisionist's year of birth made in the Parivar register by a public servant in the discharge of his official duty, shall be taken to be a certificate of his birth of the person in that year. As the birth year is certified by a document prepared by the Panchayat, there was no occasion to go to the next step of medical examination for ascertaining the revisionist's age and the claim of determination of age on the basis of medical report has rightly not been accepted by the trial Court.

34. The Gram Panchayat Adhikari has produced a copy of the Parivar Register which mentions the year of birth of the revisionist to be 1976 and the entry in Parivar Register was made long ago. This document is prepared and kept during the normal course of business. The entry made in the Parivar register stating the year of birth of the revisionist was made by a public servant in the discharge of his official duty, is a certificate of the year of birth of the revisionist and it has to be presumed that the official act of preparation of Parivar Register was performed in a regular manner and the entries in the register are correct. It has to be presumed that the common course of business has been followed in preparation, maintenance and production of the Parivar register.

35. As per the law laid down in **Ashwani Kumar Saxena** (Supra) the court is not expected to go behind this document to examine the correctness of the entry, more particularly, when there is no allegation that the Parivar Register has been fabricated or manipulated. As there is a public document certifying the year of birth of the revisionist, there is no occasion for conducting a medical examination for ascertaining his age.

36. In **Pawan Kumar v. State of U.P.**, 2023 SCC OnLine SC 1492, a formal plea of juvenility was supported by the Scholar Register of National Inter College, Barabanki which recorded the accused's date of birth as 05.07.1980 which meant that on the date when the offence was

committed, the accused would be 15 years, 6 months, and 26 days old. However, during cross-examination the clerk of the College who had produced the Scholar Register, admitted that the entry was made on the basis of a transfer certificate issued by Purva Madhyamik Vidhyalaya, which was not placed on record. Further, the Gram Panchayat Officer was examined who produced the Family Register of the appellant where D.O.B. of the appellant was recorded as 1975. The day and month of his birth were not mentioned in this Family Register. In any case, as per the Family Register of the Gram Panchayat, the appellant would be around 20 years of age at the time of the commission of the offence. In view of this contradiction, a bone ossification test was conducted under the supervision of the Chief Medical Officer of District Hospital, Barabanki where the age of the appellant was recorded as approximately 19 years. The trial Court concluded that the benefit of juvenility cannot be extended to the appellant and he was directed to face the trial. In appeal, the Hon'ble Supreme Court held that the admitted position is that the appellant had not completed his matriculation at the time of the incident in the year 1995 and therefore the only evidence he could place before the authorities was the copy of the admission register of National Inter College and the transfer certificate of the college, which had recorded his date of birth to be 05.07.1980. The appellant took admission in National Inter College, Barabanki on 25.07.1995 and thereafter since he could not pay his tuition fee, his name was removed as a student from the college register on 30.12.1995. The date of birth which was registered in the said school was 05.07.1980. In the latest enquiry conducted by the Additional Sessions Judge, Barabanki dated 28.09.2022, the appellant had produced relevant certificates of all three schools he had attended. In view of the aforesaid facts and circumstances of this case, the Hon'ble Supreme Court accepted the age on the basis of the educational documents. The Hon'ble Supreme Court further observed that: -

"38. Further, it must also be kept in mind that the medical opinion based on Bone Ossification Test, is not entirely accurate. This Court in the case of Vinod Katara v. State of U.P., 2022 SCC OnLine SC 1204 has held the following:

60. The bone ossification test is not an exact science that can provide us with the exact age of the person. As discussed above, the individual characteristics such as the growth rate of bones and skeletal structures can affect the accuracy of this method. This Court has observed in Ram Suresh Singh v. Prabhat Singh, (2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194, and Jyoti Prakash Rai v. State of Bihar, (2008) 15 SCC 223 : (2009) 3 SCC (Cri) 796, that the ossification test is not conclusive for age determination because it does not reveal the exact age of the person, but the radiological examination leaves a margin of two years on either side of the age range as prescribed by the test irrespective of whether the ossification test of multiple joints is conducted. ***The courts in India have accepted the fact that after the age of thirty years the ossification test cannot be relied upon for age determination. It is trite that the standard of proof for the determination of age is the degree of probability and not proof beyond reasonable doubt."***

33. Although **Pawan Kumar** (Supra) was decided in view of the factual background where the educational

certificates were available to prove the age of the accused, which is not the position in the present case, the aforesaid observation made by the Hon'ble Supreme Court regarding the value and effect of a medical test report is relevant for the present case and this does not help the revisionist at all.

34. It appears that the revisionist is attempting to take the statutory shelter under the guise of being a minor and it is the Court's duty to protect the confidence of a common man in the institution entrusted with the administration of justice by rejecting such a frivolous claim.

35. On the basis of the entire material available on record, which has been discussed above, the revisionist's claim of juvenility is lacking in credibility and it has rightly been rejected by the court.

36. There is no merit in the revision and the revision is **dismissed.**

(2024) 2 ILRA 26
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2024
BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 1681 of 2023

Ashish Verma ...Revisionist
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:
Sri Shashank Tripathi

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 125 - Interim maintenance - Validity of - In instant case, contention of revisionist that respondent No.2, being engaged in weaving and having obtained specialization in English and Post-Graduate degree, is earning Rs.20,000/- to Rs.25,000/- per month - No documentary evidence adduced in support thereof, except for certain photographs showing her dealing with cloth and embroidery material - Revisionist shown his income as Rs.3,000/- to Rs.4,000/- per month, yet medical papers filed by him indicate he is undergoing specialized treatment at reputed Government Hospitals and Medical Colleges involving substantial expenditure inconsistent with such meagre monthly income - Medical record shows history of alcohol dependency, smoking and tobacco use, suggesting his ailments are partly self-induced, for which he cannot evade his obligation to maintain his family - Respondent No.2, wife of revisionist and living with their minor children, dependent upon him - Even if respondent No.2 earns some income through odd jobs, it does not absolve revisionist of his statutory duty to provide maintenance - Not final verdict, revisionist have opportunity to establish his case at trial - Interim maintenance is on lower side, neither excessive nor exorbitant, minimum amount of survival and sustenance of person, require no reduction keeping in view market conditions - Revision lacks merit, dismissed. (Para 10, 16)

Revision dismissed. (E-13)

List of Cases cited:

1. Rajnesh Vs Neha (2020) 13 SCR 1093

2. Shailja & anr. Vs Khobbanna, (2018) 12 SCC 199

3. Sunita Kachwaha & Ors. Vs Anil Kachwaha, (2014) 16 SCC 715

4. Sanjay Damodar Kale Vs Kalyani Sanjay Kale, 2020, SCC OnLine Bom 694

5. Chander Prakash Bodhraj Vs Shila Rani Chander, AIR 1968 Delhi 174

6. Shamima Farooqui Vs Shahid Khan, (2015) 5 SCC 705

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

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

2. As per the office report, notice was duly served on opposite party No.2 but none appeared on her behalf to press present criminal revision.

3. Instant criminal revision has been preferred against the impugned order dated 05.01.2023, passed by leaned Additional Principal Judge, Family Court No.2, Kanpur Nagar, in Maintenance Case No.875 of 2021 (Smt. Arti and 2 others vs. Ashish Verma), under *Section 125 Cr.P.C.* By the impugned order, learned Principal Judge has allowed the application for interim maintenance filed by the applicants and has awarded Rs.3,000/- per month to the applicant No.1 and Rs.2,000/- per month to each of her minor children as interim maintenance, which is payable on 10th of each calender month.

4. The brief facts leading to filing of present revision are that the applicant No.1 Smt. Arti Soni, who is respondent No.2 in present revision filed an application for maintenance under *Section 125 Cr.P.C.* before the Principal Judge, Family Court, Kanpur Nagar with averment that opposite party Ashish Verma is her husband and applicant Nos.2 and 3 are minor children born out of their wedlock. Applicant No.1 was married with opposite party on 21.6.2021. Their marriage was solemnized according to the Hindu rites and rituals and parties belongs to Hindu community. She was send off to her matrimonial home after marriage and one son and one daughter born out of their wedlock with her husband. However, she was subjected to matrimonial cruelty soon after her marriage by opposite party and his family members due to non fulfilment of demand of dowry of Rs.1 lac cash, one gold chain, LCD TV and fridge. She was even deprived of square meal in her matrimonial home. She was given intensive beating by opposite party and his family members. However, she suffered all these misdeeds of opposite party with expectation that things will be better in course of time. In the evening of 11.6.2021, her brother Sonu and sister-in-law Babita arrived at her matrimonial home to take her back to join a festive occasion at their place but she was not permitted to go to her parental place and family members of opposite party misbehaved and abused her brother and sister-in-law and also threatened the applicant with life. Her brother and sister-in-law were thrashed and beaten by her husband and his family members when they were off to their residence. She was again roughed up and assaulted badly by her husband and his family members, in which her minor daughter Vaishnavi also got severely injured. They snatched her ornaments and cash. She anyhow got herself saved and went to her home. Her in-laws are affluent people and local police is under their influence. They did not take any action against them. The opposite party is engaged in trade of gold and silver and also earns around Rs.1 lac per month from house rent. The applicant No.1 is not having any source of income to maintain herself as well as her minor children. She prayed for

Rs.10,000/- per month as maintenance to be awarded to each of the applicants.

5. Learned court below summoned the opposite party. He appeared and filed an objection on application of interim maintenance, in which he denied the allegations made in application for maintenance. He has stated that he himself is a victim of high handedness of his wife and her family members. The applicant is a highly educated lady. She has taken course of weaving and English, from which she earns around Rs.20,000/- per month. The opposite party is not having any regularly source of income. He is being victimized by his wife due to lack of money. Even he is ready to keep his wife and her children together with him. He is suffering from severe ailments and no money is left with him to provide interim maintenance. He was assaulted by brothers and associates of applicant No.1. The marriage of the opposite party and applicant no.1 was solemnized on 21.6.2014. She has concealed her income. He has a lodged an FIR against the applicant and her family members on 11.6.2021, which registered as NCR No.97 of 2021. He is under educated person and only a Class 8th pass out.

6. Learned court below after considering the pleadings and version of the parties, concluded that the opposite party has failed to adduce any documentary evidence in support of his version that the applicant No.1 earns around Rs.20,000/- to 25,000/- per month by engaging in business of weaving. He has not filed any document with regard to his ailment and treatment after 8.6.2022. This is admitted fact that opposite party is husband of applicant no.1 and applicant nos.2 and 3 are his children. The evidence of parties is yet to come in main case. The opposite party is duty bound to provide maintenance to his wife and children under law. With these findings, the court below has awarded the maintenance to the applicants, as above. It is also directed in impugned order that any amount obtained by the applicants towards maintenance will be liable to be adjustment.

7. Learned counsel for the revisionist submitted that the revisionist has filed supplementary affidavit, in which details of his ailment and treatment are mentioned. He has filed a number of medical documents in support of his ailment and treatment. He has filed an affidavit of assets and liabilities before the court below in compliance of directions of Hon'ble Apex Court in **Rajnesh vs. Neha (2020) 13 SCR 1093**, in which he has clarified that he is a daily wage labourer and his monthly income is around Rs.3000/- per month, which also spends in his treatment. He is still undergoing treatment for his ailment. He is not having any other source of income. He has also shown his old parents, aged around 60 to 68 years, as dependants, apart from his wife and two children. A copy of affidavit dated 22.9.2022 has been filed alongwith supplementary affidavit. He has filed medical documents in support of his illness as annexure to supplementary affidavit, which reveal that he is still undergoing treatment for neuropsychiatric ailment at Medical College, Kanpur and a neuropsychiatric physician in Lucknow namely, Dr. R.K. Thukral. He has been undergoing treatment at Lucknow Neuropsychiatric Centre since 24.1.2023. He has filed medical papers up to May, 2023, which show that he is suffering from severe neurological disorder and spends substantial amount towards his treatment and survival. He was also admitted in a private hospital in Kanpur from 29.4.2023

to 2.5.2023 with complaint of hand tremors, insomnia and jerking movements. He further submitted that the learned court below in impugned order has circumvented the legal objections and submissions made by the revisionist as opposite party. Learned court below failed to consider the material available on record in proper perspective and accepted the version of the applicants at face value. The impugned order is perverse and is liable to be set aside. The revisionist is not able to pay interim maintenance awarded in impugned order to the applicants.

8. Per contra, learned AGA submitted that the learned court below has awarded maintenance to the applicants on lower side, which is minimum amount for their sustenance. The factum that applicant No.1 is legally wedded wife and applicant Nos.2 and 3 are their offspring is not disputed. The revisionist is duty bound to maintain his wife and minor children under law. The impugned order warrants no interference in present criminal revision.

9. Hon'ble Apex Court in **Rajnesh vs. Neha (2020) 13 SCR 1093**, observed as under:-

"Section 125 of the Cr.P.C.

Chapter IX of Code of Criminal Procedure, 1973 provides for maintenance of wife, children and parents in a summary proceeding. Maintenance under Section 125 of the Cr.P.C. may be claimed by a person irrespective of the religious community to which they belong. The purpose and object of Section 125 Cr.P.C. is to provide immediate relief to an applicant. An application under Section 125 Cr.P.C. is predicated on two conditions : (i) the husband has sufficient means; and (ii) "neglects" to maintain his wife, who is unable to maintain herself. In such a case, the husband may be directed by the Magistrate to pay such monthly sum to the wife, as deemed fit. Maintenance is awarded on the basis of the financial capacity of the husband and other relevant factors.

The remedy provided by Section 125 is summary in nature, and the substantive disputes with respect to dissolution of marriage can be determined by a civil court / family court in an appropriate proceeding, such as the Hindu Marriage Act, 1956.

*In **Bhagwan Dutt v Kamla Devi,** the Supreme Court held that under Section 125(1) Cr.P.C. only a wife who is "unable to maintain herself" is entitled to seek maintenance. The Court held :*

"19. The object of these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments." (emphasis supplied)

Prior to the amendment of Section 125 in 2001, there was a ceiling on the amount which could be awarded as maintenance, being Rs. 500 "in the whole". In view of the rising costs of living and inflation rates, the ceiling of Rs. 500 was done away by the 2001 Amendment Act. The Statement of Objects and Reasons of the Amendment Act states that the wife had to wait for several years before being granted maintenance. Consequently, the Amendment Act introduced an express provision for grant of "interim

maintenance". The Magistrate was vested with the power to order the respondent to make a monthly allowance towards interim maintenance during the pendency of the petition.

Under sub-section (2) of Section 125, the Court is conferred with the discretion to award payment of maintenance either from the date of the order, or from the date of the application.

Under the third proviso to the amended Section 125, the application for grant of interim maintenance must be disposed of as far as possible within sixty days' from the date of service of notice on the respondent.

The amended Section 125 reads as under :

"125. Order for maintenance of wives, children and parents. (1) If any person having sufficient means neglects or refuses to maintain-

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

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

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

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means : Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allow for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct :

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation. – For the purposes of this Chapter,-

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

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

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be. (3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for

levying fines, and may sentence such person, for the whole, or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation. – If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be a just ground for his wife' s refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

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

*In **Chaturbhuj v Sitabai** this Court held that the object of maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy and destitution of a deserted wife by providing her food, clothing and shelter by a speedy remedy. Section 125 of the Cr.P.C. is a measure of social justice especially enacted to protect women and children, and falls within the constitutional sweep of Article 15(3), reinforced by Article 39 of the Constitution.*

Proceedings under Section 125 of the Cr.P.C. are summary in nature. In Bhuwan Mohan Singh v Meena & Ors.8 this Court held that Section 125 of the Cr.P.C. was conceived to ameliorate the agony, anguish, financial suffering of a woman who had left her matrimonial home, so that some suitable arrangements could be made to enable her to sustain herself and the children. Since it is the sacrosanct duty of the husband to provide financial support to the wife and minor children, the husband was required to earn money even by physical labour, if he is able-bodied, and could not avoid his obligation, except on any legally permissible ground mentioned in the statute.

The issue whether presumption of marriage arises when parties are in a live-in relationship for a long period of time, which would give rise to a claim u/S. 125 Cr.P.C. came up for consideration in Chanmuniya v Virendra Kumar Singh Kushwaha & Anr. 9 before the Supreme Court. It was held that where a man and a woman have cohabited for a long period of time, in the absence of legal necessities of a valid marriage, such a woman would be entitled to maintenance. A man should not be allowed to benefit from legal loopholes, by enjoying the advantages of a de facto marriage, without undertaking the duties and obligations of such marriage. A broad

and expansive interpretation must be given to the term "wife," to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time. Strict proof of marriage should not be a pre-condition for grant of maintenance u/S. 125 Cr.P.C. The Court relied on the Malimath Committee Report on Reforms of Criminal Justice System published in 2003, which recommended that evidence regarding a man and woman living together for a reasonably long period, should be sufficient to draw the presumption of marriage.

The law presumes in favour of marriage, and against concubinage, when a man and woman cohabit continuously for a number of years. Unlike matrimonial proceedings where strict proof of marriage is essential, in proceedings u/S. 125 Cr.P.C. such strict standard of proof is not necessary.

10. In instant case, the main contention raised on behalf of the revisionist is that the respondent No.2 is earning income by engaging in profession of weaving of cloths. She has also done specialization in English. She has obtained Post Graduation Degree. However, there is no document in support of the version of the revisionist that respondent No.2 earns around Rs.20,000/- to Rs.25,000/- per month by her occupation. He has filed photocopies of some photographs, in which respondent No.2 is shown to have been dealing in some cloths alongwith material used in embroidery. The revisionist has shown his monthly income around Rs.3000/- to 4000/- per month but the medical papers filed by him alongwith revision memo and supplementary affidavit itself show that he is undergoing specialized treatments in various reputed Government Hospitals/Medical Colleges as well as before highly reputed neuropsychiatric in Lucknow and Kanpur, which entails substantial expenditure, which is normally not affordable by a person of such meagre monthly income. The ailment detected by the Doctor suggests that he is having history of excessive alcohol dependency alongwith smoking and use of tobacco. Thus, it may be inferred that the ailments from which the revisionist is suffering are to some extent self-induced due to bad habits and for that he cannot shirk his family responsibilities. This is admitted fact that the respondents are wife and minor children of the revisionist, who are dependant to him only due to the fact that the respondent No.2 is deriving some income by engaging in some odd jobs, the revisionist cannot be exempted from his responsibility to maintain his wife and minor children. At the stage of interim maintenance, the brief pleadings supported by affidavit are considered. This is not a final verdict and revisionist will have opportunity to prove his case at the final stage. The Courts have held that if the wife is earning, it cannot operate as a bar from being awarded maintenance by the husband. The Courts have provided guidance on this issue in the following judgments.

11. In **Shailja & Anr. v Khobbanna, (2018) 12 SCC 199**, Hon'ble Apex Court held that merely because the wife is capable of earning, it would not be a sufficient ground to reduce the maintenance awarded by the Family Court. The Court has to determine whether the income of the wife is sufficient to enable her to maintain herself, in accordance with the lifestyle of her husband in the matrimonial home. Sustenance does not mean, and cannot be allowed to mean mere survival.

12. In **Sunita Kachwaha & Ors. v Anil Kachwaha, (2014) 16 SCC 715**, the wife had a postgraduate degree, and was employed as a teacher in Jabalpur. The husband raised a contention that since the wife had sufficient income, she would not require financial assistance from the husband. The Supreme Court repelled this contention, and held that merely because the wife was earning some income, it could not be a ground to reject her claim for maintenance. The Bombay High Court in **Sanjay Damodar Kale v Kalyani Sanjay Kale, 2020, SCC OnLine Bom 694,** while relying upon the judgment in Sunita Kachwaha (supra), held that neither the mere potential to earn, nor the actual earning of the wife, howsoever meagre, is sufficient to deny the claim of maintenance. An able-bodied husband must be presumed to be capable of earning sufficient money to maintain his wife and children, and cannot contend that he is not in a position to earn sufficiently to maintain his family, as held by the Delhi High Court in **Chander Prakash Bodhraj v Shila Rani Chander, AIR 1968 Delhi 174**. The onus is on the husband to establish with necessary material that there are sufficient grounds to show that he is unable to maintain the family, and discharge his legal obligations for reasons beyond his control. If the husband does not disclose the exact amount of his income, an adverse inference may be drawn by the Court.

13. Hon'ble Apex Court in **Shamima Farooqui v Shahid Khan, (2015) 5 SCC 705**, cited the judgment in **Chander Prakash (supra)** with approval, and held that the obligation of the husband to provide maintenance stands on a higher pedestal than the wife.

14. **Maintenance of minor children**

The living expenses of the child would include expenses for food, clothing, residence, medical expenses, education of children. Extra coaching classes or any other vocational training courses to complement the basic education must be factored in, while awarding child support. Albeit, it should be a reasonable amount to be awarded for extra-curricular / coaching classes, and not an overly extravagant amount which may be claimed. Education expenses of the children must be normally borne by the father. If the wife is working and earning sufficiently, the expenses may be shared proportionately between the parties.

15. **Serious disability or ill health**

Serious disability or ill health of a spouse, child / children from the marriage / dependant relative who require constant care and recurrent expenditure, would also be a relevant consideration while quantifying maintenance.

16. On the basis of foregoing discussion, this Court is of the considered view that the amount of interim maintenance, which is to the tune of Rs.3,000/- to wife and Rs.2,000/- per month to each of the minor children is on lower side. It is neither excessive nor exorbitant. In fact, this is the minimum amount of survival and sustenance of a person and it require no reduction keeping in veiw the present market conditions. The revision is devoid of merits and it deserves to be dismissed.

17. Accordingly, present criminal revision stands **dismissed.**

18. However, the arrears of maintenance from the date of filing of

application to December, 2023 will be payable in four equal monthly instalments, out of which first instalment will be due from 10th February, 2024 and apart from that the revisionist will keep on paying maintenance in aggregate to the tune of Rs.7,000/- per month to the private respondents from January, 2024 on regular basis, till further order of trial court, as directed in the impugned order.

(2024) 2 ILRA 34
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.01.2024
BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 2246 of 2023

Bharat Singh Kushwaha ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Ajay Sengar

Counsel for the Opposite Parties:
G.A., Sri Gaurav Singh Tomar, Sri Subhash Gosain

Criminal Law - Code of Criminal Procedure, 1973 - Section 156(3) - Indian Succession Act, 1925 - Section 372 - Revisionist moved application alleging that his 32-year-old son, living separately with his wife and children, returned home at 10:30 p.m., later found unconscious with injury marks on his neck - In hospital where he was declared dead, postmortem conducted through police of police station - It is alleged that deceased's wife frequently quarreled with him over sending half of his income to her parental home, on date of incident, had insulted him, leading him to commit suicide by hanging - Despite applications to local police, no F.I.R. registered - Impugned order - Held, after her husband's death, opposite party no.2 moved application to Bank Manager requesting payment of deposits not be made to revisionist, as nominee of account - She thereafter filed Case under Succession Act seeking succession certificate in respect of said deposits for herself and her minor son - To pressurize her, revisionist approached S.P., filed application u/s 156(3) Cr.P.C. against her - Postmortem report of deceased revealed ligature marks but no other bodily injury - No documentary evidence produced by revisionist to substantiate his allegation of harassment by opposite party no.2 leading to suicide - Last rites of deceased performed by revisionist's family, no suicide note recovered to support alleged allegation - Revisionist neither mentioned nor produced any affidavit in support of application u/s 156(3) Cr.P.C., nor filed certified copy thereof, as mandated by Hon'ble Supreme Court in Priyanka Srivastava (infra). (Para 4, 11 to 13)

Revision dismissed. (E-13)

List of Cases cited:

1. Mrs. Priyanka Srivastava & anr. Vs St. of U.P. & ors., 2015 (6) SCC 287, Criminal Appeal No. 781 of 2012, (Paras 29 to 31)

2. Lalita Kumari Vs Govt. of U.P. & Others, (2014) 2 SCC 1, (Paras 49, 53)

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Ajay Sengar, learned counsel for the revisionist, Sri Subhash Gosain, Advocate, holding brief of Sri Gaurav Singh Tomar, learned counsel for the opposite party no. 2 and learned A.G.A. for the State.

2. This criminal revision has been filed against impugned order dated

22.03.2023 passed by Chief Judicial Magistrate, Jalaun at Orai in Criminal Misc. Case No. 19 of 2023 (Bharat Singh Kushwaha Vs. Smt. Vijay Lakshmi @ Bulbul), Police Station- Kotwali Orai, District- Jalaun.

3. By the impugned order, learned Magistrate rejected the application u/s 156 (3) Cr.P.C. filed by the revisionist.

4. The revisionist/applicant, Bharat Singh Kushwaha, had filed application u/s 156 (3) Cr.P.C. on 17.01.2023 contending that his son, Gopal Krishna alias Rinku aged 32 years, was living from long duration separately from him with his wife Smt. Vijay Lakshmi @ Bulbul and his children. On 04.09.2022, Gopal Krishna alias Rinku, after working as electrician, returned to his house at 10.30 p.m. After sometime, the revisionist was informed that his son became unconscious. There were mark of injuries on his neck. He was taken to the hospital for treatment where the doctor declared him brought dead. His postmortem was done through police of Police Station- Kotwali Orai. His son's wife, Smt. Vijay Lakshmi @ Bulbul, used to quarrel with him and insult him for sending half of his income to her matrimonial home. On the date of the incident, opposite party no. 2, Smt. Vijay Lakshmi @ Bulbul had quarrelled and insulted his son for sending half of his income to her matrimonial home. Due to the insult suffered by him, his son committed suicide by hanging. On 05.09.2022 and 24.09.2022, the revisionist/applicant submitted application to Police Station- Kotwali Orai and higher police authorities for registration of first information report but no F.I.R. was registered. The revisionist/applicant has submitted copy of Misc. Case No. 149 of 2022 dated 19.10.2022 (Smt. Vijay Lakshmi @ Bulbul and Another Vs. Bharat Singh Kushwaha) filed u/s 372 of the Indian Succession Act, 1925. He has also filed his son's Gopal Krishna alias Rinku postmortem report dated 05.09.2022, application dated 15.12.2022 sent to S.P., Jalaun for registration of F.I.R., newspaper cutting regarding death of his son by hanging.

5. It has been submitted by learned counsel for the revisionist that the learned Magistrate passed the impugned illegal order without appreciation of evidence and without application of his mind. It has next been submitted that the learned Magistrate passed the impugned order on the basis of report sent by police station without considering the averments made in the application u/s 156 (3) Cr.P.C. It has also been submitted that the learned Magistrate passed the impugned order presuming that the application u/s 156 (3) Cr.P.C. was filed as a counterblast to the Misc. Case No. 149 of 2022 (Smt. Vijay Lakshmi @ Bulbul and Another Vs. Bharat Singh Kushwaha) filed u/s 372 of the Indian Succession Act, 1925 by opposite party no. 2. It has also been submitted that from the basis of averments made in the application u/s 156 (3) Cr.P.C. and the documents filed in support thereof, prima facie, case u/s 306 and 201 I.P.C. was made out against opposite party no. 2 but by exceeding his jurisdiction, Magistrate illegally rejected the application. He has prayed for quashing the impugned order and directing the Magistrate to pass a fresh order on his application.

6. Per contra, learned counsel for the opposite party no. 2 has submitted that the learned Magistrate after considering the evidence on record and the provisions of

the law has rightly passed the impugned order. It has next been submitted that there is no merit in the revision and it may be rejected. It has also been submitted that after the death of his first wife, the revisionist married another woman, Mithila Devi, who started quarrelling with husband of opposite party no. 2 over trivial matters. When her husband could not bear the family dispute, he decided to stay separately from his father/revisionist. In the meanwhile, the husband of opposite party no. 2 underwent depression due to quarrel with his father and consequently committed suicide by hanging himself on 04.09.2022. Last rites were performed by family members. The opposite party no. 2 moved an application on 15.10.2022 to the Branch Manager, IDBI Bank, Branch- Jalaun at Orai, requesting not to permit anyone to withdraw amount from the account no. 1483102000002219 of her deceased husband except with the permission of the court. The opposite party no. 2 filed a Misc. Case No. 149 of 2022 (Smt. Vijay Lakshmi @ Bulbul and Another Vs. Bharat Singh Kushwaha) filed u/s 372 of the Indian Succession Act, 1925 for issuance of succession certificate to her and her minor son, Rishabh. When the revisionist came to know about the aforesaid misc. case, he threatened her with dire consequences. To pressurize her, the revisionist moved an application dated 15.12.2022 before S.P., Jalaun at Orai followed by application u/s 156 (3) Cr.P.C. dated 17.01.2023 before the court of Chief Judicial Magistrate, Jalaun at Orai arraigning opposite party no. 2 as accused. On the direction of the Magistrate, an enquiry was conducted and police report dated 22.01.2023 was submitted before him to the effect that false and fictitious allegations were levelled by the revisionist against opposite party no. 2. Meanwhile on 28.02.2023, the revisionist withdrew Rs.4,00,000/- from the account of the husband of opposite party no. 2. The opposite party no. 2 has filed true copy of the application dated 15.10.2022 given to the Branch Manager and statement of account of her husband's account as Annexure Nos. C.A.1 and C.A.2 to her counter affidavit. In support of his arguments, learned counsel for the opposite party no. 2 has relied on the judgement of the Hon'ble Supreme Court in Criminal Appeal No. 781 of 2012, **Mrs. Priyanka Srivastava and Another Vs. State of U.P. and Others, 2015 (6) SCC 287.**

7. Learned counsel for the revisionist, learned counsel for the opposite party no. 2 and learned A.G.A. for the State have been heard. Perused the entire trial court record and record of the revision.

8. In the case of **Mrs. Priyanka Srivastava (supra)**, the Hon'ble Apex Court has given following directions to the Magistrate for passing order u/s 156 (3) Cr.P.C. for registration of a first information report to the S.O. of the concerned police station :-

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 fellow citizens, efforts are to be made to scuttle and curb the same.

30.In our considered opinion, a stage has come in this country where

Section 156(3) CrPC applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31.We have already indicated that there has to be prior applications under Sections 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit is so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated inLalita Kumari[(2014) 2 SCC 1 : (2014) 1 SCC (Cri) 524] are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR.

9. In the judgement propounded by the Hon'ble Apex Court in the case of **Lalita Kumari Vs. Govt. of U.P. & Others, (2014) 2 SCC 1** cited by the revisionist relates to registration of first information report u/s 154 (1) Cr.P.C. on the application of the informant by the S.O. In the aforesaid case of **Lalita Kumari (supra)**, the Hon'ble Apex Court has laid down law for registration of first information report by the S.O. of concerned police station. In this case, the Hon'ble Apex Court has not given directions to the Magistrate regarding passing of the order on the application u/s 156 (3) Cr.P.C. The Hon'ble Apex Court has expressed the desirability of registration of first information report u/s 154 (1) Cr.P.C. by the S.O. on the application of the informant. The Hon'ble Apex Court had issued following guidelines for registration of first information report u/s 154 (1) Cr.P.C. by the S.O. concerned :-

49.Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying

the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

53.Investigation of offences and prosecution of offenders are the duties of the State. For "cognizable offences", a duty has been cast upon the police to register FIR and to conduct investigation except as otherwise permitted specifically under Section 157 of the Code. If a discretion, option or latitude is allowed to the police in the matter of registration of FIRs, it can have serious consequences on the public order situation and can also adversely affect the rights of the victims including violating their fundamental right to equality.

10. Admittedly, Gopal Krishna alias Rinku, son of revisionist was found dead on 04.09.2022 by hanging in his house. In his postmortem report dated 05.09.2022, following antemortem injuries were found on his person :-

(1) Ligature mark present below the chin above the thyroid cartilage of size 31 x 1.5 cm with gap of 5 cm right side of neck.

(2) Ligature mark 4 cm below the right ear and 6 cm below the chin and 7 cm below the left ear.

(3) On dissection of ligature mark, hyoid bone was found intact.

(4) Total circumference of nose 26 cm.

(5) No other injury seen all over the body.

The cause of death was mentioned as shock and asphyxia due to continuous hanging.

11. From the consideration of the averments made by the parties and the documents filed in support thereof, it appears that after the death of her husband, opposite party no. 2 had submitted an application dated 15.10.2022 to the Bank Manager requesting him not to make payment of the deposits to the revisionist who was made nominee of the bank account. The opposite party no. 2 had filed Misc. Case No. 149 of 2022 (Smt. Vijay Lakshmi @ Bulbul and Another Vs. Bharat Singh Kushwaha) filed u/s 372 of the Indian Succession Act, 1925 on 19.10.2022 in the civil court for issuance of succession certificate regarding the aforesaid bank deposit in favour of opposite party no. 2 and her minor son. Only after the opposite party no. 2 had filed aforesaid application regarding the bank deposits of her husband, in order to pressurize her, the revisionist submitted application to S.P., Jalaun on 15.12.2022 and filed application u/s 156 (3) Cr.P.C. on 17.01.2023 against her. In the postmortem report of deceased, apart from the aforesaid ligature marks, no bodily injuries were found on his person. The revisionist has not filed any documentary evidence regarding his averment of harassment and insult done by opposite party no. 2 to her husband due to which he committed suicide.

12. Averment has been made on behalf of opposite party no. 2 that after the death of her husband, his last rites were performed by the family members of the revisionist. In the impugned order, the learned Magistrate has taken into

consideration the fact that the revisionist has not given any documentary evidence in support of alleged harassment of his son by her wife. It has also mentioned that no suicide note was found which may corroborate the averment regarding abetment of suicide by the wife of the deceased. The Magistrate has also taken into consideration the fact that a case was filed by the wife of the deceased against the revisionist/applicant, namely, Misc. Case No. 149 of 2022 (Smt. Vijay Lakshmi @ Bulbul and Another Vs. Bharat Singh Kushwaha) filed u/s 372 of the Indian Succession Act, 1925, for issuance of succession certificate in favour of opposite party no. 2 and her son regarding the bank deposit of the deceased.

13. The revisionist has not mentioned that he had filed affidavit in support of application u/s 156 (3) Cr.P.C. nor he has filed certified copy of any such affidavit as mandated by the Hon'ble Apex Court in the case of **Mrs. Priyanka Srivastava (supra)**.

14. Considering the facts and circumstances of the case and prima facie evidence on record in the light of the law propounded by the Hon'ble Supreme Court for passing order by Magistrate on application u/s 156 (3) Cr.P.C., the Court is of the considered opinion that no illegality, irregularity or impropriety has been found in the impugned order passed by the learned Magistrate.

15. There is no merit in the criminal revision and the same is liable to be dismissed.

16. The criminal revision is **dismissed,** accordingly.

17. Let a copy of this order be sent to the concerned trial court for necessary action.

(2024) 2 ILRA 39
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.11.2023
BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 3588 of 2017

Vidya Sagar ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:
Sri Lok Nath Shukla

Counsel for the Opposite Parties:
G.A., Km. Nisha Singh, Sri Prem Chandra

Criminal Law - Indian Penal Code, 1860 - Sections 379 & 427 - Code of Criminal Procedure, 1973 - Section 245(2) - Against rejection of discharge application - Accused/applicant contended that complainant's earlier application u/s 156(3) Cr.P.C. for registration of F.I.R. and investigation, dismissed, this fact concealed while filing present complaint - Revisionist moved application u/s 245(2) Cr.P.C. raising several factual grounds, not duly considered by trial court while dismissing same - It is urged that revisionist and co-accused are on enimical terms, leaving no occasion for joint commission of theft or mischief as alleged - Held, admitted fact that criminal revision filed against summoning order was dismissed, thereafter accused moved application u/s 245(2) Cr.P.C. seeking discharge at pre-trial stage - Revisionist is not yet on bail - No proceedings taken between summoning order and discharge application - Since summoning order affirmed in criminal revision on same facts, discharge application u/s 245(2)

Cr.P.C. not maintainable - Trial court rightly dismissed it, observing that grounds raised involve disputed questions of fact, which can be adjudicated upon evidence, thus charges cannot be held groundless at this stage - Accused retains right to cross-examine prosecution witnesses u/s 244 Cr.P.C. before framing of charge, to establish that no trial is required and to seek discharge u/s 245(1) Cr.P.C., including by confronting witnesses with supporting documents that dispute is civil in nature - No illegality in impugned order, dismissed. (Para 5, 6, 8, 14)

Revision dismissed. (E-13)

List of Cases cited:

1. Ajay Kumar Ghose Vs St. of Jharkhand & ors. (2009) 14 SCC 115

2. Harinarayan G. Bajaj Vs St. of Mah. & Ors. (2010) 11 SCC 520

3. Ajay Kumar Ghose Vs St. of Jharkhand & ors. (2009) 14 SCC 115

4. Satender Kumar Antil Vs C.B.I.& anr. reported in 2022 SCC Online SC 825

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

1. Pleading have already been exchanged between the parties.

2. The instant criminal revision has been preferred by the accused-revisionist against the order dated 05.08.2017 passed by learned Additional Chief Judicial Magistrate-III, Jaunpur, in Criminal Case No. 5690 of 2017 (Jagnarayan Vs. Sher Bahadur) under Sections 379, 427 I.P.C., P.S.-Barsati, District- Jaunpur, whereby discharge application under Section 245(2) Cr.P.C. moved by the accused-revisionist has been dismissed.

3. Heard the submissions of Sri Lok Nath Shukla, learned counsel for the revisionist, Sri Deepak Kapoor, learned A.G.A. for the State, Sri Prem Chandra, learned counsel for opposite party No. 2 and perused the record.

4. The brief facts relevant for present revision are that the complainant filed present complaint against the revisionist and four other accused persons on 02.09.2005 with averment that on 17.05.2005, he was going towards her village in the evening from District Court, Jaunpur, after disembarking from a train, when he reached near border of his village around 07:00 P.M., he heard some noise from his bamboo cluster situated at Plot No.234/ 1.30. He reached near his bamboo cluster and found that the accused persons were cutting bamboo from said cluster and accused Shravan Kumar was carrying the cut bamboos on his shoulder. He cried and shouted to catch them, whereupon the witnesses Deepak and Ajay Prakash reached the spot, however, the accused persons made their good escape. In the meanwhile, accused persons carried away 10 bamboos which were cut from his cluster amounting to Rs. 500 and left two cut bamboos on the spot, due to which he suffered Rs. 400 more loss. He got a written report prepared next day, when he reached the court and produced the same before Additional S.P. Jaunpur, the complaint was registered before trial court. The complainant examined himself under Section 200 Cr.P.C. and statements of witnesses Deepak and Ajay were recorded under Section 202 Cr.P.C. in support of complainant's version. The learned court below summoned the revisionist under Section 379 and 427 I.P.C. vide order dated 31.03.2006. Feeling aggrieved by the summoning order, the revisionist preferred

a Criminal Revision No. 4210 of 2006 (Vidya Sagar Vs. State of U.P. and another) before this Court which was decided vide order dated 07.10.2016. Thereafter, present revisionist moved an application under Section 245(2) Cr.P.C. for discharge before court below on ground that he has been falsely implicated in the case. The complainant did not lodge any F.I.R. deliberately on pretext of being sick at that time. His application under Section 156(3) Cr.P.C moved before court below was dismissed and thereafter he filed present complaint. There is an old enmity between the accused on the one hand and the complainant as well as father of the witness Deepak, namely Balraj on the other hand and due to this enmity many criminal and civil litigations are proceeding between the accused applicant and complainant and father of these witnesses. The complainant had assaulted accused on 15.07.1996 regarding which a criminal case S.T. 419 of 2010 State Vs Hubanarayan is pending before Special Judge, E.C. Act, Jaunpur and another case was lodged by Tirthraj, the brother of accused applicant against Usardan and others under Section 147, 452, 504, 506 I.P.C. and a criminal revision was also preferred in that case. A civil suit is also proceeding between the accused-applicant and co-accused Sharvan Kumar, Praveen Kumar and Ram Prakash. Apart from that a criminal case is pending in the court against the accused Sher Bahadur. In that case, this is not possible that the accused-applicant would commit theft along with co-accused. The complainant has filed present complaint on creating a false story in collusion with co-accused of this case, no bamboo cluster is existing in the plot No. 234/1.30 of the complainant, he is neither owner nor in possession of said bamboo cluster. In fact, said bamboo cluster was planted by Babu Ram, the grand-son of Bhagwan Das and he is owner, in possession of said bamboo cluster and Civil Suit No. 1049 of 1994 Babu Ram Vs. Usardhan is also pending with regard to said bamboo cluster. No offence of theft is made out in the case against the accused applicant and he is liable to be discharged in this case. Learned court below dismissed discharge application on premise that grounds taken in discharge 245(2) Cr.P.C. are matter of evidence and the evidence of party is yet to be adduced and the court can give its finding after adducing of evidence in the case.

5. The accused applicant has preferred present revision with averment that the application under Section 156(3) Cr.P.C. initially filed by the complainant for lodging an F.I.R. and directing investigation by police with regard to alleged incident was dismissed by court below vide order dated 07.07.2005, however, the complainant filed present complaint by concealing this fact. The accused filed an application under Section 245(2) Cr.P.C. comprising many factual and legal grounds, but same were not properly addressed by learned court below while dismissing his application. The accused revisionist and co-accused are themselves on enmical terms and no question arises that the revisionist and co-accused will involve in commission of theft and criminal mischief as alleged in the complaint. The charge against the revisionist are groundless and he deserves to be discharged and the impugned order is liable to be set aside.

6. Learned counsel for the revisionist addressed the grounds taken in discharge application as well as in revision memo while his arguments and submitted that the matter is essentially of civil nature as the

ownership of said bamboo cluster is subjudice to civil court and on that account also no case of theft or criminal mischief is made out against the revisionist and therefore, the impugned order is liable to be setaside.

7. *Per contra*, learned A.G.A. for the State and learned counsel appearing for opposite party No. 2 submitted that the learned trial court has applied his judicial mind and rightly passed the impugned order dated 31.03.2006 whereby discharge application moved by the revisionist has been dismissed. The chargesheet is submitted against the complainant in criminal case No. 1286 of 2003 (State Vs Sudeep Narayan and others) which is pending trial. The complainant has rightly filed the complaint case against the revisionist and the summoning order 31.03.2006 is legal and genuine.

8. This is admitted fact that criminal revision filed by the present revisionist against the summoning order passed by learned court below in present case has been dismissed and just thereafter the accused has moved an application under Section 245(2)Cr.P.C. and claiming discharge at pre trial stage. The revisionist is not enlarged on bail as yet as informed by his learned counsel. No further proceedings were taken by court below between summoning order and filing of discharge application by the revisionist. As the summoning order was affirmed in criminal revision against summoning order by this Court on same facts, application for discharge under Section 245 (2) Cr.P.C. filed by the revisionist could not be allowed by trial court and the trial court has rightly dismissed the discharge application with observation that the grounds taken in the discharge application are matter of fact which can only be adjudicated after adducing of evidence. Disputed questions of facts cannot be adjudicated to hold that the charge levelled against the accused are groundless in facts and circumstances of the present case.

9. In a complainant's case two stages of discharge are provided, first at pre trial stage under Section 245(2) Cr.P.C. and secondly after recording of evidence under Section 244 Cr.P.C. The provision of Section 245 Cr.P.C. are reproduced as under:

"Section 245 in The Code Of Criminal Procedure, 1973

245. When accused shall be discharged.

(1) If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless"

10. Thus, from perusal of provisions of Section 245, it is obvious that a Magistrate may discharge an accused at any previous stage of the case before recording evidence under Section 244 Cr.P.C. if, for reasons to be recorded by such Magistrate, he considers charge to be groundless. Whereas under Section 245(1) Cr.P.C. the wide amplitude has been given to the Magistrate, who may discharge the accused if on taking of evidence under Section 244, he considers, for reasons to be recorded,

that no case against the accused has been made out which, if unrebutted would warrant his conviction. As discharge application under Section 245(2) Cr.P.C. has been filed by the accused before Magistrate on similar grounds which would have been taken by him while challenging summoning order before this Court in Criminal Revision No. 4210 of 2006 (Vidhya Sagar Vs. State of U.P. and Another), the charge cannot be held groundless at this stage.

11. Hon'be Supreme Court in **Ajay Kumar Ghose Vs. State of Jharkhand and others (2009) 14 SCC 115** held that:

"There is difference in Sections 245(1) and 245(2) CrPC. Under Section 245(1), the Magistrate has the advantage of the evidence led by the prosecution before him under Section 244 and he has to consider whether, the conviction of the accused would be warranted if the evidence remains unrebutted. If there is no discernible incriminating material in the evidence, then the Magistrate proceeds to discharge the accused under Section 245(1) CrPC. The situation under Section 245(2) CrPC is, however, different. There, the Magistrate has the power of discharging the accused at any previous stage of the case i.e. even before such evidence is led. However, for discharging an accused under Section 245(2) CrPC, the Magistrate has to come to a finding that the charge is groundless. There is no question of any consideration of evidence at that stage, because there is none. The Magistrate can take this decision before the accused appears or is brought before the court or the evidence is led under Section 244 CrPC. The previous stage would be before the evidence of the prosecution under Section 244(1) CrPC is completed or any stage prior to that. Previous stage could be from Sections 200 to 204 CrPC and till the completion of the evidence of prosecution under Section 244 CrPC. Thus, the Magistrate can discharge the accused even when the accused appears, in pursuance of the summons or a warrant and even before the evidence is led under Section 244 CrPC, and makes an application for discharge."

12. Hon'ble Supreme Court in **Harinarayan G. Bajaj v. State of Maharashtra & Ors. (2010) 11 SCC 520 and Ajay Kumar Ghose Vs. State of Jharkhand and others (2009) 14 SCC 115** considered the legal position with regard to difference of procedure in trial of warrant cases on the basis of police report and that instituted otherwise than a police report, and held that right of an accused to cross-examine the witnesses produced by the prosecution before framing of a charge against him was a valuable right. It was with their cross-examination the accused could show to the Court that there was no need for a trial against him and that the denial of the right of cross-examination under Section 244 would amount to denial of an opportunity to the accused to show to the Magistrate that the allegations made against him were groundless and there was no reason for framing of charge against him.

13. The trial court cannot frame the charge against accused without recording evidence under Section 244(1) Cr.P.C. and even at the stage of Section 244 Cr.P.C., the accused has right to cross-examine the witnesses. This Court has already held that right to cross-examine the witnesses, who are examined before framing of charge is a very precious right, because it is only by cross-examination that the accused can

show to the court that there is no need of trial against him. It is to be seen that before framing of the charge under Section 246 Cr.P.C., the Magistrate has to form an opinion about their being grounds for presuming that the accused had committed the offence triable under the Chapter. If, it is held that there is no right of cross-examination under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope of framing of charge against him.

14. On the basis of foregoing discussions and observations, this Court is of considered opinion that the learned trial court has not committed any illegality, irregularity or perversity while dismissing the discharge application moved by the accused revisionist under Section 245(2) Cr.P.C., however, the accused will have right to cross-examine the prosecution witnesses at the stage of evidence under Section 244 Cr.P.C. and before framing of charge, so that he may be able to show to the court that there is no need of trial against him and he is liable to be discharged under Section 245(1) Cr.P.C. He can confront the witnesses with regard to documents placed in support of his claim that the matter is essentially of civil nature and no charge as alleged against him is made out in the case.

15. Accordingly, the revision stands **dismissed** with above observations.

16. However, in case the accused-revisionist is not already enlarged on bail in the case, he is at liberty to move a bail application before the court below and the same will be disposed of in the light of guidelines issued by Apex Court in **Satender Kumar Antil Vs. Central Bureau of Investigation and another reported in 2022 SCC Online SC 825.**

(2024) 2 ILRA 44
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2023
BEFORE

THE HON'BLE SUBHASH CHANDRA SHARMA, J.

Criminal Revision No. 4122 of 2023

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

Counsel for the Revisionist:
Sri Rajeev Kumar, Sri Prashant Yadav

Counsel for the Opposite Parties:
G.A., Sri Chandra Prakash Pandey, Sri Firoz Ahmad Khan

Criminal Law - Indian Penal Code, 1860 - Sections 363, 366, 376-D, 328 - POCSO Act, 2012 - Section ¾ - Instant criminal revision filed by complainant/informant against orders of J.J.Board and Children's Court, whereby opposite party declared juvenile on basis of date of birth recorded in matriculation certificate, while ignoring date of birth recorded in primary school records from Classes I to V - Held, on consideration of St.ments of C.W.1, C.W.3, C.W.4 and entries in S.R. Registers of concerned schools, it established that opposite party first attended Primary School Kukandai, Kheragarh, Agra in Class I on 13.07.2009, continued his studies upto 31.01.2013, where his date of birth recorded as 17.07.2003 - Subsequently, without producing any transfer certificate or documents relating to date of birth, his uncle secured admission on basis of test in Shanti Devi Saraswati Shishu Mandir, Kheragarh, Agra by concealing earlier records and mentioning date of birth as 17.09.2006 - For determination of age of child, date of birth recorded in first

attended school is relevant and reliable - J.J. Board and Appellate Court failed to consider facts and their orders are not in conformity with Section 94 of Act or law laid down in Sanjeev Kumar Gupta (infra) - Accordingly, revision allowed, both impugned orders set aside, opposite party's date of birth as mentioned in first attending school i.e. 17.07.2003, making him 18 years, 8 months, and 8 days old, thus major. (Para 3, 13)

Revision allowed. (E-13)

List of Cases cited:

1. Sanjeev Kumar Gupta Vs St. of U.P & ors. AIR 2019 Supreme Court 4364, (Paras 14, 15)

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

1. Heard Sri Rajeev Kumar learned counsel for the revisionist, Sri Firoz Ahmad Khan learned counsel for the opposite party as well as learned A.G.A. and perused the record.

2. The present criminal revision has been preferred by the revisionist with a prayer to allow this revision and set aside the judgment and order dated 15.04.2023 passed by learned Additional District and Sessions Judge Agra in Criminal Appeal No. 137 of 2022 as well as order dated 20.10.2022 passed by Juvenile Justice Board, Agra in Case Crime No. 58 of 2022 under Sections 363, 366, 376-D, 328 I.P.C. and 3/4 of POCSO Act, Police Station Kheragarh, District Agra by which opposite party No. 2 was declared to be juvenile.

3. It is submitted by learned counsel for the revisionist that this criminal revision has been preferred on the part of complainant/ informant against the order passed by the learned J.J. Board as well as Children's Court by which the opposite party has been declared to be juvenile on the basis of date of birth as recorded in matriculation certificate while ignoring the date of birth which was recorded in primary school record that is from Class First to Class Fifth.

4. It is further submitted that the opposite party first studied in Primary School Kukandai, Kheragarh, Agra run by government in Class First and continued his studies up to Class Fifth where his date of birth was got recorded as 17.07.2003 by father of the opposite party then in Class Fifth he discontinued his studies that was the reason his name was discontinued from the record but no any transfer certificate was obtained by him from that school and he came in some other school that is Shanti Devi Saraswati Shishu Mandir Kheragarh, Agra and took admission in Class Third at the instance of his uncle Kedar Singh and continued his further studies up to Class Tenth where his date of birth was recorded as 17.09.2006 while concealing the date of birth and the previous education record in aforesaid primary school. No any other proof of date of birth was provided by the opposite party to the subsequent school. In this way he changed his date of birth and after adding three years in his age he got the date of birth registered as 17.09.2006 on the place of 17.07.2003. Before the learned J.J. Board both the records were produced and this fact was brought on record on the part of the revisionist and the documents were also proved by C.W. 3 the Head Master of Primary School Kukandai, Kheragarh, Agra Sri Jag Mohan Singh and certified copy of S.R. Register was also filed. C.W. 4 Keshav Dev Saraswat, Head Master of Shanti Devi Saraswati Shishu Mandir Kheragarh, Agra was also examined and he also filed copy of S.R.

Register showing the date of birth as 17.09.2006 and also the admission form which was signed by the uncle of the opposite party and also stated before the learned Board that no proof of date of birth of opposite party was provided to him by either the opposite party or his uncle and his admission was taken in Class Third on the basis of test. This fact was not disclosed by the revisionist before the subsequent school that he already studied in Primary School Kukandai, Kheragarh, Agra. In this way he made addition in his date of birth by concealing the previous record and passed matriculation. All these facts were also on record but not taken into consideration by the learned J.J. Board while passing the order but on the basis of date of birth as recorded in matriculation certificate he held him to be juvenile whereas on the basis of previous academic record he was major. This fact was also not considered by the learned appellate court but appeal was dismissed which cannot be said to be lawful and based on material on record, therefore request to set aside the orders passed by the learned Board as well as learned appellate court and to allow the appeal.

5. Sri Firoz Ahmad Khan learned counsel for the opposite party as well as learned A.G.A. opposed the prayer as aforesaid. It was contended by learned counsel for the opposite party that in the record of Primary School Kukandai, Kheragarh, Agra the mother's name of the opposite party was recorded as Golu Devi whereas his mother's name is Laxmi Devi and it was got registered in the record of subsequent school by uncle of the opposite party. No any other documentary evidence regarding date of birth of the opposite party was produced by the revisionist before the learned Board to doubt the genuineness of date of birth as recorded in subsequent school except S.R. Register. There was no any other document in Primary School to show that the opposite party studied there from Class First to Fifth but true fact was that he studied in Shanti Devi Saraswati Shishu Mandir Kheragarh, Agra from Class Third to Class Tenth on the basis of test and he never attended the Primary School Kukandai, Kheragarh, Agra. Learned J.J. Board as well as learned appellate court considered all these facts and passed the orders as aforesaid. In this way the orders passed by the learned courts below cannot be said to be illegal but this revision being devoid of merit is liable to be dismissed.

6. ***Section 94 of the Juvenile Justice Act*** contains the procedure for determination of age of the child as under:

(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.

7. In this regard Para 14 and 15 of the judgment in the case of ***Sanjeev Kumar Gupta Vs. State of U.P and others AIR 2019 Supreme Court 4364*** is noteworthy which is as under:-

14. Now it is in this background that it becomes necessary for the Court to determine whether the High Court, in the exercise of its revisional jurisdiction, was justified in reversing the view of the learned Sessions Judge that the second respondent was not a juvenile on the date of the incident. In seeking to place reliance on the date of birth (17 December 1998) recorded in the CBSE matriculation certificate, learned counsel appearing on behalf of the second respondent has submitted that under the provisions of Rule 12(3)(a) the said certificate has precedence over any other evidentiary document. In the course of the hearing of the appeal, we directed the CBSE to produce its records and to file an affidavit indicating the basis on which the date of birth was recorded in the matriculation certificate. The affidavit filed by the CBSE indicates that the date of birth in the records maintained by the CBSE was recorded purely on the basis of the final list of students forwarded by Maa Anjani Senior Secondary School, Etah Road, Shikohabad. The affidavit of the Assistant Secretary, CBSE states:

"? Maa Anjani Senior Secondary School, Etah Road, Shikohabad, sent Final list of Students registered for Class IX (2011-12) as (Eligible for Class X Examination Year 2013) of the School to the Central Board of Secondary Education, Regional office, Allahabad. In the said Final List of Students registered for Class IX (2011-12) (Eligible for Class X Examination for year ? 2013) at Serial No 00068 shows the name of Puneet Yadav son of Shri Rameshwar Singh and Smt Vishesh Devi and his date of birth has been shown as 17.12.1998 which contain the Signature and Photograph of Puneet Yadav. The date of Entry has been shown as 08.09.2011."

"... the Principal, Maa Anjani Senior Secondary School, Shikohabad, vide letter dated 04.02.2013 sent Roll Number ? wise List of 248 candidates for class X-2013 to the Assistant Secretary (Examination), C.B.S.E., Allahabad. Name of Puneet Yadav son of Rameshwar Singh and Mrs Vishesh Devi, Roll No 5156848 has been shown with date of birth as 17.12.1998 at page No 896 of the List, with the signature of Puneet Yadav."

"? the Certificate for Secondary School Examination (Session 2011-13) (true copy of which was been appended as Annexure CA-1 received by the Central Board of Secondary Education with the Order dated 16.04.2019 of this Hon'ble Court) showing the Date of Birth of Puneet Yadav as 17.12.1998 was issued on the basis of aforementioned records of the Central Board of Secondary Education."

CBSE has stated before this Court that the date recorded in the matriculation certificate was purely on the basis of the final list of students forwarded by the Headmaster of Maa Anjani Senior Secondary School, Shikohabad. The Headmaster of the Maa Anjani Senior Secondary School, Shikohabad deposed during the enquiry before the JJB, Firozabad. In the course of her examination, Headmaster Dipti Solanki stated:

"...We note down the date of birth of the student at the time of admission as per the information given by the parents and at the same time we obtain an affidavit but we could not procure an affidavit from this student. I have committed a mistake by not procuring an Affidavit from this student. The date of birth was entered on the basis of the information given by the parent/father."

The Headmaster further stated:

"...The father did not produce any record at the time of admission in respect of the date of birth of the student. They would have been asked to produce the record of class 4 at the time of admission but they did not. I cannot tell the reason thereof. The students are admitted without any document upto class 5."

The above deposition indicates that the second respondent was admitted to Maa Anjani Senior Secondary School, Shikohabad in the fifth standard and was a student of the school until he completed his matriculation. The second respondent attended the Saket Vidyasthali, Jedajhal, Firozabad until the fourth standard. The school register and transfer certificate form of that school specifically contains an entry in regard to the date of birth of the second respondent as 17 December 1995. Mr Ravindra Singh, learned senior counsel appearing on behalf of the second respondent has urged that the discrepancies which have been brought out in the course of the cross-examination of the former Manager of the school would indicate that there is a doubt in regard to the authenticity of that certificate. However, in our view, what must weigh against the second respondent's submission is that the date of birth which has been recorded in the certificate of the Saket Vidya Sthali completely matches the date of birth which was voluntarily disclosed by the second respondent both while obtaining his driving licence as well as the Aadhaar card. In both those documents, the originals of which were seized during the course of the investigation and have been produced before this Court, the date of birth is reflected as 17 December 1995. The driving license and the Aadhaar card are not standalone documents. The submission of the learned senior counsel that the date of birth in those documents may have been furnished by the accused to obtain an undue advantage cannot simply be accepted since it tallies with the date of birth indicated in the school records of Saket Vidya Sthali school. It is evident from the above analysis that the date of birth which was forwarded in the roll of students of Maa Anjani Senior Secondary School, Shikohabad was the sole basis of the date of birth which was recorded in the matriculation certificate. The date of birth in the records of Maa Anjani Senior Secondary School where the second respondent was a student from Class V to Class X is without any underlying document, as stated by the Principal in the course of the enquiry before the JJB. On the other hand, there is a clear and unimpeachable evidence in the form of the date of birth which has been recorded in the records of Saket Vidya Sthali school which is supported by the voluntary

disclosure made by the second respondent while obtaining both the Aadhaar card and the driving licence. The High Court reversed the findings of the Sessions Judge purely on the basis of the matriculation certificate. For the reasons which we have indicated, the date of birth as reflected therein cannot be accepted as authentic or credible. Once we come to the conclusion, as we have, that the date of birth of the second respondent is 17 December 1995, he was not entitled to the claim of juvenility as of the date of the alleged incident which took place on 18 August 2015.

15. For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 14 November 2018. Criminal Revision 2952 of 2017 shall in consequence stand dismissed. The order passed by the Sessions Judge, confirming the decision of the JJB rejecting the claim of juvenility is accordingly maintained. The second respondent shall accordingly be dealt with in accordance with law on the basis of the finding recorded in the present judgment, rejecting the claim of juvenility.

8. From perusal of record it appears that the father's name of the opposite party was Sri Ashok Kumar and his mother was Golo Devi as shown in the Ration card belonging to his family which is on record. Even in the Voter list the name of the mother of the opposite party is entered as Golo Devi. In the Ration card the name of opposite party has also been entered as son of Ashok in which mother's name Golo Devi has been entered as Mukhiya of the family. It establishes well that Golo Devi is the mother of the opposite party and she has been named as Laxmi Devi in subsequent academic record of the opposite party. In this way, the contention made by learned counsel for the opposite party cannot be accepted that Golo Devi and Laxmi Devi are two ladies and Golo Devi is not mother of the opposite party.

9. There is statement of C.W. 3 Head Master of Primary School Kukandai, Kheragarh, Agra Sri Jag Mohan Singh who clearly stated that the opposite party took admission in his school on 13.07.2009 in Class First whose date of birth as got registered was 17.07.2003 and it was also entered in the S.R. Register at Serial No. 1569. He studied there up to standard Fifth. Copy of S.R. Register was marked as Exhibit Ka 1. Opposite party passed Class Fourth and took admission in Class Fifth but he became absent that was the reason his name was discontinued and no any transfer certificate was taken by him.

10. C.W. 4 Sri Keshav Dev Saraswat, Head Master of Shanti Devi Saraswati Shishu Mandir Kheragarh, Agra stated that the opposite party took admission on 01.07.2014 in his school in Class Third and studied till Class Fifth up to 30.03.2017 and then he took his transfer certificate on 16.09.2017. On admission his date of birth was entered as 17.09.2006 but no any certificate in support thereof was given by him. His admission was taken on the basis of test in Class Third. Sri Kedar Singh made his signature in the admission form as guardian. He also filed copy of S.R. Register and the admission form and no any certificate regarding date of birth was filed in his school. In the admission form the date of birth of the opposite party was mentioned as 17.09.2006 by Sri Kedar Singh but it was not written by his father Sri Ashok Kumar. C.W. 2 Manoj Kumar, Head Master of Sri Pooran Chand Ramesh Chand Saraswati Vidya Mandir Kheragarh, Agra was also examined who made statement regarding education of opposite

party from Class Sixth to Class Tenth and also filed copy of S.R. Register in which in support of his date of birth transfer certificate from the school Shanti Devi Saraswati Shishu Mandir Kheragarh, Agra was attached. C.W. 1 Ashok Kumar, father of the opposite party was also examined who stated about the education of opposite party in Shanti Devi Saraswati Shishu Mandir Kheragarh, Agra and also stated that admission form was filed by his younger brother Sri Kedar Singh and said that he did not know about the date of birth mentioned by him in the school.

11. In Exhibit Ka 1, certified copy of S.R. Register which was filed by Head Master of Primary School Kukandai, Kheragarh, Agra Sri Jagmohan Singh, on Serial No. 1569 the name of opposite party has been entered and his date of birth is 17.07.2003 in figures and also in words. Father's name is Ashok Kumar and mother is Golo Devi. Date of admission in the school is 13.07.2009 in Class First, 01.07.2010 in Class Second 01.07.2011 in Class Third and in Class Fourth 01.07.2012 and 01.07.2013 in Class Fifth and his name was discontinued on 31.01.2013 on account of continuous absence. The education record was also got verified through B.S.A. By the learned Board in which the record was found as aforesaid.

12. In Primary School record, date of birth was recorded as 17.07.2003 and in subsequent school that is Shanti Devi Saraswati Shishu Mandir Kheragarh, Agra where date of birth was recorded as 17.09.2006.

13. On considering the statements of C.W. 1, C.W. 3, C.W. 4 and the entries made in S.R. Registers of previous and subsequent schools it is established that in this case the opposite party first attended Primary School Kukandai, Kheragarh, Agra in Class First on 13.07.2009 and continued his studies up to 31.01.2013 and then he took admission in Class Third in Shanti Devi Saraswati Shishu Mandir Kheragarh, Agra in Class Third on the basis of test and without providing any document relating to his date of birth including the transfer certificate issued from Primary School Kukandai, Kheragarh, Agra as aforesaid where his date of birth was recorded as 17.07.2003 but his uncle Sri Kedar Singh by mentioning his date of birth as 17.09.2006 got his admission done in the school Shanti Devi Saraswati Shishu Mandir Kheragarh, Agra while concealing the previous educational studies and the date of birth. In this way, for determining the age of the child/ opposite party the date of birth as mentioned in first attended school is relevant and can be relied on. The learned J.J. Board as well as learned appellate court did not consider all these facts while passing the orders in question that cannot be said to be based on the material on record and also in conformity with relevant provisions of law as contained under Section 94 of the Act and in view of the ratio in ***Sanjeev Kumar Gupta Vs. State of U.P and others AIR 2019 Supreme Court 4364***. As a result this revision being forceful is hereby ***allowed*** and order dated 20.10.2022 passed by learned J.J. Board as well as order dated 15.04.2023 passed by learned Appellate Court are hereby set aside and the age of the opposite party on the basis of his date of birth as mentioned in first attending school that is 17.07.2003 is determined which comes as 18 years 8 months and 8 days i.e. more than 18 and he is held major.

14. Accordingly, learned Board is directed to proceed further.

(2024) 2 ILRA 51
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.02.2024
BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Misc. Writ Petition No. 737 of 2024

Ajeet Pandey ...Petitioner
Versus
Directorate of Enforcement ...Respondent

Counsel for the Petitioner:
Ashish Chaturvedi

Counsel for the Respondent:
Kuldeep Srivastava, A.S.G.I.

Prevention of Money Laundering Act, 2002 (PMLA) – Sections 2(1)(a), 5, 6 & 8 – Adjudicating Authority – Composition and Jurisdiction – Chairperson Vacancy – Validity of Single-Member Bench – Maintainability of Writ Petition

The petitioner, a director of M/s Kandarp Hotels Pvt. Lt and former managing director of M/s Gangotri Enterprises Limited, challenged the validity of proceedings before the Adjudicating Authority under the PMLA, 2002, following a Provisional Attachment Order dated 17.11.2023, an Original Complaint No. 2119/2023, and a Show Cause Notice dated 14.12.2023, arguing that the Adjudicating Authority was not duly constituted due to the absence of a Chairperson after the retirement of Mr. Vinodanand Jha on 22.06.2023. The petitioner sought a mandamus to direct the constitution of a proper Adjudicating Authority under Section 6 and to stay proceedings, claiming the single-member bench was coram non judice. Held: Section 6(2) of the PMLA mandates an Adjudicating Authority comprising a Chairperson and two members, but Section 6(5)(b) allows the Chairperson to constitute benches with one or two members. Section 6(7) permits a single-member bench to hear matters, with the option to transfer complex cases to a two-member bench. Section 6(13) provides that in any vacancy (temporary or substantive) in the Chairperson's office, the senior-most member can act as Chairperson. The court rejected the petitioner's contention that Section 6(13) applies only to temporary vacancies, holding that the absence of qualifiers in the provision indicates it covers both types of vacancies, unlike Section 6(10), which explicitly addresses vacancies "other than temporary absence." The procedural requirement under Regulation 26(2) of the 2013 PMLA Regulations for the Chairperson's signature on orders is directory, not mandatory, and does not invalidate single-member proceedings. Relying on Gold Croft Properties Pvt. Lt Vs Directorate of Enforcement (2023 SCC OnLine Del 5900) and J. Sekar Vs U.O.I. (W.P. (C) 5320/2017), the court upheld the validity of a single-member bench. The writ petition was dismissed as the petitioner had a statutory remedy to file a reply before the Adjudicating Authority and approach the appropriate forum if aggrieved, as per N.P. Ponnuswami Vs Returning Officer (AIR 1952 SC 64).

Case Law Cited:

1. Kamlesh Kumar Sharma Vs Yogesh Kumar Gupta, AIR 1998 SC 1021

2. Gold Croft Properties Pvt. Lt Vs Directorate of Enforcement, 2023 SCC OnLine Del 5900

3. J. Sekar Vs U.O.I., W.P. (C) 5320/2017 (Delhi HC, 11.01.2018)

4. N.P. Ponnuswami Vs Returning Officer, AIR 1952 SC 64

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.)

(1) Heard Shri N. K. Seth, learned Senior Advocate assisted by Shri Ashish Chaturvedi, for the petitioner and Shri Kuldeep Srivastava, appearing for the Opposite party no.1.

(2) This petition has been filed by the petitioner for the following main prayer:-

"1) Issue a writ, order or direction in the nature of Mandamus directing the Respondent no.3 to take steps for constituting the Adjudicating Authority in terms of the mandate of Section 6 of the Prevention of Money Laundering Act, 2002."

(3) An application for interim relief has also been filed wherein the following prayers have been made:-

"a) Stay further proceedings before the Adjudicating Authority as well as operation of the Provisional Attachment Order No. 09/2023 [u/s 5(1)] dated 17.11.2023 (Annexure No.1) and all consequential proceedings arising therefrom including the Original Complaint No. 2119/2023 dated 12.12.2023 (Annexure No.2) filed before the Adjudicating Authority (u/s 5(5)] and the Show Cause Notice dated 14.12.2023 (Annexure No.3) issued by the Adjudicating Authority [u/s 8(1)] as they are nullity in the eyes of the law during the pendency of the Writ Petition.

b) Hold that until the Respondent No. 2 Adjudicating Authority is constituted in terms of the mandate of law under Section 6 PMLA, and a Chairperson is duly appointed, it may not carry out any further proceedings with respect to the adjudication in original complaint no. 2085/2023 filed by Respondent No. 1, as a single member Adjudicating Authority without a Chairperson tantamount to coram non judice,"

(4) A preliminary objection has been raised by Shri Kuldeep Srivastava, saying that the writ petition is not maintainable only against Show Cause Notice and since statutory remedy is available the writ petition should not be entertained. Only a Provisional Order of attachment was issued by the Deputy Director of Enforcement and thereafter the matter was referred to the Adjudicating Authority. The Show Cause Notice dated 14.12.2023 has been issued thereafter by the Respondent no.2 under Section 8 (1) of the Prevention of Money Laundering Act (hereinafter referred to as the 'PMLA' Act of 2002).

(5) It has been stated in the writ petition that the petitioner is the Director of M/s Kandarp Hotels Pvt. Ltd. and was the erstwhile Managing Director of M/s Gangotri Enterprises Limited and they had taken loan from various Banks way back in 2007. The Company could not repay such loan and opted for loan restructuring and in June, 2013, the process of Corporate Debt Restructuring was initiated with the support of Bank of India which was the lead banker at that stage. Initially, a letter of approval for the Corporate Debt Restructuring was given on 30.09.2013 and a final letter of approval of restructuring was issued on 31.10.2013. The Bank of India declared the Bank Accounts of M/s Gangotri Enterprises Limited as Non-Performing Assets (NPA) and subsequently the other Banks also declared such accounts of the Company as NPA. On 07.09.2016, a Joint Lenders Meeting was held where the Members decided to appoint Forensic Auditor for conducting forensic audit of the accounts. Later on, a report was submitted and the Bank of India proposed for closure of Forensic Audit Report subject to submission / compliance of required documents by the Company. In pursuance of such letter, M/s Gangotri Enterprises Limited, submitted all required documents and the forensic audit was 'implidely'

closed. Post closure of Forensic Audit the Bank of India itself sanctioned additional credit limit facilities to the Company. In 2020, the F.I.R. No. RC2232020A0007 was registered at CBI/AC-V, New Delhi, under Section 120-B, 420, 468, 471 of the Indian Penal Code, 1850 and Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988. On 01.01.2021 an ECIR bearing ECIR/LKZO/01/2021 was registered by the Enforcement Directorate by treating the subject F.I.R. as a scheduled offence under the Act of 2002. The CBI filed a Charge-Sheet on 30.06.2022 where various sections of the IPC and the Prevention of Corruption Act were dropped and only Sections 420 read with Section 120-B IPC were mentioned. The petitioner has been granted anticipatory bail in the predicate offence by the Special Judge, CBI (West), Lucknow on 20.05.2023.

(6) It has further been stated that the petitioner is aggrieved by the Provisional Attachment Order no.09/2023 issued by the Respondent no.1 under Section 5 (1) of the Act of 2002, where the properties owned by the petitioner have been provisionally attached. An original complaint has thereafter been filed by the Directorate of Enforcement registered as Original Complaint No. 2119 of 2023 under Section 5 (5) of the Act of 2002, on 12.12.2023 and in pursuance thereof, a Show Cause Notice has been issued by the Respondent no.2 as a member of the Adjudicating Authority on 14.12.2023.

(7) Learned counsel appearing on behalf of the petitioner has argued that there is no Adjudicating Authority available as the Chairperson one Mr. Vinodanand Jha, had retired on 22.06.2023, hence, the proceedings that have been initiated by way of Show Cause Notice, need to be quashed.

(8) Learned counsel appearing for the petitioner has placed reliance upon Section 2 (1) (a) of the Act where Adjudicating Authority has been defined as one constituted under Sub-Section (1) of Section 6. He has thereafter referred to Section 6 Sub Section (1) where it has been stated that the Central Government shall, by notification, appoint an Adjudicating Authority to exercise jurisdiction, powers and Authority conferred by or under the Act. Referring further to Section 6 (2), the learned counsel has argued that the Adjudicating Authority shall consist of a Chairperson and two other Members from the field of law, and from the field of Administration, Finance or Accountancy.

(9) Learned Senior counsel has referred to Sub-Section (5) & (6) to say that under Clause (b), a Bench may be constituted by the Chairperson of the Adjudicating Authority with one or two members as the Chairperson of the Adjudicating Authority may deem fit; and thereafter has referred to Sub-Section (7) of Section 6 to say that if at any stage of the hearing of any case or matter, it appears to the Chairperson or a Member, that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit.

(10) It has been argued that since the Chairperson alone can constitute Benches and he is one who can transfer the matters from one Bench to the other Bench. It is evident that without the Chairperson the Adjudicating Authority cannot function and it can be said that without the Chairperson

there is no Adjudicating Authority in existence.

(11) It has been argued by referring to the Regulations of 2013 framed under Act of 2002 that Regulations 26 Sub Clause-2 also says that every sheet of the order shall bear the signature of the Chairperson and Members constituting the Bench which means that if the Chairperson is not available then the order-sheet cannot be authenticated.

(12) Learned counsel for the petitioner has also placed reliance upon Sub-Section (13) of Section 6 to say that in the event of occurrence of any vacancy in the office of the Chairperson by reason of his death or resignation or otherwise, the Senior most member shall act as the Adjudicating Authority until the date on which a new Chairperson enters upon his office.

(13) It has been argued by the learned Senior Counsel that the word 'Vacancy' used in Sub-Section (13) should be read as a temporary vacancy only and not a permanent vacancy and only in case of a temporary vacancy the Senior most Member may act as the Chairperson. He has argued that Sub-Section (10) of Section 6 deals specifically with a vacancy which occurs for reasons other than temporary absence, and how the Adjudicating Authority has to continue with the adjudication in such cases of substantive vacancy. He argued that Sub-Section (10) implies that the proceedings shall be held up, in case if a permanent vacancy occurs in the office of the Chairperson and proceedings may be continued by the Adjudicating Authority from the stage at which the vacancy is filled, meaning thereby that if there occurs a Permanent Vacancy then proceedings would stop and would resume only on appointment of Chairperson.

(14) Shri N.K. Seth, has also referred to Sub-Section (14) and has argued that it provides how the hearings are to be managed before the Adjudicating Authority in case of temporary vacancy.

(15) In other words, Shri N.K Seth, has stated that under Sub-Section (10), a substantive vacancy has been referred to and under Sub-Section (14) of Section 6, a temporary absence has been referred to and not a substantive vacancy and a provision has been made by the Legislature with regard to the various exigencies and how the Adjudicating Authority should function in each of such Administrative exigencies.

(16) It has been argued on the basis of judgment rendered in ***Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta and others reported in MANU/SC/0110/1998 & AIR 1998 SC 1021***, decided by the Hon'ble Supreme Court on 09.02.1998; that the Supreme Court was dealing with the vacancies in non-Government Colleges on the post of Teachers and in Paragraph-14, it observed that the word 'Otherwise' has to be read as *'ejusdem generis' that is to say in a group similar to death, resignation, long leave vacancy, invalidation, person not joining after being duly selected.* In other words, it would be case of unforeseen vacancies which could not be conceived earlier as substantive vacancy, as Substantive Vacancy relating to retirement are vacancies that arise out with certainty as the date of retirement of the incumbent is known beforehand.

(17) It has been argued by Shri Seth that the Supreme Court has interpreted the

word 'Otherwise' in such a manner that the vacancies that are not certain should be treated as temporary vacancies and not substantive vacancies.

(18) Learned Senior counsel has referred to Annexure No.15 at Page 456 of the paper book and Paragraph-42 of the writ petition which is a news item that after retirement of the Vinodanand Jha as Chairperson the Member, Finance Mr. P.K. Upadhyaya, is working as Adjudicating Authority and has argued that he has issued the Show Cause Notice without jurisdiction. He has referred to the contents of the Paragraph-29 of the writ petition which are to same effect i.e. since at present the Adjudicating Authority comprises of a single member that too from outside the field of law and he is neither the Chairperson nor the Acting Chairperson, the Adjudicating Authority cannot be said to be constituted in terms of Section 6 of the Act of 2002 and the composition of the Adjudicating Authority suffers from the vice of *Coram Non-Judice.*

(19) It has also been argued on the basis of interim orders of different High Courts, that a large number of High Courts have stayed the proceedings before the Adjudicating Authority on the same grounds as have been argued before us with regard to Show Cause Notice/ Proceedings being without jurisdiction. The counsel for the petitioner has annexed copies of three such interim orders passed by the different High Courts in the paper book.

(20) The counsel for the Respondent no.1 has argued that all such orders that have been passed are interim orders of different High Courts and carry only persuasive value for this Court. He has referred to a Final Order/ Judgment rendered by the High Court of Delhi in LPA No.167 of 2023 in the matter of ***Gold Croft Properties Pvt. Ltd. Vs. Directorate of Enforcement***, decided on 19.09.2023 and reported in ***2023 SCC OnLine Del 5900***. He has read out the Paragraph no.1 of the judgment to say that a similar argument was raised by the appellants therein challenging an order passed by the Adjudicating Authority under the Act of 2002 disposing of an application filed by the appellant praying for deferment of proceedings before the Adjudicating Authority on the ground that the Bench at that point of time suffered from *"Coram non-judice"* as no Adjudicating Authority had been constituted in terms of Section 2 (a) read with Section 6 (1) and (2) of the PMLA, 2002. The writ court had rejected such arguments and the appellant being aggrieved had approached the Division Bench in Letters Patent Appeal against such order of the writ Court.

(21) The counsel for the Respondent no.1 has taken this Court through the observations made by the Division Bench in Paragraph Nos.11 to 14 of the judgment in Gold Croft Properties Pvt. Ltd. (supra) which are being quoted hereinbelow:-

"11. Section 6 of the PMLA deals with the composition of the adjudicating authority and powers of the Adjudicating Authority. Section 6(2) of the PMLA provides that an Adjudicating Authority shall consist of a Chairperson and two other Members.

12. The question, therefore, as to whether there can be a Bench consisting of a Single Member is no longer a res integra and has been settled in a Judgment dated 11.01.2018 passed by the Division Bench of this Court in a batch of petitions i.e., W.P. (C) 5320/2017 etc. in the case of J Sekar

vs. Union of India & Ors etc. Paragraph Nos.79 and 80 of the said Judgment reads as under:

"79. The Court next takes up the question of the composition of the AA on which extensive arguments were advanced by the learned counsel for the Petitioners. In this context, it must be noticed that under Section 6 PMLA, the AA is supposed to consist of the Chairperson and two other members - one of whom shall be a person having experience in the field of law. Section 6(3) further sets out what the qualifications for appointment as a member of an AA should be. One of those qualifications is that the person has to be qualified for appointment as a District Judge or a person in the field of law or a member of an Indian Legal Service. The other qualification is possession of a qualification in the field of finance, accountancy or administration as may be prescribed. It is, therefore, not the case that all the members of the AA should be judicial members.

80. It is seen that under Section 5 PMLA, the jurisdiction of the AA ?may be exercised by the Benches thereof'. Under Section 6(5)(b) PMLA, a Bench may be constituted by the Chairperson of the AA "with one or two members" as the Chairperson may deem fit. Therefore, it is possible to have single- member benches. The word 'bench' therefore does not connote plurality. There could, even under Section 6(5)(b) PMLA, be a 'single member bench'. When Section 6(6) PMLA states that a Chairperson can transfer a member from one bench to another bench, it has to be understood in the above context of there also being single-member benches." (emphasis supplied)

13. In view of the above, the application filed by the Appellant that the quorum of the Adjudicating Authority was not complete cannot be accepted.

14. Section 6(7) of the PMLA provides if at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit."

(22) It has been submitted on the basis of such judgment that not only the Division Bench in Gold Croft Properties (supra) but also a Division Bench of the Delhi High Court in bunch of the writ petitions leading case of which was ***J. Sekar vs. Union of India & Ors. in Writ Petition No.5320 of 2017*** by its judgment and order dated 11.01.2018 had rejected the arguments of the writ petitioners therein regarding defective composition of the Adjudicating Authority.

(23) This Court has considered the rival submissions and also carefully perused the Section-6 of the Act which refers to the composition and Powers etc. of the Adjudicating Authority and it provides that the Adjudicating Authority shall consist of a Chairperson and two members belonging to the field of Law, Administration, Finance or Accountancy. It does not say that the Chairperson shall only belong to the field of law.

(24) This Court has also considered the Sub-Section (5) of Section-6 which in Clause-b mentions that a Bench may be constituted by the Chairperson of the Adjudicating Authority with one or two Members as the Chairperson of the

Adjudicating Authority may deem fit. Similarly under Sub-Section (6) the Chairperson may transfer a Member from one Bench to another Bench and under Sub-Section (7) if at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson or, as the case may be, referred to him for transfer, to such Bench as the Chairperson may deem fit.

(25) It is apparent from a perusal of Sub-Section (7) that a matter can be heard by one Member of the Adjudicating Authority. A Bench can consist of one Member only and a matter can be transferred on sufficient grounds to a Bench of two Members.

(26) This Court has also considered Sub-Section-10 and does not find the arguments made by the Senior Counsel of any substance with regard to a case where on a temporary absence or on a vacancy having occurred in the office of the Chairperson, the Proceedings/ Hearing shall come to a halt and resume only when vacancy is filled. Sub-Section (10) only clarifies that in case of such vacancy or temporary absence of one Member of the Bench, the proceedings shall be continued or resumed before the Adjudicating Authority from the stage at which the vacancy is filled by the Central Government.

(27) We have also gone through the Sub-Section (13), on the basis whereof the counsel for the petitioner had argued that the vacancy referred therein is only of a temporary nature providing that in such a temporary vacancy the Senior Most Member shall act as Chairperson of the Adjudicating Authority only upto a date on which the new Chairperson is appointed to fill such vacancy, enters upon his office.

(28) This Court is of the considered opinion that the Legislature does not waste words. It used words which clarify its intention Sub-Section (10) refers to a Substantive vacancy as the Legislature has used the words "other than a temporary absence". On the other hand, under Sub-Section (13) the Legislature has used the words "vacancy" alone and has not clarified as to what type of vacancy it has in mind. From a bare perusal of the language of Sub-Section (13), this Court is of the considered opinion that since the Legislature has not used the same phrase as it has used in Sub-Section (10) i.e. *"If for reasons other than temporary absence, any vacancy occurs in the office of the Chairperson or any other Member",* it is apparent that without suffixing or pre-fixing the word 'vacancy', with any other descriptive noun the language used by the Legislature is unambiguous and that any type of vacancy, be it substantive or temporary, has to be dealt with under Sub-Section (13) in the manner as provided therein.

(29) Learned Senior counsel has referred to Regulations of 2013 framed under the Act of 2002 and Regulations 26 Sub-Clause 2 thereof. The orders of the Adjudicating Authority need to be signed on every page by the Chairperson and the Members constituting the Bench. The Sub-Clause (2) of Regulation 26 is only a procedural requirement and it reference as to how the order-sheet is to be maintained. The word 'shall' used in Sub-Clause (2) can be read as 'may' being a directory provision

and not as mandatory provision as no sanction is attached in case of non-signing of the order-sheet by the Chairperson. In other words, such interpretation abides by the very language of Section 6 of the Parent Act i.e. Act of 2002 which clearly provides that Chairperson can constitute a Bench either with one Member or with two Members and in case, there is a matter of substantial importance which requires hearing by two Members Bench, he can transfer a matter from one Member Bench to a Division Bench/ Two Members Bench. The "Bench" does not necessarily mean a Division Bench as is the established practice in all judicial fora. Even a Bench of the High Court having a single Judge is referred to as a "Bench" and acts as a Court.

(30) This Court is also of the considered opinion that the law was settled by the Constitution Bench of the Hon'ble Supreme Court in the case of ***N.P. Ponnuswami Vs. Returning Officer reported in AIR 1952 SC 64***, where it was categorically held that where rights and liabilities are created under statute and remedies are provided in the statute then such remedies should be availed of first before the extraordinary Writ jurisdiction under Article 226 of the Constitution of India can be invoked.

(31) This Court is of the considered opinion that the petitioner has remedy of approaching the Adjudicating Authority by filing his reply and he should file his reply taking all legally permissible grounds as are available to him, and if he is then aggrieved, he has liberty to approach the Appropriate Forum.

(32) The writ petition stands ***dismissed.***

(33) No order as to costs.

(2024) 2 ILRA 58
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.02.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

First Appeal From Order No. 321 of 2023

Saurabh Gupta ...Appellant
Versus
Smt. Archna Gupta & Ors. ...Respondents

Counsel for the Appellant:
Vipul Gupta, Pritish Kumar

Counsel for the Respondents:
Ankit Srivastava, R.B.S. Rathaur, Rajneesh Maurya

... Prohibition of Benami Property Transactions Act, 1988-Section 2(9)(b)(iii)- Appellant filed a Civil Suit- impleading the respondents as defendants- for a declaration that he is the co-sharer of 1/4th part –property belongs to joint family-e it was purchased by the father of the appellant- injunction application – rejected-impugned- Sectiontion 2(9)(b) (iii) of Act, 1988 -prescribes that if the husband purchased the property in the name of his wife or children-the same will not be said to be Benami property-but will be deemed to be purchased by the husband out of his source-prima facie the property is joint Hindu family property-protection of property from transferring to a third party is necessary-impugned order set aside-**Appeal allowed.**

Held:

This Court under Sectiontion 114 of Indian Evidence Act may presume the existence of fact that the property purchased by Hindu husband in the name of his spouse, who is homemaker and does not have independent source of income, will be the property of family, because

in common course of natural event Hindu husband purchases a property in the name of his wife, who is homemaker and does not have any source of income for the benefit of family. (E-9)

Cases cited:

1. Kuldeep Sharma & ors. VsSatyendra Kumar Sharma & ors.; AIR 2001 Alld 366

2. Dalpat Kumar & anr. Vs Prahlad Singh & ors.; AIR 1993 SC 276

3. Smt. Ranibai alias Mannubai Vs Smt. Kamla Devi & ors.; AIR 1996 Supreme Court 1946

4. VSD. Tripathi & ors. Vs Vijai Shanker Dwivedi & ors.; AIR 1976 Allahabad 97

5. Cotton Corporation of India Limited Vs United Industrial Bank Limited; 1983(4) SCC 625

6. Manohar Lal Sharma & ors. Vs Pyare Lal & ors. in Sectiono nd Appeal No.2627 of 1974 decided on 21st October, 1986

7. Kuppala Obul Reddy Vs Bonala Venkata Narayana Reddy (dead) through Lrs; AIR 1984 Supreme Court 1171

8. Bhagwat Sharan (Dead Thr. Lrs) Vs Purushottam; AIR 2020 SC 2361

9. Neon Laboratories Ltd. Vs Medical Technology Ltd. & ors.; 2016 (2) SCC 672

10. Zenith Metaplast Pvt. Ltd. Vs St. of Mah. & ors.; 2009 (10) SCC 388

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

1. Heard Sri Pritish Kumar, learned counsel for the appellant as well as Sri Ankit Srivastava and Sri R.B.S. Rathaur learned counsel for respondent no.2.

2. No one appears on behalf of respondent no.3 despite service of notice.

3. Present appeal has been filed against the order dated 25.07.2023 passed by Civil Judge (S.D.), Hardoi in Civil Suit No.23 of 2023 (Saurabh Gupta vs Smt. Archna Gupta and others) by which the injunction application filed by the appellant under Order 39 Rule 1 and 2 of C.P.C. (application no.13(g) has been rejected.

4. The crux of the matter is that the appellant filed a Civil Suit No.23 of 2023, impleading the respondents as defendants, for a declaration that he is the co-sharer of 1/4th part of the property in dispute as the property belongs to joint family property because it was purchased by the father of the appellant, who is also the husband of respondent no.1 in the name of respondent no.1. In the suit above, the specific plea was taken that respondent no.1 was the house maker and did not have any independent source of income. Through a sale deed dated 20.10.1986, the appellant's father purchased the property in dispute from Ram Ratan Gupta. It was further mentioned in the plaint that the appellant also made construction over that plot, and thereafter, the entire family has been running a business therein, and this complex is also known as R.C. Complex. Therefore, an application under Order 39 Rule 1 and 2 C.P.C. was filed during the pendency of the present suit with a prayer that the respondent may be restrained from transferring the same. In the written statement, respondents have stated that the aforesaid property has been gifted by respondent no.1 to respondent no.2. The application above for interim injunction has been dismissed by the Court below vide order dated 25.07.2023.

5. Contention of counsel for the appellant is that respondent no.1 was a homemaker and did not have any

independent income, and his father purchased the property in dispute in the name of respondent no.1 (wife), therefore property belongs to the joint family property and not an individual property of respondent no.1. It is further submitted that the appellant as well as respondent no.2, have been jointly running a business of selling toy in the property above.

6. It is also submitted by counsel for the appellant that in the gift deed, respondent no.1 admitted that she is homemaker and had she been a working women and having source of income, then this fact would have been mentioned in the gift deed itself, but she chose to mention herself as a homemaker.

7. In support of his contention, counsel for the appellant has also relied upon the judgment of Co-ordinate Bench of this Court in the case of **Kuldeep Sharma and others vs Satyendra Kumar Sharma and others; AIR 2001 Alld 366,** wherein it was observed that if Hindu husband purchases a property in the name of his wife, who is homemaker then it is to be presumed that it is a benami transaction unless otherwise shown to be purchased by the wife from her source of income. He further relied upon the judgement in the case of **Dalpat Kumar and another vs Prahlad Singh and others; AIR 1993 SC 276**, in which the Hon'ble Supreme Court observed in para 5 that for the purpose of injunction, a *prima facie* case is not to be confused with a *prima facie* title, which has to be established, on evidence at the trial and while granting injunction, the Court should consider the party seeking relief does not have any remedy available except one to seek an injunction and he needs protection from the consequence of apprehended injury or dispossession.

8. Counsel for the appellant further relied upon the judgement of Apex Court in the case of **Smt. Ranibai alias Mannubai vs Smt. Kamla Devi and others; AIR 1996 Supreme Court 1946**, in which Hon'ble Apex Court observed that the injunction should be granted in the suit for a declaration if the Court feels protection is to be given in the pending suit. Therefore, he lastly submitted that a *prima facie* case for granting injunction has not considered by the Court below. Thus, considering this fact, as well as the legal position that the property purchased in the name of the homemaker by the husband will be deemed to be the property of joint family property, the appellant is entitled to 1/4 share in the property in dispute, therefore his right should be protected by restraining the respondents from creating any 3rd party's right.

9. Per contra, learned counsel for the respondent nos. 1 and 2 has submitted that in present case application for an injunction under Order 39 Rule 1 and 2 C.P.C. itself is not maintainable as no final relief was claimed in the plaint, which is in nature of permanent injunction.

10. In support of his contention, learned counsel for the respondent nos.1 and 2 has relied upon the judgement of the co-ordinate Bench of this Court in the case of **V.D. Tripathi and others vs Vijai Shanker Dwivedi and other; AIR 1976 Allahabad 97**, in which Court observed that there was no prayer for permanent injunction restraining the defendant from suspending the plaintiff, then prayer for interim injunction cannot be granted under Order 39 Rule 1 and 2 C.P.C. because prayer for an interim injunction should not be different from final prayer in the plaint and also the judgement of Apex Court in

the **Cotton Corporation of India Limited vs United Industrial Bank Limited; 1983(4) SCC 625** in which Hon'ble Apex Court observed that the power to grant a temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms, as prayed for, temporary relief in the same terms can hardly be ever granted. In another judgement relied by the respondent in the case of **Manohar Lal Sharma and others vs Pyare Lal and others in Second Appeal No.2627 of 1974** decided on 21st October, 1986, this Court observed that there is no presumption that a Hindu joint family owns the joint properties unless it is established that it had sufficient nucleus to acquire that property. In another judgement relied upon him in the case of **Kuppala Obul Reddy vs Bonala Venkata Narayana Reddy (dead) through Lrs; AIR 1984 Supreme Court 1171,** in which Hon'ble Apex Court observed that there may be a presumption that the joint family but not for the possessing of joint family property. In another judgement of the Supreme Court in **Bhagwat Sharan (Dead Thr. Lrs) vs Purushottam; AIR 2020 SC 2361**, the Hon'ble Supreme Court observed that unless the material is produced to show that payment was made to purchase the property out of the fund of HUF, the property cannot be said to belong to HUF.

11. After considering the rival submissions of learned counsel for the parties and on perusal of the record, it is clear that the father of appellant had purchased the property in dispute, who was also the husband of respondent no.1. There is nothing on record which shows that respondent No. 1 had any independent source of income. Though the husband can purchase a property in the name of his wife as a gift to her to make her absolute owner of that property, but that would come, only after the evidence is adduced. The Co-ordinate Bench of this Court has already observed that once a property is purchased by a Hindu husband in the name of his wife, who is homemaker, then the property will be deemed to be purchased by the husband himself from his source unless the contrary is proved. Secondly, it is also evident from the judgment of the Apex Court in **Smt. Ranibai alias Mannubai (supra)** that even in the suit for declaration as an application under Order 39 Rule 1 and 2 read with Section 151 C.P.C. is maintainable for the protection of property, which is the subject matter of suit if the Court finds protection of the subject matter is necessary, and if protection is not granted, the same may result in irreparable loss to the complainant.

12. Proviso (iii) of Section 2(9)(b) of Prohibition of Benami Property Transactions Act, 1988 also prescribes that if the husband purchased the property in the name of his wife or children, then the same will not be said to be Benami property but will be deemed to be purchased by the husband out of his source.

13. Law relating to granting interim injunction during the pendency of suit is well-settled which was reiterated by the Apex Court in several judgements. In the case of **Neon Laboratories Ltd. vs Medical Technology Ltd. and others; 2016 (2) SCC 67**2, Hon'ble Apex Court observed as under;

"However, it is now entrenched in our jurisprudence that the appellate Court is not flimsily, whimsically or lightly interfere in the exercise of discretion by a sub-ordinate court unless such exercise is

palpably frivolous. Perversity can pertain to the understanding of law or the appreciation of pleadings or evidence."

14. Hon'ble Apex Court in the case of **Zenith Metaplast Pvt. Ltd. vs State of Maharastra and others; 2009 (10) SCC 388**, while laying down the law relating to granting the injunction, observed that the interim order is a temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become infructuous or a *fait accompali* before the final hearing. It also further observed that the grant of a temporary injunction is governed by three basic principles, i.e. *prima facie* case, balance of convenience, and irreparable injury, which must be considered in a proper perspective in the facts and circumstances of the particular case. For reference para 30, 31 and 37 of the above judgments are quoted as below;

"30. Interim order is passed based on prima facie findings, which are tentative. Such order is passed as a temporary arrangement to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a fait accompli before the final hearing. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial (vide Anand Prasad Agarwalla v. Tarkeshwar Prasad [(2001) 5 SCC 568] , and State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha [(2009) 5 SCC 694 : (2009) 2 SCC (L&S) 109]).

31. Grant of an interim relief in regard to the nature and extent thereof depends upon the facts and circumstances of each case as no straitjacket formula can be laid down. There may be a situation wherein the respondent-defendant may use the suit property in such a manner that the situation becomes irretrievable. In such a fact situation, interim relief should be granted (vide M. Gurudas v. Rasaranjan [(2006) 8 SCC 367 : AIR 2006 SC 3275] and Shridevi v. Muralidhar [(2007) 14 SCC 721]). Grant of a temporary injunction is governed by three basic principles, i.e. prima facie case, balance of convenience; and irreparable injury, which are required to be considered in a proper perspective in the facts and circumstances of a particular case. But it may not be appropriate for any court to hold a mini-trial at the stage of grant of temporary injunction [vide S.M. Dyechem Ltd. v. Cadbury (India) Ltd. [(2000) 5 SCC 573 : AIR 2000 SC 2114] and Anand Prasad Agarwalla [(2001) 5 SCC 568] , SCC p. 570, para 6].

37. Thus, the law on the issue emerges to the effect that interim injunction should be granted by the Court after considering all the pros and cons of the case in a given set of facts involved therein on the risk and responsibility of the party or, in case he loses the case, he cannot take any advantage of the same. The order can be passed on settled principles taking into account the three basic grounds i.e. prima facie case, balance of convenience and irreparable loss."

15. Be that as it may, here the appellant is claiming the declaration of only 1?4th share in the property in dispute on the ground that the property belongs to a joint Hindu family and the property was purchased during lifetime of father of the appellant in the name of respondent no.1, who was homemaker. **This Court under Section 114 of Indian Evidence Act may**

presume the existence of fact that the property purchased by Hindu husband in the name of his spouse, who is homemaker and does not have independent source of income, will be the property of family, because in common course of natural event Hindu husband purchases a property in the name of his wife, who is homemaker and does not have any source of income for the benefit of family. Therefore, in such case *prima facie* the property is joint Hindu family property and protection of property from transferring to a third party is necessary, consequently this Court finds that the Court below, while passing the impugned order dated 25.04.2023 has not applied his mind despite being a *prima facie* case, and in such case protection is necessary against further transferring the property or changing the nature of same, if same is not protected, there are chances the property may be transferred or nature of property may be changed in that case even if the appellant's suit is decreed, then he will suffer irreparable loss and injury.

16. Therefore, the order dated 25.07.2023 passed by Civil Judge (S.D.), Hardoi in Civil Suit No.23 of 2023 (Saurabh Gupta vs Smt. Archna Gupta and others) is hereby set aside. Injunction application filed by the appellant bearing Paper No.13(g) is allowed, and respondents are restrained from transferring the property in dispute during the pendency of the suit. As the dispute is between the real brothers and the suit is still pending, therefore, it would appropriate the Court below will decide the same expeditiously in accordance with law without giving any unnecessary adjournment to either of the parties.

17. With the observation above, the appeal is **allowed.**

(2024) 2 ILRA 63
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.02.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

First Appeal From Order No. 635 of 2018

Anil Kumar Chaturvedi ...Appellant
Versus
Union of India ...Respondent

Counsel for the Appellant:
Manish Kumar Srivastava, Chandra Prakash Singh

Counsel for the Respondent:
Ambrish Rai, Jai Prakash Tripathi, Sm Singh Royekwar

Railway claim tribunal-Jurisdiction- Impugned order-petition has been returned to the appellant as the Railway Claims Tribunal, Lucknow Bench, has no jurisdiction - tribunal at Gorakhpur has jurisdiction- claim petition was filed in the year, 2011 - returned after 7 years- the normal residence of the appellant is not at Lucknow - in place of returning the claim petition – liberty should have been granted to the applicant to move an application before the Chairman -for transfer of the case -or the tribunal itself could have directed to put up the matter before the Chairman to consider for transfer- Rule 8- the application for compensation can be filed before the Bench having territorial jurisdiction over the place from which the passenger obtains or purchases his pass or tickets –or where the incident or untoward incident had occurred or where the place of destination station lies or

where the claimant normally resides. **Appeal partly allowed.** (E-9)

Cases cited:

1. Morgina Begum vs Managing Director Hanuma Plantation Ltd; AIR 2008 SCC 199

2. Pankaj Kumar vs U.O.I.-FAFO no.767 of 2012

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard Sri Manish Kumar Srivastava learned counsel for the appellant and Sri Ambrish Rai learned counsel for the respondent.

2. This First Appeal From Order under Section 23 of the Railway Claims Tribunal Act as well as under Chapter 9 of the High Court Rules has been filed against the order dated 06.07.2018 passed in Case no.O.A/II/U/979/11; Anil Kumar Chaturvedi vs Union of India by Railway Claims Tribunal, Lucknow Bench, Lucknow by means of which the petition has been returned to the appellant as the Railway Claims Tribunal, Lucknow Bench, Lucknow (hereinafter referred as Tribunal) has no jurisdiction to try the case and the tribunal at Gorakhpur has jurisdiction.

3. Submission of learned counsel for the appellant is that the claim petition was filed in the year, 2011 and it has been returned after 7 years, whereas in case, the tribunal was of the view that the tribunal concerned has no jurisdiction then it could have been returned at the threshold by the Registrar. He further submits that as per Rule 8 of the Railway Claims Tribunal (Procedure) Rules, 1989, the application for compensation can also be filed where the claimant normally resides, therefore, the claim petition is maintainable before the tribunal at Lucknow also because the appellant normally resides at Lucknow. In this regard, the applicant had filed a certificate issued by the Corporator to the effect that the appellant resides at Bahadurpur, P.S-Gudamba, Kursi Road, Lucknow, but it has been discarded only on the ground that the appellant could not file the copy of the gas connection, electricity bill, receipt of the house etc, whereas it is not required, once, the certificate of the Corporator was filed. As such, learned counsel for the appellant submits that the impugned order is not sustainable and it is liable to be set aside with a direction to the tribunal concerned to decide the claim petition expeditiously. Learned counsel for the appellant relies on the judgment and order dated 12.07.2018 passed in FAFO no.767 of 2012 (Pankaj Kumar vs Union of India).

4. Per contra, learned counsel for the respondent submits that the appellant is resident of Gram Chaubepur, Post & P.S-Phephna, District-Ballia, the address which was given by the appellant in the claim petition also. The accident had occurred at Sagarpali railway station and the appellant claims that he was travelling from Amlai to Ballia on 04.09.2011, when the alleged accident had occurred, which falls under the jurisdiction of the Railway Claims Tribunal, Gorakhpur and not in the jurisdiction of Railway Claims Tribunal, Lucknow. The appellant was cross examined in regard to the address of Lucknow, where he claims that he normally resides. In the cross examination, the appellant admitted that he does not reside at Lucknow after the accident and he only used to come to Lucknow. He further submits that certificate of Corporator cannot be said to be conclusive proof of the ordinary residence of the appellant at Lucknow because the said certificate has

been issued only on the basis of the facts which were brought to his knowledge, which is mentioned in the certificate itself. Therefore, it cannot be said that the appellant normally resides at Lucknow on the given address. Thus, the submission is that the claim petition has rightly been returned in accordance with law. The appeal is misconceived and liable to be dismissed.

5. I have considered the submissions of learned counsel for the parties and perused the records.

6. The appellant had filed the claim petition before the Tribunal at Lucknow claiming compensation in regard to the accident held at Sagarpali, Railway Station, while the appellant was traveling from Amlai to Ballia on a second class ticket of the train on 04.09.2011. The claim petition was filed showing his address as resident of Gram Chaubepur, Post & P.S.-Phephna, District-Ballia. However, in column no.14 of the claim petition, in regard to the local address of the petitioner, Bhendahapur, P.S-Gudamba, District-Lucknow has been shown as his local address.

7. Perusal of the order sheet of the tribunal indicates that the case was registered and the notices were issued. The respondent filed the written statement raising a plea of jurisdiction in paragraph-15 that the claim petition is not maintainable before the tribunal at Lucknow on the ground that the journey has been shown from Amlai to Ballia and the place of incident was near Sagar Pali railway station and the address of the applicant has been shown in Ballia District and all these places do not come under the jurisdiction of the tribunal at Lucknow. It has further been stated that the application has been filed on the basis of local address but no documentary proof of it has been filed, as such the application is not maintainable before the tribunal at Lucknow.

8. The tribunal, while observing as to whether the case is maintainable as alleged in para-15, framed four issues on 28.03.2012. Thereafter, in support of the proof of the local address, the appellant filed an undated certificate issued by the Corporator as paper no.11/1 along with an application for taking document on record on 25.08.2015. On the said date, the additional issue no.5 was framed "whether this Bench of tribunal has territorial jurisdiction to entertain and dispose of this case". It was also observed that this issue shall be taken as preliminary issue and shall be decided at first during pronouncement of judgment as it requires evidence also. Thereafter, the evidence was adduced by the parties. The appellant was also cross examined on the point of local address on 29.01.2016.

9. The tribunal decided the preliminary issue by means of the impugned order and held that on the basis of evidence, it is not proved that the appellant resides in Lucknow, therefore, the tribunal at Lucknow has no jurisdiction to hear and decide the claim petition, accordingly, returned the claim petition to the appellant by means of the impugned order dated 06.07.2018. Feeling aggrieved the instant FAFO has been filed.

10. Section 14 of the Railway Claims Tribunal Act, 1987 (hereinafter referred as the Act of 1987) provides the distribution of business amongst Benches. Sub-section (2) of Section 14 provides that if any question arises as to whether any matter

falls within the purview of the business allocated to a Bench, the decision of the Chairman shall be final. The explanation appended to the Section 14 provides that the expression "matters" includes an application under Section 20. Section 20 of the Act of 1987 provides the power of Chairman to transfer cases from one Bench to another on the application of any of the parties.

11. Rule 3 of the Railway Claims Tribunal (Procedure) Rules, 1989 (hereinafter referred to as Rules of 1989) provides the territorial jurisdiction of Benches which is extracted hereinbelow:

"3.Territorial jurisdiction of Benches-*(1) The number of Benches, the headquarter of and the territorial jurisdiction of a Bench shall be as specified in Sch.I and Sch I(A).*

(2)If an application is received by a Bench which does not have territorial jurisdiction to deal with the matter, the Registrar of the bench shall return the application to the applicant.

(3)Notwithstanding anything contained in sub-rule (2) the applicant may apply to the Chairman and the Chairman may thereupon for reasons recorded in writing direct a Bench other than the Bench before which an application has been filed to hear such application and issue such orders as may be necessary for the transfer of the application."

12. Rule 8 of the Rules of 1989 provides the place of filing application for compensation in accident or untoward incident claim, which is extracted hereinbelow:-

"8. Place of filing application for compensation in accident or untoward incident claim- *An application for compensation payable under Sections 124 and 124A of the Railways Act, 1989 (24 of 1989) may be filed before the Bench having territorial jurisdiction over the place from which the passenger obtains or purchases his pass or tickets or where the accident or untoward incident occurs or where the place of destination station lies or where the claimant normally resides."*

13. According to the aforesaid Rule 8, the application for compensation can be filed before the Bench having territorial jurisdiction over the place from which the passenger obtains or purchases his pass or tickets or where the incident or untoward incident had occurred or where the place of destination station lies or where the claimant normally resides.

14. In the present case, the appellant has filed the application before the tribunal at Lucknow claiming that he normally resides at Lucknow. In support of his claim for the address at Lucknow, a certificate of Corporator has been filed. The certificate has been issued by the Corporator on a printed proforma, which is extracted here-in-below:-

प्रमाण-पत्र

(निवास, आय, जाति)

श्री/ श्रीमती/ कु0 अनिल कुमार चतुर्वेदी

पुत्र/ पुत्री/ पत्नी/ श्री स्व0 द्वारीकानाथ चौबे

निवासी भेडहापुरा लखनऊ

लखनऊ के निवासी है जिनकी जाति X

इनके पिता/ माता /अभिभावक X

की मासिक आय लगभग X प्रतिमाह है I

उपरोक्त तत्व जहाँ तक मेरी संज्ञान मे लाया गया उसके अनुसार में इनके उज्जवल भविष्य की कामना करता हूँ I"

15. The certificate has been issued by the Corporator on a printed proforma. It is mentioned at the bottom of the certificate that to the extent the aforesaid fact has been brought to his knowledge, he wishes for his bright future. The appellant was cross examined on this point on 29.01.2016. In the cross examination, he admitted that he is permanent resident of Ballia and he used to reside in Lucknow from the year, 2010 i.e. from the date of accident. Thereafter, he himself stated that he does not reside here after the accident and he used to come occasionally, therefore, the contradictory statement has been given by the appellant in his cross examination. On one hand, he says that he resides in Lucknow after the accident in 2010 and on the other hand, he says that he does not reside here after the accident. Therefore, this Court is of the view that the appellant can not be treated to be a normal resident of Lucknow, merely on the basis of certificate of Corporator, which has been issued only on the basis of information provided to him, without any enquiry or proof.

16. The Hon'ble Supreme Court, in the case of ***Morgina Begum vs Managing Director Hanuma Plantation Ltd; AIR 2008 SCC 199***, has held that the statements of the claimant regarding place of residence given cannot be doubted to be false simply because they have not produced the documents to show that in fact they are residing at the said place, however, other party wanted to prove that they were deposing false, they should have been cross examined.

17. In view of above, in case of raising doubt about the place of residence of the claimant, he can be cross examined. Once he has been cross examined and on the basis of cross examination it has been found that he normally does not reside at the given address, the certificate submitted by the applicant cannot be accepted as proof of normal residence of appellant, coupled with the fact that the certificate itself indicates that the same has been issued only on the basis of the facts brought to the knowledge of concerned Corporator. It also shows that it has been issued without verifying the facts and any enquiry.

18. One of the submissions of learned counsel for the appellant is that in case the tribunal at Lucknow had no jurisdiction to entertain and decide the claim petition filed by the appellant, it should have been returned to him by the Registrar of the Bench and if it was not returned it cannot be returned by the tribunal after such a long time,, therefore, the question arises as to whether, if the Registrar of the Bench, after receipt of the application has not returned the application on the ground that the Bench does not have territorial jurisdiction to deal with the matter, it can not be returned by the tribunal, even if, it finds that the tribunal has no jurisdiction.

19. Section 11 of Rules of 1989 provides the scrutiny of applications. Sub-Section (1) of Section 11 provides that the Registrar or the officer authorised by him shall endorse on every application, the date on which it is presented or received through post under Rule 5, and sign the endorsement. Sub-Rule (2) provides that if, on scrutiny, the application is found to be in order, it shall be registered and given a serial number, therefore, in case the application is found in order on scrutiny, the same is to be registered and given a serial number.

20. Rule 7 of the Rules of 1989 provides the documents to accompany the

application which is extracted hereinbelow:-

*"7. **Documents to accompany the application**. - (1) Every application for compensation in respect of loss, destruction, damage, deterioration or non-delivery of animals or goods or in respect of refund of fare or freight shall be accompanied by the following documents, namely:-*

(a) copy of the railway receipt/parcel way bill/luggage ticket;

(b) original sale invoice (Bijak), if any;

(c) copy of order or letter, if any, of the railway administration deciding the claim of the party;

(d) copy of the original certificate issued by the railway ad-ministration regarding loss, deterioration or damage to the goods, at the time of granting open delivery or assessment delivery;

[(e) copy of notice under section 106 of the Railways Act, 1989 (24 of 1989);]

(f) copies of any other relevant document in possession of the applicant.

[(2) The documents referred to in sub-rule (1) may be attested by a legal practitioner or by a Gazetted Officer of the Central Government or a State Government.

(3) An application filed under sub-rule (1) of rule 5 by a legal practitioner shall be accompanied by a vakalatnama and that by an agent shall be accompanied by a document authorizing him to act as such.

(4) When any document accompanying an application or reply appears to be defaced, torn, or in any way damaged or otherwise its condition or appearance requires special notice, a mention regarding its condition and appearance shall be made by the party producing the same in the index of such application or reply, as the case may be, and the same shall be verified by the Registrar.]"

21. The aforesaid provision does not provide for filing of the proof of residence along with an application, therefore, once the claimant (appellant in the present case) mentions the local address of the applicant, if any, in Clause 14 of the application and on the basis of the said local address, if the claim petition is maintainable before the tribunal concerned (Lucknow in the present case), it could not have been returned by the Registrar and liable to be registered, as has been done in the present case. However, once a plea of jurisdiction was raised in the written statement and the issue was framed to this effect, it has rightly been decided in accordance with law after framing the issue to this effect because the tribunal has to see as to whether the tribunal has jurisdiction or not to hear and decide the claim and it can not be said that if the Registrar of the Bench has not returned the application on the ground of jurisdiction, it can not be decided by the tribunal and the application can not be returned.

22. Considering the plea of the parties and the documents placed on record, the tribunal found that the normal residence of the appellant is not at Lucknow and accordingly directed to return the claim petition to the appellant as the case does not fall within the jurisdiction of the Tribunal at Lucknow. This Court is of the view that the learned tribunal has rightly and in accordance with law has decided that the tribunal at Lucknow has no jurisdiction to hear and decide the claim petition filed by the appellant as the

appellant has failed to prove that he normally resides at Lucknow. Therefore, once the claim petition has been returned, it can be filed by the appellant before the Bench of tribunal, which is competent to decide the same.

23. In the present case, as submitted by learned counsel for the appellant, the pleadings are complete and evidence has also been adduced by the appellant and relevant document in evidence by the respondent has also been placed on record, which could not be disputed, therefore, since the claim petition was filed in the year, 2011 and the issue has been decided by means of the impugned judgment and order dated 06.07.2018 and the Chairman of the Tribunal has a power to transfer the case on an application moved by the applicant, this Court is of the view that in place of returning the claim petition to the applicant/appellant, the liberty should have been granted to the applicant to move an application before the Chairman for transfer of the case or the tribunal itself could have directed to put up the matter before the Chairman to consider for transfer of the case in the interest of justice and to save the time of the tribunal in the facts and circumstances of the case.

24. This Court also, in FAFO no.767 of 2012 (Pankaj Kumar vs Union of India), relied by learned counsel for the appellant, has held that the applicant can also apply for transfer of the case to the Chairman.

25. In view of above and considering the over all facts and circumstances of the case, the impugned judgment and order dated 06.07.2018 is set aside only to the extent it directs to return the claim petition to the appellant/applicant Anil Kumar Chaturvedi and modifies it to the effect that the appellant may move to the Chairman for transfer of the case to the appropriate Bench of the tribunal having jurisdiction to hear and decide the claim.

26. It is further provided that in case, the application is moved by the applicant/appellant before the Chairman within a period of four weeks from today, the Chairman shall take appropriate decision on the application within a period of four weeks thereafter in light of the observations made above by this Court in this order. Consequences shall follow accordingly as per law.

27. With the aforesaid, the appeal is partly **allowed** only to the aforesaid extent. No order as to costs.

(2024) 2 ILRA 69
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

First Appeal From Order No. 1710 of 2023

ICICI Lombard General Insurance ...Appellant
Versus
Suresh & Ors. ...Respondents

Counsel for the Appellant:
Sri Rahul Sahai, Sri Aditya Parihar

Counsel for the Respondents:

Maintainability of appeal u/s 173(2) of the Motor Vehicles Act, 1988- pecuniary limit for filing of an appeal against an award of a Claims Tribunal has been raised to 'one lakh rupees' from the earlier limit of 'ten thousand rupees- the effect of the Amending Act 32 of 2019-

preexisting right of appeal continues to exist-earlier law which created the right of appeal must also exist to support the continuation of that right-earlier law continues to exist for the purpose of supporting the preexisting right of appeal- that law must govern the exercise and enforcement of that right of appeal –objection of stamp reporter unsustainable. (E-9)

Cases cited:

1. Jaswant Rao Vs Kamalabai & anr., AIR 1990 MP 354

2. Messrs. Hoosein Kasam Dada (India) Ltd. Vs The St. of M.P. & ors., AIR 1953 SC 221

3. St. of Bombay Vs M/s. Supreme General Films Exchange Ltd., (In C.A. No. 86 of '56) and Arati Cotton Mills Ltd., AIR 1960 SC 980

4. Vitthalbhai Naranbhai Patel Vs Commissioner of Sales Tax, M.P., Nagpur, AIR 1967 SC 344

5. Garikapati Veeraya Vs N. Subbiah Choudhary & ors., AIR 1957 SC 540

6. St. of Bombay Vs M/s. Supreme General Films Exchange Ltd. And Arati Cotton Mills Ltd., AIR 1960 SC 980

7. ECGC Limited Vs Mokul Shriram EPC JV , (2022) 6 SCC 704

8. Delhi Cloth and General Mills Co. Ltd. Vs CIT, AIR 1927 PC 242

9. Sectionretary of St. for Social Sectionurity Vs Tunnicliffe, (1991) 2 All ER 712

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

1. Heard Sri Rahul Sahai, along with Sri Aditya Singh Parihar, learned counsel for the appellant. Sri Satya Deo Ojha, learned counsel has also been heard.

2. A question has arisen with regard to the maintainability of the instant appeal under Section 173(2) of the Motor Vehicles Act, 1988, in view of the report submitted by the Stamp Reporter.

3. It is pointed out that the aforesaid objection of the Stamp Reporter is based on the amended provision contained under sub-section (2) of Section 173, in terms of which the pecuniary limit for filing of an appeal against an award of a Claims Tribunal, has been raised to 'one lakh rupees' from the earlier limit of 'ten thousand rupees'.

4. Contention of the counsel for the appellant is that the right to file an appeal being a vested right and having accrued on the institution of the claim petition before the Tribunal, the said right cannot be taken away or curtailed by means of a subsequent amendment, particularly, when the said amendment does not have a retrospective effect.

5. For a proper appreciation of the controversy at hand, the provisions of Section 173 of the Motor Vehicles Act, 1988, as it stood prior to the amendment of the year 2019, and as it now stands subsequent to coming into force the Motor Vehicles (Amendment) Act, 2019 [Act 32 of 2019], are being reproduced in a tabular form so as to facilitate comparison.

Pre Amendment	Post Amendment
173. Appeals.—(1) Subject to the provisions of sub-section (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court: Provided that no appeal by the person who is required to pay any	**173. Appeals.**—(1) Subject to the provisions of sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court: Provided that no appeal by the person who is required to pay any amount in terms of such

amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court: Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time. (2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than **ten thousand** rupees.	award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees or fifty per cent. of the amount so awarded, whichever is less, in the manner directed by the High Court: Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time. (2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than **one lakh** rupees.

6. A comparative reading of provisions of Section 173, pre and post the amendment would indicate that except for substituting the amount 'one lakh' for the amount 'ten thousand', the provision remains the same as it was earlier.

7. The Amending Act 32 of 2019 provides that the various provisions of the Act would come into force on the dates to be notified by the Central Government. Section 57 of the Amendment Act 2019, which is with regard to the amendment made to Section 173, was notified on 25.02.2022, to come into force w.e.f. 01.04.2022.

8. The question as to whether an appeal under an earlier statute would lie under a new enactment which comes into operation consequent to repeal of the earlier enactment and as to whether such appeal would be subject to the same conditions as were applicable to it under the repealed Act, was considered by a Division Bench of this Court in **Oriental Insurance Company Ltd. Haldwani Vs. Dhanram Singh alias Dhan Singh and Others1**, and placing reliance on an earlier Constitution Bench judgment of the Supreme Court in **Garikapati Veeraya Vs. N. Subbiah Choudhary2,** reiterated that the right of an appeal is a vested right which accrues to the litigant from the date the lis commences and this vested right in the appeal can be taken away by a subsequent enactment, if it is so provided expressly or by necessary intendment and not otherwise.

9. It was accordingly held that an appeal from a proceeding initiated under Section 110A of the Motor Vehicles Act, 1939, would be maintainable under Section 173 of the Act 59 of 1988 and that the provisions of the Old Act would continue to apply to all appeals which arise from proceedings initiated prior to the enforcement of the New Act. It was made clear that such appeals would not require to comply with the provisions as laid down under Section 173 of the New Act.

10. The question as to whether a right of an appeal under the Old Act survives even after it is repealed by a New Act, fell for consideration before the Supreme Court in **Ramesh Singh and Another Vs. Cinta Devi and Others3** and particularly the question that was addressed, was as to whether a right of appeal would accrue to a claimant under the Motor Vehicles Act, 1939 (Old Act), on the institution of a claim application in the Motor Accident Claims Tribunal notwithstanding with its repeal by the Motor Vehicles Act, 1988 (New Act).

11. The order passed by the High Court dismissing the appeal on the ground

that the appellant had not deposited the amount as required by the proviso to Section 173 of the New Act, was subjected to challenge. The Supreme Court took notice of the decisions of the High Court of Allahabad and the High Court of Madhya Pradesh in **Oriental Insurance Company Ltd., Haldwani Vs. Dhanram Singh and Others4, Jaswant Rao Vs. Kamalabai and Another5**, wherein it has been held that the appellant's right to appeal without being required to make the deposit under first proviso to Section 173 of the New Act, remained unaffected.

12. Further, noticing the earlier decisions of the Supreme Court in **Messrs. Hoosein Kasam Dada (India) Ltd. Vs. The State of M.P. And Others6, State of Bombay Vs. M/s. Supreme General Films Exchange Ltd., (In C.A. No. 86 of '56) and Arati Cotton Mills Ltd.7 and Vitthalbhai Naranbhai Patel Vs. Commissioner of Sales Tax, M.P., Nagpur8,** it was concluded that unless the New Act expressly or by necessary implication, makes the provisions applicable retrospectively, the right to appeal would crystallize in the appellant on the institution of the application in the Tribunal of first instance and that vested right of appeal would not be dislodged by the enactment of the New Act. It was accordingly held that the appellant would be entitled to file the appeal without being required to make the deposit under the proviso to Section 173 of the New Act.

13. The effect of change in the condition of preferring an appeal was considered in the decision in **Messrs. Hoosein Kasam Dada (India) Ltd. Vs. The State of M.P. And Others9,** and it was held that the right of appeal from the decision of an inferior Tribunal to a superior Tribunal becomes vested in a party when the proceedings are first initiated before the inferior court, and such a vested right cannot be taken away except by express enactment or by necessary intendment. It was also observed that an intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention is clearly manifested by express words or necessary implication.

14. The maintainability of appeal as of right subsequent to changes in law was subject matter of consideration in **Garikapati Veeraya Vs. N. Subbiah Choudhary and others10** and after an analysis of the legal position in regard to the same, the following principles were laid down:-

"23. From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the

institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

15. The effect of putting a new restriction or imposing a more onerous condition on the right of appeal was examined in **State of Bombay Vs. M/s. Supreme General Films Exchange Ltd. and Arati Cotton Mills Ltd.11** and following the judicial precedents on the point, it was observed that an impairment of the right of appeal by putting a new restriction thereon or imposing a more onerous condition would not be a matter of procedure only, and an enactment having the said effect would not be retrospective unless it says so expressly or by necessary intendment.

16. The effect of amendment of law relating to appeal after commencement of lis was again subject matter of consideration before a Constitution Bench in **Vitthalbhai Naranbhai Patel Vs. Commissioner of Sales Tax, M.P., Nagpur12**, and the view taken in **Messrs. Hoosein Kasam Dada (India) Ltd. Vs. The State of M.P**. and others13 case, was reiterated by stating that when a lis commences, all rights get crystallized and no clog upon a likely appeal can be put, unless the law was made retrospective, expressly or by clear implication.

17. In a recent decision in **ECGC Limited Vs. Mokul Shriram EPC JV14,** in the context of an appeal arising out of complaints filed prior to commencement of the Consumer Protection Act, 2019, it was held that an appeal filed in such circumstances would be governed under the Consumer Protection Act, 1986, and not under the 2019 Act. The right of appeal, its nature and scope and the extent to which the such right may be modified by amendment or repeal of the applicable provisions of law, was examined and it was held that the pre-existing right of appeal is not destroyed by the amendment if the amendment is not made retrospective by express words or necessary intendment.

18. The foregoing discussion goes to show that the right of appeal is not a mere matter of procedure but is a substantive right. It is a vested right which accrues to the litigant on the date the lis commences and this vested right cannot be taken away by a subsequent enactment, unless it is so provided expressly or by necessary intendment.

19. The pursuit of a legal remedy, suit or appeal are steps in a series of proceedings all connected by an intrinsic unity. The institution of the suit carries with it the implication that the right of an appeal, as in force, is preserved during the progress of the proceedings. This right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences, and although it may actually be exercised when the adverse judgment is pronounced by the first court, the vested right is to be governed by the law prevailing on the date of institution of the suit or proceeding and not by the law that prevails on the date of its decision or on the date of filing of the appeal.

20. There is a presumption that a statute is *prima facie* prospective unless it is expressly or by necessary implication made to have a retrospective operation –

nova constitutio futuris formam imponere debet non praeteritis, i.e. "a new law ought to regulate what is to follow, not the past". Once vested, the rights cannot be taken away or retrospectively altered.

21. In the words of **Lord Blanesburg,** as stated in **Delhi Cloth and General Mills Co. Ltd. Vs. CIT15**, "provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment".

22. In **Maxwell Vs. Murphy16** it was observed by **Dixon, C.J**, as follows:-

"7. The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

23. A similar view was expressed in **Secretary of State for Social Security Vs. Tunnicliffe17 by Staughton, L.J,** in the following words:-

"...the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears."

24. In **Sutherland on Statutory Construction18,** it has been stated as follows:-

"29. …Effect on vested rights

Under common law principles of construction and interpretation the repeal of a statute or the abrogation of a common law principle operates to divest all the rights accruing under the repealed statute or the abrogated common law, and to halt all proceedings not concluded prior to the repeal. However, a right which has become vested is not dependent upon the common law or the statute under which it was acquired for its assertion, but has an independent existence. Consequently, the repeal of the statute or the abrogation of the common law from which it originated does not efface a vested right, but it remains enforceable without regard to the repeal."

25. Under English common law there is a presumption that a statute does not have "retrospective" effect. The statement in **Maxwell on The Interpretation of Statutes19,** which is often referred, is as follows:

"Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication."

26. The presumption against interference with vested rights rests on a very simple rationale – it is often unfair for a new legislation to intrude upon rights that have validly and legally been acquired in

the past. This presumption has been stated with emphasis by **Wright J. in In re Athlumney20:**

"Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation..."

27. In the case at hand, the effect of the Amending Act 32 of 2019, in respect of Section 173 of the Motor Vehicles Act, 1988, is that in sub-section (2) thereof the amount which was earlier specified as 'ten thousand rupees', has been substituted by an amount of 'one lakh rupees'. The effect of the amendment thus is to raise the pecuniary limit for filing of an appeal against an award of a Claims Tribunal, from 'ten thousand rupees' to 'one lakh rupees'.

28. Section 57 of the Amending Act 2019, which is with regard to the amendment made to Section 173, was notified on 25.02.2022, to come into force w.e.f. 01.04.2022.

29. The fact that the pre-existing right of appeal continues to exist, must in its turn, necessarily imply that the earlier law which created the right of appeal must also exist to support the continuation of that right. As the earlier law continues to exist for the purpose of supporting the pre-existing right of appeal, that law must govern the exercise and enforcement of that right of appeal and there would be no question of the amended provision preventing the exercise of that right or acting as a clog upon the right which had crystallized earlier.

30. An amending statute cannot be read in a manner so as to take away, alter, abrogate, impair or extinguish vested rights acquired under existing laws, or create a new obligation, impose a new duty or attach a new disability, in respect of transactions already past.

31. The right of appeal having been conferred by statute and, therefore, being a vested right, the effect of the amendment would have to be seen in the context as to whether it keeps alive the old rights or whether it manifests an intention to destroy them. It would be required to see as to whether the effect of the amendment is to obliterate the earlier statute and to destroy its operation in future, or on the other hand the amendment does not contemplate alteration of the substantive right conferred by the statute, but merely seeks to alter or modify the procedure.

32. The right of appeal under the unamended provision was a substantive right, and it continues to be so under the amended provision also; the only change being with regard to enhancement of the pecuniary limit for filing an appeal. It is seen that the effect of the amendment is in no manner to destroy or even to alter the pre-existing rights. It would, therefore, follow that the substantive right of appeal which is in the nature of a vested right would continue to be enforced as per the pre-existing law without in any manner being effected by Amending Act.

33. In construing a statutory provision, the cardinal rule of construction which is to be borne in mind by the courts is that statutes should be interpreted, if possible in a manner, so as to respect vested rights. In the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be construed so as to have the effect of

altering the pre-existing law applicable to a claim in litigation.

34. The claim petition, in the present case, was filed sometime in the year 2016, and was registered as M.A.C.P. No. 479 of 2016, and related to an accident stated to have occurred on 08.06.2016. The claim petition was decided in terms of an award dated 03.08.2023, of the Motor Accident Claims Tribunal, Jhansi against which the instant appeal has been preferred.

35. The Amending Act of 2019 does not take away the right of appeal. It also does not substantially alter the pre-existing provision of an appeal under Section 173; the only modification being that the pecuniary limit of filing of an appeal has been raised from 'ten thousand rupees' to 'one lakh rupees'. The Amending Act of 2019 which was published in the gazette dated 09.08.2019, was not given retrospective effect; rather in terms of sub-section (2) of Section 1 of the Amending Act, its provisions were to come into force on different dates to be appointed by the Central Government, by notification in the official gazette. The legislative intent was clearly to apply the provisions of the Amending Act prospectively. Section 27 of the Amending Act, which relates to the amendment to the pecuniary limit of filing an appeal under Section 173, was also prospectively applied in terms of the notification dated 25.02.20222, which came into force w.e.f. 01.04.2022.

36. The Amending Act neither expressly nor by implication seeks to apply the provision retrospectively; accordingly, the right to appeal crystallized in the appellant on the institution of the claim petition before the Tribunal of first instance, cannot be held to have been dislodged by the Amending Act. The appellant would, therefore, have to be held entitled to file the appeal, as per the unamended provision, without in any manner being effected by the enhancement of the pecuniary limit for filing of the appeal in terms of the amended provision.

37. Accordingly, it is held that an appeal against an award of the Claims Tribunal, even if the amount in dispute in the appeal is less than 'one lakh rupees' would be entertainable provided that the amount in dispute is not less than 'ten thousand rupees', and it relates to a claim petition filed prior to 01.04.2022.

38. The objection of the Stamp Reporter with regard to maintainability of the appeal under Section 173(2) of the Motor Vehicles Act, 1988, is therefore held unsustainable.

39. Let the appeal be listed for admission as fresh on 22.01.2024 before the appropriate Bench.

(2024) 2 ILRA 76
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2023

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

First Appeal From Order No. 2095 of 2005

Smt. Munisha Devi & Ors. ...Appellants
Versus
Kalyan Singh & Anr. ...Respondents

Counsel for the Appellants:
Sri R.O.V.S. Chauhan, Sri S.O.V.S. Chauhan

Counsel for the Respondents:
Sri Radhey Shyam, Sri Krishna Shanker Chaudhary

Motor Vehicles Act, 1988-Claim petition of the claimants/appellants- rejected-deceased suffered injuries and died-dependents instituted the claim petition- Tribunal held that the accident was the result of rash and negligent driving of deceased-driver, therefore did not award any compensation to the claimants/appellants- record reveals that in order to save someone-deceased-driver lost control over the truck-suffered injuries which was the cause of his death- appropriate that claimant/appellants may be awarded a lump-sum Rs.5,00,000/-.

Cases cited:

1. Ram Murti & ors. Vs Punjab St. Electricity Board, 2022 (4) T.A.C. 738 (S.C.)

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

1. Heard learned counsel for the claimants/appellants and Sri Radhey Shyam, learned counsel for the respondents.

2. The present appeal has been preferred by the claimants/appellant against the award dated 18.03.2005 passed by the Motor Accident Claims Tribunal/Additional District Judge, Court No.8, Etawah whereby he has rejected the claim petition of the claimants/appellants.

3. One Subhash Chandra was driver on the Truck No.D.L-1-GB-0979 and on the instruction of his employer, he was taking the truck and while in order to save someone, he lost control over the truck and truck overturned. In the said accident, Subhash Chandra came under the truck and suffered injuries and died. The dependants of Subhash Chandra instituted the claim petition under Section 163A of the Motor Vehicles Act.

4. The Tribunal framed several issues. However, on the issue of occurrence of accident, Tribunal returned a finding in favour of claimants/appellants. The Tribunal found that the accident was the result of rash and negligent driving of deceased-driver, therefore, Tribunal did not award any compensation to the claimants/appellants.

5. On the issue of driving licence and the insurance policy, Tribunal found that the deceased was having a valid driving licence at the time of accident and offending vehicle was duly insured on the date of the accident.

6. Challenging the award, learned counsel for the claimants/appellants has contended that it is not in dispute that deceased was employed as driver on offending truck, and accident had occurred during the course of employment. It is contended that it is the choice of the claimants to claim compensation in case of death of driver either in the court of Motor Accident Claims Tribunal or before the Commissioner under the Workmen Compensation Act. It is further submitted that in the present case, claimants/appellants preferred claim petition before the Motor Accident Claims Tribunal, and therefore, the question of negligence is not to be seen in view of the fact that driver of the truck is statutorily covered under the insurance policy, and once it is established that deceased was employed as driver on the truck and had died during the course of employment due to the injuries suffered by him in the accident, the compensation cannot be denied to the claimants/appellants. Thus, it

is contended that Tribunal has erroneously held that since the deceased himself was negligent in the accident, therefore, claimants/appellants are not entitled to compensation.

7. It is further contended that in view of the fact that the driving licence of the driver of the truck was valid and further offending vehicle was insured with the insurance company, therefore, the liability to pay compensation is upon the insurance company, and this Court may not remand the matter for quantification of compensation rather this Court being an Appellate Court can determine the quantification of compensation.

8. Per contra, learned counsel for the respondents would contend that it is not in dispute that deceased was driving the truck and truck overturned and deceased came under the truck and on account of the injuries suffered by him in the accident, he died. It is submitted that the accident was the result of sole negligence of deceased-driver and in such view of the fact, the Tribunal has rightly held that since the accident had occurred due to rash and negligent driving of deceased himself, therefore, claimants/appellants cannot be compensated for the negligence of deceased in the accident. It is further contended that it is a case where claimants/appellants failed to make out any case inviting interference by this Court in its appellate jurisdiction and since the appeal is devoid of merit, therefore, it deserves to be dismissed.

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

10. It is not disputed that deceased was driving the truck at the time of accident. The record reveals that in order to save someone, deceased-driver lost control over the truck due to which, the truck overturned and deceased came under the truck and suffered injuries which was the cause of his death. It is also not disputed that deceased was employed as driver on the truck.

11. Under Section 167 of the Motor Vehicles Act, it is the choice of the claimants to claim compensation either from the court of Motor Accident Claims Tribunal or before the Commissioner under the Workmen Compensation Act for the death of an employee in the accident who died during the course of employment.

12. At this stage, it is relevant to have a glance at Section 147(1) provision (i) of the Motor Vehicles Act, 1988 (prior to substitution by Act 32 of 2019) which is as under:-

"147. ***Requirement of policies and limits of liability.-****(1)...*

Provided that a policy shall not be required-

i. to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee-

a. engaged in driving the vehicle, or

b. if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

c. if it is a goods carriage, being carried in the vehicle, or

ii. to cover any contractual liability.

Explanation.- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

13. Thus, proviso (i) of Section 147(1) of the Motor Vehicles Act, 1988 clearly stipulates that the driver of the truck is statutorily covered under the insurance policy in view of proviso (i) of Section 147(1) of the Motor Vehicles Act and the negligence of driver in such cases is not to be seen.

14. Once, claimants established that deceased was employed as driver on the offending truck, dependants of the deceased are entitled to the compensation. In such view of the fact, this Court is of the view that Tribunal has committed manifest illegality in denying compensation to the claimants/appellants on the ground that deceased himself was negligent in the accident.

15. Normally, this Court would have remanded the matter to the Tribunal to assess the compensation, but considering the fact that the accident had taken place on 01.06.2002 and claim petition has been decided in the year 2005 and claimants have not been paid even a single penny for the loss of income suffered by them on account of the death of sole bread earner i.e. deceased, therefore, this Court proceeds to determine the quantification of compensation.

16. Now, the question arises as to what amount of compensation to be granted. The claim petition has been instituted under Section 163A of the Motor Vehicles Act, therefore, compensation is to be computed as per the scheduled framed under Section 163A of the Motor Vehicles Act.

17. In the instant case, the claim petition was filed in the year 2002 and more than 21 years have passed claimants/appellants have not yet got even a single penny for the loss of income suffered by them for the death of sole bread earner of the family i.e. deceased.

18. Considering the aforesaid fact and hardship faced by the claimants/appellants, this Court finds it appropriate that claimant/appellants may be awarded a lump-sum Rs.5,00,000/- in view of the judgement of Apex Court in the case of ***Ram Murti and Others Vs. Punjab State Electricity Board, 2022 (4) T.A.C. 738 (S.C.)***

19. It would be apt to reproduce paragraphs 6 to 8 of the judgement of Apex Court in the case of ***Ram Murti (supra):-***

"6. There is no cogent basis for this Court to entertain the challenge against the findings of fact which have been recorded concurrently by the Tribunal and by the High Court while dismissing the

claim under Section 166 of the Motor Vehicles Act 1988.

7. The provisions of Section 140 which formed a part of Chapter 10 of the Motor Vehicles Act, 1988 were omitted by Act 32 of 2019. Simultaneously, Chapter 11 was substituted of which Section 164 provides for payment of compensation in the case of death in the amount of Rs.5 lakhs and in the case of grievous hurt of Rs.2.5 lakhs.

8. We are inclined to give the appellants the benefit of the beneficial provisions which have been enacted by Parliament. Hence, in modification of the order of the High Court, we direct that the appellants shall be entitled to an amount of Rs.5 lakhs as compensation. However, if the amount of Rs.50,000 which has been awarded by the High Court has already been paid over, the balance (or the entirety of 5 lakhs if no amount has been paid) shall be paid over to the appellants by 30.11.2022."

20. Accordingly, this Court awards Rs.5,00,000/- in lump-sum to the claimants/appellants. Out of the said amount, all the claimants are awarded equal amount i.e. 1,25,000/-. It is further provided that enhanced amount of compensation shall carry 7% simple interest from the date of institution of claim petition till the amount is deposited.

21. Thus, for the reasons given above, the appeal is partly ***allowed*** and the award of the Tribunal is modified to the extent indicated above. The insurance company is directed to pay the awarded amount of compensation to the claimants/appellants within a period of three months from the date of production of a certified copy of this order. There shall be no order as to costs.

(2024) 2 ILRA 80
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DONADI RAMESH, J.

First Appeal No. 177 of 2017

Charu Chug @ Charu Arora ...Appellant
Versus
Madhukar Chugh ...Respondent

Counsel for the Appellant:
Sri Vinay Kumar Mishra, Sri Vishesh Rajvanshi

Counsel for the Respondent:

Civil Law - The Hindu Marriage Act, 1955 - Section 13(1)(ia) -Divorce Upheld on Ground of Mental Cruelty The Allahabad High Court upheld the divorce decree granted under Section 13(1)(ia) of the Hindu Marriage Act, 1955, finding that the appellant-wife's false allegations of dowry demand, physical assault, and extramarital affair by the respondent-husband constituted mental cruelty. No cogent evidence supported the wife's claims, and her admissions in cross-examination disproved the allegations. (Paras 9, 12, 17)

Irretrievable Breakdown as a Facet of Cruelty The court recognized the marriage's irretrievable breakdown, with the parties living separately for over 13 years, as a facet of cruelty under Section 13(1)(ia). Despite the absence of desertion under Section 13(1)(ib), the prolonged separation and lack of cohabitation rendered the marital bond unviable, justifying divorce. (Paras 13-14)

Failure of Conciliation and Procedural Compliance The court rejected the appellant's claim that conciliation under Section 9 of the Family Courts Act, 1984, was not attempted, noting that both parties participated in

conciliation on 31.03.2014, but the appellant failed to attend further proceedings, indicating disinterest. The trial court's findings on cruelty were supported by cogent evidence and reasoning. (Paras 5, 10)

Judicial Precedents on Cruelty and Marriage Dissolution Relying on Samar Ghosh Vs Jaya Ghosh (2007), Rakesh Raman Vs Kavita (2023), and Rajib Kumar Roy Vs Sushmita Saha (2023), the court held that mental cruelty, including false accusations and long-term separation, justifies divorce. The Supreme Court's power under Article 142 to dissolve marriages on irretrievable breakdown was noted as persuasive. (Paras 15-16, 17)

Cases Cited:

1. Rakesh Raman Vs Kavita, AIR 2023 SC 2144 (Para 15)

2. Samar Ghosh Vs Jaya Ghosh, (2007) 4 SCC 511 (Paras 15, 17)

3. Rajib Kumar Roy Vs Sushmita Saha, 2023 SCC OnLine SC 1221 (Para 16)

4. Joydeep Majumdar Vs Bharti Jaiswal Majumdar, 2021 (1) ARC 505 (SC) (Para 17)

5. Shilpa Sailesh Vs Varun Sreenivasan, 2023 SCC OnLine SC 544 (Para 16)

6. R. Srinivas Kumar Vs R. Shametha, (2019) 9 SCC 409 (Para 15)

7. Munish Kakkar Vs Nidhi Kakkar, (2020) 14 SCC 657 (Para 15)

8. Neha Tyagi Vs Lieutenant Colonel Deepak Tyagi, (2022) 3 SCC 86 (Para 15)

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Sri Vishesh Rajvanshi, learned counsel for the appellant-defendant (wife) and perused the record.

2. Vide order dated 9.3.2017 present appeal was admitted and notices were issued to the sole respondent-plaintiff (husband) by registered post/speed post. As per office report dated 15.12.2017, 'unserved notice returned due to unclaimed'. Subsequently, the appeal was dismissed for want of prosecution on 17.10.2022 and on a restoration application, the same was restored on 22.5.2023. In view of the fact that the appeal had been dismissed for want of prosecution, fresh notices were issued on 1.11.2023. According to the office report dated 9.3.2023 in respect of ordinary process, it is reported that notice not received back after service and in respect of speed post, it is reported that undelivered notice received with remark. In such circumstances, notice of service on sole respondent is deemed to be sufficient.

3. No one has turned up on behalf of the sole respondent (plaintiff-husband), therefore, we proceed to hear the counsel for the appellant on merits.

4. Present appeal has been filed challenging the impugned judgement and order dated 21.1.2017 passed by the Principal Judge, Family Court, Meerut in Divorce Petition No. 643 of 2013 (Madhukar Chugh vs. Charu Chug) filed under Section 13 (1) (ia) and (ib) of the Hindu Marriage Act.

5. Submission of learned counsel for the appellant is that respondent-plaintiff (husband) has himself deserted the appellant-defendant (wife) as he wanted to perform re-marriage with another lady. It is submitted that the Court below failed to record any finding that the alleged desertion/separation by the appellant was unreasonable, unexplained and has not

recorded any finding regarding relation between the parties having become irretrievable. It is further submitted that appellant-defendant clearly pleaded her willingness to live with her husband to lead a peaceful and successful matrimonial life, which has not been considered by the Court below. It was next submitted that cruelty under Section 13 (1)(ia) and (ib) of the Hindu Marriage Act has to be proved beyond all reasonable doubt on the basis of cogent evidence, but in the present case the requirement of provisions have not been fulfilled and therefore, the judgement impugned herein is bad in the eye of law. It is also submitted that the issue of cruelty has been decided in a superficial manner without discussing the evidence on record. Attention was drawn to the stand taken by the appellant in her written statement and the statement of respondent no. 1 recorded as PW-1 as well as statement of PW-2. Specific attention was drawn to the cross-examination of DW-1 in support of the arguments to show that cruelty was committed on the appellant and not on the respondent-plaintiff (husband). It is also submitted that the Court below did not initiate conciliation proceedings between the parties as per Section 9 of the Family Court Act, 1984.

6. We have considered the submissions of leaned counsel for the appellant and have gone through the judgement of the Court below impugned herein.

7. Admitted facts of the case as reflected from the judgement are that the marriage between the plaintiff (respondent-husband) and the defendant (appellant-wife) was performed on 15.4.2002 as per hindu rites and rituals after the offer having been accepted through matrimonial advertisement in a newspaper in the year 2001. It is also admitted that after marriage they had gone to Dalhousie (Himachal Pradesh) for honeymoon and after return from honeymoon, the husband (respondent) had gone to Bhopal to join his services. It is alleged that the appellant (wife) had gone to Meerut to her parental house. Subsequently, she came to Bhopal. In September, 2002 she had returned to her parents and the husband was informed by his mother-in-law that she had a miscarriage in November, 2002. In July, 2003 the appellant got a job in Bhopal and joined the services. Subsequently, she had joined the services at different places, admittedly, away from the place of employment of her husband. Thereafter, the husband was transferred to Mumbai in February, 2004 where she had also come after leaving her job and remained with her husband for a short period till 2005. It is also not in dispute that right ovary of the appellant (wife) was operated before marriage in the year 1999 and was removed. Another admitted fact remains that out of the said wedlock, the couple is not having any child.

8. In the divorce petition, it was stated that on the unfortunate incident of death of father of the husband (respondent) on 17.2.2010, she came to Pune at matrimonial house and remained there for two days where according to the husband, she was requested to remain with him but she did not stay and go back. In April, 2010 the husband was transferred to Mumbai again and she was requested to accompany him but she did not agree and therefore, these facts as reflected from the judgement impugned herein are not in dispute. It was also asserted that the husband was subjected to mental and physical cruelty and torture and he was deserted by her and

now it is not possible for them to live under one roof as no physical or matrimonial relationship is left and it is a case of cruelty as well as irretrievable breakdown and divorce was prayed for.

9. We may also place on record this fact that although written statement was filed stating several facts, however, these specific facts noticing the details are not in dispute and this fact is clearly reflected that after marriage, they lived together for a short period only and they never lived together continuously for a long period. Apart from this admitted fact, the stand taken by the appellant (wife) in her written statement that on 27.11.2003 she was subjected to beating and torture and her head was smashed on the wall and retina of left eye was hemorrhaged and there was a demand of dowry of Rs. 20,00,000/- as well. She had also taken a stand that the husband was having an intimate relationship with one female friend Barnali Mitra and she had come to know about this during honeymoon itself in the year 2002.

10. Insofar as the ground regarding conciliation proceedings is concerned, we find that in the impugned judgement, it has been clearly noticed that on 31.3.2018 both the parties were present in the Court and they talked each other for conciliation and shared their problems and asked for next date for further hearing whereon 7.4.2014 was fixed as the next date. It has been further noticed that on 7.4.2014 the husband was present, however, the wife (appellant) was not present and therefore, it was recorded that she is not interested in conciliation proceedings or any compromise in the matter, therefore, the Court below proceeded further wherein the statement of the plaintiff (husband) was recorded as PW-1 and was cross-examined and PW-2 Pradeep Kumar was also cross-examined. Certain documents were filed by the plaintiff (respondent-husband), that is, photographs of marriage, original wedding card, two photos, copy of degree of Ph.D., copy letter of Radharaman Institute of Technology, copy of medical prescription of eye operation, copy of appointment letter dated 3.1.2004 and certain other documents.

11. Two issues were framed by the Court below: (i) whether defendant has deserted the husband two years before from the date of filing of the petition; (ii) whether the defendant has committed any cruelty with the plaintiff; and (iii) to what relief the plaintiff is entitled to.

12. While discussing the issue no. (ii) first, it was found that the appellant never lived continuously with the husband throughout the period after filing of the divorce petition and this fact was admitted by her. Insofar as the demand of dowry is concerned, it was found that the allegations levelled against the husband were false and no evidence whatsoever was produced in this regard; no complaint or FIR was lodged in this respect with any authority or concerned police officer. Insofar as the injury caused to the appellant is concerned, it was found that she was having eye-problem even before marriage, which was admitted and no report etc. in respect of the injury having been caused was placed on record and even no complaint or FIR in respect of alleged beating or smashing head of the appellant on wall was ever reported to anyone. Therefore, it was found that it was a case of false allegations and thus, mental cruelty was committed. Insofar as intimate relationship of husband with one female friend Barnali Mitra is concerned, she had admitted in her cross-examination

that the documents being paper no. 9Ga/1 upto 9Ga/7 are concerned, messages allegedly sent may contain forwarded messages and may not be the message in original. On a pointed query in respect of paper no. 96Ga/6, which was to the effect that Barnali Mitra had written that she had a boyfriend and therefore, he (Madhukar Chugh) should not remain attracted to her and that she is not fit for Madhukar and she had even called him 'Pagal'. In that reply, she had admitted this fact and therefore, even e-mail communication copy whereof were filed by the appellant clearly reflects that the allegation levelled against the husband having extra-marital relationship with Barnali Mitra was false and is not reflected or corroborated from the evidence. The Court below recorded a finding that she had clearly failed to prove such allegations of extra-marital affair. On that ground, it was found that mental cruelty was caused to the husband.

13. Insofar as the desertion is concerned, it was recorded that the petition was filed on 3.5.2012 whereas the finding has been recorded that the period for desertion would be counted from June, 2011 and therefore, issue no. (i) in respect of desertion was decided against the husband and decree of divorce was granted on the ground of cruelty. Insofar as the cruelty is concerned, the law is very well settled that it need not be physical in nature only and that there may be mental cruelty as well to the extent that it becomes impossible for the other spouse to continue in the marital relationship. We find that the issue no. 2 has been decided by the Court below by giving cogent reasons. It is a case of mental cruelty where false allegations of serious nature having intimate relationship with a female friend Barnali Mitra and causing physical injury to the appellant were found to be false. Apart from this, the admitted facts as reflected from the cross-examination annexed as Annexure 5 of the typed copy of the paper book that since 2012 after marriage the appellant was not living continuously with the husband. She had worked at different places in different States, that is, Vanasthali (Rajasthan), Gurgaon, Bombay, Bhopal and at present she is working Guru Ghasidas Central University, Bilaspur as Associate Professor. She had also admitted that from 2008 she had been visiting the husband off and on, but she does not remember the dates or the period or the duration of such living with her husband.

14. We, therefore, find that apart from issue no. 2 of cruelty the Court below appreciated that it is a case of irretrievable breakdown even if the desertion is not proved as per definition of Section 13 (1)(ia) and (ib). Admittedly at least 13 years have passed since both are living separately, which by itself amounts to cruelty under Section 13 (1)(ia) of the Act.

15. A reference may be made to the judgement of Hon'ble Apex Court in <u>*Rakesh Raman vs. Smt. Kavita,*</u> AIR 2023 Supreme Court 2144, paragraphs 12 to 18 whereof are quoted as under:

"12. Other aspect which we must consider is the fact that for the last 25 years the appellant and respondent, are living separately, and have not cohabitated. There is absolutely no scope of reconciliation between the parties. There is in fact no bond between the two and as the Law Commission in its 71st report said about such a marriage, which is a marriage which has de facto broken down, and only needs a de jure recognition by the

law. The same was reiterated by the Law Commission in its 217th report.

13. Under similar circumstances, this Court in R. Srinivas Kumar v. R. Shametha (2019) 9 SCC 409, Munish Kakkar v. Nidhi Kakkar, (2020) 14 SCC 657 and Neha Tyagi v. Lieutenant Colonel Deepak Tyagi, (2022) 3 SCC 86 has held that an irretrievable marriage is a marriage where husband and wife have been living separately for a considerable period and there is absolutely no chance of their living together again. In all the above cited three cases, this Court in exercise of its power under Article 142 of the Constitution of India has dissolved the marriage on the ground of irretrievable breakdown as a ground, which otherwise does not exist under the Hindu Marriage Act.

14. In Naveen Kohli: (AIR 2006 SC 1675)(supra), a strong recommendation has been made by this Court to the Union of India to consider adding irretrievable breakdown down of a marriage as a ground for divorce under the Hindu Marriage Act.

15. The multiple Court battles between them and the repeated failures in mediation and conciliation is at least testimony of this fact that no bond now survive between the couple, it is indeed a marriage which has broken down irretrievably.

16. Matrimonial cases before the Courts pose a different challenge, quite unlike any other, as we are dealing with human relationships with its bundle of emotions, with all its faults and frailties. It is not possible in every case to pin point to an act of "cruelty" or blameworthy conduct of the spouse. The nature of relationship, the general behaviour of the parties towards each other, or long separation between the two are relevant factors which a Court must take into consideration. In Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511 a three judge Bench of this Court had dealt in detail as to what would constitute cruelty under Section 13 (1) (ia) of the Act. An important guideline in the above decision is on the approach of a Court in determining cruelty. What has to be examined here is the entire matrimonial relationship, as cruelty may not be in a violent act or acts but in a given case has to be gathered from injurious reproaches, complaints, accusations, taunts, etc. The Court relied on the definition of cruelty in matrimonial relationships in Halsbury's Laws of England (Vol 13, 4th Edn, Para 1269, Pg 602) which must be reproduced here:

"The general rule in all cases of cruelty is that the entire matrimonial relationship must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. In cases where no violence is averred, it is undesirable to consider judicial pronouncements with a view to creating certain categories of acts or conduct as having or lacking the nature or quality which renders them capable or incapable in all circumstances of amounting to cruelty; for it is the effect of the conduct rather than its nature which is of paramount importance in assessing a complaint of cruelty. Whether one spouse has been guilty of cruelty to the other is essentially a question of fact and previously decided cases have little, if any, value. The court should bear in mind the physical and mental condition of the parties as well as their social status, and should consider the impact of the personality and conduct of one spouse on the mind of the other, weighing all incidents and quarrels between the spouses from that point of view; further, the conduct alleged must be

examined in the light of the complainant's capacity for endurance and the extent to which that capacity is known to the other spouse. Malevolent intention is not essential to cruelty but it is an important element where it exists."

The view taken by the Delhi High Court in the present case that mere filing of criminal cases by the wife does not constitute cruelty as what has also to be seen are the circumstances under which cases were filed, is a finding we do not wish to disregard totally, in fact as a pure proposition of law it may be correct, but then we must also closely examine the entire facts of the case which are now before us. When we take into consideration the facts as they exist today, we are convinced that continuation of this marriage would mean continuation of cruelty, which each now inflicts on the other. Irretrievable breakdown of a marriage may not be a ground for dissolution of marriage, under the Hindu Marriage Act, but cruelty is. A marriage can be dissolved by a decree of divorce, inter alia, on the ground when the other party "has, after the solemnization of the marriage treated the petitioner with cruelty". In our considered opinion, a marital relationship which has only become more bitter and acrimonious over the years, does nothing but inflicts cruelty on both the sides. To keep the facade of this broken marriage alive would be doing injustice to both the parties. A marriage which has broken down irretrievably, in our opinion spells cruelty to both the parties, as in such a relationship each party is treating the other with cruelty. It is therefore a ground for dissolution of marriage under Section 13 (1) (ia) of the Act.

17. 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: (AIROnline 2007 SC 377) (supra) 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. 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 illtreatment."

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)

18. We have a married couple before us who have barely stayed together as a 12. Other aspect which we must consider is the fact that for the last 25 years the appellant and respondent, are living separately, and have not cohabitated. There is absolutely no scope of reconciliation between the parties. There is in fact no bond between the two and as the Law Commission in its 71st report said about such a marriage, which is a marriage which has de facto broken down, and only needs a de jure recognition by the law. The same was reiterated by the Law Commission in its 217th report.

16. Another reference may also be made to the judgement of Hon'ble Apex Court in *Rajib Kumar Roy vs. Sushmita Saha*, 2023 SCC Online SC 1221, paragraphs 7 to 11 whereof are quoted as under:

"7. We have heard the learned counsel for the petitioner as well as the learned counsel for the respondent (wife) at length. Today, the parties are also before us through virtual mode, and we had a chance to interact with both. Considering the entire gamut of facts which are there before us, we have absolutely no doubt in our mind that this is a case of irretrievable breakdown of marriage.

8. The husband and wife have been living separately, the wife is at Udaipur (district Gomati), Tripura and husband at Agartala, Tripura for the last 12 years. Nothing would give us more satisfaction if the two could work out their differences and decide to live together, if only for the sake of their child. But under the circumstances, with the rigid attitude of both the parties, who have failed to appreciate the beauty of compromise, we have been forced to convince ourselves, albeit regrettably, that the two cannot now live together. Twelve years of separation, is a sufficiently long period of time to have sapped all emotions which the two perhaps may have had once for each other. We therefore cannot take the same hopeful view as that of the High Court, which still believes that the matrimonial bond between the two has not ruptured beyond repair or that the two cannot still give a new lease of life to their relation. Frankly, no matter how much we would have liked this to happen but in reality, this is a possibility, which under the facts and circumstances of the case, can only be called wishful.

9. Continued bitterness, dead emotions and long separation, in the given facts and circumstances of a case, can be construed as a case of "irretrievable breakdown of marriage", which is also a facet of "cruelty". In Rakesh Raman v. Kavita reported in 2023 SCC OnLine SC 497, this is precisely what was held, that though in a given case cruelty as a fault, may not be attributable to one party alone and hence despite irretrievable breakdown of marriage keeping the parties together amounts to cruelty on both sides. Which is precisely the case at hand.

10. Whatever may be the justification for the two living separately,

with so much of time gone by, any marital love or affection, which may have been between the parties, seems to have dried up. This is a classic case of irretrievable breakdown of marriage. In view of the Constitution Bench Judgment of this court in Shilpa Sailesh v. Varun Sreenivasan, 2023 SCC OnLine SC 544 which has held that in such cases where there is irretrievable breakdown of marriage then dissolution of marriage is the only solution and this Court can grant a decree of divorce in exercise of its power under Article 142 of the Constitution of India.

11. We therefore declare the marriage to have broken down irretrievably and therefore in exercise of our jurisdiction under Article 142 of the Constitution of India we are of the considered opinion that this being a case of irretrievable breakdown of marriage must now be dissolved by grant of decree of divorce."

17. Hon'ble Apex Court in Joydeep Majumdar vs. Bharti Jaiswal Majumdar, 2021 (1) ARC 505 (SC) making reference to the Hon'ble Apex Court in the case of Samar Ghosh vs. Jaya Ghosh, (2007) 4 SCC 511 has granted divorce on the ground mental cruelty. In the present case, undue harassment and thus, mental cruelty has been clearly established, therefore, the husband was rightly granted divorce by the Court below.

18. In view of the discussion made hereinabove, we do not find any good ground to set aside the judgement impugned herein.

19. Present appeal lacks merit and is accordingly dismissed.

(2024) 2 ILRA 88
ORIGINAL JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 08.02.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Habeas Corpus Writ Petition No. 330 of 2022

Malav Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shobh Nath Pandey

Counsel for the Respondents:
G.A., Dr. Manoj Kumar Dubey

Civil Law - Constitution of India,1950- Article 226 - Hindu Minority and Guardianship Act, 1956 - Section 6 - Guardians and Wards Act, 1890 - Petitioner (mother) sought habeas corpus for custody of minor son (detenue) detained by father (respondent No. 4) and relatives, alleging illegal detention post-marital discord. Court held: (1) Habeas corpus maintainable for child custody where detention is unlawful or welfare demands change; paramount consideration is child's best interest, not parental legal rights (Nithya Anand Raghavan Vs St. (NCT of Delhi), (2017) 8 SCC 454). (2) Child's welfare includes psychological, emotional, and developmental needs; custody with father (natural guardian under Section 6 of Hindu Minority and Guardianship Act) lawful, as no illegality or imminent harm shown (Dhanwanti Joshi Vs Madhav Unde, (1998) 1 SCC 112). (3) Marital discord and FIRs (Case Crime No. 560/2022 under Sections 323, 498-A, 504, 506 I.P.C. and Dowry Prohibition Act) do not justify disrupting child's stable custody with father; mother entitled to visitation rights (Tejaswini Gaud Vs Shekhar Jagdish Prasad Tewari, Criminal Appeal No. 838 of 2019). (4) No evidence of mother's financial stability or capacity for child's welfare; father's resources adequate. (5) Child to remain with father; mother granted visitation every third Sunday (10:30 A.M.-2:30 P.M.) with prior notice, and daily video calls (7:00-7:30 P.M.); liberty to seek

custody under Guardians and Wards Act. Petition disposed of. (Paras 16-26)

Habeas Corpus Disposed of.

Case Law Cited:

1. Kanu Sanyal Vs District Magistrate, Darjeeling, (1973) 2 SCC 674 (Para 19)

2. Sayed Saleemuddin Vs Rukhsana, (2001) 5 SCC 247 (Para 19)

3. Elizabeth Dinshaw Vs Arvand M. Dinshaw, (1987) 1 SCC 42 (Para 19)

4. Nithya Anand Raghavan Vs State (NCT of Delhi), (2017) 8 SCC 454 (Para 19)

5. Dhanwanti Joshi Vs Madhav Unde, (1998) 1 SCC 112 (Para 20)

6. Shradha Kannaujia Vs St. of U.P., Habeas Corpus No. 716 of 2020 (Para 20)

7. Master Manan @ Arush Vs St. of U.P., decided on 18.02.2021 (Para 20)

8. Vahin Saxena Vs St. of U.P., Habeas Corpus No. 467 of 2021 (Para 21)

9. Tejaswini Gaud Vs Shekhar Jagdish Prasad Tewari, Criminal Appeal No. 838 of 2019 (Para 20)

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

1. Heard Shri Shobh Nath Pandey, learned Counsel for the petitioner, Dr. Manoj Kumar Dubey, learned Counsel for respondent Nos.4 to 8 and Shri Ashok Kumar Singh, learned A.G.A-I for the State-respondent Nos.1 to 3.

2. The petitioner- Smt. Sudha Dwivedi has filed this Habeas Corpus petition seeking following reliefs:-

"i) issue a writ, order or direction in the nature of Habeas Corpus commanding the opposite party Nos.4 to 8 to produce the corpus of detenue, namely Malav Dwivedi son of Shwetang Dwivedi who is in the illegal detention of the opposite party No.4 to 8, before this Hon'ble Court.

ii) issue a writ, order or direction in the nature of Habeas Corpus commanding and directing the opposite parties to get released the detenue Malav Dwivedi from the illegal detention of opposite party No.4 to 8 forthwith, and after recording his statement set him free at his liberty, forthwith.

iii) issue any other suitable order or direction which this Hon'ble Court may deem just, fit and proper under the facts and circumstances of the case.

iv) Allow the writ petition with cost."

3. The Coordinate Bench of this Court on 14.10.2022 had passed the following order:

"Dr. Manoj Kumar Dubey filed his Vakalatnama on behalf of respondents no. 4 to 7 and the same is taken on record.

He further submits that respondent no. 8 is living in Surat (Gujrat) and the Vakalatnama on her behalf shall also been filed very soon.

It is further submitted by him that two weeks' time be granted for the purpose of filing counter affidavit in response to the petition filed by the petitioner.

Having regard to the request made by learned counsel for the respondents no. 4 to 7 two weeks' further time is granted for the purpose of filing counter affidavit.

Accordingly list on 3.11.2022.

It is further provided that respondent no.4, namely, Shwetang Dwivedi shall bring the corpus/ detenue, namely, Master Malav Dwivedi with him to the Mediation Centre of this Court on 18.10.2022 at 11.A.M. in the Mediation Centre of this Bench and the Incharge Mediation Centre of this Bench shall provide a space to the next friend/ mother of the corpus, namely, Smt. Sudha Dwivedi to interact with the corpus/ detenue Master Malav Dwivedi for about one hour. It is also provided that during the meeting with the detenue the Incharge Mediation Centre shall permit the mother of the corpus Smt. Sudha Dwivedi to offer some gifts or eatable items to the corpus and no objection in this regard shall be raised by opposite party no.4.

A copy of this order be immediately provided to the Incharge Mediation Centre of this Bench.

This Court hope and trust that the order pertaining to he meeting of the corpus with his mother, namely, Sudha Dwivedi on 18.10.2022 at 11.00 A.M. in the mediation centre of this Court shall be complied in letter and spirit by the opposite party no.4."

4. On 03.08.2023 the Coordinate Bench of this Court had passed the following order:

"1. A preliminary objection has been raised by respondent No.4 regarding maintainability of the petition. It is submitted that the detenue is with respondent No.4 who is his natural guardian being father and it cannot be said that it is a case of illegal detention.

2.Rebutting this submission, learned counsel for the petitioner has relied on judgment of Supreme Court in Yashita Sahu versus State of Rajasthan and others passed in Crl. Appeal No.127 of 2020 (Special Leave Petition(Crl) No.7390 of 2019) (Emphasis is on para 9) wherein similar objection was rejected by the Supreme Court and the appeal was entertained.

3.In view of the above, the objection raised by respondent No.4 is rejected.

4.Both the deponent and respondent No.4 have levelled allegation against each other that both are unemployed and have no source of livelihood. The court in a habeas corpus petition is to ensure overall welfare of the child. Neither the deponent nor the respondent No.4 has disclosed his/her source of income while filing affidavit(s) to show that they have at least minimum resources to take care of vaccination, medical needs and other basic needs of the detenue.

5.Accordingly, the deponent and respondent No.4 both are directed to file supplementary affidavit stating their source of income. They shall also file their income tax return, if any.

6.Learned counsel for the deponent petitioner submits that the deponent being the mother and natural guardian of the child cannot be deprived her visiting rights.

7.The submission carries weight.

8.It is provided that the respondent No.4 Shwetang Dwivedi shall bring the detenue Master Malav Dwivedi with him to Mediation Centre of this Court on 7.8.2023 at 03.00 p.m. and the Incharge Mediation Centre shall provide a space to the next friend/mother of the corpus, namely Smt. Sudha Dwivedi to interact with the detenue for about two hours. It is further provided that during the meeting with the detenue, the incharge Mediation Centre shall permit Smt Sudha Dwivedi to

offer gift, if any or eatable items to the corpus and no objection in this regard shall be raised by respondent No.4.

9.List on 18.8.2023."

5. Learned counsel for the petitioner submitted that the petitioner- Smt. Sudha Dwivedi got married to respondent No.4- Shwetang Dwivedi, in Faizabad (now Ayodhya) on 29.01.2015 as per Hindu Rites and Ceremonies. Thereafter, due to their wedlock, one male child namely Master Malav Dwivedi was born on 11.02.2019 and after the child was born the relationship between the husband and wife started to turn absurd and regular dispute arose.

6. Learned counsel for the petitioner further submitted that after some time the behavior of respondent No.4 turned very abnormal and the petitioner came under suspicion and started to feel very unsafe regarding the welfare of her child.

7. Learned Counsel for the petitioner further submitted that since the time of marriage the respondent Nos.4 to 8 used to harass and torture the petitioner for want of dowry as well as for other filthy reasons and used to level filthy allegations on her in the name of her family members, thereafter, the respondent No.4 brutally tortured the petitioner and ousted her from her matrimonial home forcibly on 03.09.2022 and kept the child, detenue-Malav Dwivedi in his illegal detention.

8. Learned counsel for the petitioner further submitted that the petitioner moved a complaint on 04.09.2022 before the Station House Officer concerned for giving custody of her son from the illegal detention of respondent Nos.4 to 8, thereafter, the petitioner lodged a First Information Report against the respondent Nos.4 to 8 on 05.09.2022 which was registered as Case Crime No.0560/2022, under Section 323, 498-A, 504 and 506 I.P.C. and Section 3/4 Dowry Prohibition Act at Police Station-Gomti Nagar, District-Lucknow in regard to harassment done upon her by respondent Nos.4 to 8 and also requested therein that the custody of her son may be given to her.

9. Learned counsel for the petitioner further submitted that the petitioner has also given an application before the respondent No.2 i.e. Commissioner of Police, Lucknow but of no avail and till date no action has been taken in regard to release of the detenue from the illegal detention by the respondent Nos.4 to 8.

10. Learned counsel for the petitioner further submitted that the petitioner brought into the notice about the entire incident to the concerned police authorities, but they did not conduct the investigation to locate the whereabouts of the child of petitioner. He further submitted that the respondent No.4 has no love and affection towards the child and the petitioner being mother is legally entitled to get the custody of her child being natural guardian.

11. Learned counsel for the petitioner further submitted that the petitioner is a Fashion Designer and presently she is working as Assistant Fashion Designer in Greenwear Fashion Pvt. Ltd., 301-389, Safedabad, Faizabad Road, Barabanki and drawing a salary of about Rs.15,000/- per month as well as other perks and incentives. He further submitted the petitioner is living with her father and mother at 437, Vishwanath Puram Colony, Matiyari, Chinhat, Lucknow and they have

sufficient property and asests and as such the petitioner is in good position to take good care of her child.

12. Learned counsel for the petitioner further prayed for handing over the custody of said minor child to the petitioner who is biological mother of minor child, so that the child may live with her mother with his free will and the present Habeas corpus petition may be allowed by this Hon'ble Court.

13. Per Contra, learned counsel for the respondent Nos.4 to 8 filed counter affidavit and one supplementary affidavit, which are on record and submits that the petitioner-Smt. Sudha Dwivedi is a most irresponsible lady who does not have any respect or love and care for any relation neither for her husband and nor for her minor child. The petitioner left the house of the respondent No.4 in a pre-planned manner taking all her educational documents, ornaments, clothes, jewelry etc. while the detenue was playing with his grand-parents in separate house and the respondent No.4 was in Court, she left the house after locking the door possessing the keys. The petitioner and her maternal uncle and her father tried to mislead the police after lodging the first information and compelled them to arrest the respondent No.4 and despite 'cooling period' the police mischievously obtained N.B.W. but the learned C.J.M. has recalled and set-aside the same when it was presented before him. The petitioner is suffering from genetic mental disorder i.e. Border Line Personality Disorder. He further submitted that the respondent No.4 is working in Lucknow Development Authority and is getting good salary and at this verge of services, no liabilities is upon him except the welfare of detenue, all expenses, study, foods, clothes of detenue is arranged by the respondent No.4, thus, he submitted that the present petition is nothing but a ploy to harass the respondent No.4 and his family members so that in grab of some order by this Court, the petitioner may torture the respondent Nos.4 to 8 and blackmail them to compromise the situation in fear of harassment and torture.

14. Learned counsel for the respondent Nos.4 to 8 further submitted that the respondent Nos.4 to 8 do not have any objection if the petitioner-Smt. Sudha Dwivedi wishes to visit the child in Lucknow, provided the same does not create any dispute.

15. Shri Ashok Kumar Singh, learned A.G.A-I has also supported the argument advanced by learned counsel for the respondent Nos.4 to 8.

16. After considering the arguments as advanced by learned counsel for the parties this Court finds that minor child should not be deprived of the love and affection of both the parents as deprivation results in a grave physiological impact upon the impressionable and innocent disposition of a child in his formative years and in this case the minor child is being deprived of love an affection of his parents and the parents are not able to interact with their child affectionately. Whenever a question arises before a court pertaining to the custody of the minor child, the matter is to be decided not on consideration of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest and welfare of the child. The primary object of a Habeas Corpus petition, as applied to minor child, is to determine in whose custody the best interests of the child will probably be

advanced. Further the question of custody cannot be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. It is further held that the welfare of the child must be decided on a consideration including the general psychological, spiritual and emotional welfare of the child. While resolving the disputes between the rival claimants for the custody of a child, the aim of the Court must be to choose the course which will best provide for the healthy growth, development and education of the child so that he or she will be equipped to face the problems of life as a mature adult.

17. In the present case it is not in dispute that the petitioner- Smt. Sudha Dwivedi got married to respondent No.4- Shewtang Dwivedi. Thereafter, due to their wedlock, one male child namely Master Malav Dwivedi was born 11.02.2019. After some time the relationship between the husband and wife started to turn absurd and regular dispute arose. Thereafter, the petitioner and respondent No.4 tried to settle their dispute on the their own terms but all in vain and the petitioner lodged an F.I.R., which was registered as Case Crime No.0560/2022, under Section 323, 498-A, 504 and 506 I.P.C. and Section 3/4 Dowry Prohibition Act at Police Station-Gomti Nagar, District-Lucknow in regard to harassment done upon her by respondent Nos.4 to 8 and also requested therein that the custody of her son may be given to her, thus, this type of situation where parents of the child are unable to resolve their dispute keeping in mind the future of their child gives a negative impact on the psychological behavior of the minor child and is also not in the welfare of the child in the long run.

18. In the case of ***Nithya Anand Raghvan v State (NCT of Delhi) and another 2017 8 SCC 454***, it was held by Hon'ble Apex Court that the principal duty of the court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. The relevant observations made in para 44 to 47 in the judgement are being reproduced herein below:

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674, has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful.

45. In a petition for issuance of a writ of habeas corpus in relation to the custody of a minor child, this Court in Sayed Saleemuddin v. Rukhsana, (2001) 5 SCC 247, has held that the principal duty of the court is to ascertain whether the custody of child is unlawful or illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. While doing so, the paramount consideration must be about the welfare of the child. In Elizabeth Dinshaw v. Arvand M. Dinshaw, (1987) 1 SCC 42, it is held that in such cases the matter must be decided not by reference to the legal rights of the parties but on the sole and predominant criterion of what would best serve the interests and welfare of the minor. The role of the High Court in examining the cases of custody of a minor is on the touchstone of principle of parens patriae jurisdiction, as the minor is within the jurisdiction of the Court relied upon by the appellant]. It is not necessary to multiply the authorities on this proposition.

46. The High Court while dealing with the petition for issuance of a writ of habeas corpus concerning a minor child, in a given case, may direct return of the child or decline to change the custody of the child keeping in mind all the attending facts and circumstances including the settled legal position referred to above. Once again, we may hasten to add that the decision of the court, in each case, must depend on the totality of the facts and circumstances of the case brought before it whilst considering the welfare of the child which is of paramount consideration. The order of the foreign court must yield to the welfare of the child. Further, the remedy of writ of habeas corpus cannot be used for mere enforcement of the directions given by the foreign court against a person within its jurisdiction and convert that jurisdiction into that of an executing court. Indubitably, the writ petitioner can take recourse to such other remedy as may be permissible in law for enforcement of the order passed by the foreign court or to resort to any other proceedings as may be permissible in law before the Indian Court for the custody of the child, if so advised.

47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

Similarly, in the case of ***Dhanwanti Joshi Vs Madhav Unde (1998) 1 SCC 112,*** the Hon'ble Apex Court was pleased to observe in para 27, 29, 30 of the judgment as under:

"27……However, in view of the fact that the child had lived with his mother in India for nearly twelve years, this Court held that it would not exercise a summary jurisdiction to return the child to the United States of America on the ground that its removal from USA in 1984 was contrary to the orders of US courts. It was also held

that whenever a question arises before a court pertaining to the custody of a minor child, the matter is to be decided not on considerations of the legal rights of the parties but on the sole and predominant criterion of what would best serve the interest of the minor." (emphasis supplied) Again in paragraphs 29 and 30, the three-judge bench observed thus:-

"29. While dealing with a case of custody of a child removed by a parent from one country to another in contravention of the orders of the court where the parties had set up their matrimonial home, the court in the country to which the child has been removed must first consider the question whether the court could conduct an elaborate enquiry on the question of custody or by dealing with the matter summarily order a parent to return custody of the child to the country from which the child was removed and all aspects relating to the child's welfare be investigated in a court in his own country. Should the court take a view that an elaborate enquiry is necessary, obviously the court is bound to consider the welfare and happiness of the child as the paramount consideration and go into all relevant aspects of welfare of the child including stability and security, loving and understanding care and guidance and full Nithya Anand Raghavan vs State Of Nct Of Delhi on 3 July, 2017 development of the child's character, personality and talents. While doing so, the order of a foreign court as to his custody may be given due weight; the weight and persuasive effect of a foreign judgment must depend on the circumstances of each case.

30. However, in a case where the court decides to exercise its jurisdiction summarily to return the child to his own country, keeping in view the jurisdiction of the court in the native country which has the closest concern and the most intimate contact with the issues arising in the case, the court may leave the aspects relating to the welfare of the child to be investigated by the court in his own native country as that could be in the best interests of the child. The indication given in Mckee v. McKee that there may be cases in which it is proper for a court in one jurisdiction to make an order directing that a child be returned to a foreign jurisdiction without investigating the merits of the dispute relating to the care of the child on the ground that such an order is in the best interests of the child has been explained in L (Minors), In re and the said view has been approved by this Court in Dhanwanti Joshi. Similar view taken by the Court of Appeal in H. (Infants), in re has been approved by this Court in Elizabeth Dinshaw."

Similarly, in the case of ***Shradha Kannaujia (Minor) and Another ,Vs State of U.P. and 5 others in Habeas Corpus No. 716 of 2020*** *a co-ordinate Bench of this Hon'ble court was pleased to observe as under:*

"It is well settled that writ of habeas corpus is a prerogative writ and an extraordinary remedy. The object and scope of a writ of habeas corpus in the context of a claim relating to custody of a minor child fell for consideration and it was held that in a habeas corpus petition seeking transfer of custody of a child from one parent to the other, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful or illegal and whether the welfare of the child requires that the present custody should be changed."

19. The question of maintainability of a Habeas Corpus petition under Article 226 of the Constitution of India for custody of a

minor was examined by Hon'ble Apex Court in the case of ***Tejaswini Gaud and others vs. Shekhar Jagdish Prasad Tewari and others Criminal Appeal No. 838 of 2019*** order dated 06.05.2019 and it was held that the petition would be maintainable where detention by parents or others is found to be illegal and without any authority of law and the extraordinary remedy of a prerogative writ of habeas corpus can be availed in exceptional cases where ordinary remedy provided by the law is either unavailable or ineffective.

The observations made in the judgment in this regard are as follows:-

"14. Writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated as equivalent to illegal detention for the purpose of granting writ, directing custody of the minor child. For restoration of the custody of a minor from a person who according to the personal law, is not his legal or natural guardian, in appropriate cases, the writ court has jurisdiction.

x x x

. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is of summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus."

20. A co-ordinate Bench of this in Master Manan @ Arush Vs State of U.P & 8 others, decided on 18.02.2021 was pleased to observe in para 16 and 17 as under :

"16. In the present case, it is undisputed that the child is with his father since 22.8.2019 under his care and custody. It is not the case of either party that the child was forcibly taken away by the father from the custody of the mother. The pleadings and the material on record indicates the existence of a dispute with regard to the handing over the custody of the child to the mother, pursuant to some agreement between the parties, the terms of which, are now being disputed.

17. It has been pointed out that the date of birth of the child is 09.08.2013, and accordingly, the child being more than 5 years of age, the custody of the child with the father, in view of the provisions under Section 6 (a) of The Hindu Minority and Guardian ship Act, 1956, cannot be said to be prima facie illegal."

21. Another co-ordinate Bench of this Court in ***Habeas Corpus Writ Petiton No. 467 of 2021 Vahin Saxena (Minor Corpus) ans Another Vs State of U.P. and three others decided on 27-08-2021*** was pleased to observe in para 22 as under:

"22. In a child custody matter, a writ of habeas corpus would be entertainable where it is established that the detention of the minor child by the parent or others is illegal and without authority of law. In a writ court, where rights are determined on the basis of affidavits, in a case where the court is of a view that a detailed enquiry would be required, it may decline to exercise the extraordinary jurisdiction and direct the parties to approach the appropriate forum. The remedy ordinarily in such matters would lie under the Hindu Minority and Guardianship Act, 195613 or the Guardians and Wards Act, 189014, as the case may be."

22. It is, therefore, seen that in an application seeking a writ of habeas corpus for custody of minor child, as is the case herein, the principal consideration for the court would be to ascertain whether the custody of the child can be said to be unlawful and illegal and whether the welfare of the child requires that the present custody should be changed and the child should be handed over in the care and custody of somebody else other than in whose custody the child presently is.

23. It is well settled law by a catena of judgments that while deciding the matter of custody of child, primary and paramount consideration is welfare of the children so demands then technical objections cannot come in the way. However, while deciding the welfare of minor child it is not the view of one spouse alone which has to be taken into consideration. The courts should decide the issue of custody only on the basis of what is in the best interest of the children. A child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at way with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents.

Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not

be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody.

24. Thus, this Court is not going into various allegations and counter allegations made by both the spouses on each other. I am clearly of the view that it is in the best interest of the child to have parental care of both the parents, if not joint then at least separate. I have no doubt that the child needs both parents and he would be equally happy, if not happier, in the company of the mother as well, the child would perhaps be happier if he could have both their parents. Unfortunately, the parents are unable to resolve their differences and stay together. Be that as it may, the child has a right to access both parents, and get the love and affection of both parents. Whatever the differences arose between the spouses, the child cannot be denied company of both.

25. In view of the observations/discussions made and judgments referred above, this Court is of the view that the child Master Malav Dwivedi shall remain in custody with her father in the interest of Justice as the welfare love affection company protection is in the custody of the father/ respondent no. 4. Further, this court issues following directions:

(i) The custody of child; Master Malav Dwivedi shall remain with father respondent No.4-Shwetang Dwivedi.

(ii) Since the mother-Smt. Sudha Dwivedi lives in Lucknow, she is permitted to meet the child on every third Sunday of each Month starting from February, 2024 between 10:30 A.M. to 2:30 P.M. at the current residence of respondent no. 4 i.e E-3/268, 69 Vinay Khand-3, Gomti Nagar, Lucknow with the condition of giving one day prior information to the respondent No.4-Shwetang Dwivedi (father) regarding meeting at his residence in Lucknow. It is further provided that the petitioner is allowed to have conversation with her child Master Malav Dwivedi son by mobile phone, whats app call or video call whenever she wants between 7.00 p.m to 7.30 p.m. as per Indian Standard Time.

(iii) If the mother of child wants to give any gifts on account of love and affection or do anything for well being of child then father/ respondent no. 4 or any of his family members will not make any objection. However, mother shall keep in mind that such thing will be given, which are for use and safe for the child health.

(iv) The petitioner Smt. Sudha Dwivedi is at liberty to approach the appropriate forum for claiming the custody of the child under the Hindu Minority and Guards Act 1956 or under the Guardians and Wards Act, 1890 as the case may be in accordance with law.

26. With the above observations/directions, this habeas corpus petition is finally ***disposed of.***

(2024) 2 ILRA 98
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
HON'BLE ANISH KUMAR GUPTA, J.

Habeas Corpus Writ Petition No. 622 of 2023

Niyaz Ansari ...Petitioner
Versus
Adhikshak Janpad Karagar, Chitrakoot & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandrakesh Mishra, Sri Abhishek Kumar Mishra, Sri Dayashankar Mishra (Sr. Advocate)

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

Civil Law - National Security Act, 1980 - Sections 3(2), 3(3), 3(4), 3(5), 8, 9, 10, 11, 12 & 14 - Constitution of India,1950- Article 22(3)(b) - Petitioner challenged detention order dated 06.05.2023 under Section 3(2) of NSA, confirmed on 05.06.2023, and extensions on 21.07.2023 and 27.10.2023. Court held: (1) Detention violated Article 22(3)(b); petitioner denied legal representation before Advisory Board on 26.05.2023, while St. officials (legal advisors) assisted, entitling petitioner to counsel (A.K. Roy Vs U.O.I., (1982) 1 SCC 271). (2) Confirmation order dated 05.06.2023 limited to three months under Section 12(1); extensions required fresh compliance with Sections 3, 5, 8-12 NSA, not piecemeal renewal (Pesala Nookaraju Vs Govt. of Andhra Pradesh, 2023 SCC OnLine SC 1003). (3) Ameena Begum (2023) 9 SCC 587 affirmed three-month initial limit; Cherukuri Mani (2015) 13 SCC 722 overruled for requiring periodic review beyond Advisory Board opinion. (4) No fresh grounds or Advisory Board reference for extensions; detention unlawful post-05.08.2023 (Ram Bali Rajbhar Vs St. of W.B., (1975) 4 SCC 47). (5) Petitioner's representations (26.05.2023, 01.06.2023) not considered, violating Section 8. Detention order, confirmation, and extensions quashed; petitioner released unless required in other cases. (Paras 1-10)

Writ Petition Allowed.

Case Law Cited:

1. A.K. Roy Vs U.O.I., (1982) 1 SCC 271 (Para 6)

2. Choith Nanikram Harchandani Vs St. of Mah., (2018) 2 SCC (Cri) 403 (Para 6)

3. Najar Quraishi Vs Superintendent, 2018 SCC OnLine All 1822 (Para 6)

4. Pesala Nookaraju Vs Govt. of Andhra Pradesh, 2023 SCC OnLine SC 1003 (Para 2)

5. Ameena Begum Vs St. of Telangana, (2023) 9 SCC 587 (Para 2)

6. Cherukuri Mani Vs Chief Secretary, Govt. of Andhra Pradesh, (2015) 13 SCC 722 (Para 2)

7. Ram Bali Rajbhar Vs St. of W.B., (1975) 4 SCC 47 (Para 2)

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. A First Information Report was lodged on 11.02.2023, alleging that quiet a number of persons were illegally meeting the already incarcerated person, namely Abbas Ansari in the Jail premises and were trying his escape from lawful custody. The petitioner herein was arrested and was in judicial custody. When the petitioner herein moved an application for his release on bail, the District Magistrate who was delegated powers under Section 3(3) of the National Security Act, 1980 (hereinafter called 'the Act'), apprehending the disturbance of public order by the petitioner herein passed an order dated 06.05.2023 under Section 3(2) of the Act, directing detention of the petitioner.

2. Under Section 3(4) of the National Security Act, the State Government on 10.05.2023 approved the detention order. Thereafter, as per Section 3 (5) of National Security Act, the detention order, grounds of detention and all other relevant documents, as were in the possession of the State Government, were sent to the Central Government by a communication dated 11.05.2023. Also, under Section 10 of the National Security Act, 1980, on the same date i.e. on 11.05.2023, the matter was referred by the State Government to the U.P. Advisory Board (Detention), Lucknow. The Advisory Board, after allegedly complying with all the provisions under Section 11 of the National Security Act, sent its report (the date of which is not given). However, it was received by the State Government on 31.05.2023. Thereafter, upon considering the report of the Advisory Board on

05.06.2023, an order was passed by the State of U.P. under Section 12 (1) of the National Security Act, as per the affidavit filed by the Deputy Secretary, by which the petitioner was to be detained provisionally for a period of three months. This order again, as per the affidavit filed by the Deputy Secretary, Sri Pramendra Kumar Gupta, was extended on 21.07.2023 and the petitioner was to be detained provisionally for a period of six months from the initial date of detention. Aggrieved by the initial order of detention, dated 06.05.2023 and the consequential illegal detention, the petitioner has approached this Court. Essentially, the petitioner's counsel, Sri Dayashankar Mishra, learned Senior Counsel assisted by Sri Chandrakesh Mishra and Abhishek Kumar Mishra have made the following submissions:

i) The petitioner had tried to submit his representation through the jailer and when the same was not taken by the Authorities, he submitted the representation by registered post on 26.05.2023. This representation was addressed to the District Magistrate. However, he submits that the hearing was conducted on 26.05.2023 itself by Advisory Board, and therefore, the representation as was required to be placed before the Advisory Board under Section 10 of the National Security Act, was never there before the Advisory Board.

ii) Learned counsel for the petitioner has further submitted that when the petitioner represented through his counsel on 01.06.2023 to the State Government and the Central Government, this representation was never considered.

iii) Learned counsel for the petitioner has further submitted that if the counter affidavit of Sri Premendra Kumar Gupta, is perused, then, as per paragraph '9' it is evident that Government officials were present and were heard before the U.P. Advisory Board. Learned counsel for the petitioner since has relied upon para '9' of the affidavit of Sri P.K. Gupta, the same is reproduced as under:

*"That, it is submitted that the U.P. Advisory Board, Lucknow vide its letter dated 22-05-2023, informed the State Government that the case of the petitioner would be taken up for hearing on 26-05-2023 and directed that the petitioner be informed that if he desired to attend the hearing before the U.P.Advisory Board alongwith his next friend (non-advocate), he could do so and be allowed to take his next friend (non-advocate) alongwith him if he had so requested. This fact was accordingly communicated to the petitioner through district authorities by the State Government letter dated 23- 05-2023. The petitioner appeared for hearing before the U.P.Advisory Board on the date fixed. The U.P.Advisory Board heard the petitioner in person and **government officials** and sent its report alongwith the opinion that there is sufficient cause for the preventive detention of the petitioner under the National Security Act, 1980. This report and the records of the case were received in the concerned section of the State Government on 31-05- 2023 through the letter of Registrar, U.P. Advisory Board (Detentions) dated 31-05-2023 well within seven weeks from the date of detention of the petitioner, as provided in Section 11(1) of the Act."*

iv) Learned counsel for the petitioner relying upon the judgement of ***Najar Quraishi vs. Superintendent and three others***, passed on 19.09.2018 in ***Habeas Corpus Writ Petition No. 3293 of 2018***, has submitted that if the State was being assisted by Legal Advisors in the form of Government officials then as per the law which had been laid down in the

judgement of ***A.K. Roy vs. Union of India and Another*** reported in ***(1982) 1 SCC 271*** and also as per judgement of ***Choith Nanikram Harchandani vs. State of Maharashtra and Others*** reported in ***(2018) 2 SCC (Cri) 403***, the petitioner ought to have also been given assistance of legal practitioners. Since, learned counsel for the petitioner relied heavily upon the judgement of ***A.K Roy (supra)***, the para '93' of that judgement is being reproduced herein as under:

"93. We must therefore hold, regretfully though, that the detenu has no right to appear through a legal practitioner in the proceedings before the Advisory Board. It is, however, necessary to add an important caveat. The reason behind the provisions contained in Article 22 (3) (b) of the Constitution clearly is that a legal practitioner should not be permitted to appear before the Advisory Board for any party. **The Constitution does not contemplate that the detaining authority or the Government should have the facility of appearing before the Advisory Board with the aid of a legal practitioner but that the said facility should be denied to the detenu.** In any case, that is not what the Constitution says and it would be wholly inappropriate to read any such meaning into the provisions of Article 22. **Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner or a legal adviser would be in breach of Article 14, if a similar facility is denied to the detenu. We must therefore make it clear that if the detaining authority or the Government takes the aid of a legal practitioner or a legal adviser before the Advisory Board, the detenu must be allowed the facility of appearing before the Board through a legal practitioner.** We are informed that officers of the Government in the departments concerned often appear before the Board and assist it with a view to justifying the detention orders. If that be so, we must clarify that the Boards should not permit the authorities to do indirectly what they cannot do directly; **and no one should be enabled to take shelter behind the excuse that such officers are not 'legal practitioners' or legal advisers. Regard must be had to the substance and not the form since, especially, in matters like the proceedings of Advisory Boards, whosoever assists or advises on facts or law must be deemed to be in the position of a legal adviser. We do hope that Advisory Boards will take care to ensure that the provisions of Article 14 are not violated in any manner in the proceedings before them.** Serving or retired Judges of the High Court will have no difficulty in understanding this position. Those who are merely 'qualified to be appointed' as High Court Judges may have to do a little homework in order to appreciate it."

(Emphasis Supplied)

Also since the judgement of ***Choith Nanikram Harchandani vs. State of Maharashtra and Others*** reported in ***(2018) 2 SCC (Cri) 403*** was relied upon and and specifically the paragraph '15' was relied upon and the same is reproduced as under:

"15. In our considered view, if the petitioner is a habitual offender and has past criminal record, as alleged by the respondents, it was all the more necessary for the respondents to have followed in letter and spirit the procedure laid down in A.K Roy's case (supra) before passing the impugned order of detention. It was, however, not done."

v) Learned counsel for the petitioner further states that the order which was passed by the State of U.P., initially on 05.06.2023, was an order which was passed under section 12(1) of the National Security Act after considering the report of the Advisory Board and this order could not thereafter be reviewed or extended by subsequent orders. He submits that the law as had been laid down in ***Cherukuri Mani vs. Chief Secretary, Government of Andhra Pradesh and others*** reported in ***(2015) 13 SCC 722***, which had stated that the detention order had to be initially passed for three months and thereafter could be extended after every three months under section 3(3) of the National Security Act was not a good law. Learned counsel for the petitioner relying upon ***Pesala Nookaraju vs. The Government of Andhra Pradesh & others*** reported in ***2023 SCC OnLine SC 1003*** and on ***Ameena Begum vs. The State of Telangana and others*** reported in ***(2023) 9 SCC 587*** made the above submission. Since, learned counsel for the petitioner heavily relied upon the paragraphs '42', '43' and '44' of the judgement in ***Pesala Nookaraju (supra)***, the same are being reproduced herein as under:

"42. Hence, Article 22(4)(a) in substance deals with the order of detention and has nothing to do with the delegation of the power of detention by the State Government to an Officer as stipulated under Section 3(2) of the Act. In fact, under Section 9 of the Act, the State Government has to refer the matter to the Advisory Board within three weeks from the date of detention, irrespective of whether the detention order is passed under Section 3(1) or Section 3(2) of the Act and the Advisory Board has to give its opinion within seven weeks from the date of detention. That would totally make it ten weeks. As stipulated in Article 22(4)(a) of the Constitution, if in a given case, once the Advisory Board gives its opinion within the stipulated period of three months, then in our view, Article 22(4)(a) would no longer be applicable. Thus, Article 22(4)(a) applies at the initial stage of passing of the order of detention by the State Government or by an officer who has been delegated by the State Government and whose order has been approved by the State Government within a period of twelve days from the date of detention and not at the stage subsequent to the report of the Advisory Board. Depending upon the opinion of the Advisory Board, under Section 12 of the Act, the State Government can revoke the order of detention and release the detenu forthwith or may confirm the detention order and continue the detention of the person concerned for any period not exceeding the maximum period of twelve months, which is stipulated in Section 13 of the Act. Therefore, when the State Government passes a confirmatory order under Section 12 of the Act after receipt of the report from the Advisory Board then, such a confirmatory order need not be restricted to a period of three months only. It can be beyond a period of three months from the date of initial order of detention, but up to a maximum period of twelve months from the date of detention.

43. We reiterate that the period of three months stipulated in Article 22(4)(a) of the Constitution is relatable to the initial period of detention up to the stage of receipt of report of the Advisory Board and does not have any bearing on the period of detention, which is continued subsequent to the confirmatory order being passed by the State Government on receipt of the report of the Advisory Board. **The continuation of the detention pursuant to the**

confirmatory order passed by the State Government need not also specify the period of detention; neither is it restricted to a period of three months only. If any period is specified in the confirmatory order, then the period of detention would be upto such period, if no period is specified, then it would be for a maximum period of twelve months from the date of detention. The State Government, in our view, need not review the orders of detention every three months after it has passed the confirmatory order

44. Thus, in our view, the period of three months specified in Article 22(4)(a) of Constitution of India is relatable to the period of detention prior to the report of the Advisory Board and not to the period of detention subsequent thereto. Further, the period of detention in terms of Article 22(4)(a) cannot be in force for a period beyond three months, if by then, the Advisory Board has not given its opinion holding that there is sufficient cause for such detention. Therefore, under Article 22(4)(a), the Advisory Board would have to give its opinion within a period of three months from the date of detention and depending upon the opinion expressed by the Advisory Board, the State Government can under Section 12 of the Act, either confirm the order of detention or continue the detention of the person concerned for a maximum period of twelve months as specified in Section 13 of the Act or release the detenu forthwith, as the case may be. If the order of detention is confirmed, then the period of detention can be extended up to the maximum period of twelve months from the date of detention. With respect, we observe that **it is not necessary that before the expiration of three months, it is necessary for the State Government to review the order of detention as has been expressed by this Court in Cherukuri Mani (supra). The Act does not contemplate a review of the detention order once the Advisory Board has opined that there is sufficient cause for detention of the person concerned and on that basis, a confirmatory order is passed by the State Government to detain a person for the maximum period of twelve months from the date of detention.** On the other hand, when under Section 3(2) of the Act, the State Government delegates its power to the District Magistrate or a Commissioner of Police to exercise its power and pass an order of detention, the delegation in the first instance cannot exceed three months and the extension of the period of delegation cannot also be for a period exceeding three months at any one time. [See: Abdul Razak v. State of Karnataka, ILR 2017 Kar 4608 (FB)]"

(Emphasis Supplied)

Also, since learned counsel for the petitioner heavily relied upon the paragraphs '71', '72', '73', '76' and '78' of ***Ameena Begum (supra)***, the same are being reproduced herein as under :

"71. Both Mr. Luthra and Mr. Dave have referred us the recent decision of a 3-Judges Bench of this Court in the case of Pesala Nookaraju vs. The Government of Andhra Pradesh [Crl. Appeal No. 2304 of 2023, decided on 16th August, 2023 where an order of detention passed in exercise of power conferred by the Andhra Pradesh Prevention of Dangero Activities of Boot-leggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 ("1986 Act" hereafter) was upheld despite the detenu having obtained orders of bail upon arrest in connection with investigation of 4 (four) F.I.R. under sections 7B and 8B

of the Andhra Pradesh Prohibition Act, 1995.

72. Mr. Luthra intended to rely on the decision in Cherukari Mani vs. Chief Secretary, Government of Andhra Pradesh, (2015) 13 SCC 722. According to the appellant, the detention could only be in force for a period of three months in the fir instance and that such order on a periodic assessment was required to be reviewed for continuous detention till the maximum period permissible. The contention was accepted by this Court.

73. While hearing of the appeal was in progress, came the decision in Pesala Nookaraju (supra) overruling Cherukari Mani (supra). It was held that the "State Government need not review the orders of detention every three months after it ha passed the confirmatory order." Fairly, Mr. Luthra did not seek to rely on Cherukari Mani (supra) further.

.....

.....

76. Mr. Dave next relied on the reasons assigned in Pesala Nookaraju (supra) to contend that the impugned Detention Order should be held legal and unexceptionable.

.....

78. It is indeed true that the appellant had raised a contention before the Court that the Government of Andhra Pradesh had directed detention of the appellant for the maximum period of 12 (twelve) months without any application of mind providing reasons as to why this is necessary."

vi) Learned counsel for the petitioner in effect, therefore, argued that once when an order confirming the detention under section 12(1) of the National Security Act had been passed, then, the same could not be reviewed or extended. However, he submitted that for the benefit of the detenue, order could be passed either revoking or modifying the detention in terms of the provisions of Section 14 of the National Security Act. Learned counsel for the petitioner reliying upon the judgement of the ***Ram Bali Rajbhar vs. The State of West Bengal and others*** reported in ***(1975) 4 SCC 47***, has submitted that the State could pass the modification order in favour of the detenue after complying with the provisions of Section 10 & 11 of the National Security Act. Since, learned counsel for the petitioner relied heavily upon paragraph '12', of the judgement of ***Ram Bali Rajbhar (supra),*** the same is being reproduced herein as under:

"12. We think it will be a reasonable and judicious exercise of the power under Section 14 of the Act to refer a case once again to the Advisory Board for its opinion before a subsequent representation made on fresh materials by a detenu is rejected. It is true that the conditions under which a reference is made for the opinion of the Advisory Board under Section 10 of the Act cannot be repeated. It is also clear that the express and mandatory duty to refer arises only under the conditions laid down by Section 10 of the Act and there is no specific or separate provision for calling for the opinion of the Advisory Board from time to time., Nevertheless, if the power under Sec. 14 of the Act can be exercised "in the like manner and subject to the like sanctions and conditions (if any)", to use the language employed by Section 21 of the General Clauses Act, we can only interpret "like manner" and subjection to "like conditions" to mean similar and not identical manner and conditions. We think that a situation in which a power of revocation or modification of a detention order is invoked by a second or subsequent

representation can, after making allowance for intervening events which cannot be wiped out of existence, be compared to and resembles a situation in which the opinion of the Advisory Board is sought after an approval or a preliminary confirmation of a detention order by the State Government under Section 3 (3) of the Act, awaiting the opinion of the Advisory Board, which is expected to function quite impartially and independently before the Government makes a final order under Section 12 of the Act. Section 10 of the Act only provides for the Ist representation. But, it appears to us that the power under Section 14 of the Act, read with Section 21 of the General Clauses Act, which is specifically mentioned in Section 14 of the Act, could import or imply a power of the State Government to refer a second representation likewise to the Advisory Board, if the State Government so decides in an analogous situation. And, the Advisory Board can then adopt such, parts of the procedure laid down in Section IT of the Act as could be applied to a second representation. In such a case, the reference would not be under Section 10 of the Act but under Section 14 of the Act read with the necessary implication of preserving the power of the Government to act as laid down in Section 21 of the General Clauses Act. In other words, the subsequent reference would result from a necessarily implied power of the Government, to act, so far as possible, in a like manner to the one it has to adopt in confirming or revoking the initial detention order under Section 12 of

the Act. And, if there is such a power in the Government to refer a subsequent representation on fresh grounds to the Advisory Board for its opinion, there will, we think be a corresponding implied power and obligation of the Advisory Board to give its opinion in accordance with the procedure prescribed by Section II of the Act except that its report will necessarily have to be submitted in such cases beyond ten weeks from the date of detention order but within a reasonable time."

vii) Learned counsel for the petitioner states that if any order after the order dated 05.06.2023 had to be passed, then fresh reasons ought to have been there and all the machinery which was provided under Sections 3, 8, 10 and 11 of the National Security Act ought to have been followed.

viii) Still further, learned counsel for the petitioner has submitted that there was no finding with regard to the fact as to how “public order” was being disturbed. He submits that in the First Information Report there were seven accused including Abbas Ansari, but only the petitioner-Niyaz Ansari, who was only a driver of Nikhat Ansari, the wife of said Abbas Ansari, had been detained under the provisions of the Act.

3. On 10.01.2024, we had put certain questions and had asked the learned A.G.A. to reply to them today. A Supplementary Affidavit has been filed by Sri Premendra Kumar Gupta, the Deputy Secretary, (Home Department (Confidential), U.P. and with regard to the reply vis-a-vis the representation which the petitioner had submitted, he has stated that the representation in fact, was never there before the Advisory Board. He has submitted that the petitioner had never mentioned before the Advisory Board that the representation was sent. With regard to the subsequent representation which finds mention in the writ petition and was dated 01.06.2023, learned A.G.A. submits that in fact it was not submitted on 01.06.2023 but was signed on 06.06.2023 and on that date

the detenue and his counsel had submitted the same. The original of this communication was produced before us.

4. Learned counsel for the State has submitted that as per ***Cherukuri Mani (supra)***, the initial confirmity order could not have been passed for more than three months and that it could in fact only be extended every three months. Therefore, he submits that the order dated 05.06.2023 was passed under Section 12(1) readwith 3(3) of the National Security Act for only a period of three months. He submits that in accordance with law as was prevalent at the time of the passing of the order dated 5.6.2023 the subsequent orders dated 21.07.2023 and 27.10.2023 were passed extending the detention by further three months.

5. Learned A.G.A. with regard to the presence of Government officials has stated that in the counter affidavit it was inadvertently stated that the Government officials were heard. He has stated that the Government official in fact had only visited the office of the Advisory Board and had supplied only events/documents before the Advisory Board and in fact they were never heard.

6. Having heard Sri Dayashankar Mishra, learned Senior Counsel assisted by Sri Abhishek Mishra and Sri Chandrakesh Mishra, Advocates; learned Additional Advocate General, Sri P.C. Srivastava, assisted by Sri J.K. Upadhyaya; Vikas Sahai for the State of Uttar Pradesh and the learned counsel for the Union of India Ms. Manjari Singh, we are of the view that that the writ petition deserves to be allowed. The petitioner was at the first place, as per the law laid down in ***A.K. Roy (supra)*** and ***Choith Nanikram Harchandani (supra)*** as was followed by our High Court in ***Najar Quraishi (surpra)*** was not given the right to have assistance of Legal Practitioners.

7. In view of the fact that the State was having Government officials i.e., Legal Advisors (as had been interpretted in ***Choith Nanikram Harchandani)***, the petitioner also ought to have had the legal assistance on the 26th of May 2023 i.e. the day when he had appeared before the Advisory Board. Therefore, we are of the view that the petitioner's valuable right of being properly heard was violated.

8. We also are of the view that once when the order of detention was confirmed on 05.06.2023, after considering the Advisory Board's report, then, the State Government ought to have applied its mind in one go and as per Section 12 of the National Security Act, it ought to have passed an order as to for what period the detention had to be done. Definitely, the detention could not have been done in piecemeal as has been done in the present case by the State Government. If the initial detention was for three months, then it could have been there only for three months. If for any further reasons the Government intended to detain the detenue further then all the machinery as is provided under Sections 3, 5, 8, 9, 10, 11 and 12 of the National Security Act, ought to have been followed.

9. For the reasons stated above, the writ petition is ***allowed.*** The order by which the initial detention order dated 06.05.2023 was confirmed on 05.06.2023 is quashed. The petitioner though has not challenged in the writ petition the orders dated 21.07.2023 and 27.10.2023 but were brought before us whereby the detention was extended are also hereby ***quashed*** and

set-aside. Since the confirmation order dated 05.06.2023 by which the detention order dated 6.5.2023 has been set-aside, we are of the view that the order dated 06.05.2023 also goes as it has outlived its life.

10. We, therefore, direct that the petitioner, Niyaz Ansari, (Detenue) be set at liberty, unless he is required in any other case.

(2024) 2 ILRA 107
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2024

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Habeas Corpus Writ Petition No. 831 of 2023

Yajur Verma @ Jai Verma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mahesh Narain Singh, Sri M.N. Singh, Sri Anoop Trivedi (Sr. Advocate)

Counsel for the Respondents:
G.A., Sri Sarvesh

Civil Law - Constitution of India,1950- Article 226 - Hindu Minority and Guardianship Act, 1956 - Section 6 - Guardians and Wards Act, 1890 - Petitioner (father) sought habeas corpus for custody of 4-year-old son from mother (respondent No. 4), alleging illegal detention post-separation. Court held: (1) Habeas corpus maintainable only if custody unlawful; paramount consideration is child's welfare, not parental rights (Syed Saleemuddin Vs Rukhsana, (2001) 5 SCC 247). (2) For child below 5 years, mother preferred as natural guardian under Section 6(a) of Hindu Minority and Guardianship Act; father's claim unsubstantiated (Nithya Anand Raghavan Vs St. (NCT of Delhi), (2017) 8 SCC 454). (3) No evidence of unlawful detention or mother's incapacity; child's stable environment with mother and grandparents, including schooling in Lucknow, prioritized (Meenakshi Vs St. of U.P., 2020 12 ADJ 254). (4) Prior orders granted petitioner visitation rights for elder son, extendable to younger; no justification for disrupting child's current custody (Tejaswini Gaud Vs Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42). (5) Petitioner to seek formal custody under Guardians and Wards Act; writ jurisdiction not for routine disputes. Petition dismissed; mother retains custody. (Paras 2-19)

Writ Petition Dismissed.

Case Law Cited:

1. Syed Saleemuddin Vs Rukhsana, (2001) 5 SCC 247 (Para 10)

2. Nithya Anand Raghavan Vs St. (NCT of Delhi), (2017) 8 SCC 454 (Para 11)

3. Tejaswini Gaud Vs Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42 (Para 13)

4. Kanu Sanyal Vs District Magistrate, Darjeeling, (1973) 2 SCC 674 (Para 11)

5. Elizabeth Dinshaw Vs Arvand M. Dinshaw, (1987) 1 SCC 42 (Para 11)

6. Dhanwanti Joshi Vs Madhav Unde, (1998) 1 SCC 112 (Para 11)

7. Meenakshi Vs St. of U.P., 2020 12 ADJ 254 (Para 12)

8. Githa Hariharan Vs Reserve Bank of India, (1999) 2 SCC 228 (Para 14)

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

1. Heard Sri Anoop Trivedi, learned Senior Counsel assisted by Sri Mahesh Narain Singh, learned counsel for the petitioner, Sri Sarvesh, learned counsel for

respondent no.4 and Mohd. Shoeb Khan, learned A.G.A. for the State.

2. This habeas corpus writ petition has been filed on behalf of minor son Yajur Verma @Jai Verma aged about four years through his father against Smt. Ashi Verma @ Hani Verma, mother of the corpus, the respondent no.4 and others.

3. The submissions of the petitioner in brief are as below-:

i. The marriage of Gaurav Verma, the petitioner with respondent no.4 was solemnized in 2010. Two sons were born to the couple, elder one Granth Verma is now aged about eight and half years and the younger one Yajur Verma is now aged about four and half years. Parental houses of both sides are hardly 500 meters away from each other. The family members of his wife have been exerting pressure on him to stay with them.

ii. It is alleged in the petition that his wife Ashi Verma, all of sudden, in a pre-planned manner stepped down from the train in the night of 27/28.09.2021 at Jhansi Railway Station, when they were returning from Ujjain. He lodged a missing report and she was recovered from Gwaliar railway station and was given in custody, to her father Kamlapati Verma. In pursuance of this conspiracy between his wife and father-in-law, his two sons were snatched away by his wife and her father and they left for Etawah. The petitioner requested his father-in-law and his wife to return the kids but they did not budge. They pressurized Gaurav Verma but he refused to sign certain papers. Thereafter his wife lodged a false F.I.R. as case crime no.433 of 2021, under Sections 307, 498A, 323, 504 120 B, I.P.C., Another case under Section 125 Cr.P.C. has been filed against the petitioner which was decided on the basis of a compromise. With the permission and consent of the petitioner corpus was admitted in pre-nursary class in Etawah. However, all of sudden without informing him, Yajur Verma was withdrawn from his school at Etawah and has been admitted in a school at Lucknow. Opposite party no.4, Ashi Verma, his wife is now pursuing LLB course at Etawah. These facts have proved that Yajur Verma, their minor son is not in custody of his mother and has been left under the care of some distant relative or some other. In view of the above facts, the petitioner has no alternative remedy except to file this habeas corpus writ petition for production of his child.

iii. One of the contentions of the petitioner is that earlier a Habeas Corpus Writ Petition no.521 of 2022, Gaurav Verma vs. State of U.P. and others was filed by respondent no.4 with regard to elder son Granth Verma which was decided by a coordinate Bench of this High Court by order dated 22.09.2022, in which following directions were issued :-

"I. The Corpus shall remain with his father till a contrary direction, if any, is passed by any Court of Law.

II. Father shall not obstruct or object the visiting rights of mother of Corpus and he shall permit his mother to meet the Corpus on any day with prior notice as well as on each Sunday in day time at his home and father will also have similar liberty to meet his younger son at his mother's home.

III. Mother and father of Corpus are also directed not to create any ruckus during their visit at respective houses to meet the child.

IV. The Investigating Officer is directed to organize a mediation between parties as well as, if necessary, organize a counselling session for parents also."

In view of said order passed by the High Court, the argument of the petitioner is that he was given visiting right in respect of his younger son at his mother's house and his wife Ashi Verma has deliberately shifted his younger son to a boarding school at Lucknow, therefore, he can no longer meet him.

iv. A special appeal was filed challenging the aforesaid order dated 22.09.2022 which was decided by order dated 30.11.2022. In the aforesaid order he was again granted a right to meet his younger child Yajur Verma @Jai Verma in the house of Smt. Ashi Verma. The High Court had directed Ashi Verma to allow a weekly meeting of father with his younger son, every Saturday. On the basis of the aforesaid orders dated 22.09.2022 and 30.11.2022 it is vehemently argued that the child has been deliberately removed to Lucknow just to defeat the aforesaid orders and that this facility should be restored immediately.

4. It may be noted that the petition is spread into over 40 pages containing incidents told elaborately with rather ornate and longish descriptions, many of them may not be related to main relief, hence I do not find it necessary to allude to all of them.

5. In the counter affidavit filed by opposite party no.4, deponent Ashi Verma has levelled most of the paragraphs of the petition as misleading, misconceived and fake.

It is submitted by her that the sole purpose behind the request to arrange his visit to meet his son is actually part of plot to kill her. She had noticed that two unknown persons were talking with her husband and she was in fact pushed out from the train when it had just started from Jhansi. She sustained injuries but she was saved and this was the reason they did not stop the train and did not get down for searching her. She was found lying unconscious near the track and was saved by some school going girls. Thereafter she herself went to police station and narrated the story and at that time she refused to go with her husband and mother-in-law and both of her sons refused to go with father and accompanied her. Later on her elder son was kidnapped by his father. She submits that in order to provide best education to her children she has got admitted younger son to a best school in Lucknow, where he is studying as a regular student. She herself intends to get admission in Lucknow so that she can take care of her son. Her son is in a day boarding school and his school timing is 9.30 A.M. to 4.50 P.M. Her husband has not given her any alimony. His restaurant is running in loss and he has always been very cruel in his behaviour and therefore he cannot take care of his sons for the reasons that his financial position is weak and also that his behaviour is rough and harsh. Her husband Gaurav Verma has twisted facts and concocted stories in his defence. Further it is stated that Yajur Verma is regularly studying in a very good school of U.P. and that Gaurav Verma wants to spoil the younger child in the same manner as he has been doing with his elder son, who was kidnapped from the custody of mother just in order to save himself and his parents from criminal cases.

6. In the end it is contended that this habeas corpus writ petition is not maintainable on two grounds. The first ground is that the child is only four years old and the mother is his natural guardian and the second is that Gaurav Verma has

already filed a case under the Guardian and Wards Act.

7. I heard both the sides and interacted with the parties giving them enough of space and time with a view to explore the probability of amicable solution and also to rummage through the real facts and circumstances which may aid the court in adjudicating the matter of custody of the child, which is more often then not a very sensitive issue between parents.

8. Admittedly the parties are husband and wife and are living separately since at least more than two years. The couple have two sons and this habeas corpus writ petition has been filed by the father seeking custody of his younger son who is admittedly about four years old.

9. The petitioner's straight contention is that earlier in the petition filed by mother on behalf of their elder son the High Court gave him liberty to meet his younger son at mother's house at Etawah and that as the child has been removed to Lucknow, therefore, his right granted by the High Court stands defeated. This is quite clear that younger son has been staying with his mother all along and that he never stayed with his father alone at any point of time.

10. In ***Syed Saleemuddin vs. Dr. Rukhsana and others , (2001)5 SCC 247*** it was observed as below-:

"11. From the principles laid down in the aforementioned cases it is clear that in an application seeking a writ of Habeas Corpus for custody of minor children the principal consideration for the Court is to ascertain whether the custody of the children can be said to be unlawful or illegal and whether the welfare of the children requires that present custody should be changed and the children should be left in care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration of the Court."

11. The same question again cropped up before the Hon'ble Supreme Court in ***Nithya Anand Raghavan vs. State (NCT of Delhi) and another, (2017)8 SCC 454 :-***

"44. The present appeal emanates from a petition seeking a writ of habeas corpus for the production and custody of a minor child. This Court in Kanu Sanyal v. District Magistrate, Darjeeling [Kanu Sanyal v. District Magistrate, Darjeeling, (1973) 2 SCC 674 : 1973 SCC (Cri) 980] , has held that habeas corpus was essentially a procedural writ dealing with machinery of justice. The object underlying the writ was to secure the release of a person who is illegally deprived of his liberty. The writ of habeas corpus is a command addressed to the person who is alleged to have another in unlawful custody, requiring him to produce the body of such person before the court. On production of the person before the court, the circumstances in which the custody of the person concerned has been detained can be inquired into by the court and upon due inquiry into the alleged unlawful restraint pass appropriate direction as may be deemed just and proper. The High Court in such proceedings conducts an inquiry for immediate determination of the right of the person's freedom and his release when the detention is found to be unlawful."

12. In **Meenakshi and another vs. State of U.P. and others Allahabad High**

Court, 2020 12 ADJ 254 it was observed in para-47 as below:-

"47. In a habeas corpus petition as aforesaid, the High Court must examine at the threshold whether the minor is in lawful or unlawful custody of another person (private respondent named in the writ petition). For considering that issue, in a case such as the present one, it is enough to note that the private respondent was none other than the natural guardian of the minor being her biological mother. Once that fact is ascertained, it can be presumed that the custody of the minor with his/her mother is lawful. In such a case, only in exceptionable situation, the custody of the minor (girl child) may be ordered to be taken away from her mother for being given to any other person including the husband (father of the child), in exercise of writ jurisdiction. Instead, the other parent can be asked to resort to a substantive prescribed remedy for getting custody of the child."

13. The Hon'ble Supreme Court in the case of ***Tejaswini Gaud and Others v. Shekhar Jagdish Prasad Tewari and Others, (2019) 7 SCC 42*** has observed as below:

"19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

The Supreme Court has further observed that in child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be and that it is only in suitable cases, the rights of the parties to the custody of a minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

14. In paras 25 and 26 of the judgement given by Allahabad High Court in the case of ***Meenakshi (supra)*** it has been held that :

"25. No doubt, the father and the mother, are both natural guardians, if one goes by Section 6(a) of the Act of 1956. The mother's right and that of the father, under Section 6(a) as to guardianship has been considered at par by the Supreme Court in Githa Hariharan (Ms) and another vs. Reserve Bank of India and another, (1999) 2 SCC 228. So far as custody goes, as distinct from guardianship, between the two natural guardians, the mother is to be preferred by virtue of the proviso to Section 6(a) of the Act of 1956, in the case of a child below five years of age.

26. What is important while deciding the issue of custody between two natural guardians, is where the minor's

welfare would be best secured. The statute indicates a preference for the mother, so far as a child below five years is concerned. But, that legislative edict though a strong indicator, is not to be construed as an inflexible rule to be mechanically applied. The question of a child's welfare is always a matter for the Court's decision, based on varied factors."

15. From perusing the precedents this legal position emerges that the habeas corpus petition is no ordinary remedy and that the normal procedure would be to invoke the civil court jurisdiction under the Hindu Minority and Guardianship Act or the Guardians and Wards Act. Natural corollary therefore is that writ jurisdiction in this regard should be exercised in most suitable cases if not the exceptional ones. Secondly that where difficult and complex questions, as regard custody of minor arise, the relevant statutory provisions and the rights of parties emanating therefrom should be kept in mind. Though welfare of the child shall still remain the paramount consideration. The things have to be balanced between the right of the parties and child's preference where the child is capable of forming an intelligent preference with the ultimate i.e. welfare of the child.

16. The Allahabad High Court in Meenakshi (supra) was faced with a vexed and sensitive question of custody of minor aged four years between his mother and father. The Court observed that for a child below five years a mother is to be preferred, though the ultimate parameter remains what is best for child's welfare. In the instant case the corpus, who is around four years, has been staying with his mother all along. The petitioner has not been able to show as to reasons why the custody of the corpus must change hands and how he can take better care of him rather than his mother. This has come in evidence that corpus is studying at some good educational institution at Lucknow and that his mother is having support of her family in raising the child. The petitioner has taken shelter of the fact that he was given right to visit his younger son by an order passed in Special Appeal No.658 of 2022, Granth Verma Vs. State of U.P. and others. Admittedly, this matter concerned to his elder son only. It has already been shown that this order was passed as an interim arrangement, by the High Court by its order dated 30.11.2022. Admittedly arrangement was purely temporary and was subject to the condition that mother of corpus Ashi Verma continued to reside at Etawah and that in case she changed his domicile to any other district, the interim arrangement would stand discharged.

17. In the instant case this is an admitted position that mother of the child has got him admitted to a school at Lucknow and that she planned to shift to that place to pursue her study/career. The petitioner has himself said that child has been shifted to Lucknow. Respondent no.2, mother has dispelled doubts for the reasons behind shifting. She has informed in her counter affidavit that corpus has been admitted in very good school at Lucknow and that he (the corpus) is staying with his mother, his grand mother and grand father. And meanwhile she too has already shifted to Lucknow and planned to settle there permanently. She has imputed several serious allegations against her husband. One of them being forcible removal of elder son from her custody and attempt being made on her life by pushing her from a running train. Though her allegations cannot be ascertained in this habeas corpus petition, however, the kind of allegations

demonstrate the huge and serious differences and conflicts the couple have between them. All said and done the facts remains that the petitioner has not been able to show that how it is necessary to transfer custody of the corpus from mother to the father at this juncture and how the welfare of the child would be better served with his father or how mother is not entitled or how it is not good to leave the corpus with his mother.

18. The parties were interviewed and interacted with, by me in the privacy of my chamber. I tried to fathom the factors involved in the matter for the purpose of exploring the chances of amicable settlement as well as for the purpose of deciding custody of the child. After long interaction with the two, I came to the conclusion that there are issues, controversies and certain happenings which cannot be solved by ordinary counselling. The parties need to go through long and sustained counselling and that in the circumstances I find it much better not to disturb the custody of the corpus at this juncture and more so to keep him away from complexities of the relationship between his parents. This probability cannot be ruled out that with change of hands – he might be exposed to certain other realities of strained relations between his parents, of which he might be oblivious of so far. A tender and impressionable mind is not prepared for a jolt now and in case he is dislodged from his current environment, in which he may be comfortable by now, such a course of action may bring new revelations which ultimately may not be conducive for his health.

19. Taking into consideration all the facts and circumstances, I do not find any good reason for transferring the custody of the child to the petitioner. Therefore this habeas corpus writ petition is **dismissed.**

(2024) 2 ILRA 113
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 880 of 2023

Master Mahib Sajjad Masood & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:
Sri Om Prakash Mishra, Sri R.P.S. Chauhan, Sri Abhishek

Counsel for the Respondents:
G.A., Sri R.P. Ranjan

Civil Law -Guardians and Wards Act, 1890 - Section 17 - Principles of Mahomedan Law - Sections 352 & 353 - Constitution of India,1950- Article 226 - Petitioners (father and 7-year-old son) sought habeas corpus for son's custody from mother, alleging unlawful detention post-separation. Court held: (1) Habeas corpus maintainable only for unlawful custody; child's welfare paramount, not parental rights (Syed Saleemuddin Vs Rukhsana, (2001) 5 SCC 247). (2) Under Section 352 of Principles of Mahomedan Law, mother entitled to custody (hizanat) of male child until age 7; father's unwillingness to reunite and mother's capability favored current custody (Dhanwanti Joshi Vs Madhav Unde, (1998) 1 SCC 112). (3) No illegality in mother's custody; child stable in school and health; detailed inquiry needed for change (Tejaswini Gaud Vs Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42). (4) Father's talaq claim and prior separation do not override mother's rights; liberty to seek formal custody under GWA (Nithya Anand Raghavan Vs St. (NCT of Delhi), (2017) 8 SCC 454). (5) Corpus

to return with mother; observations prima facie, without prejudice to future claims. Petition dismissed. (Paras 1-32)

Writ Petition Dismissed.

Case Law Cited:

1. Syed Saleemuddin Vs Rukhsana, (2001) 5 SCC 247 (Para 23)

2. Dhanwanti Joshi Vs Madhav Unde, (1998) 1 SCC 112 (Para 20)

3. Tejaswini Gaud Vs Shekhar Jagdish Prasad Tewari, (2019) 7 SCC 42 (Para 24)

4. Nithya Anand Raghavan Vs St. (NCT of Delhi), (2017) 8 SCC 454 (Para 24)

5. Kanu Sanyal Vs District Magistrate, Darjeeling, (1973) 2 SCC 674 (Para 24)

6. Elizabeth Dinshaw Vs Arvand M. Dinshaw, (1987) 1 SCC 42 (Para 24)

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

1. Heard Sri Abhishek, learned Advocate holding brief of Sri Om Prakash Mishra, learned counsel for the petitioners, Sri Pankaj Saxena, learned A.G.A.-I appearing for the State-respondents and Sri R. P. Rajan, learned counsel for the respondent Nos. 8, 9, 10 and 11.

2. The present habeas corpus petition has been filed primarily seeking the following relief:-

"1. a writ, order or direction in the nature of mandamus directing and commanding all the respondent authorities as well as private respondents to produce Master Mahib Sajjad Masood the corpus before this Hon'ble Court to set at liberty forthwith and to give custody to his natural guardian - father (petitioner no.2) to secure his future."

3. Pursuant to the rule nisi issued earlier, the petitioner No. 1 (corpus), minor child of age about seven years, has been produced in Court by respondent No. 8, his mother.

4. Respondent No. 8 is present in Court and has been identified by her counsel, Sri R. P. Rajan.

5. The petitioner No. 2, Sajjad Hasan Masood, father of the petitioner no.1 (corpus), is also present in Court, and has been identified by his counsel, Sri Abhishek, learned Advocate holding brief of Sri Om Prakash Mishra.

6. Learned counsel appearing for the respondent No. 8 has stated that the amount as directed by the Court vide its order dated 21.12.2023 has been received by the said respondent.

7. Counsel for the parties do not dispute the fact that looking to the age of the child, it would be difficult to ascertain his wishes and accordingly the question with regard to his guardianship and custody would be required to be considered taking into view the entirety of the facts and circumstances of the case.

8. Learned A.G.A.-I, on the basis of an inquiry from the respondent No. 8, mother of the petitioner No. 1 (corpus), in Court, submits that she has stated that she is presently living at her maternal home. She has stated that she has a post-graduate degree and is capable of looking after her son, who is presently a minor, aged about seven years. She has stated that she was

sent to her maternal home by her husband, on 03.06.2023, and thereafter she has not been taken back. She has also stated that she is not averse to going back her matrimonial home, but her husband is not willing to take her back. As regards her minor son, she has stated that the child is going to school and is in good health.

9. Learned A.G.A.-I has also made an inquiry from the petitioner No. 2, in Court, and submits that he has stated himself to be in a government job. On a pointed query, he has expressed his unwillingness to take back the wife stating that there is already a talaq between them.

10. As per the pleadings in the petition, the respondent No. 8 (mother) is stated to have left her matrimonial home, on 02.06.2023, with all her certificates, jewellery and cash, alongwith her minor son, petitioner no.1 (corpus).

11. There is no material to suggest that the petitioner No. 1 (corpus) was forcibly taken away by the respondent No. 8. On the contrary, there is a clear assertion by respondent No. 8 that she was sent alongwith her minor son by the petitioner No. 2 to her maternal home and thereafter she has not been taken back.

12. The petitioner No. 2 (father of the corpus), has categorically stated that he is unwilling to take back the respondent No. 8 (mother of the corpus).

13. The law relating to guardians and wards is governed in terms of the Guardians and Wards Act, 18901, and an order with regard to guardianship may be passed under the aforesaid enactment, upon an application filed by a person claiming entitlement.

14. The provision with regard to making of an application regarding claims based on entitlement of guardianship is under the GWA and under Section 12 thereof the court is empowered to make interlocutory orders for protection of a minor including an order for temporary custody and protection of the person or property of the minor.

15. Section 17 of the GWA relates to matter to be considered by the court in appointing a guardian, and in terms thereof it is provided that the court while deciding the question of guardianship of a minor, shall, as far as possible, do so consistently with the law to which the minor is subject, keeping in view the welfare of a minor. Thus, the provisions of the personal law are to be applied consistently with the provisions of the GWA.

16. It is common ground between the parties that insofar as the question of custody is concerned, their rights are to be governed by the personal law.

17. The matters relating to "Guardianship of Person and Property" are provided under Chapter XVIII of **Principles of Mahomedan Law2** and Part-A thereof pertains to "Appointment of Guardians". In terms of Section 349, all applications for the appointment of a guardian of the person or property or both of a minor, are to be made under the GWA.

18. Further, Section 351 of Principles of Mahomedan Law, which is in terms of Section 17 of the GWA, imposes a duty upon the court in appointing guardian to make the appointment consistently with the law to which the minor is subject, keeping in view the welfare of the minor.

19. The subject matter relating to "Guardianship of a Person of a Minor" is dealt with under Part-B of Chapter XVIII of Principles of Mahomedan Law, and Sections 352 and 353 thereof are extracted below:-

"352. Right of mother to custody of infant children.—The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (e), unless she marries a second husband in which case the custody belongs to the father (f).

353. Right of Female relations in default of mother.—Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:—

(1) mother's mother, how highsoever;

(2) father's mother, how highsoever;

(3) full sister;

(4) uterine sister;

(5) consanguine sister;

(6) full sister's daughter;

(7) uterine sister's daughter;

(8) consanguine sister's daughter;

(9) maternal aunt, in like order as sisters; and

(10) paternal aunt, also in like order as sisters."

20. A conjoint reading of the aforesaid provisions indicates that the mother is entitled to the custody *(hizanat)* of her male child until he has completed the age of seven years, and failing the mother, the custody of a boy under the age of seven years, belongs to the female relatives in an order under which the mother's mother is shown first.

21. The custody of the petitioner No. 1, corpus (a male child aged about seven years), with the respondent No. 8 (his mother), cannot, therefore, be stated to be *prima facie* illegal.

22. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown.

23. The principal duty of the Court in such matters is to ascertain whether the custody of the child is unlawful and illegal and whether the welfare of the child requires that his present custody should be changed and the child be handed over to the care and custody of any other person. The principle is well settled that in such matters the welfare of the child is of paramount consideration.

24. In child custody matters, habeas corpus proceedings may not be utilized to justify or examine the legality of the custody. The power of the Court in granting the writ is qualified only in cases where detention of a minor is by a person not entitled to his/her legal custody. For the exigence of a writ, it would be required to be proved that the detention of the minor child is illegal and without any authority of law, and that the welfare of the child requires that the present custody should be changed.

25. In a case where facts are disputed and a detailed inquiry is required, the court may decline to exercise its extraordinary

jurisdiction and may direct the parties to approach the appropriate legal forum.

26. The legal position in this regard has been considered by this Court in a recent judgment in ***Ujaif @ Noor Alam and others Vs. State of UP and others3.***

27. In the present case, the custody of the petitioner No. 1, corpus (a minor of aged about seven years), is presently with his mother. The material facts do not, in any manner, suggest that it is a case of illegal detention, and in view thereof, the present petition seeking a writ of habeas corpus would not be entertainable.

28. As regards the claim for custodial rights, it is always open to the parties to avail the appropriate remedy for the purpose before the proper forum.

29. The observations made hereinabove are *prima facie* in nature and the same would be without prejudice to the rights and contentions of the parties, which may be agitated in appropriate proceedings.

30. The *rule nisi* issued earlier is discharged.

31. The petitioner No. 1 (corpus), would go alongwith the respondent No. 8, to the place from where he has been brought.

32. The habeas corpus petition stands **dismissed.**

(2024) 2 ILRA 117
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Habeas Corpus Writ Petition No. 1002 of 2023

Abbas Ansari ...Petitioner
Versus
Adhikshak Janpad Karagar, Kasganj & Ors. ...Respondents

Counsel for the Petitioner:
Sri Chandrakesh Mishra, Sri Abhishek Kumar Mishra, Sri Dayashankar Mishra (Sr. Advocate)

Counsel for the Respondents:
G.A., A.S.G.I., Ms. Annapurna Singh Chandel

Civil Law - National Security Act, 1980 - Sections 3(2), 3(3), 3(4), 10, 11, 12(1) & 13 - Petitioner challenged detention order dated 18.09.2023 under Section 3(2), confirmed on 02.11.2023 for three months, and extended on 11.12.2023 for six months. Court held: (1) Confirmatory order under Section 12(1) is final; St. Government lacks authority to review or extend it (Pesala Nookaraju Vs Govt. of Andhra Pradesh, 2023 SCC OnLine SC 1003; Ameena Begum Vs St. of Telangana, (2023) 9 SCC 587). (2) If a specific period is prescribed in the confirmatory order, detention is valid only for that period; if no period is specified, detention may extend up to 12 months per Section 13. (3) Confirmatory order of 02.11.2023 specified three months; extension order of 11.12.2023 was illegal. (4) Detention beyond three months from 18.09.2023 was unlawful. Extension order set aside; petitioner to be released forthwith unless required in another case. (Paras 7-9)

Writ Petition Allowed.

Case Law Cited:

1. Pesala Nookaraju Vs Govt. of Andhra Pradesh, 2023 SCC OnLine SC 1003 (Paras 4, 7, 8)

2. Ameena Begum Vs St. of Telangana, (2023) 9 SCC 587 (Paras 4, 8)

3. Cherukuri Mani Vs St. of A.P., (2015) 13 SCC 722 (Paras 5, 7)

4. Abdul Razak Vs St. of Karn., ILR 2017 Kar 4608 (FB) (Para 7)

5. Sunil Chachuda Vs St. of U.P., Habeas Corpus Writ Petition No. 1046 of 2023 (Para 8)

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Dayashankar Mishra, learned Senior Counsel assisted by Sri Abhishek Mishra and Sri Chandrakesh Mishra for the petitioner, learned Additional Advocate General, Sri P.C. Srivastava, assisted by Sri J.K. Upadhyaya and Shri Vikas Sahai for the State and Ms. Annapurna Singh Chandel, learned counsel on behalf of the Union of India.

2. The instant writ petition has been filed seeking quashing of the impugned detention order dated 18.9.2023 passed by the respondent no. 2-District Magistrate, Chitrakoot under section 3(2) of the National Security Act, 1980 (hereinafter referred as 'the Act, 1980'), which was subsequently confirmed by the State Government vide order dated 2.11.2023 for a period of three months from the date of the detention of the petitioner i.e. from 18.9.2023. Thereafter, the said detention order was again extended on 11.12.2023 by the State Government for a period of six months with effect from 18.9.2023.

3. The facts, in brief, are that the petitioner herein was detained vide order dated 18.9.2023 passed by the District Magistrate- Chitrakoot, under Section 3(2) of the Act, 1980 having been authorised under Section 3(3) of the Act, 1980. The said order was approved by the State Government under Section 3(4) of the Act, 1980 on 25.9.2023 and the matter was referred to Advisory Board. After receiving the report from the Advisory Board, the said detention order was confirmed in terms of Section 12 (1) of the Act, 1980 by the State Government on 2.11.2023 whereby the petitioner was detained for a period of three months from the date of initial detention order i.e. 18.9.2023. The detention of the petitioner herein was again extended vide order dated 11.12.2023 for a period of six months from the date of initial detention.

4. Learned counsel for the petitioner contends that since the order dated 2.11.2023 passed under Section 12(1) of the Act, 1980 is a final order, the State has no right to review the said order in terms of provisions of Section 12 of the Act, 1980, therefore, the order extending detention of the petitioner is without any authority of law and could not be sustained. Therefore, the detention of the petitioner herein in terms of order dated 11.12.2023 after the expiry of three months from the date of initial detention is illegal and therefore, the petitioner is liable to be released forthwith. In support of his contentions, learned counsel for the petitioner relied upon the judgement of the Apex Court in ***Pesala Nookaraju vs. The Government of Andhra Pradesh & others*** reported in ***2023 SCC OnLine SC 1003*** and ***Ameena Begum vs. The State of Telangana and others*** reported in ***(2023) 9 SCC 587.***

5. Per contra, learned A.G.A. submits that in view of the judgement of the Apex Court in ***Cherukuri Mani v. State of A.P.,*** reported in ***(2015) 13 SCC 722***, the State Government could not have passed an order of detention at a time for more than a period of three months, therefore, initially the order dated 2.11.2023 was passed for

detention of the petitioner herein for a period of three months and subsequently, the same was extended vide order dated 11.12.2023. Therefore, there is no illegality either in the initial detention order dated 18.9.2023 and the confirmatory order dated 2.11.2023 and the subsequent extension order dated 11.12.2023 by which the detention of the petitioner herein was again extended for a period of six months from the date of the initial detention i.e. 18.9.2023.

6. To appreciate the submissions made by learned counsel for the parties, it will be relevant to go through the scheme of the Act with regard to the detention of a person under the National Security Act, 1980. It will be relevant to note that as per the provisions of Section 3(2) of the Act,1980 if the Central Government or the State Government, as the case may be, if is satisfied in respect of any person with a view to prevent him from acting in any manner prejudicial to the maintenance of public order and it records its satisfaction that it is necessary so to make an order, then, it can pass an order directing that such a person be detained. As per Section 3(3) of the Act,1980 the State Government may delegate such powers of detention to the District Magistrate or the Commissioner of Police. In view of such delegation of the powers, the District Magistrate or the Commissioner of Police, as the case may be, is empowered to pass an order under Section 3(2) of the Act,1980. Such delegation of powers to the District Magistrate or the Commissioner of Police shall not be made at a given point of time for a period exceeding three months. As per Section 3(4) of the Act,1980 the officer who is delegated power of detention under Section 3(3) of the Act,1980 is directed to forthwith report the fact of such detention to the State Government concerned alongwith grounds of such detentions and no such order shall remain in force for more than 12 days, unless it is approved by the concerned State Government. When the order of approval by the State Government is passed within the aforesaid period of 12 days, the State Government shall report the fact of such detention within 7 days from the date of approval of detention to the Central Government together with the grounds of detention and other relevant particulars. As per Section 10 of the Act,1980 the concerned Government is mandated to place the matter within a period of three weeks before the Advisory Board constituted by it in terms of Section 9 of the Act, 1980 alongwith grounds of detention and other relevant documents. As per Section 11 of the Act, 1980 the Advisory Board, after considering the material placed before it and after calling for such other information as it may deem necessary and also after hearing the detenue, if he denies to be heard, shall submit its report to the concerned Government within 7 weeks from the date of detention of the person concerned. The Advisory Board shall also record its satisfaction whether there is or not any sufficient cause for the detention of the concerned person. After receipt of the report of the Advisory Board the concerned Government may pass an order confirming the detention order and may continue the detention of the persons concerned for such period as it thinks fit. In terms of Section 13 of the Act, 1980, maximum period of detention under the provisions of the Act, 1980 shall be 12 months from the date of detention.

7. In **Cherukuri Mani (supra)**, relied upon by the learned A.G.A. , the Apex Court relying upon the proviso to Section

3(3) had held that the State Government cannot pass the confirmatory order under section 12(1) beyond the period of three months at a time. The said judgement in **Cherukuri Mani (Supra)**, has been overruled by the Apex Court in a recent judgement of the Apex Court in ***Pesala Nookaraju (supra)***, and has held as under :

"42. Hence, Article 22(4)(a) in substance deals with the order of detention and has nothing to do with the delegation of the power of detention by the State Government to an Officer as stipulated under Section 3(2) of the Act. In fact, under Section 9 of the Act, the State Government has to refer the matter to the Advisory Board within three weeks from the date of detention, irrespective of whether the detention order is passed under Section 3(1) or Section 3(2) of the Act and the Advisory Board has to give its opinion within seven weeks from the date of detention. That would totally make it ten weeks. As stipulated in Article 22(4)(a) of the Constitution, if in a given case, once the Advisory Board gives its opinion within the stipulated period of three months, then in our view, Article 22(4)(a) would no longer be applicable. Thus, Article 22(4)(a) applies at the initial stage of passing of the order of detention by the State Government or by an officer who has been delegated by the State Government and whose order has been approved by the State Government within a period of twelve days from the date of detention and not at the stage subsequent to the report of the Advisory Board. Depending upon the opinion of the Advisory Board, under Section 12 of the Act, the State Government can revoke the order of detention and release the detenu forthwith or may confirm the detention order and continue the detention of the person concerned for any period not exceeding the maximum period of twelve months, which is stipulated in Section 13 of the Act. ***Therefore, when the State Government passes a confirmatory order under Section 12 of the Act after receipt of the report from the Advisory Board then, such a confirmatory order need not be restricted to a period of three months only. It can be beyond a period of three months from the date of initial order of detention, but up to a maximum period of twelve months from the date of detention.***

43. We reiterate that the period of three months stipulated in Article 22(4)(a) of the Constitution is relatable to the initial period of detention up to the stage of receipt of report of the Advisory Board and does not have any bearing on the period of detention, which is continued subsequent to the confirmatory order being passed by the State Government on receipt of the report of the Advisory Board. ***The continuation of the detention pursuant to the confirmatory order passed by the State Government need not also specify the period of detention; neither is it restricted to a period of three months only. If any period is specified in the confirmatory order, then the period of detention would be upto such period, if no period is specified, then it would be for a maximum period of twelve months from the date of detention. The State Government, in our view, need not review the orders of detention every three months after it has passed the confirmatory order.***

44. Thus, in our view, the period of three months specified in ***Article 22(4)(a) of Constitution of India is relatable to the period of detention prior to the report of the Advisory Board and not to the period of detention subsequent thereto****. Further, the period of detention in terms of Article 22(4)(a) cannot be in force for a period beyond three months, if by*

then, the Advisory Board has not given its opinion holding that there is sufficient cause for such detention. Therefore, under Article 22(4)(a), the Advisory Board would have to give its opinion within a period of three months from the date of detention and depending upon the opinion expressed by the Advisory Board, the State Government can under Section 12 of the Act, either confirm the order of detention or continue the detention of the person concerned for a maximum period of twelve months as specified in Section 13 of the Act or release the detenu forthwith, as the case may be. If the order of detention is confirmed, then the period of detention can be extended up to the maximum period of twelve months from the date of detention. ***With respect, we observe that it is not necessary that before the expiration of three months, it is necessary for the State Government to review the order of detention as has been expressed by this Court in Cherukuri Mani (supra). The Act does not contemplate a review of the detention order once the Advisory Board has opined that there is sufficient cause for detention of the person concerned and on that basis, a confirmatory order is passed by the State Government to detain a person for the maximum period of twelve months from the date of detention.*** *On the other hand, when under Section 3(3) of the Act, the State Government delegates its power to the District Magistrate or a Commissioner of Police to exercise its power and pass an order of detention, the delegation in the first instance cannot exceed three months and the extension of the* ***period of delegation*** *cannot also be for a period exceeding three months at any one time. [See: Abdul Razak v. State of Karnataka, ILR 2017 Kar 4608 (FB)]"*

(Emphasis Supplied)

8. Following the judgement in ***Pesala Nookaraju (supra)***, in ***Ameena Begum (supra)***, the Apex Court has held that the State Government need not review the orders of detention every three months after it has passed the confirmatory order.

12. This Court has also recently dealt with elaborately this issue in ***Habeas Corpus Writ Petition No. 1046 of 2023 (Sunil chachuda Vs. State of U.P. and others)*** and has following the judgement of the Supreme Court in ***Pesala Nookaraju*** (supra) ***vide judgement dated 29.1.2024*** held that once the confirmatory order of detention passed under Section 12 (1) of the Act is a final order, the State Government has no authority to review its order. If in the confirmatory order any particular period of detention is prescribed by the State Government such detention order is valid only for that period. If no period of detention is prescribed in an order passed under Section 12 (1) of the Act, then, such detention will be for a maximum period of 12 months as prescribed under Section 13 of the Act. However, once an order under Section 12 (1) is passed by the State Government prescribing a period of detention, the said order cannot be reviewed or extended by the State Government. Such detention will be over after the expiry of the period prescribed in the confirmatory order passed under Section 12(1) of the Act. The said order cannot be reviewed or extended any further. However, the Detaining authority i.e., the State Government or the District Magistrate, may pass a fresh order in terms of Section 3(2) of the Act, if the circumstances so demand. Such detention order has to be confirmed again following the procedure prescribed under Sections 3, 10, 11 and 12 of the Act.

9. In the instant case, the confirmatory order has been passed on 2.11.2023, whereby the petitioner herein was directed to be detained for a period of three months from the initial detention order i.e., 18.9.2023. Therefore, after the expiry of three months the petitioner's detention becomes illegal and he is liable to be released forthwith. For the reasons stated above, the writ petition is ***allowed***. It is declared that the detention of the petitioner herein subsequent to the expiry of three months from 18.9.2023 as per the confirmatory order passed under section 12(1) of the Act, 1980 is illegal and the subsequent orders extending the detention of the petitioner herein is also illegal and not in accordance with law. Therefore, the order dated 11.12.2023 extending the period of detention of the petitioner herein is hereby ***set-aside.***

10. We, therefore, direct the petitioner, Abbas Ansari (the detenue) to be set at liberty forthwith unless he is required in any other case.

(2024) 2 ILRA 122
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2024

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Habeas Corpus Writ Petition No. 1041 of 2023

Jaishree & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Mohd. Monis, Sri Bhanu Kumar Ratnakar

Counsel for the Respondents:
G.A.

Criminal Law - Habeas Corpus - Hindu Marriage Act, 1955 - Section 9 - Code of Criminal Procedure, 1973 - Sections 97 & 98 - Petitioners sought writ of habeas corpus alleging illegal detention of petitioner no.1 (wife) by her maternal uncle, respondent no.4. Court held: (1) Writ of habeas corpus is an extraordinary remedy, not a matter of course, requiring a clear prima facie case of unlawful detention. (2) Petitioner no.1 left matrimonial home voluntarily; no material established illegal detention. (3) Alternative remedies exist under Section 97 (search for wrongfully confined persons) and Section 98 (restoration of abducted females) of CrPC, or Section 9 (restitution of conjugal rights) of Hindu Marriage Act, 1955. (4) Writ of habeas corpus not maintainable where facts are disputed or unclear (Soniya Vs St. of U.P., followed). Petition dismissed; petitioner no.2 at liberty to pursue other legal remedies. (Paras 7-14)

Petition Dismissed.

Case Law Cited:

1. Soniya Vs St. of U.P. (Para 6, 12)

2. Manjita Devi Vs St. of U.P. (Para 12)

3. Mohd. Ahmad Vs St. of U.P. (Para 12)

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

1. Heard Sri Mohd. Monis, learned counsel for the petitioners and Sri Pankaj Saxena, learned AGA-I appearing for the State-respondents.

2. The present petition has been filed for a writ of habeas corpus alleging that the petitioner no.1, wife of the petitioner no.2, is under illegal detention of the respondent no.4, who is stated to be the maternal uncle of petitioner no.1.

3. The case as set up in the petition indicates that, on 24.07.2023, the petitioner no.1 left the house of petitioner no.2 alongwith some cash and jewellery. It is

further averred that consequent to filing of a complaint at the police station, the petitioner no.1 agreed to come back to her matrimonial home; however, on 27.11.2023, she again left the house of petitioner no.2 alongwith her maternal uncle i.e. respondent no.4.

4. It is sought to be asserted that subsequently despite efforts being made by the petitioner no.2 (husband), the petitioner no.1 (wife) is not willing to come back to her matrimonial home.

5. Learned AGA-I submits that from the pleadings in the writ petition it is apparent that petitioner no.1 has left her matrimonial home on her own and there is no material to suggest that she is under illegal detention.

6. Accordingly, it is submitted that in the aforesaid circumstances, the petition seeking a writ of habeas corpus would not be maintainable. Reliance in this regard is placed upon the judgment of this Court in **Soniya and another Vs. State of UP and others1.**

7. The writ of habeas corpus is a prerogative writ and an extraordinary remedy. It is a writ of right and not a writ of course and may be granted only on reasonable ground or probable cause being shown.

8. The writ of habeas corpus has been held as a *festinum remedium* and accordingly the power would be exercisable in a clear case. The remedy of writ of habeas corpus at the instance of a person seeking to obtain possession of someone whom he claims to be his wife would therefore not be available as a matter of course.

9. The power to direct search for persons wrongfully confined is provided under Section 97 of the Code of Criminal Procedure, 1973 whereas Section 98 provides the procedure to compel restoration of abducted females. In a situation where the husband seeks to assert that the wife, without reasonable cause, is refusing to return to her matrimonial home, it would be open for him to seek the remedy of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. The recourse to the latter remedy may be sought where the detention does not amount to an offence and to the former if it does. While invoking either of these remedies, all the issues relating to facts can be agitated and examined, whereas a writ of habeas corpus may not be issued where facts are disputed or are not clearly established.

10. The exercise of the extraordinary jurisdiction for issuance of writ of habeas corpus would be dependent on the jurisdictional fact where the petitioner establishes a *prima facie* case that the detention is unlawful, which apparently is not demonstrated from the facts which are on record in the present case.

11. In view of the other remedies available for the purpose, under criminal and civil law, exigence of a writ of habeas corpus at the behest of a husband to regain his wife would be rare and may not be available as a matter of course and the power in this regard may be exercised only when a clear case is made out.

12. The aforementioned legal position has been stated in a recent decision of this Court in **Soniya and another Vs. State of UP and others1** and subsequently

reiterated in **Manjita Devi and another Vs. State of UP and others2 and Mohd. Ahmad** and **another Vs. State of UP and others3.**

13. In the facts of the present case, the petitioner no.1 having left her matrimonial home, on her own volition, and there being no material to establish the *factum* of illegal detention, the petition seeking writ of habeas corpus at the behest of the petitioner no.2 (husband), would not be entertainable.

14. It would be open to the petitioner no.2 to avail the appropriate legal remedies, under the civil and criminal law, as he may be advised.

15. Subject to the aforesaid observations, the petition stands **dismissed.**

(2024) 2 ILRA 124
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ANISH KUMAR GUPTA, J.

Habeas Corpus Writ Petition No. 1046 of 2023

Sunil Chachuda ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sujan Singh, Sri Anjani Kumar Raghuvanshi

Counsel for the Respondents:
G.A., A.S.G.I., Sri Om Prakash Mishra

Civil Law - National Security Act, 1980 - Sections 3(2), 3(3), 3(4), 10, 11, 12(1) & 13 - Petitioner challenged detention order dated 30.01.2023 under Section 3(2), confirmed on 13.03.2023 for three months, and extended on 27.10.2023 for 12 months. Court held: (1) Confirmatory order under Section 12(1) is final; St. Government cannot review or extend it (Pesala Nookaraju Vs Govt. of Andhra Pradesh, 2023 SCC OnLine SC 1003; Ameena Begum Vs St. of Telangana, (2023) 9 SCC 587). (2) If confirmatory order specifies a period, detention is valid only for that period; if unspecified, detention may extend up to 12 months per Section 13. (3) Confirmatory order of 13.03.2023 specified three months; extension order of 27.10.2023 was illegal. (4) Detention beyond three months from 30.01.2023 was unlawful. Extension orders quashed; petitioner to be released forthwith unless required in another case. (Paras 10-13)

Writ Petition Allowed.

Case Law Cited:

1. Pesala Nookaraju Vs Govt. of Andhra Pradesh, 2023 SCC OnLine SC 1003 (Paras 5, 10, 11, 12)

2. Ameena Begum Vs St. of Telangana, (2023) 9 SCC 587 (Paras 5, 11, 12)

3. Cherukuri Mani Vs St. of A.P., (2015) 13 SCC 722 (Paras 6, 9, 10, 11)

4. Abdul Razak Vs St. of Karn., ILR 2017 Kar 4608 (FB) (Para 10)

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Counter affidavit filed on behalf of respondent no.3 is taken on record.

2. Heard Sri Sujan Singh, learned counsel for the petitioner, Sri Amit Sinha, learned A.G.A. for the State and Sri Om Prakash Mishra, learned counsel for the respondent no.6- Union of India.

3. The instant application has been filed seeking quashing of the impugned

detention order dated 30.01.2023, passed by the respondent no.3- District Magistrate-Hapur, which was confirmed by the respondent no.2- State Government, vide order dated 13.03.2023, in terms of Section 12 (1) of the National Security Act, 1980 (hereinafter referred as 'the Act'), on 13.03.2023, which was subsequently extended vide order dated 27.10.2023.

4. The facts in brief are that the petitioner herein was detained vide order dated 30.01.2023 passed by the District Magistrate- Hapur, under Section 3(2) of the Act, having been authorised under Section 3(3) of the Act. The said order was approved by the State Government under Section 3(4) of the Act on 07.02.2023 and the matter was referred to Advisory Board. After receiving the report from the Advisory Board, the said detention order was confirmed in terms of Section 12 (1) of the Act, by the State Government on 13.03.2023 whereby the petitioner was detained for a period of three months from the date of initial detention order. The said order dated 13.03.2023 was further extended time to time and lastly on 27.10.2023 for a period of 12 months from the date of initial detention.

5. Learned counsel for the petitioner contends that since the order dated 13.03.2023 passed under Section 12(1) of the Act, is a final order and the State has no right to review the said order in terms of provisions of Section 12 of the Act, therefore, the subsequent orders passed extending detention of the petitioner, are without any authority of law and could not be sustained. Therefore, the detention of the petitioner herein in terms of order dated 13.03.2023 after the expiry of three months from the date of initial detention i.e., 30.01.2023, is illegal and therefore, the petitioner is liable to be released forthwith. In support of his contentions, learned counsel for the petitioner relied upon the judgement of the Apex Court in ***Pesala Nookaraju vs. The Government of Andhra Pradesh & others*** reported in ***2023 SCC OnLine SC 1003*** and ***Ameena Begum vs. The State of Telangana and others reported in (2023) 9 SCC 587.***

6. Per contra, learned A.G.A. submits that in view of the judgement of the Apex Court in ***Cherukuri Mani v. State of A.P.,*** reported in ***(2015) 13 SCC 722***, the State Government could not have passed an order of detention at a time more than for a period of three months. Therefore, initially the order dated 13.03.2023 was passed confirming the detention of the petitioner herein for a period of three months and subsequently, the same was extended from time to time. Therefore, there is no illegality either in the initial detention order dated 30.01.2023 and the confirmatory order dated 13.03.2023 and the subsequent extension orders extending detention of the petitioner herein for a period of three months at a time.

7. To appreciate the submissions made by learned counsel for the parties, it will be relevant to go through the scheme of the Act with regard to the detention of a persons. It will be relevant to note the Sections 3, 10, 11, 12, & 13 of the Act, which reads as under:

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

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

with foreign powers, or the security of India, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India, it is necessary so to do, make an order directing that such person be detained.

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

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

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

Provided that the period specified in an order made by the State Government under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as 3 aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

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

Provided that where under section 8 the grounds of detention are communicated by the officer making the order after five days but not later than 1[fifteen days] from the date of detention, this sub-section shall apply subject to the modification that, for the words "twelve days", the words "2[twenty days]" shall be substituted.

(5) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds

on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order.

10. Reference to Advisory Boards.—*Save as otherwise expressly provided in this Act, in every case where a detention order has been made under this Act, the appropriate Government shall, within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by it under section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer mentioned in sub-section (3) of section 3, also the report by such officer under sub-section (4) of that section.*

11. Procedure of Advisory Boards.—*(1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within seven weeks from the date of detention of the person concerned.*

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board; andthe proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

12. Action upon the report of the Advisory Board.—*(1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.*

(2) In any case where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of a person, the appropriate Government shall revoke the detention order and cause the person concerned to be released forthwith.

13. Maximum period of detention.—*The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under section 12 shall be twelve months from the date of detention:*

Provided that nothing contained in this section shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time."

8. As per the provisions of Section 3(2) of the Act, if the Central Government or the State Government, as the case may be, if satisfied in respect of any person with a view to prevent him from acting in any manner prejudicial to the maintenance of public order and record its satisfaction that it is necessary so to make an order, then, pass an order directing that such a person to be detained. As per Section 3(3) of the Act,

the State Government may delegate such powers of detention to the District Magistrate or the Commissioner of Police. In view of such delegation of the powers, the District Magistrate or the Commissioner of Police, as the case may be, is empowered to pass the order under Section 3(2) of the Act. Such delegation of powers to the District Magistrate or the Commissioner of Police shall not be made at a time for a period exceeding three months. As per Section 3(4) of the Act, the officer who is delegated power of detention under Section 3(3) of the Act is directed to forthwith report the fact of such detention to the State Government concerned alongwith grounds of such detentions and no such order shall remain in force for more than 12 days, unless it is approved by the concerned State Government. When any order is made or approved by the State Government within the aforesaid period of 12 days, the State Government shall report the fact of such detention within 7 days from the date of approval of detention to the Central Government together with the grounds of detention and other relevant particulars. As per Section 10 of the Act, the concerned Government is mandated to place the matter within a period of three weeks before the Advisory Board constituted by it in terms of Section 9 alongwith grounds of detention and other relevant documents. As per Section 11 of the Act, the Advisory Board, after considering the material placed before it and after calling for such other information as it may deem necessary and if the Advisory Board so consider it essential or the person concerned desirous to be heard, after hearing the detenue shall submit its report to the concerned Government within 7 weeks from the date of detention of the persons concerned. The Advisory Board shall also record its satisfaction whether there are or not the sufficient cause for detention of the concerned persons. After receipt of the report of the Advisory Board the concerned Government may pass an order confirming the detention order and may continue the detention of the persons concerned for such period as it thinks fit. In terms of Section 13, maximum period of detention under the provisions of the Act shall be 12 months from the date of detention.

9. In ***Cherukuri Mani(supra)***, the Apex Court in para 10, 11, 12, 13 and 14 has held as under:

"10. *To answer the above issue, it is necessary to examine the relevant provisions of the Act. Section 3 of the Act empowers the detention of certain category of persons, as defined under the Act. Apart from conferring of power, the section regulates the manner of passing the orders of detention as well as their duration. It reads thus:*

"3.Power to make orders detaining certain persons.*—(1) The Government may, if satisfied with respect to any bootlegger, dacoit, drug offender, goonda, immoral traffic offender or land grabber that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary so to do, make an order directing that such person be detained.*

(2) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the Government are satisfied that it is necessary so to do, they may, by order in writing, direct that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if

satisfied as provided in sub-section (1), exercise the powers conferred by the said sub-section:

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

(3) When any order is made under the section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the Government together with the grounds on which the order has been made and such other particulars as in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof, unless, in the meantime, it has been approved by the Government."

11. A reading of the above provisions makes it clear that the State Government, District Magistrate or Commissioner of Police are the authorities, conferred with the power to pass orders of detention. The only difference is that the order of detention passed by the Government would remain in force for a period of three months in the first instance, whereas similar orders passed by the District Magistrate or the Commissioner of Police shall remain in force for an initial period of 12 days. The continuance of detention beyond 12 days would depend upon the approval to be accorded by the Government in this regard. Sub-section (3) makes this aspect very clear. Section 13 of the Act mandates that the maximum period of detention under the Act is 12 months.

12 [Ed. : Para 12 corrected vide Official Corrigendum No. F.3/Ed.B.J./48/2014 dated 29-8-2014.] *. Proviso to sub-section (2) of Section 3 is very clear in its purport, as to the operation of the order of detention from time to time. An order of detention would in the first instance be in force for a period of three months. The Government alone is conferred with the power to extend the period, beyond three months. Such extension, however, cannot be for a period, exceeding three months, at a time. It means that, if the Government intends to detain an individual under the Act for the maximum period of 12 months, there must be an initial order of detention for a period of three months, and at least, three orders of extension for a period not exceeding three months each. The expression "extend such period from time to time by any period not exceeding three months at any one time" assumes significance in this regard.*

13. The requirement to pass order of detention from time to time in the manner referred to above, has got its own significance. It must be remembered that restriction of initial period of detention to three months is nothing but implementation of the mandate contained in clause (4)(a) of Article 22 of the Constitution of India. It reads as under:

"22. (4) *No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—*

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7)."

14. *Where the law prescribes a thing to be done in a particular manner following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure. When the provisions of Section 3 of the Act clearly mandated the authorities to pass an order of detention at one time for a period not exceeding three months only, the government order in the present case, directing detention of the husband of the appellant for a period of twelve months at a stretch is clear violation of the prescribed manner and contrary to the provisions of law. The Government cannot direct or extend the period of detention up to the maximum period of twelve months in one stroke, ignoring the cautious legislative intention that even the order of extension of detention must not exceed three months at any one time. One should not ignore the underlying principles while passing orders of detention or extending the detention period from time to time."*

(Emphasize Supplied)

10. In the recent judgement of the Apex Court in ***Pesala Nookaraju (supra)***, the Apex Court has overruled the judgement in ***Cherukuri Mani (supra)*** and has held as under :

"42. Hence, Article 22(4)(a) in substance deals with the order of detention and has nothing to do with the delegation of the power of detention by the State Government to an Officer as stipulated under Section 3(2) of the Act. In fact, under Section 9 of the Act, the State Government has to refer the matter to the Advisory Board within three weeks from the date of detention, irrespective of whether the detention order is passed under Section 3(1) or Section 3(2) of the Act and the Advisory Board has to give its opinion within seven weeks from the date of detention. That would totally make it ten weeks. As stipulated in Article 22(4)(a) of the Constitution, if in a given case, once the Advisory Board gives its opinion within the stipulated period of three months, then in our view, Article 22(4)(a) would no longer be applicable. Thus, Article 22(4)(a) applies at the initial stage of passing of the order of detention by the State Government or by an officer who has been delegated by the State Government and whose order has been approved by the State Government within a period of twelve days from the date of detention and not at the stage subsequent to the report of the Advisory Board. Depending upon the opinion of the Advisory Board, under Section 12 of the Act, the State Government can revoke the order of detention and release the detenu forthwith or may confirm the detention order and continue the detention of the person concerned for any period not exceeding the maximum period of twelve months, which is stipulated in Section 13 of the Act. ***Therefore, when the State Government passes a confirmatory order under Section 12 of the Act after receipt of the report from the Advisory Board then, such a confirmatory order need not be restricted to a period of three months only. It can be beyond a period of three months from the date of initial order of detention, but up to a maximum period of twelve months from the date of detention.***

43. We reiterate that the period of three months stipulated in Article 22(4)(a) of the Constitution is relatable to the initial period of detention up to the stage of

receipt of report of the Advisory Board and does not have any bearing on the period of detention, which is continued subsequent to the confirmatory order being passed by the State Government on receipt of the report of the Advisory Board. ***The continuation of the detention pursuant to the confirmatory order passed by the State Government need not also specify the period of detention; neither is it restricted to a period of three months only. If any period is specified in the confirmatory order, then the period of detention would be upto such period, if no period is specified, then it would be for a maximum period of twelve months from the date of detention. The State Government, in our view, need not review the orders of detention every three months after it has passed the confirmatory order.***

44. Thus, in our view, the period of three months specified in Article ***22(4)(a) of Constitution of India is relatable to the period of detention prior to the report of the Advisory Board and not to the period of detention subsequent thereto****. Further, the period of detention in terms of Article 22(4)(a) cannot be in force for a period beyond three months, if by then, the Advisory Board has not given its opinion holding that there is sufficient cause for such detention. Therefore, under Article 22(4)(a), the Advisory Board would have to give its opinion within a period of three months from the date of detention and depending upon the opinion expressed by the Advisory Board, the State Government can under Section 12 of the Act, either confirm the order of detention or continue the detention of the person concerned for a maximum period of twelve months as specified in Section 13 of the Act or release the detenu forthwith, as the case may be. If the order of detention is confirmed, then the period of detention can be extended up to the maximum period of twelve months from the date of detention.* ***With respect, we observe that it is not necessary that before the expiration of three months, it is necessary for the State Government to review the order of detention as has been expressed by this Court in Cherukuri Mani (supra). The Act does not contemplate a review of the detention order once the Advisory Board has opined that there is sufficient cause for detention of the person concerned and on that basis, a confirmatory order is passed by the State Government to detain a person for the maximum period of twelve months from the date of detention.*** *On the other hand, when under Section 3(3) of the Act, the State Government delegates its power to the District Magistrate or a Commissioner of Police to exercise its power and pass an order of detention, the delegation in the first instance cannot exceed three months and the extension of the period of delegation cannot also be for a period exceeding three months at any one time. [See: Abdul Razak v. State of Karnataka, ILR 2017 Kar 4608 (FB)]"*

(Emphasis Supplied)

11. Following the judgement in ***Pesala Nookaraju*** (supra), in ***Ameena Begum (supra),*** the Apex Court in para 71, 72, 73, 76 and 78 has held as under:

"71. Both Mr. Luthra and Mr. Dave have referred us the recent decision of a 3-Judges Bench of this Court in the case of Pesala Nookaraju vs. The Government of Andhra Pradesh [Crl. Appeal No. 2304 of 2023, decided on 16th August, 2023 where an order of detention passed in exercise of power conferred by the Andhra Pradesh Prevention of Dangero Activities of Boot-leggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic

Offenders and Land Grabbers Act, 1986 ("1986 Act" hereafter) was upheld despite the detenu having obtained orders of bail upon arrest in connection with investigation of 4 (four) F.I.R. under sections 7B and 8B of the Andhra Pradesh Prohibition Act, 1995.

72. Mr. Luthra intended to rely on the decision in Cherukari Mani vs. Chief Secretary, Government of Andhra Pradesh, ***(2015) 13 SCC 722****. According to the appellant, the detention could only be in force for a period of three months in the fir instance and that such order on a periodic assessment was required to be reviewed for continuous detention till the maximum period permissible. The contention was accepted by this Court.*

73. While hearing of the appeal was in progress, came the decision in Pesala Nookaraju (supra) overruling Cherukari Mani (supra). It was held that the "State Government need not review the orders of detention every three months after it ha passed the confirmatory order." Fairly, Mr. Luthra did not seek to rely on Cherukari Mani (supra) further.

.....

.....

76. Mr. Dave next relied on the reasons assigned in Pesala Nookaraju (supra) to contend that the impugned Detention Order should be held legal and unexceptionable.

.....

78. It is indeed true that the appellant had raised a contention before the Court that the Government of Andhra Pradesh had directed detention of the appellant for the maximum period of 12 (twelve) months without any application of mind providing reasons as to why this is necessary."

12. From the scheme of the Act as noted above and as per the judgement of the Apex Court in ***Pesala Nookaraju (supra)***, once the confirmatory order of detention is passed under Section 12 (1) of the Act i.e., a final order and the State Government has no authority to review its order. If in the confirmatory order any particular period of detention is prescribed by the State Government such detention order is valid only for that period. If no period of detention is prescribed in an order and passed under Section 12 (1) of the Act, then, such detention will be for a maximum period of 12 months as prescribed under Section 13 of the Act. However, once the order under Section 12 (1) is passed by the State Government prescribed a period of detention, the said order cannot be reviewed or extended by the State Government. Such detention will be over after the expiry of the period prescribed in the confirmatory order passed under Section 12(1) of the Act. The said order cannot be reviewed or extended any further. However, the Detaining authority i.e., the State Government or the District Magistrate, may pass a fresh order in terms of Section 3(2) of the Act, if the circumstances so demand. Such concerned detention order has to be confirmed again following the procedure prescribed under Sections 3, 10, 11 and 12 of the Act.

13. In the instant case, the confirmatory order has been passed on 13.03.2023, whereby the petitioner herein was directed to be found for a period of three months from the initial detention order i.e., 30.01.2023. Therefore, after the expiry of three months from 30.01.2023, the petitioner's detention becomes illegal and he is liable to be released forthwith. For the reasons stated above, the writ petition is ***allowed***. It is declared that the

detention of the petitioner herein subsequent to the expiry of three months from 30.01.2023 is illegal and all subsequent orders extending the detention of the petitioner herein are illegal and not in accordance with law. Therefore, all further orders extending period of detention of the petitioner herein are hereby ***quashed*** and ***set-aside.***

14. We, therefore, direct the petitioner, Sri Sunil Chachuda (the detenue) to be set at liberty forthwith unless he is required in any other case.

(2024) 2 ILRA 133
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Commercial Tax Revision No. 36 of 2021
With
Sales/Trade Tax Revision No. 54 of 2021

The Commissioner, Commercial Tax, U.P. Lucknow ...Revisionist
Versus
S/s D.I.C. India Ltd. ...Opposite Party

Counsel for the Revisionist:
Sri Bipin Kumar Pandey (Addl. C.S.C.)

Counsel for the Opposite Party:
Sri Atul Gupta

Civil Law - U.P. Value Added Tax Act, 2008 – Definition of Capital Goods – The revisionist challenged the Tribunal's order dated 27.11.2019, which classified "Cello" (a container used for storing ink) as capital goods under Section 2(f) of the Act for assessment years 2011-12 and 2012-13 – Held, the Tribunal's finding that the Cello is an integral part of the manufacturing process, as it is fitted to the machinery for storing manufactured ink, qualifies it as a storage tank under Section 2(f)(iii), and its movable nature or use in supply does not exclude it from being capital goods. (Paras 4, 5, 7, 13)

Scope of Revisional Jurisdiction Under Section 58 – The revisionist argued that the Cello is merely a transport container, not part of plant and machinery – Held, the High Court's revisional jurisdiction under Section 58 of the Act is Ltd. to questions of law, jurisdictional errors, or procedural irregularities, and it cannot reappreciate factual findings unless they are perverse or lack evidence, as per *Hindustan Petroleum Corporation Ltd. Vs Dilbahar Singh* – The Tribunal's factual determination that the Cello is integral to manufacturing was not perverse, precluding interference. (Paras 8, 9, 10, 11, 12)

Interpretation of "Capital Goods" Under Section 2(f) – The revisionist contended that the Cello, being a movable apparatus used for supply, does not fall within the definition of capital goods – Held, Section 2(f) includes storage tanks used in manufacturing, and the Tribunal's finding that the Cello is fitted to machinery for storing ink during production aligns with this definition, supported by *Commissioner of Commercial Tax Vs Ambuja Cement Ltd.* and *J.K. Cotton SPG & WVG Mills Co. Ltd. Vs Sales Tax Officer*, which emphasize apparatus integral to manufacturing. (Paras 4, 5, 6, 13)

Factual Findings of Tribunal – Binding Nature – The Tribunal found that the Cello is automatically fitted to the machinery, collects ink during production, and is reused after being returned by customers – Held, as the last fact-finding authority, the Tribunal's findings are binding unless perverse or unsupported by evidence, and the evidence supported the conclusion that the Cello is a storage device integral to the manufacturing process, not merely a transport container. (Paras 7, 8, 12, 13)

Dismissal of Revision – No Error of Law – The revisionist failed to demonstrate any legal error, perversity, or jurisdictional excess in the Tribunal's order – Held, the Tribunal's classification of the Cello as capital goods under

Section 2(f) was consistent with the statutory definition and judicial precedents, and no compelling grounds existed to disturb the Tribunal's decision, leading to the dismissal of the revisions. (Paras 12, 13, 14)

Revisions Dismissed – Tribunal's Order Dated 27.11.2019 Upheld.

List of Cases Cited:

1. Commissioner of Commercial Tax, Lucknow Vs Ambuja Cement Ltd., 2018 (8) GSTL 161 (All)

2. J.K. Cotton SPG & WVG Mills Co. Ltd. Vs Sales Tax Officer, Kanpur, 1997 (91) E.L.Y. 34 (S.C.)

3. Hindustan Petroleum Corporation Ltd. Vs Dilbahar Singh, (2014) 9 SCC 78

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

1. Heard Sri Bipin Kumar Pandey, learned Additional Chief Standing Counsel for the revisionist and Sri Atul Gupta, learned counsel for the respondent/assessee.

2. Present revisions are in relation to the assessment years 2011-12 and 2012-13 against the order dated November 27, 2019 passed by the Tribunal.

3. Both the revisions were admitted by this Court on the following question of law:

"Whether the cello used by the assessee were capital goods or merely usable containers used for sale of the ink manufactured by the assessee ?"

4. Sri Bipin Kumar Pandey, learned Additional Chief Standing Counsel appearing on behalf of the revisionist has taken the Court through the entire order passed by the Tribunal. He submitted that the definition of "capital goods" as per Section 2(f) of the Uttar Pradesh Value Added Tax Act, 2008 (hereinafter referred to as "the Act".) means any plant and machinery as also apparatus, tool and appliances used for "manufacture or processing of any goods". He has submitted that even though storage tank is included in the said definition in clause (iii) of Section 2(f) of the Act, however the Cello in question is not a fixed part of the plant and machinery and is an apparatus used for supply of the ink, that is already manufactured, to the customers. Once a customer uses the said ink, the Cello is returned to the factory and is once again attached to the plant that fills the cello again. He has further submitted that one would see that certain goods have been excluded specifically from the definition in Section 2(f) of the Act such as vehicles used for transporting the goods or passengers or both. It is his submission that the Cello is an apparatus used only for transporting and cannot be treated as a part of plant and machinery.

5. Per contra, Sri Atul Gupta, learned counsel appearing on behalf of the assessee/respondent has submitted that the Tribunal has come to a particular fact finding that the Cello is an intricate part of the manufacturing process which is attached to the machinery wherein the manufactured ink is directly stored. He has further submitted that the Cello being moveable in nature will not prevent it for being treated as capital goods. Reliance is placed on ***Commissioner of Commercial Tax, Lucknow v. Ambuja Cement Limited***, reported in **2018 (8) GSTL 161 (All)** is relied upon by him. He has further relied upon a judgment of the Supreme Court in ***J.K. Cotton SPG & WVG Mills Co. Ltd. v. Sales Tax Officer, Kanpur*** reported in **1997**

(91) E.L.Y. 34 (S.C.) to emphasise that if a particular apparatus is an integral part relating to manufacture of goods without which that process or activity of manufacture would not be possible, it should be treated as an apparatus that is "in connection with" manufacture, or "in relation to" manufacture.

Analysis and Conclusion

6. Before delving into the controversy in the instant case, I feel it is important to extract Section 2(f) of the Act herein:

"2. Definitions

In this Act, unless there is anything repugnant in the subject or context;

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ***"capital goods"*** *means any plant, machine, machinery, equipment, apparatus, tool, appliance or electrical installation used for manufacture or processing of any goods for sale by the dealer and includes:-*

(i) components, spare parts and accessories of such plant, machine, machinery, equipment, apparatus, tool, appliance or electrical installation;

(ii) moulds and dies;

(iii) storage tank;

(iv) pollution control equipment;

(v) refractory and refractory materials;

(vi) tubes and pipes and fittings thereof,

(vii) lab equipments, instruments and accessories,

(viii) machinery, loader, equipment for lifting or moving goods within factory premises, or

(ix) generator and boiler used in manufacture of goods for sale by him but for the purpose of section 13, does not include:-

(i) air-conditioning units or air conditioners, refrigerators, air coolers, fans, and air circulators if not connected with manufacturing process;

(ii) an automobile including commercial vehicles, and two or three wheelers, and parts, components and accessories for repair and maintenance thereof;

(iii) goods purchased and accounted for in business but utilised for the purpose of providing facility to the employees.

(iv) vehicle used for transporting goods or passengers or both; and (v) capital goods used in the execution of a works contract"

7. The finding of the Tribunal in the instant case is also extracted below:-

"...करदाता द्वारा संगत वर्ष में रू0 7522903.00 के खरीदे गये सीलो वे गुड्स है जो प्रिन्टिंग इंक निर्माण प्रकिया का एक अभिन्न अंग है जो एक पार्ट्स के रूप में मशीन में स्वतः फिट हो जाता है और निर्मित हो रही इंक इसमें एकत्र होती है इसके फिल हो जाने पर यह स्वतः अलग हो जाता है और इसके स्थान पर अगला दूसरा सीलो स्वतः फिट हो जाता है यह प्रक्रिया इंक निर्माण के दौरान निरंतर आटोमोटिक होती रहती है। इंक फिल्ड सीलो क्रेता के प्रिन्टिग प्लांट में एक पार्ट के रूप में फिट हो जाती है। इंक कन्ज्यूम होने के उपरान्त एन्टी सीलो वापस करदाता के व्यापार स्थल पर पुनः फिलिंग हेतु आ जाता है और प्लान्ट एण्ड मशीनरी के एक भाग के रूप में पुनः प्रयोग होता है। कर निर्धारण अधिकारी द्वारा उक्त वस्तु को केवल प्रिन्टिगं इंक को लाने ले जाने का साधन मानते हुए जो मत आर आई टी सी करने हेतु लिया गया है वह उचित नहीं है क्योंकि वैट अधिनियम के अन्तर्गत जो कैपिटल गुड्स की परिभाषा दी गई है उस में पूजीगत माल का तात्पर्य व्यवहारी द्वारा विक्रय के लिए किसी माल के विनिर्माण यह

प्रसंस्करण में प्रयुक्त किसी संयत्र मशीन, मशीनरी, उपस्करों, यंत्रों, औजारों, साधनो, विद्युत व्यवस्थापन जिसमें भण्डारण टंकी सम्मिलित है से है। बिवादित वस्तु सीलो निर्विवादित रूप से इंक के विनिर्माण में बतौर पार्ट आफ प्लांट एडं मशीनरी प्रयोग में लायी जाती है जो यथा परिभाषित पूजीगत माल है।... ''

8. 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 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.

9. 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."

10. This Court is not allowed in a revision petition to reappreciate and/or re-examine and analyse evidence and findings of the Tribunal.

11. A Constitution Bench of the Supreme Court in ***Hindustan Petroleum Corporation Limtied 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] ."

12. 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 revaluate 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.

13. Upon a plain reading of what has been written by the Tribunal, it appears that Cello is an apparatus that is fitted to the plant and machinery where the final product is stored, and once the Cello is filled up, the same is removed from the plant and machinery and it is replaced with another Cello. The fact that the Cello is directly sent to the customers for consumption would not take away from the fact that it is used as a storage device for the manufactured ink. Mere fact that the Cello is a moveable apparatus that is sent to the customers, would not take away from the fact that it is only a storage tank in the

factory. This by itself makes it an essential part of the manufacturing process and would qualify it under Section 2(f)(iii) of the Act.

14. In light of the aforesaid findings, I find no justification to intervene in the decision made by the Tribunal. As a result, both the revisions are, accordingly, dismissed.

(2024) 2 ILRA 139
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.02.2024

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Sales/ Trade Tax Revision No. 38 of 2023
Connected with
Sales/Trade Tax Revision No. 39 of 2023
and other connected cases

M/s Southern Petrochemical Industries Ltd. ...Revisionist
Versus
The Commissioner of Commercial Tax, U.P., Vibhuti Khand Gomti Nagar Lucknow ...Opposite Party

Counsel for the Revisionist:
Ritwick Rai, Alok Kumar Singh, Aviral Raj Singh, Dhruv Kumar Singh, Palash Banerjee, Vaibhav Tiwari

Counsel for the Opposite Party:
C.S.C.

Sales Tax – U.P. Value Added Tax Rules, 2008 – Rule 63(5) – Principles of Natural Justice – Revisionist challenged Commercial Tax Tribunal's order dated 08.12.2016 dismissing second appeals for assessment years 2004-05 to 2008-09 and 2010-11, and orders dated 04.11.2022 rejecting recall/rectification applications – Held, Tribunal's order lacked reasoning, violating Rule 63(5) requiring written judgment with points of determination, decision, and reasons – Non-recording of reasons contravenes natural justice, rendering order unsustainable – *Secretary & Curator, Victoria Memorial Vs Howrah Ganatantrik Nagrik Samity* and *Chandana Impex Pvt. Ltd. Vs Commissioner of Customs* followed – Tribunal failed to consider assessee's explanation for non-appearance – Impugned orders set aside, matter remanded for fresh determination within three months with opportunity to parties – Questions on inter-St. sale exemption and penalty not addressed due to remand. (Para 15-27)

Revisions allowed, matter remanded.

List of Cases Cited:

1. Mamta Steel India Pvt. Ltd. Vs Commissioner of C.Ex., Allahabad; 2019 (368) E.L.T. 529 (All.)

2. Secretary & Curator, Victoria Memorial Vs Howrah Ganatantrik Nagrik Samity; JT 2010(2) SC 566

3. Chandana Impex Pvt. Ltd. Vs Commissioner of Customs, New Delhi; 2011 (269) E.L.T. 433 (S.C.)

4. St. of Orissa Vs Dhaniram Luhar; JT 2004(2) SC 172

5. St. of Raj.n Vs Sohan Lal; (2004) 5 SCC 573

6. Raj Kishore Jha Vs St. of Bihar; AIR 2003 SC 4664

7. Vishnu Dev Sharma Vs St. of U.P.; (2008) 3 SCC 172

8. Steel Authority of India Ltd. Vs Sales Tax Officer, Rourkela I Circle; (2008) 9 SCC 407

9. St. of Uttaranchal Vs Sunil Kumar Singh Negi; AIR 2008 SC 2026

10. U.P.S.R.T.C. Vs Jagdish Prasad Gupta; AIR 2009 SC 2328

11. Ram Phal Vs St. of Har.; (2009) 3 SCC 258

12. Mohammed Yusuf Vs Faij Mohammad; (2009) 3 SCC 513

13. St. of H.P. Vs Sada Ram; (2009) 4 SCC 422

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Since common factual matrix arises in the above-captioned revisions and the parties are also the same, therefore, with the consent of the learned Counsel for the parties, the above captioned revisions were taken up for hearing together and are being disposed of by this common judgment and order.

(2) For the sake of convenience, the revisionist shall hereinafter be referred to as the assessee and the respondent shall hereinafter be referred to as the revenue.

(3) Sales/Trade Tax Revision Nos. 43, 44, 48, 52, 54 and 57 of 2023 are filed at the instance of the assessee, challenging the correctness of the common judgment and order dated 08.12.2016 passed by the Commercial Tax Tribunal, Lucknow (hereinafter referred to as **'the Tribunal'**), whereby Second Appeal Nos. 110, 109, 120, 108, 112, 116 of 2014 preferred by the assessee for the year 2004-05, 2005-2006, 2006-2007, 2007-2008, 2008-2009, respectively, in respect of demand of Sales Tax and Value Added Tax have been dismissed.

(4) Sales/Trade Tax Revisions No. 47, 51 of 2023 are directed against the common order dated 08.12.2016 passed by the learned Tribunal, whereby Second Appeal Nos. 117, 121 of 2014 for the year 2008-2009 and 2010-2011 preferred by the assessee against the penalty order dated 30.08.2011 passed by the Adjudicating Officer, has been dismissed.

(5) Sales/Trade Tax Revisions No. 38, 39, 40, 41, 42, 45, 46, 49, 50, 53, 55, 56, 58 and 59 of 2023 are directed against the common order dated 04.11.2022 passed by the learned Tribunal, whereby applications for recalling/rectification of the order dated 08.12.2016, bearing Nos. 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39 of 2019, have been rejected.

(6) In nutshell, the facts of the case are that the assessee/revisionist is a Public Limited Company incorporated under the Companies Act, 1956 and engaged in the business of manufacturing/trading of Chemical Fertilizers and Pesticides, execution of Railway Electrification Projects, Supply of Electrical Goods and execution of High Voltage Transmission Line projects for Government and Public Sector Agencies such as Power Grid Corporation of India Ltd. (Power Grid), State Electricity Board, Uttar Pradesh Power Corporation Limited and Central Organization for Railway Electrification.

(7) In response to the tenders floated by the Power Grid Corporation India Ltd. (in short, **'PGCIL'**) and others, the assessee/revisionist had entered into two separate identifiable contracts and the same was communicated to the assessee by the PGCIL vide letter dated 14.11.2003, according to which, the assessee has been assigned contracts viz. (i) for supply of equipment and material for tower package for 400k V D/C Vishnuprayag-Muzaffarnagar Transmission Line having specification No. C-12904-L165-3 (hereinafter referred to as **'goods'**); and (ii) for transportation, insurance, delivery, survey, foundation, erection, stringing, testing and commissioning of the same transmission line.

(8) It is the case of the assessee that insofar as the first contract, PGCIL through various branches offices was to inspect and certify the goods for fitness at the place of vendors from whom the goods are procured by the assesee and on such certification in Material Inspection and Clearance Certificate, 75% of payment against supply of such goods is released. Undisputedly, the vendors, from whom the goods were procured in pursuance of the aforesaid contracts, were situated outside the State of Uttar Pradesh, hence the goods were dispatched from the place of venders from outside the State of Uttar Pradesh to the site within Uttar Pradesh. After commencement of transportation, the assessee transferred the title of the goods during transit to the Contractee by making endorsement on the *bilites*. Thereafter, the Contractee received the goods at site and subsequently, the assessee, acting as bailee of goods of the Contractee, carried out other activities, such as uploading, storage etc. and used the goods in execution of the second contract.

(9) Further case of the assessee is that on observing abundant caution and to fulfil the legal requirement, assessee received relevant documents i.e. Form-C from the Contractee and Form-E1 from the vendors to further establish that such sale was a subsequent sale, which is not subjected to Taxation. According to the assesee, in case of the inter-State sales, the sale may be subjected to tax only in the State from which movement of goods takes place. However, the Deputy Commissioner of Commercial Taxes, Lucknow (hereinafter referred to as 'Assessing Officer'), had issued a show cause notice dated 22.07.2010 to the assessee, proposing to withdraw the Transit Sale Exemption availed/claim of inter-State by him under the Central Sales Tax Act, 1956 with a direction to him to file its objection. In response, the assessee had filed detailed objections. However, the Assessing Officer, vide assessment order dated 31.01.2011, denied the claim of inter-state sale exemption and confirmed the demand on such inter-state sale. The said assessment order dated 31.01.2011 was challenged by the assessee before the Additional Commissioner, Commercial Tax, Lucknow by filing appeals. The Additional Commissioner, Commercial Tax, Lucknow, vide order dated 23.11.2013, dismissed the appeal of the assessee and upheld the demand.

(10) Feeling aggrieved by the aforesaid order dated 23.11.2013, the assessee has preferred second appeal before the Tribunal. The learned Tribunal, vide an order dated 08.12.2016, dismissed the second appeal due to non-presence of the assesse or his counsel. Since the Counsel who was engaged in the matter on behalf of assessee could not appear on 08.12.2016, the assessee preferred an application for recall of the order dated 08.12.2016, which was rejected by the learned Tribunal vide order dated 22.10.2019, stating that the absence of the assessee on the day of the hearing despite being duly served with a notice as well as non-submission of prayer requesting a postponement of hearing implies the assessee's non-cooperation in the speedy disposal of the appeal and its intent to delay the proceedings by any means. Subsequently, the assessee filed another application for rectification of mistake in the order dated 22.10.2019 and recalling of the order dated 08.12.2016 before the learned Tribunal, which too was rejected vide order dated 04.11.2022. Feeling aggrieved, the assessee has preferred the above-captioned revisions before this Court.

(11) Sales/Trade Tax Revision No. 38, 39, 40, 41, 42, 45, 46, 49, 50, 53, 55, 56, 58 and 59 of 2023 were admitted on 11.01.2024 on the following questions of law :-

"a. Whether the Impugned Order is perverse as the same has been passed in violation of the principles of natural justice because the same is non-reasoned as the application for recall of the order was considered as application for rectification of mistake only?

b. Whether the Impugned Order is perverse which failed to consider the explanation of the Revisionist as sufficient cause for non-appearance on the date (07.12.2016) on which hearing was fixed?

c. Whether the date of which certified copy of the Order dated 08.12.2016 is obtained, is to be considered as the date from which limitation period commences under the Uttar Pradesh Trade Tax Act, 1948 or Uttar Pradesh Value Added Tax Act, 2008, where the requirement is on the Tribunal to serve a certified copy of the order passed by it?

d. Whether the finding recorded by the Learned Tribunal that there was delay in filing of recall Application was perverse as no contrary fact was on record, and in such circumstances, the affidavit of the Revisionist is enough to establish that the copy of order was not served upon the Revisionist?"

(12) Sales/Trade Tax Revision Nos. 43, 44, 48, 52, 54 and 57 of the 2023 were admitted on 11.01.2024 on the following question of law :-

"a. Whether the impugned order is perverse as the same has been passed in violation of the principles of natural justice because an opportunity of hearing was not afforded and also because the same is non-reasoned and non-speaking as held by this Hon'ble High court in the matter of 'Mamta Steel India Pvt. Ltd. versus Commissioner of C.Ex., Allahabad', reported in 2019 (368) E.L.T. 529) All.)?

b. Whether the impugned order is perverse as the same has been passed ignoring the ratio of the decision of the Hon'ble High Court that the sale of the goods, of which movement occasioned from outside the State of Uttar Pradesh due to a contract for use of the same in the execution of works contract in the State of Uttar Pradesh, amounts to an inter-state sale and the same is not subjected to tax in the State of Uttar Pradesh?

c. Whether the sale of goods referred in contract is subject to exemption under Section 6 (2) of the Central Sales Tax Act, 1956?

d. Whether even if the contract in question is considered as indivisible work contract then also the sale of goods, of which movement occasioned from outside the State of Uttar Pradesh is inter-state sale or not?

e. Whether the contracts in question are legally bound to be considered as two separate contracts as per the Constitutional Amendment in the definition of 'sale' under Article 366(29A)(b) of the Constitution of India?"

(13) Sales/Trade Tax Revision No. 47 and 51 of 2023 were admitted on 11.01.2024 on the following question of law :-

"a. Whether the impugned order is perverse as the same has been passed in violation of the principles of natural justice because an opportunity of hearing was not afforded and also because the same is non-reasoned and non-speaking as held by this

Hon'ble High court in the matter of 'Mamta Steel India Pvt. Ltd. versus Commissioner of C.Ex., Allahabad', reported in 2019 (368) E.L.T. 529)All.)?

b. Whether the impugned order is perverse as the same has been passed ignoring the ratio of the decision of the Hon'ble High Court that for imposing penalty, a satisfaction has to be recorded to justify intention to evade tax and the same is not subjected to tax in the State of Uttar Pradesh?

c. Whether mere blank column 6 in Form 38 lead to imposition of penalty were other documents accompanying the Form 38 proves that there was no intention to evade tax?"

(14) Heard Shri Ritwick Rai and Shri Aviral Raj Singh, learned Counsel representing the assessee/revisionists and Shri Sanjay Sarin, learned Counsel representing the respondent/revenue.

(15) Learned Counsel for the assessee has submitted that it was the duty of the Tribunal to duly consider the issues raised by the assessee and deal with all the aspects before deciding the appeals. It is also submitted that the learned Tribunal has decided the appeals in the most cursory and casual manner and without giving any reasons for not accepting the cause shown by the assessee of his absence on the date fixed. According to the learned Counsel, specific plea has been raised by the asessee before the learned Tribunal that the Counsel who appeared on his behalf, though noted the date fixed in the appeal, however, he became subsequently ill and neither the date fixed nor his illness was communicated to him, on account of which, no one has put in appearance on the behalf of the assesse before the Tribunal. Thus, it has been submitted that the impugned judgment suffers from vice of non-application of mind, which is writ large on the impugned order, and therefore the appeal deserves to be allowed on this score alone.

(16) Inviting attention to Clause (5) of Rule 63 of the Uttar Pradesh Value Added Tax **Rules, 2008** (hereinafter referred to as 'Rules, 2008'), learned Counsel for the assessee has submitted that Clause (5) of Rule 63 clearly stipulates that the judgment in the appeal shall be in writing and shall state three points viz. (a) the points of determination; (b) the decision thereon; and (c) the reasons for such decision. However, while passing the impugned order dated 08.12.2016, none of the points stipulated in Clause (5) of Rule 63 of the Rules, 2008 has been followed and in a cursory manner, the impugned order dated 08.12.2016 has been passed. He, therefore, prays that the matter be remanded back to the learned Tribunal for fresh consideration in the matter on merits.

(17) Sri Sanjay Sarin, learned counsel for the revenue, on being faced with the impugned order has fairly stated that the same is bereft of any reasoning and did not oppose the arguments raised by the counsel for the appellant for remand of the matter to the Tribunal for reconsideration in accordance with law.

(18) Having regard to the submissions made by the learned Counsel for the parties and going through the record available before this court in the above-captioned revisions, it is first required to be noted that Rule 63 of the Rules, 2008 deals with the disposal of appeal, wherein Clause (5) of Rule 63 of the Rules, 2008 provides as under :-

"(5) The judgment in appeal shall be in writing and shall state

(a) the points for determination,

(b) the decision thereon, and

(c) the reasons for such decision."

(19) The aforesaid clause (5) of Rule 63 of the Rules, 2008 clearly provided that the judgment in appeal shall be in writing and shall state the points of determination, the decision thereon and the reasons for such decision.

(20) A bare perusal of the impugned order dated 08.12.2016 clearly shows that the Tribunal has not determined the issue raised in the appeal preferred by the assessee but relying on grounds of rejection of the appeal of the assessee by the first appellate authority, dismissed the appeal . The Tribunal has concluded by holding that no convincing defence was put forth by the assessee and therefore proceeded to confirm the order passed by the first appellate authority.

(21) It is trite law that an order without valid reasons cannot be sustained. To give reasons is engrained in the rule of natural justice. Highlighting this rule, Hon'ble Supreme Court held in the case of **the Secretary & Curator, Victoria Memorial v. Howrah Ganatantrik Nagrik Samity and ors**., JT 2010(2)SC 566 para 31 to 33 as under :-

"31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice - delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind. " [Vide State of Orissa Vs. Dhaniram Luhar (JT 2004(2) SC 172 and State of Rajasthan Vs. Sohan Lal & Ors. JT 2004 (5) SCC 338:2004 (5) SCC 573].

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. [Vide Raj Kishore Jha Vs. State of Bihar & Ors. AIR 2003 SC 4664; Vishnu Dev Sharma Vs. State of Uttar Pradesh & Ors. (2008) 3 SCC 172; Steel Authority of India Ltd. Vs. Sales Tax Officer, Rourkela I Circle & Ors. (2008) 9 SCC 407; State of Uttaranchal & Anr. Vs. Sunil Kumar Singh Negi AIR 2008 SC 2026; U.P.S.R.T.C. Vs. Jagdish Prasad Gupta AIR 2009 SC 2328; Ram Phal Vs. State of Haryana & Ors. (2009) 3 SCC 258; Mohammed Yusuf Vs. Faij Mohammad & Ors. (2009) 3 SCC 513; and State of Himachal Pradesh Vs. Sada Ram & Anr. (2009) 4 SCC 422].

33.Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be

supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as why his application has been rejected."

(22) Non recording of reasons, non-consideration of admissible evidence or consideration of inadmissible evidence renders the order to be unsustainable. Hon'ble Supreme Court in the case of **Chandana Impex Pvt. Ltd. Vs. Commissioner of Customs, New Delhi :** 2011(269)E.L.T. 433 (S.C.), has held as under :-

"8. ....It needs to be emphasised that every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer, particularly when either of the parties to the lis has a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the court in denying him the relief prayed for, the remedy of appeal will not be meaningful. It is that reasoning, which can be subjected to examination at the higher forums. In State of Orissa Vs. Dhaniram Luhar, this Court, while reiterating that reason is the heart beat of every conclusion and without the same, it becomes lifeless, observed thus :

"8.....Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;....."

(23) In view of the aforesaid legal propositions, it is a cardinal principle of law that reasons are really linchpin to administration of justice. They are the link between the mind of the decision-taker and the controversy in question. To justify conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher court. Reasons are the soul of the decision and its absence would render the order open to judicial scrutiny. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing reasoned order is not only beneficial to the higher courts but is even of great utility for providing public understanding of law and imposing self- discipline in the Judge as their discretion is controlled by well- established norms. Absence of reasoning is impermissible in judicial pronouncement.

(24) The contention raised before this court that there is an absence of reasoning in the impugned order dated 08.12.2016, in itself would render the order liable to be set aside.

(25) It is the duty cast upon the Appellate Authority that even if it is in agreement with the view taken by the first Appellate Authority, it should give its own reasons/findings which may indicate that there has been application of mind and also the consideration of grounds raised in the appeal by the revisionist. In absence of reasons it is difficult to come to a conclusion that there has been any application of mind by the Tribunal and such an order in the opinion of the Court cannot be sustained and deserves to be set aside.

(26) In view of the discussions made above, the question posed for consideration in the revisions is answered in favour of the assessee and it is held that the Tribunal has committed manifest error of law in not complying the provisions of Clause 5 of Section 63 of the Rules, 2008. In view of the direction issued, alternative issues between the revisionist and revenue are not required to be examined any further.

(27) Accordingly, the impugned order dated 08.12.2016 is hereby set-aside. As a consequence thereof, the consequential impugned orders dated 04.11.2022 passed on the recall application and rectification application are also set-aside. The matter is remanded to the Tribunal for redetermination, in terms of the discussion made above, after affording opportunity to the parties, expeditiously, say within a period of three months from the date of production of a certified copy of this order in accordance with law.

(28) It is clarified that the parties shall not seek any unnecessary adjournment before the learned Tribunal.

(29) The above-captioned revisions stands **allowed** in the aforesaid term.

(2024) 2 ILRA 146
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 146 of 2023

M/s Falguni Steels ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Yadav

Counsel for the Respondents:
Sri Rishi Kumar, Addl. Chief Standing Counsel

Civil Law - U.P. Goods and Services Tax Act, 2017 – Penalty for Non-Generation of e-Way Bill – The petitioner challenged the orders dated 21.02.2019 and 20.10.2019 imposing tax and penalty under Section 129(3) for transporting goods without an e-Way Bill – Held, the absence of an e-Way Bill due to technical glitches and local administrative restrictions (Maghi Purnima, Kumbh Mela 2019) did not indicate intent to evade tax, as tax invoices with vehicle details were present and e-Way Bills were generated before the penalty order, rendering the penalty unjustified. (Paras 2, 6, 8, 13, 16, 17)

Intent to Evade Tax – Mandatory for Penalty Under Section 129 – The respondents argued that the absence of an e-Way Bill at the time of inspection violated Rule 138 of the UPGST Rules, 2017 – Held, as per *VSL Alloys (India) Pvt. Ltd. Vs St. of U.P.*, *Shyam Sel and Power Ltd. Vs St. of U.P.*, and other precedents, penalty under Section 129 requires proof of intent to evade tax, which was absent here since CGST and SGST were paid and no discrepancies were found in accompanying documents. (Paras 7, 9, 10, 11, 15, 16, 18)

Natural Justice and Non-Reasoned Orders – The petitioner contended that the orders of Respondent No. 2 and Respondent No. 3 were non-speaking and violated natural justice – Held, Respondent No. 2's order lacked reasoning beyond rejecting e-Way Bills as an afterthought, and Respondent No. 3's ex parte order erroneously St.d that intent to evade tax was not required under the UPGST Act, 2017, contrary to established law, making both orders arbitrary and unsustainable. (Paras 3, 13, 17, 18)

Writ of Certiorari – Jurisdictional Error – The petitioner sought a writ of certiorari to quash the impugned orders for exceeding

jurisdiction – Held, as per *Central Council for Research in Ayurvedic Sciences Vs Bikartan Das* and *Nagendra Nath Bora Vs Commissioner of Hills Division*, a writ of certiorari is warranted to correct jurisdictional errors or procedural irregularities, and the authorities' imposition of penalty without evidence of tax evasion constituted such an error, justifying quashing of the orders. (Paras 22, 23, 24, 25, 26)

Technical Errors vs. Intentional Evasion – The court emphasized that penalties should not be imposed for mere technical errors without financial implications – Held, the non-generation of one e-Way Bill before detention was a technical error, not a deliberate act of tax evasion, as supported by *Modern Traders Vs St. of U.P.* and *Axpress Logistics Pvt Ltd. Vs U.O.I.*, and the presence of valid tax invoices further negated any intent to evade, warranting refund of the deposited tax and penalty. (Paras 11, 12, 14, 16, 19, 27)

Writ Petition Allowed – Orders Dated 21.02.2019 and 20.10.2019 Quashed – Refund Ordered.

List of Cases Cited:

1. VSL Alloys (India) Pvt. Ltd. Vs St. of U.P., 2018 SCC OnLine All 6080

2. Shyam Sel and Power Ltd. Vs St. of U.P., 2023:AHC:191074

3. J.K. Cement Ltd. Vs St. of U.P., MANU/UP/2812/2023

4. Roli Enterprises Vs St. of U.P., [2024] 158 taxmann.com 468 (Allahabad)

5. Modern Traders Vs St. of U.P., 2018 SCC OnLine All 6054

6. Axpress Logistics Pvt Ltd. Vs U.O.I., 2018 SCC OnLine All 6089

7. Hindustan Herbal Cosmetics Vs St. of U.P., [2024] taxmann.com 200 (Allahabad)

8. Central Council for Research in Ayurvedic Sciences Vs Bikartan Das, 2023 SCC OnLine SC 996

9. Nagendra Nath Bora Vs Commissioner of Hills Division, Assam, 1958 SCC OnLine SC 45

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

1. The instant writ petition has been filed by the petitioner, M/s Falguni Steels praying for the issuance of a writ of certiorari against the order dated February 21, 2019 passed by the Assistant Commissioner, Commercial Tax, (Mobile Squad), Unit – II, Prayagraj (hereinafter referred to as 'Respondent No. 2') and the order dated October 20, 2019 passed by the Additional Commissioner, Grade - 2, (Appeal) - I, Commercial Tax, Prayagraj (hereinafter referred to as 'Respondent No. 3').

Facts

2. Factual matrix of the instant case has been laid down below:

a. The petitioner is an authorized dealer of the Steel Authority of India Ltd. (hereinafter referred to as 'SAIL'). On February 17, 2019, the petitioner purchased a consignment of TMT Bar under the Tax Invoice Nos. OS0020005822 & OS0020005823. The said tax invoices were issued by SAIL in accordance with the provision of Section 31 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the 'CGST Act, 2017') read with Rule 46 of the Central Goods and Services Tax Rules (hereinafter referred to as the 'CGST Rules, 2017').

b. Thereafter, the petitioner obtained the service of a private road carrier for the transportation of its goods through vehicle bearing registration No. UP-70-AT-3747 from SAIL Yard, Naini, Allahabad, to Falguni Steels, Lookerganj,

Allahabad. The tax invoices contained the number of the said vehicle.

c. The petitioner alleges that during the relevant time, the e-Way Bill portal of the Department was marred by glitches and technical shortcomings and owing to the said fact, e-Way Bills on several occasions could not be generated by the Transporters/Consignors/Consignees.

d. Owing to the above stated glitch, e-Way Bills could not be generated by the time of the onset of the transportation of the Good. The said e-Way Bills were generated on February 20, 2019 (No. 47051859886) and February 21, 2019 (No. 481051862043). The petitioner states that the said e-Way Bills were presented before the Respondent No. 2 at the time of the interception of the goods and before the issuance of the Show Cause Notice as well as passing of the order under Section 129(3) of the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as the 'UPGST Act, 2017'). However, the said e-way Bills were not taken into consideration by the Respondent No. 2.

e. The supplier SAIL had generated Invoices Nos. OS0020005822 and OS0020005823, both dated February 17, 2019 wherein the quantity, description of goods and the vehicle number were mentioned. The petitioner states that the transportation of the goods on the same day was not possible due to the barrier imposed by the local administration for transportation, due to the occasion of "Maghi Purnima, Kumbh Mela, 2019". These goods were transported on February 20, 2019 from SAIL Yard, Naini to Lookerganj, Allahabad.

f. Show Cause Notice (FORM GST MOV - 07) was issued to the petitioner under Section 129(3) of the UPGST Act, 2017 on February 21, 2019 alleging that the movement of the goods was in contravention to the provisions of the UPGST Act, 2017. The said Show Cause Notice required the petitioner to show cause as to why tax of an amount of INR 1,29,862/- along with an equivalent penalty of INR 1,29,862/- ought not to be recovered from it.

g. The petitioner, thereinafter, deposited the amount of INR 2,59,724/- through CPIN No. 19020900359828 dated February 21, 2019 via Reserve Bank of India towards tax and penalty, after which, the Respondent No. 2, released the goods in favor of the petitioner. Aggrieved by the order dated February 21, 2019, passed by the Respondent No. 2, the petitioner preferred a statutory appeal before the Respondent No. 3.

h. Respondent No. 3, vide its order dated October 20, 2019, which was passed under Section 107 of the UPGST Act, 2017, upheld the order dated February 21, 2019, passed by the Respondent No. 2 and confirmed the tax liability and penalty, imposed by the Respondent No. 2.

i. Aggrieved from the order dated February 21, 2019 passed by the Respondent No. 2 and the order dated October 20, 2019, passed by the Respondent No. 3, the petitioner has preferred the instant writ petition before this Court.

Contentions of the petitioner

3. Shri Ajay Kumar Yadav, learned counsel appearing for the petitioner has advanced the following arguments:

a. As per the FORM GST MOV-06, dated February 20, 2019, the Respondent No. 2 had inspected the vehicle no. UP-70-AT-3747 on February 20, 2019 at 23:37:09 at Bairahana Power House. However, as per the FORM GST MOV-07,

dated February 21, 2019, the statement of the vehicle owner was taken at the same time on February 20, 2019 at 23:27:09 which is practically not possible. There is some controversy.

b. In the order passed by the Respondent No. 2, it has been stated that both the e-Way Bills were generated by the petitioner after detention (i.e. 23:37:09 on February 20, 2019). However, as per the facts of the case, the petitioner has generated one e-Way Bill before the detention and the second e-Way Bill after the detention due to technical glitches on the Portal.

c. The Respondent No. 3, also ended up faltering in its duties. Without mindfully appreciating the arguments advanced by the petitioner, it went ahead and upheld the order of the Respondent No. 2. The said order passed by the Respondent No. 2 is a non-speaking order as the Respondent No. 2 did not afford any reason behind the decision taken by it. The only reason afforded by the Respondent No .2 is that the e-Way Bill so produced is an afterthought and that the goods were to be mandatorily accompanied with an e-Way Bill and in the absence of the same, liability is bound to arise.

d. In response to the appeal filed before the Respondent No 3, it had issued a notice for personal hearing, wherein it had fixed the date of hearing on July 26, 2019. In response to this notice, the counsel of the petitioner appeared before the Respondent No. 3. Thereafter, the Respondent No. 3 had adjourned the date for hearing to October 10, 2019. Owing to some unavoidable reasons, the counsel of the petitioner failed to appear before the Respondent No. 3 as well as the counsel of the petitioner forgot to inform the petitioner about the said date of hearing. Thereafter, the Respondent No. 3 passed an ex parte order on October 20, 2019, in all haste and hurry coupled with malafide intentions. The said act of the Respondent No. 3 is in gross violation of the principles of natural justice and against the provisions of Sections 107 (8), 107 (9), and 107(10) of the CGST Act, 2017 and the UPGST Act, 2017.

e. Although the Respondent No. 3 passed an ex-parte order on October 20, 2019 within 10 days from the last hearing date the same was served to the petitioner only on March 20, 2020, that is after five months from the date of the passing of the said order. This shows that the order was passed in violation of the principles of natural justice.

f. The Respondent No. 3 passed the order without applying its mind and without considering the grounds of appeal and facts of the case. It upheld the order of the Respondent No. 2 without giving any reasonable findings on the grounds of appeal.

g. Impugned orders passed by the Respondent No. 2 and the Respondent No 3 are wholly illegal, arbitrary, against the principles of natural justice, and contrary to law. The Respondent No. 2 and the Respondent No. 3 have completely failed to appreciate the facts of the case as well as the applicable law.

h. It is a settled law that if the e-Way Bill is generated and produced before the passing of the order under Section 129(3) of the CGST Act, 2017/UPGST Act, 2019 and if the goods are carried with all the other relevant documents evidencing payment of due tax, then in that case the detention and seizure of goods is wholly baseless and the same defeats the purpose of the said Acts. The said position has been clarified by this Court in the case of **Modern Traders v. State of UP (Writ Tax No. 762 3 of 2018)**. The writ petition in the

said case was allowed and the penalty order therein was set aside.

i. In the instant case, the petitioner had also generated and produced the e-Way Bill on February 20, 2019 at 11:34 P.M. (i.e. before the detention which was made at 23:23:09 on February 20, 2019) and on February 21, 2019 at 12:46 A.M.(i.e. before the passage of the Order dated February 21, 2019 under Section 129(3) of the UPGST Act, 2017). In view of the same, the impugned order passed by the Respondent No. 2 is liable to be quashed with the grant of consequential relief to the petitioner.

j. There is no intention of the evasion of tax by the petitioner.

k. When goods were transported along with the specified documents, in which no discrepancy was found, detention of goods under Section 129 of the UPGST Act, 2017 was wholly without jurisdiction and illegal. Thus, even on assuming that the Respondent No 2 had jurisdiction to pass an order under Section 129 of the UPGST Act, 2017, then also the movement of goods was not in contravention of any provision of the UPGST Act, 2017 and the rules framed thereunder.

l. Even otherwise, a combined reading of Sections 68, 129, and 130 of the UPGST Act, 2017 shows that goods can be detained and tax and penalty can be demanded only when the goods are liable for confiscation, which can be only when the same are transported in contravention of the provisions of the UPGST Act, 2017/CGST Act, 2017 and the rules framed thereunder along with the intention to evade the payment of tax. In the instant case, there cannot be any intention to evade the payment of tax as the CGST and the SGST were already charged by SAIL and payments were also made. Additionally, the vehicle number was mentioned in the invoices and during the physical verification of the goods, no discrepancy was found.

m. In support of its contentions, the petitioner also relies on the judgment of this Court in **M/s Axpress Logistics India Pvt Ltd. v. Union of India (Writ Tax No. 602 of 2018).**

Contentions of the Respondents

4. Shri Rishi Kumar, learned Additional Chief Standing Counsel, appearing on behalf the respondents, has made the following submissions:

a. At the time of inspection, e-Way Bill, which is mandatory, was not generated. This is a clear violation of the Rule 138(a) of the UPGST Rules, 2017. As per Rule 138 of the UPGST Rules, 2017, e-Way Bill should mandatorily be generated before starting the movement of the vehicle and ought to be furnished before the intercepting authorities in the case of interception. Reply submitted by the authorized representative of the petitioner before the Respondent No. 2 was not satisfactory and hence the Respondent No. 2 passed the penalty order under Section 129(3) of the UPGST Act, 2017.

b. The Appellate Authority i.e. the Respondent No. 3 also provided ample opportunity of hearing to the petitioner on the appeal filed by it but no one appeared on behalf of the petitioner at the time of the hearing and hence the Appellate Authority decided the appeal on the basis of facts and documents available on record. Vide order dated October 20, 2019, the Respondent No. 3 upheld the penalty order passed by the Respondent No 2 and the said decision of the Respondent No 3 is just, proper, and in accordance with the law.

Analysis and Conclusion

5. I have heard the learned counsel appearing for the parties and perused the materials on record.

6. Even though the petitioner failed to produce the e-Way Bill in time due to certain technical difficulties, the question which arises before me is whether or not there was any actual intent to evade tax on part of the petitioner.

7. In the case of **VSL Alloys (India) Pvt. Ltd. v. State of U.P. and Another** reported in **2018 SCC OnLine All 6080,** while dealing with a situation where Part-B of the e-Way Bill was not generated, this Court observed that the petitioner therein was supposed to fill up Part- B of the e-Way Bill giving all the details including the vehicle number before the goods were loaded in a vehicle, and it failed to do so. However, there was no ill intention at the hands of the petitioner therein to evade tax, since the documents accompanying the goods contained all the relevant details. Relevant paragraphs from the said judgment have been extracted below :-

"13. We are in full agreement with the submission of the learned counsel for the petitioner and after perusal of the relevant documents, we find no ill intention at the hands of the petitioner nor the petitioner was supposed to fill up Part-B giving all the details including the vehicle number before the goods are loaded in a vehicle, which is meant for transportation to the same to its end destination.

14. In the present case, all the documents were accompanied the goods, details are duly mentioned which reflects from the perusal of the documents. Merely of none mentioning of the vehicle no. in Part-B cannot be a ground for seizure of the goods. We hold that the order of seizure is totally illegal and once the petitioner has placed the material and evidence with regard to its claim, it was obligatory on the part of respondent No. 2 to consider and pass an appropriate reasoned order. In this case, no reasons are assigned nor any discussion is mentioned in the impugned order of seizure and notice of penalty. Respondent No. 2 has also not considered the above notification dated March 7, 2018.

15. In view of the aforesaid facts, the impugned seizure order dated April 9, 2018 passed under section 129 (1) and also the consequential show-cause notice dated April 9, 2018 passed/issued under section 129(3) of the Act are quashed. The respondents are directed to release the goods as well as vehicle, seized on April 9, 2018, forthwith in favour of the petitioner."

8. In the instant case before me, although the petitioner failed to generate the e-Way Bill on time, the Tax Invoices issued contained all the relevant details including the detail of the vehicle transporting the goods. Morever, the CGST and the SGST were already charged by SAIL. Therefore, no intention to evade tax is evident in this case.

9. In the case of **M/s. Shyam Sel and Power Ltd. v. State of U.P. and Others** reported in **2023:AHC:191074**, this Court emphasized that for invoking the proceedings under Section 129(3) of the CST Act, 2017, intention to evade tax is mandatory. Relevant paragraphs have been extracted below:-

"10. For invoking the proceeding under section 129(3) of the CGST Act, section 130 of the CGST Act was required to be read together, where the intent to evade payment of tax is mandatory, but while issuing notice or while passing the

order of detention, seizure or demand of penalty, tax, no such intent of the petitioner was observed. Once the dealer has intimated the attending and mediating circumstances under which e-way bill of the purchasing dealer was cancelled, it was a minor breach. The authority could have initiated proceedings under section 122 of the CGST Act instead of proceedings under section 129 of the CGST Act. Section 129 of the CGST Act must be read with section 130 of the said Act, which mandate the intention to evade payment of tax. Once the authorities have not observed that there was intent to evade payment of tax, proceedings under section 129 of the CGST Act ought not to have been initiated, but it could be done under section 122 of the CGST Act in the facts & circumstances of the present case. It is also not in dispute that after release of the goods, the same were sold to P.L. Trading Company.

11. Section 129 of the CGST Act deals with detention, seizure and release of goods in case violation of the provisions of the CGST Act is found. Section 130 deals with confiscation of goods or conveyance and levy of penalty. Both the sections revolve around a similar issue and provide for the proceedings available at the hands of the proper Officer upon him having found the goods in violation of the provisions of the Act, Rule 138 of the Rules framed under the CGST Act being one of them. Upon a purposive reading of the sections, it would sufice to state that the legislation makes intent to evade tax a sine qua non for initiation of the proceedings under sections 129 and 130 of the CGST Act."

10. In **J.K. Cement Ltd. v. State of U.P. and Others reported in MANU/UP/2812/2023**, this Court stated that even if there is no e-Way bill being carried, if there is no discrepancy in the documents accompanying the goods and no intention to evade tax, then penalty cannot be levied. Relevant paragraph has been extracted below -

"11. On perusal of the impugned order it is also found that it is categorically mentioned that the origination as well as termination of the goods in question was in State of Madhya Pradesh meaning thereby the authorities are of the view that the goods were not to be unloaded in the State of UP or any intention to avoid tax. However, mainly on the ground of some small technical fault for not carrying the e-way bill, the penalty ought not to have been levied in the absence of any discrepancy in document accompanying the goods. In view of above, the impugned orders cannot be sustained in the eyes of law."

11. In **Roli Enterprises v. State of UP and Others reported in [2024] 158 taxmann.com 468 (Allahabad)** this Court noted that the non - generation of Part B of e-Way Bill was a mere technical error, and since the invoice contained the details of the vehicle transporting the goods, there was no intention on part of the petitioner therein to evade tax. Accordingly, the penalty levied in the said case, was held to be unjustified.

12. In **Modern Traders v. State of U.P. and Others** reported in **2018 SCC OnLine All 6054**, which was relied upon by the petitioner, this Court was dealing with a case wherein the vehicle carrying the goods was intercepted solely on the ground that there was no e-Way Bill accompanying the goods. The e-Way Bill in the said case was generated as soon as information about interception of the vehicle was received. Accordingly, this Court concluded that

once e-Way Bill has been produced and if all the relevant documents accompanied the goods, then seizing the goods and imposing penalty cannot be justified. Relevant paragraphs have been extracted below: -

10. The learned counsel for the petitioner has also brought to our notice that respondent No. 3, with malice intention, has deliberately not mentioned the time in either of the orders passed being the seizure order under section 129(1) and penalty under section 129(3). Both the aforesaid orders are passed on May 5, 2018, i.e., before the date which has been indicated in the interception memo being May 6, 2018. Learned counsel for the petitioner has submitted that since the petitioner has placed the e-way bill on May 5, 2018 itself respondent No. 3 has illegally proceeded to pass the impugned orders before any physical verification done.

11. We find substance in the submission of the learned counsel for the petitioner. Once the e-way bill is produced and other documents clearly indicates that the goods are belongs to the registered dealer and the IGST has been charged there remains no justification in detaining and seizing the goods and asking the penalty.

13. Upon a bare reading of the aforesaid judgment, one cannot help, but draw a parallel between the factual situation in the aforesaid judgment, and the factual situation in the instant case. Before the order imposing penalty was passed, the petitioner in the instant case had generated both the e-Way Bills which the Respondent No. 2 failed to take into account. Furthermore, this failure on the part of the Respondent No. 2 was not corrected by the Respondent No. 3. Imposition of penalty must be backed by potent reasoning, which to me, seems missing here.

14. In A**xpress Logistics Pvt Ltd. v. Union of India and Others** reported in **2018 SCC OnLine All 6089**, this Court quashed the penalty order issued under Sections 129(1) and 129(3) of the UPGST Act, 2017, since the petitioner therein had produced e-Way Bill before the detention and seizure of the goods and vehicle. Even though, in the case before me, the petitioner generated one e-Way Bill subsequent to the detention of goods, the other e-Way Bill was generated before the detention of goods. In any case, both the e-Way Bills were produced by the petitioner before the order imposing penalty was passed.

15. What emerges from a perusal of the aforesaid judgments is that, if penalty is imposed, in the presence of all the valid documents, even if e-Way Bill has not been generated, and in the absence of any determination to evade tax, it cannot be sustained. Order dated February 21, 2019 passed by the Respondent No. 2 and the order dated October 20, 2019 passed by the Respondent No. 3, in the instant case stand on a foundationless ground, since there is no intention to evade tax, which could sustain the impugned orders.

16. In the present factual matrix, it is clear that the goods were accompanied by the tax invoices. Furthermore, the tax invoices contained the details of the vehicle that was transporting the goods. It is further to be noted that one e-Way Bill was generated before the detention and one subsequent to the detention, but before passing of the order under Section 129(3) of the UPGST Act, 2017/CGST Act, 2017. Under these circumstances, there does not appear to be any intention to evade the tax.

In addition to the above facts, the explanation given by the petitioner with regard to the delay in generation of the e-Way Bill due to the barrier imposed by the local administration on the occasion of 'Maghi Purnima, Kumbh Mela 2019' has also not been taken into consideration by the authorities below. Finally, the authorities have failed to indicate any specific reason that would indicate an intention for evasion of tax. As held by this Court in **Hindustan Herbal Cosmetics v. State of U.P. ,** reported in **[2024] taxmann.com 200 (Allahabad)**, intention to evade tax is desideratum for the imposition of penalty. I am of the view that the authorities have acted beyond jurisdiction and imposed tax without there being any cogent reason for the same. In light of the above finding, I am of the view that the petitioner cannot be made to suffer due to mere technical mistakes that may have arisen, without there being any intention to evade tax.

17. Once both the e-Way Bills were presented before passing of the penalty order, and all the documents including the tax invoices, were found to be in order, the Respondent No. 2 had no sound rationale to pass the impugned order dated February 20, 2019. A bare reading of the said order would show that the presence of the tax invoices, was recorded by the Respondent No. 2. Furthermore, the Respondent No. 2 also rejected the e-Way Bills which were generated post the detention of the goods, since the same in its opinion, was contrary to the provisions of the UPGST Act, 2017/CGST Act, 2017. Nowhere in the said impugned order, it has been recorded that there was any definite intention to evade tax. The essence of any penal imposition is intrinsically linked to the presence of mens rea, a facet conspicuously absent from the record. The order, therefore, stands vulnerable to challenge on the grounds of disproportionate punitive measures meted out in the absence of concrete evidence substantiating an intent to evade tax liabilities.

18. These errors of jurisdiction, committed by the Respondent No. 2, ought to have been corrected by the Respondent No. 3, while hearing the statutory appeal. What is also astonishing to me is the reasoning afforded by the Respondent No. 3 to reject the statutory appeal. Respondent No. 3 records that while the provisions under the Uttar Pradesh Value Added Tax Act, 2008 (hereinafter referred to as the 'UPVAT Act, 2008') mandated establishing a prior intent to evade tax, there was no such provision in the CGST Act, 2017/UPGST Act, 2017. This reasoning is palpably erroneous. A penal action devoid of mens rea not only lacks a solid legal foundation but also raises concerns about the proportionality and reasonableness of the penalties imposed. The imposition of penalties without a clear indication of intent may result in an arbitrary exercise of authority, undermining the principles of justice. Tax evasion is a serious allegation that necessitates a robust evidentiary basis to withstand legal scrutiny. The mere rejection of post-detention e-Way Bills, without a cogent nexus to intention to evade tax, is fallacious.

19. Mere technical errors, without having any potential financial implications, should not be the grounds for imposition of penalties. The underlying philosophy is to maintain a fair and just tax system, where penalties are proportionate to the gravity of the offense. In the realm of taxation, imposition of penalty serves as a critical

measure to ensure compliance with tax laws and regulations. However, a nuanced understanding prevails within legal frameworks that for penalties to be justly imposed, there must be a demonstrated actual intent to evade tax. This principle underscores the importance of distinguishing technical errors from deliberate attempts to evade tax obligations. Penalties should be reserved for cases where an intentional act to defraud the tax system is evident, rather than for inadvertent technical errors. The legal foundation for this principle lies in the recognition that taxation statutes are not designed to punish inadvertent mistakes but rather deliberate acts of non-compliance. The burden of proof, therefore, rests on tax authorities to establish the actual intent to evade tax before imposing penalties on taxpayers. This safeguards individuals and entities from punitive measures arising from honest mistakes, administrative errors, or technical discrepancies that lack any malicious intent. In the judgments cited above, the Courts therein have emphasized upon the need for a meticulous examination of the facts and circumstances surrounding each case to establish the presence or absence of intentional tax evasion.

20. To conclude, the requirement of intent to evade tax for the imposition of penalties is a fundamental principle that underpins the fairness and integrity of taxation systems. Recognising the distinction between technical errors and intentional evasion is essential for maintaining a balanced and equitable approach to tax enforcement. As nations continue their pursuit of effective tax administration, upholding this principle becomes paramount in fostering voluntary compliance, preserving trust in the tax system, and ensuring the judicious use of regulatory powers.

21. Since the petitioner in the instant case has prayed for the issuance of the writ of certiorari, it would be prudent on my part to, to lay threadbare the principles governing the issuance of a writ of certiorari.

22. The writ of certiorari, a legal remedy originating from the Latin term meaning “to be more fully informed”, holds a paramount position within the realm of administrative law. It is a high prerogative writ issued by superior courts to review and quash decisions of lower courts, tribunals, or administrative bodies. This instrument plays a pivotal role in ensuring the rule of law and judicial oversight over administrative actions, providing a mechanism to correct errors and prevent the abuse of power. The writ of certiorari is not issued as a matter of course, but rather it is granted at the discretion of the superior court. Generally, certiorari is issued in cases involving errors of law apparent on the face of the record, jurisdictional issues, or procedural irregularities that may have a substantial impact on the fairness and legality of the proceedings.

23. Having already determined that the authorities in the instant case transcended their jurisdiction while passing the impugned orders, issuance of the writ of certiorari is necessitated in the instant case. Reference is made in this regard to the **Central Council for Research in Ayurvedic Sciences and Another v. Bikartan Das and Others,** reported in **2023 SCC OnLine SC 996**, wherein Supreme Court upheld that writ of certiorari can be issued to correct errors of jurisdiction:–

"65. Thus, from the various decisions referred to above, we have no hesitation in reaching to the conclusion that a writ of certiorari is a high prerogative writ and should not be issued on mere asking. For the issue of a writ of certiorari, the party concerned has to make out a definite case for the same and is not a matter of course. To put it pithily, certiorari shall issue to correct errors of jurisdiction, that is to say, absence, excess or failure to exercise and also when in the exercise of undoubted jurisdiction, there has been illegality. It shall also issue to correct an error in the decision or determination itself, if it is an error manifest on the face of the proceedings. By its exercise, only a patent error can be corrected but not also a wrong decision. It should be well remembered at the cost of repetition that certiorari is not appellate but only supervisory."

24. In **Nagendra Nath Bora and Another v. The Commissioner of Hills Division and Appeal, Assam and Others** reported in **1958 SCC OnLine SC 45,** a Constitution Bench, upon examining various Indian and English precents, came to the conclusion that in that case an inferior tribunal has exceeded its jurisdiction or has not acted in accordance with the law, a writ of certiorari can be issued. Relevant paragraphs have been extracted below:

"36. So far as we know, it has never been contended before this Court that an error of fact, even though apparent on the face of the record, could be a ground for interference by the court exercising its writ jurisdiction. No ruling was brought to our notice in support of the proposition that the court exercising its powers under Article 226 of the Constitution, could quash an order of an inferior tribunal, on the ground of a mistake of fact apparent on the face of the record.

37. But the question still remains as to what is the legal import of the expression 'error of law apparent on the face of the record'. Is it every error of law that can attract the supervisory jurisdiction of the High Court, to quash the order impugned? This court, as observed above, has settled the law in this respect by laying down that in order to attract such jurisdiction, it is essential that the error should be something more than a mere error of law; that it must be one which is manifest on the face of the record. In this respect, the law in India and the law in England, are, therefore, the same. It is also clear, on an examination of all the authorities of this Court and of those in England, referred to above, as also those considered in the several judgments of this Court, that the common-law writ, now called order of certiorari, which was also adopted by our Constitution, is not meant to take the place of an appeal where the statute does not confer a right of appeal. Its purpose is only to determine, on an examination of the record, **whether the inferior tribunal has exceeded its jurisdiction or has not proceeded in accordance with the essential requirements of the law which it was meant to administer.** *Mere formal or technical errors, even though of law, will not be sufficient to attract this extraordinary jurisdiction."*

(emphasis added)

25. In light of the aforesaid, it becomes apparent, that the impugned orders in the instant case are a result of the Respondent No. 2 and the Respondent No. 3 exceeding their jurisdiction and not proceeded in accordance with the essential

requirement of the law where it was meant to adminiter. Therefore, a writ of certiorari is warranted in the instant case.

26. Accordingly, let there be a writ of certiorari issued against the order dated February 21, 2019 passed by the Respondent No. 2 and the order dated October 20, 2019 passed by the Respondent No. 3. The said orders are quashed and set aside.

27. This Court also directs the Respondent No. 2 to refund the amount of tax and penalty deposited by the petitioner, within a period of four weeks from date.

28. The instant writ petition is allowed in aforesaid terms. There shall be no order as to the costs.

29. Urgent photostat-certified copy of this order, if applied for, should be readily made available to the parties upon compliance with requisite formalities.

(2024) 2 ILRA 157
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Commercial Tax Revision No. 150 of 2023

The Commissioner, Commercial Tax, U.P., Lucknow ...Revisionist
Versus
M/s. Godfrey Phillips India Ltd. ...Opposite Party

Counsel for the Revisionist:
Sri Ravi Shanker Pandey, Additional Chief Standing Counsel

Counsel for the Opposite Party:
Sri Navin Sinha (Senior Advocate), Sri Raghav Nayar, Ms. Kalpana Sinha

U.P. Value Added Tax Act, 2008 – Scope of Revisional Jurisdiction – The revisionist challenged the Tribunal's order dated 25.01.2023, which accepted the opposite party's explanation for a stock discrepancy of 480 cigarette cartons, arguing it was based on erroneous findings – Held, revisional jurisdiction under Section 58 is Ltd. to questions of law, jurisdictional errors, or procedural irregularities, and the High Court cannot re-examine factual findings unless they are perverse or unsupported by evidence, as per *Hindustan Petroleum Corporation Ltd. Vs Dilbahar Singh* and *Vinod Kumar Tiwari Vs St. of U.P.* (Paras 6, 7, 8, 9, 11, 12, 13, 14, 15)

Factual Findings of Tribunal – Binding Nature – The Tribunal found no stock discrepancy after accepting the opposite party's explanation that the surveying authority's count of 14,338 cartons (against 14,818 in the stock ledger) was erroneous due to miscounting and unrecorded old stock – Held, the Tribunal, as the primary fact-finding body, provided a reasoned decision based on evidence, and no perversity or illegality was evident to warrant interference under revisional jurisdiction. (Paras 2, 4, 14, 15, 16)

Allegation of Clandestine Sales – Lack of Evidence – The revisionist contended that the shortage of 480 cartons indicated unrecorded sales to evade tax post the tax rate increase to 50% on 01.07.2012 – Held, the Tribunal's finding that the stock was reconciled with the opposite party's books and supported by Central Excise records, coupled with no sales occurring on 01-02.07.2012 due to an ERP system change, negated the presumption of clandestine sales, as assumptions alone cannot justify rejection of account books. (Paras 2, 4, 14, 16)

Central Excise Oversight – Relevance to Tax Evasion – The opposite party argued that strict excise oversight, with a Superintendent stationed at the premises, made unrecorded sales implausible – Held, the Tribunal correctly considered the excise department's control and

the opposite party's compliance with Rule 10 of the Central Excise Rules, 2002, in maintaining daily stock accounts, supporting the absence of tax evasion and validating the Tribunal's decision. (Paras 4, 14)

No Question of Law Arises – The revisionist's attempt to reargue the factual matrix was impermissible in revisional jurisdiction – Held, the Tribunal's order was based on a comprehensive assessment of evidence, including the opposite party's prompt reporting of counting errors and excise records, and no jurisdictional error or perversity was demonstrated, leading to the dismissal of the revision. (Paras 15, 16, 17)

Revision Dismissed – Tribunal's Order Dated 25.01.2023 Upheld.

List of Cases Cited:

1. Hindustan Petroleum Corporation Ltd. Vs Dilbahar Singh, (2014) 9 SCC 78

2. Vinod Kumar Tiwari Vs St. of U.P., MANU/UP/0455/2015

3. Mohd. Inam Vs Sanjay Kumar Singhal, MANU/SC/0497/2020

4. M/s Sugar Mills Vs U.O.I., 1989(2) ELT (J-172)

5. St. of Kerala Vs M.M. Mathew, 1978 STC 348

6. Sri Raja Lakshmi Dyeing Works Vs Rangaswamy Chettiar, (1980) 4 SCC 259

7. Dattonpant Gopalvarao Devakate Vs Vithalrao Maruthirao Janagaval, (1975) 2 SCC 246

8. Ram Dass Vs Ishwar Chander, (1988) 3 SCC 131

9. St. of Kerala Vs K.M. Charia Abdullah & Co., (1965) 1 SCR 601

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

1. This is a revision petition under Section 58 of the Uttar Pradesh Value Added Tax Act, 2008 (hereinafter referred to as the 'UPVAT Act, 2008') preferred by The Commissioner, Commercial Tax, U.P., Lucknow (hereinafter referred to as the 'Revisionist') against the impugned order dated January 25, 2023, passed by the Commercial Tax Tribunal. The Opposite Party in the instant revision application is M/S Godfrey Philips India Ltd.

FACTS

2. The factual matrix of the instant lis has been delineated below:

a. Opposite Party is in the business of manufacture and sale of cigarettes, tea leaves, pan masala, and other different items. For the Assessment Year 2012 – 13, as per the Revisionist, the Opposite Party had admitted a purchase turnover and stock transfer of goods to the tune of INR 3,21,65,65,914/- and sale turnover inside U.P. to the extent of INR 1,99,27,81,937/- and admitted a tax liability of INR 62,53,93,015/-.

b. A survey was conducted by the S.I.B., Ghaziabad, on the production unit of the Opposite Party on February 2, 2012, and at the time of survey, 14,338 cartons containing 17,04,84,000 cigarettes were found whereas in the books of account stock of 14,818 cartons were found as recorded according to the Revisionist. Accordingly, a total sum of 480 cartons were found less on physical verification.

c. Since, the rate of tax on cigarette was enhanced to 50% from July 1, 2012, the assessing authority took the view that 480 cartons were sold on July 1, 2012, and July 2, 2012, and no sale invoices thereof were issued in order to escape the actual sales. On this ground, the account books were rejected and evaded turnover of cigarette was determined at INR

6,00,00,000/- beside evaded purchases of tobacco paper and packing material was determined at INR 2,55,00,000/-. The evaded sale of cigar was determined at INR 58,261 and an additional liability was created of INR 78,75,000/- + INR 75,00,000/ - = INR 1,53,75,000/- on sales, and a tax liability on purchases at INR 29,75,000/- and on sale of cigar at INR 29,131/-.

d. Aggrieved by the order dated December 3, 2015, passed by the assessing authority, the Opposite Party preferred first appeal before the Additional Commissioner, Grade – 2 (Appeal) -1st, Ghaziabad. The first appellate authority vide its order dated March 8, 2016, rejected the reconciliation figures submitted by the Opposite Party and upheld the order passed by the assessing authority. Being aggrieved by the order dated March 8, 2016, passed by the first appellate authority, the Opposite Party preferred second appeal before the Commercial Tax Tribunal, Bench – I, Ghaziabad. The second appellate authority vide its order dated January 25, 2023, accepted the contention of the Opposite Party that there was no difference in the stock of the cigarettes and the stock found was in accordance with the stock ledger. The second appellate authority further held that the surveying authority had committed fault in counting the cartons. Accordingly, the second appeal filed by the Opposite Party was allowed and the account books were accepted by the second appellate authority.

e. The Revisionist filed the instant revision application under Section 58 of the UPVAT Act, 2008 against the impugned order dated January 25, 2023, passed by the second appellate authority.

CONTENTIONS OF THE REVISIONIST

3. Mr. Ravi Shankar Pandey, learned Additional Chief Standing Counsel appearing on behalf of the Revisionist has advanced the following submissions:

(i) The second appellate authority was not legally justified in accepting the contention of the Opposite Party that the surveying authority committed error in counting the stock which resulted in noting shortage of 480 cartons.

(ii) At the time of survey dated July 2, 2012, the counting of stock was conducted in the presence of Sri Pankaj Pataudi, Deputy General Manager (Accounts) who never objected that physical counting was done wrongly. The surveying authority on counting found 14,338 cartons of cigarettes instead of 14,818 cartons entered in the stock register. As such, a shortage of 480 cartons was found and the assessing authority rightly presumed that the same has been sold out of books as from July 1, 2012, the rate of tax was enhanced to 50%. The conclusion drawn by the assessing authority was based on a reasonable ground which has been completely ignored by the second appellate authority.

(iii) After survey dated July 2, 2012, the subsequent intimation by correspondence dated July 6, 2012, to the assessing authority was an attempt to cover the short comings found by the surveying authority. A reasonable explanation for tallying the shortage found at the time of survey dated July 2, 2012, was required to be furnished but the same was no reconciled by the Opposite Party. Instead, the Opposite Party tried to give a roundabout explanation by mentioning that the stock of FSS Vally + FSS ND brand cigarette was 2,188 boxes but the same was counted as 2,376 boxes as the difference of 188 boxed was counted twice, Further, the

stock of FSSPL Brand of cigarette was of 2,775 boxed which was counted as 2,402 boxes and by mistake 83 boxed were counted twice. Besides, there were 456 boxes of old cigarettes that were kept in the godown which was not recorded by the surveying authority. The second appellate authority accepted the said explanation furnished by the Opposite Party without applying its mind and reached a conclusion that the differences have been reconciled and no difference was found in the stock of cigarettes.

(iv) The second appellate authority further committed a factual mistake in observing that the goods are excisable commodity which is checked by the Excise Department from time to time and sales are regulated and controlled by the Superintendent/Inspector of Excise Department and therefore the evaded sale is not possible. The non-vigilance of excise authorities could not be ruled out in view of the fact that the stock verification was conducted by the S.I.B. Unit of the Commercial Department in the presence of a responsible person of the rank of Deputy General Manager (Accounts) and no discrepancy was pointed out at the time of conducting and recording the factual position in the survey note.

(v) The second appellate authority wrongly relied on the decisions given in M/s Sugar Mills -v- Union of India reported in 1989(2) ELT (J-172) and State of Kerala -v- M.M. Mathew reported in 1978 STC 348 in which a principle has been laid down that account books could not be rejected on suspicion, strange coincidences and grave doubts or on presumptions. It may be submitted that the account books have been rejected on a solid and valid ground as shortage of 480 cartons of cigarette was found and no valid and reasonable explanation could be put forth by the dealer at the time of survey conducted.

CONTENTIONS OF THE OPPOSITE PARTY

4. Mr. Navin Sinha, learned Senior Advocate assisted by Mr. Raghav Nayar, learned counsel appearing on behalf of the Opposite Party has advanced the following submissions:

(i) For the purposes of undertaking the aforesaid manufacturing activities, the Opposite Party supplies various raw materials to M/s International Tobacco Company Limited (hereinafter referred to as 'INTCO'). INTCO manufactures cigarettes with the use of such raw material for and on behalf of the Opposite Party under job work arrangement. The title of finished goods vests with the Opposite Party always till such goods are sold by it in the course of trade. The Opposite Party from time to time sells / stock transfer such goods from the registered premises on their own account and duly account such sales / stock transfer in its books of accounts. Besides, INTCO also maintains various statutory records as required under the central excise provisions to account finished goods as manufactured by it for and on behalf of the Opposite Party. In particular, daily stock account is maintained by it to account production and removal of finished goods on daily basis. The disposal of finished stock from the registered premises is accounted in the books of the Opposite Party as sales / stock transfer and in statutory records maintained by INTCO as removals. In other words, entries in the Opposite Party's books of accounts towards sale / stock transfer of finished stock are mandatorily always

supported by the corresponding entry in the records of INTCO.

(ii) M/s INTCO is the wholly owned subsidiary company of the Opposite Party, which manufactures cigarettes on behalf of the Opposite Party in the same premises i.e. 'Meerut Road, Ghaziabad'. However, the records of the Opposite Party and INTCO are separately maintained.

(iii) The SIB authorities conducted the survey of the Opposite Party's business premises on July 2, 2012, at 4:30 p.m. and finished counting the stock of cigarettes available in the premises by 6:00 p.m. Meanwhile, the Opposite Party was also required by the SIB authorities to produce their books of accounts, and particularly the stock statement of finished goods as on the said date.

(iv) The Opposite Party produced the required stock statement giving details of finished stock as on the said date as per their books of accounts. As per the stock statement produced by the Opposite Party, the stock of finished cigarettes was 14,818 cartons categorized into different brands of cigarettes.

(v) The SIB authorities thereafter proceeded to count the stock of finished goods in haphazard manner and without being accompanied by the concerned personnel of the Opposite Party. On completing the counting process, the SIB authorities prepared brand-wise statement of stock allegedly found available in their premises during the survey showing total stock as 14,323 cartons.

(vi) Since there was difference between the stock of finished stock as per inventory taken by the SIB authorities and stock as per books of accounts, the Opposite Party immediately pointed out the reasons of such difference and requested the authorities to re-count the stock. However, the SIB authorities, being highly adamant and non-cooperative, refused to consider the errors pointed out by the Opposite Party. At the same time, the Opposite Party was asked to report such errors, if any, to their office within 24 hours i.e. within July 3, 2012.

(vii) In line with the understanding reached with the SIB authorities, the Opposite Party submitted detailed representation to the Assistant Commissioner (SIB), Ghaziabad vide its letter dated July 3, 2012, detailing the brand-wise stock of cigarettes available in its factory duly highlighting the cases of disagreement and reasons of such disagreement. The Opposite Party specifically requested the SIB authorities vide the said letter to re-verify the stock in its premises. The Opposite Party further submitted on its own motion, a detailed representation vide letter dated July 2, 2012, to the jurisdictional Deputy Commissioner giving details of the deficiencies found by them in the survey diary dated July 2, 2012. The Opposite Party subsequently received notice from the Deputy Commissioner (SIB), Commercial Tax vide their letter no. 68 dated July 18, 2012, requiring the Opposite Party to produce relevant records in connection with the survey conducted by them on July 2, 2012. Based on the aforesaid notice, the Opposite Party submitted detailed representation along with relevant records vide its letter dated August 3, 2012.

(viii) The Opposite Party further received a notice dated January 1, 2013, from the jurisdictional Deputy Commissioner requiring the Opposite Party to reply in respect of various deficiencies allegedly noticed by the SIB authorities during their survey conducted on July 2, 2012. In particular, the Opposite Party was asked to explain as to the reasons for shortage found during such survey in

finished stock to the tune of 480 cartons. In response thereto, the Opposite Party submitted its submissions, vide its letter dated January 28, 2013, explaining the correct factual position. However, the Deputy Commissioner, Commercial Tax directed the Assistant Commissioner to conduct the re-verification. However, the authorities neither conducted re-verification of finished stock as requested by the Opposite Party, nor did they consider or discuss any of the evidence furnished by the Opposite Party to rebut the veracity of survey diary dated July 2, 2012, and accordingly passed the assessment order dated December 3, 2015. The Assessing Authority assessed the evaded purchase of INR 2,55,00,000/- and Tax at INR 29,75,000/- and evaded sales of INR 6,00,00,000/- and tax thereon at INR 1,53,75,000/- only on the basis of presumption and assumption which is wrong and illegal.

(ix) The goods manufactured by the Opposite Party are excisable goods and there is strict control of excise department. The excise authorities have deputed a Superintendent, Central Excise, Ghaziabad within the factory premises to physically supervise the clearances of the goods manufactured. No goods can be removed without payment of excise duty. When the removal of goods is not possible without paying the excise duty, there is no question of removal of goods out of the books of accounts. This view has been held in numerous cases by different courts. The Assessing Authority has not pointed out any defect in books of accounts. In the absence of specific defect in the books of accounts and any suppression, there was no justification for rejection of the disclosed turnover in monthly return.

(x) There was no sale affected from any location of the Opposite Party on July 1, 2012, and July 2, 2012. The reason behind this was that the Opposite Party was in the process of implementing an integrated system for production & dispatches in place of the existing system of production & dispatches and accordingly an intimation to that effect was given to the Deputy Commissioner, Commercial Tax, Ghaziabad vide letter dated June 26, 2012, and thereafter vide letter dated July 2, 2012.

(xi) The Assessing Authority has wrongly determined the turnover on estimated basis on the ground of survey dated July 2, 2012. There is no difference in the stock of cigarettes on July 2, 2012. The stock of cigarette was taken by the surveying authority for 14,323 cartons and further affirmed by the Assessing Authority to 14,338 cartons in provisional order. The stock of cigarettes is accounted for in the regular books of accounts.

(xii) The error that occurred while counting the stocks was pointed out to the authorities at the time of the survey itself and in response thereto, the Opposite Party was told to report such error within 24 hours to the SIB authorities. Accordingly, the correct status was duly reported to AC (SIB) vide letter dated July 3, 2012, within 24 hours of the said survey with specific request for re-verification of stocks. Further the said status was also intimated to the Assessing Authority vide letter dated July 6, 2012. However, none of the authorities felt necessary to re-verify the stock of finished goods in the premises of the Opposite Party. The stock status furnished by the Opposite Party to the SIB authorities during their visit in its premises on July 2, 2012, is duly reconciled with the corresponding stock status as per the Daily Stock Account being maintained by M/s INTCO in terms of Central Excise Rules, 2002.

(xiii) In terms of the Rule 10 of the Central Excise Rules, 2002, the manufacturer is statutorily required to maintain daily stock account on daily basis containing details of finished goods such as (a) Opening Balance, (b) Manufactured during the day, (c) Removed on payment of duty or otherwise, and (d) Closing balance. Under the central excise law, any difference in actual stock vis a vis stock as per Daily Stock Account can be considered as clandestinely removed by the manufacturer without payment of duty and has serious consequences. Significantly, there is absolutely no allegation from the excise authorities as to the alleged difference in actual stock vis a vis stock as per Daily Stock Account, which undisputedly proves that the stock counted by the SBI authorities during their visit on July 2, 2012, was improper and therefore cannot be relied upon for the present purpose.

(xiv) It is pertinent to mention here that the stock of finished goods is controlled by the Opposite Party by assigning consecutive serial nos. to each carton. The Opposite Party, as a matter of its practice, religiously mentions such assigned number on the removal documents such as excise gate pass and stock transfer challan to have complete account of the quantity manufactured and quantity removed/cleared.

(xv) The Opposite Party has not made any dispatches / sales during the period June 29, 2012, to July 2, 2012, due to implementation of ERP system change over. This position is not only evident from the books of accounts / sale documents of the Opposite Party but is also supported from the fact that it had duly intimated the central excise authorities as well as VAT authorities about the discontinuation of removal / sales during such period. Considering the position that central excise authorities remain stationed within the premises of the Opposite Party on 24x7 basis and all removals of finished goods are affected only after written authorisation by such authorities, the allegation made in the impugned order that the Opposite Party has sold the short found stocks during the period July 1, 2012 to July 2, 2012 without accounting in their books is unfounded and cannot be accepted under any circumstances. The Central Excise personnel are deputed at the Opposite Party's premises to check the excisable goods before the removal from the Opposite Party's factory as per Rule 6 and Rule 11 of the Central Excise Rules.

(xvi) The First Appellate Authority allowed the benefit of non-sellable 456 boxes lying at other location not marked with the mandatory requirement of the "specified health warning" on the retail packages containing tobacco products. The first appellate authority however erred in holding the difference of stock as 581 boxes which was never alleged either by the SIB authorities or the assessing authority.

(xvii) The enhancement in the disclosed turnover of sale & purchase for INR 8,55,00,000/- is made by the Assessing Authority on the sole ground of survey dated July 2, 2012. The stock of cigarettes as per records was 14,818 cartons but was wrongly noted by the surveying officer in diary as 14,323 cartons and further ascertained by the Assessing Authority to 14,338 cartons vide the impugned order.

(xviii) No allegation of clandestine removal can be made solely on the ground of assumptions. To establish a case of clandestine clearance, it is necessary for the department to come up with substantial evidence which could satisfy that the activity of clandestine clearance has taken place. Mere reliance

upon assumptions and conjecture is not enough for the establishment of case of clandestine clearance.

(xix) The Commercial Tax Tribunal, Ghaziabad has given detailed findings both factual as well as legal in the impugned order dated January 25, 2023.

(xx) It is finally submitted that no question of law arises in the present revision as the Revisionist itself has acknowledged the anomalies regarding the counting of the cartons and cigarettes thereby proving that physical verification was not properly conducted.

ANALYSIS AND CONCLUSION

5. I have heard the learned counsel appearing on behalf of the parties and perused the material on record.

6. It is settled principle of law that the Tribunal is the primary body responsible for fact-finding, and when this Court exercises its revisionary authority, it does not re-examine facts already adjudicated upon by the Tribunal. The revisional jurisdiction exercised by High Courts is limited, focusing primarily on jurisdictional errors, perversity and procedural irregularities. In a revision petition, the High Court should abstain from undertaking a fresh enquiry into factual matters already adjudicated by the tribunal, unless compelling reasons necessitate an intervention of such a nature by the High Court.

7. Section 58 of the UPVAT Act, 2008 has been extracted below which delineates the revisional jurisdiction of the High Court:

"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."

8. In **Hindustan Petroleum Corporation Limited v. Dilbahar Singh** reported in **(2014) 9 SCC 78**, a Constitution Bench of the Hon'ble Supreme Court of India elucidated the ambit of revisional jurisdiction as follows:

"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] ."

9. In **Vinod Kumar Tiwari v. State of U.P. and others reported in MANU/UP/0455/2015**, this Court outlined the difference between "appeal" and "revision" and marked the boundaries within which revisional jurisdiction is to be exercised. Relevant paragraphs have been extracted below:

"11. In the case of State of Kerala v. K.M. Charia Abdullah & Co., MANU/SC/0265/1964 : (1965) 1 SCR 601 : AIR 1965 SC 1585, the Court expressed the view that when the Legislature confers a right to appeal in one case and a discretionary remedy of revision in another, it may be deemed to have created two jurisdictions different in scope and content.

"Appeal" and "revision" are expressions of common usage in Indian statute and the distinction between "appellate jurisdiction" and revisional jurisdiction is well known though not well defined. Ordinarily, appellate jurisdiction involves a rehearing, as it were, on law as well as fact and is invoked by an aggrieved person. Such jurisdiction may, however, be limited in some way as, for instance has been done in the case of second appeal

under the Code of Civil Procedure, and under some Rent Acts in some States. Ordinarily, again, revisional jurisdiction is analogous to a power of superintendence and may sometimes be exercised even without its being invoked by a party. The extent of revisional jurisdiction is defined by the statute conferring such jurisdiction. The conferment of revisional jurisdiction is generally for the purpose of keeping tribunals subordinate to the revising Tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. These are general observations. The question of the extent of appellate or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute. (Vide Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, MANU/SC/0480/1980 : (1980) 4 SCC 259).

12. According to the dictionary meaning "appeal" is the judicial examination of the decision by a higher Court of the decision of an inferior Court. Simply stated, appeal is a proceeding by which the defeated authority approach the higher authority or Court to have the decision of a lower authority or Court reversed. The appeal is thus a removal of a cause from an inferior Court/authority to a superior Court/authority for the purpose of testing the soundness of the decision of the inferior Court. The appeal is a continuation of a proceeding.

13. The revisional authority, may at any time, on its own motion or on the application of any aggrieved person, call for and examine the records relating to the appeal for the purpose of satisfying itself as to the legality or propriety of such order or to the regularity of such procedure and may pass order in respect thereto as it may deem fit.

14. In order to embark upon an enquiry to find out the ambit and scope of the revisional power under Rule 23, extent, scope, ambit and meaning of the terms "legality or propriety" and "regularity, correctness, legality or propriety" will have to be determined.

15. A Constitution Bench in ***Hindustan Petroleum Corporation Limited v. Dilbahar Singh*** *reported in* ***MANU/SC/0738/2014 : (2014) 9 SCC 78,*** *was called upon to answer a reference regarding the scope and ambit of the revisional powers of the High Court under various Rent Control Acts. The Supreme Court had the occasion to determine the extent, scope and ambit of the meaning of the terms "legality or propriety" and "regularity, correctness, legality or propriety". The Court held as follows:*

"29.1. The ordinary meaning of the word "legality" is lawfulness. It refers to strict adherence to law, prescription, or doctrine; the quality of being legal.

29.2. The term "propriety" means fitness; appropriateness, aptitude; suitability; appropriateness to the circumstances or condition conformity with requirement; rules or principle, Tightness, correctness, justness, accuracy.

29.3. The terms "correctness" and "propriety" ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance, "correctness" is compounded of "legality" and "propriety" and that which is legal and proper is "correct".

29.4. The expression "regularity" with reference to an order ordinarily relates to the procedure being followed in accord

with the principles of natural justice and fair play."

16. The Court while explaining the expressions "appeal" and "revision" employed in a statute/rule, observed that the expression "revision" is meant to convey the idea of a much narrower jurisdiction than that conveyed in that expression "appeal". The use of two expressions "appeal" and "revision" 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 revisional power is not wide enough to make it a second Court/authority of second appeal. Under the garb of revisional jurisdiction, the revisional authority is not conferred a status of second authority of appeal and the authority cannot enlarge the scope of revisional jurisdiction to that extent.

17. In dealing with the finding of fact, the examination of findings of fact by the revisional authority is limited to satisfy itself to the legality and propriety of such order. Whether or not a finding of fact recorded by the subordinate authority is legal or proper, 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 by misreading of evidence or overlooking and ignoring the material evidence altogether or suffers from perversity or any such finding has resulted in gross miscarriage of justice. But the revisional power is not as wide as that of 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 revisional authority by reappreciating evidence because the revisional authority is not in agreement with the finding of fact recorded by the authority below. Revisional authority cannot reverse the finding of fact merely because on reappreciation of the evidence it has a different view on the findings of fact."

10. What becomes apparent from a reading of the aforesaid judgment is that legislature's conferment of the right to "appeal" in one instance and the discretionary remedy of "revision" in another. This implies the creation of two distinction jurisdictions, differing in scope and content. While "appeal" typically entails a comprehensive review encompassing both law and fact initiated by an aggrieved party, "revision" is akin to a power of superintendence, sometimes invoked even without the party's initiative. The extent of revisional jurisdiction is circumscribed by the statue conferring such authority, generally aimed to ensuring conformity to legal principles and procedural propriety. Appeal can be seen as a judicial examination seeking the reversal of a lower authority's decision by the superior court. Meanwhile, revision empowers the superior court to scrutinize the records of an appeal to assess its legality, propriety, or regularity of procedure, and to issue orders accordingly. In essence, the legislative framework underpinning the concepts of "appeal" and "revision" reflects a deliberate intent to establish distinct avenues of recourse, each serving a unique purpose within the judicial landscape. Revisional jurisdiction underscores the imperative for the superior

court to ensure judicious exercise of power by the lower court.

11. Relying on the Constitution Bench judgment in **Hindustan Petroleum Corporation (supra)**, the Hon'ble Supreme Court in **Mohd. Inam v. Sanjay Kumar Singhal and others reported in MANU/SC/0497/2020**, reiterated the scope of revisional powers to be exercised by the High Court:

"....It can thus be seen, that the Constitution Bench has settled the position, that the revisional power does not entitle the High Court to interfere with the finding of the fact recorded by the first appellate court/first appellate authority because on reappreciation of the evidence, its view is different from the court/authority below. The consideration or examination of the evidence is confined to find out as to whether the finding of facts recorded by the court/authority below is according to law and does not suffer from any error of law. It has been held, that a finding of fact recorded by court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, in such a case, it is open to correction because it is not treated as a finding according to law.

25. No doubt, that the observations in the aforesaid cases deal with the revisional powers to be exercised by the High Court under the special statute. This Court has observed, that in examining the legality and the propriety of the order under challenge in revision, what is required to be seen by the High Court, is whether it is in violation of any statutory provision or a binding precedent or suffers from misreading of the evidence or omission to consider relevant clinching evidence or where the inference drawn from the facts proved is such that no reasonable person could arrive at or the like. It has been held, that if such a finding is allowed to stand, it would be gross miscarriage of justice and is open to correction because it is not to be treated as a finding according to law."

12. The principles governing the exercise of revisional jurisdiction under the UPVAT Act, 2008 are imbued with a presumption of finality attached to judgments and orders pronounced by the appellate authorities. High Courts, in their capacity as revisional bodies, are entrusted with the solemn duty of upholding the sanctity of such judgments and orders, and such, should not lightly disturb them unless compelling reasons of paramount significance necessitate such intervention. It is imperative to underscore that revisional jurisdiction is not designed as a mechanism for the indiscriminate prelitigation of cases or the unwarranted reopening of matters that have been adjudicated and settled through due process. High Courts, in the exercise of their revisional jurisdiction are circumscribed by certain fundamental principles that underscore the sanctity of factual findings arrived at by lower courts or tribunals. Ordinarily, High Courts are precluded from intervening in factual findings unless such findings exhibit characteristics of perversity, are predicated on no evidence whatsoever, or evince a palpable and egregious error of law. The cardinal principle underlying revisional jurisdiction mandates that High Courts refrain from engaging in the revaluation of factual evidence or arrogating to

themselves the authority to substitute their own findings for those meticulously arrived at by the lower courts or tribunals.

13. Revisional jurisdiction, as envisaged under the UPVAT Act, 2008, is meticulously tailored to address jurisdictional errors and excesses of law that may have permeated the adjudicative process at lower echelons of the judicial hierarchy. It is incumbent upon High Courts, when exercising revisional jurisdiction, to vigilantly scrutinize the legal landscape and ascertain whether the impugned judgment or order suffers from any infirmities of jurisdictional import or egregious deviations from the normative contours of legal propriety. The legislative intent underpinning the conferment of revisional jurisdiction upon High Courts is imbued with a profound commitment to the principles of judicial economy, finality, and legal certainty. Revisional jurisdiction is not conceived as a vehicle for the protracted re-examination of factual matrices, or the interminable redressal of grievances already exhaustively adjudicated upon by the lower courts or tribunals. Rather, it constitutes an instrumental mechanism for rectifying egregious legal errors or jurisdictional excesses that may have vitiated the adjudicative process, thereby ensuring the equitable and efficacious administrative of justice.

14. In delving into the factual matrix of the instant case, it becomes manifestly clear that no overarching element of perversity or patent illegality is present in the impugned order dated January 25, 2023, which would call upon this court to exercise its revisional powers. The second appellate authority, in its adjudicatory capacity, has considered the factual aspects of the case in detail and in absence of any infirmity, in my view, the impugned order does not warrant any interference.

15. The Revisionist in the instant case, has tried to invite this court to reassess the factual matrix, as adjudicated upon by the second appellate authority. Such an exercise, in absence of any perversity in the factual adjudication by the second appellate authority runs counter to the settled principles governing the exercise of revisional jurisdiction. The second appellate authority, in my opinion, has cogently addressed the nuances of this case and rendered a reasoned decision, devoid of any palpable error of infirmity. In the absence of any glaring defect or legal transgression warranting revision, I am not inclined to interfere with the impugned order dated January 25, 2023, passed by the second appellate authority.

16. The Revisionist in the instant case argued that the shortage of 480 cartons was conclusively established by the surveying authority and as such, the second appellate authority erred in interfering with the order of the assessing authority. However, upon careful consideration, it becomes apparent that the Revisionist's stance amounts to a reiteration of arguments previously advanced before the respective appellate authorities on the merits of the case, a course of action impermissible under the exercise of revisional jurisdiction. The second appellate authority, in its reasoned order, has addressed all contentions advanced by the Revisionist and arrived at a decision based on comprehensive assessment of the evidence advanced. Accordingly, the Revisionist's plea for intervention in the instant matter cannot be countenanced, and the impugned order must be upheld in its entirety.

17. In light of the aforesaid discussion, it is evident that the impugned order dated January 25, 2023, does not warrant any intervention. Accordingly, the instant revision is dismissed. Consequential relief to follow.

18. Urgent photostat-certified copies of this order, if applied for, should be readily made available to the parties upon compliance with requisite formalities.

(2024) 2 ILRA 171
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Commercial Tax Revision No. 206 of 2022

M/s John Oakey And Mohan Limited, Mohannagar, Ghaziabad ...Applicant
Versus
The Commissioner, Commercial Taxes, U.P. Lucknow ...Opposite Party

Counsel for the Revisionist:
Sri Shubham Agrawal

Counsel for the Opposite Party:
C.S.C.

Taxation Law– Entry Tax – U.P. Tax on Entry of Goods into Local Areas Act, 2007 – Notification No. 104 dated 15.01.2009 – Revisionist challenged levy of entry tax on craft paper imported from outside local area for manufacturing coated abrasive sheets – Tribunal upheld levy for assessment year 2011-12 – Held, craft paper not used for writing, printing, or packing, hence not liable for entry tax as per notification – Prior High Court decision for 2010-11 in *Sales/Trade Tax Revision No. 728 of 2014* in favour of assessee, not challenged by department, binding under doctrine of finality – *Bharat Sanchar Nigam Ltd. Vs U.O.I.* followed, affirming consistency in tax matters absent new facts or law – Tribunal's order set aside, revision allowed, refund of deposited amount ordered within six weeks. (Para 3-6)

Revision petition allowed.

List of Cases Cited:

1. Bharat Sanchar Nigam Ltd. Vs U.O.I.; [2006] 3 SCC 1

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

1. Heard Sri Shubham Agarwal, counsel appearing on behalf of the revisionist and learned Additional Chief Standing Counsel for the respondent.

2. The following questions of law have been admitted in this revision petition :-

"(1). Whether the Tribunal was justified in affirming levy of entry tax on craft paper purchased by the applicant from outside the local area, though the craft paper purchased by the applicant has been used in manufacturing of coated abrasive sheet (Regmar paper), and is not meant for writing, printing and packing as provided by notification no.104 dated 15.1.09, upon which only the entry tax is leviable?

(2). Whether the Tribunal was justified in affirming levy of entry tax on craft paper and not considering that identical issue been decided in favour of the applicant by this Hon'ble Court for the assessment year 2010-11, and the assessing authority for the subsequent years 2012-13 to 2017-18 has already accepted that entry tax would not be leviable on the craft paper purchased by the applicant from outside the local area, since it is not used for writing,

printing and packing within the local area, by the applicant?"

3. It is to be noted that for the same assessee on the same issue the Tribunal had held in favour of the assessee for the assessment year 2010-11. The matter was carried to this High Court by way of Sales/Trade Tax Revision No.728 of 2014 and by an order dated December 21, 2015 the issue was decided in favour of the assessee and against the department.

4. This decision of the High Court was accepted by the department and has not been challenged by way of any appeal. Hence, applying the doctrine of finality this issue is no longer *res-integra.*

5. One may ofcourse keep in mind that in taxation matters, the principles of *res-judicata* do not apply squarely for one assessment year to the other. However, keeping in mind the doctrine of finality, unless there is a marked change from one assessment year to the other, the department cannot be allowed to take a different stand. The above principle has been upheld by the Supreme Court in a catena of judgments including **Bharat Sanchar Nigam Ltd. v. Union of India** reported in **[2006] 3 SCC 1**, wherein the Supreme Court has held as follows :-

"The courts will generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why court have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether qushi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision in per-incuriam. However, these are fetters only on a co-ordinate bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter a Bench of superior strength or in some cases to a Bench of superior jurisdiction."

6. In the light of the above, it is clear that as no new facts have emerged in the present case, the questions of law have to be decided in favour of the assessee. Accordingly, the revision petition is allowed. Consequential reliefs to follow.

7. Any amount that has been deposited by the assessee in relation to the above demand shall be returned to the assessee within a period of six weeks from date.

(2024) 2 ILRA 172
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 228 of 2020

M/s Ashoka P.U. Foam (India) Pvt. Ltd. ...Petitioner

Versus

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

Counsel for the Petitioner:
Sri Rahul Agarwal

Counsel for the Opposite Party:
C.S.C.

Taxation Law - U.P. Goods and Services Tax Act, 2017 – Section 129 – U.P. Goods and Services Tax Rules, 2017 – Rule 138 – Penalty for Technical Error – Petitioner challenged penalty order dated 13.09.2018 and appellate order dated 03.10.2019 for non-updated e-way bill due to vehicle breakdown during Bharat Band – Held, mere technical error in e-way bill, without intent to evade tax, does not justify penalty – Mens rea essential for penalty imposition under Section 129 – *M/s Modern Traders Vs St. of U.P.*, *M/s Galaxy Enterprises Vs St. of U.P.*, and *Hindustan Herbal Cosmetics Vs St. of U.P.* followed – Appellate authority's finding of violation despite no tax evasion intent unsustainable – Impugned orders quashed, refund of deposited amount ordered within four weeks. (Para 5-8)

Writ petition allowed.

List of Cases Cited:

1. M/s Modern Traders Vs St. of U.P.; Writ Tax No. 763 of 2018, decided on 09.05.2018

2. M/s Galaxy Enterprises Vs St. of U.P.; Writ Tax No. 1412 of 2022, decided on 06.11.2023

3. Hindustan Herbal Cosmetics Vs St. of U.P.; Writ Tax No. 1400 of 2019, decided on 02.01.2024

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

1. Heard Mr. Rahul Agarwal, counsel appearing behalf of the petitioner and Mr. Ravi Shanker Pandey, Additional Chief Standing Counsel for the respondents.

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the penalty order dated September 13, 2018 passed by the respondent No.4/Assistant Commissioner, State Goods and Services Tax, Agra and the order dated October 3, 2019 passed in appeal by the respondent No.3/Additional Commissioner Grade-2 (Appeal)-III, State Goods and Services Tax, Agra.

3. Upon perusal of the impugned order dated September 13, 2018, it is blatantly clear that in spite of recording the submissions of the petitioner, the appellate authority has not dealt with the same and in fact in the reasoning portion, has specified an incorrect submission of the assessee/petitioner.

4. The case of the petitioner was that the goods have been loaded on a particular vehicle, which broke down and upon such breaking down, the goods were loaded on another vehicle. At that point of time, the goods were seized. The petitioner had explained that the date on which the breakdown had taken place, there was Bharat Band and due to the same, the driver of the vehicle could not update the e-way bill. The factual position is that the goods were accompanied by invoice and e-way bill reflecting earlier vehicle number. Furthermore, it is to be noted that the revised e-way bill was produced before the authorities prior to the passing of the seizure order.

5. The appellate authority, while passing the order in appeal, has made categorical finding that even if the documents are accompanied with the goods but there is a technical error, the same would amount to violation of provisions of Section 129 of the Uttar Pradesh Goods and Services Tax Act, 2017 read with Rule 138 of the Uttar Pradesh Goods and Service Tax Rules, 2017, even though there is no intention to evade tax.

6. In a catena of judgments, this Court has held that presence of mens rea for evasion of tax is a *sine qua non* for

imposition of penalty and mere technical error would not lead to imposition of penalty [see M/s Modern Traders v. State of U.P. and others (Writ Tax No.763 of 2018, decided on 9.5.2018), M/s Galaxy Enterprises v. State of U.P. and others (Writ Tax No.1412 of 2022, decided on 6.11.2023 and Hindustan Herbal Cosmetics v. State of U.P. and others (Writ Tax No.1400 of 2019, decided on 2.1.2024].

7. The imposition of penalties within the realm of tax laws should not be based solely on insignificant technical errors devoid of any financial consequences. The foundational principle guiding this approach is the commitment to maintain a tax system that is characterized by fairness and justice, where the severity of penalties corresponds to the gravity of the offense committed. While penalties serve a pivotal role in ensuring compliance with tax laws, legal frameworks stress the importance of establishing the actual intent to evade taxes as a prerequisite for their just imposition. This emphasis underscores the critical need to differentiate between inadvertent technical errors and purposeful attempts to circumvent tax obligations. Penalties, according to this principle, should be reserved exclusively for cases where concrete evidence points to a deliberate and fraudulent act against the tax system, rather than being applied to situations involving unintentional mistakes. The legal rationale supporting this principle recognizes that the primary purpose of taxation statutes is not to penalize inadvertent errors but rather to address intentional acts of non-compliance. Consequently, the burden of proof falls squarely on tax authorities to demonstrate the genuine intent to evade tax before penalizing taxpayers. This safeguard is indispensable to shield individuals and entities from punitive measures arising from honest mistakes, administrative errors, or technical discrepancies that lack any malicious intent. The fundamental principle requiring an intent to evade tax for the imposition of penalties is crucial for preserving the fairness and integrity of taxation systems. In order to uphold a balanced and equitable approach to tax enforcement, it is imperative to recognize and acknowledge the distinction between technical errors and intentional evasion.

8. In light of the above, I am of the view that the orders impugned in this writ petition are not sustainable in law wherein the authorities have exceeded their jurisdiction and have not acted in accordance with the provisions of the statutes. Accordingly, the order September 13, 2018 and October 3, 2019 are quashed and set-aside. The amount deposited by the petitioner be refunded within a period of four weeks from date. Other consequential reliefs to follow.

9. The writ petition is, accordingly, allowed.

(2024) 2 ILRA 174
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 276 of 2020

M/s Associated Switch Gears and Projects Ltd., Greater Noida ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rishi Raj Kapoor

Counsel for the Respondents:
C.S.C.

Taxation Law– U.P. Goods and Services Tax Act, 2017 – Principles of Natural Justice –

Show Cause Notice – Petitioner challenged penalty order dated 24.07.2018 and appellate order dated 20.08.2019 for imposing penalty on expired e-way bill, not mentioned in show cause notice – Held, authorities cannot impose penalty on grounds beyond those in show cause notice, violating audi alteram partem – *Commissioner of Customs Vs Toyo Engineering Ltd.*, *Commissioner of Central Excise Vs Champdany Industries Ltd.*, *Commissioner of Central Excise Vs Shital International*, *Ramlala Vs St. of U.P.*, and *Jitendra Kumar Vs St. of U.P.* followed, emphasizing that revenue cannot change or supplement grounds post-notice – Impugned orders quashed for transgressing show cause notice scope, denying petitioner opportunity to defend – Refund of deposited amount ordered within four weeks. (Para 4-13)

Writ petition allowed.

List of Cases Cited:

1. Commissioner of Customs Vs Toyo Engineering Ltd.; (2006) 7 SCC 592

2. Commissioner of Central Excise Vs Champdany Industries Ltd.; (2009) 9 SCC 466

3. Commissioner of Central Excise Vs Shital International; (2011) 1 SCC 109

4. Commissioner of Central Excise Vs Ballarpur Industries Ltd.; (2007) 8 SCC 89

5. Ramlala Vs St. of U.P.; 2023 SCC OnLine All 2479

6. The Board of High School and Intermediate Education, U.P. Vs Kumari Chitra Srivastava; (1970) 1 SCC 121

7. Jitendra Kumar Vs St. of U.P.; 2023 SCC OnLine All 2837

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

(Judgment dictated in Open Court)

1. Heard counsel appearing on behalf of the parties.

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the order dated August 20, 2019, passed in appeal by the Respondent No. 2/Additional Commissioner Grade-II (Appeal), Commercial/State Tax, Gautam Budh Nagar and the penalty order dated July 24, 2018, passed by the Respondent No. 3/Assistant Commissioner, State Tax/Commercial Tax, Gautam Budh Nagar.

3. Upon examination of the order dated August 20, 2019, passed in appeal, it appears that the plea that had been taken in the show cause notice at the time of detention, that is, that the vehicle was travelling to a destination not mentioned in the invoice, was accepted in appeal by the authorities. However, the appellate authority has imposed penalty on a different ground, that is, that the e-Way Bill had expired though the same was accompanied with goods.

4. It is pertinent to mention here that the Supreme Court on numerous occasions has upheld that the authorities cannot transgress the boundaries of the show cause notice. In ***Commissioner of Customs, Mumbai -v- Toyo Engineering Ltd.,*** reported in ***(2006) 7 SCC 592,*** the Supreme Court emphasized upon the necessity of specifying the grounds for taking action against an individual in the show cause notice. The relevant paragraph of the judgment is delineated below:

"16. Learned counsel for the Revenue tried to raise some of the submissions which were not allowed to be raised by the Tribunal before us, as well. We agree with the Tribunal that the Revenue could not be allowed to raise these submissions for the first time in the second

appeal before the Tribunal. Neither the adjudicating authority nor the Appellate Authority had denied the facility of the project import to the respondent on any of these grounds. These grounds did not find mention in the showcause notice as well. The Department cannot travel beyond the show-cause notice. Even in the grounds of appeals these points have not been taken."

5. In ***Commissioner of Central Excise, Bhubaneshwar -v- Champdany Industries Ltd.,*** reported in, ***(2009) 9 SCC 466***, the Supreme Court held as follows:

"38. Apart from that, the point on Rule 3 which has been argued by the learned counsel for the Revenue was not part of its case in the show-cause notice. It is well settled that unless the foundation of the case is made out in the show-cause notice, the Revenue cannot in Court argue a case not made out in its showcause notice. (See Commr. of Customs v. Toyo Engg. India Ltd. [(2006) 7 SCC 592]) Similar view was expressed by this Court in CCE v. Ballarpur Industries Ltd. [(2007) 8 SCC 89] In para 27 of the said Report, learned Judges made it clear that if there is no invocation of the Rules concerned in the show-cause notice, it would not be open to the Commissioner to invoke the said Rules."

6. Finally, in **Commissioner of Central Excise, Chandigarh -v- Shital International,** reported in **(2011) 1 SCC 109**, the Supreme Court, stated that unless the foundation of the case is laid in show-cause notice, the Revenue cannot be permitted to build up a new case against the assessee. The relevant paragraph of the judgment is delineated below:

"19. As regards the process of electrifying polish, now pressed into service by the Revenue, it is trite law that unless the foundation of the case is laid in the show-cause notice, the Revenue cannot be permitted to build up a new case against the assessee. (See Commr. of Customs v. Toyo Engg. India Ltd. [(2006) 7 SCC 592] , CCE v. Ballarpur Industries Ltd. [(2007) 8 SCC 89] and CCE v. Champdany Industries Ltd. [(2009) 9 SCC 466]) Admittedly, in the instant case, no such objection was raised by the adjudicating authority in the show-cause notice dated 22-6-2001 relating to Assessment Years 1988-1989 to 2000-2001. However, in the show-cause notice dated 12-12-2000, the process of electrifying polish finds a brief mention. Therefore, in the light of the settled legal position, the plea of the learned counsel for the Revenue in that behalf cannot be entertained as the Revenue cannot be allowed to raise a fresh plea, which has not been raised in the showcause notice nor can it be allowed to take contradictory stands in relation to the same assessee."

7. One crucial limitation placed upon the exercise of authority is the concept of a "show cause notice". This administrative instrument serves as a vital checkpoint, delineating the boundaries within which any authority can operate. At its core, a show cause notice represents the initial step in an administrative or legal process, wherein an individual or entity is formally apprised of allegations or discrepancies attributed to them. This notice serves as a mechanism to afford the recipient an opportunity to present their side of the story, provide clarifications, or rectify any perceived errors before any punitive action is taken. By issuing a show cause notice, an authority acknowledges the principle of audi alteram partem, or "hear the other

side", ensuring fairness and due process in its proceedings.

8. The significance of adhering to the confines of a show cause notice lies in upholding the rule of law and preventing arbitrary exercises of power. Any action taken by an authority beyond the scope defined in the notice risks transgressing the boundaries of legality and procedural fairness. Such overreach not only undermines the legitimacy of the authority but also compromises the rights of the individuals or entities involved, potentially leading to legal challenges and erosion of public trust. Moreover, the issuance of a show cause notice imposes a duty on the part of the authority to meticulously outline the specific allegations or concerns prompting its issuance. This requirement fosters transparency and accountability, as the recipient is entitled to a clear understanding of the charges against it, enabling it to formulate an informed response. Any attempt by the authority to expand the scope of inquiry or introduce new allegations beyond those articulated in the notice would violate this principle of specificity, depriving the recipient of a fair opportunity to address the accusations leveled against it.

9. The issuance of a show cause notice represents a pivotal juncture in administrative proceedings, demarcating the boundaries within which any authority can exercise its powers. By adhering to the confines of the notice, authorities uphold principles of fairness, accountability, procedural regularity, and legal certainty essential for the legitimacy and effectiveness of governance systems. Any attempt to transcend these limits not only violates the rights of the individuals or entities involved but also undermines the rule of law and public trust in the institutions tasked with upholding it. Thus, this Court holds that, adhering to the show cause notice is not merely a procedural formality, but a mandatory requirement, beyond the scope of which, no action can be taken. Adherence to the show cause notice is a fundamental safeguard against arbitrary exercises of power, ensuring that authority remains tethered to the principles of justice and the rule of law.

10. In ***Ramlala -v- State of U.P and Ors.***, reported in, ***2023 SCC OnLine All 2479,*** this Court, while placing reliance on ***The Board of High School and Intermediate Education, U.P. -v- Kumari Chitra Srivastava,*** reported in, ***(1970) 1 SCC 121***, held that the reason to not allow the authorities to go beyond the show cause notice is that a person must be given a chance to put up his case with regard to the said show cause notice. Relevant paragraphs are extracted below:

"9. The principle that emerges from the above judgments is patently clear that a show cause notice is required to provide details of the nature of the offence and the grounds on which the show cause notice has been issued. Furthermore, the order that is subsequently passed, based on the show cause notice, cannot go beyond the said show cause notice and cannot in any manner penalise the noticee on grounds that were not stated in the show cause notice.

10. The rationale for not allowing the respondents from going beyond the realm of the show cause notice is that the petitioner has to be given a chance to put up his case with regard to the said show cause notice. In the event, a particular case is made out in the show cause notice and the order passed subsequently is beyond the

said show cause notice, the same would amount to violation of the principles of natural justice, as the petitioner would not have been aware of the new grounds or new factual elements and could never have placed his case for the above before the authority concerned. It is in this background that the Supreme Court in umpteen judgments has laid down the law that an order passed by an authority cannot go beyond the scope of the show cause notice. In fact, the Supreme Court in the case of The Board of High School and Intermediate Education, U.P. v. Kumari Chitra Srivastava, (1970) 1 SCC 121 has categorically stated that the principles of audi alteram partem are required to be followed even if the same is burdensome in nature. Justice S.M. Sikri in his inimitable style stated as follows:

"Principles of natural justice are to some minds burdensome but this price - a small price indeed - has to be paid if we desire a society governed by the rule of law."

11. In ***Jitendra Kumar -v- State of U.P. and Anr., reported in, 2023 SCC OnLine All 2837***, this Court, while dealing with a similar factual matrix, stated that as has been settled by various Supreme Court judgments, once the Revenue had taken a particular stand, the same cannot be completely changed and/or supplemented by a different reason or ground. Relevant paragraphs are dellineated below:

"5. It is trite law, settled by a catena of Supreme Court judgments, that the Revenue cannot beat around the bush and keep changing the goal post at each stage. Once the Revenue had taken a particular stand, the same cannot be completely changed and/or supplemented by a different reason or ground.

6. In the present case, it is clear that the detention was made on the ground that the goods were not accompanied by valid documents. However, when the show-cause notice was issued, there is no whisper of any invalid document whatsoever. In fact, the stand was completely changed by the Revenue and this volte face cannot be countenanced by this Court. The detention of goods causes serious prejudice to an assessee and the same can only be done on the basis of specific, valid and reasonable grounds. In the present case, it is quite obvious that at the time of detention, the ground that was stated by the Revenue was incorrect. More so, there was no reason for the Revenue to have detained the goods and the consequential actions that followed, were obviously vitiated."

12. In the present case, it is evident that the authorities have travelled beyond reasons provided in the show cause notice and imposed penalty on the ground that was never provided to the petitioner in the show cause notice. The petitioner never had any opportunity to defend itself on the said ground, and therefore, the show cause notice is directly in teeth of the principles of natural justice, namely, the principle of audi alteram partem.

13. Therefore, the impugned orders in the instant case, cannot be allowed to stand. Accordingly, a writ of certiorari is issued against the impugned orders dated August 20, 2019 and July 24, 2018. These orders are hereby quashed and set aside.

14. This Court also directs the amount deposited by the petitioner to be refunded within a period of 4 weeks from the date of this order. Other consequential reliefs to follow.

15. This writ petition is, accordingly, allowed.

(2024) 2 ILRA 179
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Commercial Tax Revision No. 302 of 2022

M/s Royal Sanitations, Mathura ...Revisionist
Versus
Commissioner of Commercial Tax, UP, Lucknow ...Respondent

Counsel for the Revisionist:
Sri Suyash Agarwal

Counsel for the Respondent:
C.S.C.

Limitation – U.P. Value Added Tax Rules, 2008 – Rule 39 – Condonation of Delay – Revisionist challenged Tribunal's order dated 21.07.2022 condoning 1365-day delay in filing revenue's appeal – Held, Tribunal justified in condoning delay based on sufficient cause, including staff shortages, employees' B.L.O. duties during 2019 and 2022 elections, and COVID-19 limitation exclusion from 15.03.2020 to 22.02.2022 as per Supreme Court directive – *N. Balakrishnan Vs M. Krishnamurthy* and *Collector, Land Acquisition Vs Mst. Katiji* followed, emphasizing acceptability of explanation over length of delay – *Chief Post Master General Vs Living Media India Ltd.* distinguished – Rule 39 mandates assessee to maintain records beyond eight years if proceedings pending, supporting ongoing assessment – Tribunal directed to decide appeal within four months – Revision dismissed. (Para 5-8)

Revision petition disposed of.

List of Cases Cited:

1. Chief Post Master General & Ors. Vs Living Media India Ltd. & anr.; (2012) 3 SCC 563

2. St. of M.P. Vs Bhure Lal; (not fully cited in judgment)

3. M/s Anil Enterprises Vs Commissioner of Commercial Tax, U.P. Lucknow; Sales/Trade Tax Revision No. 124 of 2020, decided on 20.07.2022

4. N. Balakrishnan Vs M. Krishnamurthy; (1998) 7 SCC 123

5. Collector, Land Acquisition, Anantnag & anr.Vs Mst. Katiji & ors.; (1987) 2 SCC 107

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

1. Heard Sri Suyash Agarwal, learned counsel for the revisionist and Sri Bipin Kumar Pandey, learned Additional Chief Standing Counsel for the State.

2. This revision petition has been filed against an order dated July 21, 2022 passed by the Commercial Tax Tribunal (hereinafter referred to as "the Tribunal) wherein delay of 1365 days in filing the appeal has been condoned.

3. The question of law, that arises, is as follows:

"A. Whether the Tribunal was legally justified in condoning the delay of 1365 days in filing the appeal of revenue before the Tribunal contrary to the decision of Supreme court in the matter of Chief Post Master General & Ors Vs. Living Media India Ltd. and Anr and State of M.P. Vs. Bhure Lal?"

4. Sri Suyash Agarwal, learned counsel appearing on behalf of the revisionist has relied upon a coordinate Bench judgment of this Court in **M/s Anil**

Enterprises v. Commissioner of Commercial Tax, U.P. Lucknow (Sales/Trade Tax Revision No.124 of 2020, decided on July 20, 2022) to buttress his argument that such inordinate delay cannot be condoned on wholly vague and generic grounds. The coordinate Bench upon examining the facts in that particular case had held that delay of 530 days should not have been allowed by the Tribunal. The coordinate Bench has relied on Supreme Court's judgment in **Postmaster General & Ors. v. Living Media India Limited and Another reported in (2012) 3 SCC 563** to support its judgment.

5. Per contra, Sri B.K. Pandey, learned Additional Chief Standing Counsel appearing on behalf of the State submits that in the present case, the Tribunal, while specifically dealing with the reasons provided for the inordinate delay and all the judgments of the Supreme Court, has come to a finding that in the present case, reasons provided for the said delay were justified. He relied upon a judgment of the Supreme Court in **N. Balakrishnan v. M. Krishnamurthy** reported in **(1998) 7 SCC 123**. The relevant paragraph of the said judgment reads as under:

"9.It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court."

6. I have perused the judgments reproduced in the impugned order and find that the impugned order has taken into account the facts of the particular case and examined the sufficiency of cause in relation to the delay. The relevant paragraphs of the impugned orders are delineated below:

"12. In the present case, there is a delay of only 1365 days. The reasons of delay are that there was shortage of employees, employees were busy in B.L.O. duties, no senior assistant, who looks after the proceedings of filing appeal was appointed in the office and there was spread of COVID-19.

13. So far as the ground of spread of COVID-19 is concerned, in this regard, it is notable that Hon'ble Apex Court considering spread of COVID-19 in the country, has directed to exclude the period of limitation for filing the appeals from 15.03.2020 to 22.02.2022. hence, the period of delay from 15.03.2020 to 17.01.2022 cannot be treated to be delayed period for filing this appeal. The reason of the employees having been busy in B.L.O. duties is concerned it is a fact of judicial notice that for B.L.O duties, State employees are deputed on various election

duties, they go for training at several rounds, lists are prepared of the employees for election duties and other ancillary works are done by the employees of the State, hence, the ground of delay taken-up by the revenue appears to have a close connection with the Parliamentary Elections of 2019 and U.P. State Elections, 2022.

14. Learned counsel for the respondent assessee referring the Rule 39 of the U.P. VAT Rules, has argued that as per this rule, the account books and documents maintained by a dealer or other person shall be for a period of eight years after expiration of the assessment year to which such books, accounts and documents: It is notable that in this Rule it has also been provided that where any proceedings are pending against a dealer, he shall maintain books, accounts beyond period of eight years till such proceedings are finalized. In this case, it is undisputed that account books of the assessee have been rejected by the assessing authority and assessee had filed first appeal and the learned first appellate authority has remanded the matter to to the assessing authority for passing assessment order afresh, hence, the assessment proceedings for the relevant year is yet not been finalized and matter is still in dispute. Hence, as per provisions given in Rule 39, the assessee has to maintain account books and other relevant documents for the relevant year till the proceedings finalized. Hence, on this point, the objection of the assessee is not tenable in the eyes of law."

7. The Tribunal has also distinguished the judgment of the Supreme Court rendered in **Chief Post Master General and Others' case (supra)** and relied upon the judgment of the Supreme Court in **Collector, Land Acquisition, Anantnag and Another v. Mst. Katiji and Others** reported in **(1987) 2 SCC 107** to support its decision.

8. In light of the above, I am of the view that the delay is explained by the authorities and the appeal is required to be heard by the Tribunal, as so much time has already elapsed. I am also of the view that the hearing of the appeal should be expedited. Accordingly, the Tribunal is directed to hear and decide the appeal within four months from date.

9. With the aforesaid observations, the revision petition is disposed of.

(2024) 2 ILRA 181
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 739 of 2020

M/s Hawkins Cookers Limited, Juhi Kanpur ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shubham Agrawal

Counsel for the Respondents:
C.S.C.

Taxation Law – U.P. Goods and Services Tax Act, 2017 – Section 129 - Rule 138 – Penalty for Incorrect E-Way Bill – Petitioner challenged penalty order dated 14.02.2020 and appellate order dated 13.10.2020 for incorrect place of supply in four out of eight E-Way bills – Held, goods intercepted on 31.01.2020 were accompanied by correct invoices and bilties reflecting destination (Satharia, Jaunpur), but

four E-Way bills erroneously mentioned petitioner's registered office (Kanpur) due to auto-population of GSTIN – No intention to evade tax, as correct address in invoices, bilties, and four E-Way bills, and incorrect address was petitioner's registered office – Technical/clerical error, not a wholesale disregard of rules – *M/s Hindustan Herbal Cosmetics Vs St. of U.P.* followed, distinguishing *Pushpa Devi Jain*, *Carpenters Classics India Pvt. Ltd.*, and *Indus Towers Ltd.* due to differing factual matrices (expired/absent E-Way bills or no declaration) – Penalty under Section 129 requires intent to evade tax, which department failed to establish – Impugned orders quashed, as penalty lacked legal basis. (Para 8-13)

Writ petition allowed.

List of Cases Cited:

1. M/s Hindustan Herbal Cosmetics Vs St. of U.P.; Writ Tax No. 1400 of 2019, decided on 02.01.2024

2. Pushpa Devi Jain Vs Assistant Commissioner of Revenue; 2023-T.L.D.-89

3. Carpenters Classics India Pvt. Ltd. Vs Assistant St. Tax Officer; (2019) U.P.T.C. [Vol. 101]-14

4. The Assistant St. Tax Officer Ernakulam Vs M/s Indus Towers Ltd., Pallarivattom; (2018) U.P.T.C. [Vol. 99]-881

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

1. Heard Sri Shubham Agrawal, counsel appearing on behalf of the petitioner and Sri Ravi Shanker Pandey, learned Additional Chief Standing Counsel appearing on behalf of the respondents.

2. This is an application under Article 226 of the Constitution of India, wherein the writ petitioner seeks a writ of certiorari for quashing the penalty order dated February 14, 2020 and the order passed in appeal dated October 13, 2020.

Facts of the case

3. Petitioner is engaged in the business of manufacturing and selling of pressure cookers under the brand name of Hawkins. The principal place of business of the petitioner is situated at 83/6, ?.?. Market, Juhi, Kanpur, The factory of the petitioner is situated at Plot No. A- 1, A-2, A-14, A-15, SIDA Industrial Estate, Satharia, Jaunpur. Petitioner purchases/stock transfers various parts/raw materials for manufacturing of pressure cookers from outside the state of UP, for being delivered in its factory (manufacturing unit) situated at Satharia, Jaunpur. The petitioner had purchased the raw materials for manufacturing of pressure cookers in the month of January 2020, from various suppliers situated in Maharashtra. Petitioner, thereafter, stock transferred certain raw materials from Maharashtra, for being delivered to its factory. In four out of the 8 E-Way bills, the place of supply has been correctly mentioned to be the factory of the petitioner situated at Satharia, Jaunpur. In the other 4 E-Way bills, the place of supply has been wrongly mentioned to be the principal place of business of the petitioner situated at Kanpur, where no manufacturing is done. The reason for the aforesaid mistake having been done by some of the parties is that on filling the GSTIN (registration number) of the petitioner while generating the E-Way bill, the principal place of business is automatically reflected in the place of supply(which is auto populated). It is the duty of the person generating the E-Way bill to change the place of supply if the same is different from the principle place of business.

4. The goods were intercepted on January 31, 2020 and the memo of

detention was issued on February 1, 2020 and subsequently the goods were seized on February 3, 2020 by issuing MOV-06.

Contentions of the Petitioner

5. Mr. Shubham Agarwal, Advocate has submitted that due to an inadvertent error/overlooking by the accountants of the suppliers who generate the E-Way bill, they failed to change the place of supply which is automatically displayed. Thus the E-Way bills have been generated containing the wrong place of supply of goods at Kanpur instead of Satharia, Jaunpur. The delivery of raw materials cannot be taken by the petitioner at Kanpur, since the raw materials are required for manufacturing of pressure cookers which is done only at its factory in Satharia, Jaunpur, and not at the principal place of business. Thus the mentioning of wrong place of supply in the E-Way bill was merely a technical breach.

6. He further submitted that the addresses that were wrongly written in the four e-way bills were addresses of the registered office of the petitioner. He submitted that the same was a technical error only as there was no intention of the petitioner to hide the destination in the e-way bills. Infact, he submitted that all the invoices and the bilties that were accompanying the goods bear the correct address of destination that is Jaunpur. The mistake committed in the four e-way bills with regard to mentioning of the registered office of the petitioner can only be seen as a clerical and typographical error and nothing more. He relied on a judgement of this Court in **M/s Hindustan Herbal Cosmetics Vs. State of U.P. and 2 others** in Writ Tax No.1400 of 2019 dated January 2, 2024, where this Court on a similar factual matrix had quashed the penalty order and the order passed in appeal.

7. Per contra, Mr. Pandey, submitted that the error/mistake in this case was grave in nature and raised a presumption of evasion of tax. He relied on the judgement in the cases of **Pushpa Devi Jain Vs. Assistant Commissioner of Revenue** reported in **2023-T.L.D.-89** and **Carpenters Clasics India Pvt. Ltd. Vs. Assistant State Tax Officer & 2 Others** reported in **(2019 U.P.T.C. [Vol. 101] - 14) and in The Assistant State Tax Officer Ernakulam and Another Vs. M/s Indus Towers Limited, Pallarivatton reported in (2018 U.P.T.C. [Vol.99] - 881)** to buttress his argument that non-compliance of the provisions of the Uttar Pradesh Goods and Service Tax, Act, 2017 (hereinafter referred to as the 'Act') and Rule 138 of the Act, would result in imposition of penalty. He further supported the impugned orders.

Analysis and Conclusion

8. Upon a perusal of the detention order, the order imposing penalty and the order passed in appeal, a common thread appears to run through the same, i.e. there was non-compliance of the Rules by putting the wrong address in four of the e-way bills. The common thread that also runs through these orders is that the invoices and the bilties in all the eight invoices and in four of the e-way bills was correct in all respect including the address. Undisputedly, the address in four of the e-way bills was incorrect. However, what is to be seen is that this particular address was not an anonymous address, but was the address of the registered office of the petitioner. The explanation provided by the petitioner with regard to a mistake on the

part of the supplier to have populated the incorrect address is not far fetched, especially since the correct addresses were mentioned in all the eight invoices and the eight bilties.

9. From the above factual matrix, it does not appear that there was any intention whatsoever to evade tax.

10. The judgement in **Pushpa Devi Jain (Supra)** is in relation to an expired e-way bill and the factual matrix therein is distinguishable from the present case. The Kerla High Court's judgement in **Carpenters Clasics India Pvt. Ltd. (Supra)** is also on a completely different footing as there was no e-way bill provided at all. Accordingly, this judgement is of no help to the department. The judgement in **Indus Towers Limited, Palarivatton (Supra)** deals with the factual matrix where no declaration was uploaded on the site of the department, and accordingly, reasonable presumption of intention to evade tax was raised in that case. Therefore, this case is also distinguishable on the facts itself.

11. As held by this Court in umpteen cases, where penalty is being imposed under Section 129 of the Act an intention to evade tax should be present. Now, such an intention to evade tax may be presumed by the department in cases where there is wholesole disregard of the Rules. For example, in the event the goods are not accompanied by the invoice or the e-way bill is completely absent, a presumption may be raised that there is an intention to evade tax. Such a presumption of evasion of tax then becomes rebuttable by the materials to be provided by the owner/transporter of the goods. However, when most of the documents are accompanied with the goods and there are some typographical and/or clerical error, a presumption to evade tax does not arise. It is then upon the department to indicate that there was an intention to evade tax.

12. In the present case, it is palpably clear that the goods were accompanied with the relevant invoices, bilty documents and the e-way bills. It is to be noted that the invoices and bilty documents also contain the correct address of the destination and only four out of eight of the e-way bills had the incorrect address. Even this incorrect address was the registered office of the petitioner. In such a case, no presumption to evade tax arises at all. The mere technical error committed by the petitioner cannot result in imposition of such harsh penalty upon the petitioner. As quoted in the **Arthashastra by Chanakya** that *'Governments should collect taxes like a honeybee collects honey from a flower without disturbing its petals.'*

13. In the light of the above, I am of the view that the penalty imposed in this particular case is without any basis in law, and accordingly, impugned penalty order dated February 14, 2020 and the order passed in appeal dated October 13, 2020 are quashed and set aside.

14. The writ petition is allowed.

(2024) 2 ILRA 184
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 975 of 2023

M/s Yadav Steels, Pala Road, Aligarh U.P. ...Petitioner

Versus

Addl. Commissioner (Grade-2) State, Aligarh U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Suresh Chandra Pandey, Sri Saurabh Pandey

Counsel for the Respondent:

C.S.C.

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

Taxation Law – U.P. Goods and Services Tax Act, 2017 – Section 107 – Limitation Act, 1963 – Section 5 – Delay in Filing Appeal – Petitioner challenged appellate order dated 23.01.2023 dismissing appeal as time-barred (filed 66 days beyond limitation period) – Held, Section 107 of the Act, a self-contained code, prescribes a three-month limitation period for filing appeals, extendable by one month under Section 107(4) upon sufficient cause – No provision allows condonation beyond this four-month period, impliedly excluding Section 5 of Limitation Act – Supreme Court rulings in *Singh Enterprises* and *Hongo India* affirm exclusion of Section 5 in special statutes like GST Act – *M/s Abhishek Trading Corporation* and *Garg Enterprises* followed, reinforcing that GST Act's strict limitation ensures timely dispute resolution and fiscal stability – Calcutta High Court's *S.K. Chakraborty & Sons* judgment, suggesting Section 5 applicability, disregarded as contrary to Supreme Court precedents – Appeal filed beyond condonable period correctly dismissed – Writ petition meritless. (Para 4-12)

Writ petition dismissed.

List of Cases Cited:

1. Singh Enterprises Vs Commissioner of Central Excise, Jamshedpur; (2008) 3 SCC 70

2. Commissioner of Customs and Central Excise Vs Hongo India Pvt. Ltd.; (2009) 5 SCC 791

3. S.K. Chakraborty & Sons Vs U.O.I.; 2024-T.L.D.-22-CAL

4. M/s Abhishek Trading Corporation Vs Commissioner (Appeals); Writ Tax No. 1394 of 2023, decided on 19.01.2024 Neutral Citation No. 2024:AHC:9563)

5. Penuel Nexus Pvt. Ltd. Vs The Additional Commissioner Headquarters (Appeals); MANU/KE/3276/2023

6. Garg Enterprises Vs St. of U.P.; MANU/UP/0197/2024

1. Heard learned counsel for the parties.

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the order dated January 23, 2023 passed under Section 107 of the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as 'the Act'). By virtue of this order, the appeal filed by the petitioner was dismissed on the ground of limitation, as the same was filed approximately 66 days beyond the date of limitation.

3. Counsel on behalf of the petitioner has fairly submitted that the appeal under Section 107 of the Act was filed beyond time. However, counsel on behalf of the petitioner relies on a Division Bench judgment of Calcutta High Court in the case of **S.K. Chakraborty & sons vs. Union of India and others** reported in **2024-T.L.D.-22-CAL** to argue that Section 5 of the Indian Limitation Act, 1963 (hereinafter referred to as 'the Limitation Act') would be attracted as Section 107 of the Act does not expressly or impliedly exclude the attraction of Section 5 of the Limitation Act.

4. This Court in **M/s Abhishek Trading Corporation vs. Commissioner (Appeals) and another** [(Writ Tax No.1394 of 2023, decided on 19.1.2024) Neutral Citation No. 2024: AHC: 9563], after relying on the Supreme Court judgments in **Singh Enterprises v. Commissioner of Central Excise, Jamshedpur and others** reported in **(2008) 3 SCC 70** and **Commissioner of Customs and Central Excise v. Hongo India Private Limited and another**

reported in (2009) 5 SCC 791 has categorically held as follows:-

"7. The Central Goods and Services Act is a special statute and a self-contained code by itself. Section 107 of the Act has an inbuilt mechanism and has impliedly excluded the application of the Limitation Act. It is trite law that Section 5 of the Limitation Act, 1963 will apply only if it is extended to the special statute. Section 107 of the Act specifically provides for the limitation and in the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. Accordingly, one cannot apply Section 5 of the Limitation Act, 1963 to the aforesaid provision."

5. In **Penuel Nexus Pvt. Ltd. -v- The Additional Commissioner Headquarters (Appeals) and Ors.,** reported in **MANU/KE/3276/2023**, the Kerala High Court held that the GST Act is a special statue and a self-contained code by itself and hence, Limitation Act will not apply. Relevant paragraph has been extracted below:

"10. The Central Goods and Services Tax Act is a special statute and a self-contained code by itself. Section 107 has an inbuilt mechanism and has impliedly excluded the application of the Limitation Act. It is trite, that the Limitation Act will apply only if it is extended to the special statute. It is also rudimentary that the provisions of a fiscal statute have to be strictly construed and interpreted."

6. The aforementioned principle was reiterated by this Court in ***Garg Enterprises -v- State of U.P. and Ors,*** reported in ***MANU/UP/0197/2024***. Relevant paragraph has been reproduced below:

"7. The Central Goods and Services Act is a special statute and a self-contained code by itself. Section 107 of the Act has an inbuilt mechanism and has impliedly excluded the application of the Limitation Act. It is trite law that Section 5 of the Limitation Act, 1963 will apply only if it is extended to the special statute. Section 107 of the Act specifically provides for the limitation and in the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. Accordingly, one cannot apply Section 5 of the Limitation Act, 1963 to the aforesaid provision."

7. Upon a perusal of Section 107 of the Act, it is clear that the appellate authority can only allow extension of a period of one month as provided in sub section (4) of Section 107 of the Act. In the present case, the appeal was filed approximately 66 days subsequent to the expiry of one month that was condonable under Section 107(4) of the Act. To make it more clear, the period within which the appeal could have been filed was three months plus a period of one month. However, in the present case the appeal was filed beyond the period of four months, and therefore, the appellate authority could not have condoned the delay even if sufficient cause was made out.

8. The significance of limitations in taxing statues, such as the GST Act, cannot be overstated. These statutes govern the collection of taxes, which are vital for the functioning of a state or country. Limitation provisions ensure timely resolution of

disputes and promote efficiency and fairness in tax administration. Tax laws are complex and often subject to interpretation, leading to disputes between taxpayers and tax authorities. Limitation provides a framework within which such disputes must be resolved, thereby preventing undue delays and ensuring that tax liabilities are determined within a reasonable time frame. This is crucial for both taxpayers and tax authorities as it promotes legal certainty and facilitates effective tax compliance.

9. Section 107 of the GST Act prescribes a specific limitation period within which appeals against certain decisions must be filed. This limitation period is integral to the functioning of the appellate mechanism under the GST Act and reflects the legislative intent to expedite the resolution of tax disputes. By imposing a time limit on the filling of appeals, Section 107 aims to prevent undue delayed in the adjudication process and promote the efficient administration of the GST regime. On the other hand, Section 5 of the Limitation Act provides for the extension of prescribed periods in certain exceptional circumstances, such as when sufficient cause is shown for the delay.

10. In analyzing the conflicting interpretations concerning the exclusion of Section 5 of the Limitation Act as far as Section 107 of the GST Act is concerned, it is essential to consider the rationale behind the exclusion of the Limitation Act in certain special statues, particularly in the context of taxation. Tax laws are often characterized by strict procedural requirements and time-bound deadlines, reflecting the need for expeditious resolution of tax disputes to ensure revenue certainty and fiscal stability.

11. The judgment rendered by the Calcutta High Court in the matter of **S.K. Chakraborty & Sons (supra)** fails to adequately consider the authoritative pronouncements of the Supreme Court in the cases of ***Singh Enterprises (supra)*** *and* ***Hongo India (supra)*** and hence the said judgment is of no precedential value, and accordingly, the view expressed therein is not accepted by this Court.

12. Taxing statutes like the GST Act embody a comprehensive framework with specific limitation provisions tailored to expedite the resolution of tax-related matters. Section 107 of the GST Act, operates as a complete code in itself, explicitly delineating limitation periods for filing appeals and implicitly excluding the application of general limitation provisions such as Section 5 of the Limitation Act.

13. Accordingly, the present writ petition is without any merit and is dismissed.

(2024) 2 ILRA 187
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1272 of 2023

M/s Bhole Baba Construction ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pranjal Shukla

Counsel for the Respondent:
C.S.C.

Taxation Law – U.P. Goods and Services Tax Act, 2017 – Section 107 – Cancellation of Registration – Petitioner challenged order dated 18.01.2023 cancelling GST registration and appellate order dated 12.10.2023 dismissing appeal as time-barred – Held, original order lacked application of mind, containing contradictory St.ments acknowledging petitioner's reply to show-cause notice (09.01.2023) while stating no reply was submitted – Non-reasoned order violates Article 14, as reasons are essential in quasi-judicial proceedings, per *Whirlpool Corporation Vs Registrar of Trademarks* and *Om Prakash Mishra Vs St. of U.P. – Surendra Bahadur Singh Vs St. of U.P.* followed, holding that non-reasoned cancellation order, impacting Article 19 business rights, can be challenged despite time-barred appeal, as doctrine of merger inapplicable when appeal not decided on merits – *M/s Namo Narayan Singh Vs St. of U.P.* reinforced necessity of reasoned orders – Impugned orders quashed, petitioner directed to file reply to show-cause notice within three weeks, adjudicating authority to pass fresh order after hearing. (Para 4-7)

Writ petition allowed.

List of Cases Cited:

1. Surendra Bahadur Singh Vs St. of U.P.; Writ Tax No. 172 of 2023, decided on 23.08.2023

2. Whirlpool Corporation Vs Registrar of Trademarks, Mumbai; (1998) 8 SCC 1

3. Om Prakash Mishra Vs St. of U.P.; Writ Tax No. 100 of 2022, decided on 06.09.2022

4. M/s Namo Narayan Singh Vs St. of U.P.; Writ Tax No. 1476 of 2022, decided on 10.10.2023

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

1. Heard learned counsel for the petitioner and Sri Ravi Shanker Pandey, learned Additional Chief Standing Counsel for the State.

2. This is a writ petition under Article 226 of the Constitution of India, wherein the petitioner challenges the order in original for cancellation of registration dated January 18, 2023 and the order dated October 12, 2023 passed in appeal under Section 107 of the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as "the Act").

3. Learned counsel appearing on behalf of the petitioner submitted that the order for cancellation of registration has been passed without any application of mind whatsoever and the same is clear from the very first two lines of the order dated January 18, 2023. The relevant part of the said order is quoted below:

"This has reference to your reply dated 09/01/2023 in response to the notice to show cause dated 09/12/2022 Whereas no reply to notice to show cause has been submitted"

4. Learned counsel appearing on behalf of the petitioner submits that in the first line, the order states that a reply was filed by the petitioner on January 9, 2023 whereas the second line contradicts the above statement saying that no reply was filed by the petitioner. He relies upon a Division Bench judgment of this Court in Writ Tax No.172 of 2023 titled as **Surendra Bahadur Singh v. State of U.P. and others** decided on August 23, 2023, wherein the Division Bench has held as follows:

"6. Learned counsel for the petitioner argues that although no fault can be found with the appellate order dismissing the appeal as Appellate Authority does not have the power to condone the delay in terms of the scheme of the Act, however, he argues that the order cancelling the registration is without application of mind; he draws my attention to the impugned order dated 07.01.2023, which does not

disclose any application of mind. He, thus, argues that the quasi judicial order which has an adverse effect on the right of the petitioner to run business as guaranteed under Article 19 of the Constitution of India, the same has been done without any application of mind which is neither the intent of the Act nor can it be held to be in compliance of the mandate of Article 14 of the Constitution of India. He further argues that as the appeal has not been decided on merit, the doctrine of merger will have no application and it is only the order dated 07.01.2023 which affects the petitioner and as the same is devoid of any reasons, the same can be challenged before this Court as decided by the Hon'ble Supreme Court in the case of Whirlpool Corporation v. Registrar of Trademarks, Mumbai and Ors. - (1998) 8 SCC 1.

7. He further places reliance on the judgment of this Court in the case of Om Prakash Mishra v. State of U.P. & Ors.; Writ Tax No.100 of 2022 decided on 06.09.2022 wherein this Court had recorded that every administrative authority or a quasi judicial authority should necessarily indicate reasons as reasons are heart and soul of any judicial or administrative order.

8. In the present case from the perusal of the order dated 07.01.2023, clearly there is no reason ascribed to take such a harsh action of cancellation of registration. In view of the order being without any application of mind, the same does not satisfy the test of Article 14 of the Constitution of India, as such, the impugned order dated 07.01.2023 (Annexure - 2) is set aside. The petition is accordingly allowed.

9. It is, however, directed that the petitioner shall file reply to the show-cause notice within a period of three weeks from today. The Adjudicating Authority i.e. Assistant Commissioner, Gonda shall proceed to pass fresh order after giving an opportunity of hearing to the petitioner and after considering whatever defence he may take."

5. Learned counsel for the petitioner further relies upon a coordinate Bench judgment of this Court in Writ Tax No.1476 of 2022 titled as **M/s Namo Narayan Singh v. State of U.P. and others** decided on October 10, 2023 to emphasis the point that providing of reasons in order is of essence in judicial proceedings.

6. In the present case, the facts are similar to one in **Surendra Bahadur Singh's case (supra)**, wherein the appeal was barred by time under Section 107 of the Act. However, the Division Bench in **Surendra Bahadur Singh's case (supra)** took into consideration the original order and set aside the same being non-reasoned and allowed the petitioner therein to file reply to the show cause notice.

7. In light of the above, I am of the view that the orders impugned herein are liable to be set aside. Accordingly, the order in original dated January 18, 2023 and the appellate order dated October 12, 2023 are quashed and set aside. The petitioner is directed to file its reply to the show cause notice within three weeks from date and the adjudicating authority is directed to proceed *de novo* and pass order after granting opportunity of hearing to the petitioner.

8. With the above directions, the writ petition is allowed.

(2024) 2 ILRA 190
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1314 of 2019

M/s Indeutsch Industries Pvt. Ltd., Noida ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nishant Mishra

Counsel for the Respondent:
C.S.C.

Taxation Law – U.P. Goods and Services Tax Act, 2017 – Section 129(3) – Penalty for Incorrect Vehicle Number in E-Way Bill – Petitioner challenged penalty order dated 22.06.2018 and appellate order dated 22.06.2019 – Held, goods transported from SEZ (Noida) to DTA (Delhi) with valid tax invoice, bill of entry, and E-Way bill, but vehicle number in E-Way bill (UP14DT-8219) differed from actual vehicle (UP14BT-8220) due to transporter's last-minute change – Interception occurred hours after dispatch, with all documents (tax invoice, bill of entry, packing list) correct except vehicle number – No evidence of tax evasion intent, as customs duty and IGST paid, and bill of entry reflected correct vehicle number – Department failed to establish intent to evade tax, a prerequisite for penalty under Section 129(3), per *Falguni Steels Vs St. of U.P.* – Mere technical/clerical error in vehicle number insufficient for penalty, as no financial implications shown – Appellate authority overlooked transporter's explanation and petitioner's documents – Impugned orders quashed, penalty set aside, refund of deposited amount ordered within four weeks. (Para 6-9)

Writ petition allowed.

List of Cases Cited:

1. Falguni Steels Vs St. of U.P.; (2024) 15 Centax 67 (All.)

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

(Judgment dictated in Open)

1. Heard Sri Nishant Mishra, learned counsel appearing on behalf of the petitioner and Sri Ravi Shankar Pandey, learned Additional Chief Standing Counsel for the respondents.

2. This is a petition under Article 226 of the Constitution of India, wherein the writ petitioner is aggrieved by the order passed in appeal dated June 22, 2019 and the order dated June 22, 2018 imposing penalty under Section 129(3) of the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as the 'Act').

Facts as narrated in the writ petition are as follows :-

3. Petitioner is a company, engaged in manufacturing Artist Brush and its materials, for which Petitioner is duly registered under the GST regime with GSTN No.09AAACI2206F1Z2. Petitioner is having its manufacturing unit established in Noida Special Economic Zone (hereinafter referred to as 'SEZ'). In normal course of business, petitioner sold 102 boxes of Artist Brushes valuing Rs. 16,86,696.68/- to one M/s Pidilite Industries Ltd., Delhi (GSTIN No.07AAACP4156B1ZU) vide Tax Invoice No.18- 19/CEN/23 dated 14.6.2018, after charging Integrated Goods and Service Tax (hereinafter referred to as the 'IGST') at applicable rate of 18%. Since the transaction in question was from a SEZ

unit to a Domestic Traffic Area (hereinafter referred to as 'DTA'), hence petitioner also charged customs duty and SWS (customs) at the rate of 10% each and also filed Bill of Entry in respect of the transaction in question. After preparing tax invoice and bill of entry, petitioner contacted transporter M/s Pawan Roadlines, for transportation of goods, who agreed to transport the goods on vehicle bearing registration no.UP14DT-8219. On the basis of the information provided by transporter, petitioner generated e-way bill no. 4110 1410 2307 (valid till 22.6.2018), after uploading all the required details relating to the transaction. From the enquiries subsequently made by petitioner, it appears that due to non-availability of vehicle bearing registration no. UP14DT-8219, the transporter provided another vehicle bearing registration no.UP14BT-8220 and due to inadvertence, petitioner also loaded the goods in the said vehicle, without even checking the vehicle number mentioned on e-way bill. When vehicle loaded with goods in question was crossing Ghaziabad via Vasundhara, the same was stopped by Respondent No.3 for verification of goods and documents. On being stopped, driver produced the entire documents available with him including e-way bill, tax invoice, bill of entry etc.. On examination of these documents, Respondent No. 3 directed driver to take the vehicle to Commercial Tax Office, Mohan Nagar for physical verification of goods. Even though the goods were being transported on the strength of valid and genuine documents, specified under Rule 138A, then also Respondent No.3 passed detention order detaining the goods on the ground that the goods were being transported on a vehicle different from that declared on e-way bill.

Contentions of the Petitioner

4. Counsel appearing on behalf of the petitioner has submitted that the goods were accompanied by the tax invoice, packing list, bill of entry for home consumption and the e-way bill. He submitted that the only mistake in all these documents was that the truck number written in the e-way bill was incorrect. He submitted that this mistake had occurred because of a problem in the initial truck that was supposed to carry the goods. He relied on a letter provided by the transporter 'M/s Pawan Roadlines' that explained the reasons for the change of the truck. Counsel submitted that this change in the vehicle was not noted by the representative's of the petitioner, and accordingly, the e-way bill that has been generated based on the earlier truck number was sent alongwith the goods. Counsel further submitted that the bill of entry for home consumption indicates that custom duty had been paid and on such document the number of the truck that was carrying the goods had been mentioned. He further submits that this bill of entry had been issued on June 21, 2018 at NOIDA and the truck was, thereafter, sent to the consignee's address in Madoli, Delhi. Counsel further submitted that there was no question of evasion of tax as the goods left in the afternoon and were intercepted at around 4 O'clock in the evening by the authorities. Counsel further placed the impugned order passed in appeal and submitted that no where in the order there is any finding that there had been any kind of intention to evade tax. He submitted that as the goods were in order and there was no discrepancy in the same with the e-way bill and the invoices including packing list, there was no scope of imposition of penalty in the present case. He further relied on several judgements of this Court including the judgement passed in **Falguni Steels Vs.**

State of U.P. reported in (2024) 15 Centax 67 (All.) to buttress his argument that imposition of penalty is invalid in cases when there is no *mens-rea* for evasion of tax.

Contentions of the Respondents

5. Per contra, Mr. Pandey, counsel appearing on behalf of respondents submitted that in the present case the mistake by the petitioner cannot be seen as a clerical error as the truck number itself is different. He further submitted that since the distance between NOIDA to Madoli, Delhi is only 100 kilometers, there is always chance of the e-way bill being used on several occasions resulting in evasion of tax. Counsel further distinguished the judgement passed in **Falguni Steels (Supra)** by saying that the factual matrix therein in that matter was different from the present case.

Analysis and Conclusion

6. Upon a perusal of the documents annexed to the writ petition, it is quite obvious that in the present transaction goods were moving from a SEZ Unit to Domestic Traffic Area and the said goods have been checked by the Custom authorities. Custom duty and also IGST had been paid on the said goods. The said goods were intercepted only two-three hours after the goods have left the SEZ Unit, and therefore, it cannot be said that this e-way bill was wrongly being used. It is a fact that the burden of proof lies on the petitioner in certain cases to show that there was no evasion of tax. However, when the the error in the documents is only that of a clerical or typographical error, the initial burden of proof lies on the department to show there was intention to evade tax. In the present case the department has failed to do so and infact has not even tried to do so. The documents produced by the petitioner at the time of the interception itself indicates that the goods have been transported from a SEZ Unit to the DTA after payment of custom duty and payment of IGST. This fact has not been discredited by the department in any manner whatsoever. Infact there is complete silence with regard to the fact whether the petitioner had made the payment as indicated in the invoices and the bill of entry. The department has accordingly failed to shift the burden of proof on the petitioner as the only error found by the department was that the vehicle number was incorrect. Apart from this one error in the e-way bill, nothing has been shown by the department to justify the imposition of penalty under Section 129(3) of the Act. The impugned order also failed to take into account the document produced by the petitioner of the transporter wherein the explanation was given with regard to the reason for the mistake of the vehicle number in the e-way bill.

7. One may reiterate the principles laid down in the judgment of **Falguni Steels (Supra)** with regard to imposition of penalty. Relevant paragraph nos.19 and 20 are delineated below :-

"19. Mere technical errors, without having any potential financial implications, should not be the grounds for imposition of penalties. The underlying philosophy is to maintain a fair and just tax system, where penalties are proportionate to the gravity of the offense. In the realm of taxation, imposition of penalty serves as a critical measure to ensure compliance with tax laws and regulations. However, a nuanced understanding prevails within

legal frameworks that for penalties to be justly imposed, there must be a demonstrated actual intent to evade tax. This principle underscores the importance of distinguishing technical errors from deliberate attempts to evade tax obligations. Penalties should be reserved for cases where an intentional act to defraud the tax system is evident, rather than for inadvertent technical errors. The legal foundation for this principle lies in the recognition that taxation statutes are not designed to punish inadvertent mistakes but rather deliberate acts of non-compliance. The burden of proof, therefore, rests on tax authorities to establish the actual intent to evade tax before imposing penalties on taxpayers. This safeguards individuals and entities from punitive measures arising from honest mistakes, administrative errors, or technical discrepancies that lack any malicious intent. In the judgments cited above, the Courts therein have emphasized upon the need for a meticulous examination of the facts and circumstances surrounding each case to establish the presence or absence of intentional tax evasion.

20. To conclude, the requirement of intent to evade tax for the imposition of penalties is a fundamental principle that underpins the fairness and integrity of taxation systems. Recognising the distinction between technical errors and intentional evasion is essential for maintaining a balanced and equitable approach to tax enforcement. As nations continue their pursuit of effective tax administration, upholding this principle becomes paramount in fostering voluntary compliance, preserving trust in the tax system, and ensuring the judicious use of regulatory powers."

8. On the perusal of the above principles, it is clear that intention to evade tax is sine qua non before imposition of penalty. In present case the department has failed to establish any such intention whatsoever. Furthermore, the Appellate Authority has failed to look into all the documents that were produced by the petitioner to rebut the allegation of the department with regard to intention to evade tax.

9. In light of the same, impugned orders dated June 22, 2019 and June 22, 2018 are quashed and set aside. The writ petition is allowed. Consequential reliefs to follow.

10. Any amount that has been deposited by the petitioner to be refunded within a period of four weeks from date.

(2024) 2 ILRA 193
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 1394 of 2023

M/S Abhishek Trading Corporation, Varanasi ...Petitioner
Versus
Commissioner (Appeals), CGST & Central Excise Appeal Commissionerate, Allahabad & Anr. ...Respondents

Counsel for the Petitioner:
Sri Suyansh Agrawal

Counsel for the Respondents:
C.S.C., Sri Parv Agarwal

Taxation Law – Central Goods and Services Tax Act, 2017 – Section 107 – Limitation Act, 1963 – Section 5 – Delay in Filing Appeal – Petitioner challenged appellate order dated 28.08.2023 dismissing appeal as time-barred – Held, appeal filed on 20.07.2023 against order communicated on 13.10.2021

(over 20 months delay) was beyond the statutory limit of three months plus one-month condonable period under Section 107 – *Singh Enterprises Vs Commissioner of Central Excise* and *Commissioner of Customs and Central Excise Vs Hongo India Pvt. Ltd.* followed, holding that appellate authority lacks power to condone delay beyond 30 days after the initial 60-day period, excluding Section 5 of Limitation Act – CGST Act, as a special statute, is a self-contained code with inbuilt limitation mechanism, impliedly excluding Section 5 – No interference warranted under Article 226, as delay undisputed and statutory bar clear. (Para 4-7)

Writ petition dismissed.

List of Cases Cited:

1. Singh Enterprises Vs Commissioner of Central Excise, Jamshedpur; (2008) 3 SCC 70

2. Commissioner of Customs and Central Excise Vs Hongo India Pvt. Ltd.; (2009) 5 SCC 791

3. Punjab Fibres Ltd.; (2008) 3 SCC 73

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

1. Heard Sri Suyash Agarwal, learned counsel for the petitioner, Sri Parv Agarwal, learned counsel for respondent No.1 and learned Standing Counsel for the State.

2. This is a writ petition under Article 226 of the Constitution of India wherein the petitioner is aggrieved by the order dated August 28, 2023 passed by the appellate authority being the Commissioner (Appeals), CGST and Central Appeal Commissionerate, Allahabad under Section 107 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as "the Act").

3. By the aforesaid order, the appellate authority dismissed the appeal filed by the petitioner on the ground that the same was time barred as it was filed beyond the period of four months. At paragraph 3.1 of the aforesaid order, the appellate authority has clearly pointed out that the petitioner has received the order dated October 13, 2021, whereas the appeal was filed on July 20, 2023, that is, after the period of more than 20 months and way beyond the time prescribed under Section 107 of the Act.

4. Upon perusal of the memo of appeal filed by the petitioner, it is clear that the order was communicated on October 13, 2021, as admitted by the petitioner itself. It is further to be noted that the order cancelling the registration was passed even earlier on January 22, 2021 and had been uploaded on the portal. As there is no dispute with regard to communication of the order and the fact that the appeal was filed beyond the time prescribed, this Court under the extraordinary jurisdiction cannot interfere with the appellate authority's order as the application of Limitation Act, 1963 does not apply to Section 107 of the Act.

5. The Supreme Court in **Singh Enterprises v. Commissioner of Central Excise, Jamshedpur and Others** reported in **(2008) 3 SCC 70**, while dealing with a similar issue as in the present case, has held as under:

"8. The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short ?the Limitation Act?) can be

availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period."

6. In **Commissioner of Customs and Central Excise v. Hongo India Private Limited and Another** reported in **(2009) 5 SCC 791,** the Supreme Court has reiterated its stand and held as under:

"31. In this regard, it is useful to refer to a recent decision of this Court in Punjab Fibres Ltd. [(2008) 3 SCC 73] The Commissioner of Customs, Central Excise, Noida was the appellant in this case. While considering the very same question, namely, whether the High Court has power to condone the delay in presentation of the reference under Section 35-H(1) of the Act, the two-Judge Bench taking note of the said provision and the other related provisions following Singh Enterprises v. CCE [(2008) 3 SCC 70] concluded that: (Punjab Fibres Ltd. case [(2008) 3 SCC 73] , SCC p. 75, para 8)

8. ...the High Court was justified in holding that there was no power for condonation of delay in filing reference application.?

32. As pointed out earlier, the language used in Sections 35, 35-B, 35-EE, 35-G and 35-H makes the position clear that an appeal and reference to the High Court should be made within 180 days only from the date of communication of the decision or order. In other words, the language used in other provisions makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning the delay only up to 30 days after expiry of 60 days which is the preliminary limitation period for preferring an appeal. In the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. The High Court was, therefore, justified in holding that there was no power to condone the delay after expiry of the prescribed period of 180 days."

7. The Central Goods and Services Act is a special statute and a self-contained code by itself. Section 107 of the Act has an inbuilt mechanism and has impliedly excluded the application of the Limitation Act. It is trite law that Section 5 of the Limitation Act, 1963 will apply only if it is extended to the special statute. Section 107 of the Act specifically provides for the

limitation and in the absence of any clause condoning the delay by showing sufficient cause after the prescribed period, there is complete exclusion of Section 5 of the Limitation Act. Accordingly, one cannot apply Section 5 of the Limitation Act, 1963 to the aforesaid provision.

8. In light of the above, no interference is required in this petition and the same is, accordingly, dismissed.

(2023) 2 ILRA 196
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.01.2024
BEFORE

THE HON'BLE SHAMIM AHMED, J.

Matters Under Article 227 No. 414 of 2024

Raj Kumar Saroj ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Ashok Kumar Singh, Mukesh Sharma

Counsel for the Respondents:
G.A.

Criminal Law - Police Act 1861 – Sectiontion 29 -Indian Penal Code,1860- Sectiontion 406-Charge against the petitioner is of having breached the court's order-impugned order punishing the petitioner under Sectiontion 29 of the U.P. Police Act and lodging F.I.R. against the petitioner u/s 406 I.P.C. -the power to examine such a complaint has to be exercised by the District Magistrate in case the information has been received by a Magistrate other than a District Magistrate-in the event the Magistrate himself takes notice of -then the matter will have to be sent to another Magistrate for conducting the enquiry after putting the Officer to notice- same Magistrate cannot be the witness and the judge himself-procedure adopted by the learned Magistrate was not in conformity with Sectiontion 29 of the Police Act 1861 read with the Regulations. **Petition allowed.** (E-9)

Cases cited:

1. Pramod Kumar Sharma Vs St. of U.P. & ors.(Special Appeal No.1453 of 2010)

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

1. Heard Sri Ashok Kumar Singh, learned counsel for the petitioner and Sri S.P. Tiwari, learned A.G.A.-I for the State as well as perused the record.

2. The instant petition under Article 227 of The Constitution of India has been filed with following relief:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to set aside the impugned order dated 19.01.2024 passed in Misc. Case No.554/2023 (State Vs. S.H.O. Mankapur, Gonda) by the Court of Additional District and Session Judge, Court No.3, Gonda."

3. Learned counsel for the petitioner submits that on 23.05.2015, police of Police Station Mankapur, District Gonda recovered a Truck bearing Registration No. UP-32-A-9016 and an F.I.R. was lodged as Case Crime No. Nil/2015, under Sections 41, 411, 413, 420, 467, 468, 487 I.P.C. at Police Station Mankapur, District Gonda, which was later on converted to Case Crime No.0999/2015.

4. He further submits that thereafter the matter was investigated by the Investigating Officer and charge sheet was submitted before the learned court below. He further submits that during trial on 23.08.2023, the court of learned Additional

District and Sessions Judge, Court No.3, Gonda issued an order in Session Trial No.216 of 2018 directing the S.H.O. Kotwali Mankapur, Gonda to get the physical verification report of the case property i.e. Truck (Registration No. UP-32-A-9016). Thereafter, the S.H.O. Mankapur, Gonda sent a letter to the Regional Transport Officer, District Gonda for physical verification of the aforesaid truck. On 30.08.2023, the In-charge Inspector (S.H.O.), Police Station Mankapur, District Gonda submitted an application for extension of time for physical verification of the aforesaid truck.

5. He further submits that on 30.08.2023, the learned trial court issued a letter to the Superintendent of Police, Gonda directing him to take action against the S.H.O. Mankapur, Gonda and also to submit the physical verification report before the trial court. Thereafter, on 01.09.2023, the A.R.T.O., Gonda completed the physical verification of the truck and submitted its report to the S.H.O. Mankapur, Gonda, which was submitted by him before the learned trial court on 12.09.2023.

6. He further submits that on 26.09.2023, the learned trial court passed an order directing the office to register Misc. Case against the In-charge / S.H.O., Police Station Mankapur, District Gonda. Thereafter, on 03.10.2023, the learned trial court issued notice to the S.H.O. Mankapur to submit his explanation to the notice issued by opposite party no.2 personally on 10.10.2023. Futher, on 10.10.2023, the then In-charge Inspector (S.H.O.), Police Station Mankapur, Gonda / petitioner submitted his report before the learned trial court stating therein that on 10.10.2023, he has taken charge of Police Station Mankapur, District Gonda.

7. He further submits that on 11.10.2023, the opposite party no.2 issued a notice to the then In-charge Inspector / S.H.O., Police Station Mankapur, Gonda to submit his explanation before the learned trial court personally on 19.10.2023. Thereafter, on 19.10.2023, the learned trial court issued a notice to the Superintendent of Police, District Baghpat directing him to produce the then S.H.O. Mankapur, District Gonda, namely, Sudhir Kumar Singh for evidence on 30.10.2023 in Misc. Case No.554 of 2023. However, the Superintendent of Police, Baghpat vide letter No. RI-Report/2023 dated 06.11.2023 informed the opposite party no.2 that Inspector Sudhir Kumar Singh has not reported in the District Baghpat till 06.11.2023. Thereafter, on 15.11.2023, the opposite party no.2 issued Non Bailable Warrant against the then S.H.O. Mankapur, namely, Sudhir Kumar Singh and directed the In-charge Inspector / S.H.O., Mankapur, Gonda to produce the accused on 30.11.2023. Thereafter, on 30.11.2023, the learned trial court issued notice to the petitioner for his evidence in Misc. Case No.554/2023.

8. He further submits that on 11.12.2023, the petitioner was on urgent duty hence he failed to appear on 11.12.2023 for adducing his evidence in Misc. Case No.554/2023. On 19.01.2024, the learned trial court passed the impugned order punishing the petitioner under Section 29 of the U.P. Police Act and lodging F.I.R. against the petitioner under Section 406 I.P.C.

9. He further submits that as per the report submitted by the Assistant Regional

Transport Officer vide paper No.5-B, there is no allegation of theft or misappropriation of any valuable part of case property. The police arrested the accused Ram Tirath with truck in question which contains different chasis number and engine number. The said truck was not registered in the office of R.T.O., Gonda and the number plate bearing no. U.P.-32-A-9016 is also false and fabricated. Even till date, no one has claimed the ownership of the said truck. He further submits that the sessions trial regarding the aforesaid crime is still pending and the alleged truck is the case property, hence, it could not be disposed of.

10. He further submits that the learned trial court had exceeded its jurisdiction by registering a Misc. Case against the then S.H.O. Mankapur, Gonda without mentioning that under which Section or Act the Misc. Case is being registered. He further submits that as per record, the Presiding Officer, the Opposite Party No.2 is complainant in the said Misc. Case and he himself tried the said Misc. Case in his own court which is against the law. He further submits that the learned trial court was supposed to send the matter for appropriate action to the competent authority / District Magistrate, Gonda for action under Section 29 of U.P. Police Act.

11. He further submits that no part of the truck is missing and no one has lodged any complaint about the misappropriation of any valuation security and even no one has claimed the ownership of said truck, hence, the prosecution under Section 406 I.P.C. as directed by the learned trial court is also an abuse of process of Court. He further submits that no case is made out against the petitioner under Section 406 I.P.C. as the petitioner has not committed any willful breach and is also not guilty of any violation of duty or neglect or any lawful order made by competent authority even he was also not a party in the Misc. Case No.554/2023, hence, the punishment order against the petitioner is absolutely illegal, arbitrary and malafide. He further submits that the impugned order suffers from material illegality and infirmity, which apparently from the face of record appears to be unsustainable in the law and the same is liable to be set aside as the same is passed in gross violation of law.

12. In support of his arguments, learned counsel for the petitioner has relied upon the judgment rendered by a Division Bench of this Court in the case of **Pramod Kumar Sharma Vs. State of U.P. & Others (Special Appeal No.1453 of 2010).**

13. On the other hand, learned A.G.A.-I for the State submits that the impugned order has been rightly passed by the learned trial court after due consideration of material available before it, as such, it does not require any interference by this Court, therefore, the instant petition is liable to be dismissed at this stage only. He further submits that the petitioner having not performed his duty in compliance of the direction of the Magistrate, the punishment was justified and the petitioner can avail of his remedies as available to him in law.

14. Having heard learned counsel for the parties and having perused the records, it is evident that the charge levelled by the learned Magistrate during the course of a judicial proceeding against the petitioner was of breach of duty by not complying with the directions of the Court. The learned Magistrate, therefore, proceeded to issue a notice to the petitioner calling for an explanation. This power was exercised by

the Magistrate purportedly under Section 29 of the Police Act, 1861 which is gainfully reproduced bellow:-

"Section 29. Penalties for neglect of duty, etc.- *Every Police Officer who shall be guilty of* ***any violation of duty or wilful breach or neglect*** *of any rule or regulation or* ***lawful order made by competent authority,*** *or who shall withdraw from the duties of his office without permission, or without having given previous notice for the period of two months, or who, being absent on leave, shall fail, without reasonable cause, to report himself for duty on the expiration of such leave, or who shall engage without authority in any employment other than his police duty, or who shall be guilty of cowardice, or who shall offer any unwarrantable personal violence to any person in his custody* ***shall be liable, on conviction before a Magistrate*** *to a penalty not exceeding three months' pay, or to imprisonment, with or without hard labour, for a period not exceeding three months, or to both."*

15. The said provision indicates that a person has to be found guilty of violation of duty or wilful breach or neglect of any rule or regulation or a lawful order made by competent authority, and if the same results in conviction by a Magistrate, then a penalty shall be imposed not exceeding three months pay or imprisonment in the manner prescribed therein.

16. The charge against the petitioner is of having breached the court's order which was a lawful order made by a competent Magistrate. The aforesaid willful neglect of duty or breach of duty has been made punishable, and from the U.P. Police Regulations, Chapter XXXII, it appears that a procedure has been provided to deal with such situations. The provisions relating to such enquiry if being undertaken under Section 29 of the Police Act 1861 are contained in Regulation 484 and 486 of the Police Regulations. Regulation 484 is quoted below:-

"Regulation 484. *The nature of the inquiry in any particular case will vary according to the nature of the offence. If the offence is cognizable or non-cognizable according to Schedule II of the Criminal Procedure Code and information of it is received by the District Magistrate he may in exercise of his powers under the Criminal Procedure Code either-*

(1)Make or order a magisterial inquiry; or

(2)Order and investigation by the police.

If the information is received by a Magistrate other than a District Magistrate, an he takes cognizance of the offence, ***he should report the case at once to the District Magistrate*** *who will withdraw it to his own Court under Section 528 (now Section 410/411), Criminal Procedure Code. The District Magistrate may then act as though the original complaint had been made to him.*

This power extends to cases under Section 29 of the Police Act, *but magisterial inquiry in cases under this section will be ordered only in very exceptional circumstances."*

17. A perusal of the aforesaid regulation indicates that the power to examine such a complaint has to be exercised by the District Magistrate in case the information has been received by a Magistrate other than a District Magistrate. The powers in the said regulations have

been extended to cases under Section 29 of the Police Act.

Regulation 486 *in relation to neglect of duty under Section 29 is quoted below:*

"Regulation 486. When the offence alleged against a police officer amounts to an offence only under Section 7 of the Police Act, there can be no magisterial inquiry under the Criminal Procedure Code. In such cases, and in other cases until and unless a magisterial inquiry is ordered, inquiry will be made under the direction of this Superintendent of Police in accordance with the following rules:-

(I)Every information received by the police relating the commission of a cognizable offence by a police officer shall be dealt with in the first place under Chapter XIV (now Chapter XII), Criminal Procedure Code, according to law, a case under the appropriate section being registered in the police station concerned provided that-

(1)if the information is received, in the first instance, by a Magistrate and forwarded by the District Magistrate to the police, no case will be registered by the police;

(2)if the information is received, in the first instance by the police, the report required by Section 165, Criminal Procedure Code, shall be forwarded to the District Magistrate, and when forwarding it the Superintendent of Police shall note on it with his own hand what steps are being taken as regards investigation or the reasons for refraining from investigation;

(3)unless investigation is refused by the Superintendent of Police under Section 157 (1)(b), Criminal Procedure Code and not ordered by the District Magistrate under Section 159, or unless the District Magistrate orders a magisterial inquiry under Section 159, investigation under Section 159, Criminal Procedure Code, shall be made by a police officer selected : by the Superintendent of Police and higher in rank than the officer charged;

(4)On the conclusion of the investigation and before the report required by Section 173, Criminal Procedure Code, is prepared, the question whether the officer charged should or should not be sent for trial shall be decided by the Superintendent of Police. Provided that before an officer whose dismissal would require the concurrence of the Deputy Inspector General under paragraph 479 is sent for trial by the Superintendent of Police, the concurrence of the Deputy Inspector General must be obtained;

(5)the charge-sheet or final report under Section 173, or Section 169, Criminal Procedure Code, as the case may be, shall be sent to the District Magistrate; if the Superintendent of Police or the Deputy Inspector General had decided against a prosecution, a note by the Superintendent of Police giving the reasons for this decision shall be endorsed on, or attached to the final report;

(6)when the reason for not instituting a prosecution is that the charge is believed to be baseless, no further action will be necessary; if the charge is believed to be true and a prosecution is not undertaken owing to the evidence being considered insufficient or for any other reasons the Superintendent may, when the final report under Section 173, Criminal Procedure Code, has been accepted by the District Magistrate; take departmental action as laid down in paragraph 490.

II. When information of the commission by a police officer of a non-cognizable offence ***(including an offence***

under Section 29 of the Police Act) *is given in the first instance to the police, the Superintendent of Police may, if he sees reason to take action, either (a)* ***proceed departmentally as laid down under head III of this paragraph and in paragraph 490,*** *or (b) as an alternative to, or at any stage of the departmental proceedings, forward a port in writing to the District Magistrate with a request that he will take cognizance of the offence under Section 190(1)(b), Criminal Procedure Code; provided that reports against Police Officers of having committed non-cognizable offences will (when made to the police and unless there are special reasons for desiring a magisterial inquiry or formal police investigation under the Code)* ***ordinarily be inquired into departmentally*** *and will not ordinarily and then only if be referred to the District Magistrate until departmental inquiry is complete, a criminal prosecution is desired.*

On receiving information either by means of a report in writing from the Superintendent of Police as laid down above, or otherwise *as laid down in Section 190(1)(a) and (c), Criminal Procedure Code, of the commission by a Police Officer of a non-cognizable offence,* ***the District Magistrate may,*** *subject to the general provisions of Chapter XV (now Chapter XIII), Part B, Criminal Procedure Code-*

(a) proceed with the case under Chapter XVII (now Chapter XVI) Criminal Procedure Code;

(b) order an inquiry by a Magistrate or an investigation by the police under Section 202, Criminal Procedure Code; or an investigation by the police under Section 155(2);

(c) decline to proceed under Section 203, Criminal Procedure Code.

If an investigation by the police is ordered, it would be made under Section 155(3), Criminal Procedure Code by an officer selected by the Superintendent of Police and higher in rank that the officer charged and all further proceedings will be exactly as laid down for cognizable cases in paragraph 486 (1), (4), (5) and (6) above.

If no investigation by the police is ordered, and the District Magistrate, after or without magisterial inquiry, declined to proceed criminally with the case, ***the Superintendent of Police will decide, in accordance with the principles set forth in paragraph 486 (1) (6) above and subject to the orders contained in paragraph 494, whether departmental proceedings under paragraph 490 are required.***

III.- When a Superintendent of Police sees reasons to take action or information given to him, or on his own knowledge or suspicion, that a Police Officer subordinate to him has committed an offence under Section 7 of the Police Act or non-cognizable offence ***(including an offence under Section 29 of the Police Act)*** *of which he considers it unnecessary at that stage to forward a report in writing to the District Magistrate under Rule II above he will make or cause to be made by an officer senior in rank to the officer charged, a departmental inquiry sufficient to test the truth of the charge. On the conclusion of this inquiry he will decide whether further action is necessary and if so, whether the officer charged should be departmentally tried, or whether the District Magistrate should be moved to take cognizance of the case under the Criminal Procedure Code; provided that before the District Magistrate is moved by the Superintendent of Police to proceed criminally with a case* ***under Section 29 of the Police Act*** *or other non-cognizable*

section of the law against an Inspector or sub Inspector, the concurrence of the Deputy Inspector General must be obtained. ***Prosecution under Section 29 should rarely be instituted and only when the offence cannot be adequately dealt with under Section 7."***

18. The aforesaid provision also indicates that the matter shall be taken up by the Superintendent of Police departmentally or by the District Magistrate in manner indicated above. In the event the Magistrate himself takes notice of it then in view of the provisions of Section 190 Criminal procedure Code as referred to therein, the matter will have to be sent to another Magistrate for conducting the enquiry after putting the Officer to notice.

19. The procedure therefore makes it amply clear that the same Magistrate cannot be the witness and the judge himself. The procedure adopted by the learned Magistrate to proceed against the petitioner was therefore not in conformity with the provisions of Section 29 of the Police Act 1861 read with the Regulations referred to hereinabove.

20. The learned A.G.A.-I has not been able to point out any contrary provision or conferment of power on the Magistrate so as to allow him to proceed to convict the petitioner in the circumstances indicated above.

21. Accordingly, the order dated 19.01.2024 passed in Misc. Case No.554/2023 (State Vs. S.H.O. Mankapur, Gonda) by the Court of learned Additional District and Sessions Judge, Court No.3, Gonda is hereby **set aside** leaving it open to the competent authority to proceed in accordance with the provisions as indicated above in the event such powers can be invoked on the facts of the present case.

22. The writ petition is accordingly **allowed.**

23. No order as to the costs.

(2023) 2 ILRA 202
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.02.2024
BEFORE

THE HON'BLE JASPREET SINGH, J.

Matters Under Article 227 No. 4239 of 2023

Upendra Nath Srivastava ...Petitioner
Versus
Addl. District & Sessions Judge/Special Judge, Pocso Act, Court No. 1, Lko & Ors. ...Respondents

Counsel for the Petitioner:
Ravi Shanker Tewari, Anant Tewari

Counsel for the Respondents:
Lalit Kishore Pandey, Pankaj Shukla

Civil Law - Code of Civil Procedure,1908- Order 39 Rule 3-Private respondent no.3 had instituted the suit for permanent injunction- also moved an application under Order 39 Rule 1 and Sectiontion2 C.P.C.- sham compliance of Order 39 Rule 3 C.P.C. was made by the private respondent no.3-private respondent has not given specific reply to indicate that compliance has been made-the impugned orders set aside- **Petition allowed.** (E-9)

Cases cited:

1. U.P. Pasi Jagriti Mandal, Lucknow & ors. Vs Devi Dayal Chauhan & ors. 1997 (1) ARC 518

2. Shiv Kumar Chadha Vs Municipal Corporation of Delhi & ors.; (1993) 3 SCC 161

(Delivered by Hon'ble Jaspreet Singh, J.)

1. Heard Shri Ravi Shanker Tewari, learned counsel for the petitioner and Shri Lalit Kishore Pandey, learned counsel for private respondent no.3.

2. Under challenge is the order dated 26.05.2023 passed by the Additional District Judge / Special Judge, POCSO Act, Court No.1, Lucknow, whereby it dismissed the appeal of the petitioner and affirmed the grant of ex parte interim injunction order dated 06.09.2022 passed by Civil Judge (Senior Divsion), Malihabad, Lucknow in Regular Suit No.1732 of 2022.

3. The controversy before this Court is limited to an extent inasmuch as it is the case of the petitioner that the private respondent no.3 had instituted the suit for permanent injunction before the Civil Judge (Senior Division) Malihabad, Lucknow bearing Regular Suit No.1732 of 2022. Along with the plaint in suit, the private respondent no.3/ plaintiff also moved an application under Order 39 Rule 1 and 2 C.P.C. duly supported by an affidavit.

4. It is the case of the petitioner that on 06.09.2022 the trial court while admitting the suit had also heard ex parte on the application under Order 39 Rule 1 and 2 C.P.C. and the trial court passed an ex parte interim order dated 06.09.2022 directing the parties to maintain status quo. By the said order itself the plaintiff was required to comply with the provision of Order 39 Rule 3 C.P.C. within 24 hours.

5. It is the case of the petitioner that a sham compliance of Order 39 Rule 3 C.P.C. was made by the private respondent no.3 as a result the said injunction order could not have subsisted nor could have been extended, as any person who approaches the Court must approach the Court with clean hand. In this regard, the counsel for the petitioner had drawn the attention of the Court to paragraph 12 of the petition wherein specific averments have been made to indicate that the compliance as alleged to have been done by the private respondent no.3 could not be treated as a valid compliance in terms of Order 39 Rule 3 CPC. Thus, for the aforesaid reason, the injunction order was liable to be recalled.

6. It is further submitted that even otherwise, if a court passes an ex parte interim order, then as per the legislative mandate, it is required to assign reasons, even though briefly to indicate that in case, if the said ex parte injunction order is not granted, it may entail frustration of the suit itself and on this count as well the order falls foul.

7. It is further submitted that the petitioner had filed an appeal and the lower appellate court also did not find favour with the reason that since the petitioner has adequate remedy of filing objections against the application under Order 39 Rule 1 and 2 C.P.C. which partakes the nature of an objection in terms of Order 39 Rule 4 C.P.C., hence, it would be appropriate for the petitioner to get the matter decided on merits as he had already put an appearance. Thus, it is submitted that the basic ingredients of Order 39 Rule 3 C.P.C., having been blatantly violated, yet this aspect has not been noticed either by the trial court or the lower appellate court, hence the both the orders are bad and interim order cannot subsist perpetuateory wrong.

8. Shri Lalit Kishore Pandey, learned counsel appearing for the private

respondent no.3 has filed his counter affidavit, which is taken on record after serving a copy on the counsel for the petitioner, who submits that he does not wish to file any rejoinder affidavit as the facts in the instant case are not in dispute and only a short but a legal question is involved.

9. Shri Lalit Kishore Pandey, learned counsel appearing for the private respondent no.3 submits that the compliance of Order 39 Rule 3 C.P.C., was duly made. It is further urged that once the compliance is made, whether it is adequate or inadequate would be an issue which can be considered by the trial court while considering the application Order 39 Rule 1 and 2 C.P.C. on its own merits and specially once the order of status quo has been passed which does not in any manner create any prejudice for either parties as the same is only for the protection of the property in question. In the aforesaid circumstances, it would appropriate for the court to pass an order even though directing the trial court to consider and decide the application Order 39 Rule 1 and 2 C.P.C. on its own merits finally rather than to procrastinate the proceedings before this Court. Shri Pandy has also relied upon a decision of this Court in the case of ***U.P. Pasi Jagriti Mandal, Lucknow and others Vs. Devi Dayal Chauhan and others 1997 (1) ARC 518*** and specific attention has been drawn to Paragraph 12 of the said report, which reads as under:-

"12. I have considered the above submissions of the learned Counsel of the parties and gone through the decisions that have been relied upon by the learned Counsel for the parties. The submissions of the learned Counsel of the petitioner in respect of non-compliance of the Rule 3 of Order XXXIX, has lost its significance in view of that fact that the petitioner had put in appearance before the trial Court and had been heard. In such a case the provisions of Rule 4 of Order XXXIX, comes in to play. After the petitioners were heard by the trial Court and even after hearing, the ad-interim injunction has been allowed to continue then, the ground of non-compliance of Rule 3 relevance loses, I am, therefore, unable to agree with the learned Counsel of the petitioners on this part of the submissions.

10. The Court has heard the learned counsel for the parties and also perused the material on record.

11. In order to appreciate the respective contentions, it will be worth while to take a glance at the provisions of Order 39 Rule 1,2 and 3 C.P.C. which read as under:

1. Cases in which temporary injunction may be granted.-*[* * *] Where in any suit it is proved by affidavit or otherwise?*

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to [defrauding] his creditors,

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit,]

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting,

damaging, alienation, sale, removal or disposition of the property [or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until the disposal of the suit or until further orders.

2. Injunction to restrain repetition or continuance of breach.?(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) [* *]*

(4) [* *]*

3. Before granting injunction, Court to direct notice to opposite party.-

The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party:

[Provided that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay, and require the applicant?

(a) to deliver to the opposite party, or to send to him by registered post, immediately after the order granting the injunction has been made, a copy of the application for injunction together with?

(i) a copy of the affidavit filed in support of the application;

(ii) a copy of the plaint; and

(iii) copies of documents on which the applicant relies, and

(b) to file, on the day on which such injunction is granted or on the day immediately following that day, an affidavit stating that the copies aforesaid have been so delivered or sent.

12. It is no doubt true that a Court is vested with the power to grant an ex parte injunction order in a befitting case. The scheme of Order 39 is such that primarily as far as possible the application must be heard bi parte and for which notices to the defendants have to be issued in terms of Rule 3. However, in cases, where the Court is of the opinion that unless an ex parte interim order is granted the basic purpose of filing the suit would be frustrated hence, as exception, the trial court can grant an ex parte injunction and in such circumstances, the provisions of Order 39 Rule 3 C.P.C. assumes significance.

13. From the perusal of the provisions which have been reproduced hereinabove, it would indicate that a party in whose favour an ex parte injunction is granted must comply with the provisions that is to say that by the next day, the compliance affidavit has to be filed before the Court indicating that the copy of the plaint, the application under Order 39 Rule 1 and 2 CPC and affidavit in its support and the documents upon which the plaintiff has relied have been sent to the defendants. The consequence of non-compliance would be

that as the injunction granted ex parte being subject to the aforesaid condition, hence unless and until the compliance is made, the ex parte injunction order cannot subsist or be extended.

14. At this stage, it will also be relevant to notice the specific pleading made by the petitioner in Paragraph 12 of the petition which reads as under:

12. that upon grant of the ex-parte interim injunction order dated 06.09.2022, the opposite party no.3/plaintiff made a sham compliance of the provisions of Order 39 Rule 3 Code of Civil Procedure.

12.1 On 07.09.2022 an affidavit was filed before the trial court by one Triloki Nath Srivastava claiming to be clerk of Shri Pankaj Shukla, Advocate stating that a copy of the plaint, application along with affidavit and documents have been sent to the defendants. The rigors of the proviso to Order 39, Rule 3 specifically. require the "applicant" to file an affidavit of compliance of the provisions of Order 39, Rule 3 and 3(a) and (3b). The opposite party No.3 never filed the affidavit of compliance. A true copy of the affidavit sworn by the clerk of Shri Pankaj Shukla, Advocate in alleged compliance of the provisions of Order 39, Rule 3 of Code of Civil Procedure is annexed as Annexure No.8 to this petition.

12.2. Pursuant to this sham compliance the petitioner received a small envelope containing only the bare tanki summon. The plaint, application, affidavit and documents were not there in the small envelope. As per the postal departments endorsement the weight of the envelope (84 inches) was a mere 20 grams as evidenced in the postal receipt affixed thereto. The petitioner thereafter obtained copies of the plaint, application, affidavit and documents and got them weighed from the postal department and found that the entire packet could fit only in a large envelope and weighed approximately 390 grams. A true copy of the envelope received by the petitioner in sham compliance of the provisions of Order 39, Rule 3 of Code of Civil Procedure is annexed as Annexure No.9 to this petition.

15. The respondent has disputed the aforesaid contents by filing the counter affidavit but has not specifically replied as shall be seen from Paragraph 8 of the counter affidavit, which reads as under:-

*8. That the contents of para 12 and 13 of the petition under reply are emphatically denied and it is further stated that the deponent through the clerk of counsel for deponent got complied the provisions of Oder 39-Rule 3. C.P.C. apart from that on the mere perusal of averments made by the petitioner in para 12.2 of this petition that he has received an envelope containing bare t**anki summon** on other hand in the petitioner himself stated in his counter affidavit dated 07.10.2022 that he has received a Blank Sheet this contradictory averments by the same person on oath constitute the fact that he wants to deprive the deponent to enjoy her property by all means and wants to get delay the final disposal of the application under order-39 Rule 1 & 2 read with section 151 C.P.C. by this way or that. Moreover it is also stated that if the copies of the preferred suit will not be supplied to the petitioner then without demanding the copies of the preferred petition by the deponent the petitioner by how filed his reply on very first day of hearing, this also seems that the entire copy of the preferred*

petition will be supplied to the petitioner of this petition.

16. Noticing the aforesaid, it would indicate that the private respondent has not given specific reply rather an evasive reply has been given to indicate that compliance has been made. There is nothing on record in shape of the counter affidavit whereby the private respondent no.3 has stated that the compliance which has been made and the registered cover sent to the defendants of the suit also accompanied the pleadings as well as the documents.

17. Certain discrepancies have been pointed out in Paragraph 8 of the counter affidavit that the petitioner at one stage stated that the compliance has not been made whereas on the other hand, it is stated that he had received two blank pages, thus the learned counsel for the respondent submits that apparently the contention of the learned counsel for the petitioner is not correct.

18. Be that as it may, the fact remains that even if two pages have been received yet there can be no denial of the fact that the copy of the plaint, the affidavit and application under Order 39 Rule 1 and 2 C.PC. and its accompanying affidavit with the necessary documents filed by the private respondent no.3 could not be encapsulated within two pages nor the registered cover could contain all such material and the charges of postal cover is of 20 grams. Thus, there is apparently, no way that the compliance in terms of Order 39 Rule 3 CPC has been done correctly.

19. In the aforesaid circumstances, it is clear that the private respondent no.3 did not comply with the direction of the Court vide order dated 06.09.2022 and two courts have also ignored the fact that their order of injunction was subject to the compliance and if the compliance is wanting in substance then there is no compliance in the eyes of law.

20. At this stage, it will also be relevant to notice that an injunction is a purely discretionary relief and therefore, if a person comes to court, he must come with clean hands. A party is not entitled to persuade the court to pass an order in his favour while on the other hand the condition attached to the said order is violated. Moreover if the legislature has provided for an act to be done then it must be done in its letter and spirit.

21. At this stage, the decision of the Apex Court in ***Shiv Kumar Chadha Vs. Municipal Corporation of Delhi and other; (1993) 3 SCC 161*** will be worthwhile to be noticed and paras 31 to 35 reads as under:-

31. Under the changed circumstance with so many cases pending in courts, once an interim order of injunction is passed, in many cases, such interim orders continue for months; if not for years. At final hearing while vacating such interim orders of injunction in many cases, it has been discovered that while protecting the plaintiffs from suffering the alleged injury, more serious injury has been caused to the defendants due to continuance of interim orders of injunction without final hearing. It is a matter of common knowledge that on many occasions even public interest also suffers in view of such interim orders of injunction, because persons in whose favour such orders are passed are interested in perpetuating the contraventions made by them by delaying the final disposal of such applications. The

court should be always willing to extend its hand to protect a citizen who is being wronged or is being deprived of a property without any authority in law or without following the procedure which are fundamental and vital in nature. But at the same time the judicial proceedings cannot be used to protect or to perpetuate a wrong committed by a person who approaches the court.

32.Power to grant injunction is an extraordinary power vested in the court to be exercised taking into consideration the facts and circumstances of a particular case. The courts have to be more cautious when the said power is being exercised without notice or hearing the party who is to be affected by the order so passed. That is why Rule 3 of Order 39 of the Code requires that in all cases the court shall, before grant of an injunction, direct notice of the application to be given to the opposite-party, except where it appears that object of granting injunction itself would be defeated by delay. By the Civil Procedure Code (Amendment) Act, 1976, a proviso has been added to the said rule saying that ?where it is proposed to grant an injunction without giving notice of the application to the opposite-party, the court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay??.

33.It has come to our notice that in spite of the aforesaid statutory requirement, the courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such orders are to operate without recording the reasons for passing such orders. It is said that if the reasons for grant of injunction are mentioned, a grievance can be made by the other side that court has prejudged the issues involved in the suit. According to us, this is a misconception about the nature and the scope of interim orders. It need not be pointed out that any opinion expressed in connection with an interlocutory application has no bearing and shall not affect any party, at the stage of the final adjudication. Apart from that now in view of the proviso to Rule 3 aforesaid, there is no scope for any argument. When the statute itself requires reasons to be recorded, the court cannot ignore that requirement by saying that if reasons are recorded, it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant.

34.The imperative nature of the proviso has to be judged in the context of Rule 3 of Order 39 of the Code. Before the proviso aforesaid was introduced, Rule 3 said ?the court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite-party?. The proviso was introduced to provide a condition, where court proposes to grant an injunction without giving notice of the application to the opposite-party, being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that the court ?shall record the reasons? why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the

procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not all. This principle was approved and accepted in well-known cases ofTaylorv.Taylor[(1875) 1 Ch D 426 : 45 LJ Ch 373] andNazir Ahmedv.Emperor[AIR 1936 PC 253 (2) : 63 IA 372 : 37 Cri LJ 897] . This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of Ramchandra Keshav Adkev.Govind Joti Chavare[(1975) 1 SCC 559 : AIR 1975 SC 915] .

35.As such whenever a court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed. But any such ex parte order should be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned. In theSupreme Court Practice1993, Vol. 1, at page 514, reference has been made to the views of the English Courts saying:

"Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion?.

An ex parte injunction should generally be until a certain day, usually the next motion day…."

22. Insofar as decision cited by the counsel for private respondent is concerned, it would reveal that the facts of the said case are quite different inasmuch as the issue of Order 39 Rule 3 was not directly in question in the said case as the defendant has put in appearance and at the said stage of inception the objections was not pressed rather it was raised alongwith the merits and once the application under Order 39 Rule 1 and 2 CPC was decided on merits, and affirmed in appeal, the said ground was raised before the High Court. However, in the instant case, the petitioner has come up before this Court by raising the issue at the inception and the

application under Order 39 Rule 1 and 2 CPC has yet not been decided on merits. Hence, the said decision may not come to the aid of the private respondent and it does not consider the decision of the Apex Court in Shiv Kumar Chaddha (supra).

23. In view of the aforesaid, this Court is of the clear opinion that both the courts were not justified in brushing aside the issue before it solely on the ground that the petitioner had already put in appearance before the court and all the objections can be heard by the court concerned.

24. This matter requires to be seen from another angle inasmuch as once an order of ex parte injunction has been passed which requires the plaintiff to comply with the provisions of order 39 Rule 3 and even though, if the defendant gets the knowledge and puts in appearance and may file his objections in terms Order 39 Rule 4 CPC but the fact remains that it is the plaintiff, who is required to adhere to the legislative mandate of order 39 Rule 3 CPC and in the instant case the order of ex parte injunction dated 06.02.2022 which categorically required the plaintiff to comply with the said provision within 24 hours. Having failed to do so, it is not open for the plaintiff to take advantage of his own wrong or else it will give a very unfair message that a person who gets an order from the count subject to conditions yet he can take benefit of it even without complying with the said conditions then it will amount to rewarding such unscrupulous plaintiff for his own wrong and will also amount to perpetuating the ex parte injunction which may operate harshly against the other party.

25. The trial courts must look into the issue regarding the non-compliance of the conditions upon which an injunction order is granted by the court. Illustratively if an injunction order is granted ex parte subject to certain terms or conditions imposed as provided under Order 39 Rule 2 Sub-Rule (2) or even relating to the compliance of Order 39 Rule 3, and later after service if it is brought to the notice of the court that the party in whose favour the interim order subsists has got the same on the basis of false, misleading or vexatious pleadings or documents or it is informed to the Court that the mandatory compliance of Order 39 Rule 3 has not been done as per law then the trial court must be prompt in vacating such interim order or refuse to extend it so that a party should not be rewarded for his sharp tactic. The Court if it is quick in granting incongruous ex parte, it must be equally quick on vacating it or refusing to extent it, if it finds a party misusing it.

26. There is no justification that once a party has put in appearance then the matter be decided on merits and the issue of non-compliance or adoption of sharp tactic to gain the order must not go unnoticed and must be addressed by the trial courts at the first given opportunity. This attitude of the trial courts does more harm then good and must be eschewed.

27. In view of the aforesaid, this Court considering the facts and circumstances finds that the order dated 06.09.2022 in so far as it grants and continues to extend the ex parte injunction order is concerned cannot be sustained and the ex parte injunction order shall stand discharged and the order of the appellate court dated 26.05.2023 shall also stand set aside. It is directed that the parties shall appear before the trial court on 15.02.2024 [which as per the parties is the date fixed] and the trial court after hearing the parties

shall decide the application for injunction expeditiously on merits without granting any unnecessary adjournment to either of the parties and endeavour be made to decide the said application, preferably within a period of two weeks from the date fixed i.e. 15.02.2024. It is further clarified that the injunction order granted ex parte has been discharged solely on the ground of non-compliance of Order 39 Rule 3 CPC and not on merits, hence the trial court shall decide the application on its own merits.

28. With the aforesaid, the petition is **allowed.** Costs are made easy.

(2023) 2 ILRA 211
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.11.2022
BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Matters Under Article 227 No. 6225 of 2022

Jagat Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Kamlesh Kumar Dwivedi, Sri Gaurav Dwivedi

Counsel for the Respondents:
G.A.

Information Technology ACT-Section 66A, 67A-Application for discharge preferred on behalf of the petitioner- rejected and the order was affirmed by the appellate court- chargesheet was submitted only under Sectiontion 66 A of the I.T. Act-cognizance was taken for that offence only -evidence was collected -accused sent obscene message –text message not come within the meaning of "sexually explicit act or conduct" as given under Sectiontion 67A of the I.T. Act- trial court definitely need not go into evidentiary value of the material collected at this stage- need not conduct any roving enquiry-impugned order set aside. **Petition disposed.** (E-9)

Cases cited:

1. Shreya Singhal Vs U.O.I.& ors. reported in AIR 2015 SC 1523

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

01. Heard Sri Kamlesh Kumar Dwivedi, learned counsel for the petitioner and Sri O. P. Mishra, learned A.G.A. for the State-respondent.

02. This petition under Article 227 of the Constitution of India has been moved with a prayer to set aside the orders dated 13.05.2022 and 12.02.2019 passed by the revisional court and the trial court respectively whereby the application for discharge preferred on behalf of the petitioner was rejected and the order was affirmed by the appellate court in a case arising out of case crime no.209 of 2016, under Section 66 A of I.T.Act.

03. The facts relevant for the purpose of this petition are as below:-

A F.I.R. was lodged against unknown persons with the allegation that some unknown person was transmitting obscene messages from a particular mobile number (as given in the F.I.R.) to the mobile of "would be husband" of the sister of the informant. On the basis of this F.I.R. investigation was conducted and chargesheet under Section 66-A of the I.T.Act was submitted against the petitioner and cognizance was taken. An application was moved on behalf of the accused that no

case under Section 66 A I.T. Act was made out as that section has been held ultra vires in view of the judgment of Hon'ble Apex Court in the case of **Shreya Singhal vs. Union of India and others reported in AIR 2015 SC 1523.** Therefore, he may be discharged. After hearing both the sides, the trial court came to conclusion that no charge under Section 66 A I.T.Act can be framed. However, prima facie offences under Sections 67, 67 A and 66C of the I.T. Act were still made out. Against the aforesaid order of the trial court, a criminal revision was preferred but the same came to be dismissed by the Additional District & Sessions Judge, POCSO Act-III, Hapur. Now the petitioner is before this Court under Article 227 of the Constitution of India.

04. The forceful contention of the petitioner is that chargesheet was submitted only under Section 66 A of the I.T. Act; cognizance was taken for that offence only. Hence in the light of the judgement of Hon'ble Apex Court in the case of **Shreya Singhal vs. Union of India and others reported in AIR 2015 SC 1523** the petitioner should have been discharged and that there was no question of framing any other charge. It may be noted at the very outset that by the impugned order learned trial court, on the basis of the dictum of the Apex Court, held that no charges can be framed under Section 66 A of the I.T. Act; at the same time it found material to show that prima facie offence under Sections 67, 67A and 66C were made out.

05. I went through papers on record and submissions of the petitioner. It appears that evidence was collected showing that it was the accused-petitioner, who sent obscene message from a mobile to the mobile of would be husband of the sister of the informant. It may be noted that Section 67 of the Information Technology Act prohibits publishing and transmitting or cause to be published or transmitted in the electronic from, any material which is lascivious or appeals to the prurient interest to the persons who are likely to see or hear the matter contained or embodied in it. Offence of such nature is punishable with a term extending upto three years and fine upto five lac rupees on first conviction. If the evidence collected is accepted as it is in the Act, in my view, case comes within the scope of definition of Section 67 of the I.T.Act. It may be noted that no argument has come-forth from the side of the petitioner as to how and why prima facie offence under Section 67 will not be made out.

06. As far as Section 67A is concerned, I doubt that a text message may come within the meaning of "sexually explicit act or conduct" as given under Section 67A of the I.T. Act. And as far as charge under Section 66C is concerned, there is nothing to suggest that any electronic signature, password and any other unique identification feature of any other person has been used fraudulently and dishonestly so as to bring the incident within the definition of Section 66C which punishes incidents of identity theft.

07. It is settled position that an investigating officer and a court function in different spheres. If at one hand, the Magistrate or a court cannot compel the I.O. to submit a chargesheet in a particular section, on the other hand, the court is not bound to toe the line taken by the I.O. or to concur with his opinion. The court/Magistrate is expected to apply his judicial mind while filtering through the prosecution papers and the evidence

collected by the I.O. for the purpose of framing of charge. It may be noted that such discretionary power is inherent by virtue of his holding of a criminal court. It will be unmeaning that a Magistrate, while exercising powers of a criminal court is restrained from applying his judicial mind. In my view, if at the time of framing of charge, the court comes to conclusion that some other offence for which the accused was not chargesheeted is prima facie made out from the available material on record, he shall be perfectly within his powers to frame the charge, irrespective of the fact whether cognizance of that particular offence-if I may use the word, is not taken. This is why it is rightly said that cognizance of a case is taken and not of offence. If such a narrow interpretation of judicial powers is made it will lead to unforeseen complications. Moreover, cognizance is a word having different connotations at different stages of a criminal case. The court is even invested with the power to add or alter charge at any stage of the trial u/s 216 of Cr.P.C. In my view, no fetters can be put on so as to sap out the life from statutory provisions.

08. Having observed as aforesaid, I point out that the court has not referred to material on record which prima facie made out the offences under Section 66C and 67A of the I.T. Act. The point, thus involved may require filtering through all the material as available in the case diary as well as hearing both the sides. There is also a probability, as suggested by learned A.G.A. that besides offence under I.T Act, offences under Indian Penal Code may be made out. As this may require considering the entire facts and evidence as collected by the I.O. hence matter, in my view, should be left open for the court concerned to adjudicate. At the same time the trial court definitely need not go into evidentiary value of the material collected at this stage and need not conduct any roving enquiry, but shall briefly point out the facts which in its view constitute the ingredients of the offence as defined by the statute.

09. In the above circumstances, orders dated 13.05.2022 and 12.02.2019 passed by the revisional court as well as the trial court respectively are set aside to the extent that offence under Section 67A and 66C of the I.T. Act are made out.

10. The petition is therefore **disposed of** with a direction to the court below to pass an order afresh after affording an opportunity of hearing to both the sides.The court while passing an order shall not be influenced by the observations made in para-6 of this order.

(2024) 2 ILRA 213

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 730 of 2024

Pawan Kumar @ Pawan Yadav ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Rakesh Kumar Agarwal, Saksham Agarwal

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 – Sections 438 & 482 – Indian Penal Code, 1860 – Sections 376 & 504 – Scheduled Castes and Scheduled Tribes

(Prevention of Atrocities) Act, 1989 – Sections 3(2)(v), 14-A & 18-A - Application U/s 482 Cr.P.C. – for quashing the charge-sheet and the impugned summoning order - preliminary objection – regarding maintainability of the Application u/s 482 Cr.P.C. by relying upon the Full Bench judgment rendered in '*Ghulam Rasool Khan & ors. Vs St. of U.P. & Others*', - Applicant has a statutory remedy to file an appeal under Section 14-A of the SC/ST Act, 1989 – Applicant placed reliance upon the judgments passed in '*Ramavatar Vs St. of M.P.*', '*B. Venkateswaran Vs P. Bakthavatchalam*', and '*Arnab Manoranjan Goswami Vs St. of Mah.*', - Court observed that, judgments placed by the applicant are not binding precedents against the Full Bench decision in '*Ghulam Rasool Khan' case* - and the scope of enquiry in an appeal under Section 14-A is broader than that under Section 482 Cr.P.C., which cannot entertain disputed questions of fact, making the appeal a more efficacious remedy – held, an application under Section 482 Cr.P.C. is not maintainable where the applicant has a statutory remedy of filing an appeal under section 14-A of the Act, 1989 – accordingly, this application is dismissed – with a liberty to the applicant to avail the remedy of appeal under Section 14-A of the Act, 1989.
(Para – 27, 28, 29, 30)

Application Dismissed. (E-11)

List of referred Cases: -

1. St. of Har. Vs Bhajan Lal – 1992 Supp. (1) SCC 335,

2. Deepak Gulati Vs St. of Har. - (2013) 7 SCC 675,

3. Arnab Manoranjan Goswami Vs St. of Mah. - (2021) 2 SCC 427,

4. Shueb Mahmood Kidwai @ Bobby Vs St. of U.P. - 2021(4)ADJ 244: 2021(4) ALJ 28,

5. Amar Nath Vs St. of Har., (1977) 4 SCC 137,

6. Madhu Limaye Vs St. of Mah., (1977) 4 SCC 551,

7. In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act - (2018) 6 ALJ 631 = 2018 SCC OnLine All 2087,

8. Ghulam Rasool Khan Vs St. of U.P., 2022 SCC OnLine All 975,

9. Abhishek Awasthi @ Bholu Awasthi Vs St. of U.P. & anr., Application under Section 482 No. 8635 of 2023 – order dated 20.09.2023,

10. Union Territory of Ladakh Vs Jammu & Kashmir National Conference, 2023 SCC OnLine SC 1140,

11. Devendra Yadav Vs St. of U.P., 2023 SCC OnLine All 164,

12. Ramawatar Vs St. of M.P.: 2021 SCC OnLine SC 966 decided on 25.10.2021,

13. B. Venkateswaran Vs P. Bakthavatchalam : 2023 SCC OnLine SC 14,

14. P. S. Sathappan Vs Andhra Bank Ltd., (2004) 11 SCC 672,

15. Amrendra Pratap Singh Vs Tej Bahadur Prajapati, (2004) 10 SCC 65,

16. U.O.I. Vs Cipla Ltd., (2017) 5 SCC 262,

17. Prithvi Raj Chauhan Vs U.O.I. : (2020) 4 SCC 727.

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

1. Heard Sri Saksham Agarwal, the learned counsel for the applicant and Sri Anurag Verma, the learned A.G.A-I appearing on behalf of the State.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has sought quashing of the charge sheet dated 10.01.2024 submitted in furtherance of F.I.R. No. 0797 of 2023, dated 26.11.2023, Police Station P.G.I., Lucknow under Sections 376, 504 I.P.C. and 3 (2) (v) of the Schedule Castes and Scheduled tribes (Prevention of Atrocities) Act, 1989 and also the order dated

20.01.2023 passed by the learned Special Judge (SC/ST Act), Lucknow in Sessions Trial No. 87 of 2024, whereby the Court has taken cognizance of the aforesaid offences and has summoned the applicant to face trial for the offences.

3. Sri. Anurag Verma, the learned A.G.A.-I has raised a preliminary objection that the applicant has a statutory remedy of filing an appeal under Section 14-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (which will hereinafter be referred to as 'the Act of 1989'). He has placed reliance upon the Full Bench judgment in the case of ***Ghulam Rasool Khan and others versus State of U. P. and others :*** 2022 (8) A.D.J. 691: 2022 SCC OnLine All 975.

4. In reply to the aforesaid preliminary objection, Sri. Saksham Agarwal, the learned Counsel for the applicant has submitted that the powers under Section 482 Cr.P.C. are inherent powers and there can be no fetters on the exercise of this power. He has submitted that the applicant has been charged for commission of offences under Sections 376, 504 I.P.C. and 3 (2) (v) of the Act of 1989. Section 3 (2) (v) of the Act of 1989 provides that whoever, not being a member of a Scheduled Caste or a Scheduled Tribe commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine. The learned Counsel for the applicant has submitted that there is no substantive offence defined by Section 3 (2) (v) of the Act of 1989 and this provision merely makes a provision for imposing an enhanced punishment for certain offences under the I.P.C. under certain conditions. He has made some more submissions to impress upon the Court that the offences alleged are not made out against the applicant even as per the prosecution case, but those arguments need to be gone into only if the objection against maintainability of the application is overcome.

5. In support of his submissions, Sri. Agarwal has placed reliance upon the judgments in the cases of ***State of Harayana versus Bhajan Lal*** : (1992) Supp 1 SCC 335, ***Deepak Gulati versus State of Haryana*** : (2013) 7 SCC 675, ***Arnab Manoranjan Goswami v. State of Maharashtra*** : (2021) 2 SCC 427, ***Shueb Mahmood Kidwai @ Bobby versus State of U.P.***¸ 2021(4)ADJ 244: 2021(4) ALJ 28.

6. Section 482 Cr.P.C. provides as follows: -

> ***"482. Saving of inherent powers of High Court.***— *Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."*

7. Article 215 of the Constitution of India provides that the High Courts shall be Court of records and shall have all the powers of such courts. A court of record is undoubtedly a superior court which is itself competent to determine the scope of its jurisdiction. Section 482 Cr.P.C. does not confer any new powers on the High Court. It merely clarifies that nothing contained in the Cr.P.C. will limit or affect the inherent powers of the High Court to make such

orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

8. In ***Amar Nath v. State of Haryana,*** (1977) 4 SCC 137, the Hon'ble Supreme Court held that: -

"3. … It is well settled that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject-matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers."

9. In ***Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551,*** again it was reiterated that: -

"8.... We may read the language of Section 482 (corresponding to Section 561-A of the old Code) of the 1973 Code. It says:

"Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

At the outset the following principles may be noticed in relation to the exercise of the inherent power of the High Court which have been followed ordinarily and generally, almost invariably, barring a few exceptions:

"(1) That ***the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;***

(2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;

(3) That ***it should not be exercised as against the express bar of law engrafted in any other provision of the Code."***

10. Section 14-A of the Act of 1989 provides as follows: -

"14-A. Appeals.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in sub-section (3) of Section 378 of the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

(3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal."

11. When the applicant has a statutory remedy of appeal under Section 14-A of the 1989 Act available to him as a matter of right, and that appeal would also lie before this High Court, albeit before another Bench, there cannot be justification in bypassing the statutory remedy of appeal and invoking the inherent powers of this Court, which are meant to be exercised in exceptional circumstances only.

12. In this regard, it is to be kept in mind that in ***State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335***, the Hon'ble Supreme Court has cautioned that: -

"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."*

(Emphasis supplied)

13. ***In "In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act"*** ; (2018) 6 ALJ 631 = 2018 SCC OnLine All 2087, the five questions considered by the Full Bench, and answers given to those questions, were as follows: -

"A. Whether provisions of sub-section (2) of Section 14-A and the second proviso to subsection (3) of Section 14-A of the Amending Act, are violative of Articles 14 and 21 of the Constitution, being unjust, unreasonable and arbitrary?

While we reject the challenge to section 14A(2), we declare that the second proviso to Section 14A(3) is clearly violative of both Articles 14 and 21 of the Constitution. It is not just manifestly arbitrary, it has the direct and unhindered effect of taking away the salutary right of a first appeal which has been recognised to be an integral facet of fair procedure enshrined in Article 21 of the Constitution. The absence of discretion in the Court to consider condonation of delay even where sufficient cause may exist renders the measure wholly capricious, irrational and excessive. It is consequently struck down.

B. Whether in view of the provisions contained in Section 14-A of the Amending Act, a petition under the provisions of Article 226/227 of the Constitution of India or a revision under Section 397 of the Code of Criminal Procedure or a petition under Section 482 Cr.P.C., is maintainable. OR in other words, whether by virtue of Section 14-A of the Amending Act, the powers of the High Court under Articles 226/227 of the Constitution or its revisional powers or the powers under Section 482 Cr.P.C. stand ousted?

We therefore answer Question (B) by holding that ***while the constitutional and inherent powers of this Court are not "ousted" by Section 14A, they cannot be invoked in cases and situations where an appeal would lie under Section 14A.*** *Insofar as the powers of the Court with respect to the revisional jurisdiction is concerned, we find that the provisions of Section 397 Cr.P.C. stand impliedly excluded by virtue of the special provisions made in Section 14A. This, we hold also in light of our finding that the word "order" as occurring in sub-section(1) of Section*

14A would also include intermediate orders.

C. Whether the amended provisions of Section 14-A would apply to offences or proceedings initiated or pending prior to 26 January 2016?

We hold that the provisions of Section 14A would be applicable to all judgments, sentences or orders as well as orders granting or refusing bail passed or pronounced after 26 January, 2016. We further clarify that the introduction of this provision would not effect proceedings instituted or pending before this Court provided they relate to a judgment, sentence or order passed prior to 26 January 2016. The applicability of Section 14A does not depend upon the date of commission of the offence. The determinative factor would be the date of the order of the Special Court or Exclusive Court.

D. Whether upon the expiry of the period of limitation for filing of an appeal as specified in the second proviso to Section 14-A(3), Section 439 Cr.P.C. and the powers conferred on the High Court in terms thereof would stand revived?

We hold that the powers conferred on the High Court under Section 439 Cr.P.C. do not stand revived. We find ourselves unable to sustain the line of reasoning adopted by the learned Judge in ***Rohit*** *that the provisions of Section 439 Cr.P.C. would remain in suspension during the period of 180 days and thereafter revive on its expiry. The conclusion so arrived at cannot be sustained on any known principle of statutory interpretation. We are therefore, constrained to hold that both* ***Janardan Pandey***

as well as ***Rohit*** *do not lay down the correct law and must, as we do, stand overruled.*

E. Whether the power to directly take cognizance of offences shall be exercisable by the existing Special Courts other than the Exclusive Special Courts or Special Courts to be specified under the amended Section 14?"

The existing Special Courts do not have the jurisdiction to directly take cognisance of offences under the 1989 Act. This power stands conferred only upon the Exclusive Special Courts to be established or the Special Courts to be specified in terms of the substituted section 14. However it is clarified that the substitution of Section 14 by the Amending Act does not have the effect of denuding the existing Special Courts of the authority to exercise jurisdiction in respect of proceedings under the 1989 Act. They would merely not have the power to directly take cognizance of offences and would be bound by the rigours of Section 193 Cr.P.C. Even if cognizance has been taken by the existing Special Courts directly in light of the uncertainty which prevailed, this would not ipso facto render the proceedings void ab initio. Ultimately it would be for the objector to establish serious prejudice or a miscarriage of justice as held in Rati Ram."

14. In ***Ghulam Rasool Khan v. State of U.P.***, 2022 SCC OnLine All 975, another Full Bench of this Court dealt with the following questions: -

(i) Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017 In re : Rohit v. State of U.P. vide judgment dated 29.08.2017 correctly permitted the conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr. P.C.?

(ii) 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.?

(iii) Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr. P.C.?

(iv) What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed?

15. The Full Bench answered the aforesaid questions as follows: -

(i) Question No. (I) is answered in negative as Rohit v. State of U.P., (2017) 6 ALJ 754 has been overruled by Full Bench of this Court in In Re : Provision of section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act, 2015, (2018) 6 ALJ 631.

(ii) Question No. (II) is answered in negative holding that an aggrieved person will not have two remedies namely, i.e. filing an appeal under Section 14A of the 1989 Act as well as filing a bail application in terms of Section 439 Cr. P.C.

(iii) Question No. (III) is answered in negative holding that ***the aggrieved person having remedy of appeal under Section 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section 482 Cr. P.C.***

(iv) Question No. (IV) - There will be no limitation to file an appeal against an order under the provisions of 1989 Act. Hence, the remedies can be availed of as provided.

16. The learned A.G.A. has informed the Court that the following questions have been referred by the order dated 20.09.2023 passed in ***Abhishek Awasthi @ Bholu Awasthi versus State of U.P. and another,*** Application under Section 482 No. 8635 of 2023 and other connected matters: -

(i) Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017 In re : ***Rohit*** *Vs. State of U.P. and another vide judgment dated 29.08.2017 correctly permitted the conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr.P.C.?*

(ii) 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.?*

(iii) ***Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr.P.C.?***

(iv) What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed?" "

17. Although the questions have been referred to a larger Bench by means of an

order dated 20.09.2023 passed by a coordinate Bench of this Court at Allahabad in Application under Section 482 No. 8635 of 2023 and other connected matters, the decision in **Ghulam Rasool Khan** (Supra) will hold good till a decision is taken by a larger Bench. In this regard, a reference to the following passage from judgment of the Hon'ble Supreme Court in ***Union Territory of Ladakh v. Jammu & Kashmir National Conference,*** 2023 SCC OnLine SC 1140 will be appropriate: -

"35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. ***We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench..."***

(Emphasis supplied)

18. Therefore, the mere reference of the aforesaid questions would not dilute the binding nature of the law laid down in **Ghulam Rasool Khan** (Supra).

19. The learned Counsel for the applicant has placed reliance upon the judgment in the case of **Devendra Yadav** v. State of U.P., 2023 SCC OnLine All 164, wherein a coordinate Bench of this Court noted the contention that Ghulam Rasool (Supra) does not take into consideration the judgment in the case of ***Ramawatar v. State of Madhya Pradesh:*** 2021 SCC OnLine SC 966 decided on 25.10.2021, wherein the Hon'ble Supreme Court held that:—

"where it appears to the Court that the offence in question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence is covered under a 'special statute' would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482 Cr. P.C."

20. The coordinate Bench merely noted the contention of the learned Counsel for the applicant that **Gulam Rasool Khan** (supra) has been decided without taking into consideration the ratio laid down in the judgment of **Ramawatar v. State of M.P.** and thus could be safely be termed as per incurim. Without expressing its view on this Submission, the Coordinate Bench took into consideration another judgment of the Hon'ble Supreme Court in the case of ***B. Venkateswaran v. P. Bakthavatchalam*** : 2023 SCC OnLine SC 14, in which the Hon'ble Apex Court has opined that:—

"From the aforesaid, it seems that the private civil dispute between the parties is converted into criminal proceedings. Initiation of the criminal proceedings for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, therefore, is nothing but an abuse of process of law and Court. From the material on record, we are satisfied that no case for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is made out, even prima facie. None of the ingredients of Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 are made out and/or satisfied. Therefore, we are of the firm opinion and view that in the facts and circumstances of the case, the High Court ought to have quashed the criminal proceedings in exercise of powers under Section 482 of the Code of Criminal Procedure. The impugned judgment and order passed by the High Court, therefore, is unsustainable and the same deserves to be quashed and set aside and the criminal proceedings initiated against the appellants deserves to be quashed and set aside."

The coordinate Bench concluded in **Devendra Yadav** (Supra) that: -

"15. Thus from the aforesaid discussions, it is clear that Hon'ble Apex Court has clearly and time and again have opined that elaborating the aforesaid provision of full bench of this Court as well as Hon'ble Apex Court and taking the help of the aforesaid judgments, the Court is of the considered opinion that 482 Cr. P.C. application could be filed assailing the summoning order.

21. While deciding the **Devendra Yadav** (Supra), this point appears to have escaped consideration of the coordinate Bench that in none of the judgments in the case of **Ramawatar v. State of M.P.** and ***B. Venkateswaran v. P. Bakthavatchalam*** , the question of effect of Section 14-A of the 1989 Act on maintainability of an application under Section 482 Cr.P.C. was neither raised, nor decided.

22. It is settled law that a judgment is an authority for what it actually decides and not for what can be deduced from it. In a Constitution Bench judgment in the case of ***P. S. Sathappan v. Andhra Bank Ltd.***, (2004) 11 SCC 672, it was held that: -

"118. ...It is well known that a judgment is an authority for what it decides and not what may even logically be deduced therefrom.

* * *

144. While analysing different decisions rendered by this Court, an attempt has been made to read the judgments as should be read under the rule of precedents. A decision, it is trite, should not be read as a statute.

145. A decision is an authority for the questions of law determined by it. *While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment, as is well known, must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. [See Haryana Financial Corpn. v. Jagdamba Oil Mills (2002) 3 SCC 496, Union of India v. Dhanwanti Devi (1996) 6 SCC 44, Nalini Mahajan (Dr.) v. Director of Income Tax (Investigation) (2002) 257 ITR 123 (Del) State of U.P. v. Synthetics and Chemicals*

Ltd. (1991)4 SCC 139, A-One Granites v. State of U.P. (2001) 3 SCC 537, and Bhavnagar University v. Palitana Sugar Mill (P) Ltd. (2003) 2 SCC 111],

146. *Although decisions are galore on this point, we may refer to a recent one in State of Gujarat v. Akhil Gujarat Pravasi V.S. Mahamandal (2004) 5 SCC 155, wherein this Court held:*

"It is trite that any observation made during the course of reasoning in a judgment should not be read divorced from the context in which it was used."

147. *It is further well settled that a decision is not an authority for the proposition which did not fall for its consideration."*

23. Again, in ***Amrendra Pratap Singh v. Tej Bahadur Prajapati***, (2004) 10 SCC 65, the Hon'ble Supreme Court reiterated that: -

"A judicial decision is an authority for what it actually decides and not for what can be read into it by implication or by assigning an assumed intention to the judges, and inferring from it a proposition of law which the judges have not specifically laid down in the pronouncement."

24. Since the question of effect of Section 14-A of the 1989 Act upon maintainability of an application under Section 482 Cr.P.C. was neither raised nor decided in **Ramawatar** and **B. Venkateswaran** (Supra), the aforesaid judgments are not binding precedents on the aforesaid point. Therefore, these judgments would not affect the binding nature of the Full Bench judgment in the case of **Ghulam Rasool Khan** (Supra).

25. The learned Counsel for the applicant has placed reliance upon the following passage from the judgment in the case of ***Arnab Manoranjan Goswami v. State of Maharashtra***, (2021) 2 SCC 427 but the question of maintainability of an application under Section 482 Cr.P.C. where the applicant has a statutory remedy available under Section 14-A of the Act, was not involved in Arnab Manoranjan Goswami (Supra) and, therefore, the aforesaid case would be of no avail for decision of the question of maintainability raised by the learned A.G.A.-I.

26. The learned Counsel for the applicant has also relied upon the judgment in the case of ***Prithvi Raj Chauhan versus Union of India*** : (2020) 4 SCC 727 wherein the petitioners had questioned the provisions inserted by way of carving out Section 18-A of the Act of 1989, which provide that nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act. The Hon'ble Supreme Court held that: -

"11. Concerning the applicability of provisions of Section 438 CrPC, it shall not apply to the cases under the 1989 Act. However, if the complaint does not make out a prima facie case for applicability of the provisions of the 1989 Act, the bar created by Sections 18 and 18-A(i) shall not apply."

However, while deciding the aforesaid question, the Hon'ble Supreme Court also observed that: -

"12. The Court can, ***in exceptional cases,*** *exercise power under Section 482 CrPC for quashing the cases to prevent misuse of provisions on settled parameters, as already observed while*

deciding the review petitions. The legal position is clear, and no argument to the contrary has been raised."

27. While making the aforesaid observation, the Hon'ble Supreme Court did not take into consideration the provision contained in Section 14-A of the Act of 1989. Therefore, the case of **Prithvi Raj Chauhan** (Supra) is also not relevant for deciding maintainability of an application under Section 482 Cr.P.C. where the applicant has a statutory remedy of filing an appeal under Section 14-A of the Act of 1989.

28. In ***Union of India v. Cipla Ltd.***, (2017) 5 SCC 262, the Hon'ble Supreme Court held that the Court is required to adopt a functional test vis-à-vis the litigation and the litigant. What has to be seen is whether there is any functional similarity in the proceedings between one court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not.

29. In the present case, the applicant has a statutory remedy of filing an appeal under Section 14-A of the 1989 Act, which remedy is available to him as a matter of right, and that appeal would also lie before this High Court, albeit before a different Bench. The scope of enquiry in the appeal will obviously be larger than the scope of enquiry while deciding an application under Section 482 Cr.P.C., where disputed questions of facts cannot be entertained. Thus the appeal would appear to be more beneficial to the applicant. The only reason for filing an application under Section 482 Cr.P.C. instead of filing an appeal appears to be avoiding a particular Bench of this Court itself. The facts stated above clearly establish that it is a typical example of forum shopping, which practice has always been deprecated by the Courts.

30. In view of the foregoing discussions, the application under Section 482 Cr.P.C. is ***dismissed*** leaving it open for the applicant to file an appeal under Section 14-A of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

(2024) 2 ILRA 223

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 1140 of 2024

Sabir Ali ...Applicant
Versus
The State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Dilip Kumar Shukla

Counsel for the Opposite Parties:
G.A., Aprajita Bansal

Criminal Law – Criminal Procedure Code, 1973 – Sections 41(1), 161 & 482 – Indian Electricity Act, 2003 – Section 135 - Application u/section 482 Cr.P.C. – filed for quashing of the charge-sheet and the order taking cognizance – offence of **theft of electricity** – FIR lodged – applicant filed a writ petition – disposed of - with the observation that the applicant may avail benefit under **Section 41(1) Cr.P.C.** – charge-sheet – cognizance taken – trial initiated – instant writ petition - Court observed that (i) **non-submission of videographic evidence** does

not constitute valid grounds for quashing proceedings when the FIR and St.ments under Section 161 Cr.P.C. disclose commission of a cognizable offence – (ii) reliance placed on *C.B.I. Vs Aryan Singh*, wherein the Hon'ble Supreme Court held that **while exercising powers under Section 482 Cr.P.C., the Court is not to conduct a mini trial**, nor is the prosecution required to prove its case at this stage – the Court reiterated that, while exercising the powers under Section 482 of the CrPC court has a limited role to examining whether, based on the prosecution's allegations, a prima facie case for trial is made out – defence of the accused cannot be considered at this stage – hence, the applicant is held guilty of committing theft of electricity by damaging the service line coming to his premises, which is sufficient for trail of an offence under section 135 of the Electricity Act – accordingly, the application was found to be devoid of merit and **dismissed**.
(Para – 11, 13, 14)

Application Dismissed. (E-11)

List of referred Cases: -

1. C.B.I. Vs Aryan Singh, 2023 SCC Online SC 379,

2. St. of Har. Vs Bhajan Lal : 1992 SCC (Crl) 426,

3. K. Sundaram Vs S.P. Rajmanikam & Anr. 1987 CrL.J.247,

4. Dakshin Har. Bijli Vitran Nigam Limited Vs Poonam Vashisth, 2008 SCC OnLine P&H 1515,

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

1. Heard Sri D.K. Shukla, the learned counsel for the applicant, Sri Akhilesh Kumar Vyas, the learned AGA-I for the State, Sri Jayant Mohan Verma holding brief of Mrs. Aprajita Bansal, the learned counsel for the opposite party no. 3.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has sought quashing of the impugned charge sheet dated 13.04.2023 filed against the applicant arising out of Case Crime No. 797 of 2020, under Section 135 of Indian Electricity Act, 2003, Police Station Anti-power Theft, District Unnao, pending in the court of Additional District Judge-4, E.C. Act, Unnao in S.T. No. 1127 of 2023 as well as for setting aside the impugned order dated 20.09.2022 by which cognizance has been taken by the Additional District Judge-4, E.C. Act, Unnao in Case Crime No. 797 of 2020, under Section 135 Indian Electricity Act, 2003, Police Station Anti-Power Theft, District Unnao in S.T. No. 1127 of 2023.

3. In the FIR lodged on 06.07.2020 it was alleged that when a team of engineers and officials of Madhyanchal Vidyut Vitran Nigam Limited had checked the premises of the applicant, it was found that he had cut the service cable and was consuming electricity by bypassing the meter installed at his premises, which was an offence under Section 135 of the Electricity Act.

4. The learned counsel for the applicant has submitted that The applicant had filed Writ Petition No. 21799 (M/B) of 2020, which was disposed of by means of an order dated 23.11.2020 by observing that the applicant is entitled to get benefit of the provisions contained under Section 41(1) Cr.P.C. During investigation, the Investigating Officer has recorded that the officials of Madhyanchal Vidyut Vitran Nigam Limited did not provide a CD or other device containing videography record of the testing.

5. The learned counsel for the applicant has submitted that the meter that

was installed on the premises of the applicant has not been tested so as to ascertain any tempering etc. made by the applicant on it.

6. Section 135 of the Electricity Act provides that whoever dishonestly damages any wire or causes it to be damaged so as to interfere with the proper or accurate metering of electricity, shall be guilty of committing theft of electricity.

7. The learned counsel for the applicant has relied upon a judgment of the Punjab and Haryana High Court in ***Dakshin Haryana Bijli Vitran Nigam Limited v. Poonam Vashisth***, 2008 SCC OnLine P&H 1515, wherein it was held that the rules require that to prove the theft of electricity it was the basic requirement that the meter must have been checked from the concerned laboratory.

8. Section 135(1)(c) of the Electricity Act, 2003 provides as follows:-

> **"135. Theft of Electricity.–**
> (1)Whoever, dishonestly,–
> * * *
> **(c) damages or destroys** an electric meter, apparatus, equipment, **or wire or causes or allows any of them to be so damaged or destroyed as to interfere with the proper or accurate metering of electricity; or"**

9. A bare perusal of the provisions contained in 135(1)(c) of the Electricity Act indicates that an offence of theft of electricity is made out when the service cable is cut so as to draw electricity and in such a contingency, there is no need of any tempering having been made with the meter. Therefore, where the allegations are such as have been levelled in the present case, there is absolutely no need for checking of the meter. The 'rules referred to in the judgment in ***Dakshin Haryana Bijli Vitran Nigam Limited,*** might have been different in that state, which are not applicable in the state of U.P.

10. The learned counsel for the applicant has next relied upon the judgment of the Orissa High Court in ***K. Sundaram v. S.P. Rajmanikam & Anr.*** 1987 CrL.J.247. This case arose from a judgment of acquittal passed after conclusion of the trial, after assessment of the evidence led by the parties. In the present case, that stage is yet to reach.

11. So far as submission regarding non furnishing of the compact disc or other device containing videography of the incident is concerned, that would be a factor to be taken into consideration by the trial court while evaluating evidence by the parties. For taking cognizance of the offence and summoning the accused to face the trial, only this much is sufficient that the FIR discloses commission of offence and the FIR allegations are supported by the statements recorded under Section 161 Cr.P.C. Therefore, the mere non furnishing of proof of videography will not give rise to a ground for quashing of the proceedings without holding a trial.

12. In ***State of Haryana v. Bhajan Lal*** : 1992 SCC (Crl) 426, the Hon'ble Supreme Court has held 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."

13. The aforesaid law has been reiterated by the Hon'ble Supreme Court in ***C.B.I. v. Aryan Singh***, 2023 SCC Online SC 379, wherein it has been held that while exercising the powers under Section 482 Cr.P.C., the Court is not required to conduct a mini trial. It does not require the prosecution/investigating agency to prove the allegations. While exercising the powers under Section 482 of the CrPC the Court has very limited jurisdiction and is required to consider "whether any sufficient material available to proceed further against the accused for which the accused is required to be tried or not".

14. When I examined the facts of the present case in light of the aforesaid law laid down by the Hon'ble Supreme Court, it is apparent that the applicant is held guilty of committing theft of electricity by damaging the service line coming to his premises, which is sufficient for trial of an offence under Section 135 of the Electricity Act. While deciding the application under Section 482 Cr.P.C., the Court has only to see whether on the basis of prosecution allegations, a case for trial of the accused is made out or not and the Court cannot examine defence of the accused at this stage.

15. The application lacks merit and is accordingly **dismissed.**

(2024) 2 ILRA 226

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 1271 of 2024

Rajbir Singh ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Abhishek Misra

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 – Sections 190 & 482 – Indian Penal Code, 1860 – Sections 323, 504 & 506 - Application U/s 482 Cr.P.C. – for quashing of entire criminal proceedings – offences under Sections 323, 504, 506 IPC – complaint case – cognizance taken – trial commenced – parties are real brothers involved in a civil dispute over a disputed Will – plea raised that criminal case was lodged with malicious intent and allegations were of civil nature – Court examined whether the allegations disclosed cognizable offences and whether invocation of criminal law was justified – reliance placed on precedents including Usha Chakraborty Vs St. of W.B.– held, mere existence of civil dispute or strained relations does not ipso facto justify quashing – complaint contained specific allegations attracting penal provisions – no ground made out for interference under Section 482 Cr.P.C. – application dismissed.
(Para – 5, 6, 9, 10)

Application Dismissed. (E-11)

List of referred Cases: -

1. Prarmjeet Batra Vs St. of Uttrakhand & ors.– 2013 vol. 11 SCC 673,

2. Usha Chakraborty & anr. Vs St. of W.B.& anr. – (SLP (Crl.) 5866 of 2022)

3. Mohd. Allaudin Khan Vs St. of Bihar – 2019 vol. 6 SCC 107,

4. Priti Saroff Vs NCT of Delhi – 2021 Vol. 16 SCC 142.

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

1. प्रार्थी के विद्वान अधिवक्ता श्री अभिषेक मिश्रा तथा विद्वान अतिरिक्त शासकीय अधिवक्ता श्री संजय मौर्या को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 482 दण्ड प्रक्रिया संहिता के अंतर्गत प्रस्तुत इस प्रार्थना पत्र द्वारा प्रार्थी ने विद्वान न्यायिक मजिस्ट्रेट द्वितीय लखनऊ द्वारा मुकदमा अपराध संख्या 25360 सन 2022 अंतर्गत धारा 190 दं०प्र०सं० थाना हसनगंज के संदर्भ में पारित आदेश दिनांक 17.10.2023 की वैधता को चुनौती दी है, जिसके द्वारा न्यायालय ने धारा 323, 504, 506 भा०दं०सं० के अतर्गत अपराधों का संज्ञान लेते हुए प्रार्थी को उक्त अपराधों के विचारण के लिए आहूत किया।

3. विपक्षी संख्या 2 द्वारा प्रस्तुत किये गये परिवाद में कहा गया है कि प्रार्थी परिवादी का बड़ा भाई है, दोनों पक्षों के मध्य एक वसीयत के माध्यम से मकान का बंटवारा हो चुका है किन्तु प्रार्थी ने परिवादी की अनुपस्थिति में उसके घर में घुसकर नाली की पाइप तोड़ दी और छत को क्षतिग्रस्त कर दिया और परिवादी के प्रबंधक द्वारा विरोध किये जाने पर उसके साथ अभद्रता की। परिवादी ने यह भी कथन किया है कि प्रार्थी ने फोन के माध्यम से उसे गालियां एवं धमकी दी, जिसके साक्ष्य परिवाद के साथ सलग किये गये हैं।

4. प्रार्थी के विद्वान अधिवक्ता का कथन है कि पक्षों के मध्य दीवानी प्रकृति का विवाद है तथा आपराधिक कार्यवाही द्वेषपूर्ण भावना से संस्थित की गयी है। **परमजीत बत्रा बनाम उत्तराखण्ड राज्य और अन्य (2013) 11 SCC 673** में पारित निर्णय का आश्रय लिया, जिसमें माननीय उच्चतम न्यायालय ने यह अवधारित किया है कि धारा 482 दं०प्र०सं० के अंतर्गत अपने क्षेत्राधिकार का प्रयोग उच्च न्यायालय को अत्यन्तसावधानीपूर्वक करना चाहिए। इस शक्ति का इस्तेमाल केवल विरलतम मामलों में न्यायिक प्रक्रिया का दुरूपयोग रोकने अथवा न्यायहित की रक्षा के लिए ही किया जाना चाहिए। किसी आपराधिक परिवाद से अपराध का होना परिलक्षित होता है या नहीं, यह परिवाद में कहे गये कथनों की प्रकृति से ही तय हो सकता है। उच्च न्यायालय को यह देखना चाहिए कि कथित अपराध के आवश्यक तत्व परिवाद में कहे गये हैं या नहीं। एक दीवानी प्रकृति के मामले को एक आपराधिक मामले की बनावट भी दी जा सकती है, किन्तु उच्च न्यायालय को यह देखना चाहिए कि क्या दीवानी प्रकृति के बाद को एक आपराधिक जामा पहनाया गया है। जहाँ दीवानी प्रकृति का अनुतोष उपलब्ध हो वहाँ उच्च न्यायालय को आपराधिक वाद की कार्यवाही को निरस्त करने से हिचकिचाना नहीं चाहिए।

5. प्रार्थी के विद्वान अधिवक्ता ने **उषा चक्रवर्ती** और एक अन्य बनाम पश्चिम बंगाल राज्य और एक अन्य **(Usha Chakraborty & Anr. Vs State of West Bengal & Anr. Arising out of SLP (Crl.) 5866 of 2022)** के प्रकरण में पारित निर्णय का भी आश्रय लिया, जिसमें माननीय उच्चतम न्यायालय ने उक्त मामले के विशेष तथ्यों एवं परिस्थितियों की समीक्षा करने के उपरान्त यह निष्कर्ष निकाला था कि आपराधिक कार्यवाही मात्र पक्षों के मध्य हुए दीवानी प्रकृति के विवाद के कारण संस्थित की गयी थी।

6. उक्त विधि व्यवस्था की समुचित जानकारी तथा समझदारी होने के उपरान्त भी प्रार्थी ने स्वयं ही अपने छोटे भाई (विपक्षी संख्या 2) के विरुद्ध प्रथम सूचना रिपोर्ट संख्या 0222 सन 2022 दिनांक 24.9.2022 को लिखाई थी। यह विचित्र प्रतीत होता है कि प्रार्थी अपने भाई के विरुद्ध मात्र धारा 504 भा०दं०सं० के अपराध के संदर्भ में प्रथम सूचना रिपोर्ट लिखवाने में सफल रहा, जब कि धारा 504 भा०द०सं० में वर्णित अपराध एक असंज्ञेय अपराध है, तथा असंज्ञेय अपराध के संबंध में प्रथम सूचना रिपोर्ट नहीं लिखाई जा सकती है।

7. जब प्रार्थी ने स्वयं ही अपने छोटे भाई से हुए दीवानी प्रकृति के विवाद के कारण उसके विरुद्ध एक असंज्ञेय अपराध का कथन करते हुए अवैधानिक तरीके से प्रथम सूचना रिपोर्ट दर्ज करायी हुई है, जबकि असंज्ञेय अपराध के संबंध में प्रथम सूचना रिपोर्ट किसी भी परिस्थिति में पंजीकृत नहीं की जा सकती है, प्रार्थी द्वारा प्रस्तुत कियागया उपरोक्त न्यायिक निर्णय का सम्मान करते हुए प्रार्थी को स्वयं ही अपने छोटे भाई के विरुद्ध न्यायिक प्रक्रिया का दुरूपयोग करने से बचना चाहिए था।

8. **मोहम्मद अलाउद्दीन खान बनाम बिहार राज्य 2019 6 SCC 107** में माननीय उच्चतम न्यायालय बिहार उच्च न्यायालय के एक निर्णय के विरुद्ध अपील निर्णीत कर रहा था, जिससे उच्च न्यायालय ने विचारण न्यायालय द्वारा पारित अपराधों का संज्ञान लेने तथा आरोपी को विचारण हेतु आहूत करने के आदेश को धारा 482 दं०प्र०सं० के अंतर्गत दी गयी शक्तियों का प्रयोग करते हुए इस आधार पर निरस्त कर दिया था कि पक्षों के मध्य एक दीवानी प्रकृति का वाद लंबित था, तथा गवाहों के बयानों में कुछ विरोधाभास थे। उच्च न्यायालय के आदेश के विरुद्ध अपील तय

करते हुए माननीय उच्चतम न्यायालय ने यह कहा कि मात्र दीवानी प्रकृति का वाद लंबित होना यह तय करने के लिए संगत नहीं है कि अभियुक्त के विरुद्ध कथित आरोपों के विचारण का मामला बनता है या नहीं। इस उद्देश्य से मात्र यह देखा जाना चाहिए कि क्या शिकायत / प्रथम सूचना रिपोर्ट में किये गये कथनों से आरोप का होना प्रथम दृष्टया प्रतीत होता है। इस स्तर पर उच्च न्यायालय को यह भी नहीं देखना चाहिए कि क्या गवाहों के बयानों में कुछ विरोधाभाष हैं।

9. **प्रीति सर्राफ बनाम राज्य (एन.सी.टी ऑफ दिल्ली), (2021) 16 SCC 142** में माननीय उच्चतम न्यायालय ने प्रतिपादित किया कि यह विधि का एक सुस्थापित सिद्धान्त है कि धारा 482 दं०प्र०सं० के अंतर्गत निहित शक्तियों का प्रयोग करते समय शिकायतकर्ता द्वारा किये गये कथनों का परीक्षण करना चाहिए तथा इस स्तर पर उच्च न्यायालय को लगाये गये आरोपों की सत्यता का परीक्षण नहीं करना चाहिए। शिकायत / प्रथम सूचना रिपोर्ट / आरोप-पत्र तथा इसके समर्थन में प्रस्तुत अभिलेखीय साक्ष्य से यदि अपराध होना प्रतीत हो तो आपराधिक प्रक्रिया को निरस्त नहीं किया जा सकता है। उच्च न्यायालय की अन्तर्निहित शक्तियां असाधारण शक्तियां हैं, जिन्हें अत्यन्त सावधानी के साथ मात्र विरलतम मामलों में ही प्रयोग किया जाना चाहिए। यदि किये गये कथनों के आधार पर शिकायतकर्ता को कुछ दीवानी प्रकृति के अनुतोष भी उपलब्ध हैं तो मात्र इस कारण से आपराधिक कार्यवाही स्थगित नहीं की जा सकती है।

10. जब प्रस्तुत मामले को प्रीति सर्राफ के उपरोक्त निर्णय के आलोक में देखा जाय तो यह स्पष्ट होगा कि परिवाद के अनुसार प्रार्थी ने परिवादी की अनुपस्थिति में उसके घरमें घुसकर नाली का पाइप तोड़ा और छत को क्षतिग्रस्त किया और परिवादी के प्रबंधक द्वारा विरोध किये जाने पर उसके साथ अभद्रता की तथा उसने प्रार्थी को गालियां दी एवं धमकी दी। उपरोक्त कथन प्रार्थी के द्वारा आरोप किया जाना प्रथम दृष्टया दर्शाते हैं तथा ऐसी परिस्थिति में मात्र इस आधार पर, कि पक्षों के मध्य दीवानी प्रकृति के वाद लंबित हैं, कथित अपराधों के लिए प्रार्थी के विरुद्ध विचारण को प्रारंभिक स्तर पर निरस्त नहीं किया जा सकता।

11. उपरोक्त समीक्षा के आलोक में प्रार्थना-पत्र बलहीन है और तद्नुसार **निरस्त** किया जाता है।

(2024) 2 ILRA 228

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 1424 of 2024

Ajay Kumar Baghel ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sant Vijay Singh, Ratnesh Kumar Rawat

Counsel for the Opposite Parties:
G.A., Saurabh Mishra

Criminal Law – Criminal Procedure Code, 1973 – Sections 482 – Indian Penal Code, 1860 – Sections 405, 406, 467, 468, 471, 503 & 506 – Negotiable Instruments Act, 1881 - Sections 138, 142, 142(1), 14-A, 18 & 18-A - Application U/s 482 Cr.P.C. – for quashing the charge-sheet as well as the entire criminal proceeding – offence of criminal breach of trust and cheating - FIR – Charge-sheet – summoning order – trial initiated - Court finds that – (i) the applicant and complainant shared business relations, and the monetary transactions were part of their commercial dealings – (ii) Allegations in the FIR failed to disclose any prima facie offence under the cited IPC sections – no evidence of dishonest intention, no written agreement for sale of property, and no material to support forgery – (iii) Cheque issued by the applicant did not correlate with the alleged payment and appeared to be part of a business transaction – (iv) complainant did not avail remedy under Section 138 of the Negotiable Instruments Act – Court held that, court's inherent powers under Section 482 Cr.P.C. are to be exercised sparingly and only to prevent abuse of process or secure the ends of justice – neither condition was met – The complaint was found to be a misuse of criminal law to settle a civil dispute and avoid payment of court fees – complaint held to be malicious and coercive – Accordingly, the charge-sheet, summoning order, and entire criminal proceedings were quashed, being a gross abuse of legal process and falling under

category (6) of *Bhajan Lal* guidelines – Application is allowed.
(Para – 25, 27, 29, 30, 33, 36, 37)

Application Allowed. (E-11)

List of referred Cases: -

1. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 335,

2. Som Mittal (2) Vs St. of Karn., (2008) 3 SCC 574,

3. Sheila Sebastian Vs R. Jawaharaj, (2018) 7 SCC 581,

4. G. Sagar Suri Vs St. of U.P., (2000) 2 SCC 636,

5. Indian Oil Corpn. Vs NEPC India Ltd., (2006) 6 SCC 736,

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

1. Heard Sri Ratnesh Kumar Rawat Advocate, the learned counsel for the applicant, Sri Anant Pratap Singh, the learned AGA for the State, Sri Saurabh Mishra, the learned counsel for the opposite party no. 2 and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has sought quashing of Charge Sheet No. 1 of 2022 dated 30.09.2022 for offences under Sections 420, 467, 468, 471, 406 & 506 I.P.C. submitted in furtherance of F.I.R. No. 440 of 2022, Police Station Sushant Golf City, Lucknow, summoning order dated 02.12.2022 as well as the entire criminal proceedings of Criminal Case No. 117643 of 2022, State v. Ajay Baghel, pending before the Judicial Magistrate-III, Lucknow.

3. The opposite party no. 2 has filed a counter affidavit which is taken on record.

4. The learned AGA states that the dispute is between the opposite party no. 2 and the applicant, which is private in nature and as the opposite party no. 2 has filed a counter affidavit, the State does not propose to file a separate counter affidavit. With the consent of all the learned counsel appearing for the respective parties, the Court proceeds to decide the application finally.

5. The opposite party no. 2 lodged FIR No. 440 of 2022 on 07.09.2022 alleging that the complainant is the proprietor of a firm 'M/s Utkarsh Vipul Transport Company' and is engaged in the business of supply of road and building material through his firm. In April, 2018, the complainant came into contact with the applicant, who projected himself to be the owner of a flat situated in Media Enclave, Sushant Golf City, Police Station Sushant Golf City, Lucknow and told its price to be Rs. 60,00,000/-. The complainant transferred Rs. 93,000/- to the firm of the applicant through IMPS on 28.06.2018. Till May, 2019, the complainant had transferred Rs. 17,00,000/- to the bank account of the applicant. The complainant claims to have paid a further amount of Rs. 12,00,000/- in cash after borrowing the same from some friends. When the complainant demanded documents of the flat on numerous times, the applicant provided a title deed of the flat, which turned out to be fake and the complainant came to know that he had been cheated.

6. The F.I.R. further states that when the complainant again demanded refund of his money, the applicant went to his house, gave him an account payee cheque for Rs. 11,71,373/- and he destroyed the fake title deed which was lying on a table in the complainant's house. The cheque presented

by the complainant was returned by the bank unpaid on 10.07.2022. When the complainant informed this fact to the applicant through his two mobile numbers and demanded his money, the applicant declined to pay money to him and threatened to kill him. The FIR further alleges that the applicant is a habitual offender and a gangster, against whom more than one and a half dozen cases are registered in various police stations.

7. After investigation, a charge sheet was submitted on 30.09.2022 alleging commission of offences under Sections 420, 467, 468, 471, 406 & 506 IPC and the trial court took cognizance of the offences on 02.12.2022 and summoned the applicant to face the trial.

8. It has been stated in the application that there were business relations between the applicant and the complainant and the monetary transactions between the parties were made in relation to their business dealings. No agreement for sale of any flat has been executed by the applicant in favour of the complainant and no money was paid by the complainant to the applicant for purchasing any immovable property.

9. The complainant has stated in the counter affidavit that the applicant is a hardened criminal and has a long criminal history, including a case under the U. P. Gangster and Anti Social Activities (Prevention) Act, 1986. He has obtained bail in the present concealing his criminal history. It has also been stated that the defence set up by the applicant in his application under Section 482 Cr.P.C. cannot be taken into consideration by this Court at this stage.

10. In the case of **State of Haryana v. Bhajan Lal,** 1992 Supp (1) SCC 335, the Hon'ble Supreme Court considered the law laid down in various precedents regarding scope of interference under Section 482 Cr.P.C. and summarized the law in the following words:-

"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."***

(Emphasis supplied)

11. Immediately after mentioning the aforesaid categories, the Hon'ble Supreme Court has cautioned that the power has to be exercised in rarest of rare cases by adding that:-

"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."

12. The expression "rarest of rare cases" used by the Hon'ble Supreme Court in **Bhajan Lal** (Supra) has been explained in **Som Mittal (2) v. State of Karnataka**, (2008) 3 SCC 574 in the following words:—

"9. When the words "rarest of rare cases" are used after the words "sparingly and with circumspection" while describing the scope of Section 482, those words merely emphasise and reiterate what is intended to be conveyed by the words "sparingly and with circumspection". ***They mean that the power under Section 482 to quash proceedings should not be used mechanically or routinely, but with care and caution, only when a clear case for quashing is made out and failure to interfere would lead to a miscarriage of justice.*** *The expression "rarest of rare cases" is not used in the sense in which it is used with reference to punishment for offences under Section302IPC, but to emphasise that the power under Section482CrPCto quash the FIR or criminal proceedings should be used sparingly and with circumspection."*

(Emphasis supplied)

13. When we examine the facts of the case in light of the law laid down by the Hon'ble Supreme Court in the aforesaid cases, what appears is that the FIR alleges

that the applicant is the proprietor of a firm, which had business relations with the firm of the applicant, although the name of the applicant's firm has not been disclosed in the FIR. The complainant claims to have entered into an agreement to purchase a flat of the applicant situated in Media Enclave, Sushant Golf City but neither the flat number nor any other particulars have been disclosed in the FIR so as to ascertain the identity of the Flat that was agreed to be sold to the complainant. In response to a query put by the Court, the learned counsel for the applicant admitted that no registered agreement had been executed between the parties for purchasing the flat and the reason for non execution of the agreement, as per the learned counsel for the applicant, was that since title had not been transferred, therefore, registered agreement was not executed.

14. The complainant claims that he had paid Rs. 93,000/- through IMPS by transferring the amount to the applicant's firm on 28.06.2018 and till May, 2019, he had transferred Rs. 17,00,000/- to the bank account of the applicant. A further sum of Rs. 12,00,000/- is said to have been paid in cash after borrowing the same from some friends. The FIR does not disclose the date of making cash payment of such a huge amount or the names of the complainant's friends who had lent him the money.

15. The complainant has alleged in the F.I.R. that the applicant had provided a title deed of the flat, which turned out to be fake and when the complainant had gone to the applicant's house to refund Rs. 11,71,373/- through a cheque, the applicant had destroyed the title deed that was given by him to the complainant. Therefore, as per the claim of the complainant himself, he does not have the alleged fake copy of the title deed that had been provided by the applicant.

16. On the aforesaid factual allegations, the complainant alleges that the applicant has committed offences of criminal breach of trust and cheating an dishonestly inducing delivery of property, forgery of valuable security for delivery of property for the purpose of cheating and using as genuine a forged document. It would be appropriate to have a look as the definitions of the offences, which are being reproduced below: -

"405. Criminal breach of trust.—*Whoever, being in any manner entrusted with property, or with any dominion over property,* ***dishonestly misappropriates*** *or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".*

* * *

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.

Illustrations…

* * *

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.*

* * *

463. Forgery.—Whoever makes any false documents *or false electronic record or part of a document or electronic record,* ***with intent to cause damage or injury,*** *to the public or to any person, or to support any claim or title,* ***or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.***

* * *

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 2[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."*

17. Criminal breach of trust defined by Section 405 IPC entails misappropriation or conversion of another's property for one's own use, with a dishonest intention. Cheating defined under Section 415 IPC also involves an ingredient of having a dishonest or fraudulent intention which is aimed at inducing the other party to deliver any property. Both the sections clearly lay down "dishonest intention", as a precondition for even prima facie establishing the commission of the said offences. In order to assess the allegations leveled by the complainant, the question whether applicant's actions were committed in furtherance of a dishonest intention is to be seen.

18. Except for the bald allegation leveled by the complainant, there is absolutely no material to establish that the applicant had entered into any agreement with the complainant to sell his immovable property. Even as per the complainant, the property was worth Rs.60,00,000/- and he

has paid merely Rs.17,00,000/- through banking channel and Rs.12,00,000/- are claimed to have been paid after borrowing the same from undisclosed sources and except for the bald allegation, there is absolutely no material to establish this payment. Even as per the complainant himself, he has not paid or even tendered to the applicant the balance amount of Rs.31,00,000/- towards sale consideration for the immovable property and there would be no occasion for execution of any sale deed prior to payment of the total sale consideration and the refusal to execute the sale deed would not establish any 'dishonest intention' of the applicant. Therefore, the offences under Sections 406 and 420 I.P.C. are not made out from the complainant's allegations.

19. Regarding the alleged act of showing a false title deed, there is no allegation that the applicant had himself made the false title deed. In **Sheila Sebastian v. R. Jawaharaj,** (2018) 7 SCC 581, the Hon'ble Supreme Court explained the requirement of the offence of 'forgery' in the following words: -

"25. Keeping in view the strict interpretation of penal statute i.e. referring to rule of interpretation wherein natural inferences are preferred, we observe that a charge of forgery cannot be imposed on a person who is not the maker of the same. As held in plethora of cases, making of a document is different than causing it to be made. As Explanation 2 to Section 464 further clarifies that, for constituting an offence under Section 464 it is imperative that a false document is made and the accused person is the maker of the same, otherwise the accused person is not liable for the offence of forgery."

20. The offence of forgery is made out only against the person who has make the fake document and there is no allegation that the applicant had made the forged copy of any sale deed. Therefore, the offences under Section 467 and 468 are not made out from the complainant's allegations.

21. The complainant himself states that the applicant had shown the fake title deed after he had already made the entire payment of Rs.29,00,000/- and the applicant did not induce the complainant to make any payment after showing the alleged fake deed. The alleged fake deed is said to have been destroyed also before the applicant could have used it as genuine to cheat the complainant. Therefore, the offence under Section 471 is also not made out from the complainant's allegations.

22. The complaint states that the applicant had given a cheque for Rs. 11,71,373/- towards return of the amount of Rs. 29,00,000/-. Although this Court is not required to return a finding of fact while deciding an application under Section 482 Cr.P.C., the magic odd figure of Rs. 11,71,373/- apparently does not bear any co-relation with the sum of Rs.29,00,000/- that is alleged to have been paid by the complainant towards purchase of the flat and prima facie this odd figure supports the contention of the applicant that it was a payment towards a business transaction between the parties.

23. The complainant claims that the cheque was dishonored by the bank and in such a situation, the complainant had the remedy of filing a complaint under Section 138 of the Negotiable Instruments Act, 1881, which he chose not to avail. Therefore, the present case also falls in category (6) mentioned in para 102 of

Bhajan Lal (Supra), i.e. where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

24. The complainant has not stated that he has filed any complaint under Section 138 of the Negotiable Instruments Act, 1881 and it appears that he has lodged the F.I.R. after being aggrieved by the dishonor of the cheque by the Bank. In this regard, it would be relevant to have a look at Section 142 (1) of the Negotiable Instruments Act, 1881 which provides that: -

"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."

25. Therefore, the filing of an FIR alleging that the cheque given by the applicant was returned by the Bank unpaid, which amounts to commission of offences of criminal breach of trust and cheating, is barred by the provisions contained in Section 142 of the Negotiable Instruments Act. This also brings the present case within category (6) of Para 102 of **Bhajan Lal** (Supra), i.e. where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act to the institution and continuance of the proceedings.

26. So far as the allegation of commission of the offence of criminal intimidation punishable under Section 506 IPC is concerned, the said offence is defined in Section 503 IPC as follows: -

"503. Criminal intimidation.— *Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested,* ***with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threats,*** *commits criminal intimidation."*

27. Although the complainant has alleged threatening by the applicant through mobile phone, there is no allegation that the threat was extended with intent to cause alarm to the complainant, or to cause him to do or omit to do any act as the means of avoiding the execution of such threats. Therefore, in absence of the allegation of such an 'intent', the offence of criminal intimidation is also not made out.

28. Therefore, none of the offences alleged are not made out from the allegations leveled by the complainant and the material relied upon by him and the

present case falls within category (3) mentioned in para 102 of **Bhajan Lal** (Supra).

29. The complainant has rightly contended that this Court cannot consider the applicant's defence at this stage and this Court has not considered any plea raised by the applicant in his defence. Even as per the complainant's case, the complainant had entered into an agreement to purchase a flat worth Rs. 60,00,000/- and had paid a sum of Rs.17,00,000/- through banking channel and Rs.12,00,000/- in cash without any documentation. No written agreement was executed in this regard, what to say about the agreement being registered. In absence of a registered agreement, no suit based on that agreement would lie in any Court and it would be difficult for the complainant to succeed even on the test of a preponderance of probabilities in his favour. Yet, the complainant has chosen to initiate criminal proceedings, which require a much high level of burden of proof beyond reasonable doubt.

30. The complainant has claimed that had he demanded refund of money from the applicant and applicant had given a cheque of Rs. 11,71,373/- , which was dishonored, but the complainant did not initiate any proceeding under Section 138 of the Negotiable Instruments Act. Admittedly, the complainant has not initiated any civil suit for recovery of the amount of money from the applicant. Had the complainant initiated some civil proceedings for enforcement of his rights of specific performance of the alleged contract of sale of immovable property or for recovery of money paid under the alleged agreement, it could be accepted that the complaint had initiated criminal proceedings for merely punishment of the applicant. As the complainant has initiated criminal proceedings only, it appears that the criminal proceedings have been initiated with an oblique motive to coerce the applicant to pay money to the complainant. Thus a matter, which is essentially of a civil nature, has been given a cloak of criminal offence as a short cut of other remedies, which require payment of Court fee and where the proof of the right will be subject to inadmissibility of an unregistered agreement regarding purchase of immovable property worthy Rs.60,00,000/- .

31. In **G. Sagar Suri v. State of U.P.**, (2000) 2 SCC 636, the Hon'ble Supreme Court held that: -

> ***"8.****Jurisdiction under Section 482 of the Code has to be exercised with great care. In exercise of its jurisdiction the High Court is not to examine the matter superficially. It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."*

32. As far back as in the year 2006, the Hon'ble Supreme Court had observed in **Indian Oil Corpn. v. NEPC India Ltd.**, (2006) 6 SCC 736, that: -

"13.While on this issue, ***it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors.*** *Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families.* ***There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged….***

* * *

*14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law,****a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law.*** *One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant…."*

33. However, instead of being checked and restrained, the tendency of entangling opponents in criminal cases to indirectly pressurize them to enter into a settlement for redressal of the grievances of infringement of civil rights, is ever growing. A very large share of the judicial time of the Courts is consumed in dealing with matters which essentially arise out of civil disputes and for which no civil proceedings for recovery of money, specific performance of contract cancellation of agreement etc., are initiated, which require payment of court fee.

34. This tendency of misusing the criminal proceedings for claiming enforcement of civil rights by indirect methods and evading payment of stamp duty, registration fee and court fee cannot be appreciated by the Courts and it should not be encouraged. It is nothing but cheating committed against the public at large by depriving the public exchequer of the money that would be payable as registration fee, stamp duty and court fee, which would have benefited the public at large.

35. So far as the applicant's criminal history and his having concealed his criminal history while obtaining bail from this Court, the same are not relevant for adjudication of this application, as the conduct of the applicant would not justify the complainant's conduct of initiating criminal proceedings with an oblique motive of taking advantage in a civil dispute even when the alleged offences are not made out even as per the allegations leveled and material relied upon by the complainant.

36. From the aforesaid facts, it appears that the complaint has instituted the criminal proceeding maliciously with an ulterior motive for wreaking vengeance on the applicant, with a view to spite him due to the complainant's personal grudge. In such circumstances, the continuance of criminal proceedings is a gross abuse of the

process of criminal law and the same are liable to be quashed.

37. Accordingly, the application is ***allowed.*** The Charge Sheet No. 1 of 2022 dated 30.09.2022 for offences under Sections 420, 467, 468, 471, 406 & 506 I.P.C. submitted in furtherance of F.I.R. No. 440 of 2022, Police Station Sushant Golf City, Lucknow, the summoning order dated 02.12.2022 as well as the entire criminal proceedings of Criminal Case No. 117643 of 2022, State v. Ajay Baghel, pending before the Judicial Magistrate-III, Lucknow, are hereby quashed.

(2024) 2 ILRA 238

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 7071 of 2022

Rakesh Kumar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Alok Kr. Misra

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 – Sections 451 & 482 – Mines and Minerals (Development and Regulation) Act, 1957- Sections 4(1-A), 15, 15(1), 21 & 21(4-A) - U.P.Minor Minerals (Concession) Rules, 2021 – Rules 72 & 72(6) - Application u/section 482 Cr.P.C. –assailing the validity of order, whereby application for release of a vehicle is rejected – as well as the order passed in Criminal Revision – Applicant's JCB machine was hired for digging of a pond – seized – on the ground that digging was without any permit — trial – application for releasing JCB was rejected – instant application - applicant argued that permission was granted by the SDM – and trial court wrongly deferred authority to District Magistrate per Rule 72(6) of UP Minor Minerals Rules, 2021 – court finds that - JCB was seized for alleged unauthorized excavation, though applicant claimed valid permission via Sub Divisional Magistrate; revision petition was also dismissed – held - Rule 72 governs transportation of minerals, not excavation machinery — hence, inapplicable to the seized JCB - Section 4(1-A) of the Act, 1957 reinforces lawful transport/storage – further court clarified that, Section 21(4-A) of the Act, 1957 vests confiscation and disposal powers with the competent Court, not the District Magistrate—hence, impugned orders quashed, Magistrate directed to reconsider release within 30 days.
(Para – 13, 14, 15, 18, 19)

Application Disposed of. (E-11)

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

1. Heard Sri Ajeet Kumar Mishra holding brief of Sri Alok Kr. Misra, learned counsel appearing for the applicant and Ms Charu Singh, learned Additional Government Advocate and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has assailed validity of the order dated 20.07.2022 passed by Judicial Magistrate-I, Gonda whereby an application for release of a vehicle has been rejected by the trial court on the ground that as per the provisions contained in Section 72(6) of the Uttar Pradesh Minor Minerals (Concession) Rules, 2021 (hereinafter referred to 'the Rules, 2021'), the District Magistrate is authorized to pass an order for release of vehicle.

The applicant had filed Criminal revision No.273 of 2022 challenging the aforesaid order dated 20.07.2022 and the revision has been dismissed by means of

the the judgment and order dated 19.06.2022 passed by the Additional Sessions Judge, Gonda and the applicant has challenged the validity of that order also.

3. Briefly stated facts of the case are that the applicant owns a JCB brand excavation machinery, which was seized on 06.07.2022 on the allegation that it was found engaged in digging a pond without any permit.

4. Contention of the learned counsel for the applicant is that the applicant's excavation machine was hired by one Awadhest Kumar for digging of a pond in furtherance of permission granted to him by the Sub Divisional Magistrate Colonelganj, Gonda, a copy whereof has been annexed with the application.

5. The trial court has rejected the application on the ground that he has no power to release the vehicle under Section 72(6) of the Rules, 2021.

6. Rule 72 aforesaid provides as follows:-..

"72. Restriction on transport of the Minerals-

(1)The holder of a mining lease or permit or a person authorised by him in this behalf shall issue a pass in Form MM-1 I or Form e-MM-11 prepared through electronic process to every person carrying, a consignment of minor mineral by a vehicle, animal or any other mode of transpo11, the State Government may, through the District Officer, make arrangements for the supply of printed MM-1 1 Form books on payment basis.

(2) No person shall carry, within the State a minor mineral by a vehicle, animal or any other mode of transport, without can-ying a pass in Form MM-11/ Form e-MM-11 issued under sub rule (I), valid transit pass issued under rule 7(3) of Uttar Pradesh Mineral (Prevention of Illegal Mining, Transportation and storage) Rules, 2018 or similar valid transit pass issued by any other State:

Provided that if the State Government enters into an agreement to collect the Royalty through contractor, receipt of royalty or zero receipt as the case may be shall be issued by such contractor and in such cases carrying out such receipt with Form MM-11/ form e-MM-11 will be mandatory for transportation.

Provided further that the transportation of the mineral will be valid only after the State Government has determined the regulation fees imposed from time to time on the mineral coming from other State.

(3)Every person carrying any minor mineral shall, on demand by any officer authorised under Rule 67 or such officer as may be authorised by the State Government in this behalf, show the said pass to such officer and allow him verify the correctness of the particulars ofthe pass with references to the quantity ofthe Minor Mineral.

(4)The State Government may establish a check post for any area included in any mining lease or permit and when a check post is so established public notice shall be given to this fact by publication in the Gazette and in such other manner as may be considered suitable by the State Government.

(5) No person shall transport a minor mineral for which these rules apply from such area without first presenting the mineral at the check post established for that area for verification of the weight or measurement of the mineral.

(6)Any person found to have contravened any provision of this rule then the District Magistrate will recover penalty of Rs. 25, 000/-(twenty five thousands) alongwith the price of such minor mineral including royalty and any such penalty for violation of environmental norms, as prescribed by the State Government from time to time. After deposit of the entire amount mentioned above the vehicle etc including minor mineral will be released."

7. A bare perusal of the aforesaid provisions indicates that it imposes restriction on 'transportation of minerals'. Rule 72(5) provides that no person shall transport a minor mineral for which these rules apply, from which area without first presenting the mineral at the check post established for that area for verification of the weight or measurement of the mineral.

8. Rule 72(6) provides that any person found to have contravened any provision of this rule will be inflicted with penalty and the District Magistrate may order release of the vehicle after deposit of penalty.

9. Rule 72 imposes restrictions on 'transportation of minerals' whereas the applicant's vehicle which has been seized is not a vehicle used for transportation and it is a vehicle used as an excavation machinery. Therefore, it appears that the provisions of Rule 72 of the the Rules, 2021 will not be applicable to the vehicle of the applicant as it is not a transportation vehicle.

10. The Uttar Pradesh Minor Minerals (Concession) Rules, 2021 have been framed in exercise of powers conferred by Sub-section 1 of Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as 'the Act, 1957').

11. Section 4(1-A) of the the Act, 1957 provides that 'no person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with provisions of this Act and the Rules made thereunder.

12. Section 21 of the Act, 1957 reads as under:-

***"21. Penalties**.-254[(1) Whoever contravenes the provisions of sub-section (1) or sub-section (1-A) of Section 4 shall be punishable with imprisonment for a term which may extend to five years and with fine which may extend to five lakh rupees per hectare of the area.*

(2) Any rule made under any provision of this Act may provide that any contravention thereof shall be punishable with imprisonment for a term which may extend to two years or with fine which may extend to five lakh rupees, or with both, and in the case of a continuing contravention, with additional fine which may extend to fifty thousand rupees for every day during which such contravention continues after conviction for the first such contravention.]

255[(3) Where any person trespasses into any land in contravention of the provisions of sub-section (1) of Section 4, such trespasser may be served with an order of eviction by the State Government or any authority authorised in this behalf by that Government and the State Government or such authorised authority may, if necessary, obtain the help of the police to evict the trespasser from the land.

256[(4) Whenever any person raises, transports or causes to be raised or transported, without any lawful authority,

any mineral from any land, and, for that purpose, uses any tool, equipment, vehicle or any other thing, such mineral, tool, equipment, vehicle or any other thing shall be liable to be seized by an officer or authority specially empowered in this behalf.

(4-A) Any mineral, tool, equipment, vehicle or any other thing seized under sub-section (4), shall be liable to be confiscated by an order of the court competent to take cognizance of the offence under sub-section (1) and shall be disposed of in accordance with the directions of such court.]

(5) Whenever any person raises, without any lawful authority, any mineral from any land, the State Government may recover from such person the mineral so raised, or, where such mineral has already been disposed of, the price thereof, and may also recover from such person, rent, royalty or tax, as the case may be, for the period during which the land was occupied by such person without any lawful authority.]

257[(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence under sub-section (1) shall be cognizable.]

258[Explanation.?On and from the date of commencement of the Mines and Minerals (Development and Regulation) Amendment Act, 2021, the expression ?raising, transporting or causing to raise or transport any mineral without any lawful authority? occurring in this section, shall mean raising, transporting or causing to raise or transport any mineral by a person without prospecting licence, mining lease or composite licence259[, exploration licence] or in contravention of the rules made under Section 23-C.]"

13. Section 21 (4-A) of the Act, 1957 provides that 'any mineral tool, equipment, vehicle or any other thing seized under sub-section (4) shall be liable to be confiscated by an order of the Court competent to take cognizance of the offence under Sub Section (1) and shall be disposed of in accordance with the directions of such Court.

14. Section 72 of the Rules, 2021 has been framed under the Act, 1957 and the provisions of the Act will obviously have precedents over the provisions of the Rules in case of any conflict.

15. Although Section 72 (6) of the Rules, 2021 based on certain restrictions on transportation of the minerals and empowers the District Magistrate to impose penalty in case of violation of those restrictions, the provisions of Rule 72(6) will not override the provisions contained in Section 21(4-A) of the Act, 1957. Therefore, I am of the considered view that the statute vests power of dealing with the confiscated tool, equipment or vehicle in the Court.

16. The Mining Inspector has entrusted the JCB excavation vehicle of the revisionist to the police and the entrustment letter dated 06.07.2022 states that the JCB was being used in digging of the pond and no document could be shown on the spot in this regard. Accordingly, the custody of the JCB was handed over to the police and the police has taken the same in its custody and it is recorded in the general diary on 06.07.2022.

17. Chapter XXXIV of Cr.P.C. deals with 'disposal of property' and Section 451 falling in this Chapter provides as follows:-

"Section 451-Order for custody and disposal of property pending trial in certain cases

When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of."

18. From the aforesaid statutory provisions, it appears that undoubtedly the Court has power to dispose of the seized vehicle of the revisionist, which is used in excavation of earth. The learned Judicial Magistrate has committed a manifest error in rejecting the application for release of the JCB vehicle on the ground that it has no jurisdiction.

19. Accordingly, impugned orders dated 20.07.2022 passed by Judicial Magistrate-I, Gonda and 19.06.2022 passed by the Additional Sessions Judge, Gonda are hereby quashed and the learned Judicial Magistrate-I, Gonda is directed to pass a fresh order on the application for release of the vehicle, in accordance with law, in the light of the observations made in this order, within a period of 30 days from the date of receipt of certified copy of this order.

(2024) 2 ILRA 242

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.02.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482 No. 7529 of 2022

Mehrab Logistics & Aviation Ltd. & Anr. ...Applicants

Versus

State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:
Abhishek Singh

Counsel for the Opposite Parties:
G.A., Amandeep Singh, Praveen Tripathi, Shakti Krishna Chaube

Criminal Law – Criminal Procedure Code, 1973 – Sections 200, 202 & 482 – Indian Penal Code, 1860 – Sections 406 & 420 – Negotiable Instruments Act, 1881 - Sections 68, 138, 138(2), 145(1), 14-A, 18 & 18-A - Application U/s 482 Cr.P.C. – for quashing the summoning order and the entire criminal proceedings – arising out of dishonour of two cheques – Complaint Case – offence under Section 138 of the NI Act – applicant plead that, the complaint is based upon an invalid MoU and a time-restricted authorization letter0 – further, cheques alleged to be forged, stolen, and not supported by any legally enforceable liability – and serious procedural lapses attributed to both the bank and the trial court – the complainant argued that the cheques were issued as security for unpaid service fees related to a hotel sale - court finds that - Forensic analysis confirms discrepancies in signatures, – no cogent evidence of a subsisting legal debt or liability – transaction appears to be civil in nature and does not attract penal consequences under Section 138 of the N.I. Act – trial court failed to conduct proper judicial scrutiny and misapplied settled legal principles – Applying Supreme Court guidelines under Section 482 Cr.P.C. – court held that - the case lacked the essential ingredients of a criminal offence under Section 138 of the N.I. Act and appeared to be civil in nature – hence, the impugned summoning order and entire proceedings are against the spirit and directions issued by the Hon'ble Apex Court and are liable to be set aside – and the matter is remanded back to the trial court for fresh consideration within four months, in accordance with legal standards and Supreme Court precedents – Application stands allowed accordingly.
(Para – 22, 23, 24, 26, 27, 28, 38, 39, 40)

Application Allowed. (E-11)

List of referred Cases: -

1. Indus Airways Pvt. Ltd. & ors. Vs Magnum Aviation Pvt. Ltd. & ors.; (2014) 12 SCC 539,

2. B. Krishna Reddy Vs Syed Hafeez (Died) Per Legal Representative Naseema Begum & anr.; (2020) 17 SCC 488,

3. Dashrath Rupsingh Rathod Vs St. of Mah., 2014(9) SCC 129,

4. Vinay Kumar Shailendra Vs Delhi High Court Legal Services Committee & anr. - 2014(10) SCC 708,

5. Inder Mohan Goswami Vs St. of Uttaranchal (2007)12 SCC 1,

6. Lalan Kumar Singh & ors. Vs St. of Mah. - 2022 SCC Online SC 1383,

7. St. of Har. Vs Bhajan Lal reported in 1992 Supp (1) SCC 335,

8. R.P. Kapoor Vs St. of Punj. - AIR 1960 S.C. 866,

9. St. of Bihar Vs P.P. Sharma - 1992 SCC (Crl.)192,

10. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq 18 & anr. - (Para-10) - 2005 SCC (Cri.) 283,

11. Neeharika Infrastructure Pvt. Ltd. Vs St. of Mah., AIR 2021 SC 1918,

12. In S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

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

1. List has been revised and the case is being taken up in the revise call.

2. Heard Shri Raghvendra Singh, learned Senior Advocate assisted by Shri Abhishek Singh, learned Counsel for the applicants, Shri Sachin Upadhaya, Advocate holding brief of Shri Praveen Tripathi, Advocate as well as Shri Amandeep Singh, learned Counsel for the opposite party No.2 and Shri Anirudh Kumar Singh, learned A.G.A-I for the State-opposite party No.1. No counsel appeared on behalf of the opposite party No.3 whereas name of Shri Shakti Krishna Chaube, Advocate is shown in the cause list.

3. The instant application has been moved on behalf of the applicants with a prayer to quash the summoning order dated 22.07.2022 passed in Complaint Case No.83520 of 2021, under Section 138 N.I. Act, Police Station P.G.I., District Lucknow as well as to set aside the entire proceedings in pursuance thereof pending before the learned Presiding Officer, Additional Court No.10, Lucknow.

4. Learned counsel for the applicants submitted that the present case arises out of complaint preferred by the opposite party no.2. The applicant no.1 is a company incorporated under the Companies Act, 1956 bearing Corporate Identification Number (CIN) U60301UP1957PLC023015 and having its registered office at Mehrab Tower, Sixth Floor TC-16V, Vibhuti Khand, Gomti Nagar, Lucknow (hereinafter referred as "Company" for sake of brevity). The applicant no.2 is the Managing Director of the Company and the affairs of the Company are run and managed by him.

5. Learned counsel for the applicants further submitted that on 17.11.2021, the opposite party no.2 preferred a complaint under Section 138 of Negotiable Instruments Act, 1881 (hereinafter referred to as "N.I. Act" for the sake of brevity) against the applicants before the learned trial court alleging there in that the applicant no.2 and other co-accused persons contacted him on behalf of the

Company for the purpose of sale of hotel and authorized him to deal for the sale of it and agreed to pay Rs.10 Crores as a fee for the services to be rendered by him vide alleged Memorandum of Understanding (Annexure No.4) (hereinafter referred to as "MoU" for the sake of brevity) which was executed between them. It has been further alleged in the aforesaid complaint that in lieu of the services rendered by the complainant, the accused issued two account payee cheques, which were dishonored, as such, the accused are liable to be prosecuted for committing the offence under Section 406, 420 I.P.C. as well as Section 138 of N.I. Act. It was also alleged by the opposite party No.2 that an authorization-cum-declaration letter dated 14.08.2020 was issued by the Director (Vishnu Kumar Pandey) of applicant No.1 Company in favour of opposite party No.2 (Annenxure No.5).

6. Learned counsel for the applicants further submitted that the opposite party no.2 0submitted his statement on affidavit under Section 145(1) of N.I. Act read with Section 200 Cr.P.C. which is nothing but the reiterated version of the complaint made by the opposite party No.2 against the applicants.

7. Learned counsel for the applicants further submitted that on perusal of the authorization letter dated 14.08.2020, it would reveal that the alleged authorization letter as claimed by the opposite party No.2 has been issued for the specific time period of 15 working days i.e. from 16.08.2020 till 30.08.2020 and there is no averment in the complaint made by the opposite party No.2 that the said letter has been extended further. He further submitted that there was no debt on the date 24.06.2021 when the alleged cheques were issued as admittedly the sale of the hotel took place on 12.07.2021. It is admitted case of the complainant that the alleged authorization letter has not been issued by the applicant no.2, who being a Managing Director is solely authorized to issue any such letter on behalf of the Company.

8. Learned Counsel for the applicants further submitted that the alleged two cheques which were stolen/misplaced from the possession of the applicant Company were reported to be lost by an employee of the applicant Company, namely-Raghuvir Prasad, who reported about the lost cheques to the concerned police station but the veracity of the aforesaid report was denied by police vide letter dated 02.12.2022, wherein it has been specifically stated that no such G.D. Entry was found in the concerned police station about the report for lost cheques. He further submitted that even the police has denied the report regarding lost cheques, thus, it appears that the alleged cheques were handed over to the complainant with the connivance of an employee of the applicant Company only with the intention to misappropriate the alleged cheques.

It is further argued that even though the alleged MoU was prepared as a draft, the same was only communicated through e-mail, which was neither signed by any of the parties nor any stamp or seal of the company was appended on it nor there is any date. An unsigned, unstamped, undated draft MoU/any agreement without payment of any stamp duty is inadmissible as a piece of evidence in the eyes of law.

9. Learned counsel for the applicants further submitted that the complainant has neither disclosed his own credentials or his alleged proprietorship firm “KBJ

Engineering Services" such as PAN No./GSTIN No./Income Tax Returns so as to ascertain his capacity to crack the claimed deal of sale.

10. Learned counsel for the applicants further submitted that the complainant somehow got handover to the two blank cheques of the company with the connivance of an employee of the applicants' Company and thereafter, conspired to extract the money from the company illegally as he also knew that the hotel property is being sold. The complainant in furtherance of the aforesaid criminal conspiracy and evil design, presented the aforesaid lost two cheques before the State Bank of India, S.G.P.G.I. Branch, Lucknow on 24.06.2021 with forged signature of the applicant no.2 and filling the self imagined amount of Rs.5 Crores in each cheque and entered the same date as 24.06.2021 on the aforesaid two cheques.

11. Learned counsel for the applicants further submits that in both the cheques, there was a note present **"valid upto Rs.50 lacs at non home branch"** and on 14.07.2021, the aforesaid bank closed the bank account of the applicant Company in view of the circular dated 06.08.2020 issued by Reserve Bank of India, which prohibited the running of multiple current accounts in the same bank and intimation regarding the same was given to the applicant company.

12. Learned Counsel for the applicants further submitted that when the opposite party No.2 got those two blank cheques with the connivance of an employee of the applicant Company, he presented the said two cheques by filling an imagined amount of Rs.5 Crores in each cheque to non home branch as he knew that the aforesaid cheques will be dishonored by the Bank and the applicant Company will be liable for an offence under the provisions of N.I. Act, even though, the signatures of the applicant were forged and were made in the two cheques to falsely implicate the applicant Company.

13. Learned Counsel for the applicants further submitted that despite the fact that the cheques should have been returned by the bank with an endorsement at the memo that ***"exceeds arrangement refer to drawer"*** or with the endorsement that the "same is unacceptable in the S.G.P.G.I Branch, which is a non home branch", however, when the two alleged cheques were presented in the bank the same were dealt in a most casual and mechanical manner and returned as dishonored with the note of ***"insufficient fund"*** on the same day of being presented without informing the applicant No.2.

14. Learned counsel for the applicants further submitted that the act/omission on the part of concerned employees of the bank in issuing an incorrect bank return memo is illegal as well as constitutes dereliction of duty resulting in false prosecution of the applicants as no offence under Section 138 N.I. Act could have been made out against the applicant Company and therefore, the connivance of the employee of opposite party No.3 cannot be ruled out. It is further submitted that the act/omission on the part of the concerned bank employee has also caused irreparable damage to the reputation and image of the applicant Company.

It is further argued that it is the admitted case of the complainant that no bill was ever raised in discharge of the

liabilities for which two alleged cheques were issued which casts suspicion over the story of the complainant as a person/firm providing any service and charging the fee of Rs.10 Crores is also liable for 18% GST/Service Tax which is a huge amount and cannot escape the eyes of tax department. Further, argument of learned Counsel for the applicants is that it is fact of common knowledge that the brokerage in any sale is paid in percentage and normally it is not more than 1% of an astronomical amount that too about 25% of the forged value of property, which is not believable.

15. Learned Counsel for the applicants further submitted that the two cheques of Rs.5 Crore presented by the opposite party No.2 before the incompetent Bank who has no jurisdiction to entertain the same as they were not presented at the Home Branch deliberately and even though the cheques were issued on the same day but the signature on both the cheques were not similar and there was complete mismatch. It was also argued that a forged signature was made on both the cheques of the applicant No.2, who has also denied his signature on the aforesaid two cheques.

It is further argued that even though the signature which was done by the applicant No.2 in the sale deed of Hotel and the signature shown in the two cheques are entirely different and has no resemblance that also falsify the story of opposite party No.2.

16. Learned Counsel for the applicants further argued that the case under Section 138 of N.I. Act can only be attracted in the Court if there exists any debt or the liability on the person who has issued the cheque and in the present case, no debt or other liability exists on the applicants and the case filed by the opposite party No.2 is false and fabricated and does not fall under the provisions of Section 138 N.I. Act.

17. Learned Counsel for the applicants also argued that provisions of Section 68 of N.I. Act are also not attracted in the present case as the there was no promisery note, bill of exchange or cheque made, drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto. Section 68 of N.I. Act is quoted hereinunder:-

"68. Presentment for payment of instrument payable at specified place and not elsewhere.—

A promissory note, bill of exchange or cheque made, drawn or accepted payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at that place."

18. Learned counsel for the applicants further submitted that the learned trial court did not conduct any proper inquiry as envisaged under Section 202 Cr.P.C. for ascertaining the truth and veracity of the allegations made in the complaint and for the purpose of deciding whether there exists sufficient ground for proceeding against the applicants/accused and in a mechanical manner without application of judicial mind, summoned the applicants/accused vide impugned summoning order dated 22.07.2022.

19. Learned counsel for the applicants further submitted that the impugned order dated 22.07.2022, by which the applicants were summoned, is also non speaking as the Magistrate has not considered any

material available before him while summoning the applicants to face the trial. As such, the impugned order dated 22.07.2022 on the face of record appears to be unjustified and is passed against the provisions of the N.I. Act , therefore, the same is liable to be set aside by this Court alongwith the entire proceeding.

20. Learned counsel for the opposite party no.2 has opposed the argument raised by the learned counsel for the applicants and submitted that in lieu of the MoU sent by the complainant to the applicants vide email dated 08.10.2020, the applicant no.2 issued two post-dated cheques to the complainant bearing nos.955800 and 955801 dated 24.06.2021 for Rs.5,00,00,000/- each as security and ensured the complainant that if the payment of service fee is not made by the applicants, the complainant can present the cheques for encashment. He further submitted that the first advance payment in lieu of the sale of said hotel was made on 29.09.2020 and in part payments all the sale amount of the Hotel was paid till June, 2021 but even after receiving the sale amount of the said Hotel and repeated requests of the complainant to pay his service fee, the applicants did not pay even a single penny to the complainant, thus, he submitted that the impugned summoning order dated 22.07.2022 has been rightly passed by the learned trial court in accordance with law, therefore, the same is not liable to be quashed and the instant application is liable to be rejected.

21. Learned A.G.A-I for the State also opposed the argument advanced by learned Counsel for the applicants and submitted that the summoning order dated 22.07.2022 is rightly passed and no interference by this Court is required in the instant matter.

22. After hearing learned counsel for the respective parties and after perusal of the materials available on record, prima facie it appears that the learned trial court has failed to appreciate the materials available on record and has committed manifest illegality while passing the impugned order while summoning the applicants as the same is passed without considering the evidence produced by the applicants, which is unsustainable in the eyes of law.

23. It is further observed that this Court is not the handwriting expert but prima facie on detail examination and comparison of the respective signature samples, which were present on the sale deed executed by the applicant No.2 in respect of sale of Hotel and the signatures which were present on the two lost cheques, the cardinal principles of identification of signatures and on comparing the writing habits, general and personal characteristics of both the sets of signature samples and upon close scrutiny of the nature of the writing of the comparative signatures reveals that the writing pertains to a good skilled writer capable of making forceful and crisp strokes in the writing of complete signatures with no hesitation or clumsiness in stroke making. The writing is found to be fluently and smoothly written in normal and natural flow of running signatures motion without any care of caution.

24. It is further observed that there are dissimilarities in the signatures and sufficient amount of dissimilarity is found. Cumulative consideration of all the dissimilarities in the writing habits between the signature samples, which lead to a conclusion that the person who did the signature on the sale deed executed in

respect of sale of hotel and the signature which was present on the lost two cheques are not the same person, who did the specimen signatures. This fact has also been confirmed by a forensic expert, whose report is annexed as Annexure No.21 to the affidavit filed in support of the present application.

25. It is observed earlier that this Court is not a handwriting expert, though, prima facie from bare perusal of the cheques, both the signatures are different whereas, the cheques were issued on the same date. It is further observed that on perusal of the signature on the sale deed, which was executed by the applicants for sale of Hotel, wherein the signature of the applicant No.2 is present. thus, it transpires that signatures on the cheques and signature on the sale deed are different, there appears force in the argument of learned counsel for the applicants that the cheques were not signed by the applicant No.2 and this fact has also not been considered by the trial court while passing the impugned order.

26. It is further observed that though a case of breach of trust may be, both a civil wrong and a criminal offence, but there would be certain situations where it would predominantly be a civil wrong and may or may not amount to a criminal offence. The present case is one of that type where, if at all, the facts may constitute a civil wrong but the ingredients of a criminal offences are wanting.

27. It is further observed that this is a very clear case of the parties entering into an agreement or MoU, if any, and compounding the offence to save themselves from the process of litigation. When such a step has been taken by the parties, and the law very clearly allows them to do the same, the Courts then cannot override such compounding and impose its will.

On perusal of the authorization letter dated 14.08.2020, it would reveal that the alleged authorization letter as claimed by the opposite party No.2 has been issued for the specific time period of 15 working days i.e. from 16.08.2020 till 30.08.2020 and there is no averment in the complaint made by the opposite party No.2 that the said letter has been extended further. He further submitted that there was no debt on the date 24.06.2021 when the alleged cheques were issued as admittedly the sale of the Htoel took place on 12.07.2021. It is admitted case of the complainant that the alleged authorization letter has not been issued by the applicant no.2, who being a Managing Director is solely authorized to issue any such letter on behalf of the Company, thus, there exists no debt or liability upon the applicants.

28. Further, on perusal of **Section 138 N.I.** Act which reveals that it is a penal provision, it must, therefore, be construed strictly, section 138 (2) enacting part of the provision makes it abundantly clear that what constitutes an offence punishable with imprisonment and/or fine is the dishonour of a cheque for insufficiency of funds, etc in the account maintained by the drawer with the bank for discharge of a debt or other liability whether in full or part. The language used in the provision is unambiguous and the ingredients of the offence clearly discernible namely (a) cheque is drawn by the accused on an account maintained by him with a banker, (b) the cheque amount is in discharge of a debt or liability, and (c) the cheque is returned unpaid for insufficiency of funds

or that the amount exceeds the arrangement made with the bank. Any dishonour falling within the four corners of the enacting provision would be punishable without much ado.

Section 138 is structured in two parts, the primary and the provisory. The contents of the proviso place conditions on the operation of the main provision, while it does not form a constituent of the crime itself, it modulates or regulates the crime in circumstances where,unless its provisions are complied with, the already committed crime remains impervious to prosecution.

The cause of action for prosecution will arise only when the period stipulated in the proviso elapses without payment. Ingredients of the offence have got to be distinguished from the conditions precedent for valid initiation of prosecution. The stipulations in the proviso must also be proved certainly before the offender can be successfully prosecuted. But in the strict sense they are not ingredients of the deemed offence under the body of Section 138 of the N.I. Act, though the said stipulations must also be proved to ensure and claim conviction. It is in this sense that it is said that the proviso does not make or unmake the offence under Section 138 of the NI Act. That is already done by the body of the sections.

29. Further, Hon'ble the Supreme Court in case of **Indus Airways Private Limited and Others Vs. Magnum Aviation Private Limited and others; (2014) 12 SCC 539** in para 9 has held as under:-

"13. The explanation appended to Section 138 explains the meaning of the expression 'debt or other liability' for the purpose of Section 138. This expression means a legally enforceable debt or other liability. Section 138 treats dishonoured cheque as an offence, if the cheque has been issued in discharge of any debt or other liability. The explanation leaves no manner of doubt that to attract an offence under Section 138, there should be legally enforceable debt or other liability subsisting on the date of drawal of the cheque. In other words, drawal of the cheque in discharge of existing or past adjudicated liability is sine qua non for bringing an offence under Section 138. If a cheque is issued as an advance payment for purchase of the goods and for any reason purchase order is not carried to its logical conclusion either because of its cancellation or otherwise, and material or goods for which purchase order was placed is not supplied, in our considered view, the cheque cannot be held to have been drawn for an exiting debt or liability. The payment by cheque in the nature of advance payment indicates that at the time of drawal of cheque, there was no existing liability."

30. Further, the Hon'ble Apex Court in the case of **B. Krishna Reddy Vs. Syed Hafeez (Died) Per Legal Representative Naseema Begum and Another; (2020) 17 SCC 488** and in paragraph 8 and 9 of the aforesaid judgment was pleased to observe as under:-

"8. In our view, the offence alleged was that a cheque was given towards consideration for purchase of a property. Neither any document was produced on record nor there was any evidence that any conveyance was executed in favour of the appellant. Thus, the submission of the appellant that there was no existing debt or liability against which the cheque was given had to be accepted. In our view, the High Court was in error in

accepting the appeal and upsetting the view taken by the Trial Court.

9. We, therefore, allow this appeal, set-aside the decision of the High Court and restore the judgment and order of acquittal passed by the Trial Court."

31. In the case of ***Meters and Instruments Private Limited v. Kanchan Mehta 1***, the Hon'ble Apex Court held that the nature of offence under section 138 of the N.I. Act, is primarily related to a civil wrong and has been specifically made a compoundable offence. The relevant paragraph of the judgment has been extracted herein:

"This Court has noted that the object of the statute was to facilitate smooth functioning of business transactions. The provision is necessary as in many transactions' cheques were issued merely as a device to defraud the creditors. Dishonor of cheque causes incalculable loss, injury and inconvenience to the Vide the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 payee and credibility of business transactions suffers a setback. At the same time, it was also noted that nature of offence under Section 138 primarily related to a civil wrong and the 2002 amendment specifically made it compoundable."

32. Further, a three Judge Bench of Hon'ble Supreme Court in **Dashrath Rupsingh Rathod Vs. State of Maharashtra, 2014(9) SCC 129 i**n para 58 held as follows:

"58. To sum up:

58. 1. An offence under Section 138 of the Negotiable Instruments Act 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for unsufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.

58.2. Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to section 138.

58.3. The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if:

(a) the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue.

(b) if the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque, and

(c) if the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

58.4. The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.

58.5. The proviso to section 138 simply postpones/defers institution of criminal proceedings and taking of cognizance by the court till such time cause of action in terms of clause (c) of the proviso accrues to the complainant.

58.6. Once the cause of action accrues to the complainant, the jurisdiction of the court to try the cause will be

determined by reference to the place where the cheque is dishonoured."

The ratio of Dashrath Rupsingh Rathod case was followed by a subsequent three Judge Bench in ***Vinay Kumar Shailendra Vs. Delhi High Court Legal Services Committee and another, 2014(10) SCC 708.***

33. It is further observed that the trial court while summoning the applicants by impugned order has totally failed to appreciate the factual and legal aspect of the matter. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

34. Further the Hon'ble Supreme Court of India in the case ***Inder Mohan Goswami v. State of Uttaranchal (2007)12 SCC 1*** has held that it would be relevant to keep into mind the scope and ambit of section 482 Cr.PC and circumstances under which the extra ordinary power of the court inherent therein as provisioned in the said section of the Cr.P.C. can be exercised, para 23 is being quoted here under:-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice."

35. Further Hon'ble the Supreme Court of India in the case of ***Lalankumar Singh and Others vs. State of Maharashtra*** reported in ***2022 SCC Online SC 1383*** has specifically held in paragraph No.38 that the order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. Paragraph No.38 of Lalankumar Singh and Others (supra) is being quoted hereunder:-

"38. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect could be made to the judgment of this Court in the case of Sunil Bharti Mittal v. Central Bureau of Investigation, which reads thus:

"51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a prima facie case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a prima facie case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."

36. Further, Hon'ble the Supreme Court of India has provided guidelines in case of **State of Haryana Vs. Bhajan Lal** reported in **1992 Supp (1) SCC 335** for the exercise of power under Section 482 Cr.P.C. which is extraordinary power and used separately in following conditions:-

"102.(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused."

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

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

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

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

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a

specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party;

(7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

37. Further the Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:- ***(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Crl.)192, (iii) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (iv) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.***

38. In ***S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168***, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

39. Thus, in view of the law laid down by the Hon'ble Apex Court and the facts and circumstances, as narrated above and from the perusal of the record, the impugned summoning order dated 22.07.2022 passed in Complaint Case No.83520 of 2021, under Section 138 N.I. Act, Police Station P.G.I., District Lucknow and the entire proceeding are against the spirit and directions issued by the Hon'ble Apex Court and are liable to be set aside.

40. Accordingly, the impugned summoning order dated 22.07.2022 passed by Presiding Officer, Additional Court No.10, Lucknow in Complaint Case No.83520 of 2021, under Section 138 N.I. Act, Police Station P.G.I., District Lucknow and the entire proceeding pending before the Presiding Officer, Additional Court No.10, Lucknow is hereby **set aside** and **reversed** and the matter is remanded back to the trial court. Learned trial court concerned is directed to pass a fresh order within four months from today, keeping in view the discussions/observations and judgments of Hon'ble the Apex Court referred above.

41. For the reasons discussed above, the instant application under Section 482 Cr.P.C. is **allowed** in respect of the instant applicants.

42. Learned Senior Registrar of this Court is directed to transmit a copy of this order to the trial court concerned for its necessary compliance.

(2024) 2 ILRA 253

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.02.2024

BEFORE

THE HON'BLE RAJEEV SINGH, J.

Application U/S 482 No. 8877 of 2023

Israr Ahmad ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Gyanendra Singh, Ajmal Khan, Javed Khan

Counsel for the Opposite Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 – Sections 161 & 482 – Indian Penal Code, 1860 – Sections 323, 353, 504, 447 & 153-B - Criminal Law Amendment Act, 1932 - Section - 7 - Application under Section 482 CrPC – seeking quashing of summoning order, charge sheet, and entire criminal proceedings - arising from FIR – alleged that, AIMIM party members allegedly trespassed into the police line premises to offer Namaz, breaching established security protocols – Investigation conducted – charge sheet filed – cognizance taken – accused summoned – trial initiated – instant application filed challenging the proceedings on grounds of fabrication and procedural irregularities – and in absence of mandatory sanction under Section 153B IPC, the Criminal Law Amendment Act, 1932 was not applicable in Pratapgarh jurisdiction – Court observed that - (i) vide Gazette Notification dated 19.06.1968 the provision of section 7 of Act, 1932 are applicable in all districts of U.P.– (ii) the police line is a high-security zone housing vital infrastructure, where public access is strictly regulated, - Held - (i) charge-sheet was duly vetted and approved by an Inspector functioning as Station House Officer – (ii) in absence of independent witnesses or sanction did not vitiate the proceedings, particularly in light of ongoing investigation – hence, the present application is misconceived and liable to be dismissed – further directions issued to the authorities to expedite further investigation and submit a comprehensive report before the competent court.
(Para – 13, 14, 16)

Application Dismissed. (E-11)

List of referred Cases: -

1. St. of Har. & ors. Vs Bhajan Lal - Supp (1) SCC 335,

2. Vikram Johar Vs St. of U.P. & anr.- 2019 (14) SCC 207,

3. Manoj Rai & ors. Vs St. of M.P. - (1999) 1 SCC 728,

Smt. Nagawwa Vs Veeranna Shivalingappa Konjalgi & ors. - AIR 1976 SC 1947,

St. of Guj. Vs Girish Radhakrishnan Varde - (2014) 3 SCC 659,

Babubhai Vs St. of Guj. - (2011) 1 SCC (Crl) 336,

Madhavrao Jiwajirao Scindia & ors. Vs Sambharao Chandrojirao Angre & ors. - (1988) 1 SCC 692,

Dilawar Babu Kurane Vs St. of Mah. - 2002 (2) SCC 135,

Subhash Mishrilal Jain Vs Laxman Kondiba Aswar - AIR OnLine 2021 BOM 4194.

Ataulla & anr. Vs Azim-Ullah & anr. - 1889 SCC OnLine All 38.

(Delivered by Hon'ble Rajeev Singh, J.)

1. Heard Shri Gyanendra Singh, learned counsel for the applicant, Dr. V.K. Singh, learned Government Advocate assisted by Shri Piyush Singh, learned A.G.A., Shri Shivendra Singh Rathaur, learned State Law Officer

2. In pursuance of earlier order dated 12.12.2023, Shri Satyapal Antil, Superintendent of Police, Pratapgarh is also present before this Court.

3. Present application has been moved by the applicant for quashing the summoning order dated 22.01.2021 passed by C.J.M., Pratapgarh and charge sheet dated 15.03.2020 in Case Crime No.1019 of 2019 U/S 332, 353, 504, 447, 153B I.P.C. and Section 7 of Criminal Law Amendment Act, P.S. Kotwali Nagar, District-Pratapgarh as well as further proceedings of Criminal Case No.2186 of 2021, State Vs Israr Ahmad and Ors.

4. Learned counsel for the applicant submitted that the impugned proceeding was initiated on the basis of concocted facts and the charge sheet was submitted by the Investigating Officer in the most mechanical manner under Sections 332, 353, 504, 447, 153B I.P.C. and Section 7 of Criminal Law Amendment Act, 1932, (for short "Act, 1932). He further submitted that provisions of Act, 1932 are not applicable in district Pratapgarh as there is no notification related to the implementation of the aforesaid Act. He further submitted that no sanction order was obtained from the Competent Authority before filing of the aforesaid charge sheet for the offence under Section 153B I.P.C., which is mandatory, on which the trial court has taken cognizance without considering this fact that neither the sanction was obtained from the Competent Authority nor the provisions of Act, 1932 are applicable in the district in question. He vehemently submitted that it was obligatory on the part of the Magistrate to pass a reasoned order at the time of taking cognizance.

5. Learned counsel for the applicant submitted that the F.I.R. of case in question was lodged by the informant, namely, Shri Shailendra Singh, Reserved Inspector, Police Line, P.S. Kotwali City, District-Pratapgarh on 29.11.2019 at 22:13 hours with the allegation that on 29.11.2019, at about 12:00 Noon, when he was working as Reserved Inspector, Police Line, Pratapgarh and was doing his day-to-day work in his office and adequate police security was deployed at the main gate of the police line as well as at different picket points in the police line and there was standing order that no any private person would be allowed to enter into the police line without adequate permission. However, on the said date, Israr Ahmad S/o Hassan Mohammad, R/o Sarauli, P.S. Khohandaur, District-Pratapgarh, Jafrul Hassan, R/o Dahilamau, P.S.- Kotwali City, District- Pratapgarh, Sujjat Ulla, S/o Mobeen, R/o Rajapur, Mufreed, P.S. Kandhai, District-Pratapgarh, all leaders of the AIMIM Party, as well as other active members of aforesaid party forcibly tried to enter into the police line, when the guard tried to stop them and the information was also flashed, the informant along with his companion officer Major Prem Narayan Mishra and other police personnel immediately came to the main gate, but the aforesaid persons and some unknown persons tried to start skirmish with the police personnel and while interrupting in the duty of police personnel and forcibly entered into the police line campus by saying that they are the members of Islamic Organization, namely AIMIM and they would perform Namaz in the Mosque situated in the premises of the police line. Thereafter, extra force was deployed then all the aforesaid persons went away.

6. Learned counsel for the applicant submitted that during the course of investigation, statements of informant as well as other witnesses were recorded under Section 161 Cr.P.C. who are police personnel. He further submitted that as per the provisions of Section 7 of Act, 1932, a report must be submitted by the officer-in-charge of a police station, but in the present case, the Officer, who submitted the police report/charge sheet, is not the officer-in-charge. He also submitted that the Superintendent of Police, Pratagparh has ordered for further investigation in the present case only with the intention to fill up the lacuna of the prosecution related to the sanction. He next submitted that since long time, the people working nearby the police line are offering Namaz in the

mosque situated in the police line campus by taking necessary precautions. He vehemently submitted that, as appropriate sanction was not obtained, the entire proceedings are liable to be set aside.

7. Learned counsel for the applicant, in support of his argument, relied upon judgments of Hon'ble Apex Court in the cases of ***State of Haryana & Ors. Vs. Bhajan Lal*** reported in ***Supp (1) SCC 335, Vikram Johar Vs. State of Uttar Pradesh and Anr.*** reported in ***2019 (14) SCC 207, Manoj Rai & Ors. Vs. State of M.P.*** reported in ***(1999) 1 SCC 728, Smt. Nagawwa Vs. Veeranna Shivalingappa Konjalgi & Ors.*** reported in ***AIR 1976 SC 1947, State of Gujarat Vs. Girish Radhakrishnan Varde*** reported in ***(2014) 3 SCC 659, Babubhai Vs. State of Gujarat reported in (2011) 1 SCC (Crl) 336, Madhavrao Jiwajirao Scindia and Ors. Vs. Sambharao Chandrojirao Angre and Ors.*** reported in ***(1988) 1 SCC 692***, ***Dilawar Babu Kurane Vs. State of Maharashtra reported in 2002 (2) SCC 135*** as well as decision of Hon'ble Bombay High Court in ***Subhash Mishrilal Jain Vs. Laxman Kondiba Aswar*** reported in ***AIR OnLine 2021 BOM 4194.***

8. Learned counsel for the applicant lastly relying on the decision of Hon'ble Allahabad High Court in the case of ***Ataulla & Anr. Vs. Azim-Ullah & Anr.*** reported in ***1889 SCC OnLine All 38*** submitted that a mosque to be a mosque at all must be a building dedicated to God and not a building dedicated to God with a reservation and in case, the mosque is situated in the police line then the people should not be deprived of offering the prayer of Jumma in the said mosque.

9. Learned A.G.A. vehemently opposed the prayer of applicant and submitted that the mosque constructed in the police line premises cannot be allowed to public for offering Namaz/prayer, for the reason that arms and ammunition of the police personnel are being stored in Armory in the police line, moreover, District Wireless Control Room is also situated there and due to several other security reasons, without appropriate permission, public at large cannot be allowed to enter in the police line campus. He further submitted that as per the prosecution case, regularly, the Guards are being deployed on the gates of the police line and only with the permission of the guard, the persons are being allowed to enter into the premises. However, on the date of incident, the accused persons forcibly tried to enter into the police line by raising several slogans and also making skirmish with the police personnel and immediately, the Guard informed to the senior officials, on which, Reserved Inspector, Police Line came to the spot along with other police personnel, but the accused persons misbehaved with them and entered into the campus of the police line, challenging the police personnel that they would offer Namaz in the mosque situated in the police line campus, as a result, law and order was disturbed, thereafter, the extra force was called and deployed, on which, the accused persons ran away.

10. Learned A.G.A. also submitted that merely on the ground that there was no independent witness at the place of incident, charge sheet cannot be quashed. He further drew attention of the Court on the Gazette Notification No.II-2568-CX-68 dated 19.06.1968 which clearly provides that His Excellency, Hon'ble Governor was pleased to direct in suppression of the previous notification on the subject that the provisions of Section 7 of Act, 1932 shall come into force in all districts of U.P. with effect from the date of publication of the Notification. In such circumstances, the argument of learned counsel for the

applicant that the provisions of Act, 1932 are not applicable in District- Pratapgarh is baseless.

11. Learned A.G.A. next submitted that in the radius of 6km of police line, 60 mosques are situated and the mosque which is situated in the police line is not allowed for civilians due to security reasons, the Superintendent of Police, Pratapgarh has also taken decision for further investigation, therefore, entire charge sheet cannot be quashed merely on the ground that the sanction was not obtained for Section 153 A IPC. He lastly submitted that during the pendency of the trial, sanction order can be placed before the trial court, therefore, charge sheet as well as summoning order cannot be quashed.

12. Mr. Satypal Antil, Superintendent of Police, Pratapgarh also informed that the campus of police line is a sensitive place in which Armory, District Wireless Control Room and Cyber Control Room etc. are situated and the accused persons forcibly entered into the campus of police line by interrupting the official duty of police personnel. He also informed that further investigation will be completed very soon and report be submitted in Court.

13. Considering the submissions of learned counsel for the applicant and learned A.G.A., going through the contents of application, statement of victim recorded under Section 161 Cr.P.C. as well as other relevant documents, it is evident from the pleading that by way of Gazette Notification dated 19.06.1968, the provisions of Section 7 of Act, 1932 are applicable in all districts of Uttar Pradesh with effect from the date of publication of the notification in the Official Gazette, and as the same has already been published in the Official Gazette on 19.06.1968, therefore, the ground of applicant that the provisions of Act, 1932 is not applicable in the District Pratapgarh has no legs to stand.

14. It is further evident from the provisions of Act, 1932 read with the provisions of Cr.P.C. that the investigation of the case in question was conducted by Sub-Inspector, Chandra Shekhar Singh and prepared the report which was approved by Shri Surendra Nath Singh, Inpector at the time of forwarding to the concerned Court. It is also admitted by the learned counsel for the applicant that the Inspectors are being appointed as SHO and in the present case, the Inspector has approved the charge sheet, therefore, the ground argued by the learned counsel for the applicant that the charge sheet was not forwarded by the S.H.O. is also irrelevant. It is also evident from the pleading filed by the learned A.G.A. that the Superintendent of Police, Pratapgarh has decided for further investigation of the case in question, and he himself informed to this Court that he will take all care and precautions for further investigation of the case in question in just and fair manner. In such circumstances, merely on the ground that the sanction was not taken by the Investigating Officer from the competent authority and submitted charge sheet to the Court concerned, on which, Court has taken cognizance, charge sheet as well as cognizance order cannot be said to be bad in the eyes of law, therefore, this Court is of the view that the present application is misconceived and liable to be dismissed. Moreover, this Court is also of the view that the campus of police line is a sensitive place where Armory, District Wireless Control Room and Cyber Control Room, etc. are situated, therefore, public at large should not be allowed in the premises

without valid permission of Superintendent of Police of the District.

15. In view of the above, the present application stands **dismissed.**

16. Superintendent of Police, Pratapgarh is directed to ensure that the further investigation of the case in question be completed as early as possible and submit a report before the Court concerned.

17. Senior Registrar of this Court is directed to communicate this order to Principal Secretary, Government of U.P. and Superintendent of Police, Pratapgarh for necessary action, forthwith.

(2024) 2 ILRA 258

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 12826 of 2023

Shashank Pandey & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
Shailendra Singh Rajawat, Saurabh Singh

Counsel for the Opposite Parties:
G.A.

(i) Criminal Law – Criminal Procedure Code, 1973 – Sections 125 & 482 – Protection of Women from Domestic Violence Act, 2005 - Sections 2(a), 2(f), 12 & 12(1) - Hindu Marriage Act, 1955- Sections 5(v), 11, 12 & 13-B – Indian Penal Code, 1860 – Sections 120-B, 376, 406 & 498-A - Application under Section 482 Cr.P.C. – challenging the legality and validity of the impugned order – whereby the application filed by the applicant seeking dismissal of the complaint case u/section 12 of DV Act was rejected – Marriage between applicant no. 1 and opposite party no. 2 solemnized in May, 2018 – matrimonial dispute arose – Suit u/sections 11 & 12 of the Hindu Marriage Act, instituted in 2019 – decree passed ex-parte in March, 2021 – marriage was declared null and void in in March, 2021 – Suit for maintenance u/s 125 Cr.P.C. instituted in year 2019 - dismissed in April, 2023 – meanwhile, opposite party no. 2 filed a Complaint case u/section 12 of the DV Act in September, 2021 – opposed by applicant – applicant filed an application questioning the maintainability of the DV complaint – application rejected – hence, present Application – question of maintainability of complaint under DV Act – contention raised that since marriage was declared null and void, opposite party no. 2 ceased to be an "aggrieved person" under the DV Act – however, court observed that on the date of filing of the complaint, the marriage was subsisting – and applicant did not dispute the factum of marriage or the domestic relationship with opposite party no. 2 – parties lived together in a domestic relationship prior to separation – therefore, relationship in the nature of marriage existed till the decree of nullity – opposite party no. 2 falls within the ambit of "aggrieved person" and "domestic relationship" as defined under the DV Act - Held - opposite party no. 2 is entitled to invoke provisions of Section 12 of the DV Act – complaint is maintainable – no merit found in the preliminary objection raised by the applicant – accordingly, Application under Section 482 Cr.P.C. stands dismissed.
(Para – 28, 29, 30, 31)

Application Dismissed. (E-11)

List of referred Cases: -

1. Amit Agarwal Vs Sanjay Aggarwal, (2016) SCC OnLine P&H 4200,

2. Dhanraj Vs Shalini, (2017) SCC OnLine Bom 7671,

3. Inderjit Singh Grewal Vs St. of Punj., (2011) 12 SCC 588,

4. D. Velusamy Vs D. Patchaiammal, (2010) 10 SCC 469,

5. S. Khushboo Vs Kanniammal (2010) 5 SCC 600,

6. Rajnesh Vs Neha, (2021) 2 SCC 324,

7. Dhanraj Vs Shalini, (2017) SCC OnLine Bom 7671,

8. Amrendra Pratap Singh Vs Tej Bahadur Prajapati, (2004) 10 SCC 65,

9. St. of Orissa Vs Mohd. Illiyas, (2006) 1 SCC 275,

10. Amit Agarwal Vs Sanjay Aggarwal, (2016) SCC OnLine P&H 4200,

11. Prabha Tyagi Vs Kamlesh Devi, (2022) 8 SCC 90.

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

1. The submissions of Sri Shailendra Singh Rajawat, the learned counsel for the applicants and Sri Anurag Verma, the learned AGA-I appearing for the State were heard on 18.01.2024 and judgment was reserved. Subsequently, on 02.02.2024 the opposite party no.

2. appeared in person and requested for being provided an opportunity to file objections against the application, which was granted. The opposite party no. 2 has filed objections without supplying a copy of the same to the applicant or his learned Counsel. Moreover, the objections filed by the opposite party no. 2 do not address the question which has been raised by means of the application under Section 482 Cr.P.C. For the aforesaid reasons, although the objections filed by the opposite party no.2 have been taken on record, the same are not being taken into consideration in this order.

2. By means of the instant application under Section 482 Cr.P.C., the applicants have assailed the legality and validity of the judgment and order dated 29.09.2022 passed by the Civil Judge (Jr. Div.)/FTC-I, Pratapgarh in Complaint Case No. 1386 of 2021, under Sections 12 of the Protection of Women from Domestic Violence Act, 2005, (which will hereinafter be referred to as 'the DV Act') Police Station Kotwali Nagar, District Pratapgarh whereby an application dated 30.08.2022 filed by the applicants for dismissal of the complaint as not maintainable for the reason that the marriage between applicant no. 1 and opposite party no. 2 had been declared to be null and void by means of decree dated 26.03.2021, has been rejected.

3. Briefly stated, the facts of the case are that the applicant no. 1 got married to the opposite party no. 2 on 12.05.2018. The applicant no. 1 filed a Suit No. 238/2019, under Sections 11 & 12 of the Hindu Marriage Act, 1955 in the Court of Principal Judge, Family Court, Dehradun, which was decreed ex parte on 26.03.2021 and the marriage between the applicant no. 1 and opposite party no. 2 was declared to be null and void for the reason that the applicant no. 1 and opposite party no. 2 were sapindas and the marriage between them was prohibited under Section 5(v) of the Hindu Marriage Act, and that the opposite party no. 2 was suffering from bipolar disorder and the consent of applicant no. 1 was obtained by concealing this fact which made the marriage voidable. The judgment records that the opposite party no. 2 had put in appearance in the suit initially but she abstained from filing a written statement or appearing to defend the suit and therefore, the suit was proceeded with and decided ex parte. The opposite party no. 2 had filed a

Maintenance Suit No. 148 of 2019, under Section 125 Cr.P.C., which was rejected by means of an order dated 18.04.2023 passed by the Additional Principal Judge, Family Court No. 1, Pratapgarh on the ground that the marriage between the parties having been declared null and void, the application was not maintainable. The opposite party no. 2 has filed an application under Section 12 of the DV Act in the Court of Civil Judge (Junior Division), Court No. 19, Pratapgarh on 11.09.2019. The applicants filed a written statement and objections against the interim relief application stating that the marriage had been declared to be null and void on 27.09.2021. Thereafter the applicants filed another application for deciding the question of maintainability of the application under the DV Act. The said application has been rejected by the impugned order dated 29.09.2022.

4. While rejecting the question of maintainability raised by the applicants, the learned court has held that the complaint under Section 12 of the DV Act was filed on 11.09.2019 whereas the decree declaring the marriage to be null and void has been passed on 26.03.2021. Therefore, on the date of filing of the complaint, the marriage subsisted.

5. Sri. Shailendra Singh Rajawat, the learned counsel for the applicants has place reliance upon a judgment of Hon'ble Single Judge of Punjab and Haryana High Court in **Amit Agarwal v. Sanjay Aggarwal**, (2016) SCC OnLine P&H 4200, wherein it was held that the provisions of the DV Act can be invoked only when the domestic relationship is in existence. Where the domestic relationship ceases, the provisions under the DV Act cannot be invoked.

6. The learned counsel for the applicants has placed reliance on a decision of an Hon'ble Single Judge of Bombay High Court, Nagpur Bench in **Dhanraj v. Shalini**, (2017) SCC OnLine Bom 7671, wherein it was held that where Family Court declared the marriage as null and void and the order was affirmed by the High Court in an appeal, there exists no relationship between petitioner and respondent no. 1 as husband and wife from the date of the order of the Family Court.

7. The learned Counsel for the applicant also relied upon the following passage from the decision of the Hon'ble Supreme Court in **Inderjit Singh Grewal v. State of Punjab**, (2011) 12 SCC 588: -

> *"33. In view of the above, we are of the considered opinion that permitting the Magistrate to proceed further with the complaint under the provisions of the 2005 Act is not compatible and in consonance with the decree of divorce which still subsists and thus, the process amounts to abuse of the process of the court. Undoubtedly, for quashing a complaint, the court has to take its contents on its face value and in case the same discloses an offence, the court generally does not interfere with the same. However, in the backdrop of the factual matrix of this case, permitting the court to proceed with the complaint would be travesty of justice. Thus, interest of justice warrants quashing of the same."*

8. Before proceeding any further, it would be appropriate to have a look at the relevant provisions of the DV Act. Section 2 (a) of the DV Act defines "aggrieved person" as follows: -

"(a)"aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent *and who alleges to have been subjected to any act of domestic violence by the respondent;"*

9. Section 2 (क) of the Hindi version of the DV Act defines 'aggrieved person" in the following words: -

"व्यथित व्यक्ति" से कोई ऐसी महिला अभिप्रेत है जो प्रत्यर्थी की घरेलू नातेदारी में है या रही है और जिसका अभिकथन है कि वह प्रत्यर्थी द्वारा किसी घरेलू हिंसा का शिकार रही है"

10. The term "domestic relationship" is defined in Section 2 (f) of the DV Act as follows: -

(f) ***"domestic relationship" means a relationship between two persons*** *who live or* ***have, at any point of time, lived together in a shared household, when they are related by*** *consanguinity,* ***marriage or through a relationship in the nature of marriage,*** *adoption or are family members living together as a joint family;*

11. Section 2 (च) of the Hindi version of the DV Act defines the term "domestic relationship" in the following words: -

"घरेलू नातेदारी" से ऐसे दो व्यक्तियों के बीच नातेदारी अभिप्रेत है जो साझी गृहस्थी में एक साथ रहते हैं या किसी समय पर एक साथ रह चुके हैं, जब वे, समरक्तता, विवाह द्वारा या विवाह, दत्तक ग्रहण की प्रकृति की किसी नातेदारी द्वारा संबंधित हैं या एक अविभक्त कुटुम्ब के रूप में एक साथ रहने वाले कुटुम्ब के सदस्य हैं"

12. When we read the aforesaid definitions given in the English and the Hindi version together, it becomes clear that the legislature has provided that any woman who has in the past lived in a domestic relation with the respondent, is included in the definition of an aggrieved person. Domestic relation includes a relationship by marriage or through a relationship in the nature of marriage.

13. Section 12 (1) of the DV Act provides that: -

"12. ***Application to Magistrate.****—(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act :"*

14. In **D. Velusamy** v. D. Patchaiammal, (2010) 10 SCC 469 relied upon by the learned Counsel for the applicant, the Hon'ble Supreme Court held that: -

"19. Having noted the relevant provisions in the Protection of Women from Domestic Violence Act, 2005, we may point out that the expression "domestic relationship" includes not only the relationship of marriage but also a relationship "in the nature of marriage". The question, therefore, arises as to what is the meaning of the expression "a relationship in the nature of marriage". Unfortunately, this expression has not been defined in the Act. Since there is no direct decision of this Court on the interpretation of this expression we think it necessary to interpret it because a large number of cases will be coming up before the courts in our country on this point, and hence an authoritative decision is required.

20. In our opinion Parliament by the aforesaid Act has drawn a distinction between the relationship of marriage and a

relationship in the nature of marriage, and has provided that in either case the person who enters into either relationship is entitled to the benefit of the Act.

21. It seems to us that in the aforesaid Act of 2005 Parliament has taken notice of a new social phenomenon which has emerged in our country known as live-in relationship. This new relationship is still rare in our country, and is sometimes found in big urban cities in India, but it is very common in North America and Europe. It has been commented upon by this Court in S. Khushboo v. Kanniammal (2010) 5 SCC 600 vide para 31.

* * *

31. In our opinion a "relationship in the nature of marriage" is akin to a common law marriage. Common law marriages require that although not being formally married:

(i) The couple must hold themselves out to society as being akin to spouses.

(ii) They must be of legal age to marry.

(iii) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(iv) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

(See "Common Law Marriage" in Wikipedia on Google.)

In our opinion a "relationship in the nature of marriage" under the 2005 Act must also fulfil the above requirements, and in addition the parties must have lived together in a "shared household" as defined in Section 2(s) of the Act. Merely spending weekends together or a one night stand would not make it a "domestic relationship".

32. In our opinion not all live-in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence. If a man has a "keep" whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage.

33. No doubt the view we are taking would exclude many women who have had a live-in relationship from the benefit of the 2005 Act, but then it is not for this Court to legislate or amend the law. Parliament has used the expression "relationship in the nature of marriage" and not "live-in relationship". The Court in the garb of interpretation cannot change the language of the statute."

15. Thus it is apparent that in **D. Velusamy** (Supra), the Hon'ble Supreme Court has dealt with the question regarding the conditions in which a live-in relationship would fall within the purview of the term 'relationship in the nature of marriage'. The question of the effect of a marriage being declared to be null and void after the parties had solemnized the marriage and had lived together as husband and wife in a shared household, was not decided in **D. Velusamy**.

16. **Dhanraj v. Shalini**, (Supra) relied upon by the learned counsel for the applicant, had been decided by following the decision of Hon'ble Supreme Court in **D. Velusamy** (Supra) and the question of the effect of a marriage being declared to be null and void after the parties had solemnized the marriage and had lived together as husband and wife in a shared household, was not decided in it.

17. In **Rajnesh v. Neha**, (2021) 2 SCC 324, the Hon'ble Supreme Court referred to the earlier decision in **D. Velusamy** (Supra) and held that: -

"41. The DV Act stands on a separate footing from the laws discussed hereinabove. The DV Act provides relief to an aggrieved woman who is subjected to "domestic violence". The "aggrieved person" has been defined by Section 2(a) to mean any woman who is, or has been, in a domestic relationship with the respondent, and alleges to have been subjected to any act of domestic violence. Section 2(f) defines "domestic relationship" to include a relationship between two persons who live, or have at any point of time lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption, or are family members living together as a joint family."

18. The question of the effect of a marriage being declared to be null and void after the parties had solemnized the marriage and had lived together as husband and wife in a shared household, was not decided in **Rajnesh versus Neha** also.

19. In **Inderjit Singh Grewal** (Supra), the appellant and Respondent 2 got married on 23.09.1998 and from the said wedlock a son was born on 05.10.1999. They filed a suit under Section 13-B of the Hindu Marriage Act, 1955 for dissolution of marriage by mutual consent, which was decreed on 20.03.2008. On 04.05.2009 the respondent 2 filed a complaint before the Senior Superintendent of Police, Ludhiana against the appellant on 04.05.2009 under the provisions of the DV Act alleging that the decree of divorce obtained by them was a sham transaction. Even after getting divorce, both of them had been living together as husband and wife. She was forced to leave the matrimonial home. A Superintendent of Police conducted inquiry and found that the parties had been living separately after divorce and no case was made out against the appellant. The Respondent 2 subsequently filed a complaint under the DV Act on 12.06.2009. The appellant filed an application under Section 482 Cr.P.C. for quashing the complaint. In the meanwhile, the Respondent 2 filed a civil suit on 17.07.2009 seeking a declaration that the decree of divorce had been obtained by fraud and it was null and void and the said suit was pending. Respondent 2 also filed an application under the Guardians and Wards Act, 1890 for grant of custody and guardianship of the child and the same was also pending. Respondent 2 also lodged an FIR under Sections 406, 498-A, 376 and 120-B of the IPC against the appellant, his mother and sister. The High Court dismissed the application filed by the appellant. In appeal, the Hon'ble Supreme Court held that: -

"17. It is a settled legal proposition that where a person gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of the law as fraud unravels everything. "Equity is always known to defend the law from crafty evasions and new subtleties invented to evade law." It is trite that "fraud and justice never dwell together" (fraus et jus nunquam cohabitant). Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. Fraud and deception are synonymous. "Fraud is anathema to all equitable principles and any affair tainted with fraud

cannot be perpetuated or saved by the application of any equitable doctrine." An act of fraud on court is always viewed seriously. (Vide Meghmala v. G. Narasimha Reddy, (2010) 8 SCC383, para 34.)

* * *

22. Respondent 2 herself had been a party to the fraud committed by the appellant upon the civil court for getting the decree of divorce as alleged by her in the impugned complaint. Thus, according to her own admission she herself is an abettor to the crime. ***A person alleging his own infamy cannot be heard at any forum as explained by the legal maxim allegans suam turpitudinem non est audiendus. No one should have an advantage from his own wrong (commondum ex injuria sua nemo habere debet). No action arises from an immoral cause (ex turpi causa non oritur actio). Damage suffered by consent is not a cause of action (volenti non fit injuria). The statements/allegations made by Respondent 2 patently and latently involve her in the alleged fraud committed upon the court. Thus, she made herself disentitled for any equitable relief".***

20. The conclusion drawn in para 33 of the judgment relied upon by the learned Counsel for the applicant was in light of the aforesaid peculiar facts and circumstances of the case, which are in no way similar to the facts of the present case and, therefore, the judgment in the case of **Inderjit Singh Grewal** (Supra) is of no avail to the applicant.

21. In **Dhanraj v. Shalini**, (2017) SCC OnLine Bom 7671, the parties were married to each other, their marriage was declared as null and void by the competent Court, which order had attained finality as appeal before Division Bench of this Court came to be dismissed. A Single Judge Bench of the Bombay High Court held that from the date of the order of the Family Court, the relationship between the parties as husband and wife ceased to exist. After referring to the decision in **D. Velusamy** (Supra), the Bombay High Court allowed the Writ Petition and set aside the order allowing application under Section 12 of the DV Act, without deciding as to whether the parties having undergone the ceremonies of a Hindu Marriage can be treated as having been in a live-in relationship in case their marriage is annulled subsequently.

22. In **Amrendra Pratap Singh v. Tej Bahadur Prajapati,** (2004) 10 SCC 65, the following well settled principle of precedents was reiterated: -

"A judicial decision is an authority for what it actually decides and not for what can be read into it by implication or by assigning an assumed intention to the judges, and inferring from it a proposition of law which the judges have not specifically laid down in the pronouncement."

23. In **State of Orissa v. Mohd. Illiyas,** (2006) 1 SCC 275, it was held that: -

"A decision is a precedent on its own facts. Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings

of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is 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 flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (See State of Orissa v. Sudhansu Sekhar Misra and Union of India v. Dhanwanti Devi.) A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In Quinn v. Leathem the Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides."

24. The question of the effect of a marriage being declared to be null and void after the parties had solemnized the marriage and had lived together as husband and wife in a shared household, was not decided in none of the cases cited by the learned Counsel for the applicant and, therefore, those precedents are not relevant for deciding this question.

25. In **Amit Agarwal v. Sanjay Aggarwal,** (2016) SCC OnLine P&H 4200, a Single Judge Bench of Punjab and Haryana High Court held that answer to the question whether aggrieved person would even mean a 'divorced woman', lies in the definition provided in Section 2(a), which says that "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent". The Punjab and Haryana High Court held that: -

"19. The use of the word is any woman 'who is' or 'has been'. Both the expressions are in the present tense. The legislature has not used the word 'who was' or 'had been'. This means the domestic relationship has to be in the present and not in the past. The definition requires that on the date Act come into force, the woman should be in domestic relationship."

26. However, the Punjab and Haryana High Court omitted to notice that the Hindi version of the DV Act which has been quoted above and which makes it clear that an aggrieved person will include a woman who has lived in the past in a domestic relationship with the respondent. Therefore, I am not persuaded to follow the interpretation of the term "aggrieved person" made by the Punjab and Haryama High Court.

27. In **Prabha Tyagi v. Kamlesh Devi**, (2022) 8 SCC 90, the Hon'ble Supreme Court decided the question whether, such a domestic relationship should be subsisting between the aggrieved person and the respondent against whom relief is claimed at the time of claiming the relief. Before answering the question, the Hon'ble Supreme Court analyzed the

relationships noted in the DV Act as under: -

"59.1. Any relationship by consanguinity is a lifelong relationship.

59.2. Marriage is also a lifelong relationship unless a separation by a decree of divorce is ordered by a competent authority of law.

(i) If there is judicial separation ordered by a court of law, that does not put an end to marriage and hence the domestic relationship continues between the spouses even though they may not be actually living together.

(ii) In the event of a divorce, marriage would no longer be subsisting, but if a woman (wife) is subjected to any domestic violence either during marriage or even subsequent to a divorce decree being passed but relatable to the period of domestic relationship, the provisions of this DV Act would come to the rescue of such a divorced woman also.

(iii) That is why, the expression "domestic relationship" has been defined in an expansive manner to mean ***a relationship between two persons who live or have at any point of time lived together*** *in a shared household when they are related by marriage. We have also interpreted the word "live" or "lived" in the context of right to reside in sub-section (1) of Section 17. The right to live in the shared household, even when the domestic relationship may have been severed for instance when a woman has been widowed owing to the death of her husband, entitles her to have remedies under the DV Act.*

(iv) ***Therefore, even when the marital ties cease and there is no subsisting domestic relationship between the aggrieved woman and the respondent against whom relief is claimed but the acts of domestic violence are related to the period of domestic relationship, even in such circumstances, the aggrieved woman who was subjected to domestic violence has remedies under the DV Act.***

59.3. Even in the case of relationship in the nature of marriage, during which period the woman suffered domestic violence and is thus an aggrieved person can seek remedies subsequent to the cessation of the relationship, the only precondition is that the allegation of domestic violence must relate to the period of the subsistence of relationship in the nature of marriage.

59.4. In the same way, when a girl child is fostered by family members living together as a joint family as interpreted above and lives or at any point of time has lived together in a shared household or has the right to reside in the shared household being a member living together as a joint family and has been ousted in any way or has been a victim of domestic violence has remedies under the DV Act."

The Hon'ble Supreme Court answered the question in the following words: -

60. In our view, ***the question raised about a subsisting domestic relationship between the aggrieved person and the person against whom the relief is claimed must be interpreted in a broad and expansive way, so as to encompass not only a subsisting domestic relationship in praesenti but also a past domestic relationship. Therefore, Parliament has intentionally used the expression "domestic relationship" to mean a relationship between two persons who not only live together in the shared household but also between two persons who "have at any point of time lived together" in a shared household."***

28. In view of the above discussion, I am of the considered view that any woman, who has in the past lived in a domestic relation with the respondent, is included in the definition of an aggrieved person and domestic relation includes a relationship by marriage or through a relationship in the nature of marriage.

29. As per the opposite party no. 2 – complainant, she got married to the applicant on 12.05.2018. A Suit filed by the applicant under Sections 11 & 12 of the Hindu Marriage Act, 1955 was decreed ex parte on 26.03.2021 by the Family Court, Dehradun and the marriage between the applicant no. 1 and opposite party no. 2 was declared to be null and void for the reasons that the applicant no. 1 and opposite party no. 2 were sapindas and the marriage between them was prohibited under Section 5(v) of the Hindu Marriage Act, and that the opposite party no. 2 was suffering from bipolar disorder and the consent of applicant no. 1 was obtained by concealing this fact which made the marriage voidable. Since that judgment is not under challenge in these proceedings, I am refraining from making any observation regarding that judgment.

30. The applicant does not dispute that he got married to the opposite party no. 2 and having been married to the applicant, the opposite party no. 2 had lived in a domestic relationship with the applicant, before they started living separately. They had been related by marriage till the marriage was declared to be null and void. Even though the marriage has subsequently been declared to be null and void, when the relationship between the applicant and the opposite party no. 2 subsisted, it was a relationship in the nature of marriage. Therefore, the opposite party no. 2 is an aggrieved person within the meaning of the Act she has a right to present an application under Section 12 of the DV Act.

31. I find no force in the preliminary objection raised by the applicant against maintainability of the application under Section 12 of the DV Act. The impugned order in no way defeats the ends of justice and there is no merit in the application under Section 482 filed by the applicant.

32. Accordingly, the application under Section 482 Cr.P.C. is **dismissed.**

(2024) 2 ILRA 267
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2024
BEFORE
THE HON'BLE SALIL KUMAR RAI, J.

Writ A No. 4136 of 2021

Kumar Bhupendra Singh ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ramesh Chandra Tiwari, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Brahma Kumar Tiwari

A. Service Law – UP Government Servant (Discipline and Appeal) Rules, 1999 – Rule 9(2) – Disciplinary proceeding – Punishment – Exchange of land with pasture land u/s 161 of UP ZA&LR Act, 1950 was made – Petitioner, vide his order dated 11.8.2016 directed mutation in the revenue records implementing the earlier order passed by Additional Commissioner – Charge of providing personal gain in favour of private parties was leveled – Though the Inquiry Officer found the order passed by the petitioner

beyond jurisdiction, but not found the charge of personal gain proved – However, disciplinary authority awarded punishment holding that the petitioner while passing the order dated 11.8.2016 had not only acted beyond jurisdiction, but had also acted for private gain – Legality challenged – No opportunity to represent before the disciplinary authority was given – Effect – Held, mere passing of an order in excess of jurisdiction does not by itself cast doubt on the integrity of a government servant and does not by itself establish that the order was passed to show favour to any party or for personal gains – High Court held punishment order contrary to Rule 9(2) of the Rules, 1999. (Para 9, 16 and 31)

Writ petition allowed. (E-1)

List of cases cited :-

1. Dr. (Smt.) Kuntesh Gupta Vs Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) & ors.; 1987 (4) SCC 525

2. Writ B No. 39011 of 2010; Babu Lal & ors.Vs Board of Revenue U.P. Allahabad & ors.decided on 3.12.2014

3. C.M. Review Application No. 64657 of 2015 in Writ B No. 39011 of 2010; Babu Lal & ors.Vs Board of Revenue U.P. Allahabad & ors.decided on 5.5.2017

4. Sushila Vs Additional Commissioner Azamgarh & ors.; 2015 (127) RD 691

5. Kaptan Singh Vs St. of U.P. & anr.; 2014 (8) ADJ 16 (DB)

6. Shyam Babu Vaish Vs St. of U.P. & anr.; 2019 (6) ADJ 398 (DB)

7. Hari Om Rastogi Vs St. of U.P. & ors.l 2022 (9) ADJ 169 (DB)

8. Ceiling No. 258 of 2016; Kaushlendra Singh & anr. Vs St. of U.P. & ors.decided on 16.11.2016

9. Writ A No. 29828 of 2021; Shri Prakash Gupta Vs St. of U.P. & ors.decided on 13.7.2022

10. Sri Kishun Vs Gaon Sabha; (1999) 90 RD 650

11. St. of Punjab & ors.Vs Ram Singh Ex-Constable; (1992) 4 SCC 54

12. M.S. Bindra Vs U.O.I.; (1998) 7 SCC 310

13. U.O.I.Vs K.K. Dhawan; (1993) 2 SCC 56

14. Zunjarrao Bhikaji Nagarkar Vs U.O.I. & ors.; (1999) 7 SCC 409

15. P.C. Joshi Vs St. of U.P. & ors.; (2001) 6 SCC 491

16. Punjab National Bank & ors.Vs Kunj Behari Misra; (1998) 7 SCC 84

17. St. of Assam Vs Bimal Kumar Pandit; AIR (1963) SC 1612

18. Lav Nigam Vs Chairman & MD, ITI Ltd. & anr.; (2006) 9 SCC 440

19. St. Bank of India & ors.Vs K.P. Narayanan Kutty; (2003) 2 SCC 449

(Delivered by Hon'ble Salil Kumar Rai, J.)

The petition has been filed challenging the order dated 14.1.2021 passed by the Special Secretary, Appointment Section – 3, Government of Uttar Pradesh, Lucknow by which the petitioner has been reverted to the post of Tehsildar from the post of Deputy District Magistrate.

At this stage, it is relevant to note that during the arguments in the case, the Standing Counsel had opposed the writ petition on grounds of availability of alternative remedy of appeal to the petitioner under Rule 11 of the Rules, 1999. However, as the petition was pending in this Court since February, 2021 and affidavits in the case had been exchanged, therefore, in view of the judgment of the Supreme Court in ***Dr. (Smt.) Kuntesh***

Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Ors. 1987 (4) SCC 525, the objections of the Standing Counsel regarding maintainability of the writ petition on grounds of availability of alternative remedy to the petitioner were rejected and the petition was heard on merits.

The facts of the case are that the petitioner was initially appointed as Naib Tehsildar in March, 1996, was promoted to the post of Tehsildar in January, 2008 and on 11.5.2016, he was promoted as Deputy Collector / Deputy District Magistrate / Sub-Divisional Magistrate. From 29.5.2016 to 3.9.2016, the petitioner was posted as Sub-Divisional Magistrate, Sardhana, District Meerut.

In 2013, M/s. A to Z Builders and Developers (hereinafter referred to as, 'Builders') through its Directors / Partners - Sri Jitendra Kumar and Sri Vinod Kumar filed an application under Section 161 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as, 'Act, 1950') for exchange of their plots with the plots of Gaon Sabha. The plots of the Gaon Sabha, which were sought to be exchanged were pasture lands included in Section 132 of the Act, 1950, therefore, no Bhumidhari Rights could have accrued in them. On the aforesaid application, Case No. 03 of 2012-13 (M/s. A to Z Builders and Developers Ltd. vs. Gaon Sabha & Ors.) was registered in the court of Sub-Divisional Magistrate. The application was allowed by order dated 28.5.2013 passed by the then Deputy District Magistrate, Sardhana, District Meerut and by another order of the same date, Process for mutation in the revenue records was also issued. However, by order dated 11.2.2014, the then Deputy District Magistrate, Sardhana recalled his previous order dated 28.5.2013 and restored Case No. 03 of 2012-13 to its original number. Against the order dated 11.2.2014, Appeal No. 43 of 2013-14 was filed by the Builders. The Additional Commissioner, Meerut Division, District Meerut, vide his order dated 27.8.2014 allowed the appeal, set-aside the order dated 11.2.2014 and affirmed the order dated 28.5.2013 previously passed in Case No. 03 of 2012-13. An application for mutation in the revenue records was filed by the Builders on 25.7.2016. The petitioner, who at the time was posted as the Deputy District Magistrate, Sardhana, District Meerut, through a letter dated 4.8.2016 sought legal opinion on the aforesaid application and the District Government Counsel in his remarks dated 6.8.2016 opined that there was no legal impediment in implementing the order dated 27.8.2014 and consequential mutation in the revenue records. The petitioner, vide his order dated 11.8.2016 directed mutation in the revenue records implementing the orders dated 27.8.2014 and 28.5.2013, but vide the same order, also directed the Tehsildar to file an appeal before the Board of Revenue, Uttar Pradesh against the order dated 27.8.2014 passed by the Additional Commissioner.

Subsequently, the Commissioner, Meerut Division, District Meerut vide his order dated 24.1.2018 cancelled the previous order dated 27.8.2014 and restored Appeal No. 43 of 2013-14 to its original number. The order dated 24.1.2018 passed by the Commissioner was challenged by the Builders before this Court in Writ – C No. 2758 of 2018 which was admitted for hearing and parties were directed to maintain *status-quo* during the pendency of the writ petition. Writ – C No.

2758 of 2018 is still pending before this Court.

Meanwhile, the District Magistrate, Meerut vide his order dated 23.11.2016 instituted an inquiry in the matter and asked for a report from the then Deputy District Magistrate, Sardhana. The then Deputy District Magistrate, Sardhana submitted his report on 24.11.2016 stating that the mutation in the revenue records was contrary to the relevant provisions of the Revenue Court Manual. It was noted in the report that the land of Gaon Sabha exchanged with the Builders was a pasture land included in Section 132 of the Act, 1950 which could have been exchanged only after permission from the State Government and no orders for exchange could have been passed under Section 161 of the Act, 1950 and the petitioner, instead of ensuring that an appeal was filed against the order dated 27.8.2014 passed by the Additional Commissioner, got the name of a private body entered into the revenue records against the Gaon Sabha plots. On the basis of report dated 24.11.2016, departmental / disciplinary proceedings were instituted against the petitioner under the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as, 'Rules, 1999') and the Commissioner, Saharanpur Division, District Saharanpur was appointed as the Inquiry Officer. A charge-sheet dated 24.12.2019 was served on the petitioner. The charge against the petitioner was that while passing the order dated 25.7.2016 for implementation of the order dated 27.8.2014 passed by the Additional Commissioner, the petitioner had acted in collusion with the Builders for personal gain by giving favours to the Builders and the conduct of the petitioner amounted to misconduct under the Uttar Pradesh Government Servant Conduct Rules, 1956 (hereinafter referred to as, 'Rules, 1956').

The petitioner submitted his reply to the aforesaid charge-sheet stating that the petitioner had not passed any order of exchange under Section 161 of the Act, 1950 but had only implemented the order passed by the Additional Commissioner and was, therefore, not guilty of the charges. It was also stated by the petitioner that mutation in the revenue records was to implement the order of the Additional Commissioner and was done after the District Government Counsel gave his legal opinion that there was no legal impediment in implementing the order of the Additional Commissioner. It was submitted by the petitioner that in his order dated 11.8.2016, the petitioner had directed the Tehsildar to file an appeal against the order of the Additional Commissioner and the order of the petitioner for mutation in revenue records was in accordance with the relevant provisions of the Revenue Court Manual because the petitioner as the Deputy District Magistrate was duty bound to implement the order of the Additional Commissioner.

The Inquiry Officer submitted his report dated 3.6.2020 holding that the lands which vested in the Gaon Sabha and were subject-matters of exchange were pasture lands included in Section 132 of the Act, 1950 and, therefore, no orders under Section 161 of the Act, 1950 could have been passed by any revenue officer permitting exchange of Gaon Sabha land. The Inquiry Officer held that it was the duty of the petitioner to inform his senior officers regarding the aforesaid fact and the petitioner should have ensured that either appeal or review application should have been filed against the order dated 27.8.2014

passed by the Additional Commissioner. In his report, the Inquiry Officer noted that instead of examining the delay by the Builders in filing the application for implementation of the order passed by the Additional Commissioner, the petitioner had mechanically relied on the opinion of the District Government Counsel and passed the order dated 11.8.2016. The Inquiry Officer held that the act of the petitioner was illegal and beyond his jurisdiction. On the aforesaid findings, the Inquiry Officer held that the charges against the petitioner were partly proved. ***No findings were recorded by the Inquiry Officer on the charge that the petitioner had acted in collusion with the Builders to favour them for personal gain.***

The petitioner was served a show cause notice dated 16.7.2020. The disciplinary authority in the case was Special Secretary, Appointment Section – 3, Government of Uttar Pradesh, Lucknow. The show cause notice stated that the Inquiry Officer had found the charges levelled against the petitioner to be proved. The show cause notice did not record that the disciplinary authority disagreed with the findings of the Inquiry Officer that the charge against the petitioner was partly proved and the disciplinary authority was of the opinion that the charge against the petitioner was proved in full. The petitioner submitted his reply but the State Government vide order dated 14.1.2021 rejected the defence of the petitioner and awarded a punishment reverting him to the post of Tehsildar. The impugned order holds the petitioner guilty of having acted in collusion with the private parties for personal gain and to favour the private parties and thus guilty of misconduct in passing the order dated 11.8.2016 for mutation in revenue records.

The order dated 14.1.2021 has been challenged in the present petition.

A counter affidavit has been filed by the State respondents contesting the writ petition and defending the reasons given in the impugned order dated 14.1.2021. The stand of the respondents in their counter affidavit is that the petitioner was expected to have informed his superior officers about the order dated 27.8.2014 and instead of implementing the order passed by the Additional Commissioner and the order dated 28.5.2013 passed by the Sub-Divisional Magistrate after two years of the order passed by the Additional Commissioner, the petitioner should have ensured that an appeal, revision or review was filed against the order of the Additional Commissioner. The failure of the petitioner to ensure filing of appeal, revision or review against the order of the Additional Commissioner was a misconduct under Rules, 1956 and his order dated 11.8.2016 was illegal and beyond jurisdiction because the land which vested in the Gaon Sabha was pasture land and therefore, no orders could have been passed under Section 161 of the Act, 1950 for exchange of the aforesaid lands and any order of exchange could have been passed only by the State Government.

It was argued by the counsel for the petitioner that there is no evidence or finding by the Inquiry Officer of any collusion between the petitioner and the Builders. It was argued that in his report dated 3.6.2020, the Inquiry Officer has only held that the act of the petitioner was contrary to the Rules and beyond his jurisdiction and, therefore, the charge levelled against the petitioners was only partly established. It was argued that in the show cause notice dated 27.7.2020, the

disciplinary authority has not recorded his disagreement with the report of the Inquiry Officer and has also not recorded his tentative opinion that the charges against the petitioner were fully proved and, therefore, the order dated 14.1.2021 holding that the petitioner had acted contrary to the interest of the State Government and for personal gains in collusion with the private parties is without jurisdiction and in violation of the principles of natural justice as the petitioner was never given any opportunity to represent against the aforesaid opinion of the disciplinary authority. It was further argued that through his order dated 11.8.2016, the petitioner had not committed any illegality as the said order was passed only for implementing the order dated 28.5.2013 passed by the then Sub-Divisional Magistrate, Sardhana and the order dated 27.8.2014 passed by the Additional Commissioner. The petitioner had not passed any order of exchange under Section 161 of the Act, 1950 and had, therefore, committed no misconduct or any illegality. It was argued that under Paragraph 32 of the Revenue Court Manual, the petitioner was duty bound to ensure mutation of the orders passed by the previous Sub-Divisional Magistrate, Sardhana and the Additional Commissioner and, therefore, the petitioner could not have been subjected to disciplinary proceedings for order dated 11.8.2016. It was argued that for the aforesaid reasons, the order dated 14.1.2021 is illegal and contrary to law and liable to be quashed. In support of his arguments, the counsel for the petitioner has relied on the judgment and order dated 3.12.2014 passed by this Court in Writ- B No. 39011 of 2010 ***(Babu Lal & Ors. vs. Board of Revenue U.P. Allahabad & Ors.);*** judgment and order dated 5.5.2017 passed by this Court on C.M. Review Application No. 64657 of 2015 passed in Writ - B No. 39011 of 2010 ***(Babu Lal & Ors. vs. Board of Revenue U.P. Allahabad & Ors.);*** judgments of this Court reported in ***Sushila vs. Additional Commissioner Azamgarh & 14 Ors. 2015 (127) RD 691; Kaptan Singh vs. State of U.P. and Anr. 2014 (8) ADJ 16 (DB), Shyam Babu Vaish vs. State of U.P. and Anr. 2019 (6) ADJ 398 (DB) and Hari Om Rastogi vs. State of U.P. & Ors. 2022 (9) ADJ 169 (DB)***, judgment and order dated 16.11.2016 passed by this Court in Ceiling No. 258 of 2016 ***(Kaushlendra Singh & Anr. vs. State of U.P. Thru Secy. Deptt. of Revenue Lko. & Ors.)*** and judgment and order dated 13.7.2022 passed by this Court in Writ - A No. 29828 of 2021 ***(Shri Prakash Gupta vs. State of U.P. Thru. Addl. Chief Secy. Appointment Lko. & Ors.).***

Rebutting the contention of the counsel for the petitioner, the Standing Counsel has supported the order dated 14.1.2021 and the reasons given in the same and has argued that from the facts on record, it was proved that the petitioner had committed misconduct and, therefore, there was no illegality in the order of punishment which has been passed after considering all the relevant materials and factors.

I have considered the rival submissions of the counsel for the parties and perused the records.

After the order dated 27.8.2014 passed by the Additional Commissioner confirming the order dated 28.5.2013 passed by the Sub-Divisional Magistrate permitting exchange of Gaon Sabha plots under Section 161 of the Act, 1950, it was the duty of subordinate revenue officers to make appropriate entries in the revenue records in accordance with the order dated

28.5.2013 (Reference may be made to the judgment in ***Sri Kishun vs. Gaon Sabha (1999) 90 RD 650)***. It is also relevant to note that by order dated 28.5.2013, Process for mutation in revenue records was also issued. The confirmation of order dated 28.5.2013 by order dated 27.8.2014 revived the Process initially issued for mutation in the revenue records. Mutation in the revenue records was a legal consequence to the order dated 27.8.2014 passed by the Additional Commissioner and should have been done without any orders for the purpose being issued by the petitioner or any other authority. Further, the order of the petitioner directing mutation in the revenue records in pursuance to the order passed by his superior revenue authority was only a ministerial act and the petitioner as the Sub-Divisional Magistrate had no discretion or choice in the matter. Mutation in revenue records create no Bhumidhari rights in favour of any person. Entries in the revenue records are appropriately modified or altered if any order adjudicating the rights of the parties is either recalled or set-aside in appeal. The order dated 11.8.2016 neither adjudicates the rights of the parties nor does it facilitate or causes exchange of Gaon Sabha property which was facilitated by the orders dated 28.5.2013 and 27.8.2014 passed by the then Sub-Divisional Magistrate and the Additional Commissioner, respectively. The petitioner did not pass any order permitting exchange of Gaon Sabha property included in Section 132 of the Act, 1950. No issue of jurisdiction arises so far as the order dated 11.8.2016 is concerned and there is no jurisdictional error in the order dated 11.8.2016 itself. In any case, in his order dated 11.8.2016, the petitioner had also directed the concerned Tehsildar to take appropriate steps for getting the order dated 27.8.2014 passed by the Additional Commissioner set-aside either by filing an appeal or revision or a recall application.

Rule 3 of the Rules, 1956 mandates that every government servant shall at all times maintain absolute integrity and devotion to duty and shall at all times conduct himself in accordance with the specific or implied orders of government regulating behaviour and conduct which may be in force. No order or regulation of the government has been brought to the notice of this Court either in the counter affidavit filed by the Standing Counsel or during the arguments to show that there was any order or regulation of the government which permitted a Sub-Divisional Magistrate not to comply with the order of his superior officer passed in an appeal or revision. The order dated 11.8.2016 was in compliance of the order dated 27.8.2014 passed by the Additional Commissioner. The opinion of the Inquiry Officer and the disciplinary authority that the petitioner should have informed his superior officers is incorrect in as much as the Additional Commissioner himself was an officer superior in rank to the petitioner. The charge-sheet or the findings of the Inquiry Officer and the disciplinary authority do not refer to any material which shows that the petitioner had acted in collusion with the Builders for his personal gain and gave favours to the Builders in passing the order dated 11.8.2016. The charge-sheet does not mention any evidence in support of the aforesaid allegation. The mere fact that the order was passed on an application which was filed two years after the order passed by the Additional Commissioner does not by itself show that the petitioner had acted for personal gain and in collusion with the Builders. As noted earlier, there is no jurisdictional error and no question of

jurisdiction arises so far as order dated 11.8.2016 itself is concerned as the said order has not been passed under Section 161 of the Act, 1950 and does not facilitate or permits exchange of Gaon Sabha property. Even assuming that the order dated 11.8.2016 was beyond the jurisdiction of the petitioner acting as Sub-Divisional Magistrate, mere passing of an order in excess of jurisdiction does not by itself cast doubt on the integrity of a government servant and does not by itself establish that the order was passed to show favour to any party or for personal gains.

At this stage, it would be apt to refer to judgments of the Supreme Court dealing with misconduct of a government servant.

In ***State of Punjab & Ors. vs. Ram Singh Ex-Constable (1992) 4 SCC 54,*** the Supreme Court observed that misconduct involves unlawful behaviour which is willful in character, is a forbidden act, a transgression of established and definite rule of action or misconduct but not a mere error of judgment, carelessness or negligence in performance of the duty. It was observed by the Supreme Court that acts referred as misconduct bear forbidden quality or character. The relevant observations of the Supreme Court are reproduced below : -

"5. Misconduct has been defined in Black's Law Dictionary, Sixth Edition at page 999 thus :-

*"**A transgression of some established and definite rule of action,** a forbidden act, a dereliction from duty, **unlawful behavior, willful in character, improper or wrong behavior,** its synonyms are misdemeanor, misdeed, misbehavior, delinquency, impropriety, mismanagement, offence but not negligence or carelessness."*

Misconduct in office has been defined as :

"Any unlawful behavior by a public officer in relation to the duties of his office, willful in character. Term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act."

P. Ramanatha Aiyar's Law Lexicon, Reprint Edition 1987 at page 821 defines 'misconduct' thus:

"The term misconduct implies a wrongful intention, and not a mere error of judgment. *Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word misconduct is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct.* ***In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indifinite, rule of action, where some discretion is necessarily left to the actor.*** *Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite.* ***Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected."***

6. Thus it could be seen that the word 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the

delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. ...”

(emphasis supplied)

In ***M.S. Bindra vs. Union of India (1998) 7 SCC 310***, the Supreme Court observed as under : -

“13. ... To dunk an officer into the puddle of ‘doubtful integrity’, it is not enough that the doubt fringes on a mere hunch. That doubt should be of such a nature as would reasonably and consciously be entertainable by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the label ‘doubtful integrity’.”

In ***Union of India vs. K.K. Dhawan (1993) 2 SCC 56,*** the Supreme Court while dealing with the circumstances in which disciplinary proceedings can be instituted against a government servant for acts done by him in exercise of quasi-judicial functions held that the disciplinary action can be taken in the following cases : -

“(i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion to duty;

(ii) ***if there is prima facie material to show recklessness or misconduct in the discharge of his duty;***

(iii) if he has acted in a manner which is unbecoming of a government servant;

(iv) if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(v) if he had acted in order to unduly favour a party;

(vi) if he had been actuated by corrupt motive, however small the bribe may be because Lord Coke said long ago ‘though the bribe may be small, yet the fault is great’.”

(emphasis supplied)

It was further held by the Supreme Court in Paragraph – 29 of the said reports as follows : - .

“29. *The instances above catalogued are not exhaustive.* ***However, we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above-enumerated instances, disciplinary action is not warranted.*** *Here, we may utter a word of caution. Each case will depend upon the facts and no absolute rule can be postulated.”*

(emphasis supplied)

In ***Zunjarrao Bhikaji Nagarkar vs. Union of India & Ors. (1999) 7 SCC 409,*** the Supreme Court while deciding the validity of disciplinary proceedings against a Collector of Central Exercise, Nagpur who had failed to impose penalty on an

assessee under Rule 173-Q of the Central Excise Rules, 1944 held that even though the imposition of penalty was imperative, there was nothing wrong or improper on the part of the Collector to form an opinion that imposition of penalty was not mandatory and the Collector, while exercising his quasi-judicial functions, was not liable to disciplinary proceedings for not imposing penalty on the assessee under Rule 173-Q of the Central Excise Rules, 1944. The Supreme Court observed that negligence in quasi-judicial adjudication is not negligence perceived as carelessness, inadvertence or omission but as culpable negligence and held that mere error in judgment, carelessness or negligence in performance of duty is not misconduct. The Supreme Court further held that there should be some material before the disciplinary authority to form an opinion that the delinquent showed favour to the assessee by not imposing the penalty and mere wrong exercise of jurisdiction cannot form a basis for initiating disciplinary proceedings against an officer. It was further held that initiation of disciplinary proceedings against an officer cannot take place on an information which is vague or indefinite and suspicion has no role to play in such matters. The relevant observations of the Supreme Court in ***Zunjarrao Bhikaji Nagarkar (supra)*** are reproduced below : -

"40. When we talk of negligence in a quasi-judicial adjudication, it is not negligence perceived as carelessness, inadvertance or omission but as culpable negligence. ***This is how this Court in State of Punjab v. Ex-Constable Ram Singh interpreted "misconduct" not coming within the purview of mere error in judgment, carelessness or negligence in performance of duty.***

...

...

In Hindustan Steel Ltd. case it was said that where proceedings are quasi-judicial penalty will not ordinarily be imposed unless the party charged had acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. This Court has said that the penalty will not also be imposed merely because it is lawful so to do. ***In the present case, it is not that the appellant did not impose penalty because of any negligence on his part but he said it was not a case of imposition of penalty. We are, however, of the view that in a case like this which was being adjudicated upon by the appellant imposition of penalty was imperative. But then, there is nothing wrong or improper on the part of the appellant to form an opinion that imposition of penalty was not mandatory.*** *We have noticed that Patna High Court while interpreting Section 325 IPC held that imposition of penalty was not mandatory which again we have said is not a correct view to take.* ***A wrong interpretation of law cannot be a ground for misconduct. Of course it is a different matter altogether if it is deliberate and actuated by mala fides.***

41. When penalty is not levied, the assessee certainly benefits. But it cannot be said that by not levying the penalty the officer has favoured the assessee or shown undue favour to him. There has to be some basis for the disciplinary authority to reach such a conclusion even prima facie. The record in the present case does not show if the disciplinary authority had any information within its possession from where it could form an opinion that the appellant showed "favour" to the assessee by not imposing the penalty. He may have

wrongly exercised his jurisdiction. But that wrong can be corrected in appeal. That cannot always form basis for initiating disciplinary proceedings against an officer while he is acting as quasi-judicial authority. *It must be kept in mind that being a quasi-judicial authority, he is always subject to judicial supervision in appeal.*

42. Initiation of disciplinary proceedings against an officer cannot take place on an information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer. *Merely because penalty was not imposed and the Board in the exercise of its power directed filing of appeal against that order in the the Appellate Tribunal could not be enough to proceed against the appellant. There is no other instance to show that in similar case the appellant invariably imposed penalty.*

43. If every error of law were to constitute a charge of misconduct, it would impinge upon the independent functioning of quasi-judicial officers like the appellant. ***Since in sum and substance misconduct is sought to be inferred by the appellant having committed an error of law, the charge-sheet on the face of it does not proceed on any legal premise rendering it liable to be quashed. In other words, to maintain any charge-sheet against a quasi- judicial authority something more has to be alleged than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi-judicial order.*** *Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal. The charge-sheet, if sustained, will thus impinge upon the confidence and independent functioning of a quasi-judicial authority. The entire system of administrative adjudication whereunder quasi-judicial powers are conferred on administrative authorities, would fall into disrepute if officers performing such functions are inhibited in performing their functions without fear or favour because of the constant threat of disciplinary proceedings."*

(emphasis supplied)

Similarly, in ***P.C. Joshi vs. State of U.P. & Ors. (2001) 6 SCC 491*** in which the disciplinary proceedings were instituted against a judicial officer on allegations of having granted bail where according to the disciplinary authority, it ought not to have been granted, the Supreme Court observed as follows : -

"7. In the present case, though elaborate enquiry has been conducted by the Enquiry Officer, there is hardly any material worth the name forthcoming except to scrutinize each one of the orders made by the appellant on the judicial side to arrive at a different conclusion. ***That there was possibility on a given set of facts to arrive at a different conclusion is no ground to indict a judicial officer for taking one view and that too for alleged misconduct for that reason alone. The Enquiry Officer has not found any other material, which would reflect on his reputation or integrity or good faith or devotion to duty or that he has been actuated by any corrupt motive. At best he may say that the view taken by the appellant is not proper or correct and not attribute any motive to him which is for extraneous consideration that he had acted in that manner.*** *If in every case where an order of a subordinate court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and*

the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly. ***Indeed the words of caution are given in K.K. Dhawans case and A.N. Saxena case that merely because the order is wrong or the action taken could have been different does not warrant initiation of disciplinary proceedings against the judicial officer. In spite of such caution, it is unfortunate that the High Court has chosen to initiate disciplinary proceedings against the appellant in this case."***

(emphasis supplied)

Even though, the order dated 11.8.2016 passed by the petitioner was merely a ministerial act and not in exercise of a quasi-judicial or judicial function, the principle laid down by the Supreme Court in ***Zunjarrao Bhikaji Nagarkar (supra) and P.C. Joshi (supra)*** are to be applied while considering the case of the petitioner.

In the present case also, there is no material to indicate that the petitioner had passed the order dated 11.8.2016 to grant favour to any party or for his personal gain and there is no material casting any doubt on the integrity of the petitioner. The charge-sheet does not refer to any such material. The inquiry report dated 24.11.2016 of the Sub-Divisional Magistrate does not refer to any material which could cast doubt on the integrity of the petitioner and that the petitioner had acted for extraneous consideration. A mere suspicion cannot be a valid reason to institute disciplinary proceedings against a government servant. The order dated 11.8.2016 may be erroneous but the same would not be sufficient to hold that the petitioner had committed any misconduct especially in the circumstance when by the same order, the petitioner had directed the Tehsildar to take steps for getting the order dated 27.8.2014 passed by the Additional Commissioner set-aside. As observed by the Supreme Court, an officer cannot be dunked into the puddle of 'doubtful integrity' merely on the basis of a doubt which fringes on a mere hunch and mere possibility is hardly sufficient to assume that the employee had acted in a dishonest manner for dishonest purposes. The opinion of the disciplinary authority that by passing the order dated 11.8.2016, the petitioner had committed misconduct under Rules, 1956 is not supported by any evidence on record.

There is another aspect of the matter. The disciplinary proceedings against the petitioner were conducted under the Rules, 1999. Rules 8 and 9 of the Rules, 1999 are relevant and are re-produced below : -

"8. Submission of Inquiry Report *- When the Inquiry is complete, the Inquiry Officer shall submit its inquiry report to the Disciplinary Authority alongwith all the records of the inquiry. The inquiry report shall contain a sufficient record of brief facts, the evidence and statement of the finding on each charge and the reasons thereof. The Inquiry Officer shall not make any recommendation about the penalty.*

9. Action on Inquiry Report -

(1) The Disciplinary authority may, for reason to be recorded in writing, remit the case for re-enquiry to the same or any other Inquiry Officer under intimation to the charged Government Servant the Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as directed by the Disciplinary Authority, according to the provisions of Rule 7.

(2) ***The Disciplinary Authority shall, if it disagrees with the finding of the Inquiry Officer on any charge, record its own finding thereon for reasons to be recorded.***

(3) In case the charges are not proved, the charged Government Servant shall be exonerated by the Disciplinary Authority of the charges and inform him accordingly.

(4) If the Disciplinary Authority, having regard to its finding on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on the charge Government Servant, he shall give a copy of the inquiry report and his finding recorded under sub-rule (2) to the charged Government Servant and require him to submit his representation if he so desires, within a reasonable specified time. The Disciplinary Authority shall having regard to all the relevant records relating to the inquiry and representation of the charge Government Servant, if any, and subject to the provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these and communicate the same to the charged Government Servant."

(emphasis supplied)

Rule 9(2) of the Rules, 1999 does not provide that if the disciplinary authority disagrees with the finding of the Inquiry Officer on any charge, it shall record its disagreement and its tentative opinion and show cause the petitioner to represent against the opinion of the disciplinary authority. However, in ***Ram Kishan vs. Union of India & Ors. (1995) 6 SCC 157***, the Supreme Court held that in case the disciplinary authority disagrees with the conclusions reached by the Inquiry Officer, the disciplinary authority has to give specific reasons in the show cause notice on the basis of which the findings of the Inquiry Officer in that behalf is based and failure of the disciplinary authority to give reasons in the show cause notice would amount to an empty formality which would cause grave prejudice to the delinquent officer and would result in injustice to him. The relevant observations of the Supreme Court in Paragraph - 10 of the reports are reproduced below : -

"10. The next question is whether the show-cause notice is valid in law. It is true, as rightly contended by the counsel for the appellant, that the show-cause notice does not indicate the reasons on the basis of which the disciplinary authority proposed to disagree with the conclusions reached by the inquiry officer. ***The purpose of the show- cause notice, in case of disagreement with the findings of the enquiry officer, is to enable the delinquent to show that the disciplinary authority is persuaded not to disagree with the conclusions reached by the inquiry officer for the reasons given in the inquiry report or he may offer additional reasons in support of the finding by the inquiry officer. In that situation, unless the disciplinary authority gives specific reasons in the show cause on the basis of which the findings of the inquiry officer in that behalf is based, it would be difficult for the delinquent to satisfactorily give reasons to persuade the disciplinary authority to agree with the conclusions reached by the inquiry officer. In the absence of any ground or reason in the show-cause notice it amounts to an empty formality which would cause grave prejudice to the delinquent officer and would result in injustice to him.*** *The mere fact that in the final order some reasons have been given to disagree with the*

conclusions reached by the disciplinary authority cannot cure the defect. ...”

(emphasis supplied)

In ***Punjab National Bank & Ors. vs. Kunj Behari Misra (1998) 7 SCC 84,*** the issue before the Supreme Court was regarding interpretation of Regulation 7(2) of the Punjab National Bank Officer Employees (Discipline and Appeal) Regulations, 1977. Regulation 7(2) of the Regulations provided as follows : -

“(2) The disciplinary authority shall, if it disagrees with the findings of the enquiring authority on any article of charge, record its reasons for such disagreement and record its own findings on such charge, if the evidence on record is sufficient for the purpose.”

The regulations did not specifically state that if the disciplinary authority disagrees with the findings of the enquiring authority and is required to record its own reason for such disagreement and also to record its own finding on such charge, it was required to give a hearing to the delinquent officer. However, the Supreme Court while interpreting the said Regulations, held that the charged officer must have an opportunity to represent before the disciplinary authority before final findings on the charges are recorded and punishment imposed. The Supreme Court held that the principles of natural justice have to be read into Regulation 7(2) and, therefore, whenever the disciplinary authority disagrees with the enquiring authority on any charge then before it records its own finding on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it finally records its findings. The Supreme Court while laying down the aforesaid principles referred to its judgment in State of Assam vs. Bimal Kumar Pandit AIR (1963) SC 1612 wherein it was held that where the dismissing authority differed from the findings of the Inquiry Officer in favour of the charged employee, it would be necessary that the conclusions of the dismissing authority should be briefly indicated in the show cause notice issued to the charged employee. The relevant observations of the Supreme Court are reproduced below : -

“15. At this stage, it will be appropriate to refer to the case of State of Assam v. Bimal Kumar Pandit decided by a Constitution Bench of this Court. A question arose regarding the contents of the second show cause notice when the Government accepts, rejects or partly accepts or partly rejects the findings of the enquiry officer. Even though that case relates to Article 311 (2) before its deletion by the 42nd Amendment, the principle laid down therein, at p. 10 of the Report, when read alone with the decision of this Court in Karunakar case will clearly apply here. The Court observed at SCR pp. 10-11 as follows:-

"We ought, however, to add that if the dismissing authority differs from the findings recorded in the enquiry report, it is necessary that its provisional conclusions in that behalf should be specified in the second notice. It may be that the report makes findings in favour of the delinquent officer, but the dismissing authority disagrees with the said findings and proceeds to issue the notice under Article 311 (2). In such a case, it would obviously be necessary that the dismissing authority should expressly state that it differs from the findings recorded in the enquiry report and then indicate the

nature of the action proposed to be taken against the delinquent officer. *Without such an express statement in the notice, it would be impossible to issue the notice at all.* ***There may also be cases in which the enquiry report may make findings in favour of the delinquent officer on some issues and against him on some other issues.*** *That is precisely what has happened in the present case. If the dismissing authority accepts all the said findings in their entirety, it is another matter: but if the dismissing authority accepts the findings recorded against the delinquent officer and differs from some or all of those recorded in his favour and proceeds to specify the nature of the action proposed to be taken on it own conclusions, it would be necessary that the said conclusions should be briefly indicated in the notice. In this category of cases, the action proposed to be taken would be based not only on the findings recorded against the delinquent officer in the enquiry report, but also on the view of the dismissing authority that the other charges not held proved by the enquiring officer are, according to the dismissing authority, proved.* ***In order to give the delinquent officer a reasonable opportunity to show cause under Article 311 (2), it is essential that the conclusions provisionally reached by the dismissing authority must, in such cases, be specified in the notice.*** *But where the dismissing authority purports to proceed to issue the notice against the delinquent officer after accepting the enquiry report in its entirety, it cannot be said that it is essential that the dismissing authority must say that it has so accepted the report. As we have already indicated, it is desirable that even in such cases a statement to that effect should be made. But we do not think that the words used in Article 311 (2) justify the view that the failure to make such a statement amounts to contravention of Article 311 (2). In dealing with this point, we must bear in mind the fact that a copy of the enquiry report had been enclosed with the notice, and so, reading the notice in common sense manner, the respondent would not have found any difficulty in realising that the action proposed to be taken against him proceeded on the basis that the appellants had accepted the conclusions of the enquiring officer in the entirety."*

17. These observations are clearly in tune with the observations in Bimal Kumar Pandit case quoted earlier and would be applicable at the first stage itself. The aforesaid passages clearly bring out the necessity of the authority which is to finally record an adverse finding to give a hearing to the delinquent officer. If the inquiry officer had given an adverse finding, as per Karunakar case the first stage required an opportunity to be given to the employee to represent to the disciplinary authority, even when an earlier opportunity had been granted to them by the inquiry officer. ***It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be overturned by the disciplinary authority then no opportunity should be granted.*** *The first stage of the inquiry is not completed till the disciplinary authority has recorded its findings.* ***The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing.*** *When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer.* ***When, like in the present case, the inquiry report is in favour of the delinquent officer but the disciplinary***

authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the findings of the disciplinary authority.

18. Under Regulation 6, the enquiry proceedings can be conducted either by an enquiry officer or by the disciplinary authority itself. When the enquiry is conducted by the enquiry officer, his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the enquiry officer. Where the disciplinary authority itself holds an inquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. ***It will be most unfair and iniquitous that where the charged officers succeed before the enquiry officer, they are deprived of representing to the disciplinary authority before that authority differs with the inquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation, the charged officer must have an opportunity to represent before the Disciplinary Authority before final findings on the charges are recorded and punishment imposed.*** *This is required to be done as a part of the first stage of inquiry as explained in Karunakar case.*

19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the inquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. *The report of the inquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the enquiry officer.* ***The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."***

(emphasis supplied)

The above principle was reiterated by the Supreme Court in ***Lav Nigam vs. Chairman & MD, ITI Ltd. & Anr. (2006) 9 SCC 440*** and also in ***State Bank of India & Ors. vs. K.P. Narayanan Kutty (2003) 2 SCC 449. In K.P. Narayanan Kutty (supra)***, the disciplinary authority had disagreed with the findings of the Inquiry Officer that the charges against the delinquent employee had been only partly proved. Rule 9(2) of the Rules, 1999 have to be interpreted in light of the judgment of the Supreme Court in ***Punjab National Bank (supra)*** and the principles of natural justice have to be read in Rule 9(2). Thus under Rule 9(2), if the disciplinary authority disagrees with the findings of the

Inquiring Authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings.

In the present case, the charge against the petitioner was that he had exceeded his jurisdiction by passing the order dated 11.8.2026 and the order was passed for personal gains and to show favour to and in collusion with the private parties thereby causing loss to the State Government and the Gaon Sabha. Apparently, the charge was in two parts. The first part of the charge was that the order passed by the petitioner was beyond his jurisdiction. The second part of the charge was that the order was passed for personal gains and to show favour to the private parties. The Inquiry Officer held that the order passed by the petitioner was beyond his jurisdiction. The Inquiry Officer held that the charge against the petitioner had been **partly proved**. Apparently, the Inquiry Officer found the charge that the petitioner had acted for personal gain and to show favour to the Builders as not proved. The disciplinary authority, i.e., respondent no. 1, in his order dated 14.1.2021 has awarded punishment to the petitioner on the charge that the petitioner while passing the order dated 11.8.2016 had acted beyond his jurisdiction and had also acted for private gain and to show favour to the private parties, i.e., the Builders and had, therefore, committed misconduct as defined in Rules, 1956. Apparently, the disciplinary authority holds the charge against the petitioner to be fully proved. So far as the charge that the petitioner had acted for personal gain and to show favour to the private parties by passing the order dated 11.8.2016 is concerned, the disciplinary authority has disagreed with the findings of the Inquiry Officer. However, the show cause notice (annexed as Annexure – 14 to the writ petition) does not record the tentative conclusion of the disciplinary authority regarding his disagreement on the findings of the Inquiry Officer regarding the second part of the charge and also does not state its reasons or findings on the said charge. Evidently, the petitioner was not given any opportunity to represent before the disciplinary authority against the tentative opinion of the disciplinary authority that the petitioner had acted for personal gain and to show favour to the private parties. The show cause notice dated 27.7.2020 and the impugned order dated 14.1.2021 are, for the said reason, contrary to Rule 9(2) of the Rules, 1999 as interpreted in light of law laid down by the Supreme Court in its above noted judgments, i.e., ***Kunj Behari Misra (supra)***; ***Bimal Kumar Pandit (supra)*** and ***Ram Kishan (supra)*** and the show cause notice as well as the impugned order are liable to be set-aside on this ground.

Normally, where a disciplinary inquiry is vitiated because of any error in the show cause notice or because of violation of principles of natural justice or any other procedural error, the matter is required to be remanded back to the concerned disciplinary authority to hold a fresh inquiry in accordance with law. However, in the present case, no purpose would be served to remand back the matter to the disciplinary authority to hold a fresh inquiry in accordance with law as the charge-sheet does not indicate that there was any material or evidence against the petitioner so far as the charge of acting for private gain and to show favour to the private parties is concerned. It has already

been held that a mere error in jurisdiction without any material to cast doubt on the integrity of the officer cannot be termed as misconduct making the employee liable to disciplinary proceedings. The charge-sheet was void ab initio and the entire disciplinary proceedings held against the petitioner were contrary to law.

For the aforesaid reasons, the order dated 14.1.2021 passed by the Special Secretary, Appointment Section – 3, Government of Uttar Pradesh, Lucknow as well as the entire disciplinary proceedings including the show cause notice and the charge-sheet issued to the petitioner are, hereby, quashed.

The writ petition is allowed. The petitioner will be entitled to all consequential service benefits including the arrears of salary that would accrue in his favour from 14.1.2021 onwards.

The consequential service benefits shall be given to the petitioner within three months from the date a certified copy of this order is produced before the competent authority.

It is clarified that the findings recorded in the present petition and the observations made are only in the context of disciplinary proceedings against the petitioner and shall not apply in disciplinary proceedings, if any, instituted against the Sub-Divisional Magistrate who passed the order dated 28.5.2013 and the Additional Commissioner who passed the order dated 27.8.2014 which shall be decided on their own merits.

With the aforesaid directions, the writ petition is ***allowed.***

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 10807 of 2023

Mumtaz Alam ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sharad Charan Srivastava

Counsel for the Respondents:
C.S.C., Sri Devendra Kumar, Sri Shekhar Gangal

A. Service Law – Constitution of India – Article 21 – Right to adopt – Muslim Personal law – UP Municipalities Act, 1916 – Family Pension – Claim was made by the adopted son of Muslim employee – Permissibility – How far right to adoption can be claimed as the fundamental right under Article 21 – Held, it is high time when the legislature ought to act and ensure for every person, irrespective of religion, realization of the right to adopt, recognizing it as one that is an inseparable part of the right to life in its fullest content envisaged under Article 21 of the Constitution. But, this Court is of opinion that it would not be appropriate for us to step ahead and think about declaring adoption a fundamental right for every person by a judicial interpose, because it is not yet very long ago when the Supreme Court considered the question in Shabnam Hashmi. Nevertheless, this Court would strongly suggest to the legislature to consider enactment of an appropriate legislation providing every person, irrespective of his religious persuasion, a right to adopt, considering it a part of the right to life. (Para 15 and 17)

Writ petition dismissed. (E-1)

List of cases cited :-

1. Shabnam Hashmi Vs U.O.I.& ors.; (2014) 4 SCC 1

2. Mohd. Arshad Jamal Vs St. of U.P. & ors.; 2018 SCC OnLine All 5737

3. Jasvir Singh & ors.Vs St. of Pun. & ors.; 2015 Crl.L.J. 2282

4. Manuel Theodore D'Souza; 1999 SCC OnLine Bom 690

5. Philips Alfred Malvin Vs Y.J. Gonsalvis & ors.; 1999 SCC OnLine Ker 5

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

1. The issue is: *Whether with the evolution of society and the right to life receiving a progressively expanded interpretation, should not the right to adopt a child for citizens of India, who are Muslims, be also regarded as part of the fundamental right enshrined under Article 21 of the Constitution?*

2. Since there is hardly a dispute on facts involved in this case, Mr. P.C. Srivastava, learned Additional Advocate General assisted by Mr. Yashwant Singh, learned Standing Counsel appearing on behalf of respondent Nos.1 and 2, waived their right to file a return. Likewise, Mr. Shekhar Kumar, learned Counsel appearing on behalf of respondent No.3, also waived his right to file a counter affidavit.

3. The petition was, accordingly, admitted to hearing and heard without a return.

4. Heard Mr. Sharad Saran Srivastava, learned Counsel for the petitioner, Mr. P.C. Srivastava, learned Additional Advocate General assisted by Mr. Yashwant Singh, learned Standing appearing on behalf of respondent Nos. 1 and 2, and Mr. Shekhar Kumar, learned Counsel appearing on behalf of respondent No.3.

5. The short facts giving rise to this petition are that the petitioner, Mumtaz Alam claims to be the adopted son of the late Gulenoor Khatoon @ Noor Bano, wife of Mohd. Haneef. Gulenoor Khatoon was an employee of the Nagar Palika Parishad, Khair, District Aligarh. She died on 08.01.2022. Gulenoor Khatoon's husband, the late Mohd. Haneef had predeceased her and they were an issueless couple. Gulenoor Khatoon, therefore, thought that she should adopt a child. The reason is expressed in a document, that is described as a deed of adoption or *Godnama*. The motive assigned is that being issuless, Gulenoor thought that it is necessary to have a child. She was scouting for an appropriate choice and requested her brother to give his son in adoption. The deed of adoption or *Godnama*, as the document is described, was executed between Gulenoor Khatoon as the first party and Allauddin son of Mohd. Qasim Ali, the second party.

6. The document describes that the second party, upon considering the request, decided to give in adoption his son, Mumtaz Alam to the first party as her son. The deed recites that Mumtaz Alam would have all privileges to perform her last rites, and on and from the date of adoption, Mumtaz Alam, then aged 3 years, would be her son. Mumtaz Alam's education and upbringing would be taken care of by Gulenoor Khatoon. Mumtaz Alam would have the same rights *vis-a-vis* Gulenoor Khatoon as a son towards his mother. He

would have the obligation to perform her rights of the third day *(Teeja)* after her demise and the fortieth day *(Chaalisa)*. The adoption deed also says that any other relative of the bloodline, close or remote, who may present any claim, contrary to the deed of adoption, would be without right or authority and considered void.

7. The petitioner, after demise of Gulenoor Khatoon, claimed family pension and other post retiral benefits due to the deceased employee, on account of death-cum-retirement benefits. The petitioner's case for grant of family pension and gratuity was approved *vide* memo dated 13.07.2022 issued by the Deputy Director, Local Fund Examination Department, Aligarh and addressed to the Executive Officer, Nagar Palika Parishad, Khair, District Aligarh. The Collector, Aligarh *vide* a memo dated 18.08.2022 also recommended to the Additional Commissioner, Aligarh Division, Aligarh payment of death-cum-retirement benefits, due on account of the deceased employee's services, to the petitioner, treating him to be her son.

8. The matter came up for approval before the Additional Commissioner, Aligarh Division, Aligarh, acting instead for the Commissioner as the Prescribed Authority under the U.P. Municipalities Act, 1916. The Additional Commissioner, Aligarh Division, Aligarh has rejected the petitioner's claim holding that under the Muslim Law, there is no recognition of adoption of a child. It was held that the deed of adoption dated 03.04.2006 is void in the eyes of law. There are some other remarks as well disbelieving the adoption deed. Those need not be examined, if the question involved here is considered and answered one way.

9. Learned Counsel for the petitioner has placed reliance upon the decision of the Supreme Court in ***Shabnam Hashmi v. Union of India*** **and others, (2014) 4 SCC 1**.

10. On the contrary, Mr. P.C. Srivastava has relied upon the decision of this Court in **Mohd. Arshad Jamal v. State of U.P. and others, 2018 SCC OnLine All 5737** to submit that there can be no adoption by a Muslim, except after following the procedure laid down in the Juvenile Justice (Care and Protection of Children) Act, 2015.

11. This Court has given its anxious consideration to the question involved and heard learned Counsel for the parties.

12. It is mooted by the petitioner that the right to adopt ought to be regarded as one of the facets of the 'right to life' guaranteed under Article 21 of the Constitution. He submits that one, who does not have natural progeny, is entitled to adopt, as that gives the adoptive parent(s) a feeling and sense of perpetuation of life.

13. This Court would think much in agreement with the learned Counsel for the petitioner, as the right to procreate has been regarded as a facet of right to life under Article 21 of the Constitution in varied context. In this connection, reference may be made to the report in **Jasvir Singh and others v. State of Punjab and others, 2015 Crl.L.J. 2282**, where the issue was considered in the context of prisoners by the Punjab and Haryana High Court. One need not dwell upon it further because what is in issue is not the right to procreate, but the right to adopt.

14. Reproduction, no doubt, is the means of perpetuation of any specie of living thing and humans are no exceptions. But, for the refined human mind, the idea of having a child may give some kind of a feeling of perpetuation, an extension of life, after the progenitor is no more. Could this be held true of adoption, where there is no feeling of a bloodline or genetic endowment in the adoptive progeny? So long as modern science did not offer options to humans of having children otherwise than in due course of nature, adoption served as a mechanism to fill-up the void for an individual, who was issueless. The uncodified Hindu Law, coming from time immemorial, made adequate provision for adoption and after codification, the Hindu Adoptions and Maintenance Act, 1956 has given the right to adopt, both to a hindu male and a hindu female.

15. This Court does not propose to go into the significance of adoption under the Hindu Religious Scriptures, which is not relevant here. What this Court wishes to emphasize is that dehors any religious signification, the idea of perpetuation is innate to human nature, like any other specie. In the face of any contingency that deprives a human from having a natural progeny, adoption makes up for it. This Court would think that the right indeed would come to any person irrespective of caste, creed, sex or religion, as a facet of his right to life, acknowledged under Article 21 of the Constitution. Of course, the right to adopt, would have to be governed by some kind of a statute, applicable to all citizens. This Court is mindful of the fact that the right to adopt for any person, irrespective of his religious persuasion, has not yet been recognized; neither by the statute nor by judicial acknowledgment. The question arose before the Supreme Court in **Shabnam Hashmi** *(supra)*, which was a Public Interest Litigation instituted under Article 32 of the Constitution. The outline of the case before the Supreme Court figures in the opening paragraphs of the report of the judgment of their Lordships in **Shabnam Hashmi**, which reads:

"1. Recognition of the right to adopt and to be adopted as a fundamental right under Part III of the Constitution is the vision scripted by the public-spirited individual who has moved this Court under Article 32 of the Constitution. There is an alternative prayer requesting the Court to lay down optional guidelines enabling adoption of children by persons irrespective of religion, caste, creed, etc. and further for a direction to the respondent Union of India to enact an optional law the prime focus of which is the child with considerations like religion, etc. taking a hind seat.

2. The aforesaid alternative prayer made in the writ petition appears to have been substantially fructified by the march that has taken place in this sphere of law, gently nudged by the judicial verdict in *Lakshmi Kant Pandey v. Union of India* [(1984) 2 SCC 244] and the supplemental, if not consequential, legislative innovations in the shape of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended in 2006 (hereinafter for short "the JJ Act, 2000") as also the Juvenile Justice (Care and Protection of Children) Rules promulgated in the year 2007 (hereinafter for short "the JJ Rules, 2007").

16. In substance, the right for a Muslim to adopt under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 [since repealed and substituted by the Juvenile Justice (Care

and Protection of Children) Act, 2015] was recognized by the Court as one created by statute conferring right on a person, irrespective of his/ her religious persuasion to adopt. But, the right to adopt for a Muslim, dehors the provisions of the Juvenile Justice Act, was not acknowledged. Their Lordships also thought that with the march of democracy, the right to adopt for any person, irrespective of his/ her faith, would come to be regarded as a fundamental right. However, they refrained at that time and stage from declaring the right to adopt a fundamental right, part of Article 21. The decisions of the Bombay High Court in **Manuel Theodore D'Souza, 1999 SCC OnLine Bom 690** and the Kerala High Court in **Philips Alfred Malvin v. Y.J. Gonsalvis and others, 1999 SCC OnLine Ker 5**, were not accepted by their Lordships as declarations raising the right to adopt to the level of a fundamental right, that was a concomitant of Article 21 of the Constitution. The following observations of their Lordships of the Supreme Court in **Shabnam Hashmi** are noteworthy:

"13. The JJ Act, 2000, as amended, is an enabling legislation that gives a prospective parent the option of adopting an eligible child by following the procedure prescribed by the Act, the Rules and the CARA Guidelines, as notified under the Act. The Act does not mandate any compulsive action by any prospective parent leaving such person with the liberty of accessing the provisions of the Act, if he so desires. Such a person is always free to adopt or choose not to do so and, instead, follow what he comprehends to be the dictates of the Personal law applicable to him. To us, the Act is a small step in reaching the goal enshrined by Article 44 of the Constitution. Personal beliefs and faiths, though must be honoured, cannot dictate the operation of the provisions of an enabling statute. At the cost of repetition we would like to say that an optional legislation that does not contain an unavoidable imperative cannot be stultified by the principles of Personal law which, however, would always continue to govern any person who chooses to so submit himself until such time that the vision of a Uniform Civil Code is achieved. The same can only happen by the collective decision of the generation(s) to come to sink conflicting faiths and beliefs that are still active as on date.

14. The writ petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitution. Reliance is placed in this regard on the views of the Bombay and Kerala High Courts in Manuel Theodore D'Souza, In re *[Manuel Theodore D'Souza, In re, (2000) 3 Bom CR 244] and Philips Alfred Malvin v. Y.J. Gonsalvis [Philips Alfred Malvin v. Y.J. Gonsalvis, AIR 1999 Ker 187]* respectively. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognise adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

15. Even though no serious or substantial debate has been made on behalf of the petitioner on the issue, abundant literature including the holy scripts have been placed before the Court by the Board in support of its contention, noted above. Though enriched by the lengthy discourse laid before us, we do not think it necessary to go into any of the issues raised."

17. Treading the same path that their Lordships of the Supreme Court have shown, this Court would think that it is high time when the legislature ought to act and ensure for every person, irrespective of religion, realization of the right to adopt, recognizing it as one that is an inseparable part of the right to life in its fullest content envisaged under Article 21 of the Constitution. But, this Court is of opinion that it would not be appropriate for us to step ahead and think about declaring adoption a fundamental right for every person by a judicial interpose, because it is not yet very long ago when the Supreme Court considered the question in **Shabnam Hashmi**. Nevertheless, this Court would strongly suggest to the legislature to consider enactment of an appropriate legislation providing every person, irrespective of his religious persuasion, a right to adopt, considering it a part of the right to life. The same view has been taken by my esteemed brother Sudhir Agarwal in **Mohd. Arshad Jamal** *(supra)*, where His Lordship held:

"8. Now looking into this backdrop, I do not find that adoption in Muslims has been recognized in any Statute so as to confer a right of succession/inheritance in the matter of claiming compassionate appointment upon petitioner. There is an exception, i.e., Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "Act, 2000") as amended in 2006 which permits adoption irrespective of religion or other factors. Act, 2000 as amended is an enabling legislation giving a prospective parent, option of adopting an eligible child by following the procedure prescribed by Act, 2000 and Rules framed thereunder. This Statute enables any person, irrespective of religion he professes, to take a child in adoption but such adoption has to be made in accordance with the procedure prescribed under Rules etc., framed thereunder. It is not the case of petitioner that he was adopted by Late Mohd. Jalaluddin by following the procedure laid down under Act, 2000 and, therefore, the same has no application to the case in hand.

9. Even otherwise, it is not disputed before this Court that in Muslim Law, scriptures do not recognize adoption. In *Shabnam Hashmi v. Union of India (supra)*, an attempt was made to seek a declaration from Supreme Court that right to adopt and to be adopted be declared a Fundamental Right under Part-III of Constitution but declining this relief, Court said:

"… elevation of the right to adopt or to be adopted to the status of a Fundamental Right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country."

10. Court further said:

"… the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution."

11. Then Court declined to make such a declaration, hence aforesaid judgment does not help petitioner in any manner and reliance placed thereon is totally misconceived.

12. The aspect of application of adoption in Islamic law came to be considered in Supreme Court of *Democratic Socialist Republic of Sri Lanka in Ghouse v. Grouse,* (1988) (1) SLR (25). Referring to Tyabji on Muslim Law (4th Ed.) page 208-209, para 228, it was

observed, "Adoption is not known to Muslim Law".

13. Similarly, Mulla's Principles of Mohammedan Law (17th Ed., page 328) states categorically that Mohamedan Law does not recognise adoption.

14. Louis Neil in his book "The Mohammedan Law of Ceylon showing the Principles and Rules of the Distribution of Inheritance" says, "Adoption is not recognised as conferring any right on the children adopted."

15. In *Umar Khan v. Niaz-Ud-Din Khan*, (1911) 39 IA 19, it was observed that under general Mohamedan law, an adoption cannot be made. An adopted son has no right of inheritance since the principle of 'Muslim Law' based on the Quoran, is that one must be a consanguine relative of the deceased to become entitled to inherit the property of the deceased; there should be actual or natural parentage, not legal parentage over other people's children in order to found a claim for inheritance under the Muslim Law."

18. Notwithstanding these remarks, this Court may emphasize again that time has arrived when the legislature must step in and free the individual of disabilities arising from personal laws to realize his/her higher rights as a human being, particularly, what could be a facet of a fundamental right. After all, it is the duty of the State to extend to all persons equal protection of law. As the law stands, particularly, the declaration of it by the Supreme Court in **Shabnam Hashmi** and by this Court in **Mohd. Arshad Jamal**, it is difficult for this Court to interfere at this stage of time with the impugned order and hold for the petitioner.

19. Of course, if the petitioner by virtue of being the deceased's brother's son falls into any class of heirs, entitled to inherit from the deceased Smt. Gulenoor Khatoon, it would be open to the petitioner to establish his right in that behalf by suit before a Court of competent jurisdiction arraying the other heirs who could also claim. So far as the impugned order is concerned, this Court is of opinion that there is no infirmity there.

20. This petition fails and is **dismissed** subject to the above remarks.

21. There shall be no order as to costs.

(2024) 2 ILRA 290
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2023
BEFORE
THE HON'BLE MANJIVE SHUKLA, J.

Writ A No. 13871 of 2023

Imtayaz Ahmad Ansari ...Petitioner
Versus
Power Corporation Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Pathak, Sri Siddharth Khare, Sri Himanshu Singh, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
Sri Adarsh Bhushan, Sri Devesh Vikram

A. Service Law – UP Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020 – Reg. 4(1) – Suspension – Discretion of appointing authority, extent of – Suspension order was passed on the direction of Higher authority – No application of mind by the appointing authority – Effect – Held, entire order does not reflect that there is even little application of mind on the part of the Superintending Engineer therefore,

it cannot be said that the appointing authority has exercised his discretion while passing the order of suspension – Suspension order does not fulfill the requirements of Regulation 4(1) of the Regulations of 2020 as such, the impugned order dated 06.05.2023 cannot sustain in the eyes of law. (Para 20 and 24)

Writ petition allowed. (E-1)

List of cases cited :-

1. Writ A No. 66759 of 2013; Chandra Boss Vs St. of U.P. & ors.decided on 17.12.2013

2. Writ A No. 58619 of 2015; V.N. Daipuria Vs St. of UP & ors.decided on 27.10.2015 (DB)

3. Writ A No. 14755 of 2018; Rakesh Chandra Agnihotri Vs St. of U.P. & ors.decided on 03.08.2018

4. Writ A No. 68494 of 2015; Pradeep Kumar Trivedi Vs St. of U.P. & ors.decided on 11.01.2016

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Himanshu Singh, learned counsel appearing for the petitioner, Sri Adarsh Bhushan, learned counsel appearing for the Respondent No. 1 and Sri Devesh Vikram, learned counsel appearing for the Respondents No. 2 & 3.

2. Petitioner through this writ petition has assailed the order dated 06.05.2023 passed by the Superintending Engineer, Purvanchal Electricity Distribution Corporation Ltd., Kushinagar whereby petitioner's services have been placed under suspension in contemplation of disciplinary proceedings.

3. Learned Senior Advocate appearing for the petitioner has submitted that petitioner prior to passing of suspension order dated 06.05.2023 was working on the post of Senior Office Assistant in Vidyut Vitaran Mandal, Kushinagar and therefore, is governed by the Uttar Pradesh Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020 (hereinafter referred to as "the Regulations of 2020").

4. It has further been submitted that Regulation 4 of the Regulations of 2020 provides that if disciplinary proceedings are either pending against an employee or contemplated, the appointing authority in his discretion can place the services of the said employee under suspension till conclusion of the disciplinary proceedings.

5. Learned Senior Advocate appearing on behalf of the petitioner has vehemently argued that a bare perusal of the suspension order dated 06.05.2023, in unambiguous terms, reveals that petitioner's services have been placed under suspension on the dictates of the higher officers and appointing authority has not exercised his discretion. It has further been argued on behalf of the petitioner that it is well settled proposition of law through catena of judgements of this court that once discretion has been vested in an administrative authority under the rules, he has to apply his independent mind over the facts and circumstances of the case and thereafter he can pass any order exercising his discretion but the said discretion cannot be exercised on the dictates of the higher officers.

6. Learned counsel appearing for the petitioner has drawn attention of this court towards the contents of the suspension order dated 06.05.2023 and has submitted that in the said order, appointing authority has categorically stated that he is placing services of the petitioner under suspension in compliance of the direction issued by the superior officers.

7. Learned Senior Advocate appearing for the petitioner has relied on the judgement and order dated 17.12.2013 passed in Writ-A No. 66759 of 2013 (Chandra Boss Vs. State of U.P. and 2 Others) and has submitted that in the said judgement, Co-ordinate Bench of this Court has

categorically held that once under the Rules, discretion has been vested with the appointing authority but instead of using the said discretion, he has passed the order of suspension of services of an employee on the dictates of the higher officer, the said suspension order cannot sustain in the eyes of law.

8. Learned Senior Advocate has further relied on the judgement and order dated 27.10.2015 rendered by Division Bench of this Court in Writ-A No. 58619 of 2015, wherein this Court had occasion to consider the Rule 4(1) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "the Rules of 1999") which is *pari materia* to Regulation 4(1) of the Regulations of 2020 and it has been held that appointing authority has been given discretion to place services of an employee under suspension either in contemplation of disciplinary proceedings or during pendency of the disciplinary proceedings but the said discretion has to be exercised independently by the appointing authority. Division Bench of this Court has further held that if the appointing authority has acted on the dictates of the superior officers and has placed services of employee under suspension then the said suspension order will not meet the requirements of Rule 4(1) of the Rules of 1999 as the appointing authority has not exercised his discretion independently.

9. Learned Senior Advocate appearing for the petitioner has also drawn attention of this court towards the fact that even in the fact finding inquiry report on the basis of which senior officers directed the appointing authority of the petitioner to place his services under suspension does not mention any role of the petitioner in entire process of forgery and therefore, even on merits suspension of the petitioner is not warranted.

10. Learned Senior Advocate appearing for the petitioner has thus concluded his arguments and has submitted that since the impugned suspension order does not meet the requirements of Regulation 4 (1) of the Regulations of 2020 therefore, suspension order dated 06.05.2023 cannot sustain in the eyes of law and is liable to be quashed by this court.

11. Per-contra, Sri Adarsh Bhushan, learned counsel appearing for the Respondent No. 1 and Sri Devesh Vikram, learned counsel appearing for the Respondents No. 2 & 3 have vehemently argued that the appointing authority, in-fact has not acted on the dictates of the higher officers rather has applied his mind and has used his discretion and thereby has passed the order dated 06.05.2023, whereby petitioner's services have been placed under suspension. It has further been argued that even if the language used in the order of suspension does not reflect that the appointing authority has applied his discretion, it cannot be presumed that there is no application of mind on the part of the appointing authority and he has acted only on the dictates of the superior officers.

12. Learned counsels appearing for the respondents have relied on the judgement and order dated 03.08.2018 passed by the Co-ordinate Bench of this Court in Writ-A No. 14755 of 2018 (Rakesh Chandra Agnihotri Vs. State of U.P. and 3 Others) and has submitted that in the said judgement it has been held that in all the cases where the suspension order has been passed in compliance of the directions issued by superior officers, it cannot be said that the appointing authority has not exercised his independent discretion.

13. Learned counsels appearing for the respondents have also relied on the judgement and order dated 11.01.2016 passed in Writ-A No. 68494 of 215 (Pradeep Kumar Trivedi Vs. State of U.P. and 6 Others) and have submitted that in the said judgement, Division Bench of this Court has categorically held that the scope of the judicial review in the matters of suspension of services of an employee is very limited and only in the cases where there is absolutely no charge against an employee, this court can interfere with the order of suspension

but in normal circumstances, this court should refrain from interfering with the orders of suspension of services passed against the employees as the issue regarding suspension of services of an employee lies in the domain of the administrative authorities and they are the best judge to ascertain as to whether services of the employee should be placed under suspension or not.

14. Learned counsels for the respondents have also drawn attention of this Court towards the fact that along with the petitioner, services of various other employees have been placed under suspension relating to same forgery and out of the said employees, one Mr. Abhishek Sharma filed Writ-A No. 9917 of 2023 and in the said writ petition, an interim order was passed on 14.07.2023 whereby the order of suspension was stayed but later on when another employee filed Writ-A No. 12569 of 2023 (Swatantra Kumar Gupta Vs. State of U.P. and Others), the same Bench of this Court did not pass interim order and has finally disposed of the writ petition with a direction to the respondents to conclude the disciplinary proceedings expeditiously.

15. It has also been submitted by the learned counsels appearing for the respondents that Charge-Sheet against the petitioner has already been issued on 06.09.2023 and therefore, at this stage it would not be proper for this Court to interfere with the order of suspension.

16. I have considered the rival submissions advanced by the learned counsels appearing for the parties.

17. This court finds that Regulation 4(1) of the Regulations of 2020 provides that appointing authority in his discretion can place services of an employee under suspension either during pendency of the disciplinary proceedings or in contemplation of the disciplinary proceedings.

18. This court is of the view that the language used in Regulation 4(1) of the Regulations of 2020 is very clear and it is the discretion of the appointing authority either to place services of an employee under suspension or not and therefore, the order of suspension must reflect that there is at least some application of mind by the appointing authority. If there is no application of mind by the appointing authority and the order of suspension reflects that the said order has been passed only on the dictates of the higher officers, the said order does not fulfill the requirements of Regulation 4(1) of the Regulations of 2020.

19. To arrive at a correct conclusion, it is necessary to extract the suspension order dated 06.05.2023 which is as under:

"कार्यालय ज्ञाप

"एतदद्वारा मुख्य अभियन्ता (वि०) गोरखपुर क्षेत्र, गोरखपुर के पत्र सं० 483/मु०अ०वि०(गो०)/दिनांक 02.05.2023 एवं मुख्य अभियन्ता (अनु०कार्य०) कार्यालय प्रबन्ध निदेशक, पू०वि० वि०नि०लि०, वाराणसी के पत्र सं०1499 /पू० वि०वि०नि०लि०(वा०)/अनु०कार्य०/शिका०सा०/1098/दिनांक 01.05.2023 के पत्र के (विषयक कुट रचित नियुक्ति आदेश के आधार पर कर्मचारियों की नियुक्ति के सम्बन्ध में) अनुपालन में।

मैं राधेश्याम, अधीक्षण अभियन्ता, विद्युत वितरण मण्डल कुशीनगर सक्षम अधिकारी होने के नाते श्री इम्त्याज अहमद अंसारी (सैप आई० 16801846), वरिष्ठ कार्यकारी सहायक, विद्युत वितरण मण्डल कुशीनगर को तत्काल प्रभाव से निलम्बित करता हूँ।

श्री इम्त्याज अहमद अंसारी (सैप आई० 16801846), वरिष्ट कार्याकारी सहायक, विद्युत वितरण मण्डल कुशीनगर निलम्बन अवधि में विद्युत परीक्षण खण्ड कुशीनगर कार्यालय से सम्बन्ध रहेंगे तथा उन्हें नियमानुसार जीवन निर्वहन भत्ता देय होगा।

(राधेश्याम)
अधीक्षण अभियन्ता

20. The Superintending Engineer while passing the suspension order dated 06.05.2023, in unambiguous terms, has stated that he is passing the suspension order in compliance of the directions issued by the superior officers and further entire order does not reflect that there is even little application of mind on the part of the Superintending Engineer therefore, it

cannot be said that the appointing authority has exercised his discretion while passing the order of suspension.

21. The Co-ordinate Bench of this Court has categorically dealt with the Rule 4(1) of the Rules of 1999 which is *pari materia* to Regulation 4(1) of the Regulations of 2020 and has held that if the order of suspension has been passed on the dictates of the higher officers and does not reflect the application of mind by the appointing authority then it cannot be said that the said order has been passed by the appointing authority while exercising his discretion therefore, the said order does not fulfill the requirements of Rule 4(1) of the Rule of 1999 and as such, the said order cannot sustain in the eyes of law. Relevant paragraphs of the judgement and order dated 17.12.2023 passed in Writ-A No. 66759 of 2013 are extracted as under:

"9. Rule 4(1) of U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "Rules, 1999"), which confers power of suspension upon authority, relevant in this case, reads as under:

"Suspension.-(1) *A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority:*

Provided that suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty:

Provided further that concerned head of the Department empowered by the Governor by an order in this behalf may place a Government servant or class of Government servants belonging to Group 'A' and 'B' posts under suspension under this rule:

Provided also that in the case of any Government servant or class of Government servants belonging to Group 'C' and "D' posts the appointing authority may delegate its power under this rule to the next lower authority."

10. An order of suspension is not to be passed in a routine manner as a regular course of business and without any application of mind.

11. Though an order of suspension in a contemplated or pending enquiry per se is not a punishment but it cannot be disputed that it visits certain civil consequences upon concerned Government servant. During the period of suspension, he is not paid full salary and allowances. It also cannot be doubted that it attaches civil stigma upon him vis a vis a society in which he lives and persons with whom he interacts. This Court has considered this aspect in ***Ayodhya Rai and others Vs. State of U.P. and others 2006(3) ESC 1755*** *wherein the Court held:*

"The questions deal with the prolonged agony and mental torture of an employee under suspension where inquiry either has not commended or proceed with snail pace. This is a different angle of the matter, which is equally important and needs careful consideration. A suspension during contemplation of departmental inquiry or pendency thereof by itself is not a punishment but is resorted to by the competent authority to enquire into the allegations levelled against the employee giving him an opportunity of participation to find out whether the allegations are correct or not. In case, allegations are not found correct, the employee is reinstated without any loss towards salary, etc., and in case the charges are proved, the disciplinary authority passes such order as provided under law. However, keeping an employee under suspension, either without holding any enquiry, or by prolonging the enquiry is unreasonable and is neither just nor in larger public interest. A prolonged suspension by itself is penal. Similarly an order of suspension at the initial stage may be valid fulfilling all the requirements of law but may become penal or unlawful with the passage of time, if the disciplinary inquiry is unreasonably prolonged or no inquiry is initiated at all without there being any fault or obstruction on the part of the delinquent employee. No person can be kept under suspension for indefinite period since during the period of suspension he is not paid

full salary. He is also denied the enjoyment of status and therefore admittedly it has some adverse effect in respect of his status, life style and reputation in Society. A person under suspension is looked with suspicion in the Society by the persons with whom he meets in his normal discharge of function."

12. A Division Bench of this Court in ***Gajendra Singh Vs. High Court of Judicature at Allahabad- 2004 (3) UPLBEC 2934*** *also observed as under:*

"We need not forget that when a Government officer is placed under suspension, he is looked with suspicious eyes not only by his collogues and friends but by public at large too."

13. Disapproving unreasonable prolonged suspension, the Apex Court has also observed in ***Public Service Tribunal Bar Association Vs. State of U.P. & others- 2003 (1) UPLBEC 780 (S.C.)*** *as under-*

"if a suspension continues for indefinite period or the order of suspension passed is mala fide, then it would be open to the employee to challenge the same by approaching the High Court under Article 226 of the Constitution." . . . . (Para 26).

14. The rule framing authority is also aware of all these facts and that is why it has not given an unbridled power of suspension to the Appointing Authority but in the rules, which have now been framed afresh in 1999, it has been specifically provided that appointing authority shall apply its mind to the fact that act or omission constituting misconduct, in respect whereto a departmental enquiry should be held, is of such grave nature that in case charge(s) is/are proved, major penalty upon concerned Government servant can be imposed. Therefore, it is not every act or omission constituting misconduct, which would justify suspension but when charge(s) are so serious so as to result, if prove, in major penalty only then he can be placed under suspension and not otherwise.

*15. In the present case, respondent no.1 has admitted this fact that he did not apply his mind to any one or the other aspect and simply towed the line as drawn by Minister concerned i.e. he surrendered to the command of Minister and simply complied the same without any application of mind on his part. The mandatory requirement of Rule 4 of Rules, 1999 has completely been given a go bye by respondent no.1, before passing impugned order of suspension. In the present case, Minister obviously was not competent to place petitioner under suspension. His direction could have been taken into consideration but the law nowhere give it status of a statutory command with which respondent no.1 was under an obligation to follow. On the contrary respondent no.1 himself was under an obligation to apply his own mind looking into the entire facts and circumstances, to find out whether requisites of statute justify an order of suspension. Unfortunately, that has not been done, as admitted by respondent n*o.1 himself that he has not looked into all these aspects while passing impugned order of suspension."

22. The Division Bench of this Court vide judgement and order dated 27.10.2015 passed in Writ-A No. 56819 of 2015 has considered the identical issue which is involved in this writ petition and has held that Rule 4(1) of the Rules of 1999 gives discretion to the appointing authority and therefore it is only the appointing authority who can exercise his discretion and can place the services of the employee under suspension. Cases where the appointing authority has proceeded on the dictates of the superior officers and without applying his mind, has placed the services of an employee under suspension, the said order does not fulfill the requirements of Rule 4 (1) of the Rules of 1999 and therefore, order of suspension cannot sustain in the eyes of law. Relevant paragraphs of the order dated 27.10.2015 passed in Writ-A No. 58619 of 2015 are extracted as under:

"In order to appreciate the respective arguments, we proceed to put a glance of Rule 4 (1) of U.P. Government Servant (Discipline & Appeal) Rules 1999:-

" 4. Suspension

(1) A Government Servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension

pending the conclusion of the inquiry in the discretion of the Appointing Authority:

Provided that suspension should not be resorted to unless the allegations against the Government Servant are so serious that in the event of their being established may ordinarily warrant major penalty :

Provided further that concerned Head of the Department empowered by the Governor by an order in this behalf may place a Government Servants or class of Government Servant belonging to Group 'A' and 'B' posts under suspension under this rule :

Provided also that in the case Government Servant or class of Government Servant belonging to Group 'C' and 'D' posts, the Appointing Authority may delegate its power under this rule to the next lower authority."

Bare perusal of the rules in question would go to show that a Government servant can be placed under suspension pending the conclusion of the inquiry in the discretion of the Appointing Authority and the same also provides that suspension should not be resorted to unless the allegations against the Government Servant are so serious that in the event of their being established may ordinarily warrant major penalty. Thus the authority of suspension has been conferred with the appointing authority and this is also clear that a Government Servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the Appointing Authority."

On the parameters of the provisions as quoted as above, the order of suspension in question indicates that in the present case that State Government had been apprised of the factual situation and State Government on being apprised with the report against the petitioner, the State Government in its turn proceeded to pass an order mentioning therein that the petitioner should be placed under suspension with immediate effect and disciplinary action be initiated under Rule 7 of U.P. Government Servant (Discipline & Appeal) Rules 1999. After receipt of the said letter in question, the Additional Director of Eduction (Basic), U.P., Allahabad, the Appointing Authority has proceeded to pass the order of suspension and by means of order of suspension the Appointing Authority has proceeded to categorically mention this fact that the said authority of suspension is being exercised by him pursuant to the decision taken by the State Government on 30.09.2015. Once such is the factual situation in the present case that discretion has been taken away by the State Government from the Appointing Authority by giving mandatory directive for placing petitioner under suspension whereas 'discretion' as per Blacks Law Dictionary means, "individual judgement: the power of free decision making". The Appointing Authority has not proceeded to exercise his independent mind and has exercised authority of suspension on the directives of State Government. Division Bench of this Court in the case of Dr. Arvind Kumar Rana Vs. State of U.P., 2007 (4) AWC, in reference of same set of Rules has taken the view that authority of suspension cannot be exercised on mere recommendation, the Appointing Authority is obligated to apply his own independent mind, the first proviso to Rule 4 (1) is mandatory and obligates Appointing Authority to prima facie record satisfaction about the seriousness of the allegations levelled and as to whether ultimately it may entail into awarding major penalty. Accordingly in the facts of the case passing of such suspension order has to be accepted being in breach of Rule 4 (1) of U.P. Government Servant (Discipline & Appeal) Rules 1999 as on its face value the discretion has not been independently exercised by the Appointing Authority in question. In view of this the order of suspension, based on this short ground is quashed but we leave it open to the Appointing Authority to apply his independent mind and if facts and circumstances do warrant to pass fresh order of suspension."

23. Learned counsels appearing for the respondents have relied on the judgement and order dated 03.08.2018 passed by the Co-ordinate Bench of this Court in Writ-A No. 14755 of 2018. I have gone through the judgement and order dated 03.08.2018 and I

find that even in this judgment, the Court has come to the conclusion that at least there must be some material in the suspension order to show that the appointing authority has exercised his independent discretion. It has further been held in the judgement that merely because the suspension order has been passed on the dictates of the superior officers, it will itself not make the suspension order invalid and it will have to be seen as to whether appointing authority has applied his mind or not. The fact remains that even in the aforesaid judgement, Co-ordinate Bench of this Court has categorically held that there must be reflection in the suspension order regarding application of mind by the appointing authority and exercise of his discretion independent to the directions issued by the higher officers.

24. So far as the suspension order dated 06.05.2023, which is impugned in the writ petition is concerned, this Court is of the view that the suspension order clearly reflects that there is no application of mind by the appointing authority while placing the services of petitioner under suspension rather on the contrary, the order reflects that the said order has been passed in compliance of the directions issued by the superior officers therefore, suspension order does not fulfill the requirements of Regulation 4(1) of the Regulations of 2020 as such, the impugned order dated 06.05.2023 cannot sustain in the eyes of law. So far as the arguments advanced by the learned counsels appearing for the respondents regarding charges levelled against the petitioner and judgement and order dated 11.01.2016 passed in Writ-A No. 68494 of 2015 are concerned, since this Court is interfering with the order of suspension only on the legal ground and is not adjudicating the charges on merits, the arguments advanced by the learned counsels appearing for the respondents do not carry any weight.

25. So far as the case of the respondents that Co-ordinate Bench of this Court initially in Writ-A No. 9917 of 2023 has passed the interim order whereby suspension order has been stayed but later on the same Bench in another matter in Writ-A No. 12569 of 2023 has refused to grant interim order and has passed final order whereby direction has been issued to conclude the disciplinary proceedings expeditiously is concerned, this court finds that in both the matters issue regarding compliance of Regulation 4(1) of the Regulations of 2020 was not raised and once the said issue was not raised, there was no occasion for the Court to decide the said issue.

26. In view of the aforesaid reasons, this writ petition is allowed. Order dated 06.05.2023, to the extent of suspension of petitioner's services, is quashed. Respondents are directed to reinstate the petitioner in service and pay him salary as and when it becomes due. Respondents are also expected to conclude the disciplinary proceedings initiated against the petitioner expeditiously.

27. Since this court has quashed the order of suspension only on the ground that the said order does not fulfill the requirements of Regulation 4(1) of the Regulations of 2020 therefore, if there is requirement, it is always open for the Appointing Authority to pass order in accordance with the provisions of Regulation 4(1) of the Regulations of 2020.

(2024) 2 ILRA 297
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 15595 of 2023

Vishal Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.K. Mishra

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava

A. Service Law – UP Power Corporation Employees (Discipline and Appeal) Regulations, 2020 – Dismissal – Disciplinary proceeding – Right of personal hearing and cross-examining the witnesses – Alleged charges may lead to major penalty – Documents annexed to the charges were not admitted by the charged-employee – Effect – Absence of proof, how far vitiate proceeding – Held, the members of the Inquiry Committee cannot arrogate to themselves personal knowledge of the contents of the documents. The documents have to be laid before them in evidence, and wherever necessary, proved by witness(s) – Inquiry Committee cannot go about their exercise like an administrative fact finding committee gleaning through idle papers. They have to have formal proceedings, where the establishment have the first burden to discharge by proving the charges through evidence, both oral and documentary. (Para 18 and 23)

Writ petition allowed. (E-1)

List of cases cited :-

1. St. of U. P. & ors.Vs Saroj Kumar Sinha; (2010) 2 SCC 772

2. Roop Singh Negi Vs Punjab National Bank & ors.; (2009) 2 SCC 570

3. St. of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB) (LB)

4. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)

5. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB)(LB)

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

1. The petitioner was a Junior Engineer in the service of the U.P. Power Corporation Limited. He was earlier posted under the Pashchimanchal Vidyut Vitran Nigam Ltd. at the Electricity Distribution Division-VIII, NOIDA and then transferred to the Purvanchal Vidyut Vitaran Nigam Limited, where he joined on 16.03.2021.

2. After a preliminary inquiry, the petitioner was charge-sheeted vide charge-sheet dated 24.09.2021. Eight charges were framed against him. The first charge relates to non-maintenance of a register for temporary connections from 01.07.2019 to 30.06.2021, leading to non-monitoring of temporary connections. It is also part of the charge that upon checking of the records, most temporary connections were found approved without installing meters, the readings not taken and bills not issued.

3. The second charge relates to the temporary connection installed at the premises of a certain Mohd. Sartaj, Khasra No.11, Neer Peer Shahberi, Greater NOIDA. This connection was sanctioned temporarily on 09.08.2019 for 2 kilowatts. The period sanctioned was three months. The premises were inspected in the month of August, 2021, where the connection was found disconnected. The office did not have any record of a permanent disconnection or that of the consumer being billed or dues of the Corporation realized. The charge says that it was the duty of the petitioner to get the meter reading of the temporary connection recorded regularly and bills issued to the consumer. It was also his duty to realize dues from the consumer.

4. The third charge is about the premises of another consumer Banshi Lal Rawat. He was sanctioned temporary connection for three months with a sanctioned load of 2 kilowatts. Upon the inspection of his premises, which was a five storey incomplete structure, it was found that the meter was installed on a 8.5 meters high pole, where it was difficult to take down the readings without the help of a ladder. The meter when inspected, was found non-functional. Prior to inspection, the consumer had given a guess-worked reading, which rendered him liable to pay Rs.9262/- only that he paid. The

charge goes that the petitioner deliberately got the meter installed at such a high point in connivance with the consumer, so that bills could be raised on concocted readings.

5. The fourth charge relates to a certain consumer, M/s. Noble Valley. This consumer was sanctioned a 2 kilowatts connection on 03.05.2018. Upon inspection of his premises on 24.07.2021, the Executive Engineer found a total of 95 residential premises, where 20 premises were drawing electricity without a valid electricity connection, committing theft. A First Information Report was lodged by the Executive Engineer. The Chief Engineer sanctioned a multi-point connection for the said consumer, but prior to the sanction of the multi-point connection, M/s. Noble Valley was drawing electricity on a temporary connection, regarding which there is no record of billing or arrears. The petitioner has been charged with laxity in not reading the meter of the temporary connection; not taking action against electricity theft; not issuing bills and realizing these for the aforesaid connection or ensuring that it was converted to a permanent connection, causing loss to the Corporation.

6. Charge No.5 relates to 59 temporary connections, out of which only 10 temporary connections were extended, whereas for the balance 49, no menoranda extending the connection were issued, no bills raised, or the Corporation's dues realized. The petitioner was, therefore, charged with laxity and not ensuring disconnection after expiry of the temporary connection’s validity, leading to loss of revenue.

7. Charge No.6 is about the petitioner sanctioning for construction work a less than 10 kilowatts connection temporarily, regarding which there is no record of meter reading or demand available with the Corporation's office. The petitioner was charged with laxity in supervision of temporary connections, ensuring meter reading or realization of bills for these temporary connections deliberately.

8. Charge No.7 is about a consumer by the name Ajay Kumar, who had outstanding on his connection for more than three months, but there is no record available with the Corporation about the steps taken to disconnect his premises. It is charged that according to Rules of the Corporation, for the outstandings the consumer's premises ought to have been disconnected. The petitioner has been charged for not disconnecting the premises on account of the outstandings, not realizing the Corporation's dues leading to financial loss and neglect in the performance of his duties.

9. Charge No.8 relates to non-ensuring of meter reading for temporary connections and raising MRI Bills. It is charged that the petitioner did not take meter readings or checked these temporary connections. The petitioner was charged with negligence in the matter of ensuring reading of temporary connections, raising MRI Bills and causing financial loss to the Corporation by his negligence in non-performance of duties.

10. Six documents were cited in evidence, mentioned in the charge-sheet, one of which is a copy of the Uttar Pradesh Government Servant's Conduct Rules, 1956. The others relate to photo copies of some temporary connection register, copy of a preliminary inquiry report, letter by an Executive Engineer dated 30.08.2019, about non-taking down of readings of meters for the temporary connections and a copy of the provisional bill relating to Ajay Kumar for the month of May, 2021. The petitioner, in response to the said charge-sheet, submitted his reply dated 04.04.2021, denying the charges with full particulars. An inquiry report was submitted by an inquiry committee, comprising two members, dated 28.01.2022, who found all the charges proved. The petitioner was provided a copy of the inquiry report along with a letter dated 11.02.2022 to show cause in the matter. The petitioner submitted a detailed reply dated 28.02.2022, refuting the findings of the Inquiry Committee.

11. The Chairman, U.P. Power Corporation Limited by his order dated 11.07.2022 proceeded to dismiss the petitioner from service and directed recovery of a sum of Rs.23,17,508/- from him. The petitioner appealed the said decision to the Board of Directors of the U.P. Power Corporation Limited vide his appeal dated 06.10.2022. The Board by their order dated 26th July, 2023 proceeded to reject the petitioner's appeal and affirmed the Disciplinary Authority.

12. Aggrieved, this writ petition has been filed under Article 226 of the Constitution.

13. Heard Mr. R. K. Mishra, learned Counsel for the petitioner and Mr. Abhishek Srivastava, leaned Counsel appearing on behalf of respondent Nos. 2 and 3.

14. It is argued by the learned Counsel for the petitioner that the inquiry against him is procedurally flawed in a manner that goes to the root of the matter. It is asserted that the respondents have not produced any witness on behalf of the establishment to prove the charges mentioned in the charge-sheet, which is an imperative in any case, where imposition of a major penalty is involved. According to the petitioner, this is also a violation of the Uttar Pradesh Power Corporation Employees (Discipline and Appeal) Regulations, 2020 (for short, 'the Regulations'). It is argued that the Inquiry Committee did not provide opportunity of personal hearing to the petitioner or cross-examining witnesses, inasmuch as no witness was examined. They did the inquiry merely as a matter of formality, purporting to hear the petitioner through video conferencing on 14.12.2021, when a date for the purpose was fixed. It is averred that on the said date no video conferencing could be held as the petitioner could not be connected with the Inquiry Committee. These averments find place in Paragraph Nos.11, 13, 22 and 25 of the writ petition.

15. In Paragraph No. 5(i) of the counter affidavit, it is averred that the petitioner has not disputed the genuineness of any document provided to him during the course of inquiry, nor had he shown any interest in asking the Department to produce any witness for examination/ cross-examination. It is averred that once the employee has duly participated in the inquiry and admitted the evidence on record, it cannot be said that any prejudice has been caused to him. In Paragraph No.5(v), it is averred:

"(v). Further from perusal of the record it is evident that no witness was proposed either in the chargesheet or any witness was named by the petitioner to examine during the departmental enquiry, therefore, no witness was examined by the Corporation to prove the charges during the course of departmental enquiry in the present case. Further to remove all these anomalies an Office Memorandum dated 14.8.2023 has been issued wherein it has been directed to all the authorities of the Corporation' and the discoms enquiry that they should strictly adhere to the provisions of Rule 7 of the Regulations 2020 and during the departmental enquiry they must first examine the officers on behalf of the Corporation to prove the charges and only thereafter they should provide opportunity to the employees to either cross examine them or to produce any witness on behalf of his defense."

16. What is, therefore, evident from the stand taken in the counter affidavit is that the respondents have not examined any witness on behalf of the establishment to prove the charges. A perusal of the inquiry report also shows that the charges have been held proved, merely by perusing the charge-sheet, the petitioner's reply and the documents on record, hearing the petitioner through video conferencing on 14.12.2021. The petitioner says that he was not heard at all, because the video conferencing connection never got through. There is no specific denial of the fact asserted in Paragraph No.13 of the writ petition that though a personal hearing through video conferencing was arranged, but the video conference was not

connected/ provided. The said fact is, therefore, admitted by non-traverse. In this connection, Paragraph No.5 of the counter affidavit and its sub-paragraphs are relevant.

17. The most important feature of the matter is that the Inquiry Committee in dealing with charges, that were apparently so serious, that these could lead to the imposition of a major penalty, and did lead to it, never took care to ask the establishment to prove the charges. In a domestic inquiry, the Inquiry Committee/ Tribunal cannot sit with a mind that identifies themselves with the establishment. They have to sit as impartial arbiters, where the establishment have to prove the charges by producing both documentary and oral evidence through a Presenting Officer. It is after the establishment have produced documents in evidence through a Presenting Officer, that are duly proved by the oral testimony of witnesses that the delinquent employee can be called upon to cross-examine the establishment's witnesses and then produce his evidence in defence.

18. Here, the proceedings have gone in a manner, where it is apparent that the Inquiry Committee were not cognizant of the serious business that they were about. They have written their report after perusing the charge-sheet, together with the documents annexed and the petitioner's reply, treating the charges and the documents in support as proof of themselves. The petitioner as the delinquent before the Inquiry Committee denied the charges. There is nothing on record to show that he admitted the documents annexed to the charges, so as to dispense with proof thereof or the establishment's burden to prove these documents discharged, after formally introducing them to record before the Inquiry Committee through a Presenting Officer and proving them by relevant witnesses. The members of the Inquiry Committee cannot arrogate to themselves personal knowledge of the contents of the documents. The documents have to be laid before them in evidence, and wherever necessary, proved by witness(s). Nothing of the kind has been done in this case. The law in this regard has been laid down by the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772**, where it has been held:

"27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. 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."

19. Guidance in this regard is to be found in the holding of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570,** where it has been observed:

"14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The

enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

20. A Division Bench of this Court in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB)(LB),** dealing with the same issue, held:

"14. Now oming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

15. In another case in Subhash Chandra Gupta v. State of U.P., 2012(4) ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold 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).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

21. The same principle has been reiterated by a Division Bench of our Court in **Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB)**, where it is observed:

"15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the unrebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was

given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

22. In **State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB),** again a Bench decision of this Court, it was held:

"14. Recently the entire law on the subject has been reviewed and reiterated in Chamoli District Co-operative Bank Ltd. v. Raghunath Singh Rana and others, AIR 2016 SC 2510 and 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."

15. The principal of law emanates from the above judgments is that initial burden is on the department to prove the charges. In case where inquiry is initiated with a view to inflict major penalty, department must prove charges by adducing evidence by holding oral inquiry.

17. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

23. The law, therefore, is well settled for a salutary principle that the Inquiry Committee cannot go about their exercise like an administrative fact finding committee gleaning through idle papers. They have to have formal proceedings, where the establishment have the first burden to discharge by proving the charges through evidence, both oral and documentary. This Court, as already remarked, finds from a perusal of the inquiry report that the Inquiry Committee have hardly functioned as an impartial arbiter. They have proceeded on the assumption that the charges in the charge-sheet read with the documents, are proof of themselves and it is for the petitioner to dispel the charge, which he has failed to do. These kind of findings of the Inquiry Committee can never be held to be valid, on the foot of which orders of such serious consequence as dismissal from service can lawfully be made. This Court

may add that the more serious the charge, the more formal, elaborate and strict the procedure has to be to prove it. After all, this Court does not reappraise evidence in a secondary review, but is obliged to see that there is procedural fairness in the conduct of the inquiry. A fundamentally flawed procedure adopted by the Inquiry Committee has to be undone and the consequences of it abated.

24. In the circumstances, this writ petition succeeds and is **allowed**. The impugned order dated 11.07.2022 passed by the Chairman, U.P. Power Corporation Limited, Lucknow and the appellate order dated 26.07.2023 passed by the Board of Directors, U.P. Power Corporation Limited, Lucknow are hereby **quashed.** The petitioner shall be reinstated in service forthwith. After reinstatement, it will be open to the respondents to proceed with the inquiry afresh from the stage of issue of the charge-sheet, bearing in mind the guidance in this judgment. It will also be open to the respondents looking to the nature of the charges, upon the petitioner's reinstatement, either to suspend him pending inquiry or assign him duties. The inquiry, if initiated, will be expedited. In the event, the petitioner is placed under suspension, he will be paid his subsistence allowance regularly, without asking him to furnish a non-alternative engagement certificate. In case he is not suspended and still proceeded with, the petitioner would be paid his current salary regularly from the date of this judgment. So far as the question of arrears of pay etc. is concerned, that will abide by the final result of the disciplinary proceedings, if resumed against the petitioner as per liberty given. If, however, no disciplinary proceedings are taken, the petitioner shall be entitled to 25% of his emoluments with all other consequential benefits.

25. There shall be no order as to costs.

(2024) 2 ILRA 305
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023

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

Writ A No. 18562 of 2023

Vimlesh Lal ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shailesh Pandey

Counsel for the Respondents:
C.S.C., Sri Brijesh Kumar, Sri Hausihla Prasad Mishra, Sri Jitendra Narayan Tripathi, Sri H.P. Singh

A. Service Law – UP Municipalities Act, 1916 – Section 34 – Promotion – Post of Water Works Supervisor – Chairman of Nagar Palika Parishad granted promotion – However, District Magistrate set aside promotion's order – Validity challenged – Authority of District Magistrate, extent of – Held, the District Magistrate's power is traceable to S. 34(1-A) alone, which authorizes him to prohibit the execution of a resolution passed by a Municipality or a Committee or an Officer etc., if he is of opinion that the resolution or the order is of a nature that may cause or tend to cause danger to human life, health or safety, or a riot or affray. That is the limited authority of the District Magistrate to interfere in the affairs of a Nagar Palika or a Municipality – There is no other power vested in the District Magistrate to interfere with any decision made by the Nagar Palika Board – Order passed by the District Magistrate is absolutely without jurisdiction and he could not have set aside the promotion order made in the petitioner's favour by the Chairman of the Nagar Palika Parishad in the exercise of his power to appoint, promote etc. employees of the Nagar Palika Parishad. (Para 16 and 22)

Writ petition allowed. (E-1)

List of cases cited :-

1. President, Nagar Palika Parishad, Sultanpur Vs St. of U.P.; AIR OnLine 2019 All 2407

2. Subodh Kumar Gupta & ors.Vs St. of U.P. through Principal Secretary & ors.; 2016 SCC OnLine All 1358

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

1. This writ petition under Article 226 of the Constitution is directed against the impugned order dated 24.05.2023 passed by the District Magistrate, Sonbhadra, setting aside the promotion granted to the petitioner by the Chairman, Nagar Palika Parishad, Sonbhadra to the post of a water works supervisor from the position of a pump attendant.

2. In consequence of the impugned order passed by the District Magistrate, the petitioner stands reverted to the post of a pump attendant. The petitioner was appointed a pump attendant vide order dated 29.11.2007 by the Executive Officer, Nagar Palika Parishad, Sonbhadra. He joined service on 04.12.2007. The petitioner was selected for the post of a pump attendant, a Group-D post vide Government Order No. (para no.4) dated 17.10.2007 after facing a duly constituted selection committee for the purpose. According to the petitioner, he is duly qualified for the post of a water works supervisor, a Class-III (Group-C) post. He has earned his Intermediate Certificate from the U.P. Board of High School and Intermediate Education and a Trade Certificate of Fitter from the I.T.I. He has apprenticed at the Thermal Training Institute, UPRVUNL, Obra, District Sonbhadra. The petitioner has been discharging his duties sincerely, honestly and with all competence at his command. Respondent No.5, on the other hand, was appointed a daily-wager on the Class-IV post of a pump attendant with the Nagar Palika Parishad, Sonbhadra on 01.01.1989. He has been regularized in service on 09.12.2014. The fifth respondent has completed his Junior High School in the year 1983 and holds a I.T.I. Trade Certificate. The fifth respondent also claims to have passed the Prathama Examination in 1997 from the Hindi Sahitya Sammelan, Allahabad (now Prayagraj).

3. It is the petitioner's case that the Director, Local Bodies, U.P. has issued an order dated 6th December, 1980, where the minimum educational qualifications prescribed for a water works supervisor is intermediate. The post of a water works supervisor was vacant since long in the establishment of the respondent, Nagar Palika Parishad. The petitioner, qualified for the post, moved an application seeking consideration of his candidature by way of promotion. The matter was referred for guidance by the Executive Officer, Nagar Palika Parishad, Sonbhadra to the Deputy Director, Local Fund Account Department, U.P., Vindhyachal Division, Mirzapur. This reference for guidance appears to have been made vide memo dated 04.09.2020. In response, the Deputy Director, Local Fund Account Department, Mirzapur, responded vide his memo of 30th September, 2020, wherein he suggested that the following proceedings can be taken:

"(1) If in the past, promotion to the post of a water work supervisor on a regular basis has been done, on the foot of whichever educational and technical qualifications, proceedings can be taken in the same manner;

(2) If the post of a pump attendant constitutes a feeding cadre for

promotion to the post of a water work supervisor, promotion can be made;

(3) Since it is a matter of promotion, the question of reservation would not be attracted."

4. The Nagar Palika Parishad, Sonbhadra, accordingly, went about the exercise of considering the case for promotion and vide an office note, that is annexed at Page Nos.49 and 50 of the paper-book, a list of six employees, who were eligible for promotion, was drawn up. Four out of these were occupants of the posts of *beldar* and two were pump attendants. Out of the six, all the other five, except the petitioner, were non-matriculates. Respondent No.5 alone held an I.T.I. Trade Certificate like the petitioner, but then his educational qualifications were only a Junior High School. The minimum educational qualification for the post of a water works supervisor, being an Intermediate Certificate, the petitioner's case was proposed for promotion by the Executive Officer to the Chairman of the Nagar Palika Parishad. The Chairman of the Nagar Palika Parishad passed an order dated 22nd October, 2020 promoting the petitioner to the post of a water works supervisor.

5. Challenging the aforesaid promotion, respondent No.5, Kamlesh Singh, instituted a writ petition before this Court being Writ-A No.4791 of 2023, praying for the following material relief:

"Issue a writ, order or direction in the nature of mandamus commanding the respondent no.2 to consider the claim of petitioner for promotion on Class III post (Jalkal Paryavekshak) within stipulated time."

6. This Court disposed of the writ petition not on merits, but permitting the petitioner there to make a fresh detailed representation to the District Magistrate raising all his grievances and directing the District Magistrate to decide that representation by a speaking order within a period of two months. The precise terms of the order dated 21.03.2023 passed by this Court in Writ-A No.4791 of 2023 read:

"Learned counsel for petitioner submits that grievance of petitioner would sufficiently be met in case representation of petitioner for the said purposes is considered and decided in a time bound manner.

Shri Brijesh Kumar, learned counsel for respondents and learned standing counsel have no objection to the same.

In view thereof, petitioner is permitted to make a fresh detailed representation to respondent no.2-District Magistrate, District Sonbhadra raising all his grievance, annexing therewith a copy of this writ petition along with annexures and all the documents in support of his claim within a period of two weeks from today along with a certified copy of this order.

In case such a representation is moved by petitioner, respondent no.2 shall consider and decide the same in accordance with law by a reasoned and speaking order within a period of two months from the date a certified copy of this order along with representation is placed before him.

It is made clear that this court has not applied itself on the merits of the case and all questions are left open to be considered and decided by the competent authority in accordance with law."

7. Acting on the said representation, the District Magistrate, Sonbhadra constituted a Three Member Inquiry Committee, comprising the Additional District Magistrate (Finance and Revenue), Sonbhadra, the Senior Treasury, Sonbhadra and the Executive Officer, Nagar Palika Parishad, Sonbhadra, asking them to submit a clear report in the matter concerning the validity of the petitioner's promotion, which they should do after personally hearing the petitioner. The Committee reported that there was nothing to show clearly that a post of water works supervisor was sanctioned for the Nagar Palika Establishment and there was no final publication of the seniority list of Class-IV employees eligible for promotion, rendering the petitioner's promotion legally untenable.

8. The District Magistrate held on the basis of the said report that the petitioner's promotion made by the Chairman vide order dated 22nd October, 2020 was illegal and set aside the same vide his order dated 24th May, 2023.

9. It is this order that the petitioner has impugned in the present writ petition.

10. In this case, when the matter came up for admission on 22.11.2023, the following order was passed:

"The District Magistrate, Sonbhadra shall show cause by filing his own affidavit under what authority of law by which is meant the authority enjoyed under the Statute, he could cancel an order passed by the Chairman of the Nagar Palika Parishad, Sonbhadra promoting the petitioner. In putting in his answer, the District Magistrate will bear in mind that even a judicial order cannot confer jurisdiction upon an authority, which he does not posses under the law.

The District Magistrate will also bear in mind that the order passed by the Chairman and set aside by him cannot lead to an approval of his action merely because the Chairman's order is for some reason, on facts or evidence, vitiated. If the District Magistrate has no jurisdiction, all inquiries undertaken by him, whether personally or through a Committee of Officers serving in the Collectorate, would be non est. The aforesaid consideration shall be borne in mind.

The personal affidavit, as above indicated, shall be filed on or before 08.12.2023.

Mr. H.P. Mishra, Advocate holding brief of Mr. J.N. Tripathi, Advocate accepts notice on behalf of respondent no. 5. He may seek instructions by the next date fixed.

Mr. Dinesh Kumar Singh, learned Additional Chief Standing Counsel accepts notice on behalf of respondent nos. 1, 2 and 3. He will also seek instruction in the matter.

Lay as fresh again on 08.12.2023 at 12:00 noon.

Till then, no recovery shall be made from the petitioner pursuant to the impugned order dated 24.05.2023 passed by the District Magistrate, Sonbhadra.

Let a copy of this order be communicated to the District Magistrate, Sonbhadra by the Registrar (Compliance) within 24 hours."

11. Heard Mr. Shailesh Pandey, learned Counsel for the petitioner, Ms. Monika Arya, learned Counsel appearing on behalf of respondent Nos. 1, 2 and 3, and Mr. H.P. Singh, learned Counsel appearing on behalf of respondent No. 5.

12. It is submitted by the learned Counsel for the petitioner that the District Magistrate has no jurisdiction or authority under the Uttar Pradesh Municipalities Act, 1916 (for short, 'the Act of 1916') to interfere and set aside an order of promotion relating to a Class-IV employee of the Nagar Palika Parishad, promoting him to a Class-III post.

13. Now, in compliance with the order requiring the District Magistrate to file a personal affidavit showing cause on the aforesaid plea of the petitioner, the District Magistrate has filed his personal affidavit dated 07.12.2023. In the said affidavit, he has taken three pleas. The first is that the promotion is bad because the process of publication of the final seniority list of Class-IV employees in the Nagar Palika Parishad has not been adopted and the promotion, for the said reason, is contrary to rules. The second plea is that the District Magistrate has passed the order impugned in compliance with the orders of this Court dated 21.03.2023 passed in Writ-A No.4791 of 2023, and the third is a plea of confession and avoidance, where the District Magistrate has said in Paragraph No.8 of the affidavit that he has no power under the statute to interfere in the affairs of the Nagar Palika Parishad. There is dovetailed to this plea, a plea of avoidance saying that he has acted in the matter in deference to the command of this Court to decide the fifth respondent's representation.

14. The moot question involved in this case is: If the District Magistrate is empowered under the Act of 1916 to interfere with a promotion order relating to a Class-IV employee passed by the Nagar Palika Parishad Establishment, be it the Chairman, the Executive Officer or the Board?

15. Upon hearing learned Counsel for the parties and a careful consideration of the matter, what this Court finds is that the District Magistrate has very little say in matters of the Nagar Palika Parishad or a Nagar Panchayat, functioning under the Act of 1916. Section 34 is the only source of power that the District Magistrate has to interfere with the decisions of a Nagar Palika Parishad. Section 34 reads:

"34. Power of the State Government or the Prescribed Authority or the District Magistrate to prohibit execution or further execution of resolution or order of [Municipality]. - (1) [The Prescribed Authority may], by order in writing, prohibit the execution or further execution of a resolution or order passed or made under this or any other enactment by a [Municipality] or a committee of a [Municipality] or a Joint Committee or any officer or servant of a [Municipality] or of a Joint Committee [if in its opinion] such resolution or order is of a nature to cause or tend to cause obstruction, annoyance or injury to the public or to any class or body of persons lawfully employed [* * *] and may prohibit the doing or continuance by any person of any act in pursuance for or under cover of such resolution or order.

(1A) The District Magistrate may, within the limits of his district, by order in writing, prohibit the execution or further execution of a resolution or order passed or made under this or any other enactment by a] [Municipality] or a committee of a [Municipality] or a Joint Committee or any officer or servant of a [Municipality] or of a Joint Committee if in his opinion such resolution or order is of a nature to cause or tend to cause danger to human life, health or safety, or a riot or affray, and may prohibit the doing or continuance by any

person of any act, in pursuance of or under cover of such resolution or order.

(1B) the State Government may, on its own motion or on report or complaint received by order prohibit the execution or further execution of a resolution or order passed or made under this or any other enactment by a] [Municipality] or a committee of a [Municipality] or a Joint Committee or any officer or servant of a [Municipality] or of a Joint Committee, if in its opinion such resolution or order is prejudicial to the public interest, [or has been passed or made in abuse of powers or in flagrant breach of any provision of any law for the time being in force,] and may prohibit the doing or continuance by any person of any act in pursuance of or under cover of such resolution or order.

(2) Where an order is made under sub-section (1) or (1-A)] [* * *], a copy thereof with a statement of the reasons for making it, shall forthwith be forwarded by the Prescribed Authority 1 added bu U.P.Act no 7 of 1949 2 added bu U.P.Act no 7 of 1949 or the District Magistrate through the Prescribed Authority, as the case may be, to the State Government which may thereupon, if it thinks fit, rescind or modify the order.

(3) [* * *]

(4) Where the execution or further execution of a resolution or order is prohibited by an order made under sub-section (1), (1-A) or (1-B) and continuing in force, it shall be the duty of the [Municipality], if so required by the authority making the order under the said sub-sections to take any action which it would have been entitled to take, if the resolution or order had never been made or passed, and which is necessary for preventing any person from doing or continuing to do anything under cover of the resolution or order of which the further execution is prohibited."

16. The District Magistrate's power is traceable to sub-Section (1-A) of Section 34 alone, which authorizes him to prohibit the execution of a resolution passed by a Municipality or a Committee or an Officer etc., if he is of opinion that the resolution or the order is of a nature that may cause or tend to cause danger to human life, health or safety, or a riot or affray. That is the limited authority of the District Magistrate to interfere in the affairs of a Nagar Palika or a Municipality, as it was formerly called. There is no other power vested in the District Magistrate to interfere with any decision made by the Nagar Palika Board, its Chairman or the Executive Officer or a Committee or an Officer thereof. Rather, this Court is inclined to think that the autonomy and independence of a Nagar Palika is far more strenghtened and requires to be more zealously protected in view of inclusion of Part IX-A in the Constitution by the Constitution (Seventy-fourth Amendment) Act, 1992. This amendment elevates local bodies to a constitutional status and attempts to effect decentralization of democratic power. It provides a constitutional bulwark to strengthen local self-government, more answerable to its eloctorate than a supervising agent of the State Government. Part IX-A of the Constitution and all its provisions would require Section 34 of the Act of 1916 to be understood very differently from the way it was in the day of its enactment. The powers of the District Magistrate must, therefore, be held limited to Section 34 and not expanded in any manner.

17. The question involved here fell for consideration of a Division Bench of

this Court sitting at Lucknow in **President, Nagar Palika Parishad, Sultanpur, Babita Jaiswal v. State of U.P., AIR OnLine 2019 All 2407. In President, Nagar Palika Parishad, Sultanpur, Babita Jaiswal** *(supra)*, it was held by their Lordships of the Division Bench:

"24. From a bare reading of said Section 34, it is clear that the District Magistrate has power to interfere with only such resolutions or orders of the Nagar Palika Parishad if the same are likely to cause or tend to cause 'obstruction, annoyance or injury to the public.....' or 'danger to human life, health or safety or a riot or affray'. Awarding a contract in favour of a person cannot be matter, which may cause obstruction, annoyance or injury to the public or danger to human life, health or safety etc. Even directions to make payment with regard to contract given by the Nagar Palika Parishad or execution of resolutions passed by the Nagar Palika Parishad, which include cleaning of drains and repairing of roads etc. also would not fall in the category of cases enumerated under Section 34 of the Act under which the District Magistrate can invoke the powers under Section 34 of the Act.

25. The Constitution of India as well as the Uttar Pradesh Municipalities Act, 1916 envisage that the Nagar Palika Parishads are to work independently and carry on the functions and duties, which it is obliged in law to perform. Interference by the District Magistrate or the State Government would only be permissible if the circumstances enumerated under Section 34 of the Act prevail.

26. The bye-laws dated 24.09.1994, as annexed with the writ petition as Annexure no.10, providing for registration and execution of works was published under Section 301 of the Act, 1916 inviting objections which is the previous publication envisaged under Section 300 of the Act, 1916. In the counter affidavit, it has been stated that the bye-laws in question was never published in the official gazette as required under Section 301 of the Act, 1916. This fact is not correct. The previous publication as envisaged under the aforesaid provision has been complied with and publication was made in the official Gazette inviting objections/suggestions from the general public. The State has failed proved that thereafter no final publication was made in the Official Gazette under Section 301 (2) of the Act, 1916.

27. In our considered opinion, the power, which has been exercised by the District Magistrate in the present case, would not fall within the ambit of provisions of Section 34 of the Act. The members of the Nagar Palika Parishad are duly elected and interference by the executive would only be to the extent permissible in law. Since we are of the opinion that the orders passed by the District Magistrate are outside the purview of the provisions of Section 34 of the Act, 1916 and the learned Standing Counsel has not placed any other provision of law under which the District Magistrate could have passed the said orders, which clearly interfere with the functioning of the Nagar Palika Parishad, the said orders would be liable to be quashed."

18. The same view was expressed earlier by a learned Single Judge of this Court in **Subodh Kumar Gupta and others v. State of U.P. through Principal Secretary and others, 2016 SCC OnLine All 1358**. The learned Judge was considering the issue in the context of orders passed by the District Magistrate, Farrukhabad terminating the service of the

petitioners there, who were Class-III and IV employees of the Nagar Palika, appointed after the Chairman's approval. The appointments were terminated by the District Magistrate purporting to exercise powers under Section 34 of the Act of 1916. It was in the context of these facts, that my esteemed Brother Mahesh Chandra Tripathi held in **Subodh Kumar** Gupta (supra):

"16. From a bare reading of Section 34 of the Act, it is clear that the District Magistrate has power to interfere with only such resolutions or orders of the Nagar Palika Parishad if the same are likely to cause or tend to cause 'obstruction, annoyance or injury to the public……' or 'danger to human life, health or safety or a riot or affray'. Awarding a contract in favour of a person cannot be matter, which may cause obstruction, annoyance or injury to the public or danger to human life, health or safety etc. Even directions to make payment with regard to contract given by the Nagar Palika Parishad or execution of resolutions passed by the Nagar Palika Parishad, which include cleaning of drains and repairing of roads etc. also would not fall in the category of cases enumerated under Section 34 of the Act under which the District Magistrate can invoke the powers under Section 34 of the Act. The Constitution of India as well as the Act envisage that the Nagar Palika Parishads are to work independently and carry on the functions and duties, which it is obliged in law to perform. Interference by the District Magistrate or the State Government would only be permissible, if the circumstances enumerated under Section 34 of the Act prevail."

19. In **Subodh Kumar Gupta**, it has further been remarked by His Lordship:

"17. Section 74 of the Act provides that the President may appoint, remove or otherwise punish a servant on posts in the non-centralised services carrying scale of payment equal to or higher than the lowest scale of pay admissible to the clerical staff. The provision contained in the Act clearly mandates that in absence of Executive Officer, the Chairman will issue the appointment officers. In the present matter, the petitioners were appointed by the Chairman of the Municipality, who is the appointing authority under Section 74 of the Act."

20. Cognizant of this position of the law, the District Magistrate here, as said earlier, conceded that he has no jurisdiction. But, as also said earlier, the District Magistrate has resorted to a plea of confession and avoidance. He has acknowledged the lack of his jurisdiction, but sought to avoid the folly of his action by saying that he acted under a command of this Court.

21. A reading of the order passed by this Court in Writ-A No.4791 of 2023 does not show that the District Magistrate was in any manner commanded to act in violation of the law. Rather, no opinion was expressed by this Court. He was just asked to decide the representation made to him by respondent No.5, questioning the petitioner's appointment. The first issue that the District Magistrate should have examined was if he at all had jurisdiction to decide. If he had done that, he would have acted in accordance with law. The acknowledgment before this Court that he has no jurisdiction has made matters more complicated and given rise to avoidable litigation.

22. Apparently, the order passed by the District Magistrate is absolutely without jurisdiction and he could not have set aside the promotion order made in the petitioner's favour by the Chairman of the Nagar Palika Parishad in the exercise of his power to appoint, promote etc. employees of the Nagar Palika Parishad.

23. This Court is not inclined to go into the validity of the petitioner's promotion, as that is in no way under challenge here. It would be open to the fifth respondent to seek his remedies as advised.

24. In the result, this petition succeeds and is **allowed**. The impugned order dated 24.05.2023 passed by the District Magistrate, Sonbhadra is hereby **quashed.** There shall be no order as to costs.

(2024) 2 ILRA 313
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2024
BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DONADI RAMESH, J.

Writ A No. 21298 of 2023

The Secretary, I.C.A.R. Ministry of Agriculture and Farmers Welfare & Anr. ...Petitioners
Versus
Ravinder Kumar Tyagi ...Respondent

Counsel for the Petitioners:
Sri Narendra Pratap Singh

Counsel for the Respondents:

A. Service law – Constitution of India – Article 14 – Writ – Maintainability – Latches of 638 days – Petitioner, ICAR, explained the delay saying that 'due to long departmental procedure the matter has been sent to ICAR head Quarter and after concurrence of Head Quarter it has been decided to challenge the matter' – High Court found the explanation of latches unsatisfactory – Bherulal's case relied upon. (Para 4 and 8)

Writ petition dismissed. (E-1)

List of Cases Cited :-

1. Madhya Pradesh & ors.Vs Bherulal; 2020 (10) SCC 654

2. St. of Madhya Pradesh & anr. Vs Chaitram Maywade; 2020 (10) SCC 654

3. Majji Sannemma @ Sanyasirao Vs Reddy Sridevi & ors.; 2021 SCC Online (SC) 1260

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Sri Narendra Pratap Singh, learned counsel for the petitioners.

2. Present petition has been filed for quashing the impugned order dated 17.12.2021 passed in Original Application No. 330/1069 of 2021 (Ravinder Kumar Tyagi vs. UOI and others).

3. The Stamp Reporter has reported latches of 638 days on the date of reporting of the present petition on 15.12.2023. Subsequently, present petition was filed on 18.12.2023.

4. On a pointed query learned counsel for the petitioners submits that latches have been explained in paragraph 15 of the petition, therefore, delay in challenging the impugned order dated 27.12.2021 is not intentional and is liable to be quashed.

Paragraph 15 of the petition is quoted as under:-

"15. That due to long departmental procedure the matter has been sent to ICAR head Quarter and after concurrence of Head Quarter it has been decided to challenge the matter on the ground of delay and latches and all these proceedings have taken enough time and there is some delay in challenging the impugned order dated 17.12.2021 which is not intentional and the same is bonafide and therefore the Hon'ble High Court may condone the delay and writ petition may be heard on merits condoning the delay otherwise the petitioners department shall suffer irreparable loss and injury."

5. We are not satisfied with the explanation so offered by the petitioner.

6. In the case of State of **Madhya Pradesh and others vs. Bherulal 2020 (10) SCC 654**, the Special Leave Petition was filed with a delay of 663 days. The Hon'ble Apex Court, while considering the application seeking condonation of delay, observed in paragraphs 3, 4, 5 and 6 as under:-

"3. No doubt, some leeway is given for the Government inefficiencies but the sad part is that the authorities keep on relying on judicial pronouncements for a period of time when technology had not advanced and a greater leeway was given to the Government (Collector, Land Acquisition, Anantnag & Anr vs. Mst. Katiji & Ors. (1987) 2 SCC 107). This position is more than elucidated by the judgment of this Court in Office of the Chief Post Master General & Ors. v. Living Media India Ltd. & Anr. (2012) 3 SCC 563 where the Court observed as under:

"27. It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us.

28. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

29. In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red- tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be

used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few.

30. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay."

Eight years hence the judgment is still unheeded!

4. A reading of the aforesaid application shows that the reason for such an inordinate delay is stated to be only "due to unavailability of the documents and the process of arranging the documents". In paragraph 4 a reference has been made to "bureaucratic process works, it is inadvertent that delay occurs".

5. A preposterous proposition is sought to be propounded that if there is some merit in the case, the period of delay is to be given a go-by. If a case is good on merits, it will succeed in any case. It is really a bar of limitation which can even shut out good cases. This does not, of course, take away the jurisdiction of the Court in an appropriate case to condone the delay.

6. We are also of the view that the aforesaid approach is being adopted in what we have categorized earlier as "certificate cases". The object appears to be to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue and thus, say that nothing could be done because the highest Court has dismissed the appeal. It is to complete this formality and save the skin of officers who may be at default that such a process is followed. We have on earlier occasions also strongly deprecated such a practice and process. There seems to be no improvement. The purpose of coming to this Court is not to obtain such certificates and if the Government suffers losses, it is time when the concerned officer responsible for the same bears the consequences. The irony is that in none of the cases any action is taken against the officers, who sit on the files and do nothing. It is presumed that this Court will condone the delay and even in making submissions, straight away counsels appear to address on merits without referring even to the aspect of limitation as happened in this case till we pointed out to the counsel that he must first address us on the question of limitation."

(emphasis supplied)

7. In the case of **State of Madhya Pradesh and another vs. Chaitram Maywade 2020 (10) SCC 654** Hon'ble Apex Court deprecated practice of filing petitions with such huge delay and has observed that these kinds of cases are only 'certificate cases' to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue. It was also observed that the costs imposed are to be recovered from the officer(s) responsible for the delay in filing and sitting on the files. Paragraph 3 and 4 of the Chaitram (supra) are quote as under:-

"3. We consider it appropriate to direct the Chief Secretary of the State of Madhya Pradesh to look into the aspect of revamping the legal Department as it appears that the Department is unable to file appeals within any reasonable period of time much less within limitation. These kinds of excuses, as already recorded in the aforesaid order, are no more admissible in view of the judgment in Office of the Chief Post Master General & Ors. v. Living Media India Ltd. & Anr. ? (2012) 3 SCC 563.

4. We have also expressed our concern that these kinds of the cases are only "certificate cases" to obtain a certificate of dismissal from the Supreme Court to put a quietus to the issue. The object is to save the skin of officers who may be in default. We have also recorded the irony of the situation where no action is taken against the officers who sit on these files and do nothing."

(emphasis supplied)

8. In the case of **Majji Sannemma @ Sanyasirao vs. Reddy Sridevi and others 2021 SCC Online (SC) 1260** the Hon'ble Apex Court quashed the order passed by the High Court, where High Court has condoned delay of 1011 days.

9. In view of the law as discussed above, we find that the explanation so offered in paragraph 15 of the petition quoted above is not satisfactory and accordingly present petition stands dismissed on the ground of latches.

(2024) 2 ILRA 316
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 31827 of 2014

Om Prakash Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Deepak K. Jaiswal, Sri Bhaiya Lal Yadav, Sri Vijay Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Junior High School (Payment of Salaries of Teachers and Other Employees) Act, 1978 – UP Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 – Rules 9(A)(ii) and 10(5)(i)(a) – Payment of salary – Post of Assistant Teacher – Petitioner was duly selected, appointed and given joining in 1996 – Appointment was also approved twice – However, in counter affidavit, the District Basic Education Officer took the stand that petitioner's appointment was made against a non-sanctioned post – Permissibility – Held, the petitioner was appointed in accordance with rules against a sanctioned post way back in the year 1996. The strength of teachers, at the time, was obviously determined by the District Basic Education Officer in accordance with the norms then prescribed, before he permitted the vacancy to be advertised. The petitioner's selection was scrutinised at all levels and it is difficult to accept that the petitioner would have been selected or appointed against a non-sanctioned post – Right or benefits already earned under the existing rules cannot be withdrawn by a retrospective amendment of the Rules – Yogendra Shrivastava's case relied upon. (Para 26, 28, 30 and 34)

Writ petition allowed. (E-1)

List of Cases Cited :-

1. St. of M. P. & ors.Vs Yogendra Shrivastava; (2010) 12 SCC 538

2. T.R. Kapur & ors.Vs St. of Har. & ors.; 1986 Supp SCC 584

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

The petitioner, Om Prakash Yadav, appears to be a qualified and duly selected Assistant Teacher, appointed with the Raja Ram Sahab Lal Kisan Adarsh Junior High School, Saraibeeka, Jaunpur way back on 04.09.1996, and, yet, for some mysterious reason, the respondent-District Basic Education Officer, Jaunpur says that he is

not qualified, not validly selected or appointed and, therefore, not entitled to salary.

2. The petitioner has moved this Court praying that a *mandamus* be issued to the District Basic Education Officer, Jaunpur and the Management to adjust/confirm the petitioner on the vacant post of an Assistant Teacher created with the Institution aforesaid on the retirement of one Ram Tawankal Patel and pay him salary. In substance, the petitioner prays that this Court do issue a writ of *mandamus*, commanding these respondents to pay him salary pursuant to his appointment as an Assistant Teacher, made strictly in accordance with law and duly approved by the Education Authority.

3. Heard Mr. Vijay Kumar Singh, learned Senior Advocate, assisted by Mr. Bhaiya Lal Yadav, learned Counsel for the petitioner, Mr. Raj Bihari, learned Counsel appearing on behalf of respondent no. 5 and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing for respondent nos. 1 to 4.

4. Raja Ram Sahab Lal Kisan Adarsh Junior High School, Jaunpur is a recognised and aided non-Government Institution. It imparts education to both boys and girls from Classes VI to VIII. There are some 400 students reading in this school, which shall hereinafter be called 'the Institution'. The teachers and other employees working in the Institution are paid salary in accordance with the provisions of the Uttar Pradesh Junior High School (Payment of Salaries of Teachers and Other Employees) Act, 1978 *(for short, 'the Act of 1978').*

5. The petitioner says that he is the holder of Bachelor of Arts and Bachelor of Education degrees. He, therefore, possesses the minimum educational qualifications required for appointment to the post of an Assistant Teacher in a recognized and aided Junior High School. The petitioner, when selected and appointed, also fulfilled the criterion of age. The procedure for selection and appointment of an Assistant Teacher to a Junior High School, recognised and aided by the State, is governed by the Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 *(for short, 'the Service Rules').*

6. According to the petitioner's case, he was selected on 27.08.1996 by a duly constituted Selection Committee who ranked him at serial no. 1 of the select list. The petitioner's selection was approved by the District Basic Education Officer, Jaunpur *vide* order dated 29.08.1996 after scrutiny of papers forwarded by the Manager of the Institution. After the Authority's approval, granted under Rule 10(5)(i)(a) of the Service Rules, the petitioner was appointed by the Manager *vide* a letter of appointment dated 04.09.1996 to the post of an Assistant Teacher on probation for a period of one year. A copy of the letter of appointment was forwarded by the Manager of the Institution to the District Basic Education Officer, Jaunpur on 06.09.1996. The petitioner appeared before the Manager of the Institution on 09.09.1996 to submit his joining report and was permitted to join. On 10.09.1996, the Manager of the Institution directed the Headmaster to permit the petitioner to join his duties. It is the petitioner's case that ever since he joined the Institution, he is regularly

teaching all subjects assigned to him from Classes VI to VIII.

7. The grievance of the petitioner is that he has not been paid salary, though he has represented his case and on several occasions, sought audience from the respondents for the purpose.

8. Failing in his endeavours, the petitioner instituted Civil Misc. Writ Petition No. 7728 of 1998, impleading both the District Basic Education Officer, Jaunpur and the Committee of Management of the Institution through its Manager as party respondents to the aforesaid writ petition. The last mentioned writ petition was disposed of by this Court *vide* order dated 09.03.1998, directing the Manager of the Institution to consider and decide the petitioner's representation within four months from the date of production of a certified copy of the order.

9. Subsequently, the last mentioned order was modified on an application made by the petitioner on 26.07.1999, whereby a direction was issued to the District Basic Education Officer, Jaunpur to decide the petitioner's representation, instead of the Manager of the Institution.

10. The petitioner submitted a copy of the orders passed by this Court in Civil Misc. Writ Petition No. 7728 of 1998, along with an application to the District Basic Education Officer, Jaunpur to act in accordance with the order. The District Basic Education Officer, in compliance with this Court's order, decided the petitioner's representation dated 02.09.2003, a copy of which is on record, whereby, taking note of the sanctioned strength of teachers and other matters relating to the validity of the petitioner's appointment, directed payment of his salary.

11. Despite the aforesaid orders passed by the District Basic Education Officer, Jaunpur, which is in addition to the initial approval granted by him to the petitioner's selection, the petitioner was not paid his salary for the post of Assistant Teacher with the Institution. The petitioner has brought on record photostat copies of the attendance registers annexed as Annexure No. 8 to the writ petition, and also, Annexure No. S.A.-2 to the third supplementary affidavit dated 10.04.2018.

12. It is the petitioner's case that upon retirement of one Ram Tawankal Patel, an Assistant Teacher with the Institution, the post of an Assistant Teacher became vacant and Ghanshyam Gupta, *Prabhari* Primary Teacher, took temporary charge in place of Ram Twankal Patel on 10.10.2012, in compliance with an order of the District Basic Education Officer, Jaunpur dated 10.10.2012. The signatures of the aforesaid teacher were verified by the District Basic Education Officer, Jaunpur also on 10.10.2012.

13. The petitioner has then relied on a Government Order No. 1232/79-6-2012-VIP-05/2012 dated 31.01.2013, issued by the Principal Secretary to the Government of U.P. in the Department of Basic Education, which takes note of the fact that on account of the Government order dated 30.04.2010, the payment of salaries of some teachers and employees of private aided Junior High Schools has been obstructed and lays down guidelines in the matter, how payment is to be made in such cases. It speaks, amongst other things, about those schools that have been brought on grant-in-aid, and, how, after determining

their cadre strength, payment to teachers is to be made. It also speaks about schools, where posts are not sanctioned and teachers and other employees are functioning in excess of the sanctioned strength. About these schools, it is said that wherever salaries have not been paid after May 2010, until time the teachers and other employees, in excess of the cadre strength, are not adjusted against sanctioned posts, vacancies caused by retirement and for other reasons, are not to be filled up by new appointments, but the existing teachers adjusted. The petitioner thinks that his rights can be dealt with under this Government Order and seeks to claim its benefit. Allusion to this issue would be made during the course of this judgment. In fact, dejected by constant failure to secure the payment of his salary, the petitioner seems to have thought that the Government Order dated 31.01.2013 would come to his rescue, and on that basis, prayed for relief of adjustment against the vacancy caused by Ram Tawankal Patel's retirement on 10.10.2012.

14. For reasons that we would presently indicate, we think that the petitioner need not ask for adjustment against a post that has subsequently fallen vacant and against which, of course, his adjustment may be a debatable issue, if one were to look to the Service Rules on one hand and the Government Order dated 31.01.2013, on the other. This Court need not go into that issue at all, nor the petitioner depend for the enforcement of his rights upon adjustment against the vacancy caused by Ram Tawankal Patel's retirement.

15. The procedure for selection and appointment of an Assistant Teacher to a private aided Junior High School is governed by the Service Rules. These also include the minimum qualifications prescribed. The relevant provisions of the Service Rules, as these stood at the time of the petitioner's selection and appointment, read:

3. Appointment.--

(1) It shall be the responsibility of the Management to fill a vacancy in the post of Headmaster or assistant teacher as the case may be, of a recognised school by 31st July every year.

(2) If any vacancy occurs during an academic session, it shall be filled within two months from the date of occurrence of such vacancy.

4. Minimum qualification.--

(1) The minimum qualifications for the post of assistant teacher of a recognised school shall be Intermediate Examination of the Board of High School and Intermediate Education, Uttar Pradesh or equivalent examination (with Hindi and a teacher's training course recognised by the State Government or the Board such as Hindustani Teaching Certificate, Junior Teaching Certificate, Basic Teaching Certificate, or Certificate of Training).

(2) xxxxx

5. Eligibility for appointment.--

No person shall be appointed as Headmaster or assistant teacher in Substantive capacity in any recognised school, unless--

(a) he possesses the minimum qualifications prescribed for such post;

(b) he is recommended for such appointment by the Selection Committee.

6. xxxx

7. Advertisement of vacancy.--

(1) No vacancy shall be filled, except after its advertisement in at least one newspaper having adequate circulation in the locality and the intimation of such

vacancy to the District Basic Education Officer.

(2) In every advertisement and initiation under clause (1), the management shall give particulars as to the name of the post, the minimum qualifications and age limit, if any, prescribed for such post and the last date for receipt of applications in pursuance of such advertisement.

8. Age limit.--

The minimum age shall on the first day of July of the academic year following next after the year in which the advertisement of the vacancy is made under Rule 7 be--

(i) in relation to the post of assistant teacher 18 years;

(ii) in relation to the post of Headmaster 25 years.

9. Selection committee.--

For appointment of Headmaster and Assistant Teacher in institutions other than minority institutions and in the minority institutions, the Management shall constitute a Selection Committee as follows :

A--Institutions other than Minority institutions :

(i) For the post of Headmaster;

(1) manager;

(2) A nominee of District Basic Education Officer;

(3) A nominee of the Management;

(ii) For the post of Assistant Teacher ;

(1) Manager;

(2) Headmaster of the recognised school in which appointment is to be made ;

(3) A nominee of the District Basic Education Officer;

B xxxx

10. Procedure for selection.--

(1) The Selection Committee shall, after interviewing such candidates as appear before it on a date to be fixed by it in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of preference, of three candidates found to be suitable for appointment

(2) The list prepared under clause (1) shall also contain particulars regarding the date of birth, academic qualifications and teaching experience of the candidates and shall be signed by all the members of the Selection Committee.

(3) The Selection Committee shall, as soon as possible, forward such list, together with the minutes of the proceedings of the Committee to the management.

(4) The manager shall within one week from the date of receipt of the papers under clause (3) send a copy of the list to the District Basic Education Officer.

(5) (i) If the District Basic Education Officer is satisfied that--

(a) the candidates recommended by the Selection Committee possess the minimum qualification prescribed for the post;

(b) the procedure laid down in these rules for the selection of Headmaster or assistant teacher, as the case may be, has been followed he shall accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the management within two weeks from the date of receipt of the papers under clause (4).

(ii) If the District Basic Education Officer is not satisfied as aforesaid, he shall return the papers to the management with the direction that the matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee.

11. Appointment by the management.--

(1) On receipt of communication of approval or as the case may be, on the expiry of the period of one month under clause (iii) of sub-rule (5) of Rule 10, the management shall, first offer appointment to the candidate given the first preference by the Selection Commines and on his failure to join the post, to the candidate next to him in the list prepared by the Selection Committee and on the failure of such candidate also, to the last candidate specified in such list

(2) (a) The appointment letter shall be sent under the signature of the manager by registered post to the selected candidate.

(b) The appointment letter shall clearly specify the name of post, the pay scale and the nature of appointment, whether permanent or temporary, and shall also specify that if the candidate does not join within 15 days from the date of receipt of the appointment letter his appointment shall be cancelled.

(c) A copy of the appointment letter shall also be sent to the District Basic Education Officer.

12. Confirmation.—

(1) The appointment of every Headmaster or assistant teacher, as the case may be, of a recognised school, not being an appointment under Rule 20 shall, in the first instance, be on probation of one year, which may be extended for a further period not exceeding one year.

(2) If the service of Headmaster or teacher of a recognised school are not terminated before the expiry of the period or the extended period of probation, as the case may be, he shall be deemed to have been automatically confirmed on the expiry of such period.

16. The petitioner holds a degree of Bachelor of Arts and Bachelor of Education, and, therefore, fulfilled the minimum educational qualifications mandated by Rule 4 of the Service Rules, as these then stood. Rule 4, made it requisite for a substantive appointment to the post of an Assistant Teacher in any recognized school that the candidate must possess the minimum prescribed qualifications for the post and is recommended for such appointment by the Selection Committee. There was also a requirement that a vacancy in an Institution governed by the rules could not be filled up, except after it was advertised in at least one newspaper having adequate circulation in the locality and the intimation of such vacancy to the District Basic Education Officer.

17. The constitution of the Selection Committee as prescribed by Rule 9(A)(ii) of the Service Rules for selection to the post of an Assistant Teacher is a three-member Committee, comprising the Manager of the Institution, the Headmaster and a nominee of the District Basic Education Officer. The other relevant provisions would be alluded to a little later.

18. In the present case, what this Court finds is that the Management of the Institution sought permission of the District Basic Education Officer to advertise the

post in question which was granted *vide* memo no. बे-2/1742/96-97 दिनांक 01-8-96. After this permission was granted, an advertisement was published in some newspaper, which the District Basic Education Officer has acknowledged in his order dated 20.03.2004. The interviews were notified through this advertisement, published on 04.08.1996, to be held on 27.08.1996 at 10.00 a.m. in the campus of the Institution. It is difficult at this distance of time to go into the name and the circulation of the newspaper, because this objection has not been raised at any point of time by the Authority or anyone else, earlier in the day, when a copy of the newspaper would have been at hand.

19. By a letter no. बे-2/2314-15/96-97 दिनांक-21-8-96, the District Basic Education Officer nominated the *Prathmik Up Vidyalaya Nirikshak* Machhlishahr, Jaunpur as the departmental observer to sit on the Selection Committee. On the scheduled date of interviews, four candidates appeared, out of whom, the three-member Selection Committee headed by the Manager considered their candidature and found the petitioner suitable.

20. Along with the supplementary affidavit, proceedings of the Selection Committee have been annexed as Annexure No. S.A.-4. It shows that the Selection Committee was headed by the Manager and had, for its members, the Headmaster of the Institution, besides Smt. Vimlashankar Tripathi, *Prathmik Up Vidyalaya Nirikshak*, Machhlishahr, Jaunpur as the District Basic Education Officer's nominee.

21. The Selection Committee's minutes are clear and recommend the petitioner for appointment. There is an appended chart to the minutes of the Selection Committee, which shows the criteria, following which, marks have been awarded by the members of the Selection Committee to the four candidates who appeared. They have been awarded interview marks on the basis of the marks earned in the High School, the Intermediate, the Bachelor of Arts and the Bachelor of Education examination. The petitioner secured 29 marks in the interview and ranked above the other three who secured lesser interview marks.

22. The proceedings of the Selection Committee dated 27.08.1996 were placed before the Committee of Management on 28.08.1996, who by a unanimous resolution, selected the petitioner. The proceedings of the Committee of Management dated 28.08.1996 are annexed to the supplementary affidavit as Annexure No. S.A.-5. It is to be noted that the Selection Committee has drawn up the list of candidates interviewed in order of preference and carries all particulars postulated by Rule 10(2) of the Service Rules. Recommendations of the Selection Committee were accepted by the Management, as already noticed, and forwarded to the District Basic Education Officer within one week, as envisaged by Rule 10(4) of the Service Rules.

23. The Basic Education Officer, *vide* order dated 29.08.1996, granted approval to the recommendations of the Selection Committee, as endorsed by the Management in the petitioner's favour, subject to the condition that if any material fact has been suppressed, the approval order shall stand automatically revoked. It is on the foot of the said approval dated 29.08.1996, granted by the Basic Education Officer that a letter of appointment dated

04.09.1996 was issued by the Manager of the Institution, addressed to the petitioner with a copy thereof endorsed to the Basic Education Officer and the Headmaster of the Institution. This letter of appointment is on record as Annexure No. 1 to the writ petition.

24. It must be noticed here that the petitioner joined the post, as already noted, on 10.09.1996, whereafter, he has been discharging his duties. Since, the petitioner was not paid his salary, he represented the matter and ultimately moved this Court for a direction to pay his salary. The writ petition instituted by the petitioner, already mentioned, was disposed of by an order dated 09.08.1998, directing the Manager, in the first instance, to decide the petitioner's representation, preferably within a period of four months of the date of receipt of a copy of this Court's order.

25. Later on, *vide* order dated 26.07.1999, the order dated 09.03.1998 was modified on an application, directing the District Basic Education Officer to decide the petitioner's representation within a period of three months from the date of making it, after hearing the Management. The Basic Education Officer, by an order dated 20.03.2004, examined the matter and found the selection and appointment to be one made in accordance with the Rules. It was also noted that the Assistant Director of Education (Basic), Vananasi Division, Varanasi had, *vide* his letter dated 28.08.1988, sanctioned twelve posts of Assistant Teacher. The District Basic Education Officer found that together with the petitioner, there were twelve Assistant Teachers functioning with the Institution, out of whom nine alone were receiving salary from the State Exchequer. In the aforesaid circumstances, the Basic Education Officer directed that there was no justification not to pay the petitioner's salary and held him entitled. He granted permission for payment of the petitioner's salary disposing of the representation.

26. This Court is constrained to observe that the petitioner's appointment is apparently not some kind of a spurious one that has sprung up from nowhere. It has originated with the Management advertising the vacancy relating to an apparently sanctioned post and the procedure under the Service Rules has been meticulously followed to select and appoint the petitioner. The petitioner's appointment has been twice approved. It was once approved initially when the papers were moved by the Management as required by the Service Rules on 29.08.1996 with the District Basic Education Officer passing an order bearing letter no. बे-2/2396/96-97 of that date; and later on, it was thoroughly examined and again affirmed by the District Basic Education Officer *vide* his order dated 20.03.2004.

27. The order dated 20.03.2004 was passed pursuant to a direction made by this Court in a writ petition to consider the petitioner's representation, as he was not receiving salary despite an appointment that was made apparently, following the prescribed procedure against a sanctioned post. The Management, in their counter affidavit, have supported the petitioner's selection and appointment.

28. In the counter affidavit filed on behalf of respondent no. 4, that is to say, the District Basic Education Officer, Jaunpur, the stand taken is that the petitioner's appointment was made against a non-sanctioned post, without determining the sanctioned strength. This was, later on,

determined by the Department, pursuant to a Government Order dated 30.04.2010 and the judgment of this Court in **Writ A No. 45051 of 2010, Achhe Lal Mishra v. State of U.P. and others**, to be one post of Headmaster and four posts of Assistant Teacher, one Clerk and one Peon for each Institution as the valid strength.

29. The eligibility qualification of the petitioner has also been disputed without saying how the petitioner is not eligible. About the orders already made by the District Basic Education Officer, it is just said that the petitioner's appointment, if approved de hors the rules by the District Basic Education Officer, would not entitle the petitioner to salary. About the submission of the learned Counsel for the petitioner that the petitioner may be adjusted against a subsequently arising vacancy, it is said that it is simply not permissible.

30. This Court can only accept the last contention of the respondents that a vacancy subsequently arising may not be available to the petitioner, but, as said earlier, there is absolutely no reason to think that the petitioner requires any of those subsequently occurring vacancies to support his appointment. The petitioner was appointed in accordance with rules against a sanctioned post way back in the year 1996. The strength of teachers, at the time, was obviously determined by the District Basic Education Officer in accordance with the norms then prescribed, before he permitted the vacancy to be advertised. The petitioner's selection was scrutinised at all levels and it is difficult to accept that the petitioner would have been selected or appointed against a non-sanctioned post, with a nominee of the District Basic Education Officer sitting on the Selection Committee that was constituted in accordance with the Service Rules.

31. The selection was apparently held after due advertisement in accordance with the Service Rules then in force and the Selection Committee also drew up, apart from the minutes, an evaluation sheet conforming to the Rules, by which they ranked the four candidates they interviewed. All these papers went to the District Basic Education Officer from the Selection Committee through the Management and the District Basic Education Officer scrutinised the petitioner's candidature as well as his qualifications, before granting approval for the payment of his salary borne on the State exchequer.

32. The two orders of the District Basic Education Officer granting approval, and subsequently affirming it, dated 29.08.1996 and 20.03.2004 respectively, have never been revoked by the District Basic Education Officer or a higher Authority in the Education Department. It is difficult, therefore, to accept the respondents' contention made in the most cavalier fashion that approval, if any, to the petitioner's appointment is non est. Also, the contention that the petitioner was appointed against a non-sanctioned post, based on an order of the year 2010 passed by this Court determining the sanctioned strength and a Government Order issued on its basis, cannot be accepted.

33. Between the years 1996 and 2010, when the sanctioned strength was determined in terms of an order of this Court, subsisting appointments validly made with the approval of competent Authorities in accordance with Rules cannot be undone, as it would unsettle

vested rights that have already accrued. The determination of sanctioned strength for teachers of Junior High School in the year 2010, even if regarded correct, cannot retrospectively be applied to undo concluded appointments of teachers, who are functioning in the Institution after a valid appointment.

34. Valid rights that have come to be realized in favour of the beneficiary under a particular rule cannot be taken away, going by the settled principles, by an amendment to the Rules made retrospectively. The principle that right or benefits already earned under the existing rules cannot be withdrawn by a retrospective amendment of the Rules finds eloquent statement in the holding in **State of Madhya Pradesh and others v. Yogendra Shrivastava, (2010) 12 SCC 538**, where it has been held:

"15. It is no doubt true that Rules made under Article 309 can be made so as to operate with retrospective effect. But it is well settled that rights and benefits which have already been earned or acquired under the existing Rules cannot be taken away by amending the Rules with retrospective effect. *(See N.C. Singhal v. Armed Forces Medical Services [(1972) 4 SCC 765] ; K.C. Arora v. State of Haryana* [(1984) 3 SCC 281 : 1984 SCC (L&S) 520] and T.R. Kapur v. State of Haryana [1986 Supp SCC 584 : (1987) 2 ATC 595] .) Therefore, it has to be held that while the amendment, even if it is to be considered as otherwise valid, cannot affect the rights and benefits which had accrued to the employees under the unamended rules. The right to NPA @ 25% of the pay having accrued to the respondents under the unamended Rules, it follows that respondent employees will be entitled to non-practising allowance @ 25% of their pay up to 20-5-2003."

35. The same principle has been enunciated by the Supreme Court in **T.R. Kapur and others v. State of Haryana and others, 1986 Supp SCC 584.**

36. It is true that these principles have been laid down in the context of rules framed by the Governor under the proviso to Article 309 of the Constitution and here, we are concerned with what may be called, in the worst case, a redetermination of the sanctioned strength of teachers for aided Junior High School upon a proper reckoning done under the orders of this Court. If this then is the state of affairs, appointments validly made according to the understanding of the relevant rules at the time when the petitioner was appointed, including the sanctioned strength, cannot be tested for its validity according to the understanding of those rules or the determination of the sanctioned strength made years later after the petitioner has already been appointed.

37. The mere fact that salary has not been paid is not an index of the fact that the appointment has not been validly made; rather, it shows a deeply perpetuated illegality, where two orders of the Competent Authority, entitled to approve an appointment and bind the State exchequer under the Service Rules, has been observed in breach with non-payment of the petitioner's salary.

38. In the passing, this Court may say that the order of this Court dated 07.08.2010 passed in Writ A No. 45051 of 2010, Achhe Lal Mishra v. State of U.P. and others, is hardly an order that actually determines anything for the sanctioned strength of teachers in a Junior High School. It is just an interlocutory order and it is dated 17.08.2010. The order dated

17.08.2010, passed in Writ A No. 45051 of 2010, reads:

"Today, Secretary, Basic Education, Government of Uttar Pradesh, Sri Anil Sant is present in Court and he has filed affidavit, which is accepted and taken on record.

In the affidavit so filed, it has been stated that the deponent has recently taken over charge of the post in question, and has further mentioned that detailed affidavit will be filed if so required by this Court.

In the facts of the case, it is hereby directed that full details be furnished, with regard to sanctioned posts of teachers, actual number of teachers functioning in recognised and aided Institutions, in respect of district Jaunpur, and the number of teachers who are functioning under the orders of this Court.

List this case after six weeks, showing the name of Sri K.S.Kushwaha, Advocate, for respondents."

39. The aforesaid writ petition is still pending, and there are no further orders of the kind which may be said to hold that four posts of Assistant Teacher alone would be there in a Junior High School. There are decisions, no doubt, of this Court speaking on the strength of Government Orders prescribing the sanctioned strength issued much later in the day, but, as said earlier, those later determinations of sanctioned strength cannot be carried back into history, to judge the validity of appointments made decades earlier, where incumbents have been validly appointed to the position of an Assistant Teacher in a Junior High School, like the petitioner. There is no reason or material to show that the apparently valid appointment to the post of an Assistant Teacher in the Institution, made in favour of the petitioner, does not entitle him to receive salary. There is also e*vide*nce that he has constantly taught throughout his tenure.

40. In the opinion of this Court, the petitioner is, therefore, entitled to payment of his salary under the Act of 1978, determined in accordance with the rules, for the entire period of time that the petitioner has been serving.

41. In the result, this petition **succeeds** and shall stand **allowed** with costs. The petitioner is entitled to receive salary as an Assistant Teacher with the Institution from the date of his appointment, together with all its revisions, increments and accretions, by whatever name called, all to be paid to the petitioner within a period of two months from the date of receipt of a copy of this judgment by the District Basic Education Officer, Jaunpur. The petitioner shall also be paid his current salary, month by month, like any other Assistant Teacher.

42. Let this order be communicated to the District Basic Education Officer, Jaunpur by the Registrar (Compliance).

(2024) 2 ILRA 326
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023
BEFORE
THE HON'BLE J.J. MUNIR, J.

Writ A No. 67182 of 2014

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

Counsel for the Petitioner:
Sri Amar Nath Tiwari, Sri Ramendra Nath Tiwari

Counsel for the Respondents:
C.S.C.

A. Service Law – UP Recruitment to Services (Determination of Date of Birth) Rules, 1974 – Rule 2 – Date of birth,

change therein – Petitioner was appointed as Sweeper and being illiterate, she was medically examined and on the basis of Medical Certificate issued by CMO, her DoB was mentioned as 18.01.1963 in Service Record in 1983 – However, her DoB was advanced to 18.01.1956 in 1995 – Validity challenged – Held, the change, whatever be the basis, is clearly one in teeth of Rule 2 of the Rules of 1974. Once the petitioner's age was recorded at the time of her entry into service as 18.01.1963, there is no scope for effecting a change, either at the instance of the petitioner or the respondents, as she had not passed her High School or equivalent examination before entry into government service. (Para 16)

B. Service law – Constitution of India – Article 14 – Principle of natural justice – No opportunity of hearing was given before altering date of birth – Effect – Held, the principle that before the employer moves to alter the recorded date of birth of an employee to his/ her prejudice, they must hear the employee – Shankar Lal's case relied upon. (Para 20 and 21)

Writ petition allowed. (E-1)

List of Cases Cited :-

1. Subhash Chand Vs St. of U.P. & ors.; 2023 (2) AWC 1219

2. Nagar Palika Parishad, Kairana Vs Subhash Chand & ors.; 2023:AHC:93646-DB.

3. Shankar Lal Vs Hindustan Copper Limited & ors.; (2022) 6 SCC 211

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

1. This writ petition is directed against an order dated 07.07.1995 passed by the Chief Superintendent, Women Hospital, Varanasi altering the petitioner's date of birth from that recorded in her service-book to 18.01.1956. The one originally recorded is 18.01.1963. Also, under challenge is an order dated 05.09.2014 passed by the Chief Medical Superintendent, Government Women Hospital, Varanasi, affirming the fact that the petitioner's date of birth, according to the medical certificate issued by the Chief Medical Officer, Varanasi and recorded in her service-book is 18.01.1956. Thus, by the orders impugned, the respondents have advanced the petitioner's date of birth, originally recorded in her service-book, by as much as seven years hastening her superannuation.

2. The petitioner says that she hails from the caste known as *Valmiki* (a Scheduled Caste). She is illiterate and can barely sign her name in a clumsy hand. An advertisement was issued by the Chief Medical Officer, Varanasi for recruitment of sweepers at the Government Hospital, Varanasi. No educational qualifications were prescribed for the said post. The petitioner, being qualified for the post of a sweeper, applied along with others. She was appointed by the Chief Medical Officer last mentioned on 31.08.1982 and posted as a sweepress at the Women Hospital, Varanasi under the administrative control of the Chief Medical Superintendent, Government Women Hospital, Kabir Chauraha, Varanasi. The petitioner was medically examined on 18.01.1983 for ascertaining her correct age. The Chief Medical Officer, Varanasi issued a certificate, estimating the petitioner's age as 27 years on the date of her appointment. The estimation was made by the Chief Medical Officer on 18.01.1983 on a casual determination, without an ossification test. Nevertheless, in the absence of any record of the petitioner's age, such as her educational certificate or a Nagar Panchayat record, it was entered in her

service-book, fixing for her date of birth, the date 18.01.1963. This determination of age was apparently made, accepting the petitioner's assertion about it and not the Chief Medical Officer's estimation of her age carried in his certificate dated 18.01.1963, which was considered but not accepted.

3. Much later, the same issue arose relating to certain sweepers with regard to their age, which did not concern the petitioner. Those sweepers said that their date of birth in the service record was not correctly recorded.

4. It is the petitioner's case that after consultation with the Chief Medical Officer, Varanasi, it was decided that the date of birth mentioned in the service-book should be treated as correct, and, accordingly, the report of all the sweepers working under the control of the Chief Medical Superintendent, Government Women Hospital, Varanasi, was circulated by respondent No.4 on 07.07.1995. Surprisingly, the petitioner's name figured at Sr. No.9, but in the letter dated 07.07.1995 issued by the Chief Medical Superintendent, Government Women Hospital, Varanasi, her date of birth was mentioned in column No.6 as 08.01.1963. In column No.4, the year was mentioned as 1963. There is a case that some unknown person attempted to change the petitioner's date of birth from 1963 to 1956, which does not bear anyone's signatures. Thus, the actual date of birth of the petitioner was changed from 1963 to 1956 without her knowledge, consent and without affording her an opportunity of being heard. It is also said that no scientific method, like an ossification test was adopted to alter the petitioner's date of birth by dint of the order dated 07.07.1995.

5. The petitioner has come up with a case that she thought that the change notified by the order dated 07.07.1995 was the result of interpolation, because on 17.06.1998, she was put up for a fresh medical examination and her age was estimated by the Medical Superintendent as 35 years. The petitioner has pleaded a case of forgery in her service-book changing her date of birth from 18.01.1963 to 18.01.1956. By her pleadings in the writ petition, it is asserted that she was not precisely aware of the terms of the order dated 07.07.1995, authorizing the change of its contents, being an illiterate person. She came to know of the fact that there was a change of her date of birth in her service-book by word of mouth in the month of April, 2014 and requested the Chief Medical Superintendent, Government Women Hospital, Varanasi for the provision of a copy of her service-book. The officer remained elusive. The petitioner was persistent. She was supplied a photostat copy of her service-book, on the basis of which, she found that her date of birth was wrongly mentioned as 27 years there instead of 20 years on the date of her appointment. She submitted a complaint, on 30.08.2014, in this regard to the Chief Medical Superintendent, Government Women Hospital, Varanasi to enter her actual date of birth, that was there in her service-book at the time of appointment and confirmation. Representations made by the petitioner herself and on her behalf by the U.P. Safai Mazdoor Sangh led to no result.

6. It is the petitioner's case that since the date of her appointment in service, her date of birth in the service-book was recorded as 08.01.1963, which was changed by dint of the order dated 07.07.1995 without hearing her. The

change was made on the basis of a medical certificate, also based on the petitioner's general appearance and without doing an ossification test. The petitioner has pleaded that in view of the Uttar Pradesh Recruitment to Services (Determination of Date of Birth) Rules, 1974 (for short, 'the Rules of 1974'), the date of birth of a non-matriculate shall be regarded as the one that is recorded in his/ her service-book at the time of entry into service for all purposes, including superannuation. There can be no change to it, later on.

7. The petitioner's case about the nature and contents of the order dated 07.07.1995 and the basis of the impugned change to her date of birth in the service-book appears to be a bit mixed up and incorrect about the description of the relative record. Nevertheless, the thrust of the case is that the petitioner's date of birth recorded at the time of her entry into service was changed after 12 years, based on mere medical opinion. As would presently be seen, the change was not based on any fresh medical opinion sought, but the same certificate that was issued by the Chief Medical Officer in the year 1983, after considering which, years earlier the petitioner's age was recorded in her service-book as 08.01.1963.

8. In the counter affidavit filed by respondent No.4, that is to say, the Chief Medical Superintendent, Government Women Hospital, Varanasi, it is stated that the petitioner's date of birth was not interpolated in her service-book, changing it from 18.01.1963 to 18.01.1956. The aforesaid date of birth was recorded according to the certificate/ opinion given by the Chief Medical Officer, Varanasi. It is asserted that the Chief Medical Officer, Varanasi fixed the petitioner's age at 27 years. It is asserted in Paragraph No.8 that after expiry of the petitioner's period of probation, the petitioner's service-book was prepared and in the age column, her age was filled up as 27 years on the basis of the Chief Medical Officer's opinion, which is final. It is asserted that there is no overwriting or interpolation in the petitioner's service-book, a fact she has pleaded throughout the petition.

9. In Paragraph No.4 of the rejoinder affidavit, it is asserted that the petitioner was appointed in the year 1982 and at that time, based on her medical examination, her age was estimated as 20 years. The fact that it was estimated as 20 years at the time of her entry into service is evident from a perusal of the medical certificate dated 18.01.1983, annexed as Annexure No.2 to the writ petition. It is also averred that in her service-book, her age was mentioned as 20 years as well, when appointed. There is also a traverse of the case that the petitioner's date of birth recorded by the CMO, Varanasi was 18.01.1956, because that was not the age mentioned in her medical certificate dated 18.01.1983, when she entered service. It was not this age, that was entered at the time of her appointment.

10. There are other pleas raised, which need not be recorded for all that they say.

11. Heard Mr. Amar Nath Tiwari, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing on behalf of the respondents.

12. Looking to the allegations about interpolation in the petitioner's date of birth and the very important fact as to what was the petitioner's date of birth recorded

initially, that is to say, at the time of her entry into service, this Court summoned the petitioner's service-book in original. A perusal of the service-book rules out any case of interpolation. At the same time, it is true that the petitioner's date of birth entered in her service-book at the time of entry in service is 18.01.1963, which is also written in figures. The basis of this entry is shown to be CMO's Letter No.19/82-83 dated 18.01.1983. The certificate dated 18.01.1983 by the CMO is based on the petitioner's general appearance and bodily development, with the CMO expressing an opinion based on impression. The certificate shows that the petitioner claimed herself to be 20 years, but the CMO by an ipse dixit of his, going by general appearance, thought that the petitioner was aged 27 years. Nevertheless, the petitioner's date of birth was entered by the respondents cognizant of this certificate dated 18.01.1983 as '18.01.1963' on 06.05.1983, that is to say, at the time of her entry in service. The CMO's certificate dated 18.01.1983 is no proof of the petitioner's age; it is not even based on an ossification test. It is merely an opinion of the doctor based on general appearance. In the absence of supporting medical basis for the estimation, it is of no worth or value. All that matters is that when the petitioner entered into service, the respondents, cognizant of the Chief Medical Officer's Certificate dated 18.01.1963, estimated or acknowledged her to be 20 years old, and, therefore, recorded her date of birth as 18.01.1963; not 18.01.1956.

13. A further perusal of the service-book shows that the petitioner's date of birth originally recorded in words and figures, has all been scored off in blue ink and an order in red ink entered at the top of the page, authorizing the petitioner's date of birth to be changed. This order is one indicated to be passed by the Chief Medical Superintendent, Government Women Hospital, Varanasi and bears Order No.55/95-96 dated 07.07.1995. There is a pointer arrow in blue ink, where, after scoring out the original date of birth recorded in the service-book, that is to say, 18.01.1963, the amended date of birth recorded is 18.01.1956, both in figures and words. This Court, therefore, finds that there is absolutely no case of an interpolation or forgery. At the same time, we find that the petitioner's date of birth originally recorded at the time of her entry into service has indeed been changed by dint of the impugned order dated 07.07.1995 from 18.01.1963 to 18.01.1956.

14. Now, the question is whether it is open to the respondents to change the petitioner's date of birth once recorded in her service-book given the fact that the petitioner is neither a matriculate nor the holder of an equivalent educational certificate. The Rules of 1974 have been made by the Governor under the proviso to Article 309 of the Constitution. Rules 2 and 3 of the Rules of 1974 read:

"2. Determination of correct date of birth or age.– The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination, or where Government Servant has not passed any such examination as aforesaid, the date of birth or the age recorded in his service book at the time of his entry into Government service, shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation to his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits, and no application or

representation shall be entertained for correction of such date or age in any circumstances whatsoever.

3. Overriding effect.–These rules shall have effect, notwithstanding anything contrary contained in the relevant service rules or orders."

15. In this case, there is no dispute about the fact that the petitioner is an illiterate woman. She holds no educational qualifications. She has certainly not passed her High School or an equivalent examination. Therefore, her date of birth, recorded in the service-book at the time of entry into service, shall be deemed to be her correct date of birth, for all purposes, including superannuation. The petitioner's date of birth recorded at the time of her entry into service was clearly 18.01.1963. Since the medical certificate dated 18.01.1983, on the basis of which the petitioner's date of birth was entered as 18.01.1963, had opined the petitioner to be about 27 years old as against the 20 years, claimed by her, the Chief Medical Superintendent, Government Women Hospital, Varanasi, after a conversation in this regard and directions issued to him on 27.06.1995 by the Regional Additional Director, passed the order impugned dated 07.07.1995, changing the petitioner's date of birth, according to the medical certificate issued by the Chief Medical Officer, Varanasi, that is to say, the one dated 18.01.1983. It is by dint of that certificate and the estimation of the petitioner's age there as 27 years that the petitioner's date of birth has now been changed to 18.01.1956 from 18.01.1963.

16. This change, whatever be the basis, is clearly one in teeth of Rule 2 of the Rules of 1974. Once the petitioner's age was recorded at the time of her entry into service as 18.01.1963, there is no scope for effecting a change, either at the instance of the petitioner or the respondents, as she had not passed her High School or equivalent examination before entry into government service. I had occasion to consider this issue in **Subhash Chand v. State of U.P. and others, 2023 (2) AWC 1219**, where it was held:

"12. Apparently, the first amendment does not apply to the petitioner's case because he never passed his High School either before or during service. When the petitioner entered service, he was not a matriculate and had not passed his High School or an equivalent examination. A perusal of Rule 2 of the Rules of 1974 makes it pellucid that all that is relevant for the purpose of recording a government servant's date of birth is his High School Certificate or a certificate of an equivalent examination and in a case, where the government servant has not passed any such examination, the date of birth or age recorded in his service-book at the time of entry into service shall be deemed to be correct. A perusal of the Rules of 1974 would show that any certificate from an educational institutions below the Grade of High School is not at all relevant to determine a government servant's age. It is perhaps for this reason that when the petitioner appeared before the Appointing Authority at the time of appointment, and as he says, produced his transfer certificate, he was directed to appear for his medical examination before the Chief Medical Officer. Apparently, when any school certification below the High School or an equivalent examination is not relevant to determine the employee's age, the Appointing Authority would not have looked into a transfer certificate relating to Class VII. These are

circumstances which show that what the petitioner asserts is correct. Even if it was incorrect, the transfer certificate relating to Class VII is not at all relevant to determine the petitioner's age. Now, what remains relevant about the petitioner's age is the entry at the time of his appointment recorded in the service-book and nothing else. The said entry is immutable and cannot be imperilled by sundry complaints from busy bodies, or may be sworn enemies. A government servant's age of retirement cannot be subjected to perpetual uncertainty on account of disgruntled complainants questioning his date of birth and laying complaints to the Appointing Authority, saying that the government servant's recorded date of birth in the service record is incorrect. If that were permitted, it would introduce a pernicious uncertainty about the tenure of government servants and much affect their efficiency.

13. Quite apart, Rule 3 of Rules of 1974 indicate that the said Rule gives the 1974 Rules overriding effect over any other service rules or orders. Therefore, what Rule 2 provides has to be given its fullest effect. The result is that the petitioner's date of birth recorded in his service-book cannot be questioned. It cannot be questioned by the petitioner; and likewise, it cannot be questioned by the employers as well. This Court, therefore, is of opinion that the impugned order dated 03.10.2022 is manifestly illegal and without jurisdiction."

17. It has been brought to the notice of this Court that the decision in **Subhash Chand** *(supra)* has been set aside on appeal by the Division Bench in **Nagar Palika Parishad, Kairana v. Subhash Chand and 3 others, Neutral Citation No.-2023:AHC:93646-DB.** The following remarks of their Lordships of the Division Bench are relevant:

"From perusal of the resolution of the Board, Nagar Palika Parishad, it is evident that an exception has been taken to the action of the writ petitioner in not producing the transfer certificate of Class VII at the time of entry into service in the year 1991. It was opined that the petitioner had conveniently concealed his correct date of birth by projecting him an illiterate person at the time of entry into service whereas for promotion to the Safai Nayak, the transfer certificate was produced in the year 2003 to seek benfit of the minimum eligibility criteria of Class V pass, for promotion to the said post.

The copy of the transfer certificate filed by the petitioner has appended at page No.'17' of the supplementary affidavit filed by the counsel for the appellant. Placing the said certificate before us, it is demonstrated that the petitioner had concealed the material information with regard to his correct age at the time of entry into service and the assessment of his age by the medical experts cannot override the entry of the date of birth in the transfer certificate produced by the petitioner himself for the purposes of promotion.

Having gone through the transfer certificate appended at page No.'17' of the paper book, we find that the said certificate was issued on 21.01.1984/17.08.1990 and it bears the seal and signature of the Principal of the institution concerned having the date as 17.08.1990. It is, thus, evident that the transfer certificate was with the petitioner at the time of joining on the post of Safai Karmi in the Nagar Palika Parishad on 04.12.1991. It seems that the petitioner had deliberately concealed the said document in order to give an impression that he was illiterate and that was the reason for

assessment of his age by the medical expert.

In any case, the date of birth of the petitioner in the transfer certificate produced by him for the purpose of promotion is the proof of his age which cannot be disputed by the petitioner. The entry of the date of birth in the transfer certificate would definitely prevail over the assessment of the medical expert, in as much as, the assessment of age through medical examination was merely an opinion of the expert.

At this stage, the learned counsel for the respondent No.1/writ petitioner submits that similar complaint was filed in the year 2010 by some person which was turned down by the authority itself with the assertion that the entry of date of birth in the service record was final and it could not be changed for any reason.

We do not find any substance in the submission of the learned counsel for the respondent. Having noted the above facts, we are of the opinion that once the petitioner availed the benefit of the transfer certificate of having fulfilled the minimum eligibility criteria for promotion to the post of Safai Nayak, he cannot be allowed to turn around to assert that he is entitled to continue in service beyond the age of superannuation as per the entry of his date of birth in the said certificate, to seek benefit of the entry of his date of birth in the service record based on the medical opinion.

The submission of the learned counsel for the writ petitioner that the petitioner is entitled to continue in service as per the entry of his age/date of birth in service record, therefore, is turned down. The stand of the appellant that the petitioner is not entitled to continue in service beyond the date of superannuation which is to be determined as per his date of birth as 07.01.1961 recorded in the transfer certificate is found force.

With due respect to the learned Single Judge, we find that an error has been committed in holding that the writ petitioner herein is entitled to continue in service as per the entry of his date of birth in the service record. The judgement and order dated 10.01.2023 is hereby set aside."

18. It appears that the judgment in **Subhash Chand** was set aside by their Lordships, going by the fact that the petitioner in that case had claimed promotion to the post of a Safai Nayak, where the essential qualification was a Class-V certificate. In order to seek promotion, he had relied on a transfer certificate of Class-VII, which he did not produce at the time of entry into service, as their Lordships held. He, according to the Division Bench, concealed his correct date of birth by projecting himself to be an illiterate. Going by a plain reading of the provisions of Rule 2 of the Rules of 1974, nothing is relevant to determine the age of a person, who has not passed his High School examination or an equivalent, except the date of birth entered at the time of entry into government service, whatever be the basis for that entry.

19. The mandate of Rule 2 of the Rules of 1974 admits of no other interpretation except that all certificates of education below that of the High School or an equivalent are irrelevant for the determination of a person's age. With great respect to their Lordships of the Division Bench, this Court finds that there is no reference to the provisions of Rule 2 of the Rules of 1974 in the decision of the Division Bench in **Nagar Palika Parishad, Kairana v. Subhash Chand** *(supra)*. If there were, on facts, a case here that the

petitioner's date of birth was altered on the basis of a Class-V or Class-VII certificate, going against the originally recorded date of birth at the time of entry into government service relating to the petitioner, this Court, with utmost respect, would have had no hesitation in referring the issue for consideration by a larger Bench, as the Bench decision clearly ignores the mandatory provisions of Rule 2 of the Rules of 1974 in this Court's opinion. But, that course of action may not be necessitated at all in this case, because the petitioner here is an abject illiterate, as already noted. Therefore, the consideration that prevailed with their Lordships of the Division Bench in **Nagar Palika Parishad, Kairana v. Subhash Chand**, the employee in that case having passed his Class-VII examination, held a certification thereof, which mentioned his age different from that mentioned in his service-book, and above all, had taken advantage of his qualification in seeking promotion to a higher post, does not apply here at all. The Bench decision in **Nagar Palika Parishad, Kairana v. Subhash Chand**, therefore, would not at all affect the rights of the petitioner here, founded on Rule 2 of the Rules of 1974. The petitioner's date of birth, as recorded at the time of entry into service, is the only date which would govern all her rights in respect of superannuation, including eligibility for promotion, premature retirement or retirement benefits. No other date would be relevant. That date can never be changed or altered. It is, accordingly, held. For the said reasons, the impugned orders dated 07.07.1995 and 15.09.2014 are manifestly illegal.

20. There are added reasons why the impugned orders are bad. The foremost is that the petitioner's date of birth originally recorded in her service-book at the time of entry in service in the year 1982, remained so recorded until the year 1995, when the order dated 07.07.1995 was passed, directing its alteration. The order dated 07.07.1995 was passed, based on some kind of a conversation on 27.06.1995 between some functionary, described as the Regional Additional Director and the Chief Medical Superintendent, Government Women Hospital, Varanasi, without hearing the petitioner in the slightest measure. The impugned orders, which visit the petitioner with adverse civil consequences, have been passed behind her back, without provision of any opportunity of hearing. On this short ground alone, the impugned orders are bad in law.

21. The principle, that before the employer moves to alter the recorded date of birth of an employee to his/ her prejudice, they must hear the employee concerned about it, has the imprimatur of the Supreme Court in **Shankar Lal v. Hindustan Copper Limited and others, (2022) 6 SCC 211**, where it has been held:

"27. We find the action of the employer lacking in authority of law in this case on two counts. First, it fails for not adhering to the principles of natural justice. The decision not to follow the service book recordal was taken without giving an opportunity of hearing to the appellant. The opportunity of hearing of the appellant also accrued because the employer themselves had proceeded on the basis that the later date i.e. 21-9-1949 was the birthdate of the appellant and this was a long established position. Moreover, since in the own records of the employer two dates were shown, under normal circumstances it would have been incumbent on their part to undertake an exercise on application of mind to determine in which of these two

records the mistake had crept in. That process would also have had to involve participation of the appellant, which would have been compatible with the principles of natural justice."

22. The added reason, which would persuade this Court to think that the respondents' action in altering the petitioner's date of birth recorded at the time of her entry into service is utterly bad in law, is the fact that the decision is based on the Chief Medical Officer's certificate dated 18.01.1983, which proceeds to opine the petitioner as 27 years old on the basis of her general appearance. The certification by the Chief Medical Officer is not founded on any scientific test like ossification. It is merely an opinion. Matters get worse for the respondents here, because this certificate was before them in the year 1983, shortly after the petitioner entered into service, and yet, they chose to enter the petitioner's date birth as 18.01.1963, contrary to the Chief Medical Officer's estimation. What made them to rethink their decision after 12 years, quite apart from the embargo in Rule 2 of the Rules of 1974, is itself a fact, which might have required more explanation to be carried in the impugned order than just a conversation between the Regional Additional Director and the Chief Medical Superintendent, Government Women Hospital, Varanasi, that is mentioned there.

23. The petitioner's case, based on the medical certificate of 1998 is more of an ill-found apprehension that her date of birth was changed, which she calls an interpolation, because she was put up for fresh medical test on 17.06.1998 and a certificate of that date issued, certifying her to be 35 years old by the Medical Superintendent. The said certificate is irrelevant, because it does not figure as the basis of the respondents' decision even in the impugned order dated 15.09.2014. The order dated 15.09.2014 also refers to the age determination certificate issued by the Chief Medical Officer, Varanasi, which is the same certificate dated 18.01.1983, that was issued when the petitioner entered service. The other order impugned dated 07.07.1995, as a direct consequence of which the petitioner's date of birth was altered in her service-book, cannot possibly be based on a subsequent medical certificate dated 17.06.1998 issued by the Medical Superintendent.

24. In the result, this petition succeeds and is **allowed with costs**. The impugned orders dated 07.07.1995 and 15.09.2014, both passed by the Chief Medical Superintendent, Government Women Hospital, Varanasi, are hereby **quashed**. The petitioner, having superannuated, will not be reinstated in service, but shall be entitled to all consequential benefits, including the payment of arrears of her salary and the revision of post retiral benefits, which the respondents shall determine and pay w**ithin six weeks** of the date of receipt of a copy of this judgment.

25. Let the original service-book of the petitioner be returned to Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel for its onward and safe transmission to the respondents.

(2024) 2 ILRA 335
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.01.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.

Writ B No. 2 of 2022

Sunita Mishra ...Petitioner
Versus
Board of Revenue, UP at Lucknow & Ors. ...Respondents

Counsel for the Petitioner:

Ashish Chaturvedi, Manish Mani Sharma

Counsel for the Respondents:
C.S.C., Alok Saxena, Amit Srivastava, C.S.C., Dr. V.K.

A. Revenue Law – UP Zamindari Abolition and Land Reform Act, 1950 – Section 143 – UP Revenue Code, 2006 – S. 80 – Change in the nature of land as non-agricultural land – Consequences – How it effect the mode of devolution – Held, for such land, the devolution as provided in the said Act of 1950 is not applicable and the succession and devolution would be governed by the personal law of such bhumidhar. (Para 35)

B. Revenue law – UP Zamindari Abolition and Land Reform Act, 1950 – 143 – UP Revenue Code, 2006 – Ss. 80, 81 and 83 – Declaration of land as non-agricultural land – Effect on jurisdiction of Tehsildar – Held, upon declaration of land as non-agricultural , the Tehsildar would not loose jurisdiction to entertain an application for mutation or record any change in respect of such land. On the contrary, any change either by transfer, succession or change in the status of the land is to be recorded in the record of rights. The Collector is the custodian of all revenue records and all such records are to be kept updated from time to time. (Para 47)

C. Revenue Law – National Highway Act, 1956 – Sections 3-A & 3-G (5) (6) – Notification of acquisition was issued – Consequence – How far it adversely effect on the mutation power of Tehsildar – Held, none of the provisions of the NH Act 1956 indicate that the power of the Tehsildar or the Collector are in any manner abridged or curtailed to deal with mutation proceedings or maintenance of revenue records. Both the NH Act of 1956 and the Land Revenue Act, 1901 and now the U.P. Revenue Code, 2006 operate in different spheres and one does not overlap with the other or create any conflict. Thus, to St. that upon issuance of notification under Section 3-A of the NH Act of 1956, the jurisdiction of Tehsildar or the Revenue Court is curtailed is not correct. (Para 51)

D. Revenue Law – Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 – S. 13(2) – Mutation proceeding – Nature – Effect on the rights of parties – Auction was held and sale certificate was issued – Mutation order was passed on the basis of sale-certificate, which has not been set aside by the competent court – Effect – How far mutation order affect the rights of parties – Held, core issue before this Court is to test the validity of the mutation order passed in summary proceedings, hence, keeping this in mind, this Court will refrain from giving any categoric finding lest it may affect the rights of the parties as they are litigating in different forums and courts – The mutation order is an order in summary proceedings and would be subject to the orders passed by the regular Forum which would bind the parties. (Para 60, 61 and 69)

Writ petition dismissed. (E-1)

<u>List of cases cited :-</u>

1. Writ C No. 12986 of 2018; Shiv Chander Devi & anr.Vs Commissioner, Varanasi Division & ors. decided on 10.04.2018

2. Ram Bhajan & ors.Vs Deputy Director of Consolidation, Allahabad & anr.; 2001 (19) LCD 906

3. Shiv Kumar Vs U.O.I.; AIR 2019 SC 5374

4. Ajay Kumar Srivastava Vs U.O.I. & ors.; 2020:AHC-LKO:87642-DB

5. Rana Sheo Ambar Singh Vs The Allahabad Bank Ltd., Allahabad; AIR 1961 SC 1790

6. Shakeena & ors.Vs Bank of India & ors.; 2020 (144) ALR 288

7. Smt. Fatma Kubra Vs Additional Commissioner (Administration, Ayodhya Mandal, Ayodhya & ors.; 2022 (6) ADJ 68 (LB)

8. Jitendra Singh Vs St. of M. P. & ors.; 2021 SCC Online SC 802

9. Writ B No. 295 of 2022; Smt. Kalawati Vs Board of Revenue & ors. decided on 05.04.2022

10. Writ C No. 10958 of 2018; Vipin Agrawal Vs U.O.I.decided on 27.03.2018

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The petitioner has approached this Court assailing the order dated 27.09.2021 passed by the Board of Revenue in Revision No. 229 of 2020 whereby the revision of the private respondent no. 2 was allowed and the order dated 23.12.2019 passed by the Additional Commissioner was set aside, as a consequence, the mutation order passed in favour of the private respondents no. 2 dated 20.06.2018 has been affirmed.

2. The matter at hand has a chequered history, accordingly, it will be appropriate to take a glance at the facts giving rise to the instant petition first:-

3. The dispute in question relates to Plot No. 470M measuring 0.0693 hectares situate in Balia Shahbadi, Pargana Haweli Awadh, Tehsil-Sadar, District Faizabad.

4. It is the case of the petitioner that the said property was purchased in part by means of a registered sale deed dated 10.08.2000 and later the petitioner again purchased some more part of Plot No. 470M measuring 0.0438 hectares on 01.07.2006. The petitioner also got the said land declared as non-agricultural by means of order dated 27.11.2012.

5. The petitioner thereafter for the purposes of expanding her business under the name and style of M/s S.P. Foods, took a loan from Allahabad Bank, Naharbagh Branch, Faizabad. A cash credit limit was granted to the tune of Rs. 20,42,000/-, a term loan was granted for Rs. 5,00,000/- and a vehicle loan was also granted for a sum of Rs. 1,42,000/-

6. The petitioner being the proprietor of a firm M/s S.P. Foods, could not service the loan, accordingly, the Bank who had granted the credit facilities issued a notice under Section 13(2) of *The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest* Act, 2002 (hereinafter referred to as "the Act of 2002) requiring the petitioner to deposit a sum of Rs. 32,96,535/- along with interest and other expenses.

7. At this stage, the petitioner assailed the said notice by filing a writ petition before a Division Bench of this Court bearing W.P. No. 6925 (MB) of 2014 which was disposed of by means of order dated 01.08.2014. The Division Bench of this Court at the admission stage itself disposed of the petition directing the Bank-authorities to look into the matter regarding the value which was disputed by the petitioner and take appropriate decision in accordance with law.

8. In the aforesaid backdrop, while a one time settlement scheme was prevalent in the Bank, hence, the Bank informed the petitioner that in case if the petitioner wishes, she can take the benefit of the OTS scheme.

9. The record indicates that in a National Lok Adalat held on 02.12.2015, a settlement was arrived at in between the petitioner and the Bank and in terms whereof all the accounts of the petitioner was compromised for a total sum of Rs. 29,50,000/- out of which Rs. 4,00,000/- deposited by the petitioner in 'No Lien

Account' was to adjusted and the balance sum of Rs. 25,50,000/- was to be paid by the petitioner in one lump-sum by 31st March, 2016 to the Bank.

10. It is also the case of the petitioner that the remaining sum of Rs. 25,50,000/- could not be paid by 31st March, 2016, however, the petitioner further alleges that there was a further settlement in terms whereof the petitioner was required to deposit the outstanding sum uptil 30th September, 2016.

11. It is the case of the petitioner that the said subsequent proceedings/negotiations which had taken place with the Bank was through one Sri Rahul Rai who was a representative of Asset Recovery Management Branch of the said Bank. As per the said arrangement, Sri Rahul Rai was to arrange for a purchaser and the property would be sold for a sum of Rs. 55,00,000/- and after adjusting the outstanding sum of the Bank, the remaining would be paid to the petitioner, however, this alleged arrangement did not materialize and being aggrieved the petitioner preferred a suit before the Civil Judge, Senior Division, Faizabad bearing Regular Suit No. 217 of 2017 wherein a decree of declaration and injunction was sought.

12. It is also alleged by the petitioner that there was a collusion and conspiracy between private respondent no. 2 and the Bank-officials. In the meantime, the account of the petitioner continued to be treated as a non-performing asset and the Bank proceeded to sell the property in question, which was a secured asset, through public auction.

13. The petitioner uptil this stage did not challenge the auction proceedings nor the sale deed executed by the Bank in favour of the private respondent no. 2. In the aforesaid backdrop, the private respondent no. 2 on the strength of the sale deed executed by the Bank in respect of the disputed property sought his mutation which came to be allowed on 20th June, 2018.

14. Simultaneously, while these proceedings were going on, the National Highway Authority of India also issued a notification under Section 3-A of the National Highway Act, 1956 (hereinafter referred to as the act of 1956) on 11.08.2017 and the notification under Section 3-D of the Act of 1956 was issued on 03.08.2018.

15. It is at this stage that the petitioner assailed the mutation order by filing a revision. The revision of the petitioner was allowed by the Additional Commissioner (Administration) Ayodhya by means of order dated 23.12.2019 and it set aside the order dated 20th June, 2018 and 26th June, 2018 and remanded the matter to the Court of Tehsildar to decide the matter afresh. This order of remand was assailed by the private respondent no. 2 in a revision before the Board of Revenue which has been allowed against which the petitioner has approached this Court.

16. From the perusal of the aforesaid narration, it would be clear that the disputed land in question was recorded in the name of the petitioner and as she had taken a loan which she could not repay, as a result, the Bank had initiated proceedings under the Act of 2002 and in pursuance thereof the property in question came to be sold in an auction, under the Act of 2002, in favour of the private respondent no. 2who

also got his name mutated in the revenue records.

17. In the aforesaid context, since the name of the private respondent no. 2 was recorded in the revenue records, the petitioner assailed the mutation order also for the reason that the National Highway Authority had acquired the land for widening of the Highway and as the name of the private respondent no. 2 continued to be recorded in the revenue records, he would be entitled to take the compensation. For the aforesaid reasons, the petitioner assailed the order for mutation and at this stage also filed an application under Section 17 of the Act of 2002 along with an application under Section 5 of the Limitation Act, 1963 assailing the proceedings under the Act of 2002, which culminated in the sale deed in favour of the private respondent no. 2.

18. Sri Manish Mani Sharma, learned counsel for the petitioner while attacking the impugned order has structured his submissions as under:-

(i) He submits that once the notification under Section 3-A was issued under the National Highway Act, 1956, the Tehsildar in such circumstances had no power or jurisdiction to continue or entertain any mutation request in respect of such land which stood acquired under the Act of 1956;

(ii) It is also submitted that once the aforesaid land in question had been declared as non-agricultural in the year 2012, accordingly, the Tehsildar would lose jurisdiction over the property as the said property becomes Abadi and there can be no mutation proceedings in respect thereto, thus, the mutation of the private respondent no. 2 was wholly without jurisdiction.

(iii) It was also urged that the Lower Revisional Court i.e. the court of Additional Commissioner had merely allowed the revision and remanded the matter to be considered afresh by the Tehsildar and this being an interlocutory order, as well as, an order by which no rights of either of the parties were decided, consequently, there was neither any jurisdictional error nor any error of law on account of which the Board of Revenue could have entertained the revision of the private respondent no. 2 and as such the impugned order passed by the Board of Revenue also falls foul for the aforesaid reason.

(iv) It is also urged that in terms of the provisions contained in the National Highway Act, 1956, once the land of the petitioner was acquired, then the property vested with the State and the Bank was not justified in holding the auction. The only option available with the Bank was to have waited for the disbursal of the compensation and out of the compensation so awarded the outstanding sum of the Bank could have been appropriated and the remaining could have been paid to the petitioner but in no case the auction could take place and thus the proceedings are bad. The Authorities have not taken note of the aforesaid submissions, hence, the mutation order for the aforesaid reasons is without jurisdiction, accordingly, it is liable to be set aside after allowing the petition.

19. Sri Sharma, learned counsel for the petitioner has relied upon a decision of a coordinate Bench of this Court in ***Writ- C No. 12986 of 2018 (Shiv Chander Devi and Another Vs. Commissioner, Varanasi Division and three others)*** decided on ***10.04.2018; Ram Bhajan and Others Vs. Deputy Director of Consolidation, Allahabad and Another 2001 (19) LCD***

906; Shiv Kumar Vs. Union of India AIR 2019 SC 5374, Ajay Kumar Srivastava Vs. Union of India and three others 2020:AHC-LKO:87642-DB, Rana Sheo Ambar Singh Vs. The Allahabad Bank Ltd., Allahabad: AIR 1961 SC 1790.

20. The learned Standing Counsel for the State-respondents has submitted that a mutation order does not decide any right, title or interest of any party finally and thus an order of mutation being an outcome of summary proceedings is not liable to be assailed in a writ petition and for the said reason, it would be open for the parties to get their rights adjudicated before the regular Court or the Debts Recovery Tribunal, as the case may be, or in terms of the provisions contained in the National Highway Act but the instant petition is not maintainable.

21. Sri Alok Saxena, learned counsel for the Bank has submitted that the petitioner had taken a loan which she could not repay and the Bank had already initiated proceedings by issuing notice under Section 13(2) of the Act of 2002. The Bank had also taken possession in terms of notice under Section 13 (4) of the Act of 2002 and since the petitioner despite approaching the court did not make any effort to pay and hence the auction was held on 24.08.2017 and a sale certificate was also issued in favour of the highest bidder and later the sale deed came to be executed on 16.03.2018.

22. It is also submitted that the petitioner has not approached the Court with clean hands, inasmuch as, she has not indicated the status of the proceedings of the civil suit filed by the petitioner herself nor filing of two other proceedings before this Court. It is also urged that the petitioner did not assail the proceeding under the Act of 2002 by moving any application under Section 17 of the Act of 2002 and had been dragging the Bank into litigation before one court to another only to delay the proceedings.

23. In the aforesaid circumstances, once the auction had taken place and the sale certificate was issued, rights had accrued in favour of the private respondent no. 2 who had acquired title and as he applied for mutation before the Competent Court which was allowed and now it cannot be said that the Tehsildar does not have the authority to pass the mutation order.

24. It is further submitted that though the petitioner in the petition has levelled allegations against certain officials of the Bank but from the perusal of the averments made in the writ petition and the corresponding annexures, it would indicate that the said documents were signed by the husband of the petitioner and even though she filed the civil suit but she did not implead her husband as a party. This only indicates the malafides since the cause of action of the alleged fraud as indicated in the suit could only be unravelled, if the husband of the petitioner was a party since he was a signatory to the alleged compromise, which is now being assailed by the petitioner.

25. Sri Saxena further urges that the provisions of Act of 2002 have an overriding effect and since the petitioner had not repaid the loan and proceedings had been initiated which were taken to its logical conclusion by the auction and issuance of sale certificate, accordingly, the order of mutation on the basis of same cannot be held to be bad.

26. Sri Saxena, learned counsel for the Bank in support of his submissions has relied upon a decision of the Apex Court in ***Shakeena and Others Vs. Bank of India and Others 2020 (144) ALR 288.***

27. Sri Amit Srivastava, learned counsel for the private respondent no. 2 submits that the private respondent no. 2 is a bona fide purchaser for value having purchased the disputed property in a public auction and the said property has vested with the private respondent no. 2.

28. The property vested with the private respondent no. 2 only when the auction became final and the Sale Certificate was issued to the respondent no. 2. It is urged that the notification under Section 3-D of the NH Act, 1956 was issued on 03.08.2018 while the Sale Certificate was already issued and the rights of the private respondent no. 2 had been crystalized by then. In the aforesaid backdrop, the petitioner got his name mutated on the basis of Sale Certificate/sale deed and thus the order of mutation cannot be held to be bad and the writ petition deserves to be *dismissed*.

29. Sri Sarvesh Dubey, learned counsel for the NHAI has submitted that the Act of 1956 envisages a complete scheme in terms whereof the land is notified and then acquired. It also provides for redressal of grievance regarding the compensation as well as who is entitled to obtain the same.

30. It is also urged that in so far as the compensation is concerned, that is the subject matter to be considered by the Competent Authority under the NHAI Act, however, the order of mutation per se does not decide the rights of any party, accordingly, the ground upon which the Additional Commissioner (Administration) had allowed the revision of the petitioner was not in consonance with law which has been set aside by the Board of Revenue and such such the same does not require any interference and the writ petition deserves to be *dismissed*.

31. Now, the stage is set to examine the arguments of the respective parties. This Court first proposes to deal with the submissions of learned counsel for the petitioner regarding the effect of declaration of the land as non-agricultural under Section 143 of the U.P.Z.A. & L.R. Act, 1950 and in such circumstances whether the Tehsildar will have jurisdiction to entertain a mutation application in respect of such non-agricultural land and also by mere declaration, the land becomes an abadi land so as to exempt such land from mutation.

32. In this regard, it will be relevant to notice certain statutory provisions. Section 143 of the U.P.Z.A. & L.R. Act, 1950 which reads as under:-

"143. Use of holding for industrial or residential purposes. - [(1) Where a [bhumidhar with transferable rights] uses his holding or part thereof for a purpose not connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming, the Assistant Collector-in-charge of the sub-division may, suo motu or on an application, after making such enquiry as may be prescribed, make a declaration to that effect.

(1-A) Where a declaration under sub-section (1) has to be made in respect of a part of the holding the Assistant Collector-in-charge of the sub-divisions

may in the manner prescribed demarcate such part for the purposes of such declaration.]

(2) Upon the grant of the declaration mentioned in sub-section (1) the provisions of this chapter (other than this section) shall cease to apply to the [bhumidhar with transferable rights] with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject.

[(3) Where a bhumidhar with transferable rights has been granted, before or after the commencement of the Uttar Pradesh Land Laws (Amendment) Act, 1978, any loan by the Uttar Pradesh Financial Corporation or by any other Corporation owned or controlled by the State Government, on the security of any land held by such bhumidhar, the provisions of this Chapter (other than this section) shall cease to apply to such bhumidhar with respect to such land and he shall thereupon be governed in the matter of devolution of the land by personal law to which he is subject.]"

33. From the bare perusal of the aforesaid provision, it would reveal that the consequence of the declaration is contained in sub Section 2 of Section 143 of the Act of 1950.

34. The import and consequence of the declaration under Section 143 of the Act of 1950 was considered by this Court in ***Smt. Fatma Kubra Vs. Additional Commissioner (Administration, Ayodhya Mandal, Ayodhya and others; 2022 (6) ADJ 68 (LB)*** and the relevant paras read as under.

"20. From the perusal of the aforesaid, it would be clear that it is only a recorded bhumidhar, who can make the said application. Moreover, from the reading of sub-section (2) of Section 143 of the U.P.Z.A. & L.R. Act it indicates the consequence of the declaration as made in sub-section (1) is that the provisions of the Chapter-VIII of the U.P.Z.A. & L.R. Act shall cease to apply to the bhumidhar with transferable rights and in respect to such land and he shall be governed in the matter of devolution of interest in the land by personal law to which he is subjected to.

21. Thus, it is clear that apparently the initiation of the provisions at the behest of the petitioner was incorrect. Moreover, she did not have a right to move an application in the first place and what is most strange that the Sub-Divisional Officer in its order dated 31.03.2006 directed that the names of the recorded tenure-holders to be deleted and the land be recorded as 'abadi' under Category 6(2). This kind of a direction in the order, in proceedings under Section 143 of the U.P.Z.A. & L.R. is not known in law. This exercise of jurisdiction by the Sub-Divisional Officer was patently erroneous and without jurisdiction."

35. Having taken a look at the aforesaid provisions, it would be clear that in so far as the consequence of declaration of land as non-agricultural under Section 143 of the Act of 1950 is provided in Sub Section (2) of Section 143 and the effect is that the mode of devolution of interest is changed and for such land, the devolution as provided in the said Act of 1950 is not applicable and the succession and devolution would be governed by the personal law of such bhumidhar.

36. At this very stage, it will be apposite to notice that after the advent of the Uttar Pradesh Revenue Code, 2006,

power to declare land as non-agricultural is provided in Section 80 of the Code of 2006. The effect of such declaration, cancellation of declaration and recording of declaration or cancellation, is contained in Section 81 to 83 of the Code of 2006. The said Sections are being reproduced hereinafter:-

"80. Use of holding for Industrial, Commercial or Residential purpose. *(1) Where a Bhumidhar with transferable rights uses his holding or part thereof, for Industrial, commercial or residential purposes, the Sub-Divisional Officer may, suo motu or on an application moved by such Bhumidhar, after making such enquiry as may be prescribed, either make a declaration that the land is being used for the purpose not connected with agriculture or reject the application. The Sub-Divisional Officer shall state the reasons in writing of such declaration or rejection and inform the applicant of this decision within forty-five working days from the date of receipt of the application:*

Provided that no such declaration under this section shall be made merely on the ground that the holding or part thereof is surrounded by boundary wall or is "Parti" on the spot:

Provided further that no application for the declaration under this sub-section moved by any co-Bhumidhar having undivided interest in bhumidhart land shall be maintainable, unless application is moved by all the co-Bhumidhars of such bhumidhart land or their interests therein are divided in accordance with provisions of law.)

(2) The application for declaration under sub section (1) shall contain such particulars and shall be made in such manner as may be prescribed.

(3) Where the application wider sub-section (1) is made in respect of a part of the holding, the Sub Divisional Officer may, in the manner presented, demarcate such part for purpose of such declaration.

(4) No declaration under this section shall be issued by the Sub Divisional Officer, if he is satisfied that the land is to be used for a purpos which is likely to cause a public nuisance of to affect adversely public prder, public health, safety or convenience of against uses proposed in the Master Plan.

(5) The State Government may fie the seule of fees for declaratine under this section and different fees may be fixed for different purposes;

Provided that if the applicant uses the holding or part thereof for his own residential purpose, no fee shall be charged for the declaration under this section.

81.Consequences of declaration. *Where a declaration has Leexi made under Section 80 the following consequences shall, in respect of such holding or part to which it relates ensue:-*

(a) all restrictions imposed by or under this chapter XI in respect of transfer of land shall cease to apply to the Bhumidhar with transferable rights;

(b) (b) Notwithstanding anything contained in chapter XI, the land shall, with effect from the commencement of the agricultural year following the date of declaration, be exempted from payment of land revenue;

(c) The bhumidhar shall, in the matter of devolution be governed by the personal

law to which he is subject.

82. Cancellation of declaration.- *(1) Whenever any holding or part thereof in respect of which a declaration has been made under section 80 is used for any purpose connected with agriculture, the*

Sub-Divisional Officer may, of his own motion or on an application made in that behalf and after making such inquiry as may be prescribed, cancel such declaration.

(2) where a declaration is cancelled under sub-section (1) the following consequences shall, in respect of the holding or part to which it relates ensue namely:

(a) the holding or part shall become subject to all restrictions imposed by or under

this chapter in matters of transfer and devolution;

(b) the holding or part shall become liable to payment of land revenue with effect from the commencement of the agriculture year in which the order for cancellation of the declaration is made:

Provided that until any land revenue is reassessed on such holding or part in accordance

with the provisions of this Code, the land revenue payable or deemed to be payable in respect of such holding or part before the grant of declaration under section 80 shall be deemed to be the land revenue payable in respect of such holding or part.

(c) where the land is in possession of any person other than the bhumidhar thereof on the basis of a contract or lease, and the terms of such contract or lease are inconsistent with the provisions of this Code, such contract or lease shall, to the extent of the inconsistency, become void and the person in possession shall be liable to ejectment on the suit of the bhumidhar:

Provided that a mortgage with possession existing on the date of the cancellation of the declaration shall, to the extent of the amount due and secured on such land, be deemed to be substituted by a simple mortgage carrying such rates of interest as may be prescribed;

***83. Recording of declaration or cancellation**—Every declaration under section 80 or cancellation under section 82 shall be recorded in record of rights in the manner as may be prescribed and even after declaration under section 80, the mutation order on the basis of transfer or succession shall be passed in the manner prescribed.*

37. Apparently, there is no provision by virtue of which the Tehsildar abdicates his right to prepare a Khatauni i.e. records of rights as provided in the Code of 2006. Moreover, the provisions of the U.P. Revenue Code, 2006 which is applicable to the instant case, as mutation proceedings were initiated under U.P. Revenue Code, 2006 and the consequences of Section 83 of the Code of 2006 is that the declaration made under Section 80 would be recorded in the records of rights and even after declaration, the mutation on the basis of transfer and successions shall be made in the record of rights in the manner prescribed. This amplifies the fact that the Revenue Authority, under the Code of 2006, maintains the record of rights even in respect of property for which declaration under Section 80 of the U.P. Revenue Code, 2006 has been made.

38. At the time, when the land in question was declared as non-agricultural, it was in the year 2012 and the U.P.Z.A. & L.R. Act, 1950 and the U.P. Land Revenue Act, 1950 and the U.P. Land Revenue Act, 1901 were in operation. Mutation of agricultural lands was governed by Section 34 of the Land Revenue Act, 1901. Sections 31, 32, 33, 34 and 35 of the Land Revenue Act, 1901 are being reproduced hereinafter:-

*"**[31] Record of Rights.-**(1) The Collector shall maintain, in the form and manner prescribed, a record of rights (khatauni) for each village, which shall contain the following particulars, namely*

(a) the names of all tenure holders together with survey numbers or plot numbers held by them and their areas;

(b) the nature or extent of the respective interests including shares of such persons and the conditions or liabilities, if any, attaching thereto;

(c) the rent or revenue, if any, payable by or to any such person;

(d) particulars of all land (other than holdings) belonging to or vested in the State Government, Central Government, Gram Panchayat or a local authority;

(e) such other particulars as may be prescribed.

(2) Shares of the co-tenure holders shall be determined in the manner prescribed.

***32. Correction of records.**—(1) Subject to the control of the Collector, the Sub-Divisional Officer, the Tahsildar, or the Revenue Inspector shall record, in the manner hereinafter provided in this chapter, all changes in the record of rights (Khatauni), the field book (Khasra) and the map that may take place, and all transactions that may affect any of the rights or interests recorded, and correct therein any error proved to have been made in the records previously prepared 34[:]*

[Provided that order for correction in map shall be passed by the Collector.]

(2) No application for correction of error under sub-section (1) where the claim is based solely on possession as well as involving intricate question of title shall be maintainable.

***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);

39. (b) in any other case, make such inquiry as may appear to him to be necessary and submit his report to the Tehsildar.

40. (3)] Any person whose name has not been recorded by Revenue Inspector or who is aggrieved by the order passed by the Revenue Inspector 37[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 a transfer referred to in sub-section (3) of section 33 shall report such transfer, in the manner prescribed, to the Tahsildar 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) (deleted)

(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."

41. The provisions of A-157 of the Land Record Manual is also relevant and it reads as under:-

"A-157. Conversion of agricultural land intonon-agricultural or vice versa. *If a bhumidhar's holding or part thereof if declared by the Collector un- der Section 143 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, to be non-agricultural land, an entry in respect of the land so declared shall be re- corded in columns 7, 8, 9, 10, 11 or 12 of the khatauni against the relevant en- tries. Such entries shall be continued to be recorded from year to year. If at any time the said declaration is revoked under Section 144 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, the particulars of the orders of revoca- tion shall also be entered. In the case of such revocation the entries shall be omit- ted from the khatauni of next and subsequent years)."*

42. After the enactment of the U.P. Revenue Code, 2006, the provisions relating to mutation are provided in Section 34 of the Code of 2006 which reads as under:-

34. Duty to report in cases of transfer.-*(1) Every person obtaining possession of any land by transfer, other than a transfer referred to in sub-section (3) of section 33 shall report such transfer, in the manner prescribed, to the Tahsildar 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.

While, Section 4 (1) of the U.P. Revenue Code, 2006 defines 'Abadi' reads as under:-

"abadi' or "village abadi" means such area in a village which, on the date of commencement of this Code, is being used for the purposes of residence or its inhabitants or for purposes ancillary thereto such as Sahan and green trees, wells etc. or which may have been or be hereafter reserved for such use;"

43. Having taken a look at the abovementioned provisions, the position as obtained is that consequence of declaration of land as non-agricultural is limited to an extent as provided in Section 143 (2) of the U.P.Z.A. & L.R. Act, 1950 and Section 81 of the U.P. Revenue Code, 2006.

44. The record of rights was maintained earlier under the U.P. Land Revenue Act, 1901 and Land Record

Manual and with the enforcement of the U.P. Revenue Code, 2006 it is now under Section 31 and Section 83 of the Code.

45. In the instant case at hand, it is admitted to the parties that the land in question was being used for business purposes and not for residential purposes. Thus for the said reason, the land in question cannot be treated to be abadi as defined in Section 4(1) of the Code of 2006.

46. Moreover, the mutation proceedings were initiated under Section 34 of the Code of 2006 and there is no provision which results in abdication of powers of the Tehsildar to deal with such lands declared as non-agricultural and nor does it create any embargo to entertain a mutation application rather any transfer or succession including any change of status of land would be required to be incorporated in the record of rights, maintained in law as per the Land Record Manual.

47. Accordingly, this Court is unable to subscribe to the view that upon declaration of land as non-agricultural then the Tehsildar would loose jurisdiction to entertain an application for mutation or record any change in respect of such land. On the contrary, any change either by transfer, succession or change in the status of the land is to be recorded in the record of rights. The Collector is the custodian of all revenue records and all such records are to be kept updated from time to time.

48. The learned counsel for the petitioner has referred to a decision of a coordinate Bench of this Court in ***Shiv Chander Devi (Supra)***, however, from the aforesaid discussions, it would reveal that the facts of the case of ***Shiv Chander Devi (Supra)*** are quite different and moreover the provisions of law as noticed in the instant case were not brought to the notice of the Coordinate Bench, hence, the said decision cannot be said to be an authority to state that upon declaration of land as non-agricultural, the Tehsildar looses jurisdiction to entertain and decide a mutation application. Thus, the contention of the learned counsel for the petitioner does not find favour with this Court and is turned down.

49. Now, coming to the next contention of the learned counsel for the petitioner that after the notification of acquisition under the NH Act of 1956, the Tehsildar could not mutate the name of the private respondent no. 2 as that would be against law. In order to examine the aspect, it will be worthwhile to notice certain provisions of the NH Act of 1956 and the same reads as under:-

"3A. Power to acquire land, etc.--
(1) Where the Central Government is satisfied that for a public purpose any land is required for the building, maintenance, management or operation of a national highway or part thereof, it may, by notification in the Official Gazette, declare its intention to acquire such land.

(2) Every notification under sub-section (1) shall give a brief description of the land.

(3) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which will be in a vernacular language.]

3D. Declaration of acquisition.--
(1) Where no objection under sub-section (1) of section 3C has been made to the competent authority within the period specified therein or where the competent

authority has disallowed the objection under sub-section (2) of that section, the competent authority shall, as soon as may be, submit a report accordingly to the Central Government and on receipt of such report, the Central Government shall declare, by notification in the Official Gazette, that the land should be acquired for the purpose or purposes mentioned in sub-section (1) of section 3A.

(2) On the publication of the declaration under sub-section (1), the land shall vest absolutely in the Central Government free from all encumbrances.

(3) Where in respect of any land, a notification has been published under sub-section (1) of section 3A for its acquisition but no declaration under sub-section (1) has been published within a period of one year from the date of publication of that notification, the said notification shall cease to have any effect:

Provided that in computing the said period of one year, the period or periods during which any action or proceedings to be taken in pursuance of the notification issued under sub-section (1) of section 3A is stayed by an order of a court shall be excluded.

(4) A declaration made by the Central Government under sub-section (1) shall not be called in question in any court or by any other authority.

3G. Determination of amount payable as compensation.--(*1) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.*

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent, of the amount determined under sub-section (1), for that land.

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government--

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration--

(a)the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d) if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change.]

3H. Deposit and payment of amount.--*(1) The amount determined under section 3G shall be deposited by the Central Government in such manner asmay be laid down by rules made in this behalf by that Government, with the competent authority before taking possession of the land.*

(2) As soon as may be after the amount has been deposited under sub-section (1), the competent authority shall on behalf of the Central Government pay the amount to the person or persons entitled thereto.

(3) Where several persons claim to be interested in the amount deposited under sub-section (1), the competent authority shall determine the persons who in its opinion are entitled to receive the amount payable to each of them.

(4) If any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the principal civil court of original jurisdiction within the limits of whose jurisdiction the land is situated.

(5) Where the amount determined under section 3G by the arbitrator is in excess of the amount determined by the competent authority, the arbitrator may award interest at nine per cent, per annum on such excess amount from the date of taking possession under section 3D till the date of the actual deposit thereof.

(6)Where the amount determined by the arbitrator is in excess of the amount determined by the competent authority, the excess amount together with interest, if any, awarded under sub-section

(5) shall be deposited by the Central Government in such manner as may be laid down by rules made in this behalf by that Government, with the competent authority and the provisions of subsections (2) to (4) shall apply to such deposit.

3I. Competent authority to have certain powers of civil court.--*The competent authority shall have, for the purposes of this Act, all the powers of a civil court while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:--*

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) reception of evidence on affidavits;

(d) requisitioning any public record from any court or office;

(e) issuing commission for examination of witnesses.]"

50. From the perusal of the aforesaid provisions, it would reveal that the NH Act of 1956 contains an inbuilt mechanism to resolve any dispute and the Competent Authority also has been conferred power to adjudicate. Section 3-G (5) (6) also provides the forum for any person who is aggrieved by an order of the Competent Authority of the NH Act of 1956.

51. None of the provisions of the NH Act 1956 indicate that the power of the Tehsildar or the Collector are in any manner abridged or curtailed to deal with mutation proceedings or maintenance of revenue records. Both the NH Act of 1956 and the Land Revenue Act, 1901 and now the U.P. Revenue Code, 2006 operate in different spheres and one does not overlap with the other or create any conflict. Thus, to state that upon issuance of notification under Section 3-A of the NH Act of 1956, the jurisdiction of Tehsildar or the Revenue Court is curtailed is not correct.

52. Now, if the interplay of the provisions of the Act of 2002 is seen with provisions of mutation under the U.P. Revenue Code, 2006 and the National Highway Act, 1956 and applied to the facts of the instant case, it would be seen that admittedly the land in question was non-agricultural and it was a security asset as defined under the Act of 2002.

53. Since, the petitioner had defaulted, the creditor bank initiated proceedings under the Act of 2002 and in furtherance thereof it was put to auction on 24.08.2017 where the private respondent no. 2 was the successful auction purchaser and a sale certificate was also issued on 16.03.2018. Significantly, this is prior to the date of notification of Section 3-D of the NH Act of 1956 which was issued on 03.08.2018.

54. Section 3-D of the NH Act of 1956 assume significance as it is on the date of the said notification that the land would vest with the State. Any transaction, or status of the said land will have to be seen in context with the aforesaid date.

55. The Act of 2002 is a special Act and deals with special rights conferred to the creditor banks and financial institutions to recover the outstanding debts by taking recourse to the provisions of the Act.

56. While the NH Act of 1956 is also a special Act conferring powers to acquire land for the purposes of building, widening and development of highways.

57. Thus, any land which is a secured asset over which the bank has initiated proceedings under the Act of 2002 and if challenged has to be seen in terms of the provisions of the Act of 2002 before the forum as provided in the said Act.

58. Similarly, an issue relating to acquisition, payment of compensation, who is entitled or its quantum is all to be considered as per the NH Act of 1956.

59. As per the parties, the petitioner has already filed a civil suit, a petition under Section 17 of the Act of 2002 along with an application under Section 5 of the Limitation Act. The petitioner has also filed a writ petition before a Division Bench of this Court bearing Writ-C No. 8078 of 2022, a fact informed by Sri Dubey but not disclosed by the petitioner in the petition or in the rejoinder affidavit filed.

60. Thus, all the contentious issues, questions will be considered by the respective forum seized of the matter. In this view of the matter, this Court is only to see the mutation order and its validity. Till date neither the sale certificate of the private respondent no. 2 has been set aside and the property in question stands acquired, hence, the land in question cannot remain in absentia in revenue records rather the mutation has to be done.

61. It will also be relevant to mention that the core issue before this Court is to test the validity of the mutation order passed in summary proceedings, hence, keeping this in mind, this Court will refrain from giving any categoric finding lest it may affect the rights of the parties as they are litigating in different forums and courts.

62. Whether the petitioner has any right to challenge the auction sale once the stage to redeem, under Section 13 (8) of the Act of 2002, has passed. What would be the effect of the pending application of the petitioner filed under Section 17 of the Act of 2002 along with an application under Section 5 of the Limitation Act wherein the delay has yet not been condoned is for the Debt Recovery Tribunal to determine.

63. Who would be entitled to receive compensation in respect of the land which has been acquired is also not a question to be determined by this Court in the instant proceedings rather would be seen by the Competent Authority of the NH Act of 1956.

64. In the aforesaid background, if the impugned order is examined, it would be found that on the basis of Sale Certificate the mutation order has been passed. Any contentious question can be adjudicated in the appropriate forum. The view taken by the Revisional Authority is not patently illegal which may persuade this Court to intervene. The decision of the Apex Court in State of ***Jitendra Singh Vs. State of Madhya Pradesh and Others; 2021 SCC Online SC 802***and of a Coordinate Bench of this Court in ***Smt. Kalawati Vs. Board of Revenue and 6 Others decided on 05.04.2022*** had laid the contours for interference in mutation cases by this Court. Since, the case of the petitioner does not fall within the said exceptions as mentioned in ***Kalawati (Supra)***, hence, the case of indulgence is not made out.

65. In so far as the decision cited by learned counsel for the petitioner ***Ram Bhajan (Supra)*** wherein the issue was regarding the revisional powers exercised under Section 48 of the U.P. C.H. Act, 1953. In the said case, it was held that where a simplicitor remand is made by an Authority that in itself is an interlocutory order and a revision may not be maintainable under Section 48 of the Act of 1953, however, in the instant case, the facts are quite different, inasmuch as, the matter has been remanded to take note of various aspects including the rights of private respondent no. 2 viz.a viz the Bank and the petitioner and thus it cannot be termed as a simplicitor order of remand. For the said reason also, it cannot be said that the remand order passed in the instant proceedings is interlocutory in nature, hence, the said decision is also of no help to the petitioner.

66. The learned counsel for the petitioner has also relied upon a decision of ***Shiv Kumar (Supra)*** which is in respect of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, however, the provisions of the LARA act are a little different to the Act of 1956 and in the instant case, it is the provisions of the Act of 2013 are applicable.

67. In the case of ***Ajay Kumar Srivastava (supra)***, a Division Bench of this Court had noticed the provisions of the NH Act, 1956 and noticed the provisions of the said Act and upheld the earlier decision by another Division Bench of the Court in ***Vipin Agrawal Vs. Union of India in Writ-***

C No. 10958 of 2018 which related the rights of the parties to receive compensation in context with the provisions of the NH Act, 1956. In the said case, it was noticed that the subsequent purchaser after issuance of the notification under the NH Act, 1956 does not get a right to contest nor does he have a right to receive compensation. This as noticed above would be seen and considered by the Competent Authority of the National Highway Authority of India.

68. The petitioner has also relied upon the decision of ***Rana Shiv Ambar Singh (Supra)*** in context with the Section 73 of the Transfer of Property Act. The rights of a mortgagee in terms of the Section 73 of the Transfer of Property Act, 1973 are different to the rights of the parties which arise in terms of the Act of 2002 and for the said reason, the said decision does not come to the aid of the petitioner.

69. In light of the above, the issue regarding compensation in pursuance of the land which stood acquired is to be considered by the Competent Authority in terms of the NHAI Act, 1956. The impact of proceedings under the Act of 2002 would be considered appropriately by Debt Recovery Tribunal concerned where the petitioner has filed an application under Section 17 along with delay condonation application and as informed the delay has yet not been condoned. In so far as the mutation order is concerned, as noticed above, it is only an order in summary proceedings and would be subject to the orders passed by the regular Forum which would bind the parties.

70. In light of the aforesaid detailed discussion, this Court does not deem appropriate to interfere in the mutation order, accordingly, petition is devoid of merits and is ***dismissed.*** In the aforesaid facts and circumstances, there shall be no orders as to costs.

(2024) 2 ILRA 352
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2024
BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ C No. 1348 of 2024

Smt. Nikita @ Najrana & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kr. Srivastava

Counsel for the Respondents:
C.S.C.

Civil Law -U.P. Prohibition of Unlawful Conversion of Religion Act, 2021 – Sections 3, 6, 8 & 9 – Inter-Faith Marriage – Validity of Conversion – Compliance Requirements – Writ of Mandamus for Protection

The petitioners, belonging to different religions (petitioner No. 1, formerly Muslim, and petitioner No. 2, Hindu), sought a writ of mandamus to ensure protection from interference in their marital life and to restrain respondents from disrupting their peaceful cohabitation as husband and wife. They married on 02.01.2024, post the enactment of the U.P. Prohibition of Unlawful Conversion of Religion Act, 2021. The petitioner No. 1 claimed a conversion certificate from Arya Samaj Mandir in 2017, arguing that compliance with Sections 8 and 9 of the 2021 Act was unnecessary as the conversion predated the Act. The St. contended that the marriage lacked validity without compliance with Sections 8 and 9, which mandate declarations and inquiries for religious conversions. Held: The 2021 Act, effective from

27.11.2020, requires compliance with Sections 8 and 9 for conversions linked to inter-faith marriages solemnized after its enactment, regardless of prior conversions. The Act's purpose, as per its preamble and Section 3, is to prohibit unlawful conversions through misrepresentation, force, fraud, or marriage. Section 6 renders marriages for the sole purpose of unlawful conversion void, with a proviso that Sections 8 and 9 apply to such marriages. The 2017 conversion certificate does not exempt the petitioners from complying with the Act for a marriage post-2020, as the Act's scheme prioritizes fresh compliance to ensure legality and sanctity. The court, applying purposive interpretation as guided by Central India Spinning Vs Municipal Committee (AIR 1958 SC 341), Girdhari Lal & Sons Vs Balbir Nath Mathur (1986) 2 SCC 237, and other precedents, held that the petitioners' failure to comply with Sections 8 and 9 rendered their marriage's validity questionable. The writ petition was disposed of with liberty to the petitioners to file a fresh petition after ensuring compliance with the 2021 Act.

Case Law Cited:

1. Central India Spinning and Weaving Manufacturing Co. Vs Municipal Committee, Wardha, AIR 1958 SC 341

2. Girdhari Lal & Sons Vs Balbir Nath Mathur, (1986) 2 SCC 237

3. K.P. Varghese Vs ITO, (1981) 4 SCC 173

4. St. Bank of Travancore Vs Moh M. Khan, (1981) 4 SCC 82

5. Som Prakash Rekhi Vs U.O.I., (1981) 1 SCC 449

6. Ravula Subba Rao Vs CIT, AIR 1956 SC 604

7. Govindlal Vs Agricultural Produce Market Committee, (1975) 2 SCC 482

8. Babaji Kondaji Vs Nasik Merchants Co-op Bank Lt , (1984) 2 SCC 50

9. Utkal Contractors & Joinery Pvt. Lt Vs St. of Orissa, (1987) 3 SCC 279

10. Eera (through Dr. Manjula Krippendorf) Vs St. (NCT of Delhi), (2017) 15 SCC 133

11. Swedish Match AB Vs Securities & Exchange Board, India, (2004) 11 SCC 641

12. Reserve Bank of India Vs Peerless General Finance and Investment Co. Lt , (1987) 1 SCC 424

13. S. Gopal Reddy Vs St. of Andhra Pradesh, (1996) 4 SCC 596

14. Prakash Kumar Vs St. of Gujarat, (2005) 2 SCC 409

15. Anwar Hasan Khan Vs Moh Shafi, (2001) 8 SCC 540

16. U.O.I. Vs Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277

17. N.K. Jain Vs K. Shah, (1991) 2 SCC 495

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Sanjay Kumar Srivastava, learned counsel for the petitioners and Yogesh Kumar, learned Standing Counsel for the State-respondents.

2. By means of present writ petition, the petitioners have prayed for a writ of mandamus commanding the respondents 2 and 3 to provide adequate security to petitioners and further restraining the respondents from causing any interference in peaceful living of petitioners as husband and wife.

3. Learned Standing Counsel points out that petitioner No.1 earlier belonged to Muslim religion and the petitioner No.2 belongs to Hindu religion and in view of the provisions of the UP Prohibition of Unlawful Conversion of Religion Act,

2021, unless compliance of the provisions of Sections 8 and 9 is made by the parties belonging to different religions, no sanctity/validity can be attached to such marriage.

4. The Act of 2021 was enacted with the following object:

"An Act to provide for prohibition of unlawful conversion from one religion to another by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means of by marriage and for the matters connected therewith or incidental thereto."

5. Section 3 of the Act prohibits conversion from one religion to another religion by misrepresentation, force, fraud, undue influence, coercion or allurement. For the purpose of the present case, Explanation attached to sub-section (1) of Section 3 has significance and, therefore, the provision is being reproduced for a ready reference:

"3. Prohibition of conversion from one religion to another religion by misrepresentation, force, fraud, undue influence, coercion or allurement- (1) No person shall convert or attempt to convert, either directly or otherwise, any other person from one religion to another by use or practice of misrepresentation, force, fraud, undue influence, coercion or allurement or by any fraudulent means. No person shall abet, convince or conspire such conversion:

Explanation.- For the purposes of this sub-section conversion by solemnization of marriage or relationship in the nature of marriage on account of factors enumerated in this sub-section shall be deemed included."

6. Section 6 of the Act renders a marriage performed for the sole purpose of unlawful conversion or vice-versa as void, however, the proviso attached to the said section speaks of applicability of the provisions of Sections 8 and 9 as regards such marriages. For the convenience sake, Section 6 is extracted as under:

"6. Marriage done for sole purpose of Unlawful Conversion or vice-versa to be declared void.- Any marriage done for sole purpose of unlawful conversion or vice-versa by the man of one religion with the woman of another religion, either by converting himself/herself before or after marriage, or by converting the woman before or after marriage, shall be declared void by the Family Court or where Family Court is not established, the Court having jurisdiction to try such case on a petition presented by either party thereto against the other party of the marriage :

Provided that all the provisions of Section 8 and 9 shall apply for such marriages to be solemnized."

7. From the scheme of the Act of 2021, conversion from one religion to another is not impermissible. Rather, Sections 8 and 9 of the Act deal with the provisions for a valid conversion and its effect. For a ready reference, Sections 8 and 9 of the Act, 2021 are extracted as under:

"8. Declaration before conversion of religion and pre-report about conversion.- (1) **One who desires to convert his/her religion, shall give a declaration** in the form prescribed in

Schedule-I at least sixty days in advance, to the District Magistrate or the Additional District Magistrate specially authorized by District Magistrate, **that he wishes to convert his/her religion on his/her own and with his/her free consent and without any force, coercion, undue influence or allurement.**

(2) The religious convertor, who performs conversion ceremony for converting any person of one religion to another religion, shall give **one month's advance notice** in the form prescribed in Schedule-II of such conversion, to the District Magistrate or any other officer not below the rank of Additional District Magistrate appointed for that purpose by the District Magistrate of the district where such ceremony is proposed to be performed.

(3) The District Magistrate, after receiving the information under sub-sections (1) and (2), shall get an **enquiry conducted** through police with regard to real intention, purpose and cause of the proposed religious conversion.

(4) **Contravention of sub-section (1) and/or sub-section (2) shall have the effect of rendering the proposed conversion, illegal and void.**

(5) Whoever contravenes the provisions of sub-section (1) shall be punished with, imprisonment for a term which shall not be less than six months, but may extend to three years and shall also be liable to fine which shall not be less than rupees ten thousand.

9. Declaration post conversion of religion.- (1) The converted person shall send a **declaration** in the form prescribed in Schedule-III **within sixty days of the date of conversion,** to the District Magistrate of the District in which converted person resides ordinarily.

(2) The District Magistrate shall **exhibit a copy of the declaration** on the notice board of the office till the date of confirmation.

(3) The said declaration shall contain the **requisite details,** i.e., the particulars of the convert such as date of birth, permanent address, and the present place of residence, father's/husband's name, the religion to which the convert originally belonged and the religion to which he has converted, the date of place of conversion and nature of process gone through for conversion.

(4) The **converted individual shall appear before the District Magistrate** within 21 days from the date of sending/filing the declaration to establish her/his identity and confirm the contents of the declaration.

(5) The District Magistrate shall record the factum of declaration and confirmation in a register maintained for this purpose. If any objections are notified, he may simply record them, i.e., the name and particulars of objectors and the nature of objection.

(6) Certified copies of declaration, confirmation and the extracts from the register shall be furnished to the parties, who gave the declaration to his/her authorized legal representative on his/her request.

(7) **The contravention of sub-sections (1) to (4) shall have the effect of rendering the said conversion illegal and void."**

8. Learned counsel for the petitioners submits that a conversion certificate was issued in the year 2017 whereas the aforesaid Act has come into existence in 2021 and, therefore, the provisions of Section 8 and 9 of the Act, 2021, would not be applicable.

9. The Court has perused Annexure-2 to the writ petition, which is a copy of conversion certificate issued by some Arya Samaj Mandir.

10. It is now necessary to give reference to certain judicial pronouncements on purposive interpretation of a statute.

11. Jurisprudence of statutory interpretation has moved from "literal interpretation" to "purposive interpretation", which advances the purpose and object of a legislation. The Supreme Court, in catena of judgments, has dealt with the issue of literal interpretation vis-a-vis purposive interpretation.

12. The Apex Court, in **Central India Spinning and Weaving Manufacturing Comp. versus Municipal Committee, Wardha, AIR 1958 SC 341,** has held that it is a recognised principle of construction that general words and phrases, however wide and comprehensive they may be in their literal sense, must usually be construed as being limited to the actual objects of the Act.

13. The Supreme Court, in **Girdhari Lal & Sons versus Balbir Nath Mathur; 1986(2) SCC 237,** has held that the primary and foremost task of a Court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the Court must then strive to so interpret the statute as to promote and advance the object and purpose of the enactment. For this purpose, where necessary the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing the written word if necessary. It went to observe that ascertainment of legislative intent is a basic rule of statutory construction and that a rule of construction should be preferred which advances the purpose and object of a legislation and that though a construction, according to plain language, should ordinarily be adopted, such a construction should not be adopted where it leads to anomalies, injustices, or absurdities, vide **K.P. Varghese v. ITO, (1981) 4 SCC 173, State Bank of Travancore v. Mohd. M. Khan, (1981) 4 SCC 82, Som Prakash Rekhi v. Union of India (1981) 1 SCC 449, Ravula Subba Rao v. CIT, AIR 1956 SC 604, Govindlal V Agricultural Produce Market Committee, (1975) 2 SCC 482 and Babaji Kondaji v. Nasik Merchants Co-op Bank Ltd. (1984) 2 SCC 50.**

14. The Supreme Court, in **Utkal Contractors & Joinery Pvt. Ltd. versus State of Orissa; 1987 (3) SCC 279**, has observed that a statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the Preamble, the scheme and the provisions of the Act. Having

discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important. It is again important to remember that Parliament does not waste its breath unnecessarily. Just as Parliament is not expected to use unnecessary expressions, Parliament is also not expected to express itself unnecessarily. Even as Parliament does not use any word without meaning something, Parliament does not legislate where no legislation is called for. Parliament cannot be assumed to legislate for the sake of legislation; nor can it be assumed to make pointless legislation. **[See-Eera (through Dr. Manjula Krippendorf) v. State (NCT of Delhi) and Anr 2017(15) SCC 133].**

15. The more stringent the Law, the less is the discretion of the Court. Stringent laws are made for the purpose to achieve its objectives. This being the intendment of the legislature, the duty of the court is to see that the intention of the legislature is not frustrated. If there is any doubt or ambiguity in the statutes, the rule of purposive construction should be taken recourse to, to achieve the objectives. **(See Swedish Match AB & Anr. Securities & Exchange Board, India & Anr., (2004) 11 SCC 641).**

16. The Apex Court, in **Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. & Ors. (1987) 1 SCC 424**, held that 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.

17. Same view has been reiterated in **S. Gopal Reddy Vs. State of Andhra Pradesh, (1996) 4 SCC 596, Prakash Kumar Alias Prakash Bhutto Vs. State of Gujarat, (2005) 2 SCC 409, Anwar Hasan Khan Vs. Mohd. Shafi & Ors. (2001) 8 SCC 540, Union of India & Ors. Vs. Filip Tiago De Gama of Vedem Vasco De Gama, (1990) 1 SCC 277, Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., (1987) 1 SCC 424: (AIR 1987 SC 1023) and N. K. Jain v. C. K. Shah (1991) 2 SCC 495: (AIR 1991 SC1289).**

18. In the present case, as per the writ petition itself, the alleged marriage between the petitioners has been performed on 2.1.2024 by which date the aforesaid Act of

2021 had come into existence. Therefore, before the date of marriage, the petitioners should have complied with the provisions of the Act, in case, they wanted to attach sanctity/legality to the conversion, which is now controlled and governed by the enactment passed by UP Legislature.

19. The scheme of the Act envisages that if conversion is done in relation to marriage of the persons belonging to different religions, irrespective of any past event, which might or might not attach sanctity to conversion, in case a marriage is solemnized after the Act of 2021 has come into force, i.e., after 27.11.2020 as per Section 1 (3) of the Act, the parties have to ensure compliance of Sections 8 and 9 of the Act and, in such event, conversion, if any, done in the past, may be a relevant fact during the course of inquiry conducted by the District Magistrate as per Sections 8 and 9 of the Act subject to satisfaction of the District Magistrate but it, in itself, cannot be a substantive proof of a valid conversion so as to attach sanctity to a marriage performed after the Act, 2021 has come into force. Therefore, the concerned party to a proposed inter-faith/inter-religion marriage has to comply with the provisions of the Act. Hence, the submission of learned counsel for the petitioners that since Act has come into force in 2020-21, but conversion was done in 2017 at Arya Samaj Mandir and, therefore, no fresh conversion is required, is not acceptable and is hereby discarded.

20. In view of the above, this writ petition stands **disposed of** with liberty to the petitioners to file a fresh petition after ensuring compliance of Sections 8 and 9 of the UP Prohibition of Unlawful Conversion of Religion Act, 2021.

(2024) 2 ILRA 358
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.01.2024
BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ C No. 1614 of 2023

Raj Kumar Gautam ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Pramod Kumar Shukla, Ashish Kumar Mishra, Pradeep Kumar

Counsel for the Respondents:
C.S.C.

Criminal Law - Arms Act, 1959 – Section 17(3)(b) – Cancellation of Arms License – Public Peace and Safety – Judicial Review – Article 226 of the Constitution

The petitioner, holder of an arms license issued in 2002 and renewed until 17.12.2025, challenged the orders dated 26.03.2021 and 06.08.2022, which revoked his license and dismissed his appeal, respectively. The revocation was based on the petitioner's alleged conduct during a sensitive period in 2018, involving spreading communal rumors, instigating villagers, and disrupting public order despite Section 144 Cr.P. being in force. The petitioner argued that cancellation cannot be based solely on pending criminal cases, citing Ram Pratap Singh Vs St. of U.P. (Writ-C No. 7078 of 2004). The St. countered that the revocation was not due to pending FIRs (where the petitioner was not named) but due to his conduct threatening public peace and safety, as recorded in the impugned order. Held: Section 17(3)(b) of the Arms Act, 1959, empowers the licensing authority to revoke a license if deemed necessary for public peace or safety. The competent authority's order dated 26.03.2021 objectively detailed the petitioner's conduct, including instigating communal tension and

violating Section 144 Cr.P. , which justified the revocation. The court found no perversity or illegality in the authority's findings, which were based on the petitioner's reply and lack of satisfactory evidence. The scope of judicial review under Article 226 is limited, as per N. Banerji Vs P.R. Mukherjee (1953 SC 58), Ajaib Singh Vs Sirhind Co-operative (1999) 6 SCC 82, and other precedents, and does not permit reappreciation of evidence or substitution of the court's view for the authority's. The judgment in Ram Pratap Singh was inapplicable, as the revocation was not solely based on pending criminal cases but on the petitioner's conduct. The writ petition was dismissed, finding no grounds for interference.

Case Law Cited:

1. Ram Pratap Singh Vs St. of U.P., Writ-C No. 7078 of 2004 (19.12.2022)

2. Thakur Das Yadav Vs St. of U.P., Writ-C No. 55352 of 2009 (16.07.2024)

3. N. Banerji Vs P.R. Mukherjee, 1953 SC 58

4. Ajaib Singh Vs Sirhind Co-operative Marketing cum Processing Service Society Lt , (1999) 6 SCC 82

5. Indian Overseas Bank Vs Indian Overseas Bank Staff Canteen Workers' Union, (2000) 4 SCC 245

6. Abdul Razak (D) through Lrs. Vs Mangesh Rajaram Wagle, (2010) 2 SCC 432

7. Commandant, 22nd Battalion, CRPF Vs Surinder Kumar, (2011) 10 SCC 244

8. U.O.I. Vs R.K. Sharma, (2001) 9 SCC 592

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard learned counsel for the petitioner and learned Standing counsel appearing on behalf of the State-respondents.

2. Instant writ petition has been filed praying for the following main reliefs:-

"(i) Issue a writ order or direction in the nature of Certiorari quashing thereby the impugned order dated 26.03.2021 and Order dated 06.08.2022 passed by opposite party no. 2 & 3 which are annexed as Annexure No. 1 & 2 to this writ petition.

(ii) Issue a writ order or direction in the nature of mandamus commanding the opposite party no. 2 to 4 to revoke the suspension/revocation of the Arms License of the petitioner forthwith.

(iii) Issue a writ order or direction in the nature of Mandamus commanding the opposite party no. 2 to 4 to release the Arms/12 bore DBBL Gun No. 19536-BE2007 Katra Bazar, District Gonda which is surrendered at Police Station Katara Bazar, District Gonda since 08.01.2022 forthwith."

3. The case set forth by the petitioner is that he was having an arms license which was issued to the petitioner on 17.12.2002. The arms license has been renewed from time to time the last renewal having been made upto 17.12.2025.

4. It is contended that on 20.10.2018, two FIRs have been lodged bearing Case Crime No. 357 of 2018 & 358 of 2019 under Sections 147, 148, 332, 153-A, 295-A, 504 & 506 I.P.C and Section 7 Criminal Law Amendment Act, 1972 against ten named persons and 40 to 50 unknown persons. However, the petitioner was not named.

5. Another FIR bearing Case Crime No. 359 of 2018 under Sections 147, 148, 307, 332, 333, 336, 153-A, 323, 325, 504, 427 I.P.C read with Section 7 Criminal Law Amendment Act, 1972 and Section 3 (1) of the Public Properties Act, 1984, respectively had been lodged against the 35

named persons and 31 unknown persons. In the said FIR also, the petitioner was not named in the said FIR.

6. The further contention is that the authorities of Police Station Katra Bazar recommended the suspension and cancellation of the arms license of the petitioner. In pursuance thereof, a notice was issued to which the petitioner submitted his reply but the competent authority vide order dated 26.03.2021 revoked the arms license of the petitioner. Being aggrieved, the petitioner filed an appeal which has been rejected vide order dated 06.08.2022, a copy of which is annexure 2 to the writ petition. Being aggrieved by both the orders, the instant writ petition has been filed.

7. The argument of learned counsel for the petitioner is that it is settled proposition of law that an arms license cannot be cancelled on the basis of pendency of criminal proceedings.

8. **Reliance has also been placed on a judgment of this Court dated 19.12.2022 passed in Writ-C No. 7078 of 2004 Inre; Ram Pratap Singh Vs. State of U.P and Ors** wherein the said proposition of law has been laid down.

9. On the other hand, learned Standing counsel on the basis of averments contained in the counter affidavit argues that the arms license of the petitioner has not been cancelled solely on the ground of pendency of criminal proceedings against him. Learned Standing counsel states that the name of the petitioner does not find place in any of the FIRs which have lodged. However, in the instant case, the competent authority has categorically recorded the conduct of the petitioner as finds place in the order impugned dated 26.03.2021 which has prevailed upon the authority to cancel the arms license of the petitioner upon a specific finding that continuance of the arms license with the petitioner would be detrimental to public peace and public safety. The said order has been upheld with the dismissal of the appeal vide order dated 06.08.2022 and there is no illegality or infirmity in the same. It is thus prayed that the writ petition deserves to be dismissed.

10. Heard the learned counsels appearing on behalf of the contesting parties and perused the records.

11. From a perusal of records it emerges that the petitioner was having an arms license issued to him in the year 2002 which has been renewed upto 17.12.2025. The arms license has been cancelled after due notice to the petitioner on account of the reasons which emerge from a perusal of the order dated 26.03.2021.

12. It is the specific case of the learned counsel for the petitioner, to which there cannot be any dispute, that the arms license cannot be cancelled merely on the ground of pendency of criminal case(s).

13. However, a perusal of the order impugned would indicate that it is not only the criminal cases which have been considered rather the competent authority has categorically recorded the conduct of the petitioner which has led to the authority to come to the conclusion that continuance of the arms license with the petitioner would be detrimental for the security of the public peace and for public safety and hence he has cancelled the said license.

14. In order to appreciate the order of the competent authority dated 26.03.2021 the Court may have to consider the provisions of the Arms Act, 1959 (hereinafter referred to as "Act, 1959") which empowers the authority concerned to cancel the license.

15. In this regard, Section 17 of the Act, 1959 is reproduced below:-

"17. Variation, suspension and revocation of licences.

(1)The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence holder by notice in writing to deliver-up the licence to it within such time as may be specified in the notice.

(2)The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3)The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence

(a)if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b)if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c)if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or(

d)if any of the conditions of the licence has been contravened; or

(e)if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

(4)The licensing authority may also revoke a licence on the application of the holder thereof.

(5)Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6)The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7)A Court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence:Provided that if the conviction is set aside on appeal or otherwise, the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also be made by an Appellate Court or by the HighCourt when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to

suspend or revoke all or any licences granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation."

16. From a perusal of Section 17 of the Act, 1959 it emerges that the licensing authority has been given the power to vary the conditions subject to which a license has been granted. The licensing authority, on an application of a holder of a license can also vary the condition of the license. The licensing authority has also been given the power under Sub section (3) of Section 17 of the Act, 1959 to suspend a license for such period as it thinks fit or revoke a license, where the licensing authority is satisfied that the holder of the license is prohibited by the Act, 1959 or by any other law from acquiring or having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a license and if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the license or license has been obtained by the suppression of material information or on the basis of wrong information provided by the holder of the license or if any of the conditions of the license has been contravened or if the holder of the license has failed to comply with a notice requiring him to deliver up the license.

17. In the case in hand, it emerges that the licensing authority has categorically recorded in his order dated 26.03.2021, after considering the reply which has been filed by the petitioner, that on 15.09.2018, an order under Section 144 of the Cr.P.C had been issued in the area which is a sensitive area . The petitioner has been charged of having actively spread rumors and having stood with his personal weapon along with various other persons and having instigated the villagers and stopped the traffic movement on the State highway and continued to remain on the spot from 12 mid night till 3 A.M. On 20.10.2018 during the religious festival he spread communal tension with the result that the District Magistrate himself went to the spot thrice at 8 PM,10 PM and 11.30 PM but despite the request made by the District Magistrate for removal of the crowd and he having informed the petitioner about Section 144 being in force, the petitioner continued to stand at the spot and also instigated the crowd. This conduct of the petitioner has been found to be of such nature as being threat to public peace and for public safety which entailed the competent authority to cancel the arms license.

18. For the sake of convenience, the relevant portion of the impugned order dated 26.03.2021 indicating the conduct of the petitioner is being reproduced below:-

विपक्षी को नोटिस निर्गत कर यह आरोप लगाया गया था कि जनपद गोण्डा में विगत इतिहास रेखांकित करता है कि दशहरा/दुर्गापूजा के अवसर पर हिन्दू मुस्लिम धार्मिक आधार पर साम्प्रदायिक तनाव रहता है। विगत में जनपद के विभिन्न भागों में साम्प्रदायिक आधार पर उत्पन्न वैमनस्य के चलते हिंसक घटनायें हुई हैं। इतिहास को देखते हुए वर्ष 2018 में सम्पन्न होने वाले दशहरा, दुर्गापूजा व दुर्गापूजा के उपरान्त मूर्ति विर्सजन के कार्यक्रम शान्तिपूर्ण ढंग से सम्पादित हो इसके लिए जिलाधिकारी के आदेश संख्या 372/जे०ए० (धारा-144)/2018 दिनांक 15.09.2018 के माध्यम से सम्पूर्ण क्षेत्र में भारतीय दण्ड संहिता की धारा 144 के तहत आधिकारिक घोषणा की गयी थी। आपको जनपद का एक

सम्भ्रान्त नागरिक मानते हुए व आपकी सामाजिक क्रिया-कलापो की साफ सुथरी धर्मनिर्पेक्ष छवि के सापेक्ष आपको जिला मजिस्ट्रेट कार्यालय से दिनांक 10.12.2002 को शस्त्र अनुज्ञप्ति संख्या 342 स्वीकृत व निर्गत किया गया था। एक सम्भ्रान्त और अच्छे नागरिक होने के नाते आपसे यह अपेक्षा थी कि इस प्रकार की साम्प्रदायिक तनाव की घटना के समय आप प्रशासन का सहयोग करते हुए लोक प्रशान्ति क्षुब्ध करने वाले तत्वों के विरुद्ध जनमत तैयार करते व लोक प्रशान्ति बनाये रखने का प्रयास करते, परन्तु आप अपने नागरिक कर्तव्यों के निर्वहन मे पूर्णतया विफल रहे और आपने शासन व प्रशासन का साथ देने के स्थान पर कोरी अफवाहें फैलाने वालों को रोकने के स्थान पर अफवाह फैलाने में बढचढ़ कर योगदान किया और लोक प्रशान्ति क्षुब्ध करने हेतु न केवल स्वयं अपने व्यक्तिगत हथियार सहित खड़े हुए वरन समस्त ग्रामवासियों को भी उकसाते हुए उन्हें ग्राम से गुजरने वाले स्टेट हाईवे के किनारे खड़ा करने हेतु प्रेरित किया व रात 12.00 बजे से 03.00 बजे तक वहीं भीड़ के साथ स्वयं मौजूद रहे। दिनांक 20.10.2018 को ग्राम बरॉव में स्थापित दुर्गापूजा की मूर्ति विर्सजन को लेकर आप न केवल आवेशित हुए वरन आपने अपने अड़ोस-पड़ोस तथा समस्त ग्रामवासियों को साम्प्रदायिक आधार पर उकसाया। तत्कालीन जिला मजिस्ट्रेट द्वारा लगातार 3 बार 08 बजे रात्रि 10 बजे रात्रि व11.30 बजे रात्रि स्वयं उपस्थित होकर आपको व आपके साथ एकत्र जन समूह, जो लाढी डण्डे से लैस थे, (जो कि धारा 144 के तहत पूर्ण प्रतिबन्धित था) को वहाँ से हटने का अनुरोध करने के बावजूद आप लगातार न केवल वहाँ बने रहे बल्कि उस आक्रोशित भीड़ की मोर्चाबन्दी मे अपने असलहा सहित बढ़ चढ़कर भाग लेते हुए नेतृत्व प्रदान किया गया। इस दौरान आपने अपने शस्त्र के साथ मौके पर मौजूद रहकर भीड को भड़काने व उकसाने का कार्य किया, जो एक अच्छे नागरिक होने के नाते आपसे अपेक्षित नहीं था और जो धारा 144 सी०आर०पी०सी० का उल्लघंन व 188 आईपीसी के अन्तर्गत दण्डनीय अपराध है व आम्र्स एक्ट की धारा 30 के विरुद्ध था। उपरोक्त आरोपों के सम्बन्ध में विपक्षी द्वारा कोई संतोषजनक उत्तर, साक्ष्य व गवाह प्रस्तुत नहीं किया गया है जिससे यह सिद्ध हो सके कि नोटिस मे उल्लिखित आरोप सत्य नहीं है। पत्रावली पर नोटिस वापस लिए जाने का कोई कारण विद्यमान नहीं है। नोटिस पुष्टि किये जाने योग्य है। आयुध अधिनियम 1959 की धारा "17(3)(ख) मे प्राविधान है कि लोक शान्ति की सुरक्षा के लिए या लोक-क्षेम की अनिवार्यता के सापेक्ष-(घ) अनुज्ञप्ति की शर्तो मे से किसी का भी उल्लंघन किया गया हो। अनुज्ञप्ति को निलम्बित या प्रतिसंहृत किया जा सकता है।"

पत्रावली पर उपलब्ध अभिलेखीय साक्ष्यों से स्पष्ट है कि विपक्षी स्वयं के सुरक्षार्थ प्रदान किये ये शस्त्र अनुज्ञप्ति के शर्तो का उल्लंघन किया गया है, जो लोक प्रशान्ति बनाये रखने के विरुद्ध है। किसी भी अनुज्ञप्ति धारक से इस प्रकार का आचरण न तो वांछनीय है और न ही विधि सम्मत। अतएव अद्योहस्ताक्षरी इस निष्कर्ष पर पहुँचता है कि अनुज्ञापी उपरोक्त को स्वीकृत किया गया अनुज्ञप्ति बने रहने योग्य नहीं है और न्यायहित मे व बृहत्तर सामाजिक समरसता व लोक प्रशान्ति बनाये रखने हेतु ऐसा किया जाना अनिवार्य है।

19. Keeping in view the aforesaid conduct of the petitioner, the competent authority while exercising the power as vested with him under the provisions of Section 17 (3) (b) of the Act, 1959 has revoked the license of the petitioner.

20. Interestingly a bald averment has been made in paragraph 15 of the writ petition of the petitioner not being present on the spot. However, there is no averment in the petition as to why the authorities concerned would specifically name the petitioner while passing the order impugned. No malafides have been alleged in the writ petition nor any officer has been impleaded by name. Moreover, the order impugned itself indicates that the order was being passed after considering the reply of the petitioner which was not found to be satisfactory and no witness or evidence was produced by petitioner in this regard. Thus, the order impugned indicates objective satisfaction of the authority concerned while cancelling the arms license of the petitioner. Thus, the Court has no option but to treat the version as has been indicated by the authorities in the order dated 26.03.2021 to be correct.

21. So far as the judgment of this Court in the case of **Ram Pratap Singh (supra)** is concerned, the Court may only indicate that there cannot be any cancellation of the arms license on account of pendency of the criminal case. There cannot be any quarrel to the aforesaid

proposition of law as enunciated by this Court even on earlier occasion. However, as already indicated above, this is not the case in which arms license of the petitioner has been cancelled solely on the ground of pendency of criminal cases or lodging of FIR rather the entire conduct of the petitioner has been gone into objectively and given in detail in the order impugned dated 26.03.2021.

22. Moreover, the judgment of **Ram Pratap Singh (supra)** would have no applicability inasmuch as the authority concerned has not cancelled the license of the petitioner merely on the ground of pendency of criminal case rather perusal of the order impugned would indicate that the competent authority has applied his mind to the reply filed by the petitioner meaning thereby that there has been objective consideration of all facts by the authority concerned and after considering the same, the authority has decided that continuance of arms license with the petitioner would cause threat to public peace and security and considering this aspect, the arms license of the petitioner has been revoked. These all are the findings of fact and in the absence of anything to show that the aforesaid inference drawn by the competent authority is per se illegal, the Court does not find any reason to interfere with the same as if sitting in appeal, since the scope of judicial review in such matters in exercise of power under Article 226/227 of Constitution of India is very limited and narrow.

23. This aspect of the matter has been considered by this Court in the case of **Thakur Das Yadav Vs. State of U.P and Ors** passed in **Writ-C No, 55352 of 2009** decided on **16.07.2024**. For the sake of convenience, the relevant observations of this Court in the case of **Thakur Das Yadav (supra)** are reproduced below:-

8. In D. N. Banerji Vs. P. R. Mukherjee 1953 SC 58 the Court said:

"Unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under articles 226 and 227 of the Constitution to interfere."

14. In Ajaib Singh Vs. Sirhind Co-opeative Marketing cum Processing Service Society Ltd., (1999) 6 SCC 82, the Court has held that there is no justification for the High Court to substitute its view for the opinion of the Authorities/ Courts below as the same is not permissible in proceedings under Articles 226/227 of the Constitution.

16. In Indian Overseas Bank Vs. Indian Overseas Bank Staff Canteen Workers' Union (2000) 4 SCC 245, the Court observed that it is impermissible for the Writ Court to reappreciate evidence liberally and drawing conclusions on its own on pure questions of fact for the reason that it is not exercising appellate jurisdiction over the awards passed by Tribunal. The findings of fact recorded by the fact finding authority duly constituted for the purpose ordinarily should be considered to have become final. The same cannot be disturbed for the mere reason of having based on materials or evidence not sufficient or credible in the opinion of Writ Court to warrant those findings. At any rate, as long as they are based upon some material which are relevant for the purpose no interference is called for. Even on the ground that there is yet another view which can reasonably and possibly be taken the High Court can not interfere.

22. In Abdul Razak (D) through Lrs. & others Vs. Mangesh Rajaram Wagle and others (2010) 2 SCC 432, Court

reminded that while exercising jurisdiction under Article 226 or 227, High Courts should not act as if they are exercising an appellate jurisdiction.

24. In Commandant, 22nd Battalion, CRPF and others Vs. Surinder Kumar (2011) 10 SCC 244, Apex Court referring to its earlier decision in Union of India Vs. R.K. Sharma (2001) 9 SCC 592 observed that only in an extreme case, where on the face of it there is perversity or irrationality, there can be judicial review under Articles 226 or 227.

24. Accordingly, keeping in view the aforesaid discussion more particularly seeing the conduct of the petitioner as stands recorded in the order dated 26.03.2021, no case for interference is made out with the orders impugned. Accordingly, the writ petition is dismissed.

(2024) 2 ILRA 365
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.01.2024
BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 3774 of 2023

M/S Sahbhav Engineering Ltd. Ahmadabad ...Petitioner
Versus
U.P. State M.S.M.E. Facilitation Council, Kanpur & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mohit Sharma, Rakesh Kumar Srivastava

Counsel for the Respondents:

Civil Law - Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act) – Sections 18, 19 – Arbitration and Conciliation Act, 1996 – Sections 34 & 36 – Writ Jurisdiction – Article 226/227 of the Constitution – Maintainability of Writ Petition Against Arbitral Award

The petitioner, M/s Sahbhav Engineering Lt , a construction company registered under the MSMED Act, 2006, challenged an arbitral award dated 23.03.2021 passed by the U.P. St. MSME Facilitation Council, Kanpur, in a dispute with respondent No. 3, M/s Hightech Concrete Lt , over the supply of RCC pipes. The petitioner, who participated initially but did not appear in later arbitration proceedings due to the Covid-19 pandemic, learned of the award only upon receiving a recovery notice on 17.11.2022. The petitioner sought to quash the award via a writ petition under Article 226/227. The respondents argued that the writ was not maintainable due to the availability of an alternative remedy under Section 19 of the MSMED Act read with Section 34 of the Arbitration and Conciliation Act, 1996, and that arbitral awards between private parties are not amenable to writ jurisdiction. Held: As per Bhaven Construction Vs Sardar Sarovar Narmada Nigam Lt (2022) 1 SCC 75, writ jurisdiction under Article 226/227 should not be invoked when a statutory remedy exists under the Arbitration Act, except in cases of exceptional rarity or clear bad faith, neither of which was established here. Section 19 of the MSMED Act mandates that challenges to arbitral awards be made under Section 34 of the Arbitration Act, requiring a 75% deposit of the awarded amount. Section 36 further stipulates that unassailed awards become enforceable as court decrees after the limitation period expires, which had lapsed in this case. The dispute being private in nature, and with execution proceedings pending where objections could be raised, the writ petition was not maintainable. The petition was dismissed for lack of merit, with liberty to the petitioner to pursue objections in execution proceedings.

Case Law Cited:

1. Bhaven Construction Vs Sardar Sarovar Narmada Nigam Lt , (2022) 1 SCC 75

2. Nivedita Sharma Vs Cellular Operators Association of India, (2011) 14 SCC 337

3. L. Chandra Kumar Vs U.O.I., (1997) 3 SCC 261

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

1. Heard Sri Mohit Sharma, learned counsel for petitioner as well as Sri G.P. Mishra, learned counsel for respondent No. 3.

2. By means of present writ petition, the petitioner has challenged the award dated 23.03.2021.

3. It has been submitted by learned counsel for petitioner that petitioner is a construction company having its office at Sadbhav House, Law Gardena Police Chowki, Elis Bridge - Ahmedabad and is primarily engaged in the business of construction of highway and toll plaza across the country.

4. It is stated that respondent No. 3/M/s. Hightech Concrete Ltd. is manufacturer of other non-metalic, mineral products, articles and concrete, cement and plaster, Hume pipes and other pre-fabricated structural components of cement and concrete for building or civil engineering and the petitioner has entered into contract with respondent No. 3 for supply of RCC pipes. There were certain disputes between petitioner and respondent No. 3 and the matter was referred to conciliation. It is stated that the conciliation proceedings had failed and consequently the matter was referred for arbitration as per Section 18 of Micro, Small and Medium Enterprises Development Act, 2006.

5. It is further stated that petitioner and respondent No. 3 are registered under the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as the MSME Act) and accordingly the dispute was referred for arbitration under Section 18 of MSME Act, 2006.

6. The petitioner had appeared in the arbitration proceedings and filed his objections to the claim preferred by respondent No. 2. It is stated that subsequently due to onset of Covid -19 pandemic, the petitioner did not appear in the arbitration proceedings and the award was passed on 23.03.2021.

7. It is further stated that petitioner only came to know about the said award when recovery notice dated 17.11.2022 was received by them. Subsequently present writ petition was filed challenging the said award.

8. Learned counsel for respondents on the other hand has submitted that present writ petition would not be maintainable inasmuch as the petitioner has an equally efficacious remedy under Section 19 of MSME Act of 2006 for challenging the award. The said challenge has to be made under Section 34 of the Arbitration and Conciliation Act, 1996. He has further submitted that the dispute between petitioner and the respondent is a private dispute and the matter was referred to arbitration and further submitted that an award passed by the Arbitrator would not be amenable to writ jurisdiction under Article 227 of the Constitution of India.

9. In this context, Hon'ble the Supreme Court in the case of **Bhaven Construction Vs. Sardar Sarovar narmada Nigam Ltd, 2022 (1) SCC 75** has categorically observed :-

16. Thereafter, Respondent No. 1 chose to impugn the order passed by the arbitrator under Section 16(2) of the

Arbitration Act through a petition under Article 226/227 of the Indian Constitution. In the usual course, the Arbitration Act provides for a mechanism of challenge under Section 34. The opening phase of Section 34 reads as 'Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3)'. The use of term 'only' as occurring under the provision serves two purposes of making the enactment a complete code and lay down the procedure.

17. In any case, the hierarchy in our legal framework, mandates that a legislative enactment cannot curtail a Constitutional right. In Nivedita Sharma v. Cellular Operators Association of India, (2011) 14 SCC 337, this Court referred to several judgments and held:

"11. We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, andamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation - L. Chandra Kumar v. Union of India, (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/ instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

(emphasis supplied)

It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear 'bad faith' shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient."

10. Considering the rival submissions, this court is of the considered view that the petitioner has an equally efficacious remedy for raising all the grievances which have been raised by him in the present case in proceeding for challenging the said award as per Section 34 of the Arbitration and Conciliation Act read with Section 19 of the MSME Act, 2006. For ready reference, Section 19 of MSME Act, 2006 is reproduced hereunder:-

"19. Application for setting aside decree, award or order.?No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court: Provided that pending disposal of the application to set aside the decree, award or order, the

court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose."

11. It is noticed that even as per Section 36, it is provided that where time for making an application to set aside the award under Section 34 of Arbitration and Conciliation Act, 1996has expired, then, subject to provisions of Sub-section 2 such award shall be enforced in accordance with the provision of the CPC in the same manner as if it were a decree of the Court.

12. It is noticed that the consequences not assailing the award within the time prescribed have been provided under Section 36 and the award has to be challenged as per the provisions of Section 36(3) of Arbitration and Conciliation Act, 1996 and the time period, accordingly is mandatory within which the award has to be assailed undoubtedly the time for challenge of award has expired.

13. Accordingly, this Court is of the considered view that where statutory prescription has already been provided for challenging the award and the dispute in between private parties a writ petition in this regard would not be maintainable. Further, it has been informed that execution proceedings are pending where the petitioner, if so advised, can take objections in accordance with law.

14. Subject to the aforesaid, this Court has not find any merit in the present writ petition, accordingly, the writ petition being devoid of merits and is dismissed.

(2024) 2 ILRA 368
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2024
BEFORE

THE HON'BLE MANISH MATHUR, J.

Writ C No. 6606 of 2023

Shivangi Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Shiv Prakash Dwivedi, Ashish Kumar Dwivedi

Counsel for the Respondents:
C.S.C., Abhinav Trivedi

Government Order dated 21.10.2022 – Paragraph 7(a) – Refund of Fees – NEET Counselling – Unjust Enrichment – Writ of Mandamus -The petitioner, Shivangi Sharma, sought a writ of mandamus to direct the refund of Rs. 8,25,000/- (tuition fees) and Rs. 2,00,000/- (security deposit) paid during the first round of NEET UG 2022 counselling for allotment to F.H. Medical College, Agr She resigned from this allotment on 13.11.2022 (or 17.11.2022, as per respondents) due to dissatisfaction and was subsequently allotted NIMS University, Jaipur, in the second round of counselling on 26.11.2022. The petitioner relied on paragraph 7(a) of the Government Order dated 21.10.2022, which permits refund of fees (minus 10% deduction) if a student resigns after first-round allotment upon securing a seat in second-round counselling, subject to providing proof of the new allotment. The respondents argued that the second proviso to paragraph 7(a), which allows a 50% deduction for resignations due to personal reasons without second-round allotment, applie Held: The court interpreted the mandatory requirement in paragraph 7(a) for submitting proof of second-round allotment at the time of resignation as directory, given the beneficial nature of the refund provision. Retaining fees without

imparting education constitutes unjust enrichment, as fees are a quid pro quo for studies. The petitioner's resignation letter clearly St.d reasons for withdrawal, and her subsequent allotment in the second round was undispute Thus, the case fell under paragraph 7(a), not the second proviso, as the petitioner secured a second-round allotment. The court issued a mandamus directing the refund of the permissible amount (after 10% deduction) within two weeks. The writ petition was allowe ....

*Shivangi Sharma Vs St. of U.P. & ors., (*2024) 2 ILRA, Writ C No. 6606 of 2023, decided on 25.01.2024 (All. HC, Lucknow Bench)

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

1. Heard learned counsel for petitioner, learned State Counsel for opposite party no.1 and Mr. Abhinav N. Trivedi, learned counsel for opposite party no.2. In view of order being passed, notices to opposite party no.3 stand dispensed with.

2. Petition has been filed seeking a direction to opposite parties to refund an amount of Rs.8,25,000/- and security amount of Rs.2,00,000/- deposited at the time of first counselling for the purposes of allotment of a medical college to petitioner.

3. It is submitted that petitioner participated in the National Eligibility-cum-Entrance Test (NEET) for the under-graduate programme in year 2022 and was allotted F.H. Medical College, Agra in the first counselling. It is submitted that at the same time, petitioner was also participating in the counselling pertaining to NIMS University, Jaipur under the general category but prior to conclusion of counselling in Jaipur, F.H. Medical College, Agra was allotted to petitioner in the first counselling.

4. Learned counsel for petitioner submits that subsequently on 26.11.2022, petitioner was allotted NIMS University, Jaipur in the second counselling. In the intervening period, petitioner submitted resignation with regard to first counselling vide letter dated 13.11.2022 on the ground that petitioner was dissatisfied with the College allotted and sought refund of the fees already deposited by petitioner.

5. Learned counsel for petitioner places reliance on paragraph 7(a) of Government Order dated 21.10.2022 to submit that petitioner is entitled for refund in terms thereof.

6. Learned counsel appearing on behalf of opposite party no.2 has refuted the submissions advanced by learned counsel for petitioner with the submission that petitioner in fact submitted her resignation on 17.11.2022.

7. It is submitted that petitioner's case instead of being covered by paragraph 7(a) of aforesaid Government Order is in fact covered by second Proviso to paragraph 7(a) of the Government Order.

8. For purposes of adjudication of present dispute, it would be necessary to advert to provisions of paragraph 7 of Government Order dated 21.10.2022, which is as follows:-

"7– त्याग–पत्र दिये जाने के संबंध में–

अभ्यर्थी को मात्र सीट का आंबटन ;।ससवजउमदजद्ध प्रवेश नहीं माना जायेगा। आवंटन के पश्चात् अभ्यर्थी को संबधित कालेज/नोडल सेंटर पर उपस्थित होकर प्रवेश प्रकिया सम्पन्न करने के पश्चात ही प्रवेश माना जायेगा। तत्पश्चात् ही प्रवेशित अभ्यर्थी प्रवेशित सीट से त्यागपत्र दे सकेगा।

(क) यदि अभ्यर्थी शैक्षणिक सत्र 2022–23 की प्रथम कांउसिंलिग से आवंटित होकर प्रदेश के किसी भी मेडिकल/डेण्टल की सीट पर प्रवेश प्राप्त कर लेता है तत्पश्चात् अभ्यर्थी आल इण्डिया या अन्य प्रदेश की काउंसिलिंग के माध्यम से किसी अन्य सीट पर आवंटन प्राप्त करता है और वह प्रदेश की प्रथम कांउसिलिंग से प्रवेशित सीट से त्यागपत्र देना चाहता है (त्यागपत्र के समय अन्य कांउसिलिंग से आवंटन का प्रमाण पत्र प्रस्तुत करना अनिवार्य होगा) तो ऐसे अभ्यर्थी उ0प्र0 राज्य की द्वितीय कांउसिलिंग की च्वाईस फिलिंग से दो दिन पूर्व तक (उदाहरणार्थ यदि द्वितीय चक्र की कांउसिलिंग दिनांक 24.112022 से प्रारम्भ होनी है, तो अभ्यर्थी 21.11.2022 को सांय 04.00 बजे तक) अपनी सीट से त्यागपत्र दे सकता है। ऐसी स्थिति में अभ्यर्थी द्वारा जमा की गयी सिक्योरिटी धनराशि तथा शिक्षण शुल्क से निम्नानुसार कटौती करते हुए शेष धनराशि वापस की जायेगीः–

– राजकीय तथा निजी क्षेत्र के मेडिकल/डेण्टल कालेजों में प्रवेशित अभ्यर्थियों की जमा शिक्षण शुल्क से 10 प्रतिशत की कटौती करते हुए शेष धनराशि तथा धरोहर धनराशि ;मबनतपजल डवदमलद्ध वापस देय होगी।

– प्रथम चक्र की कांउसिलिंग से आवंटन के पश्चात यदि अभ्यर्थी द्वारा आवंटित कालेज में प्रवेश ले लिया जाता है तथा अभ्यर्थी को आल इण्डिया/अन्य प्रदेशों की कांउसिलिंग से कोई भी आवंटन प्राप्त नही होता है, फिर भी अभ्यर्थी व्यक्तिगत कारणों से निर्धारित तिथि (द्वितीय चक्र की च्वाइस फिलिंग से दो दिन पहले तक) से पूर्व त्याग पत्र देता है तो ऐसी दशा में शिक्षण शुल्क में से 50 प्रतिशत की कटौती करते हुये शेष धनराशि एवं धरोहर धनराशि ;मबनतपजल डवदमलद्ध वापस किया जायगा।

——————————————"

9. A perusal of aforesaid provisions makes it evident that there is provision for refund of fees in case a student participates in the counselling in the first round but subsequently forsakes the seat which has been allotted. While paragraph 7(a) states that such resignation from the College allotted in the first counselling is permissible subject to a student being allocated a Medical College in the second counselling but such a fact is required to be indicated specifically in the resignation letter and by annexing a certificate regarding his allotment made in the second counselling.

10. In the considered opinion of this Court, although it has been couched in mandatory terms that at the time of resignation from allotment made in first counseling, reasons thereof and annexing of certificate pertaining to allotment in the second counselling has been made but in view of the beneficial provision pertaining to refund of fees, such a mandatory condition can be read down to be directory in nature particularly in case where the student subsequently also indicates allotment of a seat in the second counselling and indicates reasons for forsaking the allotment made in the first counselling. The reason for reading down aforesaid condition although couched in mandatory terms, is quite evident that fees is deposited as a consideration for studies imparted by a College. In case a student resigns from the allotment made in the first counselling itself, clearly no studies have been imparted to such a student and therefore permitting such a College to retain fees deposited by a student would in fact amount to unjust enrichment. It is the opinion of this Court, that fees deposited by a student is as a quid pro quo for studies imparted to such student. This is more so, as in the present case where subsequent rounds of counselling including mop up rounds of counselling have taken place.

11. In the present case, it is quite evident from resignation letters submitted by petitioner either on 13.11.2022 or 17.11.2022 that reasons for resigning the allotment made in first counselling have

been clearly indicated by petitioner. It is also evident that at the time of resignation, allotment as per the second counselling had not been made, which was subsequently done on 26.11.2022 and has been brought on record as annexure-7 to writ petition.

12. The opposite parties have not denied the fact that petitioner has in fact been allotted a Medical College in her home state in the second round of counselling. The reason therefore for resigning from allotment made in the first counseling is evident as is the fact that petitioner has definitely been allotted a Medical College in the second counselling.

13. In the considered opinion of this Court, conditions indicated in paragraph 7(a) are therefore substantially complied with. It is also the opinion of this Court that provisions of paragraph 7(a) of Government Order dated 21.10.2022 have been specifically inserted so as not to permit unjust enrichment by a College for retaining fees without imparting studies to a student.

14. So far as reliance placed by learned counsel for opposite party no.2 upon second proviso to paragraph 7(a) is concerned, it is evident that the same will be inapplicable in the present case since it pertains to those situation where a student has not been provided any seat allocation even in second counselling.

15. In view of discussions made herein above, it is evident that case of petitioner is covered under paragraph 7(a) of Government Order dated 21.10.2022.

16. Therefore, a writ in nature of Mandamus is issued commanding opposite party no.2 to refund the permissible amount as per 7(a) of Government Order dated 21.10.2022 to petitioner within a period of two weeks from the date of certified copy of this order is produced before the said authority.

17. Consequently, the writ petition succeeds and is allowed. Parties to bear their own cost.

(2024) 2 ILRA 371
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.02.2024
BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE MANISH KUMAR, J.

Writ C No. 9211 of 2011
with
Writ C No. 5539 of 2013
with
Writ C No. 5591 of 2013

M/S Sundaram Developers Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sachin Garg, Jaspreet Singh, Sachin Garg

Counsel for the Respondents:
C.S.C., Rajesh Singh Chauhan, Shailendra Singh Chauhan, Shashi Prakash Singh

Civil Law - U.P. Municipal Corporations Act, 1959 – Section 129 – Land Acquisition Act, 1894 – Sections 4 & 6 – Cancellation of Lease Deed – Principles of Natural Justice – Public Trust Doctrine – Malafide Exercise of Power – Article 226

The petitioners, M/s Sundaram Developers Pvt. Lt and M/s Eldeco Housing and Industries, challenged the cancellation of a lease deed dated 24.06.1995 executed by Lucknow Municipal Corporation in favor of M/s

Mansarovar Sahkari Awas Samiti Lt (MSAS) for land in Village Jiamau, Lucknow, vide order dated 01.06.2013, and sought to restrain interference with their possession. The lease, covering Khasra Nos. 209, 220, 221, 222, 224 (4 Bigha, 12 Biswa, 2 Biswansi), was granted to MSAS for 30 years for group housing, but was cancelled due to non-submission of a layout plan, lack of internal/external development, and transfer of the entire land to private developers (petitioners) for profit, violating lease terms. Writ Petition No. 9211 of 2011 sought to prevent interference in possession, alleging unauthorized St. action despite the land not being under acquisition, and obtained a status quo order. Writ Petitions Nos. 5539 and 5591 of 2013 challenged the lease cancellation. Held: The Municipal Corporation's resolution (No. 70, dated 05.01.1995) and lease deed were ultra vires Section 129 of the 1959 Act, as they lacked a defined public purpose under Sections 114 or 115, such as a housing scheme, and were executed without transparent bidding, rendering them a fraud on the statute. The land was transferred to petitioners through five individuals in a surreptitious manner, without sanctioned maps or development, defeating the public trust doctrine. The absence of notice to petitioners was immaterial, as per St. of U.P. Vs Sudheer Kumar Singh (AIR 2020 SC 5215), since undisputed facts showed no prejudice, and only one conclusion—illegality of the resolution—was possible. The plea of estoppel failed, as no development occurred, and the initial resolution was void ab initio. The Supreme Court's rulings in Uddar Gagan Properties Lt Vs Sant Singh ((2016) 11 SCC 378) and NOIDA Entrepreneurs Assn. Vs NOIDA ((2011) 6 SCC 508) underscored that malafide, hasty actions bypassing legal procedures are voi The cancellation was upheld, Writ Petitions Nos. 5539 and 5591 of 2013 were dismissed, and Writ Petition No. 9211 of 2011 was rendered infructuous, as the petitioners had no rights post-cancellation. Interim orders were discharge

Case Law Cited:

1. St. of U.P. Vs Sudheer Kumar Singh, AIR 2020 SC 5215

2. Uddar Gagan Properties Lt Vs Sant Singh, (2016) 11 SCC 378

3. NOIDA Entrepreneurs Assn. Vs NOIDA, (2011) 6 SCC 508

4. M/s Daffodills Pharmaceuticals Lt Vs St. of U.P., (2020) 18 SCC 550

5. St. of U.P. Vs Sudhir Kumar, (2021) 19 SCC 706

6. St. Bank of India Vs Rajesh Agarwal, (2023) 6 SCC 1

7. Sunil Pannal Banthia Vs City & Industrial Development Corporation, (2007) 10 SCC 674

8. ITC Lt Vs St. of U.P., (2011) 7 SCC 493

9. L. Sreedhar Vs K.M. Munireddy, (2003) 2 SCC 355

10. Kamaljit Singh Vs Sarabjit Singh, (2014) 16 SCC 472

11. St. of Punjab Vs Gurdial Singh, (1980) 2 SCC 471

12. Greater Noida Industrial Development Authority Vs Devendra Kumar, (2011) 12 SCC 375

13. St. of Punjab Vs Ramjilal, (1970) 3 SCC 602

14. Express Newspapers (P) Lt Vs U.O.I., (1986) 1 SCC 133

15. Jagir Singh Vs Ranbir Singh, (1979) 1 SCC 560

16. Bahadursinh Lakhubhai Gohil Vs Jagdishbhai M. Kamalia, (2004) 2 SCC 65

17. Zenit Mataplast (P) Lt Vs St. of Maharashtra, (2009) 10 SCC 388

18. Erusian Equipment & Chemicals Lt Vs St. of W. , (1975) 1 SCC 70

19. Ramana Dayaram Shetty Vs International Airport Authority of India, (1979) 3 SCC 489

20. Haji T.M. Hassan Rawther Vs Kerala Financial Corpn., (1988) 1 SCC 166

21. Shrilekha Vidyarthi Vs St. of U.P., (1991) 1 SCC 212

22. M.I. Builders (P) Lt Vs Radhey Shyam Sahu, (1999) 6 SCC 464

23. Commr. of Police Vs Gordhandas Bhanji, 1951 SCC 1088

24. Sirsi Municipality Vs Cecelia Kom Francis Tellis, (1973) 1 SCC 409

25. Collector (District Magistrate) Vs Raja Ram Jaiswal, (1985) 3 SCC 1

26. Delhi Admn. Vs Manohar Lal, (2002) 7 SCC 222

27. N. Jayal Vs U.O.I., (2004) 9 SCC 362

(Delivered by Hon'ble Vivek Kumar Chaudhary, J.
&
Hon'ble Manish Kumar, J.)

1. Heard Sri N.K. Seth, learned Senior Advocate assisted by Sri Sachin Garg, learned counsels for petitioner in Writ Petition No.9211 (M/B) of 2011 & Writ Petition No.5539 (M/B) of 2013, Sri Sachin Garg, learned counsel for petitioner in Writ Petition No.5591 (M/B) of 2013 and Sri Shailendra Singh Chauhan, learned counsel for Lucknow Municipal Corporation, Sri Puneet Chandra, learned counsel for Lucknow Development Authority and learned Additional Chief Standing Counsel for State-respondents. The arguments were made by Sri N.K. Seth, learned Senior Advocate assisted by Sri Sachin Garg, learned counsel for petitioner in Writ Petition No.5539 (M/B) of 2013. Sri Sachin Garg, Advocate appearing in connected Writ Petition No.5591 (M/B) of 2013 has adopted all the arguments of Writ Petition 5539 (M/B) of 2013.

2. These three writ petitions being Writ Petition No.9211 (M/B) of 2011, Writ petition no. 5539 (M/B) of 2013 and Writ C No. 5591 (M/B) of 2013 are being heard and decided together by a common judgment. Writ Petition No.9211 (M/B) of 2011 filed by Ms. Sundaram Developers Pvt. Ltd. Lucknow could have been decided on the very first date itself, however, an order of status-quo was passed in the same on 16.09.2011 which continues till date. By way of Writ Petition No.9211 (M/B) of 2011, petitioner approached this Court claiming that, though, land in dispute bearing plot nos. P-9, P-10, P-12, P-13 (Part of Khasra Plot Nos. 209, 220, 221, 223 & 224) situated at Village Jiamau, Ward Vikrmaditya, Lucknow is not notified for acquisition but still in the garb of acquisition respondents are trying to interfere in possession of petitioner and thus got an order of status-quo. In the counter affidavit, respondents accepted that the land in dispute is not under acquisition and they have no claim but, still the writ petition was never disposed of and was got connected with the other two aforesaid writ petitions which are on entirely different causes. Writ Petition No.5539 (M/B) of 2013 and Writ Petition No.5591 (M/B) of 2013 challenge order dated 01.06.2013 passed by respondent no.2 cancelling lease deed dated 24.06.1995 executed in favour of M/s Mansarover Sahkari Awas Samiti Ltd. (M/s MSAS). Further, a mandamus is sought directing respondents not to interfere in their peaceful possession over the property in dispute. Facts of both Writ Petition No.5539 (M/B) of 2013 and Writ Petition No.5591 (M/B) of 2013 are nearly same and thus, are being heard and decided together. No stay order was granted in the aforesaid two writ petitions which had entirely separate cause of action, however, in view of status-quo order passed in Writ

Petition No.9211 (M/B) of 2011, respondents did not take any steps to take possession of the property in dispute through-out the last ten years.

3. The order dated 01.06.2013 cancels the lease deed executed in favour of M/s Mansarovar Sahkari Awas Samiti Ltd. (M/s MSAS) on the grounds that as per the terms of lease internal or external development is not effected and even the layout plan of the land is not presented before the Municipal Corporation, despite specific order of High Court dated 30.11.2002, which provided for submission of layout plan within ten days of handing over of possession; though the land was to be developed for the members of cooperative society but neither the list of members of cooperative society, nor any intimation of transfer of land to its members was provided and, in fact, the entire land was sold for earning profits; and further details were not provided to the Municipal Corporation which were repeatedly asked for by the Municipal Corporation.

4. Facts of case are that Municipal Corporation Lucknow in its meeting held on 05.01.1995 passed a resolution No.70 whereby it provided for execution of a lease for 30 years of property bearing Khasra No.209, 220, 221, 222, 224 total area 4 Bigha, 12 Biswa, 2 Biswansi situated at Village Jiamau, Pargana and Tehsil-Lucknow at the rate of Rs. 2,50,000/- per bigha (Total Rs. 11,51,250/-) in favour of M/s MSAS. After a period of 30 years, the lease could be renewed for further two term of 30 years each, with enhancement of 50% of lease rent. In furtherance of said resolution, a lease deed was executed on 24.06.1995 by the Mukhya Nagar Adhikari, Municipal Corporation Lucknow in favour of M/s MSAS. The lease deed in addition to the aforesaid terms provided that the lessee can transfer lease land or any part of it and for the same, it would not require any prior permission from the lessor. The lessee shall make internal and external development as per the master plan. It appears that the land was neither demarcated by Municipal Corporation nor possession thereof was given to M/s MSAS, hence, it filed a Writ Petition No.7060 (M/B) of 2002 before this Court. The said writ petition was disposed of on 30.11.2002 with the following order:-

Heard the learned counsel for the petitioner and St Anand Swaroop Rai, Advocate, who has put in appearance on behalf of the opposite parties.

The petitioner has alleged that the lease deed dated 24.6.1995 was executed by the then Lucknow Nagar Nigam in favour of the petitioner's society for the Group Housing. The grievance of the petitioner is that the opposite parties have not demarcated the area on the spot in spite of their repented requests and they have also not put the society in possession of the property.

The learned counsel appearing on behalf of the opposite parties submits that the petitioner has not submitted the lay out plan.

We have considered the arguments of the learned counsel for the parties and gone through the record. There is no dispute that lease deed dated 24.6.1995 was executed im favour of the petitioner's society by the Lucknow Municipal Corporation. The petitioner has approached to the opposite parties for the demarcation of the area on the spot and for the physical possession.

Without entering into the merits of the case, the writ petition is finally disposed of with a direction to the opposite

parties to demarcate the area in pursuance of the lease deed dated 24.6.1995 on the spot within four weeks from the date a certified copy of this order is produced and as soon as the area is demarcated and the petitioner is put in possession, the petitioner shall furnish the lay out plan to the opposite parties within ten days thereafter.

Dt: 30.11.2002.

Sks

The office is directed to issue a certified copy of this order to the learned counsel for the petitioner within two days on payment of necessary charges.

Dt: 30.11.2002

sks

5. In furtherance thereof, possession of the land was handed over to the M/s MSAS. Though the order directed M/s MSAS to furnish the lay out plan to the opposite party within ten days thereafter, however, no such plan was ever handed over by the M/s MSAS to the Municipal Corporation. The entire land was transferred to the petitioners by M/s MSAS in the following manner:-

Writ Petition No.5539 (M/B) of 2013

1.	**Plot No.9 consisting of part of Gata Nos.220, 221 & 223, area 3100 sq. meter**	**By sale deed dated 25.05.2004 M/s MSAS sold to Sri Vishwajeet Singh s/o Batukeshwar Dutt Singh**	**By sale deed dated 04.06.2004 Sri Vishwajeet Singh sold to M/s Sunderam Developers Pvt. Ltd. (Petitioner)**
2.	**Plot No.10 consisting of part of Gata Nos.220, 221 and 223, area 3000 sq. meter**	**By sale deed dated 25.05.2004 M/s MSAS sold to Sri Narendrajeet Singh s/o Batukeshwar Dutt**	**By sale deed dated 04.06.2004 Sri Narendrajeet Singh sold to M/s Sunderam Developers Pvt. Ltd. (Petitioner)**
3.	**Plot No.12 consisting of part of Gata No.220, 221, 222, 223 & 224, area 394 sq. meter**	**By sale deed dated 29.05.2008 M/s MSAS sold to Sri Arjun Singh s/o Sri S.P. Singh**	**By sale deed dated 16.06.2008 Sri Arjun Singh sold to M/s Sunderam Developers Pvt. Ltd. (Petitioner)**
4.	**Plot No.13 consisting of part of Gata No.220, 221, 222, 223 & 224, area 206 sq. meter**	**By sale deed dated 18.06.2009 M/s MSAS sold to Sri Arjun Singh s/o Sri S.P. Singh**	**By sale deed dated 25.06.2009 Sri Arjun Singh sold to M/s Sunderam Developers Pvt. Ltd. (Petitioner)**

Writ Petition No.5591 (M/B) of 2013

1.	**Plot No.6 consisting of part of Gata Nos. 206, 207 & 209, area 3840 sq. meter**	**By sale deed dated 30.04.2002 M/s MSAS sold to Sri Dhruv Singh s/o Sri Seeta Saran Singh**	**By sale deed dated 03.08.2004 Sri Dhruv Singh sold to M/s Eldeco Housing and Industries (Petitioner)**
2.	**Plot No.7 consisting of part of Gata Nos. 206, 207, 208 & 209, area 2760 sq. meter**	**By sale deed dated 03.05.2002 M/s MSAS sold to Sri Arjun Singh s/o Sri S.P. Singh**	**By sale deed dated 03.08.2004 Sri Arjun Singh sold to M/s Eldeco Housing and Industries (Petitioner)**
3.	**Plot No.8 consisting of part of Gata Nos. 207, 208, 209 and 221, area 2395 sq. meter**	**By sale deed dated 20.05.2002 M/s MSAS sold to Sri Veerendra Singh s/o Sri Nepal Singh**	**By sale deed dated 03.08.2004 Sri Veerendra Singh sold to M/s Eldeco Housing and Industries (Petitioner)**
4.	**Plot No.11 consisting of part of Gata Nos. 202, 209 and 221, area 1574 sq. meter**	**By sale deed dated 29.05.2008 M/s MSAS sold to Sri Veerendra Singh s/o Sri Nepal Singh**	**By sale deed dated 05.07.2008 Sri Veerendra Singh sold to M/s Eldeco Housing and Industries (Petitioner)**
5.	**Plot No.14 consisting of part of Gata Nos. 220, 221, 222,223 and 224,**	**By sale deed dated 18.06.2009 M/s MSAS sold to Sri Veerendra Singh s/o Sri Nepal Singh**	**By sale deed dated 25.06.2009 Sri Veerendra Singh sold to M/s Eldeco Housing and Industries (Petitioner)**

	area 826 sq. meter		

No sanctioned map is filed by petitioners and thus it is not clear how said plot numbers were given. But, it is apparent that entire lease land stood transferred from M/s MSAS through only five persons to petitioners.

6. Meanwhile, State of U.P. on 09.04.2010 and 02.06.2010 issued notifications under Section 4 and Section 6 of Land Acquisition Act, 1894 for the surrounding areas. The land in dispute was not covered by the said notifications. The award of the said acquisition was also issued but the land in dispute was not included in the said award also and thus it remained unacquired. Petitioner, M/s Sundaram Developers Pvt. Ltd., claimed interference was being made by the State authorities in its possession of the property in dispute and allegedly a boundary wall of petitioner was also demolished. M/s Sundaram Developers Pvt. Ltd. thus, filed a Writ Petition No.9211 of 2011 and in the same an order of status-quo was passed on 16.09.2011. No such writ petition was filed by M/s Eldeco Housing and Industries Pvt. Ltd. or M/s MSAS. On 28.07.2012 Additional Municipal Commissioner, Municipal Corporation, Lucknow issued a show cause notice to the M/s MSAS pointing out violation of conditions of lease deed dated 24.06.1995 and therefore for cancellation of lease deed. M/s MSAS submitted its reply on merits to the Additional Municipal Commissioner on 14.08.2012. In its reply, amongst other things, it stated that some of the leased lands have been transferred to some of its members, but, neither any details were provided nor it claimed that notice should also be given to them. Having considered the reply of the M/s MSAS, by impugned order dated 01.06.2013, the lease deed executed in favour of MSAS was cancelled. Challenging the said show cause notice and impugned order dated 01.06.2013 cancelling the lease deed, petitioners have filed other two writ petitions.

7. Sri N.K. Seth, learned Senior Advocate assisted by Sri Sachin Garg, learned counsel for petitioners emphatically submits that there is no notice or opportunity of hearing given to the petitioner before passing the impugned order, even though the property had vested in the petitioner. It is claimed that it is only the petitioner who had right to contest the proceedings. He further submits that there is a specific clause in the lease deed that transfer of lease land can be made by the lessee without any prior permission of the lessor and in fact such transfer had taken place. He further submits that Municipal Corporation could have taken the stand that the lease deed is not in accordance with law in the earlier Writ Petition No.7060 (M/B) of 2002 but it never took any such stand. His next submission is that there can not be a unilateral cancellation of lease deed and in fact the Municipal Corporation somehow wanted to occupy the said land and since it could not do so it cancelled the lease deed and this amounts to malice in law. Learned counsel for the petitioner further submits that respondent Municipal Corporation is estopped from cancelling the lease deed after such a long delay. He submits that since the resolution was passed, lease deed was executed and thereafter it was also sold, therefore, the same can not be cancelled at all. To buttress his submissions reliance is placed by petitioners upon the following judgments:-

on opportunity of hearing:-

(i) (2020) 18 SCC 550; 'M/s Daffodills Pharmaceuticals Ltd. And Others Vs. State of U.P. and another;

(ii) (2021) 19 SCC 706; Civil Appeal No.3498 of 2020; 'State of U.P. Vs. Sudhir Kumar and Others;

(iii) (2023) 6 SCC Page 1; 'State Bank of India Vs. Rajesh Agarwal and Others';

on unilateral cancellation of allotment:-

(i) (2007) 10 SCC 674; 'Sunil Pannal Banthia & Others Vs. City & Industrial Development Corporation of Maharashtra Ltd. and Another.

(ii) (2011) 7 SCC 493; ITC Ltd. Vs. State of U.P. and Others.

on estoppel:-

(i) (2003) 2 SCC 355; B.L. Sreedhar & Others Vs. K.M. Munireddy (Dead) & Others

(ii) (2014) 16 SCC 472; Kamaljit Singh Vs. Sarabjit Singh.

8. On the other hand, Sri Shailendra Singh Chauhan, learned counsel for Lucknow Municipal Corporation strongly submits that the very purpose of providing the land to a housing cooperative society was to provide housing facility to the residents of the Lucknow Municipal Corporation. M/s MSAS violated the conditions of the lease deed and neither got any map sanctioned from the Lucknow Development Authority nor got the said land developed to fulfill the housing needs of the residents of the city. The land was parked for availing better prices in future and in fact the manner in which it was sold to the petitioners, private developers, proves the same. Even petitioners, till date, have not utilized the said land for its original intended purpose. The land till date is lying undeveloped, unutilized, as it was given to M/s MSAS under the order of High Court dated 30.11.2002. Thus, the benefits which were to be given to the residents of Lucknow city in the year 1995 are not provided till now, despite nearly 28 years having passed. He states that amongst other grounds, since the very purpose of the lease is violated, thus, there is no illegality in the impugned order. He further submits that since a reply on merits was filed by M/s MSAS the same was duly considered and since the Lucknow Municipal Corporation was not informed that petitioners had purchased the property, there was no occasion to grant any opportunity of hearing to the petitioners. Even otherwise, petitioners can not have any better case than the case set up by M/s MSAS.

9. Learned Additional Chief Standing Counsel and Sri Puneet Chandra, learned counsel for respondent development authority also adopt the submissions made by the learned counsel for Municipal Corporation.

10. We have considered the submissions of learned counsels for parties and perused the records with their assistance.

11. Admittedly, land in dispute was owned by the Municipal Corporation. The Municipal Corporation in its meeting dated 05.01.1995 by resolution no.70, resolved for execution of a lease deed in exercise of power under Section 129 of the U.P. Municipal Corporation Act 1959 (hereinafter referred to as 'Act of 1959'). The proposal and resolution reads as follows:-

*"**अध्यक्ष की अनुमति** से ग्राम–जयामऊ की खसरा संख्या– 209, 220, 221, 222 व 224 की कुल 04 बीघा 12 बिस्वा 02 बिस्वांसी भूमि जिला अधिकारी लखनऊ द्वारा निर्धारित कृषिक भूमि की*

दर रु0 2,50,000.00 प्रति बीघे की दर से आवंण्टित की जाने वाली उक्त भूमि का मूल्य रु0 11,51,250.00 होता है। पट्टा 30 वर्ष की अवधि उपरान्त 30–30 वर्ष के दो नवीनीकरण इस प्रतिबन्ध के साथ कि प्रत्येक नवीनीकरण के समय लीज रेण्ट में 50 प्रतिशत वृद्धि हो जायेगी, रु0 11,51,250.00 वार्षिक लीज रेण्ट में 50 प्रतिशत वृद्धि हो जायेगी। रु0 11,51,250.00 वार्षिक लीज रेण्ट पर मानसरोवर सहकारी आवास समिति लि0 लखनऊ के पक्ष में विनियमितीकरण किये जाने का प्रस्ताव मुख्य नगर अधिकारी की संस्तुति दिनांक 03.01.1995 के तहत कार्यकारिणी के समक्ष विचारार्थ प्रस्तुत।

संकल्प सं0 (70): *सर्व सम्मत्ति से उपरोक्तानुसार प्रस्ताव स्वीकृत हुआ तथा सदन के द्वारा प्रतिनिधायन के तहत धारा 129 की शक्तियों का प्रयोग करते हुये सदन के अधिकारों का प्रयोग करते हुये अनुमोदिन एवं स्वीकृत किया गया।"*

12. On the basis of the said resolution, a lease deed was executed on 24.06.1995. A perusal of the minutes of the meeting dated 05.01.1995 filed by respondent Municipal Corporation through an affidavit dated 04.08.2023 show that the proposal to allot the land in question was not on the day's agenda and was brought to agenda by permission of the President. Resolution No. 70 is silent as to why allotment is being made in favour of M/s MSAS, instead of allotting the land to the highest bidder through an open bidding system. During arguments, a question arose as to whether such a resolution can be passed and lease deed be executed by the Municipal Corporation. Counsel for the petitioner states that the Municipal Corporation has full power to dispose of its property by way of sale or lease. Reliance for the said purposes is placed upon Section 129(4) of the Act of 1959. The same reads as follows:-

"129. Provisions governing disposal of property. - *With respect to the disposal of property belonging to the Corporation the following provisions shall have effect, namely:*

(4) The Municipal Commissioner may with the sanction of the Corporation lease, sell, let out on hire or otherwise convey any property, movable or immovable belonging to the Corporation. "

13. No doubt Municipal Corporation has power to dispose of its property by executing lease deed but the same has to be done for the purposes of the Act. There is no absolute power in the Municipal Corporation to simply sell or lease its land beyond the purposes of the Act. The power of the Municipal Corporation is not absolute and unrestricted but it has to be exercised within the four corners of express legislative consent given by the Act of 1959. Sections 114 and 115 provides obligatory duties and discretionary duties of the Municipal Corporation. Municipal Corporation can work and utilize its properties, both movable and immovable, for achieving the said objects only. The corporation holds the property as a trustee on behalf of people living within its limits. It is not the absolute owner of the property to use or abuse it on its whims. The resolution and the lease deed are absolutely silent as to the purpose for which the land is provided to M/s MSAS. The lease deed merely states that M/s MSAS does not require any prior sanction from the Municipal Corporation for selling or transferring the entire land or any part thereof to third parties. Learned counsel for the petitioner states that from the bare perusal of the resolution, the lease deed and from the fact that the land was given to M/s MSAS, a Sahakari Awas Samiti, it can be inferred that the land was to be developed for a residential housing scheme for the residents of Lucknow Municipal Corporation. Petitioners in both the writ

petitions are developers and would use the land for the same purposes. Learned counsel for the petitioner was asked if the said purpose is covered under Section 114 or 115 or any other provisions of the Act of 1959. Reference is made by learned counsel for petitioner to Clause 33 of Section 114 of the Act of 1959 which reads:-

"(xxxiii) town planning and improvement, including slums clearance and preparation and execution of housing scheme and laying out new streets."

14. Counsel for the petitioner states that it is within the power of Corporation to prepare and execute housing scheme. Thus, it can also transfer land for the purpose of a housing scheme. Other than aforesaid, no other provision could be placed by the counsel for petitioner to support his submissions.

15. The term *"preparation and execution of a housing scheme"* only empower the Corporation to itself prepare and execute the housing scheme. For the said purposes, the Municipal Corporation is first to prepare a housing scheme and thereafter to take steps for its execution. Municipal Corporation can not transfer duties/obligations casted upon it by legislation in toto to private players. It ought to have first framed a housing scheme, identified if any assistance in its execution is required from private players and only thereafter, the Municipal Corporation should have taken steps as permissible in law. In the present case the decision to allot the Municipal land to M/s MSAS was not even on agenda in the meeting of Executive Committee dated 05.01.1995. It was added very hastily in a very questionable manner, with the permission of chairman. The entire land was leased out without reference to any housing scheme of the Municipal Corporation or even providing as to how the land is to be developed or utilized and the time period for such utilization. It is not clear till date as to how and why M/s MSAS was chosen for allotment of land. The manner in which subsequent transactions took place also create serious doubts. The land allotted to M/s MSAS was artificially carved into different smaller plots of varying length, some close to about 3100sq.m., without getting any map sanctioned from any authority. As per the petitioner, these plots were allotted to members of the M/s MSAS, however, no list of members was ever provided. As noted in the chart above, the alleged five members of the Society after buying plots from the society sold the entire land to petitioner-developers within a short period. There is not a word about any housing scheme either in the resolution or in the lease deed. Even the requirement to have a sanctioned map and to submit it to the corporation appeared for the first time in the order of High Court dated 30.11.2002. It is admitted that no housing scheme was ever prepared by the Municipal Corporation. In fact the lease deed specifically states that lessee M/s MSAS shall get the internal and external development of the land made on its expense as per the master plan of Lucknow urban area and as per the rules. In the judgment dated 30.11.2002 passed in Writ Petition No.7060 (M/B) of 2002, the High Court had also directed that as soon as the area is demarcated and M/s MSAS is put in possession, M/s MSAS shall furnish the lay out plan to the Corporation within ten days thereafter. The aforesaid facts clearly establish that there was no housing scheme prepared by the Municipal Corporation and

even the said duty was outsourced to M/s MSAS. Thus, from the facts and records of the case, this Court is unable to agree with the submission of counsel for petitioner that the land was given for achieving any purpose prescribed by Section 114 or 115 of Act of 1959. The claimed purpose *"preparation and execution of housing scheme"* is only an after-thought for the purposes of the present case developed during course of arguments. Therefore, the resolution No. 70 and lease deed dated 24.06.1995 executed by the Municipal Corporation to M/s MSAS does not fall within the duties of the Municipal Corporation and is, therefore, beyond the powers of the Municipal Corporation vested in it by the Act of 1959.

16. Learned counsel for petitioner places reliance upon the communication dated 17.02.1997 made by U.P. Awas Evam Vikas Parishad to the Secretary of M/s MSAS that it has granted sanction for group housing/multi-story building on the property in dispute. The said communication is filed as annexure no.6 to the writ petition. There is no sanctioned map filed along with the said communication. Even during the long course of argument no such sanctioned map was placed by the petitioners before this Court. Even otherwise the said communication dated 17.02.1997 on the face of it appears to be doubtful as in the Writ Petition No.7060 (M/B) of 2002 filed before this Court the stand of M/s MSAS was that the land is not yet demarcated and its possession is not given to the petitioners and, therefore, no layout plan as yet could be prepared and M/s MSAS would take ten days time, from date of possession, to submit proposed layout plan to the Municipal Corporation. Thus, there is no question that any map was sanctioned on 17.02.1997 by Awas Evam Vikas Parishad. Even otherwise, admittedly, the land always was within the limits of Lucknow Development Authority. It is the Lucknow Development Authority which had power to sanction map for any development of the said land, either for residential or multi-story housing society, and no such sanctioned map of Lucknow Development Authority is filed before this Court. Learned counsel for the petitioner also could not show the provision of law under which U.P. Awas Evam Vikas Parishad could sanction a map with regard to the land in dispute. In the aforesaid background, the said communication is not reliable and is also without any authority of law and can not support the case of petitioner in any manner.

17. In the aforesaid facts we are to consider the submission of petitioner on opportunity of hearing being granted to them. No doubt normally an opportunity of hearing ought to be given to a party against whom an order is being passed, but, the same is not an absolute right. Suffice would be to referred to a three judges bench of Supreme Court in case of ***'State of U.P. Vs. Sudheer Kumar Singh; AIR 2020 SC 5215'***, where Supreme Court had occasion to consider the said submission. It referred to large number of judgments on the issue and, thereafter, in paragraph-39 of the judgment laid down the following guiding principles.

"39. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem Rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) ***No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts,*** *in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.*

(4) ***In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.***

(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice." (emphasis added)

18. As per the aforesaid principles, the natural justice is flexible tool in the hands of judiciary to be applied in fit cases to remedy injustice. The mere breach of principle of opportunity of hearing by itself, without more, can not lead to the conclusion that prejudice thereby is caused. A litigant is bound to show the prejudice caused to it. It further states that no prejudice is caused to the persons complaining of breach of natural justice where such persons does not dispute the facts. This can happen amongst other reason by way of non-challenge or non-denial or admission of fact. In cases where facts can be stated to be admitted or undisputed, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand. This conclusion must be drawn by the Court on the appraisal of the facts of the case, and not by the authority who denies natural justice to persons. Applying principle 3 & 4 to the facts of the present case, on admitted facts it is proved that the land is transferred by the Municipal Corporation to M/s MSAS for the purposes not covered by the Act of 1959 and, thus, without authority of law. Once the same is not in dispute, the said resolution or lease deed or any deed thereafter can not stand in the eyes of law. The resolution no.70 of the Municipal Corporation is without any authority of law and in fact is a fraud upon the law. The Municipal Corporation could not have passed the said resolution and, therefore, all consequential acts become illegal. By giving any opportunity of hearing the said admitted facts would not change and thus no prejudice is caused to the petitioners by not remanding the matter. It is not in dispute that till date the land is not developed in any manner whatsoever and it is lying as it did at the time the resolution was passed. Petitioners land developer companies are well aware of law and have invested in land after due diligence. Court can fairly assume that its legal team must have conducted a due diligence of the property and, thus, they were fully aware of all facts, including validity of resolution of Municipal Corporation. The law does not

permit them to take a stand that after execution of sale deeds to petitioners, land would devolve upon them free from all encumbrances. If the title of earlier owner is defective consequence would fall upon petitioners also in accordance with law. The land which is bound to be utilized for the public of Lucknow Municipal Corporation can not be usurped in the aforesaid unauthorized, illegal manner and transferred to private developers. It is the duty of the constitutional Courts to safeguard the rights of people at large. Since, there is no dispute on facts and only one conclusion is possible, there is no reason to issue a futile writ and remand the matter back to the Municipal Corporation. Even otherwise, looking into the conduct of petitioner as well as of the Municipal Corporation, this Court does not find it a fit case to remand it back to the Municipal Corporation. The lease was cancelled on 01.06.2013. No stay order was passed by this Court in any of the writ petitions challenging the same. But, on the basis of the status-quo order passed in Writ Petition No.9211 (M/B) of 2011, which was for restraining respondents from interfering in possession of only M/s Sundaram Developers Pvt. Ltd. as their land is not acquired, neither petitioners handed over possession of land to Municipal Corporation nor respondents took any steps for possession of the land. Both of them very conveniently got Writ Petition No.9211 (M/B) of 2011 connected with the later two writ petitions and permitted benefit of status-quo order. Writ Petition No.9211 (M/B) of 2011 was on entirely different issue and had become futile, once the lease deed was cancelled and the cancellation was not stayed by the Court. Respondents wrongly permitted the earlier acquisition writ petition to remain pending and connected to later writ petitions challenging cancellation of lease deed, only to give benefit of status-quo order to petitioners. Thus, in this background also this Court does not find it in public interest to remand the matter to such respondents. So far as the submission with regard to malice of Municipal Corporation is concerned, suffice is to say that no malice either in law or in facts could be proved by the petitioner against the Municipal Corporation. Rather, it is the Municipal Corporation which had acted without jurisdiction in passing the resolution in the year 1995 which resulted in wrongful and unauthorized gain to M/s MSAS and thereafter to petitioners. The law referred to by the petitioners is not applicable in the facts of the case.

19. The facts of the present case are a glaring example as to how public purpose is defeated to extend unjustified benefits to private parties. From the very beginning, the Municipal Corporation and its officers appear to be hand in gloves with private persons, to allot a public land belonging to the residents of the city of Lucknow and kept in trust with Municipal Corporation, in such clandestine manner. As held above the resolution is without any authority of law. Further, the haste with which the resolution to allot the said land was brought without being on agenda, with the permission of Chairman, though, there was no urgency and passed in violation of the well established procedures of disposal of public property, which can only be through bidding/auction, renders the resolution invalid. The way the said land was subsequently carved into plots without any approval and first allegedly sold to five members of the society, who in turn sold the entire land to private developers in surreptitious manner, just to clothe the whole transaction with some semblance of

legitimacy, while disregarding the legal purpose for which such a land could be allotted by the Municipal Corporation, makes the whole transaction illegal, arbitrary and malafide. Supreme Court has time and again deprecated such malafide exercise of power against the interest of public and has called such actions void ab initio.

20. In the case of ***Uddar Gagan Properties Ltd. v. Sant Singh, (2016) 11 SCC 378,*** Supreme Court has come down heavily on colourable and malafide exercise of power by authorities and termed such actions as void. Paragraph 23 of the said judgment reads-

"23. It is well settled that use of power for a purpose different from the one for whic power is conferred is colourable exercise of power. Statutory and public power is trust and the authority on whom such power is conferred is accountable for its exercise. Fraud on power voids the action of the authority [State of Punjab v. Gurdial Singh, (1980) 2 SCC 471] , [Greater Noida Industrial Development Authority v. Devendra Kumar, (2011) 12 SCC 375, para 39 : (2012) 2 SCC (Civ) 591] . Mala fides can be inferred from undisputed facts even without naming a particular officer and even without positive evidence [State of Punjab v. Ramjilal, (1970) 3 SCC 602, paras 9-10; Express Newspapers (P) Ltd. v. Union of India, (1986) 1 SCC 133, paras 119-20] . In the present case, abuse of power in dealing with the matter by the functionaries of the State is more than clear as rightly found by the High Court. Challenge to acquisition may not be confined to those who have not accepted the amount of compensation or consideration. Once such order/transaction is vitiated there could be no estoppel on the ground that compensation/consideration has been received, as the land loser has little choice in the face of acquisition [Greater Noida Industrial Development Authority v. Devendra Kumar, (2011) 12 SCC 375, para 43] ."

Again in the case of ***NOIDA Entrepreneurs Assn. v. NOIDA, (2011) 6 SCC, 508*** Supreme Court has termed haste without urgency as the clear sign of malafide and colourable exercise of power and cautioned authorities against nepotism and favoritism while dealing with public land. Relevant paragraphs of the said judgment reads:

"26. In Jagir Singh v. Ranbir Singh [(1979) 1 SCC 560 : 1979 SCC (Cri) 348 : AIR 1979 SC 381] this Court has observed that an authority cannot be permitted to evade a law by "shift or contrivance". While deciding the said case, the Court placed reliance on the judgment in Fox v. Bishop of Chester [(1824) 2 B&C 635 : 107 ER 520] , wherein it has been observed as under : (Jagir Singh case [(1979) 1 SCC 560 : 1979 SCC (Cri) 348 : AIR 1979 SC 381] , SCC p. 565, para 5)

"5.... 'To carry out effectually the object of a statute, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined.' [Ed. : As observed in Maxwell on the Interpretation of Statutes, 11th Edn., p. 109. See SCC p. 565, para 5 of Jagir Singh case, (1979) 1 SCC 560.] "

27. The second work had been allotted to M/s Techno Construction Co. worth Rs. 1.00 crore without inviting fresh tenders, etc. on the ground that earlier a contract for execution of similar work i.e. construction of road had been awarded to it. In view of the fact that there was no urgency, such a contract should not have been awarded. Undoubtedly, Respondent 4

is guilty of proceeding in haste and that amounts to arbitrariness.

28. While dealing with the issue of haste, this Court in Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia [(2004) 2 SCC 65] , referred to S.P. Kapoor (Dr.) v. State of H.P. [(1981) 4 SCC 716 : 1982 SCC (L&S) 14 : AIR 1981 SC 2181] and held that : (Jagdishbhai M. Kamalia case [(2004) 2 SCC 65] , SCC p. 75, para 25)

25. ... when a thing is done in a post-haste manner, mala fides would be presumed…."

29. In Zenit Mataplast (P) Ltd. v. State of Maharashtra [(2009) 10 SCC 388] this Court held : (SCC p. 399, para 39)

"39. Anything done in undue haste can also be termed as arbitrary and cannot be condoned in law…."

30. Thus, in case an authority proceeds in undue haste, the Court may draw an adverse inference from such conduct. It further creates a doubt that if there was no sufficient reason of urgency, what was the occasion for Respondent 4 to proceed in such haste and why fresh tenders had not been invited.

……

……

38. The State or the public authority which holds the property for the public or which has been assigned the duty of grant of largesse, etc. acts as a trustee and, therefore, has to act fairly and reasonably. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. Every holder of a public office is a trustee.

39. State actions are required to be non-arbitrary and justified on the touchstone of Article 14 of the Constitution. Action of the State or its instrumentality must be in conformity with some principle which meets the test of reason and relevance. Functioning of a "democratic form of Government demands equality and absence of arbitrariness and discrimination". The rule of law prohibits arbitrary action and commands the authority concerned to act in accordance with law. Every action of the State or its instrumentalities should neither be suggestive of discrimination, nor even apparently give an impression of bias, favouritism and nepotism. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.

40. The public trust doctrine is a part of the law of the land. The doctrine has grown from Article 21 of the Constitution. In essence, the action/order of the State or State instrumentality would stand vitiated if it lacks bona fides, as it would only be a case of colourable exercise of power. The rule of law is the foundation of a democratic society. [Vide Erusian Equipment & Chemicals Ltd. v. State of W.B. [(1975) 1 SCC 70 : AIR 1975 SC 266] , Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489 : AIR 1979 SC 1628] , Haji T.M. Hassan Rawther v. Kerala Financial Corpn. [(1988) 1 SCC 166 : AIR 1988 SC 157] , Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC 212 : 1991 SCC (L&S) 742 : AIR 1991 SC 537] and M.I. Builders (P) Ltd. v. Radhey Shyam Sahu [(1999) 6 SCC 464 : AIR 1999 SC 2468] .]

41. Power vested by the State in a public authority should be viewed as a trust coupled with duty to be exercised in larger

public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other. [Vide Commr. of Police v. Gordhandas Bhanji [1951 SCC 1088 : AIR 1952 SC 16] , Sirsi Municipality v. Cecelia Kom Francis Tellis [(1973) 1 SCC 409 : 1973 SCC (L&S) 207 : AIR 1973 SC 855] , State of Punjab v. Gurdial Singh [(1980) 2 SCC 471 : AIR 1980 SC 319] , Collector (District Magistrate) v. Raja Ram Jaiswal [(1985) 3 SCC 1 : AIR 1985 SC 1622] , Delhi Admn. v. Manohar Lal [(2002) 7 SCC 222 : 2002 SCC (Cri) 1670] and N.D. Jayal v. Union of India [(2004) 9 SCC 362 : AIR 2004 SC 867] .]"

21. We have also considered the submission of counsel for petitioner on estoppel. Admittedly, since the year 1995 till date no development on the land in dispute has taken place. It is not the case of petitioners or M/s MSAS that they have invested or changed the nature of property. The property is lying as it did on 05.01.1995, when the resolution was passed. Thus, no case of estoppel is made out. Even otherwise, once it is proved that the resolution itself is without any authority, no case for estoppel is made out. The law relied upon by the petitioners is not applicable to the facts of the case.

22. In view of the aforesaid, it is apparent that even the very resolution of the Municipal Corporation is illegal, without any authority of law and is a fraud upon the statute. The Municipal Corporation could not have passed the said resolution. Therefore, since the resolution itself is found without any authority of law, consequential lease deed also can not stand. Thus, no case for interference with the impugned order cancelling the lease deed is made out.

23. The Writ Petition No.5539 (M/B) of 2013 and Writ Petition No.5591 (M/B) of 2013 are ***dismissed.*** The Writ Petition No.9211 (M/B) of 2011 has become infructuous as petitioner of the same, now after cancellation of lease deed, has no right over the land in dispute. Interim orders are discharged.

(2024) 2 ILRA 385
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2024
BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE SURENDRA SINGH-I, J.

Writ C No. 15864 of 2018

Smt. Kamlesh Devi & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ranjeet Singh

Counsel for the Respondents:
C.S.C., Sri S.N. Shukla

Civil Law - Constitution of India,1950-Article 226-Indian Penal Code,1860-Sections 45 & 326-A-acid attack-The petitioners sought enhanced compensation and rehabilitation measures for the injuries and losses suffered-Under the Uttar Pradesh Rani Laxmi Bai Mahila Evam Bal Samman Kosh rules,2015 acid attack victims are entitled to compensation and medical support-the

petitioners submitted various application to District Magistrate, District Legal Service Authority and even National Commission for women but no heed was paid-Held, The court emphasized the State's duty under Article 21 to ensure treatment and rehabilitation for acid attack victims-the court criticized the government for failing to verify and reimburse medical expenses, despite the petitioners providing detailed bills-The court directed the Uttar Pradesh Govt. to pay Rs. 5,26,000/- to the petitioners.(Para 1 to 29)

The writ petition is allowed. .(E-6)

List of cases cited:

1. Parivartan Kendra Vs U.O.I. & ors.. WP(C) No. 867 of 2013

2. Laxmi Vs U.O.I. WP(Crl.) No. 129 of 2006 ,

3. Laxmi Vs U.O.I. (2014) 4 SCC 457

4. Laxmi Vs U.O.I.(2016) 3 SCC 669

5. Muhim Vs St. of U.P & ors. PIL No. 18294 of 2016

6. Chameli Singh Vs St.of U.P.(1996)AIR SC 1051 Consumer Edu. & Research Centre Vs U.O.I. (1995) 3 SCC 42

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Ranjeet Singh, learned counsel for the petitioners and Sri S.N. Shukla, representing the State-respondents.

2. The petitioners have filed the writ petition praying for the following reliefs :-

(i) issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to enhance the amount of compensation upto Rs.26 lakh to the petitioners.

(ii) issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to provide suitable job/employment to the petitioner no.1 according to her educational qualification.

(iii) issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to provide compensation to the petitioner no.2.

3. The facts of the case shorn of unnecessary details is that petitioner no.1 is the mother of petitioner no. 2. They are residents of village- Gorai, Police Station- Iglas, District- Aligarh. On 31.12.2015, the petitioners sustained serious acid attack injuries, in respect of which a first information report was lodged by Brijesh Kumar, husband of petitioner no.1 and father of petitioner no. 2 on the same day at Police Station- Iglas, District- Aligarh as Case Crime No. 820 of 2015 u/s 452 and 326-A I.P.C. Soon after the incident, the petitioners were admitted in J.N. Medical College, Aligarh Muslim University, Aligarh, where primary medical treatment was given to the petitioners. Thereafter, the petitioners went for medical treatment at a private hospital, namely, Perfect Life Hospital, Mathura, where the plastic surgery, etc., of petitioner no. 1, Smt. Kamlesh Devi, was done. She was also treated in Sawai Maan Singh Hospital, Jaipur. In the aforesaid acid attack, petitioner no. 1, Smt. Kamlesh Devi, sustained 30% chemical burn injuries causing serious injuries on face, throat, right eye and right ear.

4. After investigation, the Investigating Officer submitted charge-

sheet u/s 452 and 326-A I.P.C. against the accused, Kumarpal and Sundar. Vide order dated 13.07.2018 passed in S.T. No. 437 of 2018, State Vs. Kumarpal & Another, the trial court convicted and sentenced the accused u/s 452, 326-A I.P.C.

5. Brijesh Kumar, husband of petitioner no.1 submitted an application on 06.09.2016 before the respondent no. 3, Secretary, District Legal Service Authority, Aligarh (hereinafter referred to as "DLSA, Aligarh") for compensation for the petitioners. He also moved an application dated 03.09.2016 through registered post on 16.09.2016 to the respondent no. 2, District Magistrate, Aligarh to provide financial assistance for medical treatment of petitioners. The petitioners had also approached the National Commission for Women, New Delhi for payment of compensation which was referred vide letter dated 03.08.2016 by the Commission to the DLSA, Aligarh but DLSA, Aligarh did not give any compensation to the petitioners. The qualification of petitioner no. 1 is Intermediate and she has also obtained a Diploma in Computer Application. In this regard, a certificate has been issued to her by the Manager of the institute, namely, Brilliant Computer Education, New Delhi. The petitioners belong to very poor family residing in rural area of District- Aligarh and have some agricultural land as the only means of income for their livelihood. In the medical treatment of the petitioners, husband of petitioner no.1 had to sell the agricultural land through registered sale deed dated 22.04.2017. The petitioners had earlier filed a WRIT- C No. 23884 of 2017 (Smt. Kamlesh Devi and another Vs. State of U.P. and others) which was disposed of by a Division Bench of this Court on 26.05.2017. In compliance of the direction passed in the aforesaid writ petition, on 03.07.2017 the petitioners submitted a representation before the respondent no. 1 by registered post annexing the certified copy of the order dated 26.05.2017 and other relevant papers with a prayer to provide compensation and employment according to the qualification of petitioner no. 1.

6. Averments have been made in the writ petition that the petitioner no. 1 is entitled to compensation of Rs.5,00,000/- under Uttar Pradesh Rani Laxmi Bai Mahila Evam Bal Samman Kosh Niyamawali, 2015 (hereinafter referred to as the "U.P. Niyamawali, 2015") amended vide government notification dated 30.09.2015 for the acid attack injuries suffered by her.

7. The petitioners have also claimed that as per the judgement of the Hon'ble Apex Court in **Parivartan Kendra Vs. Union of India and Others** passed in Writ Petition (Civil) No. 867 of 2013, they are entitled to be compensated for the expenses of Rs.26,00,000/- incurred by them in their medical treatment of acid attack injuries. The petitioners have filed photocopies of first information report, report of the acid burn injuries received by her, charge-sheet filed after investigation, judgement of the trial court convicting the accused, representations submitted by the petitioners to Secretary, DLSA, Aligarh and District Magistrate, Aligarh and to the National Commission for Women, New Delhi, testimonials regarding qualification of petitioner no. 1, reminder issued by the petitioners to Home Secretary, U.P. Goverment at Lucknow for compliance of order dated 26.05.2017 passed in WRIT- C No. 23884 of 2017 (Smt. Kamlesh Devi and another Vs. State of U.P. and others).

The petitioners have relied on following judgements of the Apex Court in support of their petition :-

(i) Writ Petition (Civil) No. 867 of 2013, **Parivartan Kendra Vs. Union of India and Others**

(ii) Writ Petition (Crl.) No. 129 of 2006, **Laxmi Vs. Union of India**

8. In the counter affidavit dated 05.07.2018, the respondent nos. 2 and 3 have made averment that petitioners have sustained simple injuries of chemical burns. The Committee constituted under Uttar Pradesh Rani Laxmi Bai Mahila Evam Bal Samman Kosh in its report dated 18.10.2017 has recommended grant of Rs.3,00,000/- as compensation to the petitioners. Report regarding aforesaid amount has been accepted by the Secretary/Prescribed Authority under the Uttar Pradesh Rani Laxmi Bai Mahila Evam Bal Samman Kosh. It has also been averred that the petitioners' application for compensation submitted to DLSA, Aligarh, has been rejected by the Chairman, DLSA, Aligarh vide order dated 21.01.2017 on the ground that the trial court has not made recommendation for payment of compensation to the petitioners. The petitioners were provided medical treatment at J.N. Medical College, Aligarh. The respondents have complied with the order dated 21.11.2017 passed in Contempt Application (Civil) No. 4522 of 2017. The petition was dismissed accordingly. The petitioners have claimed compensation for Rs.26,00,000/- but have not submitted bill vouchers, receipts in support of the aforesaid money spent by them. It has also been submitted that on the direction of the Hon'ble High Court, District Magistrate, Aligarh constituted a 5 member Medical Board which in its report dated 18.10.2017 submitted that petitioner no. 1, Kamlesh Devi is entitled for financial aid of Rs.3,00,000/-.

9. The respondent no. 2 has made averment in the counter affidavit dated 22.11.2022 that in compliance of Court's order dated 14.11.2018 passed in the writ petition, on the direction of the District Magistrate, a 5 member Medical Board was constituted by the C.M.O., Aligarh. The medical board after medically examining the injuries of the petitioners and the bill vouchers submitted by them has in its report dated 19.11.2022 submitted that petitioner no. 1, Smt. Kamlesh Devi sustained acid burn injuries due to which she has become 70% disabled. The petitioner no. 2, Rishi Kumar was found victim of 3% acid burn injury. The petitioners have submitted unverified bill/voucher/receipts of Rs.5,20,437/-. In the counter affidavit, it has been submitted that since the petitioner no. 1 received 70% acid burn injuries, thus under the U.P. Niyamawali, 2015, the maximum admissible amount of Rs.3,00,000/- has been paid to her.

10. After perusal of the averments made in the counter affidavit dated 22.11.2022 and hearing learned counsel for both the parties, the Court on 13.03.2023 passed the following order :-

"Heard learned counsel for petitioner and Sri Piyush Shukla, learned Standing Counsel for the State-respondent.

The petitioners, acid attack victims, are claiming compensation to the tune of about Rs. 26,00,000/- i.e. the amount which has been spent on their treatment. The petitioners have appended details to show the aforesaid medical expenses.

On the matter being taken up on 14.11.2018, the Court has proceeded to pass the following order:-

"Although pleadings have been exchanged in this matter, counter affidavit filed by the State is not adequate.

The petitioners are acid attack victims and are claiming compensation to the tune of Rs.26 lacs that is the amount which has been spent on their treatment. The petitioners have appended details to show the aforesaid expenses.

It would be in the interest of justice, if the District Magistrate takes the assistance of the Chief Medical Officer or some specialised doctors to look into the medical papers of the petitioners and to assess as to what are the actual expenses which have been incurred by them on their treatment. The petitioners may be examined also for this purpose. All this may be done within a period of one month from today. After proper examination of the issue and the inquiry into the matter, a fresh affidavit may be filed by the State.

List after a month.

A copy of the order may be given to Shri Nimai Das, learned Standing Counsel to be sent to the District Magistrate, Aligarh for compliance."

In response to the aforesaid order, the District Magistrate, Aligarh-second respondent proceeded with the matter and thereafter District Probation Officer, Aligarh wrote a letter dated 17.11.2022 to the Chief Medical Officer, Aligarh stating therein that the re-medical examination of Smt. Kamlesh Devi, wife of Brijesh Kumar, resident of village Gorai, Police Station Iglas, District Aligarh-first petitioner be conducted by the specialized acid burn doctors and also verified her document of bill-vouchers. Consequently, the Chief Medical Officer, Aligarh has constituted a five member committee for re-medical examination of petitioners on 17.11.2022. In response thereof, on 19.11.2022 the first petitioner and her son namely Rishi Kumar-second petitioner appeared before the Medical Board and their re-medical examination was conducted by the Specialist doctors-members of the committee. In the said medical examination, the bills, which have been incurred towards the medical expenses, the same has also been furnished to the committee for verifying the said documents. The committee has verified the documents and submitted its report dated 19.11.2022 which is appended as Annexure No.4 along with supplementary affidavit filed by the second respondent dated 22.11.2022. In the said report, the Medical Board has acknowledged that the petitioner has actually incurred medical expenses of Rs. 5,20,437/- but in view of the Government Order 255/60-3-2015-13 (11)/14 dated 6.2.2015 first petitioner was accorded Rs. 3,00,000/- as compensation on account of disability (10 to 30 %) due to acid attack.

Learned counsel for petitioners, in this backdrop, has vehemently contended that so far as the actual expenses, which have been incurred towards the medical expenses, the respondent has acknowledged Rs. 5,20,437/- but in most arbitrary manner, in the light of the aforesaid Government Order, only an amount of Rs. 3,00,000/- has been paid, whereas actually the first petitioner has got disability of the acid attack of 70%. In this backdrop, he has placed reliance on the scheme known as "Uttar Pradesh Rani Laxmibai Mahila Samman Kosh Niyamawali, 2015" issued by the State Government dated 6.2.2015, which is also brought on record as Annexure No.SA-1 to the supplementary affidavit dated 29.1.2020 filed by the petitioners. He submits that under the Scheme in the Head of Facilities to crime

tortured ladies, the petitioners' case is fully covered vide para 2 and the petitioners are entitled for treatment expenses by the State Government under the aforesaid Scheme. In support of his submissions, learned counsel for the petitioners has also placed reliance on the judgment passed by the Division Bench of this Court in Public Interest Litigation (PIL) 18294 of 2016 (Muhim Vs. State of U.P. and others), wherein certain directions were issued vide order dated 4.5.2016. Reliance has also been placed on the order dated 7.10.2016 passed in Writ-C No. 44094 of 2016 (Momin Vs. State of U.P. and others).

Considering the facts and circumstances of the case, we are of the considered opinion that in spite of the directions of this Court and the Scheme being available as well as the report of the five specialist doctors to the District Magistrate endorsed by the Chief Medical Officer, Aligarh verifying that the petitioners have actually incurred Rs.5,20,437/-, the actual medical expenses have not been disbursed to the petitioners till date.

Let the first respondent-Secretary (Home), Govt. of U.P., Lucknow file his personal affidavit in the matter so that justice may be ensured in favour of the petitioners, who are acid victims.

On the request of Sri Piyush Shukla, learned Standing Counsel, the matter is adjourned for the day.

List this matter on 29.3.2023 in top ten of the cases."

11. Thereafter, counter affidavit dated 28.03.2023 was submitted on behalf of respondent no. 2 in which it was stated that in compliance of Court's order dated 13.03.2023, the petitioner no.1/victim was re-examined by a team of medical officers which in its report dated 21.03.2023 submitted that the petitioner/victim, Smt. Kamlesh Devi sustained 30% acid burn injury on lower half of mouth and chin, front of neck, front of left chest with auxilla, left side front of abdomen, left arm and 2/3 forearm, back of left shoulder, back of right elbow, front of right thigh upto knee and upper portion of left thigh front area. Due to acid burn injuries, the victim's face is 3 to 4 % burned, 0.5% neck has burnt and her face has been deformed. Her disability is 70% (physical 30% and visual 40%). In the counter affidavit, it has also been averred that on the basis of the report of the medical board and District Probation Officer, Aligarh, the Secretary/Designated Authority, Uttar Pradesh Rani Laxmi Bai Mahila Evam Bal Samman Kosh, Lucknow, recommended for payment of Rs.2,00,000/- and the amount will be paid by the aforesaid Secretary. The issue of payment is now pending with the aforesaid Secretary/Designated Authority and no proceeding is pending at the level of Home Department. It has also been averred that the State Government order dated 23.05.2014 provides for 100% free medical treatment facility to the acid attack victims in government hospitals in the State of Uttar Pradesh but the petitioners have not availed the free medical treatment facility. After perusal of the averments made in the counter affidavit dated 28.03.2023 and hearing the respondents, the Court on 27.04.2023 passed the following order :-

"…….In this backdrop, learned counsel for the petitioners placed reliance upon paragraph 4 of the writ petition indicating therein that the petitioners were admitted in J.N.Medical College, Aligarh Muslim University, Aligarh where the primary treatment was given to the petitioners. It is also pressed once the condition of the first petitioner

became critical, she was shifted to the private hospital. In this backdrop, he has placed reliance upon the compliance affidavit filed on behalf of the second respondent wherein it was indicated in compliance of the order dated 14.11.2018, the District Magistrate, Aligarh proceeded with the matter and thereafter the District Probation Officer, Aligarh wrote a letter dated 17.11.2022 to the Chief Medical Officer, Aligarh stating therein that the re-medical of Smt. Kamlesh Devi wife of Sri Brijesh Kumar, resident of Gorai Police Station Iglas, District Aligarh is to be conducted by the Specialist Acid burn doctors and also verify her documents and bill vouchers. Accordingly, the Chief Medical Officer, Aligarh constituted a five members committee for re-medical of petitioners on 17.11.2022. In pursuance of which, the petitioners appeared before the Medical Board and their re-medical was conducted by the specialist doctors, members of committee. It is also averred in paragraph 9 of the said affidavit that the voucher bills so submitted by the petitioners, were also reverified. It has also been averred that all documents related to bill vouchers were examined thoroughly and after calculation, the expenses of treatment comes to the tune of Rs. 5,20,437/-. Thereafter, considering all aspect of the matter, the committee has submitted its report on 19.11.2022 and the same has been approved by the District Magistrate, Aligarh on 19.11.2022. A copy of the said report dated 19.11.2022 of five member committee along with approval of District Magistrate and Chief Medical Officer, Aligarh is brought on record as Annexure No. 4 to the compliance affidavit dated 22.11.2022.

In view of the aforesaid once bill vouchers so submitted by the petitioner were examined thoroughly and duly verified by the five members committee and the respondent authorities have calculated that the petitioner has actually incurred expenses of Rs. 5,20,437/- towards medical treatment, we are of the considered opinion that the State cannot raise an objection that the petitioner has undergone treatment under the private hospital, therefore, she is not entitled for reimbursement of medical expenses. Surprisingly, respondent's counter-affidavit is also silent whether any efforts were made by the respondents for actual assessment of expenses which incurred towards treatment of minor and further any compensation has ever been approved for him who is also an acid victim and sustained injuries.

Considering the facts and circumstances, we deem it appropriate before issuing a mandamus for release of the amount in question, let the Principal Secretary Home, Government of U.P. at Lucknow revisit in the matter and file a personal affidavit on or before the next date of listing explaining therein under what circumstances the actual expenses incurred towards the treatment of the first petitioner has not been paid till date and secondly why the respondents had kept mum towards the trauma faced by the minor and why the compensation has not been released in his favour.

List this matter again on 15.5.2023 in the top 10 of the cases.

Let a copy of this order be supplied to Sri Piyush Shukla, learned Standing Counsel free of cost for necessary compliance."

12. In compliance of Court's order dated 27.04.2023, respondent no. 2 had filed counter affidavit dated 13.05.2023 in which it has been submitted that the petitioners have not complied with the procedure provided under Rule 12-ख of

U.P. Niyamavali, 2015, for undergoing treatment in private hospital. Their case was not referred by the C.M.O./C.M.S. of the Medical College/District Hospital. Therefore, they are not entitled for payment of the medical expenses incurred by them. It has also been submitted that under the aforesaid U.P. Niyamavali, 2015, an amount of Rs.3,00,000/- has been transferred to the account of petitioner no. 1 on 21.03.2023 and on 21.03.2023, recommendation has been made to the concerned Secretary of Government of U.P. for payment of Rs.2,00,000/- under the provisions of U.P. Niyamavali, 2015. After perusal of the averments made in the aforesaid counter affidavit, the Court on 15.09.2023 passed the following order :-

"1. It has been stated in paragraph 11 of the personal affidavit of the Principal Secretary Home, Uttar Pradesh, Lucknow that the petitioner no. 1 has been paid a total sum of Rs. 5,00,000/- under the relevant scheme in lieu of the medical expenses incurred on her treatment because of the acid attack on her. It has been stated that Rs. 5,00,000/- referred above includes Rs. 3,00,000/- paid on 13th November, 2017 which is admitted by the petitioner no. 1 in the writ petition and also additional Rs. 2,00,000/- was paid to the petitioner no. 1 on 21st March, 2023. The payment of additional Rs. 2,00,000/- has been denied by the counsel for the petitioners on the basis of instructions received by him. No records have been annexed with the personal affidavit of the Principal Secretary indicating payment of the additional Rs. 2,00,000/- to the petitioner no. 1.

2. The Principal Secretary Home, Uttar Pradesh, Lucknow shall file a fresh affidavit showing the payment of additional Rs. 2,00,000/- as referred in paragraph 11 of the previous affidavit within two weeks from today.

3. List again on 10th October, 2023."

13. In compliance of the aforesaid order, respondent no. 1 filed counter affidavit dated 08.10.2023. In the counter affidavit, it has been submitted that in compliance of the order dated 15.09.2023 passed by the Hon'ble High Court in the present case, the prescribed authority of Uttar Pradesh Rani Laxmi Bai Mahila Evam Bal Samman Kosh Yojana, Lucknow, sent a communication letter dated 05.10.2023 to Special Secretary (Home), Lucknow for payment of Rs.2,00,000/- to petitioner no.1, Smt. Kamlesh Devi through R.T.G.S. in her bank account. The petitioners have already been paid Rs.3,00,000/- and Rs.2,00,000/-, total Rs.5,00,000/- on 13.11.2017 and 04.10.2023. This Hon'ble Court's order has been complied with.

14. In case of **Laxmi Vs. Union of India, (2014) 4 SCC 457,** the Hon'ble Apex Court as given several directions to the States/Union Territories to regulate sale of acid and other corrosive substances so that it may not be purchased by unauthorized persons for illegal purposes. It has also directed the State for full medical treatment, short-term as well as long term, for specialised plastic surgery, connective surgeries, providing specialised psychological treatment to the acid attack victims to help them to come out of the horror and trauma of the acid attack and for their rehabilitation.

15. In **Laxmi Vs. Union of India, (2016) 3 SCC 669**, the Apex Court inter alia held, thus :

13. Insofar as the proper treatment, aftercare and rehabilitation of the victims of acid attack is concerned, the meeting convened on 14.03.2015 notes unanimously that full medical assistance should be provided to the victims of acid attack and that private hospitals should also provide free medical treatment to such victims. It is noted that there may perhaps be some reluctance on the part of some private hospitals to provide free medical treatment and, therefore, the concerned officers in the State Governments should take up the matter with the private hospitals so that they are also required to provide free medical treatment to the victims of acid attack.

14. The decisions taken in the meeting read as follows:

The States/UTs will take a serious note of the directions of the Supreme Court with regard to treatment and payment of compensation to acid attack victims and to implement these directions through the issue of requisite orders/notifications.

The private hospitals will also be brought on board for compliance and the States/UTs will use necessary means in this regard. No hospital/clinic should refuse treatment citing lack of specialized facilities.

First-aid must be administered to the victim and after stabilization, the victim/patient could be shifted to a specialized facility for further treatment, wherever required.

Action may be taken against hospital/clinic for refusal to treat victims of acid attacks and other crimes in contravention of the provisions of Section 357C of the Code of Criminal Procedure, 1973.

17. We, therefore, issue a direction that the State Governments/Union Territories should seriously discuss and take up the matter with all the private hospitals in their respective State/Union Territory to the effect that the private hospitals should not refuse treatment to victims of acid attack and that full treatment should be provided to such victims including medicines, food, bedding and reconstructive surgeries.

18. We also issue a direction that the hospital, where the victim of an acid attack is first treated, should give a certificate that the individual is a victim of an acid attack. This certificate may be utilized by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the State Government or the Union Territory, as the case may be.

16. In **Parivartan Kendra (supra)**, the Apex Court had held about the amount of compensation to be paid to the acid attack victim as thus :-

"12. ……..It is pertinent to mention here that the mandate given by this Court in Laxmi case nowhere restricts the Court from giving more compensation to the victim of acid attack, especially when the victim has suffered serious injuries on her body which is required to be taken into consideration by this Court. In peculiar facts, this Court can grant even more compensation to the victim than Rs.3,00,000/-."

17. In the instant case, the Hon'ble Apex Court directed the government to award a compensation of Rs.10,00,000/- to the main victim (Chanchal) who has suffered 28% burn on her body and Rs.3,00,000/- as compensation to the main victim's sister, Sonam, who has suffered lesser extent of acid burn injury than her elder sister.

18. Two schemes have been formulated in the State of Uttar Pradesh in regard to the grant of compensation to victims of acid attack, namely;

(i) Uttar Pradesh Victim Compensation Scheme (formulated in terms of the directions issued by the Supreme Court in **Laxmi Vs Union of India: Criminal Misc. Writ Petition No. 129 of 2006** and under Section 357-A of the Criminal Procedure Code, 1973). The scheme envisages a victims' compensation fund from which payment is made on the application of the victim or her/his dependent by the District Legal Services Authority. The quantum of compensation is governed by Schedule-I to the scheme where a maximum of Rs. 3 lacs is payable; and

(ii) Uttar Pradesh Rani Laxmi Bai Mahila Samman Kosh Rules, 2015 which came into effect on 6 February 2015. The Rules have provided for the setting up of a fund for monetary and medical relief to acid attack survivors and the process of paying compensation has been specified in Rule 12. The Rules were modified on 30 September 2015 with retrospective effect and the amount was enhanced to Rs.10,00,000/- in case of death and Rs.5,00,000/- in other cases where the acid attack injury is 30% or more.

19. The State Government has also issued a Government Order on 23 May 2014 to the effect that all acid attack victims should be provided free medical aid at the cost of the State exchequer. The State Government has proposed a twenty five bedded speciality ward in the Department of Plastic and Reconstructive Surgery at King George Medical College, Lucknow. The compensation to the victim is paid upon an assessment of injuries by a duly constituted Medical Board.

20. A Division Bench of Allahabad High Court in **PUBLIC INTEREST LITIGATION (PIL) No. 18294 of 2016, Muhim Vs. State of U.P. and 3 Others,** vide order dated 04.05.2016, issued following directions :-

(i) The Principal Secretary, Medical Health and Education shall, within a month from the date of receipt of a certified copy of this order, proceed to formulate administrative directions to the District Collectors;

(ii) The State Government shall also take all necessary steps to ensure that the District Collectors give wide publicity to the above schemes which have been made by the State as well as in regard to the assumption by the State of full responsibility of ensuring treatment, both medical and rehabilitative, to all victims of acid attack in the State; and

(iii) The State Legal Services Authority as well as the District Legal Services Authorities shall take up the matter on priority and disseminate vital information in regard thereto. The monitoring of the performance of the schemes for compensation payable to acid attack victims, shall be carried out by the State Legal Services Authority and the District Legal Services Authorities.

21. The Court also directed the State to pursue the setting up of the twenty five bedded speciality ward at King George Medical College, Lucknow with high priority and to duly issue necessary directions to subserve the proper treatment of acid attack victims.

22. The trial court in Sessions Trial Case No. 437 of 2018, State Vs. Kumarpal and Another u/s 452, 326-A I.P.C. in its judgement and order dated 13.07.2018 while convicting the accused, had sentenced him to rigorous imprisonment for 10 years and a fine of Rs.10,000/- to be paid to the victim as compensation. The trial court did not direct the Legal Services Authority to pay any compensation to the victim. The Chairman of District Legal Services Authority, Aligarh vide order dated 21.01.2017 rejected the application of the petitioner/victim for compensation scheme of 2014 on the ground that the trial court has not recommended payment of any compensation to the victim.

23. From the above discussion, it is clear that the petitioners have been provided a maximum amount of compensation of Rs.5,00,000/- under Niyamavali, 2015 for after care and rehabilitation. The petitioner no.1 further claims payment of compensation of Rs.5,26,000/- which she has incurred in her treatment in Perfect Life Hospital, Mathura and medical expenses incurred in Sawai Maan Singh Hospital, Jaipur. The respondents have objected to the payment of aforesaid amount on the ground that the petitioner has not complied the provisions of Rule 12-ख of the U.P. Niyamavali, 2015 regarding referral by a medical officer of government hospital to a private hospital for treatment. Apart from this, the respondents have objected to that petitioner no. 2 being male child and getting injury by less than 10% in the acid attack, is not entitled for compensation under the Niyamavali, 2015.

24. From the perusal of the record, it transpires that in compliance of this Court's order dated 14.11.2018, the petitioners had submitted the bill vouchers of Rs.5,26,000/- regarding medical expenses incurred by them to the District Magistrate/Chief Medical Officer for verification and payment but the Chief Medical Officer did not get the bill vouchers verified and did not take steps for payment thereof to the petitioners.

25. It has been well established from the decisions of the Apex Court in the case of **Chameli Singh Vs. State of U.P., AIR 1996 SC 1051 and Consumer Education and Research Centre Vs. Union of India, (1995) 3 SCC 42** that medical grant is a fundamental right under the sweep of Article 21 which relates to Right to Life and Personal Liberty of all persons living in India.

26. Since, the petitioner no. 1 had submitted her bill vouchers regarding medical expenses incurred in her treatment at private hospital to the C.M.O./D.M., it was their responsibility to get it verified and make payment thereof. They kept the bill vouchers with them for a long duration and returned it back to her on the ground that no payment can be made as the bill vouchers were not verified and the petitioners have not complied with Rule 12-ख of the U.P. Niyamavali, 2015.

27. Under these facts and circumstances of the case and in the light of the law propounded by the Apex Court in the aforesaid cases, the respondent nos. 1 and 2 are duty-bound to make payment of the amount of bill vouchers of Rs.5,26,000/- to the petitioners which they have incurred on their medical treatment of acid attack burn injuries in the private hospital.

28. The respondent nos. 1 and 2 are directed to pay the amount of Rs.5,26,000/- to the petitioners in three instalments of Rs.2,00,000/-, Rs.2,00,000/- and Rs.1,26,000/-. The first instalment shall be paid within a period of three months and the second and third instalments shall be paid within a period of two-two months respectively.

29. With the aforesaid observations/directions, the writ petition is **allowed** accordingly.

(2024) 2 ILRA 396
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2024
BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ C No. 19866 of 2023

Naromattie Devi Ganpat ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishnu Pandey,, Sri Anil Kumar, Sri Ayush Mittal, Sri Prabhakar Awasthi, Sri Prateek Srivastava, Sri Vikrant Pratap Singh, Sri Vineet Kumar Singh, Sri Vipul Singh

Counsel for the Respondents:
A.S.G.I., Sri Sanjay Kumar Om

Civil Law - Constitution of India,1950-Article 226-The Citizenship Act,1955-CitizenshiRules,2009-the Petitioner sought registration as an Overseas Citizen of India based on her ancestry and marital connection to an Indian citizen-The petitioner claimed her great-grandparents emigrated from Allahabad and Jaunpur, India to Guyana in 1882 as indentured laborers-She submitted apostilled documents from National Archives of Guyana to prove her ancestry but was denied the OCI card cue to the non-availability of a Native Certificate from the district magistrate, a requirement not specified in Indian law-The court held that under the Act, 1955 and Rules 2009, a Nativity Certificate is not mandated for OCI registration-India, being a signatory to the Hague Apostille Convention,is obligated to accept apostilled documents as legal proof-The petitioner's documents were deemed sufficient-the court held that territorial jurisdiction as the petitioner's ancestors were from uttar Pradesh.(Para 1 to 50)

The writ petition is allowed. .(E-6)

List of cases cited:

1. Commr.of Customs Bangalore Vs M/S G.M. Exports & ors..(2015) SCC OnLine SC 837

2. Lakshmi Kant Pandey Vs U.O.I. & ors..(2010) 12 SCC 735

3. Dr. Sanjay Khanduja Vs PNB & anr.(2021) SCC OnLine Del 3209

4. Addul Manaf Vs St.of Ker.(2015) SCC OnLine Ker 29460

5. Hansjurgen Gunther Koch Vs The St. 1 SA 13 of 2005 (2006) NASC 6

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Vineet Kumar Singh, learned counsel for the petitioner and Shri S.P. Singh, learned Assistant Solicitor General of India (ASGI) assisted by Sri Sanjay Kumar Om, learned counsel for Union of India.

2. The factual matrix of the case is that, the petitioner is a citizen of United States of America though born in Guyana, but of Indian origin. Her grandfather Bishnath hailed from Allahabad, Jaunpur and Hania, who was sent from Calcutta by a ship "EMS" to Guyana (British Guyana) vide Immigration no.104709. The petitioner is also great granddaughter of Ganesh and Janki hailing from Jaunpur and Hania respectively, who travelled via Ship from Calcutta to Guyana. In proof of this, the petitioner got an apostille copy of her grandfather's immigration certificate from National Archives of Guyana, which clearly showed that they immigrated by Ship 'Delhet' on 10th October, 1882 and it also carried the immigration certificate of her grandmother Janki.

3. The petitioner applied for "Ancestry Certificate" for her ancestors Bishnath, Ganesh and Janaki, which were issued to her by the Village Pradhan of village-Sarigaon, Tehsil-Mariyahoo, District-Jaunpur, Uttar Pradesh on 3.10.2022, mentioning therein that Ganesh hailed from Ahir Caste and belonged to the family of Sadho and Matabhik, who were deported by the Britishers. The ancestry chart of the petitioner is as follows:-

Janki (Daughter of Bhola) – was great grandmother of petitioner, who had immigrated to Guyana on 10.10.1882 vide immigration no.104709

|

Bishnath (son of Janki)

|

Khemraj (son of Bishnath)

|

Naromattie Devi – (Daughter of Khemraj, Petitioner)

4. The petitioner claims that she got married to one Bhavin Dinesh Dholakia on 14.9.2018 in a temple in Mumbai, which was duly registered on 24.9.2018. She then applied for Overseas Citizenship of India1 Card through her spouse and also through her Indian origin ancestry, but the same was denied on the ground that her marriage was not verified. Thereafter the petitioner applied for Visa Conversion on 20.9.2022 on both counts, marriage and ancestry because for OCI registration her Visa required to have a minimum validity period of six months. However, it was again rejected.

5. The petitioner claims to have been running from pillar to posts to get the documents by which her OCI Card could be processed. In the meanwhile, her Visa expired on 6.2.2023.

6. The petitioner has all her grandparents origination documents/papers issued by the officials of Guyana, South America, which clearly demonstrate that the grandparents of the applicant were originally from India and having their origination from Allahabad(Prayagraj). All Apostilled official documents are admissible in Indian law for addressing the applicant's claim of OCI Card, allowing her Conversion Visa and issue of Nativity Certificate. These documents were sufficient as per the Hague Convention, 19612, which abolishes the requirement of legalization of foreign documents for use in any member country, once an Apostille certificate has been issued by a competent authority of the country.

7. That inspite of having the required documents the respondents refused to process or hand over the OCI Card to the

petitioner, so the petitioner filed the instant writ petition with the following reliefs:-

(i) Issue a writ, order or direction in the nature of mandamus directing to the respondent nos.1 to 3 to register petitioner as OCI card holder on the basis of her Indian Origination/Indian Spouse, and

(ii) Issue a writ, order or direction in the nature of mandamus to respondent nos.1 to 3 to allow Conversion Visa to the petitioner to X-1 Entry Visa on the basis of Indian Origination/Indian Spouse, and

(iii) Issue a writ, order or direction in the nature of mandamus to respondent nos.1 to 3 to extend the Visa of the petitioner which has expired on 06.02.2023 as she is fully eligible to receive the OCI (Overseas Citizenship of India) card.

(iv) Issue a writ, order or direction in the nature of mandamus to respondent nos.4 and 5 to issue Nativity Certificate to the petitioner with respect to her Indian parents."

ARGUMENT OF THE PETITIONER

8. Learned counsel for the petitioner submitted that the petitioner was granted a tourist visa which was valid from 7.2.2013 to 6.2.2023 and when her stay visa got expired on 12.6.2020, it was extended from time to time. The stay visa was last extended upto 8.7.2023 and further extension of visa was not granted. Even her OCI card is not being processed, as her tourist visa has already expired.

9. The petitioner's counsel further argued that production of nativity certificate is not the requirement of law in terms of the material provisions contained in the Citizenship Act, 19553 and the Citizenship Rules, 20094 in regard to grant of registration as an Overseas Citizen of India. The petitioner had duly submitted the requisite documents in support of her claim, a perusal of which, clearly demonstrates that she was having Indian Origin as her forefathers were residing within the territory of the State of Uttar Pradesh.

10. He further submitted that the respondents have failed to take into consideration the Office Memorandum dated 18.11.2020 issued by the Ministry of External Affairs, which clearly records that an Apostille document should, therefore, be treated as legalized document in India by all concerned, in accordance with the international obligation under the Convention, 1961. The provisions contained in Section 7-A of the Act, 1955 and the mandate of law engrafted in Part VI compromising Rules 29 to 35 of the Rules, 2009 do not postulate any such requirement of furnishing a nativity certificate.

11. He further submitted that Rule 32 of the Rules, 2009, the Central Government was obliged under the law to scrutinize the application of the petitioner for grant of registration as an OCI within a time bound period.

ARGUMENT OF RESPONDENTS

12. Per contra, Sri S.P. Singh, learned Assistant Solicitor General of India along with Sri Sanjay Kumar Om, learned counsel for respondent nos.1 to 3 submitted that, the petitioner's application as spouse of Indian citizen could not be processed as she could not provide her husband's earlier divorce/annulment certificate, hence, her application was closed on 20.4.2023, and

she was informed about it through email with request to apply afresh with requisite documents. She did apply again but again failed to produce copy of dissolution certificate of her husband's first marriage. Hence the Visa conversion application was again closed on 22.8.2023.

13. He further submits that Section 3(2) of the Foreigners Act, 1946 empowers the Central Government to regulate the entry stay and departure of any foreigner in India. Further, the foreign nationals cannot claim visa services from the Central Government as a matter of right as per their convenience. The visa service is meant only for those foreign nationals who intend to arrive/stay/depart in/from India legally and follow Indian laws and rules.

14. With regard to petitioner's second relief regarding issuance of an OCI card, an online application was filed by the petitioner, vide reference no.INDD00365N21 dated 05.05.2021 in Foreigners Regional Registration Office, Delhi5,without uploading any documents, though the hard copy was sent with the FRRO, she could have scanned and enclosed to the office. FRRO had sent an email reply on 11.5.2021 intimating applicant that the OCI card registration service is temporarily suspended at FRRO, Delhi due to spread of COVID-19. She was also advised that in case of any query she could call on telephone number 011-26184824, thereafter, no further communication/correspondence was made by the petitioner and as such the said OCI application could not be processed further.

15. This writ petition was filed in May, 2023. When the matter was taken up on 10.7.2023, Sri Sanjay Om, learned counsel for the respondent, very fairly submitted that though the relevant documents were not submitted earlier but if furnished now, they would definitely be processed, after the direction of this Court to the petitioner to submit the same, the documents were submitted, but again there was some short coming. She had failed to provide the Nativity Certificate from the concerned District Magistrate.

16. He further submitted that the documents furnished by the petitioner obtained by her from the archives of Guyana was not eligible for OCI card registration under Section 7A(1) or Section 7A(3) of the Act, 1955 read with Articles 5 and 8 of the Constitution of India, as descendants of Indian origin immigrants, who migrated as indentured labourers during British rule to Mauritius, Surinam, Netherlands and Reunion Island were only made eligible for OCI Card registration by granting special dispensation, with the approval of Ministry of Home under Section 7A(3) of the Citizenship Act, 1955 from time to time (whereby the documents of the archives of these countries can only be considered for OCI registration of their citizens). However, Indian immigrants of Guyana were not included in the special dispensation category. Therefore, the petitioner cannot be considered eligible for registration as OCI card holder on the basis of the documents obtained by her from the archives of Guyana. She is mandatorily required to submit a nativity certificate issued by the concerned District Magistrate and she cannot be granted any OCI card merely on the basis of documents obtained from the archives of Guyana. He further stated that in the absence of any nativity certificate from the concerned District Magistrate, her OCI application cannot be processed. An OCI card cannot be granted

to any foreign national who is found not eligible for the issuance of the same.

ANALYSIS, REASONING AND CONCLUSION

17. We have carefully considered the submissions advanced by learned counsel for the respective parties. With the able assistance, we have perused the pleadings, grounds taken in the petition, affidavits and annexures thereto and the reply filed by concerned parties.

18. The first issue is, as to whether a Nativity Certificate is mandatory for processing the application for OCI Card?

19. The second issue is as to whether an Apostille Certificate issued by the National Archives of Guyana could be treated as a valid document under Hague Convention, 1961?

20. Before proceeding further with the matter we would first analyze with the provisions of the Acts and Rules.

21. The relevant provision of the Citizenship Act, 1955 reads as under :

*"**7A. Registration of Overseas Citizen of India Cardholder.**--(1) The Central Government may, subject to such conditions, restrictions and manner as may be prescribed, on an application made in this behalf, register as an Overseas Citizen of India Cardholder--*

(a) any person of full age and capacity,--

(i) who is a citizen of another country, but was a citizen of India at the time of, or at any time after the commencement of the Constitution; or

(ii) who is a citizen of another country, but was eligible to become a citizen of India at the time of the commencement of the Constitution; or

(iii) who is a citizen of another country, but belonged to a territory that became part of India after the 15th day of August, 1947; or

*(iv) **who is a child or a grandchild or a great grandchild of such a citizen; or***

(b) a person, who is a minor child of a person mentioned in clause (a); or

(c) a person, who is a minor child, and whose both parents are citizens of India or one of the parents is a citizen of India; or

(d) spouse of foreign origin of a citizen of India or spouse of foreign origin of an Overseas Citizen of India Cardholder registered under section 7A and whose marriage has been registered and subsisted for a continuous period of not less than two years immediately preceding the presentation of the application under this section:

Provided that for the eligibility for registration as an Overseas Citizen of India Cardholder, such spouse shall be subjected to prior security clearance by a competent authority in India:

Provided further that no person, who or either of whose parents or grandparents or great grandparents is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may, by notification in the Official Gazette, specify, shall be eligible for registration as an Overseas Citizen of India Cardholder under this sub-section.

(2) The Central Government may, by notification in the Official Gazette, specify the date from which the existing persons of Indian Origin Cardholders shall

be deemed to be Overseas Citizens of India Cardholders.

Explanation.--For the purposes of this sub-section, "Persons of Indian Origin Cardholders" means the persons registered as such under notification number 26011/4/98 F.I., dated the 19th August, 2002, issued by the Central Government in this regard.

(3) Notwithstanding anything contained in sub-section (1), the Central Government may, if it is satisfied that special circumstances exist, after recording the circumstances in writing, register a person as an Overseas Citizen of India Cardholder."

22. The relevant provisions of the Citizenship Rules, 2008 are as follows:-

" PART VI

OVERSEAS CITIZENSHIP OF INDIA – REGISTRATION, RENUNCIATION AND CANCELLATION

29. Application for registration under section 7A.- *(1) An application for registration as an overseas citizen of India under section 7A shall be made in Form XXVIII.*

(2) A family consisting of a spouse and upto two minor children may apply in the same Form.

30. Application for registration under section 7A by Person of Indian Origin card holders.- A Person of Indian Origin Card holder, *notified vide the notification of the Government of India in the Ministry of Home Affairs number 26011/4/95-F.I, dated the 19th August, 2002 (published in the Gazette of India, Extraordinary, Part I, Section 1), as amended from time to time, who is otherwise eligible for registration as overseas citizen of India, may apply in Form XXVIII for grant of registration, which shall be decided in the manner specified in this part for other applicants.*

31. Authority to which applications are to be made.- *An application under rule 29 or as the case may be, rule 30 shall be made in duplicate -*

(a) in India-

(i) to the Foreigners Regional Registration Officer situated at National Capital Territory of Delhi, Mumbai, Kolkata, Chennai or Amritsar, who shall forward the same to the Central Government in the Ministry of Home Affairs; or

(ii) to the Foreigners Division, Ministry of Home Affairs;

(b) outside India-

(i) to the Indian Mission or Post having jurisdiction over the country of which an applicant is a citizen; or

(ii) where he is not in the country of his citizenship, to the Indian Mission or Post having jurisdiction over the country of which the applicant is ordinarily resident.

32. Scrutiny of applications.-*(1) The Central Government may, after a preliminary inquiry and on being apparently satisfied that there is no adverse information available against the applicant, register the person as an overseas citizen of India as soon as possible but not later than a period of thirty days and the case shall be placed for post verification of the antecedents.*

(2) The Central Government may, in case of any adverse information against the applicant, and after making such inquiry as it considers necessary, approve

or reject the grant of registration within a period of four months from the date of receipt of the application.

33. Certificate or registration and maintenance of register of persons under section 7A.-*(1) Every person, who is registered as an overseas citizen of India under section 7A shall be issued a certificate of registration in Form XXIX, signed by an officer not below the rank of Under Secretary to the Government of India.*

(2) A copy of the certificate of overseas citizen of India issued under this rule, shall be preserved for the purposes of record by the issuing authority.

(3) The issuing authority shall maintain, a register containing names and other details of the persons registered as overseas citizen of India under section 7A in Form XXX and a copy thereof shall be forwarded to the Ministry of Home Affairs in the first week of every months.

34. Declaration of renunciation of overseas citizenship;*(1) A declaration of renunciation of overseas citizenship of India under section 7C shall be made in Form XXXI, accompanied with the original certificate of registration of overseas citizen of India, to the concerned India Mission or Post or the Ministry of Home Affairs, Government of India who in turn shall forward the same to the authority which issued the said certificate of registration.*

(2) On receipt of the declaration of renunciation of overseas citizenship of India, the issuing authority shall issue an acknowledgement in Form XXXII and remove the name of the declarant from the register of overseas citizen of India.

35. Cancellation of registration as overseas citizen.- *(1) Where an order has been made cancelling the registration as an overseas citizen of India,*

the person whose registration has been cancelled or any other person in possession of the certificate of registration shall, when required by notice in writing by the Central Government, deliver the said certificate to such person and within such period as may be specified in the notice.

(2) On the certificate being delivered, it shall be cancelled and in case

the certificate is not delivered, then the Central Government may direct that it shall be treated as cancelled.

(3) The issuing authority shall make an appropriate entry in the

registered maintained under sub-rule (3) of rule 33 stating the cancellation of registration as overseas citizen of India and a copy thereof shall be submitted to the Ministry of Home Affairs in the first week of every month.

HAGUE CONVENTION , 1961

23. The convention was held in Hague on 5th October, 1961 for abolishing the requirement of Legislation for foreign public documents. In this Convention the primary reason was to ensure the authenticity of public documents of a country. This Convention replaced the traditional and cumbersome process of certification of any document. The issuance of certificate was called an "Apostille". An "Apostille" issued by the State of Origin, authenticated the origin of public document so that it can be presented abroad in any member country.

24. An 'Apostille' is an international certification that can be used in conjunction with the legal preparation of the document. An 'Apostille' granted by the State of

origin suffice to certify the document if the convention is applicable between two States.

25. The purpose of the Convention was to replace the complicated and expensive legalization process of chain certification, with the mere issuance of a single 'Apostille' certificate. Hence, as a party to the Hague Apostille Convention, public documents issued by another Contracting Party need not undergo the authentication process by the foreign country.

26. In this Convention it was decided that if an 'Apostille' is issued by any competent authority in any country, it will be presumed that they are satisfied of the authenticity of the document. The relevant Articles of the Hague Convention are as under:-

Article 1 : The present Convention shall apply to the public documents, which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.

For the purposes of the present Convention, the following are deemed to be public documents:

(a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server ("huissier de justice");

(b) administrative documents;

(c) notarial acts;

(d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

Article 2 : Each contracting State shall exempt from legislation the documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, Legislation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced, certify the authenticity of the signature, the capacity in which the person signing the documents has acted and, where appropriate, the identity of the seal or stamp which it bears.

(Emphasis Supplied)

27. India being a signatory of this Convention is bound to accept any public document issued by the other contracting party (country). An 'Apostille' document should, therefore, be treated as legalized document in India by all concerned, in accordance with the international obligation under the Hague Apostille Convention.

28. Since, India had signed on Hague Convention as a result the Ministry of External Affairs had issued Office Memorandum on 18th November, 2020, where, the Ministry of External Affairs had themselves agreed that there is no reason of attestation of any 'Apostille' document issued by the member country. It was further clarified that no other attestation or legalization of an Apostille document is required in India as India was a member of Hague Convention. An Apostille document should, therefore, be treated as a legalized document in India by all concerned, in accordance with the international obligation under the Hague Apostille Convention.

29. The Ministry of External Affairs issued Office Memorandum dated 18th November, 2020, which is being quoted below for ready reference:-

Ministry of External Affairs
(CPV Division)
***

Room No.20, Patiala House Annexe,
Tilak Marg, New Delhi -110001
November 18, 2020
No. Q/OI/433/2/2020

OFFICE MEMORANDUM

The Hague Apostille Convention, 1961, abolishes the requirement of legalization of foreign documents for use in any member country, once an Apostille certificate (including e-Apostille) has been issued by a competent authority of the country where the document originates.

2. It has been brought to the notice of this Ministry that some institutes/organizations/establishments in India demand an apostilled document of a member country to be further attested by the Indian Mission/Post in that country. It is clarified that no further attestation or legalization of an apostilled document should be required in India as India is a member of the Hague Apostille Convention. An apostilled document should, therefore, be treated as legalized document in India by all concerned, in accordance with the international obligation under the Hague Apostille Convention.

3. Copy of a Note on "Issuing and Accepting Apostilles" is enclosed for ready reference. The full text of the Hague Apostille Convention and list of its member countries are available at:

https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille.

4. To avoid unnecessary hassle caused to general public by demand of further legalization or attestation of an apostilled document, all concerned are requested to disseminate the information contained in paras 1, 2 & 3 above, among organizations/academic establishments, which are under their charge/in their jurisdiction or are affiliated with them. The information may also please be prominently displayed on the official websites.

(Devesh Uttam)/OSD(CPV)

30. Further the respondent submitted that this Court does not have territorial jurisdiction to entertain the present writ petition as the petitioner is staying in Uttrakhand is also not correct. Since the great grandparents of the petitioner hailed from Allahabad and Jaunpur, which lies within the territorial jurisdiction of this Court, hence, their objection regarding lack of territorial jurisdiction is incorrect and the same is turned down by this Court. Accordingly, we hold that this Court has full jurisdiction to entertain the present case.

31. The petitioner herein had applied for OCI Card initially as spouse but since she could not produce the earlier marriage annulment certificate of her husband, the application was initially rejected. However, she again moved an application for OCI Card on the account of being great grand child of Indian citizen who had immigrated to Guyana in 1882.

32. In the instant matter, the petitioner, who had applied for OCI Card, had given the proof that her great grandfather migrated from Allahabad and Jaunpur. These documents were taken from the National Archives of Guyana and were duly Apostilled, which goes to show that

petitioner's great grandfather Ganesh had immigrated from India and another 'Apostille' document shows that her great grandmother Janki had immigrated to Guyana on 10th October, 1882. The parentage had been proved by further birth certificates by the petitioner filed along with the petition. Once the immigration of great grandparents of the petitioner is proved, there is no reason to disbelieve the said documents.

33. Section 7(A) of the Citizenship Act, 1955 lays down for grant of OCI which can be issued to anyone, who is a child or a grandchild or a great grandchild of such a citizen of Indian Origin. Section 18 of the Citizenship Act further obliges the respondents to frame Rules. Accordingly, under Section 18 of the Act, 1955, the Rules, 2009 was framed. Rules 29 to 35 of the Rules, 2009 which is Part VI of the Rules, 2009, lays down registration, renunciation and cancellation of overseas citizenship of India. In these rules, there is no mention of Nativity Certificate as sought by the respondents herein. However, after the petitioner had furnished all the documents along with the OCI Card, the respondents asked the petitioner to submit Nativity Certificate, though the same is not required under the Citizenship Act and Rules.

34. In response to this query, the petitioner approached Nagar Nigam, Allahabad for issuance of Nativity Certificate. Nagar Nigam, Allahabad replied that, they do not have the records prior to 1900, so they are not in a position to issue Nativity Certificate to the petitioner.

35. On one hand, the Government of India had amended the Act, 1955 and added Section 7(A) and also made Rules, 2009 in which anybody who is eligible can apply for OCI Card in Form XXVIII.

36. The petitioner herein had given sufficient evidence(by way of Apostille document taken from the National Archives of Guyana) about the great grandparents of petitioner, who had immigrated from India on 10th October, 1882. But since Nagar Nigam, Allahabad had not kept records prior to 1900, it cannot be taken against the petitioner. The respondents herein cannot reject the application of the petitioner on the ground that she is not able to procure the Nativity Certificate when the government authorities had themselves failed to maintain the same. The plain reading of the Act and the Rules clearly shows that, to apply for OCI Card, the applicant has to prove that his/her grandparents or great grandparents were of Indian origin. Here, the petitioner has successfully proved the same by filing Apostille document from the National Archives of Guyana. In the light of the same it is not open for the respondents to have rejected the OCI Card on the ground that the petitioner has not been able to produce the Nativity Certificate.

37. Respondent nos.1 to 3 cannot take advantage of their own fault. They have not maintained any register/record prior to 1900, and at the same time, they cannot compel the petitioner to produce Nativity Certificate. Further, apart from Apostille Certificate issued by the Government of Guyana the petitioner had also enclosed a certificate, along with the application, given by Village Pradhan stating that Ganesh, petitioner's great grandfather was 'Ahir' by caste who belonged to family of Sadhu and Mata Bhikh, who were deported by the Britishers to Guyana. The petitioner

has produced enough evidence to show that her great grandparents had immigrated from India and hence, she is eligible to apply for the OCI Card.

38. Office Memorandum dated 18.11.2020 issued by the Ministry of External Affairs clearly state that the Apostille document by any other country would be treated as legalized document in India by all concerned authorities. However, the same Ministry of External Affairs while processing the petitioner's OCI Card has refused to accept the Apostille document of the petitioner.

39. On being asked as to whether respondent nos.1 to 3 are bound by Hague Convention and Office Memorandum dated 18th November, 2020, the reply given by the Assistant Solicitor General of India was that he has been instructed to state that the Office Memorandum is a valid document but is not mandatory. This argument per se is not correct, as the Government of India had signed the Hague Convention Treaty and in view of Hague Convention, the Ministry of External Affairs had issued the Office Memorandum dated 18th November, 2020 treating the Apostille document as a legal document, but at the same time they cannot turn around and say that following the Hague Convention Treaty is not mandatory. Respondent nos.1 to 3 are bound with the Hague Convention, 1961 and also bound to accept the Apostille document of other countries.

40. Article 51(C) of the Constitution of India is a Directive Principle of State Policy which states that the State shall endeavour to foster respect for international law and treaty obligations, where India is a signatory nation to an international treaty, and a statute is made in furtherance of such treaty, a purposive rather than a narrow literal construction of such statute is preferred. The interpretation of such a statute shall be construed on broad principle of general acceptance rather than earlier domestic precedents, being intended to carry out treaty obligations, and not to be inconsistent with them.

41. Hon'ble Supreme Court in the matter of **Commissioner of Customs, Bangalore vs M/S G.M. Exports & Ors6** has held as under:-

"15. A number of judgments, both English and Indian, have laid down as to what is the correct approach to the construction of a statute made in response to an international treaty obligation by a member nation. Thus, in The Jade The Eschersheim Owners of the motor vessel Erkowit v. Owners of the ship Jade, [1976] 1 All ER 920, the House of Lords stated:

"As the Act was passed to enable Her Majesty's government to give effect to the obligations in international law which it would assume on ratifying the convention to which it was a signatory, the rule of statutory construction laid down in Salomon v. Customs and Excise Commissioners [1966] 3 All ER 871 and Post Office v. Estuary Radio Ltd. [1967] 3 All ER 633 is applicable. If there be any difference between the language of the statutory provision and that of the corresponding provision of the convention, the statutory language should be construed in the same sense as that of the convention if the words of the statute are reasonably capable of bearing that meaning." [at page 924]

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17. In Garland v. British Rail Engineering Ltd., [1982] 2 All ER 402, the same Rule was set out with an addition –

that not only should municipal law carry out treaty obligations, but it should also not be inconsistent with the terms of a treaty. This was put by the House of Lords in the following words:-

"My Lords, even if the obligation to observe the provisions of article 119 were an obligation assumed by the United Kingdom under an ordinary international treaty or convention and there were no question of the treaty obligation being directly applicable as part of the law to be applied by the courts in this country without need for any further enactment, it is a principle of construction of United Kingdom statutes, now too well established to call for citation of authority, that the words of a statute passed after the Treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom, are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it." [at page 415]

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20. To similar effect are some of the judgments of our court. In Vellore Citizens' Welfare Forum v. Union of India and others, (1996) 5 SCC 647, when dealing with the Environment Protection Act, this Court stated:

"Even otherwise once these principles are accepted as part of the Customary International Law there would be no difficulty in accepting them as part of the domestic law. It is almost an accepted proposition of law that the rules of Customary International Law which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law. To support we may refer to Justice H.R. Khanna's opinion in Addl. Distt. Magistrate Jabalpur v. Shivakant Shukla [(1976) 2 SCC 521 : AIR 1976 SC 1207], Jolly George Varghese v. Bank of Cochin [(1980) 2 SCC 360 : AIR 1980 SC 470] and Gramophone Co. of India Ltd. v. Birendra Bahadur Pandey, [(1984) 2 SCC 534 : 1984 SCC (Cri) 313 : AIR 1984 SC 667]." [at para 15]

42. Hon'ble Supreme Court in the matter of **Lakshmi Kant Pandey vs Union of India & Ors7** has held as under:

"……..procedure prescribed in the Hague Apostille Convention be accepted and followed by the Indian courts while dealing with the adoption of children by foreign parents.

……..

(a) Direct the courts of competent jurisdiction dealing with adoption/guardianship cases to accept documents authenticated by officers competent to issue certification by "Apostille" in the country of their execution as provided and covenanted in the Hague Apostille Convention."

43. Hon'ble Delhi High Court in the matter of ***Dr. Sanjay Khanduja vs. Punjab National Bank and another8*** has held as under:-

"15. Further, the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, 1961, i.e., Apostille Convention, is clear to the effect that legalisation in the Indian Embassy would not be required if the documents is duly appostilled. India, being a member of the Apostille Convention since 2005, there is no requirement of legalisation of duly apostilled documents in India. The relevant portion of the Apostille Convention is as under:

"ARTICLE 2 – Each Contracting State shall exempt from legislation the documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, Legislation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced, certify the authenticity of the signature, the capacity in which the person signing the documents has acted and, where appropriate, the identity of the seal or stamp which it bears.

44. In the matter of **Abdul Manaf v. State of Kerala9**, High Court of Kerala has held as follows:-

"3. Ext.P5 certificate of civil status is issued by the Swiss Confederation, to prove the bride marital status, attested by a notary in terms of Hague Convention, abolishing the requirement of legalisation for foreign public documents (Apostille Convention). India has declared its accession to above Convention on 05/10/1961. The Switzerland has not objected to accession of India as Contracting State under article 12 of the Convention. Thus, the Indian Court and the Public Authorities are bound to recognise such certification of the notaries of the foreign country.

5. The Apostille Convention replaced cumbersome formalities of requirement of diplomatic or consular legislation for foreign public documents and legalisation process of authentication by issuance of Apostille Certificate. Therefore, foreign public documents do not require legislation if it bears apostille certification."

45. Hon'ble Supreme Court of Namibia has held in the matter of **Hans-Jurgen Gunther Koch vs. The State10** as follows:-

"The purpose of the Convention, as stated in its name, was to simplify proof of foreign documents and the authentication thereof for use in countries which have acceded to the Convention. The provisions of the Convention, in so far as they are relevant to these proceedings, are as follows:

"Article 1 The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.

For the purposes of the present Convention, the following are deemed to be public documents:

(a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server;

Article 2

Each Contracting State shall exempt from legislation documents to which the present Convention applies aEach Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears and which have to be produced in its territory. For the purposes of the present Convention legalisation means only the formality by which the

diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.

……..

From this it follows that the terms of the Convention are part of the law of Namibia and legally bind Namibia against other Contracting States."

46. Hence, it is clear that the petitioner has placed the documents which goes to show that, her grandparents had immigrate from India to Guyana on 10th October, 1882 and the documents given by her are sufficient enough to prove the same. The Citizenship Act, 1955 was amended and Section 7A was added on 28.6.2005. This amendment was clearly carried out to give benefits to the foreign citizens (whose forefathers/mothers have been native of Indian origin) for travelling and staying in India, so Section 7A was added in the Citizenship Act, 1955, and Overseas Citizen of India Cards were to be issued, to such citizens, whose forefathers were Indians.

47. The request of respondents to provide Nativity Certificate is, nowhere, provided in the Citizenship Act or the Rules. We understand the respondents can ask for documents to prove ancestry, which has been provided by the petitioner in this case. Further, the respondents cannot compel the petitioner to get a Nativity Certificate from the office of the District Magistrate, which admittedly as per their own objection, they have not maintained the same since 1900.

48. The Government of India has been signatory of the Hague Convention, and accordingly, the Ministry of External Affairs had issued Office Memorandum on 18.11.2020 treating the 'Apostille' document as a legal document. Here, when the petitioner had given 'Apostille' document showing her ancestry, it is not open for respondent nos.1 to 3 to disbelieve the same and not follow the Treaty, even though they themselves had signed.

49. The petitioner has clearly made out a case that her great grandparents migrated to Guyana in October, 1882, hence, she is entitled for the OCI Card. Accordingly, we direct respondent nos.1 to 3 to process the OCI Card of the petitioner in accordance with Section 7A of the Citizenship Act, 1955. We further direct conversion of VISA of the petitioner, so that she is eligible for the OCI Card.

50. Accordingly, the writ petition stands **allowed.**

(2024) 2 ILRA 409
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2024
BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ C No. 22128 of 2023

Anita Devi Chaurasiya ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jitendra Kumar Srivastava, Ashish Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Ashutosh Pandey, Sri Rahul Sahai

Civil Law - Constitution of India,1950-Article 226-Uttar Pradesh Panchyat Raj Act,1947-Section 12-C-Election disputes-The petitioner challenged the election of the gram pradhan on grounds of irregularities, including double voting and alleged undue influence by the returned candidate's husband-The court held that the elections petition requires strict compliance with statutory requirements, including precise pleadings and material facts, as per section 12-C of the 1947 Act and Rule 3 of the U.P. Panchayat Raj(Settlement of Election Disputes)Rules,1994-General allegations or lack of specific evidence on material facts, such as identifying voters who committed double voting and its impact on election results, cannot sustain a petition-Procedural objections, including claims about the candidates's eligibility or residency, must be raised before the appropriate authority at the relevant time and not introduced later in appellate or writ proceedings.(Para 1 to 34)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Rupadhar Pujari Vs Gangadhar Bhatra(2004) 7 SCC 654

2. K.Venkatachalam Vs A. Swamickan & anr.(1999) 4 SCC 526

3. Smt. Archana Vs St. Election Commission & ors.. (2018)7 ADJ 703

4. Mudi Vs St. Election Commission(2000)4 AWC 3374

5. Ram Bhual Vs Ambika Singh (2005) AIR SC 4233

6. Arikala Narasa Reddy Vs Venkata Ram Reddy Reddygari & anr.. (2014) 5 SCC 312

7. Ram Adhar Singh Vs The Distt Judge Ghazipur & ors.. (1985) AWC 246

8. Ram Sewak Yadav Vs Hussion Kamil Kidwai & ors.. AIR (1964) SC 1249

9. L.R.Shivaramagowda & ors.. Vs T.M. Chandrashekar (Dead) by Lrs. & ors..(1999) 1 SCC 666

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. The petitioner (Election Petitioner) before this Court had contested the election for the post of Gram Pradhan of Gram Panchayat Bhangura, Vikas Khand Kudaraha in the year 2021. The result was declared on 02.05.2021 and respondent No.4, the Returned Candidate, won the election and secured 349 votes while Election Petitioner got 335 votes.

2. The election petition was filed by the petitioner before Sub-Divisional Officer, Tehsil Sadar, District Basti under Section 12-C of Uttat Pradesh Panchayat Raj Act, 1947 *(hereinafter called as "Act of 1947")* on the ground that husband of Returned Candidate Jaggiram was Booth Level Officer *(hereinafter called as "BLO")* appointed in the same Village Panchayat and had influenced the election by inducting 49 new voters of another village and succeeded in getting the result in favour of Returned Candidate.

3. An allegation was made in the election petition that 49 voters, who were included in the voter list of Village Panchayat in which elections were held, the names of these 49 voters also found place in 6 Village Panchayats and the votes counted in favour of the Returned

Candidate led to her victory on the ground of double voting. In paras 8 to 14 of the election petition, descriptions of voters whose names appear in the electoral roll of Gram Panchayat Bhangura as well as other Gram Panchayats namely Vihara, Bhedwa, Sonbarsa, Turkauliya, Devadeeha, and Paun have been given. Further ground has been taken that Section 62(3) of Representation of People Act, 1951 *(hereinafter called as "Act of 1951)* provides that each person shall be entitled to vote only once and no person shall vote in more than one constituency of the same class, and if he does so, his votes shall be void in all such constituencies. Section 9(6) of Act of 1947 secures the spirit of 'one elector one vote'. Para 15 of the election petition takes note of 11 affidavits filed by residents of the six Gram Panchayats confirming that the voters, mentioned in paras 9 to 14 of election petition, had not only voted in Gram Panchayat Bhangura but also in their respective Gram Panchayats.

4. The aforesaid election petition was contested by the Returned Candidate by filing a written statements. It was alleged that after publication of electoral role, objections were invited, but, the Election Petitioner did not file any objection to the electoral role. Further, there was no documentary evidence on record to prove that 49 voters, whose names appear in the voter list of Gram Panchayat Bhangura, had also voted in the other Gram Panchayat.

5. The Prescribed Authority, on the basis of pleadings of the parties and the evidence led therein, vide order dated 27.12.2022, proceeded to hold the election null and void as names of 49 persons of six different Gram Panchayats appeared in the electoral role of Gram Panchayat Bhangura and 11 persons have given their affidavits to the effect that they have seen those persons casting their vote in their Gram Panchayat also, and declared the post of Pradhan vacant.

6. Aggrieved by the order of Prescribed Authority, the Returned Candidate preferred Civil Revision No.1 of 2023 before the District Judge, Basti. The Revision was allowed vide order impugned dated 24.05.2023 and the order of Prescribed Authority dated 27.12.2022 was set aside hence the present writ petition.

7. Sri Ashish Kumar Singh, learned counsel for Election Petitioner submitted that the Revisional Court had exceeded its jurisdiction in allowing the revision and the order passed de hors the rules and the process established by law. He contended that the Returned Candidate Anju Kumari was married to Jaggiram on 24.03.2021, and prior to that she was residing in another village but her name had been entered in the voter list of Village Bhangura, which had already been finalized and the elections were held in April, 2021. He next contended that the husband of Returned Candidate was appointed as BLO in the same Village Panchayat, who had influenced the election and thus the election needs to be set aside. According to him, 49 members of six different Village Panchayats have been included in the electoral roll of Village Bhangura and the affidavits filed by 11 persons stating that they have voted both in their respective Village Panchayats and Village Bhangura clearly spells out the ground for declaring the election of the Returned Candidate void. He has placed reliance upon decision of Apex Court rendered in **Rupadhar Pujari vs. Gangadhar Bhatra (2004) 7**

SCC 654 wherein the Apex Court had held that the procedural laws relating to panchayat elections and the election petitioner cannot be allowed to be interpreted with too much rigidity and by indulging in hair-splitting. Reliance has also been placed upon the decision of Apex Court in **K.Venkatachalam vs. A. Swamickan & Anr. (1999) 4 SCC 526.**

8. Counsel submitted that the Court exercising power under Article 226 of the Constitution can also deal with the issues which has not been raised in the election petition, which goes to the root of the matter and the prayer made in the election petition allows to be granted though the pleadings are missing.

9. Sri Rahul Sahai, learned counsel appearing for the Returned Candidate submitted that the election petition filed by election petitioner lacks basic pleadings and only the fact to the extent that names of 49 members, whose names are there in the electoral roll of Village Bhangura, also find place in another village has been mentioned. According to him, there is no pleading that these 49 voters had not only cast vote in Village Bhangura but also in the other Village Panchayat in which their names have been entered. He submitted that the alleged 49 voters were already there in the previous voter list of 2005, 2010 and 2015. The Election Petitioner had contested the election of member of Block Development Council in the year 2015 and was elected as Block Development member, but, no objections were ever raised by her with regard to voter list.

10. He next submitted that the husband of Returned Candidate was appointed as Rojgar Sewak in the year 2008 and was given oral instructions by the superior authority in the year 2010 to discharge duty of BLO. It is a Class IV post and he cannot influence the election in any manner. He next contended that the Returned Candidate was married to Jaggiram in the year 2020 and *Gauna* was solemnized in March, 2021 and since her marriage she became resident of the said village and her name was entered in the voter list. Reliance has been placed upon decision of this Court in **Smt. Archana vs. State Election Commission & Ors. 2018 (7) ADJ 703** wherein electoral roll was questioned after finalization of the election. The Court held that no such objection can be raised in regard to preparation of electoral roll after the election had been completed. Relevant para 18 of the judgment are extracted hereasunder :

"Considering the matter in its entirety and particularly with regard to the facts of the present case with reference to the law laid down by the Supreme Court in the cases of Inderjit Barua (supra), Lakshmi Charan Sen (supra) and Pampakavi Rayappa Belagali (supra), the petitioner never having raised any objection against the preparation of the electoral roll in the manner provided in the Rules, 1994 it is not open for her now after the election has already been completed and the result declared to challenge the same on the ground that the electoral roll had not been correctly prepared and it contained names of persons belonging to other villages of persons who had died."

11. Reliance has also been placed upon decision of this Court in **Mudi vs. State Election Commission 2000(4) AWC 3374**. Relevant para 8 of the judgment is extracted hereasunder :

"In view of the aforesaid provision, a challenge to the correctness of electoral roll cannot be permitted to be raised after the publication of the final electoral roll. If a person feels that name of a dead person or a person who is not eligible to be included in the electoral roll has been included in the electoral roll, his remedy lies in filing an application at the opportune time for correction of the entry. Similarly, if the name of someone has not been included in the electoral roll though he is eligible for the said purpose, he ought to make an application in that regard within the prescribed period. The decision of the Assistant Electoral Registration Officer in these matters is subject to an appeal and sub-rule (4) of Rule 21A attaches finality to the order passed in appeal. The provisions of the Act and the Rules thus provide a complete safeguard against any wrong inclusion or wrong omission of name in the electoral roll. After publication of the final roll, the same is immune from any challenge at a subsequent stage. Once the process of election has begun, they can neither be challenged by means of a writ petition under Article 226 of the Constitution nor in an election petition filed under Section 12C of the U. P. Panchayat Raj Act which gives the procedure for challenging the election of a person as pradhan."

12. On the question of specific pleading in the election petition, reliance has been placed upon decision of Apex Court rendered in **Ram Bhual vs. Ambika Singh AIR 2005 SC 4233**, relevant para 8 whereof is extracted hereasunder :

"The decisions relied on by the learned counsel in Mohd. Zahoor Ali Khan v. Thakooranee Rutta Koer (1867) 11 Moo IA 468 and Secy. of State for India in Council v. Laxmibai (1922) 50 IA 49 : AIR 1923 PC 6 that the pleadings in mofussil courts in our country are loosely drafted and a liberal construction has always to be given to such pleadings, cannot help the appellant. Here is a case of no pleading at all. How far the principles of those decisions can be applied to a High Court like the High Court of Allahabad, one of the chartered High Courts of this country and that too, more than 50 years after independence, need not be answered in this case. This Court in Badat & Co. v. East India Trading Co. AIR 1964 SC 538 after referring to Order 8 Rules 3 and 4 of the Code of Civil Procedure, 1908, held that this construction of pleadings would not apply to the Original Side of the High Court of Bombay. But in any election petition, it is well settled by the decisions of this Court, that pleadings are very important and they, in fact, play a large part in adjudications arising under the Representation of the People Act, 1951. In Sushil Kumar v. Rakesh Kumar (2003) 8 SCC 673 (SCC p. 695, para 75) this Court stated, "The pleadings in an election petition must likewise be construed strictly." Therefore, the attempt of learned counsel for the appellant to gloss over the failure of the appellant to deny the relevant and crucial allegations in the election petition, cannot succeed. The fact is that the pleadings as regards what transpired before the Returning Officer at the time of scrutiny of nominations remain un-rebutted in the pleadings of the appellant. The pleadings in the election petition also stand supported by the oral evidence of PW 1 and PW 2, in the light of the oral evidence of the appellant as RW 1 in which not even an attempt is made to deny the facts spoken to by PW 1 and PW 2. It is clear from Section 36(4) of the Act that the Returning Officer shall not reject any nomination paper on

the ground of any defect which is not of a substantial character. Section 33(4) of the Act provides that on the presentation of a nomination paper, the Returning Officer has to satisfy himself that the names and the electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral roll. The proviso thereto clearly provides that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place and in a case where there was an error in the nomination paper in regard to the description, he shall direct that the same be corrected and he could even overlook such errors. It is in the context of the proviso to Section 33(4), that the case set up by the appellant, of Sita Ram drawing the attention of the Returning Officer to the defect being only an error in the serial number and that Sant Lal, the ninth proposer, was actually at Serial No. 352 on the same page of the voters' list assumes great significance. It is a minor defect which obviously should have been got corrected by the Returning Officer even while accepting the nomination and certainly he could not have rejected the nomination on that ground in the light of Section 36(4) of the Act. At the risk of repetition, we may mention that there is no case for the appellant that Sant Lal was not the voter shown at Serial No. 352 in Part 91 of the voters' list."

13. Reliance has also been placed upon decision of Apex Court in **Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari & Anr. (2014) 5 SCC 312**, relevant para 15 whereof is extracted hereasunder :

"This Court has consistently held that the court cannot go beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing evidence that by a particular irregularity/illegality, the result of the election has been "materially affected". There can be no dispute to the settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". Thus, a decision of the case should not be based on grounds outside the pleadings of the parties. In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. The court cannot exercise discretion of ordering re-counting of ballots just to enable the election petitioner to indulge in a roving inquiry with a view to fish material for declaring the election to be void. The order of re-counting can be passed only if the petitioner sets out his case with precision supported by averments

of material facts. (Vide Ram Sewak Yadav v. Hussain Kamil Kidwai AIR 1964 SC 1249, Bhabhi v. Sheo Govind (1976) 1 SCC 687 : AIR 1975 SC 2117 and M. Chinnasamy v. K.C. Palanisamy (2004) 6 SCC 341."

14. I have heard the respective counsels for the parties and perused the material on record.

15. The question, which has been raised for consideration through this writ petition is, as to whether in an election petition filed under Section 12-C of Act of 1947, the rule of strict pleading would apply or not and the facts not stated and narrated in the election petition could be taken into account by the Prescribed Authority or by this Court exercising power under Article 226 of the Constitution of India?

16. Before adverting to decide the issue in hand, a cursory glance of Section 12-C(1) of Act of 1947, Rule 3 of U.P. Panchayat Raj (Settlement of Election Disputes) Rules, 1994 (hereinafter called as "Rules of 1994") and Sections 80 and 83 of Act of 1951 are necessary for better understanding of the case which are extracted hereasunder :

"12-C. ***Application for questioning the elections*** *– (1) The election of a person as Pradhan or as member of a Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat under Section 43 shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that –*

(a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election, or

(b) that the result of the election has been materially affected–

(i) by the improper acceptance or rejection of any nomination or;

(ii) by gross failure to comply with the provisions of this Act or the rules framed thereunder."

"3. Election Petition*.-(1) An application under sub-section (1) of Section 12-C of the Act shall be presented before the Sub-Divisional Officer, within whose jurisdiction the concerned Gram Panchayat lies, within ninety days after the day on which the result of the election questioned is announced and shall specify the ground or grounds on which the election of the respondent is questioned and contain a summary of the circumstances alleged to justify the election being questioned on such ground:*

Provided that no such application shall be entertained unless it is accompanied by a treasure challan to show that the amount of rupees fifty has been deposited in the Personal Ledger Account of the Gram Panchayat concerned as security.

(2) The person whose election is questioned and where the petition claims that the petitioner or any other candidates shall be declared elected in place of such person, every unsuccessful candidate shall be made a respondent to the application.

(3) Every respondent may give evidence to prove that any person in respect of whom a claim is made that such person be declared elected, should not be declared so elected on the same ground or ground on which his election could have been questioned if he had been elected."

"80. Election petitions.*—No election shall be called in question except by an election petition presented in*

accordance with the provisions of this Part."

***"83. Contents of petition**.—(1) An election petition—*

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

17. Section 12-C(1) of Act of 1947 provides for the application for questioning the election of a person as Pradhan or as member of a Gram Panchayat including the election of a person appointed as the Panch of the Nyaya Panchayat. The election is not to be questioned except on the ground mentioned in Section 12-C(1)(a) & (b) of Act of 1947.

18. Rule 3 of Rules of 1994 provides that the election petition is to be presented before the Sub-Division Officer, within whose jurisdiction the concerned Gram Panchayat lies, within ninety days after the declaration of the result, specifying the ground or grounds on which the election of a Returned Candidate is questioned and shall contain a summary of the circumstances alleged to justify the election being questioned on such ground.

19. The Act of 1951 and the rules framed thereunder provides for questioning the election in regard to Parliamentary and Assembly election. Section 80 of the Act of 1951 provides that no election shall be questioned except by means of an election petition presented in accordance with provisions of Part VI while Section 83(1) provides that an election petition should contain concise statement of the material facts on which the election petitioner relies.

20. Comparing the provisions of Act of 1947 and the rules framed thereunder and those of Act of 1951, it transpires that they are almost identical to each other. The matter came up for consideration before the Full Bench of this Court in **Ram Adhar Singh vs. The District Judge, Ghazipur & Ors. 1985 AWC 246**. The Full Bench, in para 18 of the judgment, has held as under :

"We are unable to accept the submission made by the learned Counsel. As already explained the Supreme Court has, in cases arising under the Representation of the People Act, spelt out the condition that all the courts dealing with an election petition should not exercise its discretion to permit inspection of ballot papers unless the petition contains an adequate statement of material facts on which the Petitioner relies in support of his case (viz. that the petition meets the requirements of Section 83(1) of the Representation of the People Act regarding contents of an election petition) for the reason that under the Act, it is a matter of

utmost importance to maintain the secrecy of ballot which is sacrosanct and which should not be lightly allowed to be violated on vague and indefinite allegations. This reason applies equally to an election held under the U.P. Panchayat Raj Act which too cherishes secrecy of ballot to the same extent. Viewed from this angle, it becomes evident that the amplitude and purpose of the requirement of Section 83(1)(a) of the Representation of the People Act that the election petition must contain a concise statements of material facts on which the Petitioner relies and that of Rule 24 of the Rules framed under the U.P. Panchayat Raj Act to the effect that an application under Section 12-C(1) of the Act must specify the grounds on which the election of the Respondent is being questioned as also a summary of circumstances alleged to justify the election being questioned on such grounds, is the same, viz. that the court or the authority dealing with an election petition under the respective enactments, should not countenance or proceed to investigate into any ground taken in the election petition unless the ground as well as the material in support of such ground have been adequately disclosed in the petition. Neither of the two enactments countenances the court or the authority to permit the election Petitioner to make or indulge into making of a roving enquiry with a view to fish out material for declaring an election void; and it is this weighty factor which impels the court or the authority not to look into or permit inspection of ballot papers unless the foundation for the purpose has been properly laid in the petition by specifying the ground and the material or the circumstances in support of such ground. Viewed in this light, the provisions contained in the U.P. Panchayat Raj Rules permitting the summary hearing of an application under Section 12-C(1) of the Act and authorising the Sub-Divisional Officer to, instead of recording evidence in full, merely maintain a memorandum thereof, has no bearing on the question regarding circumstances in which the ballot papers can either be looked into or permitted to be inspected in proceedings under Section 12-C of the U.P. Panchayat Raj Act."

21. In ***Ram Sewak Yadav vs. Hussain Kamil Kidwai & Ors. AIR 1964 Sc 1249***, the Constitution Bench of Hon'ble Apex Court had held that allegation made by election petitioner against the Returned Candidate must be clear and specific and must be supported by adequate statement of material facts. Further, the Court must be *prima facie* satisfied on the materials produced before the Court regarding the truth of the allegation made on record. Relevant paras 6 and 7 of the judgment are extracted hereasunder :

"6. An election petition must contain a concise statement of the material facts on which the petitioner relies in support of his case. If such material facts are set out the Tribunal has undoubtedly the power to direct discovery and inspection of documents with which a civil court is invested under the Code of Civil Procedure when trying a suit. But the power which the civil court may exercise in the trial of suits is confined to the narrow limits of O. 11, Code of Civil Procedure. Inspection of documents under O. 11, Code of Civil Procedure may be ordered under rule 15, of documents which are referred to in the pleadings or particulars as disclosed in the affidavit of documents of the other party, and under rule 18(2) of other documents in the possession or power of the other party. The Returning Officer is

not a party to an election petition, and an order for production of the ballot papers cannot be made under O. 11 Code of Civil Procedure. But the Election Tribunal is not on that account without authority in respect of the ballot papers. In a proper case where the interests of justice demand it, the Tribunal may call upon the Returning Officer to produce the ballot papers and may permit inspection by the parties before it of the ballot papers. That power is clearly implicit in Sections 100(1)(d)(iii), 101, 102 and rule 93 of the Conduct of Election Rules, 1961. This power to order inspection of the ballot papers which is apart from O. 11 Code of Civil Procedure may be exercised, subject to the statutory restrictions about the secrecy of the ballot paper prescribed by 94 and 128(1).

7. An order for inspection may not be granted as a matter of course : having regard to the insistence upon the secrecy of the ballot papers, the Court would be justified in granting an order for inspection provided two conditions are fulfilled :

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the Tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be granted to support vague pleas made in the petition not supported by material facts or to fish out evidence to support such pleas. The case of the petitioner must be set out with precision supported by averments of material facts. To establish a case so pleaded an order for inspection may undoubtedly, if the interests of justice require, be granted. But a more allegation that the petitioner suspects or believes that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection."

22. In **Jyoti Basu and others vs. Debi Ghosal and others AIR 1982 SC 983**, the Apex Court while dealing with an election dispute has held that an election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes, applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Relevant para 8 of the judgment is extracted hereasunder :

"A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance With the statutory creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is

what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self contained code within which must be found any rights claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say ?"

23. In dealing with the question for declaring an election to be void, the Apex Court in **L.R.Shivaramagowda & Ors. vs. T.M. Chandrashekar (Dead) by Lrs. & Ors. (1999) 1 SCC 666** has held that it is absolutely necessary for the election petitioner to plead that result of election insofar as it concerned the returned candidate had been materially affected by the alleged non-compliance with the provisions of the Act or of the Rules. The Court further stressed the importance of pleadings in an election petition and pointed out the difference between "material facts" and "material particulars". Relevant paras 10 and 11 of the judgment are extracted hereasunder :

"10. That apart, it is rightly pointed out by the appellant's counsel that in order to declare an election to be void under Section 100(1)(d)(iv), it is absolutely necessary for the election petitioner to plead that the result of the election insofar as it concerned the returned candidate had been materially affected by the alleged non-compliance with the provisions of the Act or of the Rules. We have already extracted para 39 of the election petition which is the only relevant paragraph. One will search in vain for an averment in that paragraph that the appellant had spent for the election an amount exceeding the prescribed limit or that the result of the election was materially affected by the failure of the appellant to give true and correct accounts of expenditure. In the absence of either averment, it was not open to the appellant to adduce evidence to that effect. It cannot be denied that the two matters referred to above are material facts which ought to find a place in an election petition if the election is sought to be set aside on the basis of such facts.

11. This Court has repeatedly stressed the importance of pleadings in an election petition and pointed out the difference between "material facts" and "material particulars". While the failure to plead material facts is fatal to the election petition and no amendment of the pleading could be allowed to introduce such material facts after the time-limit prescribed for filing the election petition, the absence of material particulars can be cured at a later stage by an appropriate amendment. In Balwan Singh v. Lakshmi

Narain AIR 1960 SC 770 the Constitution Bench held that an election petition was not liable to be dismissed in limine merely because full particulars of corrupt practice alleged were not set out. On the facts of the case, the Court found that the alleged corrupt practice of hiring a vehicle for the conveyance of the voters to the polling station was sufficiently set out in the pleading. The Court pointed out that the corrupt practice being hiring or procuring of the vehicle for the conveyance of the electors, if full particulars of conveying by a vehicle of electors to or from any polling stations were given, Section 83 was duly complied with, even if the particulars of the contract of hiring, as distinguished from the fact of hiring were not given."

24. In the instant case, the election petitioner had pleaded before the Prescribed Authority in paras 9 to 14 that 49 members of six different villages were also enrolled as voters in Village Bhangura. The affidavits of 11 members corroborated that they had seen many of the enrolled voters to have voted in two villages, but, there is no averment in the election petition that which member of the Village Panchayat voted in two villages which had materially affected the result of the Returned Candidate.

25. The pleadings are missing, and only through the election petition it was brought to the notice of the Prescribed Authority that 49 members of other Village Panchayat had been enrolled in the electoral roll of Village Panchayat Bhangura. Moreover, the Prescribed Authority wrongly assumed taking note on 11 affidavits that these 49 members have voted in two villages in violation of Section 62(3) of the Act of 1947 and held the election of Returned Candidate void.

26. The result could have only been declared void once there was a specific pleading in the election petition and the issue was framed by the Prescribed Authority and by the evidence led, the factum of double voting was proved by the election petitioner as to the casting of double votes by the voters in two different Village Panchayat, which had materially affected the result of the Returned Candidate. In absence of specific pleadings by the election petitioner, the order passed by Prescribed Authority was not sustainable and the Revisional Court had rightly proceeded to reverse the same.

27. As far as argument raised from petitioner's side that Returned Candidate was married in the year 2021, this Court cannot go into this question as it was never raised by the election petitioner in the election petition nor it was discussed by the Prescribed Authority. It was for the first time that before the Revisional Court the said question was raised, which has been decided and needs no interference by this Court.

28. Now coming to the issue raised by the election petitioner that this Court while exercising power under Article 226 of the Constitution can interfere to set aside a void election though the pleading was not there in the election petition, this Court finds that the election petitioner has herself alleged that according to her the marriage was solemnized between Returned Candidate and her husband Jaggiram on 24.03.2021 prior to filing of nomination papers, which has been denied by the Returned Candidate that marriage was held in the year 2020, This Court finds that this disputed question of fact cannot be dealt with under Article 226 of the Constitution of India and once the issue was not raised

before the Prescribed Authority, this Court cannot go into this question.

29. Moreover, reliance placed by election petitioner on the judgment rendered by Apex Court in **K.Venkatachalam (supra)** is distinguishable in the present case, as in that case writ of *quo warranto,* filed under Article 226 before the Single Judge, was dismissed as not maintainable, against which an appeal preferred before the Division Bench was allowed and the matter was travelled up to the Apex Court, which confirmed the order of Division Bench.

30. In the instant case the election petitioner had preferred an election petition under Section 12-C of the Act of 1947, which was allowed by the Prescribed Authority. The order passed in election petition had been reversed by the Revisional Court, which is under challenge in the present proceedings and no relief of quo warranto has been sought against the Returned Candidate, but the order passed by Revisional Court is under challenge.

31. In the proceedings under Section 12-C of the Act of 1947, the election petitioner has to state the grounds and the concise summary of facts which has materially affected the result of the election. The pleadings has to be specific in regard to the result of the election insofar as it concerned the Returned Candidate and had materially affected by the alleged non compliance with the provisions of the Act or Rules.

32. Thus, the question, framed above, stands answered in view of the decision of Full Bench of this Court in case of **Ram Adhar Singh (supra)** and Constitution Bench judgment of this Court in **Ram Sewak Yadav (supra).**

33. Considering the facts and circumstances of this case, I find that the election petition filed by the election petitioner lacks basic pleadings. Hence, the order passed by Revisional Court needs no interference.

34. The writ petition fails and is hereby **dismissed.**

(2024) 2 ILRA 421
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2023
BEFORE

THE HON'BLE SIDDHARTHA VERMA, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Writ C No. 22731 of 2023

Rajendra Prasad Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Krishna Pandey, Sri Kripa Shankar Shukla

Counsel for the Respondents:
C.S.C., Sri Archit Mandhyan, Sri Suresh C. Dwivedi

Civil Law - Land Acquisition Act,1894-Sections 18, 28A(1), 28A(2), 28A(3) & 50(2)-challenge to-compensation-Petitioners filed for redetermination of compensation u/s 28A of the Act based on the revised Supreme Court rate ie Rs.120 per sq.yard-The collector initially rejected this but following a High Court directions, redetermined at Rs. 103.34 per sq. yard in 2023-Payment was withheld as the beneficiary(respondent no. 3) filed a reference u/s 28A(3) challenging the

award-Held, Section 28A(3) references cannot be filed by beneficiaries like respondent no. 3 due to statutory bars u/s 50(2)-Beneficiaries do not qualify as " persons interested" under the provision of section 28A(3) for filing references-The collector's determination of compensation u/s 28A(2) cannot be reduced by the reference court, as prohibited by section 25 of the Act-Thus, the petitioners are entitled to the compensation redetermined by the collector-The court directed the beneficiary to release the awarded amount within a month with interest as per section 34 of the Act.(Para 1 to 19)

The writ petition is allowed. .(E-6)

List of cases cited:

1. U.P. Avas Evam Vikas Parishad Vs Mohd. Yakoob & ors..(2022)AIR All 291, First Appeal No. 305 of 2021

2. Shekhar Resorts Ltd. Vs U.O.I. MANU/SC/0015/2023

3. Yogesh Agarwal Vs Estate Officers & ors.. MANU/UP/1620/2015

4. Himalayan Tiles & Marbles Pvt Ltd. Vs Francis Victor Coutinho (dead) (1980) 3 SCC 223

5. U.O.I. & anr. Vs Sher Singh & ors.. (1993) 1 SCC 608

6. Sandeep Kumar Bafna Vs St.of Mah. & anr.(2024) 16 SCC 623

17. Sri Jagannath Temple Managing Committee Vs Siddha Math & ors.. (2015) 16 SCC 542

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

1. Heard Sri Kripa Shankar Shukla, learned counsel for the petitioner and Sri Suresh C. Dwivedi, learned counsel for respondent No.3 and learned Standing Counsel for respondents No. 1 & 2.

2. By means of the present petition, the petitioner is seeking direction to the respondents to pay compensation awarded by order dated 27.2.2023 passed by respondent No.2, u/s 28A of the Land Acquisition Act, 1894 (hereinafter referred to as "Act, 1894").

3. Factual matrix arising out of the present case is that the petitioner was the co-sharer of 1/3 share of plot No. 235 area 4 bigha 17 biswa, situated at Village Chharra Rafatpur, Aligarh. The aforesaid plot was acquired by notification dated 27.4.1984 issued u/s 4(1) of the Act, 1894, followed by notification u/s 6 of the Act, 1894 for the construction of a new market yard of respondent No.3. Collector determined the rate @ Rs.16.66 per sq. yard. Though the petitioner received the compensation under protest, he did not file reference u/s 18 of the Act, 1894 because of his poor financial condition, but his co-sharers in plot No. 235 had filed reference against the award of Collector u/s 18 of the Act, 1894 which was allowed on 21.8.1998, in Land Acquisition Reference (L.A.R.) No. 36 of 1990 *(Bhagwati Prasad and others vs. State of U.P. and others)*, by which the compensation was enhanced by fixing rate @ Rs. 100 per sq. yard. Aggrieved of the aforesaid, the petitioner moved an application on 31.8.1998 u/s 28A(1) of the Act, 1894 before respondent No.2 for redetermination of compensation on the basis of judgement passed in L.A.R. No. 36 of 1990. During the pendency of the aforesaid application of the petitioner, respondent No.3 filed an appeal against the order of reference court award dated 21.8.1998 before this Court bearing Appeal No. 609 of 1998 *(Krishi Utpadan Mandi*

Samiti vs. Bhagwati Prasad and others), and claimants have also filed cross objection against the aforesaid award of reference court. The High Court, after hearing the aforesaid appeal, dismissed the appeal of respondent No.3 but partly allowed the cross-appeal of the claimants on 8.9.2015 by granting additional compensation of Rs.80,000/- to the claimants. The co-sharer of the petitioner, not satisfied with the judgement of the High Court dated 8.9.2015, had preferred Civil Appeal No. 10225-10226 of 2018 before the Hon'ble Supreme Court, and the Apex Court was pleased to allow the same by order dated 5.10.2018 fixing the compensation of the land @ Rs.120 per sq. yard. The petitioner for getting the benefit of the enhanced rate of compensation, determined by the Supreme Court, also moved an additional application before respondent No.2 on 18.12.2018 as part of his earlier pending application u/s 28A(1) of the Act, 1894. Respondent No.2, by order dated 2.5.2022, rejected the application of the petitioner filed u/s 28A(1) of the Act, 1894. Feeling aggrieved by the order dated 2.5.2022, the petitioner filed Writ Petition No. 20476 of 2022 *(Rajendra Prasad Sharma vs. State of U.P. and others)* before this Court, and the same was allowed by order dated 6.8.2022 and respondent No.2 was directed to pass a fresh order on the application of the petitioner u/s 28A(1) of the Act, 1894, after hearing all the parties. In pursuance of the order of the High Court dated 6.8.2022 passed in Writ Petition No. 20476 of 2022 filed by the petitioner, respondent No.2 passed an order dated 27.2.2023 by which he allowed the application of the petitioner u/s 28A(1) of the Act, 1894 and redetermined the compensation @ Rs. 103.34 per sq. years along with other statutory benefits.

4. Submission of the learned counsel for the petitioner is that despite the order dated 27.2.2023 of respondent No.2 for redetermination of compensation, the same was not paid to him.

5. Learned counsel for respondent No.3 contended that as respondent No.3 has filed reference u/s 28A(3) of the Act, 1894 against redetermined award dated 27.2.2023 by respondent No.2, therefore, till the decision of the aforesaid reference enhanced amount of compensation cannot be disbursed to the petitioner. However, learned Standing Counsel has stated that S.L.O. has already written a letter dated 27.2.2023 to respondent No.3 to deposit the compensation as per the order dated 27.2.2023 so that the same could be disbursed to the petitioner. But it is respondent No.3 who has not deposited the compensation of the petitioner, and for these reasons, the same could not be paid to him.

6. Learned counsel for respondent No.3, in support of his contention, relied upon the judgement of this Court passed in **First Appeal No. 305 of 2021** ***(U.P. Avas Evam Vikas Parishad vs. Mohd. Yakoob and others; AIR 2022 ALL 291)*** decided on 3.6.2022 and contended that the Division Bench while passing the above judgement clearly observed that at the instance of the beneficiary of the acquired land, though appeal u/s 54 of the Act, 1894 is not maintainable, there is a remedy to file an application for reference u/s 28A(3) of the Act, 1894. It was further submitted by learned counsel for respondent No.3 that Hon'ble Supreme Court in the judgement of ***Shekhar Resorts Ltd. vs. Union of India,*** reported in ***MANU/SC/0015/2023*** as well as this High Court in ***Yogesh Agarwal vs. Estate Officers and others*** reported in

MANU/UP/1620/2015 held that that no party can be left remediless for operation of law, therefore, in absence of any other provision against the order passed u/s 28A(2) of the Act, 1894, application for reference is maintainable u/s 28A(3) of the Act, 1894 at the instance of beneficiary of acquired land.

7. In reply to the objection of respondent No.3, learned counsel for the petitioner specifically submitted that the application for reference u/s 28A(3) of the Act, 1894 against the order passed u/s 28A(2) is not maintainable at the instance of the beneficiary of the acquired land because that provision is for the benefit of land owners whose land has been acquired and the beneficiary does not come within the definition of 'interested person'. It was further submitted by learned counsel for the petitioner that even if it is accepted for the sake of argument that the reference is maintainable, even then reference court cannot reduce the amount of compensation as determined by the Collector because of the provision of Section 25 of the Act, 1894. Therefore, there is no reason to file an application for reference by the respondent No.3 u/s 28A(3) of the Act, 1894, and the entire exercise is being conducted by respondent No.3 just to delay the disbursal of the amount of compensation to the petitioner.

8. After considering the submission as well as on perusal of record, the only issue for determination in the present case arises is whether the application for reference under Section 28A (3) of the Act, 1894 is maintainable at the instance of the beneficiary of land (respondent no.3). It would be relevant to reproduce Section-28A of the Act, 1894 and the same is being reproduced as under :

"[28A. Redetermination of the amount of compensation on the basis of the award of the Court. - (1) where in an award under this part, the court allows to the applicant any amount of compensation in excess of the amount awarded by the collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be redetermined on the basis of the amount of compensation awarded by the court:

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, required that the matter be referred by the Collector for the determination of the Court and ***the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18.]"***

9. From the perusal of Section 28A(3) of the Act, 1894, it appears that two parts of

this provision are necessary. First is **"any person who has not accepted the award"** and second is **"provisions of Sections 18 and 28 of the Act, 1894 shall also be applied to such reference"** as they are applied to reference under Section 18 of the Act, 1894. Therefore, from the above part of Section 28A(3) of the Act, 1894, it is clear that this provision is almost *pari materia* with Section 18 of the Act, 1894 regarding reference against the award of Collector u/s 18 of the Act, 1894. For the maintainability of the application for reference, a person must be personally interested; therefore, the word 'any person' mentioned in Section 28A(3) of the Act, 1894, can be interpreted as the **'person interested'** who has not accepted the award. Section 18 of the Act, 1894, being a relevant provision for this controversy, is being reproduced as under :

"18. Reference to Court. - (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made-

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.

3. Without prejudice to the provisions of sub-section (1) the Land Reforms Commissioner may, where he considers the amount of compensation allowed by the award under section 11 to be excessive, require the Collector that the matter be referred by him to the Court for determination of the amount of compensation.

Explanation.- In any case of land under Chapter VII the requisition under this sub-section may be made by the Land Reforms Commissioner at the request of the company on its undertaking to pay all the costs consequent upon such requisition.

4. The requisition shall state the grounds on which objections to the award is taken and shall be made within six months from the date of the award."

10. Term **'person interested'** has been defined by the Hon'ble Supreme Court in the judgement of ***Himalayan Tiles and Marbles Pvt. Ltd. Vs. Francis Victor Coutinho (dead)*** reported in ***(1980) 3 SCC 223 and Union of India and another Vs. Sher Singh and others*** reported in ***(1993) 1 SCC 608***. In both the judgements, the Hon'ble Supreme Court though clearly held that the **'person interested'** also includes the beneficiary of land; therefore, they also have the right to be heard or to file an objection before the court during reference by taking into consideration **Section 50(2) of the Act, 1894** which is being reproduced as under:-

"(2) In any proceeding held before a Collector or Court in such cases the local authority or Company concerned may appear and adduce evidence for the

purpose of determining the amount of compensation.

Provided that no such local authority or Company shall be entitled to demand a reference under section 18."

11. Paragraph No.14 of the judgement in ***Himalayan Tiles (supra)*** is also being quoted as below :

"Thus, the preponderance of judicial opinion seems to favour the view that the definition of 'person interested' must be liberally construed so as to' include a body, local authority, or a company for whose benefit the land is acquired and who is bound under an agreement to pay the compensation. In our opinion, this view accords with the principles of equity, justice and good conscience. How can it be said that a person for whose benefit the land is acquired and who is to pay the compensation is not a person interested even though its stake may be extremely vital? For instance, the land acquisition proceedings may be held to be invalid and thus a person concerned is completely deprived of the benefit which is proposed to be given to him. Similarly if such a person is not heard by the Collector or a court, he may have to pay a very heavy compensation which, in case he is allowed to appear before a court, he could have satisfied it that the compensation was far too heavy having regard to the nature and extent of the land. We are, therefore, unable to agree with the view taken by the Orissa High Court or even by the Calcutta High Court that a company, local authority or a person or whose benefit the land is acquired is not an interested person. We are satisfied that such a person is vitally interested both in the title to the property as also in the compensation to be paid therefor because both these factors concern its future course of action and if decided against him, seriously prejudice his rights. Moreover, in view of the decision of this Court referred to above, we hold that the appellant was undoubtedly a person interested as contemplated by s. 18(1) of the Act. The High Court, therefore, committed an error in throwing out the appeal of the appellant on the ground that it had no locus to file an appeal before the Bench."

12. The above view, taken in ***Himalayan Tiles (supra)***, was approved in the judgement of the ***Union of India and another Vs. Sher Singh and others (supra).***

13. From the above judgements, it is very clear that Hon'ble Supreme Court treated the beneficiary as a person interested in compensation for the purpose of hearing them at the time of hearing of reference before the court, but the Hon'ble Court did not observe that the beneficiary of the acquired land will also be treated as person interested for the purpose of filing application for reference either u/s 18 or 28A(3) of the Act, 1894 against the award of Collector because proviso of Section 50(2) of the Act, 1894 clearly provides that no such local authority or company shall be entitled to demand a reference u/s 18 of the Act, 1894. Therefore, there is a specific statutory bar on the part of the beneficiary of acquired land to make any reference u/s 18 of the Act, 1894. This Court is of the opinion that bar also applies on reference u/s 28A(3) of the Act, 1894.

14. Though this Court, in the judgement of ***U.P. Avas Evam Vikas Parishad vs. Mohd. Yakoob and others (supra)*** observed that appeal u/s 54 of the

Act, 1894 against the award of Collector u/s 28A of the Act, 1894 is not maintainable, but also observed that remedy u/s 28A (3) of the Act, 1894 is available to the beneficiary without considering the proviso of Section 50(2) of the Act, 1894. Even though there was no issue before the court in the above judgement whether the application for reference under 28A(3) of the Act, 1894 is maintainable at the instance of the beneficiary, therefore, proviso of Section 50(2) of the Act, 1894 was not placed before the court and for that reason that could not be considered. Therefore, the above judgement relied upon by respondent no.3 can be said to be per *incuriam* because of non-consideration of the statutory bar of proviso of Section 50(2) of the Act, 1894. Hon'ble Supreme Court in the judgement of ***Sandeep Kumar Bafna vs. State of Maharashtra and another,*** reported in ***(2014) 16 SCC 623*** observed in paragraph No.19 as under:-

"It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. ***A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court.*** *A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Coequal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam."*

15. Similarly, Hon'ble Supreme Court, in the case of ***Sri Jagannath Temple Managing Committee vs. Siddha Math and others,*** reported in (2015) 16 SCC 542 observed in paragraph No. 35 as under:-

"It becomes clear from a perusal of the case law adverted to by the learned senior counsel appearing on behalf of the appellant Temple Committee that ***a judgment can be said to be per incuriam when it is passed in forgetfulness or ignorance of a statute operating in that field.*** *The notification dated 18.03.1974 vested the estates of Lord Jagannath, Puri in the State Government in view of the amended provision of the proviso to Section 2(oo) of the OEA Act, 1951 inserted by way of an Amendment in the year 1974. The judgment in the case of Lord Jagannath was passed only on consideration of the OEA Act, 1951. The provisions of the Temple Act, 1955, which is the principal Act that applies to the Lord Jagannath Temple, Puri were not adverted to at all."*

16. Therefore, from the legal position discussed above, it is clear that if the judgement is rendered in ignorance of any statutory provision, then that will be deemed to be *per incuriam* and will not have a binding effect on that particular issue. Therefore, the judgement rendered by the Division Bench of this Court in ***U.P. Avas Evam Vikas Parishad vs. Mohd. Yakooband others (supra)*** has no binding

effect on the issue of maintainability of application for reference u/s 28A(3) of the Act, 1894 against the order of the Collector passed u/s 28A(2) of the Act, 1894.

17. Even the contention of learned counsel for the petitioner regarding Section 25 of the Act, 1894 also appeared to be correct because once there is specific bar u/s 25 of the Act, 1894, the court shall not award compensation less than the amount awarded by the Collector, therefore, the amount of compensation determined by the Collector u/s 28A(2) of the Act, 1894 cannot be reduced by the reference court u/s 28A(3) of the Act, 1894. Therefore, permitting such an application on the part of the beneficiary of acquired land will amount to frustrating the intention of the legislature. From the perusal of the order of respondent No.2, it is also clear that before passing the order u/s 28A(2) of the Act, 1894, respondent No.3 was heard; therefore, proper opportunity of hearing was accorded to respondent No.3.

18. In view of the above considered position, this Court is of the view that application for reference u/s 28A(3) of the Act, 1894 is not maintainable at the instance of respondent No.3 and this Court, in the judgement of ***U.P. Avas Evam Vikas Parishad vs. Mohd. Yakoob and others (supra)*** has not laid down any law regarding the maintainability of such application on the part of the beneficiary of the acquired land.

19. Accordingly, this writ petition is **allowed**, and direction is issued to respondent No.3 to forthwith release the awarded amount u/s 28A(2) of the Act, 1894 by order dated 27.2.2023 within a period of one month from the date of receiving a certified copy of this order along with interest as per Section 34 of the Act, 1894.

(2024) 2 ILRA 428
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2023
BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Writ C No. 22806 of 2023

Rakesh Kumar Goswami & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Kripa Shankar Shukla, Sri Lalit Kumar

Counsel for the Respondents:
C.S.C., Sri Archit Mandhyan, Sri Suresh C. Dwivedi

Civil Law - Constitution of India,1950-Article 226-Land Acquisition Act,1894-Sections 18, 28A(1), 28A(2), 28A(3) & 50(2)-challenge to-compensation-Petitioners filed for redetermination of compensation u/s 28A of the Act based on the revised Supreme Court rate ie Rs.120 per sq.yard-The collector initially rejected this but following a High Court directions, redetermined at Rs. 103.34 per sq. yard in 2023-Payment was withheld as the beneficiary(respondent no. 3) filed a reference u/s 28A(3) challenging the award-Held, Section 28A(3) references cannot be filed by beneficiaries like respondent no. 3 due to statutory bars u/s 50(2)-Beneficiaries do not qualify as " persons interested" under the provision of section 28A(3) for filing references-The collector's determination of compensation u/s 28A(2) cannot be reduced by the reference court, as prohibited by section 25 of the Act-Thus, the petitioners are entitled to the compensation

redetermined by the collector-The court directed the beneficiary to release the awarded amount within a month with interest as per section 34 of the Act.(Para 1 to 19)

The writ petition is allowed. .(E-6)

List of cases cited:

1. U.P. Avas Evam Vikas Parishad Vs Mohd. Yakoob & ors..(2022)AIR All 291, First Appeal No. 305 of 2021

2. Shekhar Resorts Ltd. Vs U.O.I. MANU/SC/0015/2023

3. Yogesh Agarwal Vs Estate Officers & ors.. MANU/UP/1620/2015

4. Himalayan Tiles & Marbles Pvt Ltd. Vs Francis Victor Coutinho (dead) (1980) 3 SCC 223

5. U.O.I. & anr. Vs Sher Singh & ors.. (1993) 1 SCC 608

6. Sandeep Kumar Bafna Vs St.of Mah. & anr.(2024) 16 SCC 623

7. Sri Jagannath Temple Managing Committee Vs Siddha Math & ors.. (2015) 16 SCC 542

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

1. Heard Sri Kripa Shankar Shukla, learned counsel for the petitioners and Sri Suresh C. Dwivedi, learned counsel for respondent No.3 and learned Standing Counsel for respondents No. 1 & 2.

2. By means of the present petition, the petitioners are seeking direction to the respondents to pay compensation awarded by order dated 27.2.2023 passed by respondent No.2, u/s 28A of the Land Acquisition Act, 1894 (hereinafter referred to as "Act, 1894").

3. Factual matrix arising out of the present case is that the petitioners were the co-sharer of 1/4 share of plot No. 239 area 6 bigha 15 biswa and 5 dhoor, situated at Village Chharra Rafatpur, Aligarh. The aforesaid plot was acquired by notification dated 27.4.1984 issued u/s 4(1) of the Act, 1894, followed by notification u/s 6 of the Act, 1894 for the construction of a new market yard of respondent No.3. Collector determined the rate @ Rs.16.66 per sq. yard. Though the petitioners received the compensation under protest, they did not file reference u/s 18 of the Act, 1894 because of their poor financial condition, but their co-sharers in plot No. 239 had filed reference against the award of Collector u/s 18 of the Act, 1894 which was allowed on 21.8.1998, in Land Acquisition Reference (L.A.R.) No. 35 of 1990 *(Smt. Urmila Devi and others vs. State of U.P. and others)*, by which the compensation was enhanced by fixing rate @ Rs. 100 per sq. yard. Aggrieved of the aforesaid, the petitioners moved an application on 28.9.1998 u/s 28A(1) of the Act, 1894 before respondent No.2 for redetermination of compensation on the basis of judgement passed in L.A.R. No. 35 of 1990. During the pendency of the aforesaid application of the petitioners, respondent No.3 filed an appeal against the order of reference court award dated 21.8.1998 before this Court bearing Appeal No. 610 of 1998 *(Krishi Utpadan Mandi Samiti vs. Smt. Urmila Devi and others)*, and claimants have also filed cross objection against the aforesaid award of reference court. The High Court, after hearing the aforesaid appeal, dismissed the appeal of respondent No.3 but partly allowed the cross-appeal of the claimants on 8.9.2015, as corrected by order dated 8.10.2015, by granting additional compensation of Rs.80,000/- to the claimants. The co-sharer of the

petitioners, not satisfied with the judgement of the High Court dated 8.9.2015 and 8.10.2015, had preferred Civil Appeal No. 10225-10226 of 2018 before the Hon'ble Supreme Court, and the Apex Court was pleased to allow the same by order dated 5.10.2018 fixing the compensation of the land @ Rs.120 per sq. yard. The petitioners for getting the benefit of the enhanced rate of compensation, determined by the Supreme Court, also moved an additional application before respondent No.2 on 19.12.2018 as part of their earlier pending application u/s 28A(1) of the Act, 1894. Respondent No.2, by order dated 2.5.2022, rejected the application of the petitioners filed u/s 28A(1) of the Act, 1894. Feeling aggrieved by the order dated 2.5.2022, the petitioners filed Writ Petition No. 20627 of 2022 *(Rakesh Kumar Goswami and another vs. State of U.P. and others)* before this Court, and the same was allowed by order dated 2.11.2022 and respondent No.2 was directed to pass a fresh order on the application of the petitioners u/s 28A(1) of the Act, 1894, after hearing all the parties. In pursuance of the order of the High Court dated 2.11.2022 passed in Writ Petition No. 20627 of 2022 filed by the petitioners, respondent No.2 passed an order dated 27.2.2023 by which he allowed the application of the petitioners u/s 28A(1) of the Act, 1894 and redetermined the compensation @ Rs. 103.34 per sq. years along with other statutory benefits.

4. Submission of the learned counsel for the petitioners is that despite the order dated 27.2.2023 of respondent No.2 for redetermination of compensation, the same was not paid to them.

5. Learned counsel for respondent No.3 contended that as respondent No.3 has filed reference u/s 28A(3) of the Act, 1894 against redetermined award dated 27.2.2023 by respondent No.2, therefore, till the decision of the aforesaid reference enhanced amount of compensation cannot be disbursed to the petitioners. However, learned Standing Counsel has stated that S.L.O. has already written a letter dated 27.2.2023 to respondent No.3 to deposit the compensation as per the order dated 27.2.2023 so that the same could be disbursed to the petitioners. But it is respondent No.3 who has not deposited the compensation of the petitioners, and for these reasons, the same could not be paid to them.

6. Learned counsel for respondent No.3, in support of his contention, relied upon the judgement of this Court passed in ***First Appeal No. 305 of 2021 (U.P. Avas Evam Vikas Parishad vs. Mohd. Yakoob and others; AIR 2022 ALL 291)*** decided on 3.6.2022 and contended that the Division Bench while passing the above judgement clearly observed that at the instance of the beneficiary of the acquired land, though appeal u/s 54 of the Act, 1894 is not maintainable, there is a remedy to file an application for reference u/s 28A(3) of the Act, 1894. It was further submitted by learned counsel for respondent No.3 that Hon'ble Supreme Court in the judgement of ***Shekhar Resorts Ltd. vs. Union of India***, reported in ***MANU/SC/0015/2023*** as well as this High Court in ***Yogesh Agarwal vs. Estate Officers and others*** reported in ***MANU/UP/1620/2015*** held that that no party can be left remediless for operation of law, therefore, in absence of any other provision against the order passed u/s 28A(2) of the Act, 1894, application for reference is maintainable u/s 28A(3) of the Act, 1894 at the instance of beneficiary of acquired land.

7. In reply to the objection of respondent No.3, learned counsel for the petitioners specifically submitted that the application for reference u/s 28A(3) of the Act, 1894 against the order passed u/s 28A(2) is not maintainable at the instance of the beneficiary of the acquired land because that provision is for the benefit of land owners whose land has been acquired and the beneficiary does not come within the definition of 'interested person'. It was further submitted by learned counsel for the petitioners that even if it is accepted for the sake of argument that the reference is maintainable, even then reference court cannot reduce the amount of compensation as determined by the Collector because of the provision of Section 25 of the Act, 1894. Therefore, there is no reason to file an application for reference by the respondent No.3 u/s 28A(3) of the Act, 1894, and the entire exercise is being conducted by respondent No.3 just to delay the disbursal of the amount of compensation to the petitioners.

8. After considering the submission as well as on perusal of record, the only issue for determination in the present case arises is whether the application for reference under Section 28A (3) of the Act, 1894 is maintainable at the instance of the beneficiary of land (respondent no.3). It would be relevant to reproduce Section-28A of the Act, 1894 and the same is being reproduced as under :

"[28A. Redetermination of the amount of compensation on the basis of the award of the Court. - (1) where in an award under this part, the court allows to the applicant any amount of compensation in excess of the amount awarded by the collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them may be redetermined on the basis of the amount of compensation awarded by the court:

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, required that the matter be referred by the Collector for the determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18.]"

9. From the perusal of Section 28A(3) of the Act, 1894, it appears that two parts of this provision are necessary. First is **"any person who has not accepted the award" and second is "provisions of Sections 18 and 28 of the Act, 1894 shall also be applied to such reference"** as they are applied to reference under Section 18 of the Act, 1894. Therefore, from the above part of Section 28A(3) of the Act, 1894, it is

clear that this provision is almost *pari materia* with Section 18 of the Act, 1894 regarding reference against the award of Collector u/s 18 of the Act, 1894. For the maintainability of the application for reference, a person must be personally interested; therefore, the word 'any person' mentioned in Section 28A(3) of the Act, 1894, can be interpreted as the 'person interested' who has not accepted the award. Section 18 of the Act, 1894, being a relevant provision for this controversy, is being reproduced as under :

"18. Reference to Court. - (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made-

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award; (b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.

3. Without prejudice to the provisions of sub-section (1) the Land Reforms Commissioner may, where he considers the amount of compensation allowed by the award under section 11 to be excessive, require the Collector that the matter be referred by him to the Court for determination of the amount of compensation.

Explanation.- In any case of land under Chapter VII the requisition under this sub-section may be made by the Land Reforms Commissioner at the request of the company on its undertaking to pay all the costs consequent upon such requisition.

4. The requisition shall state the grounds on which objections to the award is taken and shall be made within six months from the date of the award."

10. Term **'person interested'** has been defined by the Hon'ble Supreme Court in the judgement of ***Himalayan Tiles and Marbles Pvt. Ltd. Vs. Francis Victor Coutinho (dead)*** reported in ***(1980) 3 SCC 223*** and ***Union of India and another Vs. Sher Singh and others reported in (1993) 1 SCC 608***. In both the judgements, the Hon'ble Supreme Court though clearly held that the 'person interested' also includes the beneficiary of land; therefore, they also have the right to be heard or to file an objection before the court during reference by taking into consideration ***Section 50(2) of the Act, 1894*** which is being reproduced as under:-

"(2) In any proceeding held before a Collector or Court in such cases the local authority or Company concerned may appear and adduce evidence for the purpose of determining the amount of compensation.

Provided that no such local authority or Company shall be entitled to demand a reference under section 18."

11. Paragraph No.14 of the judgement in ***Himalayan Tiles (supra)*** is also being quoted as below :

"Thus, the preponderance of judicial opinion seems to favour the view that the definition of 'person interested' must be liberally construed so as to' include a body, local authority, or a company for whose benefit the land is acquired and who is bound under an agreement to pay the compensation. In our opinion, this view accords with the principles of equity, justice and good conscience. How can it be said that a person for whose benefit the land is acquired and who is to pay the compensation is not a person interested even though its stake may be extremely vital? For instance, the land acquisition proceedings may be held to be invalid and thus a person concerned is completely deprived of the benefit which is proposed to be given to him. Similarly if such a person is not heard by the Collector or a court, he may have to pay a very heavy compensation which, in case he is allowed to appear before a court, he could have satisfied it that the compensation was far too heavy having regard to the nature and extent of the land. We are, therefore, unable to agree with the view taken by the Orissa High Court or even by the Calcutta High Court that a company, local authority or a person or whose benefit the land is acquired is not an interested person. We are satisfied that such a person is vitally interested both in the title to the property as also in the compensation to be paid therefor because both these factors concern its future course of action and if decided against him, seriously prejudice his rights. Moreover, in view of the decision of this Court referred to above, we hold that the appellant was undoubtedly a person interested as contemplated by s. 18(1) of the Act. The High Court, therefore, committed an error in throwing out the appeal of the appellant on the ground that it had no locus to file an appeal before the Bench."

12. The above view, taken in ***Himalayan Tiles (supra)***, was approved in the judgement of the ***Union of India and another Vs. Sher Singh and others (supra).***

13. From the above judgements, it is very clear that Hon'ble Supreme Court treated the beneficiary as a person interested in compensation for the purpose of hearing them at the time of hearing of reference before the court, but the Hon'ble Court did not observe that the beneficiary of the acquired land will also be treated as person interested for the purpose of filing application for reference either u/s 18 or 28A(3) of the Act, 1894 against the award of Collector because proviso of Section 50(2) of the Act, 1894 clearly provides that no such local authority or company shall be entitled to demand a reference u/s 18 of the Act, 1894. Therefore, there is a specific statutory bar on the part of the beneficiary of acquired land to make any reference u/s 18 of the Act, 1894. This Court is of the opinion that bar also applies on reference u/s 28A(3) of the Act, 1894.

14. Though this Court, in the judgement of ***U.P. Avas Evam Vikas Parishad vs. Mohd. Yakoob and others (supra)*** observed that appeal u/s 54 of the Act, 1894 against the award of Collector u/s 28A of the Act, 1894 is not maintainable, but also observed that remedy u/s 28A (3) of the Act, 1894 is available to the beneficiary without considering the proviso of Section 50(2) of the Act, 1894. Even though there was no issue before the court in the above judgement whether the application for reference under 28A(3) of the Act, 1894 is

maintainable at the instance of the beneficiary, therefore, proviso of Section 50(2) of the Act, 1894 was not placed before the court and for that reason that could not be considered. Therefore, the above judgement relied upon by respondent no.3 can be said to be per *incuriam* because of non-consideration of the statutory bar of proviso of Section 50(2) of the Act, 1894. Hon'ble Supreme Court in the judgement of ***Sandeep Kumar Bafna vs. State of Maharashtra and another***, reported in ***(2014) 16 SCC 623*** observed in paragraph No.19 as under:-

"It cannot be over-emphasised that the discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of Courts would become a costly casualty. ***A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the Court.*** *A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a Coequal or Larger Bench; or if the decision of a High Court is not in consonance with the views of this Court. It must immediately be clarified that the per incuriam rule is strictly and correctly applicable to the ratio decidendi and not to obiter dicta. It is often encountered in High Courts that two or more mutually irreconcilable decisions of the Supreme Court are cited at the Bar. We think that the inviolable recourse is to apply the earliest view as the succeeding ones would fall in the category of per incuriam."*

15. Similarly, Hon'ble Supreme Court, in the case of ***Sri Jagannath Temple Managing Committee vs. Siddha Math and others,*** reported in ***(2015) 16 SCC 542*** observed in paragraph No. 35 as under:-

"It becomes clear from a perusal of the case law adverted to by the learned senior counsel appearing on behalf of the appellant Temple Committee ***that a judgment can be said to be per incuriam when it is passed in forgetfulness or ignorance of a statute operating in that field.*** *The notification dated 18.03.1974 vested the estates of Lord Jagannath, Puri in the State Government in view of the amended provision of the proviso to Section 2(oo) of the OEA Act, 1951 inserted by way of an Amendment in the year 1974. The judgment in the case of Lord Jagannath was passed only on consideration of the OEA Act, 1951. The provisions of the Temple Act, 1955, which is the principal Act that applies to the Lord Jagannath Temple, Puri were not adverted to at all."*

16. Therefore, from the legal position discussed above, it is clear that if the judgement is rendered in ignorance of any statutory provision, then that will be deemed to be per *incuriam* and will not have a binding effect on that particular issue. Therefore, the judgement rendered by the Division Bench of this Court in ***U.P. Avas Evam Vikas Parishad vs. Mohd. Yakoob and others (supra)*** has no binding effect on the issue of maintainability of application for reference u/s 28A(3) of the Act, 1894 against the order of the Collector passed u/s 28A(2) of the Act, 1894.

17. Even the contention of learned counsel for the petitioners regarding Section 25 of the Act, 1894 also appeared to be correct because once there is specific

bar u/s 25 of the Act, 1894, the court shall not award compensation less than the amount awarded by the Collector, therefore, the amount of compensation determined by the Collector u/s 28A(2) of the Act, 1894 cannot be reduced by the reference court u/s 28A(3) of the Act, 1894. Therefore, permitting such an application on the part of the beneficiary of acquired land will amount to frustrating the intention of the legislature. From the perusal of the order of respondent No.2, it is also clear that before passing the order u/s 28A(2) of the Act, 1894, respondent No.3 was heard; therefore, proper opportunity of hearing was accorded to respondent No.3.

18. In view of the above considered position, this Court is of the view that application for reference u/s 28A(3) of the Act, 1894 is not maintainable at the instance of respondent No.3 and this Court, in the judgement of ***U.P. Avas Evam Vikas Parishad vs. Mohd. Yakoob and others (supra)*** has not laid down any law regarding the maintainability of such application on the part of the beneficiary of the acquired land.

19. Accordingly, this writ petition is **allowed**, and direction is issued to respondent No.3 to forthwith release the awarded amount u/s 28A(2) of the Act, 1894 by order dated 27.2.2023 within a period of one month from the date of receiving a certified copy of this order along with interest as per Section 34 of the Act, 1894.

(2024) 2 ILRA 435
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2023
BEFORE

THE HON'BLE PRITINKER DIWAKER, C.J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ C No. 26374 of 2023

Sanjeev Rastogi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vineet Kumar Sahu

Counsel for the Respondents:
C.S.C., Sri Ashish Agrawal, Sri Sandeep Arora

Civil Law - Constitution of India,1950-Article 226-SARFEASI Act-Sections 14, 17 & 17(4A)-The petitioner claimed tenancy rights and sought to prevent eviction-the landlord defaulted on the loan, leading to the initiation of recovery proceedings-the petitioner failed to demonstrate lawful tenancy through registered documents-Under SARFAESI Act, valid tenancy prior to the creation of mortgage can protect possession rights-tenancy established post-mortgage or without proper registration cannot override the bank's rights-The petitioner has the option to approach the Debt Recovery Tribunal under section 17(4A) of the Act to establish tenancy rights.(Para 1 to 8)

The writ petition is disposed of.(E-6)

List of cases cited:

1. Hemraj Ratnakar Salian Vs HDFC Bank Ltd & ors.. (2021) AIR SC 3880

2. Bajrang Shyamsunder Agarwal Vs Central Bank of India & anr.. (2019) 9 SCC 94

(Delivered by Hon'ble Pritinker Diwaker, C.J.
&
Hon'ble Ashutosh Srivastava, J.)

1. Heard Shri Vineet Kumar Sahu, learned counsel for the petitioner, Shri Sandeep Arora, learned counsel for respondent No. 3-Union Bank of India and learned Standing Counsel for State-respondent Nos. 1 & 2. None for respondent No. 4.

2. The writ petitioner claims to be a tenant of shop situate at 253, Jagdishbagh Attarsuiya, Nagar Nigam, Food Safety Zone-05, Allahabad. The shop is part and parcel of the premises No. 253A/334, Attarsuiya in front of Attarsuiya Police Station, Pargana and Tehsil Sadar, Prayagraj owned by one Vishal Kumar Singh son of late Shri Lalji Singh, the respondent No. 4 herein. The petitioner has approached this Court with a relief for quashing the order dated 20.2.2023 passed by the respondent No. 2 in proceedings under Section 14 of SARFAESI Act, 2002 and further praying that he may not be dispossessed from the shop in question under the order dated 20.2.2023.

3. It is the case of the petitioner that he is a valid tenant of the shop and there is a regular suit, being Suit No. 10 of 2020 pending adjudication before the Civil Court between him and his landlord/respondent No. 4. The petitioner is depositing the rent of the premises regularly. The impugned order is completely exparte and is not binding upon the petitioner yet the respondents are compelling the petitioner to vacate the shop from which the petitioner earns his livelihood.

4. Shri Sandeep Arora, learned counsel appearing for respondent No. 3 submits that the landlord of the petitioner, i.e. the respondent No. 4 was advanced financial assistance by the Bank to run his proprietorship concern M/s A to Z Builder & Suppliers. The House No. 253A/334 Attarsuiya including the shop under the tenancy of the petitioner had been mortgaged to secure the financial assistance. The respondent No. 4 defaulted in repayment of the loan and consequently, the Bank has moved the District Magistrate to take possession of the mortgaged property under Section 14 of SARFAESI Act, 2002. The impugned order dated 20.2.2023 has been passed by the respondent No. 2. Shri Arora further submits that the respondent No. 4 has already approached the Debt Recovery Tribunal under Section 17 of the SARFAESI Act, 2002 assailing the order dated 20.2.2023 and no indulgence has been granted by the Debt Recovery Tribunal. The petitioner has been set up to resist the proceedings of taking over possession by the Bank. It is contended that the petitioner being the tenant cannot resist the taking over possession of the property mortgaged which right the Bank enjoys under law owing to the default committed by the respondent No. 4 borrower, particularly in view of the fact that the petitioner has shown his tenancy from 12.2.2018 when his shop has been registered under the Food Safety and Standards Act, 2006 after the financial assistance was availed by the landlord-respondent. Moreover, the petitioner has not established his tenancy rights over the shop in question which is part and parcel of the secured asset through any registered instrument and is relying simply on certain deposits made towards rent through Bank. Reliance is placed upon the decision of the Apex Court in the case of ***Hemraj Ratnakar Salian versus HDFC Bank Ltd. and others,*** reported in ***AIR 2021 SC 3880.***

5. We have heard the learned counsel for the parties and have also perused the record as also the decision of the Apex Court cited at the Bar. The Apex Court in the decision cited was dealing with orders passed by the Chief Metropolitan Magistrate, Esplanade Mumbai rejecting the application filed by tenant restraining the HDFC Bank from taking possession of the property in his possession. The Apex

Court taking note of a decision of the Trial Judge Bench in the case of ***Bajrang Shyamsunder Agarwal versus Central Bank of India and another,*** reported in ***2019 (9) SCC 94*** after considering almost all decisions in relation to the right of a tenant in possession of a secured asset held that if a valid tenancy under law is in existence even prior to the creation of the mortgage such tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. If a tenancy under law comes into existence after the creation of a mortgage but prior to issuance of a notice under Section 13 (2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the Transfer of Property Act, 1882. If a tenant claims that he is entitled to possession of a secured asset for a term exceeding one year, it has to be supported by the execution of a registered instrument. If the tenant only relies upon an unregistered instrument or on oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under the provisions of the Transfer of Property Act.

6. In the case at hand, in our opinion, there is serious doubt as to the bona fide of the petitioner to be a lawful tenant of the shop which is part and parcel of the secured asset. The petitioner has not brought on record any registered tenancy agreement executed in his favour. The rent deposits brought on record only demonstrate rent being deposited in Misc. Case No. 10 of 2020 from January, 2020 upto September, 2023 @ Rs.550/- per month. The documents brought on record by the petitioner to establish his tenancy over the secured asset does not inspire confidence. Moreover, it is not the case of the respondent No. 4 that the secured asset comprised of shops at the time of creation of the charge, which the counsel for the respondent-Bank has informed was 6.9.2016. In such circumstances, the tenancy if at all exists was created subsequent to the mortgage.

7. Learned counsel for the respondent-Bank has also drawn our attention to the provisions of Section 17 (4A) of the Act, 2002, which provides a forum to tenants to establish one's tenancy or lease hold rights upon the secured asset before the Debt Recovery Tribunal which has been empowered to examine the facts and evidence produced in relation to such claim and pass such orders, it deems fit in accordance with the provisions of the Act. The Section 17 (4A) of the Act, 2002 is being reproduced hereunder:-

"17 (4A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purpose of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy, ?

(a) has expired or stood determined; or

(b) is contrary to Section 65A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-Section (2) of Section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold

rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act."

8. In view of the above, we are not inclined to entertain the writ petition for the reliefs prayed for. The writ petition being devoid of merits, is ***dismissed*** leaving it open for the petitioner to invoke the remedy available to him under the law.

(2024) 2 ILRA 438
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2023
BEFORE

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ C No. 26762 of 2023

Nirmala Devi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vishal Khandelwal

Counsel for the Respondents:
C.S.C., Sri Anil Kumar, Sri Avinash Chandra Srivastava, Sri Satish Kumar Pandey

Civil Law - Constitution of India,1950-Article 226-challege to-cancellation of land allotment-the dispute concerns the allotment of land to one Naresh Singh in 1979, later transferred to the petitioner(Nirmala Devi) and recorded in revenue records-After 39 years, in 2017, a complaint by one Pradeep Kumar led to proceedings to cancel the allotment, alleging non-residency of the original allottee(Naresh Singh) in the concerned Gram Sabha-The District Magistrate initially found the proceedings barred by limitation but ruled the allotment "illegal" based on the inquiry report, initiating suo moto proceedings for cancellation-the petitioner challenged this, arguing that the delay of 39 years made the proceedings inavalid and that no fraud was involved in the allotment or transfer-Held, the court reviewed the provisions of Section 128 of the U.P. Revenue Code,2006 which allows for cancellation of allotments but imposes a five year limitation on applications by aggrieved persons-No specific limitation applies to suo moto actions-The court held that actions, even if suo moto, must be initiated within a "reasonable time"-The 39 year delay was deemed unreasonable-initiation of proceedings after such a delay was arbitrary and unsustainable-The orders dated 14.09.2018(District Magistrate's decision to proceed suo moto) and 29.05.2023 (Additional Commissioner's dismissal of the petitioner's revision as interlocutory) were quashed.(Para 1 to 56)

The writ petition is allowed. .(E-6)

<u>List of cases cited:</u>

1. Ghanshyam & 11 Ors Vs U.O.I. & ors. Writ-C. 5606 of 2020

2. Siemens Ltd. Vs St. of Mah. & ors.. (2006) 12 SCC 33

3. Joyous Blocks & Panels Pvt. Ltd & anr. Vs Asst. Commr, Commercial Taxes, Ballygunj Charge & anr. (2022) SCC Online Cal 2032

4. Subhag & anr.. Vs Board of Revenue U.P. at Alld & ors.. (2011)114 RD 219

5. Suresh Giri & ors.. Vs Board of Revenue U.P. at Alld & ors.. (2010)109 RD 566

6. Jiya Ram & ors.. Vs St. of U.P. & ors..(2012)115 RD 372.

7. Smt. Bhoodevi Vs Board of Revenue & ors..(1994) RD 92 (HC)

8. Kishnu & ors.. Vs Sheesh Pal & & ors.. (2011)7 ADJ 684

9. Suresh Giri & ors.. Vs Board of Revenue & ors.. (2010)3 AWC 2834.

10. Jairam Vs St. of U.P. & ors.. (2013) RD 119 567

11. Smt. Sona Devi Vs Board of Revenue Writ-B No. 48418 Of 2015.

12. St. of Punj. & ors.. Vs Bhatinda Distt Coop. Milk Producers Union (2007) 11 SCC 363

13. SEBI Vs Sunil Krishna Khaitan & ors.. in (2023) 2 SCC 643

14. Jagdish Vs St. of Kar.(2021 12 SCC 812

15. M/s North Eastern Chemicals Indus.(P) Ltd. & anr.. Vs M/S Ashok Paper Mill (Assam) Ltd & anr., Civil Appeal No. 2669 of 2013

16. Smt. Shakuntla & ors.. Vs St. of U.P. & ors.. (2019)5 AWC 5007

17. Ajaib Singh Vs The Sirhind Co-Op. Mktg. Cum-Processing Service Socy Ltd & ors.. (1999) 6 SCC 82

18. Kishnu & ors.. Vs Sheesh Pal & ors..(2011)7 ADJ 684

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard Sri Vishal Khandelwal, learned counsel for the petitioner; Sri Awadesh Kumar Patel, learned Standing Counsel appearing on behalf of the State-respondent nos. 1 to 3, Shri A.C. Srivastava, learned counsel for the Land Management Committee (respondent no. 4) and Sri Satish Kumar Pandey, learned counsel for the respondent no. 5.

2. The present writ petition has been filed seeking a writ in the nature of certiorari quashing the impugned order dated 29.05.2023 passed by the Additional Commissioner (Judicial), Agra Division, Agra (respondent no. 2) dismissing the Revision having Case No. 02238 of 2018 as well as the order dated 14.09.2018 passed by the District Magistrate/Collector, Mainpuri (respondent no. 3), by means of which the Collector (respondent no. 3), took the decision to *suo moto* proceed for cancellation of the allotment and lease in Case No.1858 of 2018.

3. With the consent of the learned counsel for the parties, this Court proceeds to decide the present Writ Petition at the admission stage itself.

4. The facts in a nutshell, as are available on record before this Court, are that by a Resolution passed by the Land Management Committee (respondent no. 4) in its meeting held on 19.05.1979, lease was granted in favour of 150 persons including one Naresh Singh, son of Munshi Lal. In pursuance of the said lease, plot no. 60-M ad-measuring area 0.202-hectare, plot no. 360 ad-measuring area 0.526 hectare and plot no. 363 ad-measuring area 0.405 hectare were allotted in favour of the said Naresh Singh and accordingly his name was entered in the revenue records.

5. Subsequently, the aforesaid Naresh Singh transferred the said plots in favour of the petitioner whereby the petitioner was delivered possession of the same and subsequently, her name was recorded in the revenue records as 'bhumidhar with transferable rights'.

6. After a lapse of about 39 years, on an application/complaint dated 21.09.2017

moved by Pradeep Kumar (respondent no.5); proceeding for cancellation of allotment and lease, under Section 128 of the U.P. Revenue Code, 2006, was instituted against the aforesaid Naresh Singh and also against the petitioner being the transferee of Naresh Singh. The said proceeding was registered as Case No. 01858 of 2018.

7. The petitioner along with the aforesaid Naresh Singh preferred preliminary objections regarding the maintainability of the said proceeding on the ground of limitation. A reply to the notice was also filed by the petitioner on 29.05.2019, asserting therein that the aforesaid proceeding is not legally tenable; firstly, for the reason that the same is barred by time having been initiated after a lapse of about 39 years and secondly, the complainant/applicant (respondent no.5) was a minor at the time when the allotment in question was made in the year 1979 and being a minor, he was not eligible for the grant of the said lease in his favour, as such, he does not fall within the category of an 'aggrieved person'. Further, there was no illegality or infirmity in the allotment in question in favour of Naresh Singh and the same was made perfectly in accordance with the procedure as prescribed under law, after due approval of the resolution and the names in Aakar Pattra 57-kha, as has been reported by the Tehsil authorities and is available in the concerned Records. As such, the proceeding under Section 128 of the U.P. Revenue Code, 2006 are not at all maintainable and is liable to be dropped.

8. The District Magistrate/Collector, Mainpuri (respondent no.3) called for an inquiry report and in pursuance of the same the Sub-Divisional Officer concerned got the said inquiry conducted through the Tehsildar and forwarded the same to the Collector (respondent no.3) on 08.12.2017. On the basis of the same, the Collector (respondent no.3) proceeded with the aforesaid proceeding and passed the order dated 14.09.2018, categorically holding therein that although, the said proceeding is 'barred by time' (कालबाधित है) but as per the report submitted by the Sub Divisional Officer, the lessee was not a resident of the concerned Gaon Sabha at the time of the allotment and lease as such the allotment in question is 'proved illegal' (अवैधानिक साबित है). Thereby, the Collector (respondent no. 3) decided to proceed *suo moto*, for cancellation of the allotment and lease and consequently, issued notice to the lessee.

9. Assailing the aforesaid order dated 14.09.2018, the petitioner along with the aforesaid Naresh Singh filed a Revision before the Commissioner, Agra Division, Agra, under section 210 of the U.P. Revenue Code, 2006, which was registered as Case No. 02238 of 2018. The main ground raised by the petitioner in the said Revision was that the aforesaid proceeding under section 128 of the U.P. Revenue Code, 2006 is vitiated as it could only be instituted up to the period of five years after the grant of lease, but since the proceeding in question has been initiated beyond the prescribed period, rather, after a lapse of about 39 years, the same is not at all maintainable. It was further pleaded by the petitioner that the question of limitation goes to the root of the jurisdiction of the Court and as such, the Collector (respondent no.3) could not have proceeded with the case in the teeth of the fact that the Collector (respondent no.3) by the same order himself held the proceeding as barred by time.

10. The learned Additional Commissioner, Agra Division, Agra (respondent no. 2) declined to entertain the aforesaid revision by treating the aforesaid order dated 14.09.2018 passed by the learned Collector (respondent no.3) to be an order of interlocutory nature and dismissed the said Revision having Case No. 02238 of 2018; vide order dated 29.05.2023, with the observation that the Revisionists have ample opportunity to contest their case before the respondent no.3.

11. Being aggrieved by the above-mentioned orders dated 29.05.2023 and 14.09.2018, the petitioner preferred the instant writ petition, inter alia, praying for the following reliefs:

"i. Issue a writ, order or direction in the mature of Certiorari quashing the impugned order dated: 29.5.2023 (Annexure No. 9) passed by the respondent no. 2 Additional Commissioner (Judicial), Agra Division, Agra, in Revision No. 02238/2018 (computerized no. C201801000002238) as well as that of order dated: 14.9.2018 (Annexure No. 6) passed by the respondent no. 3- District Magistrate/Collector, Mainpuri, in Case No. 1858/2018 (computerised no. D20181490001858).

ii. Issue any other writ, order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

iii. Award the cost of the petitioner to the petitioner."

12. At the very outset, Shri Awadesh Kumar Patel, learned Standing Counsel appearing on behalf of the State (respondent nos. 1 to 3) and Shri Avinash Chandra Srivastava, learned Standing Counsel for the Land Management Committee (respondent no. 4) have raised serious objections on the maintainability of the present writ petition and have made the following submissions:

12.1. It has been contended on behalf of the respondents that the order impugned in the present Writ Petition is simply a show cause notice and the petitioner has every opportunity to defend her case before the learned District Magistrate/Collector (respondent no.3) by a detailed reply to the show-cause notice and as such the writ petition is not at all entertainable under Article 226 of the Constitution of India. In support of his submission, the learned Standing Counsel has relied upon the judgment passed by this Court in the case of **Ghanshyam and 11 others versus Union of India and 2 others: Writ-C No. 5606 of 2020.**

13. Refuting to the objections raised by the learned standing counsels on the maintainability of the present writ petition; Sri Vishal Khandelwal, learned counsel for the petitioner has advanced the following submissions:

13.1. He submits that in the present case, the impugned order dated 14.09.2018 passed by the Collector (respondent no. 3) is a premeditated order that has finally decided the question of limitation and moreover, determined the allotment and lease of the plots in question, as 'proved illegal' (अवैधानिक साबित है). The said show cause notice is inflicted by premeditated adjudication on the legality of the question of allotment and lease holding the same to be illegal thereby adversely affecting the valuable rights of the petitioner. Therefore, the said impugned order dated 14.09.2018/show cause notice

is not a mere show cause notice simpliciter and as such deserves interference by this Court in exercise of its powers under Article 226 of the Constitution of India. In support of his case, he has placed before this Court, the judgment passed by the Hon'ble Supreme Court in the case of **Siemens Ltd.** versus **State of Maharashtra and others,** reported in **(2006) 12 SCC 33;** and the judgment passed by the Hon'ble Calcutta High Court in the case of **Joyous Blocks and Panels Pvt. Ltd. and another** versus **Assistant Commissioner, Commercial Taxes, Ballygunj Charge and another,** reported in **2022 SCC Online Cal 2032.**

14. Addressing on the merits of the case, Sri Vishal Khandelwal, learned counsel for the petitioner pressed the following arguments:

14.1. He submits that undisputedly the proceeding for cancellation of the allotment and lease granted in the year 1979 has been initiated after a lapse of about 39 years, i.e., in the year 2017. Thus, the same is highly barred by the limitation as contemplated under Section 128 of the U.P. Revenue Code, 2006. Further, the said bar of limitation applies to the proceedings initiated on the basis of application/complaint as well as *suo moto* proceedings.

14.2. Moreover, the proceeding for cancellation of allotment and lease was initiated on the basis of an *ex-parte* inquiry report dated 08.12.2017 as no prior notice of the aforesaid inquiry was ever given to the petitioner or to the aforesaid Naresh Singh as they were never afforded any opportunity to participate in the aforesaid inquiry. Not only this much, even the said inquiry report was not formally proved in the manner as provided under law, and therefore, the same is inadmissible as evidence and cannot be relied upon.

14.3. Further, proceeding in question whereby the lease has been sought to be cancelled is based on the ground of alleged ineligibility of the allottee namely Naresh Singh (through whom the petitioner is claiming) that he was a resident of different village at the time of allotment in question, is not an illegality but a mere irregularity, if any, in the grant of lease and that does not come within the purview of fraud, especially when that the tehsil report itself categorically acknowledges the resolution of the respondent no. 4 passed in its meeting held on 29.5.1979 regarding the allotment and also entry of the name of the allottee at serial no. 78 in the *Aakar Pattra 57 kha*, as is evident from the said Tehsil report as contained in Annexure No.5 to the writ petition. Therefore, the allegations made in the impugned orders are contrary to the records inasmuch as the same do not match the facts mentioned in the said report.

14.4. The next submission of the learned counsel is that the Land Management Committee passed the resolution dated 29.5.1979 for allotment in favour of 150 persons including one Naresh Singh son of Munshi Lal, who after acquiring the status of 'bhumidhar with transferable rights' transferred the plots in question in favour of the petitioner and accordingly the petitioner was delivered possession and later on her name was duly entered in the revenue records, as is evident from the *khataun*i as contained in Annexure No.1 to the writ petition. Therefore, after the change of the legal status of the allottee from lessee to 'bhumidhar with transferrable rights', no proceeding for cancellation of allotment and lease under section 128 of the U.P. Revenue Code, 2006 is maintainable.

14.5. Further, he contended that a large number of villagers filed affidavit as contained in Annexure No.10 to the writ petition, deposing therein that the allottee was residing in the village concerned.

14.6. It has been vehemently argued by Shri Khandelwal that the respondent no.5 does not come within the purview of 'aggrieved person' as the complainant was a minor at the time when the allotment in question was made in the year 1979 and being a minor, he was not eligible for the grant of the said lease in his favour. Further, by way of single resolution the lease was granted to 150 persons including Naresh Singh, but the present proceeding has been initiated only against the petitioner/ Naresh Singh at the behest of the respondent no.5 who is not even qualified to move the application as per the requirement contemplated under Section 128 of the U.P. Revenue Code, 2006.

14.7. The learned counsel further contended that the proceedings for cancellation of the allotment and lease is solely based on the allegation that the allottee was not a resident of the Gram Sabha concerned at the time of allotment in question. He submits that for the sake of argument even if it be assumed, though not admitted to be true that the allottee was ineligible for allotment and lease, that may at the most be taken as an irregularity, and cannot be attributed as fraud on the part of the allottee, especially when the inquiry report dated 08.12.2017 specifically provides that there is a valid resolution of the Land Management Committee for the said allotment and a due entry in the *Aakar Pattar 57 kha.*

14.8. As, in the present case, neither there is any allegation of fraud nor fraud has been specifically pleaded or proved, the limitation of 5 years as stipulated under section 128 of the U.P. Revenue Code, 2006, is inevitable.

14.9. Moreover, the learned counsel drew attention of this Court to the provisions of section 198 of the U.P. Zamindari Abolition and Land Reforms Act, 1950. He submitted that the same is *pari materia* to section 128 of the U.P. Revenue Code, 2006. He submits that it has been held by this Court, time and again, that the period of limitation as stipulated in the Act cannot be stretched beyond its limits irrespective of the fact that the proceeding for cancellation of allotment and lease was initiated on an application by the aggrieved person or by the Collector, *suo moto*. In support of this contention, he has placed reliance on the judgments passed by this Court in the case of ***Subhag and Another*** *versus* ***Board of Revenue U.P. at Allahabad and others,*** reported in ***2011 (114) RD 219;*** **Suresh Giri** ***and others*** *versus* ***Board of Revenue U.P. at Allahabad and others,*** reported in ***2010 (109) RD 566*** and ***Jiya Ram and others*** versus ***State of U.P. and others,*** reported in ***2012 (115) RD 372.***

14.10. It has also been contended by the learned counsel for the petitioner that the entire proceeding is not only irrelevant but patently illegal as the petitioner is a bonafide purchaser of the abovementioned plots for valuable consideration and her rights stands protected by virtue of Section 41 of the Transfer of Property Act, 1882.

14.11. Assailing the order dated 29.05.2023 passed by the Additional Commissioner (respondent no.2), the contention of the learned counsel is that by means of the said impugned order, the revisional court has declined to entertain the revision filed by the petitioner treating the order dated 14.09.2018 passed by the Collector (respondent no. 3) as an

'interlocutory order'. His contention is that the learned Revisional Court has failed to appreciate the very nature of the impugned order dated 14.09.2018 by treating it to be an interlocutory order, whereas the same is an order giving finality to the issue of limitation and adversely affected the valuable rights of the petitioner/revisionist. Therefore, the same being arbitrary is liable to be set aside.

15. Sri Satish Kumar Pandey, learned counsel for the respondent no.5 vehemently opposed the writ petition by refuting the submissions made on behalf of the petitioner and has raised the following arguments:

15.1. The learned counsel has argued that the learned Additional Commissioner (respondent no. 2) has very rightly dismissed the revision filed by the petitioner challenging the impugned order dated 14.09.2018, which is an interlocutory order and against which revision does not lie and this issue has already been taken into consideration by this Court in the case of **Smt. Bhoodevi** versus **Board of Revenue and others** reported in **1994 RD 92 (HC)** wherein it was held that a decision taken *suo moto* or an application of an aggrieved party to start proceeding for cancellation of allotment under section 198(4) of U.P. Zamindari Abolition and Land Reforms Act, 1950 is an order to commence the proceeding. Mere decision to commence the proceeding would not tantamount "to any suit or proceeding decided". He contended that the impugned order dated 29.05.2023 passed by the revisional court of Additional Commissioner (respondent no. 2) is just and legal.

15.2. The learned counsels further submit that as the proceedings for cancellation of allotment were initiated *suo moto*, the benefit of the period of limitation is not available to the petitioner in the instant case. In support of his contention, he placed reliance on the judgment passed by this Court in the case of **Kishnu and others** versus **Sheesh Pal and others,** reported in **2011(7) ADJ 684.**

15.3. Next submission advanced by the learned counsel for the respondent no. 5 is that the petitioner has failed to establish that the original allottee, namely, Naresh Singh, was the resident of the concerned village at the time of allotment and as such, the learned Collector (respondent no.3), vide order dated 14.09.2018 has rightly speculated that the allotment and lease in question has been obtained by fraud and held it to be illegal.

15.4. In addition to the above, Shri Pandey, learned counsel for respondent no. 5 contended that the petitioner as well as the original allottee Shri Naresh Singh, are not entitled to avail the benefit of the restriction of time limit prescribed for the initiation of the proceeding of cancellation of allotment and lease, for the simple reason that the petitioner could not bring on record any evidence to establish the fact that Shri Naresh Singh was the resident of the village concerned at the time of allotment in question, which is a mandatory requirement under law and as such, the allotment made in favour of Naresh Singh was fraudulent. He submits that it is well settled that fraud unravels everything and further vitiates every solemn act, and an act of fraud is always to be viewed seriously. In support of his contention, he has relied upon the judgment passed by this Court in the case of **Suresh Giri and others** versus **Board of Revenue and others,** reported in **2010 (3) AWC 2834.**

16. Before delving into the merits of the case, this Court finds it imperative to

firstly deal with the issue of entertainability of the present writ petition.

17. From a bare perusal of the impugned order dated 14.09.2018, it is abundantly clear that, although, the learned Collector (respondent no. 3) has held that the claim of the applicant as 'barred by time' (कालबाधित है) but on the footing of a report dated 08.12.2017 submitted by the Sub-District Magistrate concerned, recorded a finding that since the defendant is not the resident of the Gram Sabha Division, the allotment in his favour is prima facie 'proved illegal' (अवैधानिक साबित है) and by relying upon the judgment passed by this Court in the case of **Jairam** versus **State of Uttar Pradesh and others**, reported in **2013 RD (119) 567** has contemplated that the issue of limitation in the present case is 'not worth consideration' (काल सीमा का बिन्दु विचारणीय नहीं है). It is relevant to mention here that the learned Collector (respondent no. 3) has completely turned a blind eye to the fact that the Order dated 18.09.2012 passed by this Court in the case of **Jairam** *(Supra)* was already reviewed and set aside by this Court vide Order dated 12.08.2013 passed in **Review Application No. 316024 of 2012** In: **WRIT-C No. 51989 of 2007**. For ready reference, the relevant portion of the impugned order dated 14.09.2019 is extracted hereinbelow,

"...दावा वादी कालबाधित है, परन्तु उपजिलाधिकारी की आख्या से प्रतिवादी का आवंटन प्रथम दृष्टया प्रतिवादी के ग्रामसभा मण्डल से बाहर का निवासी होने के कारण अवैधानिक साबित है। जिला शासकीय अधिवक्ता राजस्व द्वारा प्रस्तुत आर.डी.-2013 (119/पृष्ठ 567) जयराम बनाम स्टेट आफ उ० प्र० में उद्धृत माननीय उच्च न्यायालय की विधि व्यवस्था पूर्णतः लागू होती है। ऐसी स्थिति में इस वाद में काल सीमा का बिन्दु विचारणीय नहीं है।..."

18. The Collector (respondent no. 3) on the aforesaid premise took the decision to initiate the *suo moto* proceeding for cancellation of the allotment and lease, against the allottee by issuing notice to him.

19. It would not be out of place to elucidate that the power to issue prerogative Writs under Article 226 of the Constitution of India is plenary in nature. It does not, in terms, impose any restraint on the exercise of the power to issue Writs. It is the discretion of the Writ Court to entertain writ petition or not, depending upon the facts and circumstances of each case. One of the self-imposed restrictions on the exercise of the power under Article 226 of the Constitution that has evolved through judicial precedents, is that the High Court should normally not entertain a writ petition against a show-cause notice unless the same, inter alia, appears to have been issued without jurisdiction.

20. The Hon'ble Supreme Court in the case of **Siemens Ltd.** *(Supra)* and also the Hon'ble Division Bench of the Calcutta High Court in the case of **Joyous Blocks** *(Supra)* have held that if the authority has pre-decided the issue and the show-cause is pre-mediated then it is not a show-cause and in such a situation, the Writ Court may very well interfere with the said notice/order, in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India.

21. As far as the judgment passed by this Court in the case of **Ghanshyam** *(Supra)* is concerned, which has been relied upon by the learned Standing Counsel, the same is in respect of the issue of entertainability of the writ petition against a show cause notice simpliciter and in the

light of the discussion made herein above the same is not attracted in the instant case.

22. It is a well settled legal position that wherever there is an infringement of any legal right, the Writ Court has the jurisdiction to take cognisance of the same, in exercise of its power conferred under Article 226 of the Constitution of India. Taking into consideration the aforesaid legal preposition, this Court finds substance in the submission advanced by the learned counsel for the petitioner that the impugned order dated 14.09.2018 passed by the Collector (respondent no. 3) is a premeditated order and not a show cause notice simpliciter that has finally decided the question of limitation by recording a categorical finding that the issue of limitation in the present case is 'not worth consideration'(काल सीमा का बिन्दु विचारणीय नहीं है) and moreover, virtually determined the allotment and lease of the plots in question, as 'proved illegal' (अवैधानिक साबित है). The impugned order in the name of show cause notice is inflicted by premeditated adjudication on the legality of the question of allotment and lease, holding the same to be illegal that adversely affects the valuable rights of the petitioner and further, the petitioner being a recorded 'bhumidhar with transferable rights' carries a valuable right and interest in the property / plots in question. Her rights of not to be deprived of property save by the authority of law are protected under Article 300 A of the Constitution of India.

23. Since, the issue of limitation goes to the root of the matter and once the limitation expires, it attaches finality to the rights of the parties by operation of law. In view of the factual matrix of the case, the question of jurisdiction as well as the violation of the rights guaranteed under the Constitution of India, is involved in the instant case; justice demands indulgence by this Court in exercise of its Writ jurisdiction under Article 226 of the Constitution of India.

24. Once the preliminary objection raised by the learned standing counsels regarding the maintainability of the present writ petition has been overruled; it would now be apt to delve into the merits of the case.

25. Having heard the learned counsels for the parties and on considering the materials available on record; the pivotal issue that has emerged for consideration is that whether after a lapse of about 39 years, the impugned Order dated 14.09.2018 passed by the learned Collector (respondent no.3) to proceed for the cancellation of the allotment and lease of land, will endure the test of the time frame, as envisaged by Section 128 of the U.P. Revenue Code, 2006 ?

26. Before proceeding further, it would be germane to go through the provisions of Section 128 of the U.P. Revenue Code, 2006. For a ready reference, the same are extracted below:

"128. Cancellation of allotment and lease. *(1) The Collector may, of his own motion and shall on the application of any person aggrieved, inquire in the manner prescribed into any allotment and if he is satisfied that the allotment is in contravention of the provisions of this Code or any of the enactments repealed by this Code or the rules made there under, he may cancel the allotment and the lease, if any.*

[(1-A)] Under the provisions of sub section (1), an application may be moved in the case of an allotment or lease

of land made before or after the commencement of this code, within five years from the date of such allotment of lease.

(2) Where the allotment or lease of any land is cancelled under sub-section (1), the following consequences shall ensue, namely-

(a) the right, title and interest of the allottee or lessee or any other person claiming through him in such land and in every tree or other improvement existing thereon shall cease, and the same shall revert to the Gram Panchayat;

(b) the Collector may direct delivery of possession over such land, tree or improvement forthwith to the Gram Panchayat after ejectment of every person holding or retaining possession thereof and may for that purpose use or cause to be used such force as may be necessary.

(3) Where in proceedings for cancellation of allotment or lease referred to in clause (b) of sub-section (1) the Collector is satisfied that any land referred to in section 77 excepting clause (a) or clause (h) or (i) thereof has been allotted to any person as bhumidhar with non-transferable rights, he may instead of cancelling the allotment, or lease, direct that the allottee or lessee shall be treated as an asami under clause (b) of section 125.

(4) Every order made by the Collector under this section shall, subject to the provisions of section 210, be final.

(5) The provisions of sections 5 and 49 of the Uttar Pradesh Consolidation of Holdings Act, 1953 shall not apply to the proceedings under this section."

27. From a bare perusal of the aforesaid provisions of Section 128 of the U.P. Revenue Code, 2006, it is evident that the said Section contains the following two situations in which the Collector can proceed for cancellation of allotment and lease by holding inquiry:

(i) the collector may, of his own motion inquire in the manner prescribed, into any allotment.

(ii) the collector shall on the application of any person aggrieved, inquire in the manner prescribed, into any allotment.

28. Further, the sub-section (1-A) specifically provides the limitation of five years for an application to be moved from the date of such allotment and lease. As such, in clear words, the limitation mentioned under the said sub-section (1-A) applies to the application moved by an aggrieved person. It is also noteworthy that the Appendix-I appended to Rule 191 of the U.P. Revenue Code Rules, 2016, which specifies the period of limitation for the suits, applications and proceedings also does not mention any limitation regarding cancellation of allotment and lease as provided under section 128 of the U.P. Revenue Code, 2006.

29. The learned counsel for the petitioner has placed heavy reliance on the judgments passed by this Court in the case of ***Subhag and another*** versus **Board of Revenue U.P. at Allahabad and others**, reported in **2011 (114) RD 219; Suresh Giri and others** versus **Board of Revenue U.P. at Allahabad and others,** reported in **2010 (109) RD 566 and Jiya Ram and others** versus **State of U.P. and others**, reported in **2012 (115) RD 372.**

30. Since, the above-mentioned judgments relate to the issue of limitation as provided under section 198 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 and in the present case the dispute relates to the proceeding under

section 128 of the U.P. Revenue Code, 2006. As such, for a better understanding, it would be apt to have a brief comparative study of both the said sections, particularly the provisions of limitation contained therein, in respect of the proceeding for cancellation of allotment and lease.

31. It would not be out of place to mention here that the provisions of section 128 of the U.P. Revenue Code, 2006 are *pari materia* to the provisions contained in Section 198 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, which now has been repealed. For a better appreciation of the same, the sub-sections (4), (5) and (6) of the said section 198 are extracted below,

"198. Order of preference in admitting persons to land under Sections 195 and 197.-

[(4) The [Collector] may of his own motion and shall on the application of any person aggrieved by an allotment of land inquire in the manner prescribed into such allotment and if he is satisfied that the allotment is irregular, he may cancel the allotment and the lease, if any.

(5) No order for cancellation of an allotment or lease shall be made under sub-section (4), unless a notice to show cause is served on the person in whose favour the allotment or lease was made or on his legal representatives:

...

(6) Every notice to show' cause mentioned in sub-section (5) may be issued-

(a) in the case of an allotment of land made before November 10, 1980, (hereinafter referred to as the said date), before the expiry of a period of [seven years from the said date; and

(b) in the case of an allotment of land made on or after the said date, before the expiry of a period of [five years from the date of such allotment or lease or up to November 10, 1987, which ever be later]."

32. The aforesaid sub-section (4) of Section 198 provides the manner and the power of the Collector to inquire into the matter, before proceeding for cancellation of an allotment or lease.

33. At this stage, it would be relevant to refer to the judgment passed by this Court in the case of **Smt. Sona Devi** versus **Board of Revenue, WRIT-B No. 48418 of 2015,** wherein it has been held that the phrase "every notice to show cause" as mentioned in section 198 (6) of the U.P. Zamindari Abolition and Land Reforms Act, 1950, makes it clear that there is one limitation for the action in the case filed by aggrieved persons as well as *suo motu* initiation of proceeding for cancellation of patta. For a ready reference, Paragraph 8 of the said judgment is quoted hereinbelow,

"8. By U.P. Act No. 20 of 1982 and U.P. Act No. 24 of 1986, the Act itself provided limitation for initiation of cases for cancellation of patta under Section 198 (4) of the Act, as such the limitation as provided in Appendix III (vide Entry 24) has become redundant. In case of contradiction between the Act and the Rules, the Act will prevail. The phrase "every notice to show cause", as mentioned in Section 198 (6) of the Act, makes it clear that different limitation as previously provided for suo motu action under Entry 24 of Appendix III has also came to an end and by using words "every notice to show cause" under Section 198 (6) of the Act, one limitation for the action in the case filed by aggrieved persons as well as suo

motu initiation of proceeding for cancellation of patta has been provided. Full Bench of Board of Revenue U.P. in Virendra Singh vs. State of U.P., 1994 RD 540 has not taken notice of above legislative change and does not hold the good law."

34. Similarly, in the case of **Suresh Giri** *(Supra)*, a Co-ordinate Bench of this Court has repelled the argument that the limitation has no application for initiation of suo motu action under Section 198(6) of the U.P. Zamindari Abolition and Land Reforms Act, 1950. For a ready reference, the Paragraph 14 of the said judgment is extracted hereinbelow,

"14. Entry 24 of Appendix III prescribes a period of six months for moving an application raising objection against any irregular allotment of land and three years for suo motu action by the Collector for setting aside the allotment of land. Therefore, the limitation for initiation of proceedings for cancellation of allotment by the Collector on suo motu action is three years whereas notice for such purpose can be issued within 5 years as provided under Section 198(6) of the Act. Thus, the legislator clearly intend to provide limitation even for suo motu action and the submission that the limitation has no application for initiation of suo motu action for cancellation of allotment of land/lease is baseless and is to be rejected."

35. Needless to say that the U.P. Revenue Code, 2006 is a comprehensive and self-contained Code and it has been enacted with the objective to consolidate and amend the law relating to land tenures and land revenue in the State of Uttar Pradesh. It goes without saying that unlike the limitation period for issuing notice as provided under section 198(6) of the U.P. Zamindari Abolition and Land Reforms Act, 1950, read with Entry 24 of Appendix III under Rule 338 of the U.P. Zamindari Abolition and Land Reforms Rules, 1952; the provisions of Section 128 of the U.P. Revenue Code, 2006 read with Appendix-I appended to Rule 191 of the U.P. Revenue Code Rules, 2016, prescribe limitation only for an application to be moved by an aggrieved person, but no limitation is expressly prescribed for the initiation of *suo moto* action by the collector, for the cancellation of allotment and lease. Thus, the limitation to proceed under sub-section (1) of section 128 of the U.P. Revenue Code, 2006 is confined to the limitation period as provided under sub-section (1-A) of the same and as such, it is crystal clear that the aforesaid Section 128 is silent in respect of an inquiry to be initiated by the Collector, on his own motion.

36. In view of the above, the above quoted judgments that are relied upon by the learned counsels, specifically deals with the limitation as provided under the section 198 of the U.P. Zamindari Abolition and Land Reforms Act, 1950, which has now been repealed, and as such they are not applicable in the present case where the proceeding has been initiated under section 128 of the U.P. Revenue Code, 2006.

37. The issue of no express prescription of the time limit being provided with regard to the exercise of a statutory jurisdiction by an authority has been considered by the Hon'ble Supreme Court in the case of **State of Punjab and others versus Bhatinda District Cooperative Milk Producers Union,** reported in **(2007) 11 SCC 363** wherein the Hon'ble Apex Court has been pleased to

make the following observation. The extract of Paragraph 18 of the said judgment is reproduced as under,

"18. It is trite that no period of limitation has been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be reasonable period would depend upon the nature of the statute, rights and liabilities thereunder and other relevant factors."

38. The aforesaid principle has also been reiterated by the Hon'ble Apex Court in the case of **Securities and Exchange Board of India** versus **Sunil Krishna Khaitan and Others,** reported in (2023) 2 SCC 643.

39. The Hon'ble Supreme Court in the case of **Jagdish** versus **State of Karnataka,** reported in **(2021) 12 SCC 812**, has been pleased to observe that where the concerned statute does not prescribe a limitation, the rights conferred therein must be exercised within a "reasonable time" *(emphasis supplied).*

40. Recently, the Hon'ble Supreme Court in the case of **M/s North Eastern Chemicals Industries (P) Ltd. and another** versus **M/S Ashok Paper Mill (Assam) Ltd and another, Civil Appeal No. 2669 of 2013**, decided on **11.12.2023** condensed the view which the Courts should take when it is seized of a situation where no limitation is specially provided for an act to be done under a statute. The Hon'ble Apex Court held that a Court in such a situation, should consider the facts and circumstances of the case at hand, the conduct of the parties, the nature of the proceeding, the length of delay, the possibility of prejudice being caused, and the scheme of the statute in question. For a ready reference, Paragraph 25 of the same is extracted hereinbelow,

"25. In light of above discussion, it is clear that when a Court is seized of a situation where no limitation stands provided either by specific applicability of the Limitation Act or the special statute governing the dispute, the Court must undertake a holistic assessment of the facts and circumstances of the case to examine the possibility of delay causing prejudice to a party. When no limitation stands prescribed it would be inappropriate for a Court to supplant the legislature's wisdom by its own and provide a limitation, more so in accordance with what it believes to be the appropriate period. A court should, in such a situation consider in the facts and circumstances of the case at hand, the conduct of the parties, the nature of the proceeding, the length of delay, the possibility of prejudice being caused, and the scheme of the statute in question. It may be underscored here that when a party to a dispute raises a plea of delay despite no specific period being prescribed in the statute, such a party also bears the burden of demonstrating how the delay in itself would cause the party additional prejudice or loss as opposed to, the claim subject matter of dispute, being raised at an earlier point in time."

41. In the case at hand, the allottee, Naresh Singh was granted patta along with 150 other persons through the Resolution passed by the Land Management Committee in its meeting held on 19.05.1979. The said Naresh Singh transferred the allotted plots in question in favour of the petitioner and after acquiring the possession over the same, her name was recorded in the revenue records. From the

Khatauni annexed as Annexure No. 1 to the instant writ petition, it is evident that her name is recorded as 'bhumidhar with transferable rights'.

42. Further, after a lapse of around 39 years from the date of the aforesaid allotment, on an application moved by the respondent no. 5 on 21.09.2017, the learned Collector (respondent no. 3) got an inquiry conducted in pursuance of Section 128 of the U.P. Revenue Code, 2006 and on the basis of an inquiry report dated 08.12.2017 submitted by the Sub-Divisional Officer, the learned Collector (respondent no. 3) passed the order dated 14.09.2018 holding therein that although, the said proceeding is 'barred by time' (कालबाधित है) but on the ground that the lessee was not a resident of the concerned Gram Sabha, held the allotment in question as 'proved illegal' (अवैधानिक साबित है). Though, the Collector (respondent no. 3) found the proceeding to be barred by time but taking the shelter of a judgment passed by this Court in the case of **Jairam** versus **State of U.P. and others**, reported in 2013 (119) RD 567 decided to proceed for the cancellation of allotment and lease under section 128 of the U.P. Revenue Code, 2006 on his own motion. It is most unfortunate that the learned Collector (respondent no. 3) vide order 14.09.2018 took the decision to proceed for cancellation of an allotment made way back in the year 1979, on the strength of an annulled judgment that was already reviewed and set aside by this Court itself vide Order dated 12.08.2013 passed in **Review Application No. 316024 of 2012 in Writ-C No. 15989 of 2007.** For a ready reference, the extract of the said Order dated 12.08.2013 is reproduced hereinbelow:

"The Writ petition arose out of proceedings for cancellation of patta, which had been granted to the petitioner applicant in 1975-76. Initially, the application for cancellation of patta filed by respondent No.4 on 05.08.1985 was rejected on 30.06.1986, however review filed after about 19 years (on 31.05.2005) was allowed on 06.07.2006 by Collector, Jhansi, order dated 30.06.1986 was set aside and the case for cancellation of patta was restored. The said order was challenged through the writ petition. Through the judgment and order dated 18.09.2012, I dismissed the writ petition, directed the Collector/ Additional Collector to decide the matter expeditiously and further directed that in case patta was cancelled, damages at the rate of Rs.5000/- per hectare per year should also be recovered from the petitioner.

This review petition has been filed for setting aside the order dated 18.09.2012.

The main ground on which I dismissed the writ petition was that at two occasions land had been allotted to the petitioner; at one occasion four acres and after about a year on the second occasion about 4.5 acres. After filing of the review application, pursuant to the judgment dated 18.09.2012 (sought to be reviewed), Collector decided the matter on 30.03.2013. Copy of the said order has been filed along with affidavit filed in the review petition by respondent No.4. The Collector categorically held that petitioner was not allotted land twice and the earlier proposal dated 28.02.1975 proposing to allot 4 acres of land was not finalized. Learned standing counsel as well as learned counsel for respondent No.4 admitted this position that pursuant to resolution dated 28.02.1975, no effective allotment was made. Accordingly, the main

basis of my judgment has vanished. The other points like previous residence in another state etc. taken in the cancellation application by respondent No.4 were not so serious, which could warrant review after 19 years ignoring the limitation at both the occasions; in filing cancellation application and thereafter in filing the review. At the earlier occasion, the application was rejected on the ground that it had been filed after 10.11.1982 hence by virtue of Section 198(4) of U.P.Z.A. & L.R. Act, it was barred by time.

Accordingly, review petition is allowed. Judgment and order dated 18.09.2012 is set aside. Writ Petition is allowed. Order dated 06.07.2006 through which Collector allowed the review petition of respondent No.4 is set aside. Consequent order of the Collector dated 30.03.2013 automatically stands recalled. Revision filed against the order dated 30.03.2013 may be dismissed as infructuous."

43. That apart, the impugned order dated 14.09.2018 passed by the Collector (respondent no. 3) deciding to proceed *suo moto* for cancellation of the allotment and lease is based on a report dated 08.12.2017 submitted by the Sub Divisional Officer concerned whereby the allottee was reported to be the non-resident of the concerned Gram Sabha at the time of the allotment that took place in the year 1979 and on this ground alone, the Collector (respondent no. 3) held the patta to be 'proved illegal' (अवैधानिक साबित है). As such, this finding recorded by the Collector (respondent no. 3) is not only arbitrary and without application of mind, but also inconsistent with the report dated 08.12.2017 submitted by the tehsil authority as contained in Annexure No. 5 to the writ petition. From the perusal of the said report, it is evident that the allotment in favour of Naresh Singh was made through the Resolution of the Land Management Committee duly approved by the Sub Divisional Officer, Mainpuri on 03.07.1979 and there is nothing on record to show that the said order of approval and resolution have been challenged before any competent forum. For ready reference, the relevant part of the said report is extracted hereinbelow:

"रा० का० कार्यालय में उ०प्र०स० करीमगंज की बैठक दिनांक 29.05.79 का 57 ख उपलब्ध है इसके क्रमांक 78 पर नरेश सिंह पुत्र मुन्शी लाल नि० शाह आलमपुर के नाम गाटा संख्या 360/1335, 363/1.10, 60/0.45 3 किता/2.8 एकड़ का आवंटन अंकित है। पट्टा एस०डी०ओ० मैनपुरी द्वारा दिनांक 3.7.79 को स्वीकृत किया गया है। अन्य सेवा में प्रेषित है।"

44. Further, the Collector (respondent no.3) vide order dated 14.09.2018 dismissed the claim of the respondent no. 5 for cancellation of the allotment and lease in question as 'barred by time' (कालबाधित है) and dropped the said proceeding but without indicating any plausible reason to justify the laches in not initiating the said proceeding earlier, during the period of about 39 years i.e. since 1979 when the resolution for patta was approved and granted; abruptly switched over to the other mode of cancellation by picking up the same exercise from that very stage and on the basis of the same material, under a different complexion of *suo moto* proceeding. As narrated above, Section 128 of the U.P. Revenue Code, 2006 contemplates two situations where the Collector (1) of his own motion and (2) on the application of any person aggrieved can proceed for cancellation of allotment and lease, the said modes are altogether independent and not substitute or

supplement to each other. The calamitous way in which Collector (respondent no.3) shifted from one mode to the other by deciding to proceed *suo moto*, reflects his premeditated decision to accomplish the very task that could not have succeeded due to the legal impediment of 'time bar' and is also against the well-known principle that 'what may not be done directly cannot be allowed to be done indirectly'.

45. In any case, the long period of 39 years to initiate *suo moto* proceeding for cancellation of allotment and lease, without any genuine reason; cannot by any stretch of imagination be considered as a 'reasonable period'. Furthermore, the proceedings in question for the cancellation of allotment and lease cast an adverse impact directly on the valuable rights of the petitioner, who has been admitted as 'bhumidhar with transferable right'. As such, the impugned *suo moto* proceeding initiated under Section 128 of the U.P. Revenue Code, 2006, adversely effecting the valuable rights of the petitioner who is recorded as 'bhumidhar with transferable right' is unwarranted and unsustainable.

46. That apart, the impugned proceedings for cancellation of the allotment and lease is solely based on the allegation that the allottee was not a resident of the Gram Sabha concerned at the time of allotment which was made way back in the year 1979, the said alleged ineligibility is admittedly neither a fraud nor a charge of such a magnitude that warrants *suo moto* cognizance under section 128 of U.P. Revenue Code, 2006 after a lapse of about 39 years, that too when the person has attained the legal status of 'bhumidhar with transferable right'. It would not be out of place to note that this Court in the case of **Smt. Shakuntla and others** versus **State of U.P. and others,** reported in **2019 (5) AWC 5007,** has held that leases without observing the prescribed statutory provisions cannot be termed as fraudulent and even if there is an allegation that the lease is obtained through fraud, the recourse for cancellation should be within a 'reasonable time'. For a ready reference, excerpts from Paragraph 22 of the said judgment is extracted hereinbelow,

> *"22. Thus, even the Supreme Court has held that even in cases of fraud, the action should be taken within a reasonable time. In the present case, the action has been taken after a period of 12 years which cannot be termed as reasonable tome and thus, I hold that even in the cases of fraud action has to be taken within the period of limitation. Thus, I summarise the findings in response to the questions framed as under:*
>
> ...
>
> *(C) The leases without observing the statutory provisions prescribed for grant of lease cannot be termed as fraudulent, and*
>
> *(D) Even if fraud is alleged the recourse for cancellation should be taken within a reasonable time."*

47. At this stage, it is appropriate to flag that even though this Court finds the lapse of about 39 years being not at all a 'reasonable time' to initiate *suo moto* proceeding by the Collector under section 128 of the U.P. Revenue Code, 2006, but at the same time, this Court refrains itself from prescribing time limit for the same, in the light of the observations made by the Hon'ble Supreme Court from time to time. In the case of **Ajaib Singh** versus **The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and**

Others, reported in **(1999) 6 SCC 82**, the Hon'ble Supreme Court has been pleased to observe that,

"11… It is not the function of the court to prescribe the limitation where the Legislature in its wisdom had though it fit not to prescribe any period. The courts admittedly interpret law and do not make laws. Personal views of the Judges presiding the court cannot be stretched to authorise them to interpret law in such a manner which would amount to legislation intentionally left over by the Legislature…"

48. Moreover, the judgment of this Court in the case of **Kishnu and others** versus **Sheesh Pal and others,** reported in **2011(7) ADJ 684,** which has been relied upon by the learned counsels for the respondents is a case wherein this Court on noticing the fact that the Gram Pradhan himself usurped the property by distributing the same to his father, son, nephew etc., categorised it as a classic case of the 'fence eating the crop' and a fraud of highest order and held that the allotment was not only illegal and void but also of a fraud of the highest degree. For brevity the relevant paragraph of the aforesaid judgement is reproduced below:

"6. In the instant case the Pradhan who is custodian of Gaon Sabha property has himself usurped the property by distributing the same to his father, son, nephew etc. It is a classical case of the 'fence eating the crop' (a Hindi proverb). It was a fraud of highest order which was played by the Pradhan and petitioners allottees. The allotment was not only irregular and illegal but also void and result of fraud of the highest degree. Section 198 (4) deals with irregularity of the allotment, hence, the limitation will be relevant only when there is some irregularity in the allotment. However, if the allotment is utterly void and fraudulent then even formal proceedings under Section 198 (4) are not required. In case of stark usurpation of Gaon Sabha property Collector is entitled to take corrective measures. Proceedings may be justified under Section 33/39 of U. P. Land Revenue Act also. Under somewhat similar circumstances (expiry of period of assami lease) it was so held In Hari Ram v. Collector, Dist. Saharanpur/Additional Collector, MANU/UP/1052/2004 : 2004 (2) RD 360 : 2005 (1) AWC 758. The power to evict in case of void allotment which is tantamount to usurpation of Gaon Shaba property like the present one may also be traced to Section 122B of U.P.Z.A. and L.R. Act. However opportunity of hearing was utmost essential which was fully provided."

49. From the perusal of the impugned order dated 14.09.2018, it emerges that the *suo moto* proceeding under 128 of the U.P. Revenue Code, 2006, whereby the lease has been sought to be cancelled is based on the alleged ineligibility of the allottee being non-resident of Gram Sabha concerned, at the time of allotment and not of fraud on the part of the allottee, therefore the case of **Kishnu** *(Supra)* as relied upon by the learned counsel for the respondent is also not attracted in the present case.

50. As far as, the contention of the learned counsel for the petitioner that the respondent no. 5 does not qualify the condition of a "aggrieved person" as required under section 128 of the U.P. Revenue Code, 2006 on the ground that no prejudice has been caused to him as he was not entitled/eligible for the grant of lease in question, being a minor at the time of grant of the same, needs no advertence by this

Court at this stage, in the teeth of the fact that his claim has already been rejected as "barred by time" vide the impugned order dated 14.09.2018.

51. That apart, the arguments advanced by Sri. Khandelwal that the petitioner being the purchaser of the land acquired bhumidhari rights in the property in question and there being no case of malafide or otherwise against her with regards to the purchase of the property in question, she has been victimised, for no fault on her part, under the garb of the proceeding for cancellation of allotment and lease that was granted 39 year ago in favour of the allottee, whereby justice demands protection to the valuable rights of the petitioner as guaranteed under Article 300A of the Constitution of India. This Court finds substance in the aforesaid contentions as advanced by the learned counsel.

52. In so far as the impugned order 29.05.2023 is concerned, the same is unsustainable in law, for the obvious reason that the learned revisional court of learned Additional Commissioner, Agra (respondent no. 2) has misconstrued the order dated 14.09.2018 passed by the Collector (respondent no.3) as interlocutory, whereas the same is an order giving finality to the issue of limitation, whereby the Collector (respondent no. 3) decided to *suo moto* proceed for cancellation of the allotment and lease under Section 128 of the U.P. Revenue Code, 2006, by shutting down the legal question of limitation with a categorical finding that issue of time limit in the present case is 'not worth consideration'(काल सीमा का बिन्दु विचारणीय नहीं है) and virtually determined the allotment and lease of the plots in question, as 'proved illegal' (अवैधानिक साबित है). The learned revisional court by holding the impugned order dated 14.09.2018 to be an order of interlocutory nature, has seriously failed to appreciate the trite law that limitation goes to the root of the matter and once limitation expires, it attached finality to the rights of the parties by operation of law. For a ready reference, the relevant portion of the aforesaid order dated 29.05.2023 passed by learned Additional Commissioner, Agra (respondent no. 2) is extracted hereinbelow,

> *"5....तहसील आख्या के आलोक में अवर न्यायालय द्वारा आदेश दिनांक 14.09.2018 से पट्टा निरस्तीकरण की कार्यवाही संचालित करते हुये निगरानीकर्ता को कारण बताओ नोटिस जारी किया गया है, जो एक अन्तरिम प्रकृति का आदेश है तथा तहसील आख्या में अंकित तथ्यों के सम्बन्ध में निगरानीकर्तागण को अभी भी अवर न्यायालय के समक्ष अपना पक्ष प्रस्तुत करने का पर्याप्त अवसर उपलब्ध है।*
>
> *उपरोक्त विवेचना के आधार पर अवर न्यायालय द्वारा पारित आदेश दिनांक 14.09.2018 अन्तरिम प्रकृति का होने के कारण स्थिर रहने योग्य नहीं है, किसी हस्तक्षेप की आवश्यकता नहीं है। निगरानी बलहीन होने के कारण निरस्त किये जाने योग्य है।"*

53. In view of what has been discussed herein above, the impugned order dated 29.05.2023 passed by the learned Additional Commissioner, Agra (respondent no. 2) deserves to be set aside and is hereby set aside.

54. For the reasons and the legal proposition enumerated in the foregoing paragraphs, no useful purpose will be served to remand the matter to the revisional court of learned Additional Commissioner, Agra (respondent no. 2) to decide afresh the Revision having Case No. 02238 of 2018 wherein the impugned order dated 14.09.2018 was under challenge.

55. Taking into consideration the aforementioned legal preposition as well as factual matrix of the case, this Court is of the considered view that the impugned order dated 14.09.2018 passed by the District Magistrate/Collector, Mainpuri (respondent no.3) in Case No.1858 of 2018, in so far as it relates to the decision to *suo moto* proceed for the cancellation of the allotment and lease in question and the consequential actions, if any, against the petitioner being unwarranted are not at all sustainable in law. The same are liable to be set aside and are hereby set aside.

56. Accordingly, the writ petition succeeds and is **allowed.** No order as to costs.

(2024) 2 ILRA 456
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2024
BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE SURENDRA SINGH-I, J.

Writ C No. 26978 of 2023

Matsya Jivi Sahkari Samiti Limited ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
C.S.C., Sri Kundan Kumar

Civil Law - Constitution of India,1950-Article 226-U.P. Cooperative Societies Act-The petitioner challenged the government order dated 10.01.2019 and subsequent decisions regarding fishing rights on the Yamuna river-the petitioner also contested the auction process and allocation of fishing rights in favor of another cooperative society-the petitioner claimed discrimination and violation of fundamental rights-Held, the petitioner's operational area was confined to a specific block in Etawah, as per their registration-It emphasized the government's intention to prioritize weaker sections and local communities in granting fishing rights-The court ruled that the government's preferential framework for fishing rights was constitutional and aligned with the Directive Principles of State Policy.(Para 1 to 48)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Bishambhar Dayal Chandra Mohan Vs St.of U.P (1982) 1 SCC 39

2. M/s Laxmi Khandsari & ors.. Vs St. of U.P. & ors..(1981) 2 SCC 600

3. Bijoe Emmanuel Vs St. of Ker.(1986) 3 SCC 615 St.of Bih. Vs Project Uchcha Vidya, Shikshak Sangh(2006) 2 SCC 545

4. Modern School Vs U.O.I.(2004) 5 SCC 583

5. LIC Vs Manubhai D. Shah (Prof.)(1992) 3 SCC 637

6. Dharam Dutt Vs U.O.I. (2004) 1 SCC 712

7. Sunil Batra Vs Delhi Admn(1978) 4 SCC 494

8. Virajlal Manilal & Co. Vs St. of M.P.(1969) 2 SCC 248

9. Peerless Gen. Fin. & Investt. Co.Ltd. Vs RBI(1992) 2 SCC 343

10. Lakshman Vs St.of M.P.(1983) 3 SCC 275

11. Mohd. Faruk Vs St.of M.P. (1969)1 SCC 853

12. Saurabh Chaudri Vs U.O.I.(2003) 11 SCC 146

13. Purshottani Dass Tandon Vs St.of U.P.(1986) SCC Online All 264

14. St. of U.P. Vs Pradip Tandon(1975) 1 SCC 267

15. Matsyajivi Sahkari Samiti Ltd. thru Adhyaksha/Mukhya Pravartak Vs St.of UP thru Prin. Secy. Panchayat Raj Deptt Lko & ors..(2018) 2 ADJ 431

16. Ram Kumar & ors.. Vs The St. of UP & ors..(2005) 3 UBLBEC 2487

17. Parvej Aktar & ors.. Vs U.O.I. & ors..(1993) 2 SCC 221

18. Kar. Power Corpn. Ltd Vs. K Thangappan(2006)4 SCC 322

19. BSNL Vs Ghanshyam Dass(2011) 4 SCC 374

20. St.of U.K. Vs Shiv Charan Singh Bhandari(2013) 12 SCC 179

21. C.Jacob Vs Dir. of Geology & Mining(2008) 10 SCC 115

22. U.O.I. Vs M.K. Sarkar(2010) 2 SCC 59

23. U.O.I.& ors.. Vs Chaman Rana(2018) 5 SCC 798

24. Fertilizer Corpn Kamgar Union (Regd.) Sindri & ors.. Vs U.O.I. & ors..(1981) 1 SCC 568

25. Directorate of Film Festivals & ors.. V Gaurav Ashwin Jain & ors..(2007) 4 SCC 737

26. Indian Railway Catering & Tourism Corpn Ltd. Vs Indian Railway Major & Minor Caterers Assn & ors..(2011) 12 SCC 792

27. Jacob Puliyel Vs U.O.I. & ors..(2022) SCC OnLine SC 533

28. Jai A Dehadrai & anr. Vs Govt. of NCT of Delhi & anr. WP(C)2108 of 2020, CMAP No. 7418 of 2021

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Sri Arvind Srivastava, learned counsel for the petitioner; Sri Devesh Vikram, learned Additional Chief Standing Counsel assisted by Sri Fuzail Ahmad Ansari, learned Standing Counsel for the State respondent nos.1 to 3 and Sri Kundan Kumar, learned counsel for respondent no.4 i.e. Matsya Jivi Sahkari Samiti Limited, Tehsil Fareha, District Auraiya.

2. Present writ petition has been preferred under Article 226 of the Constitution of India inter-alia with following reliefs:-

"i. to issue a writ, order or direction in the nature of certiorari quashing the impugned advertisement dated 28.07.2023 (Annexure No.06 to this writ petition) published by the District Magistrate, Auraiya and all the actions taken in pursuance to this advertisement by the respondents.

ii. to issue a writ, order or direction in the nature of certiorari quashing the impugned order No.173-25/Samiti/2022-23 dated 26.07.2022 (Annexure No.05 to this writ petition) passed by the Chief Executive Officer, Fisheries Development Authority, Jalaun at Orai.."

3. Initially, the present matter was entertained on 11.08.2023 and on the said date, learned Additional Chief Standing Counsel was asked to seek instructions in the matter. Thereafter, the detailed instructions have been placed by learned Additional Chief Standing Counsel, which are already on record.

4. The petitioner Society thereafter moved an amendment application No.3 of 2023 on 18.10.2023 to quash the

Government order dated 10.01.2019 and the order dated 08.09.2023. The petitioner Society had also moved an impleadment application No.2 of 2023 to implead 'Matsya Jivi Sahkari Samiti Limited, Tehsil Fareha, District Auraiya' as respondent no.4 in whose favour the auction was settled. As there was no objection to the aforesaid applications, both the applications were allowed by this Court vide order dated 17.11.2023 and accordingly, the notice was also issued to the newly impleaded respondent no.4.

5. With the consent of the learned counsel for the parties, this Court proceeds to decide the present matter at this stage under the Rules of this Court without calling for the counter affidavit.

6. The facts in brief for the purpose of adjudication of the present controversy are that the petitioner is a Cooperative Society registered on 02.08.1986 under the provisions of U.P. Cooperative Societies Act, 1965 (in short, Act, 1965), in the office of the Director, Fisheries/Registrar, Matsya Sahkari Samiti Uttar Pradesh, having its registered office at Gadhakasda, Vikas Khand Chakarnagar, 81, Maal Godam Road, District Etawah.

7. It transpires from the record that a Society had earlier preferred a Writ C No.31309 of 2018 for direction to the Revenue Department, State of U.P. to take a decision in regard to fishing rights in the rivers, wherein, an interim mandamus was issued by this Court on 14.09.2018 directing the Department of Revenue, Government of U.P. to formulate a policy within two weeks. In response thereof, the State Government had taken a decision and issued Government Order on 10.01.2019 laying down the procedure for grant of fishery rights in the rivers across the State.

8. The present matter relates to fishery rights in river 'Yamuna', which flows through various villages falling in District Jalaun on one side and the villages falling in District Auraiya on the other side. In the advertisement dated 28.07.2023 issued in the light of the Government order dated 10.01.2019, the area of river 'Yamuna' was demarcated as Jal Bhag No.1, which flows through villages namely Dimoli, Nandgawan, Kandhesi, Gadha, Chakarnagar, Basaiya, Madaiya, Bilhati, Kaleshwar, Khititi, Kariyawali, Machal Ki Madaiya, Gadhakasda & Kakaraua of District Etawah and the villages namely Beejalpur, Sikharna, Khairadanda, Muradganj & Bhartaul of District Auraiya. The petitioner cooperative society is claimed to be having 80 members belonging to fishing community. Out of these 80 members, 35 members reside in District Auraiya in the villages through which the river 'Yamuna' flows and the remaining 45 members reside in the villages of District Etawah through which Jal Bhag No.1 of river 'Yamuna' passes.

9. Sri Arvind Srivastava, learned counsel for the petitioner submitted that the petitioner is a registered Fishermen Cooperative Society having its area of operation in the river 'Yamuna'. Earlier all the members of the petitioner Society were resident of District Etawah. Due to bifurcation of the District Etawah into two districts i.e. Etawah and Auraiya, 35 members of the petitioner Society became resident of District Auraiya and the remaining 45 members are residing in District Etawah. In view of the advertisement, the area of operation is already defined as Jal Bhag-1 and

therefore, the petitioner Society was competent to participate in the auction held on 21.08.2023 but in most arbitrary manner, the claim of the petitioner was rejected by the Chief Executive Officer, Fisheries Development Authority, Jalaun at Orai vide order dated 26.07.2022.

10. Sri Arvind Srivastava further submitted that the petitioner Society has been registered with the Fishery Department and recommended for grant of rights for catching fishes in river 'Yamuna', which flows through the area of Tehsil Chakarnagar. Even the members of the petitioner Society also reside in the various villages of District Auraiya namely Beejalpur, Sikharna, Khairadanda, Muradganj & Bhartaul and their livelihood is also dependent upon catching fishes. The petitioner Society was competent to participate in view of the advertisement but on the one hand the respondents had not given permission to the petitioner Society to participate in the auction of Jal Bhag No.1 and on the other hand, the respondents in most arbitrary manner had settled the auction for the year 2023-24 in favour of respondent no.4 i.e. 'Matsya Jivi Sahkari Samiti Limited Fariha, Tehsil Ajeetmal, District Auraiya' at the minimum price of Rs.1,56,06,265/- as given in the impugned advertisement dated 28.07.2023.

11. He submitted that even though some villages of District Jalaun, Etawah and Auraiya fall in the demarcated area (Jal Bhag-1) but the petitioner Society was not permitted to participate in the auction proceeding. The Government order dated 10.1.2019 does not permit any such classification on the basis of geographical location. The members of the petitioner Society have a right to earn their livelihood by exercising fishing rights over the area of Jal Bhag-1, which passes through the villages in which the members of the petitioner Society reside. The act of the respondents is in violation of the fundamental right of the petitioner Society, which is enshrined under Article 19 (1) (g) and 21 of the Constitution of India, which guarantees the right to livelihood to the members of the petitioner Society, who belong to the fishing community to operate and catch the fishes in river 'Yamuna'.

12. He had also contended that the Government order dated 10.01.2019 is merely an executive instruction/policy and no executive instruction/policy can restrict or interfere with the fundamental rights of the petitioner Society unless backed by any statutory provision. The impugned Government order/Circular dated 10.01.2019 is in teeth of the fundamental rights of the petitioner Society, which is guaranteed under Article 19 (1) (g) of the Constitution of India and therefore, the same is liable to be set aside. In support of his submission, learned counsel for the petitioner placed reliance on the judgment in **Bishambhar Dayal Chandra Mohan v. State of UP1** in which it was held that the State or its executive officers cannot interfere with the rights of others unless they can point to some specific rule of law which authorises their acts. The reliance was also placed on the judgment in **M/s Laxmi Khandsari and ors vs. State of UP and others2** in which it was held that where there is a clear violation of Article 19 (1) (g) of Constitution of India, the State has to justify by acceptable evidence, inevitable consequences or sufficient materials that the restriction, whether partial or complete, is in public interest and contains the quality of reasonableness.

13. He further submitted that the law is well settled that any law, which be made under clauses (2) to (6) of Article 19 of Constitution of India to regulate the exercise of the right to the freedoms guaranteed by Article 19 (1) (a) to (e) and (g), must be "a law" having statutory force and not a mere executive or departmental instruction. In this regard, he had placed reliance on the judgments in **Bijoe Emmanuel vs. State of Kerala3; State of Bihar vs. Project Uchcha Vidya, Shikshak Sangh4; Modern School vs. Union of India5; LIC v. Manubhai D. Shah (Prof.)6; Dharam Dutt vs. Union of India7; Sunil Batra v. Delhi Admn.8; Virajlal Manilal & Co. v. State of M.P.9 and Peerless General Finance and Investment Co. Ltd. vs. RBI10.**

14. It was contended that the classification made by the Circular dated 10.01.2019 to restrict the residents of the District Etawah to take part in the auction of fishing rights in Jal Bhag No.1 of river Yamuna amounts to excessive restriction. As per the said Circular, even though the members of the petitioner society belong to District Jalaun and District Auraiya, and they are also residing at the bank of river Yamuna but on account of arbitrary circular, they would never be entitled to participate in the auction proceedings. The said action is unsustainable. Reliance has also been placed on the judgments in **Lakshman v. State of M.P.11; Mohd. Faruk v. State of M.P.12; Saurabh Chaudri v. Union of India13; Purshottani Dass Tandon v. State of U.P.14; State of U.P. v. Pradip Tandon15.**

15. Per contra, Sri Devesh Vikram, learned Additional Chief Standing Counsel assisted by Sri Fuzail Ahmad Ansari, learned Standing Counsel had vehemently opposed the writ petition. He submitted that the petitioner Society was registered on 02.08.1986 having its registered office at Gadhakasda, Vikas Khand Chakarnagar, 81 Maal Godam Raod, District Etawah. Even in the application, which was moved by the Secretary and the President of the Society to the District Magistrate, Jalaun on 04.05.2022, which is already on record, the petitioner Society itself had accepted that the area of operation of the petitioner Society is 'Vikas Khand Chakarnagar, District Etawah'. He had also placed reliance on Chapter-II & III of U.P. Cooperative Societies Rules 1968 (in short, Rules, 1968), which is framed under the Act, 1965, which deals with the registration and the bye-laws respectively. Rule 3 of Chapter-II of the Rules, 1968 provides for an application of registration of a Society to be made in prescribed form and accordingly, Rule 15 of Chapter III provides for the name and headquarters of the Society and the area of operation.

16. It had been vehemently contended that registered bye-laws of the petitioner Society provides area of operation i.e. Vikas Khand Chakarnagar and therefore, the petitioner's own bye laws, which were framed under the Rules, 1968, do not permit the petitioner Society to operate beyond 'Vikas Khand Chakarnagar, District Etawah'. He had also placed reliance on Chapter IV of the Rules, 1968, which provides the procedure regarding amendment in the bye-laws but admittedly, the petitioner Society had not made any amendment in the bye laws regarding the area of operation and therefore, the entire claim, which has been set up by the petitioner Society to operate fishing rights beyond its area of operation and the demand of participation in the auction proceeding, which has been conducted by

the District Auraiya, is totally misconceived. The argument of the petitioner, that at the time of registration of petitioner Society, the District Auraiya was not in existence as there was only one district i.e. Etawah, and therefore, the petitioner Society may be permitted to participate in the auction proceeding, is also misconceived as the District Etawah was bifurcated in the year 1997 itself and since then the petitioner Society had not made any amendment in the bye laws as per Rule 30 (g) of Chapter IV of the Rules, 1968. The Vikas Khand Chakarnagar (registered office of the petitioner Society) was remained in District Etawah and therefore, even on this account, the argument of the petitioner's counsel could not sustain.

17. Sri Fuzail Ahmad Ansari, learned Standing Counsel to buttress the submission advanced by Sri Devesh Vikram, learned Additional Chief Standing Counsel, vehemently submitted that even though at the time of filing the writ petition the entire pleading had been set up by the petitioner to challenge the advertisement dated 28.07.2023, relying upon the Government order dated 10.01.2019 on the ground that the petitioner is being treated to have an area of operation of District Etawah, whereas the Government order does not permit any such classification on the basis of geographical location, which amounts to discrimination, arbitrariness and violative of Articles 14, 21 and 19 (1) (g) of the Constitution of India but later on, as an afterthought, the petitioner had challenged the Government order dated 10.01.2019 by means of amendment application as regard the preference given therein as Clause (Ga).

18. Learned Standing Counsel submitted that once the impugned advertisement dated 28.07.2023 was challenged on the basis of Government order itself then it was not open to the petitioner to challenge the Government order in the same writ petition by means of an amendment application. In support of his submission, he has referred paragraphs 3, 10, 14 and 17 of the writ petition. He submitted that even though, on one hand the petitioner had taken the benefit of the said Government order and secured three more fishing leases in the year 2022-23 apart from their own area of operation, therefore, at this stage they may not be permitted to blow hot and cold at the same time by challenging the Government order on the ground that they did not fall in the zone of consideration. He lastly contended that Clause (Ga) of the Government order dated 10.01.2019 cannot be challenged at this belated stage. Moreover, the said Government order had been issued in pursuance of the Division Bench order passed in Writ C No.31309 of 2018. It is submitted that similar Government order dated 17.10.1995 has been considered in **Matsyajivi Sahkari Samiti Ltd. through Adhyaksha/Mukhya Pravartak vs. State of UP through Principal Secretary, Panchayat Raj Deptt., Lucknow and others16** wherein the Division Bench of this Court had proceeded to dismiss the writ petition on 21.01.2018.

19. It was submitted that so far as the argument regarding the violation of Article 14, 19 (1) (g) and 21 of Constitution by the petitioner is concerned, the same cannot sustain as the same is already settled by the Full Bench judgment rendered in **Ram Kumar and ors vs. The State of UP and ors17,** wherein the Full Bench had discussed the aforesaid issues in paragraphs nos.25, 26 and 27 of the judgment, which are reproduced herein below:-

"25. From the above pronouncements made by the apex Court, it is well settled that restrictions imposed to give effect to the constitutional goals as laid down in Directive Principles of State Policy are restrictions with intention to give certain benefits to weaker section of the society which are reasonable restrictions which does not infringe any right of individual citizen under Article 19(1)(g). The rights under Article 19(1)(g) are not absolute rights. As noted above, every individual has also right of consideration but according to preference laid down in the Government orders issued under Section 126 of the 1950 Act. The preferences have been provided in the scheme of the Government with object of providing livelihood to fishermen and fishermen cooperative societies. The view of the Division Bench in Panchoo's case (supra) and other cases that unless fishing right is not settled by auction it will violate Article 19(1)(g) is not correct. The settlement of fishing right by auction will necessarily be in favour of a person giving highest bid. The big contractors and moneyed persons will steal a march over poor fishermen and other poor people of the village who are unable to organise themselves and the result would be that a sizeable section of fishermen and other communities will be deprived of their livelihood. **To stop the settlement from going into the hands of big contractors and middlemen, the scheme was enforced by the State Government. The scheme has rational nexus with the object sought to be achieved and the persons for whose benefits the scheme has been framed definitely falls in a separate class having intelligible differentia. The settlement of fishing right in ponds and tanks by public auction cannot be held to serve the purpose and object nor the same can carry forward the goals as laid down in the Directive Principles of State Policy. Mere getting more revenue by public auction is not only object for letting out the fishing right. The objective as displayed from the directions of the State Government under Section 126 of 1950 Act is to provide livelihood to fishermen and other similar communities and also to give preference to the cooperative societies of such fishermen so that they may organise themselves and carry on their traditional vocation for the benefit of large part of weaker section of the society.**

26. We are, thus, of the clear opinion that the directions issued by the State Government under Section 126 of 1950 Act read with Rule 115-A of 1952 Rules, as noted above, does not violate rights of any person under Article 19(1)(g) and Article 14 of the Constitution of India and the view expressed by the Division Bench in Panchoo's case (supra) and Abdul Gaffar's case (supra) in so far as they hold the settlement of fishing right only by way of public auction does not lay down the correct law. As noted above, the view in the aforesaid judgments as well as the view expressed in Ajai Sonkar's case (supra) and in Gram Panchayat Kanta's case (supra) that the renewal of lease is not permissible is absolutely correct and the same view has found favour with the Full Bench judgment of this Court in Feru's case (supra).

27.However, it is relevant to note that the directions issued under Section 126 of 1950 Act itself provides that settlement of fishing right shall be done with proper and extensive publicity so that all who are eligible to participate may be aware of such proposed settlement and may participate. It is true that without information or knowledge of all concerned who are

eligible to participate the settlement will be arbitrary. The Division Bench of this Court in 1992 A.L.J. 482; Gaon Sabha, Tuja, Vs. The Sub Divisional Officers and others, had noted the proviso to Rule 115-S and observed that public auction for settlement of fishery right is not mandatory. The Division Bench, however, in the said judgment has observed that although there is no requirement to the Sub Divisional Officer to settle the fishery lease by auction but the said procedure of auction can be exercised by the Sub Divisional Officer when there are more than one person claiming entitlement for grant of lease. Following was laid down by the above Division Bench in paragraph 5:-

"5. ..... While laying down order of preference for the grant of Patta it has been provided that if there are more than one person of one group the Patta shall be granted by auction in favour of the highest bidder. The normal rule laid down by aforesaid Government order is the grant of Patta by Sub Divisional Officer without any public auction, unless the case falls within the last part of Clause-2 which has provided for public auction, if there are more than one person of one group. It may, however, be observed that though there is no statutory requirement requiring the Sub Divisional Officer to settle the land by auction, there is no prohibition either and if he is of the opinion that in view of the facts and circumstances of a particular case it will be expedient to grant the Patta of the fisheries right by means of public auction, he may do so. But if he has settled the fisheries by means of other than the auction his order cannot be set-aside on the ground that he has not settled it by holding public auction."

(Emphasis supplied)

20. Learned Standing Counsel submitted that although the judgment of the Full Bench in Ram Kumar's case (supra) is much prior to the issuance of the Government order dated 10.01.2019 but the reasoning given and ratio taken by Hon'ble Full Bench is fully and squarely applicable on the case in hand.

21. We have considered the submissions advanced by the learned counsel for the parties and carefully perused the judgments cited at the bar and have also perused the record of the case.

22. Before proceeding to consider the rival submissions, it would be appropriate to re-produce the Government order dated 10.01.2019 as under:-

संख्या- 1/2019/33/एक-2-2019(रिट)/2018

प्रेषक,

सुरेश चन्द्रा,
प्रमुख सचिव,
उ०प्र० शासन।

सेवा में,

आयुक्त एवं सचिव,
राजस्व परिषद,
उ०प्र० लखनऊ।

राजस्व अनुभाग-2 लखनऊः
दिनांकः 10 जनवरी, 2019

विषयः नदियों में मत्स्य आखेट हेतु पट्टा/ठेका का अधिकार दिये जाने के सम्बन्ध में।

महोदय,

उपर्युक्त के सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि मा० उच्च न्यायालय, इलाहाबाद में योजित रिट याचिका संख्या-31309/2018 "मत्स्य जीवी सहकारी समिति लि० बनाम उ०प्र० राज्य व अन्य" में मा० उच्च न्यायालय द्वारा नदियों में मत्स्य आखेट हेतु पट्टा/ठेका का अधिकार दिये जाने के लिए नीति बनाये जाने के आदेश पारित किए गए हैं। अतः उ०प्र० राज्य के भौगोलिक क्षेत्राधिकार में पड़ने वाली नदियाँ/बहती जल धाराओं में मत्स्य आखेट प्रबन्धन हेतु निम्न व्यवस्था निर्धारित की जाती हैः-

(क) मत्स्य आखेट क्षेत्रों का चिन्हांकन-

(1) उ०प्र० राज्य के भौगोलिक क्षेत्राधिकार में पड़ने वाली नदियों में मत्स्य आखेट (शिकारमाही) हेतु सम्बन्धित जनपद के जिलाधिकारी द्वारा प्रत्येक तहसील में उप जिलाधिकारी की अध्यक्षता में तहसील स्तरीय मत्स्य आखेट समिति का गठन निम्नवत् किया जायेगा-

1. उप जिलाधिकारी
अध्यक्ष

2. जिलाधिकारी द्वारा नामित खण्ड विकास अधिकारी
सदस्य

3. अधिशासी अभियंता, सिंचाई द्वारा नामित सहायक अभियंता सदस्य

4. अपर मुख्य अधिकारी, जिला पंचायत द्वारा नामित अधिकारी सदस्य

5. सहायक वन संरक्षक
सदस्य

6. सहायक निदेशक, मत्स्य/जनपदीय मत्स्य अधिकारी
सदस्य सचिव

(2) उक्त समिति द्वारा तहसील में बहने वाली नदियों/बहती जलधाराओं में सर्वेक्षण कर मत्स्य आखेट क्षेत्रों का चिन्हांकन किया जायेगा। मत्स्य आखेट क्षेतों का चिन्हांकन गारम पंचायत अथवा आवागमन की सुगमता अथवा नौका घाट आदि सीमा विभाजक के रूप में लेते हुए किया जायेगा।

(3) उक्त समिति द्वारा नदियों में मत्स्य आखेट क्षेत्रों का चिन्हांकन, मत्स्य मात्रा के निर्धारण एवं उसका न्यूनतम आरक्षित मूल्य निर्धारण का कार्य प्रत्येक वर्ष माह अप्रैल में पूर्ण किया जायेगा।

(4) नदियों में मत्स्य आखेट हेतु प्रतिबन्धित क्षेत्रों को मत्स्य आखेट क्षेत्रों के चिन्हांकन से पृथक रखा जायेगा।

(ख) मत्स्य आखेट क्षेत्रों में मत्स्य मात्रा का निर्धारण-

(1) वर्तमान नदियों/बहती जलधाराओं में जल प्रवाह की लम्बाई, चौड़ाई एवं गहराई को दृष्टिगत रखते हुए चिन्हित मत्स्य आखेट क्षेत्रों में संभावित मत्स्य उत्पादकता का निर्धारण किया जायेगा।

(2) मत्स्य उत्पादकता के सम्बन्ध में यदि कोई मत्स्य उत्पादन का आंकडे उपलब्ध हों, तो उसका भी संज्ञान लिया जाये।

(3) मत्स्य मात्रा के निर्धारण के आधार पर मत्स्य आखेट क्षेत्र का न्यूनतम आरक्षित मूल्य निर्धारित किया जायेगा।

(4) न्यूनतम आरक्षित मूल्य का निर्धारण (1) क (1), में गठित समिति द्वारा किया जायेगा जिसका अनुमोद जिलाधिकारी द्वारा किया जायेगा।

(ग) मत्स्य आखेट हेतु मत्स्य जीवी सहकारी समितियों की पात्रता का वरीयताक्रम निम्नवत होगा-

(क) संबंधित ग्राम में निवास करने वाले मछुआ समुदाय के व्यक्तियों की सहकारी समितियां जो उ०प्र० सहकारी समिति अधिनियम, 1965 के अन्तर्गत रजिस्ट्रीकृत हों और मत्स्य पालन विभाग, उ०प्र० द्वारा मान्यता प्राप्त हो।

(ख) संबंधित न्याय पंचायत क्षेत्र में निवास करने वाले मछुआ समुदाय के व्यक्तियों की सहकारी समितियां, जो ऊपर की भांति पंजीकृत और मान्यता प्राप्त हो,

(ग) संबंधित विकास खण्ड में निवास करने वाले मछुआ समुदाय की सहकारी समितियां जो ऊपर की भांति पंजीकृत और मान्यता प्राप्त हो।

(घ) संबंधित जनपद में निवास करने वाले मछुआ समुदाय की सहकारी समितियां जो ऊपर की भांति पंजीकृत और मान्यता प्राप्त हो।

(ड़) उ०प्र० राज्य में निवास करने वाले मछुआ समुदाय की सहकारी समितियां जो ऊपर की भांति पंजीकृत और मान्यता प्राप्त हो।

(च) अनुसूचित जाति अथवा अनुसूचित जनजाति के व्यक्तियों की सहकारी समितियां जो ऊपर की भांति पंजीकृत और मान्यता प्राप्त हो।

(छ) अन्य सहकारी समितियां जो ऊपर की भांति पंजीकृत और मान्यता प्राप्त हो।

स्पष्टीकरण

1. चिन्हित मत्स्य आखेट क्षेत्र जिस ग्राम/ग्रामों में पड़ता है उस ग्राम/ग्रामों की ग्राम पंचायत/पंचायतों में पड़ने वाली मत्स्य जीवी सहकारी समितियां पात्र मानी जायेगी।

2. यदि चिन्हित मत्स्य आखेट क्षेत्र में केवल एक मत्स्य जीवी सहकारी समिति पात्र है तो न्यूनतम आरक्षित मूल्य पर पट्टा किया जायेगा। यदि पात्रता सूची में एक से अधिक मत्स्य जीवी सहकारी समितियां हैं तो मौके पर नीलामी करायी जायेगी। जिसमें केवल पात्रता सूची में उल्लिखित समितियों के अधिकृत प्रतिनिधि ही प्रतिभाग कर सकेंगे।

3. यदि चिन्हित मत्स्य आखेट क्षेत्र वाली नदी दो जिलों की सीमाओं से होकर पूरब पश्चिम बहती है तो उत्तर में पड़ने वाले जनपद के जिलाधिकारी द्वारा प्रथम वर्ष में पट्टा/नीलामी की जायेगी और दक्षिण में पड़ने वाले जिलाधिकारी द्वारा दूसरे वर्ष पट्टा/नीलामी की जायेगी। इसी प्रकार यदि नदी उत्तर दक्षिण में बहती है तो पूरब में पड़ने वाले जनपद के जिलाधिकारी द्वारा प्रथम वर्ष में पट्टा/निलामी की जायेगी और पश्चिम में पड़ने वाले जिलाधिकारी द्वारा दूसरे वर्ष

पट्टा/नीलामी की जायेगी। यह व्यवस्था क्रमानुसार आगे की अवधि के लिये भी जारी रहेगी।

2. यदि चिन्हित मत्स्य आखेट क्षेत्र हेतु पट्टा आवंटन के लिये केवल एक मत्स्य जीवी सहकारी समिति पात्र है, तो पट्टा न्यूनतम आरक्षित मूल्य पर या राज्य सरकार द्वारा समय-समय पर नियत भाटक की धनराशि पर दिया जायेगा।

3. संबंधित जिलाधिकारी द्वारा नामित अपर, जिलाधिकारी या उप जिलाधिकारी पट्टी आवंटन/नीलाम अधिकारी होगा।

4. चिन्हित मत्स्य आखेट क्षेत्रों में पट्टा/नीलामी समिति द्वारा माह मई व जून के अन्त तक कर दी जायेगी।

5. पट्टा आवंटन/नीलामी अधिकारी द्वारा चिन्हित मत्स्य आखेट क्षेत्रों के पट्टा आवंटन/नीलामी की सूचना जनपद में पर्याप्त प्रचार-प्रसार वाले कम से कम दो हिन्दी समाचार पत्रों में प्रकाशित करायी जायेगी। मत्स्याखेट के पट्टा/नीलामी के आवेदन हेतु कम से कम 21 दिन (3 सप्ताह) का समय दिया जायेगा।

6. मत्स्य आखेट समिति बोली में उच्चतम धनराशि वाली मत्स्य जीवी सहकारी समिति से बोली की 25 प्रतिशत धनराशि तत्काल जमा करायेगी। अवशेष धनराशि एक सप्ताह में जमा करना अनिवार्य होगा।

7. उच्चतम बोली की धनराशि जमा कर दी गयी हो, तो पात्रता सूची, नीलामी प्रपत्र और बोली की धनराशि को जमा करने संबंधी विवरण सहित तहसील स्तरीय मत्स्य आखेट समिति अपनी आख्या सम्बन्धित जिलाधिकारी को अग्रसारित करेगी।

8. यदि जिलाधिकारी का समाधान हो जाता है कि मत्स्य आखेट क्षेत्र को आवंटित करने का निर्णय नियमों के उपबन्दों के अनुसार किया गया है तो जिलाधिकारी पट्टा/नीलामी की स्वीकृति बिन्दु संख्या-12 में निर्धारित शर्तों के अधीन प्रदान कर देंगे।

9. पट्टा/नीलामी से प्राप्त धनराशि की 25 प्रतिशत धनराशि आनुपातिक रूप से संबंधित ग्राम पंचायतों को 25 प्रतिशत धनराशि जिला पंचायत को और 50 प्रतिशत धनराशि जिलाधिकारी द्वारा स्थापित किये जाने वाले मत्स्य विकास निधि के बैंक खाते में जमा की जायेगी जिसका उपयोग जिलाधिकारी के निर्देशानुसार मत्स्य विकास कार्यक्रमों में व्यय किया जा सकेगा।

10. मत्स्य आखेट पट्टा/नीलामी से क्षुब्ध व्यक्ति पट्टा/नीलामी की स्वीकृति की तिथि से 30 दिन के अन्दर सम्बन्धित मण्डलायुक्त को अपील कर सकता है। मण्डलायुक्त के आदेश के विरूद्ध 30 दिन के अन्दर राजस्व परिषद में निगरानी योजित की जा सकती है और निगरानी में पारित आदेश अन्तिम आदेश होगा।

(घ) मत्स्य आखेट हेतु शर्तें

(1) पट्टाधारक/नीलामी प्राप्तकर्ता द्वारा प्रत्येक वर्ष 01 जून से 31 अगस्त तक नदियों में मत्स्य आखेट प्रतिबन्धित रखा जायेगा।

(2) पट्टाधारक/नीलामी प्राप्तकर्ता के द्वारा बहती हुयी नदी/जलधारा के प्रवाह को रोकने का प्रयास नहीं किया जायेगा और न ही नदी/जलधारा में बाड़े (Fixed Engine) लगाये जायेंगे।

(3) मछुआरों के आर्थिक एवं सामाजिक उत्थान हेतु नदियों में बढ़ते हुए प्रदूषण एवं घटती हुई मत्स्य सम्पदा के दृष्टिगत पट्टाधारक/नीलामी प्राप्तकर्ता द्वारा मत्स्य विभाग के अधिकारियों की देखरेख में 2000 मत्स्य अंगुलिका (70 से 100 मि०मी०आकार) प्रति किमी० की दर से भारतीय मेजर कार्प मत्स्य प्रजातियों को नदियों में पुनर्स्थापित करने के लिए रिवर रैन्चिंग कराया जायेगा।

(4) पट्टाधारक/नीलामी प्राप्तकर्ता नदी में कोई ऐसा विषैला अथवा विस्फोटक पदार्थ उपयोग में नहीं लायेगा जिससे जल प्रदूषण एवं जलीय जीव जन्तुओं की मृत्यु होने की सम्भावना हो।

(5) पट्टाधारक/नीलामी प्राप्तकर्ता को नदी में कछुआ, घड़ियाल, गैन्जेटिक डॉलफिन, मगर एवं अन्य प्रतिबन्धित जलीय वन्य जीवों को पकड़ने का अधिकार नहीं होगा।

(6) मत्स्य आखेट हेतु प्रतिबन्धित श्रेणी के जाल का प्रयोग नहीं किया जायेगा।

(7) पट्टाधारक/नीलामी प्राप्तकर्ता को नदी के उस भाग में जो उसने नीलाम में लिया है प्रतिबन्धित अवधि में जीरा एकत्र करने का कोई अधिकार नहीं होगा।

(8) मत्स्य विभाग की परिस्थित विशेष में जबकि मछली के सम्पूर्ण विनाश का भय उत्पन्न हो जावे तो शिकारमाही बन्द करने अथवा नियंत्रित करने का पूर्ण अधिकार होगा।

(9) मत्स्य विभाग के कर्मचारियों/अधिकारियों को नदी में अनुसंधान कार्य हेतु प्रायोगिक शिकारमाही करने में पट्टाधाकर/नीलामी प्राप्तकर्ता को कोई आपत्ति नहीं होगी।

(10) पट्टाधारक/नीलामी प्राप्तकर्ता को समय पर राज्य सरकार द्वारा मत्स्य पालन व मत्स्य आखेट हेतु जारी आदेशों का पालन करना अनिवार्य होगा।

(11) यदि पट्टा आवंटन/नीलामी की अवधि में पट्टाधारक आवंटन/नीलामी की शर्तों का उल्लंघन करता है, तो जिलाधिकारी आवंटी/नीलामी प्राप्तकर्ता को कारण बताओ नोटिस जारी करके आवंटन/नीलामी निरस्त कर सकेगा और पुनः नीलामी की कार्यवाही की जायेगी।

(12) किसी मामले में यदि मा० उच्चतम न्यायालय, मा० उच्च न्यायालय, राष्ट्रीय हरित प्राधिकरण (एन०जी०टी०) या अन्य कोई न्यायालय का आदेश है तो वह प्रभारी रहेगा।

भवदीय,

सुरेश चन्द्रा
प्रमुख सचिव"

23. Under the relevant Government Order dated 10.01.2019, which holds the field, the concerned District Magistrate is required to constitute Tehsil Level Fishing Hunting Committees under the chairmanship of the Sub Divisional Officer. Paragraph-Ga of the Government Order dated 10.01.2019 provides preference of eligible Matya Jivi Sahkari Samities, wherein the first preference is to be given to the Sahkari Samiti registered under the Act, 1965, which has been formed by the persons of fishing community of the concerned village. The second and third preferences are to be given to the registered Societies of persons of fishing community of concerned Nyay Panchayat Kshetra and concerned Development Block respectively. The fourth preference is to be given to the registered Societies of the persons of fishing community of the concerned District. The fifth preference is to be given to the registered Societies of the persons of fishing community, who are resident of the State of Uttar Pradesh and the sixth preference is to be given to the registered Societies of persons belonging to the Scheduled Caste and Scheduled Tribe.

24. The paragraph-3 of the explanation appended to Para-Ga of the aforesaid Government order provides that if the river of earmarked fishing hunting area is flowing between the boundaries of two districts towards east-west then the District Magistrate of North district shall conduct the auction/lease for the first years and the District Magistrate of South district shall conduct the auction of the second year. In the same manner, if the river flows towards North-South, then the District Magistrate of the East district shall conduct the auction/lease for the first year and the District Magistrate of the West district shall conduct the auction/lease for the second year. This arrangement will continue in future. In accordance with provisions contained in Government order dated 10.01.2019 the District Magistrate, Auraiya has published the impugned advertisement for District Auraiya and District Jalaun (jointly) inviting applications for according fishery rights in respect of the rivers/ponds mentioned in the advertisement at serial nos.1 to 17 wherein the concerned part of river 'Yamuna' has been demarcated as Jal Bhag No.1.

25. The petitioner is a Society registered under the Act, 1965 since 02.08.1986, having its registered office at Gadhakasda, Vikas Khand Chakarngar, 81 Maal Godam Road, District Etawah and is engaged in the occupation of fisheries. Mohd. Idrees is the Secretary of the Society and Shri Amar Singh is its President. The area of operation of the petitioner Society is 'Vikas Khand Chakarnagar', which is also admitted by the petitioner in its application dated 04.05.2022 moved before the District Magistrate, District Jalaun at Orai, which is appended as Annexure No.4 to the writ petition, wherein it has been accepted that the area of operation of the petitioner Society is 'Vikas Khand Chakarnagar'. It is also apparent from the registration certificate of the petitioner Society that the petitioner Society is registered on the application submitted under Section 6 of the Act, 1965 and the said Society is registered in compliance of the said Act, Rules made thereunder and the general or special orders issued and the bye-laws of the said Society at Etawah District at Serial No.158.

26. The Government order dated 10.01.2019 issued in pursuance of the directions of this Court in Writ C No.31309 of 2018, does not violate rights of any person under Article 19 (1) (g) and Article 14 of the Constitution of India. The directions issued by the State Government itself provide that settlement of fishing right shall be done with proper and extensive publicity so that all persons, who are eligible to participate, may be aware of such proposed settlement and may participate in the auction. The Government order itself contemplates "wide publicity" and the Tehsil Level Committee is constituted under the chairmanship of the Sub Divisional Officer. The Government order provides the procedure for auction of the fishing rights over the rivers. In pursuance of the aforesaid Government order, the auction was held for Jal Bhag No.1 of river Yamuna on 21.08.2023, wherein the bid of the respondent no.4 on the minimum price of Rs.1,56,06,265/- was accepted.

27. The petitioner has 80 members belonging to fishing community. After bifurcation of District Etawah, 35 members of the petitioner society became resident of District Auraiya through which the Jal Bhag-1 of river 'Yamuna' is flowing and remaining 45 members of the Society reside in the villages of District Etawah through which Jal Bhag No.1 of river 'Yamuna' flows. Admittedly, the area of operation of the petitioner Society is Vikas Khand Chakarnagar, District Etawah, which is clearly reflected from the application of the petitioner dated 04.05.2022 moved before the District Magistrate, District Jalaun at Orai, wherein it has been accepted that the area of operation of the petitioner Society is 'Vikas Khand Chakarnagar'. Rule 15 of Chapter III of the Rules, 1968 provides for the name and headquarters of the Society and the area of operation. Clause-4 of the registered bye laws of the petitioner Society deals with the area of operation and it mentions the area of operation of the Society as 'whole Vikas Khand Chakarnagar', which consists of 64 village panchayats. Chapter-VI of the Rules, 1968 deals with the procedure regarding amendment of the bye-laws. Once at the time of registration of the society on 02.08.1986, the District Auraiya was not in existence and there was only one district i.e. District Etawah and the members of the Society were resident of one district Etawah then after bifurcation of the district Etawah in the year 1997, the petitioner Society was at liberty to seek amendment in the area of operation in its bye laws as per Rule 30 (g) of Chapter IV of the Rules, 1968. Admittedly, the petitioner had not sought any amendment regarding area of operation and as such, the petitioner cannot operate beyond the area of operation i.e. 'Vikas Khand Chakarngar, Etawah'.

28. It also transpires from the record that the petitioner Society was registered on 02.08.1986 as per provisions contained under the Act, 1965 and the rules made thereunder. The registration certificate of the petitioner Society was issued by the Registrar, Fishing Cooperative Societies, Uttar Pradesh under Section 8 (1) of the Act, 1965 certifying that 'Matsya Jivi Sahkari Samiti Limited, Gadhakasda, Vikas Khand Chakarnagar' was registered upon the application submitted by the Society under Section 6 of the Act, 1965. The name of the petitioner Society finds place at serial no.158 of the registered Societies. Therefore, the petitioner Society is undisputedly registered at District Etawah and the same is also admitted by the

petitioner in view of description given in the cause title viz "Matsya Jivi Sahkari Samiti Limited having its registered Headoffice & Office at Gadhakasda, Vikas Khand Chakarnagar, 81 Maal Godam Road, District Etawah through its Secretary Mohd. Idrees and its President Shri Amar Singh. The same is also admitted from the application of the petitioner dated 04.05.2022 submitted before the District Magistrate, Jalaun at Orai. Admittedly, the area of operation of the petitioner Society is "Vikas Khand Chakarnagar, Etawah".

29. In **Matsyajivi Sahkari Samiti Ltd** (supra) the Division Bench had considered the similar Government order dated 17.10.1995, which provides separate procedures for granting fishing rights for more than 2 hectares and less than 2 hectares. The Government order dated 17.10.1995 specifically mentions that the Scheme is framed keeping in view that the benefit of the scheme be availed by the persons of fishermen community and leases of ponds and tanks could not be made in favour of middlemen and unsocial elements. The scheme has been framed as a measure of social justice to provide means of livelihood to fishermen and other similar communities, who had been traditionally engaged in fishing. Relevant paragraphs 28 and 29 of the judgement are reproduced herein below:-

"28. It has further been provided in Para 60(2)(b)(5) of the category that **lease may be given to any desirous persons of concerned village failing which to Nyaya Panchayat of concerned village, thereafter to concerned Development Block and thereafter to Cooperative Society of the district. The directions issued by the State Government under Section 126 of UPZA&LR Act read with Rule 115(a)(3) of the Rules 1952 have been considered by a Full Bench of this Court referred in [2006(24)LCD59]; Ram Kumar and Others Vs. State of U.P. and others and this Court has upheld the validity of the directions issued.** The relevant paragraphs 23 and 24 of which are reproduced as under:

"23. **From the above pronouncements made by the Apex court, it is well settled that restrictions imposed to give effect to the constitutional goals as laid down in Directive Principles of State Policy are restrictions with intention to give certain benefits to weaker section of the society which are reasonable restrictions which does not infringe any right of individual citizen under Article 19(1)(g). The rights under Article 19(1)(g) are not absolute rights. As noted above, every individual has also right of consideration but according to preference laid down in the Government Orders issued under Section 126 of the 1950 Act. The preferences have been provided in the scheme of the Government with object of providing livelihood to fishermen and fishermen cooperative societies. The view of the Division Bench in Panchoo's case (supra) and other cases that unless fishing right is not settled by auction it will violate Article 19(1)(g) is not correct.** The settlement of fishing right by auction will necessarily be in favour of a person giving highest bid. The big contractors and moneyed persons will steal a march over poor fishermen and other poor people of the village who are unable to organize themselves and the result would be that a sizeable section of fishermen and other communities will be deprived of their livelihood. To stop the settlement from going into the hands of big contractors and

middlemen, the scheme was enforced by the State Government. The scheme has rational nexus with the object sought to be achieved and the persons for whose benefits the scheme has been framed definitely falls in a separate class having intelligible differentia. The settlement of fishing right in ponds and tanks by public auction cannot be held to serve the purpose and object not the same can carry forward the goals as laid down in the Directive Principles of State Policy. Mere getting more revenue by public auction is not only object for letting out the fishing right. The objective as displayed from the directions of the State Government under Section 126 of 1950 Act is to provide livelihood to fishermen and other similar communities and also to give preference to the cooperative societies of such fishermen so that they may organize themselves and carry on their traditional vocation for the benefit of large part of weaker section of the society.

24. We are, thus of the clear opinion that the directions issued by the State Government under Section 126 of 1950 Act read with Rule 115-A of 1952 Rules, as noted above, does not violate rights of any person under Article 19(1)(g) and Article 14 of the Constitution of India and the view expressed by the Division Bench in Panchoo's case and Abdul Gaffar's case (supra) in so far as they hold the settlement of fishing right only by way of public auction does not lay down the correct law. As noted above, the view in the aforesaid judgments as well as the view expressed in Ajai Sonkar's case (supra) and in Gram Panchayat Kanta's case (supra) that the renewal of lease is not permissible is absolutely correct and the same view has found favour with the full Bench judgment of this Court in Feru's case (supra)."

29. In view of above, **the fishing rights can be allotted in the preferential order prepared by the Government keeping in mind the customary rights. The cooperative society of the petitioner falls in para 60(B)(3)(a) whereas the cooperative society of the respondent no. 5 falls within para 60(B)(1)(c) which is above the category of petitioner. Accordingly, we are of the considered opinion that the respondent no. 5 has rightly been awarded the fishing rights in accordance with law and there is no illegality or infirmity in the same.** Hence, the writ petition is misconceived, lacks merit and deserves to be dismissed.
(Emphasis supplied)

30. In **Parvej Aktar and others Vs. Union of India and others18**, the Apex Court had occasion to consider the orders issued under Section 3 (1) of Handlooms (Reservation of Articles for Production) Act, 1985 reserving certain articles of exclusive production of handlooms. Challenge was made to the order of reservation for exclusive production of handlooms on the ground of violation of Article 19(1) (g) by certain persons. The Apex Court noticed the provisions of Article 45 of the Constitution, which require the State to promote with special care the educational and economical interests of the weaker sections of the people. The protection was given by the Government to handloom weavers because the livelihood of handloom weavers was threatened due to production of all types of items and varieties by the powerloom industry. Following observations were made by the Apex Court in paragraphs 56 & 58 of the said judgment:-

"56. The protection has been given by the Government to handloom weavers because the livelihood of handloom weavers is threatened due to the production of all types of items and varieties by the powerloom industry. It is common knowledge that the handloom weavers are economically very poor and will have no alternative employment in the rural areas unless protected through reservation of varieties for them. So poor is the weaver that he could well say in the words of Karl Marx: "Half a century on my back and still a pauper."

58. No doubt, there are restrictions under the impugned order but the question would be whether they are reasonable. The Act, as seen above, has come to be enacted for the protection of the interests of the handloom weavers, mostly concentrated in rural areas. They are pitted against a powerful sector, namely, the mills and the powerloom. As such, they face unequal competition. The restrictions are not only reasonable but also fully justified. Further, the objectives sought to be achieved by way of these restrictions should derive support from Article 43 of the Constitution which reads as follows:-

"43. Living wage, etc., for workers.- The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or cooperative basis in rural areas."

31. In Ram Kumar's case (supra) the Full Bench has held that restrictions imposed to give effect to the constitutional goals as laid down in Directive Principles of State Policy are restrictions with intention to give certain benefits to weaker section of the society which are reasonable restrictions which does not infringe any right of individual citizen under Article 19(1)(g). The rights under Article 19(1)(g) are not absolute rights. Every individual has also right of consideration but according to preference laid down in the Government orders issued under Section 126 of the 1950 Act, the preferences have been provided in the scheme of the Government with object of providing livelihood to fishermen and fishermen cooperative societies. The settlement of fishing right by auction will necessarily be in favour of a person giving highest bid. The big contractors and moneyed persons will steal a march over poor fishermen and other poor people of the village who are unable to organise themselves and the result would be that a sizeable section of fishermen and other communities will be deprived of their livelihood. To stop the settlement from going into the hands of big contractors and middlemen, the scheme was enforced by the State Government. The objective as displayed from the directions of the State Government is to provide livelihood to fishermen and other similar communities and also to give preference to the cooperative societies of such fishermen so that they may organise themselves and carry on their traditional vocation for the benefit of large part of weaker section of the society.

32. It is evident that the petitioner has challenged the Clause-Ga of the Government order dated 10.01.2019 by means of amendment application dated 15.10.2023 after lapse of more than four years and there is no explanation for the delay. Once the impugned advertisement

dated 28.07.2023 has been challenged on the basis of the Government order itself then it cannot be challenged in the same writ petition by means of amendment application. Further, the petitioner has already taken the benefit of the said Government order and secured three fishing leases in the year 2022-23.

33. The said aspect of the matter has been considered by the Supreme Court in the case of **Karnataka Power Corpon. Ltd. Vs. K. Thangappan19**. Relevant part of the judgement is reproduced herein below:

"6. Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in Durga Prashad v. Chief Controller of Imports and Exports. Of course, the discretion has to be exercised judicially and reasonably.

7. What was stated in this regard by Sir Barnes Peacock in Lindsay Petroleum Co. v. Prosper Armstrong Hurd (PC at p. 239) was approved by this Court in Moon Mills Ltd. v. M.R. Meher and Maharashtra SRTC v. Shri Balwant Regular Motor Service. Sir Barnes had stated:

"Now, the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitation, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy."

8. It would be appropriate to note certain decisions of this Court in which this aspect has been dealt with in relation to Article 32 of the Constitution. It is apparent that what has been stated as regards that article would apply, a fortiori, to Article 226. It was observed in Rabindranath Bose v. Union of India that no relief can be given to the petitioner who without any reasonable explanation approaches this Court under Article 32 after inordinate delay. It was stated that though Article 32 is itself a guaranteed right, it does not follow from this that it was the intention of the Constitution-makers that this Court should disregard all principles and grant relief in petitions filed after inordinate delay.

9. It was stated in State of M.P. v. Nandlal Jaiswal that the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is

inordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring, in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third-party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction."

34. The Supreme Court in the case of **BSNL v. Ghanshyam Dass20** has held as under :

"26. On the other hand, where only the affected parties approach the court and relief is given to those parties, the fence-sitters who did not approach the court cannot claim that such relief should have been extended to them thereby upsetting or interfering with the rights which had accrued to others.

7. In Jagdish Lal v. State of Haryana, the appellants who were general candidates belatedly challenged the promotion of Scheduled Caste and Scheduled Tribe candidates on the basis of the decisions in Ajit Singh Januja v. State of Punjab, Union of India v. Virpal Singh Chauhan and R.K. Sabharwal v. State of Punjab and this Court refused to grant the relief saying: (Jagdish Lal case, SCC pp. 562-63, para 18)

"18. … this Court has repeatedly held, the delay disentitles the party to the discretionary relief under Article 226 or Article 32 of the Constitution. It is not necessary to reiterate all the catena of precedents in this behalf. Suffice it to state that the appellants kept sleeping over their rights for long and elected to wake up when they had the impetus from Virpal Chauhan and Ajit Singh ratios. But Virpal Chauhan and Sabharwal cases, kept at rest the promotion already made by that date, and declared them as valid; they were limited to the question of future promotions given by applying the rule of reservation to all the persons prior to the date of judgment in Sabharwal case which required to be examined in the light of the law laid in Sabharwal case. Thus earlier promotions cannot be reopened. Only those cases arising after that date would be examined in the light of the law laid down in Sabharwal case and Virpal Chauhan case and equally Ajit Singh case. If the candidate has already been further promoted to the higher echelons of service, his seniority is not open to be reviewed. In A.B.S. Karamchari Sangh case a Bench of two Judges to which two of us, K. Ramaswamy and G.B. Pattanaik, JJ. were members, had reiterated the above view and it was also held that all the prior promotions are not open to judicial review. In Chander Pal v. State of Haryana a Bench of two Judges consisting of S.C. Agrawal and G.T. Nanavati, JJ. considered the effect of Virpal Chauhan, Ajit Singh, Sabharwal and A.B.S. Karamchari Sangh cases and held that the seniority of those respondents who had already retired or had been promoted to higher posts could not be disturbed. The seniority of the petitioner therein and the respondents who were holding the post in the same level or in the same cadre would be adjusted keeping in view the ratio in

Virpal Chauhan and Ajit Singh; but promotion, if any, had been given to any of them during the pendency of this writ petition was directed not to be disturbed."

35. The Supreme Court in the case of **State of Uttaranchal v. Shiv Charan Singh Bhandari.** 21 has held as under :

"19. From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time.

28. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional benefits definitely should not have been entertained by the Tribunal and accepted by the High Court."

36. The Supreme Court in the case of **C. Jacob v. Director of Geology and Mining22** has held as under :

"10. Every representation to the Government for relief, may not be replied on merits. Representations relating to matters which have become stale or barred by limitation, can be rejected on that ground alone, without examining the merits of the claim.In regard to representations unrelated to the Department, the reply may be only to inform that the matter did not concern the Department or to inform the appropriate Department. Representations with incomplete particulars may be replied by seeking relevant particulars. The replies to such representations, cannot furnish a fresh cause of action or revive a stale or dead claim."

37. The Supreme Court in the case of **Union of India v. M.K. Sarkar 23** has held as under :

"15. When a belated representation in regard to a 'stale' or 'dead' issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the 'dead' issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."

38. The Supreme Court in the case of **Union of India and others v. Chaman Rana24** has held as under:-

"10. Mere repeated filing of representations could not be sufficient explanation for delay in approaching the Court for grant of relief, was considered in Gandhinagar Motor Transport Society v. Kasbekar [Gandhinagar Motor Transport Society v. Kasbekar, 1953 SCC OnLine Bom 64 : AIR 1954 Bom 202] , by Chagla,

C.J. observing as follows: (SCC OnLine Bom : AIR p. 203, para 2)

"2. … Now, we have had occasion to point out that the only delay which this Court will excuse in presenting a petition is the delay which is caused by the petitioner pursuing a legal remedy which is given to him. In this particular case the petitioner did not pursue a legal remedy. The remedy he pursued was extra-legal or extra-judicial. Once the final decision of the Government is given, a representation is merely an appeal for mercy or indulgence, but it is not pursuing a remedy which the law gave to the petitioner. …".

39. The impugned Government order/circular is a realm of policy decision of the State Government and considering the aim and object of the said Circular, we do not find any illegality in the same. The scope and ambit of the interference in the policy matter is very limited and the same cannot be interfered by the Court in a routine manner. Such policy decisions can be interfered by the court in case it is primarily contrary to the relevant Act or Rules framed thereunder or the same is contrary to the provisions guaranteed under Chapter III of the Constitution of India. It can also be challenged on the ground of jurisdiction of the authority, who has issued the same or the said authority is incompetent. We have carefully scrutinized the Government order/circular dated 10.01.2019 in detail and we do not find any infirmity which warrants any interference in the said Government order/circular by this Court. The judgment of this Court in **Matsyajivi Sahkari Samiti Limited** (supra) is squarely applicable in the present case and therefore, challenge to the Government order/circular dated 10.01.2019 stands rejected.

40. In a catena of judgments passed by the Apex Court, the scope of interference by the courts in matters of policy is well established. Judicial review is the cornerstone of constitutionalism and is a part of our basic structure. Despite this understanding, the Supreme Court has time and again reiterated how, by way of judicial review, policy decisions of the State should not be interfered with unless they are grossly arbitrary or irrational as there is a need to maintain separation of powers.

41. In **Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors. v. Union of India & Ors.**, (1981) 1 SCC 568, the Apex Court has observed as under:-

"35. A pragmatic approach to social justice compels us to interpret constitutional provisions, including those like Articles 32 and 226, with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsman arrangements — a problem with which Parliament has been wrestling for too long — emerges. I have dwelt at a little length on this policy aspect and the court process because the learned Attorney-General challenged the petitioner's locus standi either qua worker or qua citizen to question in court the wrongdoings of the public sector although he maintained that what had been done by the Corporation was both bona fide and correct. We certainly agree that judicial interference with the administration cannot be meticulous in our Montesquien system of separation of powers. The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super-auditor, take the Board of Directors to task.

This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration."

42. In **Directorate of Film Festivals & Ors. v. Gaurav Ashwin Jain & Ors.,** (2007) 4 SCC 737, the Apex Court had observed as follows:-

"16. The scope of judicial review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review (vide Asif Hameed v. State of J&K [1989 Supp (2) SCC 364] , Sitaram Sugar Co. Ltd. v. Union of India [(1990) 3 SCC 223] , Khoday Distilleries Ltd. v. State of Karnataka [(1996) 10 SCC 304] , BALCO Employees' Union v. Union of India [(2002) 2 SCC 333] , State of Orissa v. Gopinath Dash [(2005) 13 SCC 495 : 2006 SCC (L&S) 1225] and Akhil Bharat Goseva Sangh (3) v. State of A.P. [(2006) 4 SCC 162])."

43. The aforementioned observation had also been made in **Indian Railway Catering and Tourism Corporation Ltd. v. Indian Railway Major and Minor Caterers Association and Ors.25.** The Apex Court held that policy decisions of the Government should not be interfered with unless the policy is contrary to provisions of statutory rules or of the Constitution. In the said case, no illegality or unconstitutionality had been shown and the Apex Court held as under:-

"2. By the impugned order, the High Court has interfered with the Catering Policy of 2005 in respect of reservations. By now it is a well-settled principle of law that policy decisions of the Government should not be interfered with in a routine manner unless the policy is contrary to the provisions of statutory rules or of the Constitution. Nothing has been brought to our notice that the Policy is contrary to the provisions of the statutory rules or the Constitution. For this simple reason, we set aside the order of the High Court impugned herein."

44. In **Jacob Puliyel v. Union of India and Ors.26**, though the Supreme Court was broadly examining policy decisions pertaining to health, it had observed that in exercise of their judicial review, Courts should not ordinarily interfere with the policy decisions of the Executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness, etc. The relevant portion of the judgment stating the same is as under:-

"21. We shall now proceed to analyse the precedents of this Court on the ambit of judicial review of public policies relating to health. It is well settled that the

Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Courts do not and cannot act as appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary."

45. Recently in **Jai A. Dehadrai and another vs. Government of NCT of Delhi and another27** the Apex Court had observed as follows:-

"12. Depending upon the number of undertrials and prisoners, the State has taken a decision of capping total number of visits by family members, relatives, friends and legal advisers to two times a week and it cannot be said that the said decision is completely arbitrary. The said decision has been taken after careful consideration of the facilities available in the prisons, availability of the staff and the number of undertrials.

13. In matters of policy, the Courts do not substitute its own conclusion with the one arrived at by the Government merely because another view is possible. Therefore, this Court is not inclined to pass any order issuing writ of mandamus. However, keeping in view the fact that the present PIL is not an adversarial litigation and the petition has been filed in the interest of prisoners, this Court permits the Petitioner to give a representation to the State providing suggestions, which this Court expects that the State will consider in the right spirit."

46. From the above pronouncements made by the Apex Court, it is well settled that in exercise of their powers of judicial review, the Courts do not ordinarily interfere with policy decisions of the executive unless the policy can be faulted on the ground of mala fide, unreasonableness, arbitrariness or unfairness etc. If the policy cannot be touched on any of these grounds, the mere fact that it may affect the interests of a party does not justify invalidating the policy. The objective as displayed from the directions of the State Government is to provide livelihood to fishermen and other similar communities and also to give preference to the cooperative societies of such fishermen so that they may organise themselves and carry on their traditional vocation for the benefit of large part of weaker section of the society.

47. It is not within the realm of the courts to go into the issue as to whether there could have been a better policy and on that parameters direct the Executive to formulate, change, vary and/or modify the

policy which appears better to the court. The scope of judicial review is very limited in such matters. It is only when a particular policy decision is found to be against a statute or it offends any of the provisions of the Constitution or it is manifestly arbitrary, capricious or mala fide, the court would interfere with such policy decisions. In the present matter, no such case is made out.

48. The writ petition is accordingly dismissed on both counts, on the merits as well as on the ground of delay and laches. No order as to costs.

(2024) 2 ILRA 477
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2024
BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ C No. 31555 of 2022

Indian Oil Corporation Ltd., Mathura Refinery ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ankush Tandon, Sri Anoop Trivedi (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Alok Mishra, Sri Sunil Kumar Dubey, Sri M.C. Chaturvedi (Sr. Advocate)

Civil Law - Constitution of India,1950-Article 226-IOCL entered into an agreement with UPPCL in 1999 to use a Parellel Operating System (POS) which allowed synchronization between IOCL's captive power plant and the grid-IOCL augmented its captive power plant in 2001, eliminating the need for POS-IOCL requested amendment of the agreement to remove charges for the POS-UPPCL did not act on IOCL's repeated requests to amend the agreement or disconnect the POS until 2007- Despite disconnection, UPPCL continued to charge IOCL under the original agreement-IOCL challenged the charges and sought refunds for payments made after discontinuation-UPPCL issued demand notice in 2022 for Rs. 246.5 crore claiming the charges were valid until the agreements formal termination in 2018-Held,IOCL's requests and UPPCL's inaction caused unjust delays-UPPCL's physical disconnection of POS in 2007 and subsequent acknowledgment meant no service was provided, charging post-2007 was unjustified-UPPCL delayed amending the agreement for 17 years and tried to benefit from its own inaction, violating the legal maxim that no one should profit from their wrongdoing-Henc,e the court, ruled that IOCL is not liable to pay POS charges after January 2008 and set aside demand notices for arrears beyond that period-the court emphasized the principles of fairness and accountability, holding UPPCL responsible for the delay and its consequences.(Para 1 to 66)

The writ petition is allowed. .(E-6)

<u>List of cases cited:</u>

1. Mah. St. Electricity Distribution Co. Ltd. Vs JSW Steel Ltd. & ors.. (2022) 2 SCC 742

2. PTC India Ltd. Vs Central Electricity Regulatory Commission (2010) 4 SCC 603

3. M.K. Shah Enggs. & Contractors Vs St. of M.P.(1992) 2 SCC 594

4. Mrutunjay Pani Vs Narmada Bala Sasmal(1961)AIR SC 1353

5. Kusheshwar Prasad Singh Vs St. of Bih. & ors.. (2007) 11 SCC 447

6. The Chairman, SBI & anr., Vs M.J James(2022) 2 SCC 301

7. Dehri Rohtas light Railway Co. Ltd. Vs Distt Board, Bhojpur(1992) 2 SCC 598

8. St. of Mah. Vs Digambar (1995) 4 SCC 683

9. Nirmala Anand Vs Advent Corpn. (Pvt) Ltd. & ors..(2002) 5 SCC 481

(Delivered by Hon'ble Prashant Kumar, J.)

1. Heard Sri Ankush Tandon, learned counsel for the petitioner and Sri M.C. Chaturvedi, learned Senior Advocate assisted by Sri Alok Mishra, learned counsel for respondent nos.3 and 4.

2. The petitioner is public sector undertaking, working under the aegis of Ministry of Petroleum and Natural Gas, Government of India. The preliminary business of the petitioner is to refine crude oil, market petroleum and petroleum products. To refine the crude oil, the petitioner has set up a refinery in Mathura. Though the petitioner had a Captive Power Plant, but it was not able to generate required amount of electrical energy, so the petitioner entered into an agreement on 30.11.1999 (hereinafter referred to as the 'Principal Agreement') with U.P. Power Corporation Limited (hereinafter referred to as 'UPPCL'), to provide a facility which is commonly known as "Parallel Operating System". The relevant clauses of the 'Principal Agreement' are reproduced hereunder:-

"Clause 5

It has been agreed by the consumer that during the continuance of this agreement in addition to the minimum consumption guarantee provided in the rate schedule Clause 5(b) at annexure-2, he shall pay to the supplier every month a charge at the rate of 10% (ten per cent) of the aforesaid minimum consumption per KVA for 44118 (corresponding to 37500 KW) which is subject to revision from time to time. At the current rate the ten per cent of MCG works out to ₹50/- per KVA per month & the amount so chargeable works out to ₹22,05,900/- month.

Provided that if in any revision, the minimum consumption guarantee is revised downwards, the consumer shall nevertheless, be liable to pay the charges under this clause at the rates as were charged and paid by consumer before the revision.

Provided always that in the event of non-payment or delayed payment of aforesaid charge by the due date specified in the bill, the consumer shall be liable to pay 'Additional Charge' as provided in rate schedule Clause 8(b) at Annex-2, without prejudice tot he right of the supplier to discontinue the parallel Operating.

Clause 19

This agreement shall subject herein before provided be and remain in force for one year from the date of commencement of supply (hereinafter called the initial period of supply) and thereafter from year to year basis on the terms and conditions herein contained.

Provided that either party shall be at liberty to determine this agreement at any time after the expiration of the initial period of supply on giving one month's notice in writing of such intention, and on the expiration of such notice, this agreement shall absolutely cease and determine, but without prejudice to the rights and remedies if any, of either party, which may have accrued or arisen hereunder in the meantime.

Provided further that if the consumer ceases taking supply of electrical energy due to any reason, he shall be liable to pay to the Supplier necessary charges as per provision made in the Regulation

framed by the Supplier under Section 49 & 79 of the Electricity (Supply) Act, 1948."

3. The "Parallel Operating System" is an additional facility where one electrical system operates with the connectivity to another system in similar operating condition i.e. synchronized system having same voltage, frequency and phase difference. In a simplified form, it can be said that in case if there is any variation in voltage and frequency then the grid stabilizes the variation of voltage.

4. As per the 'Principal Agreement', the petitioner started paying for the "Parallel Operating System". Subsequently, the petitioner managed to augment its own Captive Power Plant and realized that they do not have any further requirements of the "Parallel Operating System".

5. On 3.8.2001, petitioner sent a letter to UPPCL requesting for amendment to the 'Principal Agreement' as there was no requirement of "Parallel Operating System". This was followed by a number of other similar communications requesting for deletion of clause 5 from the 'Principal Agreement' but respondent no.3 did not take any action on the communications, and continued to charge for the facility provided, though the petitioner was not using the same. However, this facility was also disconnected, which is clear from the letter dated 28.9.2006 of respondent no.3. Though the "Parallel Operating System" was disconnected, but respondent no.3 for the reasons better known to them, chose not to amend the agreement, and continued charging for the facility.

6. On 19.2.2013, a demand notice was issued by respondent no.3 to the petitioner demanding parallel Operating charges @ ₹22,05,900/- per month with effect from January 2008. The entire dues came out to ₹21,12,29,268/-.

7. It was on 19.12.2018 that a supplementary agreement to the 'Principal Agreement' was executed between the petitioner and respondent no.3, whereby, Clause 5 of the 'Principal Agreement', which was parallel Operating charge, was deleted. The relevant provisions of Clause 5 of the supplementary agreement is quoted hereunder for ready reference :

"It has been agreed by the consumer that during the continuance of this agreement in addition to the minimum consumption guarantee provided in rate schedule Clause 5(b) at annexure-2, he shall also pay to the supplier every month a charge at the rate of 10% (ten percent) of the aforesaid minimum consumption guarantee per KVA for 44118 (corresponding to 37500 KW) which is subject to revision from time to time. At the current rate the ten percent of MCG works out to ₹50/- per KVA per month & the amount so chargeable works out to ₹22,05,900/- per month.

Provided that if in any revision, the minimum consumption guarantee is revised downwards, the consumer shall nevertheless, be liable to pay the charges under this clause at the rates as were charged and paid by consumer before the revision.

Provided always that in the event of non-payment or delayed payment of aforesaid charge by the due date specified in the bill, the consumer shall be liable to pay 'Additional charge' as provided in rate schedule Clause 8(b) at Annex-2, without prejudice to the right of the supplier to discontinue the parallel Operating."

8. After execution of the supplementary agreement, a request was made by the petitioner that as they have not been using the paralleling facility since 2001, so the outstanding amount may not be charged.

9. On 4.12.2020, the bill cum disconnection notice was issued by respondent no.3, wherein disconnection date was stated to be 30.12.2020 and the parallel Operating charges was shown as arrears upto March 2019. In response to the bill, the petitioner made a representation and was in sanguine hope that the arrears of paralleling charges would be waived. However, on 1.10.2022 another demand notice was issued by respondent no.3 demanding ₹2,46,50,33,498.00/- as arrears with interest on paralleling charges. In addition to it, another bill was issued on 3.10.2022 wherein the outstanding amount towards paralleling charges was shown ₹2,46,50,33,498.00/-. Along with it they added late payment surcharge for one month, which came to ₹49,300669.96/- and total arrears of paralleling charges was shown ₹251,43,34,167.96/- as on 3.10.2022.

10. The petitioner by means of instant writ petition has challenged the disconnection notice as well as demand notice. The petitioner sought for following prayers in the writ petition:-

"I. Issue a writ, order or direction in the nature of certiorari calling for the records of the case and to quash the impugned demand cum disconnection notice dated 1.10.2022 issued by Executive Engineer, Dakshinanchal Vidyut Vitran Nigam Ltd. Electricity Distribution Division-I, Mathura (Respondent no.4) demanding ₹2465033498.00/- as arrears with interest of paralleling charges (Anenxure No.30 to the writ petition).

II. Issue a writ, order or direction in the nature of certiorari calling for the records of the case and to quash the impugned bill dated 3.10.2022 issued by Executive Engineer, Dakshinanchal Vidyut Vitran Nigam Ltd. Electricity Distribution Divison-I, Mathura (Respondent no.4) demanding 246,50,33,498.00/- as arrears with interest of paralleling charges alongwith LPSC (late payment surcharge) of ₹49,300,669.96/-for one month and total arrears of paralleling charges as ₹251,43,34,167.96/- (Annexure No.31 to the writ petition).

III. Issue a writ, order or direction in the nature of mandamus commanding the respondent no.3 (Managing Director, Dakshinanchal Vidyut Vitran Nigam Ltd.) to consider and decide the representation/objection dated 7.10.2022 within a stipulated period of time.

IV. Issue a writ, order or direction in the nature of mandamus commanding the respondents to refund paralleling charges paid by the petitioner from August 2001 to December 2007."

ARGUMENT OF PETITIONER

11. Before advancing the legal argument, counsel for the petitioner has placed several communications between the parties, which are as follows:-

11(A). The 'Principal Agreement' was signed on 30.11.1999 between the parties to provide "Parallel Operating System". However, the petitioner after increasing the capacity of the Captive Power Plant, no longer needed this facility, so they wrote a letter for the first time to the Power Corporation on 3.8.2001 stating

that they have augmented the capacity of the captive power plant and they do not need facility of "Parallel Operating System", and asked them to stop extending the facility and stop charging for the same. In the aforesaid letter, they also asked for dropping Clause 5 from the 'Principal Agreement', as it was no more needed. This was followed by several representations given by the petitioner, which were sent on 14.2.2002, 16.10.2002, 12.2.2004 and 25.2.2004, wherein same request was made for amendment to the contract agreement.

11(B) Thereafter, on 19.5.2004, the petitioner wrote to General Manager (Distribution), UPPCL stating that they have been requested by CGM (Commercial), Lucknow to inspect the premises of the petitioner for confirming that the petitioner's system was operating in islanding mode and to ensure that there is no possibility of parallel Operating between petitioner's system and UPPCL grid. Thereafter, vide letter dated 18.6.2004, respondent no.3 has forwarded letter dated 19.5.2004 to the General Manager (Distribution), UPPCL for taking immediate action in the matter as per departmental rules. On great persuasion of the petitioner, the respondent Corporation set up high level meeting on 25.8.2004, wherein, it was decided that the team of Power Corporation would visit the premises of the petitioner and take up call on the request of the petitioner. **The team visited the premises of the petitioner on 24.9.2004 and after analysing the petitioner's system, recommended for recall of the parallel Operating.**

11(C) Again on 20.10.2004, the petitioner sent a request that they do not require the "Parallel Operating System" and requested to remove the facilities granted by the Corporation, which was followed by yet another representation dated 30.6.2005. Thereafter, on 3.1.2006, a report was submitted by the Committee, wherein, it was stated that petitioner's request for deletion of Clause 5 could not be entertained due to positioning of the circuit breaker and non-removal of bus bar. On 19.1.2006, petitioner again wrote to respondent no.3, referring to Committee' report on the issue of amendment of the agreement and it was categorically stated therein that the Committee Members of UPPCL have taken unilateral decision not to amend contract agreement even though it was jointly agreed by the petitioner and respondent no.3.

11(D) Another representation was sent by the petitioner on 14.2.2006 in which it was categorically stated that since the cable through which grid power was connected to petitioner's generation bus had already been dismantled and re-routed, there is no possibility of further paralleling of two systems. In the letter, it was further stated that the purpose for which parallel Operating was arranged have ceased to exist for quite a few years back, which was notified to UPPCL and was requested to amend the agreement. They further requested to discontinue the system immediately as it was causing huge financial loss which was to the tune of ₹2.5 crores per year. Thereafter, on 21.3.2006 respondent no.3 sent a letter, wherein, they admitted that site inspection was carried out by their team. **Wherein, officers of both the parties had agreed that the 11 KV cable, through which the grid power was connected, has been disconnected, though the bus bar has not been removed. They further admitted that there is no "Parallel Operating System" working.**

11(E) Again the petitioner sent another letter dated 28.3.2006 requesting

UPPCL to amend the agreement urgently. On 6.5.2006, respondent no.3 wrote letter to the petitioner stating that after the meeting of the officers it has been decided that H.T. Cable connected in the refinery of UPPCL has been separated. Even the 11 KV circuit breaker, which was set up by UPPCL for supplying power to the refinery, has been disconnected. It was further admitted in the letter, that due to technical reason, it was not possible to remove the bus from the system. The relevant part of letter dated 6.5.2006 is being reproduced hereunder for ready reference:

"इस सम्बन्ध में आपके विनम्र संज्ञान में लाना है कि दिनांक 09.12.05 को संयुक्त रूप से मथुरा रिफायनरी मथुरा का निरीक्षण किया गया था तथा दिनांक 27.02.06 को आपके विभाग के अधिकारियों से विचार विमर्श करने के उपरान्त यह निर्णय लिया कि वर्तमान में रिफायनरी की प्रणाली का परिचालन यू०पी०पी०सी०एल० की ग्रिड से एच०टी०केबिल को पृथक कर दिया गया है। यू०पी०पी०सी०एल० को ग्रिड व रिफायनरी के सिस्टम में जो पावर हाउस में परिचालन हेतु पूर्व में 11 के०वी० के सर्किट ब्रेकर लगाये गये थे उनकी एच०टी० कनैक्शन को जोड़ने वाली केबिल को निकाल दिया गया है परन्तु बस बार अभी भी उसी अवस्था में स्थित है। इस बस को अलग हटाना तकनीकी कारणों से सम्भव नहीं है। इस संयुक्त जॉच टीम में मुख्य प्रबन्धक पी०एण्ड०यू० मथुरा रिफायनरी मथुरा के भी हस्ताक्षर है।

अतः अनुबन्ध का क्लोज नं०-5 निरस्त करना सम्भव नहीं है।"

11(F) Petitioner again sent letter on 13.5.2006 asking UPPCL/DVVNL to resolve the issue and asked them to delete clause 5 from the 'Principal Agreement'. In spite of this letter and separating the cables, the parallel operating system was not withdrawn by the respondent, and they continued charging the petitioner.

11(G) On 8.12.2006, petitioner again wrote to respondent no.3 with request for deletion of Clause 5 from the 'Principal Agreement', informing them that as per suggestions, the Grid transformer incomer cubicles may be completely isolated and sealed from their respective busbar arrangement, and as such paralleling of their system with grid will no more be possible after this modification.

11(H) Thereafter, on 14.2.2007, an office memorandum was issued by respondent no.3(DVVNL) mentioning therein, that on inspection it was found that the petitioner was not using "Parallel Operating System" as Grid incomer panel and refinery generation bus were completely sealed and separated. Further on 18.6.2007, a letter was issued by DVVNL wherein it was stated that the petitioner does not require "Parallel Operating System" and accordingly appropriate amendment be done.

11(I) On 28.9.2007, DVVNL sent letter to the petitioner admitting that a team of DVVNL had inspected the premises of the petitioner and found that grid incomer panel had been delinked from the refinery generation bus. The bus has also been sealed and hence, the refinery is not carrying out the parallel operating system from the grid. The relevant portion of the letter is being reproduced below for ready reference:-

"इस कार्यालय के पत्रांक 8060/प्र०नि०/द०वि०वि०नि०लि०/(वा०)/मथुरा रिफाइनरी दिनांक 18.06.07 के तारतम्य में अवगत कराना है कि दिनांक 14.01.07 को अधीक्षण अभियन्ता, विद्युत वितरण मण्डल मथुरा एवं अधिशासी अभियन्ता विद्युत वितरण खण्ड-प्रथम, मथुरा द्वारा ***उपभोक्ता के परिसर की पुनः चैंकिग की गई तो मौके पर पाया कि ग्रिड इनकमर पैनल को रिफाइनरी जनरेशन बस से विच्छेदित कर दिया गया है तथा ग्रिड इनकमर्स पैनल के रिफाइनरी बस बार व्यवस्था से विच्छेदित एवं सील्ड होने से रिफाइनरी द्वारा उ०प्र० पावर ग्रिड सप्लाई के साथ समानान्तर परिचालन नहीं किया जा रहा है तथा 11 के०वी० फीडर को अलग पैनल लगाकर पृथक कर लिया गया है जो मेन बस से पूर्णतः अलग हैं।***

इस सन्दर्भ में अधीक्षण अभियन्ता, विद्युत वितरण मण्डल मथुरा के पत्रांक 10909/ वि०वि०मं० (म०) दिनांक 14.02.07 की प्रति संलग्न हैं।

अनुरोध है कि कृपया आवश्यक दिशा निर्देश देने का कष्ट करें।"

11(J) On 31.12.2007, a letter was sent by Chief Engineer (Commerce) to Chief Engineer (Distribution Region), Agra (respondent no.3) stating therein that as the petitioner has separated grid incomer panel from refinery bus, thus a new agreement be executed after removing clause of "Parallel Operating System".

11(K) In spite of this letter, DVVNL did not take any action, so the petitioner sent reminder on 1.1.2008 again requesting that they would not be paying charges for the "Parallel Operating System" as deletion of paralleling clause 5 has already been approved by UPPCL but not formally disconnected.

11(L) On the other hand, there was a serious audit objection on the petitioner, as the paralleling charges was being paid by IOCL in spite of physical removal of the paralleling facility and certification by UPPCL authorities on February 2007 itself. On 28.1.2008, the petitioner asked respondent no.3 to immediately issue a formal order of deletion of paralleling charges clause from the agreement. When DVVNL did not take any action, a reminder was sent on 12.3.2008 asking the Managing Director, DVVNL to resolve the issue. On 25.3.2008, respondent no.3 sent a letter to the petitioner stating that they will not delete Clause 5 from the 'Principal Agreement' until the "Parallel Operating System" is completely taken out from the premises of the petitioner. The relevant portion of the letter is quoted below:-

"जब तक आपके द्वारा सामानांतर परिचालन के सिस्टम को पूरी तरह से पृथक कर परिसर से हटा नहीं दिया जाता तब तक अनुबन्ध के क्लॉज़-5 में संशोधन नहीं किया जा सकता ऐसी स्थिति में पूर्व में किया गया अनुबंध ही मान्य होगा।"

11(M) Another reminder was sent by the petitioner on 16.4.2008 asking for the similar relief as sought for in letter dated 12.3.2008. Respondent no.3 on 3.5.2008 sent a very vague letter that the "Parallel Operating System" has not been removed and has only been sealed and it is not possible for the officers of the Electricity Department to go and check, hence, there is possibility of usage of "Parallel Operating System". The relevant portion of the aforesaid letter is being reproduced below for ready reference:

''अधिशासी अभियंता ने सूचित किया है कि आपने सामानांतर परिचालन सिस्टम को परिसर से न हटाकर मात्र सील किया है। अधीक्षण अभियंता (वितरण) मथुरा द्वारा भी यह अवगत कराया गया है कि आपका सामानांतर परिचालन सिस्टम आपके परिसर में काफी अंदर होने के कारण एवं विद्युत् विभाग के अधिकारियों की वहाँ तक आसान पहुँच न होने के कारण सामानांतर परिचालन के सिस्टम के उपयोग होने की सम्भावना बनती है। अतएव जब तक सामानांतर परिचालन सिस्टम को पूरी तरह से परिसर से हटा नहीं दिया जाता तब तक अनुबंध के Clause संख्या-05 में संशोधन का औचित्य नहीं बनता है।"

It is argued that this letter was just an eye wash exercise and a feeble attempt to justify their inaction.

11(N) The petitioner again sent letter on 14.11.2008 requesting the respondents to sign the revised agreement and sought for refund/adjustment of paralleling charges, which has been wrongly realized from the refinery with effect from 14.1.2007 to 31.12.2007.

11(O) In response, DVVNL again sent a letter stating that unless and until the entire "Parallel Operating System" is not removed, till then there is no question of amending clause 5. The relevant portion of this communication dated 10.12.2008 is quoted hereinbelow:

"उपरोक्त विषय के अंतर्गत आपको अवगत कराना है कि जब तक सामानांतर परिचालन सिस्टम को पूरी तरह से परिसर से हटा नहीं दिया जाता तब तक अनुबंध के क्लॉज़ सं.-05 में संशोधन का औचित्य नहीं बनता है, जिसके बारे में इस कार्यालय के पत्रांक

सं-428 दिनांक 06.05.2006 के द्वारा भी अवगत कराया जा चुका है।"

11(P) Thereafter again on 3.1.2009, the petitioner sent another communication to the respondent asking them to scrap the paralleling clause from the 'Principal Agreement' but nothing was done by the DVVNL. Another representation was sent by the petitioner on 9.2.2009 for scrapping the paralleling clause from the agreement, however, as usual no action was taken by DVVNL. On 8.9.2009, the petitioner again requested DVVNL to discontinue the paralleling facility and said that if UPPCL is not satisfied with the compliance of its instructions by Mathura Refinery, then the petitioner is free to resort to clause 9 of the agreement. Again no action was taken on this representation. The petitioner again sent another similar representation dated 9.10.2009 to Chairman and M.D., UPPCL and sought for execution of fresh contract.

11(Q) On 9.1.2010, a meeting between officials of IOCL (petitioner) and UPPCL (respondent no.3) was held, wherein, UPPCL responded positively and assured that agreement will be revised and signed very soon deleting Clause 5 after constitution of a Committee by Managing Director, DVVNL.

11(R) When nothing happened, petitioner again sent a reminder on 10.2.2010 stating that as the issue of "Parallel Operating System" was pending for quite sometime, a Committee was constituted for amendment in the agreement, which has given finding that the petitioner has not completely removed the "Parallel Operating System" from its premises, which was not correct, so a new Committee should be constituted to inspect the same.

11(S) The petitioner again sent a letter on 8.11.2011 and requested respondent no.3 for refund of amount charged towards "Parallel Operating System" levied with effect from 1.4.2000 as they were unjustified to charge the same. On 15.2.2013, the petitioner again wrote to respondent no.3 asking them for modification of the 'Principal Agreement'. Thereafter, instead of carrying out the amendment in the 'Principal Agreement', on 19.2.2013, respondent no.3 sent demand notice asking the petitioner to deposit ₹21,12,29,268.00/- for "Parallel Operating System" for the period from January, 2008 to December, 2012. Even though the said demand was clearly barred by limitation and also barred by Clause 56(2) of the U.P. Electricity Supply Code, 2005.

11(T) The petitioner again sent letter on 16.4.2016 and asked for executing a new agreement and removing the paralleling clause. It was further stated that the paralleling charges are continuously being claimed by DVVNL. In spite of knowing that after removing the H.T. Cables the paralleling Operating was not being carried out, still they sent a bill of ₹48,89,95,968/-.

11(U) Yet again the petitioner wrote to DVVNL on 7.5.2016 pointing out that even though DVVNL authorities had satisfied themselves that "Parallel Operating System" was not in use and also had communicated for initiating actions for signing new agreement without paralleling charges clause. But, in spite of several communications/reminders, no action has been taken. The petitioner further requested respondent no.3 to look into the matter and to take call on the priority basis.

11(V) When respondent no.3 did not taken any action and continued billing for the paralleling charges, the petitioner once again sent a letter on 2.9.2016 pointing out all communications besides meetings held between the parties and

requested to put chronological events before M.D., DVVNL for expedite action and also for waiving off the paralleling charges. Thereafter, a meeting was held between the petitioner and respondent no.3 on 23.8.2018. The minutes of the meeting shows that the 11 KV power cable from Grid transformers for "Parallel Operating System" was disconnected and completely removed from generation bus-01 and 02, which were for providing paralleling for the refinery. All old panels of generation bus 1 and 2 have been removed due to obsoleteness.

11(W) It is submitted that the respondents instead of signing the agreement again sent a cryptic letter on 27.9.2018. The operative portion of this letter is reproduced hereunder:-

"उपरोक्त तथ्यों को संज्ञान में लेने से प्रतीत होता है कि वर्तमान प्रणाली में बिना किसी आवश्यक परिवर्तन के, पैरलिंग ऑपरेशन करना संभव नहीं होगा यदि रिफाइनरी प्रशासन इस प्रणाली मैं कोई परिवर्तन करता है तो उसकी सुचना दक्षिणांचल विद्युत वितरण निगम लिमिटेड को देनी होगी तथा सम्बंधित निगम अधिकारियों को स्थल का निरीक्षण कराने के उपरांत, सहमति मिलने पर ही पैरलिंग प्रणाली में आवश्यक परिवर्तन किया जाये।"

11(X) It is further submitted that ultimately, on 19.12.2018, after 11 years of great persuasion by the petitioner, a supplementary agreement was signed. Thereafter, the petitioner sent a letter on 18.1.2019 stating that respondent no.3 is charging as per monthly bill of December 2018, the total amount of ₹101.15 crore, out of which actual paralleling charges was ₹28.90 crore and had charged ₹72.25 crore towards surcharge. The petitioner prayed to stop claiming the outstanding paralleling charges. Again, a reminder was sent on 26.2.2019 asking respondent no.3 for redressal of paralleling charges claimed by them. On 5.3.2019, an office order was issued by the Managing Director, DVVNL, whereby, a high level Committee consisting of four Members was constituted for Reversal of Paralleling Charge Claim by the petitioner, which was to be headed by Director (Commerce), DVVNL. On 3.9.2019, the petitioner again wrote letter to respondent no.3 asking them to reverse the paralleling charges as the facility has not been provided from 2001. Again another reminder was sent by the petitioner on 13.1.2020, for the same.

11(Y) Respondent no.3 again sent a letter on 30.3.2020 stating that the petitioner has paid the parallel operating charges upto December 2007 but because of the dispute they have stopped paying the same. They further claimed ₹1,07,29,48,521.00/- as parallel operating charges along with interest for period from January 2008 to March, 2019.

12. Learned counsel for the petitioner submitted that after augmentation of the capacity of the captive power plant way back in the year 2001, the petitioner wrote to respondent no.3 for discontinuing the "Parallel Operating System". In spite of writing several letters, respondent no.3 did not discontinue the facility.

13. He submitted that the entire energy produced by the petitioner's Captive Power Plant was used by them. In 2002, the petitioner informed respondent no.3 that the petitioner was keeping the electrical system in isolated condition and requested to put an end to the "Parallel Operating System" and stop charging fees for the same and to delete Clause 5 of the 'Principal Agreement'. The petitioner had sent a number of reminders informing the Power Corporation that, they were running in islanding mode and do not require to operate the "Parallel Operating System". In spite of several communications and reminder, the Power Corporation did not

remove the parallel operating facility. On the contrary, it kept on charging minimum consumer guarantee. In spite of repeated reminders, the respondent did not take any decision or action and continued to take advantage of their own delay.

14. He has also placed reliance upon letter dated 28.9.2007, which states that the premises of the petitioner was inspected by the officers of DVVNL and it was found that grid incomer panel was disconnected from the refinery generation bus and the same was sealed and the refinery was not taking any facility of the "Parallel Operating System". Once the supply was disconnected by DVVNL it is not open for them to charge for minimum consumer guarantee or even ask for the same. The petitioner had throughout been writing to the respondents to disconnect the "Parallel Operating System" and to execute a fresh agreement deleting clause 5 from the 'Principal Agreement'. In spite of several requests, respondent had failed to discharge their obligation on one hand and on the other hand, they were charging petitioner an amount of ₹22,05,900/- per month. Therefore, it was submitted that it is a clear case where respondent no.3 is trying to take advantage of their own wrong.

15. Counsel for the petitioner further submitted that no opportunity of hearing was granted before issuing bills dated 1.10.2022 and 3.10.2022 along with disconnection notice. In the demand cum disconnection notice it is indicated that a six member team was constituted by respondent no.3 to investigate into the matter. However, no opportunity or information was given to the petitioner about the same. There was no adjudication of the amount claimed in the demand cum disconnection notice and the claim made was illegal, highly excessive and based on no evidence.

16. The levying of parallel Operating charges is provided in Clause 4.26(e) of the U.P. Electricity Supply Code, 2005, which is as follows:-

> *"4.26 (e) Where old agreements exist with the licensee, condition of paying parallel Operational charges shall prevail till the termination of the agreement.*"

17. Though Clause 4.26 of the U.P. Electricity Supply Code, 2005 provides for paying of parallel operating charges till the modification/termination of the 'Principal Agreement', but it does not give respondent no.3 the right to keep charging for an indefinite period, specially when the petitioner had requested them to withdraw the facility and amend the agreement. Respondent no.3 cannot take undue advantage of a provision of the Code, when they themselves have delayed in amending the agreement.

18. The concept of "Open access regime" for the first time was introduced in the Electricity Act, 2003, as per the specific industrial policy of the Central Government. Under this "Open access regime" the distribution companies and any other user have the freedom to buy electricity directly by electricity generating companies of their choice.

19. After amendment of 2003 Act, where "open access" has been introduced, the earlier agreement lost its sanctity and virtually became defunct. The term "open access" has been defined under Section 2(47) of the Act, 2003, which is quoted hereunder:-

" 'open access' means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission."

20. Learned counsel for the petitioner further stated that after disconnection, respondent no.3 had raised bill on 19.2.2013 for the period from January, 2008 to December, 2012 for an amount of ₹21,12,29,268/-. Thereafter, another bill-cum-disconnection notice was raised on 4.12.2020, and another bill of ₹1,07,52,56,496.47 was raised on 3.9.2022 wherein date of disconnection was mentioned as 31.9.2022. Thereafter, impugned demand notice dated 1.10.2022 was issued for ₹2,46,50,33,498.00(this included paralleling charges with interest) and immediately two days thereafter, on 3.10.2022, yet another notice was issued for ₹2,51,64,15,916.21(this included paralleling charges with interest).

21. Counsel for the petitioner further submitted that the amount claimed through demand notice dated 1.10.2022 and 3.10.2022 cannot be recovered from the petitioner in terms of Section 56(2) of the Electricity Act, 2003 as the period of two years from the date when such sum became first due has lapsed. The sum has also not been shown as charges for electricity supply and as such the amount is not recoverable.

22. The relevant provisions of Section 56(2) of the Electricity Act, 2003 is quoted hereinbelow:-

"Section 56(2). *Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable* ***after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied*** *and the licensee shall not cut off the supply of the electricity."*

(Emphasis Supplied)

23. The word "Sum Due" in sub clause (2) to the proviso to section 56 of the Act 2003 means amount already adjudicated between the parties. In the present case there is no adjudication of any amount. In this case, after 2008 there is nothing on record to show that respondent no.3 had been raising bill and as such, they cannot recover the amount after period of two years from the date when such sum became first due. In this case, it cannot be said that the sum has become due for the simple reason that respondent no.3 themselves have disconnected the cables, which resulted in discontinuance of service with effect from September, 2007. Any demand raised thereafter is clearly barred by the provisions of Section 56(2) of the Electricity Act, 2003.

24. Learned counsel for the petitioner submitted that they were not availing the "Parallel Operating System" since 2001. After the disconnection of supply on 28.9.2007(which was acknowledged by respondent no.3 vide letter dated 31.12.2007) the payment towards the paralleling charges was made till December, 2007 and thereafter it was stopped from January 2008 after completion of due process of approval for deletion of paralleling clause as per the

directives of UPPCL. Further, request was made for executing a fresh agreement, as per the approval.

25. Learned counsel for the petitioner submitted that the petitioner corporation has repeatedly requested the respondent corporation to delete clause 5 of the 'Principal Agreement' and refund of parallel charges which were paid from 2001 to 2007. He further submitted that the petitioner corporation since 2001 had been raising this issue before the respondent corporation, and it took almost 7 years for the respondent corporation to disconnect the facility which was not being used by the petitioner since 2001, and it took another 10 years by them to amend the 'Principal Agreement' and respondent no.3 could not show any valid reason for this inordinate delay in doing it. He further submitted that respondent no.3 cannot charge for a service ("Parallel Operating System"), which was already disconnected with effect from September, 2007.

26. Respondent no.3 cannot be allowed to take advantage of its own procrastination. He further submitted that captive consumers have no obligation to pay any additional surcharge under Section 42(4) even if they are not receiving electricity from the distribution company. He further submitted that levy of additional charge under any name on the captive consumer would be discriminatory. Unequals cannot be treated equally.

27. Learned counsel for the petitioner further submitted that the provisions of Section 42 and Section 9 of Electricity Act, 2003 makes it clear in case of open access, a person who established the captive generating plant for carrying the electricity, no surcharge would be leviable on him. Counsel for the petitioner cited judgment of Hon'ble Supreme Court in the matter of **Maharashtra State Electricity Distribution Company Ltd. vs. JSW Steel Limited and others1** in which Hon'ble Supreme Court has held that captive consumers do not have an obligation to pay additional surcharge under Section 42(4) of the Electricity Act, even if they are not receiving electricity from the distribution licensee. The Court has further distinguished the rights of captive consumer from ordinary consumer. The Court further held that levy of additional surcharge of captive consumer would be discriminatory.

28. Counsel for the petitioner has further relied on a judgment passed by Constitution Bench of **Hon'ble Supreme Court in the matter of PTC India Ltd. vs. Central Electricity Regulatory Commission2** wherein Hon'ble Supreme Court has held that the statutory provisions and regulation, as a part of regulatory frame work, intervenes and even overrides the existing contracts between the regulated entities, since this provision do cast a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.

ARGUMENT OF THE RESPONDENTS

Per contra, Sri M.C. Chaturvedi, Additional Advocate General assisted by Sri Alok Mishra, appeared on behalf of respondent no.3 and made the following arguments.

29. Firstly, he submitted that the "Parallel Operating with the Supply System of Licensee" is envisaged under clause 4.26 of the U.P. Electricity Supply Code, 2005,

which lays down that where old agreement exists with the licensee for paying parallel Operating charges, the same will prevail till the termination of the agreement. Since, in this case the agreement was terminated on 30.11.2018, hence, the petitioner is liable to pay the parallel Operating charges till that date.

30. He further contended that Clause 4.26 of the U.P. Electricity Supply Code, 2005 read with Clause 5 of the 'Principal Agreement' made it clear that during continuance of this agreement, the petitioner would have to pay every month of charge @ 10% of the Minimum Consumer Guarantee per KVA, which was subject to revision from time to time, which works out to ₹22,05,900/- per month at the current rate.

31. He further contended that as per clause 5 of the 'Principal Agreement' in the event of non-payment or delayed payment of aforesaid charge by the due date specified in the bill, the consumer shall be liable to pay 'Additional Charge' as provided in rate schedule Clause 8(b), without prejudice to the right of the supplier to discontinue the parallel Operating. The 'Principal Agreement' was rescinded by a supplementary agreement on 30.11.2018. That means the petitioner was bound to pay the Minimum Consumer Guarantee, which was ₹22,05,900/- per month. The demand raised by respondents vide demand letters dated 1.10.2022 and 3,10,2022 is perfectly justified and is in accordance with the provisions of Clause 4.26(e) of the U.P. Electricity Supply Code, 2005.

32. He further submitted that the petitioner has paid the Minimum Consumer Guarantee till December 2007. However, from January 2008 to 30.11.2018 (till the 'Principal Agreement' was rescinded) the petitioner is liable to pay Minimum Consumer Guarantee charge of ₹22,05,900/- per month along with late payment charges. The demand notice sent was as per the provisions of Clause 4.26 of the U.P. Electricity Supply Code, 2005.

33. The provisions of Section 56(2) of the Electricity Act, 2003 will not be applicable as the demand notice was outcome of an agreement executed between the petitioner and respondent no.3 for the payment of minimum consumer guarantee. The liability and demand against the petitioner is an outcome of the continuity of the provisions of clause 5 of the 'Principal Agreement' rather the continuity or discontinuity of the "Parallel Operating System".

34. In the supplementary counter affidavit, respondent nos.3 and 4 have stated that the petitioners have agreed that since January, 2008, regular electricity bills had been sent to them and same was agreed in communications of the petitioner dated 9.10.2009, 15.10.2009, 27.1.2011, 18.2.2013, 19.2.2013, 16.2.2015 and 7.5.2016. It was further submitted that bills from 2008 to 2018 have been sent to the petitioner every month where the parallel operating charges were charged. It was further submitted that in the bill of August, 2018, the petitioner had paid only ₹29,44,982/- but defaulted to make payment of ₹22,05,900/-, which was towards parallel Operating charges. Since the bill had been raised, so the petitioner cannot get benefit of Clause 56 (2) of the U.P. Electricity Supply Code, 2005.

ANALYSIS, REASONING & CONCLUSION

35. We have carefully considered the submissions advanced by learned counsel for the respective parties. With the able assistance, we have perused the pleadings, grounds taken in the petition, affidavits and annexures thereto and the reply filed by concerned parties.

HISTORY OF ELECTRICITY ENACTMENT:-

36. The law in the field of Electricity, came to be developed by the following enactments:-

(a) The Indian Electricity Act, 1910-The Indian Electricity Act, 1910 created the basic framework for electric supply industry in India which was then in its infancy. This Act envisaged growth of the electricity industry to private licensees.

(b) The Electricity (Supply) Act, 1948- The Electricity (Supply) Act, 1948 mandated the creation of State Electricity Board to address the issues of tariffs and to provide for distancing of the Government from determination of tariffs.

(c) The Electricity Regulatory Commissions Act, 1998-The Electricity Regulatory Commissions Act, 1998 has been framed. For encouraging private sector participation in generation, transmission and distribution, the need for harmonizing and rationalizing, the provisions in Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948.

(d) U.P. Electricity Reforms Act, 1999, under this Act, U.P. Electricity Regulatory Commissions was assigned with function to regulate the distribution, supply, utilization of electricity, issue licenses to regulate the working of licensees and to set the standard of services for the consumer as well as standards for the electricity industry in the State.

(e)Electricity Act, 2003-In this a new Act has been framed by the Parliament which is 'Electricity Act, 2003'. It was made applicable on 9th June 2003, as a self-contained comprehensive legislation, which replaced the existing legislations while preserving their core feature.

(f) In accordance with Section 50 of the Electricity Act, 2003, the U.P. Electricity Supply code, 2005 was notified with effect from 14.9.2006.

ANALYSIS

37. After hearing the parties, we feel that the issues which need to be adjudicated upon are as follows:-

(I) Whether the petitioner is bound to pay the minimum guarantee charges for "Parallel Operating System" as per Clause 4.26 of the U.P. Electricity Supply Code, 2005 read with Clause 5 of the 'Principal Agreement'?

(II) Whether respondent no.3 can continue charging for a service which was discontinued by them with effect from September, 2007?

(III) Whether a Company/Corporation can keep on charging for a facility, which is no longer needed by the consumer, specially after the consumer had specifically asked the Company to stop/discontinue the facility?

(IV) Whether respondent no.3 can take advantage of their own procrastination and continue charging fees while not amending the agreement which the petitioner had continuously been asking for?

38. As far as payment of minimum guarantee charges for "Parallel Operating System" as per Clause 4.26 of the U.P. Electricity Supply Code, 2005 read with

Clause 5 of the 'Principal Agreement' is concerned, we have to first deal with Clause 4.26 of the Code, 2005, which makes it clear that wherever there is an agreement existing prior to when the Code was introduced, for payment for parallel Operating charges, the same will prevail till the termination of the agreement.

39. The levy of parallel Operating charges and tariff are governed by respective State Electricity Regulatory Commissions formed under the Electricity Act, 2003. Section 50 of Electricity Act, 2003 provides for empowering commissions to specify the code for electricity charges. Accordingly, U.P. Electricity Supply Code, 2005 was brought in force containing the provisions with regard to the Parallel Operating Charges. Clause 4.26 is quoted hereinbelow:-

"4.26 Parallel Operating with the Supply System of Licensee

(a) In case a consumer desirous to operate his generating equipment in parallel with the grid, the consumer shall arrange his installation to protect it from disturbances in the Licensees system.

(b) The Licensee shall not be liable for any damage caused to the consumer's plant, machinery and apparatus on account of such parallel Operating, or any adverse consequence arising thereof.

(c) For parallel Operating with the grid, the consumer shall have to follow the provisions of the UP Electricity Grid Code and other relevant regulations and shall pay synchronizing charges as approved by the Commission.

(d) The actual Operatings shall be carried out in coordination with the STU and the Licensee.

(e) ***Where old agreements exist with the licensee, condition of paying parallel Operatingal charges shall prevail till the termination of the agreement."***

(Emphasis Supplied)

40. The plain reading of Clause 4.26 of the U.P. Electricity Supply Code, 2005 read with Clause 5 of the 'Principal Agreement' makes it abundantly clear that during the subsistence of the 'Principal Agreement', the petitioner was under an obligation to pay minimum guarantee charges and as per Clause 8(b) of the 'Principal Agreement', has to pay additional charges until the agreement prevails. But here the petitioner sought for the amendment of the Agreement in 2001, but this request was kept pending for 17 years by respondent no.3. Since, the entire delay was on part of respondent no.3, hence, the benefit of Clause 4.26(d) of the Electricity Supply Code, 2005 and Clause 8(b) of the agreement cannot be granted to respondent no.3. However, this is a clear case where respondent no.3 is trying to take advantage of their own delay. The petitioner had been writing to respondent no.3 since 2001 to discontinue the facility provided by respondent no.3 as they were not using the same and to amend the 'Principal Agreement', but respondent no.3 chose not to do the same. It is not open for respondent no.3 to hide their inaction/inefficiency, under the cover of Clause 4.26 of U.P. Electricity Supply Code, 2005, though Clause 4.26 clearly states that the licensee has to pay for the Parallel Operating Charges till the agreement is terminated. Here, in spite of several reminders, respondent no.3 never terminated or amended the agreement, hence, they will not be allowed to take advantage of their own default, or delay in

taking a decision and amending the 'Principal Agreement'.

41. Now, the issue is whether respondent no.3 can charge for the services for the period when the services were discontinued but the agreement was not modified.

42. Since, the respondent was not providing any service but at the same time not modifying the agreement, they should not be given advantage of their own delay, and allow them to make a profit of their own default.

43. Evidently, the communications of respondent no.3 themselves make it clear that HT cable was disconnected by them, which means that the Parallel Operating Services were no longer provided to the petitioner. Hence, it is not open for respondent no.3 to charge the petitioner for services which evidently is not being provided to them.

44. Now the issue as to whether the Company can charge for a facility which is no longer needed by the consumer and the consumer had been requesting the Company to stop/discontinue the facility.

45. The bill issued on 4.12.2020 was for ₹1,07,29,48,521.47, thereafter on on 1.10.2022 the same became ₹2,46,50,33,498/- which was again amended on 3.10.2022 and raised to ₹2,51,43,34,167.96. There is no rationale behind such escalation. Hence, we come to the conclusion that respondent no.3 ought to have disconnected this facility as soon as the petitioner has asked for. Then after a delay of 6 years, once respondent no.3 got up from slumber, disconnected the facility which reflects from their letter dated 28.9.2007, it is not open for respondent no.3 to charge for the facilities which they had disconnected in September, 2007.

46. Very often it is seen that a Company, who had entered into an agreement to provide a facility, in spite of the consumer requesting them to stop the facility, they continue with the service/facility and keeps on charging its consumer, under the mask that there is an agreement, and they purposely delay in cancelling the agreement and continue billing and charging the consumer and make profit from their own inaction.

47. However, the petitioner had continued to pay the minimum guarantee charges for few months even after disconnection of the cables without any demur, hence, it is not open for them too to ask for refund of the fees already paid. However, it is also not open for respondent no.3 to charge for Parallel Operating facility for the period from January 2008 to 30.11.2018.

48. Now the issue is whether respondent no.3 can take advantage of their own default/delay in amending the agreement.

49. Before adverting to the issues, we find it appropriate to the share the saying, which is apt in this case and reads as follows:-

"If you choose to not deal with an issue, then you give up the right of control over the issues and it will select a part of least resistance.

-Susan Del Gatto"

50. Apparently, it is a clear case where respondent no.3 is trying to take advantage of its dominant position and is trying to take undue advantage of Clause 4.26(e) of the Electricity Supply Code, 2005 and Clause 8(b) of the 'Principal Agreement'. Though the ground reality was they knowingly chose not to carry out the amendment in the 'Principal Agreement', so that they can keep billing the petitioner.

51. Hon'ble Supreme Court in the matter of **M.K. Shah Engineers and Contractors vs. State of M.P.3** has held that no one could be permitted to take advantage of one's own wrong. This case is squarely covered with the doctrine of *"commodum ex injuria sua nemo habere debet"* which explains no party can derive benefits of its own wrong. The Court held as under:-

"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."***

52. It has been held that if one party delays, procrastinates or not take a decision, it will be deemed that the procedural prerequisites are waived. Hence, the respondent no.3(DVVNL) cannot take any advantage of its own default and the prerequisite procedural of amending the agreement (which was amended later on) should be deemed to have been waived off, within a reasonable time from the date when the petitioner asked for the amendment of agreement and discontinuance of the service which the respondent was providing.

53. In **Mrutunjay Pani v. Narmada Bala Sasmal, AIR 1961 SC 1353**, 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."**

54. Hon'ble Supreme Court in the matter of **Kusheshwar Prasad Singh vs. State of Bihar and others4** 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 ***default 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.*

XXXX

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."

55. In the matter of **The Chairman, State Bank of India and another vs. M.J. James5** Hon'ble Supreme Court has held as follows:-

"……..It is, therefore, necessary for the court to consciously examine whether a ***party has chosen to sit over the matter and has woken up to gain any advantage and benefit,*** *which aspects have been noticed in* ***Dehri Rohtas Light Railway Co. Ltd. vs. District Board, Bhojpur6 and State of Maharshtra v. Digambar7.*** *These facets, when proven, must be factored and balanced, even when there is delay and laches on the part of the authorities. These have bearing on grant and withholding of relief. Therefore, we have factored in the aspect of prejudice to the appellants in view of the relief granted in the impugned judgment."*

56. 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."

57. Hon'ble Supreme Court in the matter of **Nirmala Anand vs. Advent Corporation (Pvt.) Ltd. And others8** has held that the respondents cannot take advantage of their own wrong and that would amount to unfair advantage.

58. Hon'ble Supreme Court in catena of judgments starting right from **Mrutunjay Pani v. Narmada Bala Sasmal, Dehri Rohtas Light Railway Co. Ltd. v. District Board, Bhojpur, Kusheshwar Prasad Singh v. State of Bihar and others, The Chairman, State Bank of India and another v. M.J. James** 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. In this case, respondent no.3 has taken 7 years to take a decision and to disconnect the "Parallel Operating System" provided to the petitioner and took 10 years thereafter to amend the 'Principal Agreement'. In spite of the fact that the petitioner kept on requesting respondent no.3 to amend it. Respondent no.3 under no stretch of imagination can be permitted to take undue advantage of their own default.

Hence, it will not be open for respondent no.3 to bill the petitioner for the facilities, which were disconnected with effect from 28.9.2007 and they cannot ask for further payments till the agreement was amended. In fact, the delay in amending the agreement was solely attributable to respondent no.3.

59. The instant case is squarely covered with the ratio of the above judgment. In this case petitioner was continuously asking respondent no.3 to amend the contract as it was not using the facility, and respondent no.3 took 17 long years to amend the contract. Hence, it will not be open for respondent no.3 to bill the petitioner for the delay which is attributable to them.

60. Apparently, in this case the respondents agreed that the facilities of "Parallel Operating System" has been disconnected with effect from 28.9.2007, hence, there is no question of raising any bills. Even the delay of 10 years, thereafter, in execution of the supplementary agreement, which was admittedly after much persuasion of the petitioner on 30.11.2018, cannot be attributed to the petitioner. It is clear that with effect from 28.9.2007 the facilities have been disconnected, so any demand raised for the period, thereafter, is incorrect and hereby set aside. Further any demand raised for providing services of "Parallel Operating System" and any interest charged on it is incorrect and illegal and hence, the same is also set aside.

61. Record also reflects that even though time to time bills were raised by UPPCL even though they were fully aware and conscious of the fact that the "Parallel Operating System" was not being utilized and except raising the bills they have not made any sincere efforts to realize the outstanding bills as per the provisions of the Act. In such a situation, Section 52 would also be attracted, wherein, specific limitation is provided. We notice that usually, in case, consumer makes a default of payment of bills, the Electricity Department not only disconnects the supply but also takes recourse to realize the amount. On this score, the entire record is silent. The respondent Corporation (i.e. UPPCL) has not brought anything on record to indicate that they have taken any recourse to effectively realize the outstanding demand. Therefore, we can safely say that in case law of acquiescence is attracted against the petitioner to challenge the alleged bill but at the same time the law of acquiescence will also be attracted against the respondent Corporation, which except silently raising the bills had not made any sincere efforts to effectively realize the outstanding amount.

62. Admittedly, during the disputed period the respondent-Corporation had never come across with any concrete evidence that the petitioner had infact utilized the "Parallel Operating System".

63. In such eventuality, even though UPPCL is armed with all statutory backing to realize the outstanding bills, they had not realised the amount either through recovery citation or approached the competent forum/Court for realisation of the disputed bills.

64. However, since the petitioner had paid charges for the parallel operating facility till 2007, without any demur so they cannot ask for its refund. However, the bill raised for the period from January 2008 to 30.11.2018 is incorrect. Evidently, the

cable was disconnected by respondent no.3 and no service was provided, so there is no question of raising any charges for this period. They cannot keep charging for 10 years on the ground that the agreement was not amended and specially when the delay of these 10 years was totally attributable to respondent no.3.

65. Accordingly, the demand notice dated 1.10.2022 and the bill dated 3.10.2022 are quashed.

66. With the aforesaid observations, the writ petition stands **allowed.**

(2024) 2 ILRA 496
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2024
BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ C No. 31629 of 2021
connected with
Writ C No. 11173 of 2022

M/s M.K. Fuel Centre, IOCL Retail Outlet Parwati Bangla Road, Kanpur ...Petitioner
Versus
Indian Oil Corporation Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Krishna Dev Vyas, Sri Namit Srivastava

Counsel for the Respondents:
Ms. Archana Singh

Civil Law - Constitution of India,1950-Article 226-Termination of dealership-IOCL terminated the dealership of M.K. Fuel based on alleged violations of Marketing Discipline Guidelines(MDG) and terms of the dealership agreement-a show cause notice was issued months after the inspection alleging tampering with dispensing units-The termination violated the procedural norms, including delay in issuing the show cause notice beyond 30 days as required under MDG Clause 8.5.6-Held the court observed that the show cause notice was issued after an unexplained delay violating the MDG guidelines-The petitioner was not given personal hearing which undermines the fairness of the termination process-No substantial evidence of tampering or manipulation of fuel delivery was presented-The inspection reports contradicted the termination grounds-The dealership agreement alone cannot override the procedural safeguards in MDG-Hence, the court set aside the termination order-The respondents were directed to restore the dealership.(Para 1 to 37)

The writ petitions are allowed. .(E-6)

List of cases cited:

1. M/s Chaudhary Filling Point, Kazipur Vs St. of UP & ors.. Misc. Bench No. 27043 of 2018

2. M/s Kamal Kant Automobiles & anr. Vs St. of UP & ors.. Writ C No. 25127 of 2018

3. Delhi Development Authority Vs Durga Chand Kaushish(1973) 2 SCC 825

4. Hindustan Petroleum Corp. Ltd & ors.. Vs Super Highway Services & anr. (2010)3 SCC 321

5. M/s Shree Rajendra Agro Service Centre Vs IOCL & Others S.B. CMWP No. 4160 of 2023

6. D.K. Yadav Vs J.M.A. Industries Ltd(1993) 3 SCC 259

7. Mahamaya Service Centre Vs Indian Oil Corporation Ltd. & ors.. Writ C No. 1668 of 2009

8. M/s. Hindustan Petroleum Corpn. Ltd. & ors.. Vs Super Highway Services & anr. (2010) 3 SCC 321

9. Bharat Petroleum Corp. Ltd Vs Jagannath & Co. & ors.. (2013) 12 SCC 278

10. Allied Motors Ltd Vs Bharat Petroleum Corpn. Ltd.(2012) 2 SCC 1

11. Indian Oil Corpn. Ltd & ors.. Vs M/s R.M. Service Centre & anr.. Civil Appeal No. 8257 of 2019

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard Shri Krishna Dev Vyas, learned counsel for the petitioner; Ms. Archana Singh, learned counsel for Indian Oil Corporation Ltd. and Shri O.P. Singh, learned Senior Advocate assisted by Shri Indrajeet Singh, learned counsel for respondent no.6.

2. In leading Writ C No.31629 of 2021, the petitioner has sought the following reliefs:-

"I. Issue a writ, order or direction in the nature of certiorari, or appropriate writ for setting aside the impugned Show Cause Notice dated 04.01.2021 issued by the Respondent no. 4 (Annexure No.-9 to the writ petition) and quashing the proceedings initiated vide the impugned notice dated 04.01.2021;

II. Issue a writ, order or direction in the nature of certiorari, or appropriate writ for setting aside the impugned Order dated 15.11.2021 issued by the respondent no. 2 (Annexure No.-15 to the writ petition);

III. Issue a writ order or direction in the nature of mandamus commanding and directing the respondents not to take any coercive steps against the petitioner pursuant to the impugned order dated 15.11.2021;

IV. Issue a writ order or direction in the nature of mandamus commanding and directing the respondents and their agents to restore the dealership agreement dated 10.03.2004 and to forthwith restore the supply of the diesel and petrol to the petrol pump of the Petitioner."

3. In the connected Writ C No.11173 of 2012 the petitioner has prayed for quashing the appointment letter dated 15.01.2022 issued by the respondent no.3 and the notice/letter dated 26.03.2022 issued by the respondent no.3 for taking over the petrol pump from the petitioner. Further prayer is made to issue direction in the nature of mandamus commanding the respondents to handover the possession of the petrol pump to the petitioner.

4. Both writ petitions arise out of similar set of facts and seek to raise challenge to termination order dated 15.11.2021. Accordingly, with the consent of the parties, the petitions have been heard together and are being disposed of by means of a common order.

5. Brief background of the case, as reflected from the record, is that M/s M.K. Fuel Centre (petitioner) is a partnership firm and a retail outlet of Indian Oil Corporation Limited1. A dealership agreement was executed between the petitioner and IOCL on 10.03.2004 and the petitioner continued to operate the petrol pump for last 17 years without any complaint. The Marketing Discipline Guidelines, 20122 have been issued by the Government of India w.e.f. 08.01.2013 and are applicable to all Public Sector Oil Marketing Companies and are required to be strictly followed, before any action of suspension or termination of dealership is resorted to. The marketing guidelines also provide a detailed procedure for checking irregularities at retail outlets.

6. On 11.06.2020 a routine annual inspection was done by the team of Weight and Measurement (W&M) department for annual calibration and stamping of all the dispensing units and no irregularity, discrepancy or any tampering was reported in any of the Dispensing Units (DUs). Another inspection was held on 10.07.2020 by the Sales Inspection Team, which also found no discrepancies. The retail outlet was working as per the normal standards. Again on 14.07.2020, an inspection was carried out by the Sales Officer, Kanpur-II RSA and an inspection and analysis report was prepared, wherein no discrepancy was found in the stock. All seals were found intact and there was no variation in the dispensing units. Since certain errors had occurred in one of the Dispensing Unit, as such again on 16.07.2020, a joint inspection was carried out by a team constituted by the Chief Divisional Retail Sales Manager in the presence of the dealers and the Inspectors from the Weight and Measurement Department, wherein no discrepancy was found in any of the Dispensing Units. The W&M seal and the totalizer seal of the pump were found intact and the delivery from the pump was also found to be correct. In the inspection analysis report, it was reported that no extra fittings were found during the inspection and there was need of upgrading the software.

7. On some suspicion and automation error reports, seals of the aforenoted dispensing unit were broken by the respondents and the CPU card was sent to the Gilbarco Veeder-Root India3 for testing and analysis on the errors. Thereafter, the controller card was sent seeking authentication and reports over the E9 and E28 errors found in the DU Log. The concerned dispensing unit was sealed and the sales from the said dispensing unit were suspended. The respondent no.4 had issued a letter on 23.9.2020 to witness the process of opening the sealed parcel of control card of GVR-DU and the dealers duly attended the video conferencing held on 20.9.2020. Thereafter the impugned show cause notice was issued to the petitioner on 04.01.2021 for termination of the retail outlet dealership and calling for an explanation within 15 days, alleging violation of clause 5.1.4 read with clause 8.2(iv) of the Marketing Discipline Guidelines-2013. The petitioner submitted a detailed reply on 19.01.2021 denying the allegations made in the show cause notice for using any external device by removing E-cal cable connection so as to manipulate the delivery.

8. After six months, the petitioner received a letter dated 14.07.2021 from the Corporation for personal hearing on 15.7.2021 and one of the partner of the petitioner firm attended the same but the hearing was adjourned on the said date. A letter was again issued by the respondent Corporation on 05.10.2021 informing the date and time of the next hearing through video conference on 06.10.2021 at 11.30 hrs. A reply/objection dated 05.10.2021 was filed by the petitioner on 06.10.2021 reiterating the earlier reply and specific objection was taken with regard to the procedural impropriety in issuing the show cause notice and the vague report submitted by the (OEM) GVR on the basis of which the Chief Divisional Retail Sales Manager, Kanpur Divisional Office, Kanpur (respondent no.4) had formed reason to believe that the dispensing unit was deliberately tampered for manipulating the delivery. After receiving the letter dated 05.10.2021, the petitioner came to know about the termination proceedings as per Clause 8.6 of the MDG. Immediately, the

petitioner filed a Writ Petition bearing Writ C No.30089 of 2021 challenging the show cause notice dated 04.01.2021. After filing the said writ petition, the petitioner firm was served with the impugned termination order dated 15.11.2021 on 16.11.2021. Since certain subsequent events had taken place after filing the said writ petition, the writ petition was dismissed as withdrawn with liberty to the petitioner to file a fresh petition with better particulars on 23.11.2021. Thereafter, the petitioner had filed leading writ petition challenging the order of termination, which was heard on the ground of maintainability on 07.01.2022 and the matter was reserved for orders. A detailed order was passed by this Court on 16.02.2022 admitting the writ petition to be maintainable and for exchange of pleadings. The order dated 16.02.2022 is reproduced hereunder:-

"A preliminary objection has been raised by counsel for the respondents regarding the maintainability of the writ petition. It has been submitted that challenge to a show cause notice is not tenable. In any case consequent to the show cause notice and after hearing the petitioner, the dealership of the petitioner has been terminated.

Against the order of termination, an appeal lies which alternative remedy the petitioner has not availed.

It is also submitted that under the dealership contract, there is a arbitration clause, which also can be invoked by the petitioner. On account of the aforesaid, the writ petition is liable to be dismissed as not maintainable. She has relied upon the judgement dated 20.11.2017 in Writ - C No. 46927 of 2015, M/s Pravin Automobiles Vs. Indian Oil Corporation & Others and Judgement Dated 25.02.2015 in Writ - C No. 64114 of 2014, M/s Harish Filling Station Vs. Union of India & Others in support of her objection.

The show cause notice dated 04.01.2021 has been issued by the respondent no. 4 and the petitioner prays for quashing of this show cause notice and also the proceedings drawn in consequence thereof including the termination of the dealership on the ground that there was clear cut violation of the clauses 8.5.6 and 8.5.8 of the Marketing Discipline Guidelines. The afore-noted clauses of the marketing discipline guidelines read as follows:-

"8.5.6 In respect of all cases of irregularities, a show cause notice, within 30 days from the date of inspection will be issued to the dealer indicating all the irregularities. However, in case samples of MS/HSD were drawn during inspection then the show cause notice will be issued within 30 days of test results. The show cause notice should be issued along with all reports and other documents, etc. which forms the basis of the notice.

8.5.8 Upon receipt of the reply to the show cause notice, the authorized officer of the OMC will review the charges leveled and the reply received and pass a speaking order preferably within a period of 45 days from the receipt of the reply. The speaking order shall indicate complete details of the irregularities committed, the reply of the dealer and detailed reasons as to why the reply is acceptable / not acceptable to the official."

The relevant facts which are the basis of the argument raised by Shri Anurag Khanna are as follows:-

The petitioner is a partnership firm and a retail outlet of Indian Oil Corporation. A dealership agreement was executed between the petitioner and Indian Oil Corporation on 10.03.2004 and the petitioner continued to operate without any

complaint. The Marketing Discipline Guidelines, 2012 have been issued by the Government of India w.e.f. 08.01.2013 and are applicable to all public sector oil marketing companies and are required to be strictly followed, before any action of suspension or termination of dealership is resorted to. The marketing guidelines also provide a detailed procedure for checking irregularities at retail outlets.

It is also stated that a routine annual inspection was held on 10.06.2020 by the Weight and Measurement Department and no irregularities, discrepancies or tampering were reported after inspection.

Another inspection was held on 10.07.2020 by the Sales Inspection Team, which also found no discrepancies.

Again on 14.07.2020, an inspection was carried out by the fifth respondent and an inspection and analysis report was prepared. No discrepancy was found in the stock. The various seals were found intact and there was no variation in the dispensing units.

Again on 16.07.2020, a joint inspection was carried out by a team constituted by the fourth respondent in the presence of the dealer and an Inspector from the Weight and Measurement Department. The petitioner received a letter dated 16.07.2020 pointing out certain errors as per the DU Log in one dispensing unit.

It appears that on some suspicion and with the permission of the Inspector, seals of the afore-noted dispensing unit were broken and the CPU and DU were taken out. Thereafter, the controller card was sent seeking authentication and reports over the E9 and E28 errors found in the DU Log. On 04.01.2021 a show cause notice was issued to the petitioner for termination of the retail outlet calling for an explanation within 15 days alleging violation of clause 5.1.4 read with clause 8.2(iv) of the Marketing Discipline Guidelines. The subsequent facts alleged in the writ petition are not relevant for deciding the question of maintainability of this writ petition and are therefore not being alluded to.

The contention of Shri Anurag Khanna, is that in case of an irregularity being discovered by the respondents, they were required to issue a show cause notice within 30 days. This has not been done. The inspection was made on 16.07.2020 while a notice has been issued on 04.01.2021 well after the period of 30 days had elapsed. Even the lab report from the original equipment manufacturer of the controller card was received by the respondents on 19.11.2020. Even if the limitation of 30 days is to be calculated from this date, there is clear violation of the Marketing Discipline Guidelines, which provide that the show cause notice has to be issued within 30 days.

Prima-facie we find that the submission of learned counsel for the petitioner has substance. The show cause notice dated 04.01.2021 has not been issued within the time specified therefor under clause 8.5.6.

Under the circumstances, it is difficult to hold that the petition is not maintainable inasmuch as the respondents have failed to follow the statutory guidelines issued by the Union of India having failed to proceed within the time prescribed. This is so especially in view of the decision of this Court in Writ - C No. 25127 of 2018, M/s Kamal Kant Authorities & Another Vs. Hindustan Petroleum Corporation Ltd. & Others, wherein it has been held that a writ petition is maintainable as relief for restoration of dealership can be granted by the writ court and not by the arbitrator or the civil court.

It would be relevant to note that in M/s Kamal Kant (supra), it was also found that there was non-compliance of the Marketing Discipline Guidelines and the dealership was restored relying upon the decision of the Apex Court in Allied Motors Ltd. Vs. Bharat Petroleum Ltd. (2012) 2 SCC 1. The objection of counsel for the respondents is therefore, rejected, even though it has been submitted by counsel for the respondents that a show cause notice had been issued within days of the inspection in July, 2020. This plea is unacceptable as this alleged show cause notice does not mention the reasons on which the dealership has been terminated.

Accordingly, the writ petition is held to be maintainable.

The respondents may file a counter affidavit within three weeks. Petitioner will have a week thereafter to file rejoinder affidavit.

List this petition for admission/final disposal on the expiry of the aforesaid period."

9. The impugned notice/letter was received on the email ID of the petitioner firm on 26.03.2022 at 5:32 am for taking over and handing over of the retail outlet and immediately the possession of the petrol pump was taken over by the respondent authorities on the same day at 7 am. Consequently, the respondent no.3 vide letter dated 15.01.2022 appointed the respondent no.6 as an Adhoc Dealer for selling and handling petroleum products of the Corporation on temporary basis, subject to the outcome of Writ C No.30089 of 2021 filed by the petitioner, which was already dismissed as withdrawn on 23.11.2021. Thereafter, the petitioner was constrained to file the connected Writ C No.11173 of 2022 challenging the adhoc appointment letter dated 15.01.2022 as well as the notice dated 26.03.2022.

ARGUMENTS OF THE PETITIONER

10. Sri Krishna Dev Vyas, learned counsel for the petitioner while pressing the reliefs sought in the writ petitions submitted that the IOCL granted the retail outlet of petroleum products to the petitioner on 10.03.2004. The joint inspection was made at the retail outlet on 16.07.2020 and the inspection report was prepared, wherein it was reported that all the dispensing units were in working condition Subsequently, the show-cause notice dated 04.1.2021 was issued to the petitioner to which the petitioner submitted reply on 19.1.2021 denying the allegations made in the show cause notice. Finally, the Corporation had terminated the dealership of the petitioner on 15.11.2021.

11. Learned counsel for the petitioner submitted that the objection with regard to the procedural impropriety in issuing the show cause notice was duly taken by the petitioner in its reply dated 19.01.2021. At the time of inspection, testing of all the dispensing units were done and the same were found to be correct. There was no short delivery in supply and no stock variation was found. All the weight and measurement seals were found intact and no tampering, whatsoever, was found. In case of an irregularity being discovered by the respondents, they were required to issue a show cause notice within 30 days. The inspection was made on 16.07.2020, while a notice was issued on 04.01.2021, much after the period of 30 days. There was clear violation of the MDG, which provides that the show cause notice has to be issued within 30 days.

12. It was next submitted that the petitioner had not received any speaking order as per Clause 8.5.8 after filing reply dated 19.01.2021 in response to the show cause notice and thus, the respondents have exceeded its authority by issuing notices under Clause 8.6 of the MDG and finally passing of the termination order. As per Clause 8.6 of the MDG, in case of critical irregularities leading to termination, the Head of the State Office/Regional Office/Zonal Office of the concerned OMC or their nominee before recommending/approving the termination of dealership will provide a personal hearing to the signatories of the dealership, the entire action was in fragrant violation of the said clause. In support of his submission, he had placed reliance on the judgments of this Court in **M/s Chaudhary Filling Point, Kazipur vs. State of UP and ors4** and **M/s Kamal Kant Automobiles and another vs. State of UP and ors5.**

13. It was further submitted that GVR India gave its report on primary investigation of the hardware component level and secondary analysis, which specified that on both visual & functional inspection of Controller Card, there was no rework, modifications or damage and further there was no track cut, unauthorized fitting and rework found in any of the hardware peripherals. The GVR gave a clean chit to the retail outlet on the hardware part. The joint inspection analysis report confirms that no extra fittings were found during the inspection rather there was requirement of software upgradation. It was submitted that without using external device and without breaking the seals of the weight and measurement department, it was not possible to tamper the software of the dispensing unit. It was stated that the OEM report/opinion cannot be read in a piecemeal and the general rule of interpretation of a deed or document is to read the document itself as a whole and not in piecemeal. The reports are only an opinion of the OEM, which are not binding upon the respondents and the respondent authorities are required to take decision independently, according to its own evaluation as per Clause 8.5.2 of the MDG, which provides that all cases of irregularities need to be established before any action is taken against a dealer. There is no finding of short delivery by the petitioner. He has placed reliance on the judgment of the Apex Court in **Delhi Development Authority vs. Durga Chand Kaushish6** and **Hindustan Petroleum Corporation Limited and others vs. Super Highway Services and another7**, wherein it is held that the cancellation of dealership agreement of a party is a serious business/civil consequence, which cannot be taken lightly. In order to justify the action taken by the Corporation to terminate such an agreement, the concerned authority has to act fairly and in complete adherence to the rules/guidelines framed for the said purpose.

ARGUMENTS OF THE RESPONDENTS

14. Per contra, Mrs. Archana Singh, learned counsel for the respondent Corporation vehemently argued that the petitioner had not taken any ground in his reply regarding the delay of service of the notice as per Clause 8.5.6 of MDG, which provides that in respect of all cases of irregularities, a show cause notice will be issued to the dealer within 30 days from the date of inspection indicating all the irregularities. Once the petitioner submitted his reply to the show cause notice and also

participated in the proceedings of inquiry, then the petitioner has no right to challenge the legality of delay in service of the show cause notice. The statutory provision under Clause 8.9 of MDG is available to the petitioner to file an appeal against the termination order, and instead of filing the appeal, the petitioner has straightway filed the writ petitions, which are not maintainable, in view of the alternative forum. She submitted that on 14.07.2020 a mail on LEAD through Vishleshan for Exception (DU Logs-critical) for the aforesaid retail outlet was generated with analyst remarks as under:-

"AtDU#4-Pump#1, Nozzle#1-HSD total 171 events of DU Log for E-09 (Low Voltage Error) followed by E-28 (ECAL Card Connectivity Error) had occurred on across 67 days. The highest occurrence is between 7:00 to 8:30 Hrs."

15. She further stated that the GVR in its report dated 10.10.2020 has concluded that abnormal E-28 errors were observed in DU automation error. History report points out to non-standard DU declaration. However, in the secondary investigation, it was established that the observations in the report can lead to manipulation of delivery from the dispensing unit and vide e-mail dated 19.11.2021, GVR has mentioned that in various tamper modus operandi were seen in the field. HW analysis did not show anomaly but SW Logs did. Sometimes SW Log analysis is sufficient to ascertain, if tampering was active at specific dispensing unit. In case of the petitioner's retail outlet, as per GVR (OEM) log analysis it was established a periodic non-standard operation by removing ECAL cable connection and using an external device for manipulation of delivery from dispensing unit. The SW analysis had shown abnormality in the functioning of dispensing unit. There was no illegality or irregularity in process on the part of the Corporation in passing the impugned order and therefore, the petitioner is not entitled to get any relief. She had placed reliance on the judgment of High court of Rajasthan at Jodhpur in in **M/s Shree Rajendra Agro Service Centre vs. IOCL and others8.**

16. We have considered the submissions of learned counsel for the parties and perused the record.

REASONING AND CONCLUSION

17. Indian Oil Corporation Ltd. is a public sector undertaking of the Central Government engaged in the production & distribution of petrol, diesel & other petroleum products through its retail outlet dealership. The IOC has framed Marketing Discipline Guidelines initially in the year 1981-82 and thereafter, revised/amended from time to time. All the retail outlets/dealers selected and appointed by the IOC are bound to follow the "MDG" in order to maintain the discipline and ethics in the sale of oil products. The petitioner firm was given a license to own and run a retail outlet established at location Parwati Bangla Road, Kanpur and the agreement was executed on 10.03.2004.

18. The aforesaid Marketing Discipline Guidelines-2012 promulgated by the Government of India for regulating the inspections of Retail Outlet and standards of maintenance of uniform standards of quality and dispensation of fuel are uniformly binding in respect of any raids/inspections conducted at the retail outlets/petrol pumps under the dealership of all the Oil Marketing Companies and are also to be strictly followed before taking

any action of suspension or termination of sales/supplies or dealership. These guidelines contain the complete procedure for various aspects of functioning of a retail outlet/petrol pump. Relevant Clause 8 of the MDG is reproduced herein under:-

"8. Action to be taken by OMC under the Marketing Discipline Guidelines

8.1 All irregularities (mentioned in Chapter – 5) are classified into three categories, i.e. Critical, Major and Minor.

8.2 **Critical Iregulartities:** The following irregularities are classified as criticial irregularities:-

i. Adulteration of MS/HSD (5.1.1)

ii. Seals of the metering unit found tampered in the dispensing pumps (5.1.2 (b)

iii. Totalizer seal of dispensing unit tampered or deliberately making the totalizer non-functional or not reporting to the company if totalizer is not working (5.1.3 read with 5.1.2)

iv. Additional/Unauthorized fittings/gears/electronic component found in dispensing units/tampering with dispensing unit (5.1.4 (a), (b), (c)

v. Unauthorized storage facilities (5.1.5)

vi. Unauthorized purchase/sales of produces (5.1.6)

vii. Tank lorry carrying unauthorized product found under decantation at the RO (5.1.7)

Action:

Termination at the FIRST instance will be imposed for the above irregularities.

8.3 Major Irregularities:

The following irregularities are classified as major irregularities:-

i. Refusal by the dealer to allow drawl of samples/carry out inspections. (5.1.8)

ii. Non-availability of reference density at the time of inspection. (5.1.9).

iii. Selling of normal MS/HSD as branded fuels. (5.1.10)

iv. Stock variation beyond permissible limits but sample passing quality tests. (5.1.11)

v. Non-maintenance of records since last inspection. (5.1.12)

vi. Overcharging of MS/HSD/CNG/Auto LPG (5.1.13)\

vii. Non provision of clean toilet facility. (5.1.14.b).

viii. Automated Retail outlets: 5.1.16 (a), (b), (c)

ix. Non-payment of Salary, Wages and other benefits (as per clause 5.1.18) to the manpower employed at the ROs.

x. Short delivery of products with W&M seals intact: 5.1.2(a)

Action: **Except in case of (iii), (vii), (viii), (ix) & (x) above.**

First instance: Suspension of sales and supplies for 15 days.

Second instance: Suspension of sales and supplies for 30 days.

Third instance:

Termination of the dealership.

Action in case of (iii) above would be as under:-

First instance: Penalty of recovery of differential price since last inspection

Second instance: Termination of the dealership.

Action in case of (vii) above would be as under:-

First instance: Penalty of Rs.15000/- (Rupees fifteen thousand)

Second instance Penalty of Rs.25000 (Rupees Twenty Five thousand)

Third & subsequent instances: (a) Rs.35,000/- or 45% of the monthly dealer margin (based on average of last 6 months) whichever is higher; and

(b) Suspension of sales and supplies for 7 days or rectification of the defect in toilet, whichever is later.

Action in case of (viii) above would be as under:-

First instance: Penalty of Rs.1,00,000/- (Rupees one lakh only)

Second instance: Penalty of Rs.2,00,000/- (Rupees two lakhs only) and suspension of sales and supplies for 7 days.

Third instance: Termination of the dealership.

Action in case of (ix) above would be as under:-

First instance: Penalty of 20% of the monthly dealer margin

(based on average of last 3 months)

Second instance: Penalty of 30% of the monthly dealer margin

(based on average of last 3 months).

Third & subsequent instances: Penalty of 40% of the monthly dealer margin

(based on average of last 3 months) &

suspension of sales and supplies for 15 days.

Action in case of (x) above would be as under:-

First instance: Rs.25,000/- (Rupees twenty five thousand only) per nozzle found delivering short beyond permissible limit as specified in Legal Metrology Act/Rule

Second instances

(within one year of 1st instance): Rs.50,000 (Rupees fifty thousand only) per nozzle found delivering short beyond permissible limit as specified in Legal Metrology Act/Rule & suspension of Sales and supplies for 15 days.

Third instance

(within one year of 1st instance): Termination of the dealership

8.4. **Minor Irregularities:** The following irregularities are classified as minor irregularities:

i. Non-maintenance of specified records where records from last inspection are maintained but prior records are not available (5.1.12)

ii. Non-provision of facilities like air, telephone and first aid box (5.1.14.1)

iii. Miscellaneous.

a) Non-display of authorized Retail Selling prices of MS/HSD/CNG/AUTO LPG (5.1.15)

b) Non-display of density, opening stock of the day, sticker ensuring Zero before delivery on dispensing unit, name of product on each nozzle of MDP, contact details of authorized persons to be contacted in case of Complaint/Grievance/Emergency. (5.1.17)

c) Non-maintenance of complaint book or not providing the same when demanded by the customer. (5.1.17)

d) Poor housekeeping. (5.1.17)

e) Driveway Salesmen at the ROs not in uniform/wearing badges. (5.1.17)

(One or more irregularity under the above category a, b, c, d or e will be considered as one irregularity only for the purpose of taking action).

Action:- Warning-cum-guidance letter in the first instance, Rs.10000/- per irregularity on second instance and Rs.25,000/- per irregularity on third instance onwards.

8.5.1. The above are general guidelines and the actions prescribed in MDG 2012 are minimum. The competent

authority of the concerned Oil Company can however take appropriate higher action against the erring dealer, if deemed, necessary including termination in the first or any instance in line with the provisions of the Agreement.

8.5.2. **All cases of irregularities needs to be established before any action is taken against a dealer.**

8.5.3. In case, two or more irregularities are detected at the same time at the same RO,

a. Each of the irregularities should be accounted as an instance against the respective class of irregularity.

b. Suitable action will be taken for that specific irregularity and also for that specific instance.

c. Suitable action will be taken for each of the irregularity thereby giving a compounding effect.

8.5.4. In case of irregularities not specifically mentioned/covered above, the competent/appropriate authority of the concerned Oil Company will take suitable action after enquiry and in accordance with the principles of natural justice.

8.5.5. The cycle of calculating second and third instance shall be five years starting from the date of first irregularity. In other words if an irregularity is established as on date, records of previously 5 year period from this date will be examined to determine whether the present irregularity is the first, second or the third instance of irregularity. Irregularities under the previous MDG within the 5 years period will be counted as instances.

8.5.6. **In respect of all cases of irregularities a show cause notice, within 30 days from the date of inspection will be issued to the dealer indicating all the irregularities. However, in case samples of MS/HSD were drawn during inspection then the show cause notice will be issued within 30 days of test results. The show cause notice should be issued alongwith all reports and other documents etc. which forms the basis of the notice.**

8.5.7. The dealer would have a period of 10 days to reply from the date of issuance of show cause notice.

8.5.8 **Upon receipt of the reply to the show cause notice, the authorized officer of the OMG will review the charges levelled and the reply received and pass a speaking order preference within a period of 45 days from the receipt of the reply. The speaking order shall indicate complete details of the irregularities committed, the reply of the dealer and detailed reasons as to why the reply is acceptable/not acceptable to the official.**

8.6 **In case of Critical irregularities leading to termination, the Head of the State office/Regional office/Zonal office of the concerned OMC or their nominee before recommending/approving the termination of dealership will provide a personal hearing to the signatories to the dealership or their nominee(s). However, if signatories to the dealership or their nominee (s) fail to attend the hearing on an appointed date, one more chance will be given and after that the case may be processed ex-parte based on available facts.**

8.7 Under existing laws, Control Orders, Acts/Rules, etc. various authorities of Central Government/State Government, in addition to Oil Company Officers, are empowered to carry out checks of the dealership for determining and securing compliance with such laws/Control Order. If any "malpractice or irregularity" is established by such authorities after

checking, the same would also be taken as a "malpractice or irregularity" under these guidelines and prescribed action would be taken by the Oil Company, on receipt of advice from such authority.

In cases of action taken for some of Major/Minor irregularities where there is only fine and no suspension of sales and supplies involved, such fine should be paid by the concerned dealers within a period of 30 days from the date of notice by the company. If not paid within this period, the action of suspension of sales and supplies would be taken from the 31st day for a period of 15 days. The fine should be paid within this suspension period failing which the suspension would be extended for another 15 days. If fine is not paid within the extended suspension period, the dealership would be terminated.

8.8. Authority to take action:

i) The action of termination and all other critical irregularities will be approved by Regional head/State head/Zonal head of the concerned oil company (General Manager and above). However, in respect of SC/ST category dealerships termination will be approved by the Director (Marketing) HQ.

ii) In respect of major irregularities, the approving authority would be an auhtorized office not below the rank of Dy. General Manager at State/Region/Zonal level.

iii) In respect of minor irregularities the approving authority would be the head of Territory/Regional/Divisional office.

8.9. **Appellate proceedings:**

1. In case of termination arising out of invocation of MDG, the dealer will have the right to appeal within a period of 30 days from the date of receipt of order before the Appellate Authority through the concerned Divisional/Territory/Regional office of the Oil Marketing Company (OMC). The Appellate Authority is empowered to decide the matter and the appeal shall be disposed of preferably within 90 days from the date of filling the appeal in the Divisional/Territory/Regional office of the concerned Oil Marketing Company (OMC).

2. For all appeals in case of termination arising out of invocation of MDG, the Appellate Authority will be the Dispute Resolution Panel (DRP) nominated by the OMG.

The Dispute Resolution Panel (DRP) will comprise of the following members:-

i) A retired Judge of the High Court - Member-1.

ii) A retired Government servant who held post not below the rank of Joint Secretary in Govt. of India or equivalent rank - Member-2.

iii) A retired official of PSU Oil Marketing Companies who held the post not below the rank of Director – Member-3.

The Retired Judge of the High Court in the Committee will be the Chairperson.

3. The terminated dealer preferring appeal would be required to deposit Non-refundable Appeal fee of Rs.5 lakhs alongwith their appeal to the concerned OMG. In case of SC/ST dealer, Rs.2 lakhs non-refundable Appeal fee is required to be paid alongwith their appeal.

However, if appeal results in verdict in restoration of the Dealership, 50% of Appeal fee amount shall be refunded."

(emphasis supplied)

19. Chapter 5 of the MDG deals with the provisions relating to irregularities at retail outlets/petrol pumps, wherein a detailed procedure is prescribed for

checking 'short delivery of products' when the tampering of seals are found by the department of W & M and also when unauthorized fittings in dispensing units are found during inspection. Chapter 8 of the MDG provides the actions, which can be taken by the Oil Marketing Companies under the MDG. In Clause 8.5.2, it has been provided that irregularities provided in the MDG need to be established 'before' any action is taken by the Oil Marketing Companies and similarly, it is provided in Clause 8.6 of the MDG that in case of critical irregularities like tampering in dispensing units etc., the Company may terminate the dealership. However, before recommending termination of dealership, the Company will provide a pre-decisional personal hearing to the retail outlet/petrol pump owner and under Clause 8.5.2, it is provided that unless the critical irregularities are established by the Company after necessarily taking the opinion of the W & M department and the OEM under Clause 5.1.2 (b) and 5.1.4, no action would be taken against the dealer. Clause 8.9 of the MDG contains provision for appeal before the Executive Director (Retail) against the orders passed in cases of critical irregularities as defined in the MDG, which includes cases like tampering with the seals etc. The aforesaid appeal is required to be disposed off by the appellate authority, preferably within a period of 90 days from the date of filing of appeal.

20. A perusal of the record shows that on 16.7.2020 joint inspection was carried out by a team constituted by the Chief Divisional Retail Sales Manager of the IOCL (respondent no.4) in presence of dealers and the Inspector of the Weight and Measure Department and after examining all the dispensing units, the team prepared an inspection report, which reads as under:-

Indian Oil Corporation Limited Retail Outlet Inspection and Analysis Report Date: 16-07-2020			
Dealer's Name	M/s MK Fuel Centre	Address	Indian Oil Petrol Pump
Type of RO	RO A Site	Category	Open
Dealership structure	Patnership	District	Kanpur Urban
Divisional Office code	Kanpur DO	Date of previous visit	14.07.2020
Sales performance			
Trading Area Analysis			
Daily Sales Record Verification			
Stock Verification (A) Totaliser Reading			
(B) Physical Stock (Stock in Tank)			
Lubricant stock			
Details of subsidy availed			
Market Information on Competitor's activities			
Upkeep and Maintenance of Equipments Dispensing Pump All DUs in working condition? All nozzles are in working order? Correct Branding done on DU Panels? DU Painting not required as of now? DU adequate for peak hour demand? Is Built-In Printer working and print outs being handed over to customers? Message regarding zeroing of pump meter displayed on DUs? No Visual leak in DU observed? No replacements of DUs required?		 YES YES YES YES YES YES YES YES YES	
Monolith Signage a) Visibility b) Condition	 Monolish Not Updated during inspection Not updated during inspection		
Sales Room a) Painting last done on b) Painting not required c) Repairs not required d) Display of Lubes e) Cleanliness		 08-02-2017 Not updated during inspections Yes	
Lighting Sales Room Yard Lighting Pump Island Monolith High-Mast Under cannopy Lights			 GOOD GOOD GOOD GOOD GOOD GOOD
Driveway Type of Driveway Condition of Driveway Repairs required Canopy Available		 Drive Way Paver Good NA Yes	
Pump Island Lube Display at pump island Pump Island General Appearance Pump Island Tiling/Granite Condition			 N/A N/A N/A

Tank Farm		
Camlock couplings available for unloading		YES
Tank farm area free from oil spillage & kept clean?		YES
Tank Farm free from dry grss?		YES
Chain-link fencing/kerb wall availability and condition for Tank Farm area?		GOOD
Copy of MDG available at RO, is understood and being followed by dealer procedure for handling product being followed by dealer?		
Prices (RSP) Displayed and charged correctly	Price	Correctly charged
Product		
MS – BS VI	80.82	Yes
HSD BS-VI – VAT PAID	72.83	Yes
XTRA PREMIUM BS VI MS	83.32	Yes
MS BS-VI-VAT PAID	80.82	Yes
HSD – BS VI	72.83	Yes
XTRAMILE Super Diesel BS-VI	76.21	Yes
Inspection of other facilities		
Free Air-service provided?		Yes
Free Radiator water provided?		Yes
Working Hours Board displayed?		Yes
Tel Nos. of concerned IOC Officer displayed?		Yes
Poster for checking adulteration of MS displayed?		Yes
Complaint & suggestion Book available?		Yes
Density register maintained by dealer?		Yes
Water dip record maintained by dealer?		Yes
First-Aid Box available?		Yes
Filter paper available		Yes
Calibrated 5-litre measure available?		Yes
Inspection file maintained?		Yes
Explosive Rules displayed?		Yes
CCE Approved lay-out drawings of RO available and displayed?		Yes
No Smoking board displayed?		Yes
Tel Nos. of Fire Brigade, Police, Ambulance displayed?		Yes
No unauthorised work being carried out at RO without proper approvals?		Yes
Explosive licence renewed?		Yes
All Customer Attendants in Uniform as per policy?		Yes
Any training on Product Handling/Customer Management imparted to Customer Attendants in last one year?		Yes
Training imparted to Customer Attendants on safety aspects during this visit?		Yes
Clean Drinking Water available?		Yes
Clean Toilet available?		Yes
General Housekeeping of the RO (Sales Room/Driveway/Pump Island) is Good		Good
Telephone facility available?		Yes

Inspection of Pump Delivery				
Product	Weights and Measures Seal Intact	Totaliser Seal intact	Delivery	Remarks
MS DU-4 NZL-25	Yes	Yes	Correct	null
MS DU-4 NZL-26	Yes	Yes	Correct	null
MS DU-4 NZL-31	Yes	Yes	Correct	null
MS DU-4 NZL-36	Yes	Yes	Correct	null
MS DU-5 NZL-22	Yes	Yes	Correct	null
MS DU-5 NZL-37	Yes	**Yes**	Correct	null
MS DU-6 NZL-20	Yes	Yes	Correct	null
MS DU-6 NZL-21	Yes	Yes	Correct	null
XP DU-8 NZL-27	Yes	Yes	Correct	null
XP DU-8 NZL-28	Yes	Yes	**Correct**	**null**
HSD DU-8 NZL-29	Yes	Yes	Correct	null
HSD DU-8 NZL-30	Yes	Yes	Correct	null

21. In the aforesaid report, no discrepancy was found in any of the Dispensing Units. Only on some suspicion and automation error reports, seals of the aforenoted dispensing unit were broken by the respondents and the CPU card was sent to the GVR for testing. The concerned dispensing unit was sealed and the sales from the said dispensing unit were suspended. On 04.01.2021 the impugned show cause notice was issued to the petitioner to which the petitioner submitted a detailed reply on 19.01.2021 denying all the allegations made in the show cause notice. A perusal of the termination order dated 15.11.2021 reveals that the termination of the petitioner's petrol pump has allegedly been done as per Clauses 16, 43, & 56 (k) of the dealership agreement dated 10.03.2004. Relevant clauses 16, 43 & 56 are reproduced hereinafter:-

"16. No repairs to the outfit shall be done by the Dealer unless previously authorised by the Corporation in writing. The Dealer shall not interfere with or attempt to adjust the outfit or any part thereof but shall notify the Corporation immediately of the necessity of any repair or adjustment and thereby ensure that the outfit is in proper working order and delivering full and proper measure at all times. The Dealer shall not operate the outfit while it is out of order.

43. The Dealer undertakes faithfully and promptly to carry out, observe and perform all direction or rules given or made from time to time by the Corporation for the proper carrying on of the dealership of the Corporation. The Dealer shall scrupulously observe and comply with all laws, rules, regulations and requisitions of the Central/State Governments and of all authorities appointed by them or either of them including in particular the Chief Inspector of Explosives, Government of India, and/or Municipal and/or any other local authority with regard to the storage and sale of such petroleum products.

56. Notwithstanding anything to the contrary herein contained. The Corporation shall be at liberty to terminate this Agreement forthwith upon or at any time after the happening of any of the following events namely:-

(a) If the Dealer shall commit a breach of any of the covenants and

stipulations contained in the Agreement, and fail to remedy such breach within four days of the receipt of a written notice from the Corporation in that regard.

(b) Upon

(i) the death or adjudication as insolvent of the Dealer, if he an individual;

(ii) the dissolution of the partnership of the Dealer's firm or the death or adjudication as insolvent of any partner of the firm, if the Dealer be a firm;

(iii) the liquidation, whether voluntary or otherwise or the passing of an effective resolution for winding up, if the Dealer be a Company or Co-operative Society;

(c) If any attachment is levied and continued to be levied for a period of seven days upon the effects of the Dealer or any individual partner for the time being of the Dealer's firm or any member of the Dealer Co-operative Society.

(d) If the Dealer or any partner in the dealer's firm or any member of the Co-operative Society appointed as dealer hereunder shall be convicted of a criminal, offence.

(e) If a Receiver shall be appointed of any property or assets of the Dealer or of any partner in the Dealer's firm of any member of the Dealer Co-operative Society.

(f) If the licence issued to the Dealer by the relevant authorities for the storage of petroleum products supplied by the Corporation is called or revoked.

(g) If the Dealer shall for any reason make default in payment to the Corporation in full or his outstanding as appearing in Corporation's books of accounts beyond 4 days of demand by the Corporation.

(h) If the Dealer does not adhere to the instructions issued from time to time by the Corporation in connection with safe practices to be followed by him in the supply storage of the Corporation's products or otherwise.

(i) If the Dealer shall deliberately contaminate of temper with the quality of any of the Corporation's products.

(j) If the Dealer shall sell the Corporation's products at prices higher than those fixed by the Corporation.

(k) If the Dealer shall either by himself or by his servants or agents commit or suffer to be committed any act which, in the opinion of the General Manager of the Corporation or the time being in U.P. State Office, Lucknow whose decision shall be final, prejudicial to the interest or good name of the Corporation or its products; the General Manager shall not be bound to give reasons for such decision.

(l) If any information given by the Dealer in his application for appointment as a Dealer shall be found to untrue or incorrect in any material respect.

The Corporation's right to terminate this Agreement under the terms of this clause shall be without prejudice to any of its other rights and remedies against the Dealers. In the event of the Corporation Terminating this Agreement under the provisions of this clause, it shall not be liable to pay for any loss or compensation respect of such termination PROVIDED THAT that the supply of any petroleum products by the Corporation to the Dealer, pending expiry of any notice of termination or after any act, contravention or omission by the Dealer entitling the Corporation to terminate this Agreement shall have been become known to the Corporation, shall not in any way prejudice or affect right of the Corporation to revoke and/or enforce the termination of this Agreement and the licence granted hereunder."

22. A mere reading of Clauses 16, 43 & 56 (k) reveals that these clauses, in general, pertain to the requirements of the dealer taking care of the retail outlet as a prudent businessman and dealer is to be held responsible for all losses. Clause-16 of the dealership agreement stipulates that no repairs to the outfit can be done by dealer as he shall not interfere with or attempt to adjust any equipment and should only ensure that the outfit is working in a proper order and deliver full and proper measures at all times. Clause 43 stipulated that the dealer undertakes faithfully and promptly to carry out, observe and perform all direction or rules given or made from time to time by the Corporation for the proper carrying on of the dealership of the Corporation. The dealer shall scrupulously observe and comply with all laws, rules, regulations and requisitions of the Central/State Government and of all authorities appointed by them. The Clause 56 provides that the Corporation shall be at liberty to terminate the agreement forthwith upon or at any time after noticing any of the events mentioned in clause (a) to (l) of the said Clause. Clause 56 (k) deals with the situation and provides that if the dealer shall either by himself or by his servants or agents commit any act which, in the opinion of the General Manager of the Corporation are prejudicial to the interest or good name of the Corporation or its products. In such contingency, the General Manager of the Corporation is bound to give reasons for taking such harsh steps. However, the material and evidence, which were relied upon by the Corporation whatsoever, were not of such a nature, which could warrant at the initial stage to issue a show cause notice dated 04.01.2021. Said notice was also in breach of Clause 5.1.4 and 8.5.2 of the MDG.

23. The order of termination has also been attacked with vehemence on the ground of not affording opportunity of oral hearing before passing the said order. There is no denial of the said fact by the IOCL. It is settled principle of law that any order, which entails civil consequences, must be in conformity with the principles of natural justice. The Hon'ble Supreme Court in **D.K. Yadav v. J.M.A. Industries Ltd9** has held that an order involving civil consequences must be made consistently with the rules of natural justice. Clause 8.6 of the MDG-2012 provides in clear words that in case of critical irregularities leading to termination, like that of seal tampering, the Head of the State Office/Regional Office/Zonal Office of the concerned Oil Manufacturing Company or their nominee before recommending/approving the termination of Dealership will provide personal hearing to the signatories of dealership or their nominee. Principles of natural justice require that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by such a decision.

24. Thus, there is clear non-compliance of Clause 8.6 of the MDG by the respondent-authorities. Moreover, the respondents have failed to show any rule or regulation to demonstrate that when the dealership is terminated as per terms and conditions of the agreement, provisions of the MDG would not be applicable. The MDG has been enacted for such dealership agreements as the one involved in the instant case and therefore, we are of the view that these guidelines need to be strictly construed by both the parties. Further, any dealership agreement cancelled by the respondent Corporation cannot be effected on the basis of

dealership agreement itself as the MDG have to be followed while taking recourse to such action. The respondent Corporation cannot act arbitrarily at its own sweet will like a private individual and deal with any person it pleases, but rather its action must be in conformity with standards or norms, which are not irrational or irrelevant. Therefore, respondents cannot be exempted from the application of MDG merely by following the dealership agreement.

25. It may be observed here that the respondent Corporation has departed from the standard norms laid down in the Marketing Discipline Guidelines and the standard norms of natural justice and fair play and such departure was clearly unreasonable and discriminatory. It may be noted that the manufacturer of the unit calibrates the equipment ensuring proper delivery of the product and the relevant part of the machinery is sealed by the concerned department after verification of the accuracy. The very purpose of sealing of the equipment by the department is to ensure that the dealer does not tamper with the same. As seen from the reading of the impugned order, the only reason assigned for being not satisfied with the explanation offered by the petitioner was that there was manipulation in the software of the dispensing unit at the RO with an intention to manipulate the delivery of the fuel. However, what was not considered by the competent authority was that at what point of time this unauthorized tampering/soldering was done in the dispensing unit and how the dealer is manipulating the distribution of fuel. No material, much less credible one has been brought on record by the respondents to disclose the unauthorized access to the equipment by the petitioner.

26. It was specific stand of the petitioner that periodically the Weights and Measurements Department officials inspected the seals and they were found to be intact. Further more, what is the impact of tampering/manipulating the software of the dispensing unit is not disclosed by the respondent. How the dealer can manipulate delivery of fuel by inserting such unit is also not explained. The only objective of a dealer to tamper with dispensing unit is to manipulate delivery of fuel. In this case, the delivery of fuel was found to be accurate prior to checking of unit and after the checking. Merely on assumptions, that the tampering/manipulating the software of the dispensing unit was found, the petitioner dealer cannot be visited with severe consequence of termination of dealership. Thus, the action of the respondent-Corporation, in the facts of this case, in terminating the dealership of the petitioner on the sole ground that manipulation of the software was found in the Dispensing Unit is illegal, unreasonable and excessive.

27. Another point, which has been canvassed by the petitioner, is that a perusal of the show cause notice dated 04.01.2021 would indicate that the basis for the entire proceedings initiated against the petitioner is the inspection note dated 16.7.2020 and there was no other material before the competent authority to proceed against the petitioner. He had submitted that the inspection report dated 16.07.2020 has been made a sole basis of passing the impugned termination order, which was in fact no "actionable evidence", since the allegations contained therein were mere suspicions raised by the authorities and has not been verified by the Experts before the impugned termination order was passed.

28. A perusal of the show cause notice would indicate that the petitioner was asked to reply to the allegations regarding the tampering with the dispensing unit for manipulating the delivery. The inspection report itself could not be taken as to make any short selling of fuel by the petitioner. The inspection report could not have been made a basis for initiating proceedings against the petitioner, inasmuch as from the said report it could not have been concluded that the petitioner was involved in any action, which could be said to be infringement of the guidelines with regard to the tampering of the machines and short selling of the fuel.

29. Identical issue came up for consideration before High Court of Chhattisgarh in case of **Mahamaya Service Centre v. Indian Oil Corporation Ltd. & Others10**, wherein Chhattisgarh High Court held that provisions of Clause 8 of the Order, 2005 read with MDG, 2005 have not been complied with, thus, the respondents cannot claim any sanctity in law and the Court is well within its jurisdiction to declare such an act illegal and invalid. Chhattisgarh High Court also observed as under:

"26. It is a duty cast on the authorities of the State and the instrumentalities of the State that they should follow the proper procedure prescribed in the rules and regulations. The contravention of the same cannot be permitted. It is uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all."

30. The aforesaid matter was taken to the Division Bench of Chhattishgarh High Court, which was dismissed by order dated 03.01.2011 passed in W.A. No. 361 of 2010 and a Special Leave Petition against the same, being Special Leave to Appeal (Civil) No. 34817/2011, was also dismissed by the Apex Court on 04.11.2011.

31. Hon'ble Supreme Court, in **M/s. Hindustan Petroleum Corpn. Ltd. & Others v. Super Highway Services & another11**, has considered the similar issue of termination of dealership in the similar set of facts and circumstances, wherein the Supreme Court has held as under:

"16. Having carefully considered the submissions made on behalf of the respective parties and also having considered the various decisions referred to by learned counsel, we are of the view that the case made out on behalf of the Respondent No.1 is more probable. Although, the transporter's representative was present at the terminal at the stipulated time on 29th May, 2008, that by itself cannot give rise to a presumption that service had been effected also on the Respondent No.1, in the absence of any proof in that regard. Except for the endorsement on the hand-written notice said to have been given by Mr. Dash, there is nothing else on record to even suggest that notice had been sent to the Respondent No.1 and that the same had been refused. It is also rather difficult to accept that in respect of a test to be conducted on 29th May, 2008, at 3.00 p.m., an attempt was made to serve the said notice on the representative of the Respondent No.1 on the date of the proposed test itself. Although, the notice is dated 28th May, 2008, the endorsement alleged to have been made by the representative of the Respondent No.1 is dated 29th May, 2008, and we would be justified in assuming that the Respondent No.1 could not have

arranged for being represented at the laboratory in the Barauni Terminal of the petitioner Corporation on such short notice. Nothing has been shown by the petitioner to disprove the allegation made on behalf of the Respondent No.1 that the notice alleged to have been tendered to the representative of the Respondent No.1 was not in the manner and the form in which such notice is required to be given to a dealer. It is obvious that the same had been made out in haste to indicate that service had been attempted on the Respondent No.1.

17. **The cancellation of dealership agreement of a party is a serious business and cannot be taken lightly. In order to justify the action taken to terminate such an agreement, the concerned authority has to act fairly and in complete adherence to the rules/guidelines framed for the said purpose. The non-service of notice to the aggrieved person before termination of his dealership agreement also offends the well- established principle that no person should be condemned unheard. It was the duty of the petitioner to ensure that the Respondent No.1 was given a hearing or at least serious attempts were made to serve him with notice of the proceedings before terminating his agreement.**

18. In the instant case, we are inclined to agree with Mr. Bhatt's submissions that the High Court did not commit any error in allowing the writ petition filed by the Respondent No.1 herein, upon holding that notice of the Laboratory Test to be conducted at the Barauni Terminal had not been served upon the Respondent No.1, which has caused severe prejudice to the said respondent since its dealership agreement was terminated on the basis of the findings of such Test. Admittedly the dealership agreement was terminated on the ground that the product supplied by the petitioner corporation was contaminated by the respondent. Such contamination was sought to be proved by testing the T.T. retention sample in the laboratory at Barauni Terminal. **The Guidelines being followed by the Corporation require that the dealer should be given prior notice regarding the test so that he or his representative also can be present when the test is conducted. The said requirement is in accordance with the principles of natural justice and the need for fairness in the matter of terminating the dealership agreement and it cannot be made an empty formality. Notice should be served on the dealer sufficiently early so as to give him adequate time and opportunity to arrange for his presence during the test and there should be admissible evidence for such service of notice on the dealer.** Strict adherence to the above requirement is essential, in view of the possibility of manipulation in the conduct of the test, if it is conducted behind the back of the dealer. In the present case, there is no admissible evidence to prove service of notice on the respondent or refusal of notice by the respondent. Further, the notice dated 28.05.2008 which was allegedly refused by respondent, did not give him adequate time to arrange for the presence of himself or his representative during the test to be conducted at 3.00 PM on 29.05.2008. It is also to be noted that the endorsement regarding the alleged refusal is dated 29.05.2008 itself. Thus, the termination of the dealership agreement of the respondent was arbitrary, illegal and in violation of the principles of natural justice.

19. Although, Clause 68 of the Dealership Agreement refers to arbitration, it is unfortunate that the said question was

not raised before the High Court. It is now too late in the day for the petitioner Corporation to contend that in view of Clause 68 of the Dealership Agreement, the Respondent No.1 was not entitled to seek its remedy before the writ Court. In any event, by filing appeal against the order of the learned Single Judge, the Petitioner herein also submitted to the jurisdiction of the writ Court, without objecting to the same.

20. In the aforesaid circumstances, we are not inclined to admit the Special Leave Petition, which is, accordingly, dismissed, without, however, any order as to costs.."

(emphasis supplied)

32. The aforesaid judgment was followed by the Hon'ble Supreme Court in the case of **Bharat Petroleum Corporation Limited vs. Jagannath and Company and others12** wherein it was observed as under:-

"In view of the Dealership Agreement, particularly, Clause 10(k) referred above, the contention of learned senior counsel for the BPCL is liable to be rejected. In terms of Section 20 of the Petroleum Act, 1934 the contesting Respondents had a right to have fresh samples drawn and get the same re-tested within seven days of intimation of the test results. It is the assertion of the contesting Respondents that the test reports were intimated to them only upon filing of a suit before the trial Court. After getting the above reports, on 02.09.2005, the contesting Respondents moved an application before the trial Court in the said suit for fresh sampling/retest of the products. Though an objection was raised for filing counter statement in the said application, it is brought to our notice that in spite of several opportunities given by the Court, no such objection was ever filed. It was further pointed out by Learned Counsel for the contesting Respondents that they timely exercised their right available in law. In view of the application filed by the contesting Respondents on 02.09.2005 and in the light of Section 20 of the Petroleum Act, 1934 as well as the terms of Dealership Agreement, the objection raised by learned senior counsel for the BPCL is liable to be rejected.

14. It is also pointed out that it was Respondent No. 6 herein who made the inspection, collected the samples, issued show cause notice and passed an order of cancellation of the Dealership Agreement/Licence. By impleading him as one of the Respondents-Respondent No. 4 in the High Court - specific allegations were made against him that he acted mala fidely in cancelling the same and those assertions cannot be lightly ignored.

15. The High Court, after considering all the above specific claims of the contesting Respondents, rightly interfered with the order of termination of the dealership agreement/licence dated 18.01.2006 and quashed the same. We are in entire agreement with the said conclusion. In view of the same, the Appellants are directed to implement the directions given by the High Court in the impugned judgment dated 09.10.2009 within a period of four weeks from the date of receipt of this judgment.

16. In the light of the above discussion, the civil appeals are dismissed with no order as to costs."

33. The Hon'ble Supreme Court in case of **Allied Motors Limited vs. Bharat Petroleum Corporation Limited13** while dealing with a similar matter, wherein the Marketing Discipline Guidelines were not

followed and termination was held to be illegal, held as under:

"In the instant case, samples were taken on 15-5-2000. On the very next day i.e. on 16-5-2000, without even giving a show-cause notice and/or giving an opportunity of hearing, the respondent-Corporation terminated the dealership of the appellant. The appellant had been operating the petrol pump for the respondent for the last 30 years and was given 10 awards declaring its dealership as the best petrol pump in the entire State of NCT of Delhi. During this period, on a number of occasions, samples were tested by the respondent and were found to be as per specifications.

In the instant case, the haste in which 30 years old dealership was terminated even without giving show-cause notice and/or giving an opportunity of hearing clearly indicates that the entire exercise was carried out by the respondent Corporation non-existent, irrelevant and on extraneous considerations. There has been a total violation of the provisions of law and the principles of natural justice. Samples were collected in complete violation of the procedural laws and in non-adherence of the guidelines of the respondent Corporation.

On consideration of the totality of the facts and circumstances of this case, it becomes imperative in the interest of justice to quash and set aside the termination order of the dealership. We, accordingly, quash the same. Consequently, we direct the respondent-Corporation to handover the possession of the petrol pump and restore the dealership of petrol pump to the appellant within three months from the date of this judgment.

The appeal is consequently allowed with costs which is quantified at Rs.1,00,000/- (Rupees one Lakh only) to be paid by the respondent-Corporation to the appellant within four weeks from today."

34. In **Indian Oil Corporation Ltd & ors vs. M/s R.M. Service Centre & another14** the Apex Court held as under:-

"13) The first issue required to be examined is whether the appellants were required to follow the procedure under the Control Order read with Section 100 of the Code. The Control Order has been issued under Section 3 of the Act. Such Act has been enacted for control of the production, supply and distribution and trade and commerce, of certain commodities. In respect of High Speed Diesel and Motor Spirit, the Control Order is issued for regulation of supply and distribution and prevention of the malpractices. Section 6A of the Act provides for confiscation of the essential commodity whereas, Section 7 of the Act makes any person who contravenes any order made under Section 3 liable for criminal prosecution. Therefore, we find that the effect of issuance of the Control Order is that in the event of violation of such Control Order, any person who contravenes any order made under Section 3 of the Act i.e. the Control Order, he is liable to be punished by a Court. Therefore, the violation of the Control Order has penal consequences leading to conviction. The provisions of search and seizure contained in Clause 7 read with Section 100 of the Code will come into play only in the event a person is sought to be prosecuted for violation of the provisions of the Control Order. Admittedly, in the present case, the dealer is not sought to be prosecuted for the violation of the Guidelines, therefore, the procedure for drawing of samples which 12 is a necessary pre-condition under the Control Order for prosecuting an offender

does not arise for consideration. 14) The dealer has entered into an agreement on 20th December, 1995. It is not disputed that the dealer is bound by the Guidelines issued by the Public Sector Oil Marketing Companies. Clause 2.4.4 of the Guidelines provides for procedure for drawing of samples. Note 2 provides that the samples drawn should reach the laboratory for testing "preferably within ten days of the collection of the samples". Similarly, sub-clause A of Clause 2.5 of the Guidelines provides that all samples should be suitably coded before sending them to the laboratory for testing 'preferably' within ten days of drawing the samples. Sub-clause I of Clause 2.5 of the Guidelines is that the purpose of mentioning time frame for various activities such as sending samples to the laboratory preferably within ten days is to streamline the system and is in no way related to quality/result of the product. In view of the language of the Guidelines, the findings recorded by the High Court that the time line is to be strictly adhered to cannot be sustained. 15) The Guidelines as mentioned in sub-clause I of Clause 2.5 of the Guidelines is to streamline the functioning i.e. the oil companies should not arbitrarily or without any justification send the sample for testing at their sweet will. The sample in this case was drawn on 6th May, 2013 and was sent for testing on 22nd May, 2013 i.e. 13 there was a delay of 5 days. Since the Guidelines use the time line as a preferred time line, it cannot be said that the time line mentioned has to be strictly adhered to and is mandatory. The language, the purport and the effect of testing do not warrant to read the word 'preferably' as mandatory time line. It is not the case of the dealer that the sample sent after five days will lose its efficacy as the umpire sample would be sent only after the first report is confronted to the dealer. Still further, the dealer has not raised any objections regarding delay in sending the sample in the two replies submitted by him on 17th July, 2013 and 2nd January, 2014. The argument that the umpire sample in the hands of the dealer could not be tested because of sludge and to doubt the other two samples is totally untenable. Such argument is based upon conjectures as the other two samples collected and sealed cannot be permitted to be disputed only because one sample was found with sludge. There is no material to doubt the correctness of the samples taken. 16) The first test report dated 29th May, 2013 was found deficient in the density as also in K.V. @40 degree celsius, sulphur and distillation recovery. Even the report dated 19th August, 2013 is found to be deficient in density, K.V., distillation recovery and sulphur. The result of the second report is almost the same as the sample tested on 29th May, 2013. Thus, the appellant has rightly terminated the dealership for adulteration of the High Speed Diesel. 14 17) There was variation in stock beyond permissible limits. In case of positive stock variation beyond permissible limits and on account of failure of sample, action in line with that of adulteration is to be initiated. The adulteration in these circumstances is a critical irregularity falling in Clause 8.2 of the Guidelines and the action required to be taken is termination of the dealership. However, in case of stock variation beyond permissible limits and the sample passing the quality test, it leads to suspension of sale and supply for fifteen days in the first instance, suspension of sale and supply for thirty days in the second instance and termination of dealership in the third instance. In this case, since the stock variation was beyond permissible limits and the sample failed, therefore, the action was rightly taken

under Clause 5.1.11 of the Guidelines which is a critical irregularity when read with sub-clause (i) of Clause 8.2 and sub-clause (iv) of Clause 8.3 of the Guidelines. 18) The judgments referred to by the learned counsel for the dealer are not applicable to the facts of the present case as in both the cases, the action taken by the oil company was found to be in violation of the principle of natural justice as no notice was served upon the dealer but, in the present case, after failure of the first sample in the test report dated 29th May, 2013, the dealer was informed, who opted for testing of umpire sample in his possession. The said sample along with the sample in possession of the Field Survey Officer was sent for testing and in the report dated 19th August, 15 2013, the sample was found to have the same deviations as in the first sample tested on 29th May, 2013. The dealer was informed of the result of the second test and was also given a show cause notice as to why the dealership should not be terminated. Therefore, the action taken against the dealer is in terms of the Guidelines, as a consequence of contractual obligations by the dealer. 19) Consequently, we find that order passed by the High Court is not legal and sustainable and, thus, the same is set aside. The writ petition is dismissed and the termination of dealership is held to be valid and legal. Civil Appeal is allowed.

35. In **M/S Chaudhary Filling Point, Kazipur** (supra) it has been held by this Court as under:-

"As regard the Arbitration, it has rightly been asserted that the Arbitrator has no power to restore the distributorship, in the event the termination is found unlawful. The Apex Court in the case of IOCL vs. Amritsar Gas Service (1991) 1 SCC 533; E. Venkat Krishna Vs. IOCL and anor (2000)7 SCC 764 and Sanjana M. Wig Vs. HPCL; (2005) 8 SCC 242 has held in explicit words that an arbitration forum does not have the jurisdiction for the restoration of dealership, which was earlier terminated. All that the arbitrator could do, if he found that the termination of the distributorship was unlawful, was to award damages, as any civil court would have done in a suit. In Civil Misc. Writ Petition No. 51972 OF 2008 M/s Navin Filling Station vs. Indian Oil Corporation Ltd & Ors, this court observed as under:

"The presence of the arbitration clause, is not to drive away a genuine grievance arising out of disproportionate action of the Corporation, to the arbitral tribunal which in any case will not have the authority to give an award to restore the dealership. In the present case the Indian Oil Corporation terminated the agreement relying upon the clauses, which were not attracted and on the Marketing Discipline Guidelines framed for facilitating the marketing of the petroleum products on the principles of good governance and excellent customary service. The preamble to the guidelines itself provide that the guidelines need to be constantly updated to meet the customer satisfaction and to the discipline dealership network and for preventing malpractices in the sale of petroleum products."

In these circumstances, we find force in the arguments advanced by the learned Counsel for the petitioner that Arbitration between the parties is not an efficacious and proper remedy in such cases."

36. The respondent authorities have not cared for the guidelines laid down by the Supreme Court in **Hindustan Petroleum Corporation Limited &**

Others (supra) and also the provisions of the MDG and terminated the dealership in arbitrary manner. Applying the well settled principles of law as enunciated in the judgments mentioned above to the facts of the case, the impugned orders are not sustainable in the eyes of law.

37. For the aforesaid reasons, both the writ petitions are allowed and the impugned show cause notice dated 04.01.2021; order of termination dated 15.11.2021; impugned appointment letter dated 15.01.2022 as well as the notice/letter dated 26.03.2022 are hereby quashed. A mandamus is issued to the respondents to forthwith restore the agreement dated 10.03.2004 and to restore the supply of the petitioner's RO within two months from today.

(2024) 2 ILRA 519
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2023
BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE SHEKHAR B. SARAF, J.

Writ C No. 33253 of 2023

Chandrakant Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
C.S.C.

Civil Law - Constitution of India,1950-Article 226-Uttar Pradesh Minerals(Prevention of Illegal Mining, Transportation and Storage) Rules 2018-The petitioner was granted a storage license for one year which was renewed-the petitioner applied for another renewal-the District Magistrate denied the renewal-Held, the court found that the petitioner was entitled for two year limit from the initial grant as the district magistrate misinterpreted Rule 9 of the 2018 Rules-to compensate for the delay caused by litigation, the court extended the license validity by six months beyond 8 March 2024.(Para 1 to 11)

The writ petition is allowed. .(E-6)

List of cases cited:

1. Beg Raj Singh Vs St. of U.P. & ors..(2003)AIR SC 833

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Shekhar B. Sarraf, J.)

1. The petitioner was granted a storage licence upon his making an application on 16.1.2021 for a period of one year. The licence as was granted to the petitioner under the Uttar Pradesh Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2018 (hereinafter referred to as the "Rules, 2018") was to expire on 15.1.2022 and, therefore, he applied for the renewal even before the licence expired on 15.1.2022.

2. The petitioner on 31.12.2021 had, as mentioned above, applied for the renewal for a period of one year and the authorities also renewed the licence on 7.1.2022 till 7.3.2023. When the licence was renewed on 7.1.2022, the renewal was to be effective with effect from 8.3.2022 for a period of one year. When again the licence expired on 7.3.2023 the petitioner again applied for its renewal for a period of one year on 24.11.2022. This licence

renewal application when was placed before the District Magistrate, he enquired from the Geological Department as to whether the licence could be renewed again for a period of another one year.

3. On 3.7.2023, the Director of Geological Department advised the District Magistrate relying upon the Rule 9 of the Rules, 2018 that the licence could be renewed only once. Thereafter the District Magistrate on the advice received from the Director of the Geological Department passed the impugned order on 6.9.2023 saying that as per the Rule 9 of the Rules, 2018, the licence could not be renewed, as it was earlier renewed once.

4. Learned counsel for the petitioner has assailed this order on the basis of the fact that renewal of the licence as per Rule 9 of the Rules, 2018, could be done for a period of two years. He has submitted that there was no embargo as to how many times an application could be moved for nenewal within those two years.

5. Learned counsel for the petitioner, therefore, states that the licencee could move for renewal any number of times in a period of two years but the extension could not exceed two years.

6. Since learned counsel for the petitioner relied upon Rule 9 of the Rules, 2018, the same is being reproduced here as under:

*"**9. Renewal of Licence.** - (1) The licence can be renewed for a **maximum period of two years** subject to the condition that all the terms and condition have been complied with.*

(2) In case the renewal of licence is granted, the security money already deposited by the licensee, if valid, shall be accounted for as the security deposit for the renewal of licence.

(3) The period of renewal of licence shall commence from the date of the expiry of the licence under renewal."

7. Learned Standing Counsel, however, in reply has submitted that the renewal could be made only once and if the petitioner in his first application which he had moved on 31.12.2021 did not pray for the renewal of the licence for a period of two years then he had lost the opportunity to get the licence renewed for the second time. He submits that the petitioner had foregone the right to get the licence renewed after he had earlier made the application.

8. Learned Standing Counsel, therefore, supported the impugned order and submitted that the writ petition be dismissed.

9. Having heard the learned counsel for the parties, this Court is of the view that the District Magistrate erred in saying that the licence could not be renewed twice even if the licence was being renewed for only two years after the initial grant. Initially when the licence was granted it was to expire on 15.1.2022. Subsequently the petitioner had applied for a renewal on 24.11.2022 for its renewal with effect from 8.3.2022 and the renewal was done till 7.3.2023. We definitely hold that the petitioner had every right to get his licence renewed till 7.3.2024 i.e. till the time when two years period of renewal expired.

10. Under such circumstances, the order dated 6.9.2023 passed by the District Magistrate is set aside. The District Magistrate is directed to issue a renewal to

the petitioner on the application which he had moved on 24.11.2022. Since a lot of period has elapsed because of the litigation the petitioner had to undergo because of the order dated 6.9.2023, we direct that the petitioner's licence shall be effective for six more months after the expiry of the licence on 8.3.2024. This we hold on the basis of the judgement of the Supreme Court reported in ***AIR 2003 SC 833 : Beg Raj Singh v. State of Uttar Pradesh and others.***

11. The writ petition is, accordingly, stands allowed.

(2024) 2 ILRA 521
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2024
BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Writ C No. 35362 of 2023

Saurabh Kalani ...Petitioner
Versus
Stressed Asset Stabilisation Fund, Mumbai & Ors. ...Respondents

Counsel for the Petitioner:
Sri Veerendra Kumar Shukla

Counsel for the Respondents:

Civil Law - Constitution of India,1950-Article 226-Civil Procedure Code,1908-Order 7- Rule 11-Limitation Act-Section 3(1)-DRT, Jabalpur rejected the petitioner's application under Order VII Rule 11 of the CPC, claiming the original application was time barred-DRAT, Allahabad disposed of the appeal without setting aside the DRT's order but allowed the petitioner to raise limitation issues at the final hearing-Held, a plaint can only be rejected if it appears from its statements that the suit is barred by law, including limitation-the limitation issue is generally a mixed question of law and fact requiring trial for proper adjudication-The Tribunal's observation that the application was not barred by limitation does not operate as res judicata-The court found the appellate Tribunal's order correct-Petition dismissed with a direction to the DRT to decide the limitation issue during trial as per the appellate tribunal's instructions.(Para 1 to 29)

The writ petition is disposed of. .(E-6)

List of cases cited:

1. T.Arivandandam Vs T.V. Satyapal(1997) 4 SCC 467

2. Saleem Bhai Vs St. of Mah.(2003) 1 SCC 557

3. Kamala Vs K.T. Eshwara(2008) 12 SCC 661

4. Madanuri Sri Rama Chandra Murthy Vs Syed Jalal (2017) 13 SCC 174: (2017) 5 SCC (Civ) 602

5. Srihari Hanumandas Totala Vs Hemant Vithal Kamat & ors..(2021) 9 SCC 99

6. Ramesh B Desai & ors.. Vs Vipin Vadilal Mehta & ors..(2006) 5 SCC 638

7. P.V Guru Raj Raddy & anr.. Vs P. Neeradha Reddy & ors..(2015) 8 SCC 331

8. U.O.I. & anr.. Vs British India Corp. Ltd. & ors.. (2003) 9 SCC 505

9. Gannmani Anasuya & ors.. Vs Parvatini Amarendra Chowdhary & ors.. (2007) 10 SCC 296

10. Noharlal Verma Vs Distt Co-op. Central Bank Ltd Jagdalpur (2008) 14 SCC 445

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Heard learned counsel for the parties and perused the record.

2. This writ petition has been filed challenging the order dated 18.11.2022 passed in Original Application No. 729 of 2016 (Stressed Asset Stabilisation Fund Vs. M/s Gilt Pack Ltd. And others) by which, application of the petitioner under Order VII Rule 11 of C.P.C. has been rejected by the Debts Recovery Tribunal, Jabalpur *(hereinafter referred to as 'D.R.T. Jabalpur')*. The appellate order dated 3.1.2023 in Appeal No.1140 of 2022 (Saurabh Kalani Vs. Stressed Asset Stabilization Fund and others) passed by the Debts Recovery Appellate Tribunal, Allahabad *(hereinafter referred to as 'D.R.A.T., Allahabad')* is also under challenge.

3. Brief facts of the case are that respondent No.1 - Stressed Asset Stabilisation Fund is the assignee of the original lendor IDBI. IDBI granted the financial assistance to the tune of Rs. 7.60 crores to respondent No.2 – Gilt Pack Ltd. Company during the year 1994 -1996. Petitioner is the guarantor to the aforesaid financial assistance granted to the Company on the basis of Deed of Guarantee dated 24.3.1994, 16.11.1994 and 26.9.1996. The Original Application No.729 of 2016 has been filed by respondent No.1 before the D.R.T. Jabalpur in the year 2016. Petitioner has been arrayed as opposite party no. 3 in the aforesaid Original Application. Relief claimed in Original Application is that defendants No.1 to 3 be ordered to pay the applicant a sum of Rs. 394,41,00,970/- towards the loan as on 1.7.2016 together with further interest thereon on contractual rates w.e.f. 1.7.2016 and for other reliefs. In the aforesaid proceedings, petitioner moved an application under Order VII Rule 11 of CPC on the ground that Original Application has been filed after a lapse of 19 years from the date of execution of Deed of Guarantee executed by the petitioner and the claim of respondent No.1 is barred by time and, therefore, the Original Application be rejected. Respondent No.1 contested the application and filed objection to the application filed by petitioner. The application of petitioner has been rejected by the D.R.T. Jabalpur by its order dated 18.10.2022. Against the order dated 18.11.2022, petitioner preferred an appeal being Appeal No.1140 of 2022 (Saurabh Kalani Vs. Stressed Asset Stabilization Fund and others) before the D.R.A.T. Allahabad. The D.R.A.T. Allahabad, by its order dated 3.1.2023, has disposed of the appeal permitting the appellant-petitioner to raise his contentions/grievances whatever he has, with regard to the maintainability of Original Application in view of limitation and if such an application is filed by the appellant-petitioner before the Tribunal below, the same shall be considered at the time of final hearing of the said Original Application and has refused to entertain the appeal as the matter is pending before the concerned Tribunal and all the issues are yet to be adjudicated on merits.

4. It has been contended by learned counsel for the petitioner that D.R.A.T. has though permitted the petitioner to raise his grievances as to the issue of maintainability of the Original Application on the ground of limitation and has also directed for consideration of same at the time of final hearing of Original Application but has not set aside the order passed by the DRT Jabalpur by which application filed by the petitioner under Order VII Rule 11 of CPC, has been rejected by the D.R.T. Jabalpur holding that Original Application is not barred by limitation. It has been further contended by learned counsel for the

petitioner that unless the order passed by Debts Recovery Tribunal is set aside holding that the Original Application is not barred by limitation, the same will operate as resjudicata when the matter will be considered by Debts Recovery Tribunal in pursuance to the directions given by the D.R.A.T. Contentions are also raised by learned counsel appearing for the petitioner on merits against the findings recorded by the D.R.T. Jabalpur while dismissing his application under Order VII Rule 11 CPC.

5. It will be useful to examine the provisions of Order VII Rule 11 CPC before considering the submissions made by learned counsel for the petitioner. Rule 11 of the Order VII CPC is quoted as under :-

***11. Rejection of plaint** — The plaint shall be rejected in the following cases:—*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

[(e) where it is not filed in duplicate];

[(f) where the plaintiff fails to comply with the provisions of rule 9];

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]"

6. In case of **T. Arivandandam vs. T.V. Satyapal; (1997) 4 SCC 467**: Apex Court has held that the provisions of Rule 11 are mandatory. If the plaint is found to be defective and the case is covered by Rule 11, it goes to the root of the matter and the Court has no option and the plaint has to be rejected. An application by opposite party is not necessary.

7. From the reading of Clause 11 of Order 7 C.P.C., it is clear where the suit appears from the statements in the plaint to be barred by any law, the Court shall reject the plaint.

8. Indeed, Order VII Rule 11 CPC gives ample power to the Court to reject the plaint, if from the averments in the plaint, it is evident that the suit is barred by any law including the law of limitation, this position is no more *res integra.*

9. Order VII Rule 11(d) CPC provides that the plaint shall be rejected "where the suit appears from the statement made in the plaint to be barred by any law", hence, in order to decide whether the suit is barred by law, it is the statement in the plaint will have to be construed. The Court while deciding such an application under Order 7 Rule 11 C.P.C. must have due regard only to the statements made in the plaint. Whether the suit is barred by any law 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.

10. In **Saleem Bhai vs. State of Maharashtra; (2003) 1 SCC 557**, the Apex Court while considering Order VII Rule 11 of the Code held as under: (SCC 560, Para 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 thereunder 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....."

11. In **Kamala Vs. K.T. Eshwara; (2008) 12 SCC 661**, S.B. Sinha, J speaking for the Bench examined the ambit of Order VII Rule 11(d) CPC and observed: (SCC 668-69, paras 21 and 22)

"21. Order 7, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code is the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject matter of an order under the said provision."

12. In case of **Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal; (2017) 13 SCC 174: (2017) 5 SCC (Civ) 602**; the Apex Court has summarized the legal position as follows :-

"The plaint can be rejected under Order 7 Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order 7 Rule 11 CPC be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11 CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 of CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the

plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order 7 Rule 11 CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

13. Recently, the Apex Court in case of **Srihari Hanumandas Totala vs. Hemant Vithal Kamat and others; (2021) 9 SCC 99** has reiterated the same principle (paras 25, 25.1, 25.2 and 25.3), which are as follows :-

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

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

25.2 The defense made by the defendant in the suit must not be considered while deciding the merits of the application;

14. In case of **Srihari Hanumandas Totala (Supra)**, the Apex Court was considering with an objection regarding bar of *res judicata* and not of limitation.

15. With the help of petitioner, I have perused the copy of Original Application which is filed at page 64 of the paper book from which it is clear that as per the averment made therein, Deed of Guarantee has been executed by the petitioner in the year 1994-96. Defendant - respondent No.2 (original borrower) filed a Reference before BIFR being Case No. 84 of 1997 and BIFR, vide its order dated 8.1.2007, passed final winding up order in relation to original borrower company. It has been further stated in the Original Application that the original borrower has acknowledged the debt of applicant vide letter dated 18.3.2006 and has also submitted the letter dated April 1, 2006 for One Time Settlement Scheme. It has also been stated in the Original Application that to finalize the financial Assistance forming subject matter of the present Original Application, the same has been demanded by respondent No.1 from the defendant – respondent No.2 vide notice dated 17.10.2007 u/s 13(2) of the Securitisation and Reconstruction of Financial Assets And Enforcement Of Security Interest Act, 2002 and respondent no. 1 has also invoked the guarantee of the Guarantors vide letter dated 18.1.2016.

16. Question of limitation is generally a mixed question of law and fact. In case of **Ramesh B Desai and others vs. Vipin Vadilal Mehta and others; (2006) 5 SCC 638;** the Apex Court while dealing with the issue of limitation held that a plea of limitation cannot be decided as an abstract principle of law divorced from facts, as in every case, the starting point of limitation

has to be ascertained which is entirely a question of fact.

17. As the plea of limitation is generally a mixed question of law and fact. At this stage, it will be useful to refer the provisions of Order VII Rule 6 CPC which are quoted as under :-

"6. Grounds of exemption from limitation law *– Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed."*

18. In view of Order VII Rule 6 CPC, plaintiff is entitled to claim exemption from the law of limitation on the grounds as set forth by him in his plaint claiming such exemption.

19. In case of **P.V. Guru Raj Reddy and Another Vs. P. Neeradha Reddy and others; (2015) 8 SCC 331,** the Apex Court held that rejection of the plaint under Order VII Rule 11 of CPC is a drastic power conferred in the Court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII Rule 11 CPC, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII Rule 11 CPC, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. **It is only if the averments in the plaint ex facie do not disclose a cause of action or an a reading thereof the suit appears to be barred under any law, the plaint can be rejected. In all other situations the claims will have to be adjudicated in the course of trial.**

20. In the present case, from reading of the Original Application as a whole and proceeding on the basis that the averments made therein are correct, which is what the Court is required to do so it cannot be said that the said pleadings ex facie disclose that the suit is barred by limitation. So far as the contention raised by learned counsel for the petitioner that the Original Application itself was filed after a lapse of more than 16 years and the petitioner never acknowledged the claim of respondent No.1 during this period and also other submissions made by the petitioner cannot be looked into at the stage of considering the provisions of Order VII Rule 11(d) of CPC.

21. So far as contention of learned counsel for the petitioner that the Courts below have erred in law in rejecting the application of the petitioner under VII Rule 11 CPC as the Original Application was filed much beyond the time prescribed by the Limitation Act and coupled with the fact that petitioner never acknowledged the debt during this period cannot be sustained for the reason that in view of the law laid down by the Apex Court, as discussed above, at the stage of considering the application under Order VII Rule 11 CPC, it is only the plaint allegation has to be seen and not the defence which is being taken by the defendant either in his written statement or in his application under Order VII Rule 11 can be considered. From the perusal of the Original Application it cannot be said that as per the allegations contained in the Original Application, the Original Application is barred by time. So far as contentions of the petitioner on merit

otherwise are based on the pleadings in his written statement can be considered only after framing of an issue as to limitation and after considering the evidence of both the parties and not at the stage of deciding the application under Order VII Rule 11 CPC.

22. Further contention of learned counsel for the petitioner that though the D.R.A.T. while deciding the appeal has permitted the petitioner to move an application as to his grievance relating to limitation and in case such application is moved, the same shall be considered by the Tribunal at the time of decision of the Original Application is concerned is of no consequence as the order passed by the D.R.T. rejecting the application filed by the petitioner under Order VII Rule 11 CPC has held therein that the Original Application is not barred by limitation, has not been set aside by the D.R.A.T. and the same will operate as *res judicata* at the time when the issue of limitation will be considered as per the directions of the D.R.A.T. Contention of the leraned counsel for the petitioner, is also misconceived, for the reason that at the time of consideration of application under Order VII Rule 11 CPC, the Tribunal has to confine itself only to the averments made in the Original Application and at that stage, the Tribunal cannot look into any other material. While considering the issue of limitation, as directed by the D.R.A.T., the Tribunal has to examine the pleadings of both the parties as well as the evidence led in support of their cases by both the parties and in my view any finding recorded by the D.R.T. while deciding the application under Order VII Rule 11 will not operate as *res judicata* while deciding the issue of limitation after exchange of pleadings and after the parties led their evidence.

23. Even otherwise, in view of Section 3(1) of the Indian Limitation Act, it is the duty of the Court or Tribunal to consider the issue of limitation of its own even though the issue of limitation has not been raised by either of the parties. In this regard, Section 3 of the Indian Limitation Act is quoted as under :-

"3. Bar of limitation.— (1) Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) ……."

24. The Apex Court in case of **Union of India and another v. British India Corporation Ltd. and others** reported in **(2003) 9 SCC 505**, in paragraph no. 7 has held as under:

"7. As to the first point, the question of limitation is a mandate to the forum and, irrespective of the fact whether it was raised or not, the forum must consider and apply it, if there is no dispute on facts.

25. In case of **Gannmani Anasuya and others v. Parvatini Amarendra Chowdhary and others** reported in **(2007) 10 SCC 296,** the Apex Court in paragraph no. 27 has held as under:

"27. In terms of Section 3 of the Limitation Act, it is for the court to determine the question as to whether the suit is barred by limitation or not irrespective of the fact that as to whether such a plea has been raised by the parties. Such a jurisdictional fact need not, thus, be pleaded."

26. Similarly, in case of **Noharlal Verma v. District Cooperative Central Bank Limited, Jagdalpur** reported in **(2008) 14 SCC 445**, the Apex Court reiterated the view in paragraph no. 32 & 33 as under:

"32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation, a Court or an Adjudicating Authority has no jurisdiction, power or authority to entertain such suit, appeal or application and to decide it on merits.

33. Sub-section (1) of Section 3 of the Limitation Act, 1963 reads as under;

(3) Bar of limitation.--(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

(emphasis supplied)

Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in absence of such plea by the defendant, respondent or opponent, the Court or Authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation."

27. The issue of limitation being generally a mixed issue of fact and law and is subject to the evidence led by the parties. The findings recorded by the Court/Tribunal while deciding the application under Order 7 Rule 11 C.P.C. will not operate as *res judicata*.

28. I am of the considered opinion that the judgment of the Appellate Court is perfectly correct as it takes care of the petitioner's concern as to bar of limitation to maintainability of the Original Application.

29. In view of the same, I am not inclined to interfere with the matter. Accordingly, the petition is **disposed of** with the direction to D.R.T. Jabalpur to comply with the directions issued by the D.R.A.T. Allahabad vide its order dated 3.1.2023 passed in Appeal No.1140 of 2022 (Saurabh Kalani Vs. Stressed Asset Stabilization Fund and others.

(2024) 2 ILRA 528
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2023
BEFORE

THE HON'BLE MAHESH CHANDRA TRIPATHI, J.
THE HON'BLE PRASHANT KUMAR, J.

Writ C No. 37047 of 2023

Hakim Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Indra Raj, Sri M.A. Haseen

Counsel for the Respondents:
C.S.C., Sri Nipun Singh

Civil Law- Constitution of India,1950-Article 226-Urban Land(Ceiling and Regulation)Act, 1976-Section 10(3), 10(5)-U.P. Avas Evam Vikas Parishad Adhiniyam, 1965-The land was declared surplus and acquired by awas evam vikas parishad-he claimed no compensation was received under the Act,1976 and notifications were never served-The

acquisition of land under the act,1965 including possession transfer and compensation distribution was valid and lawful-The subsequent purchaser of the land had no right to challenge the acquisition process as the original acquisition vested title in the State-proceedings under the Act, 1976 were final and binding-Claims of lack of notice or compensation were refuted by records showing proper procedure and notification compliance-delay and laches disentitle equitable relief under Article 226 of the Constitution.(Para 1 to 27)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Atul Sharma & ors.. Vs St. of U.P. & ors.., L.A. No. 159 of 2014

2. Jagbeer Singh & ors.. Vs St. of U.P. & ors.. (2018)2 AWC 1639

3. Raj. St. Indus Development & Investt Corpn Vs Subhash Sindhi Co-op. Housing Socy. Jaipur & ors.. (2013) AIR SC 1226

4. V. Chandrasekaran & anr.. Vs The Administrative Officer & ors.. JT (2012)9 SC 260

5. Dehri Rohtas Light Railway Vs District Board Bhojpur & ors.. (1992) 2 SCC 598

6. Shivgonda Anna Patil Vs St. of Mah. (1999) 3 SCC 5

7. Municipal Council, Ahmednagar Vs Shah Hyder Beig(2000) 2 SCC 48

8. U.P. Jal Nigam & anr.. Vs Jaswant Singh & anr. (2006) 11 SCC 464

9. Tukaram Kana Joshi & ors.. Vs MIDC & ors.. (2013) 1 SCC 353

10. St. of Assam Vs Bhaskar Jyoti Sharma & ors.., (2015) 5 SCC 321

11. Shiv Ram Singh Vs St. of U.P. & ors.. (2015) 7 ADJ 630

12. Kapilaben Ambalal Patel & ors.. Vs St. of Guj. 2021 (12 SCC 95,

13. Smt. Kalawati Devi Vs St. of UP & ors.. Writ C No. 41628 of 2011

14. Basic Shiksha Parishad U.P. Alld. & ors.. Vs Aditya Kishor & Prabhat Kumar & ors.. (2013)2 ADJ 607

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.
&
Hon'ble Prashant Kumar, J.)

1. Heard Shri M.A. Haseen, learned counsel for the petitioner; Shri Sharad Chandra Upadhyay, learned Standing Counsel for State respondents and Shri Nipun Singh, learned counsel for U.P. Avas Evam Vikas Parishad (in short "the Parishad").

2. The instant writ petition has been preferred for a direction to respondents not to dispossess the petitioner from the land in question at Khasra No.863, 864, 897, 903, 904 situated at Village Kakaraitha, Tehsil Sadar, District Agra, declared surplus vide order dated 18.5.1977 passed under the Urban Land (Ceiling and Regulations) Act, 1976 and record the name of the petitioner after expunging the name of State Government.

3. It transpires from the record that ceiling proceedings were initiated under the Urban Land (Ceiling and Regulation) Act, 1976 (in short "the Act, 1976") against the petitioner-Hakim Singh and his brother Mavasia, both sons of Beneram, who were recorded tenure holders of Plot Nos.863, 864, 897, 903, 904 (total area 8 Beegha 4

Biswa) (in short "the disputed land"), Village Kakaraitha, Tehsil Sadar, District Agra. The petitioner was recorded tenure holder with bhumidhari rights and was in possession over his holding (half share of the disputed land). A notice under Section 8 (3) of the Act, 1976 was issued to the petitioner by the Prescribed Authority in the year 1977 and the same was also objected. The said objection was rejected by the Prescribed Authority vide order dated 18.5.1977 declaring certain land as surplus. It is claimed that the petitioner had no knowledge of the order dated 18.5.1977 and had never received any notice under Section 9 of the Act, 1976. Therefore, he could not file any appeal against the order dated 18.5.1977. It is also claimed that in the ceiling proceeding 1500 sq. mtr. land was left in favour of the petitioner as per Section 4 (9) of the Act, 1976, upon which the respondents had no right and title and as such the entire impugned action of the respondents is arbitrary and illegal. Though the land in question was declared surplus but no actual and physical possession was taken from the petitioner and the petitioner remained and still in actual and physical possession over the disputed land. It is also claimed that no compensation under Section 11 of the Act, 1976 was given to the petitioner. Although the notification under Section 10 (3) of the Act, 1976 was issued on 27.12.1982 and under Section 10 (5) was issued on 18.9.1986 but as both the notifications were not served upon the petitioner, therefore, actual possession was neither been delivered by the petitioner nor taken by the State Government. No proceeding for taking possession under Section 10 (6) of the Act, 1976 or any other provisions had even been invoked against the disputed land. After the Repeal Act, 1999 no proceeding under Section 10 (6) can be initiated and the State Government cannot dispossess the petitioner after the Repeal Act. Mere publication of notification under Section 10 (3) and 10 (5) of the Act, 1976 is not sufficient, if the actual physical possession has not been taken by the prescribed Authority.

4. It is contended that neither the actual physical possession has been taken by the authorities nor the petitioner has handed over the possession to the State but surprisingly in the month of April, 2017 the officials of the respondent no.5-Parishad came on the spot and threatened the petitioner for dispossession. When the petitioner enquired about the same, they orally informed that the entire land including the land in dispute (8 Beegha 4 Biswa) was acquired for housing purposes. It is claimed that neither the petitioner had received any notice or information of the acquisition by respondent no.5-Parishad nor he received any compensation. As such it is submitted that this Court may come for rescue and reprieve of the petitioner.

5. On the matter being taken up on 11.12.2023, the Court has proceeded to pass the following order:-

"1. Sri S.C. Upadhyay, learned Standing Counsel has placed detailed instructions indicating therein that for the part of the land, ceiling proceeding under Urban Land (Ceiling and Regulation) Act, 1976 (in short, Act, 1976) was initiated and the possession was taken over by the State Government way back in the year 1980. For the remaining part, the surplus land was handed over to the Awas Evam Vikas Parishad, which had also initiated the acquisition proceeding under Sections 28 and 32 of Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 (in short, Act, 1965). It is also claimed that qua the

acquisition proceedings, which were drawn under the Act, 1965, the award was also made and adequate compensation was also paid to the tenure holders.

2. Sri S.C. Upadhyay, learned Standing Counsel has raised an objection that at this stage, in view of law laid down by Division Bench of this Court in Writ C No.38977 of 2022 (Mithai Lal and 11 ors vs. State Of U.P. and 2 Others) decided on 16.02.2023, no relief can be accorded and in case in lieu of the award the petitioner has not lifted the compensation, it is open to the petitioner to lift the said compensation but neither any relief can be accorded under the Act of 1976 nor under the Act of 1965 the acquisition proceeding can be challenged at this stage.

3. On the request of learned counsel for the petitioner, the matter is adjourned.

4. Put up this matter as fresh day after tomorrow i.e. 13.12.2023 at 2 PM."

6. On the matter being taken up today, Shri Nipun Singh, learned counsel for Parishad, on the instructions, submits that for Sikandara Project, Agra, notification under Section 28 of U.P. Avas Evam Vikas Parishad Act, 1965 (in short "Act, 1965") of Khasra No.863 (2-1-0) 864 (1-17-0), 897 (1-14-0), 903 (1-5-0) and Khasra No.904 (1-7-0) i.e. Total (8-4-0) of Village Kakretha was issued on 4.4.1970 and notification under Section 32 was issued on 28.6.1980. After the acquisition proceeding, the actual physical possession was taken by the competent authority on 26.7.1983 and the award was declared on 26.8.1985. The compensation was also taken by the petitioner. At present allotment scheme is already completed and even allotment has also been made. The petitioner has not come to the Court with clean hands. He had transferred his rights to Shri Sobran Singh and Madhu through sale deed, who have received compensation and as such he has mislead the Court that he has not received the compensation. Learned counsel for Parishad, in this backdrop, submits that after the land was acquired and possession was taken over, the same was vested in the State free from all encumbrances. Later on under the Scheme, allotments were also made. He submits that at this belated stage, the relief as has been sought for, cannot be accorded and the writ petition is liable to be dismissed on the ground of delay and laches.

7. Shri Nipun Singh, learned counsel for Parishad has also contended that at this stage the alleged possession cannot sustain and even the provisions of Section 24 (2) of the Right to Fair Compensation & Transparency in Land Acquisition, Rehabilitation & Resettlement Act, 2013 (in short "the Act, 2013") would not apply to the acquisition made under the provisions of Act, 1965. He submits that the said issue is no longer res integra in view of the Division Bench judgment of this Court in **Atul Sharma & Ors. v. State of U.P. & Ors.,** L.A. No.159 of 2014 and **Jagbeer Singh & Ors. v. State of U.P. & Ors.**, 2018 (2) AWC 1639. The operative portion of the judgment in Atul Sharma & Ors. (Supra) is quoted as under:-

".....The aforesaid observations have been later on reproduced, considered and explained by the Apex Court in at least three decisions which deserve mention, the leading being Ch. Tika Ramji and Ors etc. vs. The State of Uttar Pradesh and Ors. (AIR 1956 Supreme Court 676), paragraphs 30 to 39. The second decision is in the case of the State of T.N. and Anr. vs. Adhiyaman Educational & Research Institute and

Ors,(1995 (4) SCC 104) paragraphs 15 to 18 and the third decision is in the case of Thirumuruga Kirupananda Variyarthavathiru Sundara Swamigalme vs. Stae of Tamil Nadu and Ors. (1996 Vol. 3 SCC 15) paragraphs 19, 20, 23 to 26. There are many more decisions to the same effect and it is not necessary for us to burden this judgment with anything further.

The basic principle that can be culled out from a perusal of these judgments is that the test of repugnancy is whether the law made by Parliament and that by the State Legislature occupy the same field and whether the Parliament intended to lay down a exhaustive code in respect of the subject matter replacing the act of the State Legislature.

The non-inclusion of the 1965 Act in the 4th Schedule to the 2013 Act in terms of section 105 thereof does not necessarily mean that the 2013 Act was extended to be applied in acquisitions under the 1965 Act. The intent of the 2013 Act was to eclipse the anomalies and improve the conditions of payment of compensation to acquisitions made under the Land Acquisition Act, 1894 only. Since the 1894 Act has been repealed, and the 1965 Act continues to exist without any amendment there does not arise any issue of repugnancy or inconsistency. This has to be viewed from another angle. The benefit of deemed lapse is by a fiction under a specific statute. A provision of fiction has to be strictly construed and it cannot be impliedly treated to be incorporated unless the 1965 Act also contemplates any such fiction. It is for this reason that an amendment will have to be expressly brought about in the 1965 Act if the provisions of 2013 Act have to be applied and not otherwise in relation to the procedure of acquisition. A provision of deemed lapse cannot be read into by way of interpretation into 1965 Act without specific amendment therein.

The other question is can this be construed the other way around by presuming an implied applicability of the 2013 Act merely because section 55 of the 1965 Act incorporates the procedure of acquisition under the 1894 Act. We may put on record that the issue of lapse of an acquisition proceeding under section 11-A of the 1894 Act was specifically held to be not applicable in acquisitions under the 1965 Act in Jainul Islam's case. The same situation exists here where the issue of deemed lapse under section 24(2) is sought to be introduced and read into the 1965 Act. We cannot accept this proposition inasmuch as section 55 of the 1965 Act has not been amended so as to include any provision relating to the acquisition resulting in any lapse as contained in the 2013 Act. Thus, such applicability cannot be implied when it has not been incorporated in the 1965 Act.

There is yet another reason namely the provisions of 2013 Act as contained in section 24(2) are not inconsistent with any provision of the State Act that exists from before. Conversely the State Act also does not include any provision that may said to be inconsistent or in conflict with 2013 Act. The non-inclusion of the benefit of the clause of deemed lapse does not make the enactment inconsistent, conflicting or repugnant.

To understand this recourse can be had to the provisions quoted herein above in the 2013 Act that clearly provide that the 2013 Act and its provisions are in addition and not in derogation of any law for the time being in force. Consequently the States have been left to enact any law that may provide for any better facilities relating to acquisition over and above that has been provided for in the 2013 Act. This,

therefore, also removes the elements of discrimination or arbitrariness. It is open to the State to provide better facility or benefit in matters of acquisition by bringing about any amendment in the 1965 Act.

Coming to the last limb of this argument namely the resultant discrimination in relation to acquisitions having been made prior to 01.01.2014, we may point out that when there is a legislation by incorporation then it is only that part of legislation which stands incorporated and continues to exist and not a new legislation which refers to the proceedings under the old legislation. The reason is what can be incorporated is that which exists. It is for this reason that section 55 of the 1965 Act incorporated the then existing provisions of 1894 Act. The 1894 Act has now been repealed and is not in existence. Thus, it is only the provisions of 1894 Act that have been incorporated in section 55 of the 1965 Act that will continue to exist for that purpose only to that limited extent. The same does not within its fold draw the elements of the 2013 Act which has never been intended to be incorporated or included in the 1965 Act or vice-versa. Thus, these are two sets of acquisitions under the different Acts and the question of applying Article 14 to invoke discrimination does not arise.

However, there is another shade of this discrimination which has to be avoided keeping in view the ratio of the Jainul Islam's case. To that extent we hold that if any acquisition is made by the authority under the 1965 Act after 01.01.2014 then it's actions or the assessment of compensation cannot be less than what has been contemplated in 2013 Act. The determination of the quantum of compensation, therefore, on principles will have to be applied in relation to acquisitions made by the Awas Vikas Parishad under the 1965 Act after 01.01.2014 as per the 2013 Act.

Consequently for all the reasons aforesaid the relief claimed in the writ petition with regard to the lapse of the proceedings cannot be availed of and the petition is accordingly dismissed."

8. For ready reference, the operative portion of the judgment in Jagbeer Singh & Ors., (Supra) is quoted as under:-

".....The Fourth Schedule contained in the 2013 Act makes reference to 13 Acts but does not make reference to the Parishad Act.

This issue was also considered by a Division Bench of this Court in Atul Sharma. It was sought to be contended that Section 24(2) of the 2013 Act would apply to acquisitions made under the Parishad Act. This contention was repelled by the Division Bench holding that the absence of exclusion of the applicability of the 2013 Act would not necessarily mean that the 2013 Act would apply to the acquisitions made under the Parishad Act. The observations of the Division Bench are as follows:

"The non-inclusion of the 1965 Act in the 4th Schedule to the 2013 Act in terms of section 105 thereof does not necessarily mean that the 2013 Act was extended to be applied in acquisitions under the 1965 Act. The intent of the 2013 Act was to eclipse the anomalies and improve the conditions of payment of compensation to acquisitions made under the Land Acquisition Act, 1894 only. Since the 1894 Act has been repealed, and the 1965 Act continues to exist without any amendment there does not arise any issue of repugnancy or inconsistency. This has to be viewed from another angle. The benefit

of deemed lapse is by a fiction under a specific statute. A provision of fiction has to be strictly construed and it cannot be impliedly treated to be incorporated unless the 1965 Act also contemplates any such fiction. It is for this reason that an amendment will have to be expressly brought about in the 1965 Act if the provisions of 2013 Act have to be applied and not otherwise in relation to the procedure of acquisition. A provision of deemed lapse cannot be read into by way of interpretation into 1965 Act without specific amendment therein.

In this connection, the Division Bench also observed that since Section 11-A of the Acquisition Act was held not to be applicable to acquisitions made under the Parishad Act, the same position would exist in regard to Section 24(2) of the 2013 Act and the observations are:

"The other question is can this be construed the other way around by presuming an implied applicability of the 2013 Act merely because section 55 of the 1965 Act incorporates the procedure of acquisition under the 1894 Act. We may put on record that the issue of lapse of an acquisition proceeding under section 11-A of the 1894 Act was specifically held to be not applicable in acquisitions under the 1965 Act in Jainul Islam's case. The same situation exists here where the issue of deemed lapse under section 24(2) is sought to be introduced and read into the 1965 Act. We cannot accept this proposition inasmuch as section 55 of the 1965 Act has not been amended so as to include any provision relating to the acquisition resulting in any lapse as contained in the 2013 Act. Thus, such applicability cannot be implied when it has not been incorporated in the 1965 Act."

The decisions referred to by the learned counsel for the petitioners relating to lapsing of acquisition under Section 24(2) of the 2013 Act when land was acquired under the provisions of the Acquisition Act would, therefore, not come to the aid of the petitioners.

Thus, for all the reasons stated above, it is not possible to accept the contention of the learned counsel for the petitioners that Section 24(2) of the 2013 Act would be applicable to the acquisitions made under the Parishad Act.

In the end, learned counsel for the petitioners submitted that though the award was made way back on 30 December 2013, compensation has not been paid to the petitioners who are the subsequent purchaser of the land that was acquired. It is for the petitioners to file an application before the Special Land Acquisition Officer for payment of the compensation and the Court has no reason to doubt that in case such an application is filed, it shall be decided in accordance with law after hearing the parties concerned.

The writ petition is, accordingly, dismissed with the aforesaid observations."

9. Similar arguments have also been raised by learned Standing Counsel. On the basis of instructions dated 16.11.2023 sent by the Addl. District Magistrate (City), Agra, he submits that under the Scheme in question the land in question was acquired. At the time of acquisition, the names of petitioner-Hakim Singh and Mawasia both sons of Baniram were recorded in the revenue record. After acquisition, the possession was transferred on 26.7.1983 and the award was declared on 26.8.1985. The original land owner Mawasia has sold his half portion to Smt. Madhu daughter of Lakhmi Chand and the petitioner Hakim Singh has sold his half portion to Soran Singh son of Ram Dayal. The said Soran Singh had sold his half share to Saudan

Singh son of Kuwari. Accordingly, Soran Singh, Saudan Singh and Smt. Madhu had received the compensation of their share/portion. As such the claim of the petitioner that he has not received compensation is absolutely incorrect and unjustified. It is submitted that acquisition proceeding had been completed way back and as such at this belated stage no interference is required in the matter.

10. Heard rival submissions and perused the record, as well as the instructions placed by learned counsel for the respondents.

11. In the present matter two issues are involved for adjudication. The **First Issue** is "whether the part of disputed land, which was acquired under the Act, 1965 is valid or not?" **The Second Issue** is "whether the Ceiling Proceeding drawn under the Act, 1976 is sustainable or not?"

First Issue

12. So far as the first issue is concerned, the notification under Section 28 of the Act, 1965 (pari materia Section 4 of the Land Acquisition Act, 1894) of the land viz. Khasra No.863 (2-1-0), 864 (1-17-0), 897 (1-14-0), 903 (1-5-0) and Khasra No.904 (1-7-0) Total 8-4-0 for planned development was issued on 4.4.1970. Thereafter, the notification under Section 32 of the Act, 1965 (pari materia Section 6 of the Land Acquisition Act, 1894) was issued on 28.6.1980. After the completion of acquisition proceeding, the competent authority had taken over the actual physical possession of the aforesaid land under the Land Acquisition Act, 1894 and, thereafter, the possession of the same was handed over to the Parishad on 26.7.1983. The award of the disputed land (8-4-0) was also made on 26.8.1985. At the time of acquisition, the names of the petitioner-Hakim Singh and his brother Mavasia, both sons of Beneram were recorded in the revenue record. The said Mawasia had sold half portion of his holding to Smt. Madhu daughter of Lakhmi Chand and the petitioner Hakim Singh had also sold his half portion to Soran Singh son of Ram Dayal. Even thereafter, the said Soran Singh had also sold his half share to Saudan Singh son of Kuwari. On the basis of said transfer, Soran Singh had received compensation of Rs.40,093.50 on 2.9.1985; Saudan Singh received compensation of Rs.40,093.50 on 2.9.1985 and Smt. Madhu received compensation of Rs.79,457.30 on 3.9.1985. Therefore, on the basis of instructions, it is claimed that in lieu of the award, the compensation was either lifted by the petitioner, his brother or even by the subsequent purchasers. Therefore, the claim, as has been set up before us, that in lieu of the award the petitioner has not lifted the compensation is factually incorrect.

13. There cannot be any quarrel with respect to the settled legal proposition that the purchase, subsequent to the issuance of notification under Section 28 of the Act, 1965 (pari materia of Section 4 of the Land Acquisition Act, 1894) in relation to such land, is void against the State and at the most, the purchaser may be a person interested in compensation, since he steps into the shoes of the erstwhile owner and may, therefore, merely claim compensation. However, it is also apparent from the record that third party interest had been created and the compensation had also been lifted by the parties. Therefore, at this stage, we are not inclined to dwell with the issue whether the alleged transfer/ sale of the disputed land is prior or after the notification under Section 28 of the Act,

1965. Hon'ble the Apex Court in the case of **Rajasthan State Industrial Development and Investment Corporation Vs. Subhash Sindhi Cooperative Housing Society Jaipur and Ors,** AIR 2013 SC 1226 has observed in Paragraph No. 7 as follows:-

"7. There can be no quarrel with respect to the settled legal proposition that a purchaser, subsequent to the issuance of a Section 4 Notification in respect of the land, cannot challenge the acquisition proceedings, and can only claim compensation as the sale transaction in such a situation is Void qua the Government. Any such encumbrance created by the owner, or any transfer of the land in question, that is made after the issuance of such a notification, would be deemed to be void and would not be binding on the Government. (Vide: Gian Chand v. Gopala & Ors., (1995) 2 SCC 528; Yadu Nandan Garg v. State of Rajasthan & Ors., AIR 1996 SC 520; Jaipur Development Authority v. Mahavir Housing Coop. Society, Jaipur & Ors. (1996) 11 SCC 229; Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain & Ors., (1997) 1 SCC 35; Meera Sahni v. Lieutenant Governor of Delhi & Ors., (2008) 9 SCC 177; Har Narain (Dead) by Lrs. v. Mam Chand (Dead) by LRs. & Ors., (2010) 13 SCC 128; and V. Chandrasekaran & Anr. v. The Administrative Officer & Ors., JT 2012 (9) SC 260)."

14. Hon'ble the Apex Court has also considered the issue 'whether the subsequent purchaser can challenge the acquisition proceeding' in **V. Chandrasekaran & Anr. v. The Administrative Officer and Ors., JT 2012 (9) SC 260** and observed as under:-

"Whether subsequent purchaser can challenge the acquisition proceedings:

6. The issue of maintainability of the writ petitions by the person who purchases the land subsequent to a notification being issued Under Section 4 of the Act has been considered by this Court time and again.

In Pandit Leela Ram v. Union of India : AIR 1975 SC 2112, this Court held that, any one who deals with the land subsequent to a Section 4 notification being issued, does so, at his own peril. In Sneh Prabha v. State of Uttar Pradesh: AIR 1996 SC 540, this Court held that a Section 4 in notification gives a notice to the public at large that the land in respect to which it has been issued, is needed for a public purpose, and it further points out that there will be "an impediment to any one to encumber the land acquired thereunder." The alienation thereafter does not bind the State or the beneficiary under the acquisition. The purchaser is entitled only to receive compensation. While deciding the said case, reliance was placed on an earlier judgment of this Court in Union of India v. Shri Shiv Kumar Bhargava and Ors.: JT (1995) 6 SC 274.

7. Similarly, in U.P. Jal Nigam v. Kalra Properties Pvt. Ltd.: AIR 1996 SC 1170, this Court held that, purchase of land after publication of a Section 4 notification in relation to such land, is void against the State and at the most, the purchaser may be a person-interested in compensation, since he steps into the shoes of the erstwhile owner and may therefore, merely claim compensation. (See also: Star Wire (India) Ltd. v. State of Haryana and Ors.: (1996) 11 SCC 698).

9.In view of the above, the law on the issue can be summarized to the effect that a person who purchases land subsequent to the issuance of a Section 4

notification with respect to it, is not competent to challenge the validity of the acquisition proceedings on any ground whatsoever, for the reason that the sale deed executed in his favour does not confer upon him, any title and at the most he can claim compensation on the basis of his vendor's title."

15. In the present matter, admittedly the petitioner has not approached this Court with clean hands. No averment is made in the writ petition, at what time he has created third party interest in the property in dispute, whereas through the instructions, it is brought into notice to the Court that the compensation was lifted. Considering the aforesaid facts and in the light of the judgments cited above, we find that in lieu of the award the entire compensation has been lifted. Therefore, at this belated stage, any challenge to the proceeding under the Act, 1965 is not available either to the petitioner or to the subsequent purchasers.

Second Issue

16. The second issue pertains to the proceedings under the Act, 1976. A notice under Section 8 (3) of the Act, 1976 was issued to the petitioner to which he filed an objection. Even the said objection was rejected by the Prescribed Authority way back on 18.5.1977 declaring the disputed land of the petitioner as surplus. Thereafter, notice under Section 10 (3) of the Act, 1976 was issued on 29.3.1986. Thereafter, notice under Section 10 (5) was issued according 30 days time to the petitioner for handing over possession and admittedly the same was served upon the petitioner on 17.10.1986. Thereafter, the possession was taken over and the name of erstwhile owner was also expunged and the name of the State Government was entered in the revenue record. Therefore, it is absolutely incorrect to say that the petitioner was having no knowledge about the ceiling proceeding as the revenue record is maintained/ rectified/ modified in every six years known as "Shat Varshiki Khatauni". Each and every villager is very particular/ conscious regarding entry in the revenue record. The entry in the khasra and khatauni gives an ample opportunity to the recorded tenure holder or to his/her heirs for correction in the revenue record. Once the name of the State Government was entered in the revenue record, therefore, it cannot be said, at this belated stage, that the petitioner had no knowledge regarding the said proceeding.

17. It is evident from the record that the petitioner has raised the issue of possession and notice under Section 10 (6) of the Ceiling Act after lapse of more than 40 years and there is no explanation for the delay. The said aspect of the matter has been considered in detail in **Dehri Rohtas Light Railway Vs. District Board Bhojpur and Others,** (1992) 2 SCC 598, wherein Hon'ble Supreme Court observed in paragraph No. 13 as under :-

"The rule which says that the Court may not inquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how the delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed

unless there is reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not to physical running of time. Where the circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches. The decision in Trilok Chand (supra) relied on is distinguishable on the facts of the present case. The levy is based on the net profits of the railway undertaking was beyond the authority and the illegal nature of the same has been questioned though belatedly in the pending proceedings after the pronouncement of the High Court in the matter relating to the subsequent years. That being the case, the claim of the appellant cannot be turned down on the sole ground of delay. We are of the opinion that the High Court was wrong in dismissing the writ petition in limine and refusing to grant the relief sought for. We however agree that suit has been rightly dismissed."

18. Similarly, Hon'ble Apex Court has also considered the delay and laches pertaining to ceiling matters in **Shivgonda Anna Patil Vs. State of Maharashtra,** (1999) 3 SCC 5 wherein the petitioner had approached after considerable delay of ten years after the land was declared surplus and vested in the State Government and the writ petition was summarily dismissed by the High Court and the same was also approved by the Apex Court. Hon'ble Apex Court has also considered the delay and laches in preferring the petition under Article 226 of Constution of India in **Municipal Council, Ahmednagar Vs. Shah Hyder Beig,** (2000) 2 SCC 48 and held that the equitable doctrine, namely, "delay defects equity" has its fullest application in the matter of grant of relief under Article 226 of the Constitution.

19. The Supreme Court in **U.P. Jal Nigam and Another Vs. Jaswant Singh and Another**, (2006) 11 SCC 464 referred, with approval the law relating to laches, as summarized in Halsbury's Law of England. The relevant extract from the aforesaid judgement is reproduced below :-

"12. The statement of law has also been summarized in Halsbury's Laws of England, Para 911 , pg. 395 as follows :

"In determining whether there has been such delay as to amount to laches, the chief points to be considered are :

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

(Emphasis added)

20. In **Tukaram Kana Joshi and others Vs. MIDC and others,** (2013) 1

SCC 353, the Supreme Court observed as follows :-

"12. The State, especially a welfare State which is governed by the Rule of Law, cannot arrogate itself to a status beyond one that is provided by the Constitution. Our Constitution is an organic and flexible one. Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause action, etc. That apart, if whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience.

13. The question of condonation of delay is one of discretion and has to be decided on the basis of the facts of the case at hand, as the same vary from case to case. It will depend upon what the breach of fundamental right and the remedy claimed are and when and how the delay arose. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226, nor is it that there can never be a case where the Courts cannot interfere in a matter, after the passage of a certain length of time. There may be a case where the demand for justice is so compelling, that the High Court would be inclined to interfere in spite of delay. Ultimately, it would be a matter within the discretion of the Court and such discretion, must be exercised fairly and justly so as to promote justice and not to defeat it. The validity of the party's defence must be tried upon principles substantially equitable. (Vide: P.S. Sadasivaswamy vs. State of T.N. AIR 1974 SC 2271; State of M.P. & Others. vs. Nandlal Jaiswal & Others., AIR 1987 SC 251; and Tridip Kumar Dingal & Others. vs. State of West Bengal & Others, (2009) 1 SCC 768;)

14. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non-deliberate delay. The court should not harm innocent parties if their rights have infact emerged, by delay on the part of the Petitioners. (Vide: Durga Prasad v. Chief Controller of Imports and Exports & Others, AIR 1970 SC 769; Collector, Land Acquisition, Anantnag & Another vs. Mst. Katiji & Others, AIR 1987 SC 1353; Dehri Rohtas Light Railway Company Ltd. vs. District Board, Bhojpur & Others, AIR 1993 SC 802; Dayal Singh & Others vs. Union of India & Others, AIR 2003 SC 1140; and Shankara Co-op Housing

Society Ltd. vs. M. Prabhakar & Others, AIR 2011 SC 2161)."

21. In **State of Assam vs. Bhaskar Jyoti Sharma and others**, (2015) 5 SCC 321, it was held by the Apex Court as under:-

"16. The issue can be viewed from another angle also. Assuming that a person in possession could make a grievance, no matter without much gain in the ultimate analysis, the question is whether such grievance could be made long after the alleged violation ofSection 10(5). If actual physical possession was taken over from the erstwhile land owner on 7th December, 1991 as is alleged in the present case any grievance based on Section 10(5) ought to have been made within a reasonable time of such dispossession. If the owner did not do so, forcible taking over of possession would acquire legitimacy by sheer lapse of time. In any such situation the owner or the person in possession must be deemed to have waived his right under Section 10(5) of the Act. Any other view would, in our opinion, give a licence to a litigant to make a grievance not because he has suffered any real prejudice that needs to be redressed but only because the fortuitous circumstance of a Repeal Act tempted him to raise the issue regarding his dispossession being in violation of the prescribed procedure.

17. Reliance was placed by the respondents upon the decision of this Court in Hari Ram's case (supra). That decision does not, in our view, lend much assistance to the respondents. We say so, because this Court was in Hari Ram's case (supra) considering whether the word 'may' appearing in Section 10(5)gave to the competent authority the discretion to issue or not to issue a notice before taking physical possession of the land in question under Section 10(6). The question whether breach of Section 10(5)and possible dispossession without notice would vitiate the act of dispossession itself or render it non est in the eye of law did not fall for consideration in that case. In our opinion, what Section 10(5)prescribes is an ordinary and logical course of action that ought to be followed before the authorities decided to use force to dispossess the occupant under Section 10(6). In the case at hand if the appellant's version regarding dispossession of the erstwhile owner in December 1991 is correct, the fact that such dispossession was without a notice under Section 10(5) will be of no consequence and would not vitiate or obliterate the act of taking possession for the purposes of Section 3 of the Repeal Act. That is because Bhabadeb Sarma-erstwhile owner had not made any grievance based on breach of Section 10(5) at any stage during his lifetime implying thereby that he had waived his right to do so.

19. In support of the contention that the respondents are even today in actual physical possession of the land in question reliance is placed upon certain electricity bills and bills paid for the telephone connection that stood in the name of one Mr. Sanatan Baishya. It was contended that said Mr. Sanatan Baishya was none other than the caretaker of the property of the respondents. There is, however, nothing on record to substantiate that assertion. The telephone bills and electricity bills also relate to the period from 2001 onwards only. There is nothing on record before us nor was anything placed before the High Court to suggest that between 7th December, 1991 till the date the land in question was allotted to GMDA in December, 2003 the owner or

his legal heirs after his demise had continued to be in possession. All that we have is rival claims of the parties based on affidavits in support thereof. We repeatedly asked learned counsel for the parties whether they can, upon remand on the analogy of the decision in the case of Gyanaba Dilavarsinh Jadega (supra), adduce any documentary evidence that would enable the High Court to record a finding in regard to actual possession. They were unable to point out or refer to any such evidence. That being so the question whether actual physical possession was taken over remains a seriously disputed question of fact which is not amenable to a satisfactory determination by the High Court in proceedings under Article 226 of the Constitution no matter the High Court may in its discretion in certain situations upon such determination. Remand to the High Court to have a finding on the question of dispossession, therefore, does not appear to us to be a viable solution."

(Emphasis added)

22. The aforesaid judgment of Hon'ble Supreme Court in **Bhaskar Jyoti Sharma and others** (supra) has been followed by a coordinate Bench of this Court in the case of **Shiv Ram Singh vs. State of U.P. and others,** 2015 (7) ADJ 630 wherein the writ petition was dismissed on the ground of laches with following observations:-

"We must also advert to another aspect of the matter particularly having regard to the recent decision of the Supreme Court in Bhaskar Jyoti Sarma (supra). The petitioner moved the first writ petition in 2002 nearly three years after the Repeal Act had come into force. After the earlier writ petition was disposed of by directing the District Magistrate to pass an order on the representation of the petitioner, an order was passed by the District Magistrate on 10 May 2007. The petitioner thereafter waited for a period of over two years until the present writ petition was filed in July 2009. If the petitioner had been dispossessed of the land without due notice under Section 10(5), such a grievance could have been raised at the relevant time. As a matter of fact, it has been the case of the State all along that a notice under Section 10(5) was, in fact, issued in the present case which would be borne out from the original file which has been produced before the Court. The issue is whether such a grievance could be made long after, before the Court. The petitioner had waited for nearly three years after the Repeal Act came into force to file the first writ petition and thereafter for a period of over two years after the disposal of the representation despite the finding of the District Magistrate that possession was taken over on 25 June 1993. In our view, such a belated challenge should not, in any event, be entertained."

23. In **Kapilaben Ambalal Patel and Others Vs. State of Gujarat,** 2021 (12) SCC 95, the Apex Court has considered the delay and laches in detail and declined to accept the pleas setup by the legal heirs/representatives of the original land holder on the ground of inordinate delay. Relevant paragraph of the judgement is reproduced herein below:-

"Feeling aggrieved, the landowners have approached this Court. It is urged that there is no tittle of evidence to substantiate the fact asserted by the respondent State that physical possession of the land in question has been taken over

on 20-3-1986. It was merely a paper-possession in the form of possession panchnama. According to the appellants, de facto possession of the subject land as on the date of the Repeal Act is crucial and entails in abatement of all the actions of the State authorities under the 1976 Act. Mere issuance of notification under Section 10(3) of the 1976 Act regarding deemed vesting of the land in the State is not enough for the purposes of the Repeal Act. Reliance has been placed on Vinayak Kashinath Shilkar Vs. Collector & Competent Authority, (2012) 4 SCC 718, State of U.P. Vs. Hari Ram (2013) 4 SCC 280, Gajanan Kamlya Patil vs. Additional Collector & Competent Authority (ULC) (2014) 12 SCC 523 and Mangalsen Vs. State of U.P. (2014) 15 SCC 332. The consistent view of this Court is that physical possession must be taken by the State authorities, failing which the proceedings shall abate on account of the Repeal Act. The appellants have relied on revenue records to show that the continued possession remained with the appellants/landowners even after the possession panchnama was made on 20-3-1986. The revenue entries have presumptive value and the respondent State had failed to rebut the same.

"Furthermore, in the grounds all that is asserted is that the High Court erred in holding that there was delay of 14 years in filing of writ petition and in not appreciating that the notice under Section 10(5) of the 1976 Act dated 23-1-1986, was not served upon Ambalal Parsottambhai Patel as he had already expired on 31-12-1985 and notice sent to him was returned bacy on 2-2-1986 unserved with remark "said owner has expired". Further, the legal heirs of Ambalal Parsottambhai Patel ought to have been served with the said notice.....Be that as it may, we are not inclined to reverse the conclusion recorded by the Division Bench of the High court that the writ petition filed by the appellants was hopelpessly delayed and suffered from laches. That is a possible view in the facts of the present case."

24. Recently, the coordinate Bench of this Court has also considered the Ceiling Act and Repeal Act qua to the subsequent purchaser in **Smt. Kalawati Devi vs. State of UP and others**, Writ C No.41628 of 2011 and dismissed the writ petition on 18.1.2023 on the ground that the owner never protested or agitated her dispossession before any authority or Court. In the circumstances, the subsequent purchaser cannot raise challenge to the procedure of dispossession at belated stage on the strength of a sale deed being void ab-initio. Relevant paragraph nos.22, 23 and 24 of the judgement are reproduced herein below:-

"22. The question of issuing notice under Section 10(5) to the petitioner after 16 years from the date of notice under Section 10(1) of the Act does not arise. The State had taken possession from the land owner way back in 1981. The subsequent transfer of the land in 1994, followed by mutation of the name of the petitioner, would have no bearing on the right of the petitioner. The transfer of the surplus land by the erstwhile owner, in the eye of law being nullity i.e. void ab-initio would not confer any right or title upon the petitioner. The possession of the petitioner after the proceedings concluding under the Act, upon the State taking possession, would merely be a case of encroachment of State land. The Repeal Act would not come to the assistance of the petitioner, rather, the case of the petitioner would not fall within the ambit and scope of the Repeal Act being subsequent purchaser of the surplus land

after notification under Section 10(1) / 10(3) of the Act.

23. Having regard to the facts and circumstances of the case, petitioner lacks locus, and any case, the proceedings came to be set up belatedly by the petitioner in 2006 by approaching this Court and filing a petition, being Writ Petition No. 14698 of 2006, which came to be disposed of directing the Collector to take a decision. Pursuant thereof, the impugned order came to be passed on 27.04.2011, whereby, the second respondent after recording the facts arrived at a conclusion that the transfer of the land by the erstwhile owner, declared surplus, vesting in the State, is a void document and does not confer any right and title upon the petitioner. The erstwhile tenure holder (Khelai), had no title or ownership to transfer the land, the petitioner on the strength of alleged possession on State land cannot agitate his dispossession in view of Repeal Act. The surplus land vested with the State upon notification under Section 10(3) followed by dispossession of the erstwhile owner of the land (Khelai) under Section 10(5) way back in 1981. The owner never protested or agitated his dispossession before any authority or Court. In the circumstances, the subsequent buyer (Petitioner) cannot raise challenge to the procedure of dispossession at belated stage on the strength of a sale deed being void ab-initio.

24. The writ petition being devoid of merit, is accordingly, dismissed."

25. It is also well settled that delay and laches constitute substantial reason for disentitling relief in equitable jurisdiction under Article 226 of the Constitution of India. This Court in **Basic Shiksha Parishad U.P. Allahabad and Ors. vs. Aditya Kishor and Prabhat Kumar and Ors.,** 2013 (2) ADJ 607 has observed in para 13 as under:-

".....13. Delay and laches constitute substantial reason for disentitling relief in equitable jurisdiction under Article 226 of the Constitution of India. In New Delhi Municipal Council v. Pan Singh and others, JT 2007(4) SC 253, the Apex Court observed that after a long time the writ petition should not have been entertained even if the petitioners are similarly situated and discretionary jurisdiction may not be exercised in favour of those who approached the Court after a long time. It was held that delay and laches were relevant factors for exercise of equitable jurisdiction. In M/S. Lipton India Ltd. and others v. Union of India and others, JT 1994(6) SC 71 and M.R. Gupta v. Union of India and others, 1995(5) SCC 628, it was held that though there was no period of limitation provided for filing a petition under Article 226 of Constitution of India, ordinarily a writ petition should be filed within reasonable time. In K.V. Rajalakshmiah Setty v. State of Mysore, AIR 1961 SC 993, it was said that representation would not be adequate explanation to take care of delay. Same view was reiterated in State of Orissa v. Pyari Mohan Samantaray and others, AIR 1976 SC 2617 and State of Orissa and others v. Arun Kumar Patnaik and others, 1976(3) SCC 579 and the said view has also been followed recently in Shiv Dass v. Union of India and others, AIR 2007 SC 1330: 2007(1) Supreme 455 and New Delhi Municipal Council (supra). The aforesaid authorities of the Apex Court has also been followed by this Court in Chunvad Pandey v. State of U.P. and others, 2008(4) ESC 2423. This has been followed in Virender Chaudhary v. Bharat Petroleum Corporation and others, 2009(1) SCC 297.

In S.S. Balu and another v. State of Kerala and others, 2009(2) SCC 479, the Apex Court held that it is well-settled principle of law that delay defeats equity. It is now a trite law that where the writ petitioners approaches the High Court after a long delay, reliefs prayed for may be denied to them on account of delay and laches irrespective of the fact that they are similarly situated to other candidates who have got the benefit. In Yunus v. State of Maharashtra and others, 2009 (3) SCC 281, the Court referred to the observations of Sir Barnesdelay Peacock in Lindsay Petroleum Company v. Prosper Armstrong Hurde etc., (1874) 5 PC 239 and held as under:

Now the doctrine of laches in Courts of Equity is not an arbitrary or technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material.....Two circumstances always important in such cases are, the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.....

26. Considering the facts and circumstances of the case as well as respectfully considering the judgments cited at Bar, we find that in lieu of the award entire compensation has been lifted and even ceiling proceedings were also finalised way back in early 1980s, therefore, at this belated stage, any challenge to the proceedings under the Act, 1965 or the Act, 1976 cannot be accepted. The claim set up by the petitioner is highly time barred and even on merits no case is made out to grant any relief at this belated stage.

27. In view of above, the writ petition sans merit and is accordingly **dismissed.**

(2024) 2 ILRA 544
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2024
BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DONADI RAMESH, J.

Writ C No. 44386 of 2023

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

Counsel for the Petitioner:
Sri Hari Om Sharan Tiwari, Sri Shrikant Chaturvedi

Counsel for the Respondents:
C.S.C.

Civil Law - Constiution of India,1950-Article 226-Maintenance and Welfare of Parents and Senior Citizens Act, 2007 and Rules 2014-Rule 21 & 22-petitioner being a senior citizen alleged that her property was under threat from private individual (land mafia), she sought action against him under the Act-Held, the court ruled that the Act and rules do not extend to dispute against private individuals unrelated to the senior citizen by blood or inheritance-Complaints against third party private persons such as land disputes should be addressed through civil or criminal proceedings under relevant procedural codes not under the Act-the

court found that the grievance does not fall under the jurisdiction of the act,2007.(Para 1 to 15)

The writ petition is dismissed. .(E-6)

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Sri Hari Om Sharan, learned counsel for the petitioner and Sri Ambrish Shukla, Additional Chief Standing Counsel appearing for the State respondents and perused the records.

2. The instant writ petition is filed seeking writ of mandamus commanding and directing the District Magistrate, Prayagraj to take appropriate action on the application of the petitioner dated 27.09.2023 as well as reminder dated 15.12.2023 under the Uttar Pradesh Maintenance and Welfare of Parents and Senior Citizens Rules, 2014 (hereinafter referred to as 'the Rules, 2014') within stipulated period.

3. The petitioner is old woman, aged about 62 years, and is fully protected under the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 (hereinafter referred to as 'the Act, 2007') read with the Rules, 2014. She purchased a Plot No. 331, area 249 hectares, situated in Dabhaon, Pargana Arail, Tehsil Karchhana, District Allahabad, through a registered sale deed dated 05.03.2022. Subsequently, the petitioner's name has been mutated in the revenue record / khatauni in respect of property in dispute. The petitioner, being a bona fide purchaser of the said property, is in continuous possession. Subsequent to her purchase, one Bhoomafia Sushil Kumar Srivastava, who is a property dealer, in collusion with local police is trying to grab the said land of the petitioner. When she made an application / complaint on 27.09.2023 for redressing her grievance before the respondent No.2, no action has been initiated and the petitioner has made a reminder through registered post on 15.12.2023. Despite her repeated requests, the second respondent has not initiated any action against the private respondent under the provisions of the Act. The petitioner, left with no option, has filed the present petition.

4. Based on the above pleadings, learned counsel for the petitioner has submitted that in the identical situation, this Court has passed the orders in Writ C No. 9417 of 2023, dated 24.03.2023 and Writ-C No. 29663 of 2023, dated 18.09.2023. The petitioner, being a senior citizen, aged about more than 62 years, is fully protected under the Act, 2007 read with the Rules, 2014.

5. According to Rule 21(2)(i) and Rule 22(2) of the Rules 2014, the respondent No.2 is duty bound to protect the life and property of the petitioner but the respondent No.2 had failed to initiate action against the private respondent based on the complaint made by the petitioner. Hence, he requested for a direction to the respondent No.2 to initiate action against the respondent No.7 as per the provisions of the Act, 2007 and the Rules, 2014.

6. Reply to the above said contentions, learned Additional Chief Standing Counsel appearing on behalf of respondents has taken an objection with regard to the maintainability of the complaint made by the petitioner under the Act, 2007. The learned Additional Chief Standing Counsel

has further brought to the notice of the Court that the complaint made by the petitioner on 27.09.2023 is against a private person and the contents of the said complaint cannot be adjudicated by the authorities as per the provisions of the Act, 2007. For better appreciation, the same is extracted below:-

that the complaint made by the petitioner on 27.09.2023 is against a private person and the contents of the said complaint cannot be adjudicated by the authorities as per the provisions of the Act. 2007. For better appreciation, the same is extracted below:-

"पुनः स्मरण प्रार्थनापत्र

सेवा में
श्रीमान जिलाधिकारी
जनपद प्रयागराज।

विषयः - प्रार्थिनी की बैनामा करायी हुयी जमीन में जबरन हस्तक्षेप करके कब्जा करने वालों के विरुद्ध शिकायत के संबंध में।

महोदय,

सबिनय निवेदन है कि प्रार्थिनी सोना देवी, पत्नी त्रिभुवन सिंह निवास ददरी, नौगवा, ग्राम डभाव, परगना अरैल, तहसील करछना, जनपद प्रयागराज की निवासिनी है, जो कि लगभग 62 वर्ष की वृद्ध महिला है। प्रार्थि प्रार्थिनी ने वर्ष 2022 में दिनांक 05.03.2022 को अपने ही गाँव के राजकरन पुत्र मल्लू राम से अपने गाँव में भूमिधरी आराजी नं० 331 (लगभग 249 हैक्टेयर) जमीन का बैनामा कराया था, जिसमें प्रार्थिनी का नाम भी राजस्व के अभिलेखों में दर्ज हो चुका है। किन्तु भू माफिया सुशील कुमार श्रीवास्तव, पुत्र वी०पी० श्रीवास्तव, निवासी मकान न० 1030, मुड्डीगंज, परगना व तहसील- सदर, जनपद प्रयागराज के है, जो कि प्रापर्टी डीलिंग का काम करते हैं। इनके द्वारा प्रार्थिनी को बैनामा कराये हुये प्लाट पर कब्जा नहीं लेने दिया जा रहा है एवं स्थानीय पुलिस की मिलीभगत से आये दिन प्रताड़ित किया जा रहा है। महोदय जी को अवगत हो कि प्रार्थिनी ने दिनांक 27.09.2023 को एक प्रत्यावेदन आप के समक्ष व्यक्तिगत रूप से प्रस्तुत किया था, परन्तु भी तक उसमें कोई कार्यवाही नहीं की जा सकी।

अतः आप से निवेदन है कि प्रार्थिनी एक वरिष्ठ नागरिक एवं वृद्ध महिला है। प्रार्थिनी की बैनामाकृत भूमि पर कब्जा दिलाये जाने हेतु सम्बन्धित अधिकारियों को आदेशित एवं निर्देशित करने की कृपा करें, साथ ही साथ सुशील कुमार श्रीवास्तव के विरुद्ध कानूनी कार्यवाही करते हुए प्रार्थिनी को कानून का उचित संरक्षण एवं सुरक्षा प्रदान करने की कृपा करें। आपकी महति कृपा होगी।

दिनांक- 15.12.2023

प्रार्थिनी

सोना देवी
पत्नी त्रिभुवन सिंह
निवासी ददरी, नौगवा, ग्राम डभांव,
परगना अरैल, तहसील करछना,
जनपद प्रयागराज।

संलग्नकः 1. बैनामा दिनांक 05.03.2022 की छायाप्रति
2. प्रार्थना पत्र प्रेषित दिनांकित 27.09.2023 की छायाप्रति।"

7. The learned Additional Chief Standing Counsel has further submitted that the averments of the above paragraphs would not attract the provisions of the Act, 2007. Here, the petitioner has made a complaint against a private person who is a land graber / land dealer, and is purely a private dispute. Hence, the authority has no power to entertain the complaint under the provisions of the Act, 2007 and the Act, 2007 does not provide to deal with the complaint against a private person.

8. Learned Additional Chief Standing Counsel further submits that the Act clearly mandates the authorities / tribunal to entertain the complaint made under Sections 4 and 5 of the Act, 2007 except that there is no provision in the Act, 2007 to initiate action against a private person.

Hence, the complaint made by the petitioner is out of the jurisdiction of the authority under the provisions of the Act, 2007 and also the Rules, 2014 made thereunder. Hence, he requested for dismissal of this writ petition.

9. We heard both the counsels for the parties and perused the complaint made by the petitioner.

10. Before proceeding further, it would be appropriate to take note of Statement of Objects and Reasons of the Act, 2007 and the provisions of the Act, 2007 and the Rules, 2014 framed thereunder, which are quoted as under :-

"Statement of Objects and Reasons:- *Traditional norms and values of the Indian society laid stress on providing care for the elderly. However due to withering of the joint family system, a large number of elderly are not being looked after by their family. Consequently, many older persons, particularly widowed women are now forced to spend their twilight years all alone and are exposed to emotional neglect and to lack of physical and financial support. This clearly reveals that ageing has become a major social challenge and there is a need to give more attention to the care and protection for the older persons. Though the parents can claim maintenance under the Code of Criminal Procedure, 1973 (Act No. 2 of 1974), the procedure is both time-consuming as well as expensive. Hence, there is need to have simple, inexpensive and speedy provisions to claim maintenance for parents.*

2. The Bill proposes to cast an obligation on the persons who inherit the property of their aged relatives to maintain such aged relatives and also proposes to make provisions for setting up oldage homes for providing maintenance to the indigent older persons.

The Bill further proposes to provide better medical facilities to the senior citizens and provisions for protection of their life and property.

3. The Bill, therefore, proposes to provide for :

(i) appropriate mechanism to be set up to provide need-based maintenance to the parents and senior citizens;

(ii) providing better medical facilities to senior citizens;

(iii) for institutionalisation of a suitable mechanism for protection of life and property of older persons; and

(iv) setting up of oldage homes in every district.

4. The Bill seeks to achieve the above objectives.

4. Maintenance of Parents and Senior Citizens.- *(1) A senior citizen including parent who is unable to maintain himself from his own earning or out of the property owned by him, shall be entitled to make an application under Section 5 in case of -*

(i) parent or grand-parent, against one or more of his children not being a minor;

(ii) a childless senior citizen, against such of his relative referred to in clause (g) of Section 2.

(2) The obligation of the children or relative, as the case may be, to maintain a senior citizen extends to the needs of such citizen so that senior citizen may lead a normal life.

(3) The obligation of the children to maintain his or her parent extends to the needs of such parent either father or mother or both, as the case may be, so that such parent may lead a normal life.

(4) Any person being a relative of a senior citizen and having sufficient means shall maintain such senior citizen provided he is in possession of the property of such senior citizen or he would inherit the property of such senior citizen:

Provided that where more than one relatives are entitled to inherit the property of a senior citizen, the maintenance shall be payable by such relative in the proportion in which they would inherit his property.

5. Application for maintenance.- *(1) An application for maintenance under Section 4, may be made -*

(a) by a senior citizen or a parent, as the case may be; or

(b) if he is incapable, by any other person or organization authorized by him; or

(c) the Tribunal may take cognizance suo motu

Explanation.- For the purposes of this section "organization" means any voluntary association registered under the Societies Registration Act, 1860 (21 of 1860) or any other law for the time being in force.

(2) The Tribunal may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this section, order such children or relative to make a monthly allowance for the interim maintenance of such senior citizen including parent and to pay the same to such senior citizen including parent as the Tribunal may from time to time direct.

(3) On receipt of an application for maintenance under sub-section(1), after giving notice of the application to the children or relative and after giving the parties an opportunity of being heard, hold an inquiry for determining the amount of maintenance.

(4) An application filed under sub-section (2) for the monthly allowance for the maintenance and expenses for proceeding shall be disposed of within ninety days from the date of the service of notice of the application to such person:

Provided that the Tribunal may extend the said period, once for a maximum period of thirty days in exceptional circumstances for reasons to be recorded in writing.

(5) An application for maintenance under sub-section (1) may be filed against one or more persons:

Provided that such children or relative may implead the other person liable to maintain parent in the application for maintenance.

(6) Where a maintenance order was made against more than one person, the death of one of them does not affect the liability of others to continue paying maintenance.

(7) Any such allowance for the maintenance and expenses for proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or expenses of proceeding, as the case may be.

(8) If, children or relative so ordered fail, without sufficient cause to comply with the order, any such Tribunal may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person for the whole, or any part of each month's allowance for the maintenance 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 whichever is earlier:

Provided that no warrant shall be issued for the recovery of any amount due

under this section unless application be made to the Tribunal to levy such amount within a period of three months from the date on which it became due.

6. Jurisdiction and Procedure.- *(1) The proceedings under Section 5 may be taken against any children or relative in any District -*

(a) where he resides or last resided; or

(b) where children or relative resides.

(2) On receipt of the application under Section 5, the Tribunal shall issue a process for procuring the presence of children or relative against whom the application is filed.

(3) For securing the attendance of children or relative the Tribunal shall have the power of a Judicial Magistrate of first class as provided under the Code of Criminal Procedure, 1973 (2 of 1974).

(4) All evidence to such proceedings shall be taken in the presence of the children or relative against whom an order for payment of maintenance is proposed to be made, and shall be recorded in the manner prescribed for summons cases:

Provided that if the Tribunal is satisfied that the children or relative against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service, or wilfully neglecting to attend the Tribunal, the Tribunal may proceed to hear and determine the case ex parte.

(5) Where the children or relative is residing out of India, the summons shall be served by the Tribunal through such authority, as the Central Government may by notification in the
Official Gazette, specify in this behalf.

(6) The Tribunal before hearing an application under Section 5 may,. refer the same to a Conciliation Officer and such Conciliation Officer shall submit his findings within one month and if amicable settlement has been arrived at, the Tribunal shall pass an order to that effect.

Explanation.- For the purposes of this sub-section "Conciliation Officer" means any person or representative of an organization referred to in Explanation to sub-section(1) of Section 5 or the Maintenance Officers designated by the State Government under sub-section (1) of Section 18 or any other person nominated by the Tribunal for this purpose.

21. Measures for publicity, awareness, etc., for welfare of senior citizens.-*The State Government shall, take all measures to ensure that -*

(i) the provisions of this Act are given wide publicity through public media including the television, radio and the print, at regular intervals;

(ii) the Central Government and State Government Officers, including the police officers and the members of the judicial service, are given periodic sensitization and awareness training on the issues relating to this Act;

(iii) effective co-ordination between the services provided by the concerned Ministries or Departments dealing with law, home affairs, health and welfare, to address the issues relating to the welfare of the senior citizens and periodical review of the same is conducted.

22. Authorities who may be specified for implementing the provisions of this Act.- *(1) The State Government may, confer such powers and impose such duties on a District Magistrate as may be necessary, to ensure that the provisions of this Act are properly carried out and the District Magistrate may specify the officer, subordinate to him, who shall exercise all or any of the powers, and perform all or*

any of the duties, so conferred or imposed and the local limits within which such powers or duties shall be carried out by the officer as may be prescribed.

(2) The State Government shall prescribe a comprehensive action plan for providing protection of life and property of senior citizens.

23. Transfer of property to be void in certain circumstances. *(1) Where any senior citizen who, after the commencement of this Act, has transferred by way of gift or otherwise, his property, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal.*

(2) Where any senior citizen has a right to receive maintenance out of an estate and such estate or part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right, or if the transfer is gratuitous; but not against the transferee for consideration and without notice of right.

(3) If any senior citizen is incapable of enforcing the rights under sub-sections (1) and (2), action may be taken on his behalf by any of the organization referred to in Explanation to sub-section (1) of section 5.

Rules 21 (1) of the Rules, 2014.- *(1) The District Magistrate shall perform the duties and exercise the powers mentioned in sub-rules (2) and (3) so as to ensure that the provisions of the Act are properly carried out in his district.*

Rules 22 (1) of the Rules, 2014. - *(1) The District Superintendent of Police and in the case of cities having Divisional Inspector General of Police, such Divisional Inspector General of Police shall take all necessary steps, subject to such guidelines as the Government may issue from time to time for the protection of life and property of senior citizens."*

11. Based on the provisions of the Act and Rules, the principles of statutory interpretation have been extensively considered by this Court in Criminal Misc. Application U/S 372 Cr.P.C. (Leave to Appeal) No.329 of 2012 (Prithvi Singh v. State of U.P.) in paragraph nos.10 to 22 and 40, thus the same are extracted hereinunder:-

"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 vs. 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 vs. 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 vs. 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 vs. 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 vs. 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.

19. In Shah Bhojraj Kuverji Oil Mills and Ginning Factory vs. Subhash Chandra Yograj Sinha, AIR 1961 SC 1596 it was observed that as a general rule, a "proviso' is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a "proviso' is not interpreted as stating a general rule.

20. However, in Chapter 3 of the aforesaid book at page 206 it has been observed that the insertion of a "proviso' by the draftsman is not always strictly adhered to its legitimate use and at times a section worded as a "proviso' may wholly or partly be in substance a fresh enactment adding to and not merely excepting something out of or qualifying what goes before. A large number of rulings, including the English Law, have been noted in support of the aforesaid observation. A reference in this regard may be made to one of such rulings, namely, Motiram Ghelabhai (deceased L.R.) vs. Jagan Nagar (deceased L.Rs.) and others, AIR 1985 SC 709.

21. Purposes of a "proviso' were aptly summarised in Sundaram Pillai vs. Pattabiraman, (1985) 1 SCC 591, wherein it was observed that by and large a proviso may serve the following four different purposes:-

"(1) qualifying or excepting certain provisions from the main enactment;

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

(emphasis supplied)

22. However, it was observed in the aforesaid book that the above summary cannot, however, be taken as exhaustive and ultimately a "proviso' like any other enactment ought to be construed upon its terms.

40. As already noticed, the golden rule of interpretation is that if the meaning of words of a statute are plain, effect must be given irrespective of the consequences. We may refer to the judgments of the Supreme Court in cases of Nelson Motis (supra), Kanailal Sur (supra), Vijay Anand Maharaj (supra), Gwalior Rayan Silk (supra), Raghunath Rai Bareja (supra)."

12. Taking from the above observations, though the learned counsel for the petitioner has relied on Rule 21 (1) and 22 (1) of the Rules, 2014 but on perusal of the complaint in consonance with Sections 4, 5 and 6 of the Act, 2007, which mandates the authority of the Tribunal to decide the grievance of the senior citizens from their legal heirs and relatives, nowhere it has given power to the authority to entertain a complaint against a private person. Even Rule 22 (1) of the Rules, 2014 has given powers to the District Superintendent of Police / Divisional Inspector General of Police to take all necessary steps subject to such guidelines as the Government may issue from time to time for protection of life and property of the senior citizens but there is no specific Rule to entertain any complaint against a private person.

13. In the instant case, no doubt, the petitioner being senior citizen has purchased the property in 2022 and the complaint itself is moved against private person stating therein that he is trying to grab the subject property. If it is so, the petitioner has other efficacious remedy under the provisions of the Civil Procedure Code and the Criminal Procedure Code but not under the provisions of the Act, 2007.

14. In view of the backdrop of the facts of this case, it appears that the complaint made by the petitioner on 27.09.2023 does not fall within the jurisdiction of the authority of the second respondent under the provisions of the Act, 2007. Therefore, we hold that the complaint made by the petitioner would not come within the purview of the provisions of the Act, 2007. Consequently, no such mandamus / directions as prayed for can be granted.

15. Accordingly, the instant petition is **dismissed.**

(2024) 2 ILRA 552
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.01.2024
BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 1000394 of 2004

Girija Prasad Ojha ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
S.M Waseem, Diwakar Pratap Pandey, I.M. Pandey Ist, Kripa Shankar Shukla, Rameshwar Tiwari, S.M. Waseem, Smt.Usha Tiwari, Vidya Bhushan Pandey

Counsel for the Respondents:
C.S.C, A. Kumar, Mayank Pathak, Ravi Shanker Mishra, S.N.Goshwami, Sharad Bhatnagar

A.Civil Law-Constitution of India,1950-Article 226-Transfer of Property Act,1882-

Section 60-The petitioner challenged the auction proceedings-The petitioner took a loan, due to non-repayment, recovery proceedings were initiated-despite multiple opportunities and extensions granted by the High Court to repay the outstanding loan, the petitioner failed to do so-The auction was confirmed, a sale certificate was issued, and the property was registered in the name of the highest bidder(Respondent No. 5)-Held, the right to redemption under the Transfer of Property Act extinguishes upon the registration of the sale deed, which had already occurred-The recovery proceedings and the auction were conducted in accordance with the law, and the petitioner's claims of procedural infirmities were dismissed due to lack of direct challenge to the sale certificate and sale deed-the right of redemption exists until extinguished by an act of the parties or law.(Para 1 to 22)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Surendra Pal Singh Vs Vijaya Bank Civil Appeal No. 6843 of 2023

2.Narandas Karsondas Vs S.A. Kamtam (1976) CJ SC 287

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

1. Heard Sri I. M. Pandey, learned counsel for the petitioner, learned Standing counsel for respondent No.s 1, 3 and 4 and Sri Mayank Pathak for respondent No.2- Bank.

2. By means of the present writ petition the petitioner has challenged the auction proceedings which has culminated into confirmation of the auction by the order of Sub Divisional Magistrate, Tehsil Milkipur, Faizabad.

3. The facts in brief are that the petitioner is a proprietor of a business firm, namely Rahul Fertilizers. He had taken a loan of Rs.10,000/- on 31.10.1985 from Punjab National Bank, Branch, Kumarganj, District Faizabad for the purpose of fertilizer business . The said loan was enhanced to Rs.20,000/- on 23.9.1987. The petitioner could not repay the said loan and consequently the respondent-bank initiated recovery proceedings against the petitioner by issuance of recovery certificate on 7.3.1994. Despite issuance of the recovery certificate the outstanding amount of loan was not repaid consequently the bank proceeded to auction the mortgaged property by sale proclamation on 23.2.1999 against the petitioner of the agricultural loan exiting on khata No.342, gata No.s 219 A/0-18-02, 98/1/0-9-10, 207/0-13-0, 219 Ba/1-10-14, 272 Kha/1-12-0, 280/0-17-5, 281/0-1-10 and 288/0-7-0 which land was mortgaged to secure the loan obtained by the petitioner. The auction proceedings were held on 22.3.1999 and the agricultural land of the petitioner was auctioned for an amount of Rs.52,000/- in favour of respondent No.5.

4. Bring aggrieved by the auction the petitioner preferred objections under Sections 285 (1) of Z.A. Rules before the Divisional Commissioner, Faizabad on 5.4.1999. The Divisional Commissioner on receiving the said objections also considered the fact that the petitioners was ready and willing to repay the said loan gave him time by means of order dated 7.5.2003 to deposit the entire outstanding amount of loan with the bank and informed the petitioner that in case he deposits the said amount with the bank, the said auctions proceedings would not be confirmed and the auction will be set aside.

5. It seems that the petitioner could not deposit the said amount by the date fixed i.e. 7.6.2003 but in the meantime the petitioner moved another application for extension of time for depositing the outstanding amount of loan. The application of the petitioner was favorably considered by learned Commissioner who by means of his order dated 5.6.2003 gave further thirty days' time to the petitioner to deposit the said amount by 7.7.2003. Even during the extended time period the outstanding amount was not deposited by the petitioner and in these circumstances the petitioner approached this Court by filing writ petition bearing writ petition No.2127 (M/S) of 2003. This Court by means of order dated 4.7.2003 had disposed of the said writ petition recording that the petitioner had filed his objections under Section 285 (1) of Z.A. Rules and he was granted time to deposit the outstanding amount of loan by 7.6.2003. It was further observed that the petitioner could not deposit the said amount due to financial constraints but is ready and willing to deposit the entire amount and consequently the order of the Commissioner, Faizabad Division, Faizabad dated 7.5.2003 was modified to the extent that the petitioner may deposit Rs.20,000/- with the bank before 31.7.2003 and the remaining amount before 30th September, 2003.

6. It is in compliance of the order of this Court dated 4.7.2003 which had modified the order of the Commissioner dated 7.5.2003 the petitioner deposited an amount of Rs.20,000/- on 30.7.2003 but it seems that he could not deposit the remaining amount and as per the impugned order a report was called from the bank which also confirmed that the petitioner had not deposited the remaining amount as directed by the High Court in their letter dated 30.10.2003. The respondent on being made aware of the fact that even the order of High Court had not been complied and the petitioner had not deposited the remaining amount, proceeded to confirm the auction.

7. After confirmation of the auction, a sale certificate was issued in favour of respondent No.5 on 30.1.2004 and the and the property was also registered in favour of respondent No.5 on 7.1.2004 as per the averments made by the petitioner himself in the writ petition. It is in aforesaid circumstances that present writ petition has been filed assailing the order dated 31.12.2003 passed by Commissioner, Faizabad Mandal, Faizabad confirming the auction. The petitioner has also prayed for a direction to the respondents not to give effect to the auction proceedings and not to mutate the said land in favour of respondent No.5.

8. Learned counsel for the petitioner while assailing the order dated 31.12.2003 has submitted that the petitioner has full right for redeeming the mortgage and even High Court had recognized the right of redemption in as much as this Court had directed the bank to accept Rs.20,000/- by 31.7.2003 and the remaining amount before 30.9.2003 and consequently the auction proceedings could not have been confirmed in case the petitioner had complied with the directions of this Court. He has further submitted that in pursuance of the directions of this court admittedly he had deposited Rs.20,000/- on 30.7.2003. He has further submitted that he had further deposited Rs.2500/- with the respondent bank. It is only subsequently that that he was made aware of the fact that the cheque was dishonored on account of insufficiency of funds and on coming to know about the

dishonoring of the cheque he had deposited Rs.9500/- in cash on 30.10.2003. He has further submitted that this is admitted fact that the petitioner on being aware of dishohouring of the cheque had deposited the remaining amount in cash and, therefore, it is submitted that the benefit of the same should be given to the petitioner and accordingly submits that his right of redemption was not extinguished on non compliance of the directions of this Court dated 4.7.2003. Lastly, he has also taken a plea that the said loan was commercial loan and the proceedings for recovery of the commercial loan could not have been made as arrears of land revenue as the said proceedings could be taken only with regard to agricultural loan and submits that accordingly the entire recovery proceedings are without jurisdiction and is liable to be set aside.

9. It is noticed that the said plea has neither been taken before any of the authorities below nor in the writ petition and only averment has been made in para 9 of the supplementary affidavit filed by the petitioner on 23.1.2024. Learned counsel for the bank has, on the other hand, submitted that according to the recovery certificate the loan has been shown to be agricultural loan and in any view of the matter this issue has not been raised before any authority and consequently cannot be permitted to raise the same by oral submissions for the first time in writ proceedings.

10. In support of his submissions, learned counsel for the petitioner has relied upon the judgment of Supreme Court in the case of ***Surendra Pal Singh Vs. Vijaya Bank*** passed in Civil Appeal No.6843 of 2023 as well as ***Narandas Karsondas Vs. S.A. Kamtam***, ***1976 CJ (SC) 287*** to canvass his plea that his right to redemption of the mortgaged property existed even subsequent to confirmation of the auction and consequently he may be permitted to deposit the outstanding amount of loan and the impugned orders may be set aside directing the respondents to hand over the property back to the petitioner.

11. Learned counsel for the respondents, on the other hand, have vehemently opposed the writ petition. It has been submitted that the recovery proceedings were initiated against the petitioner after he failed to repay the loan in terms of the agreement entered into between the petitioner and the respondent. It was stated that repeated opportunities were given to the petitioner to repay the outstanding amount of loan but despite the said notice the loan was not repaid and consequently the mortgaged property was auctioned by the respondent-bank. It has been submitted that the petitioner was fully aware of the auction proceedings in as much as ZA Form 74A was issued to the petitioner and according to the said provisions the petitioner was fully aware of the auction proceedings. The auction proceedings settled in favour of respondent No.5 who was the highest bidder for an amount of Rs.52,000/-.

12. There is no dispute with regard to the fact that the entire amount of auction money has been tendered by respondent No.5. Prior to confirmation of the sale the petitioner had submitted his objections. It is stated that it is only after considering the objections filed by the petitioner that he was further granted time to redeem the said mortgage and to repay the entire amount of loan by 7.6.2003. At the behest of the petitioner the said period was extended till 7.7.2003 and despite expiry of the time

period the said loan was not repaid. Even after that time was extended by this Court and even the directions of this Court was not complied by the petitioner.

13. It is stated that even the directions of this Court have not been complied and the Commissioner in these circumstances had no other option but to confirm the auction and even it has been stated that after confirmation of the auction the sale certificate was issued and the property has been registered in favour of respondent No.5. It has further been stated that this fact has been mentioned by the petitioner himself that the sale certificate has been issued in favour of respondent No.5 and the property has also been registered in his favour on 7.1.2004 i.e. much prior to filing of the present petition and still the petitioner has failed to assail the sale certificate as well as sale deed issued in favour of respondent No.5.

14. It is stated that the present writ petition has been rendered infructuous from the start in as much as proper prayer has not been made for setting aside the sale certificate and sale deed and setting aside the impugned orders will not have any effect upon the validity of the sale deed issued in favour of respondent No.5. Accordingly, he submits that proper prayer has not been made by the petitioner and accordingly the relief as sought by him cannot be granted.

15. I have heard learned counsel for the petitioner and perused the records.

16. In light of the aforesaid narration of facts the question which arises for determination by this Court was as to whether right of redemption existing in favour of the petitioner, who had mortgages his property to secure the agricultural loan subsists even after the confirmation of the auction and after the sale deed has been registered in favour of successful bidder/auction purchaser i.e. respondent No.5.

17. According to Section 60 of the Transfer of Properties Act, right of redemption exists with the mortgagee till such time the mortgage has been extinguished by the act of either of the parties. In the present case, in exercise of his right to redemption the Commissioner, Faizabad Division, at the outset, before confirming the said auction had given time to the petitioner till 7.6.2003 to repay the said loan. Undoubtedly there is no dispute with regard to the fact that even subsequent to the auction which was settled in favour of respondent No.5 existence of the right of redemption in favour of the petitioner was duly recognized by the confirming authority. Even at the behest of the petitioner the said time period was extended by one month and he was further given time till 3.7.2003 to repay the outstanding amount of loan.

18. This right vested in the petitioner of redemption was further recognized by this Court when this Court had passed order on 4.7.2003 where the petitioner was further granted till till 30th September, 2003. This Court while passing the order dated 4.7.2003 had given the petitioner time till 3.7.2003 to deposit the amount of Rs.20,000/- and again granted time till 30.9.2003. Accordingly undoubtedly the petitioner even in the extended time provided by this Court till 30th September to repay the said loan. There is no dispute that till 30.9.2003 the amount of outstanding loan was not deposited by the petitioner. Considering the arguments

raised by the petitioner that he had deposited Rs.20,000/- on 30.7.2003 i.e. within the time provided by this Court. While remaining amount of Rs.12500/- was deposited by the petitioner through cheque which had bounced. The reason for bouncing of cheque is insufficiency of funds. Considering the fact that till conclusion of auction the full outstanding amount of loan was not credited in the bank account and the bouncing of the cheque on account of insufficiency of funds cannot be taken as an act of redemption of the loan by the petitioner. Even subsequently against the outstanding amount of Rs.12500/- the petitioner had deposited only Rs.9500/- on 30.10.2003.

19. This Court has noticed that even the amount do not match with the amount of cheque deposited previously by the petitioner i.e. 30.10.2003 but according to the time prescribed by this Court even if the petitioner had come to know about bouncing of the cheque subsequent to 30.10.2003 then he could have moved appropriate application before this Court in writ petition No.2127 (M/S) of 2003 seeking time for depositing the outstanding amount in peculiar circumstances of the present case and could also demonstrate before this Court that the petitioner had no knowledge that the cheque had bounced. Unfortunately, no such application was made by the petitioner and the directions of this Court for depositing the outstanding loan till 30.10.2002 remained unchanged and unaltered. It is in these circumstances, this Court is of the considered opinion that the outstanding loan amount was not repaid by the petitioner within the time prescribed despite the fact that repeated extensions were given by the authorities themselves and also by this Court. Accordingly, the auction concluded and the property was duly registered in the name of respondent No.5-the auction purchaser. The act of registration of the property in favour of respondent No.5 had extinguished the right vested with the petitioner to redeem the said loan.

20. We have also considered the judgments relied upon by the petitioner. In the case of ***Surinder Pal Singh Vs. Vijaya Bank and others,*** passed in Civil Appeal No.6843 of 20023 the question that was considered of provisions of Section 13 (8) of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (in short SARFAESI Act) with regard to repayment of loan taken by the borrower from the banks and the amended provisions of Section 38 vested the right with the borrower to redeem the loan prior to issuance of the sale certificate but subsequently amendment of Section 13(8) of SARFAESI Act right of redemption was limited till the date of issuance of advertisement for the said auction. In light of the above, Supreme Court has held that right of redemption in a matter where the SARFAESI Act is applicable right of redemption has been extinguished on the issuance of advertisement for auction. The said judgment concerns the SARFAESI Act which are not applicable in the facts of the present case and consequently does not apply in the present case. In the case Supreme Court while explaining the provisions of Section 60 of Transfer of Properties Act have held as under:-

The right of redemption which is embodied in section 60 of the Transfer of Property Act is available to the Mortgagor unless it has been extinguished by the Act of parties. The combined effect of section 54 of the Transfer of Property Act

and section 17 of the Indian Registration Act is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor?s interest by registered instrument that the mortgagor?s right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a Mortgage Deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale.

The mortgagor?s right to redeem will survive until there has been completion of sale by the mortagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption."

21. In the aforesaid judgment Supreme Court has held that right of redemption would only exist till the date when sale is complete. In the present case as we have already noticed the sale deed was registered in favour of respondent No.5 on 7.1.2004 and consequently even as per the judgment of Supreme Court the right of redemption if any in favour of the petitioner stand extinguished on the date of the said auction. There is no law or rule which has been demonstrated by the petitioner to indicate that right of redemption vested even after execution of sale deed and also considering the fact that neither the sale deed nor the sale certificate issued in favour of respondent No.5 has been challenged in the present proceedings accordingly there is no infirmity in the order passed by Commissioner confirming the auction in favour of respondent No.5.

22. For the aforesaid reasons, there is no merit in the writ petition which is accordingly **dismissed.**

(2024) 2 ILRA 558
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.02.2024
BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 1002187 of 2004

Smt. Sanwari Devi ...Petitioner
Versus
Addl. Commissioner Judicial Faizabad & Ors. ...Respondents

Counsel for the Petitioner:
S.K. Tewari, Ram Kushal Tiwari

Counsel for the Respondents:
C.S.C., Pankaj Kumar Singh, Prabhat Kumar, R.L. Ojha, Ram Shiromani Pandey, Vinay Kumar Mishra, Virendra Kumar Shukla

Civil Law - Constitution of India,1950-Article 226-Land Revenue Act,1901-Section 34-dispute over property inheritance based on conflicting wills

executed by the deceased, Dharamraji, and the subsequent mutation proceedings under section 34 to the Land revenue act-The petitioner relied on a registered will dated 19.07.1994, while the respondents presented an earlier unregistered will dated 28.05.1994-A discrepancy in the recorded date of death of the testator further complicated the matter-The petitioner failed to prove the registered will before the authorities due to procedural lapses and non-participation in ex-parte proceedings-Both appellate and revisional authorities upheld the rejection of the mutation application, citing failure to prove the will as per Section 68 of the Indian Evidence Act and irregular correction of the death date-The High Court reiterated that mutation proceedings are summary in nature and do not determine title-It dismissed the writ petition, holding that the petitioner retains the liberty to seek remedies through civil courts to resolve substantive property rights.(Para 1 to 26)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Gauri Dutt. Vs St. of U.P. & ors.. –Writ-C No. 21014 of 2021

2. Hadisul Nisha Vs Addl. Commr. (Judicial), AIR Online 2021 All 2060

3. Mahesh Kumar Juneja & ors.. Vs Addl. Commr (Judicial) Moradabad Div. & ors.. (2020)3 ADJ 104

4. Harish Chandra Vs U.O.I. & ors.. (2019)5 ADJ 212

5. U.O.I. & ors.. Vs Vasavi Co-op. Housing Socy. Ltd. & ors.. MANU/SC/ 0001/ 2014

6. Bhimabai Mahadeo Kambekar (D) thru L.R. Vs Arthur Imp. & Exp. Co. & ors.. MANU/SC/O112/2019

7. Jitendra Singh Vs St. of M.P. & ors.., SLP © No. 13146 of 2021

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

1. Heard Sri Ram Kushal Tiwari, learned counsel for the petitioner as well as learned Standing Counsel for respondent nos. 1 to 3 and Sri Virendra Kumar Shukla, learned counsel appearing on behalf of respondent nos. 4 to 8 and Sri Pankaj Kumar Singh, learned counsel appearing for respondent nos. 9 to 13.

2. The dispute involved in the resent case is with regard to the two will deeds purportedly made by one Dharamraji. One of the will deed which is unregistered was made in favour of respondent nos. 4 to 8 who are the sons of the sisters of Dharamraji, while on the other hand another will is said to have been executed on 19.07.1994, which is registered in favour of petitioner alongwith respondent nos, 9 to 13, all of whom are daughters of Dharamraji.

3. The dispute in the present case pertains to the date of death of Dharamraji. According to the petitioner Dharamraji is said to have died on 30.09.1994, but date of her death was wrongly recorded by the Registrar of Birth and Death as 30.06.1994. Smt. Sanwari Devi - petitioner has moved an application under Section 34 of the Land Revenue Act before the Tehsildar for mutation of the property bequeathed by Dharamraji in favour of petitioner and her sisters namely respondent nos. 9 to 13. In the said proceedings objections were filed on behalf of respondent nos. 4 to 8 who also produced a will executed by Dharamraji on 28.05.1994, stating that Dharamraji had executed the said will in their favour while contesting the

application of the petitioner stating that on the face of it the said will has been executed 19 days after death of Dharamraji and consequently registered document cannot be believed.

4. Before the competent authority, under Section 34 of the Land Revenue Act no appearance was made by Dharamraji after filing the registered will and after recording statement of one of the witness of the said will. The statement of the attesting witness was duly recorded but no cross examination was made thereafter. It is in the aforesaid circumstances that proceedings before the competent authority proceeded ex-parte. The application was moved on behalf of petitioner for recall of the ex-parte order which was allowed on 02.01.1997 and despite the said application being allowed, no appearance was made on behalf of petitioner-applicants and again orders were passed for proceeding ex-parte on 26.05.1997, 21.02.1998 and 31.03.1998 and the application was rejected by order dated 31.03.1998.

5. Against the order of rejection of application, petitioner had moved an appeal before the Sub Divisional Magistrate, Kadipur, Sultanpur. It is before the appellate authority that all the documents were filed by the petitioner who was staking claim over the property of Dharamraji on the basis of registered will dated 19.07.1994.

6. Before the appellate authority it was submitted that on noticing the defect/infirmity in the date of death of Dharamraji, an application was moved which has been allowed by means of order dated 13.08.1998 and the date of death of Dharamraji in the Register of Birth and Death has now been recorded as 13.08.1998 and consequently, it is submitted that there is no infirmity in the will which is registered in favour of petitioner on 11.07.1994.

7. The appellate authority while considering the submissions made on behalf of petitioner rejected the contention, observing that correction was not validly and legally made with regard to date of death of Dharamraji. The appellate authority was of the considered view that correction, if any, in the Register of Birth and Death could have been made only pursuant to approval of a First Class Magistrate and same could not be done by the Registrar on his own accord. While returning such finding the appellate authority has relied upon Section 13 of the U.P. Registration of Birth and Death Act, 1969. He further held that the petitioner by her own conduct had failed to adduce any evidence and did not prosecute the matter before the competent authority. The matter was proceeded ex-parte and in the aforesaid circumstances did not find any ground for interference with the order of competent authority and rejected the appeal filed by the petitioner by means of order dated 06.07.2002.

8. Aggrieved by the order dated 06.07.2002, passed by the Sub Divisional Magistrate, the petitioner preferred revision before the Additional Commissioner (Judicial), Faizabad Division, Faizabad. Before the revisional authority entire evidence was again reapprised. The revisional authority also looked into the entire record and affirmed the findings of the appellate authority and held that the petitioner was not able to prove the will which was filed in support of the application under Section 34 of the Land

Revenue Act and consequently dismissed the revision.

9. Before this Court, learned counsel for the petitioner has vehemently submitted that main issue in the present case is with regard to the proving of registered will before the competent authority, appellate authority as well as revisional authority. He has submitted that undoubtedly, before the competent authority the will was filed and only one attesting witness was produced but he could not be cross examined due to non appearance on behalf of petitioner, the matter was decided ex-parte. The petitioner does not contest the fact that application for recall was allowed and even thereafter no appearance was made on behalf of petitioner before the competent authority and in absence of any evidence having been lead in support of the registered will, the competent authority had rejected the application of the petitioner.

10. It is submitted that before the appellate authority all the material was produced including the corrected date of birth of Dharamraji, but the appellate authority has erroneously returned finding that correction in the Register of birth and death may only be made only after approval of a Magistrate Ist Class. Learned counsel for the petitioner has submitted that as per Section 15 of the U.P. Registration of Birth and Death Act, 1969, it has to be demonstrated before the Registrar that in the register kept with him, erroneously an entry has been made fraudulently and on demonstrating the aforesaid power is vested with the Registrar of Birth and Death to correct or cancel such an entry by suitable entry in the margin of the said register without making any alteration in the original entry. It is stated that approval of Magistrate Ist Class would be required only as per Section 13 of the Act, 1969 where there is delay in information given with regard to birth and death. It is submitted that the present case do not fall under Section 13 and only in exercise of power vested under Section 15 an application was moved for correction of date of death of Dharamraji and consequently the finding recorded by the appellate authority in this regard are infirm and deserve to be interfered with.

11. It is further submitted by learned counsel for the petitioner that the revisional authority while affirming the order of competent authority and appellate authority has also failed to exercise jurisdiction vested in him and accordingly has assailed all the said orders.

12. Learned counsel for the respondents have opposed the writ petition. It is submitted that claim for mutation under Section 34 of the Land Revenue Act was made by the petitioner solely on the basis of registered will dated 19.07.1994. It is submitted that firstly, neither was the will proved before the competent authority nor before the appellate authority and neither before the revisional authority. It is submitted that the will had to be proved in accordance with law as per provisions contained in Section 68 of the Indian Evidence Act.

13. According to Section 68 of the Indian Evidence Act, it was necessary for the petitioner to have produced one attesting witness in support of the will. In the present case he had produced one of the attesting witness, but before the said witness would be cross examined, the said proceedings had proceeded ex-parte against the petitioner and in the present circumstances without cross examination

the evidence of the said witness could not have been considered by the competent authority or by the appellate authority and also not by the revisional authority and consequently, the competent authority had no other alternative except to reject the application made by the petitioner.

14. It is further submitted by learned counsel for the respondents that the finding of the appellate authority with regard to correction of will are in accordance with the provisions contained in the Registration of Birth and Death Act, 1969. Lastly it has been submitted that in the present case the dispute is only with regard mutation of property of Dharamraji. It is submitted that proceedings under Section 34 of the Land Revenue Act are summary in nature and consistently this Court has held that in such matters writ jurisdiction of the High Court cannot be invoked.

15. Learned counsel for the respondents has relied upon the judgment of coordinate Bench of this Court in the case of **Gauri Dutt Vs. State of U.P. and 8 Others - Writ - C No. 21014 of 2021** (decided on 21.09.2021), wherein this Court relying upon numerous other judgments of this Court has held that orders for mutation are passed on the basis of the possession of the parties and since no substantive rights of the parties are decided in mutation proceedings, ordinarily a writ petition is not maintainable in respect of orders passed in mutation proceedings unless found to be totally without jurisdiction or contrary to the title already decided by the compete Court. The parties are always free to get their rights in respect of the disputed land adjudicated by the competent Court.

16. Learned counsel for the petitioner in response to the arguments raised by the respondents has submitted that this Court in the case of **Hadisul Nisha Vs. Additional Commissioner (Judicial), AIR Online 2021 All 2060** had carved out certain exception with regard to issue pertaining to maintainability of the writ petition arising out of mutation proceedings. He has relied upon para 19 of the said judgment to canvass and buttress his submissions, in case it is demonstrated that mutation has been directed not on the basis of possession or simply on the basis of some title deed, but after entering into a debate of entitlement to succeed the property, touching into the merits of the rival claims, the writ petition could be entertained.

17. It is submitted by learned counsel for the petitioner that his case would fall within the exceptions provided by the Court and accordingly the writ petition in this regard would be maintainable.

18. Heard learned counsel for the parties and perused the record.

19. Undisputed facts of the present case are that Dharamraji is related to the contestants of both sides. She had executed registered will in favour of petitioner as well as respondent nos. 9 to 13 on 19.07.1994. It is also alleged that she has executed another deed on 28.05.1994 in favour of respondent nos. 4 to 8. Application for mutation under Section 34 of the Land Revenue Act was preferred by the petitioner before the competent authority. The said application was contested by respondent nos. 4 to 8. The competent authority had rejected the claim made on behalf of petitioner on the ground that she has been unable to prove the registered will inasmuch as she did not

participate in the proceedings which were held ex-parte and her application was accordingly rejected.

20. Considering that the proceedings were held ex-parte against the petitioner, no finding were to be recorded by the competent authority in such a situation. The petitioner had agitated the matter before the appellate authority who returned finding with regard to correction made in the date of death of Dharamraji and the correction made at the behest of petitioner correcting the date of death from 30.06.1994 to 30.09.1994, is invalid and illegal inasmuch as no prior approval of a Magistrate First Class was taken. He further refused to interfere with the findings recorded by the competent authority on the ground that the petitioner did not participate in the proceedings before the competent authority and even the attesting witness could not be cross examined and consequently the application for mutation was rejected and therefore there is no infirmity in the same and nor any can be pointed out by the petitioner.

21. The revisional authority also affirmed the findings of appellate authority and rejection the revision. The first issue which deserves to be considered is with regard to maintainability of the writ petition, as to whether she has remedy to approach the competent Court with regard to her grievance. It is noticed that there are several decisions of this Court where view has been taken that mutation proceedings being summary in nature do not decide a question of title and the orders passed in such proceedings do not come into the way of a person getting his rights adjudicated in the regular suit and accordingly this Court has held that writ petition under Article 226 of the Constitution of India would not be maintainable. For the sake of convenience few of such judgments are quoted herein below :-

21(i). A coordinate Bench of this Court in case of **Mahesh Kumar Juneja and Ors. Vs. Addl. Commissioner Judicial, Moradabad Division and Ors. 2020 (3) ADJ 104** reiterated the same view and held as under;

"16. The settled legal position that entries in revenue records do not confer any title has been considered and discussed in a recent judgment of this Court in Harish Chandra Vs. Union of India & Ors.13.

17. In view of the foregoing discussion, it may be restated that ordinarily orders passed by mutation courts are not to be interfered in writ jurisdiction as they are in summary proceedings, and as such subject to a regular suit.

18. The mutation proceedings being of a summary nature drawn on the basis of possession do not decide any question of title and the orders passed in such proceedings do not come in the way of a person in getting his rights adjudicated in a regular suit. In view thereof this Court has consistently held that such petitions are not to be entertained in exercise of powers under Article 226 of the Constitution of India."

21(ii). In **Harish Chandra Vs. Union of India & Ors. 2019 (5) ADJ 212** Division Bench of this Court while dealing with an issue in regard to the land acquisition proceedings had the occasion to discuss the matter relating to revenue records and held as under;

"37. This Court may also take into consideration that it is settled law that the revenue records do not confer title and even if the entries in the revenue record of

rights carry value that by itself would not confer any title upon the person claiming on the basis of the same.

38. The Supreme Court in Guru Amarjit Singh Vs. Rattan Chand & Ors.3 held that entry in Jamabandi (revenue records) are not proof of title, and it was stated as follows:-

"2. ...It is settled law that entries in the Jamabandi are not proof of title. They are only statements for revenue purpose. It is for the parties to establish the relationship or title to the property unless there is unequivocal admission..."

21(iii). **Apex Court in case of Union of India (UOI) & Ors. Vs. Vasavi Co-op. Housing Society Ltd. & Ors. MANU/SC/0001/2014** while dealing with the entries of the revenue records relying upon the earlier judgments of the Apex Court, held that revenue records are not the document of title and the same cannot be basis for declaration of title. Relevant paragraph no. 17 is extracted here as under;

"17. This Court in several Judgments has held that the revenue records does not confer title. In Corporation of the City of Bangalore v. M. Papaiah and another (1989) 3 SCC 612 held that "it is firmly established that revenue records are not documents of title, and the question of interpretation of document not being a document of title is not a question of law." In Guru Amarjit Singh v. Rattan Chand and others (1993) 4 SCC 349 this Court has held that "that the entries in jamabandi are not proof of title". In State of Himachal Pradesh v. Keshav Ram and others (1996) 11 SCC 257 this Court held that "the entries in the revenue papers, by no stretch of imagination can form the basis for declaration of title in favour of the plaintiff."

21(iv). In a recent judgment in case of **Bhimabai Mahadeo Kambekar (D) through L.R. Vs. Arthur Import and Export Company & Ors. MANU/SC/0112/2019,** decided on 31.01.2019, Apex Court held that mutation of a land in revenue records does not create or extinguish the title over the land nor it has any presumptive value on the title. Relevant paragraph nos. 8 and 9 are extracted here as under;

"8. This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the title over such land nor it has any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. (See Sawarni (Smt.) vs. Inder Kaur, (1996) 6 SCC 223, Balwant Singh & Anr. Vs. Daulat Singh(dead) by L.Rs. & Ors., (1997) 7 SCC 137 and Narasamma & Ors. vs. State of Karnataka & Ors., (2009) 5 SCC 591).

9. The High Court while dismissing the writ petition placed reliance on the aforementioned law laid down by this Court and we find no good ground to differ with the reasoning and the conclusion arrived at by the High Court. It is just and proper calling for no interference."

21(v). In a recent judgment, Apex Court in the case of **Jitendra Singh vs. The State of Madhya Pradesh & Ors., Special Leave Petition (C) No.13146 of 2021 decided on 6th September, 2021** has held as under :

"6. Right from 1997, the law is very clear. In the case of Balwant Singh v. Daulat Singh (D) By Lrs., reported in (1997) 7 SCC 137, this Court had an occasion to consider the effect of mutation and it is observed and held that mutation of property in revenue records neither creates nor extinguishes title to the property nor

has it any presumptive value on title. Such entries are relevant only for the purpose of collecting land revenue. Similar view has been expressed in the series of decisions thereafter. 6.1 In the case of Suraj Bhan v. Financial Commissioner, (2007) 6 SCC 186, it is observed and held by this Court that an entry in revenue records does not confer title on a person whose name appears in record-of-rights. Entries in the revenue records or jamabandi have only "fiscal purpose", i.e., payment of land revenue, and no ownership is conferred on the basis of such entries. It is further observed that so far as the title of the property is concerned, it can only be decided by a competent civil court. Similar view has been expressed in the cases of Suman Verma v. Union of India, (2004) 12 SCC 58; Faqruddin v. Tajuddin (2008) 8 SCC 12; Rajinder Singh v. State of J&K, (2008) 9 SCC 368; Municipal Corporation, Aurangabad v. State of Maharashtra, (2015) 16 SCC 689; T. Ravi v. B. Chinna Narasimha, (2017) 7 SCC 342; Bhimabai Mahadeo Kambekar v. Arthur Import & Export Co., (2019) 3 SCC 191; Prahlad Pradhan v. Sonu Kumhar, (2019) 10 SCC 259; and Ajit Kaur v. Darshan Singh, (2019) 13 SCC 70.

7. In view of the above settled proposition of law laid down by this Court, it cannot be said that the High Court has committed any error in setting aside the order passed by the revenue authorities directing to mutate the name of the petitioner herein in the revenue records on the basis of the alleged will dated 5 20.05.1998 and relegating the petitioner to approach the appropriate court to crystalise his rights on the basis of the alleged will dated 20.05.1998. We are in complete agreement with the view taken by the High Court."

22. We have also considered another judgment of the coordinate Bench of this Court in the case of Smt. **Hadisul Nisha Vs. Additional Commissioner (Judicial), AIR Online 2021 All 2060**, where the Hon'ble Judge of this Court has carved out certain exceptions for entertaining a writ petition arising out of mutation proceedings. In order to entertain present writ petition it was to be demonstrated by the petitioner that mutation has been directed not on the basis of possession or simply on the basis of some title deed, but after entering into a debate of entitlement to succeed the property, touching into the merits of the rival claims.

23. Considering the case of the petitioner with regard to aforesaid exceptions carved out by this Court, it is noticed that the competent authority did not dwelled into the issue with regard to validity of the registered will which is being relied upon by the petitioner. He did not return a finding that the said will was fraudulently made after death of Dharamraji (testator) nor did he return any finding with regard to unregistered will, but had rejected the application merely on the ground of the fact that the applicant did not participate in the proceedings and also that she was not able to prove the registered will which formed basis of her claim for mutation. Though, it was open for the petitioner to submit all the facts and evidence at the appellate stage but she did not do so and merely contested the order of the competent authority on merits. Further at the appellate stage the attesting witness were neither produced nor were they cross examined consequently the material on which the decision was made by the appellate authority remained the same which was before the competent authority and even before the appellate authority the

will was not proved and once the basis of petitioner's claim has not been proved, no finding could have been returned in favour of petitioner even at the appellate stage. Though the proceedings under Section 34 of the Land Revenue Act are summary in nature, but when a document is denied, then proper and adequate evidence has to be adduced to prove the said document.

24. The revisional Court has also not interfered with both the orders passed by the authorities below. Accordingly, it is in the aforesaid facts that this Court is of the considered view that neither of the authorities below have entered into the discussion with regard to rival contentions and nor had any discussion made with regard to validity of the registered will vis-a-vis unregistered document. Had a finding been returned with regard to validity or otherwise of the registered will, then certainly case could have been made out for interference by this Court as per the exception carved out by the coordinate Bench of this Court in the case of **Smt. Hadisul Nisha Vs. Additional Commissioner (supra).**

25. It is in the aforesaid circumstances, this Court finds itself bound by the consistent view taken by this Court in the case of **Guridutt Vs. State of U.P. and 8 Others - Writ - C No. 21014 of 2021** (decided on 21.09.2021), where this Court has held that in such matters it is open for the petitioner to take his/her claim before the regular Courts.

26. In the aforesaid circumstances this Court is not inclined to entertain present writ petition or interfere with the orders impugned herein. Accordingly, for the reasons stated above, present writ petition is **dismissed.**

27. However, the petitioner would be at liberty to demonstrate her case before the appropriate Court, if so advised.

(2024) 2 ILRA 566
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.01.2024
BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 1004261 of 2011

Nazmul S/O Noor Hasan ...Petitioner
Versus
Commissioner Lucknow Division, Lucknow & Anr. ...Respondents

Counsel for the Petitioner:
J.P. Narayan Vajpayee, Chhatrapal Rawat, Dilip Kumar Pandey, Praveen Kumar Sharma, Umesh Chanra Vishwakarma

Counsel for the Respondents:
C.S.C.

Civil Law - Constitution of India,1950-Article 226-Arms Act, 1959-Section 17(3)(b)-the petitioner challenges the cancellation of a firearm license-the District Magistrate cancelled the firearm license citing misuse of license in criminal activities, particulary in case crime no. 287 of 2007, where he allegedly fired at public officials during a demolition drive-the decision was upheld by the appellate authority-The court held that an acquittal based on insufficient evidence or benefit of doubt does not invalidate the administrative decision to revoke the license-the decisions made after following the prescribed legal procedure are valid, even if subsequent acquittals occur in related criminal cases-The petition was dismissed, affirming the cancellation's

legality and procedural soundness.(Para 1 to 21)

The writ petition is dismissed. .(E-6)

List of cases cited:

1. Rajeev Kumar @ Monu Shukla Vs St. of U.P. & ors.. Writ C No. 31473 of 2019

(Delivered by Hon'ble Alok Mathur J.)

1. Heard Shri Dilip Pandey, learned counsel for petitioner, learned Standing Counsel for the State and perused the material available on record.

2. By means of the present writ petition, the petitioner has challenged the order dated 10.12.2010 passed by the District Magistrate, Hardoi in exercise of powers under Section 17 (3) of the Arms Act, 1959 thereby cancelling the arm licence issued in favour of the petitioner, he further assailed the order dated 16.03.2011 passed by the Commissioner, Lucknow Division, Lucknow thereby rejecting the appeal of the petitioner against the order of the District Magistrate, Lucknow.

3. It has been submitted by learned counsel for petitioner that the petitioner was issued an arm licence for SBBL with Licence No. 6469 and Arm No. 158. Subsequently, he was served with a show cause notice on 05.06.2007 asking him to respond as to why his licence be not cancelled considering the fact that he has misused his arm licence and five cases have been registered against him, namely, (i) Case Crime No. 287 of 2007, under Sections 147, 148, 149, 307, 323, 336, 332, 353 and 427 IPC, and Section 7 of the Criminal Law Amendment Act, (ii) Case Crime No. 39-A of 1999 under Section 324 IPC,(iii) Case Crime No. 20 of 2004, under Sections 147, 148, 149 and 307 IPC, (iv) Case Crime No. 247 of 2004, under Section 3/4 of the Dowry Prohibition Act and lastly a case was lodged under the Goonda Act. The petitioner duly responded to the said notice issued by the District Magistrate, Hardoi and submitted that the criminal cases have been lodged against the petitioner are false and politically motivated and he has not misused his weapon since the date of its issuance and accordingly prayed for discharge of the said notice.

4. The Licensing Authority/District Magistrate, Hardoi by means of order dated 10.12.2010 was of the view that the petitioner has misused his arm licence, inasmuch as, according to the FIR, in Case Crime No. 287 of 2007, under Sections 147, 148, 149, 307, 323, 336, 332, 353 and 427 IPC, and Section 7 of the Criminal Law Amendment Act, it was found that when the demolition drive was being carried out by the officers of the Nagar Palika, then the petitioner including number of other persons had gathered and attacked the public official and restrained them from discharge of the public function and also used his licensed weapon, which had hit the police vehicle and had damaged the same. It is in regard of the said offence that the Licensing Authority was of the view that the condition prescribed under Section 17 (3) (b) of the Arms Act, 1959 pertaining to the fact that wherever a case is made out with regard to the public peace and public safety, the Licensing Authority is vested with the power to suspend and revoke the licence. He further considered the fact that there are number of cases registered against the petitioner and there are further allegations in Case Crime No. 39-A of 1999 in relation to the petitioner

for illegally use of weapon, he was of the view that the conditions for exercise of powers under Section 17 (3) of the Arms Act, 1959 are made out and consequently cancelled his arm licence.

5. Against the order of cancellation of arm licence, the petitioner preferred an appeal before the Commissioner, Lucknow Division, Lucknow. The appellate authority also went through the entire record and also contents of the criminal cases registered against the petitioner and was of the view that the findings recorded by the District Magistrate, Hardoi in its order dated 10.12.2010 did not suffer from any infirmity and consequently while rejecting the said appeal, affirmed the findings recorded by the Licensing Authority.

6. The petitioner while assailing both the said orders, has submitted that the main ground for cancellation of arm licence is the alleged involvement of the petitioner in Case Crime No. 287 of 2007, under Sections 147, 148, 149, 307, 323, 336, 332, 353 and 427 IPC, and Section 7 of the Criminal Law Amendment Act where there was allegation against the petitioner for misuse of weapon and fired at the public officials, who were carried out public duties for demolition of illegal structures. In this regard, he submitted that the trial was conducted by the Special Judge, (SC/ST Act), Hardoi and by means of order dated 16.11.2013, the offences were not established against the petitioner and he was acquitted by giving them the benefit of doubt. He submits that once the petitioner has been acquitted by means of order dated 16.11.2013 then on this ground alone, the order of cancellation and order of appellate authority deserves to be set aside.

7. Learned counsel for the petitioner submits that with relation to FIR in Case Crime No. 39-A of 1999, the complainant had turned hostile and consequently, giving him benefit of the same, the petitioner was acquitted. It is submitted that the remaining cases are still pending consideration. Learned counsel for petitioner has submitted that once the petitioner has been acquitted in Case Crime No. 287 of 2007 as well as Case Crime No. 39-A of 1999 and remaining cases are pending consideration at the trial stage, it cannot be said that the petitioner is a criminal minded person, consequently no proceedings should have been initiated under Section 17 of the Arms Act, 1959.

8. Learned Standing Counsel for the State on the other hand has opposed the writ petition. He submits that undoubtedly, it is correct that there are numbers of judgment of this Court holding that merely on the basis of pendency of criminal cases, a fire arm licence cannot be cancelled. He further submits that in the present case, the arm licence has not been cancelled merely on account of the pendency of the criminal cases but because misuse of the arm licence has provided for under Section 17 (3) (b) of the Arms Act, 1959. He submits that sufficient power has been vested in the Licensing Authority in cases where he satisfied that there is breach of security of the public peace or public safety. The arm licence has been clearly misused by the petitioner and after giving due opportunity to the licensee, he may revoke or suspend the arms licence granted.

9. He submits that in the present case, an FIR in Case Crime No. 287 of 2007 was lodged relation to an incident dated 17.05.2007 where the Municipal authorities along with officials were proceeding to demolish the illegal structure. According to the allegations contained therein, the

petitioner along with several other persons were present with their licensed weapon and had fired upon the public official so as to prevent them from carrying out the public duties and demolishing the illegal structure. It was in that incident that it has alleged that the petitioner had fired upon the public vehicle (police vehicle). Considering this to be a serious infraction in terms of the licence issued to the petitioner, notices were issued. He further submits that during the trial also number of persons, who had been injured, had been examined. He states that the evidence under Section 161 Cr.P.C. was duly recorded by the police authorities where also involvement of the said incident was verified but subsequently a different version of the story was given by the witnesses. Consequently, the trial court was of the view that there was no sufficient evidence and only benefit of doubt was given to the petitioner as there was no sufficient evidence to bring home the charges levelled against him. He has also submitted that the licence was cancelled in 2010 when only the FIR had been lodged and the licence was cancelled after following the due procedure. Acquittal in criminal case would not have the effect of nullifying the order of cancellation of arm licence passed after following the procedure prescribed by law.

10. Learned Standing Counsel submits that it was not a clean acquittal but only the benefit of doubt was given to the petitioner and consequently, it cannot be said that the petitioner was not involved in the incident, which occurred on 17.05.2007. He further submits that firing upon public officials is a serious offence and the Licensing Authority has duly satisfied himself in this regard as would be evident from the impugned orders and consequently, submits that there is no infirmity in the same.

11. He further submits that with regard to the Case Crime No.39-A of 1999, the complainant himself had turned hostile and accordingly, benefit of such an acquittal cannot be taken by the petitioner for assailing the order of cancellation of the arm licence.

12. I have heard learned counsel for parties and perused the record.

13. According to the impugned order dated 10.12.2010, there was an allegation against the petitioner with regard to his involvement in Case Crime No. 287 of 2007, under Sections 147, 148, 149, 307, 323, 336, 332, 353 and 427 IPC, and Section 7 of the Criminal Law Amendment Act. In the said case, it was alleged that the team of officials of the Nagar Palika had proceeded to demolish certain illegal structures where a lot of public had gathered including the petitioner with their firearms. Apart from the brick backs, the public officials were fired upon where the petitioner is also alleged to have fired and consequently an FIR was lodged and also notice under Section 17 of the Arms Act, 1959 was given to the petitioner seeking his response as to why his arm licence be not cancelled.

14. The petitioner had objected to the show cause notice and denied his involvement in the said incident and also submitted that the allegations against the petitioner are politically motivated. The Licensing Authority, considering the allegations contained in Case Crime No. 287 of 2007, under Sections 147, 148, 149, 307, 323, 336, 332, 353 and 427 IPC, and Section 7 of the Criminal Law Amendment Act as well as other four cases registered

against the petitioner, was of the considered view that permitting the petitioner to retain the arm licence would endanger the public peace and safety and consequently was also of the view that there is violation of condition prescribed under Section 17 (3) (b) of the Arms Act, 1959 are fulfilled and consequently proceeded to cancel the said licence. The appellate authority has also confirmed the findings. Considering the arguments of learned counsel for petitioner, this Court is of the considered case it is not a case where the arm licence of the petitioner has been cancelled only on the grounds of pendency of criminal cases.

15. In the present case, there are clear allegations of misuse of firearm licence by the petitioner petitioner, inasmuch as, he is said to have fired upon the public officials. Firing upon the public officials is a serious offence and if a satisfaction has been recorded by the Licensing Authority, then it would be a condition sufficient itself to cancel the arm licence. The judgments referred to by the petitioner questioning the case of ***Rajeev Kumar alias Monu Shukla Vs. State of U.P. and others passed in Writ C No. 31473 of 2019,*** this Court was to ascertain as to whether the arm licence can be cancelled in public interest or due to pendency of the criminal case against the petitioner only apprehension of misuse of arm which may endanger public peace or safety. In those cases, this Court was of the view that none of the ground were made out and consequently, had proceeded to set aside the order of cancellation of the arm licence. The facts in the present case are are substantially at variance with the facts on which the aforesaid judgment was rendered.

16. In the present case there are clear allegations against the petitioner for having use his firearm against the public officials, who were carrying out public duty. This Court is of the considered view that this allegation is substantiated and a satisfaction is recorded that certainly provisions of Section 17 (3) (b) of the Arms Act, 1959 would be made out and Licensing Authority would be justified and competent to pass such an order.

17. The other aspect of this case is that the incident is said to have occurred on 17.05.2007 and impugned order of cancellation has been passed on 10.12.2010. The acquittal order has been passed after the cancellation of the arm licence on 16.11.2013. It is not the case of the petitioner that unless and until the trial is concluded, the power under Section 17 (3) of the Arms Act 1959 cannot be exercised. The proceedings of trial are totally on a different footing than are under Sections 17 of the Arms Act, 1959, where licence can be cancelled on the satisfaction of the Licensing Authority. While exercise powers under Section 17 (3) of the Act of 1959 a subjecting satisfaction has to be recorded by the Licensing Authority with regard to the existence of conditions required for cancellation of licence as provided in sections of Section 17 of the Act of 1959. While during trial the Court has to satisfy that prosecution has proved their case beyond reasonable doubt to record a conviction.

18. Learned counsel for petitioner has submitted that at the relevant point of time, the petitioner had deposited his gun before the arms dealer. It is noticed that neither this point was raised before the Licensing Authority nor at the stage of appellate authority and has been raised for the first time before this Court in the present writ petition. These facts were never subjected

to examination by the competent authority. This Court while exercising jurisdiction under Article 226 of the Constitution of India, this Court has limited jurisdiction of examining validity of the orders passed by the authorities. A new question of fact cannot be entertained for the first time in writ jurisdiction under Article 226 of the Constitution of India unless and until the fact is uncontroverted or is of such nature that it itself reflects in truthfulness or sterling quality without any further examinations and the petitioner has been able to demonstrate cogent reasons to the satisfaction of the Court for not adducing before the authorities below. It is only in the limited sphere that in very special circumstances fresh facts can be considered in writ petition assailing the order of statutory appellate authorities. In the present case, no reason has been stated for not adducing the evidence before the District Magistrate or the appellate authority for deposit of the arm with the dealer, and even the document cannot be relied upon as the same is not a receipt issued by the dealer. He even did not take this plea before the trial court and hence this piece of evidence is not reliable, and is not of such nature or can be considered for the first time in a writ under Article 226/227 of the Constitution of India.

19. I do not subscribe to the arguments of petitioner that unless and until there is a conviction with regard to the criminal case lodged against the licensee, the arm licence cannot be cancelled. There is no connection between exercise of power under Section 17 (3) of the Act 1959 and secure a conviction in the trial in relation to the criminal case lodged against the licensee. This Court is of the considered view that the acquittal in the present case, which was much subsequent to the cancellation of the arm licence would not have bearing about the validity of the order of cancellation dated 10.12.2010.

20. I have gone through the order of the Licensing Authority and have satisfied that he has duly considered the existing conditions for exercising the powers and duly recorded the satisfaction in this regard.

21. In light of the above, no ground for interference is made out. Accordingly, the writ petition is dismissed.

(2024) 2 ILRA 571
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.01.2024
BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 1004474 of 2010

Allahabad Bank Staff Association ...Petitioner
Versus
Presiding Officer Central Govt. Industrial Tribunal-Cum-Labo. ...Respondent

Counsel for the Petitioner:
T.B. Singh

Counsel for the Respondent:
Gopal Kumar Srivastava, Anurag Srivastava, Gopal Kumar Srivastava

Civil Law - Constitution of India,1950-Article 226-The petitioner was accused of fraudulently claiming Leave Travel Concession (LTC) by submitting bills for canceled tickets-following disciplinary proceedings, his special allowance was withdrawn in dec. 2001-appeals made to the appellate authority and the Central Govt. Industrial Tribunal were rejected-The petitioner challenged that issues on the ground of natural justice principles not followed and lack of detailed reasoned

orders-Held, the appellate authority improperly supplemented reasons absent in the original disciplinary order, exceeding its jurisdiction-The High court ruled that the orders of the disciplinary authority, appellate authority, and Tribunal were arbitrary, illegal and violative of natural justice-Considering the prolonged litigation and the petitioner's retirement, the court declined to remand the matter for fresh proceedings-Hence, the court set side the punishment orders granting consequential benefits.(Para 1 to 35)

The writ petition is allowed. .(E-6)

List of cases cited:

1. State Bank of Bikaner & Jaipur & ors.. Vs Prabhu Dayal (1995) SCC 6 279

2. Tara Chand Vyas Vs Chairman & Disciplinary Authority & ors.. (1997)4 SCC 565

3. S.N. Mukherjee Vs U.O.I.(1991) 4 SCC 594

4. The Secy. & Curator, Victoria Memorial Vs Howrah Ganatantrik Nagrik Samity & ors.., JT (2010)2 SC 566 Para 31 to 33

5. Chandana Impex Pvt. Ltd. Vs Commr of Customs, New Delhi (2011)269 E.L.T. 433 SC

6. St. of Ori. Vs Dhaniram Luhar(2004) 5 SCC 568

7. St.of Raj. Vs Rajendra Prasad Jain(2008) 15 SCC 711

8. Alexander Machinery (Dudley) Ltd. Vs Crabtree (1974) ICR 120 (NIRC)

9. Smt Darshan Devi @ Darshan Devi Vs St. of U.P. & ors.. Writ-C No. 890 of 2022

(Delivered by Hon'ble Alok Mathur J.)

1. Heard Sri Anurag Srivastava, learned counsel for the petitioners as well as Sri Gopal Kumar Srivastava, learned counsel appearing for respondent nos. 2 and 3.

2. By means of present writ petition the petitioners have challenged the validity of award dated 21.01.2010, passed by the Central Government Industrial Tribunal/Labour Court *(hereinafter referred to as "the Tribunal")* whereby claim of the petitioner no. 2 - workman has been rejected and the reference has been accordingly answered denying the relief to the petitioner-workman. In the present writ petition the petitioners have also assailed the punishment order dated 19.12.2001 as well as appellate order dated 20.03.2002.

3. Brief facts of the case are that petitioner no. 2 - workman who was working with the respondent - Bank and was employed in the Krishi Utpadan Mandi Samiti Branch of Allahabad Bank at Gonda and was subjected to disciplinary proceedings on account of the fact that on 18.09.1997, the petitioner - workman has fraudulently claimed Leave Travel Concession (hereinafter referred to as "LTC"). The petitioner after availing the benefit of LTC, submitted bills for expenses amounting to Rs.17,553/- which showed that he had traveled in AC IInd Class from Gonda to Banglore City, but subsequently it was found that petitioner no. 2 had infact cancelled the said ticket and had not traveled or availed the LTC from Gonda to Banglore City and had fraudulently claimed the LTC and accordingly a charge sheet was issued to him on 13.10.1999. The enquiry officer was appointed who after giving due opportunity to the workman submitted his report on 14.06.2000, pursuant to which the disciplinary authority issued show cause notice on 03.01.2001,

supplying him the copy of inquiry report to which the workman duly replied.

4. After considering the reply of the petitioner - workman the punishment order was passed on 19.12.2001, by which the special allowance of the workman was withdrawn w.e.f. 19.12.2001. The workman thereafter filed an appeal against the order of punishment was also rejected on 20.03.2002.

5. It is in the aforesaid circumstances that a industrial dispute was raised by the Allahabad Bank Staff Association on behalf of petitioner no. 2 - workman and the question which was referred to the Tribunal was as to *"Whether the action of the Management of Allahabad Bank in imposing the punishment of withdrawal of special allowance to Shri Ram Lal, Special Assistant w.e.f. 19.12.2001 is legal and justified? If not, what relief the concerned workman is entitled?"*

6. The Tribunal had considered the validity of the domestic enquiry and framed the issue as to *"Whether the inquiry officer conducted the inquiry in utter disregard to principles of natural justice as alleged in the statement of claim?"* and duly answered the said issue in favour of the respondents holding that the workman was given due opportunity of hearing at all the stages of the enquiry. A further question was raised by the workman that the order of punishment dated 19.12.2001 did not spelt out any reason and same has been passed in clear violation of principles of natural justice.

7. In this regard the Tribunal held that the legal position is not disputed that order of disciplinary authority and appellate authority must be based on recorded reasons and also held that detailed reasons have not been recorded in the impugned orders, but he was satisfied that the appellate order contained reasons and therefore it cannot be said that any prejudice has been caused to the workman and consequently dismissed the reference and rejected the claim of the workman.

8. It has been submitted by learned counsel for the petitioner that he had vehemently submitted before all the authorities including the inquiry officer and disciplinary authority that inadvertently cancellation report of ticket had been annexed alongwith the claim for LTC and it was only on account of this mistake that proceedings were initiated and there was no intention to claim the LTC for the said travel.

9. The inquiry officer by a detailed reasoning found that the workman made a fraudulent claim with regard to his LTC, where in fact he has purchased the ticket which was cancelled and without disclosing cancellation he had claimed the said amount. The inquiry report as well as reply of the petitioner-workman were placed before the disciplinary authority who by means of order dated 19.12.2001 by a cryptic and in pre-determined manner, without even dealing with the charges or reply or gravity of offence has rejected the reply of the petitioner and held that he agrees with the reasoning given in the inquiry report holding the petitioner to be guilty.

10. Before the appellate authority it was again submitted that the order of disciplinary authority is bereft of any reasons and that same is in violation of principles of natural justice and hence ought to have been set aside. The appellate

authority again itself went into the entire facts of the case and evidence which was made available in the inquiry report and held that the punishment inflicted to the petitioner was just, fair and reasonable and rejected the appeal.

11. It has been submitted that once it is found that the impugned order has been passed without any reasons then such an order cannot be sustained and reasons by the appellate authority or any other authority cannot be substituted in place of the reasons of disciplinary authority and accordingly once infirmity in the order of punishment is noticed then that order ought to have been set aside and such infirm order cannot be made good looking at the reasons stated in an order passed at the appellate stage or by the Tribunal.

12. Learned counsel for the respondents had vehemently opposed the writ petition. The first issue raised on behalf of respondents is that there is no requirement of giving reasons by the disciplinary authority while inflicting punishment on an employee. He submits that once sufficient reasons have been indicated in the inquiry report and those are agreed by the disciplinary authority, there is no requirement of giving any reasons and order of disciplinary authority, appellate authority and the Tribunal are reasonable and valid and there is no infirmity in the same.

13. Learned counsel for the respondents has further relied upon the judgment of Hon'ble Supreme Court in the case of **State Bank of Bikaner and Jaipur and Others Vs. Prabhu Dayal, 1995 SCC (6) 279** as well as order of the Apex Court in the case of **Tara Chand Vyas Vs. Chairman & Disciplinary Authority and Others, 1997 (4) SCC 565.**

14. Heard learned counsel for the parties and perused the record.

15. In the case in hand the controversy revolves around the order of punishment dated 19.12.2001. By means of order dated 19.12.2001 the Assistant General Manager and Disciplinary Authority of the petitioner-workman has recorded that in the inquiry report punishment has been proposed and that the petitioner has been given opportunity of personal hearing on 09.07.2001 in the Regional Office, Gonda. All the contentions on behalf of petitioner have been recorded by the Disciplinary authority including the written statement filed by the workman, but without considering the grounds taken by the petitioner, rejects his contention stating that he does not agree with the defence taken by the petitioner and that he has not been able to prove himself to be innocent and consequently there is no reqirement of re-consideration of the show cause notice dated 07.03.2001 and interim of bi-partite settlement of 1996 Clause 19.5(j) he has removed him from the post of Special Assistant and also that the petitioner shall not be entitled to any allowance of the said post.

16. Perusal of punishment order indicates that neither has the disciplinary authority considered the charges levelled against the petitioner-workman nor the evidence adduced by the authorities in support or against the said charge and nor has the contention of the petitioner been considered any where in the said order. It is undisputed that the order is silent with regard to merits of the case and charges levelled against the petitioner-workman.

17. It is in the aforesaid circumstances, this Court has been called upon in the present case to determine as to whether such a non speaking order bereft of any reasoning can be sustained.

18. In order to consider aforesaid aspect, it has to be considered as to whether giving reasons is essential or not. The Apex Court in the case of **S.N. Mukherjee Vs. Union of India, (1991) 4 SCC 594**, has held that giving of reasons is a part of natural justice and it is the reasons which disclose the mind of the authority who is taken the decision. In order to indicate that there has been application of mind the said order should contain reasons before taken such a decision.The Court has held as under :-

"39. The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action". As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi-judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect as those contained in the Administrative Procedure Act, 1946 of U.S.A. and the Administrative Decisions (Judicial Review) Act, 1977 of Australia whereby the orders passed by certain specified authorities are excluded from the ambit of the enactment. Such an exclusion can also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest underlying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case.

40. For the reasons aforesaid, it must be concluded that except in cases where the requirement has been dispensed with expressly or by necessary implication, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision."

19. It is well settled that an order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. Highlighting this rule, Hon'ble Supreme Court held in the case of **The Secretary & Curator, Victoria Memorial v. Howrah Ganatantrik Nagrik Samity and ors., JT 2010(2)SC 566 para 31 to 33 as under :**

"31. It is a settled legal proposition that not only administrative but

also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice - delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind. " [Vide State of Orissa Vs. Dhaniram Luhar (JT 2004(2) SC 172 and State of Rajasthan Vs. Sohan Lal & Ors. JT 2004 (5) SCC 338:2004 (5) SCC 573].

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. [Vide Raj Kishore Jha Vs. State of Bihar & Ors. AIR 2003 SC 4664; Vishnu Dev Sharma Vs. State of Uttar Pradesh & Ors. (2008) 3 SCC 172; Steel Authority of India Ltd. Vs. Sales Tax Officer, Rourkela I Circle & Ors. (2008) 9 SCC 407; State of Uttaranchal & Anr. Vs. Sunil Kumar Singh Negi AIR 2008 SC 2026; U.P.S.R.T.C. Vs. Jagdish Prasad Gupta AIR 2009 SC 2328; Ram Phal Vs. State of Haryana & Ors. (2009) 3 SCC 258; Mohammed Yusuf Vs. Faij Mohammad & Ors. (2009) 3 SCC 513; and State of Himachal Pradesh Vs. Sada Ram & Anr. (2009) 4 SCC 422].

33.Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as why his application has been rejected."

20. Non recording of reasons, non consideration of admissible evidence or consideration of inadmissible evidence renders the order to be unsustainable. Hon'ble Supreme Court in the case of **Chandana Impex Pvt. Ltd. Vs. Commissioner of Customs, New Delhi , 2011(269)E.L.T. 433 (S.C.),** held as under :

"8. ....It needs to be emphasised that every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer, particularly when either of the parties to the lis has a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the court in denying him the relief prayed for, the remedy of appeal will not be meaningful. It is that reasoning, which can be subjected to examination at the higher forums. In State of Orissa Vs. Dhaniram Luhar2 this Court, while reiterating that reason is the heart beat of every conclusion and without the same, it becomes lifeless, observed thus :

"8.....Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the

decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;....."

21. The Supreme Court in **State of Orissa v. Dhaniram Luhar (2004) 5 SCC 568** while dealing with the criminal appeal, insisted that the reasons in support of the decision was a cardinal principle and the High Court should record its reasons while disposing of the matter. The Court held as under:

"8. Even in respect of administrative orders Lord Denning, M.R. In Breen v. Amalgamated Engg. Union, (1971)2 QB 175, observed:(QB p.191 C) "The giving of reasons is one of the fundamentals of good administration." In Alexander Machinery (Dudley) Ltd. v. Crabtree it was observed: "Failure to give reasons amounts to denial of justice." "Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made; in other words, a speaking-out. The "inscrutable face of the sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."

22. Following this very view, the Supreme Court in another judgment delivered on 22-02-2008, in **State of Rajasthan v. Rajendra Prasad Jain, (2008)15 SSC 711** stated that *'reason is the heartbeat of every conclusion, and without the same it becomes lifeless.'*

23. Providing of reasons in orders is of essence in judicial proceedings. Every litigant who approaches the Court with a prayer is entitled to know the reasons for acceptance or rejection of such request. Either of the parties to the lis has a right of appeal and, therefore, it is essential for them to know the considered opinion of the Court to make the remedy of appeal meaningful. It is the reasoning which ultimately culminates into final decision which may be subject to examination of the appellate or other higher Courts. It is not only desirable but, in view of the consistent position of law, mandatory for the Court to pass orders while recording reasons in support thereof, however, brief they may be. Brevity in reasoning cannot be understood in legal parlance as absence of reasons. While no reasoning in support of judicial orders is impermissible, the brief reasoning would suffice to meet the ends of justice at least at the interlocutory stages and would render the remedy of appeal purposeful and meaningful. It is a settled canon of legal jurisprudence that the Courts are vested with discretionary powers but such powers are to be exercised judiciously, equitably and in consonance with the settled principles of law. Whether or not, such judicial discretion has been exercised in accordance with the accepted norms, can only be reflected by the reasons recorded in the order impugned before the higher

Court. Often it is said that absence of reasoning may ipso facto indicate whimsical exercise of judicial discretion. Patricia Wald, Chief Justice of the D.C. Circuit Court of Appeals in the Article, "The problem with the Courts: Black-robed Bureaucracy Or Collegiality Under Challenge" 42 Md.L. Rev. 766, 782 (1983), observed as under:-

'My own guiding principle is that virtually every appellate decision requires some statement of reasons. The discipline of writing even a few sentences or paragraphs explaining the basis for the judgment insures a level of thought and scrutiny by the Court that a bare signal of affirmance, dismissal, or reversal does not.'

24. The Court cannot lose sight of the fact that a losing litigant has a cause to plead and a right to challenge the order if it is adverse to him. Opinion of the Court alone can explain the cause which led to passing of the final order. Whether an argument was rejected validly or otherwise, reasoning of the order alone can show. To evaluate the submissions is obligation of the Court and to know the reasons for rejection of its contention is a legitimate expectation on the part of the litigant.

25. It will be useful to refer words of Justice Roslyn Atkinson, Supreme Court of Queensland, at AIJA Conference at Brisbane on 13-9-2002 in relation to Judgment Writing. Describing that some judgment could be complex, in distinction to routine judgments, where one requires deeper thoughts, and the other could be disposed of easily but in either cases, reasons they must have. While speaking about purpose of the judgment, he said, 'The first matter to consider is the purpose of the judgment. To my mind there are four purposes for any judgment that is written:-

(1) to clarify your own thoughts;

(2) to explain your decision to the parties;

(3) to communicate the reasons for the decision to the public; and (4) to provide reasons for an appeal Court to consider.'

26. Clarity of thought leads to proper reasoning and proper reasoning is the foundation of a just and fair decision. In **Alexander Machinery (Dudley) Ltd. v. Crabtree 1974 ICR 120 (NIRC)**, the Court went to the extent of observing that 'Failure to give reasons amounts to denial of justice'. Reasons are really linchpin to administration of justice. They are the link between the mind of the decision-taker and the controversy in question. To justify our conclusion, reasons are essential. Absence of reasoning would render the judicial order liable to interference by the higher court. Reasons are the soul of the decision and its absence would render the order open to judicial chastism. The consistent judicial opinion is that every order determining rights of the parties in a Court of law ought not to be recorded without supportive reasons. Issuing reasoned order is not only beneficial to the higher courts but is even of great utility for providing public understanding of law and imposing self- discipline in the Judge as their discretion is controlled by well- established norms. The contention raised before us that absence of reasoning in the impugned order would render the order liable to be set aside, particularly, in face of the fact that the learned Judge found merit in the writ petition and issued rule, therefore, needs to be accepted. We have already noticed that orders even at interlocutory stages may not

be as detailed as judgments but should be supported by reason howsoever briefly stated. Absence of reasoning is impermissible in judicial pronouncement.

27. Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dissatisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever concise they may be.

28. It is the duty cast upon the Appellate Authority that even if it is in agreement with the view taken by the first Appellate Authority, it should give its own reasons/findings which may indicate that there has been application of mind and also the consideration of grounds raised in the appeal by the revisionist. In absence of reasons it is difficult to come to a conclusion that there has been any application of mind by the Tribunal and such an order in the opinion of the Court cannot be sustained and deserves to the set aside.

29. This Court in **Writ - C No. 890 of 2022 - Smt. Darshan Devi @ Darshan Devi Vs. State of U.P. and Others** (decided on 25.03.2022), while deciding the issue has held as under :

"Hon'ble the Supreme Court in Kranti Associates (P) Ltd. & another v. Masood Ahmed Khan and others, reported in (2010) 9 SCC 496 has held that reasons recorded in any order are the soul of the order without which an order is clearly vitiated. The relevant portions of aforesaid decision are as follows:-

"47.Summarizing the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision-maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision-making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the lifeblood of judicial

decision-making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a judge or a quasi-judicial authority is not candid enough about his/her decision-making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or ?rubber-stamp reasons? is not to be equated with a valid decision-making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision-making not only makes the judges and decision-makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor [(1987) 100 Harvard Law Review 731-37] .)

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision-making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain [(1994) 19 EHRR 553] EHRR, at 562 para 29 and Anya v. University of Oxford [2001 EWCA Civ 405 (CA)] , wherein the Court referred to Article 6 of the European Convention of Human Rights which requires, ?adequate and intelligent reasons must be given for judicial decisions?.

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of ?due process?."

30. In the aforesaid circumstances, the Apex Court has relied upon the judgment in the case of **S.N. Mukherjee Vs. Union of India (supra)**, where the Court has categorically held that unless "recording reasons" has been dispensed with by an administrative authority in exercise of judicial or quasi judicial functions, he/she is required to disclose reasons. The case of the petitioner is clearly distinguishable, as no such provision has been brought on record or evidence placed before this Court which can demonstrate that with regard to employee of the respondents, requirement of recording reasons has been dispensed with.

31. Once this Court comes to a conclusion that the order inflicting punishment was bereft of any reasons, then the same is rendered arbitrary and illegal and liable to be set aside. The appellate authority while considering the appeal preferred by the delinquent workman was only looking into the validity of the order of disciplinary authority. The appellate authority was exercising its jurisdiction as a Tribunal of limited jurisdiction, looking into the validity of the order of punishment with regard to grounds raised by the delinquent workman. It was open for the appellate authority to either agree with the grounds raised by the employee assailing

the order of punishment or it could have held that none of the grounds are made out and reject the appeal. There is no power vested in the appellate authority to itself visit the entire inquiry proceedings and record its independent reasons for justifying the punishment inflicted upon the delinquent employee. Clearly the appellate authority exercised power of disciplinary authority and such an exercise is beyond its jurisdiction and cannot be sustained. The role of the appellate authority is to look into the validity of the punishment order and the reason recorded by the disciplinary authority. He himself cannot assume the role of disciplinary authority and supplement his reasons for upholding the punishment order specifically where no such reason exists in the order of disciplinary authority. This is also because it is the discretion vested in the disciplinary authority to "decide" as to whether the charges are proved or not, and also as to what punishment is to be awarded to the delinquent employee. In case the discretion vested in the disciplinary authority has not been exercised properly or contrary to the settled provisions of law, the appellate authority should set aside the order, but cannot himself assume the role of disciplinary authority.

32. Therefore, in the present case, the appellate authority has exceeded its jurisdiction by trying to read the findings of the inquiry officer as the reasons given by the disciplinary authority which were not existing in the order of disciplinary authority and substituted its reasons in the said order. In this regard this Court is of the view that the appellate authority has exceeded the jurisdiction vested in him.

33. Lastly, it is noticed that the Tribunal was aware of the fact and it rightly noticed that order of punishment is without reasons. In para 13 they have accordingly correctly appreciated the law in this regard, but, surprisingly it has not taken it to its logical conclusion. Once it had come to a conclusion that order of punishment was bereft of reasons, then there was nothing further to be looked into and it was incumbent upon them to have set aside the punishment inflicted upon the workman, rather, it allowed the stand of the employer by proceeding to hold that the workman had been given full opportunity during disciplinary proceedings. This Court finds the order of Tribunal as illegal and arbitrary inasmuch as the disciplinary proceedings culminated in the order of punishment. If any order of punishment is passed without any reasons, its validity cannot be upheld on the ground that the delinquent employee has been given full opportunity of hearing. By not giving reasons in the order of punishment, is in violation of principles of natural justice and it is arbitrary and violative of Article 14 of the Constitution of India and in the present case, the order of Tribunal is clearly arbitrary and illegal.

34. Learned counsel for the respondent on the other hand has submitted lastly that once it has been found that order is in violation of principles of natural justice, then the matter should be remitted for fresh consideration from the stage of infirmity. Considering the above argument raised by learned counsel for the respondents it is noticed that proceedings against the employee were pending since 2001 i.e. for last 23 years and during this period the petitioner has also retired and looking into the long lapse of time it would not be just, fair and reasonable to remand the matter back to the disciplinary authority to decide the matter afresh, after such a long lapse of time, specially considering

the fact that the petitioner has superannuated in the meantime, and also looking into the gravity of punishment where only punishment inflicted was only withdrawal of allowance, which is not a major punishment, accordingly, award dated 21.01.2010, appellate order dated 20.03.2002 and punishment order dated 19.12.2001 are hereby set aside.

35. The writ petition is **allowed** with all consequential benefits.

(2024) 2 ILRA 582
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2024
BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 1004613 of 2003

Virendra Kumar Shukla & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
V.V.Tripathi, Alpana Yadav, Dr. Aniruddha Kumar Singh, Illegible, Pankaj Kr.Srivastava, Raj Mani Dubey, Sukha Ram Shukla

Counsel for the Respondents:
C.S.C., Ananttika Singh, H.S. Tiwari, Pankaj Khare, S.P.Shukla, Sarvesh Kumar Dubey

Civil Law - Constitution of India, 1950-Article 226 & 300A-U.P. Zamindari Abolition and Land Reforms Act,1950 and Rules 1952-Rule 285B –Auction of immovable property-Petitioners challenged the auction of 1.717 hectares of mortgaged agricultural land conducted by the State in 2003 for recovery of agricultural loans-The land was auctioned for Re.1 due to lack of bidders, and the State subsequently mutated the property in its name-the petitioners fully repaid the loans under a one-time settlement in 2019 and received a "no dues" certificate-Held, the auction process was arbitrary, illegal and violated statutory and constitutional principles-Rule 285B mandates fair valuation and adequate publicity for auctions, selling the property for Re. 1 violated these principles-The State, acting as auctioneer and purchaser, failed to ensure transparency and fairness in the auction process-The state was directed to revert the land to the legal heirs of the borrower and update the revenue records accordingly.(Para 1 to 39)

The writ petition is allowed. .(E-6)

List of cases cited:

1. U.O.I. Vs Official Liquidator (2000)5 SCC 274

2. Divya Manufg. Co.(P) Ltd.& anr. Vs U.O.I. & ors.. (2000) AIR SC 2346

3. Gajraj Jain Vs St.of Bih. & ors.. (2004) 7 SCC 151

4. St. of U.P. & ors.. Vs Swadeshi Polytex Ltd. & ors.. (2008) 12 SCC 596

5. S.J.S. Business Enterprises (P) Ltd Vs St. of Bih. (2004) 7 SCC 166

6. Pannalal Binjraj Vs U.O.I. AIR a.p. 409

7. Mahesh Chandra Vs U.P. Fin. Corpn.

8. Haryana Fin. Corpn. Vs Jagdamba Oil Mills

9. SIPCOT Vs Contromix (P) Ltd. (1995)4 SCC 595

(Delivered by Hon'ble Alok Mathur J.)

1. Heard Sri S. R. Shukla, learned counsel for the petitioners, Sri Shantanu holding brief of Ms. Ananttika Singh for

respondent No.5 and the Standing counsel on behalf of respondent Nos. 1 to 4.

2. By means of the present writ petition, the petitioners have challenged the auction dated 3.3.2023 held by Sub Divisional Magistrate, Tehsil Dalmau, Raebareli on account of recovery of agricultural loan taken by late Sri Ram Shankar Shukla, the father of the petitioner No.s 1 to 5 and husband of petitioner No.6.

3. It has been submitted that late Ram Shankar Shukla had taken loan of Rs.31100/- in the year 1990-91 for agricultural purpose but could not repay the said loan installments within the prescribed time. He had taken further loan of Rs.32,000/- from Kshetriya Gramin Bank Ltd. Branch Ghurwara, District Raebareli i.e. opposite party No.6 and another loan of Rs.40,000/- from Uttar Pradesh Sahkari Gramya Vikas Bank, Branch Dalmau, District Raebareli and for the aforesaid loans he had mortgages his agricultural lands of gata No.s 433-KHa/0.115, 601-Ka/0.076, 611/1.00 and 925/0.526 hectares totaling to 1.717 hectares situated in Village Ranjitpur Lonari, Post Kathgar, Tehsil Dalmau, District Raebareli. Sri Ram Shankar Shukla died leaving behind his five sons and his widow who are the petitioners in the present writ petition. In the meantime, the respondent-bank initiated the recovery proceedings against the borrower and a recovery citation was also issued on 15.4.2002.

4. A writ petition bearing writ petition No.763 (M/S) of 2003 was filed before this Court which was disposed of by means of order dated 12.3.2003 directing petitioner No.1 to deposit a sum of Rs.20,000/- within a month and rest in three equal installments. It is not disputed that the petitioner No.1 could not comply with the said order of the Court and could not repay the amount as directed by the Court. It is in aforesaid circumstances that the mortgaged agricultural land was put to auction. The said auction was carried out and as no borrower had come forward to purchase the said property, the State had purchased the said property for Re.1/- and the auction was also confirmed by the order of the competent authority on 3.3.2003. It is after confirmation of the auction that the present writ petition was filed assailing the said auction.

5. In the counter affidavit filed by the state it has been stated that recovery certificate dated 7.2.2002 was issued for an amount of ? 64,844/- by Khadi Gramoudyog, Rai Bareilly against the father of the petitioners. The recovery certificate was issued upon the defaulters personally, but they did not repay the said amount. Subsequently the land measuring area of 1.717 hectares was attached and several dates were fixed for the auction but the same could not be conducted.

6. It has further been stated that in the meanwhile the defaulter Sri Ram Shankar expired and his legal representatives despite being informed to repay the outstanding amount of loan did not repay and also did not participate in the auction proceedings conducted on 18/01/2003. On the said date no one appeared to participate in the said auction and hence the auction was done in favour of the State Government. The Sub Divisional Magistrate, Dalmau confirmed the auction in favour of the State Government.

7. During pendency of the aforesaid petition an affidavit was filed on behalf of the petitioners stating that they have

deposited the total remaining amount of the outstanding loan to the respondent-bank and the respondent-bank, on the other hand, has given no dues certificate to the petitioner on 26.11.2019. No dues certificate has been issued by District Gramodyog Adhikari, Raebareli stating that the petitioner has re-payed a total amount of Rs.89,363/- towards all the outstanding loan taken by late Ram Shankar Shukla and no further outstanding remains on account of the said loan. In the application the petitioner has submitted that now that all the amount of loan has been re-payed and the land is still in possession of the respondents the mortgaged land ought to be released in favour of the petitioners as they have redeemed the loan taken by late Ram Shankar Shukla.

8. To verify the fact as to whether firstly the petitioners have re-payed the total loan and secondly as to whether the land is still in possession of the respondents, instructions were sought from Sri Shantanu, learned counsel appearing for the respondents, who has informed this Court, on the basis of written instructions received from Uttar Pradesh Khadi and Gramodyog Board (Legal Cell), Lucknow, confirming firstly that the petitioners have re-payed the outstanding loan amount and secondly that no dues certificate has been issued in this regard and also that the officials made inquiries with regard to the status of the mortgaged land in which it has been found that gata No.s 433 Kha/0.1150 hectare, 601 Ka/0.0760 hectare, 611/1.000 hectare and 925/0.5260 hectare have now been mutated in favour of the State and possession of the said land still vests with the petitioners. The said written instructions are taken on record.

9. During the pendency of the writ petition an affidavit was filed stating that the petitioner had deposited ? 31,100/-on 22/10/2019 and 21,900/- on 23/10/2019, and accordingly requested the respondent to give him a no due certificate. On the deposit of the aforesaid amount the District Gramoudyog Officer vide letter dated 26/11/2019 issued a no due certificate stating that nothing remains due against the petitioners and recommended that his mortgaged deed be returned back.

10. The aforesaid facts have also not been disputed by the respondents and it has been confirmed by the Standing Counsel, who has informed this Court, on the basis of the written instructions received from the Sub Divisional Magistrate, Dalmau, that though the land has been mutated in the name of the State, but the petitioner and other legal heirs continue to be in possession of the same.

11. In the aforesaid circumstances, the petitioner has prayed that the auction proceedings dated 16/01/2003 be set aside along with the confirmation of the said auction and the respondents be directed to mutate the name of the legal heirs of the borrower in the revenue records and also be injuncted from interfering in the possession of the petitioners.

12. I heard the counsel the parties and perused the record.

13. The undisputed facts of the present case are that one Ram Shankar Shukla had taken an agricultural loan from the Khadi Gramudyog Board for installation of ?Kolhoo? in 1990 ? 91 amount of ? 31,000/- and a further loan of ? 32,000/- from Kshetriya Gramin Bank, ? 40,000 From Uttar Pradesh Sahkari Gram

Vikas Bank and to secure the said loan equitable mortgage was created by mortgaging the land at Gatta No. 423-Kha/0.115, 601-Ka/0.076, 611/1.00, and 925/0.526 total 4 plots with an area of 1.717 hectares. As the borrower could not repay the said loan, the Khadi Gramudyog Board sent notice to Collector, Rai Bareilly to recover an outstanding amount of Rs. 64,844/- from the petitioner. Consequently, recovery proceedings were initiated, and the petitioner approached this Court filing writ petition No. 763 (MS) of 2003 and this Court by means of order dated 12/03/2003 directed the petitioner to deposit an amount of ? 20,000 within one month and the rest of the amount in three quarterly installments. The petitioner in pursuance of the order of this Court had deposited the sum of ? 20,000/- on 19/04/2003 but did not deposit the remaining installments, and consequently recovery proceedings were recommenced as per directions of this Court, as the petitioner himself had failed to deposit the outstanding amount.

14. It is in pursuance to the recovery proceedings initiated by the respondents that the property mortgaged by the petitioner was sought to be auctioned. No person appeared in the auction, and consequently the auction was settled in favour of the State and the mortgaged property of the petitioner was purchased by the State for Re1/-. According to the entry made in the revenue records, pursuant to the confirmation of the auction on 03/03/2003 the name of the petitioner was deleted and in his place name of State of Uttar Pradesh was mutated by the Lekhpal on 16/04/2003.

15. Subsequently, the entire outstanding amount of loan has been repaid to the District, Khadi Gramoudyog, Rai Bareilly, under a onetime settlement scheme, and they have also issued a no due certificate and also released the mortgaged property as per the said certificate dated 26/11/2019.

16. The grievance of the petitioners which has been agitated in the present writ petition is with regard to setting aside the auction and mutating the name of the petitioners in relevant revenue records. The respondents having themselves permitted the petitioners to redeem the said loan, and the entire outstanding amount having been paid, the mortgage would come to an end on the repayment of the entire outstanding amount of loan.

17. In the present facts and circumstances of the case, the other issue which arises for consideration is as to whether the State could have purchased the mortgaged property for Rs.1/- in the auction.

18. The proceedings for auction were initiated by the State under the provisions of U.P Zamadari Abolition and Land Reforms Act, 1950 as well as rules of 1952.

19. Section 284 of the Act deals with the attachment, lease and sale of holding of defaulter, which provides that Collector may in addition to or instead of any other processes hereinbefore specified, either of his own motion or on the application of the Land Management Committee, attach the holding in respect of which an arrear is due. Section 286 of the Act provides procedure and power to proceed against the interest of defaulter in other immovable property, which provides that if any arrears of land revenue cannot be recovered by any of the process mentioned in clauses (a) to (e) of Section 279, the Collector may realize the

same by attachment and sale of interest of defaulter in any other immovable property of the defaulter.

20. Rule 281 of U.P.Z.A. & L.R. Rules, 1952 deals with procedure and power of sale of immovable property which inter alia provides that process for sale of holding under section 284 and other immovable property under section 286 shall be issued by the Collector. Rule 281 (2-A) of the said Rules provides that in case of sale of a holding the Collector shall auction the holding in lots of 1.26 Hectares (3.125 acres) to 5.04 Hectares (12.50 acres) after working out and announcing the land revenue and the estimated value of each lot. It should also be made clear that only those persons would bid in the auction / acquisition of land who would not contravene the provisions of Section 154.

21. For ready reference Rule 281 of the U.P.Z.A. &.L.R. Rules is quoted as under:

"281. Section 284.-

{((1) Recourse can only be had to the sale of the holding under Section 284 when the process specified in clause (a), (b), (c) and (d) of Section 279 would be insufficient for the recovery of the arrear.

{(2) Process for sale of holding under Section 284 and of other immovable property under Section 286 shall be issued by the Collector.

(2-A)--In the case of sale of a holding the Collector shall auction the holding in lots of 1.26 hectares (3.125 acres) to 5.04 hectares (12.50 acres) after working out and announcing the land revenue and the estimated value of each lot. It should also be made clear that only those persons would bid in the auction, acquisition of land by whom would not contravene the provisions of Section 154.}

*{(3) * * *}"*

22. Rule 282 of said Rules provides that proclamation for sale shall be in Z.A. Form 74. Rule 283 provides that in proclamation for sale under section 286, the Collector shall state the amount of the annual demand and the estimated value of the property calculated in accordance with the rules in Chapter XV of the Revenue Manual. For ready reference the provisions of Rules 282 and 283 are quoted as under:

"282. Section 286.- The proclamation for sale shall be in Z.A. Form 74.

283. In proclamation for sale under Section 286, the Collector shall state the amount of the annual demand and the estimated value of the property calculated in accordance with the rules in Chapter XV of the Revenue Manual." 17. Rule 285-A provides the officer authorised and time frame for holding auction sale as under: "285-A. Every sale under Sections 284 and 286 shall be made either by the Collector in person or by an Assistant Collector specially appointed by him in this behalf. No such sale shall take 8 place on a Sunday or other gazetted holiday, or until after the expiration of at least thirty days from the date on which the proclamation under rule 282 was issued. The Collector may from time to time postpone that sale."

23. Rules 285-H, 285-I, 285-J and 285-K deal with the grounds and procedure for setting aside the sale and confirmation of sale, as under: "285-H. (1) Any person whose holding or other immovable property has been sold under the Act may, at any time within thirty days from the date of sale, apply to have the sale set aside on

his depositing in the Collector's office-- (a) for payment to the purchaser, a sum equal to 5 per cent of the purchaser money; and (b) for payment on account of the arrear, the amount specified in the proclamation in Z.A. Form 74 as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been paid on that account; and (c) the costs of the sale. On the making of such deposit, the Collector shall pass an order setting aside the sale: Provided that if a person applied under Rule 258-I to set aside such sale he shall not be entitled to make an application under this rule. (2) .

285-I. (i) At any time within thirty days from the date of the sale, application may be made to the Commissioner to set aside the sale on the ground of some material irregularity or mistake in publishing or conducting it; but no sale shall be set aside on such ground unless the applicant proves to the satisfaction of the Commissioner that he has sustained substantial injury by reason of such irregularity or mistake.

(ii) { }. (iii) The order of the Commissioner passed under this rule shall be final.

285-J. On the expiration of thirty days from the date of the sale if no such application as is mentioned in Rule 285-H or Rule 285-I, has been made or if such application has been made and rejected by the Collector or the Commissioner, the Collector shall pass an order confirming the sale after satisfying himself that the 9 purchase of land in question by the bidder would not be in contravention of the provisions of Section 154. Every order passed under this rule shall be final." 285-K. If no application under Rule 285-I is made within the time allowed therefor, all claims on the ground of irregularity or mistake in publishing or conducting the sale shall be barred: Provided nothing contained in this rule shall bar the institution of a suit in the Civil Court for the purpose of setting aside a sale on the ground of fraud."

24. Before dealing with rival contentions of parties, it would be useful to refer some decisions of the Apex Court, having material bearing on the question in controversy involved in the case, hereinafter.

25. In the case of **Union Bank of India Vs. Official Liquidator, 2000 (5) SCC 274,** the Apex Court has observed as under:-

"In auction-sale of the property of the company which is ordered to be wound up, the Company Court acts as a custodian for the interest of the Company and its creditors. It is the duty of the Company Court to satisfy itself as to reasonableness of price by disclosing valuation report to secured creditors of the company and other interested persons. It was further held that the Court should exercise judicial discretion to ensure that sale of property should fetch adequate price. For deciding what would be reasonable price, valuation report of an expert is essential. The Company Judge himself must apply his mind to the valuation report. The Court observed that the High Court did not interfere with the auction-sale on the ground of sympathy for the workers which was not proper. The auction-sale was, therefore, set aside by this Court and the Official Liquidator was directed to resell the property after obtaining fresh valuation report and after furnishing copy of such report to secured creditors."

26. In **Divya Manufacturing Company (P) Ltd. and another Vs. Union of India and others, AIR 2000 SC 2346**, the Apex Court held that in appropriate cases, even the confirmed sale can be set aside.

27. In **Gajraj Jain v. State of Bihar and others, (2004) 7 SCC 151**, the Apex Court held that in absence of valuation report and reserve price, the auction sale becomes only a pretence and if there is no proper mechanism and if the intending purchasers are not able to know the details of the assets or 10 intemised valuation, the auction-sale cannot be said to be in accordance with law. If publicity and maximum participation is to be attained, all bidders must know the details of the assets and the valuation thereof.

28. In **State of Uttar Pradesh and others Vs. Swadeshi Polytex Limited and others (2008) 12 SCC 596** the sale proclamation had been issued on 1.4.2005 without any valuation of properties and only the area of vacant land had been specified therein and it was this notice that had been served on the chowkidar on 21.4.2005 and publication had been made in newspaper on 22.4.2005.The auction was held on 2.5.2005. In backdrop of this case, it was found that there was clear violation of Rules 282 and 283 of U.P.Z.A. & L.R. Rules. The Apex Court further held that the question of valuation is of the utmost importance as it is designed to ensure the best price for the property and it is essential in this circumstance that wide publication and notice of the proposed sale should be given as per Rule 285-A of the Rules. The pertinent observations made by Apex Court in paras 31 and 37 of the aforesaid decision are quoted as under:-

"31. Rule 283 provides for the estimated value of the property to be determined under the provisions contained in Chapter XV of the Revenue Manual. The said Chapter specifies the procedure for valuation of the property in terms of other similar properties. It is, however, clear from the record that the figure Rs.27 crores, the value of the property which is mentioned in the advertisement in Amar Ujala, appears to have picked up without any basis as it is not the case of UPSIDC that the property had been valued in accordance with the provisions of the Revenue Manual or by a valuer or expert in the field.

37. The question of valuation is to our mind of the utmost importance as it is designed to ensure the best price for the property and it is essential in this circumstance that wide publication and notice of the proposed sale should be given as per Rule 285-A which postulates a notice of 30 days between the date of issuance of the sale proclamation and the date of auction. It can hardly be overemphasised that the proper valuation of the property and wide publicity of the proposed auction is intimately linked with the price that the auction fetches. As already mentioned above, the auction had been held on 2.5.2005. The sale proclamation had been issued on 1.4.2005, and served on the chowkidar on 21.4.2005, the publication made in Amar Ujala on 22.4.2005 whereas Rule 285-A itself postulates a notice period of 30 days to be counted from the date of issuance of the sale proclamation. While dealing with a similar situation, this is what this Court had to say in ***S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar 2004 (7) SCC 166*** *(SCC 175- 76, paras 17-18) "*

31. We are of the view that the sale effected in favour of Respondent 6

cannot be sustained. It is axiomatic that the statutory powers vested in State financial corporation under the State Financial Corporations Act, must be exercised bona fide. The presumption that public officials will discharge their duties honestly and in accordance with the law may be rebutted by establishing circumstances which reasonably probabilise the abuse of that power. In such event it is for the officer concerned to explain the circumstances which are set up against him. If there is no credible explanation forthcoming the court can assume that the impugned action was improper. (See ***Pannalal Binjraj Vs. Union of India, AIR a p. 409)*** *Doubtless some of the restrictions placed on State financial corporations exercising their powers under Section 29 of the State Financial Corporations Act, as prescribed in* ***Mahesh Chandra Vs. U.P. Financial Corpn.*** *are no longer in place in view of the subsequent decision in* ***Haryana Financial Corpn. Vs. Jagdamba Oil Mills.*** *However, in overruling the decision in Mahesh Chandra this Court has affirmed the view taken in* ***SIPCOT v. Contromix (P) Ltd.1995 (4) SCC 595*** *and said that in the matter of sale under Section 29, State financial corporations must act in accordance with the statute and must not act unfairly i.e. unreasonably. If they do, their action can be called into question under Article 226. Reasonableness is to be tested against the dominant consideration to secure the best price for the property to be sold.*

"12. ..... This can be achieved only when there is maximum public participation in the process of sale and everybody has an opportunity of making an offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price." (SIPCOT case, SCC p. 601, para 12)

29. Adequate publicity to ensure maximum participation of bidders in turn requires that fair and practical period of time must be given to purchasers to effectively participate in the sale. Unless the subject-matter of sale is of such a nature which requires immediate disposal, an opportunity must be given to the possible purchaser who is required to purchase the property on 'as-is-where-is basis' to inspect it and to give a considered offer with the necessary financial support to deposit the earnest money and pay the offered amount, if required.

We must, therefore, repel Mr Dwidedi's argument that as SPL had suffered not prejudice in the auction proceedings, the sale should not be interfered with."

29. Thus, on a close analysis of the aforesaid decisions it is clear that in ***Union Bank of India Vs. Official Liquidator*** (supra) the Apex Court has held that in auction sale of property of company which is ordered to be wound up, the Company Court acts as custodian for the interest of company and its creditors. It is the duty of the Company Court to satisfy itself as to reasonableness of price by disclosing valuation report to secured creditors of the company and other interested persons. The Court should exercise judicial discretion to ensure that sale of property should fetch adequate price. For deciding what would be reasonable price, valuation report of an expert is essential.

30. In ***Gajraj Jain Vs. State of Bihar and others*** (supra) it was held that in absence of valuation report and reserved price the auction sale becomes only a pretence and if there is no proper

mechanism and if intending purchasers are not able to know the details of the asset or itemised valuation, the auction sale cannot be said to be in accordance with law. If publicity and maximum participation is to be attained, all the bidders must know the details of asset and valuation thereof.

31. In ***State of Uttar Pradesh and others Vs. Swadeshi Polytex Ltd.*** (supra) the Apex Court has held that the question of valuation is of utmost importance as it is designed to ensure the best price for the property and it is essential that wide publication and notice of proposed sale should be given as per Rules 285-A of the Rules.

32. In ***SIPCOT vs. Contromix (P) Ltd. 1995 (4) SCC 595*** it was held by the Apex Court that reasonableness is to be tested against dominant consideration to secure best price for the property to be sold. The Apex Court further held that this can be achieved only when there is maximum public participation in the process of sale and everybody has opportunity of making offer. Public auction after adequate publicity ensures participation of every person who is interested in purchasing the property and generally secures the best price. It was further observed that adequate publicity to ensure maximum participation of bidders in turn requires that fair and practical period of the time must be given to purchasers to effectively participate in the sale. Unless the subject matter of sale is of such a nature which requires immediate disposal, an opportunity must be given to the possible purchaser who is required to purchase the 13 property on 'as-is-where-is basis' to inspect it and to give a considered offer with the necessary financial support to deposit the earnest money and pay the offered amount, if required.

33. From the aforesaid judgements, it is clear that whenever a property is put up for auction to realise the outstanding amount of dues, one of the main considerations is to get the maximum value out of the said property. For the said purpose, it is an essential condition that there should be proper valuation of the property, for which purpose provision has been made even in the Zamindari Abolition and Land Reforms Act. Even in a situation where no person appears to participate in the auction and no bidders participate in the auction, Collector has been given the discretion to bid up to the amount of such arrears. Rule 285B of the said Act is quoted here for ready reference:-

"285B. No officer having any duty to perform in connection with any such sale, and no person employed by, on subordinate to, such officer shall, either directly or indirectly, bid for, acquire or attempt to acquire the property sold or any interest therein :

Provided that where at any auction under Section 248 no bid is offered up to the amount of the arrear, for which the sale has been ordered, the Collector may bid upto the amount of such arrear."

34. In the facts of the present case, according to the State Government no one participated in the said auction and consequently the property was purchased by the State for Re 1/-. Even in a situation where no person has appeared to bid, it was open for the State to purchase the said property, but the reserve price had to be offered and paid. There is no law which permits the State to purchase the mortgaged property Re 1/-, which would be below the reserve price for 1.7 hectares of land anywhere. The said action of the State is clearly illegal and arbitrary and contrary to

the statutory provisions of Rule 285B of the Act of 1950.

35. The State is under a mandate to act reasonably and fairly in all spheres of activity. Even the rules providing for sale of immovable property provide for a detailed mechanism where proper notices have to be issued, the property has to be valued before fixing the reserve price, and even the auction has to be fair and transparent. The action of the State in purchasing the property at an auction conducted by themselves for a price of Re. 1/- is nothing but confiscation of the property. Such a right cannot be vested in a democratic State, to confiscate the property of the citizen under the garb of a realisation of outstanding amount of loan for a paltry sum of Re.1/-. According to Rule 285B even if no one had participated in the auction, the minimum reserve price should have been paid for purchase of the said property. At this stage, we cannot lose sight of the Constitutional provisions contained in Article 300A.

36. According to Article 300 A of the Constitution of India *'no person can be deprived of his / her property save by authority of law'* and the State cannot dispossess a citizen of his / her property except in accordance with the procedure provided for in the Zamindari Abolition and Land Reforms Rules, 1952. In the present case, deprivation of the property of the petitioner in purported exercise of the powers to sell mortgaged property to recovery amount of loan by the State Government and to purchase it at Re.1/- is nothing except confiscation of the property. The said action cannot be sustained on the anvil of the provisions contained in U.P.Z.A. and L.R. Act, especially Rule 285 B as quoted hereinabove and Article 300 A of the Constitution. It is surprising that when no person appeared during the auction why was not another date fixed after due publicity to ensure maximum participation at the auction but still the State proceeded with the said auction and settled in their own favour at a paltry sum of Re.1/-. On the touchstone In the Constitutional Scheme as well as under the statutory provisions and rules of U.P.Z.A. and L.R. Act, the said exercise is clearly arbitrary and illegal and deserves to be quashed.

37. In light of the above, this Court is of the considered view that once the agricultural loan taken by late Ram Shankar Shukla has been redeemed then the land which has been auctioned ought to have been reverted back to the petitioners, who are legal heirs of the borrower, namely Ram Shankar Shukla.

38. Learned counsel for the respondents do not object to the prayer made by the petitioners nor is there any legal basis for retention of the auctioned land.

39. Accordingly, the writ petition is **allowed**. The auction dated 16.1.2003 and its confirmation dated 3.3.2003 held by Sub Divisional Magistrate, Tahsil- Dalmau, District Raebareli, are set aside.

40. Considering the fact that the loan has already been redeemed, the State Government is directed to revert the land back to the legal representatives of the borrower, namely, Ram Shankar Shukla and necessary direction be issued to the revenue officers

forthwith to pass necessary orders and mutate the name of legal heirs of late Ram Shankar Shukla.

(2024) 2 ILRA 592
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2024
BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 1006851 of 2011

Smt. Savitri Devi ...Petitioner
Versus
Civil Judge Junior Division Court No. 22 Barabanki & Ors. ...Respondents

Counsel for the Petitioner:
Ashish Kumar Rastogi, Anurag Shukla, Prem Chandra Chauhan, R.R. Upadhyaya

Counsel for the Respondents:
Om Chandra Sahu, Piyush Kr. Singh

Civil Law - Constitution of India,1950-Article 226-Civil Procedure Code,1908-Order 1 Rule 10-Transfer of Property Act,1882-Section 52-The respondent filed a suit seeking cancellation of a sale deed executed on 28.04.2009-During the pendency of the suit, the property was transferred to the petitioner through a registered gift deed on 10.08.2009-the application for impleadment by the petitioner was rejected on the grounds that the transfer was void under section 52 of the T.P. Act-Held, that the trial court erred in declaring the gift deed void at the preliminary stage without framing proper issues or conducting a trial-The petitioner having acquired substantial interest in the property, was deemed a necessary party to the litigation to avoid multiplicity of proceedings-Thus the impugned order was set aside.(Para 1 to 23)

A transferee pendente lite is not barred from being impleaded as a party if their interest in the subject matter of the suit is substantial. The decision to implead lies within the judicial discretion of the court.The doctrine does not render a transfer during litigation void but subordinates it to the rights determined by the court in the pending litigation.(Para 11 to 20)

The writ petition is allowed. .(E-6)

List of cases cited:

1. Amit Kumar Shaw & anr. Vs Farida Khatoon & anr., (2005) AIR SC 2209

2. Sri Jaggannath Mahaprabbu Vs Pravat Chandra Chatterjee & ors.. (1992) AIR ORISSA 47

3. Thomson Press (India) Ltd. Vs Nanak Builders & Investors Pvt. Ltd. & ors..(2013) 3 SCC 397

4. Purshottam Das Verma Vs 2nd Addl. Distt. Judge, Alld. & ors.. (1991)9 LCD 567

5. The Municipal Corpn of the City of Ahmedabad Vs Chandulal Shamaldas Patel & ors.. (1971)3 SCC 821

(Delivered by Hon'ble Alok Mathur J.)

1. Heard Sri Prem Chandra Chauhan, learned counsel for the petitioner as well as Sri Om Chandra Sahu, learned counsel appearing on behalf of respondent no. 2.

2. Controversy raised in the present writ petition is with regard to the scope of provisions contained in Order 1 Rule 10 CPC as the application preferred by the petitioner for impleadment has been rejected by the Additional Civil Judge (Junior Division), Barabanki by means of order dated 25.07.2011, which

order has been impugned in the present writ petition.

3. It has been submitted by learned counsel for the petitioner that respondent no. 2 had filed a suit against respondent no. 3 seeking a decree wherein the a suit for cancellation of sale deed dated 28.04.2009 was filed by him. During the pendency of the said suit respondent no. 3 had transferred the property to the petitioner by means of 'hibanama' (gift deed) dated 10.08.2009, by means of registered instrument. After execution of gift deed the petitioner had moved an application for impleadment. The said application was opposed by the respondent no. 2, stating that no transfer made during pendency of the suit would be void in terms of Section 52 of the Transfer of Property Act and consequently petitioner has not got any right to become a party in the present litigation.

4. The trial Court sustained the objections filed by respondent no. 2 and held that the petitioner claims impleadment on the basis of gift deed and the gift deed itself would be void in terms of Section 52 of the Transfer of Property Act and consequently, there is no occasion for the petitioner to be impleaded as party on the strength of a void instrument and rejected the application for impleadment.

5. Learned counsel for the petitioner has submitted that even if for the moment it is assumed that gift deed would be hit by the provisions of Section 52 of the Transfer of Property Act, it cannot be denied that the gift deed was infact executed and the petitioner has sufficient interest to become party in the present suit and consequently as to whether the gift deed was void or not, could have been established only at the conclusion of the trial. Had the said disputed question translated into a issue framed by the trial Court and after examination of evidence adduced by the parties, the said issue could have been decided. It is submitted that the application for impleadment at the very outset could not have been rejected by recording a finding that the transaction was hit by the provisions of Section 52 of the Transfer of Property Act and such a procedure followed by the trial Court is clearly arbitrary and it would have been appropriate for the trial Court to allow the application for impleadment and subsequently after doing so appropriate issue could have been framed and adjudicated after following due process.

6. It is next submitted by learned counsel for the petitioner that the trial Court should not have recorded a finding at the very inception while considering the application for impleadment that the petitioner could not become party on the strength of void instrument.

7. Learned counsel for the respondent on the other hand has opposed the writ petition. He has submitted that the gift deed was executed only on 10.08.2009 i.e. during the pendency of the suit proceedings and consequently, there is no dispute regarding the said fact and in the light of the provisions contained in Section 52 of the Transfer of Property Act, the said instrument could be deemed to be void and the petitioner does not get any right over the disputed property and there is no infirmity in the order of trial Court.

8. Heard learned counsel for the parties and perused the record.

9. The issue which arises for consideration before this Court is as to whether the petitioner has sufficient interest in the pending suit proceedings to be made party and also as to whether merely on account of the fact that gift deed was executed during the pendency of the proceedings, such an instrument can be held to be void by the trial Court while deciding the application for impleadment or such a decision could have been passed only after framing appropriate issues during the trial and after affording opportunity to the parties to adduce evidence and only then return finding in this regard.

10. Case of the petitioner is that infact it was a collusive suit filed by respondent no. 2 against respondent no. 3. The respondent no. 2 and 3 are real brother and sister while the petitioner is the daughter-in-law of the sister of respondent no. 2 and 3. After the sale deed was executed by respondent no. 2 in favour of respondent no. 3 on 28.04.2001, a valid sale deed was executed by respondent no. 3 in favour of petitioner. It was stated that the petitioner was never made aware about the suit preferred by respondent no. 2 against respondent no. 3 for cancellation of sale deed and therefore, the provisions of Section 52 of the Transfer of Property Act do not apply in the facts of the present case. In this regard various pronouncements of the Hon'ble Supreme Court are discussed herein below.

11. In the case of **Amit Kumar Shaw and Another Vs. Farida Khatoon and Another, AIR 2005 SC 2209,** it has been observed by the Apex Court that the doctrine of lis pendense applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party, but the transferee *pendente lite* can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. Relevant paragraphs 16, 17 and 18 of the judgment on reproduction read as under:

"16. The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order XXII Rule 10 an alienee pendente lite may be joined as party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation; he is entitled to be

heard in the matter on the merits of the case.

17. In the instant case, the applications for substitution were filed by the respective appellants in the second appeals which are still pending on the file of the High Court though it was filed in the year 1993. The appellants have properly, sufficiently and satisfactorily explained the delay in approaching the Court. We see bona fide in their explanation in not coming to the Court at the earliest point of time. Therefore, the appellants who are transferees pendente lite should be made as parties to the pending second appeals as prayed for by them. In our opinion, the High court has committed serious error in not ordering the applications for substitution filed by the appellants. In our view, the presence of the appellants are absolutely necessary in order to decide the appeals on merits. Since the High Court has committed error by rejecting the appellants' applications for substitution treating the same as additional parties and thereby rendering the appellants non-suited. We have no hesitation in setting aside the said orders and permit the appellants to come on record by way of substitution as prayed for. The High Court proceeded on a wrong premise that the appellants had made the application for addition of party whereas the application under consideration was for substitution as the owner had sold the suit property to the appellants and had no interest in the pending litigation.

18. In our opinion, the presence of the appellants was absolutely necessary since the appellants are the only persons who has got subsisting right, title and interest in the suit. The appellants are at liberty to contest the matter on merits."

12. In the case of **Sri Jaggannath Mahaprabhu Vs. Pravat Chandra Chatterjee and Others, AIR 1992 ORISSA 47,** the Full Bench of Orissa High Court while considering the scope of Section 52 Transfer of Property Act has held that even if a lis pendense transferee is not a necessary party and the plaintiff can ignore the transfer even if he has notice thereof and a decree or order obtained by him would be binding on the lis pendense transferee, when a motion is made by the lis pendents transferee to be impleaded as party, the Court may, in exercise of its discretion judicially, add him as a proper party to prevent multiplicity of suits. Relevant paragraph 9 of the judgment on reproduction read as under:

"9. Though in Basant Ram's case (ILR (3974) Him Pra 276) (supra), it has been held that a lis pendens transferee is not a proper party, we are of the view that even if a lis pendens transferee is not a necessary party and the plaintiff can ignore the transfer even if he has notice thereof and a decree or order obtained by him would be binding on the lis pendens transferee, when a motion is made by the lis pendens transferee to be impleaded as a party, the court may, in exercise of its discretion judicially, add him as a proper party to prevent multiplicity of suits."

13. In the case of **Thomson Press (India) Limited Vs. Nanak Builders and Investors Private Limited and Others, (2013) 3 SCC 397**, the Apex Court has considered a case where the property in question was transferred despite having notice and knowledge of injunction granted by the Court below in such pending suit. It was held that the transfer *pendente lite* is neither illegal nor void ab initio but remains subservient to rights eventually

determined by Court in pending litigation. It was also held that the transfer in favour of purchaser *pendente lite* is effective in transferring title subject to certain obligations as decision of Court in a suit is binding not only on litigating parties but also on those who derive title *pendente lite*.

14. This Court in the case of P**urshottam Das Verma Vs. 2nd Addl. Distt. Judge, Allahabad and Others, 1991 (9) LCD 567,** has held that the effect of the provision of Section 52 Transfer of Property Act is not to wipe out a sale *pendente lite* altogether but to subordinate it to the rights based on the decree in the suit. It does not create any bar in the way of the transferee to proceed with the suit. The decree will have binding effect on the vendee, though not party in the suit. Execution proceeding are continuation of the suit. Relevant paragraphs 30 to 36 are reproduced herein below:

"30. Durga Prasad Nigam has brought it on record that after filing the suit he executed a sale deed in favour of Smt. Janki Pandey on 16-1-84. This fact is not disputed. The only question is whether Smt. Janki Pandey had any right to file the application on 20-5-86 for setting aside the compromise decree.

31. Section 146 of the Civil Procedure Code reads as follows.

"Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

32. There is no dispute that Smt. Janki Pandey never chose to proceed with the suit after the sale deed was executed in her favour. She was watching her interest and felt that it was safe in the hands of Durga Prasad Nigam but it did not debar her from coming in the picture at the time of the execution of the suit. Execution proceedings were the continuation of suit in proceeding as contemplated under Section 52 of the Transfer of Property Act.

33. Order 22 Rule 10 of the Civil Procedure Code which provides for procedure in case of assignment before final order in the suit runs as follows:

"In the case of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved."

34. It empowered her to proceed with the execution proceeding.

35. Accordingly, I agree with the view of the trial court that Smt. Janki Pandey had a right to file an application for setting aside the order dated 7-5-86 and the order has been rightly set aside.

36. No other point was pressed for consideration. The impugned orders have resulted into substantial justice between the parties. I do not find any error of law apparent on the face of record. Accordingly the writ petitions are dismissed with cost."

15. Learned counsel for respondents, on the other hand, have relied on the judgments of the Apex Court in the case of **The Municipal Corporation of the City of Ahmedabad Vs. Chandulal Shamaldas Patel and Others, 1971 (3) SCC 821**, where the Court has held that an appeal by non-aggrieved party is not maintainable.

16. In the present case the petitioner has submitted that she was not aware of the pending litigation at the time of execution of the gift deed, and also the suit for

cancellation of the sale deed is collusive. She stated that the doctrine of lispendens applies only where lis is pending before the Court. Further, pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has discretion to make a party. But the transferee pendent lite can be added as a proper party, it was interest in the subject matter of the suit is substantial and not just peripheral. The transferee pendent lite to the extent he has acquired interest of the defendant, the latter having no more interest in the property may not properly defend the suit or he may collude with the plaintiff, in such circumstances, the transferee may be joined as a party.

17. Hon'ble the Supreme Court in the case of Savitri Devi Vs. District Judge, Gorakhpur, (1992) 2 SCC 577, has upheld the order passed by the trial Court for impleadment of respondent nos. 3 to 5, who had purchased the suit property without knowledge of the pending litigation, as parties. On behalf of the appellant, it was argued that respondent nos. 3 to 5 cannot be treated as necessary parties because alienation made in their favour was in violation of the injunction order passed by the Court. In support of this argument, reliance was placed on the judgment in Surjit Singh Vs. Harbans Singh (supra). This Court distinguished that the judgment by observing that in that case the assignors and the assignees had knowledge of the injunction order passed by the Court and held that the order passed by the trial Court which was affirmed by the District Judge and the High Court does not call for interference.

18. The Apex Court in the case of Vinod Seth Vs. Devinder Bajaj, (2010) 8 SCC 1, has interpreted Section 52 of the Transfer of Property Act, 1882, and has observed as under :-

"It is well settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit."

19. The principle underlying Section 52 of the Transfer of Property Act, 1882, is based on justice and equity. The operation of the bar under Section 52 is however subject to the power of the Court to exempt the suit property from the operation of Section 52 subject to such conditions it may impose. That means that the Court in which the suit is pending, has the power, in appropriate cases, to permit a party to transfer the property which is the subject-matter of the suit without being subjected to the rights of any party to the suit, by imposing such terms as it deems fit. Having regard to the facts and circumstances, we are of the view that this is a fit case where the suit property should be exempted from the operation of Section 52 of the Transfer of Property Act, 1882, subject to a condition relating to reasonable security, so that the defendants will have the liberty to deal with the property in any manner they may deem fit, in spite of the pendency of the suit.

20. From the aforesaid judgments of the Apex Court as well as this Court, it

clearly brings out that the discretion to make subsequent transferee as a party is discretion of the Court and the Court has to look into the fact as to whether the transferee has substantial right in the suit proceedings and the subject matter related therein. Transfer *pendente lite* is neither illegal nor void ab initio but remains subservient to rights eventually determined by Court in pending litigation. The transfer in favour of purchaser *pendente lite* is effective in transferring title subject to certain obligations as decision of Court in a suit is binding not only on litigating parties but also on those who derive title *pendente lite*.

21. From the aforesaid facts it is clear that entire disputed property which is subject matter of the suit has been gifted in favour of petitioner by means of registered sale deed on 10.08.2009. From the above any judgment in the suit would substantially effect the right of petitioner who claims to have received gift from the purchaser. Accordingly, there is no doubt that petitioner has substantial interest in the suit property and is a necessary party.

22. Considering the effect of Section 52 of the Transfer of Property Act on the gift deed, this Court is of the considered view that once the petitioner had been made party even effect of gift deed could have been adequately adjudicated by the trial Court by framing issue and permitting the parties to lead evidence in this regard. Such an issue could not have been decided at the preliminary stage while considering the application for impleadment filed by the petitioner under Order 1 Rule 10 CPC.

23. In the light of above, impugned order dated 25.07.2011, is set aside. The writ petition stands **allowed.**

(2024) 2 ILRA 598
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2024
BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ C No. 3000020 of 2007

Nirmohan Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
U.S. Sahai

Counsel for the Respondents:
C.S.C., Deepak Chandra Jain

Civil Law - Constitution of India, 1950-Article 226 –U.P. Imposition of Ceiling on Land Holdings Act,1960-Section 5(6)(b)-The petitioner challenged the classification and determination of surplus land by the authorities-the petitioner the recorded tenure holder, received a notice u/s 10(2) of the Act in the year 1974, proposing that 50.442 acres of his land be declared surplus-the Prescribed Authority rejected his objections, citing lack of evidence and determing that the transfers to his sons were not bona fide but aimed at evading ceiling limits-the appellate authority upheld these findings-no substantial evidence apart from oral claims was presented by the petitioner-Held, the petitioner failed to meet the criteria u/s 5(6)(b) of the Act for proving good faith, adequate consideration, and irrevocability of the transactions-Tenure holders may be allowed to exercise options u/s 12 of the Act for retaining specific portions of surplus land, provided the application is made within the permissible timeframe.(Para 1 to 30)

The writ petition is dismissed. .(E-6)

(Delivered by Hon'ble Alok Mathur J.)

1. Heard Sri U.S. Sahai, learned counsel for petitioner as well as learned Standing Counsel for respondents.

2. The petitioner by means of present writ petition has challenged the order dated 26.02.2005 passed by prescribed authority whereby he has rejected the objections filed by the petitioner as well as the order dated 26.02.2007 passed by Additional Commissioner, Lucknow Division, Lucknow whereby the appeal preferred by the petitioner against the order of prescribed authority has been dismissed.

3. Brief facts of the case are that the petitioner who is the recorded tenure holder was served with a notice under Section 10(2) of the Uttar Pradesh Imposition of Ceiling of Land Holdings Act, 1960 on 19.11.1974 indicating his holdings to be 80.04 acres out of which 77.25 acres were shown irrigated land while 2.79 acres were shown as a bagh. In the said notice, 50.442 acres was proposed to be declared as surplus. The petitioner had filed his objections stating that in his land, the holdings of Ramendra Singh, Ravindra Singh and Surjit Kaur W/o of Harvinder Singh has wrongly been included and prays for exclusion of the said land.

4. He has further stated that the entire land was unirrigated and it was wrongly shown in the notice that the land was irrigated. The prescribed authority after considering the objections rejected the same by means of order dated 25.01.1975 and declared 50.442 acres as surplus. The petitioner had filed an appeal which was dismissed and subsequently a writ petition was also filed before this Court.

5. The matter was remanded to the prescribed authority who again rejected the objections by means of order dated 17.01.2001. While rejecting the objections, he held that Ramendra Singh and Gurmohan Singh were the sons of the petitioner and consequently the sale deeds in their favour have been made only for the purpose of evading the proceedings under the Act of 1960 and there was no material that the said transaction were bonafide or for adequate consideration and consequently refused to exclude the said land from the holding of the petitioner. It was also brought before him that despite the execution of the said sale deeds, the petitioner was still in possession of the said land and consequently the sale deeds were not bona fide.

6. Against the order dated 17.01.2001, the petitioner had preferred an appeal where again he sought exclusion of the land which has been sold to his sons and further canvas the issue pertaining to the fact that the land were unirrigated and the prescribed authority had wrongly shown them to be irrigated. The appellate authority while considering the appeal was of the view that the prescribed authority has not duly considered the sale deeds by which the sale deeds have been executed in favour of the sons and also as to whether adequate consideration was received and whether the petitioner was entitled for the benefit under Section 5 Sub-Clause 6 of the Act of 1960 and consequently for this reason remanded the matter back to the prescribed authority for consideration on these aspects.

7. With regard to the issue whether the land was irrigated, a finding was recorded in favour of the petitioner holding that even as per the revenue records pertaining to fasli year 1378-1380, the land had been shown as unirrigated and the

provisions for irrigation were made only after the cut off date and consequently the land could not be held to be irrigated.

8. In the remand proceedings, the only issue before the prescribed authority was the matter pertaining to the exclusion of the lands which were sold to his sons, namely Rameder Singh and Gurmohan Singh to whom the sale deeds were executed on 28.10.1971 and 27.10.1971 respectively by the petitioner. He has stated that notices were sent to the petitioner and he was also given an opportunity to adduce evidence. Despite granting of the opportunity, no documentary evidence was filed by the petitioner and he merely reiterated that the said lands deserve to be excluded from the holdings of the petitioner. He has further noticed that both the sale deeds were excluded between 28.10.1971 and 27.10.1971 which are after the two cut off dates prescribed under the Act of 1960 and no evidence was adduced by the petitioner which can indicate that he had received adequate consideration for the sale of land and only reason stated by the petitioner was that only for the marriage of his daughter he had sold the lands.

9. The prescribed authority had recorded that it is not believable that a person would sell the land to his sons to get money for the wedding of his daughter and considering the fact that the land has been sold to his sons, it cannot be said that the sale is bonafide but it seems that an effort was made to evade the provisions of Ceiling Act of 1960 and hence rejected his objections. He further noticed that no option has been given by the petitioner as per the provisions of Section 12 of the Act of 1960 and hence while decided the matter, declaring 17.302 acres as surplus land in terms of irrigated land. The petitioner being aggrieved by the said order had preferred an appeal.

10. The matter pertaining to exclusion of the land sold to his sons was again agitated before the appellate authority. The appellate authority also recorded that no evidence has been filed by the petitioner from which it can be demonstrated that the sale deeds were bonafide and for adequate consideration. He has stated that out of four sale deeds, two sale deeds were in favour of his sons while the rest two sale deeds which were in favour of other persons have already been excluded. Even before the appellate authority, it was submitted that for the purpose of marriage of his daughter, the land was sold to his sons. It could not be demonstrated that the sons had capacity to pay for the said land or that the consideration as shown in the sale deeds was adequate considering the location of the land and it could not be shown that after the said sale deeds the sons were in occupation of the said land and performing agricultural activities themselves. While on the contrary, there was material on record to show that despite the execution of the sale deeds the petitioner continued to have possessory rights over the land and consequently in absence of any material to show that there was compliance of statutory provisions contained in Section 5 Sub-Clause 6 (b) of the Act of 1960, this issue was rejected.

11. With regard to issue pertaining to irrigated or unirrigated land, the appellate authority has relied upon the revenue records pertaining to the khasra for fasli years 1370 and 1379 where the said land was shown to be irrigated and the petitioner was obtaining two crops and hence after observing the said facts he found that no interference in this regard was also required

and hence rejected the appeal of the petitioner.

12. Sri U.S. Sahai, learned counsel for petitioner has reiterated all the issues. He has submitted that the said sale deeds executed in favour of sons by the petitioner were for adequate consideration and bona fide and hence deserves to be excluded from the holding of the petitioner and submitted that the finding recorded by the prescribed authority and the appellate authority require interference by this Court.

13. When a pointed query was put to him as to the material which was placed by him either before the authorities below or before this Court to demonstrate as to whether the said sale deeds were for adequate consideration and bonafide, he submitted that apart from oral testimony there was no other material. He has submitted that the reasons stated before the authorities below was that for the purpose of marriage, the land was sold by the father to his sons and that was the reasons sufficient itself for exclusion of the lands from the holdings of the petitioner.

14. Learned Standing on the other hand has opposed the writ petition. He has submitted that the mere fact that the father has sold his properties to the sons a presumption and suspicion arises that the said transfer of the land has been made by the tenure holder only for the purposes of evading from the clutches of the provisions of Ceiling Act of 1960. He has stated that before the prescribed authority and appellate authority there was material to indicate that despite the said sale deeds the land continued to be in possession of the recorded tenure holder and accordingly submitted that the said sale deeds were a mere sham and not entered into for the purpose of transferring the lands in the hands of his sons. He has further submitted that onus lay upon the petitioner to adduce evidence to show that after execution of the said sale deeds the sons had possessory rights over the said land and were in fact cultivating the land themselves to the exclusion of the recorded tenure holder. He has further submitted that no exemplars were filed by the petitioner to show that the consideration paid by his sons for purchase of the land was adequate.

15. In absence of any material or evidence adduced by the petitioner, both the authorities below could not have recorded any finding in favour of petitioner who has failed to demonstrate that the said sale deeds were executed for adequate consideration and were bonafide. Accordingly, he stated that there is no infirmity in the order of prescribed authority or the appellate authority and consequently the writ petition deserves to be dismissed.

16. I have heard learned counsel for respective parties and also perused the record.

17. With regard to issue pertaining to the exclusion of the land for which the petitioner has entered into a sale deed and sold the said lands to his sons by registered sale deed on 28.10.1971 and 27.10.1971. According to the provisions contained in the Act of 1960, no alienation or transfer of land is permitted after the cut off date or any such alienation or transfer is liable to be ignored by the prescribed authority while considering the land to be declared surplus at the hands of the recorded tenure holder.

18. As per Section 5 of the Act of 1960, on or from of the commencement of the Act of 1960, no tenure holder is entitled to hold aggregate any land in excess of the ceiling area applicable to him and while determining the ceiling area all lands held by him in his own right, whether in his own name, or ostensibly in the name of any other person shall be taken into account. According to Explanation - 2 of Section 5, where a person continues to be in actual cultivatory possession even if the said land is recorded in the name of any other person, it shall be presumed, unless the contrary is proved that the first person continues to hold the land so held by him even if it is recorded in the someone else name.

19. Under Section 2 of Section 5 under such a situation, the land of the recorded tenure holder can be excluded and according to Sub-Section 6, any transfer of land made after 24.01.1971 if made in good faith and for adequate consideration under an irrevocable instrument not being a benami transaction or for immediate or deferred benefit would be excluded. To seek the benefit of such exclusion, as is being sought by the petitioner in the first case it has to be demonstrated by him to the satisfaction of the prescribed authority that the said transaction is in good fair and for adequate consideration under the sale deed which is not a benami transaction.

20. In order to bring his case within the purview of Proviso (b), the tenure-holder has to show-

(i) that the transfer has been made in 'good faith';

(ii) that it is a transfer for adequate consideration;

(iii)that it has been made under an irrevocable instrument; and

(iv) that it is not a benami transaction or for immediate or deferred benefit of the tenure- holder or other members of his family.

21. The primary object of the Ceiling Act, as stated in Section 5(1) is to prohibit and disentitle a tenure-holder from holding land in the aggregate in the State of Uttar Pradesh, in excess of the ceiling area, in his own right, whether in his own name, or ostensibly in the name of any other person. The ceiling area and surplus land of a tenure-holder under the Ceiling Act, as already mentioned, are to be determined as on June 8, 1973 when the U.P. (Amendment) Act.

22. No. 18 of 1973 came into force. A transfer, therefore, made after January 24, 1971 which is designed to serve as a cloak for retention of a right or interest of the transferor in the ostensibly transferred land in excess of the ceiling area, even on or after June 8, 1973, will be patently not in 'good faith'. But the Proviso (b) to subsection (6) of Section 5 extends the negative aspect of the concept 'good faith' a little further by indicating, that even if the transfer is not an ostensible transfer and the transferor divests himself of all interest and rights in presenti in the transferred land, but reserves some benefit in futuro for himself or other members of his family, then also the transfer will be not in 'good faith'. A transfer solely for the purpose of converting surplus land into cash without any kind of need (not to be confused with legal necessity) may also lack good faith.

23. Broadly speaking, the benefit of clause (b) of the Proviso to subsection (6) is available to a transfer made in good faith, that is to a bona fide transfer whereby the tenure-holder genuinely and irrevocably

transfers all right, title and interest in the land in favour of the transferee, in the ordinary course of management, of his affairs and which is not a collusive arrangement, or device or subterfuge to enable the tenure-holder to continue to hold the surplus land or any reserved interest in presenti or in futuro, therein (or merely to convert it into cash), and thus circumvent the ban under Section 5(1) of the Ceiling Act. In order to be entitled to the benefit of Proviso (b), a transfer made in good faith, must satisfy the further conditions, (ii) to (iv), enumerated in the Proviso (b). The positive conditions laid down in Proviso (b) are that the transfer should be for adequate consideration; that it should have been made under an irrevocable instrument. The negative conditions set out in clause (b) of the Proviso are that it must not be a benami transaction; that it must not be for immediate or deferred benefit of the transferring tenure-holder or other members of his family. These tests or conditions (ii), (iii) and (iv) provided in Proviso (b) may not by themselves be conclusive to hold that the transfer was in 'good faith'. For instance, another important test for judging the genuineness or otherwise of a sale would be whether or not cultivatory possession and enjoyment of the land has passed under the sale to the vendee. Even so, once it is established by the transferring tenure-holder that the transfer in question effected in the course of ordinary management of his affairs, was made for adequate consideration and he has genuinely, absolutely and irrevocably divested himself of all right, title and interest (including cultivatory possession) in the land in favour of the transferee, the onus under Explanation II. in the absence of any circumstances suggestive of collusion, or an intention or design to defraud or circumvent the Ceiling Act, on the tenure-holder to show that the transfer was effected in 'good faith', will stand discharged, and it will not be necessary for the tenure-holder to prove further that the transfer was made for an impelling need or to raise money for meeting a pressing legal necessity.

25. Apart from oral submission, no documentary evidence or any material was adduced before the prescribed authority to enable him to record a satisfaction that all the conditions existing as per Section 5(6b) are fulfilled in the present case. The only reason given was that the money was required for the marriage of his daughter. It could not be demonstrated that the sons had the capacity to pay the amount paid in the sale deed or that after the sale deed they were in actual cultivatory possession of the said land and the said transaction was not a benami transaction. To fulfil the conditions as stated above, explicit material and evidence should have been placed before the prescribed authority so as to enable him to record the satisfaction. Both the authorities below have unequivocally stated that the petitioner had failed to adduce any material or evidence to satisfy the authorities in this regard and even before this Court no such material has been placed to indicate that there were sufficient conditions existing for exclusion of the lands sold to his sons on the ground that the sale was bonafide and for adequate consideration.

26. In light of the above, this Court is of the considered view that there is no infirmity in the order dated 26.02.2005 passed by prescribed authority whereby he has rejected the objections filed by the petitioner as well as the order dated 26.02.2007 passed by Additional Commissioner, Lucknow Division,

Lucknow whereby the appeal preferred by the petitioner against the order of prescribed authority has been dismissed.

27. Lastly, it has been submitted by learned counsel for the petitioner that petitioner may be given liberty to make an appropriate application before the prescribed authority to exercise option as per provisions of Section 12 of the Act.

28. In this regard, this Court is of the view that statute itself provides that at the time of declaring any land to be surplus, the option given by the recorded tenure holder has to be given, though he has not exercised the option any time prior but the request made by the petitioner before this Court cannot be ignored considering the statutory provisions contained in the Act of 1960.

29. Accordingly, it is provided that in case any application is made before the prescribed authority within next four weeks, the same may be considered by the said authority expeditiously in accordance with law and appropriate orders be passed after hearing all the concerned parties.

30. In view of above, the writ petition stands **dismissed.**

(2024) 2 ILRA 604
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 12545 of 2020

Seema Nagar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Gulrez Khan, Sri Javed Husain Khan

Counsel for the Respondents:
C.S.C., Sri Aakash Rai, Sri Bheem Singh

Service Law – U.P. Secondary Education Services Selection Board Rules, 1998 – Rule 10, Rule 14 – Intermediate Education Act, 1921 – Promotion to Lecturer Post – Petitioner, an Assistant Teacher (L.T. Grade), challenged requisitions dated 09.07.2019 and 05.10.2019 for direct recruitment to Lecturer (Economics) post, claiming promotion under 50% quota – Held, out of five sanctioned lecturer posts, three (including Economics) vacant; Rule 10 mandates 50% of lecturer posts filled by promotion from substantively appointed Trained Graduate teachers – Committee of Management wrongly requisitioned direct recruitment for Economics post without considering petitioner's eligibility – Rule 14 requires promotion based on seniority, subject to rejection of unfit, with Regional Selection Committee to decide – Management's claim of uncertified character roll (2010-17) and sub judice claims of others irrelevant, as petitioner's claim for Economics post survives within promotion quota – Reservation inapplicable to promotion quota alone, per *Smt. Pholpati Devi Vs Smt. Asha Jaiswal* and *R.S. Garg Vs St. of U.P.*, as clubbing promotion and direct recruitment vacancies for reservation impermissible – Requisitions quashed, Committee directed to forward petitioner's service records to District Inspector of Schools within three weeks for onward transmission to Regional Joint Director, with final decision by Regional Selection Committee within six weeks. (Para 5-11)

Writ petition allowed.

List of Cases Cited:

1. Smt. Pholpati Devi Vs Smt. Asha Jaiswal; 2009 (2) ADJ 90 (DB)

2. Tejveer Singh Vs St. of U.P.; (not fully cited, referenced as Co-ordinate Bench decision)

3. R.S. Garg Vs St. of U.P.; (2006) 6 SCC 430

(Delivered by Hon'ble Ajit Kumar, J.)

1. Heard Sri Gulrez Khan, learned counsel for the petitioner, Sri Bheem Singh, learned counsel appearing on behalf of Committee of Management and learned Standing Counsel for the State-respondents.

2. Petitioner before this Court is working as Assistant Teacher in L.T. grade in the institution and claims that she is entitled to be promoted as lecturer Economics within 50% quota as prescribed for under Rule-10 of the U.P. Secondary Education Services Selection Board Rules, 1998 (for short '1998 rules') read with relevant regulations as contained under Chapter-II of Intermediate Education Act, 1921.

3. Learned counsel for the petitioner submits that there are five sanctioned posts of lecturer in the institution in the subject of Home Science, Hindi, English, Political Science and Economics. He further submits that there are two lecturers working in the institution on direct recruitment basis as lecturer Home Science and lecturer Hindi. The post in question, i.e., lecturer Economics fell vacant on 16.07.2019 and, accordingly, in view of rule-10 of the 1998 rules, petitioner deserved to be considered for promotion. However, within three days, the Committee of Management made a requisition online to the Board and forwarded the papers to the District Inspector of Schools for direct recruitment against the post in question. The petitioner also made an objection before the District Inspector of Schools and in such circumstances, the District Inspector of Schools directed the Management of the institution vide letter dated 16.10.2019 to clarify the position. In reply to the said letter, the Committee of Management wrote a letter stating therein that the character roll of the petitioner for the year 2010-11 to 2016-17 remained uncertified and, therefore, on the date of occurrence of vacancy, her candidature could not have been considered. The other plea taken was that one Smt. Rekha Rani and Smt. Reena other Assistant Teachers in L.T. grade had set up a claim for promotion and since the case of Smt. Rekha Rani was sub judice before the Court, the post of lecturer (Economics) could not have been filled up by promotion. It is further argued on behalf of the petitioner that even if, the post of lecturer Political Science is to be given to Smt. Rekha Rani by promotion and Smt. Reena is to be promoted on other vacant post of lecturer English, the petitioner's claim still survives for the post of lecturer Economics, which falls within 50% quota. He has placed relinace upon Rule-10 of 1998 Rules. In the circumstances, the petitioner has challenged the requisition dated 19th July, 2019 ad 05.10.2019, sent by the Committee of Management for the post in question, i.e., lecturer Economics for direct recruitment.

4. Per contra, it is argued by Sri Bheem Singh, learned counsel appearing on behalf of Committee of Management that once the requisition has been made for direct recruitment, no Ad hoc promotion can be made, inasmuch as, according to him, reservation rule would apply and the post in question would not fall in the open category to which the petitioner belongs. He has further tried to defend the action of the Committee of Managment but could not dispute that the matter would ultimately be resolved by the Regional Committee as contemplated under the 1998 Rules.

5. Having heard learned counsel for the parties and having perused the records,

I find there to be no dispute between the parties that out of five sanctioned posts, three posts of lecturer including the post of lecturer Economics is lying vacant. The management's own case is that Smt. Rekha Rani and Smt. Reena have also set up their claim for promotion as lecturer in Political Science and English. In the circumstances, the other post that is lying vacant, remains to be of lecturer Economics. Out of five sanctioned posts as per rule 10 of 1998 Rules, 50% posts in the lecturer's grade are to be filled up from amongst substantively appointed teachers of Trained Graduate Grade. Relevant provisions as contained under Rule10- are reproduce hereunder :-

"10. Source of recruitment. - Teachers will be recruited in different categories through following sources -

(a) Principal of an Intermediate College or Headmaster of a High School -

(i) By direct recruitment -

(b) Teachers of lecturers grade -

(i) 50 per cent by direct recruitment;

(ii) 50 per cent by promotion from amongst substantively appointed teachers of the trained graduate grade.

(c) Teachers of Trained Graduate category by direct recruitment -

Provided that such intermediate colleges and high schools where attached primary teachers are receiving salary under provisions of the Uttar Pradesh High School and Intermediate Colleges (payment of Salaries of Teachers and other employees) Act, 1971, 75 per cent of the posts will be filled by direct recruitment and the rest of the 25 per cent of the posts will be filled through promotion of those trained graduate teachers of attached primary section who have completed satisfactory services of five years:

Provided further that where there is no eligible candidate available for recruitment through promotion in any recruitment year, the posts may be filled through direct recruitment:

Provided also that while calculating the percentage of different posts under the same recruitment, if a fraction occurs, the fraction of direct recruitment will be excluded and the fraction of posts to be filled through promotion will be increased by one to create one post.

(d) Teachers of attached primary section cent per cent by direct recruitment.

Note.- For the recruitment of the teachers of attached primary section, the minimum qualification shall be in accordance with National Council for Teacher Education.

Recruitment will be excluded and the fraction of posts to be filled through promotion will be increased by one to create one post.]"

(Emphasis added)

6. Rule-11 of the Rules, provides for determination and notification of vacancies. The intimation/requisition that is to be sent to the Board, according to Rule 2(a) of Rule-11 of 1998 Rules, is to be only in respect of direct recruitment whether the posts are vacant or likely to be vacant by the last date of year of recruitment. Rule-11 (2) (a), which is relevant for the purpose is reproduced hereunder:-

"11. Determination and notification of vacancies. -

(1) ----------

(2) (a) <u>The statement of vacancies for each category of posts to be filled in by direct recruitment including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment,</u> shall

be sent in quadruplicate, in the pro forma given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subjectwise in respect of the vacancies of lecturer grade, and group wise in respect of vacancies of Trained graduates grade. The consolidated statement so prepared shall, along with the copies of statement received from the Management, be sent by the Inspector to the Board by July 31 with a copy thereof to the Joint Director :

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment :

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30, 1998, the Management shall, unless some other dates are fixed under the preceding proviso, send the statement of vacancies by July 20, 1998 to the Inspector and the Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by July 25, 1998."

(Emphasis added)

7. Rule-12 of the 1998 Rules, provides procedure for direct recruitment and Rule-14 provides procedure for recruitment by promotion. Rule-14 is reproduce hereunder:-

14. Procedure for recruitment by promotion. - (1) Where any vacancy is to be filled by promotion, all teachers working in Trained graduates grade or Certificate of Teaching grade, if any, who possess the qualifications prescribed for the post and have completed five years continuous regular service as such on the first day of the year of recruitment shall be considered for promotion to the Lecturers grade or the Trained graduates grade, as the case may be, without their having applied for the same.

Note. - For the purposes of this sub-rule, regular service rendered in any other recognised institution shall be counted for eligibility, unless interrupted by removal, dismissal or reduction to a lower post.

(2) The criterion for promotion shall be seniority subject to the rejection of unfit.

(3) The Management shall prepare a list of teachers referred to in sub-rule (1), and forward it to the Inspector with a copy of seniority list, service records, including the character rolls, and a statement in the pro forma given in Appendix 'A'.

(4) Within three weeks of the receipt of the list from the Management under sub-rule (3), the Inspector shall verify the facts from die record of his office and forward the list to the Joint Director.

(5) The Joint Director shall consider the cases of the candidates on the basis of the records referred to in sub-rule (3) and may call for such additional information as it may consider necessary. The Joint Director shall place the records before the Selection Committee referred to in sub-section (1) of Section 12 and after the Committee's recommendation, shall forward the panel of selected candidates within one month to the Inspector with a copy thereof to the Management.

(6) Within ten days of the receipt of the panel from the Joint Director under sub-rule (5), the Inspector shall send the name of the selected candidates to the Management of the institution which has notified the vacancy and the Management shall accordingly on authorisation under its resolution issue the appointment order in the pro forma given in Appendix 'F' to such candidate."

(Emphasis added)

8. Upon bare reading of rules one can very safely conclude that criterion for promotion is seniority subject to rejection of unfit and the management is required to prepare a list of teachers working in substantive vacancy in trained graduate grade and then forward the same to the District Inspector of Schools, who in his turn shall forward the same to the Joint Director of Education. The Joint Director thereafter shall place the record before the Selection Committee, which is to be constituted under Sub Section 1 of Section 12 of the U.P. Secondary Education Service Selection Act, 1982, which consists of Regional Joint Director of Education, senior most Principal of government intermediate college and the concerned District Inspector of Schools as member Secretary and it is thereafter that recommendations shall be made to the Regional Selection Committee with its advance copy to the management and then the management would adopt a resolution to make such appointment then in all circumstances, it is the Regional Selection Committee, which is lawfully entitled to consider the candidature of the candidates from amongst the list forwarded of eligible candidates for promotion on the post of lecturer in the order of seniority but subject to rejection of unfit and the management is to identify the vacancy as per Rule-1 of Section 10 and then to notify the vacancy, which deserves to be filled up by direct recruitment. It is the rule that in the matter of fraction, in order to assess 50% of the vacancy, the division falling in fraction to be taken as a whole number and, therefore, one vacancy will be taken to be in promotion quota and direct recruitment shall be ignored. The proviso of Rule-10 clears this position.

9. So far the plea of reservation as taken by the respondents is concerned, I find the legal position to be very clear that reservation is applicable to the post falling in a particular category like direct recruitment or promotion. The posts falling in both the categories cannot be clubbed together to apply rule of reservation. Relying upon the judgment of Division Bench of this Court in the case of **Smt. Pholpati Devi vs. Smt. Asha Jaiswal and others; 2009 (2) ADJ 90 (DB),** a Co-ordinate Bench of this Court in the case of **Tejveer Singh vs. State of U.P. and others,** has held that clubbing of vacancies, which were to be filled by promotion along with the vacancies to be filled up by direct recruitment was impermissible in law. In the case of Smt. Pholpati Devi (Supra), the Division Bench of this Court has considered the direct recruitment and promotion quota separately for the purposes of application of rule of reservation. Relying upon the authority of Supreme Court in the case of **R.S. Garg vs. State of U.P. and others; (2006) 6 SCC 430,** vide paragraphs-7 and 8, the Court has held thus:-

"7. In the case in hand, there were only seven sanctioned posts of Lecturers wherein 50% were to be filled in by direct recruitment and 50% by promotion.

Therefore, at the best four posts would have been available for one source of recruitment, ie., direct recruitment or promotion. The reservation for scheduled castes is 21%. If we treat one of the vacancies in either of the source of recruitment in the institution as reserved for scheduled caste, it would be more than 21%. The Apex Court in R.S. Garg v. State of U.P. and others, 2006 (6) SCC 430, has held as under:

"40. We are not concerned with the reasonableness or otherwise of the percentage of reservation. 21% of the posts have been reserved for Scheduled Tribe candidates by the State itself. It, thus, cannot exceed the quota. It is not disputed that in the event of any conflict between the percentage of reservation and the roster, the former shall prevail. Thus, in the peculiar facts and circumstances of this case, the roster to fill up the posts by reserved category candidates, after every four posts, in our considered opinion, does not meet the constitutional requirements."

8. Thus, it is clear that in no manner a vacancy can be filled in which would exceed the prescribed limit of reservation as the extent of reservation is maximum and it cannot be exceeded thereto. In the case in hand, one of the vacancy if treated to be reserved for scheduled caste candidate out of four vacancies, the reservation would come to 25%, which would exceed the maximum extent of reservation prescribed for scheduled caste candidates under the Statute. That being so, such reservation could not have been upheld and the appointment and promotion of respondent No. 1 treating one post of lecturer reserved for scheduled castes in promotion quota, therefore, was illegal and has rightly been set aside by Hon'ble Single Judge."

10. Thus, there can be no reservation in respect of the vacancy in question which falls in promotion quota and the total number of vacancies in promotion are only three.

11. Nothing has been pleaded in the entire counter affidavit as to in what circumstances, out of five vacancies of lecturer sanctioned in the institution, the management came to determine that the post of lecturer Economics to be falling under direct recruitment quota. It is not the case that eligible candidate was not available, inasmuch as, the management on its own could not have ignored the candidature of the petitioner except forwarding the same to the District Inspector of Schools for onward transmission to the Regional Selection Committee as prescribed for under Section 12 (1) of the Act No. 5 of 1982, complying the procedure as prescribed under Rule-14 of the 1998 Rules. In the circumstances, therefore, the requisition sent by the Committee of Management impugned herein this petition is held null and void. Accordingly, the requisition sent by the Committee of Management and uploaded on the official website of the Board for direct recruitment on the post of lecturer Economics dated 09.07.2019 and 05.10.2019, annexure nos. 1 and 6 to the writ petition, are hereby quashed. The Committee of Management is directed to forward the papers of the petitioner and entire record in relation to his service career as Assistant Teacher L.T. grade, to the District Inspector of Schools within a period of three weeks from today, who shall in his turn forward the same to the Regional Joint Director of Education within a week thereafter. The Regional Joint shall make queries, if necessary, otherwise place the papers before the Regional Selection

Committee, who shall do the needful in the matter as per Rule 14 of 1998 Rules. In any case, final decision shall be taken by the Regional Selection Committee within six weeks from the date of receipt of papers in the Office of Regional Joint Director of Education from the District Inspector of Schools. It is further provided that in case, the Management does not comply with the directions issued hereinabove in forwarding the papers of the petitioner for promotion, it will remain open for the District Inspector of Schools to take appropriate measure in the matter to ensure that the papers are forwarded within the time to the Regional Joint Director of Education.

12. With the aforesaid observations and directions, the petition stands allowed.

(2024) 2 ILRA 610
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 12683 of 2023

Mohd. Ikram & Anr. ...Petitioners
Versus
Smt. Shamshana ...Respondent

Counsel for the Petitioners:
Sri Firoz Haider, Sri Abu Bakht

Counsel for the Respondents:
Sri Komal Mehrotra

Tenancy Law – U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – Section 21(1)(a) – U.P. (Regulation of Urban Premises) Tenancy Act, 2021 – Section 46 – Maintainability of Release Application – Petitioners (tenants) challenged appellate order dated 23.05.2023 setting aside Prescribed Authority's order dated 05.03.2022, which dismissed landlady's release application under Section 21(1)(a) of U.P. Act No. 13 of 1972 as non-maintainable – Held, release application filed on 22.01.2021 was not maintainable, as U.P. Act No. 13 of 1972 was repealed by U.P. Ordinance No. 2 of 2021 (effective 11.06.2020, lapsed 31.03.2021) and U.P. Ordinance No. 3 of 2021 (effective 11.01.2021), followed by U.P. Act No. 16 of 2021 (retrospective from 11.01.2021) – Section 46(2) of U.P. Act No. 16 of 2021 protects pending proceedings under U.P. Act No. 13 of 1972, but release application filed post-repeal lacks jurisdiction – Appellate Authority's reliance on landlady's prior notice (01.07.2020) erroneous, as no notice required for Section 21(1)(a) application unless filed within three years of property purchase – *Krishna Kumar Singh Vs St. of Bihar* followed, clarifying Ordinance's legal effect and lapse – Prescribed Authority's dismissal upheld, appellate order set aside. (Para 9-11)

Writ petition allowed.

List of Cases Cited:

1. Krishna Kumar Singh Vs St. of Bihar; (2017) 3 SCC 1

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

1. Heard Shri Abu Bakht, learned counsel for the petitioners and Shri Komal Mehrotra, learned counsel for the sole respondent/landlady.

2. The instant writ petition, at the instance of petitioners/tenants, has been filed assailing the order dated 23.5.2023 passed by the learned District Judge, Saharanpur in Rent Appeal No. 15 of 2022 whereby and whereunder the rent appeal has been allowed the order of the learned Prescribed Authority dated 5.3.2022 has been set aside and the matter has been remanded back to the learned Prescribed

Authority for considering the release application under Section 21 (1) (a) of the U.P. Act No. 13 of 1972, afresh.

3. The facts giving rise to the controversy involved between the parties lies in a narrow compass. A release application under Section 21 (1) (a) of the U.P. Act No. 13 of 1972 was filed on 22.1.2021 by the respondent/landlady against the petitioners setting up a need for her son to expand his business and augment his income so as to meet out family liabilities for the shop 'A' and 'B', respectively under the tenancy of the petitioners. The release application was registered as PA Case No. 6 of 2021. The petitioners appeared and filed their objections. The learned Prescribed Authority framed an issue as to whether the release application under Section 21 (1) (a) of the U.P. Act No. 13 of 1972 was maintainable and proceeded to hold that since the release application was filed on 22.1.2021 after the Uttar Pradesh (Regulation of Urban Premises) Tenancy Act, 2021 (U.P. Act No. 16 of 2021) had come into effect and the U.P. Act No. 13 of 1972 had been repealed the release application registered as PA Case No. 6 of 2021 was not maintainable and no relief could be granted to the landlady/respondent under the U.P. Act No. 13 of 1972. The Prescribed Authority accordingly dismissed the release application vide judgment and order dated 5.3.2022. Aggrieved by the dismissal of the release application as non maintainable, the respondent/landlady preferred an appeal under Section 22 of the U.P. Act No. 13 of 1972 which has been allowed by the impugned order dated 23.5.2023, the order of the Prescribed Authority dated 5.3.2022 has been set aside and the matter has been remanded back for consideration of the release application, afresh.

4. Shri Abu Bakht, learned counsel for the tenant/petitioners submits that the order of the learned District Judge, Saharanpur in allowing the rent appeal by the order dated 23.5.2023 is patently erroneous and is liable to be set aside inasmuch as the release application under Section 21 (1) (a) of the U.P. Act No. 13 of 1972 filed on 22.1.2021 was not maintainable as U.P. Act No. 16 of 2021 had come into effect from January 11, 2021 as provided under Section 1 (4) of U.P. Act No. 16 of 2021. It is further contended that sub section 1 of Section 46 of the U.P. Act No. 16 of 2021 provides that the U.P. Act No. 13 of 1972 and the Uttar Pradesh Regulation of Urban Premises Tenancy (Second) Ordinance, 2021 and U.P. Ordinance No. 3 of 2021 stand repealed.

5. Shri Komal Mehrotra, learned counsel for the landlady/respondent, on the other hand, submits that the proceedings of U.P. Act No. 13 of 1972 under which Act the release application under Section 21 (1) (a) was preferred was very much in force inasmuch as U.P. Act No. 16 of 2021 has been made operative with retrospective effect from 11.1.2021. Earlier, the Uttar Pradesh Regulation of Urban Premises Tenancy Ordinance, 2021 (U.P. Ordinance No.2 of 2021) was operative. However, it lapsed on 31.2.2021. Consequently, the provisions of U.P. Act No. 13 of 1972 revived and in such view of the matter, the Appellate Court was justified in treating the proceedings initiated under the U.P. Act No. 13 of 1972 to be maintainable. He further submits that Section 46 (2) of the U.P. Act No. 16 of 2021 which relates to repeal and savings provides that all cases and other proceedings under the U.P. Act

No. 13 of 1972 pending at the commencement of this Act shall be continued and disposed of in accordance with the provisions of the said Act as if that Act had continued to be in force and the U.P. Act No. 16 of 2021 had not been enacted. He, thus, contends that the release application filed on 22.1.2021 would be deemed to be pending on the commencement of the U.P. Act No. 16 of 2021 which has been made retrospective in operation w.e.f. 11.1.2021. It has further been argued by Shri Komal Mehrotra, learned counsel for the respondent that the U.P. Act No. 16 of 2021 contemplates existence of a tenancy agreement between the parties as is evident from Section 38 (2) of the U.P. Act No. 16 of 2021 and in the absence of any tenancy agreement between the parties the provisions of the Act No. 16 of 2021 would not be applicable.

6. Learned counsel for the petitioners in rejoinder submits that on 22.1.2021 i.e. the day on which the release application was admittedly filed, the U.P. Ordinance No. 3 of 2021 was very much in force and as such, the appropriate action against the petitioners ought to have been taken under the Ordinance No. 3 of 2021 as provided under Section 46 (4) of the U.P. Act No. 16 of 2021. It is further contended that the U.P. Ordinance No. 2 of 2021 was promulgated by the Governor on January 9, 2021. Due to the sudden adjournment of the first session of 2021 of the State Legislature on March 4, 2021, proceedings of which was determined from February 18, 2021 to March 10, 2021 replacing Bill of the said Ordinance could not be passed by the House of the State Legislature. Consequently, the Ordinance No. 2 of 2021 promulgated on January 9, 2021 lapsed on March 31, 2021 as the replacing Bill therefore could not be enacted within 06 weeks of reassembly of the State Legislature as required under Article 213 of the Constitution. After the lapse of the Ordinance No. 2 of 2021, it was decided to bring a new tenancy law to keep the provisions of the Ordinance No. 2 of 2021 in force even after March 31, 2021 to establish Rent Authority and Rent Tribunals to regulate the renting of premises, to protect the interests of landladys and tenants and to provide speedy adjudication mechanism for resolution of disputes. Since, the State Legislature was not in session, the U.P. Ordinance No. 3 of 2021 was promulgated on April 9, 2021. The Bill was subsequently presented and the U.P. Act No. 16 of 2021 was enacted w.e.f. 11.1.2021.

7. Learned counsel for the petitioners further contends that though the U.P. Act No. 16 of 2021 contemplates on existence of a tenancy agreement between the parties, the sub Section (3) (b) of Section 4 of the Act deals with a situation wherein no agreement in writing is found to have been entered between the landlady and the tenant. In such an event, a tenancy agreement shall be entered into by the landlady and tenant and present the same before the Rent Authority within 03 months of the commencement of the Act. The proviso to the said section provides that where the landlady or tenant fails to present jointly a copy of the tenancy agreement or fail to reach an agreement within specified period, the landlady and tenant shall separately file the particulars about such tenancy with the Rent Authority within one month from the date of expiry of the period mentioned in Clause (b) in the form specified in First Schedule of the Act. The landlady/respondent did not discharge this burden.

8. I have heard the learned counsel for the parties and have perused the record.

9. The moot question for consideration by this Court is as to whether the U. P. Act No. 13 of 1972 stood repealed by virtue of the Ordinance No. 2 of 2021 or Ordinance No. 3 of 2021 so as to render the application under Section 21(1)(a) of the U.P. Act No. 13 of 1972 non maintainable.

10. Before this Court dwells into the above aspect, it would be apt to understand the significance of an Ordinance. Article 213 of the Constitution of India confers power to the Governor to promulgate Ordinances during recess of Legislature. An Ordinance promulgated under Article 213 of the Constitution of India shall have the same force and effect as an Act of the Legislature of the State assented by the Governor. An Ordinance must be changed over into law within six weeks of the reassembly of the Legislature or it will lapse. Once an Ordinance lapses the law brought in the system ceases to operate and will not be treated as legal law anymore. An Ordinance can be re-promulated just thrice. The consequence of lapse of an Ordinance in cases where these existed an old law which was over ridden by the Ordinance then it will again become the valid piece of law. A Seven Judges Bench of the Apex Court in the case of ***Krishna Kumar Singh Vs. State of Bihar*** reported in ***2017 (3) SCC 1*** while dealing with various aspects regarding promulgation of an Ordinance amongst other issues held that an Ordinance which has ceased to operate is not void. As an instrument it is not still born. During the tenure of the Ordinance it has the same force and effect as a law enacted by the Legislature.

11. Now coming to the case at hand, the Court finds that the U.P. Ordinance No. 2 of 2021 was promulgated on 11th June, 2021. Under the said Ordinance the U.P. Act No. 13 of 1972 was repealed. The release application dated 22.01.2021 was filed when the U.P. Ordinance No. 2 of 2021 was very much in force. The release application under the U.P. Act No. 13 of 1972 was certainly not maintainable as the Act stood repealed. The subsequent lapse of the Ordinance No. 2 of 2021 would be of no significance inasmuch as the U.P. Ordinance No. 3 of 2021 was promulgated on 9th April, 2021 w.e.f. 11.01.2021. There is no merit in the submission of Sri Komal Mehrotra, learned counsel for the respondent that the release application would be deemed to be pending on the date of the enforcement of the U.P. Act No.16 of 2021. The entire proceedings under the U.P. Act No. 13 of 1972 are without jurisdiction. The learned Prescribed Authority was justified in rejecting the release application under Section 21(1)(a) of the U.P. Act No. 13 of 1972, as not maintainable. The Appellate Authority appears to have been misguided by the fact that the landlady/respondent had served a Notice dated 1.7.2020 terminating the tenancy of the petitioners and as such, had already initiated the proceedings for eviction of the petitioners from the tenanted premises and, therefore, stood covered by the provisions of Section 46 (2) of the U.P. Act No. 16 of 2021. The Court is afraid that such erroneous assumption by the learned Appellate Authority cannot be sustained inasmuch as there is no legal requirement of issuing a notice for filing a release application under Section 21 (1) (a) of the U.P. Act No. 13 of 1972 except when a release application is filed within three years of purchase of the tenanted premises from the erstwhile landlord/owner, which is

not the case at hand. The requirement is only when filing a suit under Section 20 of the Act. In the absence of any proceedings initiated by the landlady/respondent under Section 21 (1) (a) prior to enforcement of the U.P. Act No. 16 of 2021 or the U.P. Ordinance No. 2 of 2021, the findings recorded by the Appellate Authority cannot be sustained. The Appellate Authority in Rent Appeal committed manifest error of law in setting aside the order of the Prescribed Authority and directing fresh consideration of the release application under Section 21(1)(a).

12. For the reasons recorded above, the writ petition is **allowed**. The impugned order dated 23.05.2023 passed by the learned District Judge, Saharanpur in Rent Appeal No.125 of 2022 is set aside. The order of the Prescribed Authority dated 5.3.2022 passed in PA Case No.6 of 2021 is sustained.

13. Parties to bear their own costs.

(2024) 2 ILRA 614
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 61632 of 2013

Pramod Kumar Paswan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar, Sri Adya Prasad Tewari, Sri Manish Kumar Nigam, Sri Munna Tiwari, Sri Sheo Shankar Tripathi

Counsel for the Respondents:
C.S.C., Sri A.K. Tiwari, Sri Ashok Kumar Tiwari

Service Law – Intermediate Education Act, 1921 – Regulation 31 – Disciplinary Proceedings – Termination of Class IV Employee – Petitioner challenged termination order dated 23.10.2013 and enquiry report dated 29.06.2013 – Held, disciplinary proceedings flawed due to non-compliance with principles of natural justice – No evidence of oral enquiry conducted despite petitioner's denial of charges, as required per *Sahabuddin Ansari Vs St. of U.P.* and *St. of U.P. Vs T.P. Lal Srivastava* – Enquiry report silent on fixing date, time, or place for oral enquiry or petitioner's participation, rendering it unsustainable – No proof that enquiry report was supplied with show-cause notice, denying petitioner opportunity to defend, violating *Managing Director, ECIL Vs B. Karunakar* – Second show-cause notice mandatory in disciplinary proceedings – Allegation of biased Enquiry Committee (inclusion of Manager's son and complainant clerk) not sustainable, as petitioner did not object during proceedings – Termination order by Principal, not Committee of Management, upheld as per Regulation 31, but procedural lapses invalidate enquiry and termination – Enquiry report and termination order quashed, respondents permitted to proceed afresh in accordance with law. (Para 11-19)

Writ petition allowed.

List of Cases Cited:

1. Sahabuddin Ansari Vs St. of U.P.; 2008 (4) ADJ 158

2. St. of U.P. Vs T.P. Lal Srivastava; 1997 (1) LLJ 831

3. Managing Director, ECIL Vs B. Karunakar; (1993) 4 SCC 727

(Delivered by Hon'ble Ajit Kumar, J.)

1. Heard Sri Adya Prasad Tewari, learned counsel for the petitioner, Sri

Ashok Kumar Tiwari, learned counsel for the respondent nos.2 and 3 and learned Standing Counsel for the State-respondents.

2. Petitioner who was duly appointed and working in institution as Class IV employee was subjected to disciplinary proceedings with the issuance of the chargesheet dated 26.12.2012 leveling as many as six charges to which petitioner did submitted reply on 10.07.2013. The enquiry report was submitted by the Enquiry Committee on 29.06.2013 and, thereafter, it appears that Committee of Management proceeded to adopt resolution considering the enquiry report and possible action on that basis. In its resolution adopted by the Committee of Management on 28.07.2013, it accepted the enquiry report and on the basis of findings returned by the Enquiry Committee, proceeded to resolve to dispense with his services by way of punishment and so the consequential order came to be issued by the Manager of the Institution on 21.07.2013. Papers were forwarded to the District Inspector of Schools who disapproved the action of Committee of Management on the ground that the powers to dispense with the services of the petitioner as prescribed under Regulation 31 of chapter III of Intermediate Education Act lay with the Principal of the institution, petitioner being a Class IV employee and only appeal could be preferred before the Committee of Management and therefore, Committee of Management acceded in its authority in passing the order of termination of service of the petitioner.

3. The Committee of Management challenged the order before this Court vide Writ A No.54458 of 2013 which though was entertained but it was directed that the petitioner shall be paid salary, however left it to the discretion of the Management to take work from the present petitioner who was respondent no.4 in that petition. This petition subsequently came to be dismissed for want of prosecution and so the challenge to the order of District Inspector of Schools dated 24.09.2013 came to an end.

4. It is argued that while petitioner was getting payment of salary in terms of the order passed by this Court, the Principal of the institution on his own proceeded even during pendency of the said writ petition to pass order on 21.10.2013 dismissing the petitioner from service on the basis of the enquiry report. It is this order which is under challenge before this Court.

5. Assailing the order passed by the District Inspector of Schools, learned counsel for the petitioner has argued that:

(A) The District Inspector of Schools proceeded to pass order without giving any show cause notice to the petitioner and also without supplying the enquiry report so as to enable him to furnish his explanation against the Enquiry Committee's findings;

(B) The entire Enquiry Committee was illegally constituted as the son of the Manager of the Committee of Management was made one of the members of the Enquiry Committee and other member was Clerk of the institution himself who has leveled allegations upon which charge no.4 was based.

6. Thus in view of the above two grounds, it is submitted by learned counsel for the petitioner that the order passed by the Principal of the Institution is clearly unsustainable.

7. Sri A.K. Tiwari, learned counsel though has sought to defend the order on the score of first argument regarding opportunity by way of show cause notice by taking the Court to Annexure CA-2 to the counter affidavit which is a photocopy of the envelope which bears the postman's remarks that the recipient refused to accept the registered letter. This registered letter is addressed to Pramod Kumar Paswan who is petitioner in the present case. It is stated to have been sent by registered post on 11.10.2018 containing the show cause notice. However, no copy of the show cause notice has been annexed so as to demonstrate that the letter did contain the show cause notice and that copy thereof came back to the Principal of the institution upon being not delivered for refusal.

8. On the question of findings returned by the Enquiry Committee and the constitution of the Enquiry Committee, learned counsel for the respondents submits that there was no application ever moved by the petitioner to question the constitution of the Enquiry Committee, instead he submitted reply to the chargesheet on 10.10.2013 (Annexure-4).

9. Learned Standing Counsel submits that the State-respondents are not in picture for the simple reason that neither there is any representation made by the petitioner to the District Inspector of Schools, nor there is any order by the Education Authorities otherwise adversely affecting the interest of the petitioner and in so far as the District Inspector of School is concerned, he had been paying salary to the petitioner uninterruptedly pursuant to the directions issued by this Court in the earlier writ petition.

10. Having heard learned counsel for the respective parties and their arguments raised across the bar, the question that arises for consideration before this Court is, whether the petitioner was permitted to participate in an enquiry if held in the face of the fact that he had denied in reply to the chargesheet and secondly, whether the petitioner was supplied with the enquiry report to offer his explanation to the findings returned by the Enquiry Committee.

11. The other argument regarding constitution of the Committee does not hold merit for simple reason that there was no application filed by the petitioner raising objection to the constitution of the Enquiry Committee in as much as the reply to the chargesheet also does not contain any such recital.

12. Coming to the first argument regarding the first point on the question of participation of the petitioner in oral enquiry, the law is well settled by this Court as well as Supreme Court in the judgments that where the charges are denied by the delinquent employee, it is incumbent and imperative for the enquiry committee to hold an oral enquiry ***(Sahabuddin Ansari v. State of U.P. and Ors, 2008(4) ADJ 158, State of U.P. and Ors. vs. T.P. Lal Srivastava, 1997 (1) LLJ 831).*** The legal position to this effect being sound enough and settled now it is to be examined whether petitioner was ever given any notice to participate in the oral enquiry. For this purpose I have thoroughly examined the enquiry report and find that the enquiry committee has dealt with all the charges in detail but there is no recital to the effect or even otherwise any whisper that any date, time or place was fixed by the Enquiry Committee asking the

petitioner to remain present for oral enquiry or asking the petitioner otherwise whether he wanted to cross examine any departmental witness. The only paragraph that starts, before the enquiry committee examines the charges, only contains one recital that during the course of enquiry, the Committee had asked the concerned parties to give their oral statements and written replies and thereafter it proceeded to examine the same. The Enquiry Committee in its finding part or in its discussion part qua each charge, does not refer to any oral testimony either of the delinquent employee or any departmental witness.

13. Learned counsel for the petitioner has sought to support the procedure adopted by the enquiry committee and its report on the basis of the averments made in paragraph 8 of the counter affidavit and annexing also a notice of the Chairman of the Enquiry Committee, Sri Avitendra Jain dated 13.06.2023 and that petitioner did appear on 30.06.2023 before the Principal of the Institution. This document in the form of notice is stated to have been sent by registered post and plea taken is that on the basis of reply of the petitioner, it would be taken to have refused. In the Enquiry report there is no reference to any such letter being ever sent to the petitioner by the Chairman of the Enquiry Committee inasmuch as the Enquiry Committee does not record in its final report that any such date was fixed in the matter of holding oral enquiry. It is also well settled law that no amount of affidavit or a document filed alongwith counter affidavit will approve upon the order to fill up the lacuna. The Enquiry Report is absolutely silent about fixing date, time and place for holding the enquiry and so it is liable to be taken and also be presumed that no such oral enquiry was ever held. Even in the discussion part of the Enquiry Report, there is no recital to the effect that at any point of time petitioner was examined. Thus the procedure in the matter of departmental enquiry while the employer proceeded to impose major punishment is de hors settled procedure and principle of law qua oral enquiry of the delinquent employee permitting his due participation. The Enquiry Report on this count is not sustainable.

15. Coming to the second argument regarding non supply of the enquiry report alongwith the show cause notice, the allegations are in the form of affidavit and rebuttal of the same is also in the form of affidavit. So it is an affidavit against the affidavit. But looking to the order impugned dated 23.10.2013 passed by the Principal of the Institution, I do not find anything coming forth so as to hold that at any point of time petitioner was supplied with the enquiry report. It could have been presumed that the ex officio Principal of the Institution was Member of the Committee of Management while earlier decision was taken against the petitioner, had report been supplied to the petitioner and had it called the petitioner to appear before it.

16. The resolution is absolutely silent as I have already discussed above and, therefore it was imperative for the Principal of the Institution to have supplied Enquiry Report to the petitioner seeking his explanation. *The delinquent employee has a right to receive a copy of the enquiry Officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself*

against the charges levelled against him. A denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice. ***(Managing Director, ECIL v. B. Karunakar and Ors. (1993) 4 SCC 727)***

17. Learned counsel appearing for the Principal of the Institution as well as Committee of Management, Mr. Tiwari has sought to refer the order by annexing the photocopy of the envelope which showed that it carried the show cause notice and the enquiry report but neither the show cause notice has been annexed alongwith counter affidavit, nor the order impugned refers to any such service of enquiry report seeking explanation.

18. The law is also well settled that the second show cause notice is a must in the matter of disciplinary proceedings and departmental enquiry in view of the judgment of the constitution Bench of Supreme Court in the case of Managing Director, ECIL (Supra).

19. In view of the above exposition of law and discussion held, the order passed by the Principal of the Institution dispensing with the services of the petitioner on the basis of the Enquiry Report is held unsustainable. Since I have already held the enquiry report also to be unsustainable both the enquiry report dated 29.06.2013 as well as the order passed by the Principal of the Institution dated 23.10.2013 are hereby quashed.

20. Writ petition succeeds and is ***allowed***.

21. Consequences to follow.

22. Respondents will be at liberty to proceed afresh in accordance with law.

(2024) 2 ILRA 618
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.02.2024

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE OM PRAKASH SHUKLA J.

Writ Tax No. 228 of 2023

Grs Hotel Pvt. Ltd. Lko. ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Manish Misra, Dileep Pandey, Gaurav Upadhyay

Counsel for the Respondents:
A.S.G.I., Kushagra Dikshit

Income Tax – Income Tax Act, 1961 – Sections 148A & 144B – Reassessment Proceedings – Validity of Notice Service – Petitioner challenged order dated 26.03.2023 under Section 148A(d) and notice dated 29.03.2023 under Section 148 for Assessment Year 2019-20, alleging non-service of notice under Section 148A(b) on registered email ID – Held, notice sent to outdated email ID (gmkca1993@gmail.com) instead of current registered email ID (taxmohit56@gmail.com), updated since 2020-21, invalidates service – Section 144B mandates service on registered email as per defined alternatives, with residual clause (vi) applicable only if primary options fail – Valid service of notice under Section 148A(b) is a jurisdictional requirement, non-compliance vitiates subsequent proceedings – *Commissioner of Income Tax Vs Chetan Gupta*, *Chitra Supekar Vs Income Tax Officer*, *Lok Developers Vs Deputy Commissioner of Income Tax*, and *Jyoti Narang Vs Income Tax Officer* followed –

Impugned order and notice quashed, matter remanded for reply to Section 148A(b) notice within four weeks. (Para 12-27)

Writ petition partly allowed.

List of Cases Cited:

1. Commissioner of Income Tax (Central-1) Vs Chetan Gupta; 382 ITR 613

2. Chitra Supekar Vs Income Tax Officer; Writ Petition No. 15580 of 2022

3. Lok Developers Vs Deputy Commissioner of Income Tax; Writ Petition No. 1983/2022

4. Jyoti Narang Vs Income Tax Officer; Writ Petition (C) No. 9289/2023

5. Commissioner of Income Tax Vs Eshaan Holding (P) Ltd.; (Delhi High Court, not fully cited in judgment)

6. Commissioner of Income Tax Vs Avtar Singh; (Punjab and Haryana High Court, not fully cited in judgment)

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) The petitioner challenges the correctness of the order dated 26th March, 2023 passed by the Assessing Authority under Section 148-A (d) of the Income Tax Act, 1961 (hereinafter referred to as 'Act, 1961') for the Assessment Year 2019-20 and the consequential notice dated 29th March, 2023 issued under Section 148 of the Act, 1961 for the Assessment Year 2019-20 as also the consequential proceedings undertaken subsequent thereto.

(2) Shorn of unnecessary details, the brief facts, which led to the filing of this writ petition, are that the petitioner, a private limited company bearing PAN No. AAFCG0658J, is engaged in the business of developing and Managing hotels, motels, resorts, restaurants, cafes and other similar activities.

(3) It is the case of the petitioner that for the purpose to achieve its business goal, the petitioner's company has entered into an agreement to sale/lease dated 18.10.2011 with one Jayveer Singh in respect of his property, namely, 'Deorhi Darwaza, Purna Mahal' situated at Khasra No. 1533 in Village Maharaj Nagar, District Mahoba, U.P. (hereinafter referred to as the '**property**') in distress sale. By the aforesaid agreement for sale/lease deed dated 18.10.2011, the petitioner has also been given possession of the said property from the year 2011-12 onward. The petitioner has also paid the amount of the property as per the agreement for sale/lease deed to the owner of the property. According to the petitioner, the said agreement for sale/lease deed dated 18.10.2011 was exempted from payment of stamp duty in terms of U.P. Tax and Registration Adhiniyam, 2013 and as per Tourism Policy, 2017 of the State of U.P. However, ultimately, after receiving sale consideration of the said property, the owners of the said property had executed sale deed of the property in favour of the petitioner on 16.04.2018 i.e. relevant for the Assessment Year 2019-20. This execution of sale deed dated 16.04.2018 and ownership of the said property are pending adjudication in WPIL No. 418 of 2022 : *Mool Chand Anuragi and another Vs. State of U.P. and others*, before this Court.

(4) Noticing the transaction made in respect of purchase of the said property in the Assessment Year 2019-20, a notice under Section 148A(b) dated 07.03.2023 had been issued by the income tax department to the petitioner on the ground

that there had been a heavy financial transaction during the said assessment year for the sale/purchase of a property amounting to Rs. 6,31,10,000/- as per section 56(2)(x) of the Income Tax Act.

(5) It is the case of the petitioner that for the first time, they received a notice dated 12.10.2023 under Section 142 (1) of the Act, 1961 for the Assessment Year 2019-20, which was sent to the petitioner on its previous mail address registered on the portal of the Income Tax Department, namely, **gmkca1993@gmail.com**, which according to the petitioner, is no more registered for the PAN No. AAFCG0658J of the Company. According to him, since the aforesaid notice dated 12.10.2023 was also sent as a copy to the petitioner's registered email address on the portal of the Income Tax Department i.e. **taxmohit56@gmail.com**, which according to the petitioner, is presently his registered email I.D. with registered phone no. is 8874271081, on the portal of the Income Tax Department as well as its PAN, he came to learn about the said proceedings. It is also pleaded that the petitioner had been using the present registered email I.D. and registered phone, for filing of their income-tax return for the last three years.

(6) According to the petitioner, the petitioner's company has changed its Chartered Accountant w.e.f. 01.04.2019 as per Chartered Accountant Act, 1949 and Companies Act, 2013 and engaged the new Chartered Accountant for company. Thereafter, the New Charted Accountant has updated the portal of the income tax department with its new mail ID as well as phone number in the year 2019 itself and started using the same since Assessment Year 2020-21 for filing return etc. as is evident from the acknowledgment for the year 2020-21, 2021-22 and 2022-23 etc. It has been further stated that as per Explanation (b) of Section 139 (1) of the Act, 1961, 'Acknowledgment' is recognized as 'intimation' from the department, hence the 'acknowledgment' is automated/ computer generated and does not contain any such secondary mail on record as claimed by the department.

(7) Thus, it has been contended by the petitioner that on coming into the notice of the aforesaid proceeding with respect to some proceeding for the assessment year 2019-20, he immediately contacted his earlier Chartered Accountant, who was working with the petitioner's company till 2019 and requested him to scan through his mail ID gmkca1993@gmail.com and it was only after confronting him about any notice or information from income-tax department with respect to the petitioner, the previous Chartered Accountant informed the petitioner about the notice under Section 148A and subsequent notice under Section 133 of the Act, 1961. The petitioner, thus, have submitted that although these notices were received on the earlier registered mail but it was not informed to the petitioner as the previous CA was not having any professional or personal relation with the Company. According to the petitioner, for the first time, a notice under Section 148A (d) of the Act, 1961 came into the notice of the petitioner only after the final order under section 148 of the Act, 1961 along with the notice under Section 148 had already been issued. Further, it was only after the receipt of notice under Section 142 by the petitioner on 12.102023, now the petitioner could find out in the hindsight about the issuance of notices under Section 148A of the Income tax Act to them.

(8) In the aforesaid background, it has been stated by the petitioner that after getting information with respect to re-assessment proceedings initiated against the petitioner under Sections 147/148 of the Act, 1961, the petitioner also came to know a notice under Section 148A(b) dated 07.03.2023 was issued to the petitioner, suggesting that income chargeable to tax for the assessment year 2019-20 had escaped assessment within the meaning of Section 147 of the Act, 1961 and called upon the petitioner to show cause as to why notice under Section 148 of the Act, 1961 be not issued. The basis for reopening was the information, which reads as under:-

"As per information in department data base, you have made following financial transactions during the relevant financial year 2018-19;

1. Sale/Purchase of property-s.6,31,10,000/- (56(2)(x).

The above information is flagged in 'Insight Portal' under High Risk CRIU/VRU information category in your case for the relevant assessment year in accordance with the risk management strategy formulated by the CBDT, New Delhi."

(9) According to the petitioner, since the aforesaid notice dated 07.03.2023 was not received by the petitioner because of the mistake committed by the department, the petitioner was not able to file any reply to the same and unfortunately in the absence of any reply from the side of the petitioner, as per procedure, the department of Income Tax has passed an order under clause (d) of Section 148A of the Act, 1961 on 26.03.2023, stating that the same has been passed after getting approval of the specified authority on 25.03.2023. According to the petitioner, this order dated 26.03.2023 indicates that the email of the assessee/petitioner is gmkca1996@gmail.com, which is admittedly the previous email I.D. of the petitioner registered on the portal of the income tax department, although it is also a matter of records that presently the registered email ID of the petitioner on the portal of the income tax department is taxmohit56@gmail.com. Consequently, a notice under Section 148 of the Act, 1961 has also been issued on 29.03.2023, by which the Assessing Officer has proposed to assess or reassess the income for the assessment year 2019-20 and required the petitioner to file his return in the prescribed form.

(10) Feeling aggrieved by the aforesaid order dated 26.03.2023 and notice dated 29.03.2023, the petitioner has filed the instant writ petition before this Court.

(11) Heard Shri Manish Mishra, learned Counsel representing the petitioner and Shri Kushagra Dikshit, learned Counsel representing the respondents no.2 and 3.

(12) Learned Counsel representing the petitioner has submitted that the Finance Act, 2021 has inserted a new chapter of enquiry and opportunity of hearing in reassessment proceedings and as such, Section 148A of the Act, 1961 has been inserted with effect from 01.04.2021. This section has been introduced with the legislative intent to provide opportunity of hearing to the assessee before issuing notice for re-assessment under section 148 of the Act. Clause (b) of Section 148 of the Act provides the right of hearing to the assessee by serving him a show cause notice. Thereafter, the Clause (c) of Section 148 of the Act, 1961 mandates the

assessing authority for consideration of reply submitted by the assessee and thereafter the final order/ decision with respect to the finding that whether the case in hand is fit case for issuing notice under section 148 or not be passed is provided under clause (d) of Section 148 of the Act, 1961. In order to complete this entire procedure, the service of notice/procedure for service is provided under Section 144B of the Act, 1961. According to the learned Counsel, Section 144B of the Act, 1961 was also inserted by the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act 2020 w.e.f. 1.4.2021. This section provides that after 1.4.2021, all the assessment, reassessment or re-computation under the Act, 1961 shall be made in a faceless manner. The amended provisions entail that every notice or order or any other electronic communication shall be delivered to the addressee, being the assesse, by way of (i) placing an authenticated copy thereof in the assessee's registered account; or (b) sending an authenticated copy thereof to the registered email address of the assesse or his authorized representative; or (c) uploading an authenticated copy on the assessee's mobile App, and followed by a real time alert.. Further, the Explanation (t) provided that the registered email address means the email address at which an electronic communication may be delivered or transmitted to the addressee. Explanation (r) defines the words 'real-time alert' means any communication sent to the assessee, by way of short messaging service on his registered mobile number or by way of an email at his registered email address so as to alert him regarding delivery of an electronic communication. Further the Explanation (u) defines the registered mobile number, which means the mobile number of the assessee or his authorised representative appearing in the user profile of the electronic filing account registered by the assessee in designated portal.

(13) Pointing out the aforesaid provisions of law, learned Counsel has submitted that an elaborate and rigorous process has been provided under the law for service of notice to the assesse and in case the said notice is not legally served on the assessee, the whole process of assessment falls flat. According to him, if initial action is not in consonance with law, subsequent proceedings would not satisfy the same. The legal *maxim sublato fundamento cadit opus*, provided that in case the foundation is removed, the superstructure falls. In the present case, the impugned order under Section 148A(d) and the notice under Section 148 of the Act, 1961 has been passed on the premise that notice has been sent on the registered mail ID of the petitioner but he failed to respond the same. While it is evident from record that the notice has never been served on the registered e-mail address of the petitioner. Thus the order impugned has been passed on wrong foundation and, accordingly, having no value in the eyes of law. Thus, it has been prayed that the order dated 26.03.2023 passed by the assessing authority under Section 148A(d) of the Act, 1961 for the Assessment Year 2019-20 and all the consequential notices including the notice dated 29.03.2023 may be quashed.

(14) Per contra, learned Counsel for the respondent No.2 and 3, explaining the elaborate provisions for issuance of notice for re-opening of assessment, has argued that substantial safe-guard has been provided under Section 148A of the Act, 1961 itself for service of notice to an assesse, which was duly followed in the

present case. It has been contended by the learned counsel that notice under Section 148A(b) has been issued to the petitioner on 07.03.2023 by the jurisdictional assessing officer by uploading the same on the income tax e-filing portal of the petitioner and also intimated on the registered email id available in the database of the department, which is gmkca1993@gmail.com, through an automated system and which email is still reflecting as the email id of the assesse on the e-filing portal. Thus, it has been submitted that, since no response was submitted within the time as provided in the notice under Section 148A (b) of the Act, 1961, there was nothing wrong on the part of the Assessing Officer to pass an order under Section 148A(d) of the Act, 1961 dated 26.03.2023, which again was served in the same manner, by uploading on the income tax e-filing portal as well as through an automated system to the registered email id as available in the database of the department.

(15) The learned Counsel has emphatically stressed on the point that the order under Section 148A(d) of the Act, 1961 dated 26.03.2023 was also uploaded on the Income Tax Portal of the petitioner, which was also reflected in the e-proceeding column on the Income tax portal of the petitioner under heading- 'Last used email ID by current user-gmkca1993@gmail.com' and, as such it has been argued that the petitioner was duly aware of the notices and re-assessment proceedings.

(16) It has also been contended by the learned counsel appearing for the respondents No.2 and 3 that although the petitioner appeared to have added an additional email id–taxmohit56@gmail.com on the income Tax Portal, but has till date not deleted the old email id-gmkca1993@gmail.com as the same is still reflecting on the portal and at no point of time, the petitioner had informed the I.T. department regarding the change of email id. Thus, it has been pointed out that since the notice and the consequent order were duly uploaded on the given Email Id on the Income Tax Portal though an automated system, there was no error on the part of the Assessing Officer in serving the notice or the order under Section 148A(b) and 148A(d) of the Act, 1961 respectively. As an alternate argument, the learned Counsel has submitted that the reassessment proceedings under Section 148 of the Act, 1961 have already been initiated and the petitioner had been duly participating in the said proceedings and has infact also field his reply to the notice dated 12.10.2023 issued under Section 142 (1) of the Act, 1961 on 04.11.2023 and according to him, the grounds of non-service of the impugned notice/orders can be very well taken by the petitioner in the said proceedings and the said issue can also be considered by the assessing officer at the time of passing the Assessment Order.

(17) In rejoinder, the learned counsel for the petitioner has denied the contention of the department and has submitted that at the time of issuance of notice on 07/03/2023, the e-mail ID taxmohit56@gmail.com was the only mail registered on the database of the department against the PAN number of the petitioner company. The email sent by the Income Tax Business Application from the mail ID of ITO, Lucknow has been sent to the earlier mail ID gmkca1993@gmail.com and the concerned officer never tried to find out what was the actual email

registered on the online portal against the PAN of the petitioner. According to him, inspite of the updation of the web portal of the IT Department from the Assessment Year 2020-21 till date, if the correct information has not been picked by the jurisdictional Assessing Officer from the profile account of the petitioner, then it was a mistake committed by the respondent No.2 and 3 and the petitioner cannot be faulted.

(18) Having scrutinized the rival submission of the parties and going through the record available before this Court in the instant writ petition, this Court is of the view that there is no denial of the fact that there exists two email ID of the petitioner-Company. The petitioner termed email ID: gmkca1993@gmail.com, as the earlier email ID having been used till 2019 and email ID: taxmohit56@gmail.com, has been termed as the present Email ID having been in operational after the year 2019. Although, the respondents have not denied the email ID: taxmohit56@gmail.com, however, they have contended that email ID: gmkca1993@gmail.com continues to be the registered email ID of the petitioner. The respondents have also not denied the fact that the notice under Section 148A (b) of the Act, 1961 dated 07.03.2023 and the consequential order dated 148A (d) of the Act, 1961 dated 26.03.2023 has been sent to the email ID: gmkca1993@gmail.com. Therefore, the issue now boils down to as to what is the registered e-mail address of the petitioner as on 07.03.2023 i.e the date of issuance of notice under Section 148A (b) of the Act, 1961. Having said so, that immediately brings this Court to explanation (t) of Section 144B of the Act, 1961 which defines registered email address as follows :-

"**registered e-mail address**" means the e-mail address at which an electronic communication may be delivered or transmitted to the addressee, including—

(i) the email address available in the electronic filing account of the addressee registered in designated portal; or

(ii) the e-mail address available in the last income-tax return furnished by the addressee; or

(iii) the e-mail address available in the Permanent Account Number database relating to the addressee; or

(iv) in the case of addressee being an individual who possesses the Aadhaar number, the e-mail address of addressee available in the database of Unique Identification Authority of India; or

(v) in the case of addressee being a company, the e-mail address of the company as available on the official website of Ministry of Corporate Affairs; or

(vi) any e-mail address made available by the assesse to the income-tax authority or any person authorised by such authority"

(19) From the aforesaid definition of registered e-mail address, this Court finds that there are several alternatives provided for considering any email address as a "registered e-mail address". It has been argued by the learned counsel for the respondents that the notice under Section148A(b) of the Act, 1961 had been sent to the petitioner on the available email ID on the portal of the Income Tax department, but the question is as to whether the said available email ID can be construed to be a registered email ID in view of the explanation (t) to Section 144B of the Act, 1961. Although it has been contended by the learned counsel for the respondents that the said e-mail address

was the email ID made available by the assessee, so as to satisfy the sub-clause (vi) of the aforesaid definition, however, this Court is unable to countenance as to why the respondents without resorting to the various sub-clauses from (i) to (v) has pressed sub-clause (vi) into action. No doubt, all the sub-clauses are alternative to each other and each of them indicate independent mechanism for determination of the registered email address, but the Court cannot be oblivious to the fact that sub-clause (vi) has been inserted by the legislature as a residual provision to determine the registered email address, when the registered email address of the assessee cannot be determined by the mechanism as provided from sub-clauses (i) to (v). Thus, if the registered email address of the assessee cannot be determined from (a) e-filing account of the addressee registered in designated portal or (b) from the last income tax return furnished, or (c) from the permanent Account number data base relating to the addressee or (d) from the official website of the Ministry of corporate affairs, etc. then only the authority may resort to any e-mail address made available by the assessee. Further, the word "available" is of significance as it records a positive action on the part of the assessee in making available the e-mail ID, so that the same may be construed as the registered email ID of the assessee.

(20) As far as the present case is concerned, it has been the consistent stand by the petitioner that he has used or made available the e-mail ID: taxmohit56@gmail.com for e-filing of his income-tax return even since the Assessment Year 2020-21 and the same has been used by him even for filing of the latest income-tax return for the Assessment Year 2022-23. Further, the said email ID has been also mentioned by him in the income-tax return and the same is relatable to PAN data base and also mentioned in the master data of the petitioner's Company as available from the official website of the Ministry of Corporate Affairs at the relevant time. Therefore, taking a holistic view of the matter, it has to be held that the e-mail ID: taxmohit56@gmail.com is the registered e-mail address of the petitioner company and it is the e-mail ID, which has been made available to the Authority by the assessee.

(21) Further, there is another aspect of the matter, in as much as this Court finds that a notice issued under Section 148A(b) of the Act, 1961 to the registered email ID of the assessee is not an empty formality as the issuance of the notice and service of such notice upon the assessee are jurisdictional requirement that must be mandatorily complied with as it provides an opportunity to the addressee to satisfy the Assessing Officer with his reply, even before the issuance of the notice under Section 148 of the Act, 1961. The said right of the assessee has to be understood in the context that before the issuance of the notice under section 148 of the Income Tax Act, the Assessing Officer is enjoined upon as per section 148A (d) of the Act, 1961 to decide, on the basis of material available on record including reply of assessee, whether or not it is a fit case to issue a notice under Section 148 of the Act, 1961, by passing an order.

(22) In the present case, the notice under Section 148A(b) of the Act, 1961 has not been issued on the registered email address of the petitioner's company. However, as pointed out by the learned Counsel for the respondents that the said

point was not raised by the petitioner in the re-assessment proceedings presently pending before the Assessing Officer and in a way has contended that the said issue stands waived by the petitioner. In this context, it would be profitable to quote the conclusion of a judgment passed by the Delhi High Court, wherein the Division Bench had examined an Appeal from the ITAT (Income Tax Appellate Tribunal), which was challenged on similar grounds. The Division Bench after recording the contention of the parties, not only dismissed the appeal of the department, but also held in the said judgment reported as "**Commissioner of Income Tax (Central-1) Vs Chetan Gupta**": 382 ITR 613, *inter-alia* that

"46. To summarize the conclusions:

(i) Under Section 148 of the Act, the issue of notice to the Assessee and service of such notice upon the Assessee are jurisdictional requirements that must be mandatorily complied with. They are not mere procedural requirements.

(ii) For the AO to exercise jurisdiction to reopen an assessment, notice under Section 148 (1) has to be mandatorily issued to the Assessee. Further the AO cannot complete the reassessment without service of the notice so issued upon the Assessee in accordance with Section 282 (1) of the Act read with Order V Rule 12 CPC and Order III Rule 6 CPC.

(iii) Although there is change in the scheme of Sections 147, 148 and 149 of the Act from the corresponding Section 34 of the 1922 Act, the legal requirement of service of notice upon the Assessee in terms of Section 148 read with Section 282 (1) and Section 153 (2) of the Act is a jurisdictional pre-condition to finalizing the reassessment.

(iv) The onus is on the Revenue to show that proper service of notice has been effected under Section 148 of the Act on the Assessee or an agent duly empowered by him to accept notices on his behalf. In the present case, the Revenue has failed to discharge that onus.

(v) The mere fact that an Assessee or some other person on his behalf not duly authorised participated in the reassessment proceedings after coming to know of it will not constitute a waiver of the requirement of effecting proper service of notice on the Assessee under Section 148 of the Act.

(vi) Reassessment proceedings finalised by an AO without effecting proper service of notice on the Assessee under Section 148 (1) of the Act are invalid and liable to be quashed.

(vii) Section 292 BB is prospective. In any event the Assessee in the present case, having raised an objection regarding the failure by the Revenue to effect service of notice upon him, the main part of Section 292 BB is not attracted"

(23) To the same effect is the judgment of the Bombay High Court in ***Chitra Supekar Versus Income Tax Officer,*** (Writ Petition No. 15580 of 2022), wherein the Division Bench concluded as herein under :-

"7. We have heard both counsels at length and have perused the proceedings. we agree with the view taken by the Delhi High Court in the case of CIT vs Eshaan Holding (P) Ltd. 5 upholding the view of the ITAT that if there is no valid service of notice under section 148, the reassessment proceedings are null and void as also the decision of the Punjab and Haryana High Court in the case of CIT vs Avtar Singh 6 which held that service of

notice under section 148 is a condition precedent for making reassessment or re-computation under section 147 of the Act.

8. In our view, before issuing the notice under section 148A (b) it was imperative for the AO to have checked if there was a change of address. A condition precedent for any proceeding including a proceeding u/s. 148A, is a valid service of notice, lest it would be a jurisdictional error. With regard to, the first notice dated 20th March 2022, it is the case of the petitioner that they had not received any notice dated 20th March 2022 and the revenue contended that it was served through speed post at the last known address. It is evident that though the respondents had the new address of the petitioner as evinced from the ITR filed on 10th January 2021, the respondents chose to send the notice to their old address. We also find no averment or proof of the service of notice dated 20th March 2022 on the petitioner in respondent's affidavit in reply dated 14th November 2022. The cascading effect of non-service was the petitioner did not get an opportunity to respond to the notice. Consequently, the notice dated 20th March 2022 and the proceedings thereafter are void. Apropos section 151(ii) of the Act the sanction from the PCCIT ought to have been taken when order was sought to be passed beyond the period of three years i.e. beyond 31st March 2022 on 5th April 2022. Consequently, the notice dated 20th March 2022 and order dated 5th April 2022 deserves to be set aside on account of jurisdictional error i.e. for want of service and consequently, for non-compliance with the provisions of the Act."

(24) Further in the judgment passed in ***Lok Developers Vs Deputy Commissioner of Income Tax Circle*** (Writ Petition No 1983/2022), wherein the issue before the Bombay High Court was as to whether subsequent proceedings initiated by the revenue authorities for non-compliance of notice under Section 148 under the Act would be vitiated on account of notice under Section 148 of the Act being served on the secondary email id registered with PAN instead of the registered primary email id or updated email ID filed with the last return of income. The Division Bench, after hearing both the parties, concluded *inter-alia*:

" .... In our view the AO clearly erred in issuing a notice u/s 148 to both the primary address and the email address mentioned in the last Return of Income filed to pre-empt a jurisdictional error on account of valid service; there was neither cost to it or any prejudice to any party for sending it on more than one email in a given circumstance as in the present case.

This Court in the case of Mrs. Chitra Supekar v/s ITO in Writ Petition No. 15580 of 2022 has held that it was imperative for the AO to have checked if there was change of address before initiating a proceeding: and that a valid service of notice under section 148 is a condition precedent lest it would be a jurisdictional error."

(25) Recently, the Delhi High Court in the case of ***Jyoti Narang Vs Income tax Officer***, (Writ Petition (C) No. 9289/2023) has also set aside the penalty and demand notice on the ground that the show cause notice was issued on a wrong E-mail ID.

(26) For all the aforesaid reasons, the order dated 26th March, 2023 passed by the Assessing Authority under Section 148-A (d) of the Act, 1961 for the Assessment Year 2019-20 and the consequential notice

dated 29th March, 2023 issued under Section 148 of the Act, 1961 for the Assessment Year 2019-20 as also the consequential proceedings undertaken subsequent thereto cannot be sustained in the eyes of law and, as such, the same are quashed and the parties are relegated to the stage of reply of notice under Section 148A(b) of the Act dated 07.03.2023.

(27) Needless to say, the petitioner-company shall have an opportunity to file a reply to the said show cause notice dated 07.03.2023 within a period of four weeks from today and for that purposes, the Assessing Officer shall provide necessary opportunity to the petitioner for uploading the response of the petitioner on the designated portal and thereafter the Assessing officer shall pass an order in terms of section 148A(d) of the Act.

(28) In view thereof, the writ petition is **partly allowed**, subject to the aforesaid terms and conditions. There shall be no order as to cost.

(2024) 2 ILRA 628
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Second Appeal No. 73 of 1993

Hublal ...Appellant
Versus
Kalloo & Ors. ...Respondents

Counsel for the Appellant:
B.K. Saxena

Counsel for the Respondents:

U.P. Zamindari Abolition & Land Reforms Act, 1950 - Section 168-A The Allahabad High Court held that Section 168-A of the Act, 1950, which prohibits transfer of fragmented land in consolidated areas, does not apply to agreements to sell, as they do not transfer title. The appellate court erred in dismissing the suit for specific performance by applying Section 168-A to the agreement dated 22.07.1986. (Paras 6, 9, 12)

Effect of Deletion of Section 168-A Section 168-A was deleted by U.P. Act No. 27 of 2004, removing the embargo on executing sale deeds for fragmented lan The court ruled that the law prevalent at the time of decision applies, allowing execution of the sale deed post-deletion without legal impediment, even for agreements predating the amendment. (Paras 9, 11-12)

Specific Performance and Subsequent Vendee The court upheld the appellant's right to specific performance of the agreement to sell dated 22.07.1986, directing both the original vendor (respondent no. 1) and subsequent vendee (respondent no. 2) to execute the sale deed, as established in precedents like Lala Durga Prasad Vs Lal Deep Chand (1953) and Rathnavathi Vs Kavita Ganashamdas (2015). (Paras 7, 13)

. Reversal of Appellate Court's Judgment The first appellate court's judgment dated 13.10.1992, which set aside the trial court's decree for specific performance, was held erroneous and set aside. The trial court's decree dated 24.12.1991 was restored, directing execution of the sale deed within one month, failing which the appellant could execute it through the Civil Judge. (Para 13)

Cases Cited:

1. Ram Pratap Vs Gulab, Second Appeal No. 352 of 1993 (All HC, 25.07.2013) (Para 6)

2. Lala Durga Prasad Vs Lal Deep Chand, (1953) 2 SCC 509 (Para 7)

3. R. Chandiok Vs Chuni Lal Sabharwal, 1970 (3) SCC 140 (Para 7)

4. Rathnavathi Vs Kavita Ganashamdas, (2015) 5 SCC 223 (Para 7)

5. U.O.I. Vs Indian Charge Chrome, (1999) 7 SCC 314 (Para 9)

6. New India Assurance Co. Lt Vs Padma, 2003 (7) SCC 713 (Para 11)

7. Yadlapati Vs Venkateswarlu, 1992 Supp 1 SCC 74 (Para 11)

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

1. Heard learned counsel for the appellant.

2. Despite the service of notice, no one appears on behalf of the respondents.

3. Present appeal has been filed against the judgement and decree dated 13.10.1992 passed by the Court of 11th Additional District Judge, Lucknow, in Civil Appeal No.22/92, Sri Ram Versus Hublal and another allowing the appeal of the defendant/respondent no.2 and dismissing the suit for specific performance of a contract of the plaintiff/appellant vide regular suit no.284/88 Hub Lal Versus Kalloo and another dated 24.12.92 by the Court of Munsif Hawali, Lucknow on the following amongst others.

4. This second appeal was admitted on the following substantial question of law:

(1) Whether the learned Appellate Court below has committed manifest error of law in applying the provisions of Section-168-A of Uttar Pradesh Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as 'the Act, 1950') to the facts of the case?

5. The crux of the matter is that a registered agreement to sell was executed by respondent no.1 in favour of the appellant on 22.07.1986 regarding two biswa land in Khasra No.671, Village-Dehwa, Post-Mohanlalganj, District-Lucknow, after taking advance money of Rs.5,000/-, remaining Rs.1,000/- was payable at the time of execution of sale deed. Despite repeated requests, respondent no.1 did not execute the sale deed in pursuance of the sale agreement dated 22.07.1986. Then, the appellant came to know that respondent no.1 had executed the sale deed dated 29.02.1988 in favour of respondent no.2 regarding the entire land in Khasra No.671. Thereafter, the appellant had filed a suit no.284 of 1988 for specific performance of an agreement to sell dated 22.07.1986 with a further prayer that both the respondents may be directed to execute the sale deed in pursuance of the agreement to sell dated 22.07.1986. This suit was decreed by judgment and decree dated 24.12.1991 in favour of the appellant. Feeling aggrieved by the judgement dated 24.11.1991, respondent no.2, the subsequent vendee of respondent no.1, had filed an appeal registered as appeal no.22 of 1992. The appellate Court allowed the above appeal by judgement dated 13.10.1992 and judgement and decree dated 24.11.1991 of Munsif Hawali, Lucknow, was set aside on the ground that the agreement to sell dated 22.07.1986, will amount to fragmentation of the land, hence violating Section-168-A of the Act, 1950, is void. Feeling aggrieved by the above judgement dated 13.10.1992, the present second appeal was filed.

6. Learned counsel for the appellant contends that Section 168-A of the Act, 1950 applies to the transfer of land through a sale deed, gift deed or exchange

and not on the agreement to sell. In support of his contention, learned counsel for the appellant has relied upon the judgement of the coordinate Bench of this Court in **Second Appeal No.352 of 1993 (Ram Pratap and Others Vs. Gulab)** vide order dated **25.07.2013**. In that judgement, the learned Single Judge observed that Section 168-A of the Act, 1950 would not apply to the agreement to sell and further observed that the provision of Section 168-A of the Act, 1950 has been deleted by the UP Amendment of 2004, therefore, there is no bar for execution of sale deed as on date.

7. Learned counsel for the appellant further submits that it is an established legal position that after execution of the agreement to sell, if the vendor transfers the land to another person, then the vendor, as well as the subsequent purchaser, will have to join in executing the sale deed if a suit for specific performance of the agreement is allowed. In support of his submission, learned counsel for the appellant has relied upon the following Apex Court judgements in **Lala Durga Prasad And Others Vs. Lal Deep Chand And Others** reported in **(1953) 2 SCC 509; R.C. Chandiok And Another Vs. Chuni Lal Sabharwal and Others** reported in **1970 (3) SCC 140 and; Rathnavathi And Another Vs. Kavita Ganashamdas** reported in **(2015) 5 SCC 223.**

8. After considering the aforesaid submission and on perusal of record, the followings facts are undisputed that respondent no.1 had executed registered agreement to sell in favour of appellant on 22.07.1986 regarding *two bigha* of land in Khasra No.671 and, subsequently, without executing the sale deed of that part of the land, respondent no.1 had executed a sale deed dated 29.02.1988 in favour of the respondent no.2 regarding entire land of Khasra No.671. The sole question for determination is whether rigour of Section 168-A of the Act, 1950 will come into play for the agreement to sell part of land in Khasra no.671, and further question arises that once respondent no.1 had transferred the entire land of Khasra No.671 through sale deed dated 29.02.1988 in favour of respondent no.2, then still the respondents could have been directed to execute the sale deed in specific performance of agreement dated 22.07.1986 executed by respondent no.1 in favour of the appellant. The consequence of the violation of Section 168-A of the Act 1950 has been provided under Sections 166 and 167 of the Act, 1950. For ready reference, Sections-166, 167 as well as Section 168-A of the Act, 1950 are being quoted as under :

***"166. Transfer made in contravention of this Chapter to be void**. Any transfer made by or on behalf of [bhumidhar with non-transferable rights] or asami [in contravention of the provisions of this [Act] shall be void.*

***167.(1)** The following consequences shall ensue in respect of every transfer which is void by virtue of Section 166, namely-*

(a) the subject-matter of transfer shall with effect from the date of transfer, be deemed to have vested in the State Government free from all encumbrances;

(b) the trees, crops and wells existing on the land on the date of transfer shall, with effect from the said date, be deemed to have vested in the State Government free from all encumbrances; and

(c) the transferee may remove other moveable property or the materials of any immovable property existing on such

land on the date of transfer within such time as may be prescribed.

(2) Where any land or other property has vested in the State Government under sub-section (1), it shall be lawful for the Collector to take over possession over such land or other property and to direct that any person occupying such land or property be evicted therefrom. For the purposes of taking over such possession or evicting such unauthorised occupants, the Collector may use or cause to be used such force as may be necessary.]

***168-A. Transfer of fragments**. - Notwithstanding the provisions of any law for the time being in force, no person shall transfer whether by sale, gift or exchange any fragment situate in a consolidated area except where the transfer is in favour of tenure-holder has a plot contiguous to the fragment or where the transfer is not in favour of any such tenure-holder [the whole or so much of the plot in which the person has bhumidhari rights, which pertains to the fragment is thereby transferred.]*

(2) The transfer of any land contrary to the provisions of sub-section (1) shall be void.

(3) When a bhumidhar has made any transfer in contravention of the provisions of sub-section (1) the provisions of Section 167 shall mutatis mutandis, apply.]"

9. From the perusal of the above sections, it is clear that where the title in any fragment situated in a consolidated area is transferred either by way of a sale deed, by way of a gift deed or by way of exchange, then Section 168-A of the Act, 1950 will apply but not on the agreement to sell of a fragment of land because agreement to sell to transfer a land does not transfer the title. In the judgement of **Ram Pratap and Others (supra)**, the coordinate Bench of this Court had observed that Section 168-A of the Act, 1950 would not apply to the agreement to sell to transfer the land because the agreement transfers no title. It was also observed in the above judgement that Section 168-A of the Act, 1950 has already been deleted. Therefore, there is no legal impediment to executing the sale deed for part of the land. Apex Court in the case of **Union of India & Others Vs. Indian Charge Chrome & Another** reported in **(1999) 7 SCC 314** has observed that law prevalent on the date of decision will be applicable.

10. Section 168-A of the Act, 1950 does not completely prohibit the transfer of fragment of a land situated in consolidated area. It prohibits only that transfer of fragment of land where the vendee does not have any land adjoining to the purchased land. Therefore, Section 168-A of the Act, 1950 does not create or extinguish any right regarding agreement to sell but it simply imposed prohibition for execution of sale deed where the purchaser does not have any land adjoining to the fragmented part of the land which is subject matter of sale deed.

11. The Apex Court in the case of **The New India Assurance Company Ltd. Vs. C. Padma & Another** reported in **2003 (7) SCC 713** observed that benefit of amended provision applicable on pending cases, even though, a cause of action arose prior to enforcement of amendment Act. The Apex Cout in the case of **Yadlapati Vs. Venkateswarlu Vs. State of Andhra Pradesh & Another** reported in **1992 Supp 1 SCC 74** observed that amendment in a statute must be read as if the word of

the amendment had been written into principle act unless that leads to any inconsistency. Therefore, on deletion of Section 168-A of the Act, 2004 by the amendment Act 27 of 2004, embargo imposed under Section 168-A of the Act, 1950 on execution of a sale deed of fragment of a land has been removed. Therefore, sale deed in pursuance of agreement to sell executed prior to deletion of Section 168-A of the Act, 1950 can be validly executed after deletion of Section 168-A of the Act, 1950, without any legal impediment.

12. Based on the above analysis, this Court holds that even if the agreement to sell is executed regarding a fragment of land in any consolidated area even then the same will not be hit by Section 168-A of the Act, 1950 because the agreement to sell does not transfer the land but it is simply the agreement between the parties to transfer the same in future through execution of sale deed. Though, Section 168-A of the Act, 1950 was deleted from the Act, 1950, therefore, till the deletion of this Section in 2004, no sale deed was executed in pursuance of an agreement to sell dated 22.07.1986. Now, if the direction is made to execute the sale deed considering the present law, there will be no legal impediment based on deleted Section 168-A of the Act, 1950. Even the U.P. Act No.27 of 2004, by which Section 168-A of the Act 1950 was deleted from the statute itself, permits regularising the sale deed executed within a particular time even before the deletion of Section 168-A of the Act, 1950. Therefore, this Court decides the substantial question of law framed in this appeal in favour of the appellant by holding that the appellate Court has committed a manifest error of law by applying Section 168-A of the Act, 1950 to the agreement to sell to transfer the fragment of land in Khasra No.671.

13. Therefore, the judgement of the first appellate Court is absolutely erroneous, being contrary to the aforesaid legal position. Hence, the order of the first appellate Court dated 13.10.1992 is hereby set aside, and the present appeal is **allowed**. The order of the Munsif Hawali, Lucknow, passed in Suit No.284 of 1988 is hereby confirmed. Both the respondents are directed to execute the sale deed in favour of the appellant in pursuance of the agreement to sell dated 22.07.1986 within a period of one month, failing which the appellant will be free to execute the sale deed through the concerned Civil Judge.

(2024) 2 ILRA 632
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

First Appeal From Order No. 52 of 2024

Indra Bahadur Yadav ...Appellant
Versus
Harkhas And Aam And Anr. ...Respondent

Counsel for the Appellant:
Ram Milan Yadav, Om Prakash Yadav

Counsel for the Respondents:

Civil Law - Indian Succession Act, 1925 - Code of Civil Procedure,1908-Petition filed u/s 278 of the Act-amendment application-dismissed-impugned-challenged in Appeal-on combine reading of Sectiontions 299 and 278 of the Act, 1925- it is clear that contentious proceeding u/s 278 of the Act, 1925 will proceed as regular suit -appeal against any order,

passed during the proceeding u/s 278 of the Act, 1925, will be in accordance with the C.P.C.- appeal u/s 299 of the Act, 1925 will lie only against those orders that are appealable as per Order 43 Rule 1 C.P.C.- rejection of the amendment application under Order 6 Rule 17 C.P.C. does not find place in Order 43 Rule 1 C.P.C.- Appeal not maintainable-**Appeal dismissed with liberty.** (E-9)

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

1. Heard learned counsel for the appellant.

2. The instant appeal has been filed to set aside the impugned judgement and order dated 22.12.2023 passed by Additional District Judge, Court No.3, Pratapgarh, in M.N.R./203/2014 (*Indra Bahadur Yadav vs. Harkhas Aam & others*) whereby the amendment application of the appellant was dismissed.

3. The contention of learned counsel for the appellant is that the appellant had filed a petition u/s 278 of the Indian Succession Act, 1925 (hereinafter referred to as "Act, 1925") for grant of letters of administration and during its pendency, he filed an amendment application which was rejected by the impugned order. It is further submitted that the impugned order is absolutely erroneous as if the amendment was allowed that would not change the nature of the suit as he simply wanted to add the date of the will dated 4.6.1996 in the plaint.

4. After considering the aforesaid submission, a question arises as to whether against the rejection of an amendment application under Order 6 Rule 17 of C.P.C. by the District Judge, while hearing the suit u/s 278 of the Act, 1925, an appeal lies under Section 299 of the Act, 1925.

5. On that issue, learned counsel for the appellant submits that as per Section 299 of the Act, 1925, every order passed by the District Judge in the proceeding under Section 278 of the Act, 1925, is appealable.

6. From perusal of Section 299 of the Act, 1925, it appears that under this Section only those orders are appealable which were passed by the District Judge in exercise of power, conferred upon him under the Act and same will be in accordance with the provision of CPC. For reference Section 299 of the Act, 1925 is quoted as under:-

"299. Appeals from orders of District Judge.?Every order made by a District Judge by virtue of the powers hereby conferred upon him shall be subject to appeal to the High. Court in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), applicable to appeals."

7. The provision of appeal against an order is provided under Order 43 Rule 1 of C.P.C. For reference the Order 43 Rule 1 of C.P.C. is quoted as under:-

"1. Appeal from orders.- *An appeal shall lie from the following orders under the provisions of section 104, namely :-*

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court 1[except where the procedure specified in rule 10A of Order VII has been followed];

(b) [***]

(c) an order under rule 9 of Order IX rejecting an application (in a

case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte;

(e) [***]

(f) an order under rule 21 of Order XI;

(g) [***]

(h) [***]

(i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

[(ja) an order rejecting an application made under sub-rule (1) of rule 106 of Order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of rule 105 of that Order is appealable;]

(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

(l) an order under rule 10 of Order XXII giving or refusing to give leave;

(m) [***]

(n) an Order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(na) an order under rule 5 or rule 7 of Order XXXIII rejecting an application for permission to sue as an indigent person ;

(o) [***]

(p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;

(q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII;

(r) an order under rule 1, rule 2, [rule 2A], rule 4 or rule 10 of Order XXXIX;

(s) an order under rule 1 or rule 4 of Order XL;

(t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal;

(u) an order under rule 23 1b[or rule 23A] or Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court ;

(v) [***]

(w) an order under rule 4 of Order XLVII granting an application for review."

8. From perusal of the Order 43 Rule 1 of C.P.C., it is clear that against the rejection of an amendment application under Order 6 Rule 17, no appeal lies. Appeal is creation of statute which cannot be inferred without statutory provision. Section 295 of the Act provides that if the proceeding u/s 278 of the Act, 1925 is contentious, the same will proceed in the form of regular suit, according to the provision of C.P.C. Section 295 of the Act, 1925 is quoted as under:-

"295. Procedure in contentious cases.?In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant."

9. On combine reading of Sections 299 and 278 of the Act, 1925, it is clear

that contentious proceeding u/s 278 of the Act, 1925 will proceed as regular suit and appeal against any order, passed during the proceeding u/s 278 of the Act, 1925, will be in accordance with the C.P.C. Therefore, this Court holds that the appeal u/s 299 of the Act, 1925 will lie only against those orders that are appealable as per Order 43 Rule 1 C.P.C. and rejection of the amendment application under Order 6 Rule 17 C.P.C. does not find place in Order 43 Rule 1 C.P.C.

10. In view of the above analysis, this Court is of the view that against the rejection of amendment application under Order 6 Rule 17 C.P.C. during the proceeding of Section 278 of Indian Succession Act, 1925, no appeal lies u/s 299 of the Act, 1925 and the same can be challenged by the appellant either in revision u/s 115 C.P.C. or under the supervisory jurisdiction of the High Court, under Article 227 of Constitution of India.

11. Accordingly, the present appeal is **dismissed** with a liberty to the appellant to challenge the impugned order in appropriate proceeding.

(2024) 2 ILRA 635
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.02.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Government Appeal No. 1000144 of 2013

State of U.P. ...Appellant
Versus
Smt. Phoolan Devi @ Phoolmati ...Respondent

Counsel for the Appellant:

Govt. Advocate

Counsel for the Respondents:

Criminal Law - Indian Penal Code-Sectiontion302-Acquittal-Accused/ respondent acquitted of the offence u/s 302 IPC-cause of death of the deceased/ infant/ child is reported to be asphyxia as a result of ante mortem strangulation-co-accused, Hori Lal is the husband of the accused- respondent-he is convicted-even if acquittal is recorded in respect of some of the co-accused- yet conviction can be recorded in respect of the other accused-Respondent acquitted -based on proper analysis of evidence available on record- possible view of the matter on the basis of evidence adduced-**Appeal dismissed.** (E-9)

Cases cited:

1. Balraje alias Trimbak Vs St. of Maha., (2010) 6 SCC 673

2. Ramesh & ors. Vs St. of Har., (2017) 1 SCC 529

3. Anwar Ali & anr.Vs St. of H.P., (2020) 10 SCC 166

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J.
&
Hon'ble Ajai Kumar Srivastava-I, J.)

(Oral)

1. By means of the present application under Section 378(3) of the Code of Criminal Procedure1, the State has sought leave to appeal to challenge the judgment and order dated 16.05.2013 passed by the then Special/ Additional Sessions Judge, Lakhimpur Kheri in Sessions Trial No.52 of 2007 titled as State of U.P. vs. Hori Lal and another arising out of Case Crime No.77 of 2006, under Section 302 of the Indian Penal Code2, Police Station Pasgawan, District Kheri,

whereby the accused/ respondent herein, Smt. Phoolan Devi @ Phoolmati has been acquitted of the offence under Sections 302. However, the co-accused, Hori Lal has been convicted and sentenced to undergo life imprisonment with a fine of Rs.5,000/- for the offence under Section 302 I.P.C. and in default of payment of fine, he has further been directed to undergo two months' simple imprisonment.

2. We have heard the learned Additional Government Advocate appearing on behalf of the State-appellant on the application for grant of leave to appeal and perused the record available before this Court.

3. The brief facts are that Hori Lal submitted a written application on 10.01.2006 at Police Station Pasgawan, District Kheri saying that his wife Phoolan Devi @ Phoolmati was all alone in the house on 09.01.2006 in the night and at around 01:00 PM, Mewa s/o Dwarika and Pramod s/o Natthu inquired about the whereabouts of Hori Lal from Phoolan Devi @ Phoolmati. Phoolan Devi @ Phoolmati being unaware of the whereabouts of her husband could not tell Mewa and Pramod about the whereabouts of Hori Lal. Mewa and Pramod started beating up Phoolan Devi @ Phoolmati, as a result of such attack on the person of Phoolan Devi @ Phoolmati, the foetus that was inside her womb as she was 8 months' pregnant died and the baby was still born. Some villagers who had heard the noise came to the house of Hori Lal and saved the life of Phoolan Devi @ Phoolmati from the attack of Mewa and Pramod. As a result of such application dated 10.01.2006, an F.I.R. as Case Crime No.77 of 2006 was registered under Sections 316 & 452 of the I.P.C. initially against Mewa and Pramod at Police Station Pasgawan, District Kheri at 10:45 AM. During the course of investigation, an Ultrasound and Medical Examination of Phoolan Devi @ Phoolmati was done. The postmortem of the deceased/ child was also conducted by P.W.-3, Dr. S.P. Verma. On the basis of such investigation, the Charge-sheet was filed by the Investigating Officer against Hori Lal and Phoolan Devi @ Phoolmati under Section 302/34 I.P.C. Mewa and Pramod, who were initially named in the first information report were exonerated.

4. It is contended by the learned A.G.A. for the State/ appellant that the impugned judgment and order dated 16.05.2013 is against the weight of evidence available on record.

5. His submission is that the learned trial court, while convicting the co-accused, Hori Lal, has recorded finding of acquittal in respect of another co-accused, Smt. Phoolan Devi @ Phoolmati, the sole respondent herein, on the basis of same set of evidence, which is legally impermissible.

6. Learned A.G.A. for the State/ appellant, thus, submits that the impugned judgment and order dated 16.05.2013 is perverse and, therefore, the application seeking leave to appeal deserves to be allowed.

7. Having heard the learned A.G.A. for the State/ appellant and upon perusal of record available before us, we find that according to postmortem report, Ex. Ka-1, following ante-mortem

injuries were reported on the body of the deceased/ child :-

"1- खराश दार नीलगू निशान 2 सें०मी० x 1 सें०मी० गर्दन पर दाहिनी तरफ दाहिने कान से 3 सें०मी० नीचे।

2- खराशदार नीलगू निशान 2 सें०मी० x 1 सें०मी० गर्दन पर बायीं तरफ बायें कान से 1 सें०मी० नीचे। चोट का विच्छेदन करने पर गर्दन के सब कुटेनियम टिशूज एमाईमोप्ड पाये गये तथा ट्रैकिया कन्जेस्टेड पायी गयी।

3- नीलगू निशान 1 सें०मी० ग .5 सें०मी० ऊपरी हाथ पर दाहिनी तरफ।"

8. We also find that the cause of death of the deceased/ infant/ child is reported to be asphyxia as a result of ante mortem strangulation. The fact that the co-accused, Hori Lal is the husband of the accused-respondent, Smt. Phoolan Devi @ Phoolmati is not disputed. It is borne out from the record that the co-accused, Hori Lal, who has been convicted by means of impugned judgment and order dated 16.05.2013, was in jail for a period of about one and a half years and when he was released from jail and returned to his home, he came to know that the accused-respondent, Smt. Phoolan Devi @ Phoolmati was pregnant and was carrying eight months' foetus. He, thus, was having motive to commit the crime-in-question in order to get rid of the child, who, as he thought, was conceived by the accused-respondent, Smt. Phoolan Devi @ Phoolmati during the period when the co-accused, Hori Lal was in jail. The entire prosecution case was based on circumstantial evidence. As stated above, motive to commit the crime was with the co-accused, Hori Lal only. It is relevant to mention that ante-mortem injuries reported on the persons of the deceased/ child are of such nature, which could not have been inflicted in the manner as stated in the first information report. The cause of death of the deceased/ child also suggests that the child was done to death after her birth.

9. It is apposite to mention that even if acquittal is recorded in respect of some of the co-accused, yet conviction can be recorded in respect of the other accused if evidence indicating complicity of such convicted co-accused is found cogent and reliable against him. In this regard, a judgment rendered by Hon'ble the Supreme Court in **Balraje alias Trimbak vs. State of Maharashtra**3 may be usefully referred to.

10. Hon'ble the Supreme Court in **Ramesh and Others vs. State of Haryana**4 in paragraphs 24 and 26, has held as under:-

"24. We have duly appreciated the submissions advanced by the counsel for the parties on both sides. No doubt, the High Court was dealing with the appeal against the judgment of the trial court which had acquitted the appellants herein. The scope of interference in an appeal against acquittal is undoubtedly narrower than the scope of appeal against conviction. Section 378 of the Code of Criminal Procedure, 1973 confers upon the State a right to prefer an appeal to the High Court against the order of acquittal. At the same time, sub-section (3) thereof mandates that such an appeal is not to be entertained except with the leave of the High Court. ***Thus, before an appeal is entertained on merits, leave of the High Court is to be obtained which means that normally judgment of acquittal of the trial court is attached a definite value which is not to be ignored by the High Court. In other words, presumption of innocence in favour of an accused gets further fortified or reinforced by an order of acquittal. At the same time,***

while exercising its appellate power, the High Court is empowered to reappreciate, review and reconsider the evidence before it. However, this exercise is to be undertaken in order to come to an independent conclusion and unless there are substantial and compelling reasons or very strong reasons to differ from the findings of acquittal recorded by the trial court, the High Court, as an appellate court in an appeal against the acquittal, is not supposed to substitute its findings in case the findings recorded by the trial court are equally plausible.

26. This legal position is reiterated in Govindaraju v. State [Govindaraju v. State, (2012) 4 SCC 722 : (2012) 2 SCC (Cri) 533] and the following passage therefrom needs to be extracted: (SCC p. 732, paras 12-13)

"12. The legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 CrPC. This is an indication that appeal from acquittal is placed on a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 CrPC has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub-section (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the courts.

13. ***Under the scheme of CrPC, acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the appellate court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law.""*** (emphasis supplied by us)

11. Hon'ble the Supreme Court in **Anwar Ali and another vs. State of Himachal Pradesh**5 in paragraph 14.1, has held as under:-

"14.1. In Babu [Babu v. State of Kerala, (2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] , this Court had reiterated the principles to be followed in an appeal against acquittal under Section 378 CrPC. In paras 12 to 19, it is observed and held as under : (SCC pp. 196-99)

"12. ***This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by the trial court. The appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence on record, so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. The appellate court is entitled to consider whether in arriving at a finding of fact, the trial court had failed to take into consideration admissible evidence and/or had taken into consideration the evidence brought on record contrary to law****. Similarly, wrong placing of burden of proof*

may also be a subject-matter of scrutiny by the appellate court. (Vide Balak Ram v. State of U.P. [Balak Ram v. State of U.P., (1975) 3 SCC 219 : 1974 SCC (Cri) 837] , Shambhoo Missir v. State of Bihar [Shambhoo Missir v. State of Bihar, (1990) 4 SCC 17 : 1990 SCC (Cri) 518] , Shailendra Pratap v. State of U.P. [Shailendra Pratap v. State of U.P., (2003) 1 SCC 761 : 2003 SCC (Cri) 432] , Narendra Singh v. State of M.P. [Narendra Singh v. State of M.P., (2004) 10 SCC 699 : 2004 SCC (Cri) 1893] , Budh Singh v. State of U.P. [Budh Singh v. State of U.P., (2006) 9 SCC 731 : (2006) 3 SCC (Cri) 377] , State of U.P. v. Ram Veer Singh [State of U.P. v. Ram Veer Singh, (2007) 13 SCC 102 : (2009) 2 SCC (Cri) 363] , S. Rama Krishna v. S. Rami Reddy [S. Rama Krishna v. S. Rami Reddy, (2008) 5 SCC 535 : (2008) 2 SCC (Cri) 645] , Arulveluv. State [Arulvelu v. State, (2009) 10 SCC 206 : (2010) 1 SCC (Cri) 288] , Perla Somasekhara Reddy v. State of A.P. [Perla Somasekhara Reddy v. State of A.P., (2009) 16 SCC 98 : (2010) 2 SCC (Cri) 176] and Ram Singh v. State of H.P. [Ram Singh v. State of H.P., (2010) 2 SCC 445 : (2010) 1 SCC (Cri) 1496])"

13. In Sheo Swarup v. King Emperor [Sheo Swarup v. King Emperor, 1934 SCC OnLine PC 42 : (1933-34) 61 IA 398 : AIR 1934 PC 227 (2)] , the Privy Council observed as under : (SCC Online PC : IA p. 404)

'... the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.'

14. The aforesaid principle of law has consistently been followed by this Court. (See Tulsiram Kanu v. State [Tulsiram Kanu v. State, 1951 SCC 92 : AIR 1954 SC 1] , Balbir Singh v. State of Punjab [Balbir Singh v. State of Punjab, AIR 1957 SC 216 : 1957 Cri LJ 481] , M.G. Agarwal v. State of Maharashtra [M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200 : (1963) 1 Cri LJ 235] , Khedu Mohton v. State of Bihar [Khedu Mohton v. State of Bihar, (1970) 2 SCC 450 : 1970 SCC (Cri) 479] , Sambasivan v. State of Kerala [Sambasivan v. State of Kerala, (1998) 5 SCC 412 : 1998 SCC (Cri) 1320] , Bhagwan Singh v. State of M.P. [Bhagwan Singh v. State of M.P., (2002) 4 SCC 85 : 2002 SCC (Cri) 736] and State of Goa v. Sanjay Thakran [State of Goa v. Sanjay Thakran, (2007) 3 SCC 755 : (2007) 2 SCC (Cri) 162] .)

15. In Chandrappa v. State of Karnataka [Chandrappa v. State of Karnataka, (2007) 4 SCC 415 : (2007) 2 SCC (Cri) 325] , this Court reiterated the legal position as under : (SCC p. 432, para 42)

'(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted

conclusions", "glaring mistakes", etc. are not intended to 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.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.'

16. In Ghurey Lal v. State of U.P. [Ghurey Lal v. State of U.P., (2008) 10 SCC 450 : (2009) 1 SCC (Cri) 60] , this Court reiterated the said view, observing that the appellate court in dealing with the cases in which the trial courts have acquitted the accused, should bear in mind that the trial court's acquittal bolsters the presumption that he is innocent. The appellate court must give due weight and consideration to the decision of the trial court as the trial court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses.

17. In State of Rajasthan v. Naresh [State of Rajasthan v. Naresh, (2009) 9 SCC 368 : (2009) 3 SCC (Cri) 1069] , the Court again examined the earlier judgments of this Court and laid down that : (SCC p. 374, para 20)

'20. … An order of acquittal should not be lightly interfered with even if the court believes that there is some evidence pointing out the finger towards the accused.'

18. In State of U.P. v. Banne [State of U.P. v. Banne, (2009) 4 SCC 271 : (2009) 2 SCC (Cri) 260] , this Court gave certain illustrative circumstances in which the Court would be justified in interfering with a judgment of acquittal by the High Court. The circumstances include : (SCC p. 286, para 28)

'(i) The High Court's decision is based on totally erroneous view of law by ignoring the settled legal position;

(ii) The High Court's conclusions are contrary to evidence and documents on record;

(iii) The entire approach of the High Court in dealing with the evidence was patently illegal leading to grave miscarriage of justice;

(iv) The High Court's judgment is manifestly unjust and unreasonable based on erroneous law and facts on the record of the case;

(v) This Court must always give proper weight and consideration to the findings of the High Court;

(vi) This Court would be extremely reluctant in interfering with a case when both the Sessions Court and the High Court have recorded an order of acquittal.'

A similar view has been reiterated by this Court in Dhanapal v. State [Dhanapal v. State, (2009) 10 SCC 401 : (2010) 1 SCC (Cri) 336] .

19. Thus, the law on the issue can be summarised to the effect that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere

with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference." (emphasis supplied)" (emphasis supplied by us)

12. Thus, having regard to aforesaid overall facts and circumstances of this case and in view of the law laid down by Hon'ble the Supreme Court in **Balraje's case (supra), Ramesh's case (supra) and Anwar Ali's case (supra),** we are of the considered view that the impugned judgment and order dated 16.05.2013 insofar as it relates to the respondent, Smt. Phoolan Devi @ Phoolmati, who has been acquitted of the charge under Section 302 I.P.C., is based on proper analysis of evidence available on record. It is a possible view of the matter on the basis of evidence adduced before the learned trial court, therefore, the same cannot be said to be perverse.

13. On the basis of foregoing discussion, we are of the considered view that the application for leave to appeal lacks merit and is, accordingly, **rejected**.

14. Since the application for leave to appeal has been rejected, the appeal also does not survive and the same stands **dismissed**.

15. Let the record of trial court, if any, be transmitted forthwith to the learned trial court concerned.

(2024) 2 ILRA 641
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.02.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application U/S 482 No. 9161 of 2023

Dinesh Tiwari @ Dhirendra Kumar Tiwari ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Anshumali Srivastava, Mayank Srivastava

Counsel for the Opp. Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 100(4) & 482 – Immoral Traffic (Prevention) Act, 1956 - Sections 2(f), 3, 4, 4(1), 5, 7, 7(1)(a), 7(1)(b), 8, 9 & 15(2) - Application under Section 482 of Cr.P.C. - for quashing of the entire criminal proceedings – Police Raid – search & Seize - applicant found in an intimate position with co-accused lady, who was allegedly involved in in prostitution – FIR – Investigation – Charge-sheet – order of Cognizance – instant Application – applicant taken plea that the search violated Section 15(2) of the Act due to the absence of two local witnesses, and that the applicant, being merely a customer, cannot be penalized under the Act unless actively involved in the prostitution business – court examined - whether the applicant, found as a customer in a brothel, could be prosecuted under Sections 3 to 9 of the Immoral Traffic (Prevention) Act, and whether the search violated Section 15(2), which mandates the presence of two respectable local witnesses including a woman – court held that – (i) a search conducted in violation of Section 15(2) of the Act can be said

to be irregular but this ground cannot be the basis for quashing the impugned proceeding u/s 482 Cr.P.C. Still, this ground is available during trial, which can be decided on the basis of evidence, - (ii) a customer who visits the brothel will not be liable u/s 3/4/5/7/8/9 of the Act – consequently, the court quashed the criminal proceedings against the applicant.
(Para – 23, 24, 25, 27, 29, 31, 32)

Application Allowed. (E-11)

List of referred Cases: -

1. Shivaraj Vs St. of Karn. (Criminal Petition No. 200782 of 2016),

2. Raghavendra @ Raghu Vs St. of Karn. (Criminal Petition No. 8055 of 2016),

3. Mahesh Hebbar @ Mahesh Vs The Station House Officer, Banaswadi, P.S. Bangalore (Writ Petition No. 56504 of 2015),

4. Babu S. Vs St. by Kengeri Police Station Bengaluru (Criminal Petition No. 2119 of 2022),

5. Barath S.P. Vs St. of Karn. (Criminal Petition No. 1757 of 2022),

6. Suraj Vs St. of Karn. (Criminal Petition No. 7110 of 2011),

7. Salapu Venkateswara Rao Vs St. of Andhra Pradesh (Criminal Petition No. 2156 of 2022),

8. Korada Subrahmanyam Vs St. of Andhra Pradesh (Criminal Petition No. 6182 of 2022),

9. Goenka Sajan Kumar Vs St. of Andhra Pradesh (Criminal Petition No. 4161 of 2014),

10. Nartu Rambabu Vs St. of Andhra Pradesh (Criminal Petition No. 4289 of 2022),

11. Padala Venkata Sai Rama Reddy Vs St. of Andhra Pradesh (Criminal Petition No. 6733 of 2021),

12. Vinod @ Vijay Bhagubhai Patel Vs St. of Guj. (Criminal Misc. Application No. 8156 of 2017),

13. Naman Laddha Vs St. of M.P. (Misc. Criminal Case No. 34970 of 2022).

14. Pratibha Vs Rameshwari Devi, (2007) 12 SCC 369,

15. Bai Radha Vs St. of Guj.; (1969) 1 SCC 43,

16. Kalpnath Rai Vs St. (through CBI); (1997) 8 SCC 732,

17. Sahib Singh Vs St. of Punj.; (1996) 11 SCC,

18. D. Vinod Shivappa Vs Nanda Belliappa; (2006) 6 SCC 456,

19. Heydon's Case (1584) 76 ER 637.

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

1. Heard learned counsel for the applicant, and Sri Arvind Kumar Tripathi learned A.G.A. for the State.

2. The instant application u/s 482 Cr.P.C. has been filed seeking quashing of the entire proceeding of Case No. 426 of 2007 (*State vs. Rashmi Srivastava & others*), arising out of Case Crime No. 137 of 2006, under Sections 3/4/5/7/8/9 of the Immoral Traffic (Prevention) Act, 1956 (hereinafter referred to as "Act"), P.S. Sarojini Nagar, District Lucknow, including the charge sheet No. 7 of 2006 dated 7.8.2006, pending before Judicial Magistrate-III, Lucknow.

3. Though the present application has been filed after a considerable delay, this is being entertained because question of law is involved here.

4. The facts, giving rise to the present impugned proceeding, are that on 11.6.2006, the police conducted a search of a house that belonged to one Haji, on the information received from an informer that some of the persons were conducting prostitution. During the search, the applicant was found in an intimate position

with co-accused lady "S" (name changed), who was allegedly involved in prostitution in a locked room. As per the police, S.H.O. had seen the present applicant and one lady "S" in an intimate position through cracks in the door. Based on this search, an F.I.R. dated 11.6.2006 was registered against the accused persons, including the present applicant, as Case Crime No. 137 of 2006, under Sections 3/4/5/7/8/9 of the Act. The police, after investigation, had also submitted a charge sheet against the applicant and five other co-accused persons, u/s 3/4/5/7/8/9 of the Act on 7.8.2006, whereupon the learned C.J.M. also took cognizance on 10.8.2006, and the proceeding was registered as Case No. 426 of 2007.

5. The contention of learned counsel for the applicant is twofold:-

(i) that while conducting the search of the house in question, mandatory provision of Section 15(2) of the Act, which requires the presence of two local witnesses, was not followed, and there was a violation of Section 15 (2) of the Act; and

(ii) that as per the prosecution case, the applicant was simply a customer, and simply being a customer at any house that is being used for prostitution will not attract any penalty under the Act unless there is the involvement of the customer in the business of prostitution.

6. In support of his first contention, learned counsel for the applicant has relied upon the judgement of High Court of Karnataka, Kalaburagi Bench in the case of ***Shivaraj vs. State of Karnataka (Criminal Petition No. 200782 of 2016)*** and in support of his second contention learned counsel for the applicant has relied upon the judgements of Karnataka High Court in ***Raghavendra @ Raghu vs. State of Karnataka (Criminal Petition No. 8055 of 2016), Mahesh Hebbar @ Mahesh vs. The Station House Officer, Banaswadi, P.S. Bangalore (Writ Petition No. 56504 of 2015), Babu S. vs. State by Kengeri Police Station Bengaluru (Criminal Petition No. 2119 of 2022), Barath S.P. vs. State of Karnataka (Criminal Petition No. 1757 of 2022)*** and ***Suraj vs. State of Karnataka (Criminal Petition No. 7110 of 2011)***, the judgements of Andhra Pradesh High Court in ***Salapu Venkateswara Rao vs. State of Andhra Pradesh (Criminal Petition No. 2156 of 2022), Korada Subrahmanyam vs. State of Andhra Pradesh (Criminal Petition No. 6182 of 2022), Goenka Sajan Kumar vs. State of Andhra Pradesh (Criminal Petition No. 4161 of 2014), Nartu Rambabu vs. State of Andhra Pradesh (Criminal Petition No. 4289 of 2022)*** and ***Padala Venkata Sai Rama Reddy vs. State of Andhra Pradesh (Criminal Petition No. 6733 of 2021)***, the judgement of Gujarat High Court in the case of ***Vinod @ Vijay Bhagubhai Patel vs. State of Gujarat (Criminal Misc. Application No. 8156 of 2017)*** as well as the judgement of Madhya Pradesh High Court in the case of ***Naman Laddha vs. State of M.P. (Misc. Criminal Case No. 34970 of 2022)***.

7. Per contra, learned A.G.A. submitted that as the applicant was caught red-handed during the search of a house that was being used as a brothel, therefore an offence under the Act is made out against him. It is further submitted that the applicant cannot be said to have committed no offence on being a customer because it is the customer who procures the prostitute for consideration of money to satisfy his lust. Therefore, ingredients of the offence u/s 3/4/5/7/8/9 of the Act are attracted.

8. After hearing learned counsel for the parties and on perusal of the record, two questions arise: (i) whether there was a violation of Section 15(2) of the Act while conducting a search of the house in question where the applicant was found as a customer of a prostitute. If yes, then as to what will be its effect on the impugned proceeding; and (ii) whether a person who was found as a customer at a place that was being used as a brothel can be held liable u/s 3/4/5/7/8/9 of the Act.

9. So far as the first question is concerned, it would be appropriate to quote Section 15 of the Act as follows:-

"15. Search without a warrant.—*(1) Notwithstanding anything contained in any other law for the time being in force, whenever the special police officer or the trafficking police officer, as the case may be, has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a person living in any premises, and that search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant.*

(2) Before making a search under sub-section (1), the special police officer or the trafficking police officer, as the case may be, shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search, and may issue an order in writing to them or any of them so to do:

Provided that the requirement as to the respectable inhabitants being from the locality in which the place to be searched is situate shall not apply to a woman required to attend and witness the search.

(3) Any person who, without reasonable cause, refuses or neglects, to attend and witness a search under this Section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860).

(4) The special police officer or the trafficking police officer, as the case may be, entering any premises under sub-section (1) shall be entitled to remove therefrom all the persons found therein.

(5) The special police officer or the trafficking police officer, as the case may be, after removing the person under sub-section (4) shall forthwith produce him before the appropriate magistrate.

(5A) Any person who is produced before a magistrate under sub-section (5), shall be examined by a registered medical practitioner for the purposes of determination of the age of such person, or for the detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases.

Explanation.—In this sub-section, "registered medical practitioner" has the same meaning as in the Indian Medical Council Act, 1956.

(6) The special police officer or the trafficking police officer, as the case may be, and other persons taking part in, or attending, and witnessing a search shall not be liable to any civil or criminal proceedings against them in respect of anything lawfully done in connection with, or for the purpose of, the search.

(6-A) The special police officer or the trafficking police officer, as the case may be, making a search under this Section shall be accompanied by at least two women police officers, and where any

woman or girl removed under sub-section (4) is required to be interrogated, it shall be done by a woman police officer and if no woman police officer is available, the interrogation shall be done only in the presence of a lady member of a recognised welfare institution or organisation.

Explanation.—For the purposes of this sub-section and section 17-A,"recognised welfare institution or organisation" means such institution or organisation as may be recognised in this behalf by the State Government.

(7) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply to any search under this Section as they apply to any search made under the authority of a warrant issued under section 94 of the said Code."

10. From the perusal of above-quoted Section, it is clear that Section 15 provides if any place is searched without a warrant, then before searching, a special police officer or trafficking police officer is required to call upon two or more respectable inhabitants of the locality where the place to be searched is situated and at least one of the persons shall be a woman who may be from the same locality or any other locality.

11. In the present case, it is admitted case in the F.I.R. as well as in the search memo that no person was ready to accompany the Special Police Officer during the search of the house in question and even at the time of preparing the search and recovery memos, no public witness was ready to sign, and the police party signed it. Therefore, the provision of Section 15(2) regarding the presence of two witnesses of locality, including a woman, was violated. Thus, the entire search, recovery and arrest in the present case become doubtful. But a question arises whether the violation of Section 15(2) of the Act is itself a ground for quashing of the proceeding.

12. Though in the judgement of Karnataka High Court in the case of ***Shivaraj (Supra)***, relied upon by learned counsel for the applicant, the Hon'ble Single Judge quashed the entire proceeding. Hon'ble Apex Court, in the case of ***Bai Radha vs. State of Gujarat; (1969) 1 SCC 43***, observed that in the absence of any prejudice, having shown by noncompliance with the provision of Section 15(2), proceedings or trial cannot be quashed. However, the Court has to be very careful and cautious in weighing the evidence where there has been such failure on the part of the investigating agency. Paragraph 10 of the above judgement is quoted as follows:-

"10. In conclusion it may be observed that the investigating agencies cannot and ought not to show complete disregard of such provisions as are contained in sub-sections (1) and (2) of Section 15 of the Act. The Legislature in its wisdom provided special safeguards owing to the nature of the premises which have to be searched involving inroads on the privacy of citizens and handling of delicate situations in respect of females. But the entire proceedings and the trial do not become illegal and vitiated owing to the non-observance of or non-compliance with the directions contained in the aforesaid provisions. The court, however, has to be very careful and circumspect in weighing the evidence where there has been such a failure on the part of the investigating agency but unless and until some prejudice is shown to have been caused to the

accused person or persons the conviction and the sentence cannot be set aside. It may not be out of place to reiterate what was said in H.N. Rishbud and Inder Singh v. State of Delhi [1955 (1) SCR 1150] that a defect or an illegality in the investigation, however serious, has no direct bearing on the competency or the procedure relating to cognizance or trial of an offence and that whenever such a situation arises, Section 537 of the Code of Criminal Procedure is attracted and unless the irregularity or the illegality in the investigation or trial can be shown to have brought about a miscarriage of justice, the result is not affected."

13. Section 15(2) of the Act is pari materia with Section 100(4) of Cr.P.C., which also prescribes that before making a search, two or more independent and respectable inhabitants of the locality must be there. Section 100(4) of Cr.P.C. reads as under:-

*"**100(4).** Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do."*

14. Hon'ble Apex Court in the case of ***Kalpnath Rai vs. State (through CBI); (1997) 8 SCC 732***, while interpreting Section 100(4) Cr.P.C. observed that there can be no legal proposition that evidence of police officer is unworthy of acceptance in case of absence of a witness during police raid. At the most, it would cast a duty on the court to adopt greater care while scrutinizing the evidence of the police officer. If the evidence of a police officer is found acceptable, then it would be the erroneous proposition that the court must reject the prosecution version, solely on the ground that no witness was present. Paragraph No. 88 of the above judgement is quoted as under:-

"88. There can be no legal proposition that evidence of police officers, unless supported by independent witnesses, is unworthy of acceptance. Non-examination of independent witness or even presence of such witness during police raid would cast an added duty on the court to adopt greater care while scrutinising the evidence of the police officers. If the evidence of the police officer is found acceptable it would be an erroneous proposition that the court must reject the prosecution version solely on the ground that no independent witness was examined. In Pradeep Narayan Madgaonkar [(1995) 4 SCC 255 : 1995 SCC (Cri) 708] to which one of us (Mukherjee, J.) was a party, the aforesaid position has been stated in unambiguous terms, the relevant portion of which is extracted below: (SCC p. 261, para 11)

"Indeed, the evidence of the official (police) witnesses cannot be discarded merely on the ground that they belong to the police force and are, either interested in the investigating or the prosecuting agency but prudence dictates that their evidence needs to be subjected to strict scrutiny and as far as possible corroboration of their evidence in material particulars should be sought. Their desire to see the success of the case based on their investigation requires greater care to appreciate their testimony."

15. Similarly, in the case of ***Sahib Singh vs. State of Punjab; (1996) 11 SCC 685***, while interpreting Section 100(4) Cr.P.C., the Apex Court observed that the absence of independent witness during the search would affect the weight of the evidence of police officer, though not its admissibility. In the present case, non-presence of independent witnesses, as required u/s 15(2) of the Act, was clearly explained by the police as no one was ready to accompany them to search the house which was being used for prostitution. Therefore, unless a prejudice is shown to be caused to the applicant during trial by the applicant, the prosecution story merely on the violation of Section 15(2) of the Act cannot be thrown out.

16. Therefore, this Court is of the view that lacuna in search is a question that should be decided during trial and proceeding cannot be quashed only on the ground that there is irregularity or non-compliance of Section 15(2) of the Act while conducting the search of a house, being used for prostitution because in practical, none of the persons of locality comes forward to accompany the police in case of search of a brothel. If such ground is considered for quashing the proceedings under the Act, then most of the proceedings will be quashed without going to trial. Hon'ble Apex Court in the case of ***D. Vinod Shivappa vs. Nanda Belliappa; (2006) 6 SCC 456***, also observed that in interpreting a statute, the Court must adopt the construction which suppresses the mischief and advance the remedy. This rule is laid down in ***Heydon's Case (1584) 76 ER 637***. **Therefore, this Court also holds that the direction of Section 15(2) of the Act is directory in nature and not mandatory despite the use of the word "shall" in Section 15(2) of the Act.**

17. So far as the second question of whether a customer found in the brothel is liable to be prosecuted under Sections 3/4/5/7/8/9 of the Act is concerned, Section 3 of the Act provides punishment for keeping or managing or acting or assisting in the keeping or management of a brothel. For reference, Section 3 is quoted below:-

"3. ***Punishment for keeping a brothel or allowing premises to be used as a brothel.****—(1) Any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable on first conviction with rigorous imprisonment for a term of not less than one year and not more than three years and also with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term of not less than two years and not more than five years and also with fine which may extend to two thousand rupees.*

(2) Any person who—

(a) being the tenant, lessee, occupier or person in charge of any premises, uses, or knowingly allows any other person to use, such premises or any part thereof as a brothel, or

(b) being the owner, lessor or landlord of any premises or the agent of such owner, lessor or landlord, lets the same or any part thereof with the knowledge that the same or any part thereof is intended to be used as a brothel, or is willfully a party to the use of such premises or any part thereof as a brothel,

shall be punishable on first conviction with imprisonment for a term which may extend to two years and with fine which may extend to two thousand rupees and in the event of a second or subsequent conviction, with rigorous imprisonment for a term which may extend to five years and also with fine.

(2-A) For the purposes of sub-section (2), it shall be presumed, until the contrary is proved, that any person referred to in clause (a) or clause (b) of that sub-section, is knowingly allowing the premises or any part thereof to be used as a brothel or, as the case may be, has knowledge that the premises or any part thereof are being used as a brothel, if,—

(a) a report is published in a newspaper having circulation in the area in which such person resides to the effect that the premises or any part thereof have been found to be used for prostitution as a result of a search made under this Act; or

(b) a copy of the list of all things found during the search referred to in clause (a) is given to such person.

(3) Notwithstanding anything contained in any other law for the time being in force, on conviction of any person referred to in clause (a) or clause (b) of sub-section (2) of any offence under that sub-section in respect of any premises or any part thereof, any ease or agreement under which such premises have been leased out or are held or occupied at the time of the commission of the offence, shall become void and inoperative with effect from the date of the said conviction."

18. From perusal of Section- 3, it is clear that a customer cannot be said to be keeping or managing or acting or assisting in the keeping or management of a brothel because he simply comes and pays money to get a woman to satisfy his lust and nothing more.

19. So far as Section 4 is concerned, this Section provides punishment for a person who knowingly lives on the earnings of prostitution. For reference, Section 4 is quoted as under:-

***"4. Punishment for living on the earnings of prostitution.**—(1) Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both and where such earnings relate to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years.*

(2) Where any person over the age of eighteen years is proved—

(a) to be living with, or to be habitually in the company of, a prostitute; or

(b) to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that such person is aiding, abetting or compelling her prostitution; or

(c) to be acting as a tout or pimp on behalf of a prostitute,

it shall be presumed, until the contrary is proved, that such person is knowingly living on the earnings of prostitution of another person within the meaning of sub-section (1)."

20. From the perusal of Section 4(1), it is clear that only those persons who either live on the earnings of prostitution or themselves prostitute or work for prostitution to attract customers as a tout or pimp or exercise control, direction or influence over the movements of a prostitute to aid, abet or compel for prostitution. Therefore, a customer will not in any manner fall within the Section 4 of the Act. As a result, any customer who is not earning money from prostitution or helping or abetting the prostitution for money will not be liable to be punished u/s 4 of the Act.

21. So far as Section 5 is concerned, to attract the liability under this Section, a person either procures or attempts to procure a person for prostitution or induces a person with the intention to make him an inmate of a brothel for prostitution or takes or attempts to take a person from one place to another place to carry on the prostitution or induces a person to carry on prostitution. For reference, Section 5 is quoted as under:-

"5. Procuring, inducing or taking person for the sake of prostitution.— (1) any person who—

(a) procures or attempts to procure a person, whether with or without his consent, for the purpose of prostitution; or

(b) induces a person to go from any place, with the intent that he may for the purpose of prostitution become the inmate of, or frequent, a brothel; or

(c) takes attempts to take a person, or causes a person to be taken, from one place to another with a view to his carrying on, or being brought up to carry on prostitution; or

(d) causes or induces a person to carry on prostitution;

shall be punishable on conviction with rigorous imprisonment for a term of not less than three years and not more than seven years and also with fine which may extend to two thousand rupees and if any offence under this sub-section is committed against the will of any person, the punishment of imprisonment for a term of seven years shall extend to imprisonment for a term of fourteen years:

Provided that if the person in respect of whom an offence committed under this sub-section,—

(i) is a child, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years but may extend to life; and

(ii) is a minor, the punishment provided under this sub-section shall extend to rigorous imprisonment for a term of not less than seven years and not more than fourteen years;

(3) An offence under this Section shall be triable—

(a) in the place from which a person is procured, induced to go, taken or caused to be taken or from which an attempt to procure or take such person is made; or

(b) in the place to which he may have gone as a result of the inducement or to which he is taken or caused to be taken or an attempt to take him is made."

22. From the perusal of the above-quoted Section 5, it is clear that a person can be held liable under the said Section only if he procures, induces or takes a person for the sake of prostitution. Section 2(f) of the Act defines the word "Prostitution". For reference, the same is quoted as under:-

"2(f). *"prostitution" means the sexual exploitation or abuse of persons for commercial purposes, and the expression "prostitute" shall be construed accordingly"*

23. From the definition of "prostitution", it is clear that if a person is sexually exploited or abused for commercial purposes (for earning money), only then will there be prostitution. If a person comes to a brothel and pays money for the satisfaction of his lust, then, at the most, it can be said that he procures a woman to satisfy his lust and not for commercial purposes. Therefore, even if a

person procures a woman who is involved in prostitution by paying money to satisfy his lust, he cannot be said to procure or induce the woman for prostitution. Therefore, merely being a customer will not attract the liability u/s 5 of the Act.

24. Section 7 of the Act provides the liability if a person carries on prostitution and the person with whom prostitution is being carried on in the vicinity of any public place. For reference, Section 7 is quoted as under:-

*"**7. Prostitution in or in the vicinity of public places.**—(1) Any person, who carries on prostitution and the person with whom such prostitution is carried on, in any premises, —*

(a) which are within the area or areas, notified under sub-section (3), or

(b) which are within a distance of two hundred metres of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or magistrate in the manner prescribed, shall be punishable with imprisonment for a term which may extend to three months.

(1-A) Where an offence committed under sub-section (1) is in respect of a child or minor, the person committing the offence shall be punishable with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Any person who—

(a) being the keeper of any public place knowingly permits prostitutes for purposes of their trade to resort to or remain in such place; or

(b) being the tenant, lessee, occupier or person in charge of any premises referred to in subsection (1) knowingly permits the same or any part thereof to be used for prostitution; or

(c) being the owner, lessor or landlord, of any premises referred to in sub-section (1), or the agent of such owner, lessor or landlord, lets the same or any part thereof with the knowledge that the same or any part thereof may be used for prostitution, or is wilfully a party to such use,

shall be punishable on first conviction with imprisonment for a term which may extend to three months, or with fine which may extend to two hundred rupees, or with both, and in the event of a second or subsequent conviction with imprisonment for a term which may extend to six months and also with fine which may extend to two hundred rupees, and if the public place or premises happen to be a hotel, the licence for carrying on the business of such hotel under any law for the time being in force shall also be liable to be suspended for a period of not less than three months but which may extend to one year:

Provided that if an offence committed under this sub-section is in respect of a child or minor in a hotel, such licence shall also be liable to be cancelled.

Explanation.—For the purposes of this sub-section, "hotel" shall have the meaning an in clause (6) of section 2 of the Hotel-Receipts Tax Act, 1980 (54 of 1980).

(3) The State Government may, having regard to the kinds of persons frequenting any area or areas in the State,

the nature and the density of population therein and other relevant considerations, by notification in the Official Gazette, direct that prostitution shall not be carried on in such area or areas as may be specified in the notification.

(4) Where a notification is issued under sub-section (3) in respect of any area or areas, the State Government shall define the limits of such area or areas in the notification with reasonable certainty.

(5) No such notification shall be issued so as to have effect from a date earlier than the expiry of a period of ninety days after the date on which it is issued."

25. From a perusal of Section 7, it is clear that this offence can be said to be committed by a person if he carries on prostitution or he is helping in carrying on prostitution in any premises which is in the vicinity of public places. As mentioned above, a customer cannot be said to carry on prostitution or help the prostitution because he does not get involved in running the business of prostitution. Even otherwise, if prostitution is not being carried on in a premises which is in the vicinity of any public place, Section 7 will not be attracted. Word "Public Place" has also been defined u/s 7(1)(a) & (b) of the Act that either the area has been notified as public place or that place is within a distance of 200 meters of any religious worship place, institution of education, hostel, hospital or nursing home, but in the present case, there is nothing on record, showing that the brothel, where the applicant was found as a customer, was in the vicinity of public place as mentioned u/s 7(1)(a) & (b). Therefore, no offence u/s 7 is made out against the present applicant who was simply a customer..

26. So far as Section 8 is concerned, this Section provides punishment for a person if he attempts or endeavours to attempt or attract the attention of any person for the purpose of prostitution in any public place. Therefore, this Section is for the person who is either a prostitute or pimp or touts or attracts in any manner the other person (customer) for the purpose of prostitution. For reference, Section 8 is quoted as under:-

"8. Seducing or soliciting for purpose of prostitution.*—Whoever, in any public place or within sight of, and in such manner as to be seen or heard from, any public place, whether from within any building or house or not—*

(a) by words, gestures, wilful exposure of his person (whether by sitting by a window or on the balcony of a building or house or in any other way), or otherwise tempts or endeavours to tempt, or attracts or endeavours to attract the attention of, any person for the purpose of prostitution; or

(b) solicits or molests any person, or loiters or acts in such manner as to cause obstruction or annoyance to persons residing nearby or passing by such public place or to offend against public decency, for the purpose of prostitution,

shall be punishable on first conviction with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, and in the event of a second or subsequent conviction, with imprisonment for a term which may extend to one year, and also with fine which may extend to five hundred rupees:

Provided that where an offence under this Section is committed by a man, he shall be punishable with imprisonment

for a period of not less than seven days but which may extend to three months."

27. From the perusal of Section 8, it is clear that this Section does not attract any liability on the customer found to be in any brothel. In the present case also, there was no allegation against the applicant that in any manner he was seducing or soliciting any person for the purpose of prostitution at any public place.

28. Section 9 of the Act provides punishment for those persons who have authority over any person, including a woman, and they aid or abet such person for prostitution. However, in the present case, it is undisputed that the applicant was not in the custody or authority or care over the lady "S", who was involved in prostitution. Therefore, Section 9 also does not attract any penalty for the person who was simply a customer without having any authority, charge or custody over the person who was involved in prostitution.

29. In the judgements mentioned above, relied upon by the applicant in support of his second contention, the Gujarat High Court, Karnataka High Court, as well as Andhra Pradesh High Court also observed that merely the presence of a person as a customer at a brothel would not attract the ingredients of offence u/s 3/4/5/7/8/9 of the Act. Paragraph No.5 of the judgement in ***Goenka Sajan Kumar (supra)*** reads as under:-

"5*. None of these sections speaks about punishment to the customer of a brothel house. Admittedly, the petitioner does not fall under the provisions of Sections 3 to 7 of the Act, as the petitioner was not running a brothel house, nor did he allow his premises to be used as a brothel house. The petitioner is not alleged to be living on the earnings of prostitution. It is also not the case of the prosecution that the petitioner was procuring or inducing any person for the sake of prostitution, nor is it the case of the prosecution that any person was earning on the premises where prostitution is carried out."*

30. Similarly, the Andhra Pradesh High Court, in the case of ***Nartu Rambabu (supra)***, relying upon the judgement in ***Goenka Sajan Kumar (supra)***, observed in paragraph No.8 that when a person visits a brothel as a customer, then he is not liable for prosecution for the offence u/s 3/4/5 of the Act.

31. In view of the above analysis, this Court is of the view that if a person visits a brothel, then, at the most, he may be said to be a procurer of a prostitute to satisfy his lust but not for the purpose of prostitution because acquiring a person for prostitution means sexual exploitation or abuse for commercial purposes and not for any other purpose which does not have any commercial purpose or earning money. Therefore, this Court answered both the questions raised in this case. **First**, a search conducted in violation of Section 15(2) of the Act can be said to be irregular but this ground cannot be the basis for quashing the impugned proceeding u/s 482 Cr.P.C. Still, this ground is available during trial, which can be decided on the basis of evidence, which may ultimately make the search doubtful. **Second**, a customer who visits the brothel will not be liable u/s 3/4/5/7/8/9 of the Act.

32. In view of the above analysis, this Court holds that no case u/s 3/4/5/7/8/9 of the Act is made out against the present applicant, therefore, the impugned

proceeding of the Case No. 426 of 2007 (*State vs. Rashmi Srivstava & others*), arising out of Case Crime No. 137 of 2006, under Sections 3/4/5/7/8/9 of the Act, P.S. Sarojini Nagar, District Lucknow, pending before Judicial Magistrate - III, Lucknow, is hereby quashed.

33. Accordingly, the application is **allowed.**

(2024) 2 ILRA 653
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal No. 1 of 2024

Bank of India, Mumbai & Ors. ...Appellants
Versus
Sahajanand Rai & Anr. ...Respondents

Counsel for the Appellants:
Ms. Vatsala

Counsel for the Respondents:
A.S.G.I., Sri Sanjay Kumar Rai, Sri Vijay Chandra, Sri Ashok Khare

A. Service Law – Pensionary Benefits – Bank of India (Employees') Pension Regulations, 1995 – Memorandum of Settlement, 2002 – Respondent, a Cashier-cum-Clerk, removed from service under Clause 6(b) of the Settlement, 2002, claimed pensionary benefits – Clause 6(b) allows superannuation benefits (pension, provident fund, gratuity) to employees removed for gross misconduct, contrary to Regulation 22, which mandates forfeiture of past service upon removal – Held, Clause 6(b) of the Settlement, 2002, overrides Regulation 22, entitling the respondent to superannuation benefits, including pension, if otherwise eligible with 10 years of qualifying service – Supreme Court's ruling in *Bank of Baroda* followed, affirming that denying pension would render Clause 6(b) a fraud settlement – Respondent entitled to pension and leave encashment. (Paras 6, 7, 12, 15, 22, 27, 29, 30)

B. Service Law – Settlement, 2010 – Option to Join Pension Scheme – Settlement, 2010, extended an option to join the pension scheme to employees who served before specified cut-off dates, retired, or died in service – Respondent, removed under Clause 6(b) of the Settlement, 2002, exercised option to join pension scheme – Bank's Circular dated 24.08.2010, excluding removed employees from the pension option, challenged – Held, denying the pension option to an employee entitled to superannuation benefits under Clause 6(b) is impermissible and arbitrary – Respondent, treated at par with other employees entitled to superannuation benefits, eligible to opt for pension under Settlement, 2010. (Paras 9, 10, 17, 24, 26, 27)

C. Service Law – Interpretation of Settlements – Beneficent Construction – Settlements of 2002 and 2010 are binding agreements between the bank and employees, intended to benefit employees – Narrow interpretation excluding removed employees from pension benefits under Settlement, 2010, would contravene the intent of Clause 6(b) of Settlement, 2002 – Held, settlements must be liberally construed to ensure superannuation benefits, including pension and leave encashment, are extended to employees removed under Clause 6(b), consistent with *Bank of Baroda* – Bank's reliance on *UCO Bank* distinguished as it predates Settlement, 2002. (Paras 17, 23, 27, 28, 29)

Special Appeal Dismissed – Respondent Entitled to Pension and Leave Encashment.

List of Cases Cited:

1. Bank of Baroda Vs S.K. Kool (Dead) through Legal Representatives & anr., (2014) 2 SCC 715

2. UCO Bank & ors. Vs Sanwar Mal, (2004) 4 SCC 412

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

1. This intra-court appeal arises out of an order passed by the learned Single Judge, dated 22nd March, 2023, in Writ-A No. 53237 of 2014 whereby the writ petition has been allowed and the respondent-petitioner is held entitled to retiral benefits in light of Clause 6(b) of Memorandum of Settlement, dated 10.4.2002 (hereinafter referred to as 'Settlement, 2002'), notwithstanding a contrary circular issued by the Bank. Reliance is placed upon the judgment of the Supreme Court in Bank of Baroda Vs. S.K. Kool (Dead) through Legal Representatives and another, (2014) 2 SCC 715, to allow the claim of respondent-petitioner.

2. Facts admitted on record are that the respondent-petitioner was employed as Cashier-cum-Clerk in the appellant Bank of India. He was proceeded with departmentally on various charges and ultimately an order of punishment came to be passed against him on 19.9.2002, directing his removal from the service in terms of Clause 6(b) of the Settlement, 2002. This order of punishment was unsuccessfully challenged by the respondent and ultimately his Special Leave to Appeal (Civil) No. 30627 of 2010 got dismissed on 15.11.2010.

3. Pensionary benefits to the employees of bank were governed by the provisions of Bank of India (Employees') Pension Regulations, 1995 (hereinafter referred to as 'Pension Regulations, 1995'). Regulation 2(t) of the Pension Regulations of 1995 defined 'pension' to include the basic pension and additional pension referred to in Chapter VI of the Pension Regulations, 1995. Pensioner meant an employee eligible for pension under the Pension Regulations, 1995. Qualifying service has been defined under Regulation 2(w) and together with Regulation 14 provides it to mean a minimum of 10 years of service in the Bank on the date of his retirement.

4. Regulation 22 of the Pension Regulations, 1995 provided that resignation or dismissal or removal or termination of an employee from the service of the Bank shall entail forfeiture of his entire past services and consequently shall not qualify for pensionary benefits. Regulation 2(y) defined retirement to mean cessation from Bank's service on (a) attaining the age of superannuation specified in Service Regulations or Settlements; (b) voluntary retirement in accordance with provisions contained in Regulation 29; (c) on premature retirement by the Bank before attaining the age of superannuation specified in Service Regulations or Settlement.

5. In terms of the provisions of Pension Regulations, 1995, an employee who is removed from service would have his entire past service forfeited under Pension Regulations, 1995 and shall not qualify for pensionary benefits.

6. It transpires that the Settlement, 2002, entered into between the bank and its employees however provided for a course distinct from the scheme contemplated in the Pension Regulations, 1995. Clause 6(b)

of the Settlement, 2002, is relevant and is reproduced hereinafter:-

"6. An employee found guilty of gross misconduct may;

(a)……

(b) be removed from service with superannuation benefits i.e. Pension and /or Provident Fund and Gratuity as would be due otherwise under the Rules or Regulations prevailing at the relevant time and without disqualification from future employment, or."

7. Appellant was punished vide order dated 19.9.2002 in terms of Clause 6(b) of the Settlement, 2002, and, therefore, notwithstanding his removal from service the respondent became entitled to superannuation benefits i.e. Pension and/or Provident Fund and Gratuity as would otherwise be due under the Rules or Regulations prevailing at the relevant time and without disqualification from future employment.

8. At the time of removal of respondent from service in terms of Clause 6(b) of the Settlement, 2002, there existed a scheme of Contributory Provident Fund for the employees of the Bank. An earlier Memorandum of Settlement, dated 29th October, 1993 was arrived at, as per which, pension in lieu of Contributory Provident Fund was introduced, in respect of the employees who opted for the said pension scheme.

9. A representation was made by the united forum of Bank Unions for an option to be extended to those employees who were in the employment of Bank prior to 29th September, 1995 in case of Nationalized Banks and 26th March, 1996 in case of Associate Banks of State Bank of India. The talks between management and Union ultimately lead to a fresh settlement notified on 27th April, 2010 (hereinafter referred to as 'Settlement, 2010'). Settlement, 2010 gave another option to the employees of Bank to join existing pension scheme to the specified category of employees. Clause 2 and 4 of the terms of settlement are relevant and are reproduced hereinafter:-

"(2) Another option for joining the existing Pension Scheme shall be extended to those employees who:-

(I) (a) were in the service of the bank prior to 29 September 1995 in case of Nationalized Banks/26 March 1996 in case of Associate Banks of State Bank of India and continue in the service of the bank on the date of this Settlement;

(b) exercise an option in writing within 60 days from the date of offer, to become a member of the Pension Fund and

(c) authorise the Trust of the Provident Fund of the bank to transfer the entire contribution of the bank along with interest accrued thereon to the credit of the Pension Fund.

(II) (a) were in service of the bank prior to 29th September 1995 in case of Nationalized Banks/26th March 1996 in case of Associate Banks of State Bank of India and retired after that date and prior to the date of this Settlement;

(b) exercise an option in writing within 60 days from the date of offer to become a member of the Pension Fund and

(c) refund within 30 days after expiry of the said period of 60 days, the entire amount of the banks contribution to the Provident Fund and interest accrued thereon received by the employee on retirement together with his share in contribution towards meeting 30% of Rs.3115 crores which is estimated and

reckoned as the funding gap for those eligible under Clause 2(II), 2(III) and 2(IV) of this agreement. On an individual basis, the payment over and above the bank's contribution to Provident Fund and interest thereon has been worked out at 56% of the said amount of bank's contribution to Provident Fund and interest thereon received by the employee on retirement.

(III) The family of those employees who were in the service of the bank prior to 29th September 1995 in case of Nationalized Banks/26th March 1996 in case of Associate Banks of State Bank of India retired after that date and died will be eligible for family pension, provided-

(a) the family of the deceased employee exercises option in writing within 60 days of the offer to become a member of the Pension Fund and

(b) refund within 30 days after expiry of the said period of 60 days, the entire amount of the bank's contribution to the Provident Fund and interest accrued thereon received by the deceased employee on retirement together with his share in contribution towards meeting 30% of Rs.3115 crores which is estimated and reckoned as the funding gap for those eligible under Clause 2(II), 2 (III) and 2(IV) of this agreement. On an individual basis, the payment over and above the bank's contribution to Provident Fund and interest thereon has been worked out at 56% of the said amount of bank's contribution to Provident Fund and interest thereon received by the employee on retirement.

(IV) The family of those employees who were in the service of the bank prior to 29th September 1995 in case of Nationalized Banks / 26th March 1996 in case of Associate Banks of State Bank of India, but have died while in service of the bank after that date will be eligible for family pension, provided –

(a) the family of the deceased employee exercises an option in writing within 60 days of the offer to become a member of the Pension Fund and

(b) refund within 30 days after expiry of the said period of 60 days mentioned above, the entire amount of the bank's contribution to the Provident Fund and interest accrued thereon received upon death of the employee together with his share in contribution towards meeting 30% of Rs.3115 crores which is estimated and reckoned as the funding gap for those eligible under Clause 2(II), 2(III) and 2(IV) of this agreement On an individual basis, the payment over and above the bank's contribution to Provident Fund and interest thereon has been worked out at 56% of the said amount of bank's contribution to Provident Fund and interest thereon received on death of the employee."

10. The petitioner invoked the provisions of the Settlement, 2010 and submitted an option to receive pension vide his letter dated 1.10.2010. He also claimed benefit of leave encashment. Such claim of the respondent-petitioner came to be rejected by the Bank of India vide its order dated 13.10.2010. Clause 3 of the Circular, dated 24.8.2010, has been relied upon by the Bank for rejection of the claim of respondent, which is reproduced hereinafter:-

"3. It also may be noted that the employees who have ceased to be in the service of Bank on account of Resignation / Voluntarily retired under officer's Service Regulation 19/ Incapacitation / on medical grounds/any other type of cessation on account of penalty proceedings are not eligible to opt for joining the Pension Scheme. Also existing Pension optees

cannot revoke their option from Pension to CPF"

11. Aggrieved by the rejection of his claim to opt for pension scheme the respondent filed Writ Petition No. 53237 of 2014. Orders passed by the authority rejecting petitioner's claim dated 13.10.2010, as affirmed by the Regional Deputy Manager on 11.8.2014, were challenged. Para 3 of the Circular, dated 24.8.2010 also was put to challenge. A prayer was made to direct the Bank to release pension from 20th September, 2002 alongwith arrears within time to be specified by this Court.

12. A question arose as to whether pensionary benefits would be admissible to an employee of the Bank, who has put in 10 years qualifying service, if an order of removal has been passed against him in terms of Clause 6(b) of the Settlement, 2002. This was because Regulation 22 of the Pension Regulations, 1995 clearly dis-entitled an employee from pension whereas Clause 6(b) protected superannuation benefits i.e. Pension and/or Provident Fund. The issue was specifically examined in para 13 to 17 of the judgment of the Supreme Court in Bank of Baroda (supra). The Court examined the intent of the Bipartite Settlement and emphatically held that if Regulation 22 of the Pension Regulation, 1995, providing for forfeiture of service is to prevail then Clause 6(b) of the Settlement, 2002 would clearly be a fraud settlement. Para 13 to 17 of the judgment in Bank of Baroda (supra) are reproduced hereinafter:

"13. Regulation 22 of the Regulations, which is relied on to deny the claim of the employee reads as follows:

"22. Forfeiture of service.—(1) Resignation or dismissal or removal or termination of an employee from the service of the Bank shall entail for forfeiture of his entire past service and consequently shall not qualify for pensionary benefits."

From a plain reading of the aforesaid Regulation, it is evident that removal of an employee shall entail forfeiture of his entire past service and consequently such an employee shall not qualify for pensionary benefits. If we accept this submission, no employee removed from service in any event would be entitled for pensionary benefits. But the fact of the matter is that the Bipartite Settlement provides for removal from service with pensionary benefits "as would be due otherwise under the rules or regulations prevailing at the relevant time". The consequence of this construction would be that the words quoted above shall become a dead letter. Such a construction has to be avoided.

14. The Regulations do not entitle every employee to pensionary benefits. Its application and eligibility is provided under Chapter II of the Regulations whereas Chapter IV deals with qualifying service. An employee who has rendered a minimum of ten years of service and fulfils other conditions only can qualify for pension in terms of Regulation 14 of the Regulations. Therefore, the expression "as would be due otherwise" would mean only such employees who are eligible and have put in minimum number of years of service to qualify for pension. However, such of the employees who are not eligible and have not put in required number of years of qualifying service shall not be entitled to the superannuation benefits though removed from service in terms of Clause 6(b) of the Bipartite Settlement. Clause 6(b) came to be inserted as one of the punishments on account of the Bipartite Settlement. It provides for payment of

superannuation benefits as would be due otherwise.

15. The Bipartite Settlement tends to provide a punishment which gives superannuation benefits otherwise due. The construction canvassed by the employer shall give nothing to the employees in any event. Will it not be a fraud Bipartite Settlement? Obviously it would be. From the conspectus of what we have observed we have no doubt that such of the employees who are otherwise eligible for superannuation benefit are removed from service in terms of Clause 6(b) of the Bipartite Settlement shall be entitled to superannuation benefits. This is the only construction which would harmonise the two provisions. It is well-settled rule of construction that in case of apparent conflict between the two provisions, they should be so interpreted that the effect is given to both. Hence, we are of the opinion that such of the employees who are otherwise entitled to superannuation benefits under the Regulations if visited with the penalty of removal from service with superannuation benefits shall be entitled for those benefits and such of the employees though visited with the same penalty but are not eligible for superannuation benefits under the Regulations shall not be entitled to that.

16. Accordingly, we hold that the employee's heirs are entitled to superannuation benefits. The entire amount that the respondent is found entitled to along with interest @ 6% per annum should be disbursed within 6 weeks from the date of receipt/communication of this order.

17. In the result, we do not find any merit in this appeal and it is dismissed accordingly with costs of Rs 50,000 (Rupees fifty thousand) to be paid by the appellant to Respondent 1 along with other dues and within the time stipulated above."

13. In view of the law laid down by the Supreme Court in Bank of Baroda (supra), the superannuation benefits in the form of Contributory Provident Fund have been paid to the respondent. A supplementary affidavit has been filed by the Senior Manager of the Bank clearly acknowledging the payment made to respondent of contributory pension scheme.

14. From the facts brought on record it is, therefore, admitted to the appellant Bank that in terms of Clause 6(b) of the Settlement, 2002, as interpreted by the Supreme Court in Bank of Baroda (supra) the respondent was entitled to superannuation benefits and such benefits in terms of the earlier scheme i.e. contributory provident fund was actually paid to the respondent.

15. The short question that then arises in the facts of the case is as to whether the option extended in the Settlement, 2010, to opt for pension would be available to the respondent, or not?

16. Ms. Vatsala appearing for the Bank submits that the Settlement, 2010, restricts the benefit of scheme only to retired employees or to those who have voluntarily retired from service. The option to be exercised for pension was not available to an employee of the Bank who had been removed from service. Clause 3 of the Circular of the Bank is also relied upon, as per which, the benefit to opt for pension would only be available to those who have retired and not to those who have been terminated or removed from service by way of punishment.

17. Sri Ashok Khare, learned Senior Counsel, per contra, submits that Cause 6(b) of the Settlement, 2002, clearly extends superannuation benefits also to an employee who has been removed from service. It is, therefore, submitted that the status of a removed employee would be at par with any other retired employee who is entitled to superannuation benefits. It is urged that there is no cogent reason to exclude an employee from the benefit of the Settlement of 2010 who has been removed from service under Clause 6(b) of the Settlement, 2002, when superannuation benefits have otherwise been extended to him under the Settlement.

18. Learned Senior Counsel submits that if the Settlement of 2010 is interpreted in the manner suggested by the appellant then an employee removed under Clause 6(b) would be dis-entitled to superannuation benefits like Pension/Provide Fund which are otherwise protected under the Settlement of 2002. Sri Khare, therefore, submits that the judgment of learned Single Judge suffers from no infirmity in law and the instant special appeal lacks merit.

19. We have heard learned counsel for the parties and have perused the provisions of the Pension Regulation, 1995; Settlement, 2002 as well as Settlement, 2010. Circular issued by the Bank on 24.8.2010 interpreting the Settlement of 2010 has also been perused by us.

20. It is undisputed that respondent was removed from service under Clause 6(b) of the Settlement, 2002. Clause 6(b) clearly provides that an employee found guilty of gross misconduct may be removed from service with superannuation benefits i.e. Pension and/or Provident Fund and Gratuity as would be due otherwise under the Rules or Regulations prevailing at the relevant time and without disqualification from future employment. Clause 6(b) is unique, inasmuch as, it empowers the employer to remove an employee without natural consequences of it allowed as per service jurisprudence i.e. forfeiture of past service. But for the Settlement, 2002, the Pension Regulations, 1995 would have applied and consequently on account of removal from service the respondent would have been denied superannuation benefits. However, in view of Clause 6(b) of the Settlement, 2002, the respondent has been held entitled to superannuation benefits. Such superannuation benefit in the form of contributory provident fund alone was payable since the respondent had not opted for pension, etc. In the event he had opted for pension earlier he would have been entitled to it. The entitlement of respondent to superannuation benefits is thus admitted to the Bank.

21. It is in this context that we are to examine as to whether the right created in a bank employee to opt for pension could be denied to an employee who has been removed from service under clause 6(b) of the Settlement of 2002?

22. In Bank of Baroda (supra), the Supreme Court has clearly held that the employees who are otherwise eligible for superannuation benefit, if are removed from service in terms of Clause 6(b) of the Settlement of 2002, shall be entitled to superannuation benefits.

23. We have perused the Pension Regulations, 1995, which contemplates payment of pension to an employee who has retired from service. Retirement has been defined under Regulation 2(y) of the

Pension Regulations, 1995 to mean cessation from Bank's service on attaining the age of superannuation specified in Service Regulations or Settlements; on voluntary retirement in accordance with provisions contained in Regulation 29 of the Regulation; on premature retirement by the Bank before attaining the age of superannuation. Under the Pension Regulations, 1995, no pension is payable to an employee, who is removed from service. The right to receive pension to an employee removed from service flows from the Settlement of 2002. The Settlement of 2002 will have an overriding effect, inasmuch as, the settlement mandatorily binds the employer and employee alike. The settlement of 2002 cannot be read in a manner so as to deny its benefit to an employee contrary to the express stipulations made therein.

24. Once the Settlement of 2002 allows superannuation benefits in the form of Pension and/or Provident Fund and Gratuity to an employee removed from service under Clause 6(b), it would not be open for the employer to contend that option to opt for pension can be denied to someone who is otherwise entitled to superannuation benefits.

25. The Settlement of 2010 extends option to opt for pension scheme to the employees; (i) who were in employment on the cut-off date and were in service of the bank on the date of settlement; (ii) were in service of the bank on the cut-off date and retired after that date and prior to the date of settlement; (iii) to employees who were in service of the bank on the cut-off date and retired after that date and died would be entitled to family pension; (iv) employees in employment of Bank on the cut-off date but have died while in service of the Bank after that date are also entitled to family pension.

26. Clause 4 extended the benefit of pension to those who voluntarily retired under special scheme provided they had worked for 15 years. This clause apparently will not apply in the case of the respondent-petitioner since his period of working is less than 15 years and he has otherwise not retired voluntarily. Clause 2(ii) of the Settlement, 2010, however, would be applicable in the present case as the respondent had completed the requisite qualifying service and became entitled to superannuation benefits in terms of Settlement of 2002. The Settlement of 2010 is otherwise a beneficent provision introduced for the advancement of the cause of employees of the Bank and its provisions will have to be liberally construed. The option to opt for Pension Regulations under the Settlement of 2010 is seen to have been extended to all category of employees who are otherwise entitled to superannuation benefits. Denial of the option to the respondent to opt for pension virtually eliminates him from the category of persons who are entitled to superannuation benefits. This would be impermissible and arbitrary.

27. Once Clause 6(b) of the Settlement of 2002 allows superannuation benefits to an employee removed from service he will have to be treated at par with any other employee of the Bank who is entitled to superannuation benefits. Any other construction would clearly go against the express terms and intent of the settlement arrived at between the Bank and its employees. Such construction would also go contrary to the spirit of the rights recognized in an employee removed from service under Clause 6(b) of the Settlement

of 2002 by the Supreme Court in Bank of Baroda (supra).

28. Ms. Vatsala has placed reliance upon a judgment of the Supreme Court in UCO Bank and others Vs. Sanwar Mal, (2004) 4 SCC 412. This judgment although interpreted Regulation 22 but had not taken note of the settlement of 2002 which subsequently came to be arrived at between the employees and the Bank. Clause 6(b) of 2002 Settlement, with which we are concerned, did not fall for consideration in UCO Bank (supra). The ratio of law laid down by the Supreme Court in UCO Bank (supra) relying upon Clause 22 of the Pension Regulations, 1995, would thus not have any relevance in the present controversy.

29. Having examined the respective submissions advanced at the bar, we are of the considered view that the superannuation benefits including pension, etc., made admissible to an employee removed from service under Clause 6(b) of the Settlement of 2002 ought not to be interpreted in a narrow sense. It ought to be given a construction consisting with the nature of settlement i.e. beneficent for the employee. Any narrow construction would not subserve the objective of the Settlement of 2002. We, therefore, find ourselves to be in agreement with the view expressed by the learned Single Judge in extending offer to the respondent to opt for pension upon terms indicated in the Settlement of 2002. The appeal filed by the Bank, accordingly, fails.

30. We are inclined to take similar view in the matter of leave encashment also as under the applicable regulations and circular of the Bank leave encashment is admissible to an employee who is entitled to superannuation benefits and pension. Once we hold that the respondent is entitled to opt for pension under the Settlement of 2010, and has otherwise been extended superannuation benefits in the form of Contributory Provident Fund, there would be no good ground to deny the benefit of leave encashment to the respondent. No applicable provision of law is shown which dis-entitles the respondent to payment of leave encashment notwithstanding the Settlement of 2002.

31. For the reasons and discussions held above, this appeal fails and is, consequently, dismissed. Costs made easy.

(2024) 2 ILRA 661
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal Defective No. 57 of 2024

Bhagwan Singh ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Akash Khare

Counsel for the Respondents:
C.S.C.

A. Service Law – Seasonal Collection Peon – Denial of Engagement – Appellant, a Seasonal Collection Peon, challenged the dismissal of his writ petition seeking restoration of services and payment of salary – Respondents allegedly overlooked his seniority (serial no. 187) and engaged juniors based on a

complaint against him – Learned Single Judge dismissed the writ petition, relying on unverified allegations in the complaint – Held, allegations in a complaint cannot be treated as adjudicated facts without verification or formal inquiry – No counter affidavit was invited, nor was the appellant's appointment legality examined – Learned Single Judge's findings on appellant's minority or criminal antecedents unsustainable without evidence – Writ petition dismissal set aside. (Paras 2, 3, 4)

B. Service Law – Natural Justice – Adjudication Requirement – Denial of appellant's engagement as Seasonal Collection Peon based on unverified complaint violates principles of natural justice – Held, competent authority must examine the appellant's claim regarding denial of work and seniority – No conclusion can be drawn from a private complaint without formal adjudication or verification of allegations – Respondent no. 3 directed to consider appellant's claim and pass a reasoned order within two months. (Paras 4, 5)

Special Appeal Allowed – Writ Petition Order Set Aside – Matter Remanded for Consideration.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

Order on Delay Condonation Application

1. Heard learned counsel for the parties.

2. Reasons for delay in filing the special appeal have been satisfactorily explained. Delay Condonation Application is consequently allowed. Office is directed to treat the appeal as having been filed within time. Regular Number would be allotted to the appeal.

Order on Special Appeal

1. Appellant filed the writ petition before the learned Single Judge with the prayer to direct the respondent authorities to restore his services as Seasonal Collection Peon in Tehsil Kiraoli, District-Agra and pay his salary month to month within some period to be fixed by this Court. In the writ petition, the petitioner stated that he was placed at serial no.187 and the authorities by ignoring his seniority have proceeded to engage others who were much junior to him, overlooking his claim. It was alleged that on account of some motivated complaint, the authorities were not allowing the petitioner to work.

2. Learned Single Judge has dismissed the writ petition after taking note of the contents of the complaint made against him. Learned Single Judge has observed that the allegations made in the complaint since are not disputed, as such the ouster of the name of the petitioner from the list of Seasonal Collection Peon seems to be justified.

3. Learned counsel for the appellant submits that the allegations made in the complaint cannot be treated to be an adjudication on the charges levelled against him and without adverting to the veracity of the allegations made in the complaint, the petitioner cannot be held dis-entitled to continue as Seasonal Collection Peon.

4. We find substance in the argument advanced on behalf of the appellant that in the absence of any adjudication, the allegations made in the complaint cannot be treated as correct. There is nothing on record to show that any of the authorities have examined the legality of the appointment offered to the appellant nor the appellant's claim regarding denial of work has so far been attended to by the

competent authority. Learned Single Judge could not have drawn conclusion from the allegations contained in the complaint even if the petitioner had not elaborately explained the allegations in the writ. Further, the findings returned by the learned Single Judge holding appellant-petitioner to be minor at the time of appointment or having criminal antecedents could not be returned on the basis of a complaint made by some private person. Neither any counter affidavit was invited in the writ nor the averments made in the complaint were verified. Consequently and for the reasons narrated above, the judgment and order passed by learned Single Judge on 17.08.2023 cannot be approved. The order of learned Single Judge dated 17.08.2023 is set aside.

5. The writ petition and the Special Appeal both are disposed of with a direction upon the respondent no.3 to accord consideration to petitioner's claim with regard to denial of engagement as Seasonal Collection Peon overlooking his seniority, by passing a reasoned order within a period of two months.

(2024) 2 ILRA 663
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.01.2024

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Writ - A No. 265 of 2024
And
Writ – A No. 268 of 2024

Sunil Kumar Pandey PNR No. 062018210 & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
M.P. Raju

Counsel for the Respondents:
C.S.C.

Service Law – U.P. Police Regulations – Rule 523 – Transfer and Relieving Orders – Petitioners challenged transfer orders dated 05.06.2023 and 27.05.2023, and relieving orders dated 14.11.2023, 06.11.2023, and 15.12.2023, alleging non-compliance with Rule 523 requiring relieving within 10 days of transfer – Held, delayed relieving orders violate Rule 523, reflecting arbitrariness and non-uniform policy application – *Param Singh Vs St. of U.P.* followed, emphasizing adherence to transfer policy unless justified by recorded reasons – Judicial restraint in interfering with policy decisions reiterated, but non-compliance with regulations warrants intervention – Director General of Police directed to investigate non-compliance with Rule 523, report district-wise violations within 60 days, and propose punitive actions – Relieving orders stayed until 30.04.2024, petitioners to join new postings within a week thereafter – Uniform transfer policy implementation emphasized for transparency and accountability. (Para 12-28)

Writ petitions disposed of.

List of Cases Cited:

1. Sardaj Ali PNR No. 012642278 Vs St. of U.P.; (not fully cited in judgment)

2. Head Constable Harendra Kumar Ram Vs St. of U.P.; (not fully cited in judgment)

3. Head Constable Ravindra Kumar & ors. Vs St. of U.P.; (not fully cited in judgment)

4. Ainuddin PNR No. 912412830 Vs St. of U.P.; (not fully cited in judgment)

5. S.I. Surendra Kumar Dwivedi & ors. Vs St. of U.P.; (not fully cited in judgment)

6. Abhay Ram & anr.Vs St. of U.P.; (not fully cited in judgment)

7. Head Constable Shubhash Chandra Vs St. of U.P.; (not fully cited in judgment)

8. Anil Kumar & ors. Vs St. of U.P.; (not fully cited in judgment)

9. Ali Ahmad Vs St. of U.P.; (not fully cited in judgment)

10. Vitaralli Vs Seaton; (not fully cited in judgment)

11. A.S. Ahluwalia Vs St. of Pun.; (not fully cited in judgment)

12. Sukhdev Vs Bhagat Ram; (not fully cited in judgment)

13. Param Singh & ors. Vs St. of U.P.; (not fully cited in judgment)

14. Breen Vs Amalgamated Engineering Union; (not fully cited in judgment)

(Delivered by Hon'ble Vinod Diwakar, J.)

1. The facts of both the petitions are similar, and the prayers made thereof are also similar; therefore, both the petitions are being decided by this common judgment.

2. I have heard Shri M.P. Raju and Shri Anupam Shukla, learned counsel for the petitioners, learned Standing Counsel for the State-respondents in respective petitions, and perused the records.

3. The Writ-A No.265 of 2024 has been filed with a prayer to quash the impugned relieving order dated 14.11.2023 passed by the Deputy Commissioner of Police, Lucknow, as well as the transfer order dated 5.6.2023 passed by Deputy Inspector General of Police (Karmik), Lucknow. A further prayer has been made to direct the respondents to allow the petitioners to work on the present place of posting and pay their salary regularly every month.

4. Learned counsel for the petitioners in the aforesaid writ petition submits that the impugned order dated 14.11.2023 passed in pursuance of the transfer order dated 5.6.2023 is illegal and arbitrary. The relieving order dated 14.11.2023 has been passed in defiance of Rule 523 of the U.P. Police Regulations. The petitioners have also raised certain personal reasons for not complying with the impugned order dated 14.11.2023. He further submits that while issuing the transfer orders and thereafter relieving orders, no uniform policy has been adopted by the Department, and that is why the favoritism and non-application of mind are reflected in the impugned order. Learned counsel further states that Chapter XXXIV, Rule 523 of the U.P. Police Regulations mandates the issuance of a relieving order within 10 days after the passing of the transfer order.

5. Another Writ-A No.268 of 2024 has been filed with the prayer to quash the impugned transfer order dated 27.5.2023 as well as relieving orders dated 6.11.2023 and 15.12.2023. A further prayer has been made to direct the respondents to permit the petitioners to discharge their duties at the present place of posting till academic session 2023-24 (April 2024).

6. Learned counsel for the petitioners further submits that the impugned order dated 14.11.2023 passed in pursuance of the transfer order dated 5.6.2022 is illegal and arbitrary. The relieving order dated 14.11.2023 has been passed in defiance of Chapter XXXIV, Rule 523 of the U.P. Police Regulations. He further submits that while issuing the transfer orders, and therefore relieving orders, no uniform

policy has been adopted by the Department, and that is why the favoritism and non-application of mind are reflected in the impugned order. Learned counsel further states that Rule 523 of the U.P. Police Regulations mandates issuing a relieving order within 10 days after passing the transfer order.

7. In both the writ petitions, the learned counsel for the parties has drawn the attention of this Court to the Rule 523 of the Chapter XXXIV of the U.P. Police Regulations. Rule 523 contained in Chapter XXXIV of the U.P. Police Regulations is outlined herein under:

"On receipt of an order of transfer of a subordinate officer to another district the Superintendent will arrange to relieve him to his duties within.

Officers transferred are entitled to joining time, but the Superintendent may not grant leave to an officer under order of transfer.

An inspector relieved on transfer from another district is entitled to sign a certificate of taking over charge from the date of arrival in the new district. If the officers to be relieved cannot be present at headquarters, the charge certificate should be signed for him by the Superintendent of Police, or, in his absence, by an Assistant Superintendent of Police or Deputy Superintendent of Police. The effect of this will be that an officiating officer will be considered to have been reverted, and permanent incumbent's joining time or leave or discharge, will be counted from the date on which the relieving officer takes over charge"

8. Learned counsel for the petitioners has also relied upon the office order dated 7.6.2023 being no.9/2023/262/General/47-Ka-4-2023-(1/3/96) issued by Chief Secretary, Government of Uttar Pradesh and letter dated January 14, 2022 issued by the Director General of Police, Uttar Pradesh in which the parameters to regulate the transfer of the police officers/Head Constables/Constables have been discussed.

9. To fortify their argument, both the learned counsels for the petitioners have relied upon the series of orders passed by the co-ordinate Benches of this Court, whereby the transfer order has been either struck down by this Court on the similar ground of non-compliance of Rule 523 or because of the reasons that the transfer orders have been issued in the mid academic session of the petitioners' children. The details and gist of the orders annexed with the instant petitions are outlines hereinafter for illustrative purpose; ***(i)*** *Sardaj Ali PNR No.012642278 v. State of U.P. through Principal Secretary, Department of Home and others1;* ***(ii)*** *Head Constable Harendra Kumar Ram v. State of U.P. through Principal Secretary Home and another2;* ***(iii)*** *Head Constable Ravindra Kumar and 33 others v. State of U.P. through Principal Secretary Department Home and others3;* ***(iv)*** *Ainuddin PNR No. 912412830 v. State of U.P. through Principal Secretary Department Home and others4;* ***(v)*** *S.I. Surendra Kumar Dwivedi and 2 others v. State of U.P. through Principal Secretary Department Home, Lucknow5;* ***(vi)*** *Abhay Ram and another v. State of U.P. through Principal Secretary Department Home, Lucknow6;* ***(vii)*** *Head Constable Shubhash Chandra v. State of U.P. through Principal Secretary Department Home, Lucknow and others7;* ***(viii)*** *Anil Kumar and others v. State of U.P. through Principal Secretary Department Home, Lucknow and others8;*

and ***(ix)*** *Ali Ahmad v. State of U.P. through Principal Secretary Department Home, Lucknow and others9.*

10. The above-stated writ petitions have been disposed of/decided mainly on the ground either for non-compliance with the transfer policy issued from time to time by the government or floating of various government orders issued in this regard. For example, in *Sardaj Ali PNR No.012642278 v. State of U.P. through Principal Secretary, Department of Home and others*1, the co-ordinate Bench of this Court stayed the transfer order apparently for non-compliance of the prior approval of the Chief Minister in pursuance of the government order dated 16.8.2022; in *Head Constable Harendra Kumar Ram v. State of U.P. through Principal Secretary Home and another*2, the transfer order has been kept in abeyance till academic session of the petitioner's son is over; in *Head Constable Ravindra Kumar and 33 others v. State of U.P. through Principal Secretary Department Home and others*3, the liberty was granted to 34 petitioners to file a fresh representation to the Director General Police Establishment for reconsideration of the transfer which was done in the mid academic session of the children even though the petitioner's had completed their postings ranging from 10-15 years at a particular station. Likewise, the co-ordinate Bench of this Court disposed of the case S.I. Surendra Kumar Dwivedi and 2 others v. State of U.P. through Principal Secretary Department Home, Lucknow5 in the following terms:

"Heard learned counsel for parties.

All the writ petitions have been clubbed together as the issue involved in these petitions is the same as to whether the authority was justified in relieving the petitioners after two years of the transfer order having been passed. The transfer order in all cases were passed in the year 2014, in spite of it, on account of administrative exigencies, the need for adequate number of personnel at Lucknow, which is the State capital, they could not be relieved. Normally considering the lapse of time the appropriate course for the respondents was to re-consider the matter and pass a fresh order of transfer as has been held by this Court in the judgment dated 6.7.2016 passed in writ petition no.15148 (SS) of 2016 which has been followed by a co-ordinate bench in writ petition no.15961 (SS) of 2016, therefore only for this reason while granting liberty to the respondents to have a fresh look at the matter and pass a fresh order expeditiously say within a period of 2 weeks, the impugned orders are hereby quashed.

All the writ petitions stand disposed of in the aforesaid terms."

11. Similarly, the case of *Anil Kumar and others v. State of U.P. through Principal Secretary Department Home, Lucknow and others*8 was disposed of with the underlined observations:

"Be that as it may, since there is statutory prescription for relieving of a police officer within a period of ten days and this Court has condemned the delayed relieving of the police officers in various orders being passed by this Court in identical matter, therefore, the instant writ petition is disposed of finally quashing the impugned order dated 04.03.2020, so far as it relates to the petitioners, however, with liberty to the opposite parties to pass a fresh order of transfer, if exigency of service so requires, strictly in accordance

with law and the transfer policy, particularly considering the aspect of mid session."

12. On perusal of the order passed by this court, it transpires that such non - non-compliance is frequent, and it seems the department has no concern to the orders passed by this Court. There seems to be no effect on the working of the department so far as the transfer of the police officers is concerned, and such non-compliance is frequent. The reasons for not giving adherence to the orders passed by this Court may be best known to the officers, but its apparently reflected that this is adversely affecting the working of the police force and impacting the State's interest.

13. The executive authority is bound by the norms, standards, and procedures laid down by it to regulate the police of the State. In this regard, **Mr. Justice Frank Furter** in **Vitaralli v. Seaton**10, enunciated the Rule as under:

"An executive agency must be rigorously held to the standards by which it professes its action to be judged..... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

14. The Supreme Court accepted the Rule as valid and applied in India in **A.S. Ahluwalia v. State of Punjab**11 and in the subsequent decision given in **Sukhdev v. Bhagat Ram**12. It may be noted that this Rule though supportable also as an emanation from Article 14, does not merely rest on that Article. It is an independent existence apart from Article 14. It is a rule of administrative law that has been judicially evolved as a check against the exercise of arbitrary power by the executive authority. It is indeed unthinkable that in a democracy governed by the rule of law, the executive government or any of its officers possesses arbitrary power over the interest of the individual. Every action of the executive government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimum requirement13.

15. This Court in **Param Singh and others v. State of U.P. and others**14 has discussed the legal framework with regard to the transfer of the government servant. Transfer is a condition of service, and a government servant has no vested right to remain posted at the place of his/her choice. The court should not interfere with the transfer order, which is made in the public interest and for administrative reasons, unless an order of transfer is shown to be the outcome of a *malafide* exercise or stated to be in violation of statutory provisions prohibiting any such transfer. For clarity, para 18, 19, 26, 28 & 31 of the judgement are extracted herein under:

"18. Guided by the settled principles of law, referred above, we find that the appellants are members of a disciplined force, therefore, they are not expected to disobey the order of their transfer and if they have some personal problem or the transfer has been passed against the transfer policy, it is open to them to move a representation to the

appropriate authority for redressal of their grievance. In case it is found that they have some personal problem, the authorities ought to consider their grievance and pass appropriate order and shall make an endeavour to address the same. In the cases of genuine problems the representations of the Government employees should not be rejected mechanically.

19. It is true that if a transfer order is passed in violation of administrative order/transfer policy, it does not confer a vested right to the Government employee to challenge it but at the same time, as observed by the Supreme Court in the abovementioned cases, while transferring the Government employee the authority concerned should keep in mind the transfer policy and the executive orders.

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26. A policy/policy decision/policy matter is made by Government after considering all the points from different angles, while framing the policy the Government also takes into consideration the administrative efficiency and other incidental matters. Once the Government takes a policy decision, it is obligatory on its officials to execute its policy in the right earnest and to achieve the objects of the policy. The rule of the law casts a duty on the administrative functionaries to act within the framework of the law, be it law made by the legislature, subordinate legislation or executive orders issued under Article 73 and 162 of the Constitution. They are also obliged to follow the circulars/memos and instructions issued by the Government. In the matter of policy decision of the Government, it is trite that Courts, in exercise of their jurisdiction, will not transgress into the field of policy decision. Court's interference is called for only on limited grounds, when it suffers from unreasonableness, arbitrariness or it is beyond legislative power or is beyond constitutional limits or public policy or against statutory provision. If the Courts have treated the policy/policy decision/policy matter on such a high pedestal then Government's own employees/officials cannot be allowed to breach and ignore its order with impunity.

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28. In our view, the Government is bound by its policy. However, if for some reasons due to administrative exigency or public interest it becomes necessary to deviate from it then proper course is to record brief reasons at best on the file to justify the deviation from the policy. Earlier, the traditional view in England was that executive is not answerable where its action was attributed to administrative functions. ***Lord Denning MR. in Breen v. Amalgamated Engineering Union (now Amalgamated Engineering and Foundry Workers Union)****15, observed thus:*

"The giving of reasons is one of the fundamentals of good administration."

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31. In the light of above discussion, it is demonstrably clear that even if a transfer order is found to be in violation of executive instructions or orders, Courts ordinarily should not interfere instead the affected party may approach higher authorities in the department. But if a transfer order is passed in administrative exigency or public interest and is in violation of transfer policy of the Government, then the competent authority must record brief reasons in the file for deviation from transfer policy. It is not necessary to mention said reason in transfer order. The recording of reason shall check arbitrary

exercise of power and will help the judicial process and by superior administrative heads if the order is challenged by affected person."

16. Government policy decisions are often formulated after extensive deliberation, taking into account various considerations such as public interest, administrative efficiency, and legal framework. Once a policy is formulated, it becomes imperative for government officials to adhere to and implement it diligently.

17. However, administrative discretion is not absolute and must be exercised within the confines of legal principles and constitutional constraints. The rule of law imposes limitations on the exercise of administrative discretion, ensuring that government actions are consistent with statutory provisions, constitutional norms, and principles of fairness and reasonableness. Thus, while government officials enjoy a degree of autonomy in decision-making, they are bound by legal norms and are accountable for their actions.

18. There is another aspect of this case: this Court is flooded with similar nature of petitions every day, wherein transfer orders are challenged on the ground of contravention of Rule 523 of the Uttar Pradesh Police Regulations by the officers, and this is affecting the working of the police and undermining the morale of the police force.

19. In a State like Uttar Pradesh, which has the largest single police force in the country, covers an approximate area of 243.286 square kilometres and a population of over 20 crores approximately (as per Sensex 2011). The State has a force of approximately 3.10 lakh personnel spread over 75 districts and 33 armed battalions. The transfer and posting of police officers within the Government Department is crucially an administrative decision that significantly impacts law enforcement agencies' efficiency and effectiveness. These decisions are often subject to the discretion of the higher authorities, keeping in view the operational and administrative requirements, and the absence of a uniform and consistent approach in making such decisions may lead to various legal, administrative, and operational challenges.

20. The uniformity and consistency in the transfer and posting of police officers are essentially for promoting transparency, fairness, and accountability within the police force. When decisions are standardized, it helps prevent favoritism, nepotism and other arbitrary considerations that could compromise the integrity of force. Additionally, a uniform approach fosters a sense of trust and confidence among the rank and file, attributing to a more coercive and disciplined police force.

21. The inconsistency in the transfer and posting of police officers can have a detrimental effect on the administrative and operational capabilities of the police. Arbitrary transfers and non-compliance with rules, regulations and policies formed by the Government by the Officer-in-charge and responsible for making such transfers hinder effective community policing and diminish morale among officers.

22. This Court noticed that the provisions of U.P. Police Regulations have been regularly either ignored or violated to protect the interest of desired or chosen

candidates. It is also noticed that over a period of time, in many cases, it has made a practice that the provisions of U.P. Police Regulations are not followed in many aspects; one of the potential reasons could be either the officers are not aware of the provisions of Police Regulations and government policies issued time to time or the officers have sometimes vested interest.

23. Administrative discretion is vital for effective governance; it must be exercised within the bounds of legal norms and constitutional principles. While judicial review serves as a crucial mechanism for upholding the rule of law and ensuring accountability in government actions. However, courts should exercise restraint and deference in reviewing government policies, recognizing the expertise and autonomy of the executive branch. Ultimately, striking a balance between administrative discretion and the rule of law is essential to maintain the integrity and legitimacy of government decision-making processes.

24. Courts are hesitant to interfere in matters of policy formulation unless there are compelling reasons to do so. Grounds for judicial intervention typically include instances where government actions are arbitrary, unreasonable, ultra vires, or contrary to public policy or its own circulars and regulations. Courts may also intervene if government policies infringe upon fundamental rights or violate statutory provisions.

25. Therefore, in view of the foregoing discussions, the Director General of Police, U.P., Lucknow, is directed to examine the reasons for non-compliance with Rule 523 of U.P. Police Regulations and place a report before the Government to take immediate and effective steps to issue appropriate directions or circulars to the police officers responsible for issuing the transfer and relieving orders. The Director General of Police shall indicate in its report, the number of cases- district-wise, wherein the compliance of Rule 523 of U.P. Police Regulation has not been observed by the Officer-in-charge in letter and spirit in the last one year, and shall also propose potential punitive actions against the erring officers. The said exercise by the Director General of Police shall be concluded within 60 days from the date of the order and submit a report to the Government, accordingly, then after that the Government shall issue well-structured directions/regulations to the police officers in a time bound manner to ensure that Rule 523 of the U.P. Police Regulations is uniformly and consistently followed.

26. The Director General of Police shall also prepare a comprehensive list indicating the details of transfer orders passed by the Officer-in-charge in their respective jurisdiction in which no relieving order has been passed till date. The fate of such transfer orders, if any, shall be decided in accordance with Rule 523 of the U.P. Police Regulations, and if need be, a fresh transfer order be passed in accordance with the transfer policy and government orders issued from time to time in this regard.

27. Needless to say, if, for all practical and administrative reasons, Rule 523 of the U.P. Police Regulation cannot be implemented in letter and spirit, then the same shall be examined at the State level and needful be done accordingly. The consistently and uniformly implementing a transfer policy by executives would

enhance transparency, accountability, and responsibility within police force.

28. Reverting back to the prayer made in **(i) Writ-A No. 265 of 2024**, it is directed that the impugned relieving order dated 14.11.2023 shall remain stayed till 30.4.2024, and the impact of the impugned order shall be revived immediately thereafter. The department shall be at liberty to proceed further in conformity with the transfer order dated 5.6.2023. The petitioners are further directed to report to the new place of posting as delineated in the transfer order within a week from 31.4.2024; and also in **(ii) Writ-A No. 268 of 2024**, it is directed that the impugned relieving order dated 6.11.2023 and 15.12.2023 arising out of transfer order dated 27.5.2023 and 4.11.2023 shall also remain stayed till 30.4.2024, and the impact of the impugned order shall be revived immediately thereafter. The department shall be at liberty to proceed further in conformity with the transfer order dated 27.5.2023 and 4.11.2023. The petitioners are further directed to report to the new place of posting as delineated in the transfer orders within a week from 31.4.2024.

29. The Registrar (Compliance) is directed to send a copy of this order to the Director General of Police for necessary compliance and take note of the observations deliberated herein above. A copy of this order will also be sent to the Chief Secretary, UP, for effective supervision and compliance.

30. The present petitions stand disposed of in the aforesaid terms.

(2024) 2 ILRA 671

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 30.01.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.

THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 332 of 2023
Connected with
Special Appeal No. 330 of 2023
And other connected cases

Dr. Shakuntala Mishra National Rehabilitation University & Ors.
...Appellants

Versus

Dr. Rajendra Kumar Srivastava & Anr.
...Respondents

Counsel for the Appellants:
Atul Kumar Dwivedi

Counsel for the Respondents:
Vijay Dixit, C.S.C.

Service Law – Dr. Shakuntala Mishra National Rehabilitation University (For Differently Abled) U.P. Act, 2009 – Sections 25 & 44 - U.P. Government Servants (Discipline and Appeal) Rules, 1999 – Termination of Services – Appellants challenged Single Judge's order dated 08.05.2023 and 24.05.2023 quashing termination/cancellation of respondents' appointments for lack of qualifications – Held, termination proceedings violated principles of natural justice and statutory provisions – University's adoption of Rules, 1999 mandated compliance, but no charge-sheet issued, no full enquiry report provided, and hearing by one committee with decision by another vitiated process – *Whirlpool Corporation Vs Registrar of Trade Marks*, *Harbanslal Sahnia Vs Indian Oil Corpn. Ltd.*, and *Godrej Sara Lee Ltd. Vs Excise and Taxation Officer* followed, affirming writ maintainability despite alternative remedies due to natural justice violations – Section 44 protects selections despite procedural defects in committee constitution – Long service (7-8

years) without fraud or misrepresentation precludes cancellation, per *Mohd. Abul Lash Vs St. of U.P.*, *Nahar Singh Vs St. of U.P.*, and *Sivanandan C.T. Vs High Court of Kerala* – Termination tantamount to misconduct penalty, requiring adherence to Rules, 1999 and Statute 9.07 – Respondents' qualifications (e.g., M.Sc. equivalence to MCA, API scores, experience) upheld as sufficient – Back wages justified per *Pradeep Vs Manganese Ore (India) Ltd.* due to illegal termination without fault. (Para 16-59)

Special Appeals dismissed.

List of Cases Cited:

1. Whirlpool Corporation Vs Registrar of Trade Marks; (1998) 8 SCC 1

2. Harbanslal Sahnia Vs Indian Oil Corpn. Ltd.; (2003) 2 SCC 107

3. Godrej Sara Lee Ltd. Vs Excise and Taxation Officer; 2023 SCC OnLine SC 95

4. Union Public Service Commission Vs M. Sathiya Priya; (2018) 15 SCC 796

5. M.VS Thimmaiah Vs Union Public Service Commission; (2008) 2 SCC 119

6. Mohd. Abul Lash Vs St. of U.P.; Civil Appeal No. 37 of 2020, decided on 07.01.2020

7. Nahar Singh Vs St. of U.P.; Civil Appeal No. 3904 of 2013, decided on 14.07.2017

8. Savitri Devi Vs St. of U.P.; SLP (Civil) No. 14907/2009, decided on 07.01.2020

9. Tara Prasad Mishra Vs St. of U.P.; 1990 Vol. II UPLBEC 905

10. Nisha Devi Vs St. of H.P.; (2014) 16 SCC 392

11. Mahipal Singh Tomar Vs St. of U.P.; (2013) 16 SCC 771

12. M.P. St. Cooperative Bank Ltd. Vs Nanuram Yadav; (2007) 8 SCC 264

13. St. of Bihar Vs Lal Krishna Advani; (2008) 8 SCC 361

14. Deepak Anand Patil Vs St. of Mah.; 2023 SCC OnLine SC 34

15. Kuntest Gupta Vs Management of Hindu Kanya Mahavidhyalaya; (1987) 4 SCC 525

16. Bhavnagar University Vs Palitana Sugar Mill (Pvt.) Ltd.; (2003) 2 SCC 111

17. Tungabhadra Industries Ltd. Vs Government of Andhra Pradesh; AIR 1964 SC 1372

18. Dr. M.S. Mudhole Vs S.D. Halegkar; (1993) 3 SCC 591

19. Rekha Chaturvedi Vs University of Rajasthan; 1993 Supp (3) SCC 168

20. Gujarat St. Dy. Executive Engineers Association Vs St. of Gujarat; (1994) Supp (2) SCC 591

21. Buddhi Nath Chaudhary Vs Abahi Kumar; (2001) 3 SCC 328

22. Girjesh Shrivastava Vs St. of M.P.; (2010) 10 SCC 707

23. Vikas Pratap Singh Vs St. of Chhattisgarh; (2013) 14 SCC 494

24. Md. Zamil Ahmed Vs St. of Bihar; (2016) 12 SCC 342

25. Sivanandan C.T. Vs High Court of Kerala; 2023 SCC OnLine SC 994

26. Pradeep Vs Manganese Ore (India) Ltd.; (2022) 3 SCC 683

27. K.C. Joshi Vs U.O.I.; (1985) 3 SCC 153

28. Samsher Singh Vs St. of Pun.; (1974) 2 SCC 831

29. Anoop Jaiswal Vs Government of India; (1984) 2 SCC 369

30. Basavaiah (Dr.) Vs Dr. H.L. Ramesh; (2010) 8 SCC 372

31. Saurabh Pal Vs The Chancellor, Veer Bahadur; Civil Appeal No. 596 of 2008, decided on 22.01.2008

(Delivered by Hon'ble Om Prakash Shukla, J.)

A. INTRODUCTION

(1) The present bunch of Special Appeals have been filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952. The following five Special Appeals have been filed against a common judgment/order dated 08.05.2023 passed by the learned Single Judge in Writ-A Nos. 4293 of 2022, 4316 of 2022, 4310 of 2022, 4307 of 2022 and 4312 of 2022:-

(i) **Special Appeal No. 332/2023** *(Dr. Shakuntala Mishra National rehabilitation University & others V/s Dr. Rajendra Kumar Srivastava & Anr.) ;*

(ii) **Special Appeal No. 333/2023** *(Dr. Shakuntala Mishra National rehabilitation University & others Vs. Dr. Adya Shakti Rai & Others);*

(iii) **Special Appeal No. 334/2023** *(Dr. Shakuntala Mishra National rehabilitation University & others V/s Avanish Chandra Mishra & Ors);*

(iv) **Special Appeal No. 335/2023** *(Dr. Shakuntala Mishra National rehabilitation University & others V/s Vipin Kumar Pandey & Ors); and*

(v) **Special Appeal No. 336/2023** *(Dr. Shakuntala Mishra National rehabilitation University & others V/s Mrutyunjaya Mishra & Ors).*

However, **Special Appeal No. 330 of 2023** *(Dr. Shakuntala Mishra National rehabilitation University & others Vs. Alok Mishra & Anr.)* although has been filed against judgment/order dated 24.05.2023 passed by the learned Single Judge in Writ-A No.7046 of 2022, but on close scrutiny of the impugned judgment/order 24.05.2023, subject matter of Special Appeal No. 330 of 2023 would reveal that the impugned judgment/order daed 24.05.2023 is wholly premised and based on the common judgment/order dated 08.03.2023 (supra). Thus, all these Special Appeals have been taken up for hearing together and are being disposed of by this common order as the issues involved are common except to the aspect pertaining to their respective educational qualifications.

(2) The precincts of these special appeals lie in the challenge laid by these individuals to the termination/cancellation of their services/selection vide order dated 06.07.2022 by the appellants/University on common grounds of lack of essential qualification at the time of their selection with regard to their educational qualifications and/or experience in the year 2014.

B. FACTUAL MATRIX

(3) The facts delineated from the records would reveal that all the individual respondents are teachers having been selected in the Dr. Shakuntala Mishra National Rehabilitation University pursuant to the advertisement dated 17.02.2014. Apparently, these individuals/respondents submitted relevant documents with regard to their qualifications and experiences and also appeared before a Screening Committee, and subsequently appeared in the interview before the Selection Committee which recommended their candidature for appointment. The recommendations, thereafter, were placed before the Executive Council of the University, pursuant to which they were appointed and after being in probation, their services were confirmed and ever since then these private respondents have been continuing to render their services

until their selections were cancelled by means of an order, which was impugned by these private respondents in the respective writ petitions filed before the learned Single Judge.

(4) According to the appellants/University, the orders of cancellation of selection have been passed by the Vice- Chancellor of Dr. Shakuntala Mishra National Rehabilitation University, Lucknow primarily for the reason that in the meeting of the General Body of the University, an enquiry was instituted against the previous Vice-Chancellor Dr Nishith Rai and all the charges against him were proved and he was found guilty of administrative and financial irregularities. As a consequence of that, the appellants/University after seeking legal opinion, decided that all the appointments made during Dr. Nishith Rai's tenure would be enquired on a case-to-case basis. It seems thereafter the Executive Committee of the University had appointed a three-member Committee, which has submitted its report, where it has been found that the appointments of the private respondents were made without following the rules of qualification, reservation etc. and most importantly, no approval was sought from the Visitor for appointment of the panel of experts and that these people were appointed despite the fact that they did not have the requisite qualification, experience, API score etc. which was contrary to the rules on the date of their selection.

(5) It has been further averred that the Executive Council in its 35th meeting held on 07.10.2021 decided to constitute a two member committee consisting of two retired Judges of the Hon'ble High Court to enquire into all the appointments made by the erstwhile Vice-Chancellor. The enquiry was conducted by the said Committee, who submitted their report, which was placed before the Executive Council and was duly approved in its 38th meeting. Pursuant to the aforesaid acceptance of the report, show cause notice was given to the individuals/respondents seeking their response. The response was placed before another committee consisting of a retired Hon'ble High Court Judge and subject specialist. The Committee, thereafter, made its recommendations on 9.6.2022 to the University, which was accepted by the Executive Committee. The Committee concluded that these private respondents apparently did not fulfil the prescribed qualifications on the date of the advertisement and hence their services were cancelled/ terminated. It was further provided by the University that on considering that all the private respondents have worked for a period of 6–7 years, they would be eligible to apply in the fresh advertisement which would be issued and in case they are selected, their pay and allowances would be protected. The said individuals termination/cancellation of selection letter was interdicted by the respondents/writ petitioners before the learned Single Judge, which passed a very detailed impugned judgment, discussing every aspect of the matter and concluded that the cancellation/ termination of these private respondents by the appellants/University was wrong and as such after quashing the individual impugned order of termination, also directed for reinstatement along with all consequential benefits including back wages from the date of termination vide a common impugned judgment/order dated 08.03.2023 (supra). It is this common judgment/order daed 08.03.2023 and of course, the judgment/order dated

24.05.2023 (supra) passed in the sixth special appeal, which are subject matter of these appeals.

(6) Heard Shri Sudeep Seth, learned Senior Advocate assisted by Shri Atul Kumar Dwivedi, representing the appellants/ University, Shri Sandeep Dixit, learned Senior Advocate assisted by Shri Vijay Dixit, representing the private respondent in Special Appeal No. 332 of 2023, Shri Gaurav Mehrotra, learned Counsel representing the private respondent in Special Appeal Nos.330, 333, 334 and 336 of 2023 and Dr. L.P. Mishra, learned Counsel representing the private respondent in Special Appeal No. 335 of 2023 as well as learned Standing Counsel representing the State.

C. ARGUMENTS

(7) The impugned judgment has been attacked by the learned Senior Counsel Mr. Sudeep Seth on multiple grounds. According to him, writ petition was not maintainable on the ground of availability of suitable efficacious remedy. It has been argued that the learned Single Judge has returned an incorrect finding/reasoning relating to (i) the applicability of U.P Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "**Rules, 1999**"), (ii) decision making process of the University on the pretext that decision was taken by the Executive Council, whereas hearing was afforded by another Committee, (iii) constitution of selection committee to be in violation of Section 25 of the Dr. Shakuntala Mishra National Rehabilitation University (For Differently Abled) Uttar Pradesh Act, 2009 (hereinafter referred to as "**Act, 2009**"), (iv) selection of the writ petitioners having been cancelled as they lacked essential qualification required in the advertisement, (v) merely continuation in service for 6 to 7 years would not mean that the writ petitioners fulfilled the mandatory essential qualification, (vi) contradictory stand of entertaining the writ petition although accepting the availability of statutory remedy before the Visitor, (vii) finding returned in the impugned judgment relating to lack of qualification for appointment being a misconduct, so as to apply the procedure as prescribed under the UP Government Servants (Discipline and Appeal) Rules, 1999, (viii) erroneous adjudication of the writ petition on the ground of termination from service rather than cancellation of their selection, (ix) incorrectly holding that in case of illegal selection of a candidate, charge-sheet, evidence and names of witness are required to be mentioned and detailed procedure of departmental enquiry has to be followed, (x) wrongly holding that complete enquiry report of two members committee (retired Judge of the Hon'ble High Court) was required to be given and supply of extract amounted to violation of principles of natural justice, (xi) the petitioner having been illegally appointed cannot be allowed to enjoy the status of member of the staff, so as to claim observance of the Rules, 1999 or the university statute or Article 311 of the Constitution, (xii) wrongly held that the University enquired the legality of the selection only to annul all actions of the former vice chancellor and ignored that the general Council of the university has decided to conduct the enquiry in selection on the case to case basis. (xiii) the appointment of the writ petitioners being a scam committed by the then Vice-Chancellor and the appointment of the writ petitioners being established as procured/illegal, there was no question of long period of service or absence of

complaint. (xiv) Ignoring the settled law that whenever any procedural defect if found in the enquiry, liberty should be granted to the university to remove the said defect and either hold the fresh enquiry or proceed from the stage of the defect, (xv) incorrect holding in the impugned order that the defect in selection committee as being protected under section 44 of the Act, 2009, (xvi) non-appreciation of the fact that lack of essential qualification prescribed in the advertisement to not a trivial irregularity but a blatant one, which cannot be allowed to perpetuated, (xvii) failing to appreciate that not only the constitution of selection committee was in contravention of the statutory provisions even the writ petitioners did not possess the minimum qualification prescribed in the advertisement on the date of their application, (xviii) grant of all consequential benefits including back wages without appreciating that since 06/07/2022 the writ petitioners have not discharged any work in university, (xix) finding of the learned Single Judge being perverse on the aspect of qualification possessed by the individual writ petitioners.

(8) Per contra, learned Counsel representing the writ petitioner/respondent in his erudite manner has premised his arguments on the point that (a) a person selected and appointed though not having some prescribed essential qualifications and having been allowed to continue in service for a long period of time have acquired such essential qualifications and as such the selection and appointment cannot be interfered with. To stregthen their submissions, they relied upon the judgment of the Apex Court rendered in **Union Public Service Commission Vs M. Sathiya Priya & Others :** (2018) 15 SCC 796, **M.V. Thimmaiah & Others Vs. Union Public Service Commission & Others :** (2008) 2 SCC 119, **Mohd. Abul Lash V/s State of U.P & Ors.** (judgment dated 07.01.2020 passed in Civil Appeal No. 37 of 2020), **Nahar Singh and Others V/s State of U.P & Ors.** (Judgment dated 14.07.2017 passed in Civil Appeal No. 3904 of 2013), **Savitri Devi & Others V/s State of U.P & Others** (Judgment dated 07.01.2020 passed in SLP (Civil) No. 14907/2009).

(9) The learned Counsel has also argued that Visitor of the University being supreme authority of the University in regard to its affairs and having held that the writ petitioner/respondent were fully eligible for appointment, the Executive Council or any other authority of the University could not hold otherwise. In this regard, they relied upon the decision of the Full Bench of this Court rendered in case of **Tara Prasad Mishra Vs. State of U.P :** 1990 Vol. II UPLBEC 905.

(10) Further argument of the writ petitioner/respondent was led by Mr. Gaurav Mehrotra, learned Counsel representing on behalf of the respondent in Special Appeal Nos. 330, 33, 334, 336 of 2023, who defended the impugned order by formulating his arguments on eight different aspects. Mr. Mehrota submitted that the learned Single Judge was absolutely right in holding that no opportunity of hearing was given and the principles of natural justice was not followed. In support of his submission, he relied upon the decision of the Apex Court rendered in the case of (i) **Nisha Devi Vs State of Himachal Pradesh & Others** : (2014) 16 SCC 392, (ii) **Mahipal Singh Tomar V/s State of U.P & Others** : (2013) 16 SCC 771, (iii) **M.P State Cooperative Bank Ltd. V/s Nanuram Yadav & Others**, (2007) 8 SCC 264.

(11) Shri Mehrotra has submitted that any action taken in deviation of principles of natural justice is non-est in the eyes of law. In support of this contention, he relied

upon the judgment of the Apex Court in **State of Bihar & Others Vs. Lal Krishna Advani** : (2008) 8 SCC 361. The learned Counsel has also submitted that an adjudicatory body cannot take any decision on a material unless the person against whom it is sought to be utilized has been apprised of it and given an opportunity to respond. In this regard, he has relied on the decision of the Apex Court in **Deepak Anand Patil Vs State of Maharashtra and Others** : (2023) SCC Online SC 34.

(12) Shri Mehrotra has further stressed on the point that an authority cannot review its own order, unless the power of review is expressly conferred on it by statute under which it derives its jurisdiction. In support of this contention, he relied upon the decision of the Apex Court in **Kuntest Gupta Vs. Management of Hindu Kanya Mahavidhyalaya, Sitapur (U.P) and others :** (1987) 4 SCC 525.

(13) The learned Counsel has vociferously argued that availability of an alternate remedy is not an absolute bar for this Court to entertain a writ petition under Article 226 of the Constitution, wherein there is an apparent violation of principle of natural justice. According to the learned Counsel, in a case where the contention of a party has not been recorded or argued before the Court, then the appropriate remedy would be to file a review application before the same Court. In support of this contention, he relied upon the decision of the Apex Court in (i) **Bhavnagar University Vs Palitana Sugar Mill (Pvt.) Ltd. & Anr** : (2003) 2 SCC 111 and (ii) **Tungabhadra Industries Ltd. Vs Government of Andhra Pradesh**, AIR 1964 SC 1372. The learned Counsel on the proposition of that once a candidate has been appointed and had continued for long, even if, on question of law, the matter is decided otherwise, the appointment of such persons need not be annulled and should be protected, when there is no fraud or misrepresentation on part of the candidate.

(14) Besides the judgment already relied by Dr. L.P. Mishra, learned Counsel, Mr. Gaurav Mehrotra has also relied on the decision of the Apex Court in (i) **Dr. M.S Mudhole and another Vs S.D Halegkar and others** : (1993) 3 SCC 591, (ii) **Rekha Chaturvedi V/s university of Rajasthan and others** : 1993 Supp (3) 168, (iii) **Gujrat State Dy. Executive Engineers Association Vs State of Gujrat and others** : (1994) Supp (2) 591, (iv) **Buddhi Nath Chaudhary and others Vs Abahi Kumar and others** : (2001) 3 SCC 328, (v) **Girjesh Shrivastava Vs State of M.P and Ors.** : (2010) 10 SCC 707, (vi) **Vikas pratap Singh and Ors. Vs State of Chhattisgarh and others**, (2013) 14 SCC 494, (vii) **Md. Zamil Ahmed Vs State of Bihar and Others**, (2016) 12 SCC 342 and **Constitutional Bench Judgment of Sivanandan C.T and others Vs High Court of Kerala and others**, 2023 SCC Online SC 994.

(15) As to the proposition that in case of illegal termination, an employee is entitled for all the consequential benefits including 100% of back wages, the learned Counsel relied on the judgment of the Apex Court in **Pradeep Vs. manganese Ore (India) Limited & others** : (2022) 3 SCC 683.

D. FINDINGS & ANALYSIS

(16) Having regard to the contentions of the parties and going through the record available before us in the above-captioned

special appeals, this Court, at the outset, is of the view that basically the proceedings conducted by the appellant/ University, which is the subject matter of these appeals, shows its overzealousness to annul the decision of the former Vice-Chancellor, which is writ large in the manner they have acted against the private respondent/writ petitioner, which has to be taken with a pinch of salt. The University ought to have been careful and circumspect in their approach and should have followed the procedure and norms, especially when these private respondents have been in service for more than 7/8 years and the University being an educational institution meant for higher learning which also deals with special students who require much more care, attention and sensitivity than any other University. This Court does not wish to sound sermonically, however, the fact of the matter remains that the issues, which are being agitated by the University in the present special appeal, could have been easily averted, had the appellant/ University acted without any prejudice to the rights of these private respondents.

(17) The learned Senior Counsel representing the appellant/ University has trained his guns on the first ground of availability of alternative remedy. The learned Senior Counsel representing the appellant has submitted that the writ petitioner had suitable, efficacious and statutory remedy and as such the writ petition field by these private respondent were not maintainable in the first place. According to him, Rules, 1999 was applicable on the appellant/University, which provides for an alternative remedy of appeal against the order of termination, however, the writ petitioners failed to avail the said remedy and further, these writ petitioners had also another alternate remedy under Section 7 of Act, 2009 before the Visitor, which was also not availed and as such the writ itself would had been dismissed on the ground of availability of equally efficacious alternative remedy.

(18) On perusal of the impugned judgment/order passed by the learned Single Judge, what we find is that the learned Single Judge has very extensively dealt with the said issue raised by the appellant/University, wherein it held at paragraphs 10 and 11 of the impugned judgment as under :-

"10. To consider the preliminary objection raised by the respondent with regard to the maintainability of the writ petition on the ground of availability of an efficacious alternative remedy of an appeal under the Rules of 1999, it is undisputed that the respondent University itself did not adhere/follow to the Rules of 1999 while proceeding against the petitioners. Once the proceedings have not been initiated or conducted in terms of Rule of 1999, by the University itself then it does not lie upon them to raise an objection, that the petitioners should be required to follow the said rule. An appeal would lie under the Rules of 1999 when the proceedings are conducted under the said rules. When the proceedings are conducted under some other provision then the petitioners cannot be asked to follow the Rules of 1999 and resort to the remedy of an appeal under Rule 11 of the said rules. Learned Counsel for the respondent University fairly submitted that the proceedings against the petitioners were not conducted under the Rules of 1999, then the natural corollary would follow, and remedy of Appeal under the Rules of 1999 would not available to the petitioners and hence the preliminary

objection of the respondent with regard to availability of alternative remedy in this regard fails.

11. Secondly, the law with regard to maintainability of writ petition despite existence of alternate remedy has been well settled. The High Courts can entertain a writ petition despite the existence of an adequate alternative remedy where there are allegations of breach of fundamental rights, or violations of principles of natural justice or that the order under challenge is wholly without jurisdiction. In the present case, the ground of challenge to the order of termination is that no proper opportunity of hearing was granted to the petitioners, the enquiry was done in various stages by different set of persons for which there is no provision either in the rules or the regulations of the University and apart from that the entire proceedings were vitiated by mala-fide as merely because the petitioners have been appointed under the regime of the erstwhile Vice Chancellor who is alleged to have conducted certain misconducts, as a retaliatory measure, all the appointments made under him was sought to be scrutinised. It is stated that such exercise of police power is not vested under the provisions of the act or rules of the University, and accordingly in regard to such facts writ petition under Article 226 would be maintainable."

(19) The learned Single Judge has also extensively quoted paragraph 14 to 36 of the judgment of the Apex Court passed in **Whirlpool Corporation. v. Registrar of Trade Marks** : (1998) 8 SCC 1, wherein the Apex Court taking cognizance of the phrase "any other purpose" used in Article 226 of the constitution interpreted the expansive horizon of the High Court in issuance of prerogative writs and a self-imposed restriction for the issuance of the same when an effective and efficacious remedy is available.

(20) This court finds that the learned Single Judge, after considering the submission of both the parties, returned a finding that the allegations as enumerated in the writ petitions related to the proceedings having been conducted against the writ petitioner in gross violations of principles of natural justice, as hearing was afforded by one Committee while the decision was taken by the Executive Council, which the learned Single Judge found to be contrary to all cannons of the decision-making process. The hinge of the observation by the learned Single Judge appears to be based on the fact that since the writ petitioner has been working pursuant to the selection by a duly constituted Selection Committee for last 6 to 7 years, the termination of the services, on the face of it, appeared to be illegal and arbitrary and accordingly the learned Single Judge held that the bar of alternate remedy does not operate against the writ petitioner.

(21) Herein, the appellant has merely repeated the arguments on availability of efficacious remedy and this Court does not find any ground for arriving at a different view as has been already held by the learned Single Judge. Adding to the observation as has been returned in the impugned judgment, this Court finds that in **Harbanslal Sahnia v Indian Oil Corpn. Ltd : (2003) 2 SCC 107**, the Apex Court held as herein under:

"In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental

rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

(22) Further, recently, the Apex Court in **Godrej Sara Lee Ltd. v. Excise and Taxation Officer-cum-Assessing Authority & Ors., 2023 SCC OnLine SC 95**, has held that availability of alternative remedy does not operate as an absolute bar to the maintainability of the writ petition and that the rule which requires a party to pursue the alternative remedy provided by the statute is a rule of policy for convenience and discretion rather than a rule of law. Undoubtedly, entertainability and maintainability of the writ petition are two distinct concepts. The question of entertainability is entirely within the discretion of the High Court and writ remedy is a discretionary remedy. Further, a writ petition, despite being maintainable may not be entertained by High Courts for many reasons or relief could be refused to the Petitioner despite setting up a sound legal point. Thus, the settled law is where an alternate remedy is available, the writ courts should not normally entertain a writ petition if the Petitioner has not availed the alternative remedy without examining whether an exceptional case has been made out for such entertainment.

(23) In view of the aforesaid, since this Court is of the view that on the facts of the present case, the private respondent/writ petitioner has made out an exceptional case for entertainment of his individual writ petition before this High Court, the present objection of the appellant relating to the maintainability of the writ petition is over-ruled.

(24) As to the ground agitated by the appellant/University relating to availability of alternative remedy before the Visitor is concerned, this court finds that the learned Single Judge has dealt with the said objection at paragraph 14 of the impugned judgment in the following words :-

"14. The other objection regarding the petitioners having an alternative remedy before the Visitor, is also bereft of merits in as much as the proceedings which are being assailed before this Court have already been subjected to the scrutiny by the Vice Chancellor at the behest of one Dr Abhay Krishna. The Visitor by means of order dated 11/03/2016 has already held that the procedure adopted by the respondent University and the constitution of the selection committee resulting in the appointment of the petitioners is valid. The order of the visitor has been challenged before this Court, and the writ petition is pending consideration. Once the order of the Visitor is already on record, no useful purpose would be served by relegating the petitioners before the Visitor on the same issue. It is also urged that the respondent University is itself opposed the decision of the Visitor, which itself cannot be appreciated. In the present case no useful purpose would be served by relegating the petitioners to the remedy before the Visitor. The objection raised by the petitioners have force and the plea of dismissal on ground of availability of alternative remedy before Visitor is accordingly rejected."

(25) This Court does not find any argument addressed by the learned Senior Counsel representing the appellant to be attractive, so as to persuade this Court to observe otherwise. Thus, this Court is not inclined to return a finding adverse to the conclusion arrived by the learnd Single Judge on the issue of maintainability of the writ petition.

(26) The next major issue raised in the above-captioned appeals is *'as to whether the services of the writ petitioner has been terminated or his appointment has been cancelled'*. Although the consequential effect of both the cancellation or termination leads to severance of the relation between the writ petitioner and the University, however, the learned Senior Counsel representing appellant has tried to draw a distinction by arguing that the said question is of great significance as an answer to the said issue would determine the applicability of the provisions of Rules, 1999 on the writ petitioner.

(27) At the very outset, this court observes that one of the star argument addressed by the learned Sennior Counsel representing the appellants/University against the maintainability of the writ petition was the existence of an alternative efficacious remedy under Rules, 1999 for the writ petitioner in the form of appeal before the Visitor. Having observed so, this Court finds that the appellants/University have themselves admitted to the applicability of the provisions of the aforesaid Rules, 1999 and have also admitted that the termination order could had been impugned in an appeal before the Visitor by the writ petitioner, which consequently also meant that the provisions of the statute of the Act, 2009 ought to have been also followed by the University in its letter and spirit. The appellants cannot pick and choose and say that certain provisions are applicable and yet another provisions are not applicable to the facts of the case.

(28) Apparently, this Court finds that the appellants/ University have adopted the Rules 1999 in its meeting dated 07.10.2021, where provision for termination is provided. Once the Rules, 1999 have been adopted by the University concerned, it was bound to follow the said Rules. It is the case of the appellants/University that the Rules,1999 would be attracted only when there are allegations of misconduct by the employee, while in the present case the entire selection was *de hors* the Rules, as the writ petitioner did not fulfil the minimum prescribed educational qualifications and hence his services were dispensed with and their selection cancelled. A further alternative argument has been addressed by the appellants/University to the effect that, whether it is cancellation or termination, in either case the writ petitioners were afforded full opportunity of hearing before cancelling their selection and consequently submitted that the enquiry proceedings as well as the order of cancellation was correct and the impugned order is liable to be set-aside.

(29) In the first blush, the argument of the learned Senior Counsel representing the appellants/University seems to be very attractive, however, this Court finds that the provisions regarding power to proceed against an employee of the appellants/University can be found in the first statutes of 2009 enacted by the State Government of Uttar Pradesh in exercise of powers under sub-section (1) of Section 32 of Act, 2009 itself. Statute 9.01 is an all-inclusive clause, which says "except in the case of an appointment in a vacancy caused by the grant of leave to a teacher for a period not exceeding 10 months, teachers of the university of the University shall be appointed on a written contract in the form set out in Appendix 'A'". Thus, in case an appointment is made on vacancy caused by grant of leave to a teacher, a written

contract is not needed or else it is required mandatorily that a written contract is entered between the University and the teachers of the University. Apparently a relation is established with the written contract, which can be extinguished as per the provisions prescribed under the said statute only. Further, Statute 9.04 provides that a teacher at the University may be dismissed or removed or his services terminated on one or more of the following grounds, which include wilful neglect of duty, misconduct, breach of any of the terms of the contract of service, incompetence or abolition of post. Further Statute 9.07 provides as under: -

"9.07.(1) No order dismissing, removing or terminating the services of a teacher of the University on any grounds mentioned in clause (1) of statute 9.04 (except in case of a conviction for an offence involving moral turpitude or of abolition of post) shall be passed unless a charge of been framed against the teacher and communicated to him with the statement of the grounds on which it is proposed to take action and has been given adequate opportunity: -

a- of submitting a written statement of his defence;

b. of being heard in person, if he so chooses; and

c- of calling and examining such witnesses in his defence as he may wish

Provided that the executive Council or an officer authorised by it to conduct the enquiry, may for sufficient reason to be recorded in writing refused to call any witness.

(2) the Executive Council may, at any time ordinarily within 2 months from the date of the enquiry officer report pass a resolution dismissing or removing the teacher concerned from service or terminating the services mentioned in the grounds of such dismissal, removal or termination."

(30) The aforesaid provisions contemplate a dismissal, removal or termination of service of a teacher, however, cancellation is conspicuously missing in the said provision. Since, cancellation is not defined anywhere in the Act or the statute, the meaning of the word 'cancel" has to be construed in common parlance. In Black's Law Dictionary, cancel has been defined to be – to obliterate, strike, or cross out; to destroy the effect of an instrument by defacing, obliterating, expunging, or erasing it. In legal context, to cancel is to render something otherwise valid as void or no longer in effect. Thus cancellation presupposes an existence of a document, a relation, an instrument or a contract. Generally, termination happens when the contract has been completed and is a bilateral phenomenon, whereas cancellation is an event which may happen unilaterally or parties have agreed that a particular breach may result in cancellation of the contract. Therefore, cancellation of contract is a sub-set of termination of contract, wherein cancellation of contract can also be used as a ground for termination of contracts. Therefore, the availability of grounds for contract termination are much more than the grounds available for cancellation of a contract. Specifically, the parties may terminate a contract upon an agreement or the contract may automatically terminate when the parties fulfil their obligations without any breach or damage. Meanwhile, the cancellation of a contract mostly is a result of the parties' breach of the contract. Specifically, the parties may cancel a contract in case one party breaches the contract, which is a

condition for contract cancellation as agreed upon by the parties; or seriously breaches the contractual obligations; or one party is late in the performance of the obligations, or inability to perform. Thus, the edifice of cancellation is breach on the part of either of the parties and the moment breach becomes a ground for cancellation, the same needs adjudication as per the rules and due observance of the principle of natural justice. Thus, this court finds that whether it is cancellation or termination, the same has to be pass the test of principle of natural Justice. It is settled law that even a contractual appointment cannot be terminated without affording an opportunity of hearing, if founded on allegation and/or misconduct, which casts a stigma on the employee. The Supreme Court in **K.C. Joshi v. Union of India and Others, (1985) 3 SCC 153**, held that contract of service has to be in tune with Articles 14 and 16 of the Constitution of India and if it is to be suggested that one can dismiss anyone without a semblance of inquiry or whisper of principles of natural justice, such an approach overlooks the well-settled principle that if State action affects livelihood or attaches stigma, punitive action can be taken only after an inquiry, in keeping with the principles of natural justice. In **Samsher Singh v. State of Punjab and Another, (1974) 2 SCC 831**, the Supreme Court held that form of an order is not conclusive and the Court can lift the veil in a given case to find out the actual reason and true character of the order terminating the service of an employee. Relevant part of the judgment is as follows:-

"80……..The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311……."

To the same effect is the decision of the Supreme Court in **Anoop Jaiswal v. Government of India and Another, (1984) 2 SCC 369**, where the Supreme Court held as under: -

"12. It is, therefore, now well settled that where the form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the court before which the order is challenged to go behind the form and ascertain the true character of the order. If the court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the court would not be debarred, merely because of the form of the order, in giving effect to the rights conferred by law upon the employee."

(31) Thus, this Court is of the view that the cancellation of the selection of the private respondent/writ petitioner is an aspect of termination only and as such the same has to be dealt as per the provisions recognised in the statutes of 2009 enacted by the state Government of Uttar Pradesh.

(32) As far as the Rules, 1999 is concerned, the Executive Council of the University in its 35th meeting held on 07.10.2021 had resolved to adopt the said Rules and the memorandum was issued on 25.10.2021 indicating the said rules having been adopted for conduct of enquiry against the officer and employees of the University. It has been the sole contention

of the appellants/University that these rules were not applicable to the writ petitioner/respondent and was not required for them to be followed because there was no misconduct by the writ petitioner. A perusal of the Rules of 1999 indicates that according to Rule 6, the appointing authority of a Government servant may impose any of the penalties specified in the said rules. Section 7 provides for a detailed procedure to be followed for imposing major penalty. Major penalties include withholding of increment with little effect, reduction to a low post or grade, removal from service, dismissal from service as provided in Rule 3 while minor penalties include censure, withholding of increment etc.

(33) This Court, after considering the submissions of the parties, is in agreement with the observation of the learned Single Judge that the Rules of 1999 were applicable in the present case and were required to be followed by the respondents as in any case, whether it is cancellation or termination, the principle of natural justice has to be followed and the safe-guard mentioned in the Rules of 1999 are merely a limb of the principle of natural justice.

(34) This Court is also in agreement with the observation of the learned Single Judge relating to the perusal of the impugned order, which reveals that the Executive Committee had recommended the termination of services of the writ petitioner and the Vice-Chancellor has merely complied with the recommendation/order of the Executive Committee and had set- aside the selection of the writ petitioner. This Court finds that the learned Single Judge has given a very well-reasoned and detailed observation for treating the order impugned to be an order terminating the services of the writ petitioner and holding that the services of an employee can be terminated only as a measure of penalty as provided in the Rules of 1999, or the statutes of the University as allegedly the writ petitioner lacked the educational qualifications at the time of the selection. At this stage, it would be gain worthy to quote the observation of the learned Single Judge, while holding that the said allegation on the writ petitioner tantamount to be included in the category of misconduct entailing termination in the following words :-

"22. This allegation is directly attributable to the petitioners, and such conduct would be liable to be included in the category of misconduct, which would be the act of obtaining employment without being duly qualified for the same. It is the conduct of the petitioners in submitting their educational qualifications, which according to the respondents they did not fulfil the criteria as laid down in the advertisement or the guidelines published by the University Grants Commission, for which their services have been terminated. On both these counts, this Court is of the view that it was imperative that the procedure established and accepted by the respondents, which is the Rules of 1999 were to be followed, and in not doing so the respondents have acted in the most arbitrary and illegal manner, and the impugned termination is not in accordance with law.

23. In order to impose the punishment of dismissal or removal, the Rules of 1999 will have to be followed. In order to impose major penalty facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge contained in the charge-sheet, where the proposed evidence

and the name of witnesses are required be mentioned. The employee is required to file his response to the charges mentioned in the charge-sheet and in case he denies the charges, the enquiry officer shall call the witnesses to the proposed the charge sheet to record oral evidence, and after recording of evidence submit his enquiry report to the disciplinary authority, who may either accept the same, or differ with the report or order re-enquiry as the case may be. In case he does not order re-enquiry, he has to give a show cause notice to the employee giving him a copy of the enquiry report, and finally conclude the proceedings either exonerating the employee or awarding punishment.

24. The aforesaid procedure is also envisaged in Statute 9.07 of the respondent University. In the present case no charge sheet was given to the petitioner nor was any oral evidence of the prosecution recorded in presence of the petitioners and they were not handed over the relevant documents sought by them on the ground of confidentiality and even the copies of the enquiry report of the committees were never given to the petitioners and only a extract was given along with the show cause notice and, therefore, the procedure as provided in Statute 9.07 was not followed, and consequently the entire proceedings were held in violation of statutes of the University as well as in principle of natural justice."

(35) The learned Single Judge has painstakingly examined the validity of the proceedings conducted by the University/ appellants culminating in the order of cancellation of selection of the writ petitioners to be vitiated and this court finds that no substantive grounds have been submitted or argued by the learned Counsel for the appellants/University, which would enable this Court to upset the findings arrived by the learned Single Judge in the impugned order. The learned Single Judge recorded that apparently there were several allegations against former Vice-Chancellor, against whom action was taken after enquiry was instituted. Apparently, the Executive Council decided to initiate an enquiry against the former Vice-Chancellor in its 35th meeting held on 07.10.2021 and constituted a Committee consisting of 2 retired Hon'ble High Court Judges. Thus, as rightly held in the impugned order, as far as the present bunch of matters are concerned, the entire controversy has its roots in the resolution passed by the General Body of the University on 25/01/2019, wherein in the said meeting an enquiry report against the former Vice-Chancellor Dr Nishith Rai conducted by Justice (Retd.) Shailendra Saxena was considered. In the said meeting, while accepting the said enquiry report, the General body also resolved that action would be taken with regard to all the irregularities including technical, administrative or financial committed by the former Vice Chancellor after seeking legal opinion. Thus, the General Body of the University in its meeting held on 16/09/2021 decided to enquire into the appointments made by the former Vice-Chancellor, in pursuance to which the Executive Council in its 35th meeting dated 17/10/2021 had resolved to have the matter relating to the appointments inquired by a committee consisting of 2 former judges of the Hon'ble High Court and accordingly a committee consisting of Justice (Retd) S.V.S Rathore and Justice (Retd) Pratyush Kumar was constituted for the purpose. The General body in its resolution dated 16.09.2021 had limited the scope of enquiry only to the procedure followed in

making the appointments to the academic and non-academic posts.

(36) Apparently, it is available from records that the aforesaid Committee was of the opinion that according to clause (iv) (a) of section 25, three experts had to be nominated by the Visitor on the recommendation by the Academic Council approved by the Executive Council, and this condition can be dispensed with only where the Academic Council and Executive Council have not been constituted. However, the Enquiry Committee arrived at a decision that at the time of appointment of the Expert Panel, the Executive Committee and the Executive Council had been constituted and consequently the Vice-Chancellor could not have exercised his power as provided in the proviso to Section 25(iv)(a) of the Act, 2009. Although, the said Committee noted that according to Section 44 of the Act, 2009, the proceedings of any authority, committee or body of the University shall not be invalidated merely for the reason that the General Council, Executive Council, Academic Council or any other authority or body of the University was not duly constituted or there was defect in its constitution or re-constitution, however the Committee came to a conclusion that appointments to the teaching post in pursuance to the advertisement nos. 17 of 2014 and 19 of 2015 were not in consonance with the statutory provisions, as the selection committee was constituted without taking approval of the Academic Council and held that constitution of the Selection Committee was illegal. This court finds that the aforesaid contradictory stand taken by the Committee was surely uncalled of, especially when the protection of Section 44 of the Act, 2009 was available to the Vice-Chancellor.

(37) Thus, this Court is of the view that the sole ground for observing that the appointments pursuant to the advertisement Nos 17 of 2014 and 19 of 2015 were not in consonance with the statutory provisions was that the selection committee was constituted without taking approval of the Academic council. This Court finds that the learned Single Judge has also considered this aspect in the impugned judgement, which related to whether the Selection Committee was duly constituted or not. The learned Single judge has observed that the said aspect had been duly scrutinised by the Visitor vide order dated 11.03.2016 while deciding a complaint made by one unsuccessful candidate namely Dr. Abhay Krishna, wherein one of the grounds of the complaint was that the Selection Committee was constituted by the Vice-Chancellor without referring the same to the Executive Council in terms of Section 25 (2) (A) (iv) (a) of the Act, 2009. Thus, the learned Single Judge has recorded that the said contention and non-compliance of the statutory provisions was duly considered by the Visitor, who dismissed the complaint of the said unsuccessful candidate Dr. Abhay Krishna on the ground of availability of section 44(1) of the Act. Therefore, the learned Single Judge concluded that since the Visitor is the highest authority of the University and once a decision has been rendered by the Visitor, that decision was binding on the University and in any view of the matter, the decision of the Visitor cannot be reviewed by any other authority subordinate to Visitor either by the General Body or the Vice Chancellor.

(38) The learned Single Judge has gone on to hold that the order of the Visitor was undoubtedly binding upon the University, and only with a view to unsettle

the order of the Visitor, the University resorted to the adventure of constituting a committee consisting of 2 former judges of the High Court, who in turn recorded a finding that the selection committee was not duly constituted, which was accepted by the University. This Court finds that the learned Single Judge in these peculiar facts has rightly concluded that the procedure adopted by the University was illegal, arbitrary and malafidely done only with the intention to override the decision of the visitor and the manner in which the University has proceeded in the matter clearly indicated that to achieve their objectives, and to annul all the actions of the former Vice-Chancellor, they chose not to follow the rules and basic principles which guide their actions.

(39) This Court finds that there could not be any doubt about the manner in which the committee consisting of 2 former judges of this court came to be formed, however the fact of the matter remains that the constitution of the committee by the University is not an issue in the present bunch of matters, rather the actions taken by the said committee, which has taken the centre stage of relevance is the issue, in as much as the recommendation of the Inquiry Committee were placed before the Executive Council which duly considered and accepted the said recommendations in its 38th Meeting dated 19.04.2022 and also further stated that appointments made during the tenure of former Vice Chancellor Sri Nishith Rai suffer from various illegalities, however it was decided that persons who were not holding requisite qualifications at the relevant time be asked to submit their response and the said response be placed before the two members Committed consisting of a retired High Court Judge and subject Specialist and only then final decision would be taken regarding their selection. Accordingly, show cause notices were given to the writ petitioners on 22.04.2022. It is noted that some of the writ petitioners responded to the notice while the others sought copies of relevant documents and also the entire report of the Enquiry Committee. In any case, the response submitted to the show cause notice dated 22.04.2022 were considered by a committee consisting of Justice Harsh Kumar, retired High Court Judge as well as Subject Expert and after consideration of the response to the show cause notice submitted by the petitioners, the said Committee submitted its report on 09.06.2022, which was placed before and considered by the Executive Council in its 39th Meeting held on 13.06.2022, who decided to accept the recommendations made by the said Enquiry Committee and a decision was taken to terminate the services of the petitioners. It was further resolved that order would be communicated by the Vice Chancellor of the University and accordingly selection of the petitioners has been cancelled by means of impugned order dated 06.07.2022, which was challenged by the Writ petitioners before the Ld. Single Judge on various grounds.

(40) The learned Single Judge noting that no charge-sheet was ever given to the writ petitioners and only show cause notices were issued to them on two occasions i.e. on 21.1.2021 and 22.4.2022 where they had submitted reply, but again the copy of the inquiry report was never given to them and as such observed that in absence of charges being framed against the petitioners, they were unable to adequately defend themselves which was in gross violation of provisions of Statute 9.07 of the respondent-University. Accordingly, the learned Single Judge concluded that by

not following the mandate provided in Statute 9.07, the respondents have acted in most arbitrary and illegal manner and termination of services of writ petitioners were not sustainable in law and deserved to be set aside. The learned Single Judge also noted that merely only extract of the enquiry report was supplied to the writ petitioners and although on a direction of the said court, the University provided a copy of the enquiry report to the writ petitioner, however the learned Single Judge, noting the judgment passed in the case of **Mahipal Singh Tomar v. State of U.P.** : (2013) 16 SCC 771 concluded that non-supply of entire enquiry report to the writ petitioner has prejudiced his defence and consequently, vitiated the entire proceedings, which were conducted in gross violation of principles of natural justice and thus the court concluded that the proceedings were arbitrary, illegal and liable to be quashed.

(41) The learned Single Judge went on to observe that the procedure followed for conducting enquiry cannot be sustained as apparently the procedure which has been followed for cancellation of selection of the writ petitioners is not prescribed in the Act of 1999 or in the Statute framed by the University which in fact provide for the procedure to be followed wherever the services of a teacher are to be removed/dismissed. It was observed that once a procedure has been duly adopted which provides for termination of services of teachers, then, the University was under mandate to follow the said procedure. Thus, the learned Single Judge observed at paragraph-52 of the impugned judgment as follows:

"……Firstly, entire proceedings are de-horse the prescribed procedure and therefore same could not be validated or sustained. Secondly, it is noticed that to proceed against an employee is right of the employer whenever there are allegations of misconduct of breach of contract of employment. To make an enquiry into the matter and enquiry officer can be appointed, but after receiving the enquiry report the essential aspect of decision making cannot be delegated to any other authority. In the present case, response received to the show cause notice were directed to be placed before a Committee which consisted a former Judge of this Court and a Subject Specialist. They looked into the response as to whether the petitioners fulfilled all the qualifications prescribed and its recommendations were placed before the Executive Council which had duly accepted the same. This delegation of power of looking into the response to the show cause notice, and affording personal hearing is essential feature of the enquiry conducted against a delinquent employee and such a procedure which has been followed in the present case is neither been provided in any Rule, Statute or Act, could not have been delegated to an outside agency. Needless to say, hearing is to be afforded before an authority who has to take a decision on the matter. In case hearing is done by one authority and the order is passed by another, the hearing in such a case becomes illusionary and merely camouflage with regard to following the principles of natural justice. The hearing was afforded by the committee, while the decision was to be taken by the Executive Council before whom no hearing took place, and consequently the proceedings were held in violation of principles of natural justice. Even the procedure followed was arbitrary and not prescribed and accordingly entire proceedings are

illegal and arbitrary and violative of natural justice and liable to be quashed on this ground alone."

(42) This Court finds that the learned Single Judge has very objectively dealt with the aspect of termination of the writ petitioner and no ground has been urged in the appeals, which could lead to upsetting the conclusion arrived by the learned Single Judge. Further, this Court finds that the writ petitioner was recruited in the year 2015 and he has been continuing on the said post for the last 7-8 years till the passing of the order impugned issued by the appellant cancelling his selection. Besides the fact that the selection of the writ petitioner was made by a duly constituted Committee consisting of subject specialist from various fields and after examining the qualifications of the writ petitioner and recommendations having been duly accepted by the University, it is noted that the entire matter could not have been reviewed by the University after such along lapse of time, especially when there is no allegation of fraud, suppression of material facts or misrepresentation on these writ petitioner. It can be profitably noted that these writ petitioners have not only completed more than one year in probation but their services were also confirmed by the University. This Court finds that the said analogy drawn by the learned Single Judge is also in conformity to the Act of 2009, which also indicates that once selection has been made by a duly constituted selection committee then even if there is any lacunae, the same deserves to be ignored and the selections made are to be preserved and protected to that effect as per section 44 of the Act, 2009.

(43) This Court finds that the fate of the writ petitioners are hanging fire between the cross-fire between the erstwhile Vice-Chancellor and the current Vice-Chancellor. Merely because the present administration of the University was adamant to inquire into the appointments made during the regime of former Vice-Chancellor against whom there were several allegations, cannot be the main consideration for proceeding against the teachers appointed during the tenure of former Vice Chancellor. Although, the learned Single Judge has relied on two judgments to fortify the aforesaid proposition of law, this Court would quote only one judgement passed by the Apex Court in the case of **Md. Zamil Ahmed v. State of Bihar** : (2016) 12 SCC 342, which clinches the issue in hand. In the said judgement, it has been held as under: -

"15. In these circumstances, we are of the view that there was no justification on the part of the State to wake up after the lapse of 15 years and terminate the services of the appellant on such ground. In any case, we are of the view that whether it was a conscious decision of the State to give appointment to the appellant as we have held above or a case of mistake on the part of the State in giving appointment to the appellant which now as per the State was contrary to the policy as held by the learned Single Judge, the State by their own conduct having condoned their lapse due to passage of time of 15 years, it was too late on the part of the State to have raised such ground for cancelling the appellant's appointment and terminating his services. It was more so because the appellant was not responsible for making any false declaration nor he suppressed any material fact for securing the appointment. The State was, therefore, not entitled to take advantage of their own

mistake if they felt it to be so. The position would have been different if the appellant had committed some kind of fraud or manipulation or suppression of material fact for securing the appointment. As mentioned above such was not the case of the State."

(44) This Court finds that all set and done, besides the aforesaid facts, the most crucial and significant issue for determination in this bunch of petitions is as to whether the writ petitioners did actually fulfil the minimum eligibility qualifications for recruitment to various posts to which they were appointed as it has been submitted by the learned Counsel for the appellants/University that in case these writ petitioners did not fulfil the essential qualification itself, it would have been empty formality to give them due opportunity of hearing, and consequently even if there is some infraction of the principle of natural justice the same would not vitiate the impugned order of termination.

(45) This Court finds that the learned Single Judge has not only scanned through the various qualifications possessed by these writ petitioners, but has in a very objective manner dealt with the allegation of not possessing the essential qualification in the impugned order. It is available from the records that as far as the case of Dr. Rajendra Kumar Srivastava (Appeal No. 332/2023) is concerned, the learned Single Judge has dealt with the said aspect of essential qualification at paragraph No 64 of the impugned judgment. This Court finds that the essential controversy with Dr. Rajendra Kumar Srivastava was as to whether M.Sc. in Computer Science was equivalent to MCA or not, so as to be qualified for appointment to the post of professor in Computer Science in the University. The learned Single Judge has while recording the fact that the contention of the writ petitioner was although recorded in the impugned order but the said contention was rejected by virtue of a cryptic order without assigning any reasons and without any application of mind by the authority, tasked onto itself to examine the said allegation and went on to hold that a perusal of the clarifications notification dated 01/06/2016 issued by the AICTE does not leave any room for doubt about the equivalence of MCA with a M.Sc computer science. The learned Single Judge went on to observe that as the notification issued by the AICTE was only a clarification, it would relate back to date of initial prescription of the qualifications. Further, not only has the AICTE issued the clarification, but even prior to the same the Indian Institute of Technology Madras recognised the said equivalence when they had published an advertisement for recruitment in the year 2013-2014 was also observed by the learned Single Judge, while dealing with the said aspect of equivalence between MSc and MCA. The learned Single Judge also recorded that the said aspect of the matter was also considered by the Apex Court in the case of **Saurabh Pal Vs The Chancellor, Veer Bahadur and others** (Appeal (Civil) 596 of 2008 decided on 22/01/2008). Thus, the learned Single Judge held as follows:

"65. The above judgements clearly resolve the dispute that M.Sc. has been held to be equivalent to M.Sc. Computer Science much prior to issuing of the clarification by the AICTE in 2016 as noticed by the Hon'ble Supreme Court. It indicates that the petitioner was fully eligible and qualified for being appointed on the post of Professor in Computer

Science and fulfilled all the eligibility conditions in this regard. The respondents have acted in most illegal and arbitrary manner and did not even consider the contention of the petitioner when he responded to the show cause notice issued by the University.

66. The procedure adopted by the respondents, as well as the decision making process adopted by them where the personal hearing was given by the committee and the decision taken by the executive Council indicates that proper or opportunity of hearing was not given to the petitioners before passing of the impugned order of termination. This aspect of the matter would have been duly considered by the selection committee at the time of selection of the petitioner, and that is why an expert members of the panel is included as per the norms prescribed by the UGC, but the enquiry committee did not have any expert member and therefore could not appreciate the stand taken by the petitioner. It is in this regard the Supreme Court has also held in the case of Basavaiah (Dr.) v. Dr. H.L. Ramesh, (2010) 8 SCC 372…"

(46) Thus, the learned Single Judge arrived at a conclusion at paragraph-67 that the writ petitioner/Dr. Rajendra Kumar Srivastava was fully qualified for being appointed and did not lack any qualification as alleged and as such set-aside the impugned order of cancellation of his selection. This Court is in full agreement to the said observation of the learned Single Judge. The grounds taken by the learned Senior Counsel for the appellant/University relating to M.Sc. Computer Science being not equivalent to MCA at the time of selection and it came to be recognized as equivalent vide notification dated 09/06/2016 is concerned, the same has been already dealt with the learned Single Judge, who has returned a finding not only on the basis of the said AICTE Notification but also on the basis of the judgment of the Apex Court **Saurabh Pal Vs The Chancellor, Veer Bahadur and others** (supra). In any case, it is not a case that the writ petitioner has misrepresented, or committed any fraud or suppressed any facts. The aforesaid fact of possessing M.Sc. in Computer Science was very well in the knowledge of the University and therefore after 7/8 years, they cannot now be permitted to turn back and cancel the selection of the writ petitioner on the ground of lack of requisite experience. Further, as per the own contention of the University, the writ petitioner came to be recognised to be possessing a degree equivalent to MCA in 06/01/2016, when the regulation was notified in the Gazette of India. Therefore, to contend at this belated stage of after 7/8 years, would be a misnomer in the eyes of law. In the case of **Mohd. Abul Lash Vs. State of U.P. and others** (supra), the Apex Court, while considering a case where a person was not qualified at the time of appointment, but he acquired the requisite qualification later on, refused to interfere with the appointment and set aside the judgment and order dated 19.12.2014 passed by a Division Bench of this Court in Special Appeal (Defective) No.701 of 2014. In another case of **Nahar Singh and others Vs. State of U.P. and others** (supra) and **Savitri Devi and others Vs. State of U.P. and others** (supra), the Apex Court in Civil Appeal No.3904 of 2013 held that once a person has continued in service for a long period, his continuance should not be disturbed. Thus, this Court does not find any infirmity in the case of Dr. Rajendra Kumar Srivastava.

(47) Similarly, it is available from the records that as far as the case of Vipin Kumar Pandey (Special Appeal No. 335/2023) is concerned, the learned Single Judge has dealt with the said aspect of essential qualification at paragraph No 68 of the impugned judgment. This Court finds that the controversy with Vipin Kumar Pandey was that he had applied for the post of Assistant Professor (English) and the only ground on which the services of the selection of the petitioner was cancelled is that while offering his candidature details given in regard to API score indicated that he did not have score of 300 as prescribed under the UGC Regulations. The allegation was that the writ petitioner claimed API score of 304.5 points under category III by awarding 50 points in category III sec IIIE (i) whereas a maximum of 30 points can be claimed under that section, and hence the petitioner came down to 284.5 which is less than the minimum required API score as per the stand of the university. This court finds that the Ld. Single Judge after dealing with the concept and calculation of API as applicable in the present case, returned a finding as follows:

"……The petitioner had produced articles authored by an prior to the date of advertisement which were duly accepted by the selection committee. The panel of experts constituting the selection committee are the best to judge the qualifications of a candidate, who after due examination found the petitioner was fully qualified to be selected. There are no allegations of malafidely or bias against the panel of experts, hence their decision could not have been substituted by another body lacking the minimum/basic expertise in the matter. This Court is of the considered view that the petitioner fulfilled all the qualifications and the decision of the respondents' authorities to the contrary is arbitrary, illegal and is liable to be set-aside."

(48) The only ground taken by the appellants/University in the appeals seeking interdiction of the aforesaid judgment is that the writ petitioner did not append the documents to get the minimum API score of 300 points on the last date of submission of application form on 22/03/2014 nor did the said writ petitioner could produce any documentary evidence to prove that any document/publication had been produced before the selection committee to get the minimum API score of 300 points. This Court finds that at serial No.21 of the general Instruction issued by the university it was specifically provided that final decision in regard to eligibility of the candidate shall be that of the appointing authority/ administration of the university and the same shall be binding on the candidates. Further, it has been specifically averred by the writ petitioner in his petition that while appearing before the selection committee, he submitted his additional API score together with evidences in the prescribed format and claimed 40 additional points which were not claimed by him while submitting his application form and as such he claimed the fulfilment of minimum score of 300 points. It had also been contended in the writ petition that the selection committee after being fully satisfied with the API score as also the educational qualification and other requisite conditions selected and appointed him as associate professor in English and also attached the said requisite document as annexure 8 to the writ petition. This Court finds that there is no contrary averment to the said factual matrix of the writ petitioner. Thus, this Court besides being in

absolute agreement with the observation of the learned Single judge also conclude that the writ petitioner had the requisite API on the date of selection and as such the learned Single Judge has rightly held that he fulfilled all the qualifications and found the decision of the Appellant/University to be arbitrary, illegal and liable to be set-aside.

(49) Further, it is also available from the records that as far as the case of Dr. Adya Shakti Rai (Special Appeal No. 333/2023) is concerned, the learned Single Judge has dealt with the said aspect of essential qualification at paragraph No 69 of the impugned judgment. This Court finds that the essential controversy with Dr. Adya Shakti Rai was that she had applied for the post of Associate Professor in Department of Visual Impairment, Faculty of Special Education, which required 5 years of experience. The allegation against Dr. Adya Shakti Rai is that she only had experience of 4 years and 7 months, although she had been working on the post of Lecturer/Asst. professor in the Department of Visual Impairment since 2009 in the appellants/University itself. This Court finds that the learned Single Judge after appreciating the facts of the said case, returned a finding as follows:

"(iv). Considering the rival contentions, it is noticed that the petitioner was appointed on the post of Assistant Professor in Department of visual impairment in the faculty of special education in their 2009, and at completed 4 years and 7 months of the said post, when she applied for the post of Associate Professor in the year 2014. Even though at the time of her appointment there was shortfall of certain period of experience, but admittedly she has been working of the said post for last 7 years and there are no complaints against, and she even fulfils all the requisite qualifications as on date. This court has also considered the fact that on 2 previous occasions the respondent University had advertised the post for appointment to the post of Associate Professor, but no applications were received, which clearly indicates that firstly, there were very few people taking up the said course and due to the paucity of individuals of the required academic qualifications, and secondly, that the approval given by the Rehabilitation Council of India was subject to appointment of adequate faculty. The respondent University more because of their immediate requirement appointed the petitioner on the post of Associate Professor appointed her to the said post after duly considering her experience. It is not a case that the petitioner has misrepresented, as even an application forms clearly indicates that she has experience of four years and seven months on the post of Assistant Professor. They cannot now be permitted to turn back and cancel the selection of the petitioner on the ground of lack of requisite experience. In the case of Mohd. Abul Lash Vs. State of U.P. and others, the Hon'ble Apex Court while considering a case where a person was not qualified at the time of appointment, but he acquired the requisite qualification later on, refused to interfere with the appointment and set aside the judgment and order dated 19.12.2014 passed by a Division Bench of this Court in Special Appeal (Defective) No.701 of 2014. In another case of Nahar Singh and others Vs. State of U.P. and others and Savitri Devi and others Vs. State of U.P. and others, Hon'ble Supreme Court in Civil Appeal No.3904 of 2013 held that once a person has continued in service for a long period, his continuance should not be

disturbed. Following the aforesaid ratio of law laid down by Supreme Court a Division Bench of this Court in Special Appeal No.313 of 2015 had held that after long continuance in service, the appointment of a person to his service should not be disturbed.

(50) The only ground taken by the appellants is that the writ petitioner has herself mentioned in the application form that she had 4 years and 7 months as experience in place of the required 5 years at the time of Application and as such it has been argued that since the requisite experience was not available to the writ petitioner on the date of application, the order of the University cancelling her selection was right in the eyes of law. This Court finds that the said issue stands settled by the Apex Court in the case of **Mohd. Abul Lash Vs. State of U.P.** (supra), wherein the Apex Court held as herein below:

"…..Though the appellant was not qualified at the time of appointment, he acquired the requisite qualification later. He cannot be said to be ineligible to hold the post of Assistant teacher. Taking into account the fact that he has been working continuously since the date of appointment i.e 1995, we are inclined to grant relief to the appellant as prayed for in the writ petition in the peculiar facts and circumstances of this case".

(51) This Court is of the view that the post of Associate Professor Department of Visual Impairment, Faculty of Special Education remained vacant in the year 2010 as no one applied and similarly the said post remained vacant in 2012, wherein again no candidates applied. Dr. Adya Shakti Rai was already working in the Department of Visual Impairment, Faculty of Special Education of the appellant/University and had experience of 4 years and 7 months. It is not the case of the University that she supressed her actual experience, rather it is the other way round and inspite of the said declaration, Dr. Adya Shakti Rai was selected for the said post, apparently as permission of the Rehabilitation Council of India was subject to appointment of adequate faculty by the University. It seems the University has after giving consideration to various factors has duly selected Dr. Adya Shakti and now merely there is a change in guard/ Vice Chancellor, her selection is sought to be cancelled on the ground that she as a shortfall of five months of experience at the time of her selection. Evidently, Dr. Adya Shakti has been continuously working on the said post for the last 7/8 years and there had been no complaint nor it is the case of the University that Dr. Adya Shakri is inefficient. Having said so, this court does not find any cogent and plausible grounds to differ from the reasoning appended by the learned Single Judge in granting relief to the said Dr. Adya Shakti. The learned Single Judge has rightly held that the impugned order cancelling her selection and terminating the services to be illegal and arbitrary and liable to be set-aside.

(52) As to the case of Dr. Mrityunjay Mishra (Appeal No. 336/2023) is concerned, the Ld. Single Judge has dealt with the said aspect of essential qualification at paragraph No 70 of the impugned judgment. This court finds that the main controversy with Dr. Mrityunjay Mishra was that he had applied for the post of Associate Professor in Department of Hearing Impairment, Faculty of Special Education, which required 5 years of experience. The Allegation against Dr.

Mrityunjay Mishra is that he only had experience of 4 years and 7 months, although he had been working on the post of Lecturer/Asst. professor in the Department of Hearing Impairment since 2009 in the Appellant University itself and prior to his joining the Appellant University in 2009, he was working as Course Coordinator, a post which is equivalent to the post of Lecturer, in Research Education and Audiology Development Society, which is a society registered under the Societies Registration Act, 1860 and recognized by Rehabilitation Council of India from 15.9.2003 to 24.8.2009. This Court finds that the learned Single Judge after appreciating the facts of the said case, returned a finding as follows:

"72. Considering the aforesaid facts this Court is of the considered opinion that the period the petitioner worked i.e. from 2003 to 2009 as Post Coordinator in READS is required to be counted as his experience as Lecture. The panel of experts having examined the said issue found the petitioner to be possessing the requisite experience. It is not subsequently open for a body not having requisite qualification or expertise in the subject to test the validity of the decision taken by expert body/selection committee and also considering the fact that on the date of passing of the impugned order the petitioner has the requisite qualifications there was no occasion for the respondent-university to have terminated his services after 7 years of his working in the respondent university as Associate Professor."

(53) This Court notes that the writ petitioner, who was already working in the appellants/University since the year 2009, when he was appointed on the post of Assistant Professor/Lecturer, in the department of Hearing Impairment, and as per the career progression scheme of the Rehabilitation council of India, the writ petitioner would have already been appointed on the post of Associate Professor, after rendering five years of satisfactory service on the post of lecturer in the year 2014 itself. The only ground taken by the Appellant is that the writ petitioner has himself mentioned in the application form that he had 4 years and 7 months as experience in place of the required 5 years at the time of application and as such it has been argued that since the requisite experience was not available to the writ petitioner on the date of application, the order of the University cancelling his selection was right in the eyes of law. This Court finds that the said issue stands settled by the Apex Court in the case of **Mohd. Abul Lash Vs. State of U.P.** (supra) and as such this Court is of the view that the writ petitioner had joined the appellants/university in the year 2009 itself i.e the year of establishment of the University and all the records were lying in the custody of the University. It is not the case of the University that there is a challenge to his candidature from any third person, or that he supressed any material from the selection committee. Apparently, his selection is sought to be cancelled on the ground that he has a shortfall of five months of experience at the time of his selection. Evidently, Dr. Mrityunjay Mishra has been continuously working on the said post for the last 7/8 years and there had been no complaint nor it is the case of the University that he is inefficient. Dr. Misha had been working in the university for the last 13/14 years, initially as lecturer and then as associate professor. Having said so, this court does not find any grounds to differ from the reasoning returned by the

learned Single Judge in granting relief to the said Dr. Mrityunjay Mishra and as such the present Appeal filed by the University fails as being without any substance.

(54) As far as the facts of Avanish Chandra Mishra (Special Appeal No. 334/2023) is concerned, the learned Single Judge has dealt with the said aspect of essential qualification at paragraph No 73 of the impugned judgment. This court finds that the controversy with Avanish Chandra Mishra was that he had applied for the post of Professor in Department of History which required 10 years of teaching experience in University/college, and/or experience in research at the University/national level institution, including experience of guiding candidates for research at doctoral level. The Allegation against Avanish Chandra Mishra is that although he worked on the post of Associate Professor from 01/01/2004 till 15/01/2014, which is a period of 10 years at Jagatguru Rambadrachara Handicapped University, Chitrakoot on permanent basis, however the controversy stems out from the fact that Avanish Chandra Mishra while working as Associate Professor in the Jagatguru Rambadrachara Handicapped University, Chitrakoot, he was also given additional charge for the post of Registrar. The Appellant/ university has cancelled the appointment of the petitioner on the ground that when the petitioner worked on the post of Registrar, he could not have been involved in teaching and the period for which he worked as registrar should be deducted from his teaching experience. This court finds that the learned Single Judge has dealt with each & every contention raised by the University before the learned Single Judge and after appreciating the facts of the said case and both on the ground of being merely a registrar with additional charge and no material to substantiate that Avanish Chandra Mishra functioned as a whole time registrar as well as on the ground relating to publication of research papers as per the UGC norms has returned a finding as follows:

"77. From the aforesaid discussions it is clear that the petitioner was fully qualified, his qualifications were duly looked into by the selection committee recommended his candidature for appointment to the post of Professor in History. There is no reason for a review of his qualifications after a period of 7 years, in absence of any allegations of fraud and misconduct have been having been committed by the petitioner, the cancellation of his selection is clearly illegal and arbitrary and libel to be set aside."

(55) As regards the other deficiency pointed out, this Court notes that the learned Single Judge also returned a clear and reasoned finding that the research papers authored by Avanish Chandra Mishra, which have been accepted for publication were required to be considered, which although were duly taken into account by the Selection Committee but arbitrarily not considered by the inquiry committee and consequently there was no infirmity/deficiency in the qualification of the petitioner. Even the API score was wrongly calculated as Avanish Chandra Mishra possessed 469.5 API marks and the said score was calculated as per the UGC Regulation, 2010 as could be also found in the writ petition itself annexed along with the present Appeal. This court finds that besides repeating the same ground in the present Appeal, there are no new grounds

which have been agitated by the Appellant/university in the present Appeal. Very recently the Constitution Bench of the Apex Court in a recent Judgment dated 12.07.2023 reported in 2023 SCC Online SC 994 in Re: ***Sivanandan C.T and others V/s High court of Kerala and Ors.***, which was a matter relating to selection of Judicial officer in the state of Kerala, the Apex Court in the said judgment although held that the procedure adopted was arbitrary for selections but refused to unseat these candidates on the ground of public interest, who had been working for more than 06 years. This Court finds that the said Avanish Chandra Mishra had been working for more than 08 years and there had been no complaint relating to his inefficiency, nor there is any allegation of fraud or misrepresentation on his part. Thus, this Court is not inclined to disturb and unsettle the findings already arrived by the learned Single Judge.

(56) Further, as far as the case of Alok Mishra (Special Appeal No. 330/2023) is concerned, this court finds that although the order impugned in the present Appeal is not a part of the common order dated 08/05/2023, however it is seen that the impugned order passed in Alok Mishra case heavily relies on the common order dated 08/05/2023. Moreover, as to the fact of Alok Mishra is concerned, it is available from records that the controversy was relating to having eight years of legal practise as a registered Advocate in the High Court to be appointed as Law officer of the University. According to the University Alok Mishra did not have the said requisite experience nor did he annex a copy of the experience certificate while filling the application form. This Court finds that the learned Single Judge vide the impugned order dated 24.05.2023, has specifically dealt with the said controversy and returned a finding on facts in the following words:

"4. The Counsel for the petitioner draws my attention to the registration of the petitioner with the Bar council, being of the year 2003. He also places reliance on a certificate issued by a senior Advocate of this court, the said certificate relied upon by the petitioner, has not been denied in the counter affidavit nor is the same said to be a forged and fabricated document.

5. In view thereof, I have also perused the records and l am of the view that the petitioner possesses the minimum qualification. The other grounds on which the judgment has been delivered in the case of Dr. Rajendra Kumar Srivastava (supra) are squarely applicable to the facts of the present case."

(57) This Court finds that merely general grounds have been agitated by the appellants in the appeals, which have already been dealt with this court in the aforesaid paragraphs. Thus, this Court does not find any plausible grounds agitated by the appellants/University to have any substance and as such this court is not inclined to interfere with the impugned judgment passed by the learned Single Judge.

(58) The next issue raised by the learned Counsel for the appellants is related to grant of consequential relief including back wages to the writ petitioner/private respondents by the learned Single Judge. This Court finds that the learned Single judge has returned a finding that the private respondent/writ petitioner was not at fault and yet he was visited with illegal termination merely because there had been selected during the tenure of a Vice

Chancellor, against whom certain allegations have been made. Besides the fact that no charges-sheet or inquiry was conducted as has been envisaged under the relevant rules of the University, the principle of Natural Justice was also not followed by the University while passing the termination order. Since, this Court has upheld the findings of the learned Single Judge and has found the said to have been passed on sound legal principles, this Court does not find any reasons as to why the consequential relief, including back wages should not be granted to private respondent. The Apex Court in the case of **Pradeep vs Manganese Ore (India) Limited and others**; (2022) 3 SCC 683 has held at paragraph 12 of the said judgment, which reads as under:

"12. It is, undoubtedly, true when the question arises as to whether the back wages is to be given and as to what is to be the extent of back wages, these are matters which will depend on the facts of the case as noted in Deepali Gundu Surwase [Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324 : (2014) 2 SCC (L&S) 184] . In a case where it is found that the employee was not at all at fault and yet, he was visited with illegal termination or termination which is actually activised by malice, it may be unfair to deny him the fruits of the employment which he would have enjoyed but for the illegal/malafide termination. The effort of the Court must be to then to restore the status quo in the manner which is appropriate in the facts of each case. The nature of the charges, the exact reason for the termination as evaluated and, of course, the question as to whether the employee was gainfully employed would be matters which will enter into the consideration by the Court."

(59) Thus, this Court is of the view that once a selection is duly made, then in case there is any shortcomings in the said selection which is of such a nature that the same cannot be condoned, action has to be taken expeditiously. In the present case, there is no allegation that the writ petitioner/private respondent had misrepresented about their educational qualifications or their experience or where in any manner misconducted themselves in obtaining selection in the University. In absence of any fraud or misrepresentation having been committed by the writ petitioner/private respondent, the selection cannot be cancelled after long period of seven years.

E. CONCLUSION

(60) For all the aforesaid reasons, this Court is not inclined to interfere in the findings arrived by the learned Single Judge in the impugned common judgment/order dated 08/05/2023 passed in Writ-A Nos. 4293, 4316, 4310, 4307, 4312 of 2022 and the impugned judgement/order dated 24.05.2023 passed in Writ-A No.7046 of 2022.

(61) As a sequel to above, all the above-captioned appeals are **dismissed**. However, in the aforesaid facts and circumstances, there shall be no orders as to cost.

(2024) 2 ILRA 698
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2024

BEFORE

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

Writ - A No. 580 of 2023
with
Special Appeal Defective No. 187 of 2022
With
Special Appeal Defective No. 257 of 2022
With
Civil Misc. Review Application No. 398 of 2023

Geetanjali Tiwari (Pandey) ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Alok Kumar Yadav, Sri Digvijay Singh

Counsel for the Respondents:
A.S.G.I., Sri Ankur Agarwal, Sri Dhananjay Awasthi, Sri Kshitij Shailendra, Sri Kunal Ravi Singh, Sri Saumitra Singh, Sri Vinayak Mithal

A. Service Law – Appointment to Assistant Professor – UGC Regulations, 2018 – Short-listing Criteria – Petitioners challenged non-inclusion in the short-list for Assistant Professor interviews, alleging improper denial of marks for teaching/post-doctoral experience under Clause 7, Table 3A of UGC Regulations, 2018 – Respondents applied Regulation 10(f)(iii), requiring past teaching experience to have emoluments not less than a regularly appointed Assistant Professor – Held, Regulation 10 applies to counting past services for direct recruitment or promotion under Career Advancement Scheme (CAS) for Associate Professor/Professor posts, not for short-listing Assistant Professor candidates – Clause 7, Table 3A, does not mandate Regulation 10's salary condition for awarding marks for teaching experience – Respondents' interpretation erroneous, as teaching experience in recognized institutions with requisite qualifications suffices for 2 marks per year. (Paras 17, 23, 24, 30, 33, 36)

B. Service Law – Constitutional Validity – Regulation 10(f)(iii) – Petitioners sought to declare Regulation 10(f)(iii) ultra vires Article 14, claiming it arbitrarily excludes teaching experience with lower emoluments – Held, since Regulation 10 is inapplicable to short-listing for Assistant Professor under Clause 7, Table 3A, the challenge to its constitutional validity is unnecessary – Teaching/post-doctoral experience under Clause 7 should be given ordinary meaning, covering full-time teaching in recognized institutions without salary or appointment nature restrictions – Respondents' reliance on Regulation 10(f)(iii) misconceived, as it distorts the purpose of short-listing meritorious candidates. (Paras 11, 17, 33, 34, 36)

C. Service Law – Short-listing for Assistant Professor – Interpretation of UGC Regulations – Clause 7, Table 3A, awards 2 marks per year for teaching/post-doctoral experience without defining the term – Held, applying Regulation 10's restrictive conditions (e.g., salary equivalence, exclusion of guest lecturer roles) to Clause 7 is unwarranted, as it creates anomalies, particularly for post-doctoral experience – Teaching experience as a full-time teacher in a recognized university/college with requisite qualifications entitles candidates to marks under Clause 7, regardless of appointment type or salary – This interpretation promotes the objective of selecting the best candidates for interview – Existing selections unaffected, but future short-listing to follow this judgment. (Paras 31, 33, 35, 36, 37)

Writ Petition, Special Appeals, and Review Application Disposed – Respondents Directed to Short-list Candidates per Judgment.

List of Cases cited:

1. Gambhirdan K. Gadhvi Vs St. of Guj., (2022) 5 SCC 179

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

1. These bunch of cases raise similar questions of law and fact and have been heard together. They are thus being disposed of by this common judgment. Writ Petition No.580 of 2023 filed by Geetanjali Tiwari (Pandey) is taken as the lead case.

2. All the petitioners/appellants in this bunch undisputedly possess minimum qualification prescribed for appointment to the post of Assistant Professor in a recognized university or the degree colleges affiliated to it. The qualification

for appointment to the post of Assistant Professor is prescribed by the UGC regulations notified on 18.7.2018, titled as University Grants Commission (Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2018 (hereinafter referred to as 'the Regulations'). The post of Assistant Professor as per the regulations is to be filled by way of direct recruitment. Clause 4 of the regulations, in so far as it deals with appointment on the post of Assistant Professor, is extracted hereinafter:-

"**4.0 Direct Recruitment**

4.1 For the Disciplines of Arts, Commerce, Humanities, Education, Law, Social Science, Sciences, Languages, Library Science, Physical Education, and Journalism & Mass Communication.

I. Assistant Professor:

Eligibility (A or B):

A.

i) A Master's degree with 55% marks (or an equivalent grade in a point-scale wherever the grading system is followed) in a concerned/relevant/allied subject from an Indian University, or an equivalent degree from an accredited foreign university.

ii) Besides fulfilling the above qualifications, the candidate must have cleared the National Eligibility Test (NET) conducted by the UGC or the CSIR, or a similar test accredited by the UGC, like SLET/SET or who are or have been awarded a Ph.D. Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of M.Phil./Ph.D. Degree) Regulations, 2009 or 2016 and their amendments from time to time as the case may be exempted from NET/SLET/SET:

Provided, the candidates registered for the Ph.D. programme prior to July 11, 2009, shall be governed by the provisions of the then existing Ordinances/Bye-laws/Regulations of the Institution awarding the degree and such Ph.D. candidates shall be exempted from the requirement of NET/SLET/SET for recruitment and appointment of Assistant Professor or equivalent positions in Universities/Colleges/Institutions subject to the fulfillment of the following conditions:-

a) The Ph.D. degree of the candidate has been awarded in a regular mode;

b) The Ph.D. thesis has been evaluated by at least two external examiners;

c) An open Ph.D. viva voce of the candidate has been conducted;

d) The candidate has published two research papers from his/her Ph.D. work, out of which at least one is in a referred journal;

e) The candidate has presented at least two papers based on his/her Ph.D. work in conferences/seminars sponsored/funded/supported by the UGC/ICSSR/CSIR or any similar agency.

The fulfilment of these conditions is to be certified by the Registrar or the Dean (Academic Affairs) of the University concerned.

Note: NET/SLET/SET shall also not be required for such Masters Programmes in disciplines for which NET/SLET/SET is not conducted by the UGC, CSIR or similar test accredited by the UGC, like SLET/SET.

OR

B. The Ph.D. degree has been obtained from a foreign university/institution with a ranking among

top 500 in the World University Ranking (at any time) by any one of the following: (I) Quacquarelli Symonds (QS) (ii) the Times Higher Education (THE) or (iii) the Academic Ranking of World Universities (ARWU) of the Shanghai Jiao Tong University (Shanghai).

Note: The Academic score as specified in Appendix II (Table 3A) for Universities, and Appendix II (Table 3B) for Colleges, shall be considered for short-listing of the candidates for interview only, and the selections shall be based only on the performance in the interview."

3. The regulations also provide for selection committee for appointment to the post of Assistant Professor. The procedure for selection is also specified in the regulations. Assessment criteria for determining merit as also its methodology are specified in the regulations. Clause 10 of the regulations then provide for counting of past service for direct recruitment and promotion under career advancement scheme. This clause though does not appear to have any relevance for appointment to the post of Assistant Professor, by direct recruitment, but since clause 10(f)(iii) is applied for short-listing of candidates to be called for interview and is also challenged in some of the petitions, therefore, it has become necessary to refer to it. Clause 10 of the regulations is extracted hereinafter:-

"10.0 Counting of Past Services for Direct Recruitment and Promotion under CAS

Previous regular service, whether national or international, as Assistant Professor, Associate Professor or Professor or equivalent in a University, College, National Laboratories or other scientific/professional organisations such as the CSIR, ICAR. DRDO, UGC, ICSSR, ICHR, ICMR and DBT, should count for the direct recruitment and promotion under the CAS of a teacher as Assistant Professor, Associate Professor, Professor or any other nomenclature, provided that:

(a) The essential qualifications of the post held were not lower than the qualifications prescribed by the UGC for Assistant Professor, Associate Professor and Professor, as the case may be.

(b) The post is/was in an equivalent grade or of the pre-revised scale of pay as the post of Assistant Professor (Lecturer), Associate Professor (Reader) and Professor.

(c) The concerned Assistant Professor, Associate Professor and Professor should possess the same minimum qualifications as prescribed by the UGC for appointment to the post of Assistant Professor, Associate Professor and Professor, as the case may be.

(d) The post was filled in accordance with the prescribed selection procedure as laid down in the Regulations of the University/State Government/Central Government/Institutions concerned, for such appointments.

(e) The previous appointment was not as guest lecturer for any duration.

(f) the previous Ad-hoc or Temporary or contractual service (by whatever nomenclature it may be called) shall be counted for direct recruitment and for promotion, provided that:

(i) the essential qualifications of the post held were not lower than the qualifications prescribed by the UGC for Assistant Professor, Associate Professor and Professor, as the case may be.

(ii) the incumbent was appointed on the recommendation of a duly constituted Selection Committee/Selection Committee constituted as per rules of the respective university;

(iii) the incumbent was drawing total gross emoluments not less than the monthly gross salary of a regularly appointed Assistant Professor, Associate Professor and Professor, as the case may be; and

(g) No distinctions shall be made with reference to the nature of management of the institution where previous service was rendered (private/local body/Government) while counting the past service under this clause."

4. The regulations also specify the criteria to be followed for applicants to be shortlisted for interview for the post of Assistant Professors. Table 3A of the regulations, describing the criteria for short-listing, is extracted hereinafter:-

Table: 3A

Criteria for Short-listing of Candidates for Interview for the Post of Assistant Professors in Universities

S.N.	**Academic Record**	**Score**			
1.	Graduation	80% & Above = 15	60% to less than 80%= 13	55% to less than 60%= 10	45% to less than 55%= 05
2.	Post-Graduation	80% & Above = 25	60% to less than 80%= 13	55%(50% in case of SC/ST/OBC(non-creamy layer)PWD) to less than 60%=220	
3.	M.Phil.	60% & Above = 07	55% to less than 60%=05		
4.	Ph.D.	30			
5.	NET with JRF	07			
	NET	05			
	SLET/SET	03			
6.	Research Publications (2 marks for each research publications published in Peer-Reviewed for UGC-listed journals)	10			
7.	Teaching/Post Doctoral Experience (2 marks for oner year each)#	10			
8.	Awards				
	International /National Level (Awards given by International Organisations/Government of India/Government of	03			

	India recognized National Level Bodies)	
	State-Level (Awards given by State Government)	02

#However, if the period of teaching/Post-doctoral experience is less than one year then the marks shall be reduced proportionately.

Note:

(A) (i) M.Phil + Ph.D Maximum- 30 marks

(ii) JRF/NET/SET Maximum- 07 marks

(iii) In awards category Maximum- 03 marks

(B) Number of candidates to be called for interview shall be decided by the concerned universities

(C) Academic Score -80
Research Publications -10
Teaching Experience -10

Total -100

(D) Score shall be valid for appointment in respective State SLET/SET Universities/Colleges/Institutions only.

5. All the petitioners/appellants have applied for appointment to the post of Assistant Professor pursuant to the advertisements issued by the University of Allahabad or its constituent colleges. The petitioners/appellants are aggrieved by non-inclusion of their names in the short-listed candidates to be called for interview. The petitioners apparently have not been awarded any marks on account of their teaching/post doctoral experience in terms of clause 7 of table 3A as their teaching experience is not in consonance with regulation 10(f)(iii). Petitioners consequently urge that regulation 10(f)(iii) be not applied while computing marks admissible against clause 7 of table 3A of the regulations or else regulation 10(f)(iii) be held ultra vires. It is also submitted that in the event proper marks were accorded to them for their teaching experience in terms of clause 7 of table 3A then they would qualify to be short-listed for interview.

6. The petitioners assert that though they have requisite teaching experience yet ten marks available to them, as per clause 7 of table 3A have been denied to them by misreading and misapplying the provisions of the UGC regulations, inasmuch as the criteria specified for counting past services for appointment or promotion under career advancement scheme has no applicability while calculating marks as per clause 7 of table 3A. It is thus urged that clause 10 of the regulations apply in entirely different eventuality and has erroneously been applied in the facts of the present case.

7. In leading writ petition no.580 of 2023, the petitioner has sought a declaration that regulation 10(f)(iii) of Regulations be declared ultra vires Article 14 of the Constitution of India. Clause (B)(viii) of the General Instructions issued by respondent no.4, in that regard, is also assailed. Prayer is also made to command the respondents to consider the candidature of the petitioner on the post of Assistant Professor in Sanskrit pursuant to advertisement dated 28.11.2022.

8. Special Appeal Defective No.187 of 2022 is also filed by the petitioner in the leading case challenging a judgment of learned Single Judge dated 20.5.2022 dismissing her writ petition no.7114 of 2022. Learned Single Judge had refused the prayer made for award of marks for teaching while short-listing the candidates to be called for interview relying upon regulation 10(e)&(f)(iii) of the regulations. The petitioners working as guest faculty at Allahabad University has been overlooked in view of regulation 10(e) while her working in PG College affiliated to Deen Dayal Upadhyay Gorakhpur University has not been counted towards teaching experience as her contractual appointment did not allow her salary in terms of regulation 10(f)(iii) of the regulations. Learned Single Judge also observed that the relevant regulations, in that regard, were otherwise not challenged. It is apparently to get over this observation that the lead case has been filed challenging the regulations.

9. Special Appeal Defective No.257 of 2022 has been filed by petitioner Brahma Deo claiming marks on account of teaching experience. Learned Single Judge vide his order dated 20.5.2022 dismissed the writ relying upon the judgment of the date rendered in Writ-A No.7114 of 2022 filed by the lead petitioner Geetanjali Pandey. The judgment of learned Single Judge is thus assailed in the special appeal.

10. Lead petitioner had earlier filed Writ-A No.16585 of 2022 challenging regulation 10(f)(iii) as also the consequential clauses (iv) and (v) of the General Instructions contained in the advertisement dated 10.9.2022. This writ has been dismissed on the ground that the judgment of learned Single Judge in Writ-A No.7114 of 2022 was already challenged in special appeal defective no.187 of 2022 and leave was also sought, therein, to challenge regulation 10(f)(iii). Writ Petition No.16585 of 2022 accordingly was not entertained. Liberty, however, was granted to the petitioner to press her special appeal or the application for grant of leave. A review application no.398 of 2023 has been filed to review the judgment and order dated 2.8.2023 dismissing writ petition no.16585 of 2022. This review is also connected in this bunch of petitions.

11. Clause 10(f)(iii) provides that only such services shall be counted where the incumbent was drawing total gross emoluments not less than the monthly gross salary of a regularly appointed Assistant Professor. The benefit of past services would not be extended if the salary drawn by the teacher/Assistant Professor is less than the gross salary of a regularly appointed Assistant Professor. It is for this reason that petitioners/appellants have challenged regulation 10(f)(iii) of the UGC regulations, 2018 and a declaration has been sought that it is ultra vires Article 14 to the Constitution of India. A prayer has also been made to quash clause b(viii) of the General Instructions issued by respondent no.4 Ishwar Saran Degree College. Clause b(viii) is reproduced hereinafter:-

"(viii) **Minimum Educational Qualifications:** (a) The applicant must fulfil the essential requirements for desired post (Assistant Professor and College Librarian) and other conditions stipulated in the UGC REGULATIONS ON MINIMUM QUALIFICATIONS FOR APPOINTMENT OF TEACHERS AND OTHER ACADEMIC STAFF IN UNIVERSITIES AND COLLEGES AND

MEASURES FOR THE MAINTENANCE OF STANDARDS IN HIGHER EDUCATION, 2018 with subsequent amendments made from time to time, before the first date of publication of Advertisement.

(b) Applicants are advised to satisfy themselves before applying, that they possess the essential qualifications laid down for the posts, as on the last date of submission of Online Application Form. No enquiry asking for advice as to eligibility will be entertained."

12. In the leading writ petition of Geetanjali Tiwari (Pandey), it is asserted that petitioner has applied for appointment to the post of Assistant Professor in Sanskrit in Allahabad Degree College, a constituent college of University of Allahabad. The petitioner has graduated in Sanskrit as one of the subjects in 1996 and possesses a post-graduate degree in Sanskrit(ved). She has also done her Phd in the year 2003-2007 from Deen Dayal Upadhayay University, Gorakhpur and has also qualified NET in Sanskrit. The petitioner asserts that she has teaching experience of contractual post from Jawad Ali Shah Imambara Girls P.G. College, Gorakhpur where she was appointed on 15.10.2004 and she has served in the said institution upto 21.7.2010. The petitioner also claims that she has teaching experience as a guest faculty at the University of Allahabad for the academic year 2017-2018.

13. Respondent no.4 Ishwar Saran Degree College issued an advertisement No. ISDC/01/2022 dated 10.9.2022 inviting applications for appointment to the post of Assistant Professor in various subjects. Petitioner's name has, however, not been included in the list of eligible candidates to be called for interview apparently on the ground that she does not satisfy the condition laid down in regulation 10(f)(iii) of the 2018 regulations for her past teaching experience to be counted in terms of clause 7 of table 3A.

14. Writ petition No.71141 of 2022, filed by the petitioner, challenging her non-inclusion in the short-listed candidates to be called for interview came to be dismissed on 20.5.2022 on the ground that regulation 10(f)(iii) had not been challenged. Aggrieved by the said judgment the petitioner has preferred Special Appeal Defective No.580 of 2023 by moving an application for grant of leave. The petitioner has also challenged the vires of regulation 10(f)(iii). A separate petition has also been filed with the prayer to declare 10(f)(iii) of regulations as ultra vires.

15. Counter affidavits are filed by the respondents contending that UGC regulations are binding upon the institutions and the petitioner-appellants were not entitled to award of marks for their teaching experience since the salary paid to them was below the salary admissible for the post of Assistant Professor by virtue of regulation 10(f)(iii). Respondents contend that the salary received by the petitioner as a guest lecturer and as a teacher of the PG college at Gorakhpur was much below the salary admissible to a Assistant Professor.

16. We have heard Sri Alok Kumar Yadav and Sri Alok Mishra, learned counsel for the petitioner-appellants and Sri Dhananjay Awasthi for the University Grants Commission; Sri Kunal Ravi Singh and Sri Ankur Agarwal have appeared for the University of Allahabad and its

affiliated colleges and have perused the materials on record.

17. The short question raised in this bunch of petitions is as to whether regulation 10(f)(iii) would be applicable while awarding marks for the teaching/post-doctoral experience, in terms of clause 7 of table 3A for short-listing of candidates, to be called for interview for the post of Assistant Professors in universities? As a sequel, it has to be seen as to whether regulation 10(f)(iii) is ultra vires Article 14 of the Constitution of India.

18. It is undisputed between the parties that qualification and criteria for direct recruitment to a university, duly established as per law, would be determined by the UGC regulations. It is otherwise settled in law that UGC regulations would prevail in the matter of recruitment of teaching staff in a recognized university. (see Gambhirdan K. Gadhvi vs. State of Gujarat, (2022) 5 SCC 179)

19. Regulation 4 provides the qualification for appointment to the post of Assistant Professor. Since the appointment of Assistant Professor is an entry level appointment as such no past/previous experience on such posts is required towards eligibility under the regulations. A candidate having requisite academic qualification as per the regulation can thus be appointed as Assistant Professor even if he/she has no previous teaching experience.

20. For appointment to the post of Associate Professor or Professor the regulations require specified length of requisite previous teaching experience on the post of Assistant Professor in case of Associate Professor and Associate Professor in case of appointment to the post of Professor. This requirement is specified in regulation 4.0 (II) & (III) of the regulations.

21. Regulation 10 specifies the nature of past services to be counted for direct recruitment and also for promotion under the Career Advancement Scheme. Clause (e) & (f) of regulation 10 are already extracted above which provide that teaching experience as a guest lecturer or previous working where the total gross emoluments was less than the gross monthly salary of the Assistant Professor would not be counted towards past services for direct recruitment to the post of Assistant Professor.

22. A combined reading of clause (e) & (f) of regulation 10 undisputedly reveal that past services to be counted for direct recruitment or promotion must not be as guest lecturer for any duration; the essential qualifications of the post held was not lower than the qualification prescribed by UGC for Assistant Professor, Associate Professor and Professor, as the case may be; appointment was on the recommendation of a duly constituted selection committee as per applicable rules of the university; the incumbent drew total gross emoluments not less than the monthly gross salary of a regularly appointed Assistant Professor, Associate Professor and Professor, as the case may be.

23. The counting of past services under regulation 10, however, would be relevant and directly co-related to the post on which direct appointment or promotion under CAS itself is sought. Since, past services are required for appointment to the post of Associate Professor and Professor only in the regulations, the relevance of

regulation 10 would be restricted to these posts alone.

24. No previous teaching experience (including Assistant Professor) since is required as eligibility condition for appointment to the post of Assistant Professor, as such regulation 10 would have no direct applicability/relevance for appointment to the post of Assistant Professor.

25. Eligibility for appointment to the post of Assistant Professor is distinct from the criteria to be followed for short-listing of candidates to be called for interview for the post of Assistant Professor.

26. Table 3A appended to the regulations lays down the criteria for short-listing of candidates to be called for interview for the post of Assistant Professors. Clause 7 of table 3A talks of teaching/post-doctoral experience and for each such year a candidate is entitled to two marks.

27. From the stand taken by the respondent-university/colleges it transpires that teaching/post-doctoral experience for award of two marks for each such year the respondents have applied regulation 10 of the regulations. Two marks towards teaching/post-doctoral experience for each year has been allowed to a candidate only if such teaching is consistent with regulation 10. Even where a candidate has taught for a year in a recognized institution yet he would not be entitled to two marks unless the incumbent drew total gross emoluments not below the monthly gross salary of a regularly appointed Assistant Professor.

28. Teaching/post-doctoral experience occurring in clause 7 of table 3A has not been defined. It is for this reason that the respondents have referred to and read the provisions of regulation 10 of the regulations into it. This interpretation of the respondents is the bone of contention in the present bunch of petitions.

29. Regulation 10 specifically deals with a defined exigency i.e. counting of past services for direct recruitment and promotion under CAS. This exigency is not attracted in the present set of cases. Regulation 10 has a direct nexus with the object sought to be achieved i.e. direct recruitment and promotion under CAS. Since past services are mandatorily required for appointment to the post of Associate Professor and Professor only, therefore, regulation 10 would have relevance only for appointment and promotion to such posts.

30. Reference of past services on the post of Assistant Professor for appointment to the post of Assistant Professor appears to be a surplusage since the eligibility for the post of Assistant Professor does not require any teaching experience. Counting of past services as Assistant Professor for appointment to the post of Assistant Professor serves no purpose in the scheme contained in the regulations. Regulation 10 of the regulations, therefore, has no applicability in the case of direct appointment to the post of Assistant Professor.

31. We are persuaded to take such a view as reference to *teaching experience* in table 3A has to be read in conjunction with *post-doctoral experience* as they constitute a composite class in itself. In the event regulation 10 conditions *teaching experience*, as is suggested by the respondents, the term *post-doctoral*

experience would also have to be necessarily conditioned by regulation 10. This, however, does not appear to be the intent of the scheme contained in the regulations.

32. Limiting *teaching experience* to the experience of teaching as an Assistant Professor, by drawing emoluments not less than the monthly gross salary of a regularly appointed Assistant Professor would clearly be reading something more than what is specified in the regulations itself. Counting of past services for direct recruitment or promotion under CAS to the post of Assistant Professor otherwise is not contemplated. Such a construction would also be unworkable once a condition of the kind is attached to the *post-doctoral experiences* also.

33. *Post-doctoral experiences* can be of different kinds, including research activity, teaching activity etc. If the provisions of regulation 10 are applied while awarding marks in clause 7 of table 3A then an anomalous situation may arise, inasmuch as teaching experience gathered by a post-doctoral candidate would entitle him to two marks if teaching by him is considered as *post-doctoral experience* but such marks would be denied if it is treated as teaching experience only. It is for this reason that table 3A of the regulations does not refer to or rely upon regulation 10. The interpretation drawn by the respondents to read regulation 10 in table 3A, which specifically lays down the criteria for short-listing of candidates for interview for the post of Assistant Professors, therefore, cannot be approved.

34. In our opinion, regulation 10 of the regulations would be attracted only where past services are required to be counted for direct recruitment and promotion under CAS. It cannot be transposed to be made applicable in criteria for short-listing of candidates to be called for interview, to the post of Assistant Professor, by any recognized process of interpretation. Such construction otherwise is not culled out from the scheme contained in the regulations nor it helps in short-listing of candidates to be called for interview.

35. Table 3A specifies the marks to be awarded to a candidate on different parameters specified therein. Apart from awarding marks for graduation; post-graduation; M.Phil.; NET with JRF or NET; SLET/SET the table provides for teaching/post-doctoral experience of two marks for each year. Since the term teaching/post-doctoral experience is not defined in the regulations the ordinary/commonsensical meaning would have to be assigned to it.

36. Teaching experience as a full time teacher in a recognized university or its affiliated or constituent colleges with requisite qualification as per regulations for the post of Assistant Professor would sufficiently entitle a candidate to award of two marks for each year of teaching experience in clause 7 of table 3A. Nature of appointment i.e. substantive/adhoc/guest lecturer etc. or the amount of salary paid having not been specified in clause 7 of table 3A are not relevant for the purposes of award of marks in clause 7 of table 3A for short-listing of candidates. Regulation 10 would otherwise not be applicable for the reasons recorded above. This construction would obviate the need to examine the challenge laid to the regulation 10(f)(iii) and the general instructions appended to the advertisement in that regard. It would also effectuate the cause of

calling best candidates for interview, inasmuch as teaching experience of a candidate would be counted towards his merit for short-listing.

37. The interpretation assigned in this judgment to clause 7 of table 3A would subserve the object of short-listing the best candidates to be called for interview to the post of Assistant Professors. The selections already made, however, would not be reopened or challenged on the ground that short-listing of candidates was not done in the manner indicated in this judgment. This is so as the selected candidates are not a party to this bunch of petitions nor their selections otherwise have been assailed. The respondents would, henceforth, short-list the candidates to be called for interview for the post of Assistant Professor in the manner indicated in this judgment. On these terms the writ petition, special appeal and the review application are disposed of. No order is passed as to costs.

(2024) 2 ILRA 709
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, A.C.J.
THE HON'BLE DONADI RAMESH, J.

Special Appeal No. 637 of 2023

Amity University, NOIDA & Ors. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Rahul Chaudhary, Sri G.K. Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Sri Ajal Krishna, Sri Rijwa Ali Akhtar, Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate)

A. Education Law – Disciplinary Proceedings – Principles of Natural Justice – Second respondent, a B.Tech student, was rusticated for six months (later reduced to three months) for marking unauthorized "On Duty" (OD) attendances – Writ Court quashed rustication orders, citing violation of natural justice due to lack of formal charge-sheet, non-supply of adverse material, and enquiry report – Held, the enquiry was not vitiated as the student was aware of charges, participated in multi-level enquiries, and admitted to marking fake ODs – No material prejudice shown, as per *ECIL Vs B. Karunakar* and "useless formality" theory – Enquiry upheld, as procedural lapses did not invalidate the process given the broad-based investigation involving multiple students and faculty. (Paras 3, 14, 25, 28, 30, 32, 33, 34, 40)

B. Education Law – Rustication and B+ Grade Cap – Reformative Approach – Student's rustication led to shortfall in attendance, resulting in a B+ grade cap under Regulation 10(2)(h) – Writ Court directed removal of B+ cap and deletion of disciplinary references in mark sheet, adopting a reformative approach – Held, while B+ cap was a consequence of rustication, the court declined to interfere with the Writ Court's lenient view to avoid lifelong adverse impact on the student's career – Reformative approach upheld, balancing discipline with student rehabilitation, as supported by *Shivam Kant Vs U.O.I.*. (Paras 3, 38, 39, 42)

C. Education Law – Suspension and Examination Bar – Procedural Fairness – Student claimed the University arbitrarily barred him from filling the End Semester Examination form on 14.11.2019, before his suspension on 15.11.2019 – Held, no prejudice caused, as evidence of fake OD marking justified suspension, and the student could not have appeared in the examination post-suspension – University's action during ongoing institutional enquiry (initiated 11.11.2019) was not mala

fide, as prima facie evidence existed against the student. (Paras 14, 41)

Special Appeal Dismissed – Enquiry Upheld, but Relief on B+ Cap and Mark Sheet Upheld.

List of Cases cited:

1. Bihar School Examination Board Vs Subhash Chandra Sinha & ors., AIR 1970 SC 1269

2. ECIL Vs B. Karunakar, (1993) 4 SCC 727

3. Aligarh Muslim University & ors. Vs Mansoor Ali Khan, (2000) 7 SCC 529

4. M.C. Mehta Vs U.O.I., (1999) 6 SCC 237

5. Shivam Kant Vs U.O.I., (2015) 13 SCC 477

(Delivered by Hon'ble Manoj Kumar Gupta, A.C.J.)

1. The instant intra court appeal under Chapter VIII Rule 5 of the Rules of the Court is directed against the judgement of learned Single Judge dated 02.08.2023 by which the writ petition filed by the second respondent (student) was allowed and the order dated 25.02.2020 rusticating him for six months, the appellate order dated 16.03.2020 passed in appeal reducing the period of rustication to three months, were quashed. The appellant-University was also directed to issue a fresh mark sheet to the student treating him as a regular student and to evaluate him out of 100 marks, which had the effect of removing the 'B+' Cap and also not make any reference to the disciplinary action taken against the student in the mark sheet and delete the endorsement "reappearance in September, 2020".

Facts:

2. The second respondent (student) was admitted to B.Tech Course (Computer Science) in the appellant-University in the academic session 2016-2020. He cleared six semesters till April, 2019. While in 7th Semester, he was suspended by order dated 15.11.2019 with immediate effect by appellant no.4 for act of indiscipline by indulging in marking of unauthorised and fake "ODs" (on duty) attendances. Thereafter, the University conducted disciplinary proceedings against him and several others. By order dated 25.02.2020, the second respondent was rusticated from the University for six months w.e.f. 15.11.2019, the date of his suspension. Aggrieved thereby, the second respondent preferred an appeal to the Vice-Chancellor. The appeal was disposed of by reducing the period of rustication from six months to three months. The second respondent thereafter preferred the writ petition before this Court, which has been allowed by the impugned judgement.

Findings of the Writ Court:

3. The Writ Court has held that there was violation of principles of natural justice, as the student was not supplied the adverse material nor the enquiry report. He was also not served with any formal charge-sheet containing statement of charges and, therefore, the order of rustication and the appellate order were held to be illegal. The Writ Court also took into consideration the period of rustication of three months already undergone, while under suspension and taking a lenient view, with the object of reformation, concluded that the punishment imposed was disproportionate. Consequently, the order of punishment was held to be arbitrary and illegal and was set aside. In consequence,

further reliefs, as noted above, were also granted.

Submissions of learned counsel for the appellants:

4. Sri G.K. Singh, learned Senior Counsel for the appellant-University submitted that the findings recorded in the impugned order of the learned Single Judge that there was no proof of service of notice or intimation of charges to the student and the punishment awarded is disproportionate, are perverse and contrary to the material available on record. In support of the said contention, reliance has been placed on the written statement of the student addressed to the Enquiry Committee dated 06.12.2019, the whatsapp chat of the student, the minutes of the Disciplinary Committee meeting dated 11/12.02.2019, the statement of other students- Aabhushan Verma, Riya Agarwal and Lina Gupta; various correspondence between the University and the second respondent. It is submitted that the student was well aware of the charges against him and he never complained, even at the time of filing appeal that he was not aware of the charges or the nature of enquiry or that he was not associated with the enquiry. It is submitted that the student has not suffered any prejudice, as the University had taken action not only against the second respondent but against various other students involved in the marking of unauthorized "ODs" as well as against faculty members, who were found guilty of dereliction of duties. It is further submitted that under the Regulations a minimum of 75% attendance was essential and if a student falls short of attendance, he is not permitted to appear in End-Semester-Examination. In the present case, the student being under rustication, was not having the requisite attendance, therefore, in terms of Regulation 10(2)(h) of R-01 B+ Cap was rightly imposed. It is further submitted that in any event, since the rustication order has been set aside on the ground of violation of principles of natural justice, the appellant should have been given option to provide opportunity to the student and pass fresh order instead of allowing the writ petition in toto. This was all the more important as the enquiry proceedings related not only to the second respondent but a large number of other students as well as faculty members, who were involved in the racket. It is submitted that in most of the cases, the punishment orders have already been implemented or are being implemented and the adverse finding recorded by learned Single Judge touching upon the validity of the enquiry proceedings, without liberty to hold fresh enquiry, will have very wide ramifications.

Submission of learned counsel for the second respondent:

5. Shri Ashok Khare, learned Senior counsel appearing for the second respondent submitted that the findings recorded in the impugned judgement are perfectly valid. The enquiry stood vitiated, as no formal charge-sheet was ever served on the second respondent; that he was not given opportunity to cross-examine the witnesses; that adverse material was not supplied to him; the enquiry report was also not made available to him. He further submitted that regulation relating to imposition of B+ Cap was applicable only to a case where a student reappears in an examination i.e., where he has failed in the main examination and not to a case where a student could not appear in the main examination because of rustication, as such, the direction given by learned Single Judge

to remove B+ Cap is fully justified. It is also urged that the action of the University in not permitting the student to fill examination form of VII Semester Examination even before he was placed under suspension on 15.11.2019 was wholly illegal and malafide.

Analysis:

6. The appellant is an autonomous University constituted under the Amity University Uttar Pradesh Act, 2005. Under the said Act, the University has framed "Regulations on Conduct of Examinations, Scheme of Evaluation and Discipline Among Students in Examinations". Regulation 10 of R-01 deals with attendance and the relevant part thereof is extracted below:

"10. (1) ATTENDANCE

(a) Students are expected to have 100% attendance.

(b) Relaxation of maximum 25% may be allowed to cater for sickness or other valid reasons beyond the control of the students for which written permission of HoI/ HoD is mandatory.

(c) A student whose attendance is less than 75%, whatever may be the reason for shortfall, will not be permitted to appear in the End Semester Examination (ESE).

However, Student may be permitted by Hon'ble Vice Chancellor with B+ cap, by condoning attendance up to 5% in a course, under the following circumstances:

i) If student falls sick for a certain period during the semester.

ii) If student participates in any events, nationally/internationally, representing the University.

(d) Under extreme special circumstances, Vice Chancellor may condone attendance upto 5% below 75% without B+ Cap on grade on the recommendation of HoI and Committee constituted for the purpose.

(e) Every teaching faculty handling a class will take attendance till the last session of the course as per LTP and session plan. The percentage of attendance upto this day will be calculated and forwarded to Examination Department by the HoI for issue of Admit Cards.

(f) If a student is continuously absent for a period of two weeks without permission, a notice will be sent to the student and to his parents / guardian by the Course Faculty, Programme Leader and HoI/HoD, with a copy to the Office of Pro VC (A)/Dean. Online system for better monitoring must be developed.

(g) Attendance will be continuously monitored. Students falling short of 75% attendance will be counseled/warned with intimation to parents by HoI /HoD.

Fornightly basis - Course Faculty

Monthly basis - Programme leader

Mid-Semester - HoI/HoD

End-Semester - HoI /HoD.

(h) If a student remains absent continuously for 30 days without permission, his name will be struck off by the HoI. Such a student may apply for re-admission. The HoI will examine his performance in all semesters and back log of papers and forward recommendations to Pro VC(A)'s/Dean office to decide as to whether he should be given re-admission or not. Based on the recommendations, decision for re-admission and the semester in which re-admission is to be given will be taken. The student granted re-admission will be required to pay the prescribed readmission fee and will be governed by Academic Regulations given above. The

attendance will be calculated from the commencement date of the semester and not from the date of re-admission.

(i) "A student whose attendance is between 70-75% and who does not fall under Para 10 (1)(d), may be allowed to appear in the End Semester Examination (ESE) after obtaining written permission of Vice Chancellor subject to the condition that he/she will be awarded letter grade not exceeding B+." This provision will not be applicable to late admissions, lateral admissions and transfer cases. If a student's attendance is more than 75% in majority of the courses and has attendance between 70 to 75% in few courses then his/her case will be considered for special permission of Vice Chancellor. The admit card should indicate "Specially Permitted with B+ cap/ without B+ cap".

A Sub-Committee constituted as under will decide the category of student whether his/her case falls under 10(1)(d) or 10(1)(i).

(a) Pro Vice Chancellor / Dean/Sr. HoI : Chairman (Nominated by Vice Chancellor)

(b) One Dean of Faculty : Member

(c) One Sr. Head of Institution : Member

(d) One Sr. Professor : Member

(e) CoE : Member Secretary

Recommendation of the Committee will be placed before Vice Chancellor for approval before issue of Admit Card clearly indicating the two categories."

7. A student, whose attendance is below 75%, is not permitted to appear in the end semester examination. Regulation 10(2), which relates to action in cases of shortfall of attendance is extracted below:-

"(2) Action in Cases of Shortfall of Attendance

(a) A student, whose attendance is below 75%, will not be permitted to appear in the ESE and will be awarded 'DE' grade in that paper and treated as Fail in that subject..

(b) 'DE'/F grade students (Debarred due to shortage of attendance or Fail in a course unit) are required to repeat the course unit in the next corresponding semester and reappear in the normal schedule of ESE of that paper i.e. 'F' grade student of 3rd semester may reappear in that course unit in the 5th semester.

(c) 'DE' grade students will have to apply to the HoI for re-appearing within the first week of the commencement of the corresponding semester. The HoI will assign Guided Self Study Courses & assignments under the faculty for the concerned courses, of which, regular assessment records will be put up by the faculty to the HoI. HoI will forward the recommendations for grant of permission to re-appear in that course unit. Only on grant of permission, a student will be allowed to reappear.

(d) A student whose attendance is 75% or above but is unable to appear in a paper/papers due to valid unavoidable reasons and with proper written permission from HoI will be awarded 'I' grade. Students absent without valid reasons will be marked 'AB'.

(e) 'I' grade students other than those of Final Semester should apply to the HoI within seven days after the last paper for re-appearing for which the examination will be held within 30 days of the last paper and 'I' grade will be converted to appropriate letter grade not exceeding B+.

(f) The final year students who have obtained 'DE' grade may apply to re-appear in those Courses of final two

semesters only in the Special Supplementary Examinations to be held within 30 days of the declaration of Results.

(g) The final year students who have obtained 'I' grade may apply to re-appear in the subjects of Final Semester only in the Special Supplementary Examination to be held within 30 days of the declaration of Results.

(h) In all cases of re-appearing ('DE', 'AB', 'I' & 'F' grade students), the marks obtained by the students who have re-appeared will be converted to the appropriate letter grade not exceeding B+.

(i) The 'I', 'DE', 'AB' & 'F' grade students are allowed only one chance to reappear.

(j) A student who has qualified in a course unit is not allowed to re-appear in that course unit subject to conditions as given in para 20 (4).

(k) Students will make up academic deficiency by attending extra classes organized by the institution for Guided Self Study Course (GSSC) during PAP/PAW/ YB period as applicable.

(l) 70% attendance will be of the actual class attended by the student excluding the official duty period. The attendance including OD should not be less than 90% for allowing student to appear in End Semester Examination."

8. Regulation 11 deals with computation of attendance, which is as follows:

"11. COMPUTATION OF ATTENDANCE

(1) Attendance at lectures, tutorials, practicals, clinicals, sessionals, if any, held during the academic session shall be counted.

(2) Attendance at NCC/NSS camp, Amity Cadet Corps/ Amity Military Training Camp, seminars/ workshops organized by other Institutions/ Universities as approved by the University or any such other training organized by the University during the session shall be taken as full attendance at lectures/ practicals/ tutorials on each such day of camp/ training and the days of journey to such camp/ training (excluding the period of holidays/vacations).

(3) Participation as a member of the University/ Constituent Unit team in any inter-University competition games & sports and/or other extra curricular activities shall be taken as full attendance on the days of such competition and the days of journey for participating therein.

(4) Participation as a member of a recognized/approved team in any competition shall be taken as full attendance. The period will also include the days of actual coaching, competition and the days of journey for participating therein.

(5) In determining the exact number of minimum requisite attendance in lectures, tutorials, seminars, moots, practicals, sessionals etc. fraction shall be ignored.

(6) For re-admission of a student whose name was struck off from the rolls due to continuous absence from the classes without information, attendance in lectures, tutorials, practicals etc. in that semester/ trimester/year prior to re-admission shall be counted.

(7) "Attendance for the normal admission cases will be counted from the date of commencement of the programme of that semester. However, for late admission/lateral admission/ transfer case, the attendance will be counted from 4th day

of the payment of fee or the date of registration whichever is earlier".

(8) In case of International Students of 1st Year (1st Semester), attendance will be counted from the date of Registration."

9. A perusal of Regulation 11 reveals that attendance is also awarded, when a student participates in any training camp, seminar/workshop, sport event etc., apart from the attendance obtained in usual course in attending lectures, tutorials, practicals, clinicals and sessionals.

10. The attendance earned by a student, while participating in trainings, seminars, workshops etc., or while participating in extra-curricular activities are called "ODs".

11. The respondent-University had developed a procedure for marking of "ODs" attendances by an online system, which was accessible through the login ID and password of the authorized faculty members. The charge against the second respondent was that of marking unauthorised "ODs" for other students, although not entitled, having not participated in any of the permissible activities on the relevant date.

12. The respondent-University initially constituted a departmental committee to hold preliminary enquiry. It identified the second respondent and one Bhanu Sharma of the Amity School of Engineering and Technology involved in marking of fake "ODs". During course of enquiry, names of other students from other departments of the University also surfaced. The Departmental Enquiry Committee recommended for a proctorial enquiry, as it was a cross institutional matter. The Proctorial Board consequently held the enquiry. After the names were identified, the matter was handed over to the Institutional Committee constituted on 11.11.2019 consisting of:

Dr. Manoj Kumar Pandey – Chairman
Dr. Abhay Bansal – Chairman
Members
Dr. Nitashhasteer
Dr. Madhuri Kumari
Prof. Vivek Kumar
Dr. R.K. Kapur
Dr. Basant Singh Sikarwar
Dr. Abhilshekh Singhal
Dr. H.P. Singh
Dr. R.K. Tomer
Dr. Sai Savita

13. The Committee interrogated the second respondent and another student Bhanu Sharma on 13 Nov 2019. These two students gave the name of three more students and one faculty and one staff member who were sharing HOI Password with them. Further, the second respondent gave names of three faculty members who were also involved in the fake OD cases. Based on the above inputs, the Committee interrogated the following students, staff, and faculty members:

Students:
1. Mr. Prakhar Nagar
2. Mr. Bhanu Kumar
3. Mr. Tushar Puri
4. Mr. Prabal Gupta
5. Mr. Srijan Sharma and

Faculty and Staff Members:
a. Dr. Divya Upadhyay
b. Ms. Shanu Sharma
c. Dr. Sumita Gupta
d. Mr. Dev Kumar

e. Mr. Satish Kumar.

14. On 15.11.2019, the second respondent was placed under suspension for indulging in act of indiscipline, namely, (a) indulging in or encouraging any form of disruptive activity connected with tests, examinations or any other activity of the University or the college or the institution, (b) indulging in undesirable activities.

15. The Committee submitted its report on 02.12.2019 and recommended for action being taken against various students including the second respondent and also certain faculty and staff members.

16. The case of the University is that the second respondent and his parents thereafter sent various e-mails to different authorities of the University and started meeting them. The University, in order to ensure fair-play and transparency, decided to go for enquiry by a University level committee which was constituted on 11.12.2019 to enquire into the facts leading to marking of fake ODs. The following were the members of the said Committee:-

1. Dr. D.K. Bandyopadhyay, **Chairman**

Members

2. Dr. Sujata Khandai
3. Prof. R.K. Kapur
4. Dr. Alpana Kakkar
5. Dr. Manoj Kumar Pandey
6. Dr. Shefali Raizada
7. Ms. Mala Dev

Invited Member

8. Dr. Manohar Sajnani

17. The said Committee called various students for interrogation on 12th and 13th December, 2019. The second respondent as well as 31 other students appeared before the Committee for interrogation and based on the interrogation, submissions made by the students and analysis of whatsapp chats, the Committee recommended for action being taken against the second respondent, various other students and certain faculty members.

18. According to the enquiry report, the name of the second respondent was mentioned by the students – Apoorv Goel, Riya Agarwal, Shambhavi Sharma, Naina Gupta and Aabhushan Verma. The Committee found evidence of the second respondent having copied password of Amizone of Head of Institute from Mr. Satish. He was also found guilty of putting attendance at night from his residence by using the password. The Committee was of the opinion that the misconduct was of a serious nature and amounted to a criminal offence, but taking a sympathetic view, to protect the interest of the students, it recommended for different punishments for different students, based on the seriousness of misconduct. It recommended for rustication of the second respondent for a period of one year. Dr. Abhishek Singhal, Faculty Member, who failed to perform his duties as Deputy HoD with utmost care, was replaced by another person. Dr. Upadhya, who had given full attendance without teaching was separated from the Department and Dr. Nidhi and Ms. Shanu Sharma from PL ships immediately. The Committee also concurred with the recommendation of the Institution Committee Report dated 2.12.2019 for separation of Mr. Dev Chaudhary, AP-I, Department of CSE, Mr. Satish Kumar, Executive Secretary, Department of CSE.

19. Thereafter the Students Disciplinary Committee held its meeting on

11.02.2020 and taking a lenient view, it decided to rusticate the second respondent only for six months. The findings of the Students Disciplinary Committee in relation to the second respondent are as follows:-

"He has accepted that he had been marking OD's of other ASET student. However, he has claimed that the login ID and password was given by an ASET Faculty every time as the Faculty had asked him to help in marking the large number of authorized OD's of ASET students. However, he has not been able to explain the unauthorized/false OD's he marked for his friends."

20. Based on the recommendation of the Students Disciplinary Committee dated 11.02.2020, the second respondent was rusticated by order dated 25.02.2020 for six months starting from his suspension date i.e. 15th November, 2019. He was required to submit an undertaking of future good behaviour signed by him and his parents.

21. The second respondent aggrieved thereby preferred appeal before the Vice Chancellor. The Vice Chancellor, taking into consideration the career of the student and other facts presented before her during personal interaction, reduced the rustication period to three months from the date of his suspension i.e. 12th November, 2019.

22. It is evident from the facts narrated above that the University having regard to the seriousness of the matter got the enquiry conducted at three different levels - initially by a Departmental Committee; thereafter by a Proctorial Board; and finally by University Level Committee.

23. The second respondent was well aware of the fact that all the aforesaid enquiries were in relation to marking of fake and unauthorised ODs. It is also an admitted fact that the mobile phone of the student was seized by the University in connection with the enquiry. By e-mail dated 23.11.2019, the second respondent was informed that effort was made to contact him for returning his mobile phone, but he had not turned up. He was, therefore, advised to come and take back his mobile phone. The e-mail is to the following effect:-

"**Your mobile has been seized for doing further investigations for finding the fact related to fake official duty (OD) …… by you against payment received by you in cash from Kumar Bhanu Sharma.**

We are trying to give your mobile phone since last one week but you have not collected till now.

You are advised to collect your mobile phone as early as possible."

24. The second respondent responded to the said mail on the same date and alleged that he came to the University to get back his mobile phone. However, he and his parents were told by the Faculty that they would prepare a letter signed by all Committee members by 21.11.2019 relating to return of mobile phone and would then return the mobile phone. He returned, as the said letter was not ready.

25. It is evident from the aforesaid exchange of e-mails between the second respondent and the University that he was aware of the specific charge that enquiry

was being held against him in relation to marking of fake ODs. The second respondent admittedly appeared before the Enquiry Committee on 16.12.2019 and gave the following letter in writing:-

The Committee
Sector-125, NOIDA
Amity University

6th December 2019

Respected Sir,

Prakhar Nagar of batch 2016-2020 of B. TECH CSE would like to state that I got password from Dev Sir. Dev Sir used to get the password from Satish Sir.

One or two times. I have marked OD of a student who are not present in the university.

In 2016 when I came to college seniors used to sit with Dev Sir to mark ODs, so the students used to sit with Dev Sir and mark OD's.

Last sem I have complained regarding this to Dev Sir and given the clips of Akash Gupta and Bhanu Sharma and Satish Sir as they were **involved in taking money.** During the last sem Satish Sir was absent for 15 days approx. so during that time they didn't have the HOI login password.

Thank You
Your Sincerely
Prakhar Nagar
7 CSE 44
A2305216644
Sd./ illegible
16.12.2019

26. In the appeal preferred by the student before the Vice Chancellor, he stated as follows:-

To,
Honourable Vice Chancellor
Amity University, Sec 12, U.P>
6th March 2020
Subject : Review Appeal
Respected Madam,

I Prakhar Nagar would humbly request you to review the office order released by the university authorities dated on 25th February, 2020.

Madam I am your student my career and life is on intake. I once again with my folded hands would like to request you to review the decision.

I have already submitted the information to the enquiry committee regarding the indiscipline.

Thank you
Yours sincerely,
PRAKHAR NAGAR
2016-2020
A2305216644

27. In para 12 of the writ petition, the student admits that between *"6.11.2019 to 25.02.2020 his parents were called by the University and he alongwith his parents met the Dean, Students Welfare, Proctor and Members of the Enquiry Committee constituted for such purpose on several dates."*

28. It is evident from the facts narrated above that the second respondent was aware of the gravamen of the imputations against him; he participated in the enquiry which was held at three different levels and during pendency of enquiry, he never complained of any fault in the enquiry proceedings or violation of any principle of natural justice as may have caused prejudice to him.

29. It is not disputed that the charge against the second respondent would fall under the act of indiscipline (quoted in

paragraph 14) which were clearly specified in the suspension order.

30. The statement of the student himself admitting that he had on some occasion marked fake ODs of other students and that money was being realised from students for marking of fake ODs; the statement of other students in which also his role in the entire episode was clearly mentioned and the whatsapp chats from his mobile phone, the correctness of which was never disputed by him, constituted material evidence before the Committee to arrive at the finding of guilt. Concededly, the standard of proof in such an enquiry is not the same as in a criminal trial. Some of the relevant portions of whatsapp chats are extracted below:-

"Payment can be done via cash or through PayTM.

15/10/18, 20:00 - Prakhar Nagar : Bhara tune yeh??

15/10/18, 20:00 - Z Kartik jain : Nhi

15/10/18, 20:01 - Z Kartik jain : Bharta hu abhi

15/10/18, 20:05 - Prakhar Nagar : Haa

15/10/18, 22:35 - Prakhar Nagar : Kal cash ya paytm dediyi

15/10/18, 22:40 - Z Kartik jain : Okayy

15/10/18, 22:40 - Z Kartik jain : 350 cash dedunga

15/10/18, 22:40 - Prakhar Nagar : Haan

29/10/18, 10:13 - Z Kartik jain : Aaj 4-5 ki od lag sakti hai?

29/10/18, 10:13 - Z Kartik jain : Please

29/10/18, 10:14 - Z Kartik jain : Attendance varna kam ho jaayegi

29/10/18, 14:19 - Z Kartik jain : Bhaiya 4-5 maths ki hai please lagwa dena

30/10/18, 12:30 - Z Kartik jain : Kal ki od lag jaayegi naa?"

19/12/18, 13:40 - Z Vansh Passi : OD form maine bhar diya hai

19/12/18, 13:40 - Z Vansh Passi : Aapko kaha aakr du?

19/12/18, 13:46 - Z Vansh Passi :

19/12/18, 17:16 - Z Vansh Passi : Bhaiya lagwado OD plss

19/12/18, 17:16 - Z Vansh Passi : Date :- 18/12/18

20/12/18, 09:10 - Z Vansh Passi : Bhaiya plss lagwa dijiye

20/12/18, 09:23 - Prakhar Nagar : haa

20/12/18, 09:25 - Z Vansh Passi : Aaj lag jayegi na!

20/12/18, 09:25 - Prakhar Nagar : haq

20/12/18, 09:34 - Z Vansh Passi : OK

20/12/18, 22:30 - Z Vansh Passi : Bhaiya abhi tk nhi lagi hai attendance aap plss dekhlo ek baar

20/12/18, 22:30 - Prakhar Nagar : yaar wo miss time pura hogaya tha isliye kal lag jayegi.

20/12/18, 22:30 - Z Vansh Passi : OK bhaiya Thankyou

21/12/18, 09:24 - Z Vansh Passi : Bhaiya aaj yaad se lagwa dena plss

21/12/18, 10:12 - Prakhar Nagar : laga di

21/12/18, 10:31 - Z Vansh Passi : Thankyou so much bhaiya

16/01/19, 10:18 - Z Vansh Passi : Bhaiya??

16/01/19, 10:18 - Z Vansh Passi : Aap abhi free ho meko aapse milna h kuch imp hai

18/01/19, 17:30 - Z Vansh Passi : Thursday->BEE tute (9:15-10:10)

Law (10:15-11:10)

Maths (11:15-12:10)

Chemistry (12:15-1:10)

18/01/19, 17:31 - Z Vansh Passi : Vansh-A2305218407

Rishi—A2305218408, bhaiya dono ki laga dena

18/01/19, 17:34 - Z Vansh Passi : Friday - > Law(9:15-10:10)

Chemistry (10:15-11:10)

Maths (12:15-01:10)

Engineering graphics (1:15-2:10)

Engineering graphics (2:15-3:10)

18/01/19, 17:36 - Z Vansh Passi : Bhaiya pls laga dena

20/01/19, 23:59 - Z Vansh Passi : Bhaiya kal lagwa dena plss

21/01/19, 13:01 - Prakhar Nagar : lagadi khush reh

21/01/19, 15:21 - Z Vansh Passi : Thankyou so so so much bhaiyaa!

07/03/19, 11:51 - Z Vansh Passi : Bhaiya abhi free ho?

11/03/19, 15:22 - Z Vansh Passi :

11/03/19, 15:22 - Z Vansh Passi :

11/03/19, 15:22 - Z Vansh Passi : EVS ke alawa baaki sbki od lagwa do !

14/03/19, 15:00 - Z Vansh Passi : Monday-> 9-11 Technical comm. Wednesday - > 2-5 Basic electrical engg.

14/03/19, 15:13 - Z Vansh Passi : Bss yeh do lagwaa do plss

26/03/19, 22:55 - Prakhar Nagar : Sun

26/03/19, 22:55 - Prakhar Nagar : Sogaya Kya

26/03/19, 22:56 - Prakhar Nagar : Pool party rakhi hai

26/03/19, 22:56 - Prakhar Nagar : 4 ko 12 baje se

26/03/19, 23:06 - Z Vansh Passi : Kaha pr hai?

26/03/19, 23:07 - Prakhar Nagar : 15 min dur amity se

26/03/19, 23:07 - Z Vansh Passi : Kal milke batata hu

26/03/19, 23:07 - Prakhar Nagar : Haan 1400 price

26/03/19, 23:07 - Z Vansh Passi : Meri class k bachhe aa skte h?

26/03/19, 23:07 - Prakhar Nagar : Haan

26/03/19, 23:07 - Prakhar Nagar : Koi dikkat nahi

26/03/19, 23:07 - Z Vansh Passi : Ohkk

26/03/19, 23:08 - Prakhar Nagar : Bas class ke laiyo

26/03/19, 23:08 - Z Vansh Passi : Hn hn

26/03/19, 23:08 - Prakhar Nagar : Red label piyenge

26/03/19, 23:08 - Z Vansh Passi :

26/03/19, 23:19 - Prakhar Nagar : Kal tak batadiyo

22/04/19, 13:34 - Z Vansh Passi : Bhaiyaa! Yeh ntcc kya hai?

22/04/19, 13:34 - Prakhar Nagar : Hai ek chutiyapa amity ka

24/04/19, 21:56 - Prakhar Nagar : Fbl kaunsi hai

24/04/19, 22:14 - Z Vansh Passi : German

24/04/19, 22:15 - Z Vansh Passi : Shreya ki class m hi hu

24/04/19, 22:15 - Prakhar Nagar : Acha

25/04/19, 00:01 - Z Vansh Passi : Bhaiya ??

25/04/19, 00:01 - Prakhar Nagar : Hanji

25/04/19, 00:01 - Z Vansh Passi : German ka ppr leak hua hai kya?

25/04/19, 00:01 - Prakhar Nagar : Raat mein patah chalega

25/04/19, 00:01 - Z Vansh Passi : Shivam keh rha hi ki leak ho gya hai

25/04/19, 00:02 - Prakhar Nagar : Nahi hua abhi german ka kisi ke pass nahi hai

25/04/19, 00:02 - Z Vansh Passi : OKK

25/04/19, 00:02 - Z Vansh Passi : Jb bhi kuch pta chle toh bta dena

25/04/19, 00:02 - Prakhar Nagar : Haa

25/04/19, 01:36 - Prakhar Nagar : Mila phir

25/04/19, 01:36 - Z Vansh Passi : Nhi

25/04/19, 01:36 - Z Vansh Passi : Shivam isn't responding!

25/04/19, 01:37 - Z Vansh Passi : Btao hua bhi hai leak ya nahi?

25/04/19, 01:37 - Prakhar Nagar : Hua toh hai frnch ka kisi ko chaiye ho

25/04/19, 01:37 - Prakhar Nagar : Toh 500 mein toh

25/04/19, 01:37 - Prakhar Nagar : Lelo

25/04/19, 01:37 - Prakhar Nagar : Baki german

25/04/19, 01:37 - Z Vansh Passi : Poochhaa maine ekdo se mana kr reh hai

25/04/19, 01:38 - Z Vansh Passi : Baki german?

25/04/19, 01:38 - Prakhar Nagar : Ka Bhi Keh diya hai nikalgaya hai

25/04/19, 01:38 - Z Vansh Passi : Achha

25/04/19, 01:38 - Z Vansh Passi :

25/04/19, 01:38 - Z Vansh Passi : Yeh aya hai kahi se

25/04/19, 01:40 - Prakhar Nagar : Abe chutiyapa ignore

25/04/19, 01:40 - Z Vansh Passi : German ka kitne ka hoga??

25/04/19, 01:40 - Prakhar Nagar : Yaar wo jab niklega tabh

25/04/19, 01:40 - Z Vansh Passi : ohkk

25/04/19, 01:40 - Prakhar Nagar : Patah chalega

25/04/19, 01:40 - Z Vansh Passi : Genuine hoga na?

25/04/19, 01:40 - Prakhar Nagar : Haan

25/04/19, 01:41 - Z Vansh Passi : Bta dena jaise bhi ho

25/04/19, 01:41 - Prakhar Nagar : Ok

25/04/19, 01:50 - Prakhar Nagar : German chaiye

25/04/19, 01:50 - Z Vansh Passi : Kitne?

25/04/19, 01:50 - Prakhar Nagar : 2k

25/04/19, 01:50 - Z Vansh Passi : 500 ka aya hai ek se offer!

25/04/19, 01:51 - Prakhar Nagar : Yaar mein agey se ata hai puchta hoon

25/04/19, 01:51 - Z Vansh Passi : Hn bhaiya

25/04/19, 01:51 - Prakhar Nagar : Agar esa hai

25/04/19, 01:51 - Z Vansh Passi : Hosteller h ek keh rhi hai 500! Same aya toh ok nhi toh paise vapis

25/04/19, 01:52 - Prakhar Nagar : 500 ka offer hai ab

06/09/19, 08:36 - Z Shreya Amity : 3-5 od laga doge

06/09/19, 08:36 - Z Shreya Amity : dad ka bday h

06/09/19, 08:36 - Z Shreya Amity : jaldi ghr jaana h

06/09/19, 11:29 - Z Shreya Amity : batado pls

06/09/19, 11:32 - Prakhar Nagar : Ok

02/11/18, 16:15 - z manav asija : Bhai laga do please 5 k badd nahi lag paegi

02/11/18, 16:16 - Prakhar Nagar : laga di

02/11/18, 16:24 - z manav asija : Thankyou

03/11/18, 16:13 - Prakhar Nagar : arush tera bhai hai?

03/11/18, 16:13 - z manav asija : Asija?

Family friend

05/08/19, 16:09 - z manav asija : Bhai laga do please

05/08/19, 17:34 - Prakhar Nagar : Laga di

05/08/19, 18:11 - z manav asija : Thanks bhai

02/11/18, 13:38 - Z Akash Nigam : Jasmine ki 1st nov ki nhi lgi bhai

02/11/18, 13:56 - Z Akash Nigam :

02/11/18, 13:57 - Z Akash Nigam : Jasmine enrollment no. A2305218432

02/11/18, 13:57 - Prakhar Nagar : lagadi

31. It is now well settled that violation of natural justice is not a straight jacket formula but depends on facts of each case. Where enquiry is not against any particular individual but broad based and involves a large number of persons, it is not always necessary to hold detailed enquiry against each individual. If on examination of facts, it emerges that a fair procedure has been adopted without causing any material prejudice to any person then the courts have declined to interfere. Thus, in the **Bihar School Examination Board vs. Subhash Chandra Sinha and others**1, where enquiry was on charge of mass-cheating, it was found not necessary to give opportunity of hearing to individual candidates. The relevant observation in this regard is as follows :-

13. This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging any one individually with unfair means but to condemn the examination as ineffective for the purpose it was held. Must the Board give an opportunity to all the candidates to represent their cases? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go.

32. Constitution Bench of the Supreme Court in **ECIL v. B.Karunakar**2, considered the effect of non-supply of enquiry officer's report to the delinquent. While it was held that non-supply of the enquiry report would result in breach of principles of natural justice, but in every case, non-supply of report would not *ipso facto* result in the proceedings being declared null and void, unless the delinquent is able to show any serious prejudice to him. The majority view in para 30(v) is extracted below :-

"30. (v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and

to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an 'unnatural expansion of natural justice' which in itself is antithetical to justice." (emphasis supplied)

33. The same principle came to be identified in the "useless formality" theory. It provides a yard stick for judging whether a particular violation of any principle of natural justice would render the action illegal and void. It stipulates that if no real prejudice is evident then it would be empty formality to strike down the action on ground of violation of principles of natural justice. In **Aligarh Muslim University and others vs. Mansoor Ali Khan**3, "useless formality" theory has been explained thus :-

"25. The "useless formality" theory, it must be noted, is an exception Apart from the class of cases of "admitted or indisputable facts leading only to one conclusion" referred to above, there has been considerable debate on the application of that theory in other cases. The divergent views expressed in regard to this theory have been elaborately considered by this Court in **M.C. Mehta**4 referred to above. This Court surveyed the views expressed in various judgments in England by Lord Reid, Lord Wilberforce, Lord Woolf, Lord Bingham, Megarry, J. and Straughton, L.J. etc. in various cases and also views expressed by leading writers like Profs. Garner, Craig, de Smith, Wade, D.H. Clark etc. Some of them have said that orders passed in violation must always be quashed for otherwise the court will be prejudging the issue. Some others have said that there is no such absolute rule and prejudice must be shown. Yet, some others have applied via media rules. We do not think it necessary in this case to go deeper into these issues. In the ultimate analysis it may depend on the facts of a particular case."

34. In the instant case, we do not find any such violation or unfair-play which may vitiate the entire disciplinary proceedings *albeit* there may have been certain procedural lapses. One fact which has a material bearing is that the second respondent has already passed the course, therefore, even if we think of doubting the correctness of the procedure, in normal course, the matter requires to be remitted to the concerned authority for resuming the enquiry from the stage it stood vitiated. This would visit the student with far more serious consequences.

35. One of the concerns of the University expressed during course of the hearing of the instant appeal, was that the episode involved a large number of students and also Faculty members. The University, as noted above, had taken action not only against the second respondent but against several other students and also Faculty members. In most of the cases, the punishment orders have been duly implemented without any challenge. The indiscipline was of such

great magnitude that the University despite having taken very lenient view in the interest of students could not have absolved the students and given them clean chit as it would have sent a wrong message.

36. In order to buttress the submission that the University had taken lenient view in the matter, it is pointed out that the following steps were taken in respect of the second respondent –

(a) Waiver of readmission charges of Rs.15,000/- which are payable for late registration.

(b) special permission for registration for VIIIth semester.

(c) permission for registration for major project (in absence of which that would gone to next academic year and the complete year of the petitioner would have been wasted).

(d) Viva of minor project of VIIth semester

37. Moreover, in appeal the Vice Chancellor also taking a lenient view reduced the rustication period from six months to three months.

38. The student had undergone the rustication period of three months and on account of which he could not appear in the 7th semester examination when it was due.

39. We feel that it would be impracticable as well as inequitous to direct holding of fresh enquiry. In **Shivam Kant vs. Union of India**5, the direction of this Court to hold fresh enquiry against the student of IIT Kanpur, as previous enquiry was found to be violative of principles of natural justice, was not approved by the Supreme Court taking into consideration the fact that the student had already suffered and any further enquiry would prolong his agony. The relevant observations in this regard are as follows :-

"4. Remand of the case by the High Court to Senate in such case is uncalled for as would prolong the agony of students. They have already suffered for sufficient period. No further action need be taken by the Senate as against the students. However, we direct that the students involved in the case to maintain the good behaviour and in case they again involve in any kind of similar misconduct, let the matter be reported to this Court. We will direct appropriate action against them, if considered necessary."

40. In view of the above discussion, we do not agree with the conclusion arrived at by learned Single Judge that the enquiry stood completely vitiated and should be treated as *non est* in the eyes of law. We having considered the facts of the case and the present enquiry in the broader context, feel persuaded to uphold the same.

41. One of the contention of Sri Ashok Khare, learned counsel appearing for the second respondent was that the suspension order was passed on 15.11.2019 but the University even on 14.11.2019 did not permit the second respondent to fill the End Semester Examination Form for which it was the last date. Therefore, it had acted arbitrarily. However, we find no force in the submission. It is evident from the facts noted above and the manner in which the enquiry proceeded that the suspension order came to be passed while the Institutional level enquiry in respect of marking of fake ODs against the second respondent and other students was in progress. It has come on record that the Institutional level committee was

constituted on 11.11.2019. It interrogated the second respondent and one more student on 13.11.2019 and they disclosed name of three more students, one Faculty member and one staff member, who were involved in the racket. Thus, there was, prima facie, evidence in possession of the University linking the second respondent with the marking of fake ODs and it seems that the University had already decided to place him under suspension so as not to permit him to appear in the end semester examination. The actual order of suspension was issued a day later on 15.11.2019 but this had in no manner caused any prejudice to the second respondent because after passing of the suspension order, in any case, he could not have appeared in the End Semester Examination. Thus, there was no change in the ultimate result.

42. The issue which remains to be considered is regarding imposition of B+ Cap by the University, the effect of which was that the second respondent was not granted Grade above B+, irrespective of his actual performance. The learned Single Judge had directed the University not to impose B+ Cap on the student taking a lenient view and with the aim of adopting a reformative approach. Although strictly speaking, imposition of B+ Cap may be a necessary consequence of the rustication of the second respondent but in exercise of power in intra-court appeal, we are reluctant to interfere with the relief granted to the student in this regard by the learned single judge. We agree with his view that in matters relating to students, while on one hand, the University has to ensure maintenance of discipline to ensure a conducive academic atmosphere, but at the same time it is also obliged to adopt reformative approach which is critical for bringing back indisciplined students to the main stream. We, therefore, decline to interfere with the ultimate directions issued by learned Single Judge for removal of B+ Cap and from not making any reference to the disciplinary proceedings in his mark sheet as it would definitely visit him with evil consequences all through his career.

43. In the result, the appeal is **dismissed.**

(2024) 2 ILRA 725
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal No. 734 of 2023
Connected with
Special Appeal Defective No. 707 of 2023
With other connected cases

State of U.P. ...Appellant
Versus
Dr. Javed Bahar & Ors. ...Respondents

Counsel for the Appellant:
C.S.C., S.C., Sri Ashok Mehta (Sr. Advocate)

Counsel for the Respondents:
Sri Rakesh Kumar, Sri Ashok Khare (Sr. Advocate)

Service Law – U.P. (Krishi Evam Prodyogik Vishwavidyalaya Adhiniyam), 1958 –U.P. General Clauses Act, 1904 – Sections 2(k) & 6 - Age of Superannuation – Appellants challenged Single Judge's order dated 14.08.2023 holding respondents (Research Assistants) as teachers entitled to superannuation at 62 years – Held, respondents, initially appointed as Research

Assistants, were granted 'Teacher' status under unamended Section 2(k) for conducting/guiding research, reinforced by Executive Council resolution (25.02.2000) and Government Orders (04.01.2008, 16.02.2010) granting Assistant Professor pay scale – Amendment to Section 2(k) via U.P. Act No. 9 of 2019, redefining 'Teacher' as Assistant Professor appointed per UGC/ICAR norms, operates prospectively as no retrospective intent expressed – Vested right to 'Teacher' status protected under Section 6 of General Clauses Act, per *St. of Rajasthan Vs Trilok Ram*, *St. of Gujarat Vs Raman Lal Keshav Lal Soni*, and *Punjab St. Agricultural Development Bank Ltd. Vs Registrar, Cooperative Societies* – Respondents covered under unamended Section 2(k)'s first part, not requiring statutory declaration, per *P.S. Rama Mohana Rao Vs A.P. Agricultural University* – No change in superannuation age (60 for non-teaching, 62 for teachers) under Statutes; issue Ltd. to status, not employer's right to alter superannuation age – Division Bench judgment in Writ-A No. 7847 of 2022, upheld by Supreme Court (02.02.2024), supports vested right protection – Appellants' reliance on *Bishnu Narayan Mishra* and *K. Nagraj* misplaced as case not about changing superannuation age – Single Judge's finding upheld, respondents entitled to continue till 62 years with consequential benefits. (Para 12-46)

Special Appeals dismissed.

List of Cases Cited:

1. P.S. Rama Mohana Rao Vs A.P. Agricultural University; (1997) 8 SCC 350

2. St. of Rajasthan Vs Trilok Ram; (2019) 10 SCC 383

3. St. of Gujarat Vs Raman Lal Keshav Lal Soni; (1983) 2 SCC 33

4. Punjab St. Agricultural Development Bank Ltd. Vs Registrar, Cooperative Societies; (2022) 4 SCC 363

5. Bishnu Narayan Mishra Vs St. of U.P.; AIR 1965 SC 1567

6. K. Nagraj Vs St. of Andhra Pradesh; (1985) 1 SCC 523

7. St. of Raj. Vs Mangilal Pindwal; (1996) 5 SCC 60

8. Koteswar Vittal Kamath Vs K. Rangappa Baliga & Co.; (1969) 1 SCC 255

9. Railway Board Vs C.R. Rangadhamaiah; (1997) 6 SCC 623

10. B.S. Yadav Vs St. of Haryana; 1980 Supp SCC 524

11. Qudrat Ullah Vs Municipal Board, Bareilly; (1974) 1 SCC 202

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

1. This bunch of special appeals are filed by the State of Uttar Pradesh as well as Chandra Shekhar Azad University of Agricultural and Technology, Kanpur, challenging the judgment and order dated 14.08.2023, passed by learned Single Judge in a batch of writ petitions with leading Writ-A No.10622 of 2022 filed by Dr. Rajendra Prakash Vyas and others.

2. The issue before learned Single Judge was as to what would be the age of superannuation of the respondents-petitioners. The respondents-petitioners contended before learned Single Judge that they are to be treated as faculty member of the Agricultural University at Kanpur, against teaching positions, and hence are entitled to continue in service till the age of superannuation i.e. 62 years. The case of the appellants-respondents before learned Single Judge, on the other hand, was that the respondents-petitioners were member of non-teaching staff and were to retire at the age of 60 years under the Statute. Learned Single Judge upon consideration

of the cause has held that all the respondents-petitioners are members of teaching faculty and would be entitled to continue in service till they attain the age of superannuation of a teacher i.e. 62 years. All consequential benefits have been allowed to the respondents-petitioners. Thus aggrieved, the appellants-respondents have filed the present bunch of appeals.

3. Chandra Shekhar Azad University of Agricultural and Technology, Kanpur (hereinafter referred to as 'Agricultural University at Kanpur') is a university established under the provisions of the Uttar Pradesh (Krishi Evam Prodyogik Vishwavidyalaya Adhiniyam), 1958 (hereinafter referred to as 'Act of 1958'). Section 2(k) of the Act of 1958, as it stood prior to its amendment in 2019, defined 'Teacher' in following words:-

"2(k). "Teacher" means a person appointed or recognised by the University for the purpose of imparting instruction or conducting and guiding research or extension programmes and includes a person who may be declared by the statutes to a teacher; and

1. (University means the Govind Ballabh Pant Evam Prodyogik Vishwavidyalaya or the Narendra Deva Krishi Evam Prodyogik Vishwavidyalaya or the Chandrashekhar Azad Krishi Evam Prodyogi Vishwavidyalaya, as the case may be)."

4. Section 28 of the Act of 1958 provided for framing of statutes subject to the provisions of the Act which were to provide for:

(a)……..
(b)……..
(c) The designation, manner of appointment, powers and duties of the officers of the University.

5. The manner of making statutes is specified in Section 29. Statutes have been framed accordingly. Chapter XXI of the Statutes contain terms and conditions of service of employees of the University (Agricultural University at Kanpur) other than Vice Chancellor. Clause 7(i) of the Statutes provides the age of superannuation for all employees of the University to be 60 years. Clause 7(a)(ii) of the Statutes provides for the age of superannuation of the teachers/scientists as 62 years. The provisions, in that regard, are reproduced hereinafter:-

"7. Age of Retirement

(i) The age of superannuation for all classes of employees of the University shall be 60(sixty) years. In no case extension or re-employment will be given to any of its employees.

7(a)(ii). The age of superannuation of teachers/scientists of the university shall be 62 years after 1.7.2003. In no case extension or re-employment will be given to any of its employees."

6. Section 2-A of the Act of 1958 provided for establishment of Agricultural Universities at Faizabad and Kanpur. We are concerned in this bunch of appeals with the Agricultural University at Kanpur. The other University established under the Act of 1958 was Narendra Dev Krishi Evam Prodyogik Vishwavidyalaya, Faizabad (hereinafter referred to as 'Agricultural University at Faizabad'). Before establishment of these two Universities there existed an earlier Agricultural University in the erstwhile State of Uttar Pradesh namely Govind Vallabh Pant

Krishi Evam Pradyogik Vishwavidyalaya, Pantnagar (now in Nainital, Uttaranchal). A Government Order was issued by the State of U.P. on 06.06.1981 granting pay scale of UGC (University Grants Commission) to the Research Assistants of Agricultural University at Pantnagar. Admittedly, all the respondents-petitioners were initially appointed on the post of Research Assistant in the University.

7. It transpires that a Writ Petition No.1082 (SB) of 1995 came to be filed before Lucknow Bench of this Court by Rajitram Verma and others, who were the Senior Research Associates in the Agricultural University at Faizabad claiming salary of Teachers/Assistant Professors in the pay scale of Rs.2200-4000 on the ground that other Research Assistant are already getting such benefits. An ad-interim mandamus or show cause was issued in the writ on 07.05.1999. The State of Uttar Pradesh choose to abide by the interim mandamus and issued a Government Order on 22.07.1999 granting pay scale of Rs.2200-4000 to the Senior Research Associate of the Agricultural University at Faizabad. The aforesaid writ petition thereafter was dismissed as not pressed on 03.03.2000. The grant of benefit of UGC pay scale of Rs.2200-4000, admissible to a teacher was, however, restricted to 19 petitioners of the aforesaid writ petition.

8. The Research Assistants of the Agricultural University at Kanpur, who had already filed a Writ Petition No.836 (SB) of 1994, claimed parity with the petitioners in whose favour the ad-interim mandamus or show cause was issued on 07.05.1999. The Writ Petition No.836 (SB) of 1994 was disposed of on 18.08.1999 with the observation that once the State has granted benefit of UGC pay scale of Rs.2200-4000 to the Senior Research Associates of the Agricultural University at Faizabad, there is no reason why such benefits be denied to the Research Assistants of Agricultural University at Kanpur.

9. The Executive Council of the Agricultural University at Kanpur in its 117th meeting held on 25.02.2000 took up the issue of declaration of Teacher to the 52 Research Assistants, and vide resolution no.6, the Executive Council resolved to declare the Research Assistants as a Teacher.

10. Minimum qualification for appointment to the post of Teacher in University and its colleges got prescribed by the UGC on 24.11.1998. Since the respondents-petitioners were working from much prior to such date, as such the University at Kanpur extended the UGC Regulations to direct recruitments only. Relaxation was given to the teachers working from before and had research experience for a period of five years.

11. A Government Order was issued on 04.01.2008 sanctioning pay scale of Assistant Professor to the respondents-petitioners. This Government Order also provided that Research Assistants be adjusted/absorbed against the posts created/existing of Assistant Professor or equivalent posts. This decision of the State was reiterated vide Government Order dated 16.02.2010. The respondents-petitioners accordingly state that as they were initially appointed for conducting and guiding research and were also granted pay scale of the post of Assistant Professor by the Agricultural University at Kanpur, as such they are to be treated as member of

the teaching staff and thus entitled to continue in service till the age of 62 years.

12. Learned Single Judge in the judgment under challenge, dated 14.08.2023, took note of the previous litigation and the passing of orders, therein, which resulted in the grant of declaration of 'Teacher' to the Research Assistants of the Agricultural University at Kanpur.

13. The issue of respondent-petitioners being teacher apparently would have been given a quietus but for an amendment introduced in the Act of 1958 vide U.P. Act No.9 of 2019. The definition of 'Teacher', contained Section 2(k) of the Act of 1958 was substituted vide Section 2(k) of the UP Act No.9 of 2019, which is reproduced hereinafter:-

"2(k). 'Teacher' means a person not below the rank of Assistant Professor duly appointed as per the norms and guidelines of UGC and ICAR in this regard by the University."

14. The authorities took the view that as respondents-petitioners were not appointed as Assistant Professor as per the norms and guidelines of UGC and ICAR, as such they cannot be treated as 'Teacher" and, consequently, they are to superannuate at the age of 60 years treating them to be non-teaching staff. The Director (Administration and Monitoring) of the Agricultural University at Kanpur, however, sought guidance from the State on 05.10.2020 in view of the fact that Research Assistants were already granted the status of Teacher/Assistant Professor. The State Government vide order dated 16.06.2022 opined that in view of the amended definition of 'Teacher', contained in Section 2(k) of the Act of 2019, the respondents-petitioners cannot be treated as 'Teacher'.

15. It may be worth noticing at this stage that the Agricultural University at Faizabad had also established various Krishi Vigyan Kendras. An issue arose as to what would be the age of superannuation of Research Assistants engaged in such Krishi Vigyan Kendra. The matter ultimately came before a Division Bench of this Court at Lucknow in Writ-A No.7847 of 2022, in the context of amended Section 2(k), substituted vide U.P. Act No.9 of 2019. Although the Amending Act was challenged in the writ but at the time of its hearing such challenge was given up. The amended definition of 'Teacher' in Section 2(k) was noticed in para 3 of the Division Bench judgment dated 17.05.2023. Taking aid of Section 6 of the General Clauses Act, the Co-ordinate Bench observed as under in paras 14 to 18:-

"(14) Thus prior to amendment, Section 2(k) provided that anyone appointed or recognized by the University for the purposes of imparting instructions or conducting and guiding research or extension programmes will be a teacher which will include any person who may be declared as such by the University. However, after the amendment, the teacher in the University is now a person not below the rank of Assistant Professor appointed as per the norms and guidelines of UGC and ICAR. Thus, the persons appointed for conducting and guiding research or extension programmes have been excluded from the purview of 'teacher'. The Government by means of the order dated 14.06.2022 directed that action be taken in terms of the provisions contained therein in respect of the employees appointed in Krishi Vigyan Kendras treating them to be

non-teaching staff and accordingly, the impugned orders have been issued retiring the petitioners on their completion of age of 60 years treating them to be non-teaching staff.

(15) It is to be noticed that U.P. Act No. 9 of 2019 does not make a mention as to from which date the said amendment shall take effect. It was published on 05.08.2019 and in absence of any specific date when the U.P. Act No. 9 of 2019 would come in operation, it will be deemed to have come in operation w.e.f. 05.08.2019. It is settled principle of law that any statutory prescription, which will include a legislation as well, will operate prospectively unless the statute itself provides for its retrospective application expressly or by implication. U.P. Act No. 9 of 2019 does not expressly provide its operation to be retrospective. There is no implied provision in U.P. Act No. 9 of 2019 which can be taken aid of to infer that the said amending Act will be operative retrospectively.

(16) In view of the provisions contained in the amending Act, namely, U.P. Act No. 9 of 2019, since there is no express provision of its applicability from a retrospective date, it will thus operate prospectively. In our considered opinion, since U.P. Act No.9 of 2019 has not been made applicable retrospectively, if a particular category of employees has already been classified or recognized as "Teachers", they will continue to be treated as "Teachers". We have already noticed that as per the powers vested in it in Chapter XII of the First Statutes of the University, the Board of Management in its 28th meeting held on 30.09.1980 has already recognized the Subject Matter Specialists as "Teachers" and thus by operation of U.P. Act No. 9 of 2019 their status as "Teacher", in our opinion, will not change for the reason that U.P. Act No. 9 of 2019 has not been made effective with effect from any retrospective date.

(17) At this juncture, we may refer to Section 6 of U.P. General Clauses Act, 1904 according to which if any U.P. Act repeals any enactment, then unless a different intention appears, the repeal shall not affect the previous operation of any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. Section 6 of U.P. General Clauses Act, 1904 is quoted hereunder:-

"6. Effect of repeal. Where any Uttar Pradesh 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 remedy, or investigation or legal proceeding commenced before repealing Act shall have come into operation in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such remedy may be enforced and any such investigation or legal proceeding may be continued and

concluded, and any such penalty, forfeiture or punishment imposed as if the repealing Act had not been passed."

(18) Thus, by substituting new definition of 'Teacher' in Section 2(k) in the Principal Act by way of Act No. 9 of 2019, the old definition of the word "Teacher" stands repealed, however, since there is no express or implied provision in U.P. Act No. 9 of 2019 for its retrospective operation, those employees who were already recognized as "Teachers" will continue to be "Teachers". In the unamended Section 2(k), the words occurring are a person "appointed" or "recognized". Thus before U.P. Act No. 9 of 2019, if a person was appointed as Teacher, he will be a "Teacher" and if any employee though not appointed as Teacher, but is recognized as "Teacher", he shall also be a "Teacher". At the cost of repetition, we may again refer to the decision of the Board of Management of the University taken in its 28th meeting held on 30.09.1980, wherein the Subject Matter Specialists have been recognized as "Teachers". Thus in the aforesaid view of the matter, the amendment in the definition of the word "Teacher" as occurring in Section 2(k) will not affect the status of the petitioners as "Teachers". "

16. Learned Single Judge in the impugned judgment has relied upon the aforesaid judgment to conclude that notwithstanding the amended definition of 'Teacher' the status and pay scale already granted to the respondents-petitioners cannot be withdrawn and they are entitled to continue in service at the age of 62 years.

17. The Division Bench Judgment of the Lucknow Bench dated 17.5.2023 was challenged before the Supreme Court in Special Leave Petition (Civil) Diary No(s). 32010 of 2023, which has been dismissed vide following orders on 2.2.2024:-

"Delay condoned.

Heard learned counsel for the parties.

We see no reason to interfere with the impugned orders.

The Special Leave Petitions are, accordingly, dismissed.

Pending applications stand disposed of."

18. Sri Ashok Mehta, learned Senior Counsel for the appellants submits that the respondents-petitioners were not appointed as per the norms and guidelines of UGC and ICAR on the post of Assistant Professor and, as such, they cannot be treated as 'Teacher'. He further submits that the amendment incorporated vide Act No.9 of 2019 is not challenged and, therefore, the respondents-petitioners cannot claim themselves to be 'Teacher'. It is further submitted that Section 6 of the General Clauses Act will have no applicability in the facts of the present case, since it is not a case of repeal of statute but is a case of amendment introduced in the definition of 'Teacher'.

19. Sri Mehta has placed reliance upon the judgment of Supreme Court in Bishnu Narayan Mishra vs. State of U.P. and others, AIR 1965 SC 1567, to submit that employer has the right to reduce the age of superannuation. Reliance is also placed upon the judgment of Supreme Court in K. Nagraj and others vs. State of Andhra Pradesh and another, (1985) 1 SCC 523, for the similar proposition. It is further argued that change in the age of superannuation does not take away any vested right, inasmuch as the age of

superannuation fixed at the time of initial appointment can always be changed by the employer. Submission is that though the pay scale of Rs.2200-4000 admissible to a teacher would continue to be available to Research Assistants, as per the scale of UGC, but they cannot claim continuation in service beyond the age of 60 years.

20. Per contra, Sri Ashok Khare, learned Senior Counsel for the respondents-petitioners submits that the effect of amendment in the definition of 'Teacher' would have the same consequence as that of repeal, inasmuch as the previous definition stood substituted by a new provision. The effect of amendment is thus similar to repeal and the spirit underlying Section 6 would clearly be applicable.

21. Sri Khare, has placed reliance upon judgment of the Supreme Court in State of Rajasthan vs. Trilok Ram, (2019) 10 SCC 383, wherein the effect of substitution of provision was examined. Reliance is also placed upon judgment of the Supreme Court in P.S. Rama Mohana Rao vs. A.P. Agricultural University and others, (1997) 8 SCC 350, in order to contend that a similar definition of 'Teacher', as it previously existed in the unamended section 2(n) fell for determination before the Supreme Court. The Court took the view that the definition is in two parts. The first part included a Professor, Reader, Lecturer or other Professor appointed or recognized by the University for the purposes of imparting instructions or conducting any guiding research or extension programme. The second part included any person declared by the Statutes to be a Teacher. Learned Senior Counsel, accordingly, submits that the case of the respondents-petitioners fell in the first part and, therefore, they are covered by the definition of 'Teacher' even without a declaration granted under the Statutes.

22. Learned counsel further submits that the status of 'Teacher' since has already been granted to the respondents-petitioners, by the University, and the pay scale etc. is otherwise protected by the State, as is urged by Sri Mehta, the status of 'Teacher' cannot simultaneously be withdrawn for the age of superannuation and retained for the purposes of payment of salary. It is further argued that vested right since has been created in favour of respondents-petitioners on account of grant of declaration of 'Teacher', and the pay scale of Assistant Professor is granted to them, therefore, they cannot be treated as non-teaching staff in the matter of other service conditions. Sri Khare, submits that the right of the employer to change the age of superannuation is not doubted but that, in fact, is not the issue here. The issue rather is as to whether a vested right already created in favour of the respondents-petitioners to the status of 'Teacher' can be retrospectively withdrawn. Reliance is also been placed upon the judgment of the Supreme Court in State of Gujarat vs. Raman Lal Keshav Lal Soni, (1983) 2 SCC 33, as well as the judgment in Punjab State Agricultural Development Bank Ltd. vs. Registrar, Cooperative Societies, (2022) 4 SCC 363.

23. We have heard Sri Ashok Mehta, learned Senior Counsel, assisted by Sri Rakesh Kumar, Sri M.P. Sahi, Sri Ankit Gaur, Sri C.P. Yadav and Sri Pradeep for the State and Agricultural University at Kanpur, and Sri Ashok Khare, learned Senior Counsel, assisted by Sri Om Prakash Tripathi for the respondents-petitioners and

have perused the materials brought on record.

24. It is not in dispute that all the respondents-petitioners were initially appointed as Research Assistants. As per the unamended definition of 'Teacher' in Section 2(k) of the Act of 1958, it meant a person appointed or recognized by the University for the purposes of imparting instructions or conducting a guiding research or extension programme and included a person, who may be declared by the Statues to be a 'Teacher'. The term 'Teacher' has been employed in a wide sense to include a person appointed or recognized by the University for the purposes of imparting instructions or conducting a guiding research or extension programmes. It is undisputed that all the respondents-petitioners were appointed by the Agricultural University at Kanpur for the purposes of conducting and guiding research. We are, therefore, of the view that in the first part of the definition contained in Section 2(k) itself the respondents-petitioners would qualify to be a Teacher.

25. In P.S. Rama Mohana Rao (supra) a similar definition of 'Teacher' came up for interpretation before the Supreme Court. Para 5 of the judgment contains definition of Teacher in section 2(n), which is reproduced hereinafter:-

"5. For the purpose of deciding the above issue arising between the parties, it is necessary to refer to the relevant provisions of the Act and the Regulations. Clause (n) of Section 2 defines "teacher" as follows:

"2. (n) 'teacher' includes a professor, reader, lecturer or other person appointed or recognised by the University for the purpose of imparting instruction or conducting and guiding research or extension programmes, and any person declared by the statutes to be a teacher;"

The definition does not say what the word "teacher" means but includes certain categories within the meaning of the said word."

While considering the status of Physical Director to be a Teacher or not, the Court clearly countenanced two distinct eventualities to subsist in the definition of 'Teacher' under Section 2(n). The first part of the term 'Teacher' included a Professor, Reader, Teacher or other person appointed or recognized for the purposes of imparting instructions or conducting and guiding research or extension programme , while the second part included a person to be declared as a 'Teacher' under the Statutes. In Para 16 and 17 of the judgment in P.S. Ram Mohan Rao (supra), the Supreme Court observed as under:-

"16. In the impugned judgment of the High Court it has been said that merely because Physical Directors are paid the same scales as the teaching staff that does not confer on them the status of a teacher. There is also no discrimination if Physical Directors are retired at the age of 58 years and other teachers are allowed to retire at the age of 60 years. The High Court further said that while it was true that Section 2(n) of the Act contained an inclusive definition of "teacher", the Physical Directors did not come within the categories mentioned in the inclusive definition. They are neither Professors nor Readers nor Lecturers nor were they persons appointed or recognised by the University for the purpose of imparting instruction or conducting and guiding research or extension programmes.

17. In our view, the learned Judges did not go into the meaning of the

word "teacher" in the main part of the clause nor assessed correctly the effect of the material evidence on record. The learned Judges observed that assuming Physical Directors imparted instructions to their students, unless the University recognised them as teachers they could not claim the benefit of Section 2(n) of the Act. Obviously the learned Judges were referring to the last part of Section 2(n) which includes persons other than those enumerated in the inclusive part if so recognised by the University. As we have held that the Physical Directors come within the main part of the definition of "teacher", it is in our opinion not necessary that they should be separately recognised as teachers by an order or statute of the University."

26. In the facts of the present case, the State legislature had enacted the Act of 1958 for establishment of two agricultural universities in Uttar Pradesh at Faizabad and Kanpur. A similar University already existed from before at Pantnagar. Government Order was already issued on 06.06.1981 allowing UGC pay scale to Research Assistants of the Agricultural University at Pantnagar. Pursuant to an ad-interim mandamus issued on 07.05.1999 by the Lucknow Bench in Writ Petition No. 1082 (SB) of 1995, the State Government on 22.07.1999 granted the benefit of UGC pay scale of teacher to Senior Research Associate of the Agricultural University at Faizabad. They were also granted declaration of Teacher and were adjusted against such posts. We have already noticed that the Lucknow Bench of this Court in Writ Petition (SB) No.836 of 1994 had extended the benefit, granted to Senior Research Associate of Agricultural University at Faizabad, to the Research Assistants of Agricultural University at Kanpur. The Executive Council clearly granted declaration of Teacher to the Research Associate in its resolution dated 25.02.2000.

27. A Government Order dated 04.01.2008 has also been issued extending the pay scale of Assistant Professor to the Research Assistants of the Agricultural University at Kanpur i.e. respondents-petitioners. These Research Assistants have already been absorbed on the vacant posts of Assistant Professor or equivalent post. Subsequent Government Order dated 16.02.2010 is also on record granting the benefit of post and pay scale of Teacher to the respondents-petitioners.

28. Sri Ashok Mehta, learned Senior Counsel for the State and Agricultural University at Kanpur has referred to and relied upon the Government Order dated 18.02.2000, whereby the previous Government Order dated 22.07.1999 has been modified. While granting the benefit of promotional pay scale of UGC to 19 petitioners, their post was re-designated as Senior Research Associate and no further post with such name was to be created henceforth. Relevant portion of the Government Order dated 18.02.2000 is extracted hereinafter:-

"मुझे यह कहने का निदेश हुआ है कि उपर्युक्त विषयक आपके अर्द्धशासकीय पत्र सं०-1914/स्था०/99, दिनांक 12 नवम्बर, 1999 के संदर्भ में तथा कृषि विश्वविद्यालय फैजाबाद के शौध सहायकों के वेतन पुनरीक्षण के संबंध में शासनादेश जारी होने के तिथि से यू०जी०सी० वेतनमान रू० 2200-4000 प्रदान करने के कारण शासनादेश जारी होने की तिथि व उच्चीकरण वेतनमान देने की समान नीति को दृष्टिगत रखते हुए। कृषि विश्वविद्यालय, फैजाबाद

के 19 याची सीनियर रिसर्च एशोसियेट को भी यू०जी०सी० वेतनमान देने के संबंध में पुर्नविचार करते हुए शासनादेश सं०- 1138/12-8-99-400(157)/90, दिनांक 22 जुलाई, 1999 में आंशिक संशोधन करते हुए श्री राज्यपाल महोदय उक्त शासनादेश के प्रस्तर-4 को निम्नवत संशोधित करने की सहर्ष स्वीकृति प्रदान करते हैं:-

"वर्णित तथ्यों के परिप्रेक्ष्य में एवं माननीय उच्च न्यायालय में दायर रिट याचिका सं०-1082(एसबी)/1995 में दिए गए निर्देश दिनांक 7-5-99 को दृष्टिगत रखते हुए सम्यक विचारोपरान्त री राज्यपाल कृषि विश्वविद्यालय फैजाबाद के उक्त रिट के 19 याचीगण से सीनियर रिसर्च एशोसियेट को शासनादेश जारी होने की तिथि 22-7-1991 से यू०जी०सी० का प्रोन्नत वेतनमान स्वीकृत किए जाने के आदेश प्रदान करते है। इनका पदनाम वरिष्ठ अनुसंधान सहायक कर दिया जाए तथा इस उद्देश्य और कार्य हेतु किसी भी नाम से कोई पद भविष्य में सृजित नहीं किया जाय।

2- उक्त संशोधन के फलस्वरूप शासनादेश दिनांक 22.7.99 को पूर्व प्रस्तर-4 निरस्त करने की भी राज्यपाल महोदय स्वीकृति प्रदान करते है।"

29. The argument of Sri Mehta that initial benefit granted in 1999 was modified in the year 2000 cannot be accepted in view of the Subsequent Government Order issued on 04.01.2008, which categorically held as under:-

"अतः उक्त को दृष्टिगत रखते हुए शासनादेश दिनांक 7.8.2002 को संशोधित करते हुए दिनांक 8.1.2001 से याचीगण को सहायक प्राध्यापक का वेतनमान शासनादेश दिनांक 20.10.05 द्वारा प्रदान कर दिया गया है। इस संबंध में यह भी उल्लेखनीय है कि विश्वविद्यालय से प्राप्त सूचना के अनुसार विश्वविद्यालय में सृजित/रिक्त सहायक प्राध्यापक एवं समकक्षीय पदो पर याचीगण को समायोजित कर लिया गया है।"

30. The Government Order dated 04.01.2008 has been reiterated vide Government Order dated 16.02.2010. Operative portion of the aforesaid Government Order is extracted hereinafter:-

"अतः उक्त को दृष्टिगत रखते हुए शासनादेश दिनांक 7.8.2002 को संशोधित करते हुए दिनांक 8.1.2001 से याचीगण को सहायक प्राध्यापक का वेतनमान शासनादेश दिनांक 20.10.05 द्वारा प्रदान कर दिया गया है। इस संबंध में यह भी उल्लेखनीय है कि विश्वविद्यालय से प्राप्त सूचना के अनुसार विश्वविद्यालय में सृजित/रिक्त सहायक प्राध्यापक एवं समकक्षीय पदो पर याचीगण को समायोजित कर लिया गया है।"

31. In view of the specific stand taken by the State Government, by issuing the aforesaid Government Orders, various proceedings initiated before the Writ Court as also the contempt proceedings were dropped. The appellants-respondents clearly admit that the benefit of pay scale of 'Teacher' granted to the respondents-petitioners is not proposed to be withdrawn. It is admitted to the appellants-respondents that the pay scale admissible to an Assistant Professor under the UGC scale would continue to be paid to respondents-petitioners. Their entitlement, in that regard, is not doubted or disputed.

32. The only issue raised by the appellants-respondents is with regard to the age of superannuation of respondent-petitioners. According to the appellants-respondents, it is open for the employer to

change the age of superannuation, and that age of superannuation is otherwise not a vested right and, therefore, the plea that it cannot be retrospectively amended is misconceived.

33. It is worth clarifying at this stage that there is no change in the age of superannuation under the Act or the Statutes. The age of superannuation has been fixed under clause 7 of the Statutes and there is no amendment in it. For the non-teaching staff the age of superannuation from the very beginning is 60 years and continues to remain the same. Similarly, in the case of teaching staff the age has remained at 62 years. We are, therefore, not required to answer the question as to whether any change in the age of superannuation is permissible or not.

34. In the facts of the present case, we are only concerned with the issue as to whether the amendment in Section 2(k) can be given a retrospective application, so as to deny the benefit of designation of 'Teacher' to the respondents-petitioners?

35. In State of Rajasthan vs. Trilok Ram (supra) the Supreme Court has considered the effect of amendment in a legislation. What exactly happens in a case of amendment and as to what extent the repeal would be applicable in such a case has been dealt with in para 18 and 19 of the judgment which are reproduced hereinafter:-

"18. We are in this case concerned with the effect of amending Act which brought about the substitution of a provision. An amendment which brings about substitution of a provision essentially does two things. In the first place, the provision which is substituted undergoes a repeal. At the same time, there is a re-enactment through the newly inserted provisions.

19. We may only refer to a decision of this Court in State of Rajasthan v. Mangilal Pindwal [State of Rajasthan v. Mangilal Pindwal, (1996) 5 SCC 60 : AIR 1996 SC 2181] , therein this Court inter alia held as follows: (SCC pp. 63-64, paras 9-12)

"9. As pointed out by this Court, the process of a substitution of statutory provision consists of two steps; first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place. (See: Koteswar Vittal Kamath v. K. Rangappa Baliga & Co. [Koteswar Vittal Kamath v. K. Rangappa Baliga & Co., (1969) 1 SCC 255 : (1969) 3 SCR 40] , SCR at p. 48.) In other words, the substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. As regards repeal of a statute the law is thus stated in Sutherland on Statutory Construction:

'2042. The effect of the repeal of a statute where neither a saving clause nor a general saving statute exists to prescribe the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right to proceed under the statute, which, except as to proceedings past and closed, is considered as if it had never existed.' (Vol. I, Para 2042, pp. 522-23.)10. Similarly in Crawford's Interpretation of Laws it has been said:

'316. Effect of Repeal, Generally.— In the first place, an outright repeal will destroy the effectiveness of the repealed act in futuro and operate to destroy inchoate rights dependent on it, as a general rule. In many cases, however, where statutes are repealed, they continue to be the law of the period during which

they were in force with reference to numerous matters.' (Para 316 pp. 640-41.)

11. The observations of Lord Tenterden and Tindal, C.J. referred in the above-mentioned passages in Craies on Statute Law also indicate that the principle that on repeal a statute is obliterated is subject to the exception that it exists in respect of transactions past and closed. To the same effect is the law laid down by this Court. (See: Qudrat Ullah v. Municipal Board, Bareilly [Qudrat Ullah v. Municipal Board, Bareilly, (1974) 1 SCC 202 : (1974) 1 SCR 530] , SCR at p. 539.)

12. This means that as a result of repeal of a statute the statute as repealed ceases to exist with effect from the date of such repeal but the repeal does not affect the previous operation of the law which has been repealed during the period it was operative prior to the date of such repeal."(emphasis supplied)"

36. The import of amendment in an Act has been examined in the above case as a result of which a substitution is incorporated in the provision. The consequence is two fold. The first part indicates repeal of the earlier provision, whereas in the second part there is re-enactment of provision. Relying upon the previous judgments of the Court in State of Rajasthan vs. Mangilal Pindwal, (1996) 5 SCC 60, and Koteswar Vittal Kamath vs. K. Rangappa Baliga and Co. (1969) 1 SCC 255, the Court in Trilok Ram (supra) interpreted such amendment to result in repeal of the earlier provision and its replacement by the new provision. In a case where there was no saving clause or a general saving statute to prescribe the governing rule for the effect of repeal, is to destroy the effectiveness of the repealed act in futuro and to divest the right under the Statute, which, except as to proceedings past and closed, is considered as if it had never existed. In such eventuality, the repeal would not effect the previous operation of law for the period it operated prior to repeal.

37. In State of Gujarat vs. Raman Lal Keshav Lal Soni (supra) an issue arose with regard to status of ex-municipal employees, who had previously been granted status of government servant in view of amendment subsequently introduced whereby such benefit was withdrawn. After referring to the legislation the Court recognized the vested right created in the employees to the grant of status of government servant to them and protected it notwithstanding the amendment introduced by the legislature. Para 52 of the judgment in State of Gujarat vs. Raman Lal Keshav Lal Soni (supra) is relevant and is reproduced hereinafter:-

"52. The legislation is pure and simple, self-deceptive, if we may use such an expression with reference to a legislature-made law. The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that

obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in B.S. Yadav v. State of Haryana [1980 Supp SCC 524 : 1981 SCC (L&S) 343 : AIR 1981 SC 561 : (1981) 1 SCR 1024 : (1981) 2 SCJ 137 : 1981 Lab IC 104] . Chandrachud, C.J. speaking for the Court held: (SCC headnote)

Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case.

Today's equals cannot be made unequal by saying that they were unequal 20 years ago and we will restore that position by making a law today and making it retrospective. Constitutional rights, constitutional obligations and constitutional consequences cannot be tampered with that way. A law which if made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective. Past virtue (constitutional) cannot be made to wipe out present vice (constitutional) by making retrospective laws. We are, therefore, firmly of the view that the Gujarat Panchayats (Third Amendment) Act, 1978 is unconstitutional, as it offends Articles 311 and 14 and is arbitrary and unreasonable. We have considered the question whether any provision of the Gujarat Panchayats (Third Amendment) Act, 1978 might be salvaged. We are afraid that the provisions are so intertwined with one another that it is well nigh impossible to consider any life-saving surgery. The whole of the Third Amendment Act must go. In the result Writ Petitions Nos. 4266-4270 of 1978 are allowed with costs quantified at Rs 15,000. The directions given by the High Court, which we have confirmed, should be complied with before June 30, 1983. In the meanwhile, the employees of the panchayats covered by the appeal and the writ petitions will receive a sum of Rs. 200 per month over and above the emoluments they were receiving before February 1, 1978. This Order will be effective from February 1, 1983. The interim Order made on February 20, 1978 will be effective up to January 31, 1983. The amounts paid are to be adjusted later."

38. The concept of vested and accrued right of an employee to be divested, with retrospective effect, by the rule making authority, has recently been examined by the Supreme Court in Punjab State Agricultural Development Bank Limited (supra). The issue was noticed in para 44, which is quoted hereinafter:-

"44. The question that emerges for consideration is as to what is the concept of vested or accrued rights of an employee and at the given time whether such vested or accrued rights can be divested with retrospective effect by the rule-making authority."

39. After referring to a series of judgments including judgment of Supreme Court in Railway Board vs. C.R. Rangadhamaiah, (1997) 6 SCC 623, the principle of law has been culled out in paras 49 to 51 of the judgment in Punjab

State Cooperation Agricultural Development Bank Ltd. (supra), which are extracted hereinafter:-

"49. The exposition of the legal principles culled out is that an amendment having retrospective operation which has the effect of taking away the benefit already available to the employee under the existing rule indeed would divest the employee from his vested or accrued rights and that being so, it would be held to be violative of the rights guaranteed under Articles 14 and 16 of the Constitution.

50. In the instant case, the bank pension scheme was introduced from 1-4-1989 and options were called from the employees and those who had given their option became member of the pension scheme and accordingly pension was continuously paid to them without fail and only in the year 2010, when the Bank failed in discharging its obligations, the respondent employees approached the High Court by filing the writ petitions. The Bank later on withdrew the scheme of pension by deleting Rule 15(ii) by an amendment dated 11-3-2014 which was introduced with effect from 1-4-1989 and the employees who availed the benefit of pension under the scheme, indeed their rights stood vested and accrued to them and any amendment to the contrary, which has been made with retrospective operation to take away the right accrued to the retired employee under the existing rule certainly is not only violative of Article 14 but also of Article 21 of the Constitution.

51. It may also be noticed that there is a distinction between the legitimate expectation and a vested/accrued right in favour of the employees. The rule which classifies such employees for promotional, seniority, age of retirement purposes undoubtedly operates on those who entered service before framing of the rules but it operates in futuro. In a sense, it governs the future right of seniority, promotion or age of retirement of those who are already in service."

40. A close examination of the facts of this case would reveal that all the respondents-petitioners were granted the benefit of Teacher as per the pre-amended definition. The status of Teacher carried with it the benefit of pay scale and other conditions of service. The State also does not dispute the entitlement of respondents-petitioners to the pay scale of a Teacher even as per amended Section 2(k) of the Act. A person under Section 2(k) can either be a teacher or can be a non-teaching staff. He cannot simultaneously be a teacher for the purposes of payment of salary and non-teaching staff for other purposes including the age of retirement.

41. In the present case also the definition of 'Teacher' as originally stood in the Act of 1958 has been amended vide U.P. Act No.9 of 2019. The amendment in the definition of 'Teacher' brings about two consequences i.e. repeal of the earlier definition and secondly its substitution by the later definition. Though it is a case of amendment in the Act of 1958, as rightly contended by Sri Mehta, but its consequences of repeal of previous definition with substitution of later are similar to a case of repeal covered under Section 6 of the General Clauses Act. In that view of the matter, the principles of repeal, contained in Section 6 of the General Clauses Act would get attracted. The vested right of grant of status of 'Teacher' would continue to remain protected notwithstanding the later amendment in the definition of 'Teacher'. It is also undisputed that all those Research

Assistants, who retired prior to the amendment in section 2(k), worked upto the age of 62 years.

42. The status of 'Teacher' since is a vested right, it would continue to be protected notwithstanding the amendment introduced in section 2(k) of the Act. We are in respectful agreement with the view expressed by the Co-ordinate Bench of this Court at Lucknow Bench in Writ-A No.7847 of 2022 that the status of 'Teacher' is a vested right and cannot be retrospectively taken away on account of Amending Act. Special Leave Petition filed against this judgment has also been dismissed by the Supreme Court on 02.02.2024. It is noticed that a Government Order was also issued on 24.06.2004 as per which teachers of Agricultural University were continued in service uptill the age of 62 years.

43. Sri Ashok Mehta, learned Senior Counsel for the appellants-respondents has lastly placed reliance upon the Division Bench judgment of Lucknow Bench in Special Appeal No.75 of 2022, decided on 21.03.2022, to submit that the Division Bench has set aside the judgment of learned Single Judge in Writ Petition No.327 (SB) of 2000, filed against the Government Order dated 18.02.2000, as a result of which the status of respondents-petitioners remained that of Research Assistant and not a Teacher.

44. We have considered the above submission of Sri Mehta but are not impressed by it. The Government Order dated 18.02.2000 has already been referred to above, whereby the Government Order dated 22.07.1999 has been modified. The appeal has been allowed by the Division Bench at Lucknow after noticing that the decision taken by the Board of Management in its 86th meeting, held on 30.01.1993, was ignored by learned Single Judge, inasmuch as the previous decision taken in the 85th decision was not noted. It was in the 85th meeting that the declaration of Teacher was granted to the respondents-petitioners.

45. Unlike the facts of Special Appeal No.75 of 2022, in the facts of the present case, the benefit of post and pay scale has been granted to the Teachers of the Agricultural University at Kanpur vide Government Orders dated 04.01.2008 and 16.02.2010, which have neither been withdrawn nor have been modified. We have otherwise held that the claim of respondents-petitioners for grant of status of 'Teacher' in the pre-amended Section 2(k) was covered in the first part itself as they were engaged in research facility and did not require any specific declaration under the Statute. The judgment of the Division Bench in aforesaid special appeal is thus distinguishable, and would not come to the rescue of the appellants.

46. We have already held that the respondents-petitioners were granted the status of 'Teacher' under unamended Section 2(k) and were receiving salary of Teacher, which otherwise is protected and is not proposed to be withdrawn by the appellants-respondents. Once the status of 'Teacher' has been bestowed under the unamended provision, it constitutes a vested right in respondents-petitioners and cannot be withdrawn retrospectively on account of amendment in the definition of 'Teacher'.

47. In view of the deliberations and discussions held above, we find no error in the reasons contained in the impugned

judgment and order of learned Single Judge. The special appeals, consequently, fail and are, accordingly, dismissed. No order is passed as to costs.

(2024) 2 ILRA 741
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.
THE HON'BLE SURENDRA SINGH-I

Special Appeal No. 777 of 2023

Chandrajeet Kumar Gond ...Appellant
Versus
High Court of Judicature at Allahabad & Anr. ...Respondents

Counsel for the Appellant:
Sri Amit Kumar Tiwari, Sri Akash Yadav, Sri Shyam Dhar Gupta

Counsel for the Respondents:
Sri Ashish Mishra

A. Service Law – Cancellation of Candidature – Non-Disclosure of Criminal Case – Appellant's candidature for Class-IV post (Orderly/Peon) was cancelled for failing to disclose a pending criminal case (Case Crime No. 166 of 2020 under Sections 307, 323, 504, 506, 325 IPC) in the application form – Appellant claimed the error was inadvertent due to a computer operator's mistake and disclosed the case in an affidavit post-selection – Held, deliberate non-disclosure of a pending criminal case, despite opportunity to correct the application, justifies cancellation of candidature under High Court guidelines and *Avtar Singh Vs U.O.I.* – No special circumstances warranted leniency, as appellant's claim of inadvertence was unconvincing given his computer literacy and delay in disclosure until directed by authorities. (Paras 4, 5, 9, 16, 17, 20, 22)

B. Service Law – Application of Avtar Singh Guidelines – Avtar Singh Vs U.O.I. mandates truthful disclosure of criminal cases, with cancellation of candidature permissible for suppression of material facts – Appellant's case falls under para 38.1 of *Avtar Singh*, as he falsely declared "No" to pending criminal cases, despite a correction window (15.11.2022–16.11.2022) – Disclosure only after authorities' directive (20.05.2023) does not mitigate deliberate suppression – Employer's trust in candidate's credibility is paramount, and non-disclosure undermines suitability for appointment, as reinforced by *Rajasthan Rajya Vidyut Prasaran Nigam Ltd. Vs Anil Kanwaria*. (Paras 11, 14, 15, 17, 22)

C. Service Law – High Court Guidelines – Procedural Fairness – High Court guidelines (para 6) require candidates to submit an affidavit declaring no pending criminal cases or convictions, with cancellation of candidature for non-disclosure – Respondent no. 2 (District Judge) issued a show-cause notice and considered appellant's explanation before cancelling candidature – Held, the process complied with natural justice and High Court guidelines – Learned Single Judge's dismissal of the writ petition upheld, as no illegality or irregularity found in the cancellation order dated 03.08.2023. (Paras 10, 18, 19, 23)

Special Appeal Dismissed – No Illegality in Cancellation of Candidature.

List of Cases cited:

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

2. St. of M.P. & ors. Vs Bhupendra Yadav, 2023 SCC OnLine SC 1181

3. Daya Shankar Yadav Vs U.O.I., (2010) 14 SCC 103

4. Rajasthan Rajya Vidyut Prasaran Nigam Ltd. Vs Anil Kanwaria, (2021) 10 SCC 136

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Shyam Dhar Gupta assisted by Sri Akash Yadav representing the appellant and Sri Ashish Mishra representing the respondents.

2. This special appeal has been instituted against judgement and order dated 18.09.2023 passed by learned Single Judge of this Court in WRIT- A No. 15566 of 2023, Chandrajeet Kumar Gond Vs. High Court of Judicature at Allahabad and Another). Vide impugned order, learned Single Judge had rejected the writ petition filed praying for quashing of the order dated 03.08.2023 passed by learned District Judge, Sultanpur, whereby the candidature of the petitioner for Class-IV post in District Court, Sultanpur, has been rejected.

3. The aforesaid writ petition was filed by the petitioner, Chandrajeet Kumar Gond, with the following prayer to :-

(a) issue a writ, order or direction in the nature of certiorari to quash/set-aside the impugned administrative order dated 03.08.2023 passed by the respondent no. 2, i.e. District Judge, Sultanpur, where learned District Judge, Sultanpur, has rejected the candidature of the petitioner for the post of Orderly/Peon/Office Peon/Farrash (Group 'D') conducted by High Court of Allahabad with respect of Advertisement No. 01/Sub.Court/Category D/2022.

(b) issue a writ, order or direction in the nature of mandamus commanding and directing the respondent no. 2 to appoint the petitioner for the post of Orderly/Peon/Office Peon/Farrash (Group 'D') within some stipulated period in pursuance of the Advertisement No. 01/Sub.Court/Category D/2022, by which the petitioner may discharge his duty for the said post.

4. The averment made by the appellant/petitioner in the writ petition is that the High Court of Judicature at Allahabad had issued an advertisement bearing Advertisement No. 01/Sub.Court/Category- D/2022 on 30th October, 2022 (30.10.2022) at official website of High Court of Judicature at Allahabad. The petitioner applied to the post of Orderly/Peon/Office Peon/Farrash: Category- D bearing Advertisement No. 01/Sub.Court/Category- D/2022. The essential qualification for the appointment for the post of Orderly/Peon/Office Peon/Farrash : Category- D was that the candidate must have passed Junior High School (Class-VIIIth). The petitioner had passed Class- VIIIth examination from Nav Bharat Junior High School, Sevapuri, District- Varanasi in the year 2010. The petitioner finding himself eligible for the said post filled the online application form on 13.11.2022. As per him, against the column of *"Whether any criminal complaint case have been registered against you ?"*, the petitioner inadvertently filled in the reply column as *"No"*. The selection was held in two rounds of which the first round was held on 17.12.2022 in which the petitioner qualified. The second round of selection was held on 02.04.2023 in which the petitioner again qualified and he was declared as successful. An order was received by the petitioner from the respondents on 20.05.2023 requiring the petitioner to complete various formalities including submission of an affidavit as to whether the petitioner has got any criminal case pending against him or whether he has ever been proceeded against in a criminal case in which he has been acquitted or found guilty. In pursuance thereof, the petitioner claims to have submitted an affidavit on 02.06.2023 in which he has disclosed about pendency of a Case Crime

No. 166 of 2020 u/s 307, 323, 504, 506 & 325 I.P.C. registered in Police Station- Mirzamurad, District- Varanasi. Learned District Judge vide impugned order dated 03.08.2023, considering the guidelines issued by the High Court, more particularly paragraph 6 of the guidelines that where a candidates has not disclosed information of criminal case/proceedings then his candidature is liable to be cancelled, has cancelled the candidature of the petitioner.

5. It has been submitted by learned counsel for the appellant that the learned Single Judge without applying proper judicial mind by misreading the true facts and also not correctly applying the judgement of Hon'ble Apex Court in **Avtar Singh Vs. Union of India and others, (2016) 8 SCC 471,** cancelled the candidature of the appellant. It has also been submitted that the appellant had filled his online application form with the aid of computer operator. By the mistake of the computer operator in the column of disclosing criminal case against the candidate, *"No"* was mentioned in place of *"Yes"* . Although a criminal case had been registered against the appellant about two years ago. It has also been submitted that the appellant could not detect the mistake done by the computer operator. The appellant appeared in the examination and was declared finally selected. Vide letter dated 20.05.2023, the District Judge, Sultanpur directed the appellant for document verification and to file an affidavit regarding various particulars inter alia non-pendency of and conviction/acquittal in any criminal case against him. When the appellant was making preparation for document verification and for the affidavit, at this very stage, he noticed the mistake occurred in his online application. It has also been submitted that without any delay on 27.05.2023, the appellant/petitioner submitted an affidavit correctly admitting that a criminal case bearing Case Crime No. 166 of 2020 u/s 307, 323, 504, 506 & 325 I.P.C., Police Station- Mirzamurad, District- Varanasi, is registered against him in which charge-sheet has been submitted before the court. It has also been submitted that the appellant disclosed about the pendency of criminal case against him on 27.05.2023 i.e. before issuance of the notice of District Judge, Sultanpur dated 07.07.2023 calling upon an explanation from him why his candidature must not be cancelled for concealing the criminal case pending against him. It has also been submitted that in reply to the aforesaid notice, the petitioner had explained the reasons for not mentioning the criminal case pending against him but in an arbitrary and illegal manner without applying judicial mind, the District Judge, Sultanpur vide order dated 03.08.2023 cancelled his candidature. It has also been submitted that paragraph no. 38.1 of the judgement of **Avtar Singh (supra)** is not applicable in the case of appellant and the case of appellant is covered with paragraph nos. 38.2 and 38.3 of the judgement of the same case which has not been considered by the learned Single Judge and he illegally dismissed his writ petition. It has also been submitted that due to pendency of a criminal case registered against him, his candidature should not be cancelled but an undertaking should be taken from the selected candidate that if the judgement in the criminal case goes against him, he shall be dismissed from his service and the candidate shall have no objection.

6. Per contra, learned counsel for the respondents has argued that the appellant filled the online application on 13.11.2022.

Against the column regarding pendency of criminal case, the appellant deliberately filled in *"No"*. In the advertisement, it was provided that the particulars of the online application form could be corrected within the period from 15.09.2022 to 16.09.2022. However, the appellant did not make any effort to correct the erroneous entry made in the application form. It has also been submitted that the appellant was asked vide order dated 20.05.2023 by the District Judge, Sultanpur to file an affidavit regarding pendency of the criminal case against him and whether he has been convicted or acquitted in any criminal case. Only thereafter on 27.05.2023, he filed affidavit mentioning that a criminal case is pending against him. Therefore, the appellant did not disclose the pendency of criminal case against him within the prescribed period but after a gap of more than 10 months. Therefore, it cannot be presumed that the error in the application was not deliberate but inadvertently made. It has also been submitted that the learned Single Judge, after going through the facts and circumstances of the case and the law applicable thereto, had rightly dismissed the writ petition filed by the appellant.

7. Heard learned counsel for the parties and perused the record.

8. From the perusal of the record it transpires that the High Court has issued an advertisement on 30.10.2022 inviting applications for appointment to the Class-IV post of Orderly/Peon/Office Peon/Farrash. The appellant submitted in his application form against the column 'whether any criminal/ complaint case have ever been registered against you?'. The appellant gave reply as "No". The appellant appeared in two rounds of selection process held on 17.12.2022 & 2.4.2023 and qualified for being appointed as a Class-IV Post.

9. The office of Respondent No.2 vide letter dated 20.5.2023 required the appellant to fulfil certain formalities prior to his appointment to the aforesaid post. One of the formalities was of submission of an affidavit in the shape of undertaking that no criminal case is pending against the appellant neither in any case he has been convicted or acquitted. It is only then that the appellant submitted his affidavit on 2.6.2023 indicating about pendency of a criminal case i.e. Case Crime No. 0166 of 2020 under Sections 307, 323, 504, 506 & 325 IPC registered in Police Station, Mirzamurad, District-Varanasi. In his affidavit dated 2.6.2023, the appellant has indicated that while filling in the online application form he had inadvertently filled the column against the criminal case as "No" which as per the appellant is incorrect as a criminal case i.e. Case Crime No. 0166 of 2020 is pending against him and his reply should be treated as "Yes".

10. The competent authority, respondent no.2 after considering the appellant's affidavit dated 2.6.2023 as well as paragraph no.6 of the guidelines issued by the High Court regarding concealment has cancelled the candidature of the appellant.

11. A three Judges Bench of the Hon'ble Apex Court in **Avtar Singh Vs. Union of India and others, (2016) 8 SCC 471,** after examining different views expressed by the Bench of Hon'ble Apext Court from time to time, has laid down the broad guidelines as yardstick to be applied for verification of disclosure made by a candidate to the employer for deciding as to whether the cancellation of candidature or

termination of service of the incumbent should be done or not? In this context, it may be useful to extract the following observations made in ***Avtar Singh (supra);***

32. No doubt about it that once verification form requires certain information to be furnished, declarant is duty-bound to furnish it correctly and any suppression of material facts or submitting false information, may by itself lead to termination of his services or cancellation of candidature in an appropriate case. However, in a criminal case incumbent has not been acquitted and case is pending trial, employer may well be justified in not appointing such an incumbent or in terminating the services as conviction ultimately may render him unsuitable for job and employer is not supposed to wait till outcome of criminal case. In such a case non-disclosure or submitting false information would assume significance and that by itself may be ground for employer to cancel candidature or to terminate services.

36.What yardstick is to be applied has to depend upon the nature of post, higher post would involve more rigorous criteria for all services, not only to uniformed service. For lower posts which are not sensitive, nature of duties, impact of suppression on suitability has to be considered by authorities concerned considering post/nature of duties/services and power has to be exercised on due consideration of various aspects.

"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:

38.1 Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

38.2 While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

38.3 The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

38.4 In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted : -

38.4.1 In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.

38.4.2 Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

38.4.3 If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts

available as to antecedents, and may take appropriate decision as to the continuance of the employee.

38.5 In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

38.6 In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

38.7 In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8 If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9 In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10 For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11 Before a person is held guilty of ?suppressio veri? or suggestio falsi?, knowledge of the fact must be attributable to him."

12. In paragraph no.16 of the judgment of Hon'ble Apex Court in **State of Madhyra Pradesh and Ors. Vs. Bhupendra Yadav, 2023 (SCC Online) SC 1181** has given credence to of the judgment of Hon'ble Apex Court in Avtar Singh case (supra) which is as follows:-

16. As can be discerned from the above decision, an employer has the discretion to terminate or condone an omission in the disclosure made by a candidate. While doing so, the employer must act with prudence, keep in mind the nature of the post and the duties required to be discharged. Higher the post, more stringent ought to be the standards to be applied. Even if a truthful disclosure has been made, the employer is well within its right to examine the fitness of a candidate and in a concluded criminal case, keep in mind the nature of the offence and verify whether the acquittal is honourable or benefit has been extended on technical reasons. If the employer arrives at a conclusion that the incumbent is of a suspect character or unfit for the post, he may not be appointed or continued in service."

13. In **Daya Shankar Yadav Vs. Union of India; 201014 SCC 103,** the Court has held that where the candidate has

given correct or false or half backed information with respect to his antecedents, the following consequences will take place.

"15. When an employee or a prospective employee declares in a verification form, answers to the queries relating to character and antecedents, the verification thereof can therefore lead to any of the following consequences:

(a) If the declarant has answered the questions in the affirmative and furnished the details of any criminal case (wherein he was convicted or acquitted by giving benefit of doubt for want of evidence), the employer may refuse to offer him employment (or if already employed on probation, discharge him from service), if he is found to be unfit having regard to the nature and gravity of the offence/crime in which he was involved.

(b) On the other hand, if the employer finds that the criminal case disclosed by the declarant related to offences which were technical, or of a nature that would not affect the declarant's fitness for employment, or where the declarant had been honourably acquitted and exonerated, the employer may ignore the fact that the declarant had been prosecuted in a criminal case and proceed to appoint him or continue him in employment.

(c) Where the declarant has answered the questions in the negative and on verification it is found that the answers were false, the employer may refuse to employ the declarant (or discharge him, if already employed), even if the declarant had been cleared of the charges or is acquitted. This is because when there is suppression or non-disclosure of material information bearing on his character, that itself becomes a reason for not employing the declarant.

(d) Where the attestation form or verification form does not contain proper or adequate queries requiring the declarant to disclose his involvement in any criminal proceedings, or where the candidate was unaware of initiation of criminal proceedings when he gave the declarations in the verification roll/attestation form, then the candidate cannot be found fault with, for not furnishing the relevant information. But if the employer by other means (say police verification or complaints, etc.) learns about the involvement of the declarant, the employer can have recourse to courses (a) or (b) above."

14. In **Rajasthan Rajya Vidhut Prasaran Nigam Limited Vs. Anil Kanwaria (2021) 10 SCC 136** where the respondents after qualifying for the post was appointed as a probationer trainee, technical helper in the course of his police verification it had transpired that he had been convicted by the trial court for the offences under Sections 323 and 341 of IPC but was extended benefit under the Probation of Offenders Act, 1958 and released on good conduct. The respondent withheld these facts in his application form for appointment. After distilling the law on appointments obtained by fraud or misrepresentation/ by suppression of material facts. The Hon'ble Apex Court proceeded to quash the appointment and set aside the order passed by the learned Single Judge and upheld the order passed by the Division Bench of High Court stating that the decision of learned Single Judge directing the reinstatement of the respondent- employee was unsustainable in view of the fact that the employee had not disclosed/suppressed the fact that he has

been convicted by a competent court and had filed a false declaration in this regard. In this case, the Hon'ble Apex Court expressed its view that even where there is a subsequent acquittal, the employee having furnished false information/indulged in suppression of material fact of his conviction in a criminal case, cannot claim appointment as a matter of right. Following observation was made regarding credibility of such an employee from the perspective of the employer:

"14. The issue/question may be considered from another angle, from the employer's point of view. The question is not about whether an employee was involved in a dispute of trivial nature and whether he has been subsequently acquitted or not. The question is about the credibility and/or trustworthiness of such an employee who at the initial stage of the employment i.e. while submitting the declaration/verification and/or applying for a post made false declaration and/or not disclosing and/or suppressing material fact of having involved in a criminal case. If the correct facts would have been disclosed, the employer might not have appointed him. Then the question is of trust. Therefore, in such a situation, where the employer feels that an employee who at the initial stage itself has made a false statement and/or not disclosed the material facts and/or suppressed the material facts and therefore he cannot be continued in service because such an employee cannot be relied upon even in future, the employer cannot be forced to continue such an employee. The choice/option whether to continue or not to continue such an employee always must be given to the employer. At the cost of repetition, it is observed and as observed hereinabove in catena of decision such an employee cannot claim the appointment and/or continue to be in service as a matter of right."

15. From considering the law laid down by the Hon'ble Apex Court in **Avtar Singh (supra)** and **Rajasthan Rajya Vidhut Prasaran Nigam Limited (supra)** it can be concluded that the information given to the employer by a candidate as to the conviction/acquittal or arrest or pendency of criminal case whether before or after entering into the service must be true and there should be no suppression or false mention of required information. Any contravention made by the candidate shall cause cancellation of his candidature, dismissal from service if already appointed.

16. The discloser made by the appellant while applying for the Class-IV post regarding pendency of criminal case was clearly false as he had mentioned/replied "No" to the query regarding the criminal case pending against him. The advertisement itself provided space for correction of error between period 15.11.2022 to 16.11.2022 but no efforts were made by the appellant for correction of the said reply/answer in his online application form. The appellant appeared in two rounds of selection process and despite having been qualified in the same, no effort was made by him to indicate the pendency of criminal case to the respondent no.2 competent authority. It is only when on 20.5.2023, the appellant was asked to furnish an affidavit/undertaking regarding his conviction/acquittal or pendency of criminal case against him. The appellant submitted his affidavit on 2.6.2023 indicating the pendency of criminal case. Thus, the appellant from the date of the submission of application form i.e.

13.11.2022 until 02.06.2023 persisted on giving wrong information about the pendency of criminal cases against him and for the first time on 02.06.2023, he disclosed the criminal case pending against him. The competent authority respondent no.2 after considering the said affidavit as well as paragraph no.6 of the guidelines issued by the High Court has rightly cancelled the candidature of the appellant.

17. From the above discussion, it is obvious that the appellant has deliberately furnished false information about the non-pendency of criminal case against him, therefore his case is squarely covered under the paragraph no. 38.1 of **Avtar Singh case (supra)**. There is no special circumstances in favour of the appellant which may extenuate him from his aforesaid mislead. The appointing authority- respondent no.2 has taken into consideration the guidelines of High Court before passing impugned order. There is no substance in the plea of the appellant that his case is not covered under paragraph no. 38.1 and it is covered under paragraph nos. 38.2 and 38.3 of **Avtar Singh case (supra)** and his candidature should not be cancelled. Therefore, his plea cannot be taken into consideration in favour of him.

18. The High Court had issued guidelines for verification of antecedent testimonials of the candidate and if required cancelling of his candidature. The paragraph No. 6 of the guidelines is as follows:

"An undertaking on affidavit shall be taken from the selected candidates declaring that neither any criminal case/proceeding is pending against him/her nor he has been convicted/acquitted by any Court. In case any criminal case/proceeding is found pending against him/her in any court which has not been declared by the candidate in the application form, a show cause notice shall be issued to such candidate by the appointing authority as to why their candidature be not canceled. The decision of the appointing authority about the candidature of such candidate shall be treated as final. Further, if such a candidate has not disclosed the information of criminal case/proceeding in the Undertaking on Affidavit submitted at the time of joining, the candidature/appointment of such candidate shall be forfeited/cancelled by the appointing authority at their end."

19. The respondent no.2 appointing authority after following procedure provided in the paragraph no.6 of the aforesaid guidelines after giving the appellant opportunity to explain false statement regarding pendency of criminal case in his application for appointment has rightly cancelled the candidature of the appellant.

20. From the discussion of the aforesaid facts it is thus, obvious that the appellant had given false information regarding pendency of criminal case in his application form and he did not make correction within the time prescribed in the advertisement and also he did not disclose the facts regarding pendeny of criminal case till declaration of the result. For the first time he made disclose regarding pendency of criminal case against him. When on 20.5.2023, the appellant was directed by the respondent no.2 to give undertaking by an affidavit regarding pendency of criminal case. Apart from this, from the testimonials filed by the appellant, it is clear that he is computer knowing

person and has done C-Grade course of computer in June, 2017 i.e. before submitting an online application for appointment.

21. Thus, the explanation given by the appellant that he has no knowledge about the online filling form and he gave all the relevant information/documents to the person who filled his online form and inadvertently error crept in by the person filling the application form regarding non pendency of criminal case against him, cannot be accepted.

22. Thus, considering conduct of the appellant and in light of the law laid down by the Hon'ble Apex Court in **Avtar Singh (supra)** and **Rajya Vidyut Prasaran Nigam Ltd. (supra),** it can be concluded that the appellant deliberately made concealment of fact regarding pendency of criminal case in his application form.

23. Considering the law laid down by the Hon'ble Apex Court in the aforesaid cases, and in the facts and circumstances of the case, we do not find any illegality or irregularity in the impugned order 18.9.2023 passed by the learned Single Judge in WRIT - A No. - 15566 of 2023.

24. There is no merit in the Special Appeal. It is accordingly dismissed.

(2024) 2 ILRA 750
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal Defective No. 791 of 2023
Connected with
Special Appeal Defective No. 790 of 2023
And
Special Appeal Defective No. 84 of 2024
And
Special Appeal Defective No. 803 of 2023

C/M, Sri Durga Ji (P.G.) College Chandeswar, Azamgarh & Anr.
...Appellants
Versus
Ambrish Kumar Gond & Ors.
...Respondents

Counsel for the Appellants:
Sri Ravindra Nath Yadav, Sri Akhilesh Kumar Yadav

Counsel for the Respondents:
C.S.C., Sri Alok Mishra

A. Service Law – Appointment of Class-III Employees – Validity of Selection Process – Appellants challenged the reinSt.ment of four Class-III employees (Lab Assistants, Routine Clerk, Library Clerk) whose appointments were cancelled due to the participation of an Officiating Principal in the selection committee instead of the regular Principal – Held, the regular Principal was under suspension, and the Officiating Principal, Dr. Phool Chandra Singh, was duly authorized to participate in the recruitment process – The selection committee was validly constituted under the statutes of Veer Bahadur Singh Purvanchal University, and the objection to the Officiating Principal's participation was baseless – Cancellation of appointments by the Director and Authorized Controller was erroneous, as no disciplinary enquiry or opportunity of hearing was provided, violating natural justice. (Paras 4, 9, 10, 11, 12)

B. Service Law – Natural Justice – Cancellation of Appointments – The appointments of Class-III employees, approved by the Regional Higher Education Officer on 25.11.2004, were cancelled without conducting a disciplinary enquiry or providing an opportunity of hearing – Held, such cancellation was impermissible and arbitrary, as it lacked procedural fairness – Learned Single Judge rightly set aside the cancellation orders dated 26.3.2009 (Director), 2.6.2010 (Principal), and 18.6.2010 (Authorized Controller) – ReinSt.ment of employees upheld, as the selection process

was valid and cancellations were not based on any substantive grounds. (Paras 5, 6, 12)

C. Service Law – Back Wages and Continuity of Service – Employees sought back wages for the period 2010–2023, during which they were not allowed to work due to wrongful cancellation of their appointments – Held, denial of back wages was not illegal, as employees did not work during this period – However, employees are entitled to continuity of service and notional fixation of salary from 2004, ensuring uninterrupted service benefits – Authorities directed to reinSt. employees forthwith and fix salaries accordingly, without back wages for the unworked period. (Paras 6, 13, 14)

Special Appeals (Nos. 791, 790, 803 of 2023) by Committee of Management Dismissed – Special Appeal (No. 84 of 2024) by Employees Disposed with Directions for ReinSt.ment and Continuity of Service.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Delay in filing of the appeals has been explained to the satisfaction of the Court. Applications are allowed. Delay in filing of appeals is condoned.

2. These four appeals are in respect of appointments offered on Class-III posts to four Class-III employees of Shri Durga Ji Postgraduate College Chandeshwar, Azamgarh. The writ petitions filed by the four Class-III employees have been allowed by the learned Single Judge and they have been held entitled to reinstatement without back wages. Since all the appeals have been heard together and common questions of fact and law are involved, as such, with the consent of learned counsel for the parties all the four appeals are being decided by this common judgment.

3. Shri Durga Ji Postgraduate College Chandeshwar, Azamgarh (hereinafter referred to as the 'institution') is duly recognized educational institution, affiliated to Veer Bahadur Singh Purvanchal University, Jaunpur. It is governed by the provisions of the U.P. State Universities Act, 1973, as well as the statutes of the Purvanchal University. In the concerned institution process of recruitment was initiated on the post of Lab Assistant and Library Clerk. An advertisement was issued by the institution for appointments to be made on 3 posts of Lab Assistant, one of which was reserved for Scheduled Castes candidate; 1 post of Routine Clerk and 3 posts of Class-IV employees. The advertisement was issued by the then Manager Kanhaiya Singh as well as Dr. Phool Chandra Singh, who was the Officiating Principal of the institution. The selection committee was constituted for appointment to Class-III posts consisting of the Officiating Principal Dr. Phool Chandra Singh. Bharat Singh and Manoj Kumar Yadav were appointed as Routine Clerk; while Satyendra Kumar Singh was appointed as Library Clerk. Ambarish Kumar Gond, and Ravindra were appointed as Lab Assistant. Certain other persons were appointed on Class-IV post. These appointments were approved by the Regional Higher Education Officer, Varanasi on 25.11.2004. The candidates, who were duly appointed, started working after their appointments were approved by the Regional Higher Education Officer and also started receiving salary. No issue in that regard was apparently raised.

4. An Authorized Controller came to be appointed in the institution in January,

2008. It is thereafter that some doubts were raised with regard to legality of the appointments offered to the aforesaid persons on the ground that regular Principal of the institution had not participated in the selection proceedings and that the Officiating Principal had no right to take part in such proceedings.

5. It appears that the Regional Higher Education Officer proposed cancellation of the appointments offered to Class-III employees, wherein the Officiating Principal Dr. Phool Chandra Singh had participated as a member of the Selection Committee. The Regional Higher Education Officer, nevertheless, sought guidance from the Director, Higher Education, U.P. The Director, Higher Education on 26.3.2009 directed cancellation of the appointment of such employees. In compliance of the orders passed by the Director, the Principal of the institution passed an order on 2.6.2010 suspending the payment of salary of the concerned employees. The Authorized Controller subsequently passed an order on 18.6.2010 cancelling the appointments offered to the Class-III employees in compliance of the orders passed by the Director on 26.3.2009. The aforesaid orders came to be challenged before this Court in separate writ petitions filed by the concerned employees.

6. Writ Petition No.49802 of 2010 came to be filed by Bharat Singh, who was appointed as Routine Clerk. Writ Petition No.54687 of 2010 was filed by Satendra Kumar Singh, who was appointed as Library Clerk. Writ Petition No.47780 of 2010 came to be filed by Ambarish Kumar Gond and Ravindra. The writ petitions were initially dismissed by learned Single Judge, but those orders were reversed in appeal on the ground that facts have not been correctly adjudicated. The orders passed in Special Appeal No.1748 of 2012 filed by Ambarish Kumar Gond and another has been produced before us, which would go to show that the Division Bench was of the view that facts have not been correctly appreciated by the learned Single Judge, and therefore the dismissal of writ petitions was not proper. The special appeals were, consequently, allowed and the matters were remitted back for a fresh consideration of cause. It is pursuant to such orders passed in the year 2013 by the Division Bench that the abovenoted three writs have now been finally decided by the learned Single Judge vide orders dated 25.4.2023 and 22.5.2023. Learned Single Judge has come to the conclusion that cancellation of appointments offered to Class-III employees was not based on any proper enquiry report and opportunity of hearing has also been denied to such persons. It is for this reason that the writs filed by Class-III employees have been allowed. They have been held entitled to reinstatement and continuity in service. Salary, however, has been denied to them on the ground that they have admittedly not worked from 2010 to 2023. Aggrieved by these orders of learned Single Judge, Special Appeal Defective Nos.791 of 2023, 790 of 2023 and 803 of 2023 have been filed by the Committee of Management, whereas on behalf of Class-III employees Ambarish Kumar Gond and Ravindra, Special Appeal Defective No.84 of 2024 has been filed, insofar as back wages have been denied to them.

7. We have heard Sri R.N. Yadav for the Committee of Management, whereas Sri V.K. Singh, learned Senior Counsel assisted by Sri S.M. Mishra has been heard on behalf of Satendra Kumar Singh. Bharat

Singh and two appellants Ambarish Kumar Gond and Ravindra are represented by Sri Alok Mishra. We have examined the materials placed on record.

8. It is undisputed that the institution is a recognized institution and certain vacancies of Class-III and Class-IV posts had arisen in the institution. The advertisement was duly published in that regard, which is on record of Special Appeal Defective No.791 of 2023 at page 158. The advertisement has been issued jointly by the Manager Kanhaiya Singh and the Officiating Principal Dr. Phool Chandra Singh. Pursuant to this advertisement selection committee has been constituted and all four Class-III employees were duly appointed. Their appointment was also approved by the Regional Higher Education Officer, Varanasi on 25.11.2004. These employees started working and receiving salary from State Exchequer. There is no denial of such facts in any of the appeals.

9. The dispute with regard to appointments offered to Class-III employees originated on the report of Regional Higher Education Officer, as per which the selection committee itself was flawed, since regular Principal of the institution was not associated in issuing the advertisement nor was he a member of the selection committee. This is the only objection on which the appointments offered to Class-III employees were set aside. In such view of the matter, it would be necessary to examine as to whether a valid person had participated in the selection proceedings as Principal or not?

10. It is undisputed that Dr. Durga Prasad Dwivedi was the Principal of the institution. He was placed under suspension by the Committee of Management on 3.9.2024. The suspension of Dr. Durga Prasad Dwivedi was stayed by the Vice Chancellor on 19.10.2004. On 16.12.2004 the suspension order was set aside by the Vice Chancellor. The order dated 16.12.2004 came to be challenged by the Committee of Management before a Division Bench of this Court in Writ Petition No.55955 of 2004. The Division Bench of this Court quashed the order passed by the Vice Chancellor after holding that he had no jurisdiction to set aside the suspension of the Principal. The suspended Principal Dr. Durga Prasad Dwivedi thereafter filed Writ Petition No.51603 of 2005 challenging his suspension. This writ petition was disposed of after holding that in view of the previous order passed by the Co-ordinate Bench in Writ Petition No.55955 of 2004, there was no occasion for this Court to interfere with the order of suspension. The enquiry, however, was directed to be concluded within a period of three months.

11. The order of the Division Bench dated 3.1.2005 in Writ Petition No.55955 of 2004 has attained finality. Once that be so, it remains undisputed that regular Principal Dr. Durga Prasad Dwivedi continued under suspension. The plea taken by the educational authority and the Committee of Management that Dr. Durga Prasad Dwivedi ought to have participated in the recruitment as the Principal of the institution is clearly impermissible. A suspended Principal cannot take part in the recruitment proceedings, nor can he be expected to form part of the selection committee. The objection taken by the Committee of Management as well as the educational authorities in this regard is, therefore, found bereft of merits.

12. It is otherwise undisputed that Dr. Phool Chandra Singh was authorized to officiate as Principal and his signatures were attested. The officiation of Dr. Phool Chandra Singh as Principal has not been challenged by anyone. It is undisputed that Dr. Phool Chandra Singh had participated in the recruitment exercise and was also a member of the selection committee. Being the Officiating Principal he was entitled to be a part of the selection committee, since the statutes of the University contemplates a selection committee for appointment to Class-III post to consist of Principal. As the regular Principal was under suspension, the Officiating Principal had to take part in such proceedings. We find that there was absolutely no occasion for anyone to doubt the recruitment of Class-III employees on the ground that an incompetent person had participated in the recruitment proceedings, as the Principal. The educational authorities as well as Authorized Controller clearly fell in error in doubting the correctness of the recruitment proceeding culminating in appointment of Class-III employees, who were duly approved by the Regional Higher Education Officer. We otherwise find substance in the reasoning assigned by learned Single Judge to interfere with the order of the authorities, inasmuch as at no stage, any opportunity of hearing was given to the selected employees. No disciplinary enquiry was otherwise held. The services of Class-III employees, who were duly appointed and approved by the educational authorities, could not have been set aside, merely on a misconceived apprehension that selection committee was incompetent. We, therefore, fully endorse the view taken by the learned Single Judge that the cancellation of appointment of Class-III employees was impermissible. Learned Single Judge, therefore, has rightly set aside the order passed by the Director dated 26.3.2009 as well as the consequential orders passed by the Principal dated 2.6.2010 and the order passed by the Authorized Controller dated 18.6.2010. The Special Appeal Defective Nos.791 of 2023, 790 of 2023 and 803 of 2023 filed by the Committee of Management, in that regard, are dismissed.

13. So far as the claim for back wages put forth by the two employees are concerned, we find that they have not worked since 2010. Although we find substance in the argument of Sri Alok Mishra that it was for no fault of these employees that they were not allowed to work, yet, in the facts of the case we find that denial of back wages to these two employees cannot be said to be illegal or arbitrary. All these employees, however, would be entitled to continuity in service and their salary etc. would be notionally fixed by granting them the benefit of uninterrupted continuance since their appointment in the year 2004 without any back wages for the period 2010 to 2023. The authorities shall ensure that all the four Class-III employees would be allowed to resume their duties, forthwith, if it has not already been done, and they would be entitled to salary in terms of the above directions.

14. Subject to the observations made above, Special Appeal Defective No.84 of 2024 stands disposed of.

(2024) 2 ILRA 755
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal No. 818 of 2022

Food and Civil Supply Pensioners Welfare Association, Meerut ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kumar Ashutosh Srivastava, Sri Bhupendra Pratap Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Implementation of Sixth Pay Commission – Food and Civil Supply Department – Appellant-association, representing retired employees of the Food and Civil Supply Department (2008–2011), challenged the rejection of their representation seeking implementation of the Sixth Pay Commission report notionally from 1.1.2006 – Held, the Sixth Pay Commission report was uniformly implemented across all St. departments, including Food and Civil Supply, from 1.1.2006 vide Government Order dated 8.12.2008 – No illegality or perversity shown in the finding of the learned Single Judge – Appellant's primary grievance regarding non-implementation of the Sixth Pay Commission from 1.1.2006 rejected. (Paras 3, 8)

B. Service Law – Upgradation of Pay Scale – Rectification of Anomalies – Appellant sought retrospective application of upgraded pay scales (effective 30.6.2011) from 1.1.2006, alleging arbitrariness – Held, the upgradation of pay scales, based on the Tenth Pay Committee Report, addressed anomalies considering work performed and equivalence with other departments – This potential claim was recognized only on 30.6.2011, and benefits were rightly granted prospectively from that date – No existing right to upgraded pay existed prior to 30.6.2011, rendering retrospective application untenable. (Paras 4, 9, 10, 11)

C. Service Law – Potential Claims – Prospective Application – The claim for upgraded pay scales was a potential claim, not based on pre-existing rights, and required determination through appropriate proceedings – Held, such claims are ordinarily implemented prospectively from the date of recognition (30.6.2011) – No evidence showed that the appellant's claim was recognized earlier or that their circumstances mirrored Central Government employees – Learned Single Judge's refusal to interfere with the St.'s order upheld as no illegality found. (Paras 10, 11, 12)

Special Appeal Dismissed – No Merit Found in Challenge to Single Judge's Order.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Appellant before this Court is the Association of Food and Civil Supply Pensioners, which is aggrieved by the judgment of the learned Single Judge dated 4.10.2021, passed in writ petition nos.68856 of 2015 and 57952 of 2014.

2. The appellant-association by filing the writ petition had primarily challenged the order passed by the Principal Secretary, Department of Food and Civil Supply, State of U.P., Lucknow dated 12.2.2015, whereby representation made by the appellant-association was rejected. A further prayer has been made to issue a writ of mandamus commanding the respondents to implement the sixth pay commission report from 1.12.2008 notionally from

1.1.2006. The members of the appellant-association are those employees of the department of food and civil supply, who had retired between 2008 to 2011.

3. Learned Single Judge after examining the claim of the appellant has returned a finding that the recommendation of the sixth pay commission report was uniformly implemented in all departments of the State, including department of food and civil supply, with effect from 1.1.2006 in terms of the Government Order dated 8.12.2008. The finding returned in that regard is not shown to be illegal or perverse. Learned Single Judge has also observed that the rectification of anomalies in the pay scale vide tenth report of pay committee got implemented with effect from 30.6.2011 and upgraded pay was granted from the date of notification dated 30.6.2011.

4. Learned Single Judge has opined that the grant of benefit of up-gradation of pay consequent upon rectification of anomalies in the pay scale has nothing to do with the implementation of the sixth pay commission report. With this finding, writ petition filed by the appellant-association has been rejected.

5. Learned counsel for the appellant submits that the benefit of rectification of anomalies ought to have been extended from the date when sixth pay commission report itself was implemented i.e. 1.1.2006 and restricting its benefits with effect from 30.6.2011 is wholly arbitrary.

6. The appeal is opposed by learned State counsel.

7. We have heard learned counsel for the parties and have perused the materials on record.

8. The appellant has essentially prayed that the benefit of sixth pay commission report be extended in the department of food and civil supply with effect from 1.1.2006. This is the primary grievance raised in the writ petition. Learned Single Judge upon evaluation of respective pleas put forth by the parties has returned a categorical finding that the sixth pay commission report has been implemented in the department of food and civil supply with effect from 1.1.2006 vide Government Order dated 8.12.2008. Though the judgment of learned Single Judge has been challenged but the appellant has not been able to show that in the department of food and civil supply the benefit of sixth pay commission report was not implemented at par with other departments with effect from 1.1.2006. The grievance of the appellant in that regard is, therefore, rejected.

9. The claim raised by the members of the appellant-association apparently was in the nature of a potential claim as the employees of the department were claiming parity with employees of other departments on the basis of work performed by them. The recommendations made by the pay committee report (tenth report) was based upon the nature of work performed by the appellant-association and upon consideration of the plea of equivalence of status viz-a-viz posts of other departments and got implemented vide notification dated 30.6.2011. Such potential claim since was recognized, for the first time, on 30.6.2011, the recommendations got enforced in the department from that day.

10. In the order of the State Government a categorical finding has been returned that the grant of upgraded pay scale was on the basis of consideration by the pay committee with regard to anomalies in the pay scale, with reference to the work performance and status of the employees

viz-a-viz posts of other departments of the State. Since claims which were potential in nature got recognized vide notification dated 30.6.2011, for the first time, the grant of benefit of upgraded pay only from 30.6.2011 cannot said to be illegal or arbitrary.

11. Potential claims since are not based on any existing rights, such claims would require determination first. It is only after determination of such potential claim in appropriate proceedings that the benefits found due can be extended. Ordinarily grant of such benefits would be prospective.

12. It is not the case of the appellant that their claim for upgraded scale stood recognized from before nor is it their case that they were similarly circumscribed as the employees of the Central Government. We, therefore, find no error in the judgment of the learned Single Judge refusing to interfere in the writ petition.

13. The special appeal lacks merit and is, accordingly, dismissed.

(2024) 2 ILRA 757
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ - A No. 848 of 2019

Firoz Khan ...Petitioner
Versus
Bank of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sharad Malviya, Sri Yogendra Singh

Counsel for the Respondents:
Sri R.V. Pandey

A. Service Law – Compassionate Appointment – Financial Condition Assessment – Petitioner sought compassionate appointment after his father's death, which was rejected by the Bank of India – Held, under Para 17, Sub Para (iii) of the Bank of India Scheme for Compassionate Appointment, the financial condition of the deceased employee's family, including assets, liabilities, and terminal benefits, must be assessed – Family received Rs. 44,43,178/- (after deducting liabilities of Rs. 5,97,000/-) and a monthly pension of Rs. 24,718/-, which was sufficient to avoid financial crisis – Rejection of compassionate appointment upheld as the family was not in a penurious condition. (Paras 3, 5, 8, 9, 17, 19)

B. Service Law – Bank of India Scheme – Interpretation of Para 17 (iii) – The scheme mandates a balanced and objective assessment of the family's financial condition, considering terminal benefits (e.g., gratuity, provident fund, leave encashment) and liabilities – Held, compassionate appointment cannot be rejected solely on the ground of receiving welfare scheme benefits, but the quantum of benefits (Rs. 44,43,178/- and Rs. 24,718/- monthly pension) justified denial, as the family could meet financial liabilities without appointment – No illegality found in the impugned order dated 15.11.2017. (Paras 4, 8, 18, 19)

C. Service Law – Precedents on Compassionate Appointment – Judgments in *General Manager (D & PB) Vs Kunti Tiwary*, *Punjab National Bank Vs Ashwani Kumar Taneja*, *St. Bank of India Vs Jaspal Kaur*, and others consistently hold that terminal benefits and pension amounts can be considered to assess financial hardship – Held, amounts comparable to or less than Rs. 44,43,178/- (terminal benefits) and Rs. 24,718/- (pension) in prior cases justified denial of compassionate appointment – Petitioner's case aligns with these precedents, and no interference warranted. (Paras 6, 10–16, 17)

Writ Petition Dismissed – No Illegality in Rejection of Compassionate Appointment.

List of Cases cited:

1. General Manager (D & PB) & ors. Vs Kunti Tiwary & anr., (2004) 7 SCC 271

2. Punjab National Bank & ors. Vs Ashwani Kumar Taneja, (2004) 7 SCC 265

3. St. Bank of India Vs Jaspal Kaur, (2007) 9 SCC 571

4. St. Bank of India Vs Ajay Kumar, Special Appeal No. 14 of 2007

5. Punjab National Bank Vs Deepak Pandey, Special Appeal No. 867 of 2006

6. Smt. Nanda Tambe Vs U.O.I. & ors., Writ-A No. 54592 of 2004

(Delivered by Hon'ble Neeraj Tiwari, J.)

1. Heard learned counsel for the petitioner and Sri R.V. Pandey, learned counsel for the respondents.

2. Present petition has been filed with the following prayers:-

"(i) Issue, a writ, order or direction in the nature of certiorari to quash the order dated 15.11.2017, which was communicated on 24.11.2017, rejecting the application of petitioner on compassionate appointment.

(ii) Issue, a writ order or direction in the nature of mandamus directing the respondent Bank to provide employment to the petitioner on compassionate ground as per his qualification."

3. Brief facts of the case are that father of petitioner was working as Branch Manager at Mahoba Branch. During the course of service, he died on 19.1.2017. After his death, mother of petitioner has received Rs.10,000,00/- as Gratuity Fund, Rs. 15,160,00/- as Provident Fund, Rs. 6,24,178/- as leave encashment, Rs. 17,000,00/- against TDR and Rs. 2,000,00/- from LIC insurance amounting to a sum of Rs. 50,40,178/-. Father of petitioner had liabilities to pay Rs. 5,97,000/- towards bank. After deduction of the same, total amount paid is Rs.44,43,178/-. Mother of petitioner is also getting family pension of Rs. 24,718/- per month.

4. Learned counsel for the petitioner submitted that in light of Para 17 of Sub Para (iii) of the Bank of India Scheme for Compassionate Appointment, application for appointment on compassionate ground cannot be rejected on the ground that family of employee has received the benefits under the various welfare schemes, therefore, order is bad and liable to be set aside.

5. Per Contra, Sri R.V. Pandey, learned counsel for the respondents vehemently opposed the submission of learned counsel for the petitioner and submitted that Para 17 of Sub Para (iii) of the Bank of India Scheme for Compassionate Appointment clearly says that while deciding the application liability has to be taken into consideration. In the present case, undisputedly, total liability upon the father of petitioner was of Rs.5,97,000/- towards bank, therefore, after deduction of the same, apart from monthly family pension of Rs.24,718/-, mother of petitioner has received Rs. 44,43,178/-, therefore, there is no illegality in denial of compassionate appointment to petitioner.

6. In support of his contention, he has placed reliance upon the judgments of

Apex Court as well as this Court in the cases of ***General Manager (D & PB) and others vs. Kunti Tiwary and another (2004) 7 SCC 271, Punjab National Bank and others Vs. Ashwani Kumar Taneja 2004 (7) SCC 265, State Bank of India Vs. Jaspal Kaur (2007) 9 SCC 571, State Bank of India Vs. Ajay Kumar (Special Appeal No. 14 of 2007), Punjan National Bank Vs. Deepak Pandey (Special Appeal No. 867 of 2006) and Smt. Nanda Tambe vs. Union of India and others passed in Writ-A No. 54592 of 2004.***

7. In rejoinder argument, learned counsel for the petitioner could not dispute the factual as well as legal submissions so made by the learned counsel for the respondents.

8. I have considered the rival submissions advanced by the learned counsel for the parties and perused the judgments as well as record. The main issue is before this Court that about the interpretation of Para 17 of Sub Para (iii) of the Bank of India Scheme for Compassionate Appointment, which is being quoted hereinbelow:-

"iii An application for compassionate appointment should, however, not be rejected merely on the ground that the family of the employee has received the benefits under the various welfare schemes. While considering a request for appointment on compassionate ground a balanced and objective assessment of the financial condition of the family has to be made taking into account its assets and liabilities (including the benefits received under the various welfare schemes mentioned above) and all other relevant factors such as the presence of an earning member, size of the family etc."

9. From perusal of the same, it is apparently clear that while considering the application of petitioner for appointment on compassionate ground, it is required on the part of Bank to consider the liability of petitioner. Further, after deduction of the same, mother of petitioner was paid Rs.44,43,178/- alongwith family pension of Rs.24,718/-.

10. The very same matter was came up before the Apex Court as well as this Court in the cases of ***General Manager (D & PB) and others (Supra), Punjab National Bank and others Supra), State Bank of India Vs. Jaspal Kaur (Supra), State Bank of India Vs. Ajay Kumar (Supra), Punjab National Bank Vs. Deepak Pandey (Supra) and Smt. Nanda Tambe (Supra).***

11. Similar issue came up before this Court for adjudication in the matter of ***General Manager (D & PB) and others (Supra)***. The employee Kunti Tiwary was working in the State Bank of India and died in-harness on 16.01.1998. Application for compassionate appointment was made when deceased's son was minor. He attained majority on 25.02.2000. Thereafter he applied for compassionate appointment. Financial condition of family was examined by Bank and it was found that deceased employee's family was paid Provident Fund of Rs.3,33,410/-, Gratuity of Rs.1,73,987/- and Leave Encashment of Rs. 1,01,344/-. The deceased employee had an investment of Rs. 66,000/- in share of State Bank of India, etc. Family was paid a pension of Rs.5,583/- per month. The application, therefore, was rejected on the ground that possessed assets and monthly income was such as not to hold family in penury condition. The family also consisted of a widow, two sons and a daughter.

Rejection of application was challenged in Writ Court and a learned Single Judge dismissed writ petition. In intra Court appeal judgment of learned Single Judge was set aside and direction was issued to Bank to give compassionate appointment. This order came to be challenged in Supreme Court, who allowed appeal and restored judgment of learned Single Judge.

12. Again similar issue came up before this Court in the matter of ***Punjab National Bank and others (Supra)***. Father of Ashwani Kumar Taneja, a Class IV employee, died in harness on 03.12.1999 leaving behind his mother, widow, two sons and one daughter. Request for compassionate appointment was declined by Bank, whereagainst writ petition was allowed by learned Single Judge of Rajasthan High Court and Letters Patent Appeal was dismissed by Division Bench. The High Court held that for considering application for compassionate appointment, amount paid towards gratuity, provident fund etc. cannot be looked into. The matter went in appeal to Supreme Court and it held that the said amount can be taken into consideration and judgment of High Court was reversed holding that benefit paid after death can be considered for judging financial hardship.

13. This issue was again adjudicated in the matter of ***State Bank of India Vs. Jaspal Kaur (Supra)***. One Sukhbir Inder Singh, husband of Jaspal Kaur died in harness on 01.08.1999 while working as Record Assistant. An application for compassionate appointment of widow was rejected by Bank. In writ petition filed by Jaspal Kaur, High Court directed Bank to reconsider the application, which was again declined. The matter again came to High Court, which took a view that retiral benefits of Rs.4,57,607/- paid to the family as terminal benefits cannot be said to be a sufficient amount to bring away family from financial hardship. Supreme Court found that family of deceased consisted of a widow, two daughters and a son. Terminal benefits were paid as Rs.4,57,607/- and monthly pension was Rs.2,055/- and held that in the above facts and circumstances denial of compassionate appointment on the ground that family was not in penurious condition was justified.

14. Division Bench of this Court has also considered the very same issue in the matter of ***State Bank of India Vs. Ajay Kumar (Supra)*** and Court found that terminal benefits of Rs.3.79 lakhs, Rs.1 lakh from LIC policy and gross monthly income of Rs.4,000/- justify denial of compassionate appointment on the ground that family is not in penurious condition.

15. In the matter of ***Punjab National Bank Vs. Deepak Pandey (Supra)***, this Court found that family pension of Rs.4,807/- per month after death of deceased employee justify denial of compassionate appointment on the ground that family is not in penurious condition.

16. In the matter of ***Smt. Nanda Tambe (Supra)***, petitioner has received terminal benefits of Rs.2,38,975/- alongwith family pension of Rs. 4,969/- and further application was filed for compassionate appointment which was rejected by this Court vide order dated 28.3.2019 after considering the relevant provisions as well as law laid down by the Court.

17. In the present case, petitioner's father died on 19.1.2017. The amount of family pension payable to petitioner is Rs.

24,178/- per month and terminal benefit paid to Rs. 44,43,178/-. The above amount is such which has been considered in the cases referred to above and denial of compassionate appointment has been held valid.

18. This Court is also of the view that while deciding the application for appointment on compassionate ground, Para 17 of Sub Para (iii) of the Bank of India Scheme for Compassionate Appointment has to be taken into consideration in letter and spirit. It is to be seen as to whether terminal benefits is sufficient to meet liabilities of family or not. In case authority is satisfied that without providing appointment on compassionate ground, family would not be in position to meet the financial crisis, only then appointment may be given to family member subject to fulfillment of required qualification and eligibility, etc.

19. So far as present case is concerned, family of deceased employee has received sufficient money alongwith family pension to meet the financial liabilities, therefore, there is no occasion for this Court to interfere with the impugned order dated 15.11.2017. Respondents have rightly rejected the application for grant of compassionate appointment.

20. Accordingly, writ petition lacks merit and is **dismissed.** No order as to costs.

(2024) 2 ILRA 761
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ - A No. 907 of 2024

Rakesh Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh, Sri Adarsh Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Regularization of Ad-hoc Teacher – Procedural Fairness – Petitioner challenged the rejection of his regularization claim by the Regional Selection Committee, which cited the conversion of a short-term vacancy (1997) into a substantive vacancy (2008) as the reason for denial – Held, the Committee's order was based on incorrect facts, as the vacancy arose due to the ad-hoc promotion of another teacher, who was reverted in 2003, and the cancellation of petitioner's appointment in 2005 was quashed by the Additional Director of Education in 2008 – The Committee's failure to verify records or consult relevant authorities rendered the order dated 29.12.2023 arbitrary and unsustainable – Matter remitted for fresh consideration with directions to verify records and involve the Committee of Management and petitioner. (Paras 2, 3, 4, 7, 16, 17)

B. Service Law – Duty of Regional Selection Committee – Due Diligence – The Regional Selection Committee acted negligently by not verifying critical documents, including the order dated 5.12.2008, and relied on contradictory facts – Held, such committees must thoroughly examine records, verify facts with the Committee of Management and Director of Education, and provide reasoned findings on vacancy existence, candidate eligibility, and approval status – Casual or cursory orders affecting teachers' careers, especially those serving for decades, are impermissible and may warrant reprimand – Director of Education directed to ensure committees adhere to these principles. (Paras 6, 7, 8, 13, 14, 15)

C. Service Law – Protection of Ad-hoc Teachers – Supreme Court Precedents – Relying on *Radhey Shyam Yadav Vs St. of U.P.* and *Chief Engineer, M.S.E.B Vs Suresh Raghunath Bhokare*, the court held that ad-hoc teachers serving for decades cannot be terminated merely due to irregularities by the

Committee of Management unless the teacher is complicit in fraud or ineligible – Held, petitioner's appointment, approved and continued for over two decades, cannot be summarily rejected without evidence of misrepresentation or collusion – Petitioner entitled to continue in service with salary pending fresh adjudication by the Committee. (Paras 9, 10, 12, 17)

Writ Petition Allowed – Order Dated 29.12.2023 Quashed, Matter Remitted for Fresh Consideration – Petitioner to Continue in Service with Salary.

List of Cases cited:

1. Radhey Shyam Yadav & anr. Vs St. of U.P. & ors., AIR 2024 SC 260

2. Chief Engineer, M.S.E.B & anr. Vs Suresh Raghunath Bhokare, (2005) 10 SCC 465 (AIR 2005 SC 1622)

(Delivered by Hon'ble Ajit Kumar, J.)

1. Heard Sri Indra Raj Singh, learned counsel representing the petitioner, Sri J.N. Maurya, learned Chief Standing Counsel assisted by Sri R.S. Umrao, learned Standing Counsel appearing on behalf of the State-respondents and perused the records.

2. Petitioner has questioned the order dated 29.12.2023 passed by respondent no.2 - Regional Selection Committee chaired by the present Regional Joint Director of Education, Secondary, Prayagraj rejecting his claim for regularization of the petitioner only on the ground that short-term vacancy upon which he was appointed in the year 1997, later on got converted into a substantive vacancy in the year 2008.

3. This Court earlier, however, noticed this above reason and found to be highly misplaced and, therefore, had directed the Regional Joint Director of Education, Secondary, Prayagraj as well as the District Inspector of Schools concerned to remain present today in the Court along with their affidavits. Sri Sacchidanand Yadav, who happens to be the District Inspector of Schools, Kaushambi and Sri Dibya Kant Shukla, the Regional Joint Director of Education, Secondary, Prayagraj both are present. Both the officers have filed their personal affidavits in support of their application seeking exemption from personal appearance and have stated that as a matter of fact, the earlier Assistant Teacher Manmohan Pandey upon whose ad-hoc promotion as a Lecture (Sociology), the vacancy in L.T. Grade had arisen on a short-term basis, later on got reverted to the said position on 4.12.2003 and consequently the approval of the appointment of the petitioner on that short-term vacancy came to be cancelled on 30.9.2005. This stand taken in the affidavit and the order annexed runs contrary to the reason assigned in the order of the Regional Selection Committee while refusing to grant benefit of regularization to the petitioner that the vacancy had became substantive and so petitioner had no claim. In the reason assigned in the order passed by the Regional Selection Committee, it has clearly come in black and white that the said Manmohan Pandey had retired on 30.6.2008 while working as Lecturer (Sociology) in the Institution. Thus, the stand taken by the Regional Selection Committee which was chaired by the present Regional Joint Director of Education, Secondary, Sri Dibya Kant Shukla and of which Sacchidanand Yadav was the ex-officio Secretary, is contrary to this individual stand taken before the Court in their affidavits by the officers present in Court.

4. Today, another order has been placed before this Court by the learned counsel appearing for the petitioner which was passed by the Additional Director of Education on behalf of the Direction of Education (Secondary) on 5th December, 2008, whereby the order passed by the District Inspector of Schools dated 30.9.2005 was held to be erroneous and illegal and was accordingly cancelled. It is the order dated 30.9.2005 upon which the affidavits filed today by Sri Dibya Kant Shukla and by Sri Sacchidanand Yadav, present in court, depend.

5. Upon a pointed query being made, both the officers have shown their ignorance of the order dated 5th December, 2008 and submit that this order was not available in their records.

6. In the total circumspect of the case as discussed above, it transpires that the Regional Selection Committee did not apply its mind to the correct facts available on record, nor could even search out the documents available in the Institution or in the office of the District Inspector of Schools. Sri Sacchidanand Yadav, who is present in court, submits that earlier report, which has been discussed by the Regional Selection Committee was submitted by earlier District Inspector of Schools and not by him and, therefore, he can not say much about the same.

7. It is unfortunate that the Regional Selection Committee has proceeded in the matter and passed order in a cursory manner without completely looking into the available records and without verifying its correctness, in consultation with the Committee of Management and the Office of the Director of Education, Secondary. This approach of the Regional Selection Committee in passing orders is a casual one and cannot be approved of.

8. This Court takes this to be a solitary case to condone the arbitrary act at the end of the present Regional Selection Committee headed by the Regional Joint Direction of Education, Secondary Sri Dibya Kant Shukla and the present District Inspector of Schools, Sri S.N. Yadav as its Secretary and their conduct in accepting mistake before the Court, but in future it is expected that such Regional Selection Committees will not play with the career of such teachers who have been teaching in the Institutions for more than two decades and have been drawing salary. Orders rejecting regularization would have adverse civil consequences and, therefore, not only the Regional Selection Committees are required to have seriously look into documents, but in the event of any confusion regarding the same, they may get it clarified from the concerned Committee of Management, the teacher concerned and also in consultation with the office of the Director of Education Secondary.

9. A teacher should not be axed simply because the Management did commit some irregularity unless and until such a teacher is found to have colluded with the management in securing appointment for which he was not eligible or found back door entry to the disadvantage of others in matters of open selection. In a recent judgment in the case of ***Radhey Shyam Yadav and another Etc. Vs. State of U.P. and others (AIR 2024 SC 260)*** decided on 3rd January, 2024, Supreme Court relied upon its earlier authority in the case of ***Chief Engineer, M.S.E.B & Anr. Vs. Suresh Raghunath Bhokare (2005) 10 SCC 465 (AIR 2005***

SC 1622), in which paragraph 5, it was held thus:

"5. The entire basis of the dismissal of the appellant depends upon the factum of the alleged misrepresentation attributed to the respondent. The Industrial Court in its impugned order has noticed the fact that the respondent was appointed in April 1994 pursuant to the selection procedure followed by the competent authority and that he was selected by the panel of Selection Committee consisting of 6 members which included the very same Social Welfare Officer who had sent the proposal including the name of the respondent for appointment. It also noticed the fact that the selection in question was made after an oral interview and the required test as also the medical examination. The Industrial Court also noticed the fact that the appointment of the respondent was confirmed after one-year period and thereafter the respondent has been working without any complaint. The said Industrial Court also noticed the fact that the termination of the respondent was based on a showcause notice issued on 5-7-1999 which was replied to by the respondent on 17-7-1999 and the termination was made in a summary procedure permissible under Rule 90(b) of the Service Regulations.The Industrial Court after perusing the pleadings and the notice issued to the respondent came to the conclusion that the alleged misrepresentation which is now said to be a fraud was not specifically pleaded or proved. In the show-cause notice, no basis was laid to show what is the nature of fraud that was being attributed to the appellant. No particulars of the alleged fraud were given and the said pleadings did not even contain any allegation as to how the appellant was responsible for sending the so-called fraudulent proposal or what role he had to play in such proposal being sent. It also noticed from the evidence of Mr Waghmare, Social Welfare Officer who sent the proposal before the Labour Court that he did not utter a single word as to whether the said supplementary list was ever called for by the department concerned or not. Thus applying the basic principle of rule of evidence which requires a party alleging fraud to give particulars of the fraud and having found no such particulars, the Industrial Court came to the conclusion that the respondent could not be held guilty of fraud. The said finding of the Industrial Court has been accepted by the High Court. Mr. Bhasme though contended that the fraud in question was played in collusion with the Social Welfare Officer and 2 other employees of the Board and action against the said 2 employees of the Board has been taken, but by that itself we are unable to accept the argument of Mr. Bhasme that there is material to support the contention of the Board that the appellant had also contributed to making the misrepresentation at the time of applying for the job with the Board. In the absence of any such particulars being mentioned in the showcause notice or at the trial, attributing some overt act to the respondent, we do not think the Board can infer that the respondent had a role to play in sending a fraudulent list solely on the basis of the presumption that since the respondent got a job by the said proposal, the said list is a fraudulent one. It was the duty of the Board to have specifically produced the material to prove that the respondent himself had the knowledge of such a fraud and he knowingly or in collusion with other officials indulged in this fraud. Since there is no such material on record, on the facts of the instant case, the Industrial Court and the High Court

have come to the right conclusion that the alleged fraud has not been established by the appellants, hence, this is not a fit case in which interference is called for. This appeal, therefore, fails and the same is dismissed." (emphasis added)

10. Thus, the Court took a view that if the beneficiary is not liable to be charged with any misrepresentation or any kind of involvement in any conspiracy for securing such appointment, such an employee cannot be dismissed from service for such irregularity in appointment. Once, the appointment has been made and the teachers have been made to continue for a very long time like two decades or more, now to fire them by one stroke of pen only on the ground that Committee of Management was not fair enough in holding selection, is not justifiable. It has been held that if there is no cancellation of appointment order or cancellation of approval order then such teachers are liable to be treated in service. The Court in that case has also held vide paragraph 34 which reads thus:

*"**34.** We feel that the appellants were not at fault and the State could not have abruptly stopped their salaries. Accordingly, we set aside the judgments of the High Court dated 15.09.2021 in Special Appeal Nos. 1435/2013 and 1445/2013 and direct that the State shall pay the salaries of the appellants for the period from 25.06.1999 till January, 2002 in full. We also direct that insofar as the period from October, 2005 till today is concerned, the State shall pay the appellants 50% of the backwages. Since the appointment order and the approval order are still in force, we declare that the appellants have always been and are deemed to be in service. Apart from 50% backwages, as ordered above, we direct that all consequential benefits, including seniority, notional promotion, if any, and fitment of salary and other service benefits due, be granted to the appellants. We direct the State to comply with these directions within four weeks from today. We also direct that the appellants be allowed to commence work within the said period of four weeks."*

11. Supreme Court, however, permitted respondents to recover the amount after holding management to be guilty for such illegality/impropriety in making appointments. Vide paragraph 35, the Court held thus:

*"**35.** We notice from the record that the Committee of Management, Junior High School, Bahorikpur was arrayed as fifth respondent in the writ petition before the High Court. They are also arrayed as fifth respondent before us in these appeals. Before us, even though notice has been served on the Committee of Management, Junior High School, Bahorikpur, nobody has entered appearance. It appears that even before the learned Single Judge and the Division Bench, the Committee of Management did not appear. We grant liberty to the State to issue a show-cause notice to the Committee of Management (R-5), after setting out clearly the charge pertaining to the alleged manipulation of the sanction order and altering of the figure from two to three. After receiving reply, if any, and after holding an inquiry with an opportunity of personal hearing, the State will be at liberty to pass an appropriate order. In the event of the Committee of Management being exonerated, no further question will arise. In the event of them being found guilty of the charge, in view of any finding that may be arrived that the manipulation prior to*

the recruitment was done at the level of the employees of the school (whether by themselves or in collusion with the officials), we grant liberty to the State to recover from the Committee of Management one-third of the arrears, as ordered to be paid, hereinabove. This direction will serve the ends of justice in the matter."

12. In view of the above, such teachers are held entitled to be paid salary until their claim is finally rejected.

13. The Director of Education (Secondary), Uttar Pradesh is directed to ensure that the Regional Selection Committees do not pass orders at their whims negligently without looking into the records and without verifying truthfulness of the same.

14. In future, if such orders are passed by any of the Regional Committees constituted for the said purpose, such orders will not only be unsustainable but act of conduct of the authorities concerned will also deserve reprimand.

15. The Director of Education (Secondary) U.P. shall, therefore, ensure that Regional Selection Committees while rejecting claim of Ad-hoc teachers for regularization must returned findings of fact with reason broadly on following points:

(i) Existence of vacancy on the date of selection.

(ii) Eligibility of candidate selected on the date of selection.

(iii) Approval by the District Inspector of Schools;

(iv) If approval under the orders of this Court, justification for such disapproval or withholding of approval prior to intervention of Courts;

(v) Status of vacancy as on date;

16. In view of above, writ petition succeeds and is allowed. The order passed by the Regional Selection Committed headed by the Chairman namely the Regional Joint Director of Education, Prayagraj dated 29.12.2023 is, *hereby*, quashed.

17. The matter is remitted to the Regional Selection Committee to pass orders afresh, after looking into and verifying the entire records and after verifying the order dated 5.12.2008 from the office of the Direction of Education, Secondary and also, if there is any confusion, getting it clarified by issuing notice to the Committee of Management and the teacher concerned namely the petitioner herein. Copy of the order dated 5.12.2008 has been supplied to the Regional Joint Director of Education, Secondary, who is present in the Court. The appropriate orders now will be passed in the next six weeks from today. The petitioner would, therefore, be entitled to continue in the service and shall be paid salary without any further break.

18. The petitioner shall ensure that he along with the Manager of the Committee of Management appears before the Regional Joint Director of Education on or before 28.2.2024 and the Committee of Management shall submit the entire material available with it before the Regional Joint Director of Education.

19. In the circumstances, the personal appearance of the officers concerned stands exempted. Notices issued to them stand discharged.

20. Let this order be communicated to the Director of Education (Secondary) Prayagraj, U.P. by Registrar (Compliance) within a week.

(2024) 2 ILRA 767
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.12.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ - A No. 3031 of 2021

Keshav Das Head Constable PNO-842580177 ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sanjay Maurya, Sri Manish Kumar Pandey

Counsel for the Respondents:
C.S.C.

A. Service Law – Disciplinary Proceedings – Procedural Irregularities – Petitioner, a Head Constable, challenged his dismissal from service for alleged robbery, arguing procedural lapses in the disciplinary process – Held, the disciplinary authority's reliance on a preliminary enquiry to justify punishment, despite the enquiry officer's finding that charges were not proved, was untenable – Issuance of a second show cause notice (10.06.2019) proposing a harsher penalty (dismissal) without statutory backing under Rule 14 of the U.P. Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991, and without reasoned disagreement with the enquiry report, rendered the process arbitrary – Dismissal order dated 19.03.2020 and appellate/revisional orders (20.08.2020, 30.12.2020) quashed for violating procedural fairness. (Paras 14, 16, 17, 19, 20, 22, 32)

B. Service Law – Departmental Enquiry Vs Criminal Trial – Impact of Acquittal – Charges in the departmental enquiry mirrored those in a criminal case (robbery under Section 392, 120B IPC), relying on the same evidence and witnesses – Petitioner was acquitted in the criminal trial (31.07.2023) with the court disbelieving the complainant's evidence and initiating proceedings under Section 344 Cr.P.C. for false testimony – Held, where charges, evidence, and witnesses are identical, and the criminal court finds the prosecution's case disproved, allowing contrary findings in departmental proceedings is unjust and oppressive, as per *G.M. Tank Vs St. of Gujarat* – Enquiry officer's finding of unproven charges further invalidated the disciplinary authority's decision to impose punishment. (Paras 7, 14, 18, 26, 28, 30)

C. Service Law – Scope of Judicial Review – Disciplinary Proceedings – Courts under Article 226 do not reappreciate evidence but can intervene if the disciplinary process is procedurally flawed or arbitrary – Held, the enquiry officer's recommendation of punishment (reversion to basic pay) despite unproven charges, and the disciplinary authority's reliance on a preliminary enquiry without independent reasons, constituted arbitrary exercise of discretion – The absence of statutory provision for a second show cause notice to escalate punishment, coupled with mechanical affirmation by appellate/revisional authorities, warranted interference – Matter remitted to the disciplinary authority for reconsideration based on the enquiry report. (Paras 10, 19, 23, 32, 34)

Writ Petition Allowed – Dismissal Order, Appellate/Revisional Orders, and Show Cause Notices Quashed – Matter Remitted for Reconsideration.

List of Cases cited:

1. U.O.I. & ors. Vs Subrata Nath, Civil Appeal Nos. 7939-7940 of 2022 (decided on 23.11.2022)

2. St. of U.P. Vs Kharak Singh, (2008) 8 SCC 236

3. G.M. Tank Vs St. of Gujarat & ors., (2006) 5 SCC 446

4. State Bank of Hyderabad & anr. Vs P. Kata Rao, (2008) 15 SCC 657

5. Ram Lal Vs St. of Raj. & ors., Civil Appeal No. 7935 of 2023 (decided on 04.12.2023)

6. State Bank of India Vs A.G.D. Reddy, (2023) 11 Scale 530

7. United Bank of India Vs Biswanath Bhattacharjee, (2022) 13 SCC 329

8. Deputy Inspector General of Police Vs S. Samuthiram, (2013) 1 SCC 598

9. Vijayee Singh Vs St. of U.P., (1990) 3 SCC 190

(Delivered by Hon'ble Ajit Kumar, J.)

1. Heard Sri Sanjay Maurya, learned counsel for the petitioner and Sri P.K.Srivastava, learned Additional Chief Standing Counsel for the Stat respondents. .

2. The petitioner is aggrieved by the order of disciplinary authority imposing major penalty of dismissal from service vide order dated 19th March, 2020 and appellate order dated 20th August, 2020.

3. It is submitted that on the point of findings returned in the enquiry officer's report bringing home the charge against the petitioner regarding alleged incident where one Kanhaiya Lal was robbed by the petitioner of Rs. 4 lacs and odd that he was carrying in pocket. Except for the statement of his friend, namely Bobby @ Gopal Sharma who accompanied him, there was no other evidence available to the enquiry officer, intrinsic enough, on the touchstone of principles of preponderance of probability, to hold petitioner guilty of the charge.

4. It is next submitted that charges the were levelled against petitioner were same as alleged in the first information report lodged by the victim Kanhaiya Lal five days after the alleged incident.

5. It is also submitted that except the statment of Kanhaya Lal , the main victim and Gopal Sharma his friend no other statement got recorded by the Inquiry Officer so as to corroborate charge leveled in the chargesheet, inasmuch as Gopal Sharma showed his innocence regarding alleged loot conducted upon complainant Kanhiya Lal for a specific sum of Rs. 4 lacs and odd.

6. Besides above, the argument advanced by learned counsel for the petitioner is that second show cause notice that was issued on 30.12.2018 based upon the enquiry report, was in respect of proposed punishment for reverting the petitioner to the basic pay of the pay-scale as admissible to the post of constable. The petitioner did question the enquiry report, but his reply was keeping in mind the proposed punishment, however, instead of awarding punishment of reversion, a harsh penalty of termination from service has got awarded by the disciplinary authority, which according to him is an arbitrary exercise of power that too without assigning any special reason as to why the authority acted contrary to its earlier show cause notice. He submits that there was no further show cause notice issued to him for change in the proposed punishment and departmental appeal was decided in a routine manner affirming the decision of the disciplinary authority without considering this aspect of the matter.

7. Learned Advocate appearing for the petitioner has further argued before this

Court that since charge levelled in the departmental enqury was based upon the allegations made in the first information report, the departmental enquiry ought to have awaited for the outcome of the criminal trial but instead, it proceeded on its own relying upon the statements of those very persons whose testimony was to be recorded in the criminal trial. He submits that the trial court virtually disbelieved the statements made as it did not find there to be sufficient evidence in support of charge, and thus gave him a clean chit by acquitting him in the criminal case vide final judgment and order dated 31st July, 2023 and even directed for proceeding against Nagesh @ Kanhaiya , the main complainant to be proceeded with under Section 344 of the Cr.P.C., 1973.

8. Learned Standing Counsel on the contrary has argued that merely because accused has been acquitted in criminal trial, he could not be said to deserve automatic exoneration in the departmental enquiry as well. He submits that principle that evidence be such that guilt is proved to the hilt as required in criminal law, is not attracted in the disciplinary proceedings and enquiry officer is not required to go for such a sound and strict proof of evidence. He submits that the principle of 'preponderance of probability' is the guiding principle in matters of departmental enquiry and enquiry officer after evaluating and appreciating evidence before it, can conclude that charges were made out to hold delinquent employee guilty.

9. Learned Additional Chief Standing Counsel has cited many authorities on the point of interference by this Court in matter of disciplinary proceedings.

10. Having heard learned counsel for the respective parties and their arguments raised across the bar and having perused the records, I find there to be no quarrel regading scope of interference in the matter of departmental enquiry but the issue is whether prescribed procedure has been followed or not. The law is also well settled that while exercising jurisdiction under Article 226 of the Constitution of this Court would not ordinarily go for appreciation of evidence recorded by enquiry officer and wherever the question arises as to evaluation/appreciation and assessment of evidence it will not be done by either court or tribunal. This Court will certainly not act like an appellate authority to form a different view by reappreciating evidence. The enquiry officer of course, would be examining only evidence produced before it and the statement of witnesses. While it is true that the departmental enquiry could have been deferred in view of regulations 498 of of the U.P. Police Regulation to wait for the outcome of criminal trial but in case if departmental enquiry has proceeded with, it cannot be said to be bad on this count alone. Very recently the Supreme Court in the case of **Union of India and Others v. Subrata Nath (Civil Appeal Nos. 7939-7940 of 2022) decided on 23.11.2022** has taken this view and speaking for bench, Justice Hima Kohli summed up legal position as under:

"22. To sum up the legal position, being fact finding authorities, both the Disciplinary Authority and the Appellate Authority are vested with the exclusive power to examine the evidence forming part of the inquiry report. On finding the evidence to be adequate and reliable during the departmental inquiry, the Disciplinary Authority has the discretion to

impose appropriate punishment on the delinquent employee keeping in mind the gravity of the misconduct. However, in exercise of powers of judicial review, the High Court or for that matter, the Tribunal cannot ordinarily reappreciate the evidence to arrive at its own conclusion in respect of the penalty imposed unless and until the punishment imposed is so disproportionate to the offence that it would shock the conscience of the High Court/Tribunal or is found to be flawed for other reasons, as enumerated in P. Gunasekaran (supra). If the punishment imposed on the delinquent employee is such that shocks the conscience of the High Court or the Tribunal, then the Disciplinary/Appellate Authority may be called upon to re-consider the penalty imposed. Only in exceptional circumstances, which need to be mentioned, should the High Court/Tribunal decide to impose appropriate punishment by itself, on offering cogent reasons therefor."

11. Thus in the event findings are not perverse, only area open for interference would be where issue is relating to procedure whether followed or not during departmental enquiry and in the process of finalization of a disciplinary proceeding.

12. Supreme Court in the case of **State of U.P. v. Kharak Singh (2008) 8 SCC 236** vide paragraphs 18 and 19 have held thus:

"18) Another infirmity in the report of the enquiry officer is that he concluded the enquiry holding that all the charges have been proved and he recommended for dismissal of the delinquent from service. The last paragraph of his report dated 16.11.1985 reads as under:-

"During the course of above inquiry, such facts have come into light from which it is proved that the employee who has doubtful character and does not obey the order, does not have the right to continue in the government service and it is recommended to dismiss him from the service with immediate effect."(emphasis supplied)

Though there is no specific bar in offering views by the enquiry officer, in the case on hand, the enquiry officer exceeded his limit by saying that the officer has no right to continue in the government service and he has to be dismissed from service with immediate effect.

19). As pointed out above, awarding appropriate punishment is the exclusive jurisdiction of the punishing /disciplinary authority and it depends upon the nature and gravity of the proved charge/charges and other attended circumstances. It is clear from the materials, the officer, who inspected and noted the shortfall of trees, himself conducted the enquiry, arrived at a conclusion holding the charges proved and also strongly recommended severe punishment of dismissal from service. The entire action and the course adopted by the enquiry officer cannot be accepted and is contrary to the well-known principles enunciated by this Court."

13. Thus the enquiry officer could not have proposed a punishment and, so to that extent, enquiry report is liable to be held bad.

14. Now coming to the enquiry report on the question of guilt being proved, I find that enquiry report was sought in respect of the charges that were levelled in the

chargesheet, which was based upon the same allegations as contained in the first information report regarding robbering of Kanhaiya Lal Mishra for Rs. 4,25,000/- on the fateful day i.e. 17.12.2016. Besides the fact that petitioner stood finally acquitted in the criminal trial in the matter of offence punishable under Section 392 and 120B of IPC in connection with criminal case no. 422 of 2016, I find that in the departmental enquiry as charges were not proved. After holding detailed deliberation upon charges and the oral statements recorded by the enquiry officer during course of the enquiry, the enquiry report categorically records that the statements of the departmental witnesses and charged constables that they gave in their defence, nothing intrinsic as concrete and relevant facts has come out from which it can be held that charged officials were guilty of the charges. The finding part of the enquiry report is reproduced hereunder:

"विभागीय कार्यवाही के मध्य अभियोजन पक्ष के बयानात एवं आरोपीगण आरक्षियों द्वारा अपने बचाव पक्ष के साक्षियों से जिरह में किये गये प्रश्नोत्तर से कोई विशेष एवं ऐसा ठोस/ लाभदायक तथ्य दृष्टिगोचर नही हुआ है, जिससे स्पष्ट हो सके कि आरोपीगण मु०आ०प्रो०/ आरक्षीगण के उक्त कृत्य के अनुकूल हो।"

15. From further reading of the enquiry report, I find that in the penultimate paragraph of the report , the enquiry officer has simply referred to the various dates when the first information report was got registered, when the varies of registration of the first information report, arrest of the delinquent employee and then his release and consequential absence from the duty. Further in the concluding part of the enquiry report which is final finding which can be said instead of holding the petitioner to be guilty of charges, the only opinion has been expressed by the enquiry officer that petitioner deserved to be reverted to the basic pay on the admissible post for three years and no payment of salary for the period they had remained absent from the duty on the principle of 'no work no pay'. The relevant conclusion part of the enquiry report is reproduced hereunder:

"निष्कर्षः-

इस प्रकार सम्पूर्ण विभागीय कार्यवाही से मैं पीठासीन अधिकारी आरोपी आरक्षीगण 1. आरक्षी चालक 030680946 मुकेश कुमार, यूपी 100 जनपद आगरा, 2. आरक्षी 2778/112623050 भानूप्रताप सिंह पुलिस लाइन्स आगरा 3. एचसी 340/842580177 केशव देव पर्तमान नियुक्ति थाना टूण्डला, जनपद फिरोजाबाद, 4. आरक्षी चालक 065020035 अशोक कुमार, यूपी 100 आगरा, हाल मथुरा को उ०प्र० अधीनस्थ श्रेणी के अराजपत्रित पुलिस अधिकारियों/कर्मचारियों की (दण्ड एवं अपील) नियमावली 1991 के नियम 14 के उपनियम 4 में वर्णित दीर्घ शक्तियों के अनुरूप 03 वर्ष के लिए निम्नतर वेतनमान पर अवनत करने एवं हे० कां० 340 केशव देव दिनांक 22.12.16 से 22 दिवस 21 घण्टा, (कुल 23 दिवस) आरक्षी 2778 भानु प्रताप सिंह दिनांक 22.12.16 से 26 दिन 01 घण्टा 40 मिनट (कुल 27 दिवस) तथा आरक्षी चालक 065020035 अशोक कुमार दिनांक 23.12.16 से 89 दिवस 06 घण्टा 30 मिनट (कुल 90 दिवस) गैर हाजिर होने के 'काम नही तो दाम नही' के सिद्धान्त पर बिना वेतन अवकाश स्वीकृत किये जाने का दण्ड प्रस्तावित करता हूँ।"

16. Thus, it is very much clear that charges could not be brought home by the enquiry officer, however agreeing with

recommendation made by the enquiry officer in his report for the punishment, the said punishment in the nature of reversion of three years to the basic pay of post was agreeing by the disciplinary authority and accordingly show cause notice was issued. Reason to agreeing with proposed punishment of enquiry officer has been disclosed to be the findings arrived in the preliminary enquiry report held in the matter prior to issuance of chargesheet. Even though, the petitioner submitted his reply to the show cause notice which was detailed reply, however in one line, it was held to be not satisfactory and the disciplinary authority has proceeded to refuse punishment by decision taken on 10.06.2019 on same day show cause notice was issued to which again petitioner had replied and then reply was rejected and final punishment dismissal from service was ordered on 19th March, 2020.

17. Looking to the finding part of the enquiry report, I am not able to sustain the show cause notice not only the subsequent one but even the earlier one. Once findings could not bring home the charges in the final enquiry report, the disciplinary authority could have ordered either for fresh enquiry or it could have recorded the reasons to disagree with report, but disagreeing with report on the ground that there was preliminary enquiry holding petitioner guilty is absolutely untenable. Preliminary fact finding enquiry is always a summary enquiry which lays basis for full fledged enquiry for the major penalty if the disciplinary authority so decides and the moment a final enquiry comes after holding detailed enquiry, preliminary fact finding enquiry becomes absolutely insignificant and irrelevant. Thus, even the first show cause notice for proposed punishment is not sustainable for want of valid reasons.

18. I may also here consider the case of the petitioner from the point of view that charges of alleged robbery by the police officers in conspiracy against victim was pure criminal charge, which required strict proof under criminal law . The evidence that could have been led in the criminal trial by the prosecution in the form of oral testimonies were the same as in the departmental enquiry. Petitioner has been acquitted in the criminal trial and even in the departmental enquiry also after examining those witnesses, crucial of them was the Gopal Sharma @ Bobby who denied about money robbery in his statement and even recovery of Rs. 20,000/- that was shown from him was in the absence of any independent witness and so offence of robbery could not be proved. In total circumspect of events that have taken place with lodging of the first information report, then criminal trial and also departmental proceedings I find, except for the witness Gopal Sharma who was the only eye witness account, there was no intrinsic material to establish the charge and even this eye witness account did not corroborate the incident.

19. Some evidence was led in departmental enquiry and enquiry officer was not able to bring home the charge. Thus in my considered view, the disciplinary authority was not justified in issuing show cause notice without recording its independent reasons for disagreeing with findings on charges recorded in enquiry report in which petitioner was not found guilty. The first show cause notice, therefore, was not sustainable. The appellate authority and revisional authorities have proceeded to affirm order of disciplinary authority without holding all those aspects of the matter as discussed in the judgment.

20. There is no such finding returned in the order dated 10.06.2019 to justify the action of respondent disciplinary authority to revise punishment to the prejudice of the petitioner and resultant second show cause notice. In my considered view, therefore, the second show cause notice dated 10.06.2019 stands vitiated. The penultimate paragraph of the order in which view has been expressed regarding reply of the petitioner to be not found satisfactory and then to consider imposition of higher degree of punishment is reproduced hereunder:

" मेरे द्वारा इनके स्पष्टीकरण एवं पत्रावली पर उपलब्ध अभिलेखों का सम्यक रूप से अवलोकन किया गया तो पाया कि तथा पुनः पत्रावली का अवलोकन करने पर मेरे द्वारा इस निष्कर्ष पर पहुंचा गया, जिस प्रकार का आपराधिक कृत्य इनके द्वारा किया गया उसके लिए प्रस्तावित दण्ड अपर्याप्त है, जिस कारण इनके द्वारा स्पष्टीकरण पर बिना गुण-दोष पर विचार किये ही निर्गत किया गया कारण बताओ नोटिस निरस्त किये जाने एवं सेवा से पदच्युत किये जाने का पुनः कारण बताओ नोटिस निर्गत किये जाने का निर्णय लिया गया है।

अतः (पीएनओ नं० – 112623050) आरक्षी 2778/1791 भानूप्रताप सिंह, थाना-एत्माद्दौला, जनपद आगरा के स्पष्टीकरण पर बिना कोई गुण दोष पर विचार किये ही इनके उक्त कृत्य के लिये उ०प्र० अधीनस्थ श्रेणी के पुलिस अधिकारियों (दण्ड एवं अपील) नियमावली 1991 के नियम – 14(1) के सपठित नियम 4(1)(क) के उप-खण्ड (3) के अन्तर्गत तीन वर्ष के लिये आरक्षी के पद के न्यूनतम वेतनमान पर प्रत्यावर्तित किये जाने का कारण बताओ नोटिस दिनांक-30.12.2018 को निरस्त किया जाता है तथा इनके उक्त कृत्य के लिये इनको सेवा से पदच्युत किये जाने का कारण बताओ नोटिस अलग से पारित किया जायेगा।"

21. Thus, there is no independent finding for revising the punishment and yet the appellate authority has acted mechanically in the matter and so also revisional authority while affirming the order passed by the disciplinary authority, whereas it was required to examine correctness in the approach of the disciplinary authority concerned in the matter of imposition of punishment. The authority to issue second show cause notice was itself to be seen with reference to provision through which it could have traced administrative power for this purpose . It is necessary to go into relevant provision as contained under of U.P Police Officers of Subordinate Rank (Punishment and Appeal) Rules, 1991. Rule 14 of Rules, 1991 reads as under:

"14. Procedure for conducting departmental proceedings.- (1) Subject to the provisions contained in these Rules. The departmental proceedings in the cases referred to in sub-rule (1) of Rule 5 against the Police Officers may be conducted in accordance with the procedure laid down in Appendix I.

(2) Notwithstanding anything contained in sub-rule (1) punishments in cases referred to in sub-rule (2) of Rule 5 may be imposed after informing the Police Officer in writing of the action proposed to be taken against him and of the imputations of act or omission on which it is proposed to be taken and giving him a reasonable opportunity of making such representation as he may wish to make against the proposal.

(3) The charged Police Officer shall not be represented by Counsel in any proceedings instituted under these rules."

22. From a bare reading of the aforesaid provisions, it is clear that once a

show cause notice has been issued , there is no further provision to issue a second show cause for imposing higher degree of punishment.

23. Coming to the argument advanced by learned Standing Counsel and the judgments cited by him, I do not find there to be any doubt to form a view regarding proposition of law laid down by the Supreme Court in the matter of scope of interference by this Court in departmental proceedings under Article 226 of the Constitution, but question remains regarding arbitrariness if detected in the exercise for discretion by authority and that too a discretionary exercise without applying procedure prescribed and rendering of due application of mind. If such an action is sustained in law, it would lead to miscarriage of justice. This Court in exercise of equitable jurisdiction under Article 226 of the Constitution of India, therefore, will certainly not hesitate in interfering in matter of such exercise of discretion by the authority which is arbitrary or at whims. Wade and Forsyth in their celebrated work "Administrative Law" refer to the everlasting Halsbury's principle on administrative law qua exercise of discretion and quotes Coke's words *" For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, talis discretio discretionem confundit."* (Administrative Law Wade & Forsyth 10th Edition P. 294)

24. The State authorities while acting under statutory rules have to be very careful in exercising their discretion and every of their actions must be well informed one and well fortified within the four corners of procedure prescribed under the relevant rules. And I find the orders impugned to fail on the above test.

25. Now coming to the issue of penalty in the departmental enquiry, I find that in matters of departmental enquiry where the charges are same as in case of criminal trial and evidence led is also same, there has been departure from the settle principle of law that even in cases of acquittal, departmental enquiry may go on.

26. Discussing various authorities on the point in the case of **G.M. Tank v. State of Gujarat and Others (2006) 5 SCC 446**, Supreme Court has very categorically held that where witnesses were examined as in the criminal case and the criminal court held that after examination of such witnesses that prosecution failed to prove the guilt beyond reasonable doubt and acquitted the accused by way of judicial pronouncement, it would be unjust and unfair and rather oppressive to allow contrary findings recorded by the departmental proceeding, to stand. Vide paragraph 30 of the judgment, the Court held thus:

30. *The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected*

against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer Mr V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed that the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand.

27. The above authority has further been relied upon by the Supreme Court in the case of **State Bank of Hyderabad and Another v. P.Kata Rao (2008) 15 SCC 657,** wherein the appeal was filed by the State Bank of Hyderabad against the judgment of the division bench of Andhra Pradesh High Court which upheld the judgment of the Single Judge in which learned Single Judge allowed writ petition against order of dismissal from service. Learned Single Judge while deciding the matter and directing for notice had observed that findings in criminal trial may not be binding but required reconsideration. Supreme Court in SLP filed by State Bank of Hyderabad referred the judgment in G.M.Tank case and affirmed this view of the High Court.

28. Very recently in the case of **Ram Lal v. State of Rajasthan and Others being in Civil Appeal No. 7935 of 2023 (arising out of SLP © No. 33423 of 2018)** decided on 4th December, 2023, the Court observed that where the charges in criminal trial , the departmental proceedings based upon the same allegations and same evidence the case is liable to be led as criminal case in the departmental proceeding the matter acquire different dimension. Discussing legal position, Vide paragraphs 11,12, and 13, the Court held thus:

*"**11**. We have examined both the questions independently. We are conscious of the fact that a writ court's power to review the order of the Disciplinary Authority is very limited. The scope of enquiry is only to examine whether the decision-making process is legitimate. [See State Bank of India v. A.G.D. Reddy, 2023 : INSC : 766 : (2023) 11 Scale 530]. As part of that exercise, the courts exercising power of judicial review are entitled to consider whether the findings of the Disciplinary Authority have ignored material evidence and if it so finds, courts are not powerless to interfere. [See United Bank of India v. Biswanath Bhattacharjee, (2022) 13 SCC 329: 2022 : INSC : 117]*

***12.** We are also conscious of the fact that mere acquittal by a criminal court will not confer on the employee a right to claim any benefit, including reinstatement.*

(See Deputy Inspector General of Police v. S. Samuthiram, (2013) 1 SCC 598).

***13**. However, if the charges in the departmental enquiry and the criminal court are identical or similar, and if the evidence, witnesses and circumstances are one and the same, then the matter acquires a different dimension. If the court in judicial review concludes that the acquittal in the criminal proceeding was after full consideration of the prosecution evidence and that the prosecution miserably failed to prove the charge, the Court in judicial review can grant redress in certain circumstances. The court will be entitled to exercise its discretion and grant relief, if it concludes that allowing the findings in the disciplinary proceedings to stand will be unjust, unfair and oppressive. Each case will turn on its own facts. [See G.M. Tank v. State of Gujarat, (2006) 5 SCC 446, State Bank of Hyderabad v. P. Kata Rao, (2008) 15 SCC 657 and S. Samuthiram (supra)]"*

29. Further discussing disciplinary proceedings in respect of the case in hand, the Court discussed the prosecution witnesses testimony led in the departmental proceedings and then also discussed the effect of acquittal in the criminal case and the ultimate findings returned by the trial judge and then held that in the face of findings returned on the charges, the departmental disciplinary proceedings and the orders passed therein could not be sustained in law. Vide paragraph 28, 29 and 30, the Court held thus:

***28.** Expressions like "benefit of doubt" and "honorably acquitted", used in judgments are not to be understood as magic incantations. A court of law will not be carried away by the mere use of such terminology. In the present case, the Appellate Judge has recorded that Exh. P-3, the original marksheet carries the date of birth as 21.04.1972 and the same has also been proved by the witnesses examined on behalf of the prosecution. The conclusion that the acquittal in the criminal proceeding was after full consideration of the prosecution evidence and that the prosecution miserably failed to prove the charge can only be arrived at after a reading of the judgment in its entirety. The court in judicial review is obliged to examine the substance of the judgment and not go by the form of expression used.*

29. We are satisfied that the findings of the appellate judge in the criminal case clearly indicate that the charge against the appellant was not just, "not proved" - in fact the charge even stood "disproved" by the very prosecution evidence. As held by this Court, a fact is said to be "disproved" when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said to be "not proved" when it is neither "proved" nor "disproved" [See Vijayee Singh v. State of U.P., *(1990) 3 SCC 190]*.

***30.** We are additionally satisfied that in the teeth of the finding of the appellate Judge, the disciplinary proceedings and the orders passed thereon cannot be allowed to stand. The charges were not just similar but identical and the evidence, witnesses and circumstances were all the same. This is a case where in exercise of our discretion, we quash the orders of the disciplinary authority and the appellate authority as allowing them to stand will be unjust, unfair and oppressive.*

This case is very similar to the situation that arose in G.M. Tank (supra).

30. In so far as criminal trial is concerned in respect of present petitioner being sessions trial no. 381 of 2018 not only the accused persons including petitioner were acquitted giving them benefit of doubt but the Court has proceeded for institution of a case under Section 344 of the Cr.P.C. against complainant Nagesh @ Kanhaiya. The proceedings under Section 344 are to be instituted against a person who gives false evidence. The entire criminal case got instituted against petitioner and other persons only on the complaint of one Kanhaiya Lal and so also on that basis disciplinary proceeding was instituted. In the criminal trial, the Court having rejected all false evidence led by the prosecution witness Nagesh @ Kanhaiya directed for issuance of notice to him vide judgment dated 31st July 2023 Enquiry Officer in the departmental proceeding has also found charges not proved against the petitioner. Thus there was no occasion for the disciplinary authority to have issued notice for major penalty.

31. Having not discussed anything on facts to justify disagreement with findings arrived in the enquiry report, the disciplinary authority is not justified in taking the view that petitioner deserved punishment of dismissal/termination even without charges being proved. Thus, I am not able to sustain show cause notices issued to the petitioner on 30.12.2018 and 10.06.2019 and so also the final order of punishment.

32. In view of the above, writ petition succeeds and is allowed . The order of dismissal dated 19th March, 2020, and the appellate authority and revisional order dated 20.08.2020 and 30.12.2020 as well as first and second show cause notices issued on 30.12.2018 and 10.06.2019 respectively are hereby quashed.

33. Consequences to follow.

34. The disciplinary authority is directed to reconsider the matter to take decision afresh on the basis of enquiry report, if it so wishes and desires.

(2024) 2 ILRA 777
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2024

BEFORE

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

Writ - A No. 4338 of 2019

Mahendra Nath Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashutosh Tripathi

Counsel for the Respondents:
C.S.C., Sri Girijesh Kumar Tripathi (Addl. C.S.C.), Sri O.P. Singh (Sr. Advocate), Sri Sushil Kumar Rao

A. Service Law – Disciplinary Proceedings Post-Retirement – Lack of Jurisdiction – Petitioner, a retired Senior Warehouse Superintendent, challenged the order dated 12.05.2010 imposing a recovery of Rs. 12,60,586/- from his post-retirement benefits for alleged negligence, and the appellate order dated 13.06.2019 – Held, under the U.P. St. Warehousing Corporation Staff Regulations, 1961, there is no provision akin to Regulation 351-A of the Civil Service Regulations allowing continuation of disciplinary proceedings against a retired employee – The employer's disciplinary

jurisdiction ends upon superannuation, and no statutory provision extended the Corporation's authority to penalize the petitioner post-retirement on 31.07.2009 – Impugned orders quashed as nullity for lack of jurisdiction. (Paras 5, 10, 11, 12, 15, 16)

B. Service Law – Statutory Regulations Vs Contractual Employment – The employment relationship in the U.P. St. Warehousing Corporation is governed by statutory Staff Regulations, 1961, framed under Section 42 of the Warehousing Corporations Act, 1962, not by contract – Held, in the absence of a specific provision in the Regulations permitting continuation of disciplinary proceedings post-retirement, the Corporation lacked authority to impose penalties after the petitioner's superannuation – General principle that employer's disciplinary jurisdiction ceases upon retirement upheld, as no statutory fiction extended such jurisdiction. (Paras 10, 11, 12)

C. Service Law – Precedents on Post-Retirement Disciplinary Proceedings – Relying on *Dev Prakash Tewari Vs U.P. Cooperative Institutional Service Board* and *Rishi Pal Singh Vs St. of U.P.*, the court held that without explicit provisions in the governing regulations, disciplinary proceedings cannot continue post-retirement, and any penalty imposed is invalid – Held, the Corporation's failure to cite any enabling provision in the Regulations, coupled with judicial precedents, confirmed that the disciplinary proceedings lapsed upon petitioner's retirement, entitling him to full retiral benefits. (Paras 12, 13, 14, 15)

Writ Petition Allowed – Orders Dated 12.05.2010 and 13.06.2019 Quashed – Petitioner Entitled to Full Retiral Benefits.

List of Cases cited:

1. Rishi Pal Singh Vs St. of U.P. & anr., Neutral Citation No. 2017:AHC:73316-DB

2. Dev Prakash Tewari Vs Uttar Pradesh Cooperative Institutional Service Board, Lucknow & ors., (2014) 7 SCC 260

3. Bhagirathi Jena Vs Orissa St. Financial Corpn., (1999) 3 SCC 666

4. U.P. Coop. Federation Ltd. Vs L.P. Rai, (2007) 7 SCC 81

5. Chatter Sen Vs St. of U.P. & anr., 2015 (33) LCD 2724

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

1. This writ petition is directed against an order dated 12.05.2010 passed by the Managing Director, U.P. State Warehousing Corporation, punishing the petitioner, a former Warehouse Superintendent post retirement, with recovery of a sum of Rs.12,60,586/-.

2. The facts giving rise to this petition are:

The petitioner was a Senior Warehouse Superintendent with the U.P. State Warehousing Corporation (for short, 'the Corporation'). He retired from the Corporation's employ upon attaining the age of superannuation on 31st July, 2009. He had joined the service of the Corporation in the year 1971 as a Clerk and was a permanent employee. In course of time, he was promoted to the post of a Senior Warehouse Superintendent. Disciplinary proceedings were instituted against the petitioner with the issue of a charge-sheet dated 08.11.2005. It carried allegations marshalled into five charges, all about negligence in the matter of maintenance of records and storage of rice, leading to loss sustained by the Corporation.

3. The petitioner submitted his reply to the charge-sheet on 18.11.2005, denying the charges. He offered his explanation to each of the charge. The Inquiry Officer submitted an inquiry report dated 17.01.2006, holding the petitioner guilty of all the charges and finding him negligent in

taking care of the stored stock at the Centre, laxity in control, deficiency in upkeep of records, storage of substandard rice and detection of damage to the stored rice beyond the approved limits by the Food Department.

4. The petitioner superannuated from the service of the Corporation on 31.07.2009 without any final orders being made in the pending disciplinary proceedings. The Managing Director of the Corporation passed the order impugned dated 12.05.2010, notifying a decision of the Executive Committee dated 19.04.2010, holding the total loss occasioned to the Corporation on account of misfeasance charged against the petitioner and three other employees in the sum of Rs.25,21,171.38. Apportioning the liability between the petitioner and the three other employees, the petitioner was held liable to make good a loss of Rs.12,60,586.19 from his post retirement benefits and other assets. It was also resolved that the petitioner's subsistence allowance, that he had received during the period he was under suspension, that is to say, between 16.09.2005 and 17.05.2009, alone would be payable. This decision of the Executive Committee was notified and enforced through the order impugned passed by the Managing Director on 12.05.2010. It was directed that in order to realize the sum of Rs.12,60,586.19 to be recovered from the petitioner's post retirement benefits and other dues, the sum of money payable to him on account of four increments that he had earned between 1st March, 2006 to 1st March, 2009, would be adjusted.

5. It appears that the petitioner preferred an appeal dated 06.07.2010 and a supplementary appeal dated 10.02.2011, challenging the order of the Disciplinary Authority dated 12.05.2010, raising a ground that there is no jurisdiction with the Corporation under the U.P. State Warehousing Corporation Staff Regulations, 1961 (for short, 'the Regulations') to pass the impugned order, inasmuch as there was no provision in the Regulations to continue disciplinary proceedings against a retired employee. As such, the proceedings lapsed and the impugned order was a nullity.

6. The petitioner has raised a grievance that this appeal preferred on 06.07.2010 has remained pending for years together – as long as nine years – with no result or information about its disposition being conveyed to the petitioner. It was in these circumstances that the petitioner invoked our jurisdiction under Article 226 of the Constitution, praying that the impugned order be quashed on the basis of grounds raised.

7. A counter affidavit has been filed on behalf of respondent No.2 dated 08.04.2019, to which a rejoinder has been filed by the petitioner. A supplementary counter affidavit has also been filed on behalf of the Corporation on 20th January, 2023.

8. Heard Mr. Ashutosh Triptahi, learned Counsel for the petitioner, Mr. O.P. Singh, Senior Advocate assisted by Mr. Sushil Kumar Rao, learned Counsel appearing on behalf of the Corporation and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing for the State.

9. This Court must remark that the petitioner's appeal carried to the Board of Directors of the Corporation was kept pending for an unpardonably long period of

time, that is to say, from 06.07.2010 to 13.06.2019, a period of almost nine years. Departmental remedies are meant to be remedies of convenience; not inconvenience or a trap for the indefinite postponement of determination of an employee's rights. Now, that the departmental appeal has been rejected by the order dated 16.06.2019, a copy of which has been brought on record through the supplementary counter affidavit dated12.01.2023, this Court is of opinion that there is no impediment for this Court to hear this writ petition on merits. Even if the appeal had not been decided, there was no impediment, because an alternative remedy after all does not oust the jurisdiction of this Court. If this Court finds that the remedy is being utilized as an abuse of the statutory process, it can and ought to be ignored in the interest of justice.

10. The short question involved in this petition is: If it was within the jurisdiction of the Corporation to continue pending disciplinary proceedings against the petitioner post retirement and pass the order impugned, punishing him in the exercise of their disciplinary jurisdiction? The general principle is that the disciplinary jurisdiction of the employer comes to an end with the end of the employer-employee relationship, upon the employee's superannuation. Generally, therefore, the employer ceases to exercise any kind of the employer's authority, *vis-a-vis* his quondam employee upon the latter's exit from service in consequence of superannuation. The relationship of an employer and employee in case of the Government or Government owned corporations, like the Corporation, which have a constitutive statute of their own, is more often than not governed by statutory rules, generally called service rules. The relationship between the employer and the employee in such establishments, that have statutory service rules is not governed by contract, which is otherwise invariably the case. In case of any other private employer or even a State employer, where there are no statutory Service Rules governing the terms and conditions of employment, the rights, liabilities and duties of the employer, *vis-a-vis* the employee, are governed by contract. However, wherever there are statutory Service Rules governing the terms of employment, the relationship between the employer and employee is not governed by contract. It is a status.

11. Here, there are Regulations in force governing the terms and conditions of service for the petitioner. These Regulations are framed by the Corporation in the exercise of powers conferred upon them by Section 42 of the Warehousing Corporations Act, 1962 (No.58 of 1962). If these Service Rules were to provide in terms akin to Regulation 351-A of the Civil Service Regulations, which permit the employer to hold/ continue pending disciplinary proceedings, after the employee's retirement and impose penalties, it would have been a different matter. A provision of that kind in the Regulations would then, by fiction of law, extend the employer's disciplinary jurisdiction over a retired employee, against whom proceedings were initiated prior to his retirement. Some regulations invest employer with powers to initiate proceedings against their employees post retirement up to a certain period of time, of course, with permission of some higher authority. It is, thus, only by dint of statute that the employer can enjoy extended disciplinary jurisdiction over his retired employee; not otherwise.

12. There is hardly cavil on the issue that the Regulations do not empower the Corporation any kind of disciplinary jurisdiction over their retired employees, enabling them to continue disciplinary proceedings post retirement. Reference in this connection may be made to the decision of this Court in **Rishi Pal Singh v. State of U.P. and another, Neutral Citation No. 2017:AHC:73316-DB**, where it has been held:

"We have considered the submissions raised and having heard learned counsel for the parties, no provision has been pointed out to be available under the U.P. State Warehousing Corporation Staff Regulation, 1961, that may permit the Corporation to proceed to hold disciplinary proceedings and impose any penalty on its employees governed by the aforesaid Regulations under the same after retirement. There is no such provision pari materia with Regulation 351-A of the Civil Services Regulation. The Division Bench in the case of Dhananjay Prasad Pandey (supra) has held as follows:-

"The petitioner was to retire on 31 October 2014 and it appears that for this reason action was taken against the petitioner because the Rules do not permit initiation or continuance of disciplinary proceedings after retirement. The action of the respondents is clearly arbitrary and against the principles of natural justice."

The aforesaid case was in relation to the Warehousing Corporation itself. The same ratio has been followed in the case of Surendra Singh (supra) decided on 22.02.2017, as referrred to hereinabove.

Consequently, since there is no such provision available under which the disciplinary proceedings can be continued or penalty imposed, as a consequence there of, the writ petitions deserve to be allowed." (emphasis by Court)

13. In **Dev Prakash Tewari v. Uttar Pradesh Cooperative Institutional Service Board, Lucknow and others, (2014) 7 SCC 260**, the issue that is involved here came up before the Supreme Court in the context of the Uttar Pradesh Cooperative Societies Employees' Service Regulations, 1975. In those regulations also, there was no provision at the time for initiation or continuation of disciplinary proceedings against a retired employee. The employer in **Dev Prakash Tewari** *(supra)* initiated disciplinary proceedings against an employee of theirs, whose earlier punishment order was quashed on grounds of violation of principles of natural justice with a direction to reinstate. Liberty was, however, was granted to pursue fresh proceedings. Pending those proceedings, the employee retired. It was in the context of these facts that in **Dev Prakash Tewari**, it was held by their Lordships of the Supreme Court:

"**5.** ..... There is no provision in the Uttar Pradesh Cooperative Societies Employees' Service Regulations, 1975, for initiation or continuation of disciplinary proceeding after retirement of the appellant nor is there any provision stating that in case misconduct is established a deduction could be made from his retiral benefits.

6. An occasion came before this Court to consider the continuance of disciplinary inquiry in similar circumstance in *Bhagirathi Jena case [Bhagirathi Jena v. Orissa State Financial Corpn.,* (1999) 3 SCC 666 : 1999 SCC (L&S) 804] and it was laid down as follows: (SCC pp. 668-69, paras 5-7)

"5. Learned Senior Counsel for the respondents also relied upon clause

(3)(c) of Regulation 44 of the Orissa State Financial Corporation Staff Regulations, 1975. It reads thus:

'**44. (3)(c)** When the employee who has been dismissed, removed or suspended is reinstated, the Board shall consider and make a specific order:

(i) Regarding the pay and allowances to be paid to the employee for the period of his absence from duty, and

(ii) Whether or not the said period shall be treated as a period on duty.'

6. It will be noticed from the abovesaid Regulations that no specific provision was made for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry nor was any provision made for continuance of the departmental enquiry after superannuation.

7. In view of the absence of such a provision in the abovesaid Regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

7. In a subsequent decision of this Court in *U.P. Coop. Federation case [U.P. Coop. Federation Ltd. v. L.P. Rai*, (2007) 7 SCC 81 : (2007) 2 SCC (L&S) 598] on facts, the disciplinary proceeding against employee was quashed by the High Court since no opportunity of hearing was given to him in the inquiry and the management in its appeal before this Court sought for grant of liberty to hold a fresh inquiry and this Court held that charges levelled against the employee were not minor in nature, and therefore, it would not be proper to foreclose the right of the employer to hold a fresh inquiry only on the ground that the employee has since retired from the service and accordingly granted the liberty sought for by the management. While dealing with the above case, the earlier decision in Bhagirathi Jena case [*Bhagirathi Jena v. Orissa State Financial Corpn.*, (1999) 3 SCC 666 : 1999 SCC (L&S) 804] was not brought to the notice of this Court and no contention was raised pertaining to the provisions under which the disciplinary proceeding was initiated and as such no ratio came to be laid down. In our view the said decision cannot help the respondents herein.

8. Once the appellant had retired from service on 31-3-2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits.

9. The question has also been raised in the appeal with regard to arrears of salary and allowances payable to the appellant during the period of his dismissal and up to the date of reinstatement. Inasmuch as the inquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him."

14. In similar circumstances, a learned Single Judge of this Court in **Chatter Sen v. State of U.P. and another, 2015 (33) LCD 2724** has held in the context of the Regulations that the Corporation have no jurisdiction to initiate or continue disciplinary proceedings against an employee after his retirement.

15. The decision of the Supreme Court in **Dev Prakash Tewari** clinches the issue. It has not at all been suggested or urged by the respondents that there is indeed any provision in the Regulations empowering them to continue proceedings against a retired employee. This Court on a perusal of the said Regulations has not found any provision enabling the Corporation to continue pending disciplinary proceedings against a retired employee.

16. In the result, this writ petition succeeds and is **allowed with costs**. The impugned order dated 12.05.2010 passed by the Managing Director of the Corporation, the appellate order dated 13.06.2019 passed by the Board of Directors of the Corporation are hereby **quashed**.

17. The consequences shall follow. Costs easy.

(2024) 2 ILRA 783
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

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

Writ - A No. 4628 of 2023
Connected with
Writ – A No. 12441 of 2023

Mahendra Pal Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.K. Mishra

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava, Sri Kaushlendra Nath Singh

A. Service Law – Disciplinary Proceedings – Forfeiture of Pension – Major penalty imposed without holding regular inquiry – No witness examined – No copy of inquiry report furnished – Violation of principles of natural justice – Punishment unsustainable.

Held, before imposing a major penalty like forfeiture of pension, it is imperative that the disciplinary authority establish charges through oral and documentary evidence in a duly convened inquiry, where the delinquent has a right of defence. Mere reliance on preliminary inquiry report or interrogatories put by the Inquiry Officer cannot substitute a valid inquiry. (Paras 13–17)

B. Service Law – Appellate Authority – Power of enhancement of punishment – Must be exercised after fair procedure – Enhancement of punishment from 3% to 100% forfeiture of pension – Not sustainable when inquiry itself is vitiated.

Held, when the foundation of punishment itself is unlawful, the order of enhancement also falls. (Paras 9, 17)

C. Departmental Inquiry – Nature of proceedings – Quasi-judicial function – Inquiry Officer must act as independent adjudicator – Cannot assume role of investigator.

Held, proceedings conducted without examination of witnesses and without proof of documents vitiate the inquiry. (Paras 14–15)

D. Consequential Orders – Recovery of Pension already paid – Orders of Accounts Officer and Treasury Officer – Having no independent basis

– Quashed as consequential to the main disciplinary orders. (Para 18–20)

Held :
The disciplinary and appellate orders forfeiting pension are vitiated, being founded on no valid inquiry. Both writ petitions allowed. Impugned orders dated 18.01.2022 and 23.02.2023 quashed. Consequential orders dated 25.05.2023 and 23.06.2023 also quashed. Respondents at liberty to proceed afresh from the stage of charge-sheet in accordance with law. Petitioner entitled to full pension and arrears unless fresh proceedings are validly concluded. No order as to costs. (Paras 17, 19, 20)

Case Law Discussed:

1. Roop Singh Negi Vs Punjab National Bank & ors., (2009) 2 SCC 570

2. St. of U.P. & ors. Vs Saroj Kumar Sinha, (2010) 2 SCC 772

3. St. of U.P. & anr. Vs Kishori Lal & anr., 2018 (9) ADJ 397 (DB)(LB)

4. St. of U.P. & anr. Vs T.P. Lal Srivastava, 1997 (1) LLJ 831

5. Subhash Chandra Sharma Vs Managing Director & anr., 2000 (1) UPLBEC 541

6. Subash Chandra Gupta Vs St. of U.P., 2012 (4) ADJ 4 (NOC)

7. Salahuddin Ansari Vs St. of U.P. & ors., 2008 (3) ESC 1667

8. Imperial Tobacco Co. Ltd. Vs Its Workmen, AIR 1962 SC 1348

9. Uma Shankar Vs Registrar, 1992 (65) FLR 674 (All)

10. Mahesh Narain Gupta Vs St. of U.P. & ors., (2011) 2 ILR 570

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

1. This judgment will decide Writ-A No.4628 of 2023 and connected Writ-A No.12441 of 2023. Writ-A No.4628 of 2023 has been heard as the leading case and facts, therefore, will be noticed from the said petition. Both the petitions have been filed by Mahendra Pal Sharma, a Technician Grade-II in the employ of the U.P. Power Corporation, who functioned for sometime as the In-charge Junior Engineer and for sometime as the Draftsman. The petitioner has risen from the ranks, being appointed a Coolie on 29.09.1978. He was promoted to the post of a Technician Grade-II *vide* order dated 30.05.2010 and on the same day, given the charge of Junior Engineer, 33/11 KV Electricity Sub-Station Bankapur. He discharged those duties, as he says, ably. In the month of July, 2017, the petitioner was the In-charge Junior Engineer. On 16.07.2018, he was given the charge of the Revenue In-charge by the Superintending Engineer, apart from his regular charge of Junior Engineer, managing the the 33/11 KV Sub-Station. In addition to both these responsibilities, he was also given charge of the draftsman.

2. It is the petitioner's case that on 10th October, 2018, the Executive Engineer, Jewar directed the petitioner to take care of the duties of accounts along with the Junior Engineer. The petitioner was transferred to Burhana, Saharanpur and then to the Electricity Distribution Division, Greater NOIDA. He retired from service on 30.06.2019, while posted at the Electricity Distribution Division, Greater NOIDA. He retired from the post of Technician Grade-II, which was the post substantively held by him. Post retirement, the petitioner was paid his general provident fund and dues on account of leave encashment, but no other retiral dues,

including the several of his arrears and pension were paid. This happened in the manner that when the petitioner was on the verge of retirement, a charge-sheet was served upon him on 05.05.2019, carrying charges to the effect that some tubewell connection had been illegally sanctioned and an inquiry was conducted *vide* order dated 30.10.2018 passed by the Managing Director, Pashchimanchal Vidyut Vitran Nigam Limited. This was a preliminary inquiry and the Inquiry Committee by their report dated 05.11.2018 indicted the petitioner.

3. The sole basis of the charge-sheet was whatever material the Inquiry Committee entrusted with the preliminary inquiry gathered and submitted through their report of 5th November, 2018. The petitioner upon service of the charge-sheet submitted his reply dated 15.05.2019 to the Inquiry Officer, who was the Executive Engineer, Electricity Urban Test Division-II, NOIDA, stating all relevant, true and correct facts in his defence, as the petitioner says. It was pleaded, amongst other things, that the petitioner had no concern with Village Kani Garhi and he was posted at 33/11 KV Sub-Station Bankapur. He was detailed to revenue duties, where his assignment was to issue receipts. He was the Revenue In-charge.

4. It is the petitioner's case that after his reply, the Inquiry Officer did not proceed with the inquiry until the petitioner attained his superannuation. It is also the petitioner's case that the Inquiry Officer submitted some inquiry report that he sent to the Managing Director. He did not find the petitioner guilty. The Managing Director was not inclined to accept the report and by his order dated 26.05.2020 directed the Inquiry Officer to conduct the inquiry again and submit a fresh report. The Executive Engineer (Hydel), Pashchimanchal Vidyut Vitran Nigam Limited *vide* letter dated 19.10.2020 asked the Inquiry Officer to complete the inquiry within 15 days. The Inquiry Officer put certain questions to the petitioner and also asked him to appear for personal hearing. The petitioner appeared before the Inquiry Officer and answered questions, that were put to him on 05.09.2020. No decision by the Inquiry Officer was rendered in the form of a report, but the pendency of the inquiry proceedings was prejudicing the petitioner. He was deprived of his various post retiral benefits, that were lying withheld.

5. It is for that reason that the petitioner instituted Writ-A No.10388 of 2021 before this Court with a prayer to direct the respondents to pay his retiral benefits and pension, and further direct the respondents to take a final decision in the matter of the disciplinary proceedings pending against him. This Court *vide* order dated 19.08.2021 disposed of the writ petition last mentioned with a direction to examine the records and ascertain if the inquiry had already been finalized. It was further directed that it is incumbent upon the competent Authority to pass appropriate orders in the matter, so that the petitioner gets appropriate relief. The Authority concerned with the matter was directed to take all remedial measures, so that substantial justice would be ensured. The respondents were directed to complete all proceedings within two months of the date of production of a copy of the order passed in Writ-A No.10388 of 2021. A copy of this order was served upon the respondents by registered post on 23.08.2021. A reminder was sent on 01.11.2021. These evinced no response from the respondents.

This compelled the petitioner to institute Contempt Application (Civil) No.5432 of 2021 against M. Devraj, Chairman, the U.P. Power Corporation Limited and the other contemnors.

6. It is in the contempt proceedings that along with a compliance affidavit, the Executive Engineer produced a copy of the impugned order dated 18.01.2022, by which the Disciplinary Authority had punished the petitioner with forfeiture of pension by 3%. After the said order was passed, retiral dues were paid to the petitioner with pension reduced by 3%.

7. Aggrieved by the forfeiture of his pension by 3%, the petitioner preferred an appeal on 07.04.2022 to the Chairman of the U.P. Power Corporation Limited. The petitioner was served with a notice dated 09.05.2022 by the Chairman asking him to represent against a proposed enhancement of punishment by the Appellate Authority. In compliance, the petitioner submitted his representation through registered post dated 25.08.2022 with a prayer to annul the order, ordering a 3% forfeiture of his pension. The petitioner claimed parity with the matter of a similarly circumstanced employee, Anil Kumar Sharma, who was awarded the punishment of forfeiture of 1% of his pension alone.

8. The appeal was not decided by the Chairman and the petitioner again had to approach this Court instituting Writ-A No.803 of 2023, with a prayer to direct the Chairman of the Power Corporation to decide his appeal within a specified period of time. This Court disposed of the aforesaid writ petition with a direction to the Chairman of the Power Corporation to decide the petitioner's appeal within two months. A certified copy of the said order was sent to the Chairman by registered post on 17.01.2023. By his order dated 23.02.2023, the Chairman, U.P. Power Corporation Limited, Lucknow has passed the order impugned, by which he dismissed the petitioner's appeal and enhanced the penalty, ordering a 100% forfeiture of his pension.

9. This writ petition has been instituted assailing the orders of the Appellate Authority dismissing the appeal and enhancing the forfeiture of pension from 3% to 100%, as also the order of the Disciplinary Authority holding the petitioner guilty and ordering a 3% forfeiture of his pension.

10. At this stage, it would be apposite to say that in consequence of the appellate order dated 23.02.2023, the Deputy Chief Accounts Officer, arrayed as respondent No.4 in Writ-A No.12441 of 2023, passed an order dated 25.05.2023, directing the recovery of pension paid to the petitioner. A further order dated 23.06.2023 was passed by the Chief Treasury Officer, Gautam Budh Nagar, arrayed as respondent No.5 to Writ-A No.12441 of 2023, asking the petitioner to refund the pension paid to him.

11. Writ-A No.12441 of 2023 has been instituted by the petitioner challenging the order dated 25.05.2023 passed by the Deputy Chief Accounts Officer, Pashchimanchal Vidyut Vitran Nigam Limited, Meerut and the order dated 23.06.2023 passed by the Chief Treasury Officer, Gautam Budh Nagar, directing recovery of pension already paid to the petitioner.

12. In the supplementary affidavit, that has been filed by the petitioner, it is

averred that without proper and appropriate opportunity of hearing, the Inquiry Committee have submitted their report, on the basis of which the impugned orders have been passed. It is also averred in Paragraph No.6 of the supplementary affidavit that the respondents have not produced any witness on behalf of the Corporation to prove the charges detailed in the charge-sheet. It is next averred in Paragraph No.8 that the petitioner was never furnished a copy of the inquiry report and no opportunity of submitting a representation against it was given.

13. In the counter affidavit, that has been filed on behalf of respondent Nos.2, 3 and 4, it is evident from a perusal of Paragraph No.7 that what the respondents call full opportunity afforded before imposition of a major penalty, was the opportunity given to the petitioner to appear before the Inquiry Committee for a personal hearing. There is a reference to letters from the Inquiry Officer dated 20.07.2020 and 26.08.2020, asking the petitioner to appear and participate in the inquiry. There is also on record proceedings before the Inquiry Officer held on 05.09.2020. It carries eleven questions that were put to the petitioner. Apparently, in this inquiry, which has led to the imposition of the most drastic penalty that one can suffer after retirement, to wit, a 100% forfeiture of his pension, no witness was examined on behalf of the establishment to prove the charges. The requirement of holding a formal inquiry before the imposition of a major penalty is salutary and this Court thinks that forfeiture of the entire pension is a major penalty of the most drastic kind. In the case of imposition of major penalty, it is imperative for the establishment to prove the charges by examining evidence, both documentary and oral before the Inquiry Officer. The Inquiry Officer has to formally convene inquiry proceedings, sitting as an impartial arbiter. The establishment have to lead evidence, both documentary and oral through a Presenting Officer. This issue is no longer *res integra* in view of the decision of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570.**

14. In order to elucidate the point, it would be apposite to refer to the holding of their Lordships of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772**, where it has been observed:

"**27.** A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. 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."

15. In **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB)(LB),** which is a Bench decision of this Court, it has been held:

"**14.** Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

15. In another case in Subhash Chandra Gupta v. State of U.P., 2012(4) ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold 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).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

16. A reading of the impugned orders and the record of the inquiry leaves no manner of doubt for a fact that the establishment never examined any witness in support of the charges or formally

produced evidence, documentary or oral, before the Inquiry Officer, who was an Executive Engineer. What is more intriguing in this case is that beyond the preliminary inquiry report dated 05.11.2018, annexed as Annexure No.3 to the writ petition, a copy of the inquiry report has not appeared on record or seen light of the day. This Court is, therefore, constrained to hold that the two Authorities, that is to say, the Disciplinary Authority and the Appellate Authority, have proceeded to punish the petitioner, either on the basis of the preliminary inquiry report or some other inquiry report, that was never furnished to the petitioner. Surprisingly, the inquiry report was never produced before this Court as well, though a counter affidavit has been filed on behalf of respondent Nos.2, 3 and 4. The proceedings, on the basis of which the impugned order of punishment was passed by the Authority of first instance, are surprisingly elusive about the date of the inquiry report. There is no date of the inquiry report mentioned in the order passed by the Disciplinary Authority. In this connection, reference may be made to the following remarks in the order of the Disciplinary Authority, where he has discussed the Inquiry Officer's report. These read:

"जांच अधिकारी इं० दिनेश अग्रवाल, अधिशासी अभियन्ता, विद्युत नगरीय परीक्षण खण्ड-द्वितीय, नोएडा द्वारा प्रेषित जांच आख्या के मेरठ डिस्कॉम स्तर पर किये गये परीक्षण में श्री महेन्द्र पाल शर्मा के विरूद्ध अधिरोपित आरोपों के सम्बन्ध में प्राप्त निष्कर्षों के सापेक्ष साक्ष्य प्रमाणित नहीं पाये जाने के दृष्टिगत नैसर्गिक न्याय के सिद्धांत के लिए पुनः पत्र दिनांक 26.05.2020 को जांच अधिकारी इं० दिनेश अग्रवाल, अधिशासी अभियन्ता, विद्युत नगरीय परीक्षण खण्ड-द्वितीय, नोएडा को सन्दर्भित किया गया जिस पर जांच अधिकारी द्वारा सम्बन्धित साक्ष्य एकत्र कर अपने पत्रांक - 2626 / वि०न०परी० खं०- द्वि० - नोएडा दिनांक 10.12.2020 द्वारा पुन नियमानुसार मौखिक सुनवाई का अवसर प्रदान करते हुए जांच व विवेचना कर सुसंगत साक्ष्यों एवं निष्कर्ष सहित अपनी जांच आख्या उपलब्ध करायी।"

17. A perusal of the order of the Disciplinary Authority, and in particular the relevant part quoted above, shows that the order of the Disciplinary Authority is conspicuous by its non-mention of the inquiry report's date. It does speak of an inquiry report, but when it was submitted, is not to be found across the length and breadth of the Disciplinary Authority's order. Likewise, there is no mention of the date of this report in the Appellate Authority's order impugned, by which he has enhanced the punishment. Before this Court, one would expect that a copy of the report would be produced by the respondent along with their return, but that has not been done. During the hearing, all that the respondents could show, was a copy of the preliminary inquiry report dated 05.11.2018, annexed as Annexure No.3 to the writ petition. One of the documents annexed to the counter affidavit, also shows that the manner in which the Inquiry Officer held inquiry, was to put questions, like interrogatories to the petitioner. Therefore, what was apparently done by the Inquiry Officer, sans training or guidance how to hold disciplinary proceedings, was to interrogate the petitioner like an Investigating Officer, rather than adjudicate the matter, requiring the establishment to prove the charges by evidence. This Court, therefore, holds that the orders of the Disciplinary Authority and the Appellate Authority, are either founded

on no other inquiry report, except the preliminary inquiry report or some surreptitious kind of a report that cannot qualify for valid findings of an inquiry held in disciplinary proceedings on the foot whereof a major penalty may be imposed. Since this Court proposes to quash the impugned orders with liberty to the respondents to proceed afresh, if they so desire, the other issue raised by the petitioner about violation of Article 351-A of the Civil Service Regulations, is left open to be examined, should occasion arise.

18. The orders impugned in Writ-A No.12441 of 2023 are consequential to those impugned in the leading writ petition. Therefore, the orders impugned in Writ-A No.12441 of 2023 would fall as well, once the orders impugned in Writ-A No.4628 of 2023 are quashed.

19. In the result, both the writ petitions succeed and are **allowed.** The impugned order dated 23.02.2023 passed by the Chairman, U.P. Power Corporation Limited, Lucknow and the order dated 18.01.2022 passed by the Managing Director, U.P. Power Corporation Limited, Lucknow, are hereby **quashed.** Unless the respondents elect to take fresh proceedings from the stage of the charge-sheet against the petitioner and pass orders afresh, after holding an inquiry in accordance with law and the guidance in this judgment, the petitioner shall be entitled to receive his full pension, including arrears and other post retiral benefits. If fresh proceedings are taken, the entitlement to receive pension, including arrears and other post retiral benefits, not yet paid, will abide by the result of orders to be made in those proceedings.

20. The impugned order dated 25.05.2023 passed by the Deputy Chief Account Officer, Pashchimanchal Vidyut Vitran Nigam Limited, Meerut and the order dated 23.06.2023 passed by the Chief Treasury Officer, Gautam Budh Nagar in Writ-A No.12441 of 2023 are also **quashed**. The respondents are restrained from recovering from the petitioner pursuant to the said orders, in any manner.

21. There shall be no order as to costs.

(2024) 2 ILRA 791
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2024

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ - A No. 4914 of 2022

C/M Rahat Janta Inter College & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Ramesh Kumar Srivastava

Counsel for the Respondents:
C.S.C.

A. Constitution of India, Arts. 29, 30, 226 — U.P. Intermediate Education Act, 1921, Ss. 16-FF, 16-D — Regulation 101, Ch. III — U.P. Secondary Education Services Selection Board Act, 1982, S. 30 — Minority Institution — Appointment of Clerks — Whether prior permission of DIOS required — Held, No.
Regulation 101, Ch. III of the U.P. Intermediate Education Act has no mandatory application to minority institutions. Even if construed as regulatory, it does not envisage prior approval. Mere non-obtaining of such permission from DIOS cannot vitiate appointments.

B. Minority Educational Institutions — Administrative Autonomy — Scope of St. Interference.
The St. Government cannot under the guise of regulation interfere with the administrative autonomy of a minority educational institution. Appointment of teaching or non-teaching staff by a duly constituted Selection Committee of the Management cannot be annulled by the authorities except on the ground that the selected candidate lacks requisite qualifications.

C. U.P. Intermediate Education Act, 1921 — Ss. 16-FF, 16-D — Scope of scrutiny by DIOS.
Powers of DIOS qua minority institutions are limited only to verifying whether selected candidates possess the prescribed qualifications. Objections relating to prior permission, joint advertisement or alleged ban on recruitment are beyond jurisdiction.

D. Principles Reiterated.
(i) Statutory provisions apply to minority institutions only if expressly made applicable.
(ii) Once candidates fulfill qualifications, appointments in minority institutions cannot be cancelled on administrative objections like combined advertisement or non-mention of pay-scale.
(iii) Orders passed without affording opportunity of hearing are unsustainable.

Held (Paras 17, 18, 20, 21, 26):
— Prior permission under Regulation 101 not required in case of minority institutions.
— St. authority cannot interfere in method of appointment of teaching/non-teaching staff of minority educational institutions.
— DIOS has limited jurisdiction to verify qualifications only.
— Impugned orders cancelling appointments of Clerks without hearing petitioners and without statutory basis, liable to be quashed.

Result: Writ Petition Allowed — Impugned orders dated 14.03.2022 (Director of Education, Secondary, Lucknow) and 30.03.2022 (DIOS, Bahraich) quashed — Matter remitted to DIOS to decide afresh after hearing petitioners within 4 weeks.

List of Cases cited:

1. Mohd. Faizan & ors. Vs St. of U.P. & ors., 2013 (5) ADJ 471 (All)

2. Jagdish Singh Vs St. of U.P. & ors., (2006) 2 UPLBEC 1851

3. St. of U.P. Vs Manager, C/M Islamia Inter College, 2022 (4) ADJ 531 (DB)

4. T.M.A. Pai Foundation Vs St. of Karnataka, (2002) 8 SCC 481 (Const. Bench)

5. P.A. Inamdar Vs St. of Mah., (2005) 6 SCC 537 (Const. Bench)

(Delivered by Hon'ble Om Prakash Shukla, J.)

A. Introduction

(1) This writ petition under Article 226 of the Constitution of India has been filed by the petitioners with the following main reliefs :-

i. Issue a writ, order or direction in the nature of certiorari quashing the impugned letter dated 14-03-2022 passed by the opposite party no.2 to the extent of cancelling the appointment of two post of Clerk after summoning the original from the opposite parties.

ii. Issue a writ, order or direction in the nature of certiorari, quashing the impugned order/letter dated 30-03-2022 to the extent of cancelling the appointment on the post of Class-III post which is contained in as **Annexure no.1** to the writ petition.

iii. Issue a writ, order or direction in nature of mandamus, commanding the opposite parties to approved the two appointment of Clerk made by the petitioner's Institution on the basis of submitting the papers regarding the appointment of Class-III post by letter

dated 22-10-2021 which is contained as Annexure no.15 to the writ petition."

B. Factual Matrix

(2) The facts, in nutshell, are that Anjuman Talim Dargah is a Society registered under the Societies Registration Act, 1860. It is a minority organization and has established and is presently running private college, namely, Rahat Janta Inter College situated at Nanpara, District Bahraich (hereinafter referred to as '**the Institution**'). The Institution is managed by a 'Committee of Management (petitioner no.1)' (for short **'the Management'**) as per the Scheme of Administration. The institution is an aided private minority institution and is governed by the provisions of Uttar Pradesh Intermediate Education Act, 1921. Petitioner No.2-Arshad Khan is said to be the Manager of the Institution.

(3) It is the case of the petitioners that in the Institution, there is one sanctioned post of Principal, 6 sanctioned posts of Lecturer, 15 sanctioned posts of Assistant Teacher L.T. Grade, 10 sanctioned posts of Assistant Teacher C.T. Grade, 3 sanctioned post of Routine Grade Clerk and 12 sanctioned posts of Peons. According to the petitioners, the State Government had issued a Government Order dated 15.02.2007, providing that in case of minority institution, no prior permission from any authority is required before publication of advertisement for filling up of vacancies of the approved/sanctioned post of teachers/lecturers. Again, the State Government had issued another Government Order dated 21.08.2014 in relation to one Smt. Shaista Ali on the post of Assistant Clerk, wherein the State Government had relied upon the earlier Government Order dated 12.02.2007, which specifically stated that in respect of minority Institution, Section 18 (Cha-Cha) of Intermediate Education Act, 1921 is applicable and further there is no provisions for taking prior permission or restriction for minority Institution for making appointment on Class-III posts.

(4) It has been stated by the petitioners that after the Government Order dated 21.08.2014, the Director of Education has issued a letter on 29.10.2014, directing all the District Inspector of Schools saying that the Government Order dated 21.08.2014 is related to minority institution of *Ashashkiya Sahayata Prapt* for appointment on Class-III post and the Director of Education has further directed all the District Inspector of Schools to proceed on the basis of the Government Order dated 21.08.2014.

(5) Further case of the petitioner is that on the basis of Government Orders dated 15.02.2007, 21.08.2014 and 29.10.2014, petitioners' institution had advertised three posts of Class-III (Clerk) and three Class-IV posts on 04.09.2021 in two newspapers, namely, Rashtriya Sahara and Daily Shahafat (in Urdu Language). In pursuance of the said advertisement, number of eligible candidates have submitted requisite applications for the aforesaid posts. The Manager of the Institute (petitioner no.2), vide letter dated 21.09.2021, had informed the District Inspector of Schools regarding the vacancy, advertisement and other relevant facts.

(6) Apparently, on receipt of the aforesaid letter dated 21.09.2021, the District Inspector of Schools, vide letter dated 23.09.2021, informed the Manager of

the Institution (petitioner no.2) that no prior permission under Regulation 101 of U.P. Intermediate Education Act, 1921 has been taken and further in respect of Class-IV posts, there is a process of outsourcing. In this regard, the District Inspector of Schools had stopped the interview which was fixed for 24.09.2021.

(7) It is stated by the petitioner that as per Government Orders dated 05.02.2007, 21.08.2014 and 29.10.2014, there is no procedure prescribed for taking prior permission for appointment from the District Inspector of Schools for appointments on Class-III posts and as such, the Institution had proceeded with the interview and the Selection Committee took interview of the eligible candidates and the procedure for appointment was done for two Class-III posts only on 24.09.2021, whereby one Geeta Srivastava, who got 62.40 marks and one Dilbagh has got 55.91 marks, were selected. Thereafter, the Manager of the Institution (petitioner), in response to the letter of the D.I.O.S. dated 23.09.2021, has sent a reply letter dated 13.10.2021, placing reliance upon the Government Order dated 29.10.2014 and 21.08.2014 stating inter-alia that the Institution is a minority institution and provision of Regulation 101 of Chapter-3 of the Intermediate Education Act is not applicable and as such prayed that interview, which was held on 24.09.2021, be legally recognized and the letter dated 23.09.2021 be declared as in-effective. Subsequently, vide letter dated 22.10.2021, the Manager of the Institution (petitioner no.2) has forwarded the necessary papers regarding the appointment of Class-III posts to the D.I.O.S. for its approval. Thereafter, the D.I.O.S. had sent the aforesaid letter of the petitioner no.2 to the Director of Education (Secondary), Lucknow vide letter dated 25.02.2022. In furtherance thereof, the Director of Education (Secondary), Lucknow, vide letter dated 14.03.2022, had raised two objection viz. (i) in the advertisement in question, there is no detailed description of pay-scale etc. of the Junior Clerk and post of Class-IV together with post of Junior Clerk were advertised, which is contrary to the established arrangement/order; (ii) there is ban on making appointment of *Ashashkiya Sahayat Prapt Madhyamik Vidyalaya* and the State Government has also introduced the new procedure for appointment, hence appointment was found to be irregular and was liable to be cancelled.

(8) Noting the aforesaid two objections, the D.I.O.S., vide letter/order dated 30.03.2022, cancelled the appointment made by the Institution on the post of two Class-III posts and required the petitioners to show cause as to why action under Sections 16 (d) (8) of Intermediate Education Act, 1921 for disruption of the Management be not taken and the same be not sent to the State in term of Section 16 (d) (v) of the Intermediate Education Act, 1921.

(9) In response to the aforesaid show cause notice, the petitioner no.2 had sent a letter dated 20.05.2022 to the D.I.O.S., stating that insofar as point no.1 relating to non-mentioning of the pay-scale for Class-III employee in advertisement is concerned, in the advertisement dated 04.09.2021, it was noted that after joining, the incumbent will get the pay-scale fixed by the State Government and further qualification will be according to the qualification prescribed under the Intermediate Education Act, 1921 and the joint advertisement of Class-III and Class-IV post was made only in order to

save the Government money. It was contended that even the Public Service Commission and other agencies are also advertising the joint post of various category and in so far as point no.2, the petitioner no.2 had mentioned that there is no mention of any Government Order regarding the ban for appointment in minority institution and further no specific rule and regulation has been mentioned in respect of introducing new system by the Government regarding the appointment for Class-III posts. Thereafter, the petitioner no.2 had forwarded the original file of appointment of two posts of Clerk vide letter dated 22.10.2021.

(10) Feeling aggrieved by aforesaid two letters/orders dated 14.03.2022 and 30.03.2022, the petitioners have filed the instant writ petition.

C. Contention of the Parties

(11) Heard Shri Ramesh Kumar Srivastava, learned Counsel representing the petitioner and Shri Vivek Shukla, learned Standing Counsel representing the State/respondents.

(12) Learned Counsel representing the petitioners has submitted that impugned letters/orders dated 14.03.2022 and 30.03.2022 to the extent of cancelling the appointment on two posts of Junior Clerk in the Institution is erroneous *inter alia* on the ground that petitioner no.2 has already mentioned in the advertisement dated 04.09.2021 that after joining by the selected candidates, the selected candidates will get pay-scale and allowances fixed by the state Government and further there is no violation of any regulation of the Act making joint advertisement of Class-III and Class IV posts. Moreso, there is no ban on appointment on Class-III posts in the minority Institution and no new notification for making appointment on Class-III posts has been made by the State Government.

(13) Elaborating his submission, learned Counsel for the petitioners has submitted that there is no provision relating to providing for prior permission from the D.I.O.S. to fill the post of Junior Clerk (Class-III) in minority Institution such as petitioners. In the advertisement published by the Management in two newspapers all information were there and no one has challenged the selection proceedings. According to the learned Counsel, a minority institution enjoys certain privileges in terms of Article 30 of the Constitution of India and enjoys unfettered right of choice, hence it is not open for the D.I.O.S. to question the right of the Management for appointment of the selected candidates on the post of Junior Clerk. It is submitted that the provisions under Chapter II, Regulation 101 of the Intermediate Education Act do not apply to the minority institutions mandatorily as held by this Court in the case of **Mohd. Faizan and others Vs. State of U.P. and others** reported in 2013 (5) ADJ 471.

(14) Learned Counsel for the petitioners has further submitted that the District Inspector of Schools has very limited role to play in functioning of minority institution, which is evident from perusal of Section 16 (FF) and the provision of Chapter II Regulation 17 of U.P. Intermediate Education Act, 1921, which clearly states that District Inspector of School can question the appointment in the minority institution only on the ground of lack of qualification by the candidate and not on any other ground. However, in the present case, there is no such objection.

He has placed reliance upon the judgment of Division Bench of this Court rendered in **State of U.P. Vs. Manager, Committee of Management Islamia Inter College** 2022 (4) ADJ 531.

(15) *Per contra*, learned Standing Counsel has submitted that in view of Article 30 of the Constitution of India, the State-respondents may not interfere in the administration of the minority institution but the petitioners being an aided institution, the State-respondents, who not only sanctioned the strength of teaching and non-teaching staff but has to also pay salary to them from the State Exchequer. Thus, according to him, the Government has every right to regulate the things and to see that after due sanction and approval, the appointments are made in accordance with law, which shall ultimately help the institution in achieving the object for which it is established and ultimate beneficiary would be the students, who are builder of the nation.

(16) Learned Standing Counsel has further submitted that the matter of selection/appointment of two Clerks in the Institution in question submitted by the petitioners/institution to the D.I.O.S., has been referred to the Director of Education (Secondary), Lucknow for providing guidelines. In pursuance thereof, the Director of Education (Secondary), Lucknow, after examining the records, vide letter dated 14.03.2022, has provided the guidelines mentioning that in the advertisement published by the Management, there is no mention about the pay-scale and selection/appointment on the posts of non-teaching employee (Group-C) in non-governmental aided secondary colleges has been banned by the State Government till a transparent standardized process for filling up the said posts is made. Thus, there is no illegality in cancelling the appointment of the selected candidates by means of the impugned orders.

D. <u>Analysis</u>

(17) Having regard to the submissions advanced by the learned Counsel for the parties and going through the record available before this Court, this Court deems it appropriate to mention that in the case of Mohd. Faizan and others (supra), a Co-ordinate Bench of this Court has clearly held that there is no specific provisions for applying Regulation 101, Chapter III of the Intermediate Education Act to the minority institution and as a corollary mere non-obtaining of permission from the DIOS would not be fatal. Even assuming that it is regulatory in nature, it does not mean prior approval as explained by the Division Bench of this Court in the case of **Jagdish Singh vs. State of U.P. and others**, (2006) 2 UPLBEC 1851. Thus, apparently it seems to this Court that prior permission for conducting the selection process in the minority institution was not required in terms of Regulation 101, Chapter III of the Intermediate Education Act.

(18) The Constitutional Bench of the Apex Court in the case of **T.M.A. Pal Foundation Vs. State of Karnataka**, reported in 2002 (8) SCC 481 and another constitution Bench Judgement in the case of **P.A. Inamdar Vs. State of Maharastra**, reported in 2005 (6) SCC 537 has laid down certain guidelines with regard to the functioning of a minority institution. A perusal of the aforesaid pronouncement of the Hon'ble Apex Court would indicate the fact, that, *inter alia* it has explicitly been held that the State Government is not empowered to interfere

with the functioning of the minority institution in the matters relating to appointment of teaching staff as well as non-teaching staff.

The State Authority cannot under the garb of adopting regulatory measure destroy the administrative autonomy of a minority educational institution or start interfering with the administration and the management of the institution so as to render the right of administration of the institution concerned nugatory or illusory. The State Government cannot regulate the method or procedure for appointment of teachers and non-teaching staff of a minority educational institution. Once the teacher or non-teaching staff, as the case may be, possessing the requisite qualification prescribed by the State or the University has been selected by the Management of the minority education institution by adopting the procedure of selection, the State Government or the University, as the case may be, would have no right to vitiate the selection of such teacher.

(19) Even the U.P. Secondary Education Service Section Board Act, 1982 is also not applicable upon a minority institution in terms of Section 30 of the U.P. Intermediate Education Act.

(20) A perusal of Section 16-FF of the U.P. Intermediate Act, which is a provision meant for appointment of teaching staff in a minority institution, would show that the said provision provides the District Inspector of Schools with limited power of examining the qualification of the candidates who have been selected in a minority institution. The power of the District Inspector of Schools in so far as the appointment of teaching and non-teaching staff in a minority institution is concerned, is quite limited and the power is only to the extent that whether the candidates who have been selected by a minority selection committee possessed requisite qualification or not.

(21) In any case, there is no gainsaying that the position of law is clear, in as much as, if there is a doubt as to whether any order or statutory provision would apply to a particular set of institution or not, the law says that there ought to be a specific mention in the Statute itself that it shall apply upon a minority institution and that a provision *ipso facto* shall not be deemed to apply upon a minority institution in terms of Article 29 and 30 of the Constitution. The learned counsel for the State was unable to show any order or provision of law from the records, which would entail the Director of Education (Secondary) or the DIOS in taking a stand that the advertisement for appointment of Junior Clerks or Class-IV post is in any manner contrary to the established arrangement/order. Apparently, nothing has come on record to show as to what was the established arrangement/order as has been mentioned by the Director of Education (Secondary) in its impugned letter dated 14.03.2022.

(22) Further, it is not in dispute that the petitioners/Institution is a minority institution and was included in the list of grant-in-aid. The institution had advertised three posts of Junior Clerk (Class-III) and three posts of Peon in two newspaper on 04.09.2021. Thereafter, on 21.09.2021, the petitioner no.2 wrote a letter to the D.I.O.S. regarding the aforesaid recruitment in the Institution. On receipt of the aforesaid letter dated 21.09.2021, the D.I.O.S. wrote letter to the petitioner no.2 saying that no prior

permission had been taken by the Institution regarding the aforesaid process of selection. In response, the petitioner No.2, vide letter 13.10.2021, informed the D.I.O.S. that on the basis of the Government Order dated 05.02.2007, 21.08.2014 and 29.10.2021, no prior permission for Class-III posts for appointment in the Institution was required as the Institution is a minority institution. Thereafter, the Institution had completed the selected procedure and appointed two eligible Junior Clerk and vide letter dated 21.10.2021, the petitioner No.2 forwarded the papers regarding the appointment of the said two Junior Clerks to D.I.O.S. for its approval along with the relevant documents. On receipt of the aforesaid letter dated 21.10.2021, the D.I.O.S. has forwarded the same to the Director of Education (Secondary), Lucknow, seeking guidelines for proceeding further. Thereafter, on reference, the Director of Education (Secondary), Lucknow issued letter dated 14.03.2022 to the D.I.O.S. for cancelling the aforesaid appointment of two posts of Junior Clerk in the Institution and informed as under :-

"I. in the advertisement in question, there is no detailed description of pay-scale etc. of the Junior Clerk and post of Class-IV together with post of Junior Clerk were advertised, which is contrary to the established arrangement/order; and

(ii) there is ban on making appointment of *Ashashkiya Sahayat Prapt Madhyamik Vidyalaya* and the State Government has also introduced the new procedure for appointment, hence appointment are itself irregular and are liable to be cancelled."

(23) Pursuant to the aforesaid, the D.I.O.S. has cancelled the appointment of two selected candidates made by the Institution on the post of Junior Clerk by the letter/order dated 30.03.2022 without affording any opportunity of hearing to the petitioners.

(24) So far as aforesaid first objection of the Director of Education (Secondary), Lucknow regarding no detailed description of pay-scale made in the advertisement and making advertisement for combined posts i.e. three posts of Junior Clerk and three posts of Peon, the contention of the petitioners is that in the advertisement dated 04.09.2021, it was mentioned that candidate(s) will also get the pay-scale as provided by the State Government. According to the learned Counsel, although common advertisement of Class-III and Class-IV was made but the Management had decided to make two Class-III appointments and after adopting due procedure of selection, two eligible candidates were given appointment on the post of Class-III, however, the Institution has not made any appointment in respect of Class-IV employee. Thus, the first objection raised against the Institution is erroneous. Another submission in this regard is that the letter dated 14.03.2022 has not been supplied to the Institution and the same has been issued without affording opportunity of hearing to the petitioner.

(25) So far as second objection made in the letter dated 14.03.2022 regarding ban on making appointment of *Ashashkiya Sahayat Prapt Madhyamik Vidyalaya* and also introduction of the new procedure for appointment, the contention of the learned counsel for the petitioners is that there was no ban regarding the appointment Class-III post in the minority Institution. More so, in the letter dated 14.03.2022, neither date of ban is mentioned nor the detailed new

system of appointment is mentioned and it has been simply mentioned that appointment was itself irregular and liable to be cancelled. Thus, the contention is that the letter dated 14.03.2022 itself and consequent letter dated 30.03.2022 are non-speaking and are erroneous and, therefore, the same are liable to be quashed.

(26) The facts of the present case clearly indicate that it is not in dispute that the selected candidates has possessed requisite qualification for appointment on Class - III post on the date of occurrence of vacancies and that no such findings have been returned by the District Inspector of Schools or the Director Education (Secondary) with regard to the lack of requisite qualifications of the selected candidates. Thus, it can be concluded that the impugned letters have been passed without any application of mind and the Director of Education (Secondary) and the District Inspector of Schools has clearly ignored the distinction between a minority and non-minority institution and has neglected the privileges which are enjoyed by the institution in question in terms of Articles 29 and 30 of the Constitution of India. Thus, the impugned orders/letters passed/issued by the Director of Education (Secondary) and the District Inspector of Schools cannot be sustained and are liable to be quashed.

E. Conclusion

(27) In view of the aforesaid, the writ petition is **allowed**. The impugned letters dated 14.03.2022 issued by the Director of Education (Secondary), Lucknow and consequent letter dated 30.03.2022 issued by the DIOS, Bahraich are hereby quashed. The District Inspector of Schools, Bahraich is directed to look into the matter afresh and pass appropriate order, in accordance with law, after affording opportunity of hearing to the petitioners, expeditiously, say, within a period of four weeks from the date of receipt of a certified copy of this order. The decision so taken shall be communicated to the petitioners forthwith.

(2024) 2 ILRA 799
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2024

BEFORE

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

Writ - A No. 7198 of 2023

Vijay Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jitendra Kumar

Counsel for the Respondents:
A.S.G.I., Sri Yashwant Singh

A. Service Law – Compassionate Appointment – Regional Rural Banks – Applicable Scheme – Date of death of employee decisive factor.

Held, right to compassionate appointment is not an inherent right but one conferred by Rules/Scheme in force on the date of death of the employee. Subsequent schemes cannot be applied retrospectively unless expressly provided. (Paras 13–16)

B. Regional Rural Banks – Adoption of Ministry of Finance Scheme dated 07.08.2014 – Applicability.
Scheme of Ministry of Finance dated 07.08.2014, though effective for Public Sector Banks from 05.08.2014, applied to Regional Rural Banks only upon adoption by the concerned Bank. Prathama U.P. Gramin Bank adopted the scheme vide circular dated

10.05.2019, with effect from 08.02.2019 (for erstwhile Sarva U.P. Gramin Bank staff). Death prior to this date governed by SUPGB HRD Circular No. 16/2013, which confined compassionate appointment to two contingencies alone. (Paras 12–13, 16)

C. Service Law – Compassionate Appointment – Principle settled by Supreme Court.
Date of death of employee is the determinative criterion, not the date of application or its consideration. Pending applications cannot be decided under a subsequent scheme unless the scheme itself provides. (Para 14, 15; *Bheemesh alias Bheemappa*, AIR 2022 SC 402 relied on)

D. Result.
Petitioner's father having died on 25.08.2018, prior to enforcement of 2014 scheme in the Bank (08.02.2019), petitioner not entitled to claim compassionate appointment.

Held: Petition dismissed. No order as to costs. (Paras 16, 17, 18)

List of Cases cited:

1. Bharat Sanchar Nigam Limited & ors. Vs Tata Communications Limited, Civil Appeal Nos. 1699-1723 of 2015, decided on 22.09.2022

2. Secretary to Govt., Deptt. of Education (Primary) Vs Bheemesh alias Bheemappa, AIR 2022 SC 402 (Paras 14, 15)

3. Bechan Giri Vs U.O.I. & ors., 2023 SCC OnLine All 441 (Para 15)

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

1. Heard Mr. Jitendra Kumar, learned Counsel for the petitioner and Mr. Yashwant Singh, learned Counsel appearing on behalf of the respondent-Bank.

2. The petitioner, Vijay Kumar, is the son of a deceased employee of the Prathama U.P. Gramin Bank. His father died in harness. The petitioner's claim for compassionate appointment has been rejected by the respondent-Bank by the orders impugned dated 30.06.2018 and 29.12.2022. He has, therefore, moved this Court, praying that the orders aforesaid be quashed and a *mandamus* issued to the respondent-Bank to consider his case for grant of compassionate appointment.

3. The facts giving rise to this petition are these:

The Regional Rural Banks Act, 1976 (for short, 'the Act of 1976') was enacted to incorporate and regulate Regional Rural Banks in the country. This was done for the purpose of developing the rural economy, particularly, that relating to agriculture, trade etc. One of these Banks was the U.P. Gramin Bank established under the Act of 1976. The U.P. Gramin Bank was a Regional Rural Bank, and, subsequently, incorporated as the Sarva U.P. Gramin Bank, Meerut. Still later, the Prathama U.P. Gramin Bank came into existence by amalgamation of the existing Sarva U.P. Gramin Bank and the Prathama Bank. The Prathama U.P. Gramin Bank is a Rural Bank, which is an undertaking of the Government of India and sponsored by the Punjab National Bank. It is the petitioner's case that all rules and regulations made by the Government of India for Public Sector Banks are applicable to the Prathama U.P. Gramin Bank (for short, 'the Bank').

4. The Ministry of Finance, Government of India by an order dated 07.08.2014, bearing DOF No.18/2/2013-IR made a scheme for compassionate appointment in Public Sector Banks and this scheme is applicable to all Public Sector Banks, including the Bank. The petitioner's father, the late Om Prakash was a permanent employee of the Bank. He was

a Clerk-cum-Cashier in the erstwhile Sarva U.P. Gramin Bank. He died in harness on 25.08.2018. At the time of his demise, the petitioner's father was posted at the Gangdhari Branch of the erstwhile Sarva U.P. Gramin Bank, Meerut, which, as already said, later on amalgamated with the Prathama Bank, giving rise to its successor, the Bank. The petitioner submitted an application for compassionate appointment to the Bank on 29.10.2018 and followed up the matter with a reminder dated 22.11.2018.

5. The petitioner's claim, however, for compassionate appointment was not considered by the Bank and no result whatsoever of the decision taken, if any, was communicated. The petitioner, therefore, moved this Court by instituting Writ-A No.19314 of 2022, seeking a direction to the Bank to take a decision on the petitioner's claim for compassionate appointment. This Court by an order dated 24.11.2022 disposed of the aforesaid writ petition with a direction to the petitioner to make an appropriate application to some functionary of the Bank, described in this Court's order as respondent No.3. The specified functionary of the Bank was directed to consider the petitioner's application sympathetically and pass appropriate and reasoned orders thereon within a period of four months of the receipt of the petitioner's application.

6. In compliance with this Court's order dated 24.11.2022, the petitioner made an application along with a certified copy of the order. The date of this application is not mentioned by the petitioner; nor is it shown on the face of the document, annexed as Annexure No.7 to the writ petition. In compliance, on their part, the Chief Manager of the Bank passed the order impugned dated 29.12.2022, whereby the petitioner was informed that his claim already stands rejected by his predecessor (the then General Manager, Sarva U.P. Gramin Bank) by the impugned order dated 30.10.2018. Thus, the petitioner's application was rejected.

7. A perusal of the impugned order dated 30.10.2018 shows that the General Manager of the Sarva U.P. Gramin Bank, the Bank's predecessor, held that according to the scheme enforced in the Bank for appointment, the dependents of a deceased's employee are considered eligible in two contingencies alone: "(a) where the employee dies in harness while performing his official duty, as a result of violence, terrorism, robbery or dacoity; or, (b) the employee dies within five years of his first appointment or before reaching the age of 30 years, whichever is later, leaving behind a dependent spouse and/ or minor children." It is said in the order impugned that according to the records of the Bank, the late Om Prakash, the petitioner's father's date of birth was 22.06.1961 and he was employed with the Bank since 13.08.1986. It was observed that on the date of his demise, the deceased employee was aged 56 years and had been in the Bank's service for the past 32 years. Also, his death was not on account of any act of violence, terrorism, robbery or dacoity, while performing his official duty. For the said reason, the petitioner was held ineligible for consideration of compassionate appointment for him, under the existing scheme. By the latter order impugned, that is to say, the one dated 19.12.2022, the same position was taken, but it was clarified that the rule for consideration of compassionate appointment, applicable to the petitioner's case is the one laid down by SUPGB HRD

Circular No. 16/2013, which provides for only two contingencies, where a claim for compassionate appointment is maintainable. These are the same two contingencies, which have been mentioned hereinabove.

8. It was further stated that the petitioner's claim would be governed by SUPGB HRD Circular No. 16/2013, inasmuch as subsequent orders, circulars or schemes would not apply with retrospective effect, as held by the Supreme Court in **Bharat Sanchar Nigam Limited and others v. M/s. TATA Communications Limited, Civil Appeal No(S).1699-1723 of 2015, decided on 22.09.2022**. There is no mention in this order about what subsequent scheme for compassionate appointment is being referred to, but apparently what the Bank intend to say is that on the date of death, the scheme that was enforced relating to compassionate appointment would apply and that was SUPGB HRD Circular No. 16/2013, above referred. This circular provided for compassionate appointment only in the two contingencies of an employee's death on duty as a result of violence, terrorism etc. or within five years of his first appointment or before reaching the age of 30 years, whichever was later, leaving a dependent spouse and/ or minor children. Since these contingencies did not apply, the scheme in force at the time of the petitioner's father's demise would not entitle him to compassionate appointment.

9. The petitioner in the writ petition says that SUPGB HRD Circular No. 16/2013 has not been provided to the petitioner and non-provision of compassionate appointment has been pleaded to be arbitrary and discriminatory. The petitioner relied upon the scheme for compassionate appointment in Public Sector Banks issued by the Ministry of Finance, Government of India *vide* order 07.08.2014, which he says would apply to the Bank w.e.f. the said date. The attention of the Court is drawn to Paragraph Nos.8.1 and 8.2 of the scheme issued by the Ministry of Finance. This provides for compassionate appointment, according to the learned Counsel for the petitioner, to all eligible dependents normally to be considered up to five years from the date of death or retirement on medical grounds, with an obligation upon the employer to take a decision on merits in each case. He has further drawn the attention of the Court to the meaning of an employee under Clause 1.2 of the scheme to show that the petitioner is eligible under it.

10. The submission, in substance, by the learned Counsel for the petitioner, therefore, is that the scheme issued by the Ministry of Finance, Government of India applies to the Bank w.e.f. 05.08.2014 as it has been made effective from that date by the Ministry *proprio vigore*, with no adoption necessary by the Bank to make it applicable in their establishment. He submits that since the petitioner's father died on 25.08.2018, the scheme for compassionate appointment issued by the Ministry of Finance, must be held to govern his rights; not SUPGB HRD Circular No. 16/2013, that was earlier applicable and provided for a limited right to compassionate appointment in two contingencies alone. The learned Counsel for the petitioner emphasized that since under the scheme dated 07.08.2014, the right to consideration for compassionate appointment is an open right, not restricted to certain contingencies and the petitioner has applied within five years of his father's demise, in fact promptly, his case could not

have been rejected by the Bank, falling back upon the old scheme.

11. In the counter affidavit, the Bank has raised a plea that the scheme for compassionate appointment issued by the Ministry of Finance was adopted by the Prathama U.P. Bank for the staff of the erstwhile Sarva U.P. Gramin Bank w.e.f. 08.02.2019, and, in case of staff of the erstwhile Prathama Bank, w.e.f. 01.03.2019. Since the petitioner's father died on 25.08.2018, his rights would not be governed by the scheme for compassionate appointment issued by the Ministry of Finance, that was enforced in the Bank's establishment for the staff of the erstwhile Sarva U.P. Gramin Bank w.e.f. 08.02.2019.

12. Upon hearing learned Counsel for the parties, the first question to be determined, therefore, is if the scheme for compassionate appointment dated 07.08.2014 (w.e.f. 05.08.2014) issued by the Ministry of Finance by their order bearing DOF No.18/2/2013-IR would apply to the Bank *proprio vigore* or become enforceable upon the Bank adopting and enforcing it by their circular dated 10.05.2019. There is apparently nothing to show in the scheme issued by the Ministry of Finance, Government of India that it would apply to the Bank *proprio vigore*. Rather, it has been adopted by the Bank in terms of their circular dated 10.05.2019 with distinct and different dates for its enforcement for the erstwhile staff of the Sarva U.P. Gramin Bank and erstwhile Prathama Bank. Both the dates are retrospective. In case of the erstwhile staff of the Sarva U.P. Gramin Bank, the date of enforcement of the scheme is 08.02.2019 and in case of the erstwhile staff of the Prathama Bank, it is 01.03.2019.

13. The petitioner's father was on the staff of the erstwhile Sarva U.P. Gramin Bank and, therefore, the scheme or the model scheme framed by the Ministry of Finance, as adopted by the Bank by their circular dated 10.05.2019 would apply w.e.f. 08.02.2019. This Court finds on the material on record and the way the scheme has been adopted by the Bank that the Ministry of Finance had proposed a model scheme to be adopted by the Nationalized Banks. It was extended to Regional Rural Banks incorporated under the Act of 1976. In either case, the model scheme would be applicable upon an adoption by the concerned Bank's Board, on such modified terms, subject to which it was adopted. The date of enforcement of the scheme in a Bank, as is the case with the Bank, would be the date of its enforcement according to the Bank's decision to adopt it. Here, the circular dated 10.05.2019 adopts the scheme proposed by the Ministry of Finance for staff of the category to which the petitioner's father belonged, w.e.f. 08.02.2019. Therefore, it is held that the scheme for compassionate appointment providing for a general right to compassionate appointment for the dependent family member of a permanent employee of the Bank dying in harness, would be effective in the Bank for the class of an employee that the petitioner's father was, w.e.f. 08.02.2019. Prior to that, the rights would be governed by SUPGB HRD Circular No. 16/2013. It would be well to remember that under SUPGB HRD Circular No. 16/2013, there was no general right for compassionate appointment to a dependent family member of a permanent employee. It was restricted to two categories of death in harness mentioned in the impugned orders and the petitioner does not fall in either.

14. Now, the other issue is if the right to compassionate appointment would be governed by the scheme or the rules in force regarding compassionate appointment on the date of death of an employee or the rules or scheme in force on the date the dependent's application for consideration was moved, or actually considered by the employer. This issue has been the subject matter of much division of opinion in authority, which was considered by the Supreme Court in **Secretary to Government, Department of Education (Primary) and others v. Bheemesh alias Bheemappa, AIR 2022 SC 402**. In **Bheemesh alias Bheemappa** *(supra)*, it was held by the Supreme Court:

"19. The important aspect about the conflict of opinion is that it revolves around two dates, *namely*, ***(i)*** date of death of the employee; and ***(ii)*** date of consideration of the application of the dependant. Out of these two dates, only one, namely, the date of death alone is a fixed factor that does not change. The next date namely the date of consideration of the claim, is something that depends upon many variables such as the date of filing of application, the date of attaining of majority of the claimant and the date on which the file is put up to the competent authority. ***There is no principle of statutory interpretation which permits a decision on the applicability of a rule, to be based upon an indeterminate or variable factor.*** Let us take for instance a hypothetical case where 2 Government servants die in harness on January 01, 2020. Let us assume that the dependants of these 2 deceased Government servants make applications for appointment on 2 different dates say 29.05.2020 and 02.06.2020 and a modified Scheme comes into force on June 01, 2020. If the date of consideration of the claim is taken to be the criteria for determining whether the modified Scheme applies or not, it will lead to two different results, one in respect of the person who made the application before June 1, 2020 and another in respect of the person who applied after June 01, 2020. In other words, if two employees die on the same date and the dependants of those employees apply on two different dates, one before the modified Scheme comes into force and another thereafter, they will come in for differential treatment if the date of application and the date of consideration of the same are taken to be the deciding factor. ***A rule of interpretation which produces different results, depending upon what the individuals do or do not do, is inconceivable***. This is why, the managements of a few banks, in the cases tabulated above, have introduced a rule in the modified scheme itself, which provides for all pending applications to be decided under the new/modified scheme. Therefore, we are of the considered view that the interpretation as to the applicability of a modified Scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor.

20. Coming to the case on hand, the employee died on 8.12.2010 and the amendment to the Rules was proposed by way of a draft notification on 20.06.2012. The final notification was issued on 11.07.2012. Merely because the application for appointment was taken up for consideration after the issue of the amendment, the respondent could not have sought the benefit of the amendment. The Judgment of the Division Bench of the Karnataka High Court in *Akkamahadevamma* on which the Tribunal as well as the High Court placed reliance, was not applicable to the case of

compassionate appointments, as the amendment in *Akkamahadevamma* came as a result of the existing rule being declared to be ultra vires Articles 14 and 16 of the Constitution."

15. Following the decision in **Bheemesh alias Bheemappa**, I had occasion to consider the issue in **Bechan Giri v. Union of India, 2023 SCC OnLine All 441**. In **Bechan Giri** (supra), I held:

"**29.** Here, there is no issue that in the Scheme in question, there is no provision at all about consideration of pending applications for compassionate appointment made prior to the introduction of the Scheme w.e.f. 15th March, 2019. This is logically so because the present case is not one where there was apparently an older scheme granting some kind of limited right to a consideration for compassionate appointment in force or a right to an *ex-gratia* payment, whereunder an application could be made by the dependent of a deceased employee. What appears from the facts here is that prior to 15th March, 2019, there was no scheme at all in the establishment of the respondent Bank in force extending any kind of a right to compassionate appointment, howsoever limited or circumscribed. The right to compassionate appointment upon introduction of the Scheme w.e.f. 15th March, 2019 was a new found right. In the absence, therefore, of any provision in the Scheme for whatever reason to provide rights for dependents of an employee, who died prior to its introduction, asking for compassionate appointment, there could be no right to compassionate appointment. It has already been pointed out that the right to compassionate appointment is not an inherent right, but one that flows from a Rule or Scheme being in force at the time of the death of an employee in harness. There could be more reason to supply in aid of that interpretation. Once it is held that the right to compassionate appointment is not inherent, but the creature of a Rule, the right of whatever kind it is, originates and culminates on the date of death of the employee in harness. There is no fact surviving the death of an employee in harness on the foot of which, a Scheme or Rule for compassionate appointment introduced at a later date, may afford the dependent a right to consideration. Of course, that kind of a right may arise if the Scheme provides for that right on its own terms. Here, the words employed in Clause 8.1, or for that matter Clause 8.2 of the Scheme, do not envisage cognizance of cases of dependents, where death of an employee in harness has taken place before the Scheme was enforced in the Bank. The employment of the expression in Clause 8.1 "normally be considered upto five years from the date of death" refers to the period of five years of death on a date when the Scheme was already in force in the Bank; not five years or a little short of that time antedating the introduction of the Scheme."

16. Like the case in **Bechan Giri**, in the scheme, that was introduced *vide* circular dated 10.05.2019, the retrospective operation for an employee of the petitioner's father's class is limited to 08.02.2019, whereas the petitioner's father passed away on 28.08.2018. On the date that he died, therefore, the scheme providing for a general right to compassionate appointment had not come into force. On that date, the scheme in force provided for compassionate appointment in two contingencies mentioned in the impugned order, which are not attracted to the petitioner's case at all. The petitioner's father having died before the date on which

the new scheme for compassionate appointment enforced through circular dated 10.05.2019, had become effective i.e. 08.02.2019, the petitioner cannot claim a right to compassionate appointment under the Finance Ministry's scheme or the circular dated 10.05.2019. He had, in fact, no right to compassionate appointment, as rightly held by the Bank.

17. In this view of the matter, there is no force in this writ petition. It is, accordingly, **dismissed**.

18. There shall be no order as to costs.

(2024) 2 ILRA 806
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2024

BEFORE

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

Writ - A No. 7942 of 2023

Ram Prasad Dwivedi ...Petitioner
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Mr. Girish Chandra Yadav

Counsel for the Respondents:
C.S.C., Mr. Vimlesh Kumar Rai, Mr. Suresh Singh

A. Uttar Pradesh Government Servants (Medical Attendance) Rules, 2011 – Adoption by U.P. Jal Nigam –
Medical reimbursement claim for cancer treatment at Mahamana Pandit Madan Mohan Malaviya Cancer Centre (a unit of Tata Memorial Centre, Mumbai, a Govt. of India grant-in-aid institute) – Denial on ground of being "private hospital" – Whether sustainable.

Held: Para 9–13
The 2011 Rules stand adopted by the Board of Directors of U.P. Jal Nigam through office memorandum dated 28.06.2016. The said Scheme permits reimbursement even for treatment in private hospitals recognized by the St./Central Government, subject to certain conditions. MPMMCC being a unit of Tata Memorial Centre (grant-in-aid by Department of Atomic Energy, Govt. of India) cannot be treated as a private hospital for denial of claim.

B. Interpretation of Office Memoranda vis-à-vis Statutory Rules –
Whether a subsequent memo dated 13.07.2020, prohibiting reimbursement for private hospitals, overrides adoption of 2011 Rules and memo of 2016.

Held: Paras 6, 9, 14–15
Once the Board has adopted the 2011 Rules and framed the 2016 Scheme accordingly, a later office memo by the Managing Director cannot defeat statutory adoption. The binding scheme remains the 2016 memorandum.

C. Scheme of 2016 — Requirement of Referral & Prior Permission – Non-Compliance — Effect.
Held: Paras 11–13
Although the Scheme requires referral from Government hospital and prior permission of Chairman, such technical lapses cannot defeat genuine claims, particularly of senior citizens suffering from life-threatening diseases like cancer. Rules must receive a liberal construction to advance their purpose.

D. Writ Jurisdiction — Objection that impugned rejection order not challenged — Sustainability.
Held: Para 6
Mandamus being a writ of widest amplitude, relief cannot be denied merely because specific order not challenged. Writ jurisdiction is essentially equitable and technical objections cannot bar relief where justice demands.

Writ petition partly allowed.

Petitioner directed to resubmit his claim in prescribed proforma under 2016 Scheme. Respondents to process and dispose of claim within one month, bearing in mind Court's directions and affidavit of Principal Secretary dated 16.07.2023. No order as to costs.

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

1. Heard Mr. Girish Chandra Yadav, learned Counsel for the petitioner, Mr. Vimlesh Kumar Rai, learned Counsel appearing on behalf of respondent Nos.2, 3 and 4 and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing for respondent No.1.

2. The petitioner, Ram Prasad Dwivedi is a retired Assistant Engineer. He was employed with the Uttar Pradesh Jal Nigam, and after its division, is regarded a part of the Uttar Pradesh Jal Nigam (Urban). He retired from service on 30.09.2008, when the Nigam was still a unified entity. The petitioner is now a 70 year old man, and as he says, lost vision in both his eyes to Glaucoma. The petitioner consulted an E.N.T. Doctor for a problem with his throat, who, after a clinical evaluation and consideration of pathological reports, referred him to the Mahamana Pandit Madan Mohan Malaviya Cancer Centre, Varanasi (for short, 'the MPMMCC') on 07.11.2021. The petitioner went to the MPMMCC, where after a thorough check-up from 13.11.2021 to 11.01.2022, he was diagnosed with Lymphoepithelial Carcinoma, a cancer. He underwent surgery followed by radio and chemotherapy, that was necessary to treat the deadly disease. The petitioner says that his treatment is still continuing. It is averred in Paragraph No.11 of the writ petition that the petitioner informed the Personal assistant/ Executive Engineer in the office of the Chief Engineer, U.P. Jal Nigam (Urban), Prayagraj Zone, Prayagraj through an application dated 13.01.2022 that he was undergoing treatment for his cancer at the MPMMCC and Homi Bhabha Cancer Hospital, Varanasi. The petitioner then submitted his treatment plan and record of admission for the purpose of surgery at the MPMMCC to the Personal Assistant to the Chief Engineer aforesaid, whereupon the Personal Assistant is said to have written a letter to the petitioner on 31.01.2022 that the MPMMCC is not a government hospital. A copy of this letter is not on record.

3. Nevertheless, it is the petitioner's case that he posted the office of the Chief Engineer with details of his treatment, that includes his treatment file, card etc. on 22.02.2022, that were duly received by the office of the Chief Engineer, U.P. Jal Nigam (Urban), Prayagraj on 23.02.2022. The petitioner indicated that the MPMMCC is a government hospital, being a grant-in-aid institute of the Department of Atomic Energy, Government of India. Upon receipt of the said letter dated 23.02.2022, the Personal Assistant to the Chief Engineer, U.P. Jal Nigam (Urban), Prayagraj Zone, Prayagraj responded vide memo dated 24.02.2022, bearing No. 550/ चिकित्सा प्रतिपूर्ति/ 18, declining the petitioner's claim on the ground that the MPMMCC is a private hospital and a Branch of the Tata Memorial Centre, Mumbai. It was indicated that the petitioner's claim for medical reimbursement cannot be paid in accordance with the office memo No. 966/ एसी-लेखा सामान्य/ चि0प्रति0/309/20, dated 13.07.2020 issued by the Managing Director, U.P. Jal Nigam, Lucknow, which prohibits reimbursement of medical claims for treatment availed in private hospitals. The material part of the office memo aforesaid reads:

"प्रायः यह देखा जा रहा है कि उ0प्र0 जल निगम के कार्मिकों एवं सेवानिवृत्त पेंशनरो द्वारा सामान्यतः निजी चिकित्सालयों में ही उपचार कराया जा रहा है, जबकि सरकारी

चिकित्सालय अपेक्षाकृत अधिक सुविधा सम्पन्न है तथा उपचार भी बेहतर होता है। निजी चिकित्सालयों में कराये जा रहे उपचार अत्यधिक व्ययभार आता है तथा विभाग की वर्तमान वित्तीय स्थिति ठीक न होने के कारण निजी चिकित्सालय में करायी गयी चिकित्सा की प्रतिपूर्ति किये जाने में कठिनाई उत्पन्न हो रही है सम्यक विचारोपरान्त यह निर्देश जारी किये जा रह हैं कि सामान्यतः सरकारी चिकित्सायों यथा के0जी0एम0यू0, एस0जी0पी0जी0आई0, डॉ0 राम मनोहर लोहिया मेडिकल इन्सटीट्यूट, बलरामपुर चिकित्सालय, श्यामा प्रसाद मुखर्जी जिला चिकित्सालय आदि सरकारी चिकित्सालयों/ संस्थानों में करायी गयी चिकित्सा की ही प्रतिपूर्ति की जा सकेगी। यदि अत्यन्त विषम स्थिति में निजी चिकित्सालय में चिकित्सा कराना इस लिए अपरिहार्य हो कि वह उपचार इन सरकारी अस्पतालों / संस्थानों में उपलब्ध नही हो तभी उसकी स्वीकृति हेतु प्रस्ताव मा0 अध्यक्ष जी को स्वीकृतार्थ अग्रसारित किया जा सकेगा।"

4. It is the petitioner's case that his claim has been rejected solely on the ground that he took treatment to cure his cancer at the MPMMCC, which the respondents regard as a private hospital. It is also the petitioner's ground to assail the denial of his claim that the view that for treatment taken at a private hospital, no medical reimbursement can be claimed, is based on a mere memo issued by the Managing Director of the U.P. Jal Nigam, whereas the right to claim medical reimbursement flows from The Uttar Pradesh Government Servants (Medical Attendance) Rules, 2011 (for short, 'the Rules of 2011'). The petitioner has prayed for a *mandamus* ordering the respondents to reimburse his medical expenses to the tune of Rs.3,64,303/- spent on his treatment within a stipulated period of time.

5. When this petition came up for admission on 07.07.2023, this Court passed a detailed order, requiring the Chief Engineer to file his personal affidavit, which would be read as a counter affidavit. The Chief Engineer (Prayagraj Zone), U.P. Jal Nigam (Urban), Prayagraj filed a counter affidavit dated 12.07.2023, where the stand taken, that would shortly be noticed, seem to be very obstructive, rather than fair and facilitative in a matter like the one in hand. This Court, therefore, passed a further order dated 12.07.2023, requiring the Principal Secretary, Ministry of Urban Development, Government of U.P., Lucknow to file his personal affidavit. The material part of this Court's order dated 12.07.2023 reads:

"A counter affidavit has been filed on behalf of respondent nos. 2, 3 and 4, where the stand maintained is strikingly bureaucratic. The respondents insist that be it cancer and howsoever a killer disease it might be, the scheme for reimbursement of medical expenses would require the petitioner to be treated at a Government Hospital. The respondents have refused to acknowledge the Mahamana Pandit Madan Mohan Malaviya Cancer Centre, Varanasi as a Government Hospital, though an establishment of TATA Memorial Centre, which is a grant-in-aid institute of the Department of Atomic Energy, Government of India.

Before proceeding to hear the matter, this Court considers it appropriate to know the stand of the Government. In this regard, let the Principal Secretary, Ministry of Urban Development, Government of U.P., Lucknow file his personal affidavit by Monday i.e. 17.07.2023, answering all that is said by this Court in the order dated 07.07.2023 extracted above."

6. In compliance, the Principal Secretary, Ministry of Urban Development, Government of U.P., Lucknow has filed his affidavit dated 16.07.2023, where a seemingly reasonable stand has been taken. Before proceeding further, this Court must remark that the Chief Engineer's stand in the counter affidavit filed on behalf of respondent Nos.2, 3 and 4 is far from one that can be commended. He has raised an objection that the petitioner has not challenged the order dated 24.02.2022 and has merely sought a *mandamus*. A writ petition under Article 226 of the Constitution is essentially an equitable remedy and if a case is made out, it does not much matter which particular writ has been sought by the petitioner, unless, of course, the remedy sought is misconceived. A writ of *mandamus* is a general writ of the widest scope, which may be issued to remedy injustice wherever found. The objection taken by the respondents, under the circumstances, is one stated to be rejected. It is then averred in the counter affidavit that the Rules of 2011 do not automatically apply to the Nigam. These have been adopted by the Board of Directors of the U.P. Jal Nigam in its 164th Meeting, and, with permission of the Chairman of the U.P. Jal Nigam, an office memorandum dated 28.06.2016 was issued by the Managing Director, U.P. Jal Nigam in order to give effect to the Rules of 2011. A copy of the office memorandum dated 28.06.2016 has been referred to.

7. We have perused the office memorandum dated 28.06.2016 issued by the Managing Director, U.P. Jal Nigam. It would be profitable to refer to the aforesaid memo (relevant parts), which read:

"उत्तर प्रदेश जल निगम के आदेश संख्या 55 / चिकित्सा प्रतिपूर्ति दिनांक 09-02-1995 द्वारा चिकित्सा व्ययों की प्रतिपूर्ति तथा इस हेतु अग्रिम की स्वीकृति के सम्बन्ध में पुनरीक्षित प्रक्रिया लागू किये जाने हेतु दिशा निर्देश निर्गत किये गये थे। जल निगम के ज्ञाप संख्या 138/ ए.सी. लेखा (सा0)/ चि0 प्रति0/309/354/12 दिनांक 18/01/2012 द्वारा पूर्व निर्गत ज्ञापों के क्रम में शासन के आदेश द्वारा जारी 'उत्तर प्रदेश सरकारी सेवक (चिकित्सा परिचर्या) नियमावली 2011' को उत्तर प्रदेश जल निगम के समस्त कार्यरत एवं सेवानिवृत्त कार्मिकों हेतु प्रक्रिया एवं चिकित्सा प्रतिपूर्ति स्वीकृत करने के अधिकार की सीमा तक लागू किया गया। अग्रेतर उत्तर प्रदेश जल निगम के ज्ञाप संख्या 2883 / ए.सी. लेखा (सा0)/चि0 प्रति0/309/354/14 दिनांक 22/08/2014 द्वारा 'उत्तर प्रदेश सरकारी सेवक (चिकित्सा परिचर्या) (प्रथम संशोधन) नियमावली 2014' के कतिपय प्राविधानों को ज्ञाप दिनॉक 18/01/2012 के क्रम में प्रतिस्थापित किया गया।

उत्तर प्रदेश जल निगम निदेशक मंडल की 160वीं बैठक में लिये गये निर्णय के अनुपालन में ज्ञाप संख्या 1114 / ए.सी. लेखा (सा0)/ चि0 प्रति0 / 309/520 / 13 दिनांक 06/06/2013 द्वारा चिकित्सा प्रतिपूर्ति किये जाने के सम्बन्ध में निजी चिकित्सालयों में इलाज एवं कतिपय विशिष्ट बीमारियों को छोड़कर अन्य पर हुये व्ययों की प्रतिपूर्ति पर प्रतिबन्ध लगाये गये। अग्रेतर ज्ञाप संख्या 2729/ ए.सी. लेखा (सा0)/ चि0 प्रति0/309/520 / 13 दिनांक 31/12/2013 एवं 2145 / ए.सी. लेखा (सा0) / चि0 प्रति0 / 309/520/15 दिनांक 18/09/2015 द्वारा प्रतिबन्धों को शिथिल करते कुछ और गम्भीर व विशिष्ट बीमारियों को प्रतिपूर्ति हेतु सम्मिलित किया गया।

उत्तर प्रदेश जल निगम निदेशक मंडल की 164वीं बैठक (मद संख्या 164.34) में निदेशक मंडल की 160वीं बैठक में लगाये गये प्रतिबन्धों को समाप्त किया गया है तथा मद संख्या 164.32 द्वारा स्वीकर्ता प्राधिकारी का पुर्ननिर्धारण किया गया है। जल निगम द्वारा

चिकित्सा व्ययों की प्रतिपूर्ति तथा इस हेतु अग्रिम की स्वीकृति के सम्बन्ध में पूर्व में निर्गत समस्त कार्यालय ज्ञापों / आदेशों को अतिक्रमित कर उनमें दी गई व्यवस्थाओं को समेकित कर अध्यक्ष, उत्तर प्रदेश जल निगम की अनुमति से जल निगम के सेवारत / सेवानिवृत्त कार्मिको हेतु चिकित्सा प्रतिपूर्ति की निम्न व्यवस्था लागू की जाती है:-

"3.3 विशिष्ट उपचार

3.3.1 जटिल और गम्भीर बीमारियों के उपचार के लिए, जिनके लिए सरकारी चिकित्सालय या संदर्भित करने वाली संस्थाओं में चिकित्सा सुविधा उपलब्ध नहीं है, संदर्भित करने वाली संस्था के आचार्य या विभागाध्यक्ष या सरकारी जिला चिकित्सालय के मुख्य चिकित्सा अधीक्षक या जिले के मुख्य चिकित्सा अधिकारी से अन्यून श्रेणी के उपचारी चिकित्सक द्वारा विशिष्ट और चिकित्सा परिचर्या के लिए रोगी को ऐसे निजी चिकित्सालय या संस्था को जिसे राज्य अथवा केन्द्र सरकार द्वारा मान्यता प्राप्त हो संदर्भित किया जा सकता है।

3.3.2 ऐसे निजी चिकित्सालय या संस्था में उपचार पर व्यय की प्रतिपूर्ति वास्तविक व्यय या राज्य के भीतर उपचार के लिए संजय गाँधी स्नातकोत्तर आयुर्विज्ञान संस्थान लखनऊ की दरों या राज्य के बाहर हुए उपचार के लिए अखिल भारतीय आयुर्विज्ञान संस्थान, नई दिल्ली की दरों तक, जो भी कम हो, सीमित होगी।

3.3.3 ऐसे उपचार या जॉच जिनके लिए संजयगांधी स्नातकोत्तर आयुर्विज्ञान संस्थान, लखनऊ या अखिल भारतीय आयुर्विज्ञान संस्थान, नई दिल्ली में सुविधा विद्यमान न हो, पर हुए व्ययों की प्रतिपूर्ति वास्तविक आधार पर की जायेगी प्रतिबन्ध यह है कि उपचार देश के भीतर कराया गया हो।

3.3.4 उक्तानुसार निजी चिकित्सालयों में उपचार कराये जाने हेतु अध्यक्ष, उ0प्र0 जल निगम की पूर्वानुमति आवश्यक होगी।" (emphasis by Court)

8. This Court is of opinion that it would also be of relevance to refer to Paragraph Nos.1.11 and 1.12 of the Scheme for reimbursement framed vide memo dated 28.06.2016. These read:

"1.11 संदर्भित करने वाली संस्था, का तात्पर्य सभी राजकीय चिकित्सालय / चिकित्सा महाविद्यालय, KGMU लखनऊ संजय गाँधी स्नातकोत्तर आयुर्विज्ञान एवं अनुसंधान संस्थान (SGPGIMS) लखनऊ, डा0 राम मनोहर लोहिया आयुर्विज्ञान संस्थान लखनऊ, ग्रामीण आयुर्विज्ञान एवं अनुसंधान संस्थान, सैफई, इटावा, इंस्टीट्यूट ऑफ मेडिकल साइंस वाराणसी (बनारस हिन्दू विश्वविद्यालय), जवाहर लाल नेहरू चिकित्सा महाविद्यालय (अलीगढ मुस्लिम विश्वविद्यालय). अलीगढ और सरकार द्वारा इस रूप में अधिसूचित किसी अन्य संस्था से है,

1.12 "राज्य" का तात्पर्य उत्तर प्रदेश राज्य से है,"

9. What we find from a reading of the Scheme framed by the Managing Director *vide* memo dated 28.06.2016 is that the Rules of 2011 have indeed been adopted by the Board of Directors of the U.P. Jal Nigam. The earlier restrictions that were imposed regarding non-provision of medical reimbursement for treatment availed at private hospitals have also been relaxed and expenses incurred in treatment availed at private hospitals, can also be reimbursed. A perusal of Paragraph No.3.13 and its sub-paragraphs shows that for the treatment of complicated and serious diseases, where treatment is not available with government hospitals or the referring institutions, an employee or a retired employee or other beneficiary under the Scheme, may be referred by the specified functionaries of a government hospital or the referring institution to such

such private hospital for treatment, which the State or the Central Government has recognized. This is provided specifically in sub-Paragraph No.3.3.1 of the Scheme carried in the memo dated 28.06.2016. Sub-Paragraph No.3.3.2 provides the rate of reimbursement, which shall be limited to the rate at which costs would be incurred at the Sanjay Gandhi Postgraduate Institute of Medical Sciences, Lucknow, if the treatment is taken in a private hospital within the State of Uttar Pradesh. The rate, according to which reimbursement would be made, if the treatment is taken in a private hospital outside the State, is one that would be in accord with the rates, the treatment would cost if availed at the All India Institute of Medical Sciences, New Delhi. Sub-Paragraph No.3.3.3 of the Scheme provides that if the treatment necessary is not available with the SGPGI or the AIIMS, the expenses incurred in the treatment would be reimbursable to the extent actually incurred at the private hospital. Sub-Paragraph No.3.3.4 stipulates that for the purpose of the Scheme in order to avail treatment (which really means reimbursement) at a private hospital, prior permission of the Chairman of the Nigam would be necessary.

10. This Court must remark that the contention on behalf of the respondents founded on their stand in the counter affidavit filed on behalf of respondent Nos.2, 3 and 4 that no reimbursement claim can be entertained unless the Head of Office/ Drawing and Disbursing Officer is informed of the treatment being taken within 30 days of its commencement as required by sub-Paragraph No.3.1.2, is not at all tenable. The reason is that Paragraph No.3.1 of the Scheme, of which sub-Paragraph Nos.3.1.2 is a part and envisages a limitation of 30 days regarding intimation to be given to the Head of Office from the date of commencement of the beneficiary's treatment, is one which deals with treatment during emergencies. It has no application to the case of special treatment, that is the subject matter of Paragraph No.3.3 of the Scheme. Special treatment relates to complicated and serious ailments, as already noticed. In Paragraph No.3.3 of the Scheme and all its sub-Paragraphs, there is no rule of limitation envisaged, upon which learned Counsel for the respondents has much harped to discredit the petitioner's claim.

11. This Court does notice that there are certain matters, which indeed have not been observed in compliance by the petitioner to claim reimbursement. There is no recommendation by a government hospital or a referring institution envisaged under the Scheme, recommending the petitioner's case for care in a private hospital. The other is, that there is no prior permission of the Chairman of the Jal Nigam obtained by the petitioner. This issue about non-referral by a competent doctor representing the referring institution or a government hospital was also a point much canvassed on behalf of the respondents. This submission is not altogether without force. At the same time, we think that though in many a case, strict adherence to Paragraph No.3.3 may be necessary, but the rules there are not inflexible. After all, the respondents do not dispute the fact that the Board of the Jal Nigam have adopted the Rules of 2011 conferring the benefit of medical reimbursement upon their employees, the retired employees and their families. The regulation of that right through the Scheme that has been framed *vide* memo 28.06.2016 by the Managing Director with the Chairman's permission, cannot be

construed in a manner that palpably genuine claims are defeated for the non-observance of a technicality. Many a time, a genuine claimant may not be aware of the requirements of this Scheme tucked away in an office memo issued by the Managing Director of the Jal Nigam. After all, it is not a statute or a notification of the Government, of which constructive knowledge may be attributed to one and all. Even if it were, the Rules of 2011 being adopted by the Jal Nigam and the Scheme being one to regulate and effectuate the rights of an employee or ex-employee to claim medical reimbursement, the terms of the Scheme must receive a liberal construction that advances its purpose. It cannot and ought not to be construed strictly against the employee denying him/her the benefit of its coverage. The true test is if the employee's or the ex-employee's claim by evidence and upon verification is a genuine case, where the facility of medical reimbursement ought to be extended.

12. The present case is one where the petitioner is a 70 year old retired Assistant Engineer and if the papers of his treatment that he has annexed at Pages 15 to 49 of the paper-book, are to be believed, he appears to be a cancer patient, who has been extensively treated at the MPMMCC, a unit of Tata Memorial Centre, Mumbai. There are documents of the expenses incurred in the treatment as well. These are always open to verification by the respondents, which they could and must do before they accept the petitioner's claim for reimbursement. In a situation like the present case, if the petitioner is indeed a cancer patient, who in his old age, has incurred substantial expense for treating cancer, this Court does not think that the few technical lapses in adhering to the requirements of Paragraph No.3.3 of the Scheme, carried in the memo dated 28.06.2016, should result in the rejection of his claim.

13. This Court must also remark that apart from the other technicalities envisaged under Paragraph No.3.3, there is also a stand taken on behalf of the respondents that the petitioner has not demonstrated the non-availability of treatment for his disease in any government hospital or referring institution. This Court thinks that faced with a disease, as dreadful as cancer, where there are no second chances that can be taken, trusting oneself to the care of the MPMMCC, which is a unit of the Tata Memorial Centre, Mumbai is an unexceptionable course. The formality of proving that the treatment is not available in a government hospital, must also be considered liberally and dispensed with, where facts warrant. Once the respondents accept the liability for medical reimbursement, and there is a reasonable safe treatment available with a reputed specialized institution, treating cancer, which is a unit of the Tata Memorial Centre, Mumbai, to say that there is no certification about treatment for the disease not being available with a government hospital, is a stand that can hardly be accepted.

14. This Court is also mindful of the fact that *ex facie* the petitioner has not come up with a claim for his treatment, that is extravagant or inflated. It seems to be a reasonable expense for treatment of the deadly disease. This Court would not have hesitated to issue a *mandamus* straight away, ordering the respondents to reimburse the medical expenses, but happily in the personal affidavit filed by the Principal Secretary, Urban Development

Department, Government of U.P., Lucknow, there is a very candid stand taken, which we do appreciate. In Paragraph Nos.9 and 10 of the personal affidavit, it is averred:

"9. That it has also been assured in the attached report of the Managing Director, U.P. Jal Nigam (Urban) that if the claim of medical reimbursement is submitted again by the petitioner on the prescribed proforma, its examination will be done as per the provisions of office 28.06.2016 dated 28.06.2016 thereafter, further memorandum dated proceeding will be initiated.

10. That after proper consideration of the documents of the case, answering respondent no.1 is of the opinion that while the office memorandum dated 28.06.2016 regarding the permissibility of reimbursement of medical expenses with the approval of the Board of Directors of U.P. Jal Nigam is effective, then the entire reimbursement claims should be examined under the provisions of the said office memorandum and not under another office memorandum dated 13.07.2020 issued by the Managing Director without making any reference of the said office memorandum dated 28.06.2016. As assured in the report of U.P. Jal Nigam (Urban), examination of the petitioner's claim will be done under the provisions of the office memorandum dated 28.08.2016, if submitted again, necessary instructions have also been given to the Managing Director, Uttar Pradesh Jal Nigam (Urban) by the Government on 14.07.2023 itself. Copy of the instruction issued by the Government is being filed herewith and marked as **Annexure No. PA-2** to this affidavit."

15. There is also on record memo No. 246/9-3-2023 issued by the Special Secretary, Government of U.P. and addressed to the Managing Director, U.P. Jal Nigam (Urban), Lucknow. This memo has been issued specifically with reference to the petitioner's case and in deference to the directions issued by this Court in the present writ petition at interlocutory stages. The relevant part of the memo dated 14th July, 2023 reads:

"3. प्रकरण से सम्बन्धित अभिलेखों के अवलोकनोपरान्त यह स्थिति सामने आई है कि याची (श्री राम प्रकाश द्विवेदी) के चिकित्सा व्यय प्रतिपूर्ति दावे का परीक्षण उ0प्र0 जल निगम के निदेशक मण्डल के अनुमोदनोपरान्त निर्गत का0ज्ञा0 दिनांक 28.06.2016 के प्रावधानों के अर्न्तगत किया जाना अपेक्षित है। अतः तदनुसार आवश्यक कार्यवाही कराने का कष्ट करें । साथ ही चिकित्सा व्यय प्रतिपूर्ति के परिप्रेक्ष्य में प्रबन्ध निदेशक, उ0प्र0 जल निगम के हस्ताक्षर से निर्गत कार्यालय ज्ञाप दिनांक 13.07.2020 की अद्यतन प्रासंगिकता पर भी समग्र रूप से विचार कर आवश्यक कार्यवाही कराई जाय, विशेष रूप से यह देखते हुए कि कार्यालय ज्ञाप दि0 28.06.2016 में निजी चिकित्सालयों में भी चिकित्सा की अनुमन्यता की गई है।"

16. Looking to the stand of the Principal Secretary and the Government in the matter, this Court is of opinion that ends of justice would be met by requiring the petitioner to submit his claim afresh in the prescribed proforma, annexed as Schedule 'ख' to office memo No.2126/एसी.लेखा. (सा.)/चि.प्रतिपूर्ति/309 dated 28.06.2016, issued by the Managing Director, U.P. Jal Nigam, Lucknow **within a month** of the date of receipt of a certified copy this judgment to the Chief Engineer (Prayagraj Zone), U.P. Jal Nigam (Urban), Prayagraj. The same shall be transmitted

forthwith to the competent Authority, who will take appropriate steps to consider sanctioning medical reimbursement to the petitioner, bearing in mind the guidance in this judgment and the stand taken in Paragraph Nos.9 and 10 of the Principal Secretary's affidavit dated 16.07.2023. The petitioner's claim shall be disposed of within a period of one month of the date that it is submitted by the petitioner to the Chief Engineer, as directed hereinabove.

17. This writ petition is **allowed in part** in terms of the above orders.

18. There shall be no order as to costs.

(2024) 2 ILRA 814
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2024

BEFORE

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

Writ - A No. 8963 of 2023

Anjesh son of Late Radhey Giri ...Petitioner

Versus

F.C.I. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Kumar Asthana, Sri Pradeep Kumar Srivastava

Counsel for the Respondents:
Hari Narayan Singh, Sri Santosh Kumar Mishra

A. Compassionate Appointment — Dying in Harness — Date of death relevant — Later declaration of "dying cadre" irrelevant — Scheme applicable is one in force on date of death.
Held: The dependent's right to be considered for compassionate appointment crystallizes on the date of death of the employee in harness. The subsequent declaration of the employee's cadre as a "dying cadre" cannot extinguish that right. The relevant scheme is the one in force on the date of death, not one subsequently introduced or modified.(Paras 16, 17, 19, 20, 21, 22, 25)

B. Food Corporation of India — Departmental Labour System — Declared dying cadre w.e.f. 03.01.2020 — Father of petitioner died in 2009 — Claim already recommended by Committee in 2010 — Petitioner's case must be considered under scheme applicable on 21.01.2009.

Held: Since the employee died much before the cadre was declared dying, and the Compassionate Appointment Committee had already found the petitioner's case fit in 2010, the declaration of the cadre as dying in 2020 cannot defeat petitioner's claim. Respondents' refusal on this ground is unsustainable.(Paras 21, 22, 24, 25, 26)

C. Appointment on Compassionate Ground — Object — To provide immediate succour to bereaved family — Economic crisis relevant — Cadre classification irrelevant.
Held: The essential object is to relieve sudden financial hardship of dependents. The fact that the deceased employee belonged to a cadre later abolished or declared dying is wholly irrelevant. What matters is that a scheme for compassionate appointment was in force at the time of death. (Paras 17, 19, 20, 26)

RESULT

Writ Petition Allowed — Mandamus issued to respondents to consider petitioner's case for compassionate appointment within six weeks in accordance with law and guidance contained in this judgment. No order as to costs.

List of Cases cited:

1. Secretary to Government Department of Education (Primary) Vs Bheemesh alias Bheemappa, (2021) 20 SCC 707.

2. Court on its Own Motion Vs U.O.I., (2016) 2 Mah LJ 647.

3. Food Corporation of India Workers Union Vs U.O.I., SLP (C) No.19218 of 2016, order dated 31.07.2017 (SC).

4. Bina Devi Vs St. of H.P., 2010 SCC OnLine HP 4642.

5. Bechan Giri Vs U.O.I., 2023 SCC OnLine All 441.

6. St. of M.P.Vs Amit Shrivas, (2020) 10 SCC 496.

7. St. of M.P.Vs Ashish Awasthi, AIR Online 2021 SC 1047.

8. Indian Bank Vs Promila, (2020) 2 SCC 729.

9. N.C. Santhosh Vs St. of Karnataka, (2020) 7 SCC 617.

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

1. The petitioner, Anjesh is a son of the late Radhey Giri, an employee of the Food Corporation of India. Radhey Giri died in harness on 21.01.2009, leaving behind him his widow, his son and two daughters. Upon demise of Radhey Giri, the petitioner's mother Smt. Sona Devi, moved an application before the District Manager, Food Corporation of India, Allahabad, seeking compassionate appointment for her son on account of the sudden demise of her husband. The petitioner himself made an application, seeking compassionate appointment, to the General Manager, Food Corporation of India, Lucknow on 15.06.2009. The petitioner says that he is a graduate and has earned his degree of Bachelor of Science in the year 2014. The petitioner submitted his claim in the prescribed format in the month of September, 2009 before the Food Corporation of India, District Office Agra, a copy of which is annexed as Annexure No.5 to the writ petition. The Regional Manager, Food Corporation of India, Lucknow, who is respondent No.3 to this writ petition, by a letter dated 17th December 2009 directed the petitioner to get his health certificate from the Chief Medical Officer, Allahabad. The medical examination was done on 23.12.2009 and a certificate of that date issued.

2. The Committee, competent to assess the petitioner's claim for compassionate appointment, examined his case and submitted a report dated 13.01.2010, opining that the family are living in hardship and a compassionate appointment is very necessary. It appears that taking into account the petitioner's claim, the recommendations of the Committee, besides similar claims by others, a roster was drawn up by the District Manager, Food Corporation of India, District Allahabad, placing the petitioner's name at serial No.15, showing the date of his application as 25.02.2010. The roster serial number indicated was 14. The roster aforesaid was forwarded by the District Manager to the Assistant General Manager (Industrial Relation), Food Corporation of India, Lucknow for necessary action on 18.06.2013. A reminder dated 24.02.2014 was sent by the District Manager, Food Corporation of India, Allahabad to the Assistant General Manager (Industrial Relation), Food Corporation of India, Lucknow.

3. It is the petitioner's case that *vide* letter dated 20.10.2014, the District Manager, FCI, Allahabad intimated the Assistant General Manager (Industrial Relation-Labour), Food Corporation of India, Lucknow about the roster position of claims pending before him for compassionate appointment. It is averred that in the office of the District Manager, Food Corporation of India, Allahabad, no

compassionate appointment was given to any candidate. An information was secured by one Satyapal Singh from the Manager (IR-L), acting on behalf of the Assistant General Manager (IR-L), Food Corporation of India, Regional Office, Lucknow, that there were two posts available to be filled up on compassionate ground with the Food Storage Depot, Naini, Allahabad. At the same time, *vide* a letter dated 21.12.2016, the Manager (IR-L) in the office of the Assistant General Manager (IR-L) informed the petitioner that for the present, there are no posts available to be filled up on compassionate basis in the Corporation's depot at Naini, Allahabad.

4. The petitioner has specifically pleaded in Paragraph No.21 of the writ petition that on account of his father's sudden death in harness, the family is in distress and sent a representation dated 27.12.2016 to the Chairman, Food Corporation of India, New Delhi, as well as a representation dated 08.03.2017 to the Regional Manager, Food Corporation of India, Lucknow, requesting that the petitioner's case for compassionate appointment be considered. The petitioner then received a memo dated 11.01.2017 from the Assistant General Manager (IR-L), Food Corporation of India, Lucknow, informing him that for every depot at the depot level, a roster had been prepared for compassionate appointment. Out of the available vacancies, 5% are set apart for compassionate appointment, to which appointments are made according to the roster. The letter also says that at the Naini depot of the Corporation at Allahabad, the petitioner's name stands at the 14th place of the roster. It is also said in the memo that in the entire State, a roster for compassionate appointments for the DLS/ DPS labourers was being drawn up. After the process was over, the compassionate appointments would be made according to the new roster against the available vacancies.

5. The respondent General Manager (IR-L) reiterated his stand about the petitioner's roster position at the FSD, Allahabad by his memo dated 23.03.2017. The petitioner again received a memo dated 09.08.2017 from the Regional Office of the Food Corporation of India at Lucknow, saying that there was a 5% ceiling on the total number of available posts against which compassionate appointment could be made, and that considering the petitioner's roster position, there was no post available for him. The petitioner then represented the matter further to the General Manager (IR) on 03.04.2023, sending the communication by registered post with a request that his case had already been recommended by the Committee, but no action taken, which may now be considered. Finding inaction and the stand of the respondent, Food Corporation of India (for short, 'the Corporation'), to be destructive of the purpose of compassionate appointment, the petitioner instituted the present writ petition on 16.05.2023, praying that a *mandamus* be issued, commanding the respondents to appoint the petitioner on compassionate grounds.

6. In the short counter affidavit that was filed in Court on 12.07.2023, a stand was taken that the Departmental Labour System has been abolished, of which the deceased Radhey Giri was a member.

7. This Court required the respondents to file a detailed counter affidavit, which was filed on 19.07.2023. A rejoinder was filed to it on 30.07.2023.

8. The respondents, Corporation have taken a stand that compassionate appointment in their establishment is governed by the 'Scheme for Compassionate Appointment' enforced by the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) *vide* memorandum, bearing F No. 14014/02/2012--Estt. (D) dated 16th January, 2013. This office memorandum has been issued by an Under Secretary to the Government of India. The Scheme for Compassionate Appointment (for short, 'the Scheme') has been pleaded by the respondent Corporation to say that compassionate appointments can be made up to a maximum of 5% of the available vacancies, falling under direct recruitment quota, in any Group-C posts. The position in this regard will be considered in moreful detail with reference to the Scheme during the course of this judgment.

9. In Paragraph No.5 of the short counter affidavit, it is said that the Nagpur Bench of the Bombay High Court had taken cognizance of a news item, published in the Times of India, that the Departmental Labour System workers were being paid salary, running into more than Rs.4 lacs a month. The public interest litigation, which was assigned PIL No.84 of 2014 [**Court on its Own Motion v. Union of India and others, (2016) 2 Mah LJ 647**], was disposed of by the Nagpur Bench of the Bombay High Court *vide* judgment dated 20.11.2015, issuing a slew of directions to the Government of India to consider phasing out the Departmental Labour System in order to spare the public exchequer of money wasted on the system, that could 'be utilized for better purposes', to borrow the words of their Lordships. The following directions were issued by the Division Bench to the Government of India:

"(i) The Government of India is directed to decide the representation made by the Food Corporation of India for grant of exemption under the provisions of Section 31 of the said Act within a period of one month from today, in the light of observations made by us hereinabove within a period of one month from today.

(ii) The Government of India shall decide the issue regarding denotification of the depots of the Food Corporation of India, in respect of which notification is issued u/s.10 of the said Act, within a period of six months from today, in the light of observations made by us hereinabove and the report of M/s.Deloitt Consultancy and the report of High Level Committee appointed by the Government of India itself.

(iii) We clarify that the respondent/Food Corporation of India would be entitled to transfer the services of departmental labourers from one depot to another subject to protecting their salary and all other service conditions.

(iv) We also clarify that the respondent/ Corporation would be at liberty to implement its policy of change in the Scheme of incentives.

(v) The Government of India shall also take a decision regarding abolition of system of departmental labourers in a phased manner or absorbing their services in other establishments as recommended by the High Level Committee."

10. A petition for special leave to appeal bearing SLP(C) No.19218 of 2016, Food Corporation of India Workers Union v. Union of India, was preferred against the judgment, about which it is said in

Paragraph No.6 of the short counter affidavit that it was dismissed by the Supreme Court *vide* order dated 31.07.2017. It is further on pleaded in Paragraph No.7 of the short counter affidavit that in compliance with the orders of the Bombay High Court, the Ministry of Labour & Employment, Government of India have granted exemption to the Corporation from the applicability of the prohibitory notifications issued under Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970, and, in consequence, permitting the Corporation to engage contract labour in the notified depots. The exemption notification is renewed by the Government after every two years, as the pleading goes.

11. It is further said that acting on the judgment of the Bombay High Court, last mentioned, the Ministry of Labour & Employment are actively considering de-notification of the notified depots of the Corporation. It is also pleaded that in compliance with the judgment of the Bombay High Court, last referred, the Ministry of Consumer Affairs, Food and Public Distribution, Government of India *vide* O.M. No.18013/2/2018-FC-3 dated 03.01.2020, have declared the Departmental Labour System a dying cadre. The Corporation Headquarters had communicated the said decision to the Field Officers *vide* circular dated 08.01.2020, clearly saying that there shall be no further employment under the Departmental Labour System.

12. In Paragraph No.10 of the short counter affidavit, a specific case has been pleaded to the effect that in view of declaration of the Departmental Labour System, a dying cadre, appointment of family members of a deceased employee, who was part of that system, on compassionate ground, has been placed in abeyance *vide* Corporation Headquarters circular dated 28.09.2020. It is then said that *vide* Circular No. IR(L)/4(9)/2021/ dated 28.07.2021, it was clarified by the Corporation Headquarters that while appointment on compassionate grounds to dependents of deceased employees, serving under the Departmental Labour System, would continue to be in abeyance, but appointment on compassionate basis in regard to Direct Payment System workers may be considered as per existing policy. About the petitioner's father, it is said that he was employed under the Departmental Labour System and died in the year 2009. The petitioner's name was registered in the compassionate appointment roster at the Divisional Office, Allahabad. However, the petitioner could not be appointed for want of vacancies. It is then said that as the Departmental Labour System has been declared a dying cadre, there exists no vacancy in the said system. The workers, already inducted in the said system, are functioning on supernumerary posts and the system will die out or vanish with the retirement, death or resignation of the existing workers in course of time. The Board of Directors of the Corporation have already approved the voluntary retirement scheme for workers in the Departmental Labour System, and the same will be implemented immediately after receipt of approval of the Government of India. It is pleaded that there is no scope for inducting or appointing any new worker under the said system, since such an appointment would mean that the system would never die out and the object of declaring it a dying cadre defeated.

13. The stand further taken in Paragraph No.14 of the short counter

affidavit is that the Corporation are examining the possibility of considering the pending applications of the family members of deceased employees, functioning under the Departmental Labour System as on 03.01.2020 under the 'Direct Payment System' or the 'No Work No Pay System', subject to fulfillment of necessary conditions under the policy for compassionate appointment. The said system is also a regular labour system, which is current in the Corporation, and not being phased out.

14. In the counter affidavit subsequently filed, the basic stand taken is the same as that in the short counter affidavit, apart from certain pleadings in answer to the writ petition, of which due note would be taken during course of this judgment.

15. Heard Mr. Pradeep Kumar Srivastava, Advocate, holding brief of Mr. Pankaj Kumar Asthana, learned Counsel for the petitioner and Mr. S. K. Mishra, learned Counsel appearing on behalf of the respondents.

16. It is submitted by the learned Counsel for the petitioner that compassionate appointment had to be considered for him by the Corporation, according to the rules or the scheme in force when his father passed away, and not the scheme or rules that have been later on introduced. He has placed reliance for the purpose on the decision of the Supreme Court in **Secretary to Government Department of Education (Primary) and others v. Bheemesh alias Bheemappa, (2021) 20 SCC 707**, where it has been held in the context of the date of applicability of a scheme for compassionate appointment or a modified scheme, that it ought to apply with reference to the date of death of the employee in harness and not any other date, like the date when the dependent moves for consideration or the application is considered. It is also argued by the learned Counsel for the petitioner, Mr. Pradeep Kumar Srivastava, that the fact that the deceased employee was a member of the Departmental Labour System, which has now been declared a dying cadre, is not at all relevant to the consideration of his right to compassionate appointment. He submits that the petitioner's case for compassionate appointment has to be considered against one or the other post in the establishment of the Corporation, suitable to his qualification that is part of a living cadre. In the submission of the learned Counsel for the petitioner, it is misconceived on the respondents' part to relate or identify the petitioner's claim for compassionate appointment to the cadre to which his father belonged and then refuse to consider it by saying that his father's cadre is a dying one.

17. The object of compassionate appointment is to bring immediate relief to the dependent family members of an employee, who dies in harness. The fact that the deceased belonged to a cadre, which was declared dying, even on the date of his demise, would not affect the rights of the dependents under the Dying in Harness Rules or the scheme in force in the establishment to seek compassionate appointment, because the purpose of such an appointment is quite unreferable to the fact of abolition of the deceased employee's cadre.

18. Mr. S.K. Mishra, learned Counsel for the respondents, on the other hand, has refuted the submissions advanced by the learned Counsel for the petitioner and

submits that his case was considered according to the scheme after his father's demise. He was placed on the compassionate appointment roster, but within the ceiling limit, no posts were available to appoint him. Later on, the Departmental Labour System, to which the petitioner's father belonged, has been declared a dying cadre, and under the schemes subsequently declared, dependents of employees of that cadre, who died in harness at whatever time, have limited avenues of consideration for appointment on compassionate basis. The petitioner can only be considered, according to the Corporation's policy for compassionate appointment, under the Direct Payment System as he is the dependent of a deceased employee of the Departmental Labour System, whose claim was there on 03.01.2020.

19. Upon hearing learned Counsel for the parties, this Court thinks that there is no force in the stand taken by the respondents that because the Departmental Labour System, of which the petitioner's father was a member, has now been declared a dying cadre, the petitioner's case for compassionate appointment cannot be considered for that reason alone. The fact that the employee, whose dependent claims appointment, belongs to a dying cadre, is completely irrelevant to the object of compassionate appointment, provided there is in force a scheme for such appointment on the date of death of the employee in harness. Why this is so, can be understood like this. The purpose of compassionate appointment is to extend an immediate helping hand to members of a deceased employee's family, who passes away in harness, plunging them into an unforeseen economic crisis. It is a mechanism to enable the survivors to swim through the tragedy.

20. The other principle of equal force is that compassionate appointment is not an inherent right, but the creature of a statutory rule or a scheme framed for the purpose and enforced in the employer's establishment. Now, if the deceased on the date of his demise in harness was the holder of a post that was already a dying cadre, the deceased would have certainly survived the abolition of the cadre until the time of his retirement, resignation from service or termination of employment in some other manner known to law. He would, while a member of a dying cadre, stay in service until the determination of his employment. He would continue to support his dependent family members until he exited employment. Therefore, the fact that an employee belonged to a dying cadre, when he died in harness, is quite irrelevant to his dependents' right to seek compassionate appointment, provided, of course, it is there under a scheme framed for the purpose or rules. In this connection, reference may be made to a Bench decision of the Himachal Pradesh in **Bina Devi v. State of H.P. and another, 2010 SCC OnLine HP 4642.** In **Bina Devi** *(supra)*, V.K. Ahuja, J., speaking for the Division Bench, observed:

"2. It appears that the petitioner is on the third round of litigation. The application was rejected on the only ground that the husband of the petitioner was an employee of Nahan Foundry and the same had been declared as a dying cadre. For one thing, it has to be seen that policy regarding compassionate appointment as promulgated by the government on 18th January, 1990 and clarified thereafter on several occasions, does not make any difference as

to whether a government servant is in a dying cadre or not. The only expression used in the policy is 'government servant'. There is no dispute that the husband of the petitioner was a government servant at the time of his death. In other words, it is a case of an employee dying while in government service. That apart, it is seen from Annexure P-8, order, dated 23rd December, 1989 in the matter of taking over of Nahan Foundry that "The employee taken over from erstwhile Nahan Foundry will be integrated in the cadre of corresponding categories of employees of PWD/IPH subject to provision of para-7."

21. There is another feature added to this case, different from one where a member of a cadre, that is declared dying, dies in harness, leaving behind an eligible dependent for compassionate appointment under a scheme or rule in force in the establishment. The feature in this case is that when the petitioner's father died, that is to say, on 21.01.2009, the Departmental Labour System was not at all a dying cadre. It was declared so by the Government of India O.M. dated 03.01.2020 pursuant to the judgment of the Bombay High Court in **Court on its Own Motion** *(supra)*. The petitioner had claimed compassionate appointment promptly and his case was found fit by the Compassionate Appointment Committee by the report dated 13.01.2010. This was a time when the Departmental Labour System was not at all a dying cadre. The petitioner's right, if it can be called that, to be considered for compassionate appointment, would, therefore, crystallize on the date of his father's demise and the date when he was found fit to be appointed on compassionate ground by the Compassionate Appointment Committee. The supervening declaration of the Departmental Labour System, under which the petitioner's father was working when he died, would, therefore, not affect the petitioner's right at all. Therefore, the contention put forward on behalf of the Corporation refuting the petitioner's claim for consideration of appointment on compassionate basis on ground that his father belonged to the Departmental Labour System, later on declared a dying cadre, has to be rejected on double count.

22. Now, the other question that particularly survives for consideration is: If the petitioner's case is to be considered according to the Scheme, that was in force w.e.f. 16th January, 2013, or one that is now in force in accordance with the Corporation Headquarters Circular dated 28.07.2021, which the respondents say would apply to the petitioner's case; or, the petitioner's case is to be considered according to the scheme that was in force when his father died in harness? There is absolutely nothing said by parties about the Scheme that was in force governing compassionate appointment prior to the one dated 16th January, 2013. At the same time, it is not the respondents' case either that there was no scheme for compassionate appointment in force at the time when the petitioner's father died. The question whether the dependent of an employee, who dies in harness, would be entitled to have his case considered according to the scheme or rules in force on the date when the employee died, or according to the scheme or rules that are in force at a later date, say when the application for appointment is moved by the dependent, or when it actually comes up for consideration by the competent Authority, fell for consideration of this Court in **Bechan Giri v. Union of India and others, 2023 SCC OnLine All 441**. In **Bechan Giri** *(supra)*, this Court had the

guidance of the Supreme Court in **Bheemesh alias Bheemappa** *(supra)*, which has clinched this issue. It would nevertheless be of profit to refer to **Bechan Giri**, where I held:

"24. The issue whether the claim of a dependent under the dying in harness rules would be considered in accordance with the Rule or the Scheme in force on the date of death of the employee in harness or at a subsequent date, like the one when a dependent makes an application, or the application comes up for consideration, was the subject matter of very elaborate guidance by their Lordships of the Supreme Court in *Secretary to Govt. Department of Education (Primary) v. Bheemesh alias Bheemappa*, AIR 2022 SC 402. The facts giving rise to what was held in *Bheemesh alias Bheemappa* (supra) may best be recounted in their Lordships' words, which read:

"8. Admittedly, the appointment on compassionate grounds in the State of Karnataka is governed by a set of Rules known as Karnataka Civil Services (Appointment on Compassionate grounds) Rules, 1996, issued in exercise of the powers conferred by Section 3(1) read with Section 8 of the Karnataka State Civil Services Act, 1978. The Rules as they stood, on the date on which the sister of the respondent died in harness, did not include an unmarried brother, within the definition of the expression "dependant of a deceased Government servant" under Rule 2(1)(a) of the said Rules vis-a-vis a deceased female unmarried Government servant. But it was only by way of an amendment proposed under a draft Notification dated 20.06.2012 which was given effect under the final Notification bearing No. DPAR 55 SCA 2012, Bangalore dated 11.07.2012 that an unmarried brother of a deceased female unmarried Government servant was included within the definition. There is no dispute about the fact that the sister of the respondent died as an unmarried female Government servant, but on 8.12.2010, before the amendment was made to the Rules."

25. In answering the issue whether the amended rules that came into force after the death of the government servant involved, would have retrospective operation to enure for the benefit of the dependent unmarried brother of the deceased unmarried female government servant in that case, or the amendment would apply prospectively with effect from the date when it came into force, it was held by their Lordships:

"9. To hold that the amendment will have retrospective application, the High Court as well as the Tribunal relied upon a Judgment of the Division Bench of the High Court of Karnataka in *State of Karnataka v. Akkamahadevamma*, decided on 18.11.2010 in Writ Petition Nos. 20914 of 2010 etc. : (Reported in (2011) 2 AIR Kant R 118). But it should be pointed out at the outset that the Judgment of the High Court in Akkamahadevamma arose out of an amendment to the Karnataka Civil Services (General Recruitment) (57th Amendment) Rules, 2000. By the Amendment made on 30.03.2010 to the said Rules, grandson, unmarried granddaughter, daughter in law, widowed daughter and widowed granddaughter were included within the definition of the expression "members of the family" under Explanation-2 of Rule 9. But the amendment so made on 30.03.2010 expanding the definition of the expression "members of the family" was triggered by an Order of the Tribunal which held the unamended rule to be unconstitutional. It is in that context that the amendment made on

30.03.2010 to the Rules issued on 23.11.2000 was held by the High Court to be retrospective in nature. It must also be remembered that the expanded definition was with respect to project displaced persons. The right conferred upon a project displaced person stands on a different footing from the entitlement of a person to seek appointment on compassionate grounds. In any case an amendment brought forth, on the basis of a Judgment of a Court or Tribunal, holding the exclusion of certain categories of persons to be violative of Articles 14 and 16 of the Constitution, may receive an interpretation such as the one proposed by the High Court in Akkamahadevamma. But the same may not be applicable to amendments of the nature that we are concerned with in this case.

10. x x x

11. Be that as it may, Sh. Jayanth Muthraj, learned senior counsel appearing for the respondent pleaded that there are two lines of Judgments of this Court, one taking the view that the Rules/Scheme in force on the date of death of the Government servant would govern the field and the other holding that the Rules/scheme in force on the date of consideration of the claim would govern the field. Unable to reconcile this conflict, a two Member Bench of this Court, by its Order dated 08.02.2019 in *State Bank of India v. Sheo Shankar Tewari1*, has referred the matter for consideration by a larger Bench. Sh. Jayanth Muthraj, learned senior counsel therefore made a request that the present appeal may either be placed along with the reference or await a decision on the above reference.

12. But we do not consider it necessary to do so. It is no doubt true that there are, as contended by the learned senior Counsel for the respondent, two lines of decisions rendered by Benches of equal strength. But the apparent conflict between those two lines of decisions, was on account of the difference between an amendment by which an existing benefit was withdrawn or diluted and an amendment by which the existing benefit was enhanced. The interpretation adopted by this Court varied depending upon the nature of the amendment. This can be seen by presenting the decisions referred to by the learned senior counsel for the respondent in a tabular column as follows:

26. There is an elaborate tabulated reference to six cases decided by the Supreme Court, where seemingly varying views have been expressed on the issue whether the scheme in force at the time of death of the deceased employee would apply for the purpose of consideration of the dependent's claim for compassionate appointment or the Rule/Scheme in force subsequently enforced, after the death of the government servant, at the time when the application for compassionate appointment is made or comes up for consideration. For brevity's sake, the table set out in Paragraph No. 12 of the report in **Bheemesh alias Bheemappa** is not being quoted.

27. Two other cases after the tabulated analysis have been considered in **Bheemesh alias Bheemappa**, where it is observed:

"13. Apart from the aforesaid decisions, our attention was also drawn to the decision of the three member Bench in *State of Madhya Pradesh v. Amit Shrivas*2. But that case arose out of a claim made by the dependant of a deceased Government servant, who was originally appointed on a work charged establishment and who later claimed to have become a permanent employee. The Court went into the distinction between an employee with a

permanent status and an employee with a regular status. Despite the claim of the dependant that his father had become a permanent employee, this Court held in that case that as per the policy prevailing on the date of death, a work charged/contingency fund employee was not entitled to compassionate appointment. While holding so, the Bench reiterated the opinion in *Indian Bank v. Promila*.

14. The aforesaid decision in *Amit Shrivas* (supra) was followed by a two member Bench of this Court in the yet to be reported decision in the *State of Madhya Pradesh v. Ashish Awasthi* decided on 18.11.2021 : (Reported in AIR OnLine 2021 SC 1047)."

28. After noticing these seemingly divergent opinions on the issue, the Court has proceeded to observe in **Bheemesh alias Bheemappa**:

"15. Let us now come to the reference pending before the larger Bench. In *State Bank of India v. Sheo Shankar Tewari* (supra), a two member Bench of this Court noted the apparent conflict between *State Bank of India v. Raj Kumar and MGB Gramin Bank* on the one hand and *Canara Bank v. M. Mahesh Kumar* on the other hand and referred the matter for the consideration of a larger Bench. The order of reference to a larger Bench was actually dated 8.02.2019.

16. It was only after the aforesaid reference to a larger Bench that this Court decided at least four cases, respectively in (i) *Indian Bank v. Promila*; (ii) *N.C. Santhosh v. State of Karnataka*; (iii) *State of Madhya Pradesh v. Amit Shrivas*; and (iv) *State of Madhya Pradesh v. Ashish Awasthi*. Out of these four decisions, N.C. Santosh (supra) was by a three member Bench, which actually took note of the reference pending before the larger Bench.

17. Keeping the above in mind, if we critically analyse the way in which this Court has proceeded to interpret the applicability of a new or modified Scheme that comes into force after the death of the employee, we may notice an interesting feature. In cases where the benefit under the existing Scheme was taken away or substituted with a lesser benefit, this Court directed the application of the new Scheme. But in cases where the benefits under an existing Scheme were enlarged by a modified Scheme after the death of the employee, this Court applied only the Scheme that was in force on the date of death of the employee. This is fundamentally due to the fact that compassionate appointment was always considered to be an exception to the normal method of recruitment and perhaps looked down upon with lesser compassion for the individual and greater concern for the rule of law.

18. If compassionate appointment is one of the conditions of service and is made automatic upon the death of an employee in harness without any kind of scrutiny whatsoever, the same would be treated as a vested right in law. But it is not so. Appointment on compassionate grounds is not automatic, but subject to strict scrutiny of various parameters including the financial position of the family, the economic dependence of the family upon the deceased employee and the avocation of the other members of the family. Therefore, no one can claim to have a vested right for appointment on compassionate grounds. This is why some of the decisions which we have tabulated above appear to have interpreted the applicability of revised Schemes differently, leading to conflict of opinion. Though there is a conflict as to whether the Scheme in force on the date of death of the

employee would apply or the Scheme in force on the date of consideration of the application of appointment on compassionate grounds would apply, there is certainly no conflict about the underlying concern reflected in the above decisions. Wherever the modified Schemes diluted the existing benefits, this Court applied those benefits, but wherever the modified Scheme granted larger benefits, the old Scheme was made applicable.

19. The important aspect about the conflict of opinion is that it revolves around two dates, namely, (i) date of death of the employee; and (ii) date of consideration of the application of the dependant. Out of these two dates, only one, namely, the date of death alone is a fixed factor that does not change. The next date namely the date of consideration of the claim, is something that depends upon many variables such as the date of filing of application, the date of attaining of majority of the claimant and the date on which the file is put up to the competent authority. There is no principle of statutory interpretation which permits a decision on the applicability of a rule, to be based upon an indeterminate or variable factor. Let us take for instance a hypothetical case where 2 Government servants die in harness on January 01, 2020. Let us assume that the dependants of these 2 deceased Government servants make applications for appointment on 2 different dates say 29.05.2020 and 02.06.2020 and a modified Scheme comes into force on June 01, 2020. If the date of consideration of the claim is taken to be the criteria for determining whether the modified Scheme applies or not, it will lead to two different results, one in respect of the person who made the application before June 1, 2020 and another in respect of the person who applied after June 01, 2020. In other words, if two employees die on the same date and the dependants of those employees apply on two different dates, one before the modified Scheme comes into force and another thereafter, they will come in for differential treatment if the date of application and the date of consideration of the same are taken to be the deciding factor. A rule of interpretation which produces different results, depending upon what the individuals do or do not do, is inconceivable. This is why, the managements of a few banks, in the cases tabulated above, have introduced a rule in the modified scheme itself, which provides for all pending applications to be decided under the new/modified scheme. Therefore, we are of the considered view that the interpretation as to the applicability of a modified Scheme should depend only upon a determinate and fixed criteria such as the date of death and not an indeterminate and variable factor.

20. Coming to the case on hand, the employee died on 8.12.2010 and the amendment to the Rules was proposed by way of a draft notification on 20.06.2012. The final notification was issued on 11.07.2012. Merely because the application for appointment was taken up for consideration after the issue of the amendment, the respondent could not have sought the benefit of the amendment. The Judgment of the Division Bench of the Karnataka High Court in Akkamaha-devamma on which the Tribunal as well as the High Court placed reliance, was not applicable to the case of compass-ionate appointments, as the amendment in Akkamahadevamma came as a result of the existing rule being declared to be ultra vires Articles 14 and 16 of the Constitution."

29. Here, there is no issue that in the Scheme in question, there is no provision at all about consideration of

pending applications for compassionate appointment made prior to the introduction of the Scheme w.e.f. 15th March, 2019. This is logically so because the present case is not one where there was apparently an older scheme granting some kind of limited right to a consideration for compassionate appointment in force or a right to an ex-gratia payment, whereunder an application could be made by the dependent of a deceased employee. What appears from the facts here is that prior to 15th March, 2019, there was no scheme at all in the establishment of the respondent Bank in force extending any kind of a right to compassionate appointment, howsoever limited or circumscribed. The right to compassionate appointment upon introduction of the Scheme w.e.f. 15th March, 2019 was a new found right. In the absence, therefore, of any provision in the Scheme for whatever reason to provide rights for dependents of an employee, who died prior to its introduction, asking for compassionate appointment, there could be no right to compassionate appointment. It has already been pointed out that the right to compassionate appointment is not an inherent right, but one that flows from a Rule or Scheme being in force at the time of the death of an employee in harness. There could be more reason to supply in aid of that interpretation. Once it is held that the right to compassionate appointment is not inherent, but the creature of a Rule, the right of whatever kind it is, originates and culminates on the date of death of the employee in harness. There is no fact surviving the death of an employee in harness on the foot of which, a Scheme or Rule for compassionate appointment introduced at a later date, may afford the dependent a right to consideration. Of course, that kind of a right may arise if the Scheme provides for that right on its own terms. Here, the words employed in Clause 8.1, or for that matter Clause 8.2 of the Scheme, do not envisage cognizance of cases of dependents, where death of an employee in harness has taken place before the Scheme was enforced in the Bank. The employment of the expression in Clause 8.1 "normally be considered upto five years from the date of death" refers to the period of five years of death on a date when the Scheme was already in force in the Bank; not five years or a little short of that time antedating the introduction of the Scheme."

23. Much unlike **Bechan Giri**, in this case, there was definitely a scheme about which there is no cavil between parties regarding compassionate appointment to dependents of employees of the Corporation, including those working under the Departmental Labour System when the petitioner's father died on 21.01.2009.

24. A perusal of the writ petition shows that the petitioner had made very early and consistent efforts to seek appointment and his case was found fit for appointment by the Compassionate Appointment Committee on 13.01.2010. In the counter affidavit filed on behalf of the Corporation, the contents of Paragraph No.13 of the writ petition have not at all been denied. In Paragraph No.18, all that is said is that these are matter of record. In Paragraph No.13 of the writ petition, it is asserted that the economic condition and source of income of the deceased's family and the petitioner are such that they live in hardship, making compassionate appointment for them a necessity. This fact has been endorsed, according to the petitioner, by the report submitted by the Compassionate Appointment Committee. These facts are not in dispute. The respondents say that the petitioner was

placed in a roster for compassionate appointment for the Allahabad Depot and placed at Roster Sr. No.14. It is also the respondents' case that the petitioner could be considered for compassionate appointment subject to availability of posts under the 5% vacancies for direct recruitment and set apart for compassionate appointment. This percentage of vacancy is, according to Paragraph No.7(b) of the Scheme, introduced by the Government of India *vide* Office Memorandum dated 16th January, 2013.

25. To the understanding of this Court, this restriction of 5% out of the vacancies is meant for Group-C posts under the Scheme of 2013, and, in any case, that is not the scheme that would govern consideration of the petitioner's case. His case has to be considered according to the Scheme that was in force when his father died on 21.01.2009. No later scheme would govern consideration of the petitioner's case. On merits, the petitioner's case has already been recommended and found fit for consideration by the Compassionate Appointment Committee, a position admitted to the respondents.

26. At the same time, it is true and that is verily the law that the right to compassionate appointment is not a right *strico sensu*. An employer can consider many factors before deciding to grant compassionate appointment. The most predominant of these is the economic crisis that the death of the breadwinner has brought on the bereaved family. Here, however, the petitioner's case has been found fit by the designated Committee for consideration, but the petitioner has not been offered an appointment on the pretext: firstly, that there was no vacancy available, and, later on, on ground that now the Departmental Labour System, to which the petitioner's deceased father belonged, has been declared a dying cadre. These considerations we have already dealt with and do not find them to be relevant, particularly, the one about the 'dying cadre'. The question of availability of vacancy would be a matter that would depend on the scheme, as already said, in force in the respondents' establishment on the date of the petitioner's father's death.

27. In conclusion, it is the respondents, who have to consider the petitioner's case for compassionate appointment, but they have to do so on a correct understanding of his rights in this regard and what the law is, that would govern their decision. This Court has clarified the principles by which the petitioner's case for compassionate appointment has to be considered by the respondents. Since, the respondents, till date, have not taken a decision about the petitioner's claim for compassionate appointment, they ought to do that now; and do that strictly according to law and the guidance in this judgment.

28. In the result, this petition succeeds and is **allowed**. A *mandamus* is issued to the respondents to consider the petitioner's case for compassionate appointment within a period of *six weeks* from the date of receipt of a copy of this judgment, in accordance with law and bearing in mind the guidance here.

29. There shall be no order as to costs.

30. Let a copy of this order be communicated to the Assistant General Manager (Industrial Relation), Food Corporation of India, Lucknow, the Regional Manager, Food Corporation of

India, Lucknow and the District Manager, Food Corporation of India, Allahabad by the Registrar (Compliance).

(2024) 2 ILRA 828
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2024

BEFORE

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

Writ - A No. 9872 of 2023

Ram Sewak Yadav (Retired Pump Attendant) ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Puneet Bhadauria

Counsel for the Respondents:
C.S.C., Sri Saurabh Tiwari

A. U.P. Nagar Palika Non-Centralized Services Retirement Benefits Regulations, 1984 – Reg. 2(m), 3 & 13(2) – U.P. Qualifying Service for Pension and Validation Act, 2021 – Applicability. Employees of Nagar Palika Parishad (Non-Centralized Services) are governed exclusively by Regulations of 1984, framed under Ss. 297(2) & 300(2) of U.P. Municipalities Act, 1916 – Act of 2021 has no application.

B. Pension – Qualifying Service – Ad hoc/Daily-wage service followed by Regularization – Whether reckonable. Regulation 2(m) of 1984 Regulations substantially pari materia with Rule 3(8) of U.P. Retirement Benefit Rules, 1961 – Supreme Court in *Prem Singh Vs St. of U.P.*, (2019) 10 SCC 516 read down restrictive provisions and held continuous service in work-charged/non-pensionable establishment followed by regularization to be "qualifying service" – Principle extended to daily wagers/ad hoc employees later regularized (*Kallu Ali Vs St. of U.P.*, 2022 (4) AWC 3840).

Held : Para 17 – Petitioner's services from 02.09.1988 (ad hoc appointment) till 25.03.2006 (date of regularization) must be reckoned as qualifying service along with regular service for determining pension, gratuity and other post retiral benefits. Non-consideration of such service is manifest error.
Mandamus issued – Respondents directed to revise and re-determine pensionary dues including arrears, within 2 months; arrears to be paid within 1 month thereafter, failing which interest @ 6% p.a. payable.

Writ Petition Allowed with costs.

List of Cases cited:

1. Prem Singh Vs St. of U.P., (2019) 10 SCC 516

2. Dr. Shyam Kumar Vs St. of U.P., 2023 (3) ADJ 138 (LB)

3. Kallu Ali Vs St. of U.P., 2022 (4) AWC 3840

4. Hari Shankar Asopa Vs St. of U.P., 1989 (1) UPLBEC 501

5. Yashwant Hari Katakkar Vs U.O.I., (1996) 7 SCC 113

6. VS Sukumaran Vs St. of Kerala, (2020) 8 SCC 106

7. Indian Aluminium Co. Vs St. of Kerala, (1996) 7 SCC 637

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

1. This writ petition has been instituted, praying that a *mandamus* be issued to the respondents to grant post retiral benefits to the petitioner, a Pump Attendant in the Water Supply Division of the Nagar Palika Parishad, District Etawah, after taking into consideration his *ad hoc* services.

2. According to the petitioner's case, he was 'appointed' as a Pump Attendant in the Water Supply Division of the Nagar

Palika Parishad, Etawah on *ad hoc* basis w.e.f. 02.09.1988. His services were regularized on 26.03.2006. He retired from service on 31.07.2022, upon attaining the age of superannuation. It is the petitioner's case that upon retirement, he claimed his post retiral dues, which were verified by the Deputy Director, Local Fund Audit Department, U.P., Kanpur on 13.02.2023.

3. The grievance of the petitioner is that despite the said verification and his entitlement, he has not been paid his post retiral benefits. It is averred in Paragraph No.7 of the writ petition that the respondents have reckoned the petitioner's entitlement to post retiral benefits from the date of his regularization and not the date of his appointment. It is the petitioner's case that though he is entitled to receive pension and other retiral benefits, reckoning his entire length of service from the date of his initial appointment, the respondents have declined to grant him pension and other commensurate benefits, taking into consideration the entire length of his service; not just the period of service post regularization.

4. Respondent No.4, that is to say, the Executive Officer, Nagar Palika Parishad, Etawah has filed a counter affidavit and the stand taken is that the petitioner's right to receive pension would be governed by the Uttar Pradesh Nagar Palika Non Centralized Services Retirement Benefits Regulations, 1984 (for short, 'the Regulations of 1984'). It is averred that the petitioner was initially engaged as a daily-wager on 02.09.1988, which was not a pensionable post. His services were regularized on 26.03.2006 i.e. after 1st April, 2005. As such, the petitioner is not entitled to receive any retirement pension in accordance with Regulations 3 and 4 of the Regulations of 1984. It is also urged that the petitioner did not hold a 'pensionable post' as defined in Regulation 2(k) of the Regulations of 1984 nor has he rendered 'qualifying service' under Regulation 2(m) of the Regulations last mentioned.

5. The thrust of the fourth respondent's case, set up in the counter affidavit, is that the petitioner did not hold any substantive or pensionable post prior to 26.03.2006, when his services were regularized. His services rendered earlier were *ad hoc* in nature and not services rendered against any pensionable post. The petitioner's appointment to a post came after 01.04.2005, and, therefore, under Regulation 3(4) of the Regulations of 1984, the petitioner is not entitled to pension and gratuity by virtue of Regulation 13(2). It is also pleaded that by an order dated 13.02.2023 passed by the Deputy Director, Local Fund Audit Department, U.P., Kanpur, the petitioner has been rightly denied sanction of pension and gratuity in accordance with the provisions of Regulation 13(2) of the Regulations of 1984, an order that the petitioner has not challenged. The said order has become final and in the absence of a challenge to the said order, no *mandamus* can be issued to pay the petitioner his pension and gratuity.

6. Heard Mr. Puneet Bhadauria, learned Counsel for the petitioner and Mr. Saurabh Tiwari, learned Counsel appearing on behalf of the Nagar Palika Parishad, respondent Nos.3 and 4.

7. The relief in this writ petition, though rather vaguely worded as one seeking grant of post retiral benefits, after computing *ad hoc* services rendered by the

petitioner, is one that seeks the grant of pension and gratuity upon reckoning the petitioner's period of engagement as an *ad hoc* employee together with the period of service post regularization. It is common ground between parties that the petitioner's entitlement to receive his pension and gratuity, in fact, all retirement benefits, are governed by the Regulations of 1984. This commonality of stand is evident upon a conjoint perusal of Paragraph No.15 of the writ petition and Paragraph No.9 of the counter affidavit. The respondent-Nagar Palika Parishad, go as far as saying that the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021 (for short, 'the Act of 2021') will not apply to employees of the Nagar Palika Parishad, belonging to the Non-Centralized Services, for whom the Regulations of 1984 have been framed by the Nagar Palika Parishad in exercise of powers conferred by Section 297(2) and sub-Section (2) of Section 300 of the U.P. Municipalities Act, 1916 (for short, 'the Act of 1916').

8. It is the submission of Mr. Puneet Bhadauria, learned Counsel for the petitioner that the petitioner is entitled to reckon his services on *ad hoc* basis rendered in the establishment of the Nagar Palika Parishad together with his services rendered post regularization. To support the aforesaid submission of his, Mr. Bhadauria relies upon the interpretation of Section 2 of the Act of 2021, which he submits, has been read down by a learned Single Judge of this Court in **Dr. Shyam Kumar v. State of U.P. and another, 2023 (3) ADJ 138 (LB)**. The issue before the learned Single Judge in **Dr. Shyam Kumar** *(supra)* arose in the context of different categories of employees, such as work-charged employees, daily-wagers, *ad hoc* employees and seasonal collection peon/ *amin*. All these various categories of employees were not regular employees in their various establishments, appointed on either temporary or permanent posts. All of them were engaged on one or the other kind of terms of employment, such as work-charged employees or daily-wagers or *ad hoc* with the common genre being that the appointment was *dehors* the Rules and not an appointment temporary or permanent on a sanctioned post in the establishment. They were regularized in service later on, but wanted their services for the period that they were not part of the establishment, in one capacity or the other, to be counted for the purpose of granting them post retiral benefits, treating it as qualifying service. Their claim was inspired by the decision of the Supreme Court in **Prem Singh v. State of Uttar Pradesh and others, (2019) 10 SCC 516**.

9. Now, **Prem Singh** *(supra)* was a case, where their Lordships of the Supreme Court were confronted with the validity of the Uttar Pradesh Retirement Benefit Rules, 1961 (for short, 'the Rules of 1961') and the Civil Services Regulations, which did not entitle payment of pension to such employees, who had been part of the work-charged establishment, but not temporary or permanent employees, appointed against a post in accordance with Rules. It was in the context of the said Rules that the Supreme Court held in **Prem Singh**, of which note has been taken by the learned Single Judge in **Dr. Shyam Kumar**:

"30. We are not impressed by the aforesaid submissions. The appointment of the work-charged employee in question had been made on monthly salary and they were required to cross the efficiency bar also. How their services are qualitatively different from regular employees? No

material indicating qualitative difference has been pointed out except making bald statement. The appointment was not made for a particular project which is the basic concept of the work-charged employees. Rather, the very concept of work-charged employment has been misused by offering the employment on exploitative terms for the work which is regular and perennial in nature. The work-charged employees had been subjected to transfer from one place to another like regular employees as apparent from documents placed on record. In *Narain Dutt Sharma v. State of U.P.* [CA No. _____2019 arising out of SLP (C) No. 5775 of 2018] the appellants were allowed to cross efficiency bar, after '8' years of continuous service, even during the period of work-charged services. Narain Dutt Sharma, the appellant, was appointed as a work-charged employee as Gej Mapak with effect from 15-9-1978. Payment used to be made monthly but the appointment was made in the pay scale of Rs 200-320. Initially, he was appointed in the year 1978 on a fixed monthly salary of Rs 205 per month. They were allowed to cross efficiency bar also as the benefit of pay scale was granted to them during the period they served as work-charged employees they served for three to four decades and later on services have been regularised time to time by different orders. However, the services of some of the appellants in few petitions/appeals have not been regularised even though they had served for several decades and ultimately reached the age of superannuation.

31. In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularised. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment.

32. In view of the Note appended to Rule 3(8) of the 1961 Rules, there is a provision to count service spent on work-charged, contingencies or non-pensionable service, in case, a person has rendered such service in a given between period of two temporary appointments in the pensionable establishment or has rendered such service in the interregnum two periods of temporary and permanent employment. The work-charged service can be counted as qualifying service for pension in the aforesaid exigencies.

33. The question arises whether the imposition of rider that such service to be counted has to be rendered in-between two spells of temporary or temporary and permanent service is legal and proper. We find that once regularisation had been made on vacant posts, though the employee had not served prior to that on temporary basis, considering the nature of appointment, though it was not a regular appointment it was made on monthly salary and thereafter in the pay scale of work-charged establishment the efficiency bar was permitted to be crossed. It would be highly discriminatory and irrational because of the rider contained in the Note to Rule 3(8) of

the 1961 Rules, not to count such service particularly, when it can be counted, in case such service is sandwiched between two temporary or in-between temporary and permanent services. There is no rhyme or reason not to count the service of work-charged period in case it has been rendered before regularisation. In our opinion, an impermissible classification has been made under Rule 3(8). It would be highly unjust, impermissible and irrational to deprive such employees benefit of the qualifying service. Service of work-charged period remains the same for all the employees, once it is to be counted for one class, it has to be counted for all to prevent discrimination. The classification cannot be done on the irrational basis and when respondents are themselves counting period spent in such service, it would be highly discriminatory not to count the service on the basis of flimsy classification. The rider put on that work-charged service should have preceded by temporary capacity is discriminatory and irrational and creates an impermissible classification.

34. As it would be unjust, illegal and impermissible to make aforesaid classification to make Rule 3(8) valid and non-discriminatory, we have to read down the provisions of Rule 3(8) and hold that services rendered even prior to regularisation in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also be counted towards the qualifying service even if such service is not preceded by temporary or regular appointment in a pensionable establishment.

35. In view of the Note appended to Rule 3(8), which we have read down, the provision contained in Regulation 370 of the Civil Services Regulations has to be struck down as also the instructions contained in Para 669 of the Financial Handbook.

36. There are some of the employees who have not been regularised in spite of having rendered the services for 30-40 or more years whereas they have been superannuated. As they have worked in the work-charged establishment, not against any particular project, their services ought to have been regularised under the Government instructions and even as per the decision of this Court in *State of Karnataka v. Umadevi (3) [State of Karnataka v. Umadevi (3)*, (2006) 4 SCC 1 : 2006 SCC (L&S) 753] . This Court in the said decision has laid down that in case services have been rendered for more than ten years without the cover of the Court's order, as one-time measure, the services be regularised of such employees. In the facts of the case, those employees who have worked for ten years or more should have been regularised. It would not be proper to regulate them for consideration of regularisation as others have been regularised, we direct that their services be treated as a regular one. However, it is made clear that they shall not be entitled to claiming any dues of difference in wages had they been continued in service regularly before attaining the age of superannuation. They shall be entitled to receive the pension as if they have retired from the regular establishment and the services rendered by them right from the day they entered the work-charged establishment shall be counted as qualifying service for purpose of pension.

37. In view of reading down Rule 3(8) of the U.P. Retirement Benefits Rules, 1961, we hold that services rendered in the work-charged establishment shall be treated as qualifying service under the aforesaid rule for grant of pension. The arrears of pension shall be confined to three

years only before the date of the order. Let the admissible benefits be paid accordingly within three months. Resultantly, the appeals filed by the employees are allowed and filed by the State are dismissed."

10. After the decision of the Supreme Court in **Prem Singh**, the State Legislature of Uttar Pradesh enacted the Act of 2021, which is castigated to have attempted a brazen legislative overruling of the Supreme Court's judgment in **Prem Singh**, without removing the defect or the vices that were read down by the Supreme Court in **Prem Singh** to save the Rules of 1961 and the Civil Services Regulations from being struck down as *ultra vires*. It was in the context of the aforesaid fact that Section 2 of the Act of 2021 was read down by my esteemed Brother Vivek Chaudhary in **Dr. Shyam Kumar** in terms of the following remarks:

"6. .....

Thus, the Supreme Court held that since the State Government has proceeded to take work on long term basis from the work charge employees, without there being a rational classification between the work performed by such work charge employees and the regular employees of the State Government, the Rules are required to be read down, as otherwise they would be arbitrary and, thus, gave benefit of the services rendered as work charge employees in counting the period of qualifying service for pensionary benefits.

7. Now, by the Act of 2021, the effect of the aforesaid judgment of the Supreme Court is attempted to be undone by the State Government. It has come up with Section 2, which provides:

"2. Notwithstanding anything contained in any rule, regulation or Government order for the purposes of entitlement of pension to all officer, "Qualifying Service" means the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post."

Thus, as per section 2 of the Act of 2021, if a person was not appointed on a temporary or permanent post as per service Rules, his services would not be qualifying service for the purposes of pension. Law with regard to the manner in which the Legislature can nullify or modify the impact of a judgment is settled since long. Suffice is to refer to the case of ***Indian Aluminium Co. and others vs. State of Kerala and others (1996) 7 SCC 637***. In the said case, after considering the entire law on subject, the Supreme Court in Para 56 of the judgment enumerates the principles, which read:

"56. From a resume of the above decisions the following principles would emerge:

(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them;

(2) The Constitution delineated delicate balance in the exercise of the sovereign power by the legislature, executive and judiciary;

(3) In a democracy governed by rule of law, the legislature exercises the power under Articles 245 and 246 and other companion articles read with the entries in the respective lists in the Seventh Schedule to make the law which includes power to amend the law.

(4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the

delicate balance devised by the Constitution between the three sovereign functionaries. In order that rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded. The smooth balance built with delicacy must always be maintained;

(5) In its anxiety to safeguard judicial power, it is unnecessary to be overzealous and conjure up incursion into the judicial preserve invalidating the valid law competently made;

(6) The court, therefore, needs to carefully scan the law to find out: (a) whether the vice pointed out by the court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution.

(7) The court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the legislature. Therefore, they are not encroachment on judicial power.

(8) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

(9) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same."

8. The law long settled is that the Legislature can render judicial decision ineffective by enacting valid law on the topic within its legislative field by fundamentally altering or changing its character retrospectively. The changed or altered conditions should be such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid.

9. Therefore, the question now before this Court is whether by bringing Act of 2021, the State Government has

done away with the vice pointed out by the Supreme Court in case of **Prem Singh** (supra). In the said judgment, the Supreme Court found that the State Government has adopted exploitative labour practice by taking work of regular employees from work charge employees on long term basis without any rationale classification while refusing them benefits available to regular employees. Supreme Court specifically held that the State Government can not get involved in corrupt labour practices. On the aforesaid grounds, the Supreme Court read down the provisions of Rule 3(8) of the Rules of 1961 and struck down Regulation 370 of Civil Services Regulations and Para 669 of the Financial Handbook.

10. It is the duty of State to create new temporary or permanent posts as per its needs and make appointments on the same. Law also permits State to appoint daily wagers or work charge employees, but only when the work is for short period or is in a work charge establishment for fixed duration. Law does not permit the State to take work for long period, extending even for the entire working life of a person, on temporary or work charge basis. In such cases, it is the duty of State to create new posts and make appointments, giving all benefits of regular employees. Otherwise, State would be found to be adopting exploitative labour practice. This is the vice pointed out by the Supreme Court in **Prem Singh**'s case (supra), and instead of removing the same, the State by Section 2 of the Act of 2021 has extended the sphere of its illegality. By Section 2 of the Act of 2021, it desires to take benefit of its own failure of creating posts in time and making appointments on the same, by not counting the said period of such service for pensionary benefits. State still fails to explain the rationale on the basis of which it has created this new classification and the manner in which, by the amended provision, it has removed the irrationality.

In case Section 2 of the Act of 2021 is given a literal meaning it would mean that services rendered by a person on a temporary or permanent post alone can be counted for pension. The same would again be an exploitative device and labour malpractice, as by this, the State Government is again attempting to use persons to work for it on long term basis, just like regular employees, without giving them benefits they are entitled to as regular employees. The very vice pointed by the Supreme Court in the judgment of **Prem Singh** (supra) with regard to work charge employees is, in fact, now made applicable to even larger number of employees and extended to daily wagers and other persons not working on a temporary or a permanent post including, work charge employees.

In case of **V. Sukumaran vs. State of Kerala (2020) 8 SCC 106**, the Supreme Court held:

"22. We begin by, once again, emphasising that the pensionary provisions must be given a liberal construction as a social welfare measure. This does not imply that something can be given contrary to rules, but the very basis for grant of such pension must be kept in mind i.e. to facilitate a retired government employee to live with dignity in his winter of life and, thus, such benefit should not be unreasonably denied to an employee, more so on technicalities."

Thus, again to save Section 2 of the Act of 2021 from the vice/arbitrariness, in the spirit of the judgment of **Prem Singh** (supra), the word 'post'

is required to be diluted to save it from arbitrariness and hence, the word 'post' used in Section 2 of the Act of 2021, be it temporary or permanent, has to be

read down as 'services rendered by a government employee, be it of temporary or permanent nature'.

11. The other case laws cited by learned counsel for the petitioners as well as by learned Standing Counsel, as noted above, are not applicable in the facts and circumstances of the present cases, as in none of the above cited cases, interpretation of Section 2 of the Act of 2021 is considered.

12. In the light of aforesaid, since Section 2 of the Act of 2021 also suffers from the vice pointed out by the Supreme Court in the case of **Prem Singh** (supra), hence, to be brought out of arbitrariness, it is read down and services rendered on temporary or permanent post is read as services rendered by a government employee, be it of temporary or permanent nature. Therefore, it is held that the petitioners are also entitled for the benefit of the judgment of **Prem Singh** (supra). All the impugned orders are set aside."

11. It must be observed that the above remarks, though on principle ones that cover the case of all kind of employees, who were not part of the regular establishment, selected in accordance with the Rules, were made in the context of work-charged employees. But, the case of the daily-wager was also considered on the same touchstone by his Lordship and in regard to them it was observed:

"14. It is settled since long that daily wager employees are entitled to pensionary benefits counting their services from the date of their initial appointment and not from the date of their regularization. Suffice would be to refer to the judgment in cases of **Hari Shankar Asopa vs. State of U.P. and another, 1989(1) UPLBEC 501; Yashwant Hari Katakkar vs. Union of India and others, 1996 (7) SCC 113;** and **Prem Singh** (supra). In fact earlier they were covered by Rule 2 of U.P. Retirement Benefit Rules, 1961 and other Civil Services Regulations.

15. Now learned Standing Counsel submits that in view of Section 2 of the Act of 2021, since petitioners were not appointed on a temporary or permanent post initially, therefore, benefit of said services cannot be granted to them.

16. The said aspect of the matter is already discussed above at length. Section 2 of the Act of 2021 is already read down and it is held that the word 'post' used in Section 2 of the Act of 2021, be it temporary or permanent, has to be read down as 'services rendered by a government employee, be it of temporary or permanent nature'."

12. This Court would think that the doctrine of reading down may not be attracted at all in a case where the vires of the statute is not under challenge. Apparently, in **Dr. Shyam Kumar**, there was no challenge raised to the *vires* of the Act of 2021. This Court would think that the doctrine of reading down is a principle devised to save a statute, otherwise *ultra vires* and fit to be struck down. And, that too can be done if the words of the legislature are not so clear as not to admit of any ambiguity. If the legislative intent is unmistakable by its words, the constitutionality thereof upon a challenge raised has either to be upheld or the challenge sustained with a striking down of the offending portion. However, in cases where the statute is capable of being ascribed two or more meanings, reading down affords a less intrusive alternative to the striking down of a statute, which the Court finds otherwise must be. A statute in order to be struck down requires the person

challenging its *vires* to specifically plead that case and come up with a prayer for the purpose. It is only in a case where that kind of a prayer is there, which the Court on hearing finds fit to be granted that the milder alternative to remedy the legislative flaw, may be resorted to by reading it down. If there is no prayer to strike down a statute or a provision thereof, we do not think that it can be resorted as a principle of statutory interpretation or construction, while judging rights of parties affected by the statute.

13. Nevertheless, this Court leaves this issue open in the matter, inasmuch as this case may be decided effectively on a different point altogether. The principle laid down by the Supreme Court in **Prem Singh** can be said to be negated by the Act of 2021, in cases where the said Act applies. In the present case, it is common ground between parties that the Act of 2021 does not apply; rather, the entitlement of the petitioner is governed by the Regulations of 1984. It is true that the Act of 2021 would not affect the petitioner's rights, but the decision in **Prem Singh** was rendered in the context of Rule 3(8) of the Rules of 1961 and Regulation 370 of the Civil Services Regulations of U.P. in case of work-charged employees, who had worked for a long period of time, holding that non-consideration of long service in the work-charged establishment would be discriminatory in view of the note appended to Rule 3(8) of the Rules of 1961, which says that *'If service rendered in a non-pensionable establishment, work-charged establish-ment or in a post paid from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment, it will not constitute an interruption of service'*. This note appended to Rule 3(8) (supra) was regarded as creating a class without an intelligible differentia bearing nexus with the object of classification, and, therefore, discriminatory when compared to a case of continuous work-charged establishment. It was in the context of Rule 3(8) of the Rules of 1961 and Regulation 370 of the Civil Services Regulations of U.P. that continuous service in the work-charged establishment was held by their Lordships of the Supreme Court to entitle the employee to a reckoning of the work-charged period with service rendered in the regular establishment.

14. Regulation 2(m) of the Rules of 1984 reads:

"2. **Definition.–** …..

(m) "qualifying service" means service which qualified for pension, in accordance with the provisions of Article 368 of the Civil Service Regulations, as amended from time to time, excepting the following:

(i) periods of temporary or officiating service in a non-pensionable establishment under the Municipal Board concerned;

(ii) periods of service in a work-charged establishment; and

(iii) periods of service in a post paid from contingencies:

Provided that period of continued, temporary or officiating service under the Municipal Board concerned shall count as qualifying service if it is followed by confirmation on the same post or any other post without any interruption of service.

NOTE-If service rendered in a non-pensionable establishment, work-charged establishment or in a post paid

from contingencies falls between two periods of temporary service in a pensionable establishment or between a period of temporary service and permanent service in a pensionable establishment it will not constitute an interruption of service."

15. Now, the definition of 'qualifying service' in Regulation 2(m) of the Regulations of 1984 is almost cast in the same terms as that in Rule 3(8) of the Rules of 1961, that were read down by the Supreme Court in **Prem Singh** to hold that services rendered in the work-charged establishment would be treated as 'qualifying service' under the last mentioned Rules for the purpose of grant of pension. The principle in **Prem Singh**, to reckon continuous service in the work-charged establishment as 'qualifying service' under Rule 3(8) of the Rules of 1961, has been extended in its application to continuous service of any kind, such as those rendered on daily-wages or *ad hoc* basis, followed by regularization, on the same post and in the same capacity. These principles have been adopted, particularly, in case of long retention in service on daily-wages or *ad hoc* basis or work-charged establishment, followed by regularization. Without reference to much authority on this point, it would suffice to refer to a decision of this Court in **Kallu Ali v. State of U.P. and others, 2022 (4) AWC 3840**, a case relating to an employee of a Development Authority, who had worked for a long time on daily-wages and then regularized in service. The issue had arisen in **Kallu Ali** *(supra)* in the context of his qualifying service for the purpose of entitlement to pension. After a copious review of authority on the point in **Kallu Ali**, it was held:

"28. The authorities referred to herein above and those of this Court clearly hold that if an employee has discharged duties whether temporarily or as a daily wager or on ad hoc basis on a post for which requirement was there and services of such an employee have come to be regularized on the said post or in the same capacity, the period spent before regularization should be considered and added to pensionable services. The courts have not approved the act and conduct of the employer to deny pension to its employee if he has rendered a number of substantial year of continuous service in an establishment leading to his / her regularization if such an establishment holds a pensionable service. The State Government has been taken to be a model employer and a State being a welfare State, the courts have shown serious concern in the event an employee who has spent all his life in the service of such establishment, stands denied pension on his attaining the age of superannuation and being retired as such."

16. The line of decisions noticed in **Kallu Ali** and the extension of the principle to various classes of employees, who had worked outside the regular establishment followed by regularization, asking their service rendered *dehors* the rules to be reckoned for the purpose of their qualifying service, entitling them to pension etc., are all based on the principle in **Prem Singh**. In the opinion of this Court, this line of decisions would pose some difficulty in cases of employees of establishments of the State Government, to which the Act of 2021 applies and which, as said earlier, virtually upturns the principles laid down by the Supreme Court in **Prem Singh**. This would, however, not be the case about establishments, to which the Act of 2021

does not apply. It has already been noticed that there is no issue in this case that the Act of 2021 does not apply to the respondents. What, therefore, follows is that the law laid down in **Prem Singh** would govern the rights of employees in the respondents' establishment. The decisions that have followed and extended the principle in **Prem Singh** to classes of employees functioning *dehors* the rules followed by regularization for the purpose of reckoning their qualifying service, entitling them to pension, would squarely apply to the petitioner's case.

17. In the opinion of this Court, therefore, the petitioner is entitled to the reckoning of his services rendered on *ad hoc* basis w.e.f. 02.09.1988 until his regularization in service on 26.03.2006 for the purpose of determining his post retiral benefits. The respondents have committed a manifest error in not taking into account the period of service rendered on *ad hoc* basis prior to regularization for the purpose of determining the petitioner's pension, gratuity and other post retiral benefits. These have to be determined taking into account the entire period of service, including that rendered on *ad hoc* basis prior to regularization.

18. In the result, this petition succeeds and is **allowed** with costs. A *mandamus* is issued to the respondents, ordering them to revise and redetermine the petitioner's post retiral benefits, including pension and gratuity, taking into account his services rendered on *ad hoc* basis from 02.09.1988 to 25.03.2006, followed by regularization. The necessary re-determination shall be carried out within a period of two months of the date of communication of a copy of this judgment to the respondents. Arrears on account of the revised post retiral benefits shall be paid to the petitioner within a month of the determination thereof by the respondents. In the event of delay in making the revised determination or the payment of arrears as per schedule indicated above, the petitioner would be entitled to simple interest at the rate of 6% *per annum* on the due arrears.

19. Let a copy of this order be communicated to the Principal Secretary, Local Bodies, Government of U.P., Lucknow, the Director, Local Bodies, Lucknow, the Chairman, Nagar Palika Parishad, Etawah, District Etawah and the Executive Officer, Nagar Palika Parishad, Etawah, District Etawah by the Registrar (Compliance).

(2024) 2 ILRA 839
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ - A No. 9908 of 2023

Rajendra Dhar Dwivedi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sameer Kalia

Counsel for the Respondents:
C.S.C., Abhinav Trivedi

A. Service Law – Central Service Regulation – Reg. 351-A – Post retiral benefit – Initiation of inquiry – Matter relate to an events taken place four years prior to retirement – Earlier, High Court quashed the notice granting liberty to the Governor to proceed under Reg. 351-A – No order has been passed – Mandamus

sought – Held, since matter relates to the event which took place four years prior to the retirement of the petitioner, so no action can be taken against the petitioner and inquiry cannot be initiated hence, there is no occasion to consider the matter relating to grant of any approval under Regulation 351-A of C.S.R. – There exists no impediment in making the payment of post retiral benefits to the petitioner. (Para 13 and 15)

Writ petition allowed. (E-1)

List of cases cited :-

1. R. Sundaram Vs Tamil Nadu St. Level Scrutiny Committee; (2023) SCC OnLine SC 287

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

1. Heard.

2. With the consent of the learned counsel for the petitioner, learned Standing Counsel representing the respondent nos. 1 and 3 as well as Shri Abhinav Trivedi, learned counsel for the respondent no. 2, the present writ petition is finally adjudicated at the admission stage itself.

3. Present writ petition has been preferred for issuing a direction to the respondents to release the post retiral benefits of the petitioner i.e. an amount of Rs. 20 lacs towards Grautity, Rs. 33 lacs approximately towards commutation of Pension and further pay regular pension to the petitioner with interest in view of paragraphs nos. 49, 50 and 51 of the writ petition as no order has been passed either by the Governor or the State Government.

4. Learned counsel for the petitioner has submitted that the petitioner after attaining the age of superannuation had retired from the post of Director (Agriculture) on 31.10.2019 but in place of making payment of post retiral dues to the petitioner, the petitioner was served with a show-cause notice dated 04.09.2021 under Rule 10 (2) of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules,1999 (hereinafter referred to as, the Rules, 1999) for minor punishment. The said notice was challenged by the petitioner by filing a Writ Petition No. 23536 (S/S) of 2020 which was allowed in part by this Court vide its judgment and order dated 02.12.2020 and quashed the notice under challenge. The relevant extract of the said judgment is being reproduced hereunder:-

"For these reasons the issuance of show-cause notice to the petitioner for imposition of a penalty under Rule 10(2) of the Rules 1999 is apparently beyond the scope of the Rules and the jurisdiction vested thereunder with the opposite parties. The appropriate course, if at all i.e. if the conditions mentioned in Article 351-A of the Civil Services Regulations were satisfied was to proceed against the petitioner under the said provision in accordance with law, however, even in this regard the learned counsel for the petitioner says that the allegations pertain to an incident which took place more than four years earlier and, therefore, any action under Article 351-A of the Civil Services Regulations stands excluded by the provisions/prohibitions contained therein as no chargesheet was or has been issued to the petitioner within the said period of four years nor was he ever under suspension, nevertheless, it is for the State Government to see as to whether the contingencies mentioned in Article 351-A of the Civil Services Regulations are satisfied for any action against the petitioner or not, but so far as the impugned notice is concerned, same is

clearly unsustainable and liable to be quashed. It is accordingly quashed subject, however, to the observations made hereinabove.

Considering the fact that only provisional pension has been sanctioned to the petitioner and has been granted which orders are also under challenge, instead of interfering with the same at this stage and quashing the same, it would be appropriate if the State Government examines the matter as to whether the petitioner is amenable to any action under Article 351-A of the Civil Services Regulations in the facts of the case or not, but, within a period of six weeks from the date an e-copy of this order downloaded from the official website of this High Court is submitted before the opposite party no. 1.

The consequences as to entitlement of post-retirement dues to the petitioner shall depend upon the same, meaning thereby, if the State Government comes to the conclusion that the mandatory prerequisites mentioned in Article 351-A of the Civil Services Regulations are not satisfied and no action can be taken against the petitioner under the same, then the petitioner shall be entitled to all the post-retirement dues otherwise admissible as per law, which shall be paid to him within 3 months therefrom. However, if the State Government finds that contingencies mentioned in the said provision are satisfied and the petitioner can be proceeded under the said provision, then, appropriate initiation shall be made within one month and the consequences as to entitlement of the petitioner to post-retirement dues shall follow accordingly as per law. The impugned orders sanctioning and granting provisional pension shall abide by such decision which is to be taken by the opposite party no. 1 as aforesaid.

The writ petition is allowed in part."

5. It is further contended that after the said judgment, an another notice dated 23.02.2021 was issued by the Additional Chief Secretary (Agriculture) to the petitioner for the same charges as mentioned in the earlier notice issued under Rule 10 (2) of the Rules 1999, mentioning therein that the Show-Cause notice dated 04.09.2021 has now been converted into notice Under Regulation 351 (A) of the Civil Services Regulation (hereinafter referred to as, the C.S.R).

6. The said notice was again challenged by the petitioner by filing Writ Petition No. 8799 (S/S) of 2021, which was partly allowed by this Court vide its judgment and order dated 22.06.2021. The relevant extract of the said judgment is quoted hereinebelow:-

"14. Learned Senior Advocate on the other hand has submitted that a perusal of the notice dated 29.11.2018 filed at page 126 of the writ petition would show that it was not issued with regard to any preliminary enquiry or with regard to any disciplinary proceedings to be initiated against the petitioner. It had only called for an explanation and such a notice cannot be termed to be an order initiating disciplinary proceedings because disciplinary proceedings are said to be initiated as per the Explanation given under Article 351-A of the Civil Services Regulations, only when the employee concerned is suspended or a charge-sheet is issued to him.

15. Be that as it may, this Court is only concerned with the careless manner in which the order impugned has been issued by the respondent no.2. He has not referred

to the conditions mentioned under Article 351-A of the Civil Service Regulations nor the specific directions issued by the Court in its judgment and order dated 02.12.2020. He has merely converted the earlier show cause notice dated 04.09.2020 which was already quashed by the Court, into a show-cause notice under Article 351-A of the Civil Services Regulations. The order impugned dated 23.02.2021 deserves to be quashed on this ground alone. It is hereby quashed.

16. His Excellency the Governor of Uttar Pradesh in exercise of power under Article 351-A may pass a fresh order as expeditiously as possible. The post retiral benefits of the petitioner shall be subject to order passed by His Excellency the Governor of the Uttar Pradesh as already been observed by this Court in its judgment and order dated 02.12.2020.

17. If the Government comes to a conclusion that no case under Article 351-A of the Civil Services Regulations is made out for proceeding against the petitioner, then the post retiral benefits of the petitioner shall be released within three months.

18. The writ petition stands partly allowed."

7. It is further submitted that the judgment was passed on 22.06.2021 and now more than two and a half years have passed but till date no order has been passed by the Governor while exercising its power under Regulation 351 A of C.S.R. and depriving the petitioner of his lawful claims of post retiral benefits which is neither a charity or a bounty as per the law settled in the case of **R.Sundaram Vs. Tamil Nadu State Level Scrutiny Committee (2023) SCC OnLine SC 287.**

8. It is further submitted that in the show cause notice dated 04.09.2020 issued under Rule 10 (2) of the Rules, 1999 and the Show Cause notice dated 23.02.2021 (both are quashed by this Court, as mentioned above), the allegation or the explanation which were sought from the petitioner related to the period of four years prior to the retirement of the petitioner and as per Regulation 351 (A) of C.S.R., no inquiry can be initiated against the petitioner for the charges which relate to for the period of four years of retirement.

9. On the other hand, learned Standing Counsel on the basis of instructions received has submitted that the legal opinion has been taken and the matter is under consideration but unable to dispute that the charges which were alleged in the earlier two show cause notices were related to the period four years before retirement of the petitioner.

10. Learned counsel for the respondent no. 2 on the basis of instructions has submitted that the Office of the Governor has not received the complete file from the Department for consideration under Regulation 351 (A) of C.S.R. and till date no such order under said regulation has been passed against the petitioner.

11. After hearing learned counsel for the parties and going through the record, it is found that the petitioner has retired on 31.10.2019 and as on today, there is no inquiry pending against the petitioner. Earlier two proceedings i.e. first Show Cause notice dated 04.09.2020 issued under Rule 10 (2) of the Rules, 1999 and thereafter a second Show Cause notice dated 23.02.2021 issued by the Additional Chief Secretary (Agriculture) converting the earlier show cause notice issued under

Rule 10 (2) of the Rules, 1999 to Regulation 351 (A) of C.S.R. had already quashed by this Court as mentioned in the preceding paragraphs.

12. The petitioner had earlier also approached this Court by filing writ petitions against the show cause notices issued against him with a prayer for payment of post retiral dues. Both the petitions were partly allowed by quashing of the notices issued against the petitioner and giving liberty to the respondents to look into the case of the petitioner as to whether any approval is required under Regulation 351-A of C.S.R.

13. This Court vide its judgment and order dated 22.06.2021 had granted liberty to proceed under Regulation 351 (A) of C.S.R. but more than two and a half years have passed but the department has not forwarded the complete file to the Governor to pass an order under Regulation 351 (A) of C.S.R. , as informed by learned counsel for the respondent no. 2-Additional Chief Secretary, Hon'ble Governor Secretariat, Raj Bhawan, Lucknow and it has also informed that no order under Regulation 351 (A) of C.S.R. has been passed so far.

14. Under these circumstances as mentioned above, next it may be examined whether Regulation 351-A of C.S.R. is attracted or not for that the necessary questions which may require attention of this Court are as follows:-

firstly, any order has been passed by the competent authority under Regulation 351-A of C.S.R. or not;

secondly, and most importantly whether Regulation 351-A is applied to the present case or not; and

thirdly, as to whether there is any impediment existing in payment of post retiral benefits to the petitioner.

15. The questions framed above are being dealt with as below:

Firstly, it may be seen whether any order has been passed under Regulation 351-A and it is to be found that so far, no such order has been passed as would be clear from submission made by the learned counsel for the respondent no. 2-Additional Chief Secretary, Hon'ble Governor Secretariat. Learned counsel for the respondent no. 2 informed this Court on the basis of his instructions that complete file was never made available by the department to the office of Governor so till date no order under Regulation 351 A has been passed against the petitioner.

Secondly, perusal of the show-cause notices show that the allegations relate to 24.07.2015 and the petitioner has retired on 31.10.2019, so the allegation is more than four years prior to the retirement of the petitioner. This fact is not disputed by the learned counsel for the respondents. Regulation 351 (A) of C.S.R. Regulation 351 (A) of C.S.R. is reproduced hereinbelow:-

" 351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his

service, including service rendered on re-employment after retirement.

Provided that :-

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment-

(i) Shall not be instituted with the sanction of the Governor,

(ii) shall be in respect of event which took place not more than four years before the institution of such proceedings, and"

It is thus clear that since matter relates to the event which took place four years prior to the retirement of the petitioner which is an undisputed fact as accepted by Counsel for respondents, so no action can be taken against the petitioner and inquiry cannot be initiated hence, there is no occasion to consider the matter relating to grant of any approval under Regulation 351-A of C.S.R.

And lastly, it is found that there exists no impediment in making the payment of post retiral benefits to the petitioner.

16. After retirement, an employee is dependent upon his/her post retiral dues but in place of getting the same the petitioner had been compelled by the arbitrary action of the respondents to approach this Court time and again. In place of getting any dues the petitioner is spending the cost of litigation from his life long savings. The petitioner has been deprived from getting his lawful claim due to wrong actions, inaction and non action by the authorities at different stages which is making the petitioner to suffer great hardship.

17. In view of the discussions made hereinabove, the writ petition is **allowed.**

18. Respondent no. 1 is directed to make payment of all post retiral dues to the petitioner including computation of pension within a period of two months from the date of production of certified copy of this order. In case, the payment is not made in the period mentioned hereinabove, the respondents will liable to pay the simple interest at the rate of 7.5% from the date of retirement till actual payment is made.

(2024) 2 ILRA 844
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ - A No. 10260 of 2023
With
Writ – A No. 10256 of 2023
and other connected cases

Rachana & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vineet Kumar Singh, Sri Rishabh Srivastava, Sri H.N. Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Smt. Archana Singh

A. Service Law – Basic Shiksha Parishad Teachers – Inter-District / Mutual Transfer – G.O. dated 02.06.2023 – Clause 4 – Interpretation.

Clause 4 limits inter-district transfers to maximum 10% of teachers working as on 30.04.2023 vis-à-vis sanctioned posts – Calculation made by considering both sanctioned strength and actual working strength – If working strength exceeds sanctioned posts, incoming transfer may be declared "zero"

though outgoing transfer permitted – Not arbitrary, but in tune with policy language.
B. Transfer Policy – Judicial Review – Scope.

Transfer is not a vested right – Teachers appointed district-wise with open eyes – Inter-district transfer is change of cadre, not a matter of right – Court can interfere with transfer policy only if found to be arbitrary, discriminatory, or contrary to law – Policy framed on rational criteria of sanctioned vis-à-vis working strength held valid.

Held : Para 13 – St.'s decision to exclude certain districts (where teachers are surplus) from incoming transfers and to allow only outgoing transfers, based on clause 4 of transfer policy dated 02.06.2023, cannot be termed arbitrary – No interference warranted.

All writ petitions dismissed. No costs.

Case Law Discussed:

1. Shraddha Yadav Vs St. of U.P. (Allahabad HC, 2024 : AHC : 4085)

2. Devesh Sharma Vs U.O.I., 2023 SCC OnLine SC 985

3. Satyadev Bagur Vs St. of Raj., (2022) 5 SCC 324

4. Krishnan Kakkanath Vs St. of Kerala, (1997) 9 SCC 495

5. Sher Singh Vs U.O.I., (1995) 6 SCC 515

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. In the present bunch of writ petitions, interpretation of clause 4 of a transfer policy for inter district and mutual transfer issued by a government order dated 02.06.2023 for teachers working in school run by Basic Shiksha Parishad is under consideration. The said clause is reproduced below -:

"जनपद में स्वीकृत पद के सापेक्ष दिनांक ३० अप्रैल २०२३ तक कार्यरत अध्यापकों की संख्या के १० प्रतिशत की अधिकतम सीमा तक अंतर्जनपदीय स्थानांतरण किये जायेंगे। किसी जनपद से स्थानांतरित होकर जाने तथा आने वाले शिक्षक एवं शिक्षिका की अधिकतम सीमा १० प्रतिशत होगी।"

2. Sri H.N. Singh, Senior Advocate assisted by Sri Rishabh Srivastava, learned Advocate for petitioners along with S/Sri Seemant Singh, Rakesh Kumar Pandey, Manoj Kumar Singh, K.R. Singh, Sikhar Trivedi, Neeraj Shukla, Kamal Kumar Kesharwani, O.P.S. Rathore, Vibhu Rai, Navin Kumar Sharma, Pratik Chandra, Man Bahadur Singh, Vinod Kumar Singh, Sanjay Kumar Mishra, Shashi Kant Mishra, Prathamesh Upadhyay and Suresh Singh for petitioners have submitted that petitioners have been denied from consideration of their applications to transfer at desired district on the ground that there are no vacancy for incoming transfer. Crux of their argument is that interpretation and determination of calculation of 10% of vacancy and to declare zero vacancy for incoming transfer in certain districts is not only contrary to the object of transfer policy but based on incorrect interpretation of referred clause also.

3. Learned Senior Advocate has further submitted that in a district, if teachers are working more than sanctioned strength, they are also included for determination of 10% of posts available for transfer and accordingly, State has calculated that since there are already surplus teachers, therefore, there will be no incoming transfer but they have allowed outgoing transfer. In a way they have tried

to accommodate illegal appointment above than sanctioned posts.

4. Above arguments have been opposed by Sri Shashi Prakash Singh, learned Additional Chief Standing Counsel along with S/Sri Ravi Prakash Srivastava and Manvendra Dixit, learned Standing Counsel for State and Ms. Archana Singh, learned counsel appearing for Board of Basic Education, U.P. at Allahabad and they have supported the calculation and stressed upon a word used in the above referred clause i.e. "जनपद में स्वीकृत पद के सापेक्ष दिनांक ३० अप्रैल २०२३ तक कार्यरत अध्यापकों" that both aspects have to be taken into consideration i.e. number of sanctioned posts and number of teachers working in a district and they have submitted that there is no infirmity in the calculation.

5. Before adverting to the rival submissions, for example the calculation in regard to primary rural School where in 11 districts, incoming transfer has been declared as zero is mentioned hereinafter-:

Sl. No.	District	PRIMARY SCHOOL RURAL					
		Assistant Teacher			10% of Working at	Incoming	Outgoing
		Sanction	Working	Vacant			
1	2	3	4	5	6	7	8
1	BAGHPAT	1576	1640	-64	164	0	164
2	CHITRAKOOT	2181	2290	-109	229	0	229
3	G.B. NAGAR	13 67	14 24	-57	142	0	142
4	GHAZIABAD	890	1183	-293	118	0	118
5	HAPUR	1178	1200	-22	120	0	120
6	KANNAUJ	3054	3374	-320	337	0	337
7	KANPUR NAGAR	3081	3110	-29	311	0	311
8	LUCKNOW	2531	2677	-146	268	0	268
9	MAU	2670	2880	-210	288	0	288
10	MEERUT	2490	2505	-15	251	0	251
11	MUZAFFAR-NAGAR	2509	2565	-56	257	0	257

6. It will be apposite to refer the law in regard to interference with policy decision of a State as held by this Court in a recent judgement in the case of **Shraddha Yadav and 6 others vs. State of U.P. and 10 others, Neutral Citation No. 2024:AHC:4085** and relevant paragraph from 15 to 20 are quoted below-:

"**१५.** शिक्षकों व शिक्षिकाओं के वर्ष २०२३-२०२४ की अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण नीति को उत्तर प्रदेश शासन के शासनादेश दिनाँक ०२, जून, २०२३ द्वारा निर्धारित की गई। इसके खण्ड १६, १७ व १८ पूर्व में उल्लेखित किये जा चुके हैं, के अनुसार परिषद को इस स्थानान्तरण नीति के ' तकनीकी चरण एवं प्रक्रिया के निर्धारण का दायित्व सौपा गया और उसी क्रम में, और स्थानान्तरण नीति के क्रम में अग्रतर कार्यवाही हेतु सचिव, उ.प्र.

बेसिक शिक्षा परिषद ने परिपत्र दिनांक १६.०६.२०२३ व २८.०६.२०२३ को निर्गत किया, जिसके अनुसार ऑनलाइन आवेदन के सत्यापन व परीक्षण की प्रक्रिया को निर्धारित किया। इन परिपत्रों के माध्यम से एकल अभिभावक, दिव्यांगता, असाध्य या गंभीर रोग, सरकारी सेवा का लाभ, निलम्बन की स्थिति आदि के विषय में प्रावधान बनाये गये। इसी क्रम में परिपत्र दिनांक २८.०६.२०२३ द्वारा अन्तर्जनपदीय स्थानान्तरण प्रक्रिया के अन्तर्गत स्थानान्तरित शिक्षक एवं शिक्षिका (१६,१६४ शिक्षक एवं शिक्षिका) को कार्यमुक्त किये जानें की कार्यवाही की, विस्तृत प्रक्रिया को भी निर्धारित किया। इसी परिपत्र के खण्ड (५) को निरस्त करने की प्रार्थना याचिकाकर्तागण ने की है। उक्त खण्ड पुनः निम्न उल्लेखित किया जा रहा हैः-

"५. प्रोन्नति पद पर कार्यरत शिक्षक एवं शिक्षिका के स्थानान्तरित जनपद में बैच की पदोन्नति वर्ष/मौलिक नियुक्ति तिथि के आधार पर कार्यमुक्त करने की कार्यवाही की जायेगी।"

१६. स्थानान्तरण नीति के खण्ड १६, १७ व १८ के अन्तर्वस्तु से स्पष्ट है, जो परिषद के उक्त परिपत्रों को, जो उक्त नीति के ' तकनीकी चरण व प्रक्रिया के निर्धारण', इसकी समय सारिणी व कार्यमुक्त कराने के सम्बन्ध में है, निर्गत करने के लिए स्पष्ट रूप से परिषद के सचिव को अधिकृत करते है। अतः उक्त परिपत्रों को निर्गत करने का अधिकार सचिव, उ.प्र. बेसिक शिक्षा परिषद को पूर्ण रूप से था। अतः परिपत्र वैधानिक है व विधिक रूप से संधारणीय भी है। यह परिपत्र स्थानान्तरण नीति के क्रम में उसके कार्यवाहन के लिए है, न कि उसकी प्रकृति के विरोध में निर्गत किये गये है। स्पष्टता व संदर्भ के लिए स्थानान्तरण नीति के खण्ड १६, १७ व १८ पुनः निम्न उल्लेखित किये जा रहे हैः-

"(१६) अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण के लिए निर्गत शासनादेश के अनुसार उ०प्र० बेसिक शिक्षा परिषद द्वारा अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण के तकनीकी चरण एवं प्रक्रिया का निर्धारण किया जायेगा तथा शासनादेश के क्रम में अग्रतर कार्यवाही की जायेगी।

(१७) अन्तर्जनपदीय स्थानान्तरण हेतु समय-सारिणी सचिव, बेसिक शिक्षा परिषद द्वारा अपने स्तर से पृथक से निर्गत की जायेगी।

(१८) अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण के उपरान्त शिक्षक/शिक्षिका को कार्यमुक्त करने तथा कार्यभार ग्रहण करने की कार्यवाही मध्य शैक्षिक सत्र में नहीं की जायेगी। शिक्षक/शिक्षिका को कार्यमुक्त करने तथा कार्यभार ग्रहण करने की कार्यवाही अवकाश के दौरान ही की जायेगी।"

१७. अब न्यायालय को यह निर्धारित करना है कि परिपत्र दिनाँक २८.०६.२०२३ के खण्ड (५) में उल्लेखित 'स्थानान्तरित जनपद में बैच की पदोन्नति वर्ष/मौलिक नियुक्ति तिथि के आधार पर' कार्यमुक्त करने की कार्यवाही का कोई न्यायोचित कारण है अथवा नही। यहां यह ध्यान रखना होगा कि याचिकाकर्तागण के संबंध में अंतर्जनपदीय स्थानान्तरण का आदेश पारित हो गया था परन्तु उपरोक्त खण्ड (५) के कारण उनको कार्यमुक्त नहीं किया गया है।

१८. उपरोक्त वर्णित खण्ड (५) के अन्तःवस्तु के मात्र परिशीलन से स्पष्टता प्रतीत नही होती है परन्तु परिषद के द्वारा दायर प्रतिउत्तर पत्र व उसके विद्वान अधिवक्ता के कथन से स्पष्टता प्रतीत होती है, कि अगर याचिकाकर्तागण जो पदोन्नति पद पर है स्थानान्तरित जनपद, जहां उनके बैंच के शिक्षकों की पदोन्नति नही हुयी है, कार्यभार ग्रहण कराया जाता है तो वो अपने संवर्ग मे निम्नतम वरिष्ठता पर रहेंगे। फिर भी वो उनके बैंच में कार्यरत शिक्षक/शिक्षिका जिनको पदोन्नति नहीं की गई है, से वरिष्ठ हो जायेंगे और उनके पदोन्नति होने के बाद भी याचिकाकर्तागण ही वरिष्ठ रहेंगे। जिससे असमंजसता की स्थिति उत्पन्न हो जायेगी, चाहे वरिष्ठता सूची मूल जनपद

के स्तर पर ही क्यो न हो। यह स्थिति सहकर्मी को साथ कार्य करने के लिए प्रतिकूल होगी। उपरोक्त वर्णित कारण एक नीतियुक्त कारण है जो उपरोक्त खण्ड (५) को वैधानिकता प्रदान करता है। अगर परिषद उक्त खण्ड (५) के अन्तःवस्तु में और स्पष्टता ला पाते तो अच्छा होता। अग्रिम स्थानान्तरण नीति में स्पष्टता का ध्यान रखना चाहिये।

१९. मा० उच्चतम न्यायालय के एक नवीन निर्णय जो **देवेश शर्मा प्रति भारत संघ व अन्यः २०२३ एस.सी.सी. ऑनलाइन एस.सी. ९८५,** के प्रकरण में पारित किया गया है, में पुनः यह प्रतिपादित किया किः-

"७३. हमारे मस्तिष्क में निश्चित रूप से कोई संदेह नही है, कि साधारणतः राज्य के नीतिगत निर्णयों में संवैधानिक न्यायालयों द्वारा उसके पुनः निरीक्षण अधिकारो के अंतर्गत हस्ताक्षेप नहीं किया जा सकता है। इसी के साथ अगर नीतिगत निर्णय स्वयं में ही विधि के विरूद्ध और वो मनमाना व तर्कहीन हो तो पुनःनिरीक्षण के अधिकार का उपयोग करना ही चाहिये।"

२०. मा० उच्चतम न्यायालय द्वारा एक अन्य प्रकरण **सत्यदेव बागुर प्रति राजस्थान शासन व अन्य (२०२२)५ एस.सी.सी. ३२४**, के प्रकरण मे पूर्व मे पारित **कृष्णन्न कक्कनाथ प्रति केरल राज्यः (१९९७)९ एस.सी.सी. ४९५** व **शेर सिंह प्रति भारत संघः (१९९५)६ एस.सी.सी. ५१५** के निर्णयों का संदर्भ लेते हुए यह निर्णीत किया किः-

"१५. यह अतिसामान्य है कि न्यायालय नीतिगत मामलो में हस्तक्षेप करने में मन्द रहेंगे, जब तक कि नीति स्पष्ट रूप से पक्षपाती और मनमानी न स्थापित हो जाये। यह न्यायालय राज्य की नीतिगत निर्णय में हस्तक्षेप नही करेगा, जब राज्य यह इंगित कर सके कि नीति के कार्यविहन में युक्तियुक्त अंतर है और वो युक्तियुक्त अंतर, उसके उद्देश्य की प्राप्ति से संबंध रखता है।"" [emphasis supplied]

7. Learned Senior Advocate for petitioners has not disputed number of sanctioned posts viz.-a-viz. number of working teachers in above districts. The only dispute is that in a case where working strength is more than sanctioned strength, whether applications for incoming inter district transfer could not consider as it was declared 'zero' and whether permission was correctly granted only for applications for outgoing transfer from said district and thereby some districts are completely excluded from incoming inter-district transfer and petitioners are aggrieved that no transfer is allowed to their desired district.

8. In this regard, following paragraphs of counter affidavit would be relevant -:

"9. That here, it is also necessary to make it clear that respect of para 02 (04) of the Transfer Policy framed by the State Government vide Government Order dated 02.06.2023, it has been provided that the cadre of Board's Teacher depends upon the local area (Rural or Urban) in any district and as such the nature of Inter District Transfer is the change of cadre and accordingly claiming transfer is not a matter of right for any teacher because at the time of appointment, a teacher like the Petitioners on her own wishes opted her cadre and after the appointment, she is bound to follow all the service conditions during his/her entire services.

10. That the strength of Board's teachers who come on inter-district transfer and go on inter-district transfer are not the same in all the districts and in such a situation, in the so-called backward districts, the strength of assistant teachers who on inter-district transfer is negligent and in case percentage of 10% is enhanced, then there is great possibility that there

shall be scarcity of Assistant Teachers in backward districts which obviously affect the educational interest of the students and taking into the aforesaid situation, the aforesaid decision has been taken.

11. That in the light of the provisions contained under point no. 2(4) of the Transfer Policy framed vide Government Order dated 02.06.2023, as a result after calculating the 10% strength of Assistant Teachers as against the working teachers, vacancies in the so-called districts were declared "Zero". For the kind perusal of this Hon'ble Court a photo copy of the chart showing the details of vacancies in those different districts are being filed and marked as Annexure-CA-2 to this counter affidavit."

9. In order to interfere with a decision taken by the respondents in pursuance of referred clause of transfer policy, petitioners have to show that such decision is arbitrary and absolutely contrary to the transfer policy.

10. The figures mentioned in regard to sanctioned strength and working strength are not in dispute. In some of the districts, working strength is more than sanctioned strength. Therefore, State's decision not to allow incoming transfer cannot be said to be arbitrary since these group of districts have been created on the basis of comparison of sanctioned strength and working strength which is in tune of referred paragraph that 10% has to be considered in terms of sanctioned posts and strength of working teachers.

11. In case of a particular district, where there are surplus working strength, if by process of inter-district transfer more teachers are allowed to join, the strength may further increase Ratio of working teachers viz.-a-viz. sanctioned strength will remain high which cannot be done by way of transfer.

12. In the policy, words are carefully used that transfer will be allowed upto 10% only in comparison of sanctioned posts viz.-a-viz. working strength.

13. The teachers have joined a particular district (being selected district wise) with open eyes. They have no right to work at their desired district. The transfer policy is a policy of a welfare State and in absence of any evident arbitrariness or a clause contrary to law, there is no scope to interfere with any clause of a transfer policy. As discussed above, there is no arbitrariness in framing of concerned clause or its interpretation.

11. In the above background of analysis and taking note of the judgement passed by this Court in **Shraddha Yadav (supra)**, this Court does not find any substantive material which could warrant interference with a decision taken by the State in pursuance of the referred clause of transfer policy, therefore, no interference is warranted and accordingly, all writ petitions are **dismissed**.

(2024) 2 ILRA 849
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2024

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Writ - A No. 11555 of 2019
With
Writ – A No. 15498 of 2019
And
Writ – A No. 20414 of 2019

Govind Raman Tripathi, Assistant Teacher ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Prabhakar Awasthi

Counsel for the Respondents:
C.S.C., Sri Deepak Kumar, Sri Santosh Kumar

A. U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 – Rule 10(5)(iii) – Deemed Approval – Scope.

Held : Deemed approval comes into play only where there is total inaction by the District Basic Education Officer. If DBEO communicates a decision within one month – whether to approve, disapprove, or withhold approval for reasons recorded – the deeming fiction does not apply. (Paras 25, 26, 27)

B. Assistant Teacher – Appointment without approval – Effect.
Where DBEO withheld approval citing low student strength and referred matter to Director of Education (Basic), subsequent appointment order issued by Committee of Management before expiry of period reckoned from last communication (30.7.2018) – Appointment cannot be treated as validly approved. Petitioner not entitled to salary from St. exchequer. (Paras 26, 27, 28)

Writ Petitions Dismissed. No interference warranted in orders dated 22.5.2019, 17.7.2019 and 19.9.2019.

Case Law Discussed:

1. Prem Singh Vs St. of U.P., (2019) 10 SCC 516 – distinguished.

2. Relevant provisions of Rule 10 of 1978 Rules examined.

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard learned counsel appearing for the petitioner, learned Standing Counsel appearing for the Respondents No.1 to 3 and learned counsel appearing for the Respondent No.4.

2. Petitioner through Writ-A No.11555 of 2019 has challenged the order dated 22.5.2019 passed by the District Basic Education Officer, Shahjahanpur, whereby petitioner's case for payment of salary of the post of Assistant Teacher has been rejected.

3. Petitioners through Writ-A No. 15498 of 2019 have challenged the order dated 17.7.2019 passed by the District Basic Education Officer, Shahjahanpur, whereby direction has been issued to Manager of the Committee of Management of Sri Vishwanath Junior High School, Shahjahanpur to cancel the appointment of Mr. Govind Raman Tripathi on the post of Assistant Teacher.

4. Petitioner through Writ- A No. 20414 of 2019 has challenged the order dated 19.9.2019 passed by the Director of Education (Basic), U.P., Lucknow, whereby it has been provided that appointment of the petitioner on the post of Assistant Teacher cannot be approved.

5. Since the aforesaid all the writ petitions are related with the approval of the appointment of Mr. Govind Raman Tripathi on the post of Assistant Teacher in Sri Vishwanath Junior High School, Shahjahanpur and all the writ petitions have been connected by the order passed by this court therefore, they are being decided together.

6. Facts of the case, in brief, are that one post of Assistant Teacher in Sri Vishwanath Junior High School, Shahjahanpur (hereinafter referred to as 'the school') fell vacant on 30.6.2015. The District Basic Education Officer, Shahjahanpur vide order dated 1.4.2016 granted permission for making appointment on the aforesaid vacant post of Assistant Teacher. An advertisement for the selection and appointment on the post of Assistant Teacher in the school was published on

7.6.2018 in the Newspaper 'Spasht Awaz', on 8.6.2018 in the Newspaper 'Divya Prakash' and on 10.6.2018 in the Newspaper 'Pioneer'. The District Basic Education Officer, Shahjahanpur vide order dated 2.6.2018 has appointed Sri Suresh Chandra, Block Education Officer as his nominee in the selection committee for the appointment in question.

7. The selection committee conducted interviews of the candidates and prepared merit list and thereby recommended name of Mr. Govind Raman Tripathi for appointment on the post of Assistant Teacher in the school. The Committee of Management of the school considered the recommendations made by the selection committee in its meeting held on 29.6.2018 and accepted the recommendations. The Manager of the Committee of Management of the school vide his letter dated 2.7.2018 forwarded the papers relating to the selection of Mr. Govind Raman Tripathi to District Basic Education Officer, Shahjahanpur for his approval. The District Basic Education Officer, Shahjahanpur vide his letter dated 23.7.2018 responded to the Manager of the Committee of Management of the school and informed that since the strength of the students in the school is very low therefore, the matter has been referred to the Director of Education (Basic), U.P., Lucknow for his guidance and only after the Director of Education (Basic), U.P., Lucknow provides guidance in the matter, the decision over the matter of approval of selection will be taken.

8. The Manager of the Committee of Management of the school vide his letter dated 30.7.2018 submitted his explanation in response to the letter of the District Basic Education Officer, Shahjahanpur dated 23.7.2018 and requested that selection in question be approved so that appointment may be made against the vacant post. Since there was no response by the District Basic Education Officer, Shahjahanpur after the letter dated 23.7.2018, the Manager of the school issued appointment order on 14.8.2018, whereby Mr. Govind Raman Tripathi was appointed on the post of Assistant Teacher in the school. Pursuant to appointment order dated 14.8.2018, Mr. Govind Raman Tripathi joined on the post of Assistant Teacher in the school on 16.8.2018.

9. Since in spite of working of Mr. Govind Raman Tripathi on the post of Assistant Teacher in the school, his salary was not released, he submitted representation to the District Basic Education Officer, Shahjahanpur and in response thereof, the District Basic Education Officer, Shahjahanpur passed an order on 22.5.2019, wherein he has stated that since appointment of Mr. Govind Raman Tripathi on the post of Assistant Teacher has been made without there being mandatory approval of the District Basic Education Officer, Shahjahanpur therefore, the said appointment is illegal and accordingly, it has been held that Mr. Govind Raman Tripathi is not entitled for payment of salary from the State exchequer.

10. The order dated 22.5.2019 passed by the District Basic Education Officer, Shahjahanpur has been challenged by Mr. Govind Raman Tripathi by filing Writ-A No.11555 of 2019.

11. While the aforesaid Writ-A No.11555 of 2019 was pending before this court, the District Basic Education Officer, Shahjahanpur has passed another order on 17.7.2019, whereby he directed the

Manager of the Committee of Management of the school to cancel the appointment of Mr. Govind Raman Tripathi. The Committee of Management of the school as well as Mr. Rajiv Kumar, Manager of the Committee of Management of the school have filed Writ-A No. 15498 of 2019, whereby they have challenged the aforesaid order dated 17.7.2019.

12. This court while hearing Writ-A No.11555 of 2019 passed an order on 19.8.2018 in the following terms:-

"Heard learned counsel for the petitioner, learned Standing Counsel for the respondent no. 1 and Sri Santosh Kumar, learned counsel for the respondent nos. 2 and 3.

It appears that the approval sought with respect to the appointment of the petitioner by respondent no.4 has not been granted by the District Basic Education Officer, Shahjahanpur on an opinion that the Director of Education (Basic) has yet not issued any directions with respect to the clarification that had been sought from him.

In view of the above, matter requires consideration.

Issue notice to the respondent no.4 returnable within four weeks. Steps be taken within one week.

In the meantime, respondents may file counter affidavits.

List this case on 20.09.2019.

In the meanwhile, it is provided that the petitioner may serve a copy of this order to the Director of Education (Basic) within a period of two weeks from today. Upon service being made, the Director of Education (Basic) shall pass appropriate order/directions to the District Basic Education Officer with respect to the clarification that may have been sought by that authority from the said Director with respect to the petitioner's appointment.

It is expected that the such direction may be placed on record on the next date fixed."

13. The Director of Education (Basic), U.P., Lucknow in compliance of the aforesaid order dated 19.8.2019 passed in Writ-A No.11555 of 2019 has passed an order on 19.9.2019, whereby it has been held that strength of the students in the school is very low therefore, as per standards prescribed under Right of Children to Free and Compulsory Education Act, 2009, there is no requirement of appointment of the Assistant Teacher in the school, accordingly petitioner's selection/appointment cannot be approved.

14. Learned counsel appearing for the petitioner has pointed out that the school in question is being run by a Society registered under the Societies Registration Act, 1860 through a validly elected Committee of Management. The school is receiving grant-in-aid from the Government of U.P. The terms and conditions of the appointment and service of the teachers working in the school are governed by the U.P. Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (hereinafter referred to as 'the Rules of 1978').

15. Learned counsel appearing for the petitioner has submitted that Rule 10 of the Rules of 1978 provides the procedure for selection and appointment on the post of Assistant Teacher. He has further submitted that under the aforesaid Rule 10 of the Rules of 1978, after selection, the papers of selection are to be forwarded to the District

Basic Education Officer for approval and Rule 10 (5)(iii) of the Rules of 1978 categorically provides that if the District Basic Education Officer does not communicate his decision within one month from the date of receipt of papers under Clause (4), he shall be deemed to have accorded approval to the recommendations made by the selection committee.

15. Learned counsel appearing for the petitioner has argued that the Manager of the Committee of Management of the school forwarded papers relating to the selection of Mr. Govind Raman Tripathi on the post of Assistant Teacher to the District Basic Education Officer, Shahjahanpur on 2.7.2018 and since he has not communicated his decision within one month from the date of receipt of papers, the selection in question stood deemed approved and therefore, after expiry of period of one month from 2.7.2018, the Manager of the Committee of Management of the school has issued appointment order on 14.8.2018 and in pursuance thereof, petitioner has joined on the post of Assistant Teacher in the school on 16.8.2018.

16. Learned counsel appearing for the petitioner has vehemently argued that since selection of the petitioner for appointment on the post of Assistant Teacher in the school stood deemed approved as per provisions made in Rule 10 (5)(iii) of the Rules of 1978 and petitioner with effect from 16.8.2018 is continuously discharging duties of the post of Assistant Teacher in the school, he is entitled for payment of salary form the State exchequer with effect from 16.8.2018. Learned counsel appearing for the petitioner has further argued that the District Basic Education Officer, Shahjahanpur while passing orders dated 22.5.2019 and 17.7.2019 denying payment of salary to the petitioner and directing the Committee of Management of the school to cancel petitioner's appointment, has acted in gross violation of provisions of the Rule 10 (5)(iii) of the Rules of 1978 accordingly, the said orders are not sustainable in the eyes of law.

17. Learned counsel appearing for the petitioner has also argued before this court that the Director of Education (Basic), U.P., Lucknow has passed order on 19.9.2019 without even considering the fact that the petitioner's selection on the post of Assistant Teacher stood approved as per provisions of the Rule 10 (5)(iii) of the Rules of 1978 therefore, the said order dated 19.9.2019 cannot sustain in the eyes of law.

18. Learned counsel appearing for the petitioner has thus concluded his arguments and has submitted that since petitioner's selection for appointment on the post of Assistant Teacher in the school stood approved by operation of law i.e. under provisions of the Rule 10 (5)(iii) of the Rules of 1978 therefore, the orders impugned in the writ petitions, are not sustainable in the eyes of law and writ petitions filed by the petitioners are liable to be allowed by this court with a direction to the District Basic Education Officer, Shahjahanpur to release petitioner's salary forthwith along with arrears of salary.

19. Per contra, learned Standing Counsel appearing for the State respondents has submitted that Rule 10 (5)(iii) of the Rules of 1978 provides that if the District Basic Education Officer does not communicate his decision within one month from the date of receipt of papers

under clause (4), he shall be deemed to have accorded approval to the recommendations made by the selection committee and in the present case, papers relating to the selection of Mr. Govind Raman Tripathi were forwarded to the District Basic Education Officer, Shahjahanpur on 2.7.2018 and immediately thereafter the District Basic Education Officer, Shahjahanpur communicated his decision on 23.7.2018 to withhold the approval of the selection for the reason that strength of the students in the school is very low and he has sought guidance in the matter from the Director of Education (Basic), U.P., Lucknow therefore, provisions of Rule 10 (5)(iii) of the Rules of 1978 are not attracted and accordingly, selection of Mr. Govind Raman Tripathi for appointment on the post of Assistant Teacher cannot be considered to be deemed approved.

20. Learned Standing Counsel has further invited attention of this court that papers of the selection were forwarded to the District Basic Education Officer, Shahjahanpur on 2.7.2018 and in response thereof, he communicated his decision to withhold the approval and reasons thereof, vide his letter dated 23.7.2018 and thereafter, the Manager of the Committee of Management of the school vide his letter dated 30.7.2018 submitted his response to the reasons given in the letter dated 23.7.2018 and thereafter, without even waiting for expiry of the period of one month from 30.7.2018, the Manager of the Committee of Management of the school straightaway issued appointment order on 14.8.2018 therefore, selection of Mr. Govind Raman Tripathi on the post of Assistant Teacher cannot be treated to be deemed approved under Rule 10 (5)(iii) of the Rules of 1978.

21. Learned Standing Counsel has also submitted before this court that since after submission of the papers on 2.7.2018 relating to the selection, the District Basic Education Officer, Shahjahanpur vide his letter dated 23.7.2018 communicated his decision to withhold the approval of selection for certain reasons and in response thereof, the Manager of the school submitted more information vide his letter dated 30.7.2018 therefore, if the provisions of deemed approval are to be attracted, one month time shall be counted with effect from 30.7.2018, whereas even before one month time appointment order was issued on 14.8.2018 therefore, there is no scope for applying provisions of Rule 10 (5)(iii) of the Rules of 1978 and treating the selection in question to have been deemed approved.

22. Learned Standing Counsel has vehemently argued that since strength of the students in the school is very low and there are sufficient number of teachers working in the school as per norms provided under Right of Children to Free and Compulsory Education Act, 2009 therefore, the District Basic Education Officer, Shahjahanpur as well as the Director of Education (Basic), U.P., Lucknow have disapproved the selection in question and have denied the payment of salary to Mr. Govind Raman Tripathi from the State exchequer.

23. Learned Standing Counsel has thus concluded his arguments and has submitted that provisions of Rule 10 (5)(iii) of the Rules of 1978 are not applicable in the present case and the writ petitions filed by the petitioners being absolutely misconceived are liable to be dismissed by this court.

24. I have considered the rival submissions advanced by the learned counsels appearing for the parties and I find that the case of Mr. Govind Raman Tripathi is that since papers of his selection on the post of Assistant Teacher were forwarded to the District Basic Education Officer, Shahjahanpur on 2.7.2018 and since within one month he did not take decision in respect of approval of the selection therefore, in view of the provisions of the Rule 10 (5)(iii) of the Rules of 1978, his selection stood deemed approved and therefore, petitioner is entitled for payment of salary from the State exchequer with effect from 16.8.2018. For arriving at a conclusion it is necessary to have a brief look of the provisions made in Rule 10 of the Rules of 1978. Rule 10 of the Rules of 1978 is extracted as under:-

10. Procedure for selection. *-(1) The Selection Committee shall, after interviewing such candidates as appear before it on a date to be fixed by it in this behalf, of which due intimation shall be given to all the candidates, prepare a list containing as far as possible the names, in order of preference, of three candidates found to be suitable for appointment.*

(2) The list prepared under clause (1) shall also contain particulars regarding the date of birth, academic qualifications and teaching experience of the candidates and shall be signed by all the members of the Selection Committee.

(3) The Selection Committee shall, as soon as possible, forward such list, together with the minutes of the proceedings of the Committee to the management

(4) The Manager shall within one week from the date of receipt of the papers under clause (3) send a copy of the list to the District Basic Education Officer.

(5) (i) If the District Basic Education Officer is satisfied that-

(a) the candidates recommended by the Selection Committee possess the minimum qualifications prescribed for the post;

(b) the procedure laid down in these rules for the selection of Headmaster or Assistant Teacher, as the case may be, has been followed he shall accord approval to the recommendations made by the Selection Committee and shall communicate his decision to the Management within two weeks from the date of receipt of the papers under clause (4).

(ii) If the District Basic Education Officer is not satisfied as aforesaid, he shall return the papers to the Management with the direction that the matter shall be reconsidered by the Selection Committee.

(iii) If the District Basic Education Officer does not communicate his decision within one month from the date of receipt of the papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the Selection Committee."

25. This court finds that Rule 10 (5)(iii) of the Rules of 1978 provides that if the District Basic Education Officer does not communicate his decision within one month from the date of receipt of papers under clause (4), he shall be deemed to have accorded approval to the recommendations made by the selection committee. The word 'decision' used in Rule 10 (5)(iii) of the Rules of 1978 can be the decision to approve the selection or the decision to disapprove the selection or the decision to withhold the approval of the selection for certain reasons.

26. This court further finds that papers of the selection of Mr. Govind Raman Tripathi for appointment on the post of Assistant Teacher were forwarded by the Manager of the Committee of Management of the school to the District Basic Education Officer, Shahjahanpur vide his letter dated 2.7.2018 and in response thereof, the District Basic Education Officer, Shahjahanpur promptly communicated his decision to withhold the approval of the selection for the reason that the strength of the students in the school is very low and further he has sought guidance in the matter from the head of the department i.e. Director of Education (Basic), U.P., Lucknow. Once the District Basic Education Officer, Shahjahanpur after 2.7.2018 has communicated his decision to withhold the approval of selection vide his letter dated 23.7.2018, the question of selection having been deemed approved under the provisions of Rule 10 (5)(iii) of the Rules of 1978 does not arise. Even further pursuant to letter of the District Basic Education Officer, Shahjahanpur dated 23.7.2018, the Manager of the Committee of Management of the school has provided certain information in respect of reasons given in the letter dated 23.7.2018, vide his letter dated 30.7.2018 therefore, even if one month time for the purposes of deemed approval is to be counted that will start with effect from 30.7.2018 and before that, the Manager of the Committee of Management of the school has issued appointment order on 14.8.2018 in favour of Mr. Govind Raman Tripathi therefore, the said selection cannot be treated to have been deemed approved by operation of law as provided under Rule 10 (5)(iii) of the Rules of 1978.

27. It is worth consideration that the intention of the rule making authority in providing for deemed approval of the selection under Rule 10 (5)(iii) of the Rules of 1978 is crystal clear that there may be a situation of complete inaction on the part of the competent authority in the matter of approval of the selection, then in that case if one month time has passed from the date of submission of the papers of the selection, the competent authority shall be deemed to have approved the selection, but in the present case after submission of the papers of the selection on 2.7.2018, the District Basic Education Officer, Shahjahanpur considered the entire matter and communicated his decision to withhold the approval for certain reasons therefore, there did not appear any inaction on the part of the District Basic Education Officer, Shahjahanpur, accordingly the deeming clause provided under Rule 10 (5)(iii) of the Rules of 1978 will not come into play.

28. In view of the aforesaid reasons, this court does not find any illegality in the impugned orders dated 22.5.2019, 17.7.2019 and 19.9.2019 therefore, any interference by this court is not warranted.

29. In the result, the writ petitions are dismissed.

(2024) 2 ILRA 856
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ - A No. 12652 of 2023
Writ – A No. 11530 of 2023
Writ – A No. 12873 of 2023
Writ – A No. 17354 of 2023
Writ – A No. 13399 of 2023

Archana Taliyan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajat Aren, Sri Raj Kumar Singh, Sri Rishi Srivastava

Counsel for the Respondents:
Mrs. Archana Singh

A. Service Law – Basic Education – Transfer Policy dated 02.06.2023 – Clause 12(4) – Weightage Marks for Inter-District Transfer – Scope.
Petitioners, Assistant Teachers, claimed weightage on ground that their spouses are serving in Delhi Police – Contention that Delhi Police is under Ministry of Home Affairs, U.O.I., hence falls under "regular employees in service of U.O.I." as referred in Clause 12(4) of transfer policy – *Held,* Delhi Police is confined territorially to NCT of Delhi, not an All India Service – Services expressly included in clause are those of All India character (Army, Navy, Air Force, CAPFs, etc.) or St. of U.P. – No other St. services are included. Petitioners' claim rightly denied. (Paras 2–6, 8, 9)

B. Transfer Policy – Judicial Review – Scope.
Transfer policy is only an administrative guideline, not statutory in nature – Courts can interfere only if policy is arbitrary, discriminatory or violative of law – Explanation afforded by St. for excluding Delhi Police is rational and not arbitrary – Reliance on O.M. dated 01.09.2006 misplaced. (Paras 1, 5, 7, 8)

Writ Petitions Dismissed. No costs.

Case Law Discussed:

1. Shradha Yadav & ors. Vs St. of U.P. & ors., Neutral Citation: 2024:AHC:4085

2. Devesh Sharma Vs U.O.I., 2023 SCC OnLine SC 985

3. Satyadev Bagur Vs St. of Raj., (2022) 5 SCC 324

4. Krishnan Kakkanath Vs St. of Kerala, (1997) 9 SCC 495

5. Sher Singh Vs U.O.I., (1995) 6 SCC 515

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

CORAM : HON'BLE SAURABH SHYAM SHAMSHERY, J.

1. In present bunch of writ petitions an issue with regard to interpretation of Clause 12, sub-clause (4) of transfer policy dated 02.06.2023 is involved. It is well settled that a transfer policy is only an administrative policy without any back up of statutory provisions.

2. Petitioners before this Court are Assistant Teachers in different Primary Schools at different districts of State of U.P. run by Board of Basic Education, Uttar Pradesh. They claimed that their respective spouses are working in Delhi Police, which is under the supervision of Ministry of Home Affairs, Union of India and their services would fall within the terminology "regular employees working under service of Union of India", as referred in above transfer policy for purpose of granting weightage marks for consideration of their respective applications for inter-district transfer.

3. The claim of petitioners for inter-district transfer was rejected and petitioners were not granted any weightage marks on basis that services with Delhi Police would not fall within the service of Union of India.

4. In the counter affidavit a categorical stand has been taken by State as decided in a high level meeting of State Authorities that nature of employment of Delhi Police is akin to State services, i.e., the working area of said employees is only within territory of State of NCT and not as a All India Service, whereas other services mentioned in sub-cause (4) of Clause 12 of transfer policy are the services having nature of All India Services as well as services which are within the State of U.P. No service of other State is included in said clause of transfer policy. For reference

relevant part of transfer policy dated 02.06.2023 and circular dated 16.06.2023 is reproduced hereinafter:

Transfer policy dated 02.06.2023

12. अंतर्जनपदीय स्थानांतरण प्रक्रिया में वरीयता हेतु देय भारांक

क्रमांक	*मानक*	*अधिकतम अंक*
1	*Xxx*	*Xxx*
2	*Xxx*	*Xxx*
3	*Xxx*	*Xxx*
4	*शिक्षक/शिक्षिका जिनके पति या पत्नी सरकारी सेवा (भारत सरकार/भारतीय थल सेना/भारतीय वायु सेवा/भारतीय नौ सेना/केन्द्रीय अर्ध सैनिक बल एवं उत्तर प्रदेश सरकार व उ०प्र०, बेसिक शिक्षा परिषद के अधीन) में नियमित रूप से कार्यरत हो।*	*10*
5	*Xxx*	*Xxx*
6	*Xxx*	*Xxx*
7	*Xxx*	*Xxx*
8	*Xxx*	*Xxx*

Circular dated 16.06.2023

"(8)- सरकारी सेवा का लाभ ऐसे शिक्षक/शिक्षिका जिनके पति या पत्नी भारत सरकार/भारतीय थल सेना/भारतीय वायु सेना/भारतीय नौ सेना/केन्द्रीय अर्ध सैनिक बल एवं उत्तर प्रदेश सरकार व उ०प्र०, बेसिक शिक्षा परिषद के अधीन नियमित कार्यरत सरकारी सेवक होंगे, को ही देय होगा। भारत के संविधान के अनुच्छेद 309 के परन्तुक के अधीन जिन कार्मिकों का सेवा विनियमन होता है, वे सरकारी सेवा की श्रेणी में माने जायेंगे। सरकारी सेवा में अद्यतन कार्यरत होने का प्रमाण पत्र जो सक्षम नियुक्ति प्राधिकारी द्वारा निर्गत किया गया हो, ही मान्य होगा।"

5. Learned counsel for petitioners have argued at length and invited this Court to enter into a controversy, whether the service of Delhi Police will be a service under Union of India or not. However, since it is not a lis between parties to decide this large issue as neither Delhi Police nor Union of India being not necessary party to this dispute are before this Court nor the controversy could be decided by this Court in present writ petitions, being beyond territorial jurisdiction, therefore, despite various arguments raised touching Act and Rules which govern the services of Delhi Police as well as Articles of Constitution and office memorandum dated 01.09.2006 including some judgments, this Court in present writ petitions cannot go to consider the above issue to extent of deciding an issue not before this Court.

6. In above background, within limited scope of this Court in present cases considering explanation afforded by State, I am of the view that Delhi Police is a service having jurisdiction within National Capital Territory of Delhi, whereas services mentioned in sub-clause (4) of Clause 12 of transfer policy, i.e., Army etc. are within the ambit of All India Services. No other services of other States are included in that clause except services of State of U.P.

7. Recently this Court in a bunch of writ petitions leading being **Writ-A No. 15163 of 2023 (Shradha Yadav and**

others vs. State of U.P. and others), Neutral Citation :2024:AHC: 4085 has dealt with the issue of scope of interference in a policy decision of State and relevant paragraphs thereof are reproduced hereinafter:

*"**१६.** स्थानान्तरण नीति के खण्ड १६, १७ व १८ के अन्तर्वस्तु से स्पष्ट है, जो परिषद के उक्त परिपत्रों को, जो उक्त नीति के ' तकनीकी चरण व प्रक्रिया के निर्धारण', इसकी समय सारिणी व कार्यमुक्त कराने के सम्बन्ध में है, निर्गत करने के लिए स्पष्ट रूप से परिषद के सचिव को अधिकृत करते है। अतः उक्त परिपत्रों को निर्गत करने का अधिकार सचिव, उ.प्र. बेसिक शिक्षा परिषद को पूर्ण रूप से था। अतः परिपत्र वैधानिक है व विधिक रूप से संधारणीय भी है। यह परिपत्र स्थानान्तरण नीति के क्रम में उसके कार्यवाहन के लिए है, न कि उसकी प्रकृति के विरोध में निर्गत किये गये है। स्पष्टता व संदर्भ के लिए स्थानान्तरण नीति के खण्ड १६, १७ व १८ पुनः निम्न उल्लेखित किये जा रहे है:-*

"(१६) अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण के लिए निर्गत शासनादेश के अनुसार उ०प्र० बेसिक शिक्षा परिषद द्वारा अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण के तकनीकी चरण एवं प्रक्रिया का निर्धारण किया जायेगा तथा शासनादेश के क्रम में अग्रतर कार्यवाही की जायेगी।

(१७) अन्तर्जनपदीय स्थानान्तरण हेतु समय-सारिणी सचिव, बेसिक शिक्षा परिषद द्वारा अपने स्तर से पृथक से निर्गत की जायेगी।

(१८) अन्तर्जनपदीय एवं पारस्परिक स्थानान्तरण के उपरान्त शिक्षक/शिक्षिका को कार्यमुक्त करने तथा कार्यभार ग्रहण करने की कार्यवाही मध्य शैक्षिक सत्र में नहीं की जायेगी। शिक्षक/शिक्षिका को कार्यमुक्त करने तथा कार्यभार ग्रहण करने की कार्यवाही अवकाश के दौरान ही की जायेगी।"

***१७.** अब न्यायालय को यह निर्धारित करना है कि परिपत्र दिनाँक २८.०६.२०२३ के खण्ड (५) में उल्लेखित 'स्थानान्तरित जनपद में बैच की पदोन्नति वर्ष/मौलिक नियुक्ति तिथि के आधार पर' कार्यमुक्त करने की कार्यवाही का कोई न्यायोचित कारण है अथवा नही। यहां यह ध्यान रखना होगा कि याचिकाकर्तागण के संबंध में अंतर्जनपदीय स्थानान्तरण का आदेश पारित हो गया था परन्तु उपरोक्त खण्ड (५) के कारण उनको कार्यमुक्त नहीं किया गया है।*

***१८.** उपरोक्त वर्णित खण्ड (५) के अन्तःवस्तु के मात्र परिशीलन से स्पष्टता प्रतीत नही होती है परन्तु परिषद के द्वारा दायर प्रतिउत्तर पत्र व उसके विद्वान अधिवक्ता के कथन से स्पष्टता प्रतीत होती है, कि अगर याचिकाकर्तागण जो पदोन्नति पद पर है स्थानान्तरित जनपद, जहां उनके बैंच के शिक्षकों की पदोन्नति नही हुयी है, कार्यभार ग्रहण कराया जाता है तो वो अपने संवर्ग मे निम्नतम वरिष्ठता पर रहें। फिर भी वो उनके बैंच में कार्यरत शिक्षक/शिक्षिका जिनको पदोन्नति नहीं की गई है, से वरिष्ठ हो जायेंगे और उनके पदोन्नति होने के बाद भी याचिकाकर्तागण ही वरिष्ठ रहेंगे। जिससे असमंजसता की स्थिति उत्पन्न हो जायेगी, चाहे वरिष्ठता सूची मूल जनपद के स्तर पर ही क्यो न हो। यह स्थिति सहकर्मी को साथ कार्य करने के लिए प्रतिकूल होगी। उपरोक्त वर्णित कारण एक नीतियुक्त कारण है जो उपरोक्त खण्ड (५) को वैधानिकता प्रदान करता है। अगर परिषद उक्त खण्ड (५) के अन्तःवस्तु में और स्पष्टता ला पाते तो अच्छा होता। अग्रिम स्थानान्तरण नीति में स्पष्टता का ध्यान रखना चाहिये।*

***१९.** मा० उच्चतम न्यायालय के एक नवीन निर्णय जो **देवेश शर्मा प्रति भारत संघ व अन्यः २०२३ एस.सी.सी. ऑनलाइन एस.सी. ९८५,** के प्रकरण में पारित किया गया है, में पुनः यह प्रतिपादित किया किः-*

" ७३. हमारे मस्तिष्क में निश्चित रूप से कोई संदेह नही है, कि साधारणतः राज्य के नीतिगत निर्णयों में संवैधानिक न्यायालयों द्वारा उसके पुनः निरीक्षण अधिकारो के अंतर्गत हस्ताक्षेप नहीं किया जा सकता है। इसी के साथ अगर नीतिगत निर्णय स्वयं में ही विधि के विरूद्ध और वो मनमाना व तर्कहीन हो तो पुनःनिरीक्षण के अधिकार का उपयोग करना ही चाहिये।"

२०. *मा० उच्चतम न्यायालय द्वारा एक अन्य प्रकरण* ***सत्यदेव बागुर प्रति राजस्थान शासन व अन्य (२०२२) ५ एस.सी.सी. ३२४,*** *के प्रकरण मे पूर्व मे पारित* ***कृष्णन्न कक्कनाथ प्रति केरल राज्यः(१९९७) ९ एस.सी.सी. ४९५*** *व* ***शेर सिंह प्रति भारत संघः (१९९५) ६ एस.सी.सी. ५१५*** *के निर्णयों का संदर्भ लेते हुए यह निर्णीत किया किः-*

" १५. यह अतिसामान्य है कि न्यायालय नीतिगत मामलो में हस्तक्षेप करने में मन्द रहेंगे, जब तक कि नीति स्पष्ट रूप से पक्षपाती और मनमानी न स्थापित हो जाये। यह न्यायालय राज्य की नीतिगत निर्णय में हस्तक्षेप नही करेगा, जब राज्य यह इंगित कर सके कि नीति के कार्यावहन में युक्तियुक्त अंतर है और वो युक्तियुक्त अंतर, उसके उद्देश्य की प्राप्ति से संबंध रखता है।"

8. Heavy reliance placed by learned counsel for petitioners on office memorandum dated 01.09.2006 will also not be helpful since the word used therein is 'treated' only. Otherwise also, as referred above, territorial area of service under Delhi Police is only limited to N.C.T. of Delhi, not beyond.

9. In above background as well as taking note of an explanation afforded by State, I do not find that there is any arbitrariness on the part of respondents in not granting any marks to petitioners on strength of their spouses being working in Delhi Police.

10. The writ petitions are accordingly dismissed.

(2024) 2 ILRA 860
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2024

BEFORE

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

Writ - A No. 14750 of 2020

Ashok Kumar Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Samarath Singh, Sri Ajay Kumar, Sri Sankalp Narayan

Counsel for the Respondents:
C.S.C., Sri Jagannath Maurya

A. Service Law – Dismissal – Departmental enquiry – Right of cross-examination – Recovery of lost money from charged-employee was also directed – Charge of embezzlement was leveled – Burden of proof, on whom lie – Neither solitary witness was examined on behalf of the establishment nor any kind of evidence was led before the Inquiry Officer – Effect – Inquiry officer, how to act and proceed enquiry – Held, Inquiry officer must convene himself as an impartial arbiter, an Inquiry Tribunal, before whom the establishment must, in the first instance, lead evidence, both documentary and oral, through a Presenting Officer to prove the charge – When the establishment produce their witnesses in support of the charge/ charges, the employee has the right to cross-examine them – Manner in which disciplinary proceedings have been held by the Inquiry Officer are manifestly

illegal and the order impugned, founded on such proceedings, cannot be sustained. (Para 15, 16 and 22)

Writ petition allowed. (E-1)

List of cases cited :-

1. St. of U. P. & ors. Vs Saroj Kumar Sinha; (2010) 2 SCC 772

2. Roop Singh Negi Vs Punjab National Bank & ors.; (2009) 2 SCC 570

3. St. of U.P. & anr.Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB)(LB)

4. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)

5. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB)(LB)

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

1. This writ petition is directed against an order of dismissal from service and recovery of the price of wheat said to be embezzled by the petitioner. This order has been made against the petitioner by the Executive Director, U.P. Rajya Karamchari Kalyan Nigam, Lucknow on 22.09.2020 and shall hereinafter be referred to as the impugned order.

2. The petitioner was a Centre Superintendent in the employ of the U.P. Rajya Karamchari Kalyan Nigam, Lucknow (for short, 'the Corporation'). He was appointed a Centre Superintendent at the Wheat Purchase Centre, Vijay Nagla, District Badaun in the month of March, 2018. The petitioner was transferred from District Badaun to District Agra on 13.07.2018. On 16th of July, 2018 in a quick movement of events, the petitioner was transferred from District Agra to District Sambhal and posted as a Salesman/ Accounts Clerk by the Managing Director, Uttar Pradesh State Food and Essential Commodities Corporation Limited, Lucknow. The petitioner joined the station of transfer on 16.07.2018. On 24th July, 2019, a little over a year after his preceding transfer to Sambhal, the petitioner was transferred back to District Agra, where he joined on 19.08.2019.

3. It is the petitioner's case that while posted as the Centre In-charge, Wheat Purchase Centre, Vijay Nagla, District Badaun, an incident took place on 15.06.2018, where records relating to purchase of wheat were forcibly taken away by one Harish Shankhdhar, a government contractor. The petitioner made a complaint regarding the incident to the Executive Director of the Corporation as well as the District Magistrate through registered post on 12.07.2018. Another complaint regarding the incident was addressed to the Director of the Corporation on 23.07.2018. The petitioner says that no action was taken by these Authorities upon his complaints. The petitioner was served with a show cause notice instead, by the Eecutive Director last mentioned on 03.08.2019, where it was claimed that the petitioner was guilty of short-deposit of wheat in the stocks of the Corporation, compared to the quantity purchased while posted at Badaun. The short-deposit was alleged to be a quantity of 2411.60 quintals.

4. The show cause notice was answered by the petitioner on 09.08.2019. The allegation was denied. In his reply, the petitioner said that he was transferred from Badaun on 13.07.2018, handing over charge to one Ashok Kumar Saxena. He joined the station of transfer on 14.07.2018. The stand of the petitioner was that he had

no information regarding any embezzlement or shortage of wheat, which took place afterwards.

5. The Executive Director of the Corporation placed the petitioner under suspension pending inquiry *vide* order dated 31.10.2019. He was served with a charge-sheet on the day he was suspended. The charge-sheet says that the petitioner was *prima facie* found to have caused a loss of Rs.46,38,592.02 to the Corporation in that, that out of a total procurement of 11000 quintals of wheat at the Centre during the *Rabi* Season of 2018-19, the petitioner had deposited with the Food Corporation of India 8588.40 quintals, leaving a shortfall of 2411.60 qunitals. It was said in the charge that calculating the worth of the shortfall at the rate prescribed by the Food Corporation of India, which was Rs.1923.45 per qunital, the petitioner was guilty of embezzling a sum of Rs.46,38,592.02, and thus, causing serious financial loss to the Corporation. It is also said in the charge that the petitioner was required to show cause, but his reply did not clarify the position. He was summoned by the Executive Director *vide* his memo dated 11.09.2019, requiring the petitioner to appear before the Director aforesaid on 13.09.2019 in his office and clarify matters.

6. The petitioner, upon appearing before the Executive Director of the Corporation, had sought a month's time to make good the shortfall of wheat, but did not keep his word. The petitioner was, therefore, charged with serious financial irregularity and the resultant act of misconduct punishable under the Model Conduct Discipline and Appeal Rules framed by the Corporation. The petitioner was required to submit reply to the charge-sheet, which carried a solitary charge as aforesaid. The petitioner submitted his reply dated 19.11.2019 denying the charge.

7. It was the petitioner's case in his reply that the embezzlement was done by government contractors, Santosh Mishra and Harish Shankhdhar, regarding which information had already been conveyed by the petitioner and permission also sought to lodge a first information against the said contractors. It was pointed out that further action was not taken due to want of instructions from the Authorities of the Corporation. A First Information Report was nevertheless lodged by the petitioner on 23.09.2019 against government contractors, Santosh Mishra and Harish Shankhdhar on 23.09.2019, which was registered as Case Crime No.238 of 2019, under Sections 406, 420, 341, 506 IPC, Police Station Vinawar, District Badaun.

8. The petitioner challenged his suspension from service by means of Writ-A No.2731 of 2020, which was disposed of by this Court *vide* an order dated 18.02.2020, directing the respondents to complete departmental proceedings expeditiously. This Court's order was observed in breach, compelling the petitioner to move Contempt Application (Civil) No.3699 of 2020. Pending these contempt proceedings, the petitioner was issued with a show cause notice by the respondents on 17.07.2020, requiring him to submit a reply to the inquiry report, a copy of which was supplied to him along with the show cause. This was followed by the impugned order of dismissal from service dated 22.09.2020, which further directed that a sum of Rs.15,46,197.33/- shall be recovered from the petitioner and that he will not be paid any sum of money for the period of his suspension, except the subsistence allowance. Amongst other

pleas, that are urged, it is averred in Paragraph No.32 of the writ petition that after receipt of his reply to the charge-sheet, no date, time and place of inquiry was fixed and intimated to the petitioner, where he could appear and cross-examine witnesses in support of the charge or answer other evidence led. It is averred that a namesake of inquiry was held without giving the petitioner a fair opportunity of hearing.

9. In the counter affidavit filed on behalf of the Corporation in Paragraph No.22, Paragraph No.32 of the writ petition, along with a host of other paragraphs, ranging from 26 to 38 of the writ petition, have been answered. All the averments in the relative paragraphs have been 'not admitted'. Paragraph No.22 of the counter affidavit reads:

"22. That the contents of paragraph nos. 26 to 38 of the writ petition are not admitted. In reply thereto it is submitted that for the aforesaid embezzlement of Rs.46,38,592.02, departmental enquiry was initiated against the petitioner and vide order dated 31-01-2019 he was placed under suspension and Finance & Accounts Officer, Uttar Pradesh, Rajya Karmchari Kalyan Nigam, Lucknow was appointed as Enquiry Officer. It is further submitted that the Enquiry Officer after conducting enquiry into the matter submitted enquiry report dated 07-08-2020 in which the charge of embezzlement levelled against the petitioner was proved. On the basis of enquiry report dated 07-08-2020 submitted by the Enquiry Officer, the Executive Director, Uttar Pradesh, Rajya Karmchari Kalyan Nigam, Lucknow(respondent no.2) after affording opportunity of hearing to the petitioner/delinquent employee, passed order dated 22-09- 2020 whereby the petitioner was dismissed from service with further direction to recover an amount of Rs.15,46,197.33 from the petitioner."

10. Heard Mr. Sankalp Narayan, learned Counsel for the petitioner, Mr. J. N. Maurya, learned Counsel for respondent Nos. 2 and 3 and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel for respondent No.1.

11. The thrust of the petitioner's submission is that the inquiry held was a slipshod affair, where no date, time and place was fixed and intimated to the petitioner. Elaborating his submissions, the learned Counsel for the petitioner has urged that in matters involving the possible imposition of a major penalty, it is incumbent upon the Inquiry Officer to fix a date, time and venue, which should be intimated to the delinquent. It is also imperative that in the inquiry held, some kind of a formal proceeding be undertaken, where the Inquiry Officer should hear evidence on behalf of the establishment, requiring them to prove the charge by evidence, both documentary and oral. It is, particularly, urged that in matters involving the likelihood of imposition of a major penalty, it is imperative for the establishment that they examine witnesses in support of the charge with opportunity to the delinquent to cross-examine them. It is after the establishment have led evidence to prove the charge/ charges, that the delinquent is to be afforded opportunity to produce evidence in his defence, both documentary and oral.

12. The learned Counsel appearing for the respondents are in unison to say that the petitioner has been given adequate opportunity in the sense that he was served

with a copy of the charge-sheet, to which he submitted a reply, and further was given a copy of the inquiry report with opportunity to show cause at that stage. In the submission of the learned Counsel appearing for the respondents, there is no procedural lapse or unfairness, causing prejudice to the petitioner, calling for interference by this Court.

13. Upon hearing learned Counsel for the parties and going through the record, what this Court finds is that the inquiry indeed has been held in a slipshod manner by the establishment without following salutary principles for proving the charge they have laid. A copy of the inquiry report is not available on the record of the writ petition, but surprisingly it has not been annexed to the counter affidavit as well. The best material to know about the proceedings of the inquiry and what happened before the Inquiry Officer is the order impugned itself. It is recorded about the proceedings of the inquiry in the order impugned as follows:

"तत्पश्चात प्रकरण में कार्यालय पत्र सं0-18 स्था0 / बत्तीस - 2020 दिनॉक 08.01.2020 द्वारा अपचारी कर्मचारी की व्यक्तिगत सुनवाई / बयान अभिलिखित करने हेतु दिनॉक 13.01.2020 की तिथि नियत की गयी, अपचारी कर्मचारी व्यक्तिगत सुनवाई हेतु नियत तिथि को उपस्थित हुआ तथा अपना बयान अंकित कराया गया। अपचारी कर्मचारी के विरूद्ध निर्गत आरोप पत्र प्राप्त अभिलिखित कथन, अपचारी कर्मचारी का अंकित बयान तथा अभिलेखीय साक्ष्यों का परीक्षण एवं विवचनोपरान्त, विधि सम्मत जॉचोपरान्त जॉच अधिकारी द्वारा अपनी जॉच आख्या दिनॉक 07.08.2020 को प्रस्तुत की गयी, जिसमें मात्र 01 आरोप लगाया गया है, जो कि सिद्ध पाया गया है।"

14. A perusal of the aforesaid proceedings of the inquiry shows that 13th January, 2020 was the date fixed before the Inquiry Officer that was intimated to the petitioner by the respondents through their memo dated 8th January, 2020. This date was described as a date for the petitioner's personal hearing. A perusal of the description of proceedings, above extracted, would show that on 13.01.2020, the petitioner appeared before the Inquiry Officer and his evidence or statement was recorded. The Inquiry Officer then proceeded to hold the petitioner guilty looking into the charge-sheet, the employee's reply to the charge-sheet, the evidence or statement of the petitioner and the documents. The Inquiry Officer looked into this material and held these proceedings as above described and nothing else. In his report dated 07.08.2020, as the impugned order would show, he found on the aforesaid material the solitary charge proved against the petitioner.

15. Now, in doing all this, the Inquiry Officer fell foul of the most salutary principle governing the procedure to hold departmental inquiries. Wherever the charge/ charges is/ are serious and there is likelihood of imposition of a major penalty, the most salutary principle that applies to departmental inquiries is that charges are not to be regarded as proofs of themselves and it is the establishment's burden to prove them before the Inquiry Officer. The Inquiry Officer must convene himself as an impartial arbiter, an Inquiry Tribunal, before whom the establishment must, in the first instance, lead evidence, both documentary and oral, through a Presenting Officer to prove the charge. It is also of the most salutary importance, in matters where the charge is serious that the establishment

do examine witnesses to prove it in the first instance. The Inquiry Officer cannot just look into the charge-sheet and the delinquent's reply, besides documents on record that are idle papers, to form his opinion. The documents have to be produced before the Inquiry Officer as evidence and proved by witnesses. It is after the establishment have discharged their burden of proving the charge by producing both documentary and oral evidence that the employee may be called upon to produce evidence in defence.

16. Also, when the establishment produce their witnesses in support of the charge/ charges, the employee has the right to cross-examine them. The course of proceedings before the Inquiry Officer, as extracted in the order impugned, shows that what the Inquiry Officer looked into was the charge-sheet, the petitioner's reply and took down the petitioner's statement, holding the charge proved. He also did look into some documents of his own that were never produced before him by a Presenting Officer and proved by witnesses. The Inquiry Officer seems to have proceeded on the supposition that the charge was proof of itself and the petitioner's statement was virtually considered like an explanation in a preliminary inquiry that was not satisfactory. This kind of a disciplinary inquiry is no inquiry in the eye of law. The petitioner's defence to the charge was also based on the incident dated 15.06.2018, where records relating to the purchase of wheat were forcibly taken away by Harish Shankhdhar, a government contractor. The matter was complained by the petitioner, but no action was taken as he says. The defence is further based on the fact that the petitioner had left charge of the Centre during the relevant year and his successor in office, to whom he had handed over charge, was responsible for the shortfall. Now, the charge in the very nature, would require the establishment to prove it by the testimony of witnesses on their behalf, apart from the principle that witnesses must always be examined in a charge involving the possible imposition of a major penalty.

17. Here, as already remarked, not a solitary witness was examined on behalf of the establishment nor any kind of evidence led before the Inquiry Officer. Far from functioning as an impartial arbiter, the Inquiry Officer seems to have functioned as a servant of the establishment to endorse the charge-sheet blindfoldedly. The salutary principles in regard to a departmental inquiry have been laid down by the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772**, where it is observed:

"**27.** A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. 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."

18. To the same end, is the decision of the Supreme Court in **Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570**, where it was observed:

"**14.** Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

19. Dealing with the same issue, a Division Bench of this Court in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB)(LB)**, held:

"**14.** Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

15. In another case in Subhash Chandra Gupta v. State of U.P., 2012(4) ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view

taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold 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).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the

delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

20. The same principle has been reiterated by the Division Bench of our Court in **Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB)**, where it has been held:

"**15.** The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the unrebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

21. In **State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB)**, again a Bench decision of this Court, it was held:

"**14.** Recently the entire law on the subject has been reviewed and reiterated in Chamoli District Co-operative Bank Ltd. v. Raghunath Singh Rana and others, AIR 2016 SC 2510 and 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."

15. The principal of law emanates from the above judgments is that initial burden is on the department to prove the charges. In case where inquiry is initiated with a view to inflict major penalty, department must prove charges by adducing evidence by holding oral inquiry.

17. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

22. The said principles would show that the manner in which disciplinary proceedings have been held by the Inquiry Officer are manifestly illegal and the order impugned, founded on such proceedings, cannot be sustained.

23. It goes without saying that the charge being serious, involving allegations of embezzlement of valuable goods of the Corporation, it would be open to the respondents to hold proceedings afresh against the petitioner from the stage of the charge-sheet, in accordance with law and the guidance in this judgment. The respondents would be at liberty to pass fresh orders, if they elect the aforesaid course.

24. In the result, this writ petition succeeds and is **allowed in part**. The impugned order dated 22.09.2020 passed by the Executive Director of the Corporation is hereby **quashed**. A *mandamus* is issued to respondent Nos.2 and 3, ordering them to reinstate the petitioner forthwith in service and pay him current salary from the date of this judgment. The payment of arrears of salary will abide by the result of disciplinary proceedings, if taken afresh. Else, 50% of the due emolument will become payable to

the petitioner, that is, if the respondents chose not to pursue fresh proceedings. It would be open to the respondents after reinstating the petitioner to assign him duties at such station as they wish and pay him current salary or place him under suspension pending inquiry, in which event the petitioner shall be regularly paid his subsistence allowance, without asking him to furnish a non-alternative engagement certificate. If fresh proceedings are taken, the entitlement of the petitioner to receive emoluments for the period of his ouster from service will abide by the final result of those proceedings. If the petitioner is finally reinstated in service at the end of proceedings, with whatever punishment is meted out to him, other than a terminal punishment, he will be entitled to all benefits of seniority and continuity.

25. There shall be no order as to costs.

(2024) 2 ILRA 870
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2024

BEFORE

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

Writ - A No. 14972 of 2023

Arbind Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ritesh Srivastava, Ms. Shweta Singh

Counsel for the Respondents:
C.S.C., Sri Abhishek Srivastava

A. Service Law – Disciplinary proceeding – Punishment – Demotion – Award of a censure and stopping one increment with cumulative effect – Quantum of punishment – Scope of interference – Charge of travelling on a air ticket purchased by the Firm, where the petitioner was going to inspect quality, was leveled – Defence of cancellation of earlier flight, for which petitioner purchased the ticket, and further of paying the price of ticket upon destination was taken – Though no witnesses were examined by the establishment, but there was admission of the petitioner to travel on Firm's ticket – Effect – Held, the finding of the Disciplinary Authority is not bad, based on the petitioner's admission about his impropriety of conduct or the misconduct in travelling on a ticket purchased by the Firm's representative, where he was going to inspect, as also the finding in not believing the evidence about paying off the Firm's representative upon arrival at destination, the quantum of punishment imposed, may still be the subject matter of some scrutiny by this Court on settled parameters – High Court can interfere with the quantum of punishment only if we find it to be shockingly disproportionate – Given the totality of circumstances, where the conduct of the petitioner appears to be indiscreet and highly irregular, but not dishonest, or one that has caused any kind of a loss to the Corporation, the punishment of demotion by the Revisional Authority, to this Court's conscience, is indeed shockingly disproportionate. (Para 12, 14, 21 and 23)

B. Service law – Violation of natural justice – Punishment – Revisional authority enhanced the punishment – No notice of enhancement was served upon the petitioner – Effect – Held, the requirement to serve a notice before enhancement of punishment is also a requirement under the Regulations, and, in any case, its non-service would be a violation of the principles of natural justice. (Para 20)

Writ petition partly allowed. (E-1)

List of cases cited :-

1. St. of U. P. & ors.Vs Saroj Kumar Sinha; (2010) 2 SCC 772

2. Roop Singh Negi Vs Punjab National Bank & ors.; (2009) 2 SCC 570

3. St. of Uttaranchal & ors. Vs Kharak Singh; (2008) 8 SCC 236

4. St. of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB) (LB)

5. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)

6. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB)(LB)

7. U.O.I.& ors.Vs Subrata Nath; 2022 SCC OnLine SC 1617

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

1. This writ petition is directed against the order dated 24.01.2023 passed by the Chairman, U.P. Power Corporation Limited, Lucknow, revising the order of the Disciplinary Authority *suo motu*, enhancing the penalty and punishing the petitioner with demotion to the post of a Junior Engineer. Also under challenge is the order dated 28.05.2022 passed by the Managing Director, U.P. Power Corporation Limited, Lucknow, the Disciplinary Authority, punishing the petitioner, after disciplinary proceedings, with the award of a censure and stopping one increment with cumulative effect.

2. The facts giving rise to this petition are these:

The petitioner was a Junior Engineer in the service of the U.P. Power Corporation Limited. He was appointed as such in the year 2007. He was promoted to the post of an Assistant Engineer in the year 2014. After suffering the orders inflicting penalty, the petitioner is working as a Junior Engineer (Meter) with the Electricity Test Division, Purvanchal Vidyut Vitran Nigam Limited, Pratapgarh. The charge, in relation to which disciplinary proceedings were drawn against the petitioner, relates to the time when he was posted as an Assistant Engineer (Meter) in the Electricity Test Division, Purvanchal Vidyut Vitran Nigam Limited, Varanasi (for short, 'the Distribution Corporation'). By an office memo of 11th January, 2021, the petitioner was directed to inspect Single Phase Two Wire Meters (10 – 60 Amperes) at the establishment of a certain M/s. Secure Meter Limited, Ahmedabad (for short, 'the Firm'). It appears that the purpose of the aforesaid inspection was to inspect meters that were to be purchased by the Distribution Corporation for installation at the premises of consumers. In order to travel to the destination, the petitioner booked an air passage from Varanasi to Ahmedabad on board Wise Jet Flight (SG-072), bearing PNR No. DSQ FVA, scheduled on 23.01.2021. There is on record a photostat copy of the said air ticket.

3. It is the petitioner's case that due to bad weather, the flight was cancelled. The fact, about cancellation of the petitioner's air ticket, was apprised to the representative of the Firm. As the inspection of meters was urgent and the petitioner was finding it difficult to book an air passage at short notice, the representative of the Firm booked a ticket for the air passage on 23.01.2021 from Varanasi to Ahmedabad via New Delhi. A copy of the said air ticket too is on record. Upon reaching Ahmedabad, the petitioner inspected the meters along with one of the representatives of some entity called NPCCL. The petitioner has described that entity as NPCCL with no clue to the

abbreviation. It is asserted that he refunded the air fare and cost of the hotel accommodation paid by the Firm's representative. Upon an inquiry made by the Director (P.M. & A.) *vide* letter dated 03.11.2021, the authorized signatory of the Firm *vide* letter dated 25.02.2022 confirmed that no costs of the petitioner's travel were borne by the Firm. It mentions the fact that the air ticket the petitioner had booked was cancelled due to bad weather and the Firm had to facilitate his journey, besides lodging at Ahmedabad, for which the Firm were paid a sum of Rs.23,902/- by the petitioner, that is to say, for the air ticket and the hotel arrangement. This conduct of the petitioner was found against the service regulations and he was charge-sheeted *vide* charge-sheet dated 23.07.2021 issued by the Inquiry Committee, that was constituted. The charge-sheet aforesaid was issued to the petitioner by the Inquiry Officer after approval by the Managing Director. The charge-sheet carried the following charges:

"गोपनीय सूत्रों से डिस्काम स्तर पर प्राप्त सूचना के आधार पर पाया गया कि आपके द्वारा फर्म M/s Secure Meters Ltd., E-566, Sanand-II, Sanand Ahmadabad के सामग्री की निरीक्षण एवं गुणवत्ता के समय निम्न विवरण के अनुसार आचरण किया जो कि सेवा नियमावली के विरूद्ध है :-

1. सामग्री निरीक्षण हेतु कार्यदायी संस्था के माध्यम से यात्रा टिकट प्राप्त किया गया जो विभागीय नियमानुसार अनुचित है ।

2. आपका यह व्यवहार, आचरण एवं कार्यशैली एक जिम्मेदार अधिशासी अभियन्ता स्तर के अधिकारी से स्वीकार योग्य नहीं है। कूटरचित आचरण से सामग्री की गुणवत्ता पर प्रतिकूल प्रभाव पड़ने की सम्भावना से इनकार नहीं किया जा सकता। आपके द्वारा सामग्री निर्माता को अनुचित लाभ पहुंचाने के उद्देश्य से यह कृत किया गया ।

अतः आप अपने कर्तव्यों एवं उत्तरदायित्वों के निर्वहन में घोर शिथिलता बरतने, कदाचरण बरतने एवं कारपोरेशन की छवि धूमिल करने तथा उ0प्र0 सरकारी कर्मचारी आचरण नियमावली-1956 (यथा संशोधित) के संगत नियमो के उल्लंघन करने हेतु प्रथम दृष्टया दोषी पाये जाते है।"

4. The petitioner submitted a reply to the charge-sheet. He denied the charge with a plea of confession and avoidance. He admitted getting the ticket through the Firm, but assserted that he inspected the meters according to the prescribed parameters on 23.01.2021 and upon reaching the destination, paid the price of the air ticket purchased by the Firm to their representative in cash. He denied the charge, explaining the circumstances in the following terms:

"उक्त निरीक्षण के सम्बन्ध में मैने दिनांक 23.01.2021 को हवाई जहाज से यात्रा करने हेतु दिनांक 19.01.2021 को आन लाइन टिकट क्रय किया था जिसका पी0एन0आर0 सं0 TFQFVA है। (टिकट की छायाप्रति संलग्न) मौसम की खराबी के कारण फ्लाइट निरस्त हो गयी। फ्लाइट निरस्त होने के सम्बन्ध में मैने मेसर्स सिक्योर मीटर्स लि0 के प्रतिनिधि को फोन द्वारा सूचित कर दिया था। मेसर्स सिक्योर मीटर्स लि0 के प्रतिनिधि ने अपनी आवश्यकता के अनुरूप टिकट कराने का प्रयास करने हेतु कहा। उन्होने अपने प्रयास से दिनांक 23.01.2021 का वाराणसी से अहमादाबाद वाया दिल्ली का टिकट कराकर मुझे सूचित किया। मैने दिनांक 23.01.2021 को अहमदाबाद जाकर NPPCL के प्रतिनिधि के साथ समस्त पैरामीटर्स को ध्यान में रखते हुए मीटर की टेस्टिंग की । अहमदाबाद जाने पर टिकट की

धनराशि रू0 6590.00 का नगद भुगतान मेसर्स सिक्योर मीटर्स लि0 के प्रतिनिधि को मैने कर दिया था। इस प्रकार मेरे द्वारा सामग्री निर्माता को किसी भी प्रकार का अनुचित लाभ नहीं दिया गया।"

5. The Inquiry Committee submitted its report dated 14.09.2021, holding the charge proved. The Inquiry Committee returned the following finding:

"जाँच समिति का मत :-

आरोपित सेवक द्वारा सामग्री निरीक्षण हेतु कार्यदायी संस्था के माध्यम से यात्रा टिकट प्राप्त करना स्वीकार किया गया है, जो कि विभागीय नियमानुसार अनुचित है। इनके आचरण से सामग्री की गुणवत्ता पर प्रतिकूल प्रभाव पड़ने की सम्भावना से इन्कार नहीं किया जा सकता साथ ही इनके द्वारा कार्यदायी संस्था को अनुचित लाभ पहुॅचाने की सम्भावना से भी इन्कार नहीं किया जा सकता। **इनका कार्य-व्यवहार सरकारी लोक सेवक के लिये निर्धारित आचरण नियमावली का उल्लंघन है।** अतः इनकी सत्यनिष्ठा संदिग्ध प्रतीत होती है।

उपरोक्त के आलोक में आरोपित सेवक पर लगाया गया आरोप सिद्ध पाया गया।"

6. It is averred in Paragraph No.16 that during the course of inquiry, no oral evidence was led to prove the charges and only on the basis of the air ticket, the petitioner was held guilty. It is also pleaded that in the absence of any witness being examined to support the charge levelled against the petitioner, he has been condemned unheard. The Inquiry Committee have neither recorded any oral evidence nor provided opportunity to the petitioner to adduce any evidence in his defence.

7. It is emphasized that on 12.10.2021, the Director (P.M. & A.) of the Distribution Corporation issued a show cause notice to the petitioner. The petitioner responded to the show cause by his reply dated 28.10.2021, where the petitioner again mentioned the fact that the air ticket booked by him was cancelled due to cancellation of the flight. Since, it was necessary for the petitioner to reach Ahmedabad at the earliest and test the meters, bearing in mind the interest of the Corporation, the petitioner travelled on an air ticket booked by the representative of the Firm. The further case was that the petitioner conducted the inspection of meters in accordance with norms, and after being satisfied with the quality, drew up an inspection report, signed by the representative of the NPCCL as the Inspecting Officer and the petitioner a witness. The petitioner has further said in his representation that he has not extended any undue advantage to the Firm.

8. It appears that the petitioner was again given a show cause notice along with a copy of the inquiry report by the Disciplinary Authority, the Managing Director of the Distribution Corporation by his memo dated 31.01.2022. The petitioner submitted his reply dated 14.03.2022. The petitioner enclosed three documents along with his reply dated 14.03.2022, which are directed to show that there was no compromise with his duties in inspecting the quality of meters. It is the petitioner's case that without considering the relevant material and his representation, the Disciplinary Authority acted on bald allegations of the possibility of adverse effect on the quality of material (meters) and the possibility of extending undue advantage to the Firm. It is also said that the Disciplinary Authority has remarked

that there is no refund of the price of the air ticket, which the petitioner says, is a perverse finding. He says that it is perverse, because in response to the letter dated 31.11.2021 by the Director (P.M. & A.) of the Distribution Corporation, addressed to the Firm, the authorized signatory of the Firm, had conveyed *vide* a letter dated 25.09.2022 that no cost of travel for the petitioner was borne by the Firm.

9. The Director of the Distribution Corporation, by his order dated 28.05.2022, awarded the petitioner the punishment of censure and stoppage of one increment with cumulative effect. The Chairman of the U.P. Power Corporation Limited, in exercise of his revisional powers under Section 13(c) of the Uttar Pradesh Power Corporation Limited Employees (Discipline and Appeal) Regulations, 2020 (for short, 'the Regulations'), enhanced the penalty by the impugned order dated 24.01.2023 and demoted the petitioner from the post of an Assistant Engineer to that of a Junior Engineer. The petitioner pleads that the impugned order dated 21.04.2023 was passed by the Director of the Power Corporation, who acting on his own motion under Regulation 13 and finding it a fit case for enhancement of penalty, after calling for the petitioner's representation *vide* his notice dated 28.09.2022, enhanced the punishment. The petitioner has averred in Paragraph No.27 of the writ petition that the aforesaid letter dated 28.09.2022 was never served upon the petitioner, but when he went to appear in a case in Court at Varanasi, the said letter was handed over to the petitioner on 27.04.2023 in the office of the Electricity Test Division, Varanasi. It is averred in Paragraph No.28 that since the petitioner was transferred to Pratapgarh, he could not receive the letter dated 28.09.2022 issued by the Director of the Power Corporation within time and represent his case against the proposed enhancement of penalty.

10. In the counter affidavit, the respondents have refuted the petitioner's allegations, where the necessity of witnesses has been denied for a proposition of law in Paragraph No. 4(vi) of the affidavit last mentioned. It is averred in Paragraph Nos.4(ix), 4(xii) and 4(xiii):

"4. ix. Further the petitioner himself in his reply had admitted the fact of travelling on the air ticket provided by the firm. However, in reply to the said charge, he was not able to give any cogent evidence of refunding the said amount of Air Ticket to the representative of the firm.

xii. Further when the matter of the petitioner was duly examined by Respondent authority after taking into account the material evidence on record along with enquiry report and reply given by the petitioner, a situation of enhancement in punishment was found and a show cause notice was issued on 28.9.2022 to the petitioner to submit his reply within 15 days in regard to the fact as to why the punishment should not be enhanced and said show cause notice was duly served upon the petitioner which was also confirmed from the petitioner on his Mobile Number. Copy of proof of service of show cause notice dated 28.9.2022 provided to the petitioner is being annexed herewith and marked as **Annexure- CA-4** to this counter affidavit.

xiii. Further when the petitioner had not submitted a reply to the show cause notice dated 28.9.2022, the Respondent No.2 had passed a detailed, reasoned and speaking order dated 21.4.2023 enhancing the punishment and had awarded the

censure entry along with demotion of the petitioner to the post of Junior Engineer."

11. Heard Mr. Ritesh Srivastava and Ms. Shweta Singh, learned Counsel for the petitioner, Mr. Ujjwal Srivastava, Advocate holding brief of Mr. Abhishek Srivastava, learned Counsel appearing on behalf of the Power Corporation and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel for the State.

12. It is, no doubt, true that the Corporation, once again in this case, as often noticed, have failed to adhere to the salutary procedure of examining witnesses in support of the charge before their Inquiry Officer, as laid down by preponderant authority to be the requirement of a valid inquiry in a disciplinary case, which may result in the imposition of a major penalty. But, the facts here are slightly different. The charge against the petitioner is about travelling on a ticket purchased by the Firm, from whom the electricity meters were to be procured by the Distribution Corporation and whose establishment the petitioner was to visit in order to inspect the quality of those meters. The charge labels this conduct as one contrary to rules of the Corporation.

13. It is also mentioned in the charge that the petitioner's behaviour, conduct and method of work does not show him to be a responsible officer of the rank of an Executive Engineer. The forged (described as 'कूटरचित' in Hindi) conduct could have a possible impact on the quality of the materials purchased. The inference, therefore, is that he did the act, subject matter of charge, with a view to extend undue favour to the manufacturer. For one, the charge appears to be rather casually worded, in that, that the petitioner was never an Executive Engineer. He was an Assistant Engineer. Even if that be regarded as a mere irregularity, not impacting the proceedings, the same is true of the choice of words for the charge, where the petitioner's conduct has been described as forged, said in Hindi by the words 'कूट रचित आचरण'. Possibly, there cannot be any kind of a 'forgery of conduct', which is an act associated with tampering of documents or electronic record. Nevertheless, reading the charge to be that it was improper conduct on the petitioner's part, this Court has proceeded to understand the matter, the way it has been dealt with by the Disciplinary Authority and the Revisional Authority.

14. So far as the submission of the learned Counsel for the petitioner, that in support of the charge, no witnesses were examined by the establishment, is concerned, it is true for a fact that the aforesaid salutary procedure to be adhered to in all inquiries, where a major penalty may be imposed, has not been followed. This is against the settled authority of the law. In this connection, reference may be made to the decisions of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, Roop Singh Negi v. Punjab National Bank and others, (2009) 2 SCC 570, State of Uttaranchal and others v. Kharak Singh, (2008) 8 SCC 236** and the Bench decision of this Court in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB)(LB), Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB)** and **State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB).**

15. The aforesaid salutary requirement is attracted to a case, where the

delinquent denies the charge or so much material part of it, which the employer has to establish. Here, the charge is about the conduct of the petitioner in travelling on a ticket purchased by the Firm, whose meters he was going to inspect for their quality, and the charge further is that the conduct of the petitioner aforesaid, leads to the possibility of the quality of material purchased being compromised, as the petitioner might have favoured the Firm. The petitioner has no doubt denied the fact that he has compromised his position in any manner, affecting the quality of the material purchased after his inspection, which in any case was held in the presence of another Officer of higher rank. The charge is, therefore, reduced to the propriety of the petitioner's conduct in travelling on a ticket purchased by the Firm, whose materials he was going to inspect. This part of the charge about the fact of purchasing the ticket, the petitioner does not deny. Rather, he says that on reaching destination, he paid the representative of the Firm the money spent on purchasing the ticket.

16. The petitioner has also explained the circumstances in which he had to purchase the ticket through the Firm's representative. Therefore, so far as the petitioner's conduct in travelling on a ticket purchased through the Firm's representative is concerned, the said act is admitted. The entire charge, if understood, is only about the propriety of the petitioner's conduct in purchasing a ticket through the Firm's representative. There is no imputation that, in fact, the quality of the meters was compromised, in consequence of the petitioner's act. If that were the charge, the employer would have to establish it by leading oral evidence in support of the charge. But, that is not at all the case. The case is only about the propriety of the petitioner's conduct in travelling on a ticket purchased by a representative of the Firm, where he was going to inspect.

17. The petitioner's defence that on arrival at destination, he paid the Firm's representative, has not been accepted by the Disciplinary Authority, because there was no evidence *aliunde* to show that the petitioner, in fact, paid the Firm, such as a cash receipt or payment in account. The letter written by the Firm about receiving the entire price of the air ticket and the arrangements for lodging made with the hotel has not been accepted as reliable evidence. This view of the Disciplinary Authority cannot be said to be manifestly illegal or perverse, that may be interfered with in the exercise of our jurisdiction under Article 226 of the Constitution.

18. The Revisional Authority, however, has enhanced the penalty, exercising power *suo motu* on a revision under Regulation 13(c) of the Regulations. The Revisional Authority, no doubt, has that jurisdiction under the Regulations, but two questions do arise in this case. The first is that the petitioner says that he was never served with the notice for enhancement by the Revisional Authority, as he has pleaded in Paragraph Nos.27 and 28 of the writ petition. He has, particularly, said that he could not be served with the Revisional Authority's notice dated 28.09.2022 proposing enhancement, because by that time, he had been transferred to Pratapgarh.

19. In the counter affidavit, a copy of the notice for the proposed enhancement has been annexed, as also a photostat copy of the registered postal receipt, which shows the petitioner to be posted as an

Assistant Engineer with the Distribution Corporation at Varanasi. The petitioner says that at the relevant time, he was posted at Pratapgarh and not Varanasi. There is nothing said or shown in the counter affidavit, which may establish that the notice, in fact, was directed to the petitioner's correct place of posting or residence at the relevant time. The assertion in Paragraph No.28 of the writ petition that he was posted at Pratapgarh, and, therefore, never received the notice for enhancement, remains undisputed. The petitioner's case in Paragraph No.27 that he received the notice of enhancement much later on 27.04.2023, when he went to Court to appear in a case there and while visiting the Electricity Test Division, Varanasi, too has not been denied. Rather, it appears that the notice sent to the Assistant Engineer (Meter) of the Distribution Corporation, was served upon the petitioner, as he says, on 27.04.2023. The order was passed by the Revisional Authority on 24.01.2023.

20. This Court is, therefore, of opinion that the petitioner was never served with the notice of enhancement by the Revisional Authority in good time to enable him to answer. The requirement to serve a notice before enhancement of punishment is also a requirement under the Regulations, and, in any case, its non-service would be a violation of the principles of natural justice. For the said reason alone, the revisional order impugned cannot be sustained.

21. There is another reason, which has been spoken of as the second to merit consideration. While this Court has opined that the finding of the Disciplinary Authority is not bad, based on the petitioner's admission about his impropriety of conduct or the misconduct in travelling on a ticket purchased by the Firm's representative, where he was going to inspect, as also the finding in not believing the evidence about paying off the Firm's representative upon arrival at destination, the quantum of punishment imposed, may still be the subject matter of some scrutiny by this Court on settled parameters. This Court is mindful of the fact that the quantum of punishment is a matter that primarily lies within the domain of the Disciplinary Authority and a *fortiori* the Revisional Authority. We cannot substitute our view simply because we think that the punishment imposed is disproportionate or excessive. We can interfere with the quantum of punishment only if we find it to be shockingly disproportionate; something revolting to the Court's conscience given the charge, the evidence and the entirely of circumstances appearing against the delinquent. In this regard, reference may be made to the decision of the Supreme Court in **Union of India and others v. Subrata Nath, 2022 SCC OnLine SC 1617**, where it has been held:

"**21.** To sum up the legal position, being fact finding authorities, both the Disciplinary Authority and the Appellate Authority are vested with the exclusive power to examine the evidence forming part of the inquiry report. On finding the evidence to be adequate and reliable during the departmental inquiry, the Disciplinary Authority has the discretion to impose appropriate punishment on the delinquent employee keeping in mind the gravity of the misconduct. However, in exercise of powers of judicial review, the High Court or for that matter, the Tribunal cannot ordinarily reappreciate the evidence to arrive at its own conclusion in respect of the penalty imposed unless and until the punishment imposed is so disproportionate

to the offence that it would shock the conscience of the High Court/Tribunal or is found to be flawed for other reasons, as enumerated in *P. Gunasekaran* (supra). If the punishment imposed on the delinquent employee is such that shocks the conscience of the High Court or the Tribunal, then the Disciplinary/Appellate Authority may be called upon to re-consider the penalty imposed. Only in exceptional circumstances, which need to be mentioned, should the High Court/Tribunal decide to impose appropriate punishment by itself, on offering cogent reasons therefor."

22. Upon a perusal of the circumstances here, what this Court finds is that though the petitioner may be guilty of the impropriety of travelling on a ticket purchased by the representative of a Firm, where he was going to inspect quality, there is some explanation about the circumstances how the indiscretion happened. The petitioner had booked an air ticket for himself from Varanasi, but the flight was cancelled. The petitioner, mindful of his duties to reach destination and inspect as an Officer of the Corporation, where another superior was joining him, committed the indiscretion of securing the ticket through the representative of the Firm. While it is true that there is no evidence *aliunde* that he repaid, there is also no reason to believe that he was saying falsehood altogether. The Disciplinary Authority has thought it fit not to believe him and we do not interfere with that finding, as already said. But, the fact remains that there is no charge, let alone a finding, that the petitioner actually favoured the Firm in any manner or compromised his employer's interest. The Disciplinary Authority, on the totality of circumstances, thought fit to impose the major penalty of stopping one increment with cumulative effect. This, however, was enhanced by the Revisional Authority, acting *suo motu* to a demotion to the post of a Junior Engineer. The punishment awarded by the Disciplinary Authority is also a major penalty.

23. Given the totality of circumstances, where the conduct of the petitioner appears to be indiscreet and highly irregular, but not dishonest, or one that has caused any kind of a loss to the Corporation, the punishment of demotion by the Revisional Authority, to this Court's conscience, is indeed shockingly disproportionate. Nevertheless, going by the settled law, this Court refrains from reducing the punishment ourselves and instead think that it would be appropriate to send back the matter to the Revisional Authority, the Chairman of the Power Corporation Limited, Lucknow, who would be under a command to pass a fresh order, in accordance law, bearing in mind the guidance in this judgment.

24. Quite apart from the remand to the Chairman of the Power Corporation on the issue of quantum, the matter, in any case, has to go back to the Chairman, because we have held that the petitioner was not given any opportunity of hearing. Therefore, the Chairman has to take a decision afresh after providing the petitioner adequate opportunity of hearing in the manner hereinafter directed by this Court.

25. In the result, this petition succeeds and is **allowed in part**. The impugned order dated 21.04.2023 passed by the Chairman, U.P. Power Corporation Limited, Lucknow is hereby **quashed**. The Chairman of the Power Corporation is

commanded to pass fresh orders in the exercise of his revisional jurisdiction. After furnishing the petitioner time to submit his reply to the notice of enhancement, which shall be **three weeks** from the date of receipt of a copy of this judgment, the Chairman shall pass his orders within **six weeks** of receipt of the petitioner's reply. The order passed by the Chairman shall be communicated to the petitioner at his current place of posting within **a week** of the orders being recorded. Needles to say that the impugned order being quashed, in the interregnum, the consequences shall follow and the petitioner reinstated to his position forthwith as an Assistant Engineer and paid his current salary accordingly. The question of consequential benefits, pecuniary and otherwise shall abide by the decision of the Revisional Authority.

26. There shall be no order as to costs.

(2024) 2 ILRA 879
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.02.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ - A No. 15229 of 2019
Connected with
Writ – A No. 4223 of 2022
and other connected cases

Urvashi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Mushir Khan, Sri Amit Saxena (Senior Adv.), Sri Ashok Khare (Senior Adv.), Sri Himanshu Singh

Counsel for the Respondents:
C.S.C., Sri Akhilesh Kumar Singh, Sri Amaresh Yadava, Sri Chheda Lal Verma, Sri Nand Kishore Singh, Sri Shivendu Ojha, Sri Sunil Kumar Srivastava, Sri Vishnu Kumar

A. Service Law – Post of Assistant Teacher – Cancellation of appointment – Re-valuation of answer booklets – It was found that the petitioners were granted more marks above than their merit, i.e., marks granted on basis of their answer booklets – Authority of re-valuation was challenged – Held, petitioners were granted benefit and were awarded more marks than their merit in tabulation chart, i.e., fairness and merit was compromised – Less meritorious candidates are not allowed to continue in service at the cost of meritorious candidates and in order to maintain fairness, the procedure adopted by respondents could not be said to be illegal – High Court imposed cost of Rs, 5000/- for each petitioners. (Para 14, 15, 18 and 20)

Writ petition dismissed. (E-1)

List of cases cited :-

1. Omveer Singh & ors. Vs St. of U.P. & ors.; 2016:AHC:9510-DB

2. Ram Naresh Singh & ors. Vs St. of U.P. & ors.; 2017:AHC:185314

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. Fairness is the soul of any competitive examination. Any compromise of merit would betray confidence and trust of meritorious candidates on examination system and in case some irregularity is detected during process of examination and there is a scope to cure it, in the interest of justice and to maintain fairness, an endeavour has to be taken to cure it. This is what happened in facts and circumstances of present cases.

2. Petitioners have participated in selection for recruitment of 68500 Assistant Teachers in Basic Education Department in the year 2018. After examination, petitioners were in the list of selected candidates (41556) in a result declared as 16th August, 2018. Petitioners thereafter appeared in counselling, their documents were verified, they were appointed and later on they joined in September, 2018 on probation of one year. Petitioners appointments were cancelled by means of similarly worded orders impugned in writ petitions and one of such impugned order dated 07.09.2019 annexed in leading writ petition, i.e., Writ-A No. 15229 of 2019, is reproduced hereinafter:

"कार्यालय- जिला बेसिक शिक्षा अधिकारी, हमीरपुर

आदेश सं०: वे०शि०/ 236 /2019-20 दिनांक 07:09 2019

आदेश

शासनादेश संख्या/1267/68-5-2018/2013 दिनांक 18-08-2018 एवं शासनादेश सं०/1321/68-5-2018 दिनांक 28.08.2018 के क्रम में सचिव, बेसिक शिक्षा परिषद उ०प्र०, प्रयागराज के स्तर से निर्गत पत्रांकः बे०शि०प०/7263-7507/2018-19 दिनांक 19.08.2018 के द्वारा 68500 स०अ० भर्ती के अर्न्तगत लिखित परीक्षा में उत्तीर्ण 41556 अभ्यर्थियों के सापेक्ष जनपद हमीरपुर हेतु 263 उत्तीर्ण अभ्यर्थियों की सूची उपलब्ध कराते हुये जनपद के ग्रामीण क्षेत्र में संचालित प्राथमिक विद्यालयों में पदस्थ किये जाने हेतु निर्देश प्रदान किये गये थे। प्राप्त निर्देश के समादर में, प्राप्त सूची के अनुसार अभ्यर्थियों के शैक्षिक अभिलेखों की जांच किये जाने हेतु दिनांक 01-09-2018 से 03-09-2018 तक जिला शिक्षा एवं प्रशिक्षण संस्थान भरूवा सुमेरपुर-हमीरपुर में काउन्सिलिंग आयोजित की गयी, आयोजित काउन्सिलिंग में प्राप्त 263 की सूची में से शैक्षिक अभिलेखों की जांच करवाये जाने हेतु 259 अभ्यर्थी उपस्थित हुये, उपस्थिति 259 अभ्यर्थियों में से सुश्री ज्योति साहू पुत्री श्री जगदेव प्रसाद देहाती एवं सुश्री उर्वशी पुत्री श्री राजेश कुमार का भी नाम सम्मिलित था, जोकि परिषद कार्यालय से 263 की प्राप्त सूची के कमांक 125 पर सुश्री ज्योति साहू पुत्री श्री जगदेव प्रसाद देहाती व 205 पर सुश्री उर्वशी पुत्री श्री राजेश कुमार का नाम अंकित था। शैक्षिक अभिलेखों की जांच हेतु आयोजित काउन्सिलिंग में 04 अभ्यर्थियों द्वारा प्रतिभाग नहीं किया गया। शैक्षिक अभिलेखों की जांच करवाये जाने हेतु दिनांक 01-09-2018 से 03-09-2018 तक आयोजित काउन्सिलिंग में उपस्थित 259 अभ्यर्थियों को विद्यालयों में पदस्थ किये जाने हेतु संबंधित अभ्यर्थियों से विकल्प लिये जाने के निमित्त दिनांक 04-09-2018 को चयन समिति के समक्ष काउन्सिलिंग आयोजित की गयी।

उक्त आयोजित काउन्सिलिंग में 259 अभ्यर्थियों का चयन समिति के अनुमोदनापरान्त व विद्यालय में पदस्थ किये जाने हेतु चयन समिति के समक्ष सुश्री ज्योति साहू पुत्री श्री जगदेव प्रसाद देहाती एवं सुश्री उर्वशी पुत्री श्री राजेश कुमार द्वारा प्रस्तुत किये गये विकल्प के आधार पर कार्यालय के आदेश सं०/307/2018-19 दिनांक 05.09.2018 द्वारा सुश्री ज्योति साहू पुत्री श्री जगदेव प्रसाद देहाती की नियुक्ति कन्या प्राथमिक विद्यालय, रीवन विकास खण्ड, मौदहा में एवं सुश्री उर्वशी पुत्री श्री राजेश कुमार की नियुक्ति कन्या प्राथमिक विद्यालय बेरी, विकास खण्ड, कुरारा में सहायक अध्यापक पद पर ग्रेड पे० 4200/- में नितान्त अस्थायी रूप से एक वर्ष की परिवीक्षा काल अवधि में की गयी थी जिनका नाम कमशः 220 व 226 पर अंकित किया गया था। निर्गत किये गये नियुक्ति पत्र में इस बात का स्पष्ट उल्लेख कर दिया गया था कि यदि नविष्य में कोई अभिलेख त्रुटिपूर्ण/ फर्जी पाया जाता है

तो सम्बन्धित की, की गयी नियुक्ति स्वत निरस्त समझी जायेगी।

शासनादेश सं० 1498 (i)/68-4-2018 दिनांक 05.10.2018 के बिन्दु (छ) में दिये गये निर्देश के क्रम में सचिव, बेसिक शिक्षा परिषद उ०प्र० प्रयागराज के स्तर से निर्गत पत्रांकः बे०शि०प०/ 8564-8642/2019-20 दिनांक 16.08.2019 के द्वारा सहायक अध्यापक भर्ती परीक्षा 2018 के दिनांक 13.08. 2018 को घोषित परीक्षफल में उत्तीर्ण 49 ऐसे अभ्यर्थी जो पुर्नमूल्यांकन के पश्चात अनुत्तीर्ण घोषित किये गये है, जो वर्तमान में सहायक अध्यापक पद पर नियुक्ति है, को सेवा से पृथककरण किये जाने हेतु शासनादेश सं०: 522/अरसठ-4-2019 दिनांक 29.07.2019 में दिये गये निर्देशों के अनुपालन में अग्रिम कार्यवाही किये जाने हेतु निर्देश प्रदान किये गये हैं तथा सचिव, उ०प्र० बेसिक शिक्षा परिषद, प्रयागराज के पत्रांक बे०शि०प०/8756-89/2019-20 दिनांक 19.08.2019 के द्वारा अनुत्तीर्ण 04 अभ्यर्थियों की सूची उपलब्ध कराया गयी है। सचिव, बेसिक शिक्षा परिषद उ०प्र०, प्रयागराज के पत्र दिनांक 19-08-2019 के साथ सलग्न अनुत्तीर्ण घोषित अभ्यर्थी की सूची में सुश्री ज्योति साहू पुत्री श्री जगदेव प्रसाद देहाती एवं सुश्री उर्वशी पुत्री श्री राजेश कुमार का नाम अंकित हैं, जोकि उक्तवत् जनपद में कार्यरत है।

अतः शासनादेश सं० 1498 (i)/68-4-2018 दिनांक 05.10.2018 के विन्दु (छ) में दिये गये निर्देश के क्रम में सचिव, बेसिक शिक्षा परिषद उ०प्र० प्रयागराज के स्तर से निर्गत पत्रांकः बे०शि०प०/ 8564-8642/2019-20 दिनांक 16.08.2019 एवं पत्रांक वे०शि०प०/8756-89/2019-20 दिनांक 19.08.2019 तथा शासनादेश सं० 522 / अरसठ-4-2019 दिनांक 29.07.2019 के द्वारा प्राप्त निर्देश के अनुपालन में उ०प्र० बेसिक शिक्षा परिषद कर्मचारी वर्ग नियमावली 1973 में अंकित वृहत खण्ड के बिन्दु (6) एवं उ०प्र० सरकारी सेवक (अनुशासन एवं अपील नियमावली 1999) के बिन्दु (ख) दीर्घ शास्तियाँ (4) में निहित प्राविधानुसार तत्काल प्रभाव से सुश्री ज्योति साहू पुत्री श्री जगदेव प्रसाद देहाती सहायक अध्यापिका कन्या प्राथमिक विद्यालय, रीवन विकास खण्ड, मौदहा एवं सुश्री उर्वशी पुत्री श्री राजेश कुमार सहायक अध्यापिका कन्या प्राथमिक विद्यालय, बेरी विकास खण्ड, कुरारा जनपद-हमीरपुर में की गयी नियुक्ति को तत्काल प्रभाव से एतद् द्वारा निरस्त करते हुये सेवा से पृथक किया जाता है।"

3. Sri Ashok Khare, learned Senior Counsel assisted by Sri Himanshu Singh, Advocate and Sri P.K. Upadhyay, Sri Umesh Prasad Singh, Sri Bashisth Narayan Pandey, Sri Sanjeev Kumar Singh, Advocates for different petitioners, submitted that above referred impugned order does not discloses any reason(s) for cancellation of appointments of respective petitioners as well as Government Order dated 05.10.2018 and subsequent Circular dated 16.08.2019 would not provide any power to concerned respondent to pass impugned orders. On basis of pleadings they submitted that respondents have no power to re-evaluate the answer booklets of petitioners as relevant rules and procedure does not permit to do so. Learned counsel have submitted that in absence of any procedure prescribed, entire exercise to recheck answer booklets was illegal and impermissible, therefore, impugned orders cannot survive.

4. Learned counsel further submitted that both Government Orders dated 05.10.2018 and 16.08.2019, referred in impugned orders, do not deal with issue of re-examination of answer booklets, rather details mentioned in said Government Orders would indicate that exercise

undertaken was contrary to procedure prescribed. For reference both Government Orders are reproduced hereinafter:

Government Order dated 05.10.2018

"प्रेषक,
चन्द्रशेखर,
विशेष सचिव,
उ०प्र० शासन।

सेवा में,
सचिव,
परीक्षा नियामक प्राधिकारी
उ०प्र०, इलाहाबाद
बेसिक शिक्षा अनुभाग लखनऊ, दिनांक 05 अक्टूबर, 2018
विषय- सहायक अध्यापक भर्ती परीक्षा - 2018 मे हुई अनियमितताओं की जांच के सम्बन्ध में।

महोदय,
उपर्युक्त विषय के सम्बन्ध में मुझे यह कहने का निदेश हुआ है कि बेसिक शिक्षा विभाग, उ०प्र० द्वारा 68500 पदों पर सहायक अध्यापकों की सम्पन्न हुई भर्ती ***परीक्षा-2018 में हुई अनियमितताओं की जांच हेतु श्री संजय आर० भूसरेड्डी की अध्यक्षता में गठित तीन सदस्यीय उच्चस्तरीय जांच समिति की जांच आख्या एवं सचिव, परीक्षा नियामक प्राधिकारी द्वारा समस्त 1,07,865 उत्तर पुस्तिकाओं की करायी गयी स्क्रूटनी के आधार पर शासन द्वारा निर्णय लिये गये है, जिसमें तात्कालिक प्रभाव से कार्यवाही किये जाने की अपेक्षा की गयी है:-***

(ख) राज्य विज्ञान शिक्षा संस्थान के 07 अधिकारियों जिन्हें भर्ती परीक्षा का मूल्यांकन सुचारू रूप से संचालित करने की जिम्मेदारी सौंपी गयी थी, के द्वारा ***अपने कार्य में न केवल लापरवाही बरती गयी, उत्तर पुस्तिकाओं का उनके द्वारा पर्यवेक्षण नहीं किया गया जिसके कारण उत्तर पुस्तिकाओं के मूल्यांकन में कतिपय कमियां हुई एवं परिणाम प्रभावित हुआ। अतः इन सातों के विरुद्ध शिथिल पर्यवेक्षण एवं अपना कार्य नियमों के आलोक में उत्तरदायित्वपूर्ण ढंग से न करने के कारण इन सभी के विरूद्ध अनुशासनिक कार्यवाही किये जाने का निर्णय लिया गया है।***

(ग) सहायक अध्यापक भर्ती परीक्षा-2018 का परीक्षा परिणाम तैयार करने वाली ***एजेन्सी मैनेजमेन्ट कंट्रोल सिस्टम प्राइवेट लिमि०, 29 विधान सभा मार्ग, लखनऊ द्वारा परीक्षा परिणाम घोषित करने में असावधानी बरती गयी तथा परीक्षा परिणाम में विसंगतियां तथा गम्भीर त्रुटियां भी की गयी। एजेन्सी की लापरवाही से त्रुटियां होने के कारण घोषित परीक्षा परिणाम में भी त्रुटियां हुई, जिसके लिए इस एजेन्सी को तात्कालिक प्रभाव से ब्लैकलिस्ट करने की कार्यवाही के साथ-साथ सभी विभागों को इस आशय की सूचना दी जाए कि भविष्य में वह इस एजेन्सी से कार्य न कराये।*** *इसके अतिरिक्त यदि एजेन्सी को कोई भुगतान किया जाना अवशेष है तो यह भुगतान न किया जाय एवं अनुबन्ध की शर्तों के अनुरूप एजेन्सी के विरूद्ध अन्य दण्डात्मक कार्यवाही भी सुनिश्चित किये जाने का निर्णय लिया गया है।*

(घ) ***पारदर्शिता के दृष्टिगत यह निर्णय भी लिया गया है कि कोई भी अभ्यर्थी यदि अपनी उत्तर पुस्तिका का पुनर्मूल्यांकन करना चाहता है तो उसे निःशुल्क पुनर्मूल्यांकन का अवसर प्रदान किया जाय। पुनर्मूल्यांकन के लिए निःशुल्क आवेदन करने हेतु दिनांक 11.10.2018 से 20.10.2018 के मध्य ऑन-लाइन आवेदन प्राप्त करने का निर्णय लिया गया है।*** *कृपया इस सम्बन्ध में एन०आई०सी० के साथ मिलकर आवेदन पत्र का प्रारूप डिजाइन करते हुए दिनांक 11.10.2018*

से 20.10.2018 के मध्य ऑन-लाइन आवेदन प्राप्त करने की व्यवस्था करें तथा उससे पूर्व समाचार पत्रों के माध्यम से विज्ञापन प्रकाशित करते हुए इसका समुचित प्रचार-प्रसार करायें।

(च) ***जांच समिति को प्राप्त कुल 725 शिकायतों में से मात्र 285 अभ्यार्थियों की शिकायते ही मूल्यांकन में अनियमितता से सम्बन्धित थीं। जांच समिति द्वारा उक्त कुल 285 शिकायतों के गहनतापूर्वक परीक्षण के बाद यह पाया गया कि कुल 110 अभ्यार्थियों के प्रकरणों में परीक्षाफल में कोई परिवर्तन नहीं पाया गया तथा 17 प्रकरण सहायक अध्यापक भर्ती परीक्षा से सम्बन्धित नहीं थे। इस प्रकार कुल 285-(110+17)=158 प्रकरणों में भी शासन द्वारा स्वयं पुनर्मूल्यांकन कराए जाने का निर्णय लिया गया है।***

(छ) ***कुल 1,07,865 उत्तर पुस्तिकाओं के स्क्रूटनी में कुल 343 प्रकरणों में मिलान करने पर अन्तर पाया गया, जिसमें से 239 प्रकरणों में परीक्षा परिणाम अप्रभावित है शेष 51 प्रकरण ऐसे हैं जिनमें जो अभ्यर्थी अभी अनुत्तीर्ण है तथा अनर्ह है वे उत्तीर्ण तथा अर्ह हो जाते है तथा 53 प्रकरण ऐसे हैं, जिनमें जो अभ्यर्थी अभी उत्तीर्ण तथा अर्ह हैं. वे अनर्ह तथा अनुत्तीर्ण हो जाते हैं। शासन द्वारा इन 53 उत्तर पुस्तिकाओं का भी पुनर्मूल्यांकन कराए जाने का निर्णय लिया गया है तथा जो 51 अन्यर्थी अर्ह हो गये हैं उन्हें काउंसलिंग की अनुमति देते हुए अग्रिम कार्यवाही किये जाने का निर्णय लिया गया है।***

(ज) ***स्क्रूटनी में जिन 343 प्रकरणों में अन्तर पाया गया है उन 343 उत्तर पुस्तिकाओं का मूल्यांकन करने वाले परीक्षकों को कारण बताओ नोटिस निर्गत करते हुए उनके विरुद्ध दण्डात्मक कार्यवाही किये जाने का निर्णय भी लिया गया है।***

अतएव कृपया तद्नुसार तत्काल अग्रतर आवश्यक कार्यवाही करते हुए कृत कार्यवाही से शासन को भी अवगत कराने का कष्ट करें।" (Emphasis supplied)

<u>Government Order dated 16.08.2019</u>

"प्रेषक,
सचिव,
उ०प्र० बेसिक शिक्षा परिषद,

प्रयागराज।
सेवा में,
जिला बेसिक शिक्षा अधिकारी,
समस्त जनपद, उत्तर प्रदेश।

पत्रांकः- बे०शि०प० /8564-8642/2019-20 दिनांक- 16-08-19

विषयः- सहायक अध्यापक भर्ती परीक्षा-2018 पुर्नमूल्यांकन के सम्बन्ध में निर्गत शासनादेश दिनांक 05.10.2018 के बिन्दु संख्या (छ) में दिये गये निर्देश के अनुपालन के सम्बन्ध में।

महोदय,

कृपया उपर्युक्त विषयक सचिव परीक्षा नियामक प्राधिकारी उ०प्र० प्रयागराज के पत्रांक गोप०/स०अ०म०प०-18/9414-17/2019-20 दिनांक 01.08.2019 का संदर्भ ग्रहण करने का कष्ट करें जिसके द्वारा अवगत कराया गया है कि शासनादेश संख्या-522/अरसठ-4-2019 दिनांक 29 जुलाई 2019 द्वारा सम्यक विचारोपरान्त ***सहायक अध्यापक भर्ती परीक्षा 2018 पुनर्मूल्यांकन हेतु निर्गत शासनादेश दिनांक 05.10.2018 के बिन्दु संख्या (छ) में दिये गये निर्देश के क्रम में पुनर्मूल्यांकन पश्चात उनुत्तीर्ण पाये गये 49 अभ्यर्थियों का परीक्षाफल घोषित किये जाने एवं उक्त 49 अभार्थियों, जो पूर्व घोषित परीक्षाफल दिनांक 13.08.2018 के अनुसार उत्तीर्ण एवं वर्तमान में सहायक अध्यापक के पद पर नियुक्त है,***

को सेवा से पृथककरण कराये जाने हेतु निर्देश दिये गये है।

सचिव परीक्षा नियामक प्राधिकारी उ०प्र० प्रयागराज द्वारा अपने पत्र दिनांक 01.08.2019 के साथ सहायक अध्यापक भर्ती परीक्षा 2018 के दिनांक 13.08.2018 को घोषित परीक्षाफल में ***उत्तीर्ण 49 ऐसे अभ्यर्थी जो पुनर्मूल्यांकन के पश्चात अनुत्तीर्ण घोषित किये गये है, का संशोधित परीक्षाफल घोषित करते हुए घोषित परीक्षाफल की सूची (कुल 49 अन्यर्थियों की सूची) जो वर्तमान में सहायक अध्यापक के पद पर नियुक्त है, को सेवा से पृथक्करण किये जाने हेतु शासनादेश दिनांक 29.07.2019 में दिये गये निर्देशों के अनुपालन हेतु संलग्न की गयी है।***

उक्त के सम्बन्ध में आपको निर्देशित किया जाता है कि शासनादेश दिनांक 29.07.2019 का ***अक्षरशः अनुपालन एवं उ०प्र० बेसिक शिक्षा परिषद कर्मचारी वर्ग नियमावली, 1973 व उत्तर प्रदेश सरकारी सेवक (अनुशासन एवं अपील नियमायली 1999) में दी गयी व्यवस्थानुसार कार्यवाही करना सुनिश्चित करें।***

उक्त प्रकरण के सम्बन्ध में आप द्वारा कैविएट माननीय उच्च न्यायालय में दाखिल किया जाना सुनिश्चित किया जाय।" (Emphasis supplied)

5. The above referred Government Order and Circular have declared that:

(i) Total 1,07,865 answer booklets were examined.

(ii) On examination of 1,07,865 answer booklets difference was found in 343 answer booklets.

(iii) Out of above referred 343 booklets-

(a) despite difference result of 239 candidates was remained unaffected;

(b) due to rechecking 51 candidates, who were earlier declared failed, were found successful; and,

(c) remaining 53 candidates, who were earlier declared successful, were found failed on rechecking.

The petitioners before this court are from above referred batch of 53 candidates.

6. Learned counsel for petitioners have placed reliance on judgments passed by this Court in **Constable 979 Civil Police Omveer Singh and others vs. State of U.P. and others, Neutral Citation No. - 2016:AHC:9510-DB and Ram Naresh Singh and others vs. State of U.P. and others, Neutral Citation No. - 2017:AHC:185314.** Relevant paragraphs of the judgments are reproduced hereinafter:

<u>Omveer Singh (supra)</u>

"10. In the judgment and order dated 17.02.2012 impugned in Special Appeal No.839 of 2012, the learned Single Judge has observed and recorded finding to the effect that Petitioner-Appellant Rajveer Singh and petitioner non-appellant/intervenor Suresh Chandra have secured 53 marks in first evaluation while in the second evaluation Rajveer Singh Yadav has got 46 marks and Suresh Chandra have got 45 marks.

11. Relevant part of judgment and order impugned reads as under:

"... Answer sheet in question has not at all been checked as not even a single mark is there which would reflect that at any point of time same have been objectively checked by the examiner concerned and examiner has proceeded to award marks looking into the performance as put in by the petitioners.

Confronted with this Examination Controller who is present in person contended that specific instructions have been issued to the examiner and examiner was only required to fill up front page and in view of this it has been stated that transparency has been maintained in evaluation.

Evaluation process which has been so adopted is not at all been approved of as answer sheets in question bears no mark whatsoever which would reflect that mind has been applied by the examiner while evaluating the said answer sheets as each and every answer sheet has been left blank without any sign of any evaluation exercise having been carried out except that on the cover page of answer sheet marks has been awarded and that too on two occasions. Evaluation is an act or process to ascertain the quality of performance put in by the candidate who has undertaken the examination. Such type of evaluation of examining body cannot be approved of as under the Right to Information Act, 2005 any incumbent can get answer sheet in question to satisfy himself/herself as to whether it has been properly evaluation or not.

Here in the present case answer sheets have been left blank and and it has not at all been shown and demonstrated before this Court as to in what way and manner said answer sheets in question have been evaluated and on cover paper on first evaluation 53 marks have been awarded to both the petitioners and on second evaluaton same have been reduced to 46 and 45 marks respectively. Except for awarding marks, no other record of evaluation has been maintained. The examiner has purportedly evaluated the answer sheet on first occasion and on second occasion marks have been reduced. Once answer sheet would have been examined, then this Court could also examine the action of examiner in reducing the marks and specially when in the Rules there is no provision for re-evaluation. Evaluation exercise in effect are reasons given by examiner for awarding such marks. Exercise undertaken is not at all subscribed by rules."

12. In the facts of the case as purported evaluation of answer sheet is not at all being approved of and it does not indicate any application of mind vis-a-vis marks given and on the basis of above, learned Single Judge has allowed the writ petition Nos. 38563 of 2011 and 38676 of 2011 with direction to afresh evaluation of the answer-sheets of petitioner-appellant Rajveer Singh Yadav and petitioner- non appellant Suresh Chandra.

13. Though learned standing counsel has tried his best to counter the observation and findings recorded by learned Single Judge as referred in detail in predecesing paragraph, despite repeated querries by the Court about second evaluation of answer sheets, ***learned Standing Counsel could not show for specific provision which was authorising the Board for second evaluation of answer sheet and award marks to appellants on the basis of average marks of two evaluated these answer sheets of Hindi Essay Paper except to submissions made on the basis of above referred paragraph No.15 of the counter affidavit filed in Civil Misc. Writ Petition No.38563 of 2011 by Shri Habibul Hasan, Deputy S.P., U.P. Police Recruitment and Promotion Board, Lucknow.***

14. In these circumstances, we find no occassion to take a different view as observed in the findings recorded by the learned Single Judge except of modification in direction regarding reevaluation of answer sheets afresh.

15. It is clear from the averments of paragraph nos. 15 and 16 of the counter affidavit of Shri Habibul Hasan, Deputy S.P., that answer-sheets of Hindi Essay Paper of the candidates have been subjected to evaluation twice and the candidates were finally awarded marks in Hindi paper on the basis of average of the marks of the two evaluations. The writ court has allowed the Writ Petition Nos.38563 of 2011, Rajveer Singh Yadav and Writ Petition No.38576 of 2011, Suresh Chandra Vs. State of U.P. with direction to evaluate of answer sheets of Hindi Essay Paper of above petitioners afresh.

16. ***In view of observations and finding recorded by the learned Single Judge in respect of various discrepancies in evaluation of the answer sheet of Hindi Essay Paper and impermissibility of evaluation process of answer-sheet by the Board, and due to non-satisfactory answer for second the evaluation of answer-sheets and any specific provision or authority for permission of second evaluation of answer sheets. We are of considered view that manner of the second evaluation of answer sheets of Hindi Essay Paper adopted by the respondents is arbitrary, violatiave of concerned recrruitment rules, unauthorised and illegal.***" (Emphasis supplied)

Ram Naresh Singh (supra)

"93. ***Both in the case of the Rajesh Kumar (supra) and in the case of Vikas Pratap Singh (supra) almost on similar facts, the Supreme Court has held that candidates, who were selected earlier due to erroneous decision of the Selection Board and who continued to work for sometime on the said post, could not be allowed to suffer because of the error on the part of the Selection Board. At the same time, no candidate could be allowed to earn an undeserved advantage over others by an application of a erroneous Answer Key.***

94. ***In balancing the equities the Hon'ble Supreme Court directed that candidates later on selected by application of rectified Answer Key were to be given appointment and such candidates would earn their seniority from the date the wrongly selected candidates were first appointed in accordance with their merit position. The appointments of such correctly selected candidates after reevaluation of their Answer Scripts should relate back to the date when wrongly selected candidates were first appointed with continuity of service to them for the purpose of seniority, but without any back wages or other incidental benefits.***

95. Such candidates, who could not make a grade after reevaluation, i.e. candidates like the petitioners herein should not be ousted from service, but should figure at the bottom of the list of the selected candidates based on the first selection in terms of the advertisement issued, and also all such selected candidates, whose results had been announced after the second selection pursuant to a later advertisement.

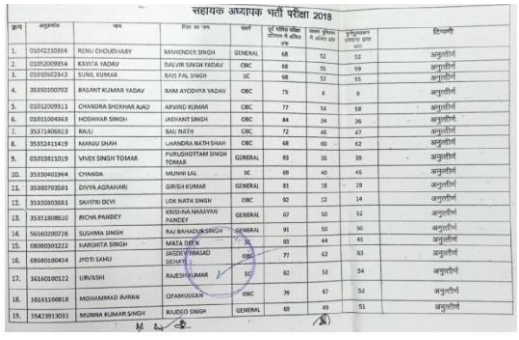
96. This Court in respectful deference to the observations made by the Hon'ble Supreme Court in the case of Rajesh Kumar (supra) and in the case of Vikas Pratap Singh (supra) and in Civil Appeal No. 367 of 2017 (Ran Vijay Singh and others vs State of U.P. and others) may also issue such directions for the case of writ petitioners herein.

97. ***The writ petitioners therefore cannot be ousted from service altogether and shall be kept at the bottom of the rectified Select List issued for Advertisement No. 1 of 2010, and also any***

other Select List on the basis of any later advertisement issued by the Selection Board, selection on the basis of which has been completed and recommendations made for appointment. *The petitioners shall be offered fresh appointments on the posts of Hindi Teachers L.T. Grade in Institution, which have determined such vacancies in direct recruitment quota and intimated them to the District Inspector of School concerned and further notified to the Selection Board, but on which vacancies selection has not been advertised or finalized by the Selection Board till date.*

98. If need be then supernumerary posts be created for the petitioners as directed by the Hon'ble Supreme Court in Civil Appeal No. 367 of 2017 for similarly situated appellants therein, who were ousted as a consequence of rectification of result of selection held for Trained Graduate Grade Teachers in Advertisement No. 1 of 2009 of the Selection Board." (Emphasis supplied)

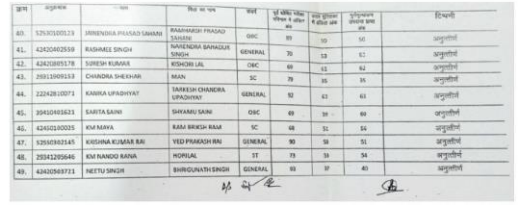
7. Per contra, Sri Ashish Kumar Nagvanshi, learned Additional Chief Standing Counsel, Sri Manvendra Dixit, Sri Brijesh Narayan Srivastava, Sri L.M. Singh and Sri Suresh Srivastava, learned Standing Counsel for State-Respondents and Sri Chandra Shekhar Singh, Sri Akhilesh Kumar Sharma, Sri Sanjay Singh, Sri Ashish Kumar Singh, Sri Shivendra Singh Bhadauria and Sri Shashi Prakash Singh, Advocates appearing for respective District District Basic Education Officers, have placed reliance on counter affidavit and orders passed by this Court during hearing that after re-evaluation it was found that despite petitioners got very less marks, as mentioned in their respective answer booklets, in tabulation chart they were granted much more marks. They referred the tabulation chart annexed alongwith counter affidavit and scanned copy of the same is pasted hereinafter:



सहायक अध्यापक भर्ती परीक्षा 2018

क्रम	अनुक्रमांक	नाम	पिता का नाम	वर्ग	पूर्व लिखित परीक्षा में अर्जित अंक	अंक पुनरीक्षण में अर्जित अंक	पुनर्मूल्यांकन उपरान्त प्राप्त अंक	टिप्पणी
1.	01042310864	RENU CHOUDHARY	MAHENDER SINGH	GENERAL	68	52	52	अनुत्तीर्ण
2.	01052009854	KAVITA YADAV	DALVIR SINGH YADAV	OBC	68	55	59	अनुत्तीर्ण
3.	01010502843	SUNIL KUMAR	BAS PAL SINGH	SC	68	52	55	अनुत्तीर्ण
4.	35350200702	BASANT KUMAR YADAV	RAM AYODHYA YADAV	OBC	75	8	9	अनुत्तीर्ण
5.	01012009911	CHANDRA SHEKHAR AJAD	ARVIND KUMAR	OBC	77	54	58	अनुत्तीर्ण
6.	01011004363	HOSHYAR SINGH	JASVANT SINGH	OBC	84	34	36	अनुत्तीर्ण
7.	35371406923	RAJU	BAU NATH	OBC	72	46	47	अनुत्तीर्ण
8.	35352414419	MANJU SHAH	LAXNDRA NATH SHAH	OBC	68	60	62	अनुत्तीर्ण
9.	01013811519	VIVEK SINGH TOMAR	PURUSHOTTAM SINGH TOMAR	GENERAL	93	36	39	अनुत्तीर्ण
10.	35350401964	CHANDA	MUNNI LAL	SC	69	45	45	अनुत्तीर्ण
11.	35380703581	DIVYA AGRAHARI	GIRISH KUMAR	GENERAL	83	18	19	अनुत्तीर्ण
12.	35330803681	SAVITRI DEVI	LOK NATH SINGH	OBC	92	12	14	अनुत्तीर्ण
13.	35351808610	RICHA PANDEY	KRISHNA NARAYAN PANDEY	GENERAL	67	50	52	अनुत्तीर्ण
14.	56560200726	SUSHMA SINGH	RAJ BAHADUR SINGH	GENERAL	91	50	50	अनुत्तीर्ण
15.	08380303222	HARSHITA SINGH	MATA DEEN	SC	85	44	45	अनुत्तीर्ण
16.	08580100434	JYOTI SAHU	JAGDISH PRASAD DEHATI	OBC	77	63	63	अनुत्तीर्ण
17.	16160100122	URVASHI	RAJESH KUMAR	SC	62	53	54	अनुत्तीर्ण
18.	16161106816	MOHAMMAD IMRAN	QEAMUDDIN	OBC	79	47	52	अनुत्तीर्ण
19.	35421913031	MUNNA KUMAR SINGH	RUDEO SINGH	GENERAL	69	49	51	अनुत्तीर्ण

क्रम	अनुक्रमांक	नाम	पिता का नाम	वर्ग	पूर्व लिखित परीक्षा में अर्जित अंक	अंक पुनरीक्षण में अर्जित अंक	पुनर्मूल्यांकन उपरान्त प्राप्त अंक	टिप्पणी
20.	35360304524	PRACHI SAHU	ANAND KUMAR SHASTRI	OBC	78	45	47	अनुत्तीर्ण
21.	49490100260	KM PREM LATA	VEDABRAS SHUKLA	GENERAL	83	54	56	अनुत्तीर्ण
22.	49491507054	KM SUMAN YADAV	DHODHAI YADAV	OBC	75	27	28	अनुत्तीर्ण
23.	49501707870	KM SANGITA YADAV	DOODH NATH YADAV	OBC	69	59	61	अनुत्तीर्ण
24.	59680401801	KM SHALU	SATISH KUMAR	SC	99	43	43	अनुत्तीर्ण
25.	10280503028	SANJIV KUMAR SINGH	CHANDRA BHAN SINGH	GENERAL	80	51	57	अनुत्तीर्ण
26.	59680607912	BINDU KALA VERMA	MUNNI LAL VERMA	OBC	69	59	62	अनुत्तीर्ण
27.	16171208549	POOJA YADAV	V S YADAV	OBC	90	55	61	अनुत्तीर्ण
28.	59591507149	USHA SINGH	LATE MAN SINGH	OBC	68	21	25	अनुत्तीर्ण
29.	42420704968	FILLIA SINGH	VIJAY NARAYAN SINGH	GENERAL	83	43	43	अनुत्तीर्ण
30.	39410602847	ASAD AHMAD	MAHMOOD AHMAD	OBC	82	57	58	अनुत्तीर्ण
31.	12130100621	DINESH KUMAR	RAMCHARAN SINGH	OBC	74	63	65	अनुत्तीर्ण
32.	63630503325	JITENDRA KUMAR SAHU	HANUMAN PRASAD SAHU	OBC	69	59	65	अनुत्तीर्ण
33.	22221407174	RUBY RATHI	MAHAK SINGH	SC	89	36	42	अनुत्तीर्ण
34.	52520301746	NIDHI RAI	NAGENDRA RAI	GENERAL	74	64	65	अनुत्तीर्ण
35.	42430302524	MD ESAHAR	IDRISH ANSARI	OBC	84	8	8	अनुत्तीर्ण
36.	39390100180	AKHILESH YADAV	MANSINGH YADAV	OBC	84	61	61	अनुत्तीर्ण
37.	39430903888	GULAB DEVI	MULAYAM SINGH	OBC	84	4	4	अनुत्तीर्ण
38.	42440100187	PRAMOD KUMAR	RAJ BAHADUR YADAV	OBC	89	49	54	अनुत्तीर्ण
39.	52530100253	ARVIND DHAR DWIVEDI	PREM NARAYAN DWIVEDI	GENERAL	74	24	24	अनुत्तीर्ण



क्रम	अनुक्रमांक	नाम	पिता का नाम	वर्ग	पूर्व लिखित परीक्षा में अर्जित अंक	अंक पुनरीक्षण में अर्जित अंक	पुनर्मूल्यांकन उपरान्त प्राप्त अंक	टिप्पणी
40.	52530100123	JITENDRA PRASAD SAHANI	RAMHARSH PRASAD SAHANI	OBC	89	60	60	अनुत्तीर्ण
41.	42420402559	RASHMEE SINGH	NARENDRA BAHADUR SINGH	GENERAL	70	53	61	अनुत्तीर्ण
42.	42420805178	SURESH KUMAR	KISHORI LAL	OBC	69	61	62	अनुत्तीर्ण
43.	29511909153	CHANDRA SHEKHAR	MAN	SC	79	35	35	अनुत्तीर्ण
44.	22242810071	KANKA UPADHYAY	SURESH CHANDRA UPADHYAY	GENERAL	92	61	61	अनुत्तीर्ण
45.	39410403621	SARITA SAINI	SHYAMU SAINI	OBC	69	59	60	अनुत्तीर्ण
46.	42461100025	KM MAYA	RAM BRIKSH RAM	SC	68	51	54	अनुत्तीर्ण
47.	52530302145	KRISHNA KUMAR RAI	VED PRAKASH RAI	GENERAL	90	50	51	अनुत्तीर्ण
48.	29341205646	KM NANDO RANA	HORILAL	ST	73	53	54	अनुत्तीर्ण
49.	42420503721	NEETU SINGH	BHRIGUNATH SINGH	GENERAL	69	37	40	अनुत्तीर्ण

8. Learned counsel also submitted that on basis of complaints marks given on answer booklets were compared with tabulation chart and 343 cases were found where there was difference between two. All 343 booklets were re-examined and finally 53 cases were detected where there was huge different and merit was compromised. These candidates were wrongly selected, therefore, their appointments were cancelled. Original

booklets were summoned by this court and above discrepancies were found. The petitioners were allowed to get photocopy of booklets also. On facts, judgments cited by petitioners are distinguishable.

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

10. Before adverting to rival submissions, it would be relevant to quote relevant orders passed by this Court during hearing as under:

Order dated 07.11.2019

"Heard Sri Amit Saxena, learned Senior Counsel assisted by Sri Mushir Khan, learned counsel for the petitioner, learned standing counsel for respondent Nos. 1, 2 & 4 and Sri Nand Kishore Singh, learned counsel for respondent Nos. 3 & 5.

Learned counsel for the petitioner submitted that petitioner had appeared in Assistant Teacher Recruitment Examination- 2018 in which he was declared successful and accordingly he was appointed. Pursuant to that, he has submitted his joining but all of sudden, without providing opportunity of hearing, impugned order dated 07.09.2019 has been passed by which his services were terminated on the ground that after re-evaluation, he was awarded lesser marks than the cut-off-marks required for appointment. It is next submitted that once petitioner has joined his services, he can only be terminated in accordance with service rules applicable in the case of petitioner.

Put up this case on 15.11.2019 in the additional cause list.

Learned standing counsel is directed to produce original answer book, model answer key as well as records/complaints which leads to re-evaluation of answer book of petitioner on the next date fixed.

Learned standing counsel as well as Sri Nand Kishore Singh, learned counsel for respondent Nos. 3 & 5 shall also inform the Court that whether any notice has been given to the petitioner or not and in case any such notice is given, they shall also produce the copy of the same."

Order dated 15.11.2019

*"**Pursuant to order of this Court dated 7.11.2019, learned Standing Counsel has produced two sealed cover envelops, one sealed cover envelop is having 14 answer books and other sealed cover envelop is having photostat copy of tabulation chart. The same are retained in the custody of Registrar General which shall be produced in the Court tomorrow i.e. 16.11.2019 at 10.00 A.M.***

Put up tomorrow i.e. 16.11.2019 in the additional cause list alongwith connected matters."

Order dated 16.11.2019

"Heard learned counsel for the petitioner, learned standing counsel for respondent Nos. 1, 2 & 4 and Sri Nand Kishore Singh, learned counsel for respondent Nos. 3 & 5.

Brief facts of the case are that earlier petitioner along with many other candidates had appeared in Assistant Teacher Recruitment Examination-2018 and declared successful. Ultimately they have been given appointment. Pursuant to the appointment letters, they have submitted their joining and working at the place of their posting. Now by impugned order dated 16.08.2019, her services has been terminated and in the impugned order, it is mentioned that after receiving some complaints, re-evaluation was conducted and 49 candidates including petitioner was found fail as they have not

obtained minimum cut off marks and due to which her services was terminated.Similar orders of termination have also been passed in the matter of 48 candidates.

The main argument of learned counsel for the petitioner was that she had never applied for revaluation, therefore, her answer book cannot be revaluated and further no opportunity was given to her prior to passing the impugned order.

This Court vide order dated 07.11.2019 directed learned standing counsel to produce original answer book, model answer key as well as records/complaints which leads to re-evaluation of answer book of petitioner.

Pursuant to that, original answer book of 14 candidates including petitioner out of 49 candidates along with photocopy of tabulation chart having marks of petitioner as well as many other candidates have been produced before the Court. Letter dated 01.08.2019 has also been produced before the Court having the list of all such 49 candidates along with chart of their marks after first evaluation, revaluation and also marks mentioned in tabulation chart upon which they have been given appointment. *This letter was sent to Secretary, Board of Basic Education, U.P. Prayagraj by Secretary, Examination Regulatory Authority, Prayagraj. Photocopy of tabulation chart and letter dated 01.08.2019 along with detail chart of 49 candidates be taken on record.*

Mr. Anil Bhushan Chaturvedi, Secretary, Examination Regulatory Authority is also present before this Court for proper assistance.

By the perusal of 14 answer books as well as tabulation chart annexed along with letter dated 01.08.2019, it is found that after re-evaluation, either marks of the petitioner and other candidates have been increased or there is no change in their marks, but most shocking and surprising thing is that tabulation chart is having entirely different marks which is much higher than the marks given on the answer books after first evaluation and revaluation.

Petitioner before this Court had earlier obtained 53 marks and after re-evaluation she has been awarded 54 marks whereas in the tabulation charge, she has been given 62 marks and upon that she has been given appointment on the post of Assistant Teacher.

The position is same about all other 48 candidates mentioned in tabulation chart annexed along with letter dated 01.08.2019. For example, another candidate namely Divya Agrahari who is also petitioner in other petition had been awarded 18 marks and after revaluation she has been awarded 19 marks but in the tabulation chart, she has been given 81 marks, Basant Kumar Yadav had been awarded 8 marks and after revaluation, he has been awarded 9 marks, but in tabulation chart, he has been given 75 marks, M.D. Ejahar had been awarded 8 marks and after revaluation, he has been again awarded 8 marks, but in tabulation chart, he has been given 68 marks and Gulab Devi had been awarded 4 marks and after revaluation, she has also been again awarded 4 marks, but in tabulation chart, she has been given 84 marks. Other candidates are also having the same factual position.

On being confronted by the Court, Mr. Anil Bhushan Chaturvedi, Secretary, Examination Regulatory Authority has informed the Court that appointments are given to the candidates on the basis of marks mentioned in tabulation chart, which is also shown in chart annexed along with letter dated

01.08.2019. He further informed that in all these matters, show cause notice has been issued to concerned teachers, who had prepared the tabulation chart, but no F.I.R. has been lodged in this matter.

After perusing the 14 answer books, tabulation chart as well as chart annexed along with letter dated 01.08.2019, it is very much clear that fraud was played at very large scale and it is a fit case to lodge FIR, therefore, Examination Regulatory Authority, Prayagraj is directed to lodge FIR in this matter.

Learned standing counsel for respondent Nos. 1, 2 & 4 and Sri Nand Kishore Singh, learned counsel for respondent Nos. 3 & 5 pray for and are granted two weeks time to file counter affidavit. Rejoinder affidavit, if any, may be filed within one week thereafter.

List this case on 11.12.2019 in top three cases along with connected matters.

Original answer books of 14 candidates is returned to Mr. Anil Bhushan Chaturvedi, Secretary, Examination Regulatory Authority. He is directed to produce answer books of all 49 candidates including these 14 answer books and also copy of F.I.R. lodged in this matter on the next date fixed."

Order dated 12.12.2019

"Counter affidavit filed on behalf of respondent nos. 1 and 4 is taken on record.

Sri Ashok Khare, learned Senior Advocate submitted that the appointment of the petitioners, in this petition and other connected petitions, have been cancelled on the ground that in revaluation their marks have been reduced, due to which, they did not secure minimum qualifying marks and as such, their appointments have been cancelled.

This Court passed an order on 16.11.2019 directing the respondents to produce answer books of all the 49 candidates. Pursuant to the direction of this Court dated 16.11.2019, Sri R.P. Dubey, learned Standing Counsel submitted that answer books of all the 49 candidates have been brought to the Court.

Sri Ashok Khare, learned Senior Advocate contended that since there are allegations against the petitioners that the marks have been tempered in the examination copy, therefore, the petitioners have right to see the examination copies. He submits that there is provision to supply scanned copy of answer books, therefore, respondents may be directed to supply the photo-copy of the answer-books to the counsel of each candidates.

Sri R.P. Dubey, learned Additional Chief Standing Counsel, on instructions from Sri Prem Sanker Singh, Deputy Registrar submitted that the respondents have no objection in supplying the photo-copies of the answer-books to the counsel of each candidates.

In view of the statement of Sri R.P. Dubey, learned Chief Standing Counsel, this Court directs the respondents to supply the photo-copies of the answer books to the counsel of candidates, who are desirous to obtain it.

In this regard, the petitioners are directed to supply the list of candidates, who are desirous of obtaining the photo-copies of the answer books, with details by 2:00 pm on 13.12.2019 in the Office of the Chief Standing Counsel which may be collected by representatives of the Department for doing needful.

It is further provided that the counsels of the candidates whose name figures in the list of candidate for

obtaining photo-copies of examination, may approach in the Chamber of Chief Standing Counsel to collect the same from the representatives of the Department on 16.12.2019 between 3:00 pm to 5:00 pm

Put up this case on 18.12.2019 in the additional cause list."

Order dated 10.01.2020

"Sri Amit Saxena, learned Senior Counsel assisted by by Saurabh Singh, for the petitioner submits that pursuant to the order of this Court dated 12.12.2019, scanned copy has been supplied to the petitioner by the respondents and perusal of the scanned copy reflects that there is no tampering by the petitioner in the copy.

He submits that the observation made by this Court in its order dated 16.11.2019 that "fraud was played at very large scale" may be modified.

Since the petitioner is seeking modification of the order dated 16.11.2019 passed by this Court, therefore, in view of the said fact, let the record of this case be placed before Hon'ble The Chief Justice for necessary orders."

Order dated 16.08.2021

"Civil Misc. Modification Application No. 5 of 2020

Heard Sri R.K. Ojha, learned senior counsel assisted by Sri Shivendu Ojha, learned counsel for the applicant and Sri J.N. Maurya, learned Chief Standing Counsel on behalf of State.

Learned counsel for the applicant submits that while passing the order dated 16.11.19, Court has made an observation and further directed to file FIR. In fact, Court has observed that fraud was played at very large scale and it is a fit case for lodging for FIR, therefore, Investigating Officer is bound with the observation made by the Court and cannot investigate the matter on its own. Court may also please to issue necessary direction to I.O. to carry out investigation without being influenced with the observation made by the Court vide order dated 16.11.2019.

I have considered the submissions made by learned counsel for the petitioner.

Paragraph in question for which modification application is filed is as follows;

"After perusing the 14 answer books, tabulation chart as well as chart annexed along with letter dated 01.08.2019, it is very much clear that fraud was played at very large scale and it is a fit case to lodge FIR, therefore, Examination Regulatory Authority, Prayagraj is directed to lodge FIR in this matter."

From the perusal of above noted paragraph, contention of learned senior counsel for the applicant appears to be correct, ***therefore, I.O. is given liberty to carry out investigation on the basis of evidences and witnesses available to him without being influenced with the observation made by the Court in the above noted paragraph.***

Accordingly, modification application is allowed and order dated 16.11.2019 is modified to that extent only.

It is made clear that the case shall not be treated as tied up or part heard to this Bench in future and shall be listed before appropriate Bench." (Emphasis supplied)

11. Heard learned counsel for parties, perused the record and also carefully perused above referred orders passed by this Court during hearing.

12. Original answer booklets of 14 candidates including petitioner in Writ-A No. 15229 of 2019 and later on answer booklets of 49 candidates were summoned

and atleast 14 booklets were examined and perused by Coordinate Bench and Court was shocked that marks mentioned in answer booklets vis-a-vis tabulation chart were different and much higher marks were given in tabulation chart. The Court notes that in the case of petitioner-Urvashi, she obtained 53 marks as mentioned in answer booklet, on re-evaluation she was awarded 54 marks, whereas in tabulation chart she was given 62 marks, i.e., her marks were increased atleast by 8-9 marks, which is nothing but to give undue advantage to said petitioner. Coordinate Bench has also noted similar irregularities with regard to some other petitioners also. Shockingly three candidates, who got 4, 8 and 8 marks respectively on basis of answers on their answer booklets, were shown as much as 84, 45 and 68 marks respectively in tabulation chart, i.e., huge variation of 80, 37 and 60 marks respectively. It is apparent that fraud was writ large.

13. In order to maintain fairness the Coordinate Bench vide order dated 12.12.2019 has allowed all petitioners to apply scanned photocopy of answer booklets so that they can verify the allegations. However, during argument none of the petitioners have come up with a submission that there was any ambiguity that despite they get lesser marks in their answer booklets, they were provided much more marks in tabulation chart so that they could qualify in merit list.

14. In aforesaid circumstances, there is no factual dispute that petitioners were granted benefit and were awarded more marks than their merit in tabulation chart, i.e., fairness and merit was compromised. The petitioners were not fairly qualified for post of Assistant Teachers. The petitioners were not able to dispute above referred factual position.

15. In above factual background, only issue left for consideration is, whether in aforesaid circumstances even there is no specific provision for re-evaluation, the entire exercise of re-evaluation could be declared illegal ignoring above referred glaring undisputed fact that petitioners were granted more marks above than their merit, i.e., marks granted on basis of their answer booklets, and they were illegally benefited.

16. The first judgment relied by learned counsel for petitioners is **Omveer Singh (supra).** Facts of **Omveer Singh (supra)** are absolutely distinguishable from facts of present case. As referred above, in the present case undisputedly petitioners were illegally benefited by giving more marks in tabulation chart whereas in **Omveer Singh (supra)** petitioners therein were put in an adverse position when they were granted average marks out of the marks granted in two evaluations and in those circumstances the Division Bench has held that procedure for fresh evaluation was wrong.

17. In **Ram Naresh Singh (supra)** (para 93), as quoted above, the Court has noted that no candidate could be allowed to earn an undeserved advantage over others by application of an erroneous answer key, though in order to maintain equity, some relief was granted taking note the period of appointment also. However, in the present case petitioners were appointed on basis of result in September, 2018 and within one year (i.e., September, 2019) impugned orders were passed. Therefore, the short period of one year is not sufficient to tilt the balance of convenience in favour of

petitioners and it could not be ignored that petitioners were in probation period.

18. In aforesaid circumstances, there is no dispute that petitioners were illegally benefited and this Court has verified the said fact from perusal of record produced before Court during hearing. Petitioners have also not been able to dispute that they were granted more marks than their merit so that they could qualify examination, otherwise according to their actual marks they could not get appointment. Less meritorious candidates are not allowed to continue in service at the cost of meritorious candidates and in order to maintain fairness, the procedure adopted by respondents could not be said to be illegal. There is no allegation of any impurity in process of rechecking. As referred above, First Information Reports were lodged. Outcome of investigation is not on record. Complicity of petitioners is also required to be investigated since they were the beneficiaries of fraud.

19. The impleadment applications are rejected since it is informed that the persons seeking impleadment are facing criminal proceedings and it is on record that a First Information Report has already been lodged against them and possibly investigation may also be completed.

20. The writ petitions are accordingly dismissed. A cost of Rs. 5000/- is fixed for each petitioners to be paid within four weeks from today in favour of High Court Legal Services Committee and receipt thereof shall be placed on record.

(2024) 2 ILRA 893
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2024

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Writ - A No. 16791 of 2023

Satyendra Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Siddharth Khare, Sri Ashok Khare (Sr. Advocate), Sri Himanshu Singh

Counsel for the Respondents:
C.S.C., Sri Ashish Mishra, Ms. Bushra Maryam

A. Service Law – Post of Stenographer – Appointment – Cancellation of candidature – Suppression of pendency of criminal case – Effect – Defence of fault of operator of Cyber café was taken – Permissibility – Avtar Singh's case relied upon – Held, once there is suppression/ concealment of pending criminal cases against the candidate, then the employer can cancel his candidature for the appointment – Petitioner is an educated youth and is seeking appointment on the post of Stenographer Grade III in the Civil Court therefore, it is expected from him that he will fill up the application form and will personally re-check all the entries made therein. (Para 22 and 27)

B. Service Law – Post of Stenographer – Cancellation of candidature – Suppression of pendency of criminal case – Subsequent acquittal, how far dilute the fault of suppression – Held, once in the application form a candidate is required to disclose the pending criminal case and if the said fact is suppressed/concealed, merely because at subsequent stage

candidate has been acquitted in the criminal case, that will not dilute the suppression/concealment of material facts as the same has direct bearing on the character, conduct and antecedents of the candidate. (Para 28)

Writ petition dismissed. (E-1)

List of cases cited :-

1. Avtar Singh Vs U.O.I.& ors.; 2016 (8) SCC 471

2. Satish Chandra Yadav Vs U.O.I.& ors.; (2023) 7 SCC 536

3. St. of M. P.& ors.Vs Bhupendra Yadav; AIR 2023 SC 4553

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Himanshu Singh, learned counsel appearing for the petitioner, learned Standing Counsel appearing for the Respondent No.1 and Ms. Bushra Maryam, learned counsel appearing for the Respondents No.2 and 3.

2. Petitioner through this writ petition has assailed the order dated 11.8.2023 passed by the Chairman, Documents Verification Committee/Special Judge (SC/ST Act), Prayagraj, whereby his candidature for the post of Stenographer Grade III has been cancelled on the ground that at the time of submission of application for appointment, he had suppressed/concealed material information relating to pendency of a criminal case against him.

3. Facts of the case, in brief, are that an advertisement was issued for the Uttar Pradesh Civil Court Staff Centralized Recruitment 2022-23, whereby applications were invited from eligible candidates for appointment on the posts of Stenographer Grade III. Petitioner submitted his application in prescribed proforma for appointment on the post of Stenographer Grade III and in the said application, against the columns where candidate was required to give information regarding pending criminal cases, he has written 'No'.

4. The final result of the selection for the post of Stenographer Grade III was declared on 16.5.2023 and petitioner was declared successful. Petitioner after declaration of aforesaid result submitted a notarial affidavit on 26.5.2023, whereby he disclosed that a criminal case registered as Case Crime No.143 of 2019, under Sections 498A, 354 IPC and Section 3/4 of Dowry Prohibtion Act is pending against him. After submission of the aforesaid affidavit by the petitioner, a show cause notice was issued by the Chairman, Documents Verification Committee/Special Judge (SC/ST Act), Prayagraj, whereby petitioner was required to submit his explanation as to why he has concealed the information relating to pendency of a criminal case against him, at the time of submission of application form.

5. Petitioner submitted his reply to the aforesaid show cause notice dated 7.6.2023, on 12.6.2023, wherein he has admitted that a criminal case was pending on the date of submission of application form for appointment on the post of Stenographer Garde III but since his form was filled in by the operator of a cyber cafe, as such he has written 'No' against the column, where petitioner was required to disclose the criminal cases pending against him therefore, non disclosure of pending criminal case cannot be treated as deliberate suppression of the material facts

and further, the said mistake may be condoned by treating it to be a clerical error. The Chairman, Documents Verification Committee/Special Judge (SC/ST Act), Prayagraj has considered the reply submitted by the petitioner and has passed the order on 11.8.2023, wherein finding has been recorded that petitioner while submitting application form for appointment on the post of Stenographer Grade III has deliberately suppressed/concealed the facts regarding pendency of criminal case against him. Further finding has been recorded that the post of Stenographer Grade III of the Civil Court is a sensitive post and on the said post the person who has suppressed/concealed facts regarding pendency of criminal case against him cannot be appointed. The Chairman, Documents Verification Committee/Special Judge (SC/ST Act), Prayagraj vide his order dated 11.8.2023 has cancelled the candidature of the petitioner.

6. Learned Senior Advocate appearing for the petitioner has submitted that since application form submitted by the petitioner was filled in by the operator of a cyber cafe therefore, inadvertently he had written 'No' against the columns under which petitioner was required to make disclosure about the pending criminal cases therefore, petitioner cannot be held responsible for deliberate suppression/concealment of facts regarding pendency of criminal case. It has further been submitted that subsequently petitioner himself has filed an affidavit on 26.5.2023, whereby information regarding pending criminal case was provided to the competent authority therefore, petitioner cannot be held guilty for non-disclosure of the facts relating to pendency of a criminal case.

7. Learned Senior Advocate appearing for the petitioner has drawn attention of this court towards the fact that the criminal case which was pending against the petitioner on the date of submission of application form for appointment on the post of Stenographer Grade III has been concluded and petitioner has been acquitted from all the charges vide judgment and order dated 5.6.2023 passed by the Judicial Magistrate, Court No.3, Prayagraj in Case No.1946 of 2021.

8. Learned Senior Advocate appearing for the petitioner has cited a judgment rendered by the Hon'ble Supreme Court in the case of **Avtar Singh Vs. Union of India and others, 2016 (8) SCC 471** and has submitted that the Hon'ble Supreme Court in the said judgment has categorically held that in the cases of suppression/concealment of material facts regarding pending criminal cases, employer has to consider the facts of the case as to whether charges in the criminal case which has not been disclosed by the candidate are so serious that he cannot be appointed on the post in question or he cannot be allowed to continue in service and in the present case, petitioner was tried for a trivial offence and since he has been acquitted from the charges, the order passed by the employer by which petitioner's candidature has been cancelled, cannot sustain in the eyes of law.

9. Learned Senior Advocate appearing for the petitioner has vehemently argued that in view of the law laid down by the Hon'ble Supreme Court in the case of **Avtar Singh (supra),** the competent authority must have considered that the charges levelled against the petitioner in the criminal case were trivial and further, he has been acquitted in the criminal case

therefore, looking into the career and future prospects of the petitioner, the employer should not have cancelled his candidature, whereas in most arbitrary manner, without considering the relevant facts of the case, petitioner's candidature has been cancelled vide order dated 11.8.2023 as such, the said order cannot sustain in the eyes of law.

10. Learned Senior Advocate appearing for the petitioner has also argued that once after selection of the petitioner for appointment on the post of Stenographer Grade III petitioner himself has submitted an affidavit and has disclosed that a criminal case was pending against him and further he has been acquitted in the said criminal case, the employer would not have cancelled petitioner's candidature but in most arbitrary manner, his candidature has been cancelled vide order dated 11.8.2023. It has further been argued that the post of Stenographer is not such a sensitive post where a person against whom a trivial criminal charge was levelled and later on he has been acquitted from the said charge, cannot be appointed therefore, the order dated 11.8.2023, which is impugned in this writ petition, is absolutely arbitrary and reflects total non-application of mind as relevant factors as required under the judgment of the Hon'ble Supreme Court rendered in the case of **Avtar Singh (supra)** have not been considered.

11. Learned Senior Advocate appearing for the petitioner has thus concluded his arguments and has submitted that keeping in view the facts and circumstances of the case and law laid down by the Hon'ble Supreme Court in the case of **Avtar Singh (supra)**, the order dated 11.8.2023 passed by the Chairman, Documents Verification Committee/Special Judge (SC/ST Act), Prayagraj cannot sustain in the eyes of law accordingly, the writ petition is liable to be allowed by this court.

12. Per contra, Ms. Bushra Maryam, learned counsel appearing for the Respondents No.2 and 3 has submitted that in the application form to be filled in by the candidates for selection on the post of Stenographer Grade III, there was specific requirement for the candidates to disclose the pending criminal cases but petitioner while filling up his application form has written 'No' against the columns where he was required to disclose pending criminal cases therefore, it is apparent that the petitioner has suppressed/concealed the material facts, accordingly he is not entitled for appointment on the post of Stenographer Grade III.

13. Learned counsel appearing for the Respondents No.2 and 3 has further submitted that petitioner is seeking appointment on the post of Stenographer in the Civil Court, therefore the story set out by the petitioner that his application form was filled in by the operator of a cyber cafe cannot be believed as he is an educated person as such, it is expected from him that he must have seen each and every information given in his application form.

14. Learned counsel appearing for the Respondents No.2 and 3 has vehemently argued that suppression of the material facts regarding pending criminal cases by a candidate seeking appointment on a particular post raises serious doubt on his character and therefore, once it is established that there is suppression/concealment regarding pending criminal case, the employer has every right to cancel the candidature of the said candidate or to terminate services of an

employee. It has further been argued that the competent authority issued a show cause notice to the petitioner whereby he was required to submit his reply and thereafter, reply submitted by the petitioner has duly been considered and the competent authority has found that once petitioner has deliberately suppressed/concealed the facts relating to pending criminal case against him at the time of submission of application form, he is not fit to be appointed on the post of Stenographer Grade III in the Civil Court as the work in the courts attaches higher degree of trust and responsibility.

15. Learned counsel appearing for the Respondents No.2 and 3 has also argued that petitioner has filed an affidavit after his selection for appointment on the post of Stenographer Grade III, wherein he has disclosed the pending criminal case therefore, it is apparent that petitioner at the time of submission of application form deliberately suppressed/concealed the material facts and has not disclosed about pending criminal case.

16. Learned counsel appearing for the Respondents No.2 and 3 has cited judgments rendered by the Hon'ble Supreme Court in the cases of **Satish Chandra Yadav Vs. Union of India and others, (2023) 7 SCC 536** and **State of Madhya Pradesh and others Vs. Bhupendra Yadav, AIR 2023 SC 4553** and has argued that the Hon'ble Supreme Court in the said judgments has categorically held that suppression/concealment of facts relating to pendency of criminal cases by a candidate itself is sufficient for cancellation of his candidature or terminating services of an employee as the person who at the time of filling up application form has not disclosed the pending criminal cases, cannot be allowed to work on a sensitive post as non-disclosure raises serious doubt on his character therefore, the employer has every right to deny appointment to the said candidate.

17. Learned counsel appearing for the Respondents No.2 and 3 has thus concluded her arguments and has submitted that since petitioner deliberately has not disclosed the pending criminal case as such, the order dated 11.8.2023 passed by the competent authority, whereby petitioner's candidature has been cancelled, does not warrant interference by this court and the writ petition filed by the petitioner is liable to be dismissed.

18. I have considered the rival submissions advanced by the learned counsels appearing for the parties and I find that in the application form meant for appointment on the post of Stenographer Grade III, candidate was required to disclose the pending criminal cases against him but the petitioner, while filling up the said relevant columns of the application form, has written 'No', whereas it is admitted case of the petitioner that on the date of submission of application form, criminal case being Case Crime No.143 of 2019, registered under Sections 498A, 354 IPC and Section 3/4 of Dowry Prohibition Act, was pending. The relevant portion of the application form submitted by the petitioner is extracted as under:-

Criminal Proceeding	
Have you ever been tried, convicted or acquitted by Court of law?	No
Whether any criminal complaint	No

case have ever been registered against you?	

19. This court finds that result of the selection in question was declared on 16.5.2023 and thereafter proceedings relating to police verification of the selected candidates started. At that point of time, petitioner realized that he had not disclosed criminal case pending against him therefore, he submitted a notarial affidavit on 26.5.2023, wherein for the first time he disclosed the criminal case pending against him. From the facts of the case, it is apparent that petitioner has deliberately suppressed/concealed the criminal case pending against him. Petitioner is an educated person therefore, this story cannot be believed that application form of the petitioner was filled in by the operator of a cyber cafe and he has written 'No' in front of the questions relating to the pending criminal cases.

20. Now, this court proceeds to consider the issue as to whether on the ground of suppression/concealment of pending criminal case, candidature of a selected candidate for appointment on a post can be cancelled.

21. The Hon'ble Supreme Court vide its judgment rendered in the case of **Avtar Singh (supra)** has considered the law laid down in different judgments of the Hon'ble Supreme Court regarding the issue as to where the candidate has suppressed/concealed the pending criminal case or has disclosed that he has been convicted in a criminal case, what course is available with the employer to take a decision either for cancellation of candidature of a selected candidate or to offer him appointment. The Hon'ble Supreme Court after summarizing the entire law on the issue has given its conclusion in paragraph 30. Paragraph 30 of the judgment rendered in the case of **Avtar Singh (supra)** is extracted as under:-

30. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:

(1) Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.

(2) While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.

(3) The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.

(4) In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted : -

(a) In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact

or false information by condoning the lapse.

(b) Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.

(c) If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.

(5) In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.

(6) In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

(7) In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

(8) If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

(9) In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/removal or dismissal on the ground of suppression or submitting false information in verification form.

(10) For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

(11) Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him.

22. This court finds that the Hon'ble Supreme Court in the judgment rendered in the case of Avtar Singh (supra) has held that information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case whether before or after entering into service must be true and there should be no suppression or false mention of required information. The Hon'ble Supreme Court has further held that once there is suppression/concealment of pending criminal cases against the candidate, then the employer can cancel his candidature for the appointment.

23. The judgment rendered in the case of **Avtar Singh (supra)** has been considered by the Hon'ble Supreme Court in its judgment rendered in the case of **Satish Chandra Yadav Vs. Union of**

India, (2023) 7 SCC 536, wherein after considering the entire law on the issue, it has been held that suppression of material information and making a false statement in the application form relating to arrest, prosecution, conviction etc. has a clear bearing on the character, conduct and antecedents of the employee. It has further been held that if it is found that employee has suppressed or given false information in regard to the matters having a bearing on his fitness for suitability to the post, he can be terminated from service. The relevant paragraphs of the judgment rendered in the case of **Satish Chandra Yadav (supra)** are extracted as under:-

*62. In the **Union of India (UOI) v. Dilip Kumar Mullick,** (2022) 6 Scale 108, a CRPF officer had suppressed the fact that the proceedings under the IPC pending against him. The Court, while referring to Avtar Singh (supra), held that the suppression can be a ground for an employer to cancel the candidature or to terminate the services. The respondent served in the organization since 2003 and continued to remain as an under trial accused without the knowledge of the organisation. The respondent received an honourable acquittal from the trial court. This Court held as under:*

"13. Thus, it remains beyond the pale of doubt that the cases of non-disclosure of material information and of submitting false information have been treated as being of equal gravity by this Court <u>and it is laid down in no uncertain terms that non-disclosure by itself may be a ground for an employer to cancel the candidature or to terminate services.</u> Even in the summation above- quoted, this Court has emphasized that information given to the employer by a candidate as to criminal case including the factors of arrest or pendency of the case, whether before or after entering into service, must be true and there should be no suppression or false mention of the required information.

14. In case of suppression, when the facts later come to the knowledge of employer, different courses of action may be adopted by the employer depending on the nature of fault as also the nature of default; and this Court has indicated that if the case is of trivial nature, like that of shouting slogans at a young age etc., the employer may ignore such suppression of fact or false information depending on the factors as to whether the information, if disclosed, would have rendered incumbent unfit for the post in question.

14.1. However, the aforesaid observations do not lead to the corollary that in a case of the present nature where a criminal case was indeed pending against the respondent and the facts were altogether omitted from being mentioned, the employer would be obliged to ignore such defaults and shortcomings. ... x x x x

<u>16. In the given set of facts and circumstances, where suppression of relevant information is not a matter of dispute, there cannot be any legal basis for the Court to interfere in the manner that the employer be directed to impose 'any lesser punishment', as directed by the Division Bench of the High Court.</u> The submissions seeking to evoke sympathy and calling for leniency cannot lead to any relief in favour of the respondent." [Emphasis supplied]

*63. In the case of **Pawan Kumar v. Union of India,** (2022) SCC OnLine SC 532, a case was registered against the appellant for the offences punishable under Sections 148, 149, 323, 356 and 506 of the IPC. The appellant was honourably acquitted. However, the fact of the said criminal prosecution was not disclosed in*

the attestation form filled by the petitioner. On such ground, the appellant was discharged from service. The High Court upheld the discharge. While allowing the appeal, this Court held as follows:

"13. What emerges from the exposition as laid down by this Court is that by mere suppression of material/false information regardless of the fact whether there is a conviction or acquittal has been recorded, the employee/recruit is not to be discharged/terminated axiomatically from service just by a stroke of pen. At the same time, the effect of suppression of material/false information involving in a criminal case, if any, is left for the employer to consider all the relevant facts and circumstances available as to antecedents and keeping in view the objective criteria and the relevant service rules into consideration, while taking appropriate decision regarding continuance/suitability of the employee into service. What being noticed by this Court is that mere suppression of material/false information in a given case does not mean that the employer can arbitrarily discharge/terminate the employee from service.

x x x x

18. The criminal case indeed was of trivial nature and the nature of post and nature of duties to be discharged by the recruit has never been looked into by the competent authority while examining the overall suitability of the incumbent keeping in view Rule 52 of the Rules 1987 to become a member of the force. Taking into consideration the exposition expressed by this Court in Avtar Singh (supra), in our considered view the order of discharge passed by the competent authority dated 24th April, 2015 is not sustainable and in sequel thereto the judgment passed by the Division Bench of High Court of Delhi does not hold good and deserves to be set aside." [Emphasis supplied]

Xxxxxxxxxxxxxxxxxxx

65. Thus, this Court took the view that irrespective of the fact whether the dispute is of a trivial nature or not, it is the credibility/ trustworthiness of a particular employee which matters the most when it comes to public employment. This Court took the view that if a particular employee suppresses something important or makes any false declaration with a view to secure public employment then such employee could be said to have exhibited a tendency which is likely to shake the confidence of the employer. In such circumstances, it would be within the discretion of the employer whether to continue or not to continue such an employee who has exhibited a tendency which reflects on his overall character or credibility.

Xxxxxxxxxxxxxxxxxx

*68. The only reason to refer to and look into the various decisions rendered by this Court as above over a period of time is that the principles of law laid therein governing the subject are bit inconsistent. Even after, the larger Bench decision in the case of **Avtar Singh** (supra) different courts have enunciated different principles.*

69. In such circumstances, we undertook some exercise to shortlist the broad principles of law which should be made applicable to the litigations of the present nature. The principles are as follows:

a) Each case should be scrutinised thoroughly by the public employer concerned, through its designated officials–more so, in the case of recruitment for the police force, who are under a duty to maintain order, and tackle lawlessness, since their ability to inspire

*public confidence is a bulwark to society's security. [See **Raj Kumar** (supra)]*

b) Even in a case where the employee has made declaration truthfully and correctly of a concluded criminal case, the employer still has the right to consider the antecedents, and cannot be compelled to appoint the candidate. The acquittal in a criminal case would not automatically entitle a candidate for appointment to the post. It would be still open to the employer to consider the antecedents and examine whether the candidate concerned is suitable and fit for appointment to the post.

c) The suppression of material information and making a false statement in the verification Form relating to arrest, prosecution, conviction etc., has a clear bearing on the character, conduct and antecedents of the employee. If it is found that the employee had suppressed or given false information in regard to the matters having a bearing on his fitness or suitability to the post, he can be terminated from service.

d) The generalisations about the youth, career prospects and age of the candidates leading to condonation of the offenders' conduct, should not enter the judicial verdict and should be avoided.

e) The Court should inquire whether the Authority concerned whose action is being challenged acted mala fide.

f) Is there any element of bias in the decision of the Authority?

g) Whether the procedure of inquiry adopted by the Authority concerned was fair and reasonable?

24. This court finds that the Hon'ble Supreme Court in the judgment rendered in the case of **Satish Chandra Yadav (supra)** has categorically held that if an employee while filling up his application form for appointment on the post has suppressed/concealed the pending criminal case, then it has a clear bearing on the character, conduct and antecedents of the employee and therefore, if it is found that employee has suppressed or given false information in regard to the matters having bearing on his fitness for suitability to the post, his services can be terminated. The Hon'ble Supreme Court has further held that that the generalisations about the youth, career prospects and age of the candidate leading to condonation of the offenders' conduct, should not enter into the judicial verdict and should be avoided.

25. The Hon'ble Supreme Court has again considered the law in respect of issue involved in this writ petition and has rendered a judgment in the case of **Bhupendra Yadav (supra),** wherein it has been held that if a candidate in a selection has suppressed/concealed material facts relating to criminal cases pending against him, then if the employer feels that a candidate who at the initial stage itself has made a false statement and/or not disclosed the material facts and therefore, he cannot be continued in service because such an employee cannot be relied upon in future, the employer cannot be forced to continue such an employee. The relevant paragraphs of the judgment rendered in the case of **Bhupendra Yadav (supra)** are extracted as under:-

*"13. In **Rajasthan Rajya Vidhut Prasaran Nigam Limited and Another v. Anil Kanwaria,** where the employer had invited applications for the post of a Technical Helper and on qualifying for the said post, the respondent therein was appointed as a probationer trainee, in the course of his police verification which was a pre-condition for confirming him to the post, it had transpired that he had been*

convicted by the trial Court for offences under Sections 323 and 341 of the IPC but was extended benefit under the Probation of Offenders Act, 1958 and released on good conduct. This Court observed that at the time of submitting an application for appointment, the respondent had already suffered a conviction by the competent Court which fact was withheld by him and he had filed a false declaration. These facts emerged only after receiving the police verification report. After distilling the law on appointments obtained by fraud or misrepresentation/by suppression of material facts, this Court proceeded to quash and set aside the order passed by the learned Single Judge and upheld the order passed by the Division Bench of the High Court, directing reinstatement of the respondent – employee and held that said decision was unsustainable in view of the fact that the employee had not disclosed/suppressed material facts and had filed a false declaration.

14. In the captioned case, this Court expressed a view that even where there was a subsequent acquittal, the employee having furnished false information/indulged in suppression of material fact of a pending criminal case, cannot claim appointment as a matter of right. Following are the observations made regarding the credibility of such an employee from the perspective of the employer:

"14. The issue/question may be considered from another angle, from the employer's point of view. The question is not about whether an employee was involved in a dispute of trivial nature andwhether he has been subsequently acquitted or not. The question is about the credibility and/or trustworthiness of such an employee who at the initial stage of the employment i.e. while submitting the declaration/verification and/or applying for a post made false declaration and/or not disclosing and/or suppressing material fact of having involved in a criminal case. If the correct facts would have been disclosed, the employer might not have appointed him. Then the question is of trust. Therefore, in such a situation, where the employer feels that an employee who at the initial stage itself has made a false statement and/or not disclosed the material facts and/or suppressed the material facts and therefore he cannot be continued in service because such an employee cannot be relied upon even in future, the employer cannot be forced to continue such an employee. The choice/option whether to continue or not to continue such an employee always must be given to the employer. At the cost of repetition, it is observed and as observed hereinabove in catena of decision such an employee cannot claim the appointment and/or continue to be in service as a matter of right."

15. On applying the law expounded by this Court in a series of decisions to the facts of the instant case, we find that the Division Bench of the High Court has dismissed the appeal1 preferred by the appellant – State Government and set aside the order passed by the learned Single Judge who had upheld the order passed by the Competent Authority, terminating the services of the respondent on the ground that he was candid enough to make a disclosure in his verification form stating that he had been chargesheeted in a criminal case wherein he was later on acquitted and there was no other criminal case pending against him at the relevant time.

16. We are, however, unable to concur with the aforesaid view. Even though the respondent had truthfully

declared that he was involved in a criminal case which was decided by the trial Court vide judgement 26th October, 2015, on perusing the facts of the said case as noted hereinabove and the observations made in the judgement, quite clearly, this was not a case of clean acquittal. It is evident from the facts narrated that after the chargesheet was filed, the respondent had arrived at a compromise with the complainant and filed an application under Section 320 of the CrPC, based on which the offence under Section 341 IPC was compounded. As for the remaining offences for which the respondent was charged i.e. Section 354(D) of the IPC and Section 11 (D)/12 of the POCSO Act, they were non compoundable and therefore, the matter was taken to trial. The respondent was acquitted by the trial Court primarily on account of the fact that the complainant did not support the case set up by the prosecution and the other prosecution witnesses had turned hostile. In such circumstances, the respondent's plea that he had been given a clean acquittal in the criminal case, is found to be devoid of merits."

26. This court finds that the Hon'ble Supreme Court in its judgments has considered the issue of non-disclosure of pending criminal cases by an employee while submitting his application form for selection/appointment and has held that concealment/suppression of the facts relating to pending criminal cases has a clear bearing on the character, conduct and antecedents of the employee therefore, if it is found that the employee has suppressed or given false information in regard to the matters having a bearing on his conduct for suitability to the post, he can be terminated from service.

27. This court further finds that petitioner while filling up the application form for appointment on the post of Stenographer Grade III has deliberately suppressed/concealed the fact of pending criminal case against him and therefore, the employer after considering the entire facts and circumstances of the case, particularly keeping in view the trust and responsibility attached to the post of Stenographer in the Civil Court, has found that petitioner can not be appointed on the post of Stenographer Grade III and thereby has cancelled his candidature vide order dated 11.8.2023. So far as the story set out by the petitioner in the writ petition that his application form was filled in by the operator of a cyber cafe, is concerned, the said story does not inspire confidence as petitioner is an educated youth and is seeking appointment on the post of Stenographer Grade III in the Civil Court therefore, it is expected from him that he will fill up the application form and will personally re-check all the entries made therein. So far as another issue that petitioner has submitted affidavit before the employer whereby he has disclosed criminal case pending against him, is concerned, it is apparent from the record that said affidavit has been filed by the petitioner after he has been declared successful in the result of selection in question therefore, the said affidavit cannot dilute the suppression/concealment made by the petitioner at the time of submission of his application form.

28. So far as subsequent acquittal of the petitioner in the criminal case is concerned, this court is of the view that once in the application form a candidate is required to disclose the pending criminal case and if the said fact is suppressed/concealed, merely because at

subsequent stage candidate has been acquitted in the criminal case, that will not dilute the suppression/concealment of material facts as the same has direct bearing on the character, conduct and antecedents of the candidate.

29. In view of the aforesaid reasons, this court is of the view that the petitioner at the time of filling up his application form for appointment on the post of Stenographer Grade III has deliberately suppressed/concealed the fact of pending criminal case and the competent authority after providing opportunity to the petitioner and considering his reply, has passed the order dated 11.8.2023, whereby petitioner has not been found fit for appointment on a sensitive post of Stenographer in the Civil Court therefore, the order dated 11.8.2023 does not call for any interference by this court.

30. In view of the aforesaid reasons, this writ petition is dismissed.

(2024) 2 ILRA 905
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2024

BEFORE

THE HON'BLE SAURABH SHYAM SHAMSHERY, J.

Writ - A No. 17129 of 2023
And other connected cases

Vinay Kumar Pandey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Agnihotri Kumar Tripathi, Sri Indresh Dubey, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:
C.S.C., Smt. Archana Singh

A. Service Law – Post of Trainee Teacher – Recruitment – Counselling – Proceedings were initiated for consideration of candidature of candidates who are part of list of 12091 way back in the year 2016 – Except about 4000 candidates, rest candidates out of 12091 have not participated – Reason for not participating was that either no counselling was conducted or candidates were not adequately informed – High Court directed the St.-authority to issue a fresh advertisement to call the candidates belonging to said category of 12091, who have not appeared earlier for counselling, fixing a date in the week commencing 05th February, 2024. (Para 12, 17 and 18)

Writ petitions disposed of. (E-1)

List of cases cited :-

1. Diary No. 19925/2023 : Writ Petition (Civil) No. 001078 of 2023; Ram Prasad Vishwakarma Vs The St. of UP decided on 27.09.2023 (SC)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

1. The dispute in present bunch of writ petitions is arising out of an advertisement issued by State of Uttar Pradesh dated 30.11.2011, i.e., more than a decade ago, for recruitment of 72885 Trainee Teachers for Junior Basic Schools run by Board of Basic Education, Uttar Pradesh.

2. The dispute has already been travelled up to the Supreme Court and Civil Appeals were disposed of vide order dated 25.07.2017 and thereafter contempt petitions were also disposed of vide order dated 13.12.2019. Later on some of the petitioners approached Supreme Court by way of filing Writ Petition under Article 32 of the Constitution which was disposed of vide order dated 27.09.2023 and on basis of observations made therein petitioners have

approached this Court by filing present writ petitions.

3. Before adverting to rival submissions, a brief history of litigation till date alongwith relevant part of various orders passed is mentioned hereinafter.

4. Above referred advertisement and proceedings thereof were cancelled by State Government by issuing a Government Order dated 21.08.2012 and by subsequent Government Order dated 05.12.2012 fresh procedure was initiated for recruitment in accordance with relevant amended rules.

5. Aforesaid Government Order dated 05.12.2012 was subject matter of challenge before this Court by means of several writ petitions. A Single Bench of this Court vide judgment dated 16.01.2013 passed in bunch of writ petitions, leading being Writ-A No. 39674 of 2012 (Akhilesh Tripathi and others vs. State of U.P. and others) has uphold the above referred Government order of State Government.

6. Aforesaid judgment was challenged by means of several special appeals and Division Bench of this Court vide judgment dated 20.11.2013 allowed bunch of special appeals, leading being Special Appeal (Defective) No. 237 of 2013 (Shiv Kumar vs. State of U.P. and others) and judgment of Single Bench was modified. Relevant part of judgment is reproduced hereinafter:

"In the result all the Special Appeals are allowed to the following extent:

1. The Government Order dated 26.7.2011 insofar as it directs for restoration of criteria for selection as was prevalent prior to 12th amendment rules is set-aside.

2. The U.P. Basic Education (Teachers) Service Amendment Rules, 2012 (15th Amendment Rules dated 31.8.2012) in so far as Rule 14 (3) is concerned is declared to be ultra-vires to Article 14 of the Constitution and are struck down. Consequently, the Government Order dated 31.8.2012 as well as the communication dated 31.8.2012 issued by the board of Basic Education are set-aside.

3. Respondents are directed to proceed and conclude the selection as per the advertisement dated 30.11.2011 as modified on 20.12.2011 to its logical end within the time allowed by the Central Government vide its notification issued under Section 23 (2) of the Act, 2009.

4. The judgment of the learned Single Judge is modified to the above extent."

7. In aforesaid circumstances number of Special Leave Petitions were filed before Supreme Court against aforesaid judgment dated 20.11.2013.

8. During pendency of litigation before Supreme Court various interim orders were passed. Relevant part of interim orders and judgments passed by Supreme Court are reproduced hereinafter:

(I) Order dated 25.03.2014 in Civil Appeal Nos. 4347-4375 of 2014

"Leave granted "

Hearing expedited

By this interim order, we direct the State of Uttar Pradesh to fill up the vacancies of Assistant Teachers in the schools pursuant to the advertisement issued on 30.11.2011 as per the directions issued by the Division Bench of Allahabad

High Court in the case of Shiv Kumar Pathak & Ors. [Special Appeal (Defective) No. 237 of 2013] and connected matters as expeditiously as possible at any rate within 12 weeks' time from today.

Further, the State in the letter of appointment that will be issued to the successful candidates shall mention that their appointment is subject to the result of the civil appeals that are pending before this Court.

The appointee(s) shall not claim any equities at the time of final disposal of the civil appeals. All actions/proceedings of the State Government will be subject to the final result of these civil appeals."

(II) Order dated 17.12.2014 in Civil Appeal Nos. 4347-4375 of 2014

"Primary education can be equated to the primary health of a child. When a child is educated, the Nation marches towards civilization. No student can inculcate or cultivate education without guidance. Definitely not a child, who is supposed to get primary guidance from a teacher, for him he is like a laser beam. The State, as the guardian of all citizens and also with a further enhanced and accentuated responsibilities for the children, has a sacrosanct obligation to see that the children are educated. Almost two thousand years back, Kautaliya had stated that the parents who do not send their children to have the teachings, deserves to be punished. Similar was the climate in England almost seven centuries back. Thus, the significance of education can be well recognized. In such a situation, we cannot conceive that the posts would lie vacant, students go untaught and the schools look like barren in a desert waiting for an oasis. The teacher shall serve the purpose of oasis in the field of education. Hence, the aforesaid direction The competent authority shall file a compliance report, failing which they shall face the consequences as the law provides and the law does not countenance disobedience of the law and orders of the court.

Let the matter be listed on 25th February, 2015, for further hearing."

(III) Order dated 25.05.2015 in Civil Appeal Nos. 4347-4375 of 2014

"At this juncture, we may note with profit that we have fixed the percentage for persons belonging to Schedule Castes/Schedule Tribes/Other Backward Classes at 65%. It is urged by Mr. Sharma and learned counsel whose names appear hereinabove, that the persons who have obtained 60% marks should also be considered. As 6 we find, as of today, 29174 vacancies are available to be filled up. If the persons belonging to Scheduled Casts/Scheduled Tribes/Other Backward Classes have secured 65% marks and their number meets the requirement, the vacancies meant for their quota, shall be filled up by taking into consideration the said percentage. If the candidates of that percentage are not available, the State shall offer appointments to the candidates who have secured 60% of the marks. Be it noted, if the candidates belonging to Scheduled Castes/Scheduled Tribes/Other Backward Classes who have secured 65% of the marks are available, the candidates who have secured 60% of the marks cannot be allowed to compete with them.

The State Government is directed to issue the public notice within four weeks from today requiring the selected candidates in respect of 29174 vacancies to join and if any candidate fails to join within the stipulated period provided in the public

notice, he will forefeit his right of appointment in this selection. To clarify, we may add that the public notice shall be published in widely circulated newspapers and the candidates shall be given three weeks time to join failing which the conditions prescribed hereinabove shall follow.

At this juncture, we have been apprised by the learned counsel for the respondents that some candidates who have applied in more than one districts and secured the requisite marks which have been fixed by this Court on the previous occasion, have joined in two posts, though not working. The competent authority of the State Government shall verify the same and restrict the appointment to one place and count the said vacancies and fill up the same by following the critaria fixed by us.

We will be failing in our duty if we do not take note of the submission which has been advanced before us that though certain posts are reserved in the category of horizontal quota, no steps have been taken to fill up the said. Regard being had to provisions contained in the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the Rules in vogue in the State of Uttar Pradesh, we direct that the posts in those categories shall be filled up as per the Rules relating to relaxation in respect of the said category. That apart, if any quota and relaxation are available for any other horizontal category, that may also be applied.

Let the matter be listed on 22.04.2015. It is hereby made clear that it shall be finally heard on that day and no adjournment shall be granted to any counsel."

(IV) Order dated 27.07.2015 in Civil Appeal Nos. 4347-4375 of 2014

"Presently, we shall proceed to deal with our initial order passed on 25th February, 2015, in connection with the appointments. It reads as under:

"This Court, on 17.12.2014, after hearing the learned counsel for the parties, apart from other directions, had issued the following direction :

"... After length has not hearing the on various CA 4347-4375/14 occasions, we are inclined to modify the order passed on 25th March, 2014, and direct that the State Government shall appoint the candidates, whose names have not been weeded out in the malpractice and who have obtained/ secured seventy percent marks in the Teacher Eligibility Test (TET). candidates belonging to Scheduled The Caste/ Scheduled Tribe/ Other Backward Classes and the physically handicapped persons, shall be appointed if they have obtained/secured sixty-five percent marks. If there is any policy of the State Government covering any other category for the purpose of reservation, it may be given effect to with the same percentage. It shall be mentioned in the appointment letter that their appointment shall be subject to the result of these appeals and they shall not claim any equity because of the appointment, for it is issued direction passed by this Court. on the basis of the The letters of appointment shall be issued within a period of six weeks."

Mr. Venkataramani, learned senior counsel appearing for the State of Uttar Pradesh, has filed an affidavit sworn by the Joint Secretary, Basic Shiksha Parishad, Allahabad indicating, thus :

"3. That in view of the said order dated 25.03.2014 passed by this Hon'ble Court, the State Government vide its order

dated 27.06.2014 and 1.7.2014 decided to make the selection and appointment against 72,825 post of trainee teachers in parishadiya primary schools initiated in the year 2011; and accordingly the counseling have been done in following manner :

(i) Ist counseling 29.08.2014 to 31.08.2014

(ii) IInd Counseling 22.09.2014 to 30.09.2014

(iii) IIIrd counseling 05.11.2014 to 13.11.2014

(iv) IVth counseling 09.01.2015 to 14.01.2015

4. That pursuant to order dated 17.12.2014 of this Hon'ble Court only the candidates who *have secured 70% (105 marks) amongst general category and 65% (97.5 marks) amongst the reserved category have been permitted to participate in the said counseling.*

5. That amongst the candidates who ave been permitted to CA 4347-75/14 10 participate in the counseling during the period of aforementioned schedule have also been offered the appointment letters and they have also joined post in their institutions.

6. That some of the candidates were repeatedly offered appointment letters from different districts on the account of their participation in counseling in such district but it is clarified that here that they have been permitted to join their post only once. Accordingly although 83983 appointment letters were issued, however, the joining has been taken only by 43651 candidates. The process of filling up the remaining 29174 vacancies is also on."

Relying on the said affidavit, it is put forth by Mr. Venkataramani, learned senior counsel, that the State may be granted four weeks time to issue public notice to the candidates to join in the vacancies failing which the Court may issue appropriate directions.

At this juncture, Mr. V.K. Sinha, learned senior counsel, Mr. V.K. Sharma, Mr. Ajay Jain, Mr. Jayant Mehta, Mr. Arvind Shrivastava, Mrs. Rachana Shrivastava, Mr. Abhishek Shrivastava, learned counsel, submitted that this Court may ask the State Government to file an affidavit about the number of vacancies still available. Mr. Venkataramani, learned senior counsel, submitted that an affidavit to that extent will be filed by the next date.

At this juncture, we may note with profit that we have fixed the percentage for persons belonging to Schedule Castes/Schedule Tribes/Other Backward Classes at 65%. It is urged by Mr. Sharma and learned counsel whose names appear hereinabove, that the persons who have obtained 60% marks should also be CA 4347-75/14 11 considered. As we find, as of today, 29174 vacancies are available to be filled up. If the persons belonging to Scheduled Casts/Scheduled Tribes/Other Backward Classes have secured 65% marks and their number meets the requirement, the vacancies meant for their quota, shall be filled up by taking into consideration the said percentage. If the candidates of that percentage are not available, the State shall offer appointments to the candidates who have secured 60% of the marks. Be it noted, if the candidates belonging to Scheduled Castes/Scheduled Tribes/Other Backward Classes who have secured 65% of the marks are available, the candidates who have secured 60% of the marks cannot be allowed to compete with them.

The State Government is directed to issue the public notice within four weeks from today requiring the selected

candidates in respect of 29174 vacancies to join and if any candidate fails to join within the stipulated period provided in the public notice, he will forfeit his right of appointment in this selection. To clarify, we may add that the public notice shall be published in widely circulated newspapers and the candidates shall be given three weeks time to join failing which the conditions prescribed hereinabove shall follow.

At this juncture, we have been apprised by the learned counsel for the respondents that some candidates who have applied in more than one districts and secured the requisite marks which have been fixed by this Court on the previous occasion, have joined in two posts, though not working. The competent authority of the State Government shall verify the same and restrict the appointment to one place and count the said vacancies and fill up the same by following the criteria fixed by us.

We will be failing in our duty if we do not take note of the submission which has been advanced before us that though certain posts are reserved in the category of horizontal quota, no steps have been taken to fill up the said. Regard being had to provisions contained in the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and the Rules in vogue in the State of Uttar Pradesh, we direct that the posts in those categories shall be filled up as per the Rules relating to relaxation in respect of the said category. That apart, if any quota and relaxation are available for any other horizontal category, that may also be applied.

Let the matter be listed on 22.04.2015. It is hereby made clear that it shall be finally heard on that day and no adjournment shall be granted to any counsel."

It is submitted by Mr. Prashant Bhushan, learned counsel appearing for the petitioners in Writ Petition (C) No.89 of 2015, that persons who were declared failed in the entrance examination, after the order passed, for some unfathomable reason, have been declared to have passed and some of them have been allowed to be appointed. Mr. Prashant Bhushan, learned counsel, undertakes to file the additional affidavit containing the particulars relating to the aforesaid aspect.

Mr. H.L. Gupta, Secretary, Basic Education, Uttar Pradesh, who is present in Court today, shall file a reply duly supported by personal affidavit to the said assertions and also to the additional affidavit to be filed by Mr. Bhushan, within four weeks from today.

Let the matter be listed on 2nd November, 2015 at 2.00 p.m.

The Secretary and the Special Secretary, Basic Education, Uttar Pradesh, shall remain personally present on the next date of hearing.

At this juncture, we may note that Mr. R. Venkataramani, learned senior counsel, who has been appearing since beginning in this matter for the State of U.P., has submitted that some other counsel will be appearing for the State in the case. Be that as it may, we request Mr. R. Venkataramani, learned senior counsel, to assist the Court in the matter"

(V) Order dated 02.11.2015 in Civil Appeal Nos. 4347-4375 of 2014

"In this regard, we require Mr. Bhatia to explain to us about the number of vacancies.

At this juncture, we must formulate the issues that the learned

counsel should address while arguing the matter on the next date, for we are not inclined any more to deal with the matter as interim measures. The issues are as under :

a) Whether the NCTE Guidelines fixing the minimum qualification are arbitrary and unreasonable?

b) Whether the marks obtained in the TET Examination is the sole criterion for filling up the vacancies?

c) Whether the High Court is justified in declaring the 15th Amendment brought in on 31.08.2012 to the U.P. Basic Education (Teachers) Service Rules, 1981?

d) Assuming, the guidelines framed by the NCTE are treated as intra vires, the question will be what interpretation would be placed by the Court on the concept of weightage as mentioned in the guidelines of the NCTE?

Needless to say, if any ancillary issue arises, the same shall also be addressed to. It is hereby made clear that except these issues, no other submissions as regards the interim arrangement shall be entertained.

The personal presence of the authorities stand dispensed with for the present.

Let the matters be listed on 07.12.2015 at 2.00 p.m. Needless to say, if the matter is not completed on that day, it will continue at 2.00 p.m. on 08.12.2015.

(VI) Order dated 07.12.2015 in Civil Appeal Nos. 4347-4375 of 2014

"CA Nos. 4347-4375 and 4376/2014, SLP(C) No. 62, 1672, 1674, 11671 and 11673/2014, SLP (C) No.14386/2015, SLP (C).....CC No. 10408/2014, WP(C) No. 135, 167 and 89/2015 and CONMT. PET.(C) No. 199/2015 In C.A. No. 4347-4375/2014 and CONMT. PET.(C) No. 399/2015 In C.A. No. 4347-4375/2014

On 2.11.2015, after hearing the learned counsel for the parties, this Court noted the stand of Mr. Bhatia which is to the following effect :-

"It is submitted by Mr. Bhatia that keeping in view the order dated 27.07.2015, as against 72825 posts advertised, 43,077 candidates have been appointed, who, after completion of the training till September 2015, are working in praesenti.

It is also submitted that 15,058 candidates are undergoing training out of which 8,500 shall be appearing in the examination on 16th and 17th November, 2015 and the rest will be appearing in the examination after completion of their training. In the result around 14,640 posts still remain vacant."

Thereafter a grievance was made with regard to the people obtaining higher percentage not being appointed. The said grievance was taken note of in the following manner :

"At this juncture, number of counsel have raised a grievance that there are number of candidates who have secured more than 70% marks in TET examination in the general category and the lower percentage for other categories as per our earlier order and yet they are not appointed. At this juncture, learned Additional Advocate General submitted that some of the candidates might not have been appointed as they may not have been qualified otherwise under the NCTE Rules. We do not intend to interpret on the said point, as advised today.

However, the persons who are claiming that they are entitled to the benefit on the basis of the percentage fixed by the earlier order dated 27.07.2015 shall submit their applications/ representations before

the Secretary, U.P. Basic Education Board (Board), Allahabad within one week hence and the said authority shall constitute a Committee to verify their percentage of marks as well as criteria by which the persons who have already been selected and put the same on the website as well as due intimation be given to the applicants. If there is parity they shall be extended the benefit of our order forthwith. The said exercise shall be completed within three weeks."

Be it stated that on that occasion, four issues were framed to be dealt with at the time of final hearing.

It is submitted by Ms. K. Sharda Devi, learned counsel that the names of the appointees have not yet been put on the website. Mr. Vijay Bahadur Singh, learned Advocate General for the State of U.P. and Mr. Gaurav Bhatia, learned AAG undertake that the same shall be put on the website within a week hence.

At this juncture, we may state that Mr. Bhatia, learned AAG submitted that in pursuance of the direction of this Court on the earlier occasion and prior to that more than 75,000 representations were received and after scanning the same, the State Government has found 12,091 persons eligible for being appointed subject to verification of antecedents. Let the said persons be appointed subject to the said verification within six weeks hence.

At this juncture, Mr. Rakesh Dwivedi, learned senior counsel, Mr. Neeraj Jain, Mr. Siddharth Dave, Mr. Sanjay Hegde, Mr. Vikas Singh, Mr. Anand Nandan, Mr. Arvind Srivastava, Mr. Ajay Jain, Ms. Rachana Shrivastava, Mr. Avnish Singh, Mr. D.K. Tiwary, Mr. Rajiv Dubey, Ms. S. Janani, Mr. Ashok Kuamr Sharma and Mr. Manoj Prasad learned counsel submit that they represent approximately 1100 people and some arrangement should be made for them. On being asked, Mr. Vijay Bahadur Singh, learned Advocate General submitted that the State has no objection to offer them appointment on ad hoc basis subject to result of the special leave petitions. Let that be done within four weeks hence. Needless to say, no right shall accrue in their favour because of this order.

Let the matter be listed for final disposal on 24.02.2016 at 2.00 p.m. The hearing shall continue on 25.02.2016 and 26.02.2016 at the same time.

S.L.P.(C)...CC Nos. 21708-21709, 20837, 20914, 20953, 20875, 20894, 21017, 21265, 21277, 20690, 21052, 20651, 21118, 21184, 21085-21089, 21376, 21392, 21589, 21056/2015 and SLP(C) Nos. 32599, 33328-33339, 33235 and 34093/2015

Permission to file the special leave petitions stands allowed.

Heard Mr. Dushyant Dave, learned senior counsel along with Mr. Gaurav Bhatia, learned counsel for the petitioner.

Issue notice returnable within four weeks.

Dasti, in addition, is permitted.

The State shall make a paper publication which is widely published I the State of Uttar Pradesh so that the persons who were the petitioners before the High Court shall be aware of the pendency of these cases before this Court.

Learned counsel for the State shall file a convenience volume which shall contain all the pleadings that were filed before the High Court in Writ Petition No.34833 of 2014 so that no fresh pleadings are required to be filed.

Let this matter be heard along with Civil Appeal No.4347-4375 of 2014 on 24.02.2016 for final disposal. As

indicated by learned counsel for the petitioners, they will not seek any adjournment.

As an interim measure, there shall be stay of the operation of the impugned judgment till the next date of hearing."

(VII) Judgment dated 25.07.2017 in Civil Appeal Nos. 4347-4375 of 2014

"16. There is no manner of doubt that the NCTE, acting as an 'academic authority' under Section 23 of the RTE Act, under the Notification dated 31st March, 2010 issued by the Central Government as well as under Section 12 and 12A of the NCTE Act, was competent to issue Notifications dated 23th August, 2010 and 11th February, 2011. The State Government was under obligation to act as per the said notifications and not to give effect to any contrary rule. However, since NCTE itself has taken the stand that notification dated 11th February, 2011 with regard to the weightage to be given to the marks obtained in TET is not mandatory which is also a possible interpretation, the view of the High Court in quashing the 15th Amendment to the 1981 Rules has to be interfered with. Accordingly, while we uphold the view that qualifications prescribed by the NCTE are binding, requirement of weightage to TET marks is not a mandatory requirement.

17. ***As a result of above, in normal course the State would have been at liberty to proceed with the selection in terms of advertisement dated 7th December, 2012 in accordance with the amended rules by way of 15th amendment, in view of developments which have taken place during pendency of these appeals, the said advertisement cannot proceed and while upholding the said advertisement, relief has to be moulded in the light of developments that have taken place in the interregnum.***

18. ***Vide interim order dated 25th March, 2014, this Court directed the State of Uttar Pradesh to fill up the vacancies of Assistant Teachers in terms of the impugned judgment. Thereafter, on 17th December, 2014, the said order was modified and the State was directed to appoint candidates whose names were not involved in malpractices in the TET test and who had obtained 70% marks (65% for SC, ST, OBC and physically handicapped or any other category covered by the Government policy for reservation). 54,464 posts have already been filled up in compliance of the orders of this Court. The said appointments were subject to result of these matters. It was also observed that if anyone without TET qualification is appointed his services will be terminated. Vide order dated 2nd November, 2015 it was noted that against 72,825 posts which were advertised, 43,077 candidates had completed training and were working while 15,058 candidates were undergoing training. Around 14,690 posts were vacant. It was further observed that candidates who had the required percentage of marks in terms of order dated 27th July, 2015 were to file their applications and a Committee constituted for the said purpose could verify such percentage and if parity was found the same benefit could be extended.***

19. ***We have been informed that 66,655 teachers have already been appointed in pursuance of the interim orders of this Court. Having regard to the entirety of circumstances, we are not inclined to disturb the same. We make it clear that the State is at liberty to fill up the remaining vacancies in accordance***

with law after issuing a fresh advertisement.

20. The matters will stand disposed of in above terms."

(Emphasis supplied)

(VIII) Judgment dated 13.12.2019 in Contempt Petition (Civil) Nos. 1332-1360/2018

"11. Following facts, therefore, emerge from the record:-

(a) Large number of vacancies were lying unfilled while the Civil Appeals were pending in this Court. Taking into account the interest of the student community those appointments were required to be made. A principle was, therefore adopted by order dated 17.12.2014 that those who had obtained more than 70% marks in TET Examination from the general category and those who had obtained more than 65% marks from the reserved categories be given appointments. The idea was clear that such candidates would normally stand selected in the ultimate process of selection. It was, however, made clear that such appointments would not entitle the selected candidates to raise any claim in equity.

(b) In the selection process undertaken thereafter, initially 29,174 candidates were selected and a direction was issued on 25.02.2015 to fill up those posts.

(c) ***The next order dated 02.11.2015 recorded that as against 72,825 posts which were advertised, 43,077 candidates were appointed, who after completion of training were actually working while 15,058 candidates were undergoing training, leaving about 14,640 posts still vacant.***

(d) ***The exercise of selecting those who had secured minimum marks in terms of criteria devised by order dated 17.12.2014 also resulted in finding 12,091 persons eligible subject to verification of antecedents, as was recorded in the order dated 07.12.2015.***

(e) ***The list of these 12091 candidate was published and it is a matter of record that the names of the contempt petitioners were part of this list.***

(f) ***According to para 21 of the Affidavit dated 01.10.2016 (which has been referred to in the order dated 22.07.2019) out of these 12091 candidate, only 391 candidate could be appointed as the others either did not take part in the selection process or had not opted for certain Districts or could not be selected going by the cut-off for the concerned District. This development had happened way back in October 2016 and the affidavit was on record since then.***

(g) ***The State thereafter published another advertisement on 06.02.2016 so that if any candidate was left out, his candidature could be considered. Steps were thereafter taken and another advertisement was published on 08.02.2016. Para 25 of the Affidavit dated 01.10.2016 as quoted in the order dated 22.07.2019, dealt with this issue in clear terms and was thus part of the record.***

(h) ***Aforesaid para 25 of the Affidavit thus made it clear that as on the date when the affidavit was filed, 64,257 vacancies were filled up and 1,536 appointment letters were being issued in addition. It was also stated that 862 candidates were given ad-hoc appointments in terms of the order dated 07.12.2015 and were not included in the number of 64,257. These three figures aggregate to number 66,655.***

(i) ***Thus, the reasons for not appointing all the persons who were part***

of list of 12,091 candidates were available on record from October 2016 onwards.

(j) At no stage any grievance was made till the matter was disposed of in July 2017 which gave the status of permanency to those who were appointed under various interim orders passed by this Court.

(k) The grievance was made for the first time almost a year after when these contempt petitions were filed.

(l) The order dated 22.07.2019 had, therefore, observed that the Court could not disregard the fact that challenge had been raised more than a a year after the final Judgment. Even then, the State Government was called upon to indicate on affidavit certain issues. The reason was obvious that if there was large scale infraction of interim orders passed by this Court which merged in the final Judgment, the matter could still have been considered.

(m) However, the response filed by the State Government now indicates with clarity that no fresh appointments were effected after 2016 and no person other than those who satisfied the requirements laid down by this Court in its Order dated 27.07.2015 as modified by further orders, was given any appointment. The State Government has also placed on ecord the District wise break-up of all candidates appointed in various categories in all 75 Districts of the State.

(n) Even after the filing of the response by the State, as indicated in para 10 hereinabove, nothing substantial cold be pointed out by any of the candidates or contempt petitioners.

12. ***In the circumstances, we do not see anything wrong in the process undertaken by the State Government in pursuance of various interim orders passed by this Court and also in pursuance of the Judgment and final order dated 25.07.2017. The fact that out of 12,091 candidates only few could be selected and the reasons for non-selection of rest of the candidates, were part of the record since October 2016. In any case, response filed by the State is also clear. In the totality of the circumstances, in our view, there has not been any violation of any of the orders passed by this Court as alleged in the contempt petitions or otherwise.***

13. ***We, therefore, see no reason to interfere in these contempt petitions which are directed to be closed."*** *(Emphasis supplied)*

(IX) Order dated 08.05.2020 in Review Petition (Civil) Nos. 851-879 of 2020

"The contempt petitions preferred by various parties were disposed of by Order dated 13.12.2019. In para 11 of the order certain facts which emerged from the record were set out, which included inter alia,:-

Thus, the reasons for not appointing all the persons who were part of list of 12,091 candidates were available on record from October 2016 onwards.

At no stage any grievance was made till the matter was disposed of in July 2017 which gave the status of permanency to those who were appointed under various interim orders passed by this Court."

In para 2(e) of the review petition it is now alleged that some of the candidates had filed contempt petition No.190 of 2016 on 11.03.2016 along with other contempt petitions seeking compliance of the order dated 07.12.2015. However, the record does not indicate that any grievance was made when the matter was finally heard and disposed of in July 2017.

In the circumstances, we see no merit in the review petitions. accordingly dismissed. These review petitions are accordingly dismissed."

(X) Judgment dated 27.09.2023 in Writ Petition (Civil) Diary No. 19925/2023

"Application seeking condonation of delay in refiling is condoned.

Learned senior counsel appearing for the petitioners submitted that the petitioner(s) is one of the 66,655 teachers (Sub-Category 12,091) who have been appointed pursuant to the interim order of this Court. However, the grievance of the petitioners is that there is no actual appointment orders which have been issued to them, therefore, this petition has been filed seeking a writ of mandamus under Article 32 of the Constitution of India.

At this stage, we are not inclined to interfere in the matter. However, liberty is reserved to the petitioners to file a petition before the High Court under Article 226 of the Constitution and seek appropriate remedies.

It is needless to observe that if such a petition is filed before the High Court, the same shall be considered as expeditiously as possible having regard to the fact that the order of this Court is dated 25.07.2017.

The Writ petition is disposed in the aforesaid terms.

Pending application(s), if any, shall stand dispose of." (Emphasis supplied)

9. I have heard Sri Ashok Khare, Senior Advocate assisted by Sri Agnihotri Kumar Tripathi and Sri Indresh Dubey, Advocates, Sri R.K. Ojha and Sri H.N. Singh, Senior Advocates assisted by Sri Abbula Kalam, Sri Jamil Ahmad Ansari and Sri Sushil Kumar Pandey, Advocates for petitioners, Sri Ashish Kumar Nagvanshi, learned Additional Chief Standing Counsel alongwith Sri Ravi Prakash Srivastava, learned Standing Counsel for State-Respondents and Mrs. Archana Singh, Advocate for Board of Basic Education, U.P. at Prayagraj, at length. Before adverting to their rival submissions, petitioners before this Court can be divided under three categories:

(I) Candidates who were part of sub category of 12091 candidates, i.e., within the cut off merit and have filed writ petition before Supreme Court.

(II) Candidates who were part of sub category of 12091 candidates, i.e., within the cut off merit list but have not filed any writ petition before Supreme Court.

(III) Candidates who were neither part of sub category of 12091 nor have filed any writ petition before Supreme Court.

10. Learned Senior Advocates appearing for petitioners have referred various orders passed by Single Bench and Division Bench of this Court as well as Supreme Court which are referred in earlier paragraphs of this judgment. Learned Senior Advocates have vehemently submitted that if the figure of selected candidates is 66655 which has been referred in sub-para (h) of para 11 of order dated 13.12.2019 passed by Supreme Court in contempt petitions which has already been mentioned in earlier paragraphs of this writ petition, petitioners who are part of list of 12091 are also part of it but since Supreme Court is satisfied by the affidavit

filed on behalf of State about calculation of 66655, therefore, the Court has no option but to accept the details of calculation and that list of 12091 candidates was not part of list of selected candidates.

11. In later stage of argument when learned Standing Counsel has referred para 6 of order dated 13.12.2019 that in order to accommodate the candidates of aforesaid list of 12091 candidates, they were invited for counselling by publishing advertisements dated 06.02.2016 and 08.02.2016 and in this regard a categorical observation was made by Supreme Court in its order dated 13.12.2019 that out of 12091 candidates only few could be selected and reason for non selection of rest of candidates were part of record, the learned Senior Advocates appearing for petitioners have placed reliance on a categorical averment made on affidavit that no such counselling was ever took place and petitioners have not participated in any counselling in pursuance of said advertisements.

12. In aforesaid circumstances, in view of the limited window opened by Supreme Court, as referred in order dated 27.09.2023 passed in Writ Petition (Civil) Diary No. 19925 of 2023, the controversy before this Court is now narrowed down only to the aspect that since proceedings were initiated for consideration of candidature of candidates who are part of list of 12091 way back in the year 2016 and it is the stand of State that only few (391) were found eligible on counselling of such candidates (about 4000), who have appeared in counselling, this stand has to be tested on basis of specific averments made on oath by petitioners, who are part of aforesaid list that counselling in number of districts were never took place and petitioners have not participated in any counselling.

13. There are certain documents annexed alongwith rejoinder affidavit that concerned State-Respondents at district level have communicated that no counselling took place in pursuance of advertisements issued in the year 2016 and that except about 4000 candidates rest of candidates out of aforesaid list of 12091 have not participated, therefore, in the interest of justice I am of the considered opinion that all these writ petitions be disposed of with certain observations/ directions.

14. Supreme Court while granting liberty vide judgment dated 27.09.2023 passed in Writ Petition (Civil) Diary No. 19925 of 2023 has referred word ‘petitioners’. However, considering that number of petitioners who were not even before Supreme Court, i.e., they have not filed writ petition, are before this Court and being similarly situated, therefore, in order to avoid any arbitrariness their grievance is also considered by this Court.

15. So far as writ petition filed by petitioners who are admittedly not part of list of 12091 candidates, no relief can be granted even though, as contended, they are on better footing than candidates of list of 12091.

16. As referred above, out of 12091 candidates, only about 4000 candidates have appeared during counselling and out of them only 391 were appointed, therefore, number of vacancies towards that list are still available.

17. Supreme Court has opened a window for consideration of candidates

belonging to said list of 12091 candidates, though on the premises that they have granted appointment but not allowed to join, which is not substantiated, still as referred above, now the case is that number of candidates of list of 12091 candidates were not participated in counselling either no counselling was conducted or they were not adequately informed and said fact was not brought in record except about process of counselling. It would be strange event if despite knowledge of counselling, number of candidates of said list have not participated in counselling but remained in litigation thereafter.

18. In view of above position and in the interest of justice and to conclude the controversy, it is directed that concerned respondents shall issue a fresh advertisement to call the candidates belonging to said category of 12091, who have not appeared earlier for counselling, fixing a date in the week commencing 05th February, 2024 and for that advertisement shall be published in three leading newspapers having circulation at least of one paper in each district of State of Uttar Pradesh on 22nd and 25th January, 2024.

19. The candidates who have not participated in counselling and are part of list of 12091, will have liberty to appear in pursuance of advertisement to be issued without any fail and counselling shall be concluded in accordance with law and result thereof shall be pronounced during last week of February, 2024.

20. Each candidate has to submit a notarized affidavit that they have not appeared in earlier counselling and has to deposit Rs. 2000/- for counselling additionally before concerned authority.

21. With aforesaid observations and directions, all the writ petitions are disposed of.

22. Before parting with this judgment, it is observed that this Court has proceeded to take note of solemn affidavits of petitioners with regard to their statement about counselling and that they are aspirants to become a 'Teacher', a highly regarded position, so much as that a Teacher has been put on a place above than God, as many years ago Saint Kabir has said:

गुरू गोविन्द दोऊ खड़े, काके लागूं पांय।
बलिहारी गुरू अपने गोविन्द दियो बताय।।

(2024) 2 ILRA 918
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2023

BEFORE

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

Writ - A No. 18505 of 2023

Rajeev Kumar Arya, Executive Engineer, Ghaziabad ...Petitioner
Versus
Chairman, Power Corporation of Uttar Pradesh, Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rohit Kumar Singh

Counsel for the Respondents:
Sri Brajesh Pratap Singh, Sri Abhishek Srivastava

A. Service Law – Disciplinary proceeding – Punishment of withholding three increments with cumulative effect –

Charge of not taking effective control over subordinate, who is found guilty of embezzlement, was leveled – No evidence for the establishment was heard in the petitioner's presence – Effect – Inquiry Committee, how to conduct the enquiry – Burden of proof, on whom lie – Held, the Inquiry Committee cannot regard themselves as officers of the establishment. They have to sit as impartial arbiters – Burden to prove the charges is on the establishment. Here, the Inquiry Committee do not seem to have sat as impartial arbiters, but as mere functionaries of the establishment, who assumed the petitioner guilty, and either heard no evidence or did so behind the petitioner's back – Inquiry proceedings are vitiated on account of a serious procedural lapse prejudicing the petitioner. (Para 18, 20 and 24)

Writ petition allowed. (E-1)

List of cases cited :-

1. St. of Uttar Pradesh & ors.Vs Saroj Kumar Sinha; (2010) 2 SCC 772

2. St. of U.P. & anr.Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB)(LB)

3. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)

4. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB)(LB)

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

1. The petitioner is an Executive Engineer in the employ of the Pashchimanchal Vidyut Vitran Nigam Ltd., Meerut and functioning under the overall control of the U.P. Power Corporation Limited, Lucknow. The petitioner is currently posted as an Executive Engineer with the Electricity Distribution Division-IV, Ghaziabad and says that he has an excellent service record. The petitioner was appointed an Assistant Entineer on 16.06.2012 and posted as SDO (T) at Banda on 16.06.2012. He worked there upto 31.05.2017. After a posting at Panki Sub-Station from 01.06.2017 to 05.10.2017, he was promoted to the post of an Executive Engineer on 06.10.2017. Upon promotion, the petitioner was posted as the Executive Engineer, Headquarters, Meerut on 13.12.2017. The petitioner was assigned to the Meter Department as Executive Engineer (Meter) at Saharanpur Zone from 13.12.2017 to 26.01.2018. He was transferred to the Electricity Distribution Division-I, Baghpat on 26.01.2018. The petitioner held administrative powers and had to look after the financial matters there.

2. It is the petitioner's case that in the Finance Department, he had the assistance of a number of ministerial functionaries, such as the reconciliation clerk, a cashier, a head cashier, an accountant and an assistant accountant, working under the immediate control of an Assistant Engineer (Finance), who headed the Section. The petitioner, as the Executive Engineer, had overall control in financial matters. There were a number of complaints against the Assistant Accounts Officer (Revenue). Therefore, the petitioner sent a memo dated 28.03.2018 to Ishpal Singh, Assistant Accounts Officer regarding the permanent disconnection files, correction of bills and opening of the ID in fluent grade etc., the same day. The petitioner recommended the Assistant Accounts Officer's transfer to the Superintending Engineer. The Assistant Accounts Officer was transferred on the petitioner's recommendation and relieved on 28th May, 2018, while absenting. The petitioner communicated with the Competent Authority at Meerut to prepare an ID for the Assistant Accounts Officer

and for other employees in the Finance Department. The petitioner has come up with a number of details in his pleadings regarding how he had controlled and dealt with the Finance Department under his administrative control, but all that may not be relevant for the decision of the matter at hand.

3. The case relating to the present proceedings against the petitioner arose out of the misconduct of one Suresh Babu, a Cashier (Technician Grade-II), who was not directly under the petitioner's control, but working under the Assistant Engineer (Finance). There was something suspicious about Suresh Babu's manner of functioning. The petitioner through a letter dated 23.04.2019 directed the Accountant to reconcile accounts with deposits in the Divisional Office, besides calculation of interest and apprise him in the matter. A deficit of Rs.1,44,84,108/- was found in the online billing of HCL and Fluent Grade Systems. Accordingly, a letter was written to Suresh Babu on 10.05.2019 to deposit the receipt/ *challan* relating to the balance in three days time.

4. The petitioner lodged a First Information Report on 15.05.2019 with the Kotwali Police Station, Baghpat against Suresh Babu. The petitioner also informed, as he says, all the Authorities concerned regarding the non-deposit of receipt-books by Suresh Babu. Suresh Babu, in the meantime, was promoted to the post of a Junior Engineer and the petitioner sent a memo dated 09.03.2019 for the closure of his computer ID, as he was relieved on 08.03.2019 to join his promotion post. Suresh Babu worked under the immediate control of the Assistant Engineer and prior to information about the deficit etc., received from the Accountant, the petitioner had no information about his misdoings. It is emphasized that so far as the provision of a "No Dues Certificate' to Suresh Babu is concerned, there was nothing shown against him up to 06.03.2019, and on that basis a "No Dues Certificate' was issued to Suresh Babu. However, when the embezzlement came to the petitioner's notice, prompt action was taken and a First Information Report lodged against the delinquent. He was arrested with the petitioner's efforts.

5. An inquiry team was constituted on the basis of the petitioner's report by a memo dated 15.05.2019. The report submitted by the inquiry team was one made after comparing the cashbook and discovering the embezzlement of Rs.1,44,00,000/-, all done by Suresh Babu, the Cashier-cum-Bill Clerk and otherwise a Technician Grade-II with the Electricity Distribution Division-I, Baghpat. By time, this report came, Suresh Babu had been promoted as a Junior Engineer, as already said, and posted to Loni, Ghaziabad. The Inquiry Committee in submitting their report, determined the total embezzlement by Suresh Babu during his tenure from 27.01.2014 to 11.03.2019, to be a sum of Rs.3,68,04,939/-.

6. The preliminary inquiry report dated 28.05.2019 was submitted to the Managing Director. Another inquiry was ordered and they found that Suresh Babu had embezzled a sum of Rs.5,09,16,482/- in all. The second inquiry report, that was submitted, was the product of a most casual exercise and it indicted the petitioner without considering that he had not the slightest role in the matter, and, in fact, was the officer, who had discovered the embezzlement by Suresh Babu and reported it. The petitioner's name was

included amongst one of the employees involved in the misconduct. He was served with a charge-sheet dated 07.04.2019.

7. The first charge against the petitioner was that Suresh Babu embezzled a sum of Rs.5,09,16,000/- and odd, but the petitioner did not take any proceedings in a matter of such serious dimension during the period of his posting from 26.01.2018 to March, 2019. The formal charge, therefore, was that the petitioner did not exercise effective control over his subordinates and was negligent in the discharge of his duties. A misconduct under Rule 3 of the Government Servant Conduct Rules Rules, 1956 (for short, 'the Rules of 1956') was charged. The documents cited in support of the charge was a letter by the General Manager, Accounts and Audit, Pashchimanchal Vidyut Vitran Nigam Ltd., Meerut dated 23.05.2019, addressed to the Managing Director (together with all its annexures). The other document cited was a published copy of the Rules of 1956.

8. The second charge against the petitioner was that while posted at Baghpat from 26.01.2018 to 27.07.2019, a number of revenue cashiers during the period 2014 to March, 2019, did not return 89 revenue receipt-books, which includes Suresh Babu, who did not return 25. In this fashion, Suresh Babu was not depositing cash, he received, in the coffers of the Corporation, and did so, with a long delay. The petitioner is charged with the act that during his tenure, Suresh Babu retained various receipt-books with him, which is a serious misconduct. The petitioner was charged with negligence in the discharge of his duties under the Rules of 1956. In support of the said charge, the same documentary evidence, as that in support of the first charge, was relied.

9. The third charge relates to certain failures of the system, such as the one regarding failure to generate a computer ID for the revenue cashiers, on account of which, no information about the cash collected by them, could be taken cognizance of, non-closure of the tender balance on the computer system relating to all revenue cashiers with the consequence that on account of lapses, numbering ten, Suresh Babu could embezzle funds of the Corporation. The petitioner was charged with laxity in control over his subordinates and negligence in that regard, leading to the petitioner being charged with misconduct under Rule 3 of the Rules of 1956. The two documents, that were cited in support of the first charge, were again the only evidence spoken of in the charge-sheet.

10. The petitioner submitted his reply to the charge-sheet dated 23.12.2019, rebutting the charges and annexing documents.

11. The petitioner's case is that the inquiry against him was *ex parte* as no date, time and place was fixed and intimated to him. He was called only once on 29.01.2020 for the inquiry, but no inquiry was held. Nothing was asked of him. He was just asked to sign the Inquiry papers. It is also asserted that at the inquiry held, no witnesses were produced by the Department to prove the charges, nor the petitioner given opportunity to produce his witnesses. The inquiry was held in breach of Regulation 7 of the Regulations of 2020. At this stage, it would be apposite to notice that in Paragraph No.35 of the writ petition, it is alleged that no date, time and place of inquiry was fixed and in Paragraph No.37, it is said that no witness was produced by

the Department, which apparently means in support of the charges, regarding which the inquiry report, an undated was submitted.

12. The petitioner was served with a show cause notice dated 04.12.2021. The petitioner submitted a reply to the show cause notice on 15.02.2022. The Inquiry Committee found the first charge partly proved, the second charge proved and the third charge partly proved. It was opined by the Inquiry Committee that though these charges are proved or partly proved, it would be relevant to say that the embezzlement was continuing for a period of more than five years, but it was during the petitioner's posting of one year in the Division, that it was unearthed and effective proceedings taken in that regard.

13. After submission of the petitioner's reply, by the impugned order dated 07.06.2023 passed by the Managing Director, U.P. Power Corporation, the petitioner was held partly guilty of Charges Nos.1 and 3 and entirely on the second charge, in agreement with the Inquiry Committee. The petitioner was inflicted with the punishment of withholding three increments with cumulative effect, besides recovery of a sum of Rs.1,01,183/-.

14. Aggrieved by the said order, this writ petition has been instituted.

15. Heard Mr. Rohit Kumar Singh, learned Counsel for the petitioner, Mr. Abhishek Srivastava, learned Counsel appearing on behalf of respondent Nos.1 and 2, and Mr. Brajesh Pratap Singh, learned Counsel appearing on behalf of respondent Nos.3, 4 and 5.

16. Since the petitioner has come up with a case of wholesale violation of principles of natural justice, where the Department did not fixed a date, time and place for convening the inquiry or proving the charges by examining witnesses, an imperative in a case, where a major penalty may be the result of proceedings, this petition was entertained without the petitioner being relegated to his alternative remedy of filing an appeal to the Chairman of the U.P. Power Corporation.

17. In answer to the allegation that no date, time and place, for convening the inquiry, was fixed, it is averred in Paragraph No.4(iv) of the counter affidavit that the Inquiry Committee vide letter dated 21.01.2020 had scheduled the date, time and place of inquiry, providing the petitioner personal hearing. The petitioner appeared before the Inquiry Committee and said whatever he had to. Annexure CA-1 and CA-2 are documents that have been relied in support of the said contention. This Court has gone through the said documents. One is a copy of the memo dated 21.01.2020, which is a notice issued to the petitioner by the officer, heading the Inquiry Committee, to appear on 29.01.2020 at 11:00 a.m. before the Inquiry Committee. The other is a record of proceedings, that the Inquiry Committee held on 29.01.2020. These read:

"केस सं:184-4

दिनांकः 29.01.2020

पत्रावली व्यक्तिगत सुनवाई हेतु प्रस्तुत हुई।

आरोपित अधिकारी श्री राजीव कुमार आर्य, तत्कालीन अधिशासी अभियन्ता वि.वि.ख. बागपत अनुशासनिक कार्यवाही के अपने प्रकरण में आज 'जांच समिति' के समक्ष व्यक्तिगत रूप से उपस्थित हुए।

आरोपित अधिकारी को 'जांच समिति' द्वारा अपना पक्ष प्रस्तुत करने का अवसर दिया गया। आरोपित अधिकारी ने अपने लिखित अभीकथन के समर्थन में मौखिक कथन प्रस्तुत किया तथा यह अवगत कराया कि इसके अतिरिक्त उन्हें अपने बचाव में कोई कथन/ साक्ष्य प्रस्तुत नहीं करना है तथा किसी साक्ष्य/ साक्षी के परीक्षण/ प्रतिपरीक्षण की मांग नहीं की गई।

इस प्रकार व्यक्तिगत सुनवाई की कार्यवाही संपन्न हुई।

ह0 अपठित ह0 अपठित ह0 अपठित

29/1/2020 29/1/20 29/1/20

AO (EC)

राजीव कुमार आर्य

अधिशासी अभियन्ता

तत्कालीन- बागपत (वि.वि.ख.)

सम्प्रति- वि.न.वि.ख.- चतुर्थ, गाजियाबाद,"

18. What this Court finds, therefore, is that while the petitioner was intimated of the date, time and place, where the Inquiry Committee would hear him, but in the proceedings of the day, no evidence for the establishment was heard in the petitioner's presence. The proceedings dated 29.01.2020 show that the Inquiry Committee had either already heard the establishment's evidence behind the petitioner's back or not heard it at all. They assumed the petitioner to be guilty, taking the charge-sheet and the documents annexed, to be proof of themselves. It also shows that there was no Presenting Officer appointed by the establishment to present its case before the Inquiry Committee in order to lead evidence, both oral and documentary, in proof of the three charges. The charges were apparently accepted as true on their face by the Inquiry Committee going through idle papers on their own, as if they were the establishment's agents. The petitioner when asked to appear on 29.01.2020 was just required to explain himself and offer evidence in his defence. Even if it be assumed that some evidence was earlier heard by the Inquiry Committee, the petitioner was not there and it was all done in his absence. Therefore, what the petitioner was required to do before the Inquiry Committee was to explain his innocence, either on the basis of the presumption that the charges were true or on evidence, that was heard behind his back. This Court finds that no oral testimony was recorded before the Inquiry Committee. We have already noticed that the record of proceedings on 29.01.2020 does not show any Presenting Officer.

19. Learned Counsel for the respondents has emphasized that the petitioner was given the opportunity to produce evidence or witnesses in his defence. This Court is afraid that the said stage would arrive after the establishment had led evidence before the Inquiry Committee to prove the charges in the presence of the delinquent, that is to say, the petitioner. He could then be asked to produce his evidence. This never happened in the present case all.

20. Moreover, the imperative in all departmental proceedings, where a major penalty may be imposed is to lead oral evidence, or the production of witnesses by the establishment in support of the charges through a Presenting Officer before the Inquiry Committee/ Officer. This is regarded as a salutary procedure in order to ensure procedural fairness, broadly. The Inquiry Committee cannot regard

themselves as officers of the establishment. They have to sit as impartial arbiters, before whom the Presenting Officer leads both oral and documentary evidence in the delinquent's presence. It is after the establishment have led their evidence in support of the charges that the delinquent can be called upon to produce evidence in his defence. After all, the burden to prove the charges is on the establishment. Here, the Inquiry Committee do not seem to have sat as impartial arbiters, but as mere functionaries of the establishment, who assumed the petitioner guilty, and either heard no evidence or did so behind the petitioner's back. In either case, the inquiry proceedings would be vitiated and so also the impugned order founded on it. The imperative of producing witnesses or hearing oral evidence in support of the establishment's case, has been the subject matter of consideration by the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772,** where it has been held:

"28. 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.

30. 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."

21. The issue has further been considered by a Division Bench of this Court in **State of U.P. and another v. Kishori Lal and another, 2018 (9) ADJ 397 (DB)(LB)**, where it has been held:

"14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in State of U.P. and another v. T.P. Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subhash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

15. In another case in Subhash Chandra Gupta v. State of U.P., 2012(4) ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular

manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold 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).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that hose documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair

play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

22. The question was also considered by a Division Bench of this Court in **Smt. Karuna Jaiswal v. State of U.P., 2018 (9) ADJ 107 (DB) (LB)**, where it was held:

"15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of State of Uttar Pradesh and others v. Saroj Kumar Sinha, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the unrebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of Saroj Kumar Sinha (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates

the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable."

23. A Division Bench of this Court in **State of U.P. v. Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB)**, after a copious review of authority on the point, held:

"14. Recently the entire law on the subject has been reviewed and reiterated in Chamoli District Co-operative Bank Ltd. v. Raghunath Singh Rana and others, AIR 2016 SC 2510 and 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."

15. The principal of law emanates from the above judgments is that initial burden is on the department to prove the charges. In case where inquiry is initiated with a view to inflict major penalty, department must prove charges by adducing evidence by holding oral inquiry.

17. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

24. Upon a reading of the inquiry report in this case, this Court finds the charge against the petitioner is of laxity in control over his subordinates, or negligence as the Department have chosen to call it. Looking to the nature of the charges and the fact that there was a total denial of the charges by the petitioner with a case that he in fact unearthed the fraud, the establishment had to prove their charges by leading both documentary and oral evidence. More than that, the Inquiry Committee, as already remarked, did not conduct themselves as impartial arbiters and seem to have proceeded on an assumption of guilt. They summoned the

petitioner on 29.01.2020 to appear before them virtually to explain himself. That is not how an inquiry into charges, serious in nature and likely to lead to the imposition of a major penalty, is held. These facts and the manner in which the inquiry has been held, leads this Court to the irresistible conclusion that the inquiry proceedings are vitiated on account of a serious procedural lapse prejudicing the petitioner.

25. In the considered opinion of this Court, therefore, this is a case, where the impugned order deserves to be quashed with liberty to the respondents, if they so chose, to proceed afresh against the petitioner from the stage of the charge-sheet, holding inquiry *de novo* in accordance with law.

26. In the result, this petition succeeds and is **allowed in part**. The impugned order dated 07.06.2023 passed by the Managing Director, U.P. Power Corporation Limited, Lucknow is hereby **quashed**. The respondents shall be at liberty, if they so elect, to proceed afresh with the inquiry in accordance with law, from the stage of issue of the charge-sheet, bearing in mind the guidance in this judgment.

27. There shall be no order as to costs.

(2024) 2 ILRA 928
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2023

BEFORE

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

Writ - A No. 19796 of 2023

Mushran ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sanjeet Kumar Mishra

Counsel for the Respondents:
C.S.C., Sri Jainendra Kumar Mishra

A. Service Law – Appointment – Post of Sweeper – Qualification – Maximum matriculation was required – Petitioner claimed himself as Class VIII passed candidate, however, he was declared illegible on the basis that in his KYC Form, qualification of Graduate was mentioned – Validity challenged – KYC Form, how far bear significance for public employment – Plea of inaccuracy in date of birth was also raised in counter affidavit – Permissibility – Held, it is a well settled principle of law that an order under challenge before the Court cannot be asked to be sustained by a respondent on the grounds other than those mentioned in the order itself – The impugned order cannot be supplemented for its reasons by an affidavit – Held further, a KYC Form, submitted by a customer, while opening a bank account, cannot be the basis of finally determining his rights or visiting him with adverse civil consequences in a matter as profound as public employment –No inference can be drawn about the petitioner's qualification based on the KYC Form. (Para 11, 13 and 16)

Writ petition allowed. (E-1)

List of cases cited :-

1. Mohinder Singh Gill & anr. Vs The Chief Election Commissioner, New Delhi & ors.; (1978) 1 SCC 405

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

1. An advertisement was published by the Punjab National Bank on 18.11.2021, inviting applications for post of part-time sweepers in their establishment. The advertisement was published in newspapers. The petitioner applied for the post of a part-time sweeper and submitted his application form in the office of the Chief Manager, Human Resource and

Development, Punjab National Bank, Saharanpur. After verification, the petitioner was selected for the post of a sweeper on 25.02.2022 and his name finds mention at Sr. No.5 in the select-list of candidates under the category of O.B.C. The Chief Manager of the Punjab Nation Bank last mentioned, respondent No.2, sent a letter for verification of the petitioner's documents on 30.03.2022. This letter required the petitioner to appear in the office of respondent No.2 on 06.04.2022 at about 10:30 in the morning hours. The petitioner appeared before the said respondent on 06.04.2022 for the verification of his documents. After all necessary verification was done, the respondent Bank issued appointment letters to other candidates, but not the petitioner.

2. The petitioner's case is that he had opened a bank account with another branch of the respondent Bank, where his date of birth mentioned is 20.05.1993. It was mentioned in his Aadhaar Card as well. The petitioner states that he had sought correction of his date of birth in the Aadhaar Card and PAN Card before making his application for employment with the Bank. The petitioner's case is that his date of birth, in fact, is 20.09.1994; not 20.05.1993. In this connection, he has drawn the attention of this Court to his transfer certificate issued by the Headmaster, New Janta Public Junior High School, Village Nasarullapur, Deoband, Saharanpur. This document relates to the year 2008 when the petitioner passed his Class-VIII examination from the aforesaid institution. The certificate is countersigned by the District Basic Education Officer, Saharanpur.

3. The petitioner, faced with inaction by the respondent Bank in issuing his appointment letter, approached this Court by means of Writ-A No.9832 of 2023, seeking a direction to the Bank to consider his case for appointment. This Court after noticing the discrepancy about the petitioner's date of birth in the Aadhaar Card and steps taken for its rectification, directed the respondent Bank to re-verify the entire documents relating to the petitioner and communicate the result to him. The last mentioned order was passed by this Court in Writ-A No.9832 of 2023 on 31.05.2023. A copy of the said order, along with all necessary documents, including his transfer certificate, was submitted by the petitioner in the office of respondent Bank on 17.06.2023. After a long lapse of time on 09.10.2023, the respondent Bank passed the order impugned of that date saying that his documents had been subjected to re-verification and it was observed that the petitioner had opened a current account in the name of M/s. Deepak Electronics, where his qualification mentioned in the KYC Form was ‘graduate’. Since the maximum qualification for the post of a sweeper indicated in the advertisement was Class-X, the petitioner was ineligible for appointment as a part-time sweeper.

4. Aggrieved by the impugned order dated 09.10.2023, this writ petition has been instituted by the petitioner.

5. This Court *vide* order dated 29.11.2023 called upon the Chief Manager, Human Resource and Development, Punjab National Bank, Saharanpur, the respondent, who had made the said order, to file his own affidavit clearly stating if he asserts for a fact on oath that the petitioner is a graduate. This Court had indicated that the petitioner says that he is not a graduate, but had passed his Class-VIII examination. The

Chief Manager was also cautioned that in case the petitioner was not indeed a graduate, necessary action may be initiated against him, because the stand taken in the order impugned was *prima facie* directed at frustrating this Court's earlier orders dated 31.05.2023 passed in Writ-A No.9832 of 2023, requiring a verification of the petitioner's documents *vis-a-vis* her age.

6. An affidavit has been filed by the respondent Bank, substantially answering the petitioner's case. It is an affidavit filed by Sanjay Khanna, Chief Manager, Human Resource and Development Department, Circle Office, Saharanpur. All that is said there, for the basis of passing the impugned order, is that the petitioner, in his KYC Form submitted to the Bank before the G.T. Road, Deoband Branch, had shown himself to be a graduate way back on 18.09.2021. It is also said in Paragraph No.4 of the affidavit filed on behalf of the respondent Bank that the account opening form moved in the name of M/s. Deepak Electronics clearly shows the petitioner's date of birth as 20.05.1993, which was verified by his own affidavit dated 18.09.2019. It is asserted that at the time of applying for the part-time sweeper's post, the petitioner had mentioned his date of birth as 20.09.1994, a fact evident to the respondents from a perusal of documents filed along with the KYC Form relating to the bank account under reference. In Paragraph No.5 of the affidavit, there is a rather scandalous and contumacious piece of pleading, where it is asserted:

"5. That it is relevant to mention here that the petitioner previously filed a writ A No. 9832 of 2023 before this Hon'ble court <u>on the basis of false and concocted documents</u>, which was disposed of vide order dated 31.05.2023 with direction that the respondent bank to re-verify the documents' provided by the petitioner within 2 months, in compliance of the order passed by this Hon'ble Court vide order dated 31.05.2023; the deponent further examine the correctness of the documents provided by the petitioner along with the copy of the order dated 31.05.2023 passed by this Hon'ble court in writ A No.9832 of 2023 and at the time of perusal of the documents relates to petitioner, the deponent found that the records available before the bank, which was previously submitted by the petitioner at the time of opening the account in the name of M/s Deepak Electronics, in the KYC form the petitioner clearly mentioned that he is Graduate; on that basis, the deponent passed order on 09.10.2023 in compliance of the previous order passed by this Hon'ble court; on the basis of records available before the bank. (emphasis by Court)

7. Again, in Paragraph No.6 of the affidavit filed by the respondent Bank, it is averred:

"6. That on the basis of the declaration upon the KYC form submitted by the petitioner before the bank on 18.09.2019 which was also verified by his affidavit, it is clearly shows that the petitioner is a graduate, therefore on that basis the deponent passed the Impugned order, on the basis of facts submitted by the petitioner on 18.09.2019 before the bank; therefore it is shows that the deponent passed the order on the basis of facts and documents submitted by the petitioner in previously before the bank, there was no any malafide intention of the deponent, the petitioner himself submitted the deferent documents for seeks illegal appointment before the bank which is not permissible in the eye of the law; if the petitioner

permitted then the respondent bank filed the details counter affidavit."

8. Heard Mr. Sanjeet Kumar Mishra, learned Counsel for the petitioner and Mr. Jainenendra Kumar Mishra, learned Counsel appearing on behalf of the respondent Bank.

9. Before adverting to the merits of the case, this Court cannot ignore the opening part of the pleadings in Paragraph No.5 of the personal affidavit filed by the respondent Bank, where it is said in a very nonchalant and almost contumacious fashion that the petitioner previously filed Writ-A No.9832 of 2023 before this Court on the basis of false and concocted documents, which was disposed of *vide* our order dated 31.05.2023, directing the respondent Bank to re-verify the petitioner's documents within two months. It is no business of any Manager of the Bank to speak small of our proceedings. It is not open to a litigant to say, particularly, a State litigant, that some orders of ours was passed on the basis of false and concocted documents, unless he seeks vacation of that order or its recall on that ground and that is an issue to be determined by this Court. Here, the assertion has been made in an affidavit filed in a subsequent petition, that is to say, the present writ petition, regarding proceedings of this Court that have already concluded in the order dated 31.05.2023, which the respondent Bank never challenged on ground that it was obtained by presenting false and concocted documents to this Court. The assertion in Paragraph No.5 of the affidavit to the above effect has been made to denigrate our proceedings. This fact was pointed out by this Court to the learned Counsel for the respondent Bank, but he did not seek time to file a better affidavit or explain the respondent Bank's position in this regard. We, accordingly, hold that the first five lines of Paragraph No.5 of the affidavit dated 01.12.2023 filed by Sanjay Khanna, Chief Manager, Human Resource and Development, Saharanpur, are scandalous pleading, which ought to be struck off the record. Therefore, the following part of Paragraph No.5 of the affidavit dated 01.12.2023 filed by Sanjay Khanna, shall stand struck off as scandalous pleading:

"That it is relevant to mention here that the petitioner previously filed a writ A No. 9832 of 2023 before this Hon'ble court on the basis of false and concocted documents, which was disposed of vide order dated 31.05.2023 with direction that the respondent bank to re-verify the documents' provided by the petitioner within 2 months."

10. Sanjay Khanna, Chief Manager, Human Resource and Development, Circle Office, Saharanpur is admonished with the remark that he shall be careful in future in wording his pleadings filed in Court.

11. Turning to the merits of the matter, this Court is of opinion that so far as the issue of date of birth is concerned, the same does not arise in this case at all. The reason is that the impugned order has not been passed on the ground of any inaccuracy in the date of birth mentioned by the petitioner in his application form seeking employment. The petitioner's candidature has been rejected by the impugned order on the ground of his qualifications being above eligibility, that is to say, a matriculate. It is a well settled principle of law that an order under challenge before the Court cannot be asked to be sustained

by a respondent on grounds other than those mentioned in the order itself.

12. In this connection, reference may be made to the decision in **Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others, (1978) 1 SCC 405**, where their Lordships of the Constitution Bench stated the principle thus:

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji*, 1951 SCC 1088 : AIR 1952 SC 16] :

"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

13. In short, the principle is that the impugned order cannot be supplemented for its reasons by an affidavit. This is what precisely the respondent Bank seeks to do by bringing in the issue of some discrepancy in the petitioner's date of birth, whereas that is not the ground at all, on which the impugned order is founded. The impugned order discards the petitioner's candidature solely on the ground that in some commercial transaction with the Bank, where the petitioner had opened a bank account for his firm, M/s. Deepak Electronics, he had mentioned his qualifications as graduate in the KYC Form. The KYC Form has been annexed to the affidavit filed by the respondent Bank at Page No.23. The entry in the relevant column is *ex facie* suspicious because the box, that was ticked for the petitioner's qualification, is the one that mentions him as an undergraduate. This tick mark has been cross-marked with a line, as if to opt out of it and the next box, which mentions the qualification 'graduate' has been tick marked. This *ex facie* makes the matter suspicious. But, this Court does not wish to enter into that issue.

14. In our earlier order, the Court had ordered the respondent Bank *vide* order dated 31.05.2023 passed in Writ-A No.9832 of 2023 to re-verify the entire documents pertaining to the petitioner appended with the application form. Now, apparently, the purpose of all that exercise was to find if the petitioner is indeed a graduate or he is just a matriculate; or not even that. If the petitioner is a matriculate or holds a lower qualification, he would be eligible. The petitioner along with a copy of this Court's order has produced his transfer certificate or school leaving certificate from the New Janta Public Junior High School, Village Nasarullapur, Deoband, Saharanpur, signed by the Headmaster of the school. It is countersigned by the District Basic

Education Officer. It shows the petitioner to have passed his Class-VIII and his date of birth as 20.09.1994. The petitioner passed out of the New Janta Public Junior High School, Village Nasarullapur, Deoband, Saharanpur on 20.05.2008. The certificate that the petitioner has relied on has been issued on 27.11.2021 and countersigned by the District Basic Education Officer, Saharanpur on 29.11.2021. A xerox copy of the certificate, that is on record, shows these facts also indicate that the certificate is a part of the book maintained by the School, bearing Sr. No.26. This is the most authentic document about the petitioner's qualifications, unless the petitioner holds a higher qualification.

15. The first inquiry, the Bank ought to have undertaken, was to verify the genuineness of the petitioner's school leaving/ transfer certificate, which is countersigned by the District Basic Education Office, Saharanpur. But, nothing of the kind was done. It is the duty of the Bank to verify the genuineness of the school leaving/ transfer certificate produced by the petitioner before the respondent Bank, contacting the school and the District Basic Education Officer both for the purpose. If still, the respondent Bank believe that the petitioner holds a higher qualification and is a graduate, it is open to them to inquire about the fact. If they find any evidence *aliunde* to indicate that the petitioner is indeed a graduate or holds a qualification above a matriculate, they would be perfectly within their rights to reject the petitioner's candidature. However, it is not open to the respondent Bank to opine that the petitioner is a graduate by relying upon an entry made in the KYC Form filled up by the petitioner while opening a bank account with them. For one, the document, as noticed by this Court regarding educational qualifications of the petitioner, betrays suspicious scoring out of one entry and the making of another.

16. Quite apart, a KYC Form submitted by a customer of the bank while opening a bank account, cannot be the basis of finally determining his rights or visiting him with adverse civil consequences in a matter as profound as public employment. In the nature of things, a form like a KYC, much as it ought not be done, is filled up with a kind of casualness about it. A qualification, even if incorrectly tick marked in the KYC Form, cannot be held as a binding admission against the subscriber or the customer in an unrelated matter like his eligibility for employment. No inference can be drawn about the petitioner's qualification based on the KYC Form. After all, a person's qualification is not a matter of admission. It is to be proved by evidence *aliunde*. This requires the educational testimonials to be examined or inquiries made to find out what are the real qualifications that a candidate holds.

17. It is not the case of the respondent Bank that while filling up the application form seeking employment for the post of a part-time sweeper, the petitioner has indicated himself to be a graduate. Clearly, he must not have done so, else he would have been eliminated much earlier. Now, to rely on a KYC Form submitted along with a bank opening application form in order to hold the petitioner disqualified for public employment by the Bank is a perverse approach to the matter, which this Court cannot countenance. The impugned order, in the considered opinion of this Court, has been passed on irrelevant considerations, relied on extraneous materials and is clearly perverse.

18. In the circumstances, this writ petition succeeds and is **allowed**. The impugned order dated 09.10.2023 passed by the Chief Manager, Human Resource and Development, Circle Office, Saharanpur is hereby **quashed**. A *mandamus* is issued to the Chief Manager, Human Resource and Development, Circle Office, Saharanpur to re-determine the petitioner's entitlement to be appointed a part-time sweeper on the basis of select-list dated 25.02.2022, and appoint him if found to be the holder of educational qualifications not above a matriculate. This order shall be carried out by the respondent Bank within a month of its receipt.

(2024) 2 ILRA 934
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DONADI RAMESH, J.

Writ - A No. 21742 of 2023

Sudeep Kumar Yadav ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vimal Kumar

Counsel for the Respondents:
A.S.G.I.

A. Service Law – Compassionate appointment – Financial position of the family – Relevance – Father was died in 1998 and application for compassionate appointment was made in 1999 – Earlier, petitioner's case was considered four times during 2001-2002, but due to constraints of inadequate vacancies, the petitioner could not be appointed – Entitlement – Tribunal rejected the claim petition – 25 years was elapsed during the course – Effect – Held, compassionate appointment is given only for immediate unexpected hardship which is faced by the family by the reason of the death of sole bread earner – More than 25 years have elapsed. At this juncture, consideration of the petitioner's case under compassionate ground would not be just and reasonable – Sushma Gosain's case relied upon. (Para 9 and 10)

Writ petition dismissed. (E-1)

List of cases cited :-

1. Sushma Gosain Vs U.O.I.; (1989) SCC 468

2. Umesh Kumar Nagpal Vs St. of Har.; (1994) 4 SCC 138

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Sri Vimal Kumar, learned counsel for the petitioner as well as Sri Shashi Prakash Singh, learned Additional Solicitor General of India assisted by Sri Gopal Verma, learned counsel for the respondents and perused the record.

2. The writ petition has been filed questioning the order dated 23.08.2023 passed by the Central Administrative Tribunal, Allahabad Bench Allahabad, in Original Application No.330/01292 of 2019 Sandeep Kumar Yadav Vs. Union of India and orders dated 20.06.2002, 01.07.2002, 30.09.2003 and 10.09.2019 passed by respondent no.3 and consequential directions passed by the Central Administrative Tribunal.

3. Facts of the case is that the father of the petitioner who was a permanent vehicle mechanic in 508 Army Base

Workshop, Allahabad Fort, Allahabad died in harness on 05.12.1998 leaving behind his wife Leelawati and four daughters and three sons. Subsequently, the mother of the petitioner has moved an application to the Director General, Army Head Quarter, New Delhi for consideration of the appointment on compassionate ground to anyone of the members of the family of the deceased. Pursuant to the said application, the Commandant & M.D. 508, Army Base Workshop, Allahabad Fort Allahabad has requested the mother of the petitioner for sending complete documents to register name of the eldest son Sudeep Kumar Yadav for employment assistance in the office. The petitioner has complete all requisite formalities in compliance of the letter dated 26.02.1999 before third respondent. Subsequently, third respondent also made correspondence directing the petitioner to submit all the relevant documents. Accordingly, the petitioner complied with the letter dated 11.12.1999.

4. That being so, the respondents arbitrarily and illegally without considering financial condition of the family of the deceased refused to accept the request and passed the impugned orders 20.06.2002/01.07.2002. While passing the said orders, the respondents have not disclosed details of merit list of all the candidates considered by the Board during June 2001, September 2001, December 2001 and March 2002. Hence the petitioner was not able to know correct position of the merit list. As against the said order, the mother of the petitioner has preferred appeal / representation on 11.12.2002 and 19.12.2002 requesting for giving employment to her son on compassionate ground. Considering the said request, the respondents again vide order dated 30.09.2003 rejected the request of the petitioner for appointment on compassionate ground saying that the case of the petitioner has already been rejected vide orders dated 20.06.2002 / 01.07.2002.

5. Being aggrieved by the aforesaid action of the respondents, the petitioner has moved a civil misc. writ petition no.40017 of 2004 before this Court and challenged the said rejection orders. The said writ petition was dismissed on the ground of alternative remedy vide order dated 28.09.2018.

6. After that, the petitioner has received one more letter dated 14.11.2018 from third respondent whereby he demanded certain documents for consideration of his appointment on compassionate ground and the petitioner has submitted further documents in support of the request made by third respondent vide letter dated 20.12.2018. The petitioner has further received a letter dated 27.03.2019 whereby he was directed to complete certain formality for sending the matter to the Army Head Quarter and further the petitioner received a letter from third respondent on 10.09.2019 whereby the Board of Officers as per the guidelines/instructions issued by the Government of India has examined the case of the petitioner and found that due to constraints of inadequate vacancies and also due to not make up in relative merit against the ceiling of 5% quota, the petitioner has not been selected. Consequently, left with no option, the petitioner approached the Central Administrative Tribunal, Allahabad Bench Allahabad questioning the orders passed by the respondents rejecting the case of the petitioner for compassionate appointment.

7. After completing the pleadings, the Tribunal has considered the original application filed by the petitioner. Though the case of the petitioner was considered by the respondents five times but no details of the candidates who were selected in those Board meeting has been given and the respondents failed to consider the petitioner's application and based on financial income of the deceased in prospective manner, the Tribunal also rejected the petitioner's application for compassionate ground.

8. Refuting the submissions, learned counsel for the respondents has submitted that the petitioner's case was considered on four times June 2001, September 2001, December 2001 and March 2002, due to constraints of inadequate vacancies, the petitioner could not be appointed and his name was deleted from the names of the aggrieved persons for further consideration. Despite the same, the respondents have considered once again the candidature of the petitioner in 2019 but he could not be appointed on the ground of inadequate vacancies. Further he has argued that the matter is very old and the deceased employee had died in 1998 and more than 25 years have elapsed. Hence, at this juncture, the question of consideration of the compassionate appointment would not arise in view of ratio laid down by Hon'ble Apex Court in the various judgments. The said legal position has been extracted by the Tribunal in its order in paragraph nos. 7, 8 and 10 of the said judgment, which are reproduced herein under:-

"7. Before proceeding to discuss the submissions raised across the bar and analyzing the same in the light of the facts and circumstances of the case, I find it expedient to quote the relevant portion of the judgments relied upon by the applicant:-

Relevant portion of judgment of Smt. Parden Oraon (supra)

"9. We are in agreement with the High Court that the reasons given by the employer for denying compassionate appointment to the Respondent's son are not justified. There is no bar in the National Coal Wage Agreement for appointment of the son of an employee who has suffered civil death. In addition, merely because the respondent is working, her son cannot be denied compassionate appointment as per the relevant clauses of the National CoalWage Agreement. However, the Respondent's husband is missing since 2002. Two sons of the Respondent who are the dependents of her husband as per the records, are also shown as dependents of the Respondent. It cannot be said that Umesh Kumar Nagpal vs. State of Haryana, (1994) 4 SCC 138 7 Page there was any financial crisis created immediately after Respondent's husband went missing in view of the employment of the Respondent. Though the reasons given by the employer to deny the relief sought by the Respondent are not sustainable, we are convinced that the Respondent's son cannot be given compassionate appointment at this point of time. The application for compassionate appointment of the son was filed by the Respondent in the year 2013 which is more than 10 years after the Respondent's husband had gone missing. As the object of compassionate appointment is for providing immediate succour to the family of a deceased employee, the Respondent's son is not entitled for compassionate appointment after the passage of a long period of time since his father has gone missing".

Relevant portion of judgment of Smt. Phulmati Devi (supra)

"25. In view of this court, the aforesaid argument cannot be accepted. The revised consolidated instruction on the scheme of compassionate appointment circulated by G.I. Department of Personnel and Training OM dated 09.10.1998 is relevant for this purpose. In Rules-7 and 8, it is mentioned that:-

7. Determination/Availability of Vacancies

(a) Appointment on compassionate grounds should be made only on regular basis and that too only if regular vacancies meant for that purpose are available.

(b) Compassionate appointments can be made upto a maximum of 5% of vacancies falling under direct recruitment quota in any Group 'C' or 'D' post. The appointing authority may hold back upto 5% of vacancies in the aforesaid categories to be filled by direct recruitment through Staff Selection Commission or otherwise so as to fill such vacancies by appointment on compassionate grounds. A person selected for appointment on compassionate grounds should be adjusted in the recruitment roster against the appropriate category viz SC/ST/ OBC/General depending upon the category to which he belongs. For example, if he belongs to SC category he will be adjusted against the SC reservation point, if he will be adjusted against ST/OBC point and if he belongs to General category he will be adjusted against the vacancy point meant for General category.

(c) While the ceiling of 5%, for making compassionate appointment against regular vacancies should not be circumvented by making appointment of dependent family member of Government servant on casual/daily wage/ad-hoc/contract basis against regular vacancies, there is no bar to considering him for such appointment if he is eligible as per the normal rules/orders governing such appointments.

(d) The ceiling of 5% of direct recruitment vacancies for making compassionate appointment should not be exceeded by utilising any other vacancy e.g., sports quota vacancy.

(e) Employment under the scheme is not confined to the Ministry/ Department/Office in which deceased/medically retired Government servant had been working. Such an appointment can be given anywhere under the Government of India depending upon availability of a suitable vacancy meant for the purpose of compassionate appointment.

(f) If sufficient vacancies are not available in any particular 'office to accommodate the persons in the 'Waiting list for compassionate appointment, it is open to the administrative Ministry/Department/Office to take up the matter with other Ministries/Departments/Offices of the Government of India to provide at an early date appointment on compassionate grounds to those in the waiting list.

8. Belated requests for Compassionate Appointment (a) Ministries/Departments can consider requests for compassionate appointment even where the death or retirement on medical grounds of a Government servant took. place long back, say five years or so. While considering such belated requests it should, however, be kept in view that the concept of compassionate appointment is largely related to the need for immediate assistance to the family of the Government servant in order to relieve it from economic distress. The very fact that the family has been able to manage somehow all these

years should normally be taken as adequate proof that the family had some dependable means of subsistence. Therefore, examination of such cases would call for a great deal of circumspection. The decision to make appointment on compassionate grounds in such cases may, therefore, be taken only at the level of the Secretary of the Department/Ministry concerned.

(b) Whether a request for compassionate appointment is belated or not may be decided with reference to the date of death or retirement on medical ground of a Government servant and not the age of the applicant at the time of consideration.

26. For the same purpose, OM No.14014/19/2002 dated 05.05.2003 is also relevant, which says:-

"Copy of O.M.No.14014/19/2002-Estt(D) dated 5.5.2003 from Ministry of Personnel, Public Grievances & Pensions Department of Personnel &Training

Subject: Time-limit for making compassionate appointment.

1. The undersigned is directed to refer to Department of Personnel & Training OM No.14014/6/94-Estt(D) dated October 9, 1998 and OM No.14014/23/99-Estt(D) dated December 3, 1999 on the above subject and to say that the question of prescribing a time limit for making appointment on compassionate grounds has been examined in the light of representations received, stating that the one year limit prescribed for grant of compassionate appointment is often resulting in depriving genuine cases seeking compassionate appointments, on account of regular vacancies not being available, within the prescribed period of one year and within the prescribed ceiling of 5% of direct recruitment quota.

2. It has therefore been decided that if compassionate appointments to genuine and deserving cases, as per the guidelines contained in the above OMs is not possible in the first year due to non-availability of regular vacancy, the prescribed committee may review such cases to evaluate the financial conditions of the family to arrive at a decision as to whether a particular case warrants extension by one more year, for consideration for compassionate appointment by the Committee, subject to availability of a clear vacancy within the prescribed 5% quota. If on scrutiny by the Committee, a case is considered to be deserving, the name of such a person can be continued for consideration for one more year.

3. The maximum time a person's name can be kept under consideration for offering Compassionate appointment will be three years, subject to the condition that the prescribed Committee has reviewed and certified the penurious condition of the applicant at the end of the first and the second year. After three years, if compassionate appointment is not possible to be offered to the applicant, his case will be finally closed, and will not be considered again.

4. The instructions contained in the above-mentioned OMs stand modified to the extent mentioned above.

5. The above decision may be brought to the notice of all concerned for information, guidance and necessary action".

27. Therefore, looking to the aforesaid provision and the rules, it appears that the claim of the applicant was required to be considered for the vacancies of three years. Nowhere it is provided that the vacancy should arise only after the death of the deceased employee. The

vacancies may be carried forward for three years. If the vacancies are available (5% for compassionate appointment) then the selection for the aforesaid vacancies should be made in chronological order. At the time of consideration of the application, the vacancies available should be filled. It is not relevant that the vacancies are related to which year. The oldest vacancies should be filled on a priority basis. Therefore, the case of the applicant has rightly been considered for the vacancies related to three years and was available at the time of consideration of the application.

28. In the aforesaid situation, in view of this court the OA is liable to be dismissed. The respondents rightly rejected the claim of the applicant. Hence, OA is dismissed".

8. As per dictums of Hon'ble Apex Court, it is settled position of law that compassionate appointment is granted to meet the sudden crisis on account of death of breadwinner while in service. While considering the claim for compassionate appointment, financial condition of family of deceased employee must be taken into consideration. The object to grant compassionate appointment is to provide immediate help to the dependents of deceased employee, so that they may not die in starvation.

10. Hon'ble Apex Court in the case of ***State of West Bengal Vs. Debabrata Tiwari and Ors. Etc. etc. in Civil Appeal No. 8842-8855 of 2022*** *decided on* ***3.3.2023*** *in paras 7.1 and 7.2 has held as under:-*

"7.1. It may be apposite to refer to the following decisions of this Court, on the rationale behind a policy or scheme for compassionate appointment and the considerations that ought to guide determination of claims for compassionate appointment.

i. In Sushma Gosain vs. Union of India, (1989) 4 SCC 468, this Court observed that in all claims for appointment on compassionate grounds, there should not be any delay in appointment. That the purpose of providing appointment on compassionate grounds is to mitigate the hardship caused due to the death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress.

ii. In Umesh Kumar Nagpal vs. State of Haryana, (1994) 4 SCC 138, this Court observed that the object of granting compassionate employment is to enable the family of a deceased government employee to tide over the sudden crisis by providing gainful employment to one of the dependants of the deceased who is eligible for such employment. That mere death of an employee in harness does not entitle his family to such source of livelihood; the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied that, but for the provision of employment, the family will not be able to meet the crisis, that a job is to be offered to the eligible member of the family, provided a scheme or rules provide for the same. This Court further clarified in the said case that compassionate appointment is not a vested right which can be exercised at any time after the death of a government servant.

That the object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, compassionate employment cannot be claimed and offered after lapse of considerable amount of time and after the crisis is overcome.

iii. In Haryana State Electricity Board vs. Hakim Singh, (1997) 8 SCC 85,

("Hakim Singh") this Court placed much emphasis on the need for immediacy in the manner in which claims for compassionate appointment are made by the dependants and decided by the concerned authority. This Court cautioned that it should not be forgotten that the object of compassionate appointment is to give succour to the family to tide over the sudden financial crisis that has befallen the dependants on account of the untimely demise of its sole earning member. Therefore, this Court held that it would not be justified in directing appointment for the claimants therein on compassionate grounds, fourteen years after the death of the government employee. That such a direction would amount to treating a claim for compassionate appointment as though it were a matter of inheritance based on a line of succession.

iv. This Court in State of Haryana vs. Ankur Gupta, AIR 2003 SC 3797 held that in order for a claim for compassionate appointment to be considered reasonable and permissible, it must be shown that a sudden crisis occurred in the family of the deceased as a result of death of an employee who had served the State and died while in service. It was further observed that appointment on compassionate grounds cannot be claimed as a matter of right and cannot be made available to all types of posts irrespective of the nature of service rendered by the deceased employee.

v. There is a consistent line of authority of this Court on the principle that appointment on compassionate grounds is given only for meeting the immediate unexpected hardship which is faced by the family by reason of the death of the bread earner vide Jagdish Prasad vs. State of Bihar, (1996) 1 SCC 301. When an appointment is made on compassionate grounds, it should be kept confined only to the purpose it seeks to achieve, the idea 19 being not to provide for endless compassion, vide I.G. (Karmik) vs. Prahalad Mani Tripathi, (2007) 6 SCC 162. In the same vein is the decision of this Court in Mumtaz Yunus Mulani vs. State of Maharashtra, (2008) 11 SCC 384, wherein it was declared that appointment on compassionate grounds is not a source of recruitment, but a means to enable the family of the deceased to get over a sudden financial crisis.

vi. In State of Jammu and Kashmir vs. Sajad Ahmed Mir, AIR 2006 SC 2743, the facts before this Court were that the government employee (father of the applicant therein) died in March, 1987. The 6 application was made by the applicant after four and half years in September, 1991 which was rejected in March, 1996. The writ petition was filed in June, 1999 which was dismissed by the learned Single Judge in July, 2000. When the Division Bench decided the matter, more than fifteen years had passed from the date of death of the father of the applicant. This Court remarked that the said facts were relevant and material as they would demonstrate that the family survived in spite of death of the employee. Therefore, this Court held that granting compassionate appointment after a lapse of a considerable amount of time after the death of the government employee, would not be in furtherance of the object of a scheme for compassionate appointment.

vii. In Shashi Kumar, this Court speaking through Dr. D.Y. Chandrachud, J. (as His Lordship then was) observed that compassionate appointment is an exception to the general rule that appointment to any public post in the service of the State has to be made on the basis of principles which accord with Articles 14 and 16 of the Constitution. That the basis of the policy is

that it recognizes that a family of a deceased employee may be placed in a position of financial hardship upon the untimely death of the employee while in service. That it is the immediacy of the need which furnishes the basis for the State to allow the benefit of compassionate appointment. The pertinent observations of this Court have been extracted as under:

"41. Insofar as the individual facts pertaining to the Respondent are concerned, it has emerged from the record that the Writ Petition before the High Court was instituted on 11 May 2015. The application for compassionate appointment was submitted on 8 May 2007. On 15 January 2008 the Additional Secretary had required that the amount realized by way of pension be included in the income statement of the family. The Respondent waited thereafter for a period in excess of seven years to move a petition Under Article 226 of the Constitution. In Umesh Kumar Nagpal (supra), this Court has emphasized that the basis of a scheme of compassionate appointment lies in the need of providing immediate assistance to the family of the deceased employee. This sense of immediacy is evidently lost by the 7 delay on the part of the dependant in seeking compassionate appointment."

7.2. On consideration of the aforesaid decisions of this Court, the following principles emerge:

i. That a provision for compassionate appointment makes a departure from the general provisions providing for appointment to a post by following a particular procedure of recruitment. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions and must be resorted to only in order to achieve the stated objectives, i.e., to enable the family of the deceased to get over the sudden financial crisis.

ii. Appointment on compassionate grounds is not a source of recruitment. The reason for making such a benevolent scheme by the State or the public sector undertaking is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the family of the deceased to get over the sudden financial crisis.

iii. Compassionate appointment is not a vested right which can be exercised at any time in future. Compassionate employment cannot be claimed or offered after a lapse of time and after the crisis is over.

iv. That compassionate appointment should be provided immediately to redeem the family in distress. It is improper to keep such a case pending for years.

v. In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of 22 the family, its liabilities, the terminal benefits if any, received by the family, the age, dependency and marital status of its members, together with the income from any other source".

9. While considering the above observations of the Hon'ble Apex Court and also the fact that the deceased died in 1998 and 25 years have elapsed, the Hon'ble Apex Court in the case of **Sushma Gosain Vs. Union of India (1989) SCC 468,** and **Umesh Kumar Nagpal Vs. State of Haryana (1994) 4 SCC 138** has categorically held that with regard to the principle of compassionate grounds, appointment is given only for immediate unexpected hardship which is faced by the family by the reason of the death of sole bread earner. The provision for

compassionate appointment makes a departure from the general provisions providing for appointment to a post by following a particular procedure of recruitment. Since such a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. Further, it has been observed that compassionate appointment is not a vested right which can be exercised at any time in future. Compassionate employment cannot be claimed or offered after a lapse of time.

10. As observed by Hon'ble Apex Court in the instant case, more than 25 years have elapsed. At this juncture, consideration of the petitioner's case under compassionate ground would not be just and reasonable. Accordingly, the Tribunal rejected claim of the petitioner in the right perspective. It is also not in dispute that the Authority has considered the case of the petitioner. In fact, the petitioner's case has been considered by the respondent no.3 nearly five times and he could not be able to provide employment for want of inadequate vacancy.

11. In view of the above, we are not inclined to interfere with the order of the Tribunal. Accordingly, the writ petition is dismissed.

(2024) 2 ILRA 942
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.02.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ - A No. 30173 of 2019
connected with
Writ – A No. 2000845 of 2014
and other connected cases

Harendra Bahadur Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Varadraj Shreedutt Ojha, Amardeep Yadav

Counsel for the Respondents:
C.S.C., Dharmendra Kumar Dixit, Gaurav Mehrotra, Praneet Kumar Agarwal, Shireesh Kumar, Sridhar Awasthi

A. Service Law – UP Higher Judicial Services Rules, 1975 – Rules 5(a), 6, 7 & 8(1) – Promotion – Post of Higher Judicial Services cadre – Determination of seats for each three source of recruitment of the HJS cadre – Inter-se seniority for the recruitment year 2012 and 2014 – More seat for promotion was claimed on the basis of quota – How far liable to be accepted – Phrase *'vacancy likely to occur in next two years'* is used in S. 8(1) – Applicability – Held, the expression '*vacancies likely to occur in the next two years'* is a concept, which comes into play only when it is decided for the recruitment of a particular year to commence in that year itself. If, the recruitment starts in a particular year, Rule 8(1) of the UPHJS Rules, 1975 mandates that for determining the number of vacancies, the Courts also take into consideration the anticipated vacancies for the following year – The vacancy for the recruitment year 2012 was correctly determined by the High Court in terms of Rule 8(1) of the UPHJS Rules, 1975 and there was no occasion for the High Court to consider the appointment of the petitioners on the unforeseen vacancies, which were created or came into existence once the recruitment process started for the said year 2012. (Para 3, 37, 38, 39 and 50)

B. Service Law – UP Higher Judicial Services Rules, 1975 – Rules 7, 8(2) & 22(2) – UP Public Services (Reservation

for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 – S. (2) – Reservation Policy, extent of application – Carry Forward Rule – Applicability to the recruitment of UP High Judicial Services – Held, there is no provision under the UPHJS Rules, 1975 for carry forward of unfilled vacancies of reserved category as per the Section 3(2) of the Reservation Act, 1994, as the same has not been adopted by the High Court on the administrative side and most importantly, the said carry forward would run contrary to the existing provisions of the UPHJS Rules, 1975 – High Court found no error in the determination of vacancies for recruitment year 2012 and 2014 as suggested by the petitioners by filling up the vacancies by the unreserved candidates. (Para 52, 83, 89, 97 and 110)

C. Service Jurisprudence – Constitution of India – Article 226 – Writ – Maintainability – Non-joinder of parties – All direct recruits for recruitment year 2012 and 2014 have not been arrayed as a party though averments have been made and sought for quashing of their appointments – Effect – Held, it is not essential to implead each and every one who could be affected but if a section of such affected employees is impleaded then the interest of all is represented and protected – Ajay Kumar Shukla' case relied upon – High Court rejected the objection regarding maintainability of writ . (Para 65, 68 and 69)

D. Service Law – Seniority, determination thereof – Rotational system – Applicability – Held, seniority has to be given as per the appointment made on a substantive post and seniority is to be determined in accordance with rotation of vacancies between direct recruits and promotes based on quota of vacancies reserved for both the categories as per Rule 22(2) of the UPHJS Rules, 1975. [Para 114 and 125 (vi)]

Writ petition dismissed. (E-1)

<u>List of cases cited :-</u>

1. Sri Kant Tripathi & ors.Vs St. of U. P. & ors.; (2001) 10 SCC 237

2. All India Judges Association Vs U.O.I.; (2002) 4 SCC 247

3. V.K. Srivastava Vs Government of Uttar Pradesh; (2008) 9 SCC 77,

4. Malik Mazahar Sultan Vs UPSC; (2008) 17 SCC 703

5. Ashok Pal Singh Vs U.P judicial Services & ors.; (2010) 12 SCC 635

6. Nawal Kishore Mishra & ors.Vs High Court of Judicature at Allahabad & ors.; (2015) 5 SCC 479

7. High Court of Judicature at Allahabad Vs St. of U. P.; (2018) 15 SCC 439

8. R.K. Sabharwal & ors. Vs St. of Pun. & ors.; (1995) 2 SCC 745

9. Prabhuji & anr..Vs St. of U.P. & ors.; 2010 SCC Online All 2410

10. Premkala Singh HJS & ors. Vs High court of Judicature at Allahabad decided on 30.06.2017

11. Rakhi Ray Vs High Court of Delhi & ors.; 2010(2) SCR 239

12. Vivek Kaisth Vs St. of H. P.; 2023 SCC Online 1485

13. P.S Sadasivaswamy Vs St. of T. N.; (1975) 1 SCC 152

14. U.O.I. Vs C. Girija; (2019) 15 SCC 633

15. St. of Bihar Vs Bal Mukind Sah; (2000) 4 SCC 640

16. Delhi Administration Vs Manohar Lal; (2002) 7 SCC 222

17. Natural Resources Allocation, in re: Spcial Ref. 1 of 2012; (2012) 10 SCC 1

18. Rajasthan High Court Vs Ved Priya & anr..; (2021) 13 SCC 151

19. Rashmi Mishra Vs MP Public Service Commission; (2006) 12 SCC 724

20. Ranjan Kumar Vs St. of Bihar; (2014) 16 SCC 187

21. Hon'ble High Court of Punjab & Haryana at Chandigarh Vs St. of Pun.; 2019 (12) SCC 496

22. B.S Bajwa Vs St. of Pun. & ors.; AIR 1999 SC 1510

23. Malcom Lawrence Cecil D'Souza Vs U.O.I. & ors..; AIR 1975 SC 1269

24. H.S Vanikani & ors. Vs St. of Gujrat & ors.; (2010) 4 SCC 301

25. Malook Singh & ors.. Vs St. of Punjab & ors.; 2021 SCC Online SC 876

26. Rashi Mani Mishra & ors. Vs St. of UP & ors.; 2021 SCC Online 509

27. Anup Bhuyan Vs St. of Assam & anr.; (2023) SCC Online SC 338

28. Indian Council for Agricultural Research Vs Central Administrative Tribunal & anr. 2018 SCC Online All 667

29. P. Chittaranja Menon & ors.. Vs A. Balakrishnan & ors.; (1977) 3 SCC 255

30. Vijay Kr. Kaul Vs U.O.I.; 2012 (7) SCC 610

31. KH Siraj Vs High Court of Kerala; (2006) 6 SCC 395

32. Amarjeet Singh Vs Devi Rattan; (2010) 1 SCC 417

33. Mukul Kumar Tyagi & ors. Vs The St. of U. P. & ors.; (2020) 4 SCC 86

34. Ajay Kumar Shukla Vs Arvind Rai; (2022) 12 SCC 579

35. Writ Petition (Civil) No. 147/2021; Randheer Singh & ors. Vs High Court of Judicature at Allahabad & ors.: Order dated 25.10.2021 and 15.11.2021

36. Rajasthan High Court Vs Ved Priya & anr.; (2021) 13 SCC 151

37. St. of Punjab & ors. Vs Rafiq Masih (White Washer); (2014) 8 SCC 883

38. Girish Kumar Suneja Vs Central Bureau of Investigation; (2017) 14 SCC 809

39. Mervyn Coutindo & ors. Vs Collector of Customs, Bombay & ors.; 1966 (3) SCR 600

40. Hon'ble Punjab & Haryana High Court at Chandigarh Vs St. of Pun.& ors.; 2019(12) SCC 496

41. Yamini Vs St. of Andhra Pradesh; (2019) 17 SCC 228

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Shri Sandeep Dixit, Shri Sudeep Seth, Shri J.N. Mathur, Shri Sanjay Bhasin, Shri Asit Kumar Chaturvedi, learned Senior Advocates assisted by Shri Varadraj Shreedutt Ojha, Shri Kshitij Mishra, Shri Shobit Mohan Shukla, Shri Amardeep Yadav, representing the petitioner, learned Standing Counsel representing the State/rspondent, Shri Gaurav Mehrotra, learned Counsel representing the High Court/respondent and Shri Dharmendra Kumar Dixit, Shri Shireesh Kumar, Shri Praneet Kumar Agarwal, Shri Sridhar Awasthi, Shri Sanjay Hari Shukla, Shri Manoj Kumar Singh Gautam, Shri Vivek Tripathi, Shri Jitendra Saksena, Shri Ashwani Kumar Singh, learned Counsel representing the private respondents.

A. Introduction

(2) The perennial problem of determination of number of vacancy to be filled from each source of recruitment and its consequential effect on the seniority list has yet again come to haunt the recruitment year 2012 and 2014 for the Uttar Pradesh Higher Judicial Services. Although by now these problems ought to have been resolved by the authoritative decision of the Apex

Court, however these issues refuses to die down and have a salutary burial.

(3) The Uttar Pradesh Higher Judicial Services Rules, 1975 (hereinafter to be referred as "**UPHJS Rules, 1975**") have been framed to regulate the recruitment, appointment and other conditions of services for Higher Judicial Services appointees in the State of Uttar Pradesh. Rule 5 of UPHJS Rules, 1975 provides for three source of recruitment; the first being (a) by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test; the second being (b) by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service; and the third being (c) by direct recruitment from amongst the learned Advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published. The conundrum relating to the number of available seats for each source of recruitment in view of the quota prescribed under Rule 6 of UPHJS Rules, 1975 and number of appointment to be made as per Rule 8 of UPHJS Rules, 1975 and the effect of reservation for posts of schedules castes etc. as per Rule 7 of the UPHJS Rules, 1975 and their inter-play, which also had an eventful effect on the seniority list prepared as per Rule 26 of the UPHJS Rules, 1975 had been fascinated by this Court as well as the Hon'ble Apex Court in various judicial precedent. Some of these judgements are being enumerated herein below, so that this Court, while dealing with the issues raised by the parties in the present writ petitions, is alive to these precedents, which holds the ground even as on today :-

(i) Sri Kant Tripathi & Ors. Vs State of Uttar Pradesh & Ors, (2001) 10 SCC 237,

(ii) All India Judges Association Vs Union of India (2002) 4 SCC 247,

(iii) V.K. Srivastava Vs government of Uttar Pradesh, (2008) 9 SCC 77,

(iv) Malik Mazahar Sultan Vs UPSC, (2008) 17 SCC 703,

(v) Ashok Pal Singh Vs U.P judicial Services & Ors. (2010) 12 SCC 635,

(vi) Nawal Kishore Mishra & Ors. Vs High Court of Judicature at Allahabad, Through its Registrar general & ors., (2015) 5 SCC 479;

(vii) High Court of Judicature at Allahabad Vs State of Uttar Pradesh, (2018) 15 SCC 439

(4) The determination of seats for each source of recruitment and the inter-se seniority for the recruitment year 2012 and 2014 is the centrifugal issue engaging the attention of this Court in these four writ petitions. Although, the prayer in these petitions are not similar, however, the relief sought and the issue raised in these petitions are complimentary to each other and as such they are being decided together.

(5) All these writ petitions have been filed by "promotees" belonging to category/quota as per Rule 5 (a) of the UPHJS Rules, 1975 and apparently, there is no challenge by either the Direct Recruits {category/quota as per Rule 5(c) of the UPHJS Rules, 1975} or the out of turn promote {category/quota as per Rule 5(b) of the UPHJS Rules, 1975} and from the

memo of the writ petitions, it is apparent that :-

1.	Writ-A No. 200845 of 2014 (*Sanjeev Kumar Singh & Ors. Vs. State of U.P*) amended vide order dated 05.07.2018	Has been filed by Petitioners, who have been selected in U.P Judicial Services on the basis of Examination-1999 and all the promotees.
2.	Writ-A No. 30173 of 2019 (*Harendra Bahadur Singh & Ors. V/s State of U.P.*)	Has been filed by Petitioner No.1 to 10, who have been selected in U.P Judicial Services on the basis of Examination-1999 & Petitioner No.11 has been selected in U.P Judicial Services on the basis of Examination-2000 and all are promotees.
3.	Writ-A No. 11453 of 2020 (*Manorama & 6 others V/s State of U.P*)	Has been filed by Petitioner No.1, who has been selected in U.P Judicial Services on the basis of Examination-1997 & Petitioner No. 2 to 7 have has been selected in U.P Judicial Services on the basis of Examination-1999 and all are promotees.
4.	Writ-A No. 28511 of 2021 (*Randheer Singh & others Vs State of U.P*)	Has been filed by Petitioners, who have been selected in U.P Judicial Services on the basis of Examination-1996 and all are promotees.

(6) All these petitioners, who were initially selected and appointed under the U.P Judicial Services Examination conducted in the year 1996 or 1997 or 1999, became entitled to promotion to the U.P Higher Judicial Service cadre, in due course of time. Since, their promotion was contingent on the number of seats available in the said UPHJS Cadre in a particular year, it became a bone of contention, wherein these petitioners as promotees claimed more seats/vacancies available to them for promotions on basis of the quota and also raised other ancillary grounds, which shall be discussed in the later part of this judgment.

B. **Background**

(7) Apparently, the root to the present controversy relating to determination of vacancies for each quota, stems from the year 2000, which came to be decided by the Apex Court in **Sri Kant Tripathi & others vs. State of U.P. & others** reported in (2001) 10 SCC 237, wherein certain directions for redetermination of vacancies was given by the Hon'ble Apex Court by interpreting the relevant provisions of the Rules and leaving the actual numbers to be determined by the High Court for different recruitment years starting from 1988 to 1998. The Apex court *inter-alia* in Sri Kant Tripathi's case (supra) held :

"(i) Appointments already made to the higher judicial service, whether by direct recruitment or by promotion, need

not be annulled and shall be continued.

(ii) With effect from 1988 recruitment and in all subsequent recruitments which are the subject matter of challenge before us, the high court shall determine the number of vacancies available as on the relevant year of recruitment in terms of rule 8, as already explained by us and then, allocate the percentage to different sources of recruitment, contained in rule 6, and after such determination is made, then find out whether the appointments of direct recruits already made for that recruitment year are in excess of the quota or within the quota. If it is found that any appointment has been made in excess of the quota, then the said appointee would be allowed to continue, but his or her seniority will have to be reckoned only when he or she is adjusted in the next recruitment.

(iii) If in each recruitment year, posts were available in the quota of promotees and promotion has not been made, even though selection had been made under rule 20, then the legitimate right of the promotees cannot be denied and promotion must be made with effect from the date they should have been appointed.

(iv) This exercise has to be made for the recruitment of 1988 as well as for each subsequent recruitment that has been made.

(v) Since the determination under rule 8 is being made now, pursuant to the directions of this court, in respect of past recruitment years for which recruitment has been made, the expression "vacancies likely to occur" loses its importance and determination has to be made, on the basis of the actual vacancies available in any of such recruitment year.

(vi) So far as the recruitment of 1998 is concerned, advertisements having been issued for 38 vacancies being filled up by direct recruitment and the process of selection being already over, but no appointment having been made, we think it appropriate to direct that the appointment of the selected candidates may be made against the quota available to direct recruits calculated in accordance with the rules in the light of our decision.

(viii) For all future appointments, the high court must take steps to fill the vacancies of every recruitment year during that year itself. The high court must determine the vacancies not only on the basis of the actual vacancies on the date of such determination but also take into account probable vacancies by reason of superannuation of officers in the next two years from that date.

(ix) Once the vacancies are so determined, the percentage of the vacancies available for recruitment by direct recruitment and by promotion must be fixed and steps taken for filling up the same expeditiously. The number of vacancies available for the direct recruit's quota must be advertised without any variation clause. The select list prepared both for direct recruits as well as for promotees prepared by the high court will be operative only till the next recruitment commences with the fixation of the vacancies for the next recruitment year."

(8) On the heels of the aforesaid judgment, **All India Judges' Association and others vs. Union of India and others : (2002) 4 SCC 247** was pronounced on 21.03.2002, having an all India effect, wherein a quota was prescribed relating to 3 sources of recruitment i.e. by promotion on merit-cum-seniority based on a suitability test, merit promotion on the basis of a limited competitive examination for its cadre candidates and direct recruitment, in the ratio of 50:25:25. The

said judgment also provided for a Quota-Rota Rule based on a roster in terms of the judgment pronounced in **R.K. Sabharwal and others vs. State of Punjab and others :** (1995) 2 SCC 745 case for determination of seniority in UPHJS so as to avoid any further litigation. The Hon'ble Supreme Court in the All India Judges' case (Supra) also issued directions for amendment in the relevant Rules to all concerned State, by specified dates as mentioned in paragraphs 27, 28, 29 and 39 of the said judgment.

(9) Although the All India Judges' case (Supra) would had been the torch-bearer in providing the guidance in determination of the vacancy and providing the seniority, however, before the amendments could be made in UPHJS Rules, 1975, an exercise was undertaken for redetermination of vacancies in terms of Sri Kant Tripathi's case (supra) by a Committee of this High Court which submitted its report on 24.08.2002 and the said report came to be approved by the Full Court on 01.02.2004. Even this report was challenged by the promotees judicial officers vide Writ Petition No.316 (SB) of 2004 (*U.P. Judicial Services Association vs. State of U.P. and another*), which was decided on 25.08.2004 with certain directions for redetermination of vacancies. After this judgment, the result of 1998-2000 recruitment was declared in 2004.

(10) In the meantime, the aforesaid judgment dated 25.08.2004 (supra), which had declared availability of 24 direct recruit vacancy and 331 promotions seats, was itself challenged before the Hon'ble Supreme Court in the case of **Ashok Pal Singh & others vs. U.P. Judicial Services & others : (2010) 12 SCC 635** and since there was no interim stay in the said case, the High Court in compliance of judgment dated 25.08.2004 (supra) (High Court order) proceeded to prepare a seniority list of pre-1998 appointees that came to be approved by the Full Court on 24.08.2007. The said seniority list was subjected to challenge in **Prabhuji and Anr. Vs. State of U.P. and Ors.**, 2010 SCC Online All 2410 and during pendency of the said petition, judgment in the case of Ashok Pal Singh's case (supra) came to be delivered on 13.09.2010, wherein the Apex Court while considering the purport and intent of Rule 8 (2) of UPHJS Rules, 1975, it was held that the same was not to dilute or change the quota of direct recruits. It further held that its object was to ensure that no vacancy remained unfilled for want of adequate number of direct recruits under the prescribed quota. While holding so, the Apex Court noted that there were reasonable chances of adequate number of candidates being not available for direct recruitment whereas usually sufficient number of candidates would be available for promotion. It also made further clear that the proviso to Rule 8(2) of UPHJS Rules, 1975 ensures that the short fall in quota for direct recruits in any recruitment does not get permanently converted to promotee quota by providing that the short fall should be made at the next recruitment for the direct recruitees, subject to it does not exceeds the 25% of strength of the service.

(11) In the interregnum, the UPHJS Rules, 1975 were amended in terms of paragraphs 27, 28 and 39 of the judgment in All India Judges' Association's case (supra) vide notification dated 09.01.2007 by which UPHJS (Sixth Amendment) Rules 2006 (hereinafter referred to as '**UPHJS Amended Rules, 2006**') came into force with retrospective effect from 21.03.2002 i.e. the date of the All India

Judges' Association's case (supra). However, only part compliance of the dictum was made, in as much no amendment in terms of paragraph 29 took place, which provided for seniority on the basis of quota and rotational basis. In any case, the vires of UPHJS Amended Rules, 2006 came to be challenged in ***V.K. Srivastava and others Vs. Government of U.P. and Ors.*** before the Hon'ble Supreme Court under Article 32 of the Constitution of India and while the aforesaid challenge was pending, a determination of vacancies took place for direct recruitment and promotees on 15.02.2007, as approved by Full Court on 17.02.2007 including those existing as on 31.12.2006 and anticipated vacancies upto 31.12.2008. A suitability test was also held for purposes of promotion under the 50% quota for promotees on 10.02.2008.

(12) Based on the aforesaid recruitment process, a final list of direct recruits and promotees was approved by the Full Court on 12.07.2008. However, instead of putting the names of direct recruits and promotees aforesaid in the order as envisaged in Rule 22 (1) and (2) of the UPHJS Rules 1975 keeping in mind paragraph 29 of All India Judges' case (supra), separate orders of appointment for direct recruits and promotees were issued, even though a combined list as envisaged in Rule 22(1) was sent to the State Government. Interestingly, although para-3 of the appointment/promotion order mentioned that the members of HJS selected/appointed on the basis of selection of 2007 their inter-se placement as per roster shall be done by the High Court subsequently, however, nothing was done and the appointments were notified under Rule 25 on 10.12.2008.

(13) During the aforesaid process, ***V.K. Srivastava and others Vs. Government of U.P. and Ors. (supra)*** : (2008) 9 SCC 77 came to be decided by the Hon'ble Supreme Court on 04.09.2008 and the challenge to the vires of UPHJS Amended Rules, 2006 was repelled. Thereafter, another recruitment took place of 2009 batch based on a determination of vacancies on 24.03.2009, as approved by the Full Court on 10.04.2009. Final list of selectees including direct recruits and promotees was approved by Full Court on 09.01.2010. In the interregnum, on 24.08.2009 the UPHJS Rules, 1975 were amended for the Seventh time so as to comply the remaining part of the dictum in All India Judges' Association's case (supra) viz. paragraph 29 thereof, albeit belatedly, so as to amend Rule 22 and introduce a rotational system based on roster.

(14) As usual, even this Recruitment of 2009 was impugned before this Court, wherein the challenge was with regard to the appointment made to the post of Direct Recruit District Judges in the unfilled reserve vacancies, to the extent of 34 in number by way of promotion from the 'in service candidates' by applying Rule 8(2) of the UPHJS Rules, 1975. The Division Bench of the High Court dismissed the writ petitions on 02.03.2012. Feeling aggrieved, the appellants filed appeal before the Hon'ble Supreme Court, which came to be decided in **Nawal Kishore Mishra & Ors. V/s high Court of Judicature at Allahabad, through its Registrar General & Ors : (2015) 5 SCC 479**. The findings of the said judgment can be recapitulated from the following paragraphs of the judgment:

"61. It is well settled principle of law as has been laid down by this Court in

the decision relied upon by learned counsel for the High Court, namely, the Constitution Bench decision reported in R.K. Sabharwal (supra) wherein it has been held as under in para 4:

"No general category candidate can be appointed against a slot in the roster which is reserved for the backward class."

62. Therefore, when the posts were reserved for the SC, ST, filling up of those posts from the general category candidates would seriously affect the rule of reservation, as once the posts of direct recruit are filled up from other category candidates even the carrying forward of those vacancies as provided under the proviso to Rule 8(2) cannot be operated upon. In other words, by applying Rule 8(2) in the event of vacancies remaining due to non- availability of the candidates of the reserved category and such vacancies were filled up by the 'in service candidates' by resorting to promotion, the proviso can be conveniently operated upon by carrying forward those vacancies in the future years in the direct recruit source and by maintaining the rule of reservation to the extent it could not be filled up in the relevant recruitment years. If instead of resorting to promotion of 'in service candidates' those unfilled reserved vacancies are filled from the general category candidates, there would be no scope for applying the proviso to Rule 8(2). Such a contingency created would run counter to the rule of reservation and, therefore, the same cannot be countenanced.

63. We have to, therefore, hold that the High Court by adopting the Reservation Act, 1994 adopted the rule of reservation to the full extent provided for and as prescribed under Section 3(1) of the Reservation Act, 1994 and that in respect of any unfilled vacancies of that category, the High Court rightly resorted to the prescription contained in Rule 8(2) by resorting to filling up of such vacancies by special recruitment in that year as directed by this Court and in the absence of not getting such vacancies filled up by resorting to such filling up by promotion of 'in service candidates' and also by applying the proviso to Rule 8(2) and thereby carry forward those vacancies in the future years of recruitment.

64. Keeping the said legal principle relating to applicability of Section 3(1) of the Reservation Act, 1994 vis--vis Rules 7 and 8(2) of the High Court Rules in mind, when we consider the last of the submissions made on behalf of the appellants, it must be held that the action of the High Court in having resorted to filling up of the unfilled reserved vacancies by taking umbrage under Rule 8(2) was perfectly justified. The said action of the High Court in having filled up those unfilled reserved vacancies of direct recruitment of the year 2009 was stated to have been made by promoting the in-service candidates. Though we have found that such a course adopted by the High Court was in order, as the proviso to Rule 8(2) specifically mandates that while fixing the number of vacancies to be allotted to the quota of direct recruitment at the next recruitment, it should be raised accordingly. We are of the view, without disturbing whatever promotions already made by resorting to Rule 8(2), the High Court can be permitted to provide that number of vacancies which remained unfilled in the year 2009 in the reserved category of direct recruit source by adding that number of vacancies in the recruitment to be made in the future years until such number of vacancies of unfilled reserved category pertaining to 2009 are filled.

65. With the above limited directions to the High Court, we do not wish to meddle with the promotions already made. We do not find any scope for granting any relief to the appellants, as none of the submissions raised on behalf of the appellants, which were though not considered by the Division Bench of the High Court and which were also dealt with by us in extenso and we find no merit. These appeals, therefore, fail and the same are accordingly dismissed."

(15) As aforesaid, the judgement rendered in Nawal Kishore Mishra's case (Supra) came to be passed on 17.02.2015, however, in the intervening period, the State Government again, instead of issuing an appointment in the order of names occurring in the combined list envisaged in Rule 22 (1), separate orders of appointment were issued in 2010 for the 3 sources of recruitment, which did not reflect therein rotational placement as per their quota. Separate notifications were issued under Rule 25. Paragraph 3 of the orders stated that their seniority would be determined by the High Court separately as per final decision of the Hon'ble Supreme Court in Malik Mazhar Sultan's case. Adding to more confusion, Prabhuji's case (supra) was decided on 16.02.2010 and the seniority list of pre-1998 appointees was quashed by this Court. Thereafter, on 20.04.2010, directions were issued in an interim application filed in All India Judges' Association's case (supra) permitting variation of the Quotas of 50:25:25 to 65:10:25, 10% posts being prescribed for LCE based promotees. Consequently, on 29.01.2014, Ninth Amendment to Rules 1975 were notified amending Rule 6 and 22 (2) accordingly and providing a new roster based thereon, but without retrospective effect.

(16) In compliance of the direction of the Hon'ble Supreme Court in Ashok Pal Singh (supra) decided on 13.09.2010, a Committee was constituted, which undertook an exercise for determination of seniority, including determination of vacancies and based thereon submitted its 1st tentative report dated 02.03.2011, thereafter 2nd tentative report was submitted on 18.05.2011 including appointees of 1998-2000 recruitment. Based thereon a final seniority list dated 14.07.2011 was prepared, which was approved by the Full Court on 30.7.2011 and notified on 1.8.2001, which contained the determination of seats as well as the seniority upto 1998-2000 recruitment.

(17) Another exercise for determining seniority of subsequent recruits that of 2007 and 2009 recruitment was undertaken in continuation of the final seniority list dated 14.07.2011, wherein the Committee also determined the vacancies and their allocation to various quotas to 2007 and 2009 batches, although the same had been determined prior to such recruitment, which was notified on 07.02.2012 to the members of HJS inviting objections. A tentative seniority list was issued on 25.07.2013, objections were invited. Thereafter, another tentative seniority list dated 10.12.2014 of 2007 and 2009 batches was issued on 20.12.2014 and objections were again invited from the officers. After considering the objections, the seniority committee prepared a final seniority report dated 23.09.2015, which was placed before the Full Court on 01.12.2015. The said final seniority report dated 23.09.2015 was followed by a supplementary final seniority report dated 06.04.2016 as approved by the Full Court on 14.04.2016 and which was published on 18.04.2016.

(18) Apparently, the seniority list, which was drawn by the High Court, on the administrative side in pursuance to Ashok Pal Singh's case (supra) on 14.07.2011 was modified on 23.9.2015 based on a subsequent report of the Committee of the same date and it is this report/seniority list, which was challenged before a Co-ordinate Bench of this Court in a bunch of writ petitions lead being "***Premkala Singh HJS & 4 Ors V/s High court of Judicature at Allahabad***". Subsequently, Premkala Singh's case (Supra) came to be decided on 30.06.2017, wherein a Co-ordinate Bench of this Court, after tracing the background of the present litigation, arrived at a conclusion that the determination of vacancies by the Committee did not require any interference but determination of seniority was held to be not sustainable as there had been a complete non-adherence to the Quota-Rota Rule and the determination of seniority in accordance thereof in terms of Rule 22 and 26 of the UPHJS Rule, 1975. The Co-ordinate Bench of this Court also held that the judgment rendered in All India Judges' Case (supra) was not followed as was mandatorily required. The Co-ordinate Bench of this Court in the said Premkala Singh's case, after recording the aforesaid finding relevant to the context, held that (a) determination of vacancies by the Committee did not require any interference and (b) quashing the seniority list, directed for redetermination of the seniority in the light of the observations made in the said judgment.

(19) However, an appeal came to be filed against Premkala Singh's case (supra) before the Hon'ble Supreme Court. The said appeal came to be decided vide "***High Court of Judicature at Allahabad and Ors. V/s State of U.P & Ors.***" **(2018) 15 SCC 439,** wherein the Hon'ble Supreme Court allowed the appeal and both the determination of seniority as well as determination of vacancies for the UPHJS Recruitment Years 2007 and 2009 was upheld in the following words:

"30. With regard to the Quota-Rota rule, there is no doubt that this is a mandatory requirement of the Rules. The said requirement has however to be seen in the peculiar fact situation. The issue of determination of vacancies was embroiled in continuous litigation. The Quota-Rota rule could not be applied in the absence of determination of vacancies. The suitability test though validly laid down could not be held till 2008 for reasons already noted. No promotion could be given in absence of suitability test. The rule provided for seniority of the promotees to be fixed from the date of availability of vacancy but such seniority could also not be given in the present fact situation. If rota rule is applied, it will work serious prejudice to the promotees. Thus, the Rules will have to be given pragmatic interpretation. As laid down by this Court in Direct Recruit Class-II Engineering Officers' Association versus State of Maharashtra, (1990) 2 SCC 715, if it becomes impractical to act upon rule fixing quota from two sources, it is no use insisting that the authority must give effect to such a rule. Every effort has to be made to respect a rule but if it is not feasible to enforce it, the rule has to be given a practical interpretation. Thus, interference by the High Court with the seniority given to the promotees above the direct recruits without following the rotation principle cannot be sustained."

(20) Consequently, the validity and legality of the final seniority report dated 23.09.2015 and supplementary report dated

06.04.2016 corresponding to the recruitment year upto 2009, has been upheld by the Hon'ble Supreme Court in the said case and for all intents and purposes, the said seniority list has attained finality. Now, in the present petitions, the final seniority list dated 31.01.2019 relating to the recruitment year 2012 and 2014 is a matter of challenge basically on the ground that the same has not been prepared as per UPHJS Rules of 1975.

C. **Relevant Rules applicable to the present issue**

(21) Part-III of the UPHJS Rules, 1975 postulates the various rules concerning recruitment of an officer to the HJS. Rule 5 of the said Rules, describes the various sources of recruitment as herein below :-

"5. **Source of recruitment**- The recruitment to the service shall be made---
(a) by promotion from amongst the Civil Judges (Senior Division) on the basis of Principle of merit-cum-seniority and passing a suitability test.

(b) by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service;

(c) by direct recruitment from amongst the Advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published."

(22) The quota for various sources of recruitment under the Rules are prescribed in Rule 6 of UPHJS Rules, 1975, which *inter-alia* says:

"6. **Quota** -- Subject to the provisions of rule 8, the quota for various sources of recruitment shall be –

(i) Uttar Pradesh Nyayik Sewa:

(a) from amongst the Civil Judges (Senior Division) on the basis of merit - cum seniority and passing a suitability test - ---65%

(b) On the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years' service --10%

Provided that in case of there being any shortfall in the vacancies to be filled up on the basis of in cadre competitive examination, the short fall of 10% reserved for such promotion will be made good by corresponding increase in the quota reserved for promotion of Civil Judge (Senior Division) referred to in Clause (i) (a).

(ii) Direct recruitment from Bar --25%

Provided that where the number of vacancies to be filled in by any of the sources in accordance with the quota is in fraction, less than half shall be ignored and the fraction of half or more shall ordinarily be counted as one:"

(23) As to the reservation for Schedules caste, Scheduled Tribe, Other Backward Classes, Rule 7 of the UPHJS Rules, 1975 prescribes as under :-

"7. **Reservation of posts for Scheduled Caste, etc.**- Reservation to posts in the service for the members of the Scheduled Castes, Scheduled Tribes and other categories including women shall be in accordance with orders of the Government for reservation as adopted by the High Court.

Provided that twenty percent horizontal reservation for women to posts

in service in direct recruitment from Bar in Uttar Pradesh Higher Judicial Service shall be subject to suitability i.e. if the sufficient number of women candidates is not available, then and in that event the reservation shall not have any operation to the extent of such unavailability.

Provided further that there shall be no carry forward of reservation for women."

(24) The UPHJS Rules, 1975 also provides for the number of appointment to be made in a particular recruitment year as per Rule 8, which says in the following words :-

"8. **Number of appointments to be made** -- (1) The Court, shall, from time to time, but not later than three years from the last recruitment, fix the number of officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years.

Note - The limitation of three years mentioned in this sub-rule shall not apply to the first recruitment held after the enforcement of these rules.

(2) If at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Court may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa;

Provided that the number of vacancies filled in as aforesaid under this sub rule shall be taken into consideration while fixing the number of vacancies to be allotted to the quota of direct recruits at the next recruitment, and the quota for direct recruits may be raised accordingly; so, however, that the percentage of direct recruits in the service does not in any case exceed 25% of strength of the service:"

(25) That as regards the promotion of Nyayik Sewa, appointment and seniority, the Rules provide for the following :-

"20. **Promotion of such members of Nyayik Sewa as referred to in Rule 5(a):** - (1) Recruitment by promotion of the members of the Nyayik Sewa shall be made by selection on the principle of merit-cum-seniority and on passing such a suitability test, as prescribed in Appendix "G(i)"

(2) The field of eligibility for recruitment by promotion shall be confined to four times the number of vacancies to be filled by promotion. The selection Committee shall prepare a list in order of seniority of the officers eligible under Rule 5(a) of these rules.

(3) The Selection Committee shall, after examining the record of the officers included in the list prepared under sub-rule (2) of this rule make a preliminary selection of the officers who in its opinion are fit to be appointed on the basis of merit-cum-seniority. In assessing the merit of a candidate, the Selection Committee have due regard to his service record, ability, character and seniority. The list shall contain the names of officers twice the number of vacancies required to be filled by promotion of the members of the Nyayik Sewa.

(4) The Selection Committee shall forward the list of the candidates chosen at the preliminary selection to the Chief Justice along with the names of the Officers who, if any, in the opinion of the Committee have been passed over for promotion to the Service.

(5) The Court shall examine the recommendations of the Selection

Committee and make a final selection for promotion and prepare a list in order of seniority of the candidates who are considered fit for promotion and forward the same to the Governor. The list shall remain operative only till the next recruitment.

22. **Appointment** - (1) Subject to the provisions of sub-rule (2), the Governor shall, on receipt from the Court of the list mentioned in Rules 18, 20 and 21 make appointments to the service on the occurrence of substantive vacancies by taking candidates from the list in the order in which they stand in the respective lists in accordance with the roster.

(2) Appointments to the service shall be made on the basis of roster system, the first post shall be filled from the list of promotees, the second post shall be filled up by direct recruit, the third and fourth posts shall be filled up from the list of promotees and fifth post shall be filled up by the candidate selected strictly on merit through LDCE (and so on) according to the roster as prescribed in Appendix '1', which will cease to become operative on the date the respective three streams achieve their full allotted vacancies. Thereafter on account of arising any vacancy in quota of respective stream the same could be filled-up from the same stream of which vacancy arises;

Provided that while following the roster at no point of time the respective percentage of posts filled from direct recruit and LDCE shall exceed 25% and 10% of the strength of service. In case the percentage is exceeding the allotted quota, in such eventuality the promotee shall occupy the vacancy which would have gone to the direct recruit or LDCE, had not the same been in excess of 25% and 10% respectively of either of the two.

(3) In the eventuality of delay in making appointment under sub-rule (1) and further if exigency of service so requires, the Governor may, in consultation with the Court, make short term appointment as a stop-gap arrangement from amongst the promotees, in the vacancy in these services till the appointments are made under sub-rules (1) and (2):

Provided that the period of service spent by the promotees on a short term appointment to the service as a stop-gap arrangement shall not be computed under Rule 26.

26 - Seniority - (1) Seniority of the officers appointed in the Service shall be determined in accordance with the order of appointment in the Service under sub rules (1) and (2) of Rule 22 of these rules.

(2) Seniority of members of the service who have been confirmed in the service prior to the commencement of these rules shall be as has been determined by the order of the Government as amended from time to time."

D. **<u>The Dispute</u>**

(26) As already recorded herein above, there are altogether four writ petitions. The common thread of facts running through these petitions, invariably denotes that these petitions are preferred by petitioners, who are promottees and have been initially selected under the U.P Judicial Services (also known as Provincial Civil Service (Judicial). The fundamental issue raised in these petitions are related to determination of the vacancies for HJS recruitment year 2012 and 2014, which has resulted in other consequential effects. Thus, these writs can be broadly divided into two categories :-

"1st Category :-

Writ Petition No. 845(S/B) of 2014 (Sanjeev Kumar Singh & Ors. V/s State of U.P), wherein the basic prayer has been sought for promoting the petitioners on approximately 32 vacancies, which according to them existed prior to 31.12.2013 and have occurred under rule 8, in the recruitment year 2012 itself, which predominantly is an issue connected to the determination of the vacancy.

2nd Category:-

In this category, three Writ Petitions being (i) Writ Petition No. 30173(S/B) of 2019 (Harendra Bahadur Singh & Ors. V/s State of U.P), (ii) Writ Petition No. 11453(S/B) of 2020 (Manorama & 6 others V/s State of U.P) and (iii) Writ Petition No. 28511 (S/B) of 2021 (Randheer Singh & others V/s State of U.P) are placed, wherein the challenge basically is to the seniority list of HJS officers of recruitment year 2012 and 2014 and final Seniority Committee Report dated 31.01.2019 circulated vide letter dated 26.08.2019 and other reliefs incidental to the said challenge has also been raised in the said petitions. Pertinently, the seniority list prepared is also indirectly related to the determination of vacancy in each quota."

This Court proposes to take the aforesaid category separately, however, issues, which overlap each other, would be dealt in the 2nd category petitions.

E. **Disposal of Writ-A No. 2000845 of 2014**

(27) In Writ-A No. 2000845 of 2014, Sanjeev Kumar Singh and 11 others Judicial Officers have filed the petition claiming themselves to have been selected in U.P Judicial Services on the basis of Examination-1999 and after having been recommended and selected for appointment had been working in various districts of the State of Uttar Pradesh. These promotee Judicial Officers have raised an issue, which can be traced to Rule 5 (a) of the UPHJS Rules, 1975, by means of which promotions are to be granted to the Civil Judge (Senior Division) on the principle of merit-cum-seniority and passing a suitability test. It has been submitted by them that as per Rule 8 (1) of the UPHJS Rules, 1975, the competent authority fixes the number of officers to be recruited in that particular year, keeping in view the vacancies then existing and likely to occur in the next two years and Rule 8 (2) of the UPHJS Rules, 1975 specifically directs that if at any selection the number of selected direct recruits available for appointment is less than the number of recruits decided by the Court to be taken from that source, the Ccourt may increase correspondingly the number of recruits to be taken by promotion from the Nyayik Sewa. Thus, according to them, the number of seats available for promotion in Nyayik Sewa is a consequential product of the process of identifying the number of post available for recruitment in that particular year as per Rule 8 (1) of UPHJS Rules, 1975 and according to them, since the competent authority for the recruitment year 2012, were not able to correctly identify the number of officers to be taken into recruitment by determining the existing, as well as the vacancies likely to occur in the next two years, the number of promotional seats available to Nyayk Sewa decreased. These promotees identifying that about 32 such vacancy, which although were reported in the "next two years" for the recruitment year 2012 but were not taken into consideration for that recruitment year, has prayed for the following reliefs :-

(i) Issue a writ, order or direction in the nature of mandamus directing the opposite parties to make promotion of the petitioners on the approximately 32 vacancies existing prior to 31.12.2013 having been occurred under rule 8, in the recruitment year 2012;

(ii) Issue a writ, or order or direction in the nature of mandamus restraining the opposite parties to include 32 vacancies which had existed on 31.12.213 in any next recruitment as the same would amount to violation under the rules;

(iii) Issue a writ, order or direction in the nature of certiorari quashing any decision, if taken by the opposite parties on the representations of the petitioners denying promotions to the petitioners after summoning the same as the same will not be tenable in the eyes of law;

(iv) Issue a writ, order or direction in the nature of certiorari quashing the resolution passed by the selection and appointment committee in its meeting held on 05.03.2014 to the extent to include, the unforeseen vacancies of Recruitment year 2012 which had occurred prior to 31.12.2013, in HJS 2014 recruitment as well as the resolution passed by the selection and appointment committee in its meeting held on 19.05.2014 vide Agenda Item No. 8(a), 8(b), 8(c), 8(f), 8(g) contained in Annexure No. 16 and 17 respectively to this writ petition."

(28) According to learned Senior Counsel representing the petitioners, altogether 78 vacancies have been notified for direct recruitment as per the advertisement dated 17.03.2012 in terms of Rule 5 (c) of the UPJHS Rules, 1975 and about 25 vacancies were notified to be filled up by limited competitive examination (LCE) vide notification dated 09.07.2012 in terms of Rule 5(b) of the UPHJS Rules, 1975.

(29) The learned Senior Counsel representing the petitioner has submitted that against 78 vacancies to be filled by direct recruitment, only 39 candidates were selected, whereas against 25 vacancies to be filled by Limited Competitive examination of the HJS 2012, about 3 candidates were selected. Thus, 39 vacancies of direct recruit and 22 vacancies of LCE were not filled for the year 2012, which as per the operation of Rule 8 (2) of the UPHJS Rules, 1975, were to be transferred to the Nyayik Sewa and accordingly the number of recruits by promotions were to be increased correspondingly by 39+22= 41 seats by the operation of Rule 8 (2) of UPHJS Rules, 1976. Further, as per Rule 5 (a) of the UPHJS Rules, 1976, about 341 candidates were declared eligible to appear in the suitability test, wherein about 205 candidates were declared successful for promotion on merit-cum-seniority basis, who essentially belonged to 1997 and 1999 batch of officers. It has been further contended that besides these 205 candidates, there was another 105 Civil judge (Senior Division), essentially belonging to the 1989 and 1990 batch, who have been exempted to appear in the suitability test on account of the fact that they were already working in the Fast Track Court as *ex cadre* post of Additional District Judge (ADJ) and the creation of the Fast Track Court has already come to an end. Thus, the total select list under Rule 5(a) of the UPHJS Rules, 1975 for making promotions from the post of Civil Judge (Senior Division) would be 105 + 205= 310, however since 8 candidates within the

said 205 list could not qualify the suitability list, the total seats approved by the competent authority would come to 302, which according to them was the pool of suitable candidates as per Rule 20 (3) of the UPHJS Rules, 1975, who were entitled for promotion for the recruitment year 2012.

(30) It is the contention of the petitioners that during the aforesaid process of recruitment, about 94 posts were created by means of Government Orders and due to elevation of District Judges as Hon'ble Judges of this Court in the following manner :-

Government order dated 25.04.2013	3 post of HJS as special Judge, Courts 22 Posts of HJS as Anti-corruption Court
Government order dated 23.05.2013	63 posts of Family court in HJS
Period between 01.01.2012 to 31.12.2013	06 District Judges were elevated as Hon'ble Judges of this High Court
Total	94 seats

(31) According to the petitioner, as per Rule 8 (1) of the UPHJS Rules, 1975, the competent authority ought to have fixed the number of Judicial Officers to be recruited in the year 2012 by keeping in view the aforesaid 94 vacancies as these vacancies would qualify the term *"likely to occur in the next two years"* as mentioned in Rule 8 (1) for determining the number of vacancy. It has been further submitted that against the 94 such vacancies, although 62 candidates have been adjusted from the select list, however 32 vacancy remained unfulfilled and, as such, according to them, these 32 officers have been discriminated in not promoting them to these vacant seats. It has also been contended that their various representation sent to the competent authority also did not yield any results.

(32) This Court finds that during the pendency of Writ-A No. 2000845 of 2014, an application for amendment to the writ petition was allowed by this Court vide order dated 05.0.2018, wherein two additional grounds came to added relating to a challenge to the resolution passed by the Selection and Appointment Committee in its meeting held on 05.03.2014, wherein it was resolved to include the unforeseen vacancies of recruitment year 2012, which had occurred prior to 31.12.2013 in HJS 2014 and another resolution passed by the Selection and Appointment Committee in its meeting held on 19.05.2014, wherein it had rejected the representations of some of the petitioners. A supplementary ground has also been urged by the petitioners by filling a supplementary affidavit dated 23.10.2019 that since it was apparent from the notification of number of seats for the recruitment year of 2016 and 2018, that about 12 and 11 vacancies, respectively, of the recruitment year 2009 were being carried forward and filled in the year 2016 and 2018, respectively, these 23 vacant seats would ought to have been filled in the recruitment year of 2012 and had the same been done for that year, these petitioners would had been promoted in that year itself in view of Rule 8 (2) of the UPHJS Rules, 1975 as well as the law laid down in the case of **Malik Mazhar Sultan & Another Vs. UPPSC and others :** (2008) 17 SCC 703.

(33) On the other hand, the opposition to the present case has been led by the learned Special Counsel representing the

High Court (administrative side) as well as the learned counsels representing the private respondents. It has been submitted by the learned Counsel that HJS Recruitment-2012 was commenced on 09.01.2012 with the calculation and finalization of 254 vacancies, then existing and likely to occur in next 2 years i.e upto 31.12.2013, wherein the break-up for vacancies would be (i) Nyayik Sewa – 151 vacancies, (ii) Direct Recruits- 78 Vacancies and (iii) LDCE – 25 Vacancies. It is the contention of the respondents that the said number of vacancies was finalized in the minutes dated 09.01.2012 of the Selections and Appointment Committee and the same was approved by the Full court in its meeting on 11.02.2012. According to them, there was no dispute as to the number of successful candidates having been reported for the Direct Recruitment or the LCDE, however, the fact of the matter remains that the Selection and Appointment Committee on 12.01.2013 prepared a select list containing names of 302 officers being twice the number of available vacancies of the Nyayik Sewa as per Rule 20 (3) of the UPHJS Rules, 1975. It has been further submitted that the Full Court has approved the select list as well as the final result of the HJS Recruitment-2012, wherein applying the provisions of Rule 6 (i) (b) and Rule 8 (2) of UPHJS Rules, 1975, unfilled vacancies of 39 vacancies from Direct Recruit and 22 vacancies from LCDE were duly credited to the quota of Nyayik Sewa, thereby increasing their number from 151 to 151+39+22= 212 and thus for the HJS Recruitment of 2012, the total vacancies of 254 was filled by 212 Nyayik Sewa, 39 by Direct Recruits and 3 by LDCE with the issuance of office memo dated 05.08.2013.

(34) It is further submission of the respondent that out of the said 254 candidates of Nyayik Sewa, 207 were immediately posted/promoted in the districts before 20.12.2013 and since in the said recruitment, vacancies likely to occur upto 31.12.2013 were also taken into account, therefore, the vacancies for rest of the 47 candidates were not available in the district and their posting promotions order could not be promptly issued, which only came to be issued subsequently.

(35) The learned Counsel for the respondent, after giving details of the creation of 93 Courts/posts after 09.01.2012 i.e the start of the recruitment year 2012, has submitted that there was urgent need for manning these Courts as seen by the High Court and as such these Courts/posts were made functional by posting from "existing HJS Officers" in these newly created Courts and even after making this posting, vacancies in the districts were available for rest of the 47 officers of Recruitment Year – 2012 and as such they were promoted/posted in HJS Cadre vide Court's notification dated 20.12.2013.

(36) The submission of the respondent is thus two fold, firstly that after 2012 recruitment, even the entire exercise for the next recruitment year i.e 2014 has been completed and appointment have been made, therefore, it was practically impossible for anyone to claim appointment on the basis of select list of 2012 recruitment particularly in view of the fact that Rule 20 (5) of the UPHJS Rules, 1975 specifically says that the select list prepared for any particular recruitment year is valid only till the next recruitment year. Further, these 93 vacancies created due to creation of new Courts were later reported as "unforeseen vacancies of 2012 recruitment" for the recruitment in the 2014 HJS recruitment and promotion/recruitment

against the said 93 vacancies has already been made in the HJS Recruitment, 2014.

(37) Having heard the learned Counsel for the parties, this Court finds that Rule 8 of the UPHJS Rules, 1975 provides for number of appointment to be made from time to time. The said Rule provides a guidance to the competent authority for determination of number of appointments, which are required to be made in a particular recruitment year. Rule 8(1) of the UPHJS Rules, 1975 specifically says that the competent authority shall fix the number of Officers to be taken at the recruitment keeping in view the vacancies then existing and likely to occur in the next two years. Thus, the number of vacancies would be determined in two parts, (i) the first being the existing vacancies and (ii) the second being the vacancies which are likely to occur in the next two years. There is no controversy between the parties as to the first part of ascertaining the vacancies, however, the ascertainment of the vacancy for the second part is the bone of contention between the parties.

(38) This Court finds that the said issue has already decided by various precedents and is squarely covered by the judgment of the Hon'ble Supreme Court in ***Sri Kant Tripathi & Ors. V/s State of Uttar Pradesh & Ors :*** (2001) 10 SCC 237, wherein the Apex Court, at paragraph 34 of the said judgement, while holding the interpretation given to the said expression "likely to occur in the next two years" by a Division Bench of this Court to be unsustainable, remarked in the following words;

"34…….The aforesaid Division Bench judgment of Allahabad High Court, requires little consideration, in view of the interpretation given to the expression "the vacancies likely to occur in the next two years", in rule 8(1) of the rules. The High Court in the impugned judgment has come to the conclusion that the vacancies on account of death, compulsory retirement, voluntary retirement, removal, dismissal and appointment of officers as judge of the Allahabad High Court, could also come within the expression "vacancies likely to occur in the next two years". This concept is wholly unsustainable inasmuch as nobody can anticipate as to how many people would die or how many would compulsorily be retired or removed or dismissed or even would be elevated to the High Court. The expression "vacancies likely to occur in the next two years" would obviously mean the vacancies, which in all probability, would occur. In other words, it can only refer to the cases when people would superannuate within the next two years. The difficulty has arisen because of the fact that the high court is fixing the number of officers to be taken for the recruitment of 1990 in the year 1992 or 1994 and so on and so forth for the next recruitment. If the vacancy position is calculated, at the end of the block-period, then the expression "vacancies likely to occur in the next two years" would become redundant and in such a case, the vacancies actually existing for the period, will have to be taken into account. The expression "vacancies likely to occur in the next two years" will operate only, when the high court decides for the recruitment of 1988 in 1988 and then takes into consideration the anticipated vacancies in 1989 and 1990. The enunciation of law made by the High Court in the impugned judgment, therefore, cannot be sustained, so far as, it relates to interpretation of the

expression "vacancies likely to occur in the next two years" in rule 8(1)"

(39) Apparently, Recruitment Year of 2012 took into account the existing vacancy as well as the vacancy likely to occur till 31.12.2013 and as such the said recruitment process started with the notification for the number of vacancy on 09.01.2012. The vacancy notified included those seats which has all likelihood of being vacant due to retirement/superannuation till 31.12.2013, i.e the block year for recruitment. It is the case of the petitioners in this writ petition that 94 seats came to be created vide Government Order dated 25.04.2012, 23.05.2013 and due to elevation of HJS officers to High Court and as such these seats would had been also additionally be made available for the recruitment year 2012 as these seats actually came into existence prior to 31.12.2013. First and foremost, the petitioners are wrong in reading and understanding the provisions of Rule 8(1) of the UPHJS Rules, 1975. Rule 8(1) propagates the concept of likelihood of vacancy in the next two years, which has a certain amount of certainty. The creation of post in a Family Court or Anti-Corruption Court or for that matter elevation to the High Court cannot be anticipated nor any amount of certainty or likelihood can be attached to the said creation. These being unforeseen vacancies, which could not had been anticipated, has to be understood as rightly has been observed by the Hon'ble Apex Court in the S.K. Tripathi's case (Supra) that the expression *"vacancies likely to occur in the next two years"* is a concept, which comes into play only when it is decided for the recruitment of a particular year to commence in that year itself. If, the recruitment starts in a particular year, Rule 8(1) of the UPHJS Rules, 1975 mandates that for determining the number of vacancies, the Courts also take into consideration the anticipated vacancies for the following year. There is no concept of unforeseen vacancies to be added to the existing vacancies and suffice to say that these unforeseen vacancies occurred after the determination of vacancies for recruitment year 2012 and had to only included in the recruitment year of 2014. The process of filling up of vacancies ought to be based on the provisions of UPHJS Rules, 1975 only.

(40) Further, this Court finds that even the Selection and Appointment Committee has decided the said aspect in a correct manner, while holding that Rule 22 of UPHJS Rules, 1975 clearly states that recruitment in HJS Cadre can only be made against substantive vacancies available for a particular recruitment period as specified by the Hon'ble Court. The Committee went on to observe that although recruitment was irregular and delayed in the past due to a large number of litigation pending in the High Court as well as in the Hon'ble Supreme Court but at present, the recruitment in Higher Judicial Service cadre is being carried out at regular intervals and in accordance with the UPHJS Rules, 1975. The Committee noted the aspect that at present, process of recruitment usually commences in the month of January or so at every 2 year block period and concludes in around one and half year and after finalization of computation of vacancies for the recruitment in process, any vacancy caused due to creation of Courts/posts, death, elevation, resignation, dismissal etc. during the intervening period is taken into account in the subsequent recruitment under the head of unforeseen vacancies. After noting its observation, the Committee concluded

that these vacancies cannot be taken into account in the same recruitment for practical reasons/difficulties because any change in the number of vacancies will alter the quota fixed for different sources of recruitment and once the vacancies for Direct Recruitment get advertised, it would not be possible to change the number of vacancies so advertised, on some later date in the same recruitment year.

(41) In any case, it must be noted that Rule 20 of UPHJS Rules, 1975 provides that recruitment by promotion of the members of the Nyayik Sewa shall be made by selection on the principle of merit-cum-seniority and on passing such a suitability test and the Selection Committee shall prepare a Select List containing the names of officers twice the number of vacancies required to be filled by promotion of the members of the Nyayik Sewa. The said rule, in an unambiguous manner, thereafter, says that the appointment in HJS Cadre shall be made from the select list, against substantive vacancies available in respective quota and seniority of the officers appointed in the HJS Cadre shall be determined in accordance with the order of appointment in the Service under sub rules (1) and (2) of Rule 22 of the UPHJS Rules, 1975. Appointments to the HJS Cadre shall be made on the occurrence of substantive vacancies by taking candidates from the list in the order in which they stand in the respective lists in accordance with the roster. Therefore, it is very clear that no appointment can be made in HJS Cadre without following the due selection procedure mentioned in the UPHJS Rules 1975 and availability of substantive vacancy in the quota of the respective cadre.

(42) One of the grounds taken by the petitioners in the writ petition and also vehemently argued during the oral argument is that the determination of seats was not made as per the decision of the Apex Court passed in **Malik Mazhar Sultan and Another v. U.P. Public Service Commission and Others : (2008) 17 SCC 703**. Having noted the said Judgment, it would be important for this Court to deal with the judgment in extenco. Pertinently, this Court finds that the Hon'ble Supreme Court in the said case was mainly concerned with the timely filling of judicial vacancies in the State. Therefore, Hon'ble Supreme Court in the said judgment had fixed a time period to be followed by each High Court so that the existing judicial vacancies are filled without any delay. Relevant to the context, in the said judgment, the Apex Court has provided a Time-Table for filling of the vacancies of the cadre of District Judges from all the three sources at paragraph-7 of the judgment, wherein invariably the Apex Court has directed that the number of vacancies to be notified by the High Court by 31st of March and the vacancies was to be calculated, which would include :

"(a) Existing vacancies.

(b) Future vacancies that may arise within one year due to retirement.

(c) Future vacancies that may arise due to elevation of the High Court, death or otherwise, say ten per cent of the number of posts.

The third category which was the "future vacancies", that may come due to reasons other than retirement, were to be 10% of the cadre strength, as this was clarified at paragraph 15 of the said judgment, in the following words:

"15. We further direct that ten per cent of unforeseen vacancies would be in

respect of sanctioned posts and not vacancies occurring in a particular year."

(43) This Court need not burden this judgment by quoting extensively the detailed Time Table and the Time line, provided in the said Judgment relating to the receiving the applications, holding of examinations, prompt declaration of results, issuance of appointment letters, joining of incumbents etc. for both the HJS as well the Civil Judge recruitments. Suffice to say that the said Time lines were implemented by various High Court, throughout India and multiple intervening applications also came to be filed in the said case for clarification, extension of time lines etc. Apparently, relevant to the context, the third category of determination of vacancies as mentioned in the category of "Future Vacancies" created some confusion in different States as there could be no clarity of what these vacancies would be or how they were to be calculated. Ultimately, in **Malik Mazhar Sultan and Another v. Uttar Pradesh Public Service Commission and Others (2009) 17 SCC 24**, the Apex Court clarified this aspect in its order dated 24.03.2009, while deciding IA No. 56, in the following words:

"1. On 4-1-2007 [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] , this Court had given certain directions regarding the selection and appointment of members of the subordinate judicial officers in various courts. In the tabular form, the number of vacancies are notified by the High Court/Public Service Commission. It was directed that the further vacancies that may arise due to elevation or death or otherwise, 10% of the posts shall be notified and this is referred at para 15 of the order; it is further stated: (Malik Mazhar case

"15. We further direct that ten per cent of unforeseen vacancies would be in respect of sanctioned posts and not vacancies occurring in a particular year."

2. It has been pointed out by the counsel appearing for the various High Courts that 10% of the sanctioned posts are notified in some States. A large number of posts are to be notified whereas there was corresponding number of vacancies to be filled if the candidates are selected in the select list. There may be an expectation for such candidates to get appointment and this creates unwanted litigation by the candidates and it is prayed that the existing vacancies alone be notified along with the anticipated vacancies that may arise in the next one year and some candidates also be included in the wait list prepared by the High Courts/PSCs.

3. In supersession of the order passed by this Court on 4-1-2007 [Malik Mazhar Sultan (3) v. U.P. Public Service Commission, (2008) 17 SCC 703 : (2010) 1 SCC (L&S) 942] , this Court directs that in future the High Courts/PSCs shall notify the existing number of vacancies plus the anticipated vacancies for the next one year and some candidates also be included in the wait list. To this extent earlier order is modified."

4. I.A is disposed of accordingly." (emphasis supplied)

(44) From the aforesaid observation of the Hon'ble Apex Court, it stands clarified by the Apex Court in Malik Mazhar Sultan's case [(2009) 17 SCC 24] (Supra) that the third category earlier created in Malik Mazhar's case [(2008) 17 SCC 703] (supra) did not exist any longer. Pertinently, Malik Mazhar's case (supra) has to be understood for the proposition

that, now it merely directs the High Courts/PSCs to notify the existing number of vacancies plus the anticipated vacancies for the next one year and some candidates, who may be included in the wait list. It is important to note that as far as the vacancies for the next one year is concerned, the Apex Court very significantly qualified the said vacancy by the word "anticipated", which is a word closely associated to "likely to occur" as used in Rule 8 (1) of the UPJHS Rules,1975. Further, according to Black's law Dictionary, 'anticipation' is the act of doing or taking something before its proper time. In common parlance, 'anticipated' means something is expected or looked forward to and generally means to imagine or expect something, which will happen and do some action in preparation for it. Creation of posts of Family Courts, Anti-Corruption Courts or elevation to the High Court, cannot be imagined nor anything can be prepared for that imagination. It has to be understood that there is some kind of certainty attached to such anticipation as held in Malik Mazhar Sultan's case (Supra). Thus, the entire edifice of the petitioners comes down crumbling as they are wrongly relying on a judgment, which stands modified by a successive order by the Apex Court and this Court expects that as an officer of this Court, it was the bounden duty of the learned Counsels appearing for the parties to bring to the notice of this Court about the said second judgment passed in Malik Mazhar Sultan's Case.

(45) In any case, this Court finds that the said unforeseen vacancies have been reported as existing vacancies for the recruitment year 2014. Since, the selection and appointment of the said recruitment process also stands culminated and this Court has been informed that these petitioners have also been promoted in the year 2014, nothing remains in the present writ petition in the absence of any illegality or irregularity in the determination of Vacancy for the recruitment year 2012 on the ground agitated by these petitioners.

(46) Further this Court finds that the representation of some of the petitioners have also been duly considered by the Selection and Appointment Committee in its meeting dated 19.05.2014, wherein the Committee while rejecting the representation observed that the newly created posts have already been calculated in the vacancies of UPHJS Recruitment, 2014. The Committee determining the seats and seniority for the Recruitment Year 2012 and 2014 has also dealt with the said issue at page nos. 11 and 12 of the said report, therefore, this Court finds that the petitioners have already ventilated their grievances and it was rightly rejected by the Committee.

(47) There is another aspect of the matter. It has also been submitted on behalf of the petitioners that against the 94 unforeseen vacancies, merely 32 seats were remaining vacant and the High Court has offered appointment to these newly created unforeseen vacancies and as such in that manner, the petitioners could not be treated with such hostile discrimination. In this regard, this Court finds that the petitioners are again at an erroneous belief that these newly created seats were not filled by any new promotee, but by existing HJS Cadre Officers and, as such, even those persons, who were promoted/appointed against the substantive post, were given late appointments. The petitioners should bear in mind that a person whose name appears in the select list, does not acquire any

indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate and only against a substantive available post.

(48) Further, the said issue can be analysed from another angle, in as much as the recruitment year 2012 was notified on 09.01.2012 and at that point of time, these unforeseen vacancies were not available nor there were anticipated and as such these vacancies did not form a part of the notification for the recruitment year -2012. Since, these unforeseen vacancies came much later, when the recruitment process had already started, whether it is legal to accommodate the petitioners or for that matter any persons on these unforeseen vacancies, which now came into existence at a later stage on the basis of the recruitment of 2012. Answering the said proposition in negative, the Hon'ble Apex Court in the case of **Rakhi Ray Vs High Court of Delhi & Ors.: 2010(2) SCR 239** observed :-

"9. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide Union of India & Ors. v. Ishwar Singh Khatri & Ors. (1992) Supp 3 SCC 84; Gujarat State Deputy Executive Engineers' Association v. State of Gujarat & Ors. (1994) Supp 2 SCC 591; State of Bihar & Ors. v. The Secretariat Assistant S.E. Union 1986 & Ors AIR 1994 SC 736; Prem Singh & Ors. v. Haryana State Electricity Board & Ors. (1996) 4 SCC 319; and Ashok Kumar & Ors. v. Chairman, Banking Service Recruitment Board & Ors. AIR 1996 SC 976)."

(49) Recently, the Hon'ble Supreme Court, while dealing with identical issue for Judicial Officers appointed in the State of Himachal Pradesh in the case of **Vivek Kaisth Vs State of Himachal Pradesh : 2023 SCC Online 1485** concluded at paragraph 35 and 36 of the judgment as follows :-

"35. Having gone through the pleadings of the appellants and that of the respondents, we are of the considered view that there has been a violation of the process in making selection/ appointment of the appellants, in as much as the vacancies on which the appellants were appointed were never advertised, and strictly speaking these vacancies cannot be termed as "anticipated vacancies" for the simple reason that these vacancies were only created on 18.04.2013 i.e. after the

selection process had begun and advertisement was issued on 01.02.2013.

36. What is also important for our consideration at this stage is that the appellants in the present case have been working as Judicial Officers now for nearly 10 years. They are now Civil Judge (Senior Division). These judicial officers now have a rich experience of 10 years of judicial service behind them. Therefore, unseating the present appellants from their posts would not be in public interest. Ordinarily, these factors as we have referred above, would not matter, once the very appointment is held to be wrong. But we also cannot fail to consider that the appellants were appointed from the list of candidates who had successfully passed the written examination and viva voce and they were in the merit list. Secondly, it is nobody's case that the appellants have been appointed by way of favouritism, nepotism or due to any act which can even remotely be called as "blameworthy". Finally, they have now been working as judges for ten years. There is hence a special equity which leans in favour of the appellants……."

(50) For all the aforesaid reasons, this Court does not find any force in the argument of the petitioners and holds that the vacancy for the recruitment year 2012 was correctly determined by the High Court in terms of Rule 8(1) of the UPHJS Rules, 1975 and there was no occasion for the High Court to consider the appointment of the petitioners on the unforeseen vacancies, which were created or came into existence once the recruitment process started for the said year 2012.

(51) As a sequel to the findings recorded herein above, the other prayers of the petitioners are inconsequential and as such the same are declined. The petitioners are not entitled for any relief as prayed for and as such Writ-A N. 2000845 of 2014 (*Sanjeev Kumar Singh & Ors. Vs State of U.P*) is **dismissed**.

F. **Contention of the parties in Writ-A No. 30173 of 2019, Writ-A No. 11453 of 2020 and Writ-A No. 28511 of 2021.**

(52) As far as Writ-A No. 30173 of 2019 (*Harendra Bahadur Singh & Ors. Vs. State of U.P. and others*) is concerned, the petitioners although have challenged the seniority list of HJS officers of recruitment year 2012 and 2014 as finalized vide the Seniority Committee's Report dated 31.01.2019 and circulated vide letter dated 26.08.2019, however, the ammunition for the said challenge has been grounded on re-calculating/re-determination of the vacancies for direct recruited HJS for recruitment year 2012 and 2014 as per law laid down by the Hon'ble Supreme Court in Nawal Kishore Mishra's case (supra) as well as Rule 8(2) of the UPHJS Rules, 1975. According to these petitioners, Section 3 (2) of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and other Backward Classes) Act, 1994 (hereinafter referred to as '**Reservation Act, 1994**') provides that any unfilled reserved category vacancy should be carried forward and filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and since unfilled reserved seats for the recruitment year 2009 were not carried forward in the recruitment year 2012 and similarly, the unfilled reserved seats of 2012 were not carried forward for recruitment year 2014, there was a fallacy in over determination of seats of direct recruits and in any case the general

category candidates have been appointed in excess as they were the direct beneficiary of these unfilled reserved seats.

(53) Further, these petitioners have tried to interpret Rule 7 of the UPHJS Rules, 1975, which deals with reservation of posts for scheduled casts etc. to mean that since the said Rules provides that there shall be no carry forward of reservation for women and does not specifically bars any such carry forward for Scheduled Caste and Scheduled Tribes posts in similar manner. It has been sought to be argued that the unfilled reserved category vacancies are liable to be carried forward. These petitioners have relied on the judgment of the Hon'ble Supreme Court rendered in **R.K. Sabharwal & Ors. Vs. State of Punjab & Ors. : (1995) 2 SCC 745** to argue that the reserved posts are to be filled amongst the members of reserved categories and the candidates belonging to the General Categories were not entitled to be considered for the reserved post. Thus, it has been argued that the determination of vacancy for direct recruitment in UPHJS for the year 2012 and 2014 were made in excess and on the post meant for reserved category and as such the determination of the vacancy for direct recruits are violative of Section 3(2) of the Reservation Act, 1994, Rule 8(2) of the UPHJS Rules, 1975 and mandate of Hon'ble Supreme Court rendered in Nawal Kishore Mishra's case (Supra).

(54) Apparently, the case of the petitioners in Writ-A No. 30173 of 2019 is not as to the exceeding numbers of direct recruits, beyond the prescribed 25% quota meant for direct recruits in HJS, but they are basically aggrieved by the erroneous calculation of vacancies for General Category candidates within the said 25% quota meant for direct recruits for the recruitment year 2012 and 2014. The petitioners have relied upon paragraph 55, 58 and 61 to 64 of the Nawal Kishore Mishra's case (Supra) and have argued that although, in the said judgment, a specific stand has been taken by the High Court on the administrative side that those unfilled reserved category vacancies of the year 2009 which were filled up from "in-service candidates" were subsequently carried forwarded in the subsequent years as reserved category vacancies with regard to direct HJS Recruitment Year 2009, however, the same was not followed by the High Court in the successive recruitment years of 2012 and 2014, which according to them, have resulted in excess appointment of direct General Category candidates in UPHJS. Thus, according to them, there is an utter violation of the Reservation Act 1994 as well as Rule 8(2) of the UPHJS Rules 1975, which had adversely effected the seniority list. It is the case of the petitioners that although they have sent representation, however, the same has not yielded to anything as the same was rejected arbitrarily by this Court on the administrative side. The petitioners have also relied upon paragraph 19 & 21 of the Nawal Kishore Mishra's case (Supra) to point out that the Seniority Committee in its report dated 31.01.2019 has itself admitted that the calculation of vacancies from 2009 to 2014 was erroneous.

(55) On the other hand, the learned Special Counsel representing for High Court on the administrative side, has sharpened his attack on the various reliefs sought by the petitioners in the aforesaid petition. The learned Counsel has assertively argued that as far as the Recruitment Year 2009 is concerned, whether it is re-determination of vacancy

for direct recruit or the seniority, the same stands settled and has attained finality in view of the judgment of the Hon'ble Supreme Court in **High Court of Judicature at Allahabad Vs. State of Uttar Pradesh : (2018) 15 SCC 439** and reiterated vide orders dated 25.10.2015 and 15.11.2021 passed in Writ Petition (Civil) No. 147/2021 (*Randheer Singh & Ors. Vs High Court of Judicature at Allahabad & Ors.*). As far as assailing the advertisement dated 09.08.2019 relating to recruitment of UPHJS for the year 2018 on the ground of non-availability of vacancies for direct recruit is concerned, the learned Counsel has argued that there was neither any pleading nor any oral argument by the petitioners as to how they were aggrieved or as to how they had locus standi to assail the said advertisement, which in any case was related to subsequent recruitment years. The learned Counsel citing the various dates on which the recruitment for the year 2012 and 2014 started and the appointments were made for that recruitment year, has drawn the attention of this Court to the proposition that the present writs suffered from laches of delay as the same has been preferred belatedly in the year 2019, whereas the recruitments were made in the year 2012 and 2014. Further, a ground of all the petitioners being in service and also being very well in knowledge of the said vacancies and appointment, have been raised by the learned Counsel to counter any relief being granted to the petitioners. The learned Counsel has relied on the judgment of **P.S Sadasivaswamy Vs State of Tamil Nadu : (1975) 1 SCC 152, Union of India Vs C. Girija: (2019) 15 SCC 633** to submit that promotion order ought to be challenged between 6 months to 1 year.

(56) As regards the non-complying with Section 3(2) of the Reservation Act, 1994 read with Rule 7 of the UPHJS Rules, 1975 and resultantly failing to carry forwards reserved category direct recruits seats is concerned, the learned Counsel for the respondents, has countered the said proposition by stating that Section 3(2) of the Reservation Act, 1994 have not been adopted by this Court on the administrative side as it is section 3 (1) of the said Act, 1994, which has only been adopted and as such it was argued that the unfilled vacancies of reserved category candidates are not to be carried forward or filled through Special Recruitment in that very year or in succeeding year(s) as a separate class of vacancy. The learned Counsel has stressed on the point that the UPHJS Rules, 1975 in their letter and spirit envisages that not a single post should be left vacant as could be found in proviso to Rule 8(2) of the UPHJS Rules, 1975, rather than carrying forward the vacant seats. The learned Counsel has relied on the judgment of the Constitution Bench of the Apex Court rendered in **State of Bihar Vs Bal Mukind Sah, (2000) 4 SCC 640** to fortify his argument that the rules of the executive would not apply to the High Court in the absence of adoption or consultation.

(57) It has been also submitted that although the petitioners have sought to challenge the Seniority Committee's reports dated 31.01.2019 and tentative report dated 30.07.2018 of the Seniority Committee, however, none of the grounds addresses to the said challenge and the petitioners have merely highlighted the issue of vacancies being not available for direct recruit by tracing the recruitment of the years 2007 and 2009, which according to the learned Counsel has already attained finality with the delivery of judgment in

High Court of Judicature at Allahabad Vs State of Uttar Pradesh (Supra). Further, according to the learned Counsel, Nawal Kisore Mishra's case (Supra) did not decide the issue of carry forward of reserved category seats for successive year, rather has decided the carrying forward of reserved category seats for the recruitment year 2009 only. The learned Counsel has vehemently argued that the present issue for carrying forward of reserved category seats in successive years in UPHJS was not an issue before the Apex Court and has also relied on the judgment of **Delhi Administration vs Manohar Lal, (2002) 7 SCC 222** and **Natural Resources Allocation, in re: Spcial Ref. 1/2012, (2012) 10 SCC 1** to submit that judgment is binding on only those issues which are decided by the Court.

(58) The learned Counsel has further submitted that as far as the assailing of resolution dated 23.05.2015 passed by the Hon'ble Full Court of this Court is concerned, there had been no alleged flaws or infirmity pointed out by the petitioners either in the pleadings or at the stage of oral arguments and the same reasoning would follow for assailing resolution dated 13.01.2016 of the Rules Revision Committee by the petitioners, wherein in both the resolutions, it has been reiterated that this High Court has not adopted Section 3 (2) of the Reservation Act, 1994. The learned Counsel has relied on the judgment of **Rajasthan High Court Vs Ved Priya & Anr, (2021) 13 SCC 151** for the proposition that collective wisdom of the Full Court deserves due respect and should not be interfered with lightly. An additional ground of non-joinder of parties have also been taken by the respondents, on the premises that all the persons, who are going to be effected by the writ petition, has not been impleaded as a party to the said writ petition and has relied on the judgement of **Rashmi Mishra vs MP Public service Commission, (2006) 12 SCC 724** and **Ranjan Kumar Vs State of Bihar, (2014) 16 SCC 187** to submit that where appointment of candidates are called in question, all appointed candidates are necessary parties.

(59) Further, as far as the Writ-A No. 11453 of 2020 (*Smt. Manorama and others Vs Hon'ble High Court of Judicature at Allahabad and others*) is concerned, the petition has been filed against almost 42 respondents, wherein respondent Nos. 3 to 36 are direct recruit of 2012 and respondent Nos. 37 to 42 are direct recruit of year 2014. These petitioners claim to be placed *en bloc*, within the quota of promotees in the seniority list of 2012 above the direct recruits, on the ground that they had been inducted in the cadre of Higher Judicial Services vide Government Memo dated 04.03.2013, whereas the direct recruits came to be appointed only on 05.08.2013. According to them, since these direct recruits were not even born in the cadre in the recruitment year 2012 i.e till 30.06.2013 (*although at paragraph 37 of the petition it has been stated that the last date for recruitment year 2012 is 31.12.2013*) and as such have relied on the judgment of **R.K. Sabbarwal Vs. State of Punjab:** 1995 (2) SCC 745, to argue that their seniority be fixed with HJS 2012 batch and not with HJS 2014 batch. A further ground for re-determination of the quota for allotment to promotees, merit based limited competitive promotions and direct recruits has been raised by these petitioners, on the ground of the judgment dated 03.10.2018 passed by the Hon'ble Supreme Court in the case of "**Hon'ble High Court of Punjab and Haryana at**

Chandigarh Vs State of Punjab, 2019 (12) SCC 496". It has been submitted by them that after the passing of the judgment, there was no doubt that the un-amended quota of 15% for direct recruits has to be applied to the said post in the cadre prior to the date of amendment and the amended quota of 25% for the direct recruits has to be applied to the post created/ increased after the date of amendment in the rules pursuant to the judgment of the Apex Court in All India Judges' case (Supra). Thus, by the application of the said analogy, it has been submitted that 25% quota for the direct recruit is wrongly applied retrospectively by the respondent from the date when UPHJS Rules, 1975 came into existence to determine the strength of direct recruits, whereas it ought to be that 25% quota would have to be applied only on the enhanced strength, which got enhanced after the relevant date of 21.03.2022 (i.e passing of the All India Judges' case) and 15% of the total cadre strength prior to the said date of 21.03.2022.

(60) However, later on these petitioners confined (see paragraph 39 of the writ petition) their challenge to the appointment of 35 direct recruits in the recruitment year 2012. According to them, even if by applying 25% quota of direct recruitees on the entire cadre strength, there are 64 excess direct recruits in the recruitment year 2012 and as such no direct recruits could had been given any place in the Recruitment Year 2012 and that too, over and above the petitioners, as there was existing no quota for direct recruits in for the recruitment year 2012. The petitioners have also relied upon Rule 8(2) of the UPHJS Rules, 1975 to argue that although the said rule enable filing up of unfilled post of Direct recruitees, whether belonging to reserved category or general category, by promotion from Nyayik Sewa, however it would be a breach of the said rule, in case General category of direct recruitees are selected on the posts meant for reserved category of direct recruits as it would adversely effect the promotional avenues of the promotees.

(61) The petitioners have also submitted that although they have been appointed on promotion under Rule 22(1) of the UPHJS Rules, 1975 in the recruitment year 2012 and they are entitled to be placed *en bloc* over and above the direct recruits of the year 2014, however with the application of roster rule they have been placed below in the seniority list. It is argued that roster cannot be applied between candidates selected in different recruitments 2012 and 2014 and in any case Rule 22 (2) of the UPHJS Rules, 1976 clearly says that roster is applicable only if selection and appointment is done in same recruitment year. Thus, it has been prayed for quashing the seniority list of HJS officers of recruitment year 2012 and 2014 dated 21.01.2019 along with the final seniority report of the judges committee dated 31.01.2019, re-fix the inter-se seniority of the petitioners *qua* the direct recruitees of recruitment year 2012 and 2014 of the HJS Cadre, after calculating the number of post meant for direct recruits in accordance with the judgment of the Apex Court rendered in Punjab & Haryana High Court at Chandigarh's case (Supra).

(62) On the other hand, the respondents have argued that the petitioners have assailed the seniority list after an inordinate delay of over one year, which is not permissible in law as per the judgment of the Apex Court in **B.S Bajwa Vs State of Punjab & Ors. AIR 1999 SC 1510, Malcom Lawrence Cecil D'Souza Vs**

Union of India & Ors. AIR 1975 SC 1269 and **H.S Vanikani & Ors. Vs State of Gujrat & Others, (2010) 4 SCC 301**. The learned Counsel has argued that although the petitioners have sought the relief of not applying the roster rule to their promotion, however these petitioners have failed to challenge Rule 22 (2) of the UPHJS Rules, 1975, which provides for a roster system for promotions under the UPHJS Rules, 1975. Further, according to them, the judgment of the Apex Court rendered in Hon'ble Punjab & Haryana High Court at Chandigarh Vs State of Punjab (supra) relied by the petitioners is of no avail as it has been held in the said judgement that any amendment cannot be to the disadvantage of the existing recruits in a cadre. According to the respondents, all the objections have been duly taken care by this Court on the administrative side vide its final seniority report dated 31.01.2019 at paragraph 7 to 10. Other grounds relating to carrying forward of reserved category seats etc. have been repeated as has been taken in the Harendra Bahadur Singh's case.

(63) Similarly, as far as Writ-A No. 28511 of 2021 (*Randheer Singh and others Vs Hon'ble High Court of Judicature at Allahabad and others*) is concerned, these petitioners had earlier approached the Apex Court with the same relief, wherein vide an order dated 15.11.2021 passed in Writ Petition (Civil) No. 147/2021, the Apex Court permitted these petitioners to withdraw their writ petition before the Apex Court, so as to approach this Court by way of writ petition, keeping in view that other similar writ petitions challenging the seniority list of 31.01.2019 is engaging the attention of this Court. The case urged in the petition is that the petitioners were promoted to UPHJS under Rule 22(3) of the UPHJS Rules 1975 vide notification dated 10.12.2008 and were appointed in stop-gap arrangement as Addititonal District & Sessions Judge against Fast Track Courts after qualifying the suitability test as per the scheme of Rule 20 of the UPHJS Rules, 1975. These petitioners were placed against the temporary ex-cadre posts vide notification issued on 31.03.2011 and were subsequently promoted under Rule 22(1) of the UPHJS Rules, 1976 vide memorandum dated 04.03.2013, which came to be superseded by another memorandum dated 05.08.2013. The petitioners have taken all those grounds for upsetting the seniority list dated 31.01.2019 and seeking for re-determination of vacancies for direct HJS Recruitment 2009 and 2012 as has been taken by the petitioners in Harendra Bahadur Singh's case and Manorama Devi's case, however additional grounds of services having been rendered under principal clause of Rule 22(3) of the UPHJS Rules, 1976 and the same being not recognised for the purposes of seniority and other ancillary service benefits has been raised in the instant petition. Further, various reliefs also included to finalize the seniority list by placing the petitioners at appropriate places in the seniority list dated 23.09.2015 and 26.08.2019, keeping in view the date on which substantive vacancies occurred in their quota and that too without applying the Rota rule.

(64) Per contra, learned Counsel for the respondents have vehemently opposed the said writ petition and has taken all the defence as has been taken by them in the earlier aforesaid two petitions. As far as the submission of Rule 22(3) of UPHJS Rules, 1975 is concerned, it has been submitted that the proviso appended to the said Rule 22 (3) itself clarifies that the promotees on

a short term appointment to the service as a stopgap arrangement cannot be computed under Rule 26 relating to seniority. The learned Counsel has relied on the judgment of **Malook Singh and Ors. Vs State of Punjab and Ors. 2021 SCC Online SC 876** and **Rashi Mani Mishra and Ors. Vs State of UP and Ors. 2021 SCC Online 509** to submit that *ad hoc* services cannot be counted towards determining seniority. It has been further argued by the learned Counsel that although the petitioners are challenging the proviso to Rule 22 (3) of the UPHJS Rules, 1975, however, there had been no challenge to the constitutional validity of the said rules. The learned Counsel has relied on the judgement of **Anup Bhuyan Vs State of Assam & Anr, (2023) SCC Online SC 338** to submit that in the absence of challenge to the constitutional validity of a statute, the same may not be read down. The respondents have also argued that the petitioners have merely challenged the final seniority list dated 31.01.2019 and the committee report of the same date, whereas failed to challenge the tentative seniority list dated 31.07.2018, which was the very basis of the said final seniority list. The learned Counsel relying on the precedent delivered by the Apex Court in **Indian Council for Agricultural Research Vs Central Administrative Tribunal and Anr. 2018 SCC Online All 667** and **P. Chittaranja Menon and Ors. Vs A. Balakrishnan and Ors. (1977) 3 SCC 255** has submitted that writ petition preferred for challenging the consequential order without any challenge to the main order from which cause of action arises is not maintainable and is liable to be dismissed. Additionally, it has also been submitted by the learned Counsel that both in the writ petition filed by Manorama Devi's Case and Randhir Singh's case, although the direct recruits have bene arrayed as parties but their appointment have not been challenged. It has been argued that seniority, which is consequential to appointment/promotion, could not be challenged without challenging the appointment/promotions and has relied on the judgement of **Vijay Kr. Kaul Vs Union of India, 2012 (7) SCC 610** and **Ranjan Kr. Vs State of Bihar, (2014) 16 SCC 187, KH Siraj Vs High Court of Kerala, (2006) 6 SCC 395, Rashmi Mishra V/s MP Public Service Commisison, (2006) 12 SCC 724** and **Amarjeet Singh V/s Devi Rattan, (2010) 1 SCC 417**.

G. **Discussion & Findings**

(65) The learned counsel for the respondents, while defending the various issues raised by the petitioners, have also taken a preliminary objection of non-maintainability of the present writ petitions. It is one of the contention in *Harinder Bahadur's case* that all direct recruits for recruitment year 2012 and 2014 have not been arrayed as a party though averments have been made and sought for quashing of their appointments. According to the learned counsel for the respondents, only 7 incumbents have been arrayed in representative capacity without compliance of Order I Rule 8 CPC read with Chapter V Rule 12 of the Allahabad High Court Rules, 1952 and as such it has been submitted by them that since large number of direct recruits of 2012 and 2014 have not been made a party, the writ of Harinder Bahadur's case may be dismissed for non-joinder of necessary parties.

(66) However, this Court finds that the aforesaid contention of the learned counsel for the respondents is not sustainable both in facts and under law. It

has to be noted that the present petition is being heard and decided along with two other writ petitions challenging the self-same issue, wherein almost all the appointed directly recruited candidates, who are likely to be affected by a decision in the present writ petitions are respondents in that said other two writ petitions, therefore, firstly these direct recruitees are already present before this Court and secondly some of the respondents are already party-respondents in the said writ petition in representative capacity and as such there is no need of dismissing the present petition on the ground of non-joinder of parties. In any case, the sole objective of making a party-respondent in a writ petition is that (i) relief cannot be granted in the absence of such party, (ii) the said party is heard before any adverse orders are passed by the court and (iii) the interest of the party is preserved. In our view, the respondents are very much protected and well represented before this Court.

(67) Further, the Apex Court in **Mukul Kumar Tyagi and Ors. Vs The state of Uttar Pradesh and others, (2020) 4 SCC 86,** laid emphasis that when there is a long list of candidates against whom the case is proceeded, then it becomes unnecessary and irrelevant to implead each and every candidate. If some of the candidates are impleaded, then they will be said to be representing the interest of rest of the candidates as well. The relevant portion of paragraph 75 from the judgment is reproduced below :

"81…… We may further notice that Division Bench also noticed the above argument of non-impleadment of all the selected candidates in the writ petition but Division Bench has not based its judgment on the above argument. When the inclusion in the select list of large number of candidates is on the basis of an arbitrary or illegal process, the aggrieved parties can complain and in such cases necessity of impleadment of each and every person cannot be insisted. Furthermore, when select list contained names of 2211 candidates, it becomes unnecessary to implead every candidate in view of the nature of the challenge, which was levelled in the writ petition. Moreover, few selected candidates were also impleaded in the writ petitions in representative capacity."

(68) Recently, the Apex Court in **Ajay Kumar Shukla V/s Arvind Rai, (2022) 12 SCC 579**, after tracing the various precedents on the issue of impleadment of parties, it has been held that in matters relating to service jurisprudence, it is not essential to implead each and every one who could be affected but if a section of such affected employees is impleaded then the interest of all is represented and protected. Thus, it was observed by the Apex Court in the following words :-

"51……..In view of the above, it is well settled that impleadment of a few of the affected employees would be sufficient compliance of the principle of joinder of parties and they could defend the interest of all affected persons in their representative capacity. Non-joining of all the parties cannot be held to be fatal."

(69) Thus, in view of the above, the ground of non-joinder of parties being not fatal, the ground of non-joinder of all the direct recruits of recruitment year 2012 and 2014 in *Harinder Bahadur's case* cannot take the respondents any further and as such the same is rejected.

(70) Further, as far as the other writ petitions being that of *Manorama's case* and *Randheer Singh's Case* are concerned, it has been contended that although direct recruits have been made a party, however their appointment have not been challenged. According to the respondents, since seniority is a consequential of appointment/promotions, in the absence of any challenge to the basic order of appointment, both the writs are liable to be dismissed. Various judgments including **Vijay Kr. Kaul Vs union of India**, (2012) 7 SCC 610, **Ranjan Kr. Vs State of Bihar**, (2014) 16 SCC 187, **KH Siraj Vs High Court of Kerala**, (2006) 6 SCC 395, **Rashmi Mishra V/s MP Public Service Commission**, (2006) 12 SCC 724 and **Amarjeet Singh V/s Devi Rattan**, (2010) 1 SCC 417 has been cited at the bar. Further, another ground of non-maintainability has been taken in Harendra Bahadur Singh's case, in as much as it has been contended by the respondents that the appointments of direct recruits have been challenged in 2019 though they were appointed in 2013 and 2015. Thus, according to them, since the appointments have been challenged in a vague manner and without impugning their respective order of appointments and details of appointees and most importantly, the challenge itself was belated by 4-6 years without any explanation for such inordinate delay, all the three writ petitioners were not maintainable. It has also been argued that order of promotion/ appointment/seniority should be challenged by a person aggrieved within 6 months or at most 1 year as has been held in various precedent.

(71) This Court finds that no doubt, the issue raised by the learned Counsel for the respondents are serious in nature and would have an adverse effect on the outcome of the writ petition, however, this Court in the facts of the present case and keeping in view the larger issue raised by the petitioners, defer the aforesaid issue to be dealt in the later part of this judgment. Thus, this Court would first take up the core issue and thereafter decide the other ancillary issues, which have been raised in these petitions.

(72) After hearing the parties at length on various issues agitated in the present writ petitions, this Court is of the view that the hinge of the argument of the Nyayik Sewa Promotees in the present petitions is relating to the re-determination of the vacancy available for the general candidates for the recruitment year 2009, 2012 and 2014 as according to them, although the High Court had been following Rule 8(2) of the UPHJS Rules, 1975 and had been increasing the number of seats for promotion from the Nyayik Sewa corresponding to the number of less candidates selected in the direct recruitment of that particular year and have also crediting back the seats to the direct recruit in the next recruitment year as per the proviso to Rule 8(2) of the UPHJS Rules, 1975, however, in crediting back the seats to the direct recruitment in the next year, the rule of carrying forward of reserved seats was not followed, which led to selection of excess general candidates in the recruitment year 2009, 2012 and 2014. In claiming that excess general candidates of direct recruits have been appointed against seats meant for reserved category, these promotee petitioners have sought to interdict the seniority list of HJS officers of Recruitment Year 2012 and 2014 and final Seniority Committee's Report dated 31.01.2019 circulated vide letter dated 26.08.2019.

(73) Before, this Court embarks on to decide the aforesaid issue, it is of paramount significance that first the benchmark or rather the reference point for deciding the said issue may be determined, particularly in view of the matter that in (i) *Manorama's case*, it has been sought to be agitated by the petitioners for determining the quota between the three sources of recruitment, the cadre strength which existed prior to the amendments incorporated in the rules pursuant to Judgment of the Apex Court in All India Judges' cases (Supra) and subsequent to the amended Rrules, have to be treated differently in view of the judgment of the Apex Court in Hon'ble High Court of Punjab and Haryana at Chandigarh V/s State of Punjab (supra) and (ii) *Randheer Singh's case*, re-determination of the vacancy for direct recruits for the year 2009 and 2012 has been prayed for in the writ petition.

(74) Having said so, this Court cannot be oblivious to the fact that the seniority report dated 23.09.2015 read with Supplementary Seniority Report dated 06.04.2016 for recruitment year 2009, which was prepared by this High Court on the administrative side came to be approved by the Hon'ble Full Court of this Court on 14.04.2016. These reports consisting of the determination of seats in each cadre and the seniority of the officers till the recruitment year of 2009 was assailed before this Hon'ble Court in Writ Petition No. 16569 (S/B) of 2016 (Smt. Premkala Singh and Others Vs. High Court of Judicature of Allahabad and Others), wherein a Co-ordinate Bench of this Court refused to interfere with the determination of vacancies in each cadre, however had set-aside the determination of seniority on the ground that no quota-rota rule was applied while preparing the seniority list till the recruitment year 2009.

(75) The said judgment of the Co-ordinate Bench came to be impugned before the Apex Court limited to the extent of quashing the seniority list by this Court on the administrative side, wherein the Hon'ble Supreme Court, while allowing the civil appeal, set-aside the directions of this Court by which the determination of seniority was made by the seniority report dated 23.09.2015 read with supplementary seniority report dated 06.04.2016 for the recruitment year 2009 was set-aside by the Co-ordinate Bench of this Court in the case reported as "**High Court of Judicature at Allahabad and Ors. Vs. State of U.P & Ors." (2018) 15 SCC 439.** Significantly, the Apex Court observed that from 21st of March, 2002 to 2008, since a different regime of Rules was stipulated under the judgment of All India Judges' case and the Rules came to be amended by the High Court only on 9th of January, 2007 and notwithstanding the availability of vacancies in promotion quota, the promotee officers, who were eligible and were officiating against the said vacancies, could not be recruited as they came to be recruited only after the suitability test was held for the first time in the year 2008.

(76) Thus, the Apex Court, although held that the quota-rota rule to be mandatory as per the Rules, however, in the said peculiar facts of the case that the essential suitability test was conducted for the first time in 2008 only, did not find any fault in the finding of the Committee that these promotee's were entitled to *enbloc* seniority without the quota-rota system. It was also held in the said judgment that the direct recruits could not be given seniority for the period prior to their appointment for

both the 2007 as well as the 2009 recruitment as the same would create imbalance and injustice.

(77) Apparently, after the passing of the aforesaid judgment, the determination of vacancies in each cadre as well as the seniority list till the recruitment year 2009 as could be found in the seniority report dated 2309.2015 and supplementary seniority report dated 06.04.2016 stands finalized & settled for all intents and purposes, which has also been resonated in the report dated 31.07.2018 of the Hon'ble Five Judges Seniority Committee as well as the final seniority report dated 31.01.2019 of the Hon'ble three Judges Committee.

(78) Further, recently the said position was reiterated by the Hon'ble Apex Court in **Writ Petition (Civil) No. 147/2021 (Randheer Singh & Ors. Vs High Court of Judicature at Allahabad & Ors.),** wherein vide an order dated 25.10.2021 as well as Order dated 15.11.2021, the Hon'ble Supreme Court observed that the challenge to seniority list dated 23.09.2015 has attained finality in terms of decision in the case of High Court of Judicature at Allahabad Vs State of Uttar Pradesh, reported in (2018) 15 SCC 439 and categorically refused to reopen the challenge on any new ground. The Hon'ble Supreme Court in categorical terms vide an order dated 25.10.2021 held :-

" Mr. Patwalia, learned Senior counsel appearing for the petitioners, at this stage, contends that stated decision does not deal with all aspects. As noted earlier, we will not permit the petitioners to assail the seniority list dated 23.09.2015 and more so, at this distance of time, in the year 2021. The grievance of the petitioners in respect of that seniority list will have to be negated even on the principle of laches."

(79) Thus, this Court is clear in mind that the final seniority list dated 23.09.2015 as supplemented by report dated 06.04.2016, which corresponds to the recruitment year 2007 & 2009 has attained finality and in all fairness and Judicial proprietary it would be considered as the benchmark for adjudicating the present issues raised in these writ petitions pertaining to the recruitment year 2012 and 2014.

(80) Thus, as far as one of the prayers in the *Randheer Singh's case* for re-determination of the vacancy for direct recruits for the year 2009 is concerned, the same cannot be entertained by this court and the same is hereby rejected. That brings this court to the contention made by the petitioners in Manorama Devi's case, wherein relying on the judgment of the Hon'ble Apex Court in **Hon'ble High Court of Punjab and Haryana at Chandigarh V/s State of Punjab, 2019 (12) SCC 496,** it has been sought to be agitated by the petitioners therein for determining the quota between the three sources of recruitment on the basis of cadre strength which existed prior to the amendments incorporated in the rules pursuant to Judgment of the Apex Court in All India Judges' case (Supra) and subsequent to the amended Rules. Although this Court finds that during the oral argument, the said issue was not pressed and no argument has been addressed on the said point by either of the parties, as the petitioners modulated and restricted their argument to having made 35 excess direct recruit appointed in the recruitment year 2012, however it is important to note that the judgment passed

by the Apex court in the case of High Court of Punjab & Haryana's Case (supra) is not helpful to the petitioners in the present context. It must be understood that in the said case, the Hon'ble Supreme Court had examined the aspect as to whether the newly introduced 25% quota of *"out of turn promotion"*, which had only come into existence after the passing of the All India Judges case (Supra) can claim 25% quota of the cadre strength in the total cadre strength of Punjab Superior Judicial services and can the promotee Judges by virtue of the said All India Judges' case (supra) and the pursuant amendment carried by the State can suddenly become excess, so as to effect in all future vacancy. This Court finds that even the Hon'ble Apex Court in that said case has held at paragraph 49 as follows :-

"49. The judgment of this Court in All India Judges case (3) [*All India Judges Assn. (3) v. Union of India*, (2002) 4 SCC 247: 2002 SCC (L&S) 508] being prospective, the ratio of officers as existing before unamended rules cannot be adversely affected. A promotee before the amendment of the 2004 Rules, who was well within their quota, suddenly cannot go out of their quota and become an excess merely on the strength of amendment of Rules, which are prospective in nature. For determining the quota, the cadre strength, which existed prior to amended rules and subsequent to the amended rules have to be treated differently. Promotees quota, which was 75 per cent prior to the 2004 Rules makes 66 posts in their quota as before amendment dated 15-1-2004, when the cadre strength has been increased from 89 to 107, 18 posts have to be further added to the cadre. This increase having been made after the amendment of the Rules dated 15-1-2004, on this cadre strength, the Rules as amended will be applied for bifurcation of quota. On 18 newly created posts, 50 per cent comes to 9, for out-of-turn promotees 4.5 and for direct recruits 4.5. Thus promotee officers on or after the increase of the cadre could have been 66+9 i.e. 75. In the appeal filed by the High Court, it is also indicated that 10 promotees were effected in October 2004 under 50 per cent quota of merit-cum-seniority. The rules providing 25 per cent quota for out-of-turn promotion being in place, at least few vacancies ought to have been given to the out-of-turn promotees. There is no detail of any further promotion or appointment made after 2004 to 2008." **(emphasis supplied)**

(81) Relating to the present context, it is clear from the above observation of the Apex Court that the number of direct recruits, who were existing prior to the amendment, cannot be adversely effected and an officer, who was appointed as a direct recruit, cannot be suddenly termed to be in excess. The point being made in the said case, if accepted, would open a pandora box, in as much as re-determination of post and seniority in each cadre has to be worked out freshly from the very inception of the UPHJS Rules of 1975, which needless to say would not only topple the entire seniority list but would have a catastrophic effect. In any case, any re-determination of the vacancy or tinkering with the seniority list prior to the recruitment year 2009 would be in the teeth of the judgment passed by the Apex Court in **"High Court of Judicature at Allahabad and Ors. Vs State of U.P & Ors." (2018) 15 SCC 439.** Further, even this Court is convinced that opening of the re-determination of the vacancy would not be justifiable on the facts of the present case.

(82) According to this Court, the common ground taken in all the three petitions in sum and substance is that since the seats meant for reserved candidates belonging to direct recruits had remained vacant in the recruitment year 2009, 2012 and 2014, they ought to be carried forward as per section 3(2) of the Reservation Act, 1994 read with Rule 7 of the UPHJS Rules, 1975. It is the submission of the petitioners that Rule 7 of UPHJS Rules, 1975 relating to reservation and Rule 8 (2) of UPHJS Rules, 1975 relating to carry forward of quota of direct recruit has to be read to mean that unfilled reserved quota in direct recruits has to be carry forward to the next recruitment year and has to be dealt as per the provisions of Section 3 (2) of the Reservation Act, 1994. The learned Counsel for the petitioners had been in chorus asserting that since the respondents have in Nawal Kishore Mishra's case, have not only taken a stand before the Hon'ble Supreme Court that they have implemented the Reservation Act, 1994 in its full spirit, but also in compliance to the said judgment have identified 34 seats for reserved category, which were not carried forward for the recruitment year 2009 and have also decided to adjust these 34 seats in subsequent recruitment years, the concept of carry forward of reserved seats has to be implemented in all successive years by the High Court on the administrative side.

(83) First and foremost, it has to be understood as to whether the mandate to carry forward reserved category vacancy is applicable to the recruitment of Uttar Pradesh High Judicial Services or not in view of the applicable rules. Answer to the said question would be a condition precedent to the second question, as to whether the said carry forward was required to be implemented for the recruitment year 2012 and 2014 or as to whether re-determination of the vacancy is required for the direct recruit for the recruitment year 2012 and 2014.

(84) Since, the issue before this court is related to carrying forward of unfilled reserved category seats of direct recruit in the following years, which essentially flows from the provision contained in Section 3 (2) of the Reservation Act, 1994, it would be appropriate to first reproduce the said section:

"Section 3 (2) says

If, in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in sub-section (1)]"

(85) Admittedly, Rule 7 of the UPHJS Rules, 1975 is the only rule, which provides for reservation of posts of scheduled caste etc. Apparently, Rule 7 of the UPHJS Rules, 1975 says as follows:

"7. **Reservation of posts for Scheduled Caste, etc.-** Reservation to posts in the service for the members of the Scheduled Castes, Scheduled Tribes and other categories including women shall be in accordance with orders of the

Government for reservation as adopted by the High Court.

Provided that twenty percent horizontal reservation for women to posts in service in direct recruitment from Bar in Uttar Pradesh Higher Judicial Service shall be subject to suitability i.e. if the sufficient number of women candidates is not available, then and in that event the reservation shall not have any operation to the extent of such unavailability.

Provided further that there shall be no carry forward of reservation for women."

(86) Rule 7 of UPHJS Rules, 1975 specifically provided that all reservation to the posts for the members of SC and ST or other categories and prescribes for two conditions viz. (i) it should be in accordance with orders of the Government for reservation (ii) it should be adopted by the High Court. So, according to this Court, reservation has to be provided in terms of some order of the Government related to reservation and most importantly the said Government Order should be adopted by the High Court.

(87) As to whether the Reservation Act, 1994 was adopted by the High court or not, the Hon'ble Apex Court in Nawal Kishore Mishra's case at paragraph 32 has categorically held that :

"32. *For the sake of argument, even if we ignore such an extended contention made on behalf of the High Court by relying upon Article 13(3)(a) of the Constitution, we are convinced that having regard to the specific prescription providing for reservation under Section 3(1) of the Reservation Act, 1994 and there being no other specific order of the Government providing for reservation in any other manner and as stated by us no other specific order of the Government, as was previously issued viz. the one dated 18-7-1972 after the emergence of the Reservation Act of 1994, we hold that for all practical purposes the usage of the expression "order" in Rule 7 is only referable to the provision for reservation as contained in Section 3(1) of the Reservation Act, 1994. Therefore, if the said Act was adopted by the High Court in exercise of its powers under Rule 7, that would be sufficient for applying the rule of reservation. Therefore, we hold that in the event of valid adoption of the rule of reservation of the Reservation Act of 1994 by the High Court by exercising its power under Rule 7 of the High Court Rules the same would be valid and in accordance with law."*

(88) Apparently, the Apex Court has held that the usage of the expression "order" in Rule 7 of UPHJS Rules, 1975 is only referable to the provisions for reservation as contained in Section 3(1) of the Reservation Act, 1994, however the contention of the petitioners in all these three petitions had been consistently that in Nawal Kishore Mishra's case even the provisions of Section 3(2) of the Reservation Act, 1994 was accepted by the Hon'ble Apex Court and in that regard has also asserted and relied on Paragraph 55, 58 and 61 to 64 of the said judgment to contest that the Hon'ble Supreme Court had directed for carrying forward of the unfilled reserved category quota to the next year. Although the argument of the learned counsel for the petitioners appears to be attractive in the first blush, however on a deeper scrutiny of the judgment, the said contention of the petitioners cannot be countenanced for the reasons that the said proposition has been developed on a

selective reading of the said judgment passed by the Apex Court. It would be appropriate to see that when a direct question was poised to the Apex Court as to whether the provision of Section 3(2) of the Reservation Act, 1994, would be applicable for recruitment of the post of direct recruit district Judges. The Hon'ble Supreme Court, while quoting extensively from the Constitutional Bench judgment of Bal Mukund's case, held in the following words at paragraphs 53 and 54 of the Nawal Kishore's judgment;

***53**. When we consider the application of Section 3(2) of the Reservation Act, 1994 a further question arises as to whether the application of the said section can be made in the matter of recruitment for the post of direct recruit District Judges. In this context, the principles set down by the Constitution Bench [State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640: 2000 SCC (L&S) 489] of this Court require to be noted:*

"(l) Having regard to Article 16(4), the High Court being a high constitutional functionary would also be alive to its social obligations and the constitutional guideline for having a scheme of reservation to ameliorate the lot of deprived reserved categories like SC, ST and OBC. But for that the Governor in consultation with High Court should make appropriate rules and provide for a scheme of reservation for appointments at grassroots level and even at the highest level of District Judiciary. If that was not done, the State Legislature cannot upset the entire apple cart and by bypassing the constitutional mandate of Articles 233 and 234 lay down a statutory scheme of reservation governing all State services including judiciary.

(m) Even in that respect it is obvious that maintenance of efficiency of judicial administration is entirely within the control and jurisdiction of the High Court as laid down by Article 235.

(n) If the proper course of formulating the scheme in the form of a rule by the High Court to provide for reservation is not made, that would deprive of the right to suggest the consultative process by way of its own expertise that for maintenance of the efficiency of administration of judicial service controlled by it 50% reservation may not be required and/or and even lesser reservation may be required or even may not be required at all."

***54.** Keeping the said principles in mind when we consider, even though the High Court having taken into account the constitutional mandate as prescribed under Articles 16(1), 16(4) and 335 and specifically provided in Rule 7 for applying the rule of reservation by adopting the same, the question is as to what extent the High Court decided to adopt the rule of reservation. In this context, when we refer to the specific content of Rule 7, it specifically provides that reservation to post in the service for the members of SC, ST and other categories including women should be in accordance with the orders of the Government for reservation "as adopted" by the High Court. Therefore, even while applying the rule of reservation, it must be seen as to what extent the High Court chose to adopt the rule of reservation. When we refer to the resolution of the Full Court by which we have found that the High Court decided to apply the rule of reservation, we have to in turn refer to the resolution passed by the Selection and Appointment Committee dated 24-3-2009 which resolution was adopted by the Full Court and that is how*

the rule of reservation came to be implemented. The said resolution of the Selection and Appointment Committee specifically mentioned that the "vacancies" should be filled up applying the "reservation" as per the Reservation Act, 1994 as amended up to date."

(89) The Hon'ble Apex Court clearly held that even while applying the rules of reservation, it was mandatory to be seen as to what extent the High Court had chosen to adopt the rule of reservation. This court finds that even before seeing the resolution of the High Court and examine the extent it has adopted the rule of adoption, it is clear as day light that the Hon'ble Apex Court in Nawal Kishore Mishra's judgment at paragraphs 55 and 56 has clarified and held that the High Court had adopted the Reservation Act, 1994 limited to the extent of providing the prescribed percentage of reservation under Section 3(1) of the Reservation Act, 1994 and there was no question of invoking the provisions of Section 3(2) of the Reservation Act, 1994, in the following words:

55. *We are, therefore, clear of the position that what was adopted was "reservation" simpliciter and not other consequences. Therefore, there is no question of invoking Section 3(2) of the Reservation Act, 1994 relating to consequential action to be taken if the posts of direct recruit District Judges are not filled up. Section 3(2) only prescribes as to the manner in which unfilled reserved seats are to be filled up by resorting to fresh selection in that very year and in the event of the posts still not being filled up, continue to retain the posts in the reserved category and notify the same in the subsequent years for being filled up. Such a consequence cannot be stated while applying Rule 7 of the High Court Rules which merely refers to provision for reservation and nothing more. Insofar as provision for reservation is concerned, in the absence of any government order prescribing reservation, the only provision available is Section 3(1). Section 3(2) is only a methodology to be followed for filling up the unfilled reserved posts. As far as the said methodology in respect of the unfilled reserved posts of direct recruit District Judges is concerned, it is governed only by Rule 8. In fact, even by applying Rule 8(2) by virtue of the proviso to the said Rule, the interest of the reserved category candidates is sufficiently safeguarded which is preserved and filled up in the selection to be made in the future years.*

56. *Therefore, if we consider the adoption made by the High Court, as regards the rule of reservation, we find that what was adopted was to apply the "reservation" as provided under the Reservation Act of 1994 while filling up the vacancies of direct recruit District Judges. In other words, the High Court chose to adopt the prescription of various percentage of "reservation" in the Reservation Act, 1994 and stop with that. To put it differently, what was adopted by the High Court was to the limited extent of providing the prescribed percentage of "reservation" under Section 3(1) of the Reservation Act, 1994 and nothing beyond that. Since the principles laid down in the Constitution Bench decision of this Court succinctly stated as to how Articles 233 to 235 of the Constitution empower the High Court to maintain its independent functioning by allowing its recruitment process by prescribing its own limitations and not to be affected by even a statutory prescription relating to reservation, it must be stated that in order to ensure that the*

independence of institution of judiciary is safeguarded, such a strict construction of its decision pertaining to the rule of reservation must be maintained or otherwise, as cautioned by this Court in the Constitution Bench decision, that would impinge upon the very basic structure of the Constitution vis-à-vis the Judiciary.

57. *Therefore, we hold that by virtue of the adoption of the rule of reservation by invoking Rule 7 when the High Court decided to apply only to the extent of prescribed percentage of "reservation" for different categories, namely, SC, ST and OBC as provided under Section 3(1) of the Reservation Act, 1994 in all other respects, it must be held that it would be governed by its own rule, namely, the rules of the High Court pertaining to the judicial service. In this context, a question may arise that earlier this Court directed the High Court in its order dated 15-11-2010 passed in Malik Mazhar Sultan v. U.P. Public Service Commission [(2010) 15 SCC 47 : (2013) 1 SCC (L&S) 541] to go in for a special recruitment in that very year itself which was apparently based on the prescription contained in Section 3(2) of the Act and by going by that direction should it not be held that the said procedure should follow for all time to come. It will have to be stated that the said order passed in an IA cannot be taken as a final statement of law when the legal principle has been succinctly set out with reference to the application of rule of reservation in so many words in the decision of the Constitution Bench of this Court. Therefore, based on the said order, it cannot be held that various other provisions contained in the Reservation Act of 1994 would get attracted."*

(90) Further, on a plain reading of the aforesaid paragraphs of the judgment, it is easily derivable that the Apex Court has not only clarified that the percentage of reservation was adopted by the High Court as and in operation of Rule 7 of the UPHJS Rules, 1975 but also elaborated that there was no question of invoking Section 3 (2) of the Reservation Act, 1994 relating to the methodology of carrying forward the unfilled reserved seats as the same was being taken care by Rule 8 (2) of the UPHJS Rules, 1975. As a matter of fact, the Hon'ble Apex Court went one step beyond in even holding that except for the prescribed percentage of reservation for different categories as had been adopted by the High Court, all other aspects must be governed by the own rules of High Court for this judicial service.

(91) This Court finds that the concept of "carry forward" of any seats is conspicuously missing altogether in the provisions of the UPHJS Rules, 1975. The only place, the said phrase has been used is the proviso to Rule 7, wherein it has been quite vocal in barring any 'carry forward", by saying that there shall be no carry forward of reservation for women. Although nothing has been mentioned about the reserved category, either by interpolating or extrapolating the express provisions, however, the fact of the matter remains that the said provisions must be understood that barring any "carry forward", the legislature had always intended to not enter into the rigmarole of carrying this seats to next recruitment year and rather fill all the post in that particular year itself, so that there are no seats left vacant, owing to any reasons of shortage of any candidate/women. The said intention is clear from the insertion of sub-Rule (2) of Rule 8 of the UPHJS Rules, 1975.

(92) Further this Court finds that the legislature had been very careful in not using the phrase "carry forward" in the proviso to Rule 8(2) of the UPHJS Rules, 1975 as it invariably says that the number of vacancies filled in by the promotees/Nyayik Sewa due to shortage of candidate of direct recruit shall be taken into consideration for fixing the number of vacancies to be allotted to the quota of direct recruits in the next recruitment, and the quota for direct recruits may be raised accordingly, of course to the condition that the percentage of direct recruits in the service does not in any case exceed 25% of strength of the service. In other words, the limited sense in which the concept of carry forward can be loosely connected is the proviso to Rule 8 (2) of the UPHJS Rules, 1975, which is primarily for the reasons that while making good the shortfall of direct recruits at the next recruitment, the direct recruits do not encroach upon the quota of promotees. This Court finds it profitable to note that the Hon'ble Apex Court in the case reported as ***Ashok Pal Singh v. U.P. Judicial Services Assn.,*** (2010) 12 SCC 635 held that the purpose and intent of Rule 8(2) of the UPHJS Rules, 1975 is *to ensure that no vacancy remains unfilled for want of adequate number of direct recruits under their quota.* The Apex Court in that judgment gave reasons that because there are reasonable chances of adequate number of candidates being not available for direct recruitment, whereas usually sufficient number of candidates will be available for promotion, Rule 8(2) of the UPHJS Rules, 1975 was enacted and the right of the direct recruits were protected by enacting proviso to the said Rule. Thus, the Court in the said judgment concluded that the total vacancies to be filled at a recruitment shall have to be filled by applying sub-rules (1) and (2) of Rule 8 and its provisos and in that sense all vacancies, which are not filled by direct recruitment, get filled by promotion and there will be no carry over. Thus, it was concluded by the Hon'ble Apex Court that there is only a limited 'carry over' of unfilled direct recruitment vacancies in the manner stated in Rule 8(2) of UPHJS Rules, 1975 and the first proviso thereto.

(93) Further, it has come on records that consequent to the judgment of the Hon'ble Supreme Court of India in ***Naval Kishore Mishra (Supra)***, the issue of adoption of Section 3(2) of the Reservation Act, 1994, was considered by the Hon'ble Rules Revision Committee of this Court in its meeting convened on 31.01.2016, wherein it was resolved that the Full Court of this Hon'ble Court in its meeting held on 23.05.2015 had clearly resolved to adopt only Section 3(1) of the Reservation Act 1994 and not Section 3(2) of the Reservation Act 1994 which provides for consequential effect of carry forward of vacancies in the reserved class. The said resolution dated 31.01.2016 of the Rules Revision committee is to the following effect:

"……the High Court had not adopted Rule 3(2) of the Reservation Act, 1994, the unfilled vacancies of the HJS meant to be filled by direct recruitment will eb carried forward in terms of the judgment of the Supreme Court but the rule of carry forward contained in Section 3(2) will not apply…..

This apart, the Full court of the High Court in its meeting held on 23 May 2015 had clearly resolved to adopt only section 3(1) of the Reservation Act and not section 3(2) which provides for the consequential effect of carry forward of the vacancies in the reserved class.

No material has been placed before us which may persuade us to apply the rule of carry forward of the vacancies of the reserved categories in the subsequent year for the other posts within the purview of the High Court. We, therefore, do not consider it appropriate to recommend that section 3(2) of the Act may be adopted and the rules require any change or amendment."

(94) This Court finds that even the Hon'ble Selection Committee of Five judges has considered the said aspect extensively in its report dated 31.07.2018 and has also recorded that the aforesaid resolution of the Rules Revision Committee was also approved by the Hon'ble Chief Justice of this Court. It would be mention herein that the Hon'ble Apex Court in Ashok Pal Singh's case (Supra), while appreciating the High Court Sub-Committee in making a sincere effort to implement the Rules and the directions observed that unless the exercise by the High Court through its Sub-Committee (approved by the Full Court of the High Court), is arbitrary or is in non-compliance with any specific direction of this Court, it will not be open to question. To the same effect is the judgment reported in ***Rajasthan High Court Vs. Ved Priya and Another*, (2021) 13 SCC 151**, wherein it was held that given the responsibility and powers bestowed upon the High Court under Article 235 of the Constitution of India, the collective wisdom of the Full Court deserves due respect, weightage and consideration in the process of judicial review.

(95) Therefore, this Court is in agreement of the learned counsel for the High Court on the administrative side that firstly the said sub-section was never adopted by the High Court on the administrative side and secondly, a clarification has been made to that effect by the Full Court meeting on 23.05.2015 and subsequent Rule Revision Committee on 31.01.2016. As far as the judgment of the Hon'ble Supreme Court in Nawal Kishore Mishra's case is concerned, the same is of no help to the petitioners as has been discussed herein above. It may be mentioned also that if Nawal Kishore Mishra's case was filed by general candidates of the direct recruits praying the unfilled seats of the reserved category, the present bunch of petitions have been filed by the Promotees/Nyayik Sewa praying the unfilled seats of the reserved category in the successive year, in as much the promotees by claiming that unfilled reserved seats should be carry forward for direct recruit, very well knows that seeing the track record and availability of less reserved category seats, the promotion seats would be increased in that year by the operation of Rule 8(2) of the UPHJS Rules, 1975. This Court finds that none of the petitioners belong to the reserved category claiming a seat in the quota of direct recruitment or there is no averment to the effect that any eligible reserved category candidate did not find any place in the select merit list as the same was occupied by a general category candidate under the direct recruitment quota. Although, this Court does not find any adverse in the locus of the petitioners in filing the present petition, however the reasons appear to be far from actually showing any concern for the reserved category candidates of the direct recruitment quota.

(96) Further, as has been rightly pointed by the learned Counsel appearing for the High Court on the administrative side that the arguments of the petitioners

regarding adoption of Section 3(2) of the Reservation Act, 1994 in terms of Rule 7 of the UPHJS Rules, 1975, for carry forward of vacancy of the Reserved Category to be filled by the Reserved Category only in the succeeding recruitment years is a self-defeating argument, as presently by the operation of Rule 8(2) of the UPHJS Rules, 1975, the unfilled vacancies are to be filled from the Officers of the promotees/Uttar Pradesh Nyayik Seva and in case Section 3 (2) of the Reservation Act, 1994, is applied the unfilled vacancies will have to be filled up as backlog in the same year or succeeding years and such unfilled vacancies may not be filled by UPNS Officers by adoption of Rule 8(2) of the UPHJS Rules, 1975. In fact, the operation of Rule 8(2) would run contrary to section 3(2) of the Reservation Act, 1994.

(97) For all the aforesaid reasons, this Court holds that there is no provision under the UPHJS Rules, 1975 for carry forward of unfilled vacancies of reserved category as per the Section 3(2) of the Reservation Act, 1994, as the same has not been adopted by the High Court on the administrative side and most importantly, the said carry forward would run contrary to the existing provisions of the UPHJS Rules, 1975.

(98) Since, this Court has held that Section 3(2) of the Reservation Act, 1994 was never adopted by this High Court on the administrative side and the same is not applicable on a plain reading of the UPHJS Rules, 1975, there is no need to answer the second question, as to whether the said carry forward was required to be implemented for the recruitment year 2012 and 2014. However, the quest of this court to determine as to whether the determination of the vacancy or the promotion for the direct recruit for the recruitment year 2012 and 2014 requires any interference.

(99) There is another aspect of the matter and the aforesaid issue can also be viewed from a different perspective, which is in fact the next significant question, which falls for consideration of this court. Apparently, it has also been contended by the petitioners that the Hon'ble Supreme Court in ***Nawal Kishore Mishra*** case ***(Supra)*** had directed for filling up of vacancies of unfiled reserved category seats of direct recruit for the year 2009 in the future recruitment and which has infact been complied by the High Court on the Administrative side. Thus an analogy has been sought to be drawn, by these petitioners to the effect that similar filling of vacancies ought to be of unfilled reserved category seats of direct recruit for year 2012 & 2014 and the same having been not done, the determination of vacancy & seniority list of 31.01.2019 is liable to be set-aside.

(100) In answering to the said issue, it would first be appropriate to understand the context in which the Hon’ble Apex Court came to pass the aforesaid Judgment of *Nawal Kishore Mishra* (Supra). Briefly stating, a Writ Petition came to be filed by a qualified but unselected candidate belonging to unreserved category before this Court, *inter alia* contending that quota of Direct Recruits should be filled up by Direct Recruits only and only if no other successful candidate was available from the Direct Recruits belonging to any of the categories i.e reserved or unreserved, then and then alone the High Court could have resorted to promotion of "in-service candidates" of UPNS under Rule 8(2) of the UPHJS Rules, 1975. Apparently, the

said contention did not find favour with this Court and the said Writ Petition was dismissed, against which an Appeal came to be filed before the Hon'ble Apex court. The facts curled by the Hon'ble Apex Court could be found at para 2 to 4 of the judgment passed in Nawal Kishore Mishra's case (Supra), which inter-alia stated:

*"**2.** The challenge in the writ petitions was to the appointment made by the High Court to the post of direct recruit District Judges in the unfilled reserve vacancies, to the extent of 34 in number by way of promotion from the "in-service candidates" by applying Rule 8(2) of the Uttar Pradesh Higher Judicial Service Rules, 1975 (hereinafter referred to as "the Rules"). The Division Bench of the High Court dismissed the writ petitions. Aggrieved, the appellants have come forward with these appeals.*

***3.** To trace the brief facts, on 15-4-2009 the High Court notified and called for applications for filling up 68 vacancies in the Higher Judicial Service. Of the 68 vacancies, 24 vacancies were meant for open category, 21 for Other Backward Classes (OBC), 21 for SC and 2 for ST. It is not in dispute that all the 24 vacancies in the open category got filled up on merits. Of the 21 vacancies in the OBC category, 10 alone could be appointed leaving 11 vacancies to remain. All the SC/ST vacancies numbering 23 were also not filled up. In the unfilled 34 vacancies, the High Court promoted the "in-service candidates". The appellants were successful in the written test and also attended the interview.*

***4.** According to the appellants, even applying Rule 8(2) of the Rules, all the 68 vacancies were direct recruit vacancies and that in the first instance, the unfilled vacancies should have been filled up only from the other successful candidates from the direct recruitment source. In other words, the contention was that only if no other successful candidate was available from the direct recruit source belonging to any of the categories, namely, open category or any other category such as OBC or SC/ST then and then alone the High Court could have resorted to promotion of "in-service candidates". To put it differently, according to the appellants since the posts advertised were by way of direct recruitment, it was meant for that particular source of recruitment, namely, "direct recruit" and all those successful candidates of that source alone, namely, "direct recruit" were in the first instance eligible to be considered for being appointed to the unfilled posts of any of the categories, namely, open or OBC or SC or ST and in the event of unavailability of any candidate from that source then and then alone the High Court could have resorted to filling up of those posts by way of promotion of "in service candidates". Since, the above submission of the appellants did not find favour with the High Court, the appellants are before us."*

(101) The Hon'ble Apex Court on the aforesaid factual matrix of the case involved in ***Nawal Kishore Mishra (Supra)*** had framed the following five issues, which can be enumerated as herein below:

"i. Whether the appellants have the locus standi to challenge the appointments made by the High Court in the filling up of the unfilled vacancies of the reserved categories in the direct recruitment posts by way of promotion of the "in-service candidates"?

ii. Whether the High Court could have validly adopted the Reservation Act of

1994 by relying upon Rule 7 of the High Court Rules?

Iii. Whether the Reservation Act of 1994 or any of the orders of the Government providing for reservation was validly adopted by the High Court as claimed by it?

iv. While filling up the unfilled posts of direct recruit vacancies by way of promotion under Rule 8(2), did the High Court fall into errors in not considering the appellants who were the successful candidates and who hailed from the very same source, namely, direct recruitment, who alone were eligible to be considered in the first instance even as per Rule 8(2)?

v. Assuming the Reservation Act of 1994 was validly adopted by the High Court, yet by ignoring Section 3(2) of the said Act, was the High Court justified in filling up the posts by way of promotion of "in-service candidates?"

(102) As is apparent from the aforesaid issues framed by the Hon'ble Apex Court, the filling up of vacancies of unreserved category by the reserved category in Higher Judicial Service Selection in Uttar Pradesh or the carrying forward of reserved category seats to future recruitment years was not the issue involved before the Hon'ble Supreme Court in ***Nawal Kishore Mishra (Supra)***. Nevertheless, the Hon'ble Supreme Court made certain observations relating to the aspect, and ultimately without disturbing the determination of the Vacancies for each quota or the promotions already made by resorting to Rule 8(2) of the UPHJS Rules, 1975, a direction was issued, wherein, the Hon'ble Apex Court had permitted the High Court on the administrative side to provide that number of vacancies which remains unfilled in the Recruitment Year 2009 in the reserved category of Direct Recruit by adding that number of vacancies in the recruitment to be made in the future years until such number of vacancies of unfilled reserved category pertaining to Recruitment Year 2009 are filled, in the following words:

"64 Keeping the said legal principle relating to applicability of Section 3(1) of the Reservation Act, 1994 vis-vis Rules 1 and 8(2) of the High Court Rules in mind, when we consider the last of the submissions made on behalf of the appellants, it must be held that the action of the High Court in having resorted to filling up of the unfilled reserved vacancies by taking umbrage under Rule 8(2) was perfectly justified. The said action of the High Court in having filled up those unfilled reserved vacancies of direct recruitment of the year 2009 was stated to have been made by promoting the in-service candidates. Though we have found that such a course adopted by the High Court was in order, as the proviso to Rule 8(2) specifically mandates that while fixing the number of vacancies to be allotted to the quota of direct recruitment at the next recruitment, it should be raised accordingly. We are of the view, without disturbing whatever promotions already made by resorting to Rule 8(2), the High Court can be permitted to provide that number of vacancies which remained unfilled in the year 2009 in the reserved category of direct recruit source by adding that number of vacancies in the recruitment to be made in the future years until such number of vacancies of unfilled reserved category pertaining to 2009 are filled."

(103) This Court is informed that in compliance of the aforesaid judgment of Hon'ble the Supreme Court, the Selection and Appointment Committee of this Court

resolved that 34 leftover vacancies of reserved category of the recruitment year 2009 i.e SC-21, ST02 & OBC-11, are to be filled up in accordance with the directions of the Apex Court. It has been submitted and as has also been observed in the committee report dated 31.07.2018 of Hon'ble Five Judges of this Court that since there was no binding for inclusion of entire 34 left over reserved vacancies in the same recruitment year, therefore, it was resolved to provide the aforesaid 34 vacancies from the recruitment year 2009, in the next three consecutive recruitment years, as 12 vacancies in the recruitment year 2016 and the remaining 22 unfilled vacancies of UP HJS Direct Recruitment 2009 to be divided in equal numbers in two future successive UP HJS Recruitment years i.e. 11 in the recruitment year 2018 and remaining 11 in the next recruitment year.

(104) This Court finds that the Apex Court did not decide the aspect of carry forward of unfilled reserved category seats of the direct recruit nor disturbed the determination of vacancy of the direct recruit quota of the recruitment year 2009 and as such merely since the High court on the administrative side chose to comply with the directions of the Hon'ble Apex court in Nawal Kishore Mishra's (Supra) by providing for a scheme for adjustment of the 34 leftover reserved seats, the petitioners cannot claim that to be a declaration of law. As had been rightly argued by the learned counsel for the High Court on the administrative side that the Hon'ble Supreme Court in the Nawal Kishore Mishra's case has not declared any law of universal applicability and the direction for filling of unfilled seats of reserved category in the next recruitment years was rendered under Article 142 of the Constitution of India, and not under Article 136 read with Article 141 of the Constitution of India, in as much as the aforesaid direction is not relatable to the challenge made in the Civil Appeal in its paragraph 2 of the report and the issues framed and considered as borne out from paragraph 8 of the aforesaid Judgment.

(105) This Court finds that the difference in the judgements rendered by the Hon'ble Supreme Court exercising power under Article 142 of the Constitution of India vis-a-vis the Hon'ble Supreme Court exercising power under Article 136 of the Constitution of India, which creates binding precedent under Article 141 of the Constitution of India, have been explained time and again in a number of judgements, including in **State of Punjab and Ors. Vs. Rafiq Masih (White Washer), (2014) 8 SCC 883** and **Girish Kumar Suneja Vs. Central Bureau of Investigation, (2017) 14 SCC 809**. The Apex Court in the operative portion of the Judgment delivered in ***Girish Kumar Suneja (Supra)*** held as follows:

"54. In 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 considered the powers under Article 142 of the Constitution. It was held that this article enables this Court to pass such an enforceable decree or order as is necessary for doing complete justice in any case or matter. While discussing the meaning of the expression "complete justice", this Court took the view that there were several decisions that have been rendered which made it clear that though the powers are wide, nevertheless, the power is ancillary and could be used when not necessary (sic

necessarily) in conflict with substantive provisions of law. Article 142 of the Constitution is supplementary in nature and cannot supplant substantive provisions of the statute. It is the power that gives preference to equity over the law enabling the moulding of a relief as distinguished from a declaration of law as contemplated under Article 141 of the Constitution. While directions issued under Article 142 of the Constitution do not constitute a binding precedent, a declaration of law under Article 141 of the Constitution does constitute a binding precedent. "

(106) Thus, what this Court finds that the selection to be made by this Court regarding unfilled reserved category vacancies of Recruitment year 2009 as contained in ***Nawal Kishore Mishra (Supra)*** is a direction issued in exercise of Article 142 of the Constitution of India and which would not constitute a binding precedent. Further, it has also come on records that the judgment and order in ***Nawal Kishore Mishra (Supra)*** was passed on 17.02.2015 by which time the Direct Recruitment for the recruitment year 2012 was already over and the Direct Recruitment for the recruitment year 2014 had already commenced and was in advance stage of completion. In any case, since the judgment of the Hon'ble Apex Court would operate prospectively only, the said direction cannot be made applicable to an earlier event, which had already fructified. Thus, even on this ground no infirmity in the determination of the Vacancy and the promotions for the recruitment year 2012 and 2014 can be entertained by this Court.

(107) This Court finds that the petitioners have claimed infirmity in Direct Recruitments for the recruitment years 2012 and 2014 on the recruitment made of unreserved candidate and have in that regard placed reliance on the vacancy position and the advertisements issued for Direct Recruitment in the recruitment years 2007 and 2009 which has already attained finality vide judgement dated 28.03.2018 passed in ***High Court of Judicature of Allahabad through its Registrar General (Supra*)**, and seeking aid whereof has been categorically prohibited by the Hon'ble Supreme Court vide the order dated 25.10.2021 read with order dated 15.11.2021 passed in Writ Petition(Civil) No. 147 of 2021 while requesting this Hon'ble Court to decide the present controversy expeditiously.

(108) The vacancy positions based on the cadre strength taking into account the Direct Recruits working for the relevant year as also the vacancies which were likely to occur in the next two years in respect of both Recruitment-2012 and Recruitment-2014 along with the unfilled vacancies of Direct Recruits which were filled up by UPNS incumbents, have been duly taken note of by the Hon'ble Five Judges Seniority Committee while preparing the report dated 30.07.2018. The aforesaid report running into 32 pages distinctively determines the vacancy positions for Recruitment-2012 and Recruitment-2014 by noting the various permutation & combinations. Apparently, a very exhaustive methodology has been followed in the aforesaid report and the Hon'ble Five Judges Seniority Committee has considered all the aspects related to vacancy position threadbare and has thereafter arrived at conclusions regarding the vacancies available for Recruitment-2012 and Recruitment-2014 both for Direct Recruits as well as UPNS. This Court finds that the petitioners have not been able to

demonstrate before this Hon'ble Court either through the pleadings in the Writ Petition or during the course of arguments that the recruitments of the Direct Recruits for the Recruitment Year 2012 and 2014 had breached the 25% ceiling in any manner as is the mandate of proviso to Rule 8(2) of the UPHJS Rules, 1975.

(109) A feeble attempt has also been made some of the petitioners to advance their arguments on the premises that paragraph No. 19 and 21 of the Seniority Report dated 31.01.2019 prepared by Hon'ble three Judges committee of this Court has itself admitted that the calculation of vacancies from 2009 to 2014 was erroneous. However, what this Court finds that the petitioners have wrongly understood the meaning and import of the said paragraphs, in as much as the Committee in the said paragraphs have merely capitulated the exhaustive determination of vacancies explained in the seniority report dated 30.07.2018 prepared by a Committee of Hon'ble Five Judges of this Court. This Court finds that the seniority Committee in the said report at internal page No. 23-29 has categorically observed that since some promotees were found excess in quota in the recruitment year of 2009, they had to be adjusted in recruitment 2012 and accordingly the said adjustment tickled down to successive recruitment years. This Court finds that the Seniority committee was alive to the actual ground realities and the changing parameter during the recruitment process and the seniority process and has not left any stone unturned in arriving at a just decision, which is both factually and legally valid.

(110) Thus, this court finds no error in the determination of vacancies for recruitment year 2012 and 2014 as suggested by the petitioners by filling up the vacancies by the unreserved candidates and no law of universal application has been laid down by the Hon'ble Supreme Court of India in ***Nawal Kishore Mishra (Supra)*** for filling up of vacancies by suggesting previous recruitment to be bad.

(111) The petitioners in Manorama's case have also claimed to be placed *en bloc*, within the quota of promotees in the seniority list of 2012 above the direct recruits, on the ground that they had been inducted in the cadre of Higher Judicial Services vide Government Memo dated 04.03.2013, whereas the direct recruits came to be appointed only on 05.08.2013. According to them, since these direct recruits were not even born in the cadre in the recruitment year 2012 i.e till 30.06.2013 (*although at paragraph 37 of the petition it has been stated that the last date for recruitment year 2012 is 31.12.2013*) and as such have relied on the judgment of ***R.K. Sabbarwal V/s State of Punjab***, 1995 (2) SCC 745, to argue that their seniority be fixed with HJS 2012 batch and not with HJS 2014 batch. Apparently, this Court finds that the instant contention is on the basis of mistaken belief and goes into the teeth of the rota-quota rule for promotion as prescribed under Section 22 (2) of the UPHJS Rules, 1975 and settled by the Apex Court in various cases including R.K. Sabharwal case (Supra) and High Court of Allahabad's case (Supra).

(112) It is available from records and has also been observed by the Seniority Committee report prepared by Hon'ble five judges of this Court that the aforesaid claim of the petitioners was duly considered and the Hon'ble Seniority Committee returned a finding in their report dated 30.07.2018 at

page 19 of the report in the following words :-

"During recruitment year 2012, the court had recommended names of total 254 candidates vide D.O Letter dated 12.02.2018 for appointment in HJS Cadre containing candidates of all three streams i.e., promotes direct recruits as well as candidates selected through LDCE by strictly applying roster. However, Governments had mistaken and issued appointment of only 214 candidates vide Government Notification dated 04.03.2013 excluding the names of direct recruits without applying roster. The said appointment was not in accordance with the recommendation made by the High Court. Therefore, a fresh request had been sent to the Government to rectify the said mistake and pursuant thereto, Government had rectified the said mistake by superseding its earlier notification/appointment of all 254 candidates vide Notification dated 05.08.2013 in accordance with the recommendation of the High Court by applying roster. All the 254 candidates had been appointed in HJS cadre accordingly and no direct recruit has been appointed in HJS cadre accordingly and on direct recruit has been given seniority prior to the date of his/her joining the service."

(113) From the aforesaid disposal of the representation of the petitioners, it is apparent that the Government Notification dated 04.03.2013, which was the basis of contention of these petitioners, was superseded by Government Notification dated 05.08.2013. Firstly, how can the petitioners claim benefit of the notification, which itself was superseded and secondly, the said notification was superseded as rightly held by the Committee of Hon'ble Five Judges of this Court that since the said earlier notification did not follow the rota-quota principle as is to be found in Rule 22 of the UPHS Rules, 1975. Further, the basic scheme of recruitment provided under the Rules cannot be shrugged aside and the petitioners are forgetting that appointment in HJS cadre can only be made against substantive vacancies in their respective cadre. It has come on records that as substantive vacancy under Rule 22(1) of the UPHJS Rules, 1975 for these petitioners were not available in the recruitment year 2012 as per the roster and as such there was no occasion for them to be appointed with the officers of recruitment year 2012. In any case, seniority has to be given as per the appointment made in the substantive post and this court finds that these petitioners have been righty given the seniority according to their appointment to the substantive post.

(114) It is a well settled position of law that the seniority is to be determined in accordance with rotation of vacancies between direct recruits and promotees based on quota of vacancies reserved for both the categories. This court finds that the Supreme Court upheld rotational system of fixing seniority in the Constitution Bench judgment of **Mervyn Coutindo & Ors. v. Collector of Customs, Bombay & Ors : 1966 (3) SCR 600**. This Court cannot be oblivious to the fact that the object of rotational system of fixing seniority is to blend the talent with experience and to augment the efficiency. Further, in the case of **Hon'ble Punjab & Haryana High Court at Chandigarh v. State of Punjab & Ors. :** 2019(12) SCC 496, the Hon'ble Apex Court has also held that seniority has to be determined on the basis of roster and not on the basis of the

date of joining of a particular stream. Thus, for all the aforesaid reasons, the aforesaid ground agitated by the petitioners are unsustainable in law and as such the same are rejected.

(115) The next question, which falls for consideration of this court is as has been raised in *Randheer Singh's Case*, in as much as it has been urged that these petitioners were promoted to UPHJS under Rule 22(3) of UPHJS Rules, 1975 vide notification dated 10.12.2008 and were appointed in stop-gap arrangement as Additional District & Sessions Judge against Fast Track Courts after qualifying the suitability test as per the Scheme of Rule 20 of the UPHJS Rules, 1975. These petitioners were placed against the temporary *ex cadre* posts vide notification issued on 31.03.2011 and were subsequently promoted under Rule 22(1) of the UPHJS Rules, 1974 vide memorandum dated 04.03.2013, which came to be superseded by another memorandum dated 05.08.2013. Thus, the fulcrum of these petitioners to upset the seniority list dated 31.01.2019 and to seek re-determination of vacancies for direct HJS recruitment 2009 and 2012, besides the aforesaid grounds as has already been dealt herewith by this Court, is that these petitioners have rendered services under principal clause of Rule 22(3) of the UPHJS Rules, 1975 and as such have claimed to be appointed at appropriate places in the seniority list dated 23.09.2015 and 26.08.2019, keeping in view the date on which substantive vacancies occurred in their quota and that too without applying the rota rule.

(116) As far as placing these petitioners at appropriate place in the seniority list dated 23.09.2015 is concerned, this Court need not remind itself that the said seniority list pertaining to the recruitment year 2009 has already attained finality vide judgement dated 28.03.2018 passed in ***High Court of Judicature of Allahabad through its Registrar General (Supra),*** and reiterated by the Hon'ble Supreme Court vide its Order dated 25.10.2021 read with Order dated 15.11.2021 passed in Writ Petition(Civil) No. 147 of 2021 (supra).

(117) Thus, the relief being sought by the petitioners stands scaled down to being placed at appropriate place in seniority list dated 26.08.2019 only and that too in case the same is found to be commensurate to the legal findings. Having said so, this Court finds that these petitioners has sought the said relief without challenging the *vires* of Rule 22(2) and Rule 22(3) of the UPHJS Rules, 1975, in other words can the seniority position of the petitioners be changed without applying the *"Rota Rule"* as mandatorily provided for in Rule 22(2) of the UPHJS Rule, 1975.

(118) Apparently, Rule 22(2) of the UPHJS Rules, 1975, provides that *"appointments to service shall be made on the basis of Roster System"*. The petitioners have not challenged the validity of the aforesaid Rule 22 (2) of the UPHJS Rules, 1975 in the instant writ petition and neither there is any specific averments made by the petitioners against the validity of Rule 22 (2) of the UPHJS Rules, 1975. The law relating to challenging the vires of a statute stands pretty settled, as there is always a presumption in favour of the constitutionality of the enactment and the person who challenges it has to establish that there has been a clear transgression against the fundamental rights as guaranteed under the Constitution of India or the said enactment is a product of

incompetent legislation. The petitioners have merely sought to change their seniority without the Rota rule, without adducing any valid grounds and this Court holds that the same cannot be granted on merely askance. Further, this Court finds that even in ***High Court of Judicature of Allahabad through its Registrar General (Supra),*** the Hon'ble Supreme C\court has held appointment to service on the basis of rota-quota to be mandatory and even in the All India Judges' case (supra), Hon'ble Supreme Court has held that

"……When roster system is followed, there is no question of any dispute arising. The 40-point roster has been considered and approved by this Court in R. K. Sabharwal and Ors., v. State of Punjab reported in [1995] 2 SCC 745. One of the methods of avoiding any litigation and bringing about certainty in this regard is by specifying quotas in relation to posts and not in relation to the vacancies. This is the basic principle on the basis of which the 40-point roster works. We direct the High Courts to suitably amend and promulgate Seniority Rules on the basis of the roster principle as approved by this Court in R.K. Sabharwal 's case (supra) as early as possible. We hope that as a result thereof there would be no further dispute in the fixation of seniority. It is obvious that this system can only apply prospectively except where under the relevant Rules seniority is to be determined on the basis of quota and rotational system. The existing relative seniority of the members of the Higher Judicial Service has to be protected but the roster has to be evolved for the future. Appropriate rules and methods will be adopted by the High Courts and approved by the States, wherever necessary by 31 st March, 2003.

This court finds that in view of the statement of the Hon'ble Apex court the UPHJS Rules, 1975 has been duly amended and the same has been enforced. Thus, this court finds that no justifiable grounds have been made out by the petitioners for not following the rota-quota rules."

(119) Similarly, the case of the petitioners also rests on an assumption that the proviso appended to the provision contained in Rule 22(3) of the UPHJS Rules, 1975 is allegedly *ultra vires* to the Constitution of India. The aforesaid proviso appended to Rule 22(3) the UPHJS Rules, 1975 lays down that the period of service spent by the promotes on a short-term appointment to the service as stop-gap arrangement shall not be computed towards determination of their seniority.

(120) Even the aforesaid proviso appended to 22(3) the UPHJS Rules, 1975 has not been challenged by the petitioners in the writ petition, however, the petitioners have made specific assertion against the validity of the same. Thus, in the absence of any challenge to the validity of the proviso appended to 22(3) the UPHJS Rules, 1975, the assertions made by the petitioners against the validity of the same does not hold any water. Even otherwise, the Hon'ble Supreme Court has time and again held that *ad hoc* services rendered by an employee under a stop gap arrangement cannot be counted towards determination of his seniority and as such, the contention raised by the petitioners for recognition of services rendered by them under stop gap arrangement under Rule 22(3) of the UPHJS Rules, 1975 for purpose of determination of seniority is unsustainable and *de hors* the settled position of law. The aforesaid view has been recently reiterated by the Hon'ble Supreme Court in ***Malook***

***Singh and Others v. State of Punjab*, 2021 SCC OnLine SC 876** and in ***Rashi Mani Mishra and Others v. State of U.P. and Others.*, 2021 SCC OnLine SCC 509.**

(121) In any case, it has to be understood that the posting/ appointment of any officer against the temporary Fast Track Court is of no relevance for the purpose of fixation of seniority. The said Rule 22(3) itself provides that any period of service spent by the promotees on a short terms appointment to the service as a stop-gap arrangement shall not be computed under Rule 26 for determination of their seniority in HJS Cadre.

(122) Further, in an identical situation relating to seniority of Adhoc appointee vis-à-vis regular appointee, in the judgment of **C. Yamini v. State of Andhra Pradesh**, (2019) 17 SCC 228, a Three Judge Bench of the Hon'ble Supreme Court was dealing with the service conditions of Judicial officers of Andhra Pradesh. The Hon'ble Supreme Court, after examining their nature of appointment as a District & Sessions Judge Fast Track on ad-hoc basis under the Rules, 2001 and later appointed by Order dated 2nd July, 2013 on regular basis and becoming members of the Rules, 2007, had held that the petitioners are not entitled to claim benefit of seniority from the date of their initial appointment as District & Sessions Judge Fast Track and other consequential reliefs prayed for. However, limited benefit of service rendered as Fast Track Court, Judges was granted to them only for the purpose of pensionary and other retiral benefits. The Hon'ble Supreme Court, hence, held that since the services rendered by the petitioners as Fast Track Court Judges have not been recognized by the Court for the purpose of seniority except for pensionary and other retiral benefits, the plea raised by the petitioners to consider their service rendered as Fast Track Court Judges as a judicial service for the purpose of Article 217 (2)(a) of the Constitution, cannot be not legally sustainable. [**C. Yamini v. High Court of Andhra Pradesh**, 2023 SCC OnLine SC 176].

(123) Thus, this Court holds that no relief can be granted for the aforesaid grounds agitated by the petitioners and as such the seniority position of the petitioners cannot be changed without applying the *"Rota Rule."*

(124) These issues are decided, accordingly, in the aforesaid terms.

H. Conclusion

(125) In view of the above, this Court keeping in view the facts agitated and the prevailing law, arrives at the following conclusion :-

(i) The final seniority report dated 23.09.2015 and its supplementary final seniority report dated 06.04.2016, approved by the Full Court on 14/04/2016 corresponding to the determination of vacancies and seniority for the recruitment year 2007 and 2009 has already attained finality in view of the authoritative judgement dated 28.03.2018 passed in ***High Court of Judicature of Allahabad through its Registrar General (Supra),*** and reiterated by the Hon'ble Supreme Court vide its Order dated 25.10.2021 read with Order dated 15.11.2021 passed in Writ Petition(Civil) No. 147 of 2021 (supra) and as such the same cannot be opened for re-consideration on any grounds.

(ii) There is no concept of "carry forward" of any unfilled seats to the next

recruitment year, in the existing Uttar Pradesh Higher Judicial Services Rules, 1975 on the harmonious construction of the provisions of Rule 7 and Rule 8 of the said Rules. However, there is also no bar under the rules for the High Court to conduct a special drive for recruitment to the unfilled reserved category direct recruitment seats against the existing vacancies of that particular recruitment year, provided the same is prior to the corresponding increase to the number of recruits to be taken by promotion from the Nyayik Sewa by the operation of Rule 8(2) of the UPHJS Rules, 1975 for that particular recruitment year.

(iii) The High Court of Judicature at Allahabad on its administrative side has only adopted Section 3 (1) of the Reservation Act, 1994 by virtue of interpretation of "order" as could be found in Rule 7 of the UPHJS Rules, 1975.

(iv) Under the existing UPHJS Rules, 1975 and the Resolution of the Full court dated 23.05.2015 and the resolution of the Rule Revision Committee dated 13.01.2016, section 3(2) of the Reservation Act, 1994 cannot be construed to be adopted by the High Court of Judicature at Allahabad on its administrative side.

(v) Unforeseen Vacancies are not anticipated Vacancies or likely vacancies and as such these unforeseen vacancies cannot be assessed at the start of Recruitment year within the meaning of Rule 8(1) of the Uttar Pradesh Higher Judicial Services Rules, 1975.

(vi) This Court finds no error in the determination of vacancies for recruitment year 2012 and 2014 and accordingly the Seniority report and list dated 31.01.2019 is upheld.

(v) Adhoc posting/appointment of any officer against the Fast Track Courts is of no relevance for the purpose of fixation of seniority as provided under Proviso to Rule 22 (3) and Rule 26 of the UPHJS Rules, 1975.

(vi) Seniority has to be given as per the appointment made on a substantive post and seniority is to be determined in accordance with rotation of vacancies between direct recruits and promotees based on quota of vacancies reserved for both the categories as per Rule 22(2) of the UPHJS Rules, 1975.

(126) For all the aforesaid reasons and a sequel to above, all the writ petitions being Writ-A No.2000845 of 2014 (*Sanjeev Kumar Singh and others Vs State of U.P. and others*), (ii) Writ-A No. 30173 of 2019 (*Harendra Bahadur Singh and others Vs State of U.P. and others*), (iii) Writ-A No. 11453 of 2020 (*Smt. Manorama and others Vs Hon'ble High Court of Judicature at Allahabad and others*) and (iv) Writ-A No. 28511 of 2021 (*Randheer Singh and others Vs Hon'ble High Court of Judicature at Allahabad and others*) are hereby **dismissed**.

(127) There shall be no order as to cost.

(2024) 2 ILRA 995
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.01.2024

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ - A No. 2000147 of 2011

U.P. State Sugar And Cane Devp. Corp. Ltd. ...Petitioner
Versus
Surendra Prasad Mishra & Anr. ...Respondents

Counsel for the Petitioner:
P.K. Sinha

Counsel for the Respondents:
C.S.C., V.S. Trivedi

A. Service Law – General Clauses Act, 1897 – S. 27 – Disciplinary proceeding – Punishment – Lost money was directed to be recovered from the retiral dues – Charge of not performing duty as Storekeeper as 160 bags were found short during physical verification – Show cause notice sent after the charged-employee was found guilty in departmental enquiry – IInd notice returned back with endorsement that he has refused to take the letter – Effect of refusal – Tribunal allowed the claim of charged-employee holding the service of notice insufficient – Validity challenged – Held, refusal of the show cause notice is deemed service and has to be construed as acceptance of the show cause notice – Claimant/respondent himself has refused to accept the said second show cause notice. In this backdrop, the competent authority i.e. General Manager had proceeded with the matter and after considering the gravity of charges as well as the inquiry report, has passed the impugned order – There is no illegality in conducting the departmental inquiry against the claimant/respondent. (Para 16, 17 and 18)

Writ petition allowed. (E-1)

List of cases cited :-

1. C.C. Alavi Haji Vs Palapetty Muhammed & anr. AIR 2007 SC (Supp) 1705

(Delivered by Hon'ble Om Prkash Shukla, J.)

(1) This writ petition under Article 226 of the Constitution of India has been instituted by the petitioners, assailing the correctness of the judgment/order dated 11.11.2010 passed by the State Public Services Tribunal, Lucknow (hereinafter referred to as the '***Tribunal***'), whereby (i) Claim Petition No. 810 of 2008 filed by the claimant/respondent no.1 (Surendra Prasad Misra) has been allowed; (ii) the order of punishment dated 23.05.2007 and consequential order dated 02.01.2008 passed on appeal preferred by the respondent no.1-claimant have been quashed; and (iii) the respondents/petitioners herein have been directed to pay full retiral dues and full salary for suspension period except what has already been paid, as per rules.

(2) Apparently, by means of the punishment order dated 23.05.2007, an amount of Rs.1,05,42.50 was ordered to be recovered from the retiral dues of the respondent no.1-claimant and his pay for suspension period, except subsistence allowance was also ordered to be withheld.

(3) The facts, in nutshell, are that in the year 1972, the claimant/respondent no.1, Surendra Prasad Mishra, was appointed on the post of Storekeeper in U.P. State Sugar Corporation Ltd and while continuing on the said post, the Managing Director, U.P. State Sugar Corporation Ltd., vide order dated 24.06.2002, had transferred the claimant/respondent no.1 in Sale Department as Incharge Godown and since 25.06.2002, claimant/respondent was deputed for the said work in the Godown at Budhwai Unit.

(4) On 05.10.2003, when the claimant/respondent was posted in the Godown at Budhwai Unit, physical verification of the Godowns was made, wherein it was found that although all the locks of Godowns were in tact and even there were no breaches in the walls of Godowns at any other place, but even then

160 bags were found short. In this backdrop, the claimant/respondent was placed under suspension vide order dated 18.11.2003 and an inquiry was instituted against the claimant/respondent. However, since the inquiry took some time to finalize, the claimant/respondent was reinstated in service vide order dated 03.11.2004, pending finalization of the inquiry.

(5) The record of the instant writ petition reveals that initially, Shri Y.K. Agarwal, Deputy Chief Engineer was appointed as Inquiry Officer to conduct the inquiry and on his transfer, one Shri R.C. Saxena, Assistant Engineer was appointed as Inquiry Officer. Subsequently, it was found that Shri R.C. Saxena, without serving the charge-sheet on the claimant/respondent and even without conducting the inquiry as per law, submitted its report and apparently gave a report that no case is made out against the claimant/respondent and others. As no action was taken on the aforesaid report by the petitioners/department, hence the claimant/respondent filed Writ Petition No. 8065 (S/S) of 2005 before this Court, wherein a direction was issued by this Court to take decision on the aforesaid report of the Inquiry Officer. In compliance of the aforesaid direction of this Court, the department/petitioners proceeded to consider the said inquiry report and after due consideration, it was found that the inquiry conducted by the Inquiry Officer Shri R.C. Saxena was not in accordance with the provisions of law and as such, the said inquiry report was not accepted and another inquiry officer Shri P.K. Saxena was appointed to conduct the inquiry. The Inquiry Officer, after his appointment as aforesaid, served a charge-sheet on the claimant/respondent vide letter dated 11.03.2006, to which the claimant/respondent submitted his reply vide letter dated 24.03.2006. However, records reveal that before Shri P.K. Saxena, the Inquiry Officer, could submit his report, he was transferred to some other unit and as such, Shri L.P. Singh, Accountant and thereafter Shri R.K. Jain were appointed as Inquiry Officer, but they too did not conclude the inquiry. Lastly Shri Sanjay Sinha, Assistant Engineer (Civil) was appointed as Inquiry Officer, who after concluding the inquiry, submitted his report dated 04.11.2006, holding the claimant/respondent guilty for the charges so levelled against him. Thereafter, a show cause notice along with a copy of the inquiry report was served on the claimant/respondent vide letter dated 07.02.2007 by registered post, but it returned undelivered with the remarks that the recipient is not available at home. Thereafter, another letter dated 04.04.2007 was sent to the claimant/respondent by registered post directing him to put up his case before the punishing authority and also allowing him personal hearing on 11.04.2007, however, this letter too was returned undelivered with the remark that the claimant/respondent refused to accept it. Thereafter, the disciplinary authority, after taking into consideration of all the relevant material, passed the punishment order dated 23.05.2007 against the claimant/ respondent, whereby an amount of Rs.1,05,42.50 was ordered to be recovered from the retiral dues of the respondent no.1-claimant and his pay for suspension period, except subsistence allowance was also ordered to be withheld.

(6) Feeling aggrieved by the aforesaid order of punishment dated 23.05.2007, the claimant/respondent preferred an appeal on 10.08.2007, which was rejected vide order

dated 02.01.2008 by the Appellate Authority. Thereafter, the claimant/respondent challenged the order of punishment dated 23.04.2007 and appellate order dated 02.01.2008 by instituting Claim Petition No. 810 of 2008 before the learned Tribunal. The learned Tribunal, after hearing the parties and going through the record, allowed the claim petition with the direction as stated in paragraph-1 hereinabove vide judgment/order dated 11.11.2010. It is this judgment/order dated 11.11.2010, which has been assailed in the instant writ petition.

(7) Heard Shri P.K. Sinha, learned Counsel representing the petitioners and respondent no.3 and Shri V.S. Trivedi, learned Counsel representing the respondent no.1.

(8) Submission of the learned Counsel representing the petitioners and respondent no.3 is that the learned Tribunal has not correctly appreciated the facts and circumstances of the case and has, in fact, recorded a vague finding that the charge-sheet has not been approved by the competent authority i.e. General Manager and show case notice was not served upon the respondent no.1-claimant and as such the enquiry conducted against the respondent no.1-claimant was flawed. According to the learned Counsel, the General Manager is the appointing authority of the respondent no.1/claimant and charge-sheet was approved by the General Manager, however, after filing the instant writ petition, it transpired that in the impugned judgment/order dated 11.11.2010, words 'Managing Director' have inadvertently been mentioned in paras-7 and 9 of the impugned judgment/order in place of words 'General Manager' and as such, the petitioners preferred an application for correction in the impugned judgment/order to the aforesaid extent, bearing Misc. Application No. 109 of 2017. The learned Tribunal, vide judgment/order dated 16.08.2017, after hearing the parties and going through the record, allowed the aforesaid correction application and corrected the words 'Managing Director' mentioned in paras-7 and 9 of the impugned judgment/order as 'General Manager'. The said order dated 16.08.2017 (supra) has been brought on records by the petitioners by means of an affidavit dated 04.09.2017 and the respondent no.1/claimant has not controverted the aforesaid finding by filing any affidavit. Learned Counsel, thus, submitted that since the charge-sheet has been approved by the competent authority i.e. General Manager, hence the finding recorded by the learned Tribunal in this regard is patently illegal and not sustainable.

(9) Learned counsel representing the respondent no.1-claimant, on the other hand, has argued that in the facts and circumstances of the case, the impugned judgment passed by the learned Tribunal does not warrant any interference by this Court in this case for the reason that a clear finding has been recorded by the learned Tribunal to the effect that issuance of charge-sheet, show cause notice and passing of the punishment order are exclusive jurisdiction of the appointing authority and since there is no evidence brought on record to draw the inference that the charge-sheet was approved by the competent authority i.e. appointing authority, the impugned order of punishment based on such charge-sheet dated 11.03.2006 is vitiated in the eyes of law. He has further argued strenuously that

after the impugned judgment/order, the petitioners had made manipulation in the record of inquiry and with the *mala fide* intention, the word 'approved' has been mentioned in the charge-sheet and on that basis, the petitioners are now trying to set-up a case before this Court, as if the charge-sheet has been approved by the competent authority, so that it can be argued by them that the learned Tribunal has recorded erroneous finding that the charge-sheet has not been approved by the competent authority. According to the learned Counsel, if for the sake of argument, if manipulation has not been done after the impugned judgment/order, there is no reason to record a finding by the learned Tribunal in its order to the effect that there is no evidence brought on to draw the inference that the charge-sheet was approved by the competent authority i.e. appointing authority. According to the learned Counsel, the charge-sheet against the respondent no.1-claimant were not proved by the competent authority and the inquiry officer has submitted his report only on the basis of the charge-sheet and reply submitted by the respondent no.1-claimant. In this view, submission on behalf of the respondent no.1-claimant is that at this juncture no interference in the judgment and order passed by the learned Tribunal is warranted.

(10) We have given our thoughtful consideration to the rival submissions made by the learned counsel appearing for the respective parties and have also perused the records available before us on this writ petition.

(11) Apparently, it is an admitted fact that while the petitioner was working on the post of Incharge Godown in Budhwal Unit of the U.P. State Sugar Corporation Limited, a physical verification was made on 05.10.2003, wherein irregularities in stock were found, upon which the claimant/respondent was placed under suspension vide order dated 18.11.2003 and an inquiry was instituted. During pendency of the inquiry, the claimant/respondent was reinstated vide order dated 03.11.2004, however, inquiry was ordered to be continued against the claimant/respondent. Initially, Shri Y.K. Agarwal, Deputy Chief Engineer was appointed as inquiry officer to conduct the inquiry, however, on his transfer, one Shri R.C. Saxena, Assistant Engineer was appointed as Inquiry Officer, who, without serving charge-sheet to the claimant/respondent and without conducting the inquiry in accordance with law, gave a report, stating that no case is made out against the claimant/respondent and others. This inquiry report was not accepted by the Disciplinary Authority/General Manager and another inquiry officer Shri P.K. Saxena, Incharge Chief Engineer, was appointed to conduct the inquiry.

(12) Thereafter, a charge-sheet was issued to the respondent no.1-claimant on 11.03.2005, which contained two charges. The first charge stated against the respondent no.1-claimant was related to having not performed his duties as assigned by the Sugar Corporation Board on the post of Sugar Godown Keeper as on physical verification, 160 bags were found short and he had not informed to the competent authority regarding deficiency in the same. The second charge against the claimant/respondent relates to non-verification of stock with the record nor any mention has made in F.D.O. report dated 15.10.2003 and 31.10.2003 and knowingly causing loss to the Corporation.

(13) The respondent no.1-claimant submitted reply to the said charge-sheet on 24.03.2006, denying the allegations made against him in the charge-sheet. However, before submitting his inquiry report, Shri P.K. Saxena was transferred to some other unit and as such, Shri L.P. Singh, Accountant and thereafter, Shri R.K. Jain were appointed as inquiry officer, but they too could not conclude the inquiry. Lastly Shri Sanjay Sinha, Assistant Engineer (Civil) was appointed as Inquiry Officer, who, after due inquiry, submitted its report dated 04.11.2006, holding both the charges levelled against the claimant/respondent to have been proved. The Disciplinary Authority/General Manager, after considering the said inquiry report, issued a show cause notice to the claimant/respondent vide letter dated 07.02.2007 by registered post, but it returned undelivered with the remark that recipient is not available at home. Thereafter, another letter dated 04.04.2007 was sent to the claimant/respondent by registered post, however, this letter dated 04.04.2007 was also returned undelivered with the remark that the claimant/respondent refused to accept it. Thereafter, the Disciplinary Authority/General Manager, after taking into consideration all the relevant material, passed the punishment order dated 23.05.2007, which was challenged by the claimant/respondent by instituting an appeal before the Managing Director/Appellate Authority, who, vide order dated 02.01.2008, rejected the appeal.

(14) Feeling aggrieved, the claimant/respondent had instituted Claim Petition No. 810 of 2008 before the learned Tribunal, who, vide judgment/order dated 11.11.2010 allowed the claim petition mainly on two grounds viz. (I) charge-sheet has not been approved by the competent authority; and (II) show cause notice was not served upon the claimant/respondent.

(15) So far as first ground of allowing the claim petition i.e. charge-sheet has not been proved by the disciplinary authority is concerned, the record reveals that the disciplinary authority in the case of the claimant/respondent is the General Manager of the Corporation. From perusal of the impugned judgment/order dated 11.11.2010, what we find is that the learned Tribunal, in para-9 of the impugned judgment, has inadvertently mentioned that the Managing Director is the competent authority, however, this inadvertent error was corrected by the learned Tribunal itself vide order dated 16.08.2017 on an application moved by the petitioners and it was directed that the words 'General Manager' be substituted in place of words 'Managing Director' in paras-7 and 9 of the impugned judgment. The record available before this Court also reveals that the charge-sheet has been approved by the General Manager of the Corporation. In this regard, the petitioners had also arrayed Sri S.K. Verma, Retired General Manager, who, vide affidavit dated 04.09.2017, stating on oath that there is no manipulation in the approval of the charge-sheet as alleged by the claimant/respondent. Thus, the plea of the claimant/respondent regarding the manipulation in the charge-sheet, in this regard, has no substance as the learned Counsel for the claimant/respondent has not submitted any documentary proof to show that there is manipulation in the record and on the other hand, learned Counsel for the petitioners have filed an affidavit of Incharge General Manager to prove the authenticity of the approved charge-sheet.

(16) So far as the second ground for allowing the claim petition by the learned Tribunal i.e. show cause notice was not served upon the claimant/ respondent, it is an admitted fact that first show cause notice was returned back to the department with the endorsement that recipient is not available at home. Thereafter, second letter containing show cause notice was issued to the claimant/respondent, however, the record reveals that the second letter containing show cause notice was returned back to the department with the endorsement that claimant/respondent has refused to take the letter. Thus, the finding recorded by the learned Tribunal in this regard that show cause notice was not served upon the claimant/respondent, is contrary to the record and the law propounded by this court as well as the Hon'ble Apex Court that refusal of the show cause notice is deemed service and has to be construed as acceptance of the show cause notice. In a slightly different context, while considering the effect of Section 27 of the General Clauses Act, 1897, a Bench of three Judges of the Hon'ble Apex Court in **C.C. Alavi Haji vs. Palapetty Muhammed and Anr, AIR 2007 SC (Supp) 1705** made following observations: -

"14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. [Vide Jagdish Singh v. Natthu Singh AIR 1992 SC 1604 : State of M.P. vs. Hiralal & Ors. (1996) 7 SCC 523 and V. Raja Kumari vs. P. Subbarama Naidu & Anr. (2004) 8 SCC 774]"

(17) From the aforesaid, it is apparent that the reasoning given by the learned Tribunal while allowing the claim petition is contrary to record as the charge-sheet has already been approved by the competent authority i.e. General Manager and after returning the first show cause notice unserved upon the claimant/respondent, second show cause notice was issued to the claimant/respondent, however, the postal endorsement on the second show cause notice reveals that the claimant/respondent himself has refused to accept the said second show cause notice. In this backdrop, the competent authority i.e. General Manager had proceeded with the matter and after considering the gravity of charges as well as the inquiry report, has passed the impugned order. The learned Tribunal has lost sight of not considering the aforesaid fact while allowing the claim petition.

(18) In view of the aforesaid, we find that there is no illegality in conducting the departmental inquiry against the claimant/respondent and the punishment awarded against the claimant/respondent is commensurate to the charges proved against him, which was after following the due procedure of law. Learned Counsel for

the claimant/respondent has failed to point out any illegality or irregularity in conducting the departmental inquiry against him. Thus, the impugned judgment/order passed by the learned Tribunal is liable to be set-aside.

(19) Accordingly, the instant writ petition is **allowed**. The impugned judgment/order dated 11.11.2010 passed by the learned Tribunal is hereby set-aside with the consequential effect that the order of punishment/recovery passed by the disciplinary authority is restored.

(20) There will be no order as to costs.

(2024) 2 ILRA 1002
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.02.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE MANISH MATHUR, J.

Writ - C No. 7195 of 2022

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

Counsel for the Petitioner:
Rajnish Ojha, Amrendra Nath Tripathi

Counsel for the Respondents:
C.S.C., Manish Vaish, Pankaj Gupta, Pravin Kumar Singh

Civil Law - U.P. Panchayat Raj Act, 1947 – Section 95(1)(g) – U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 – Rule 3, Rule 5, Rule 6 – Locus Standi of Complainant – Necessary and Proper Party – Writ Petition Challenging Seizure of Gram Pradhan's Powers – Article 226 of the Constitution of India,1950 - The petitioner, a Gram Pradhan, challenged an order under the proviso to Section 95(1)(g) of the U.P. Panchayat Raj Act, 1947, seizing her administrative and financial powers during a preliminary enquiry into alleged irregularities, initiated based on a complaint by a Gram Sabha member. The complainant sought impleadment in the writ petition, prompting a reference by a Single Judge to a Division Bench to determine: (1) whether the complainant has locus standi to be impleaded in such a writ petition, and (2) whether the Division Bench judgment in Amin Khan Vs St. of U.P. (2008 SCC OnLine All 269) requires reconsideration. Held: A complainant under Rule 3 of the 1997 Rules is not a necessary party in a writ petition challenging the interim seizure of a Gram Pradhan's powers, as no relief is typically sought against the complainant, and their absence does not preclude an effective order, per the principles of Order 1 Rule 10(2) CPC, applied analogously to writ proceedings. However, the complainant may be a proper party in specific cases where their presence aids the court in fully adjudicating the dispute, such as when facts or documents are withheld by St. authorities, subject to the court's discretion under Article 226 and Rule 5A of the Allahabad High Court Rules, 1952. The discretion must be exercised with reasoned fairness, not arbitrarily, as per Uday Narain Singh Malpaharia Vs Addl. Member, Board of Revenue, Bihar (AIR 1963 SC 786). The judgment in Amin Khan was distinguished, as it addressed the complainant's locus standi to file an appeal, not impleadment in a writ petition, and involved a complainant who was also a member of the committee exercising the Pradhan's powers, unlike the present case. The court found no conflict with Amin Khan and declined to refer it for reconsideration by a larger bench. The questions were answered, and the writ petition was directed to be listed before the Single Judge for further proceedings.

Case Law Cited:

1. Amin Khan Vs St. of U.P. & ors., 2008 SCC OnLine All 269

2. Dharam Raj Vs St. of U.P. & ors., (2009) 108 RD 689

3. Vivekanand Yadav Vs St. of U.P. & Anr., (2010) 111 RD 699

4. Uday Narain Singh Malpaharia Vs Addl. Member, Board of Revenue, Bihar, AIR 1963 SC 786

5. St. of U.P. & ors. Vs Committee of Management, Anjuman Madarsa Noorul Islam Dehra Kalan, Ghazipur, (2009) 76 ALR 750

(Delivered by Hon'ble Rajan Roy, J.)

1) Heard Shri Amrendra Nath Tripathi and Shri Rajnish Ojha learned counsel for the petitioner, Shri Manish Vaish, learned counsel for the respondent/applicant seeking impleadment and Shri Indrajeet Shukla along with Shri Pratyush Chaubey, learned Standing Counsel.

2) This Bench was nominated to hear a reference made by a learned Single Judge of this Court vide order dated 03.03.2023 passed in this petition.

Questions for consideration

3) On a consideration of the said reference, we rephrased the questions referred to us vide our order dated 22.09.2023. The questions are as under:-

(i) Whether the complainant who is allegedly an elected member of Gram Sabha and has submitted a complaint under Rule 3 of the Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 has locus standi to get himself impleaded in a writ petition filed by the Gram Pradhan challenging an order passed under the proviso to Section 95(1)(g) of U.P. Panchayat Raj Act, 1947 by the District Magistrate seizing his administrative and financial powers, as an interim measure, during pendency of the proceedings under Section 95(1)(g) of U.P. Panchayat Raj Act, 1947 read with Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 or not?

(ii) Whether the Division Bench judgment in the case of Amin Khan Vs. State of U.P and Ors; 2008 SCC OnLine All 269 requires reconsideration by a Larger Bench as regards question no. (i)?

4) We, accordingly, proceed to consider and answer the aforesaid questions.

5) Sri Amrendra Nath Tripathi, learned counsel for the petitioner submitted that a complainant is neither a necessary nor a proper party in writ proceedings filed by Gram Pradhan challenging the order of seizure of his financial and administrative powers. Such an order creates a dispute between the District Magistrate who has passed the order and the Gram Pradhan. Merely because, the proceedings have started on the complaint of the complainant does not entitle him to become party to the lis. In this regard, he relied upon Division Bench judgments in the case of **'Amin Khan vs. State of U.P. & Ors.'** ;(2008) SCC Online All 269. In this context, he also relied upon a Division Bench judgment in **'Dharam Raj vs. State of U.P. & Ors.'** reported in 2009 (108) RD 689.

6) Sri Manish Vaish, learned counsel for the applicant seeking impleadment took us through the provisions of Section-95(1)(g) of the U.P. Panchayat Raj Act, 1947 and U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997. He invited our attention to Rule-3 of the Rules, 1997, according to which, a complainant has a right to submit a complaint which is

supported by an affidavit. He then took us through provision/ rule -6 of the Rules 1997 to submit that even during the final enquiry the complainant has been given a right of adducing evidence and proving charges framed by the inquiry officer as also a right of hearing which included a right of examination and cross-examination of the witnesses and the Gram Pradhan. The intent of the Rule is very clear. He also submitted that in the event, there is connivance between the State authorities and the Gram Pradhan, it is the complainant alone who would bring to light the said connivance and facts and documents which may not be produced by the State authorities. Therefore, the presence of the complainant in such proceedings is necessary. The seizure of administrative and financial powers is a consequence of the complaint made by the complainant which has to be proved by the complainant apart from departmental authorities, therefore, he is a necessary party in such proceedings. In this context, he referred to averments made by the petitioner in para no.20 and reply in the counter affidavit wherein no comments had been made in response to the said averment of the writ petition which according to him may persuade the Court to grant relief to the petitioner in such a scenario. He submitted that judgment of the Co-ordinate Bench in Amin Khan's case (supra) did not apply as the applicant seeking impleadment is not a beneficiary. Moreover, the applicant is not a part of the three membered committee constituted as a consequence of seizure of powers of Gram Pradhan, therefore, the said decision does not come in his way. He referred to Section 26 of the Act, 1947 and Rule 31 of the Rules, 1997.

Functions of Gram Pradhan under the U.P. Panchayat Raj Act, 1947

7) The U.P. Panchayat Raj Act, 1947 (hereinafter referred to as 'the Act, 1947') was promulgated to establish and develop local self government in rural areas of Uttar Pradesh. As per its preamble, the object of the Act is to establish and develop local self government in rural areas and to make better provisions for village administration and development.

8) The Office of Gram Pradhan is an office of election under the Act, 1947 and the Rules made thereunder. He is head of Gram Panchayat/ Gram Sabha as the case may be. The Gram Panchayats/ Gram Sabhas have been assigned functions and duties under the Act, 1947 and Rules made thereunder. In this context, Sections-15, 15-A, 16, 16-A, 17, 18, 19, 20, 21, 24 are relevant. There is a Bhumi Prabandhak Samiti with the Pradhan as its Chairperson which also has important functions to perform as is mentioned in Section 28-A and 28-B of the Act, 1947. Chapter V of the Act, 1947 deals with acquisition of land, Gaon fund and property. Thus, the Gram Panchayat/ Gram Sabha is vested with funds and its use. It also has property vested in it as is mentioned in Section-34 of the Act, 1947. It can even acquire land in terms of Section-33 of the said Act. It can borrow money (Section-36). It can impose taxes and fees (Section-37). The Gram Panchayat has a budget of its own (Section-41). Without dwelling at length on the contents of the said provisions, suffice it to say that the Gram Panchayat perform public functions and Gram Pradhan as its head as also the head of Bhumi Prabandhak Samiti also perform important public functions including financial and

administrative functions. Chapter VII of the Act, 1947 deals with External Control.

Removal of Gram Pradhan and seizure of his power in the interregnum during pendency of proceedings for his removal under the Act, 1947 and Rules, 1997 made thereunder.

9) Section-95(1)(g) of the Act, 1947, inter alia, deals with removal of Pradhan but on specified grounds which are as under:-

"95 Inspection-(1) The State Government may-

..

(g) remove a Pradhan or member of a Gram Panchayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch [Nyaya Panchayat] if he –

(i)- absents himself without sufficient cause for more than three consecutive meetings or sittings.

(ii)-refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charged for an offence involving moral turpitude.

(iii)- has abused his position as such or has persistently failed to perform the duties imposed by this Act or rules made thereunder or his continuance as such is not desirable in public interest, or

[(iii)-a has taken the benefit of reservation under sub-section (2) of Section 11-A or sub-section (5) or Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of Scheduled Castes, the Scheduled Tribes or the backward classes, as the case may be.]

(iv)- being a Sahayak Sarpanch or a Sarpanch [of the Nyaya Panchayat] takes active part in politics, or

(v)-suffers from any of the disqualifications mentioned in Clauses (a) to (m) of Section 5-A;

[Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan [or Up-Pradhan] is prima facie found to have committed financial and other irregularities such Pradhan [Up-Pradhan] shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government.]"

10) The first proviso to 95(1)(g) of the Act, 1947 is relevant for our purposes as it contains the provision for seizing financial and administrative powers and functions of Gram Pradhan where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan is prima facie found to have committed financial and other irregularities. In the event of such seizure of powers of Gram Pradhan, it is to continue until he is exonerated of the charges in the final inquiry. In the interregnum, such powers and functions are to be exercised by a Committee consisting of three member of Gram Panchayat appointed by the State Government.

11) The powers of the State Government under Section-95(1)(g) of the Act, 1947 have been delegated to the District Magistrate concerned and there is no dispute in this regard.

12) The words **'in such manner as may be prescribed'** used in the proviso to Section 95(1)(g) lead us to the rules known as U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred to as 'the Rules, 1997') which have been

made by the Governor in exercise of powers under Section 110 read with clause (g) of sub-Section-(1) of Section 95 of the Act, 1947.

13) Rule-3 of the Rules, 1997 refers to procedure relating to complaints against Pradhan. The complaint has to confirm to the requirements of Rule-3 of the Rules, 1997. If it does not confirm to such requirements, it cannot be acted upon but this does not prevent the District Magistrate from taking suo-motu cognizance based on material before him including the complaint and proceeding accordingly, as per Rules.

14) The provision for initiation of proceedings against a Gram Pradhan on the basis of a complaint emphasizes the underlying idea that in a given case, government functionaries may not be aware of the illegalities but the public, which is directly affected by the functioning of the Gram Panchayat, may be aware and accordingly, they can complain against the Gram Pradhan, especially as, he holds an office of election and has been elected by the people of that area.

15) Ordinarily, a complainant would be a member of the gram panchayat/ gram sabha and a resident of the same who has a stake in the village administration and development unless of course he is not so but is in possession of some incriminating material which has a bearing on the functions of the Gram Pradhan.

16) Rule 4 of the Rules, 1997 envisages a preliminary enquiry to be ordered on a complaint or report referred in Rule 3 or otherwise. The report herein would mean a complaint or report by a public servant as is referred in Rule 3(6) of the said Rules. The preliminary enquiry is required to be completed within thirty days. This preliminary inquiry is also referrable to the first proviso to Section 95(1)(g) of the Act.

17) Rule 5 of the Rules, 1997 is relevant which reads as under:-

"5. Where the State Government is of the opinion, on the basis of the report referred to in sub-rule (2) of Rule 4 or otherwise that an enquiry should be held against a Pradhan or Up-Pradhan or Member under the proviso to clause (g) of sub-section(1) of Section 95 it shall forthwith constitute a committee envisaged by proviso to clause (g) of sub-section(1) of Section 95, of the Act and by an order ask an Enquiry Officer, other than the Enquiry Officer nominated under sub-rule (2) of Rule 4, to hold the enquiry. "

18) As per Rule 5, based on the report referred to in sub-rule (2) of Rule 4 i.e. the preliminary enquiry report or otherwise the State Government is of the opinion that an enquiry should be held against a Pradhan under the proviso to clause (g) of sub-section(1) of Section 95 it shall forthwith constitute a committee envisaged by the first proviso to clause (g) of sub-section(1) of Section 95, of the Act and by an order ask an Enquiry Officer, other than the Enquiry Officer nominated under sub-rule (2) of Rule 4, to hold the enquiry. Now, the enquiry referred in Rule 5 is a final inquiry. We have been told that the State Government has delegated its powers in this regard to the District Magistrate concerned.

19) Once such an opinion is formed as is referred in Rule (5) then seizure of administrative and financial powers follow

in terms of proviso to Section 95(1)(g) of the Act.

20) Rule 6 of the Rules, 1997 deals with procedure for the final/ regular enquiry. We need not enter into details of the procedure prescribed but suffice it to say that the complainant has an important role to play in final proceeding for removal of the Gram Pradhan, in a case where the proceedings are based on a complaint. It is not, as if, he, after submission of complaint, has no role to play or that he is to be a passive player. He is entitled to active participation in not only making of allegations against a Gram Pradhan supported by requisite proof but also in proving the articles of charges framed by the Enquiry Officer. According to sub-Rule-16 of Rule 6, the Enquiry Officer may after completion of production of evidence, hear the complainant, if any, apart from the person against whom the enquiry is being held, or permit them, or him, as the case may be, to file written briefs of their respective cases. Based on the final inquiry, a decision is taken whether Pradhan is to be removed or not but in this case we are not concerned with final inquiry or removal of Pradhan based thereon. We are concerned with the interim stage referable to proviso to Section 95(1)(g) regarding seizure of his powers during pendency of such proceedings.

21) The seizure of administrative and financial powers of Gram Pradhan is not to be resorted to mechanically, in a routine manner, without due application of mind to the facts and material which may have been collected. Instead, it is required to be done on the basis of a preliminary enquiry followed by a show-cause notice to the Gram Pradhan confronting him with the material adverse to him and after considering his reply to the same. The legal position in this regard is very well settled. Therefore, once a complaint supported by proof is made and it is found to be in accordance with rules, it is to be acted upon and the competent authority may order a preliminary enquiry under Rule 4 of the Rules 1997 read with the first proviso to Section 95(1)(g). At this stage, the powers of the Gram Pradhan cannot be seized. The preliminary enquiry is ordered only to find out if there is a prima facie case for regular inquiry in the matter. Only after report of preliminary enquiry is received that the Competent Authority forms an opinion based on such report as to whether a final enquiry as envisaged in Rule 5 and 6 etc is required or not. If it opines that it is not required, the matter ends. However, if it finds that it is required which could, in a given case, be, if, prima facie, the Gram Pradhan is found to have committed financial and other irregularities, then, the Competent Authority would pass an order seizing the exercise of and performance of financial and administrative powers and functions by such Pradhan. Of course, this would be after following the procedure as mentioned hereinabove and as has been explained in detail in a full Bench decision of this Court in the case of **'Vivekanand Yadav vs. State of U.P. & Anr.'** reported in 2010 (111) RD 699.

22) In this scenario, the Gram Pradhan, if aggrieved, can challenge such order by filing a writ petition under Article 226 of the Constitution of India and it is in this context the questions as framed by us have arisen as to locus-standi of the complainant to get himself impleaded in such writ proceedings.

CONCEPT OF NECESSARY AND PROPER PARTY

23) In order to answer the question no.1 framed by us, we need to consider the concept of 'necessary party' and 'proper party'. In this context, the principles contained in Order 1 Rule 10 (2) C.P.C. are relevant. Even though the provision contained in C.P.C. do not apply to writ proceedings stricto sensu in view of explanation to Section 141 C.P.C. but, the principles enshrined therein can be applied and are applied very often to writ proceedings. Order I Rule 10(2) C.P.C. reads as under:-

"10(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."

24) A necessary party is a person who ought to have been joined as a party and in whose absence, no effective decree or order could be passed at all by the court. If a necessary party is not impleaded, the suit or petition itself is liable to be dismissed whereas a proper party is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit/ petition though he need not be a person in favour or against whom the decree is to be made. Legal position in this regard is well settled1.

TWIN TEST OF A NECESSARY PARTY

25) For being a necessary party, there is a twin test. The first is that there must be a right to some relief against such party in respect of the dispute involved in the proceedings. The second is that in the absence of such a party, no effective order/ judgment can be passed. In cases where these two tests are not satisfied, a person cannot be said to be necessary party2.

Question No.1-

Whether complainant is a necessary party in a writ petition filed by Gram Pradhan challenging seizure of his power under Section-95(1)(g) of the Act, 1947 read with Rules, 1997.

26) The first and foremost question is whether a complainant under the Rules, 1997 is a necessary party in a writ petition filed by the Gram Pradhan challenging the order of the District Magistrate seizing the exercise and performance of administrative and financial powers by him, or not.

27) In such a writ petition, if no relief has been sought against the complainant then it cannot be said that he is a necessary party. A complainant having made a complaint in terms of Rule 3 which has been acted upon by the Competent Authority who has ordered a preliminary enquiry resulting in a preliminary enquiry report, based on which, the Competent Authority after due and proper application of mind and following the procedure prescribed in law has passed an order seizing the administrative and financial powers of the Gram Pradhan may give rise to a *lis* between the Gram Pradhan and the Authority passing the order but the

complainant who may be the catalyst for the entire exercise cannot be said to be a necessary party in the *lis*. This is especially as, final/ regular enquiry is yet to be held wherein he will have an opportunity to adduce evidence, examine and cross-examine the witnesses and would be also entitled to personal hearing after completion of enquiry as is envisaged in Rule-6 of the Rules, 1997. But prior to that, that is at the stage of passing of an order of seizure of powers against the Gram Pradhan, in a writ petition filed by the Gram Pradhan, he cannot be said to be a necessary party. It cannot be said that his non-impleadment would render the proceedings bad resulting in its dismissal. An application for impleadment as a necessary party filed by him in such writ proceedings will not lie.

28) An argument was advanced by Sri Manish Vaish, learned counsel for the applicant seeking impleadment that in a case of connivance between the authorities and the Gram Pradhan, it is the complainant alone who could inform the court about such connivance as also the interest of the Gram Panchayat and Gram Sabha which was being compromised as a result thereof, therefore, he would be a necessary party. This argument cannot be accepted in the context of question no.1 framed by us for the reasons at the interim stage referable to proviso to Section 95(1)(g) of the Act, when the District Magistrate has already passed an order seizing the powers of Gram Pradhan, there can hardly be a situation where it could be said that the State authorities would be conniving with Gram Pradhan. In fact, in such a scenario, there would already be an order against the Gram Pradhan.

29) As regards his submission if such connivance takes place after filing of the writ petition before the writ court, then, the complainant would be a necessary party, we cannot answer this question on an hypothesis/ assumption that in every writ proceeding there would be connivance between the State authorities and the Gram Pradhan nor can we assume that the writ court which has extraordinary powers under Article 226 of the Constitution of India would be a mute spectator to such connivance and it cannot see through it and exercise its extraordinary powers to ensure substantial justice by summoning the records or for that matter even summoning the officials for its assistance, if required. It can put such queries as it may deem proper to the State to secure the ends of substantial justice. We cannot declare a complainant to be necessary party in such proceedings merely on such a hypothesis. We have no doubt that after filing of the writ petition if the State authorities are conniving with the petitioner and are not contesting the matter properly, the writ court can always see through this design and do the needful in exercise of its extraordinary powers, but merely because of this 'assumed possibility', we cannot hold that a complainant is a necessary party in such proceedings. However, this aspect can be taken into consideration by the writ court in the context of the concept of 'proper party' which shall be discussed hereinafter.

30) It is also pertinent to mention that there is nothing in the Act, 1947 or the Rules, 1997 requiring participation of the complainant in the preliminary enquiry ordered on his complaint which does not mean that he can't be allowed to participate if the Enquiry Officer so desires, but only to say that there is no such statutory requirement nor a corresponding right in favour of the complainant.

31) We are, therefore, of the considered opinion that a complainant is

not a necessary party in such writ proceedings.

Whether such complainant is a proper party

32) However, there is another aspect to be considered as to whether complainant can be a proper party in such proceedings. Now a proper party, as already stated, means a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favor or against whom the decree/ order is to be passed.

33) Whether or not a complainant is a proper party in writ proceedings as referred above would depend on the facts and circumstances of each case and it is not possible for us to lay down any general proposition in this regard which may be universally applicable in all the cases. Meaning thereby, in a given case, where the writ court finds that presence of a person would enable it to completely, adequately and effectively adjudicate upon all matters in dispute in writ proceedings, it can allow impleadment of such a person as a proper party unconditionally or with terms and conditions.3 This may include a case where the court finds that certain facts or documents are being withheld by the State or its authorities even after exchange of affidavits and if it is so demonstrated by the complainant seeking impleadment to the satisfaction of the writ court.

34) After all, the writ court has vide discretionary powers and we do not wish to fetter its exercise of discretion under Article 226 of the Constitution of India unnecessarily nor to impose a blanket prohibition upon it from hearing the complainant even as a proper party as it may in a given case result in grave miscarriage of justice. It may also in a given situation jeopardize/ compromise valuable rights of members of Gaon Sabha and public interest therein.

35) In this context, we may refer to a Constitution Bench decision of Hon'ble the Supreme Court in the case of **'Uday Narain Singh Malpaharia v Addl. Member, Board of Revenue, Bihar'** AIR 1963 SC 786 wherein the concept of 'proper party' was considered in the context of writ proceedings and in para no.10, it was held as under:-

"The question of making such a person as a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a party or such a party may suo motu approach the court for being impleaded therein."

36) We, however, hasten to add that such discretion has to be exercised by the writ court according to reasons and fair play and not as per the 'wish of the court', meaning thereby, even while deciding as to whether a complainant is a proper party in a given case or not, the decision has to be a considered one based on reasons and consideration of fair play, not otherwise4.

37) In this very context, we may refer to Allahabad High Court Rules, 1952 framed under Article 225 of the Constitution of India. Chapter XXII thereof deals with writ petitions. Rule 5A is relevant, it reads as under:-

"5-A. Hearing of persons not served with notice.- At the hearing of the application, any person who desires to be heard in opposition to the application and

***appears to the Court to be a proper person to be heard**, may be heard notwithstanding that he has not been served with notice under rule 2."*

On a reading of the above quoted rules itself it is evident that the writ court can at the hearing of the application (writ petition) hear any person who desires to be heard in opposition to the application (writ petition) and appears to the court to be a proper person to be heard notwithstanding that he has not been served with notice under Rule 2. Therefore, this provision also empowers the writ court specifically to hear a person who in its opinion is a proper party. We cannot take away the discretion of the writ court in this regard.

38) Above quoted Rule has been considered by a Division Bench of this Court in a case reported in (2009) 76 ALR 750 **'State of U.P. & Ors. vs. Committee of Management, Anjuman Madarsa Noorul Islam Dehra Kalan, Ghazipur through its Manager and Anr.'.** Relevant extract of the judgment is quoted hereinbelow:-

"9. A bare perusal of Rue 5-A shows that where a person in the Writ Court appears and requests to be heard in opposite on the petition and and it appears to the Court that he is a proper person only then he may be heard even though no notice has been served upon him since he was not a party impleaded in the writ petition To attract Rule 5-A of the High Court Rules, two things are necessary:

(1) a person desired to be heard in opposition to the application and (2) he appears to be a proper person to the Court that he should be permitted to be heard. Here the present application is not one seeking intervention for opposing the writ petition. Secondly, in the dispute involved in the writ petition, the learned Counsel for the applicant could not show as to how he is a proper person to be heard. Therefore, in our view, the reference made and reliance placed on Rule 5-A is misconceived and does not apply to the present application. We have no manner of doubt that wherever and whenever the Court finds that a person is a proper party to be heard in a matter he should be allowed opportunity to be heard but simply because someone has come and requested to be heard, he cannot be allowed as a matter of course and that too, which all the parties in the writ petition are opposing."

39) The Division Bench in the aforesaid judgment also had the occasion to consider provisions of Order I, Rule 8-A C.P.C. in this very context and in this regard, it observed as under:-

10. Then we come to Order I, Rule 8-A, C.P.C which reads as under:

"8-A. Power of Court to permit a person or body of persons to present opinion or to take part in the proceedings. - While trying a suit, the Court may, if satisfied that a person or body of persons is interested in any question of law which is directly and substantially in issue in the suit and that it is necessary in the public interest to allow that person or body of persons to present his or its opinion on that question of law, permit that person or body of persons to present such opinion and to take such part in the proceedings of the suit as the Court may specify."

11. To attract Rule 8-A three things are required: (1) While trying the suit the Court should be satisfied that a person or body of persons has interest in any question of law, (2) such question of

law must have directly and substantially in issue in the suit and (3) it is necessary in the public interest to allow such person or body of persons to present his or its opinion on the question of law.

12. Besides, the power of the Court to permit such person or body of persons to present his or its opinion is discretionary, inasmuch as, the Rule says that the Court may permit such person or body of persons. Sri Chaudhary vehemently submitted that the word "may" has to be read as 'shall. In "Principles of Statutory Interpretation" by Sri G.P. Singh, at page 447 while commenting upon the proposition as to when a provision would be read as mandatory or directory, the following observations of Lord Cairns have been quoted:

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

"Where a power is deposited with a public officer for the purpose of being used for the benefit of person specifically pointed out with regard to whom a definition is supplied by the legislature of the condition upon which they are entitled to call for its exercise, that power ought to be exercised and the Court will require it to be exercised."

40) The Court did not go into the question of may or shall which was raised before it in the context of Rule -8-A C.P.C. as it only considered the first pre-requisite that there should be question of law involved. The word 'may' in our opinion confers a discretion on the writ court and does not create a right in favour of the person seeking impleadment as proper party in a writ proceedings.

41) Now, in this very context, the Division Bench considered as to who is an intervener and when intervention application can be allowed and in this context it observed that in all the three cases cited before it, the intervention was allowed either when the person was supporting one of the party or he was found to be necessary or proper party to this dispute before the court and did not accepted the contention on facts but the legal position in this regard was considered by it. Relevant extract i.e. Para no.15 & 16 of the said judgment is quoted hereinbelow.

"15. Then comes the basic questions as to who intervener is and when intervention application can be allowed.

16. ***In Saraswati Industrial Syndicate (supra) the Apex Court categorically held that purpose of granting an intervention application is to entitle the intervener to address argument in support of one or the other side.."***

42) Merely because a person claims himself to be a proper party in the facts of a case, the said complainant cannot insist on being impleaded as, that is a discretion to be exercised by the writ court and not a right to be claimed by the complainant. The *sine qua non* in this regard, is the satisfaction of the Court and discretion to be exercised by it as aforesaid, that is, if the court finds presence of such complainant necessary to enable it to completely, effectively and adequately adjudicate upon all matters in dispute then it can order his impleadment as a proper party but this does

not give an indefeasable right to the complainant to seek such impleadment. As already stated, this is a discretion to be exercised by the writ court keeping in mind the facts and circumstances of a case and for reasons to be recorded keeping in mind fair play. The writ court cannot allow impleadment of proper party merely because it wishes to do so. It has to give reasons. It has to act according to reason and fair play. In a given case, the writ court can instead of ordering impleadment of a complainant as a proper party give him a right of hearing as an intervener.

43) In a case where a complainant is neither a necessary party nor a proper party neither such complainant can seek impleadment nor can the court order his impleadment.

44) We thus opine that in a writ petition filed by a Gram Pradhan, the complainant as referred in Rule-3 of the Rules, 1997 read with the first proviso to Section-95(1)(g) of the Act is not a necessary party unless some relief has been sought against him, but, in a given case he may be impleaded as a proper party or he may be heard as an intervener, as the case may be, as per discretion exercised by the writ court in the light of what we have stated hereinabove.

45) We answer question no.1 accordingly.

46) We make it clear that we have not considered the question as to whether a complainant under Rule-3 of Rule 1997 is a necessary or a proper party in any writ petition in which a *lis* relating to or based on a final enquiry referred in Rule-4 and 6 etc of the Rules, 1997 is involved. We have confined ourselves only to action at the interim stage i.e. seizure of financial and administrative powers of the Gram Pradhan referrable to first proviso to Section-95(1)(g) of the Act, 1947. We have also not considered the locus standi of a complainant to file a writ petition and challenge an order of withdrawal/ recall of order of seizure of functions passed against the Gram Pradhan in the teeth of proviso to Section 95(1)(g) and leave these issues for consideration in some other case.

Question No.2

47) We may in this context refer to a Division Bench judgment in the case of **Dharam Raj vs. State of U.P. & Ors.'** reported in 2009 (108) RD 689. First of all, the said matter pertained to a fair price shop license and did not pertain to the seizure of administrative and financial powers of a Gram Pradhan as an interim measure as involved herein and as was involved in **Amin Khan's** case (supra). Secondly, the said writ petition was filed by complainants challenging an order passed by the District Magistrate exonerating the fair price shop licensee and it was not a case whre complainant was seeking impleadment as an opposite party. The Division Bench in the said case considered the concept of 'person aggrieved' and held that complainant was not a person aggrieved. The judgment does not disclose any statutory provisions or rules similar to those involved in the case of a Gram Pradhan as has been referred by us hereinabove wherein the complainant plays an active role not only at the time of filing the complaint but even thereafter in the regular enquiry which is the basis for the final order passed. Moreover, the concept of 'person aggrieved' is relevant in a case where the complainant files a writ petition or appeal arising therefrom but so

far as the question of impleadment as an opposite party in a writ proceedings is concerned, it is concept of necessary and proper party which has to be considered. This was neither the issue in the case of Dharam Raj (supra) nor was it considered. Therefore, the said decision also does not persuade us to take any other view of the matter especially as we have also held that the complainant would not be necessary party in a writ proceedings unless any relief has been claimed against him. However, we have opined that the court can in its discretion order his impleadment as a proper party. Moreover, we have not expressed any opinion as to the *locus standi* of a complainant referable to Rule 3 of the Rules, 1997 to maintain a writ petition challenging a final order passed by the District Magistrate under Section 95(1)(g) of the Act and we leave this question for consideration in some other appropriate case.

48) We have also considered the judgment rendered by a Co-ordinate Bench in the case of **'Amin Khan vs. State of U.P. & Ors.'** ;(2008) SCC Online All 269. It was an appeal by a complainant challenging a judgment passed by a Single Judge along with an application seeking leave to appeal. The Court noticed that the applicant was a complainant and also a member of the three-Member Committee constituted by the District Magistrate under the proviso to Section-95(1)(g) to perform the functions and duties of Pradhan consequent to cessation of his powers. The Division Bench held that such a member of the Committee cannot be a party in a litigation as he was not a 'person aggrieved'. It has also observed that being a complainant, he should not have been made a member of the three-membered Committee by the District Magistrate and that being a complainant he could at the most be examined as a witness in the inquiry but he cannot be permitted to become a party in the *lis*. The Division Bench opined that complainant did not have any locus standi to maintain the appeal and rejected the application for leave to appeal.

49) On a perusal of the said judgment we find that it was a case where the writ court allowed the writ petition of Gram Pradhan and quashed the order of seizure of financial and administrative powers passed by the District Magistrate. Therefore, there was already an adjudication by the writ court which was sought to be challenged by the complainant by filing a special appeal and seeking leave to appeal. There is no mention in the judgment that the appellant therein had moved an application before the writ court seeking impleadment as is the case here. We have already held that in such writ proceedings a complainant is not a necessary party unless any relief has been sought against him. It appears that after the writ court had pronounced its verdict, the complainant came forward to file the appeal challenging the said judgment. Therefore, not having sought impleadment before the writ court, once the latter had pronounced its verdict on validity of the order of seizure then the *locus standi* of the complainant was absent to maintain the appeal as per the judgment of the Co-ordinate Bench. This is not the question before us.

50) As regards the observations in **Amin Khan's** case (supra) that such a complainant is not a 'person aggrieved', the concept of 'person aggrieved' would arise in the situation of the writ petition being filed by the complainant or an appeal being filed against the judgment of the writ court in the

circumstances noticed hereinabove which is not the case here. In a case such as the one at hand where the complainant had sought impleadment as an opposite party in writ proceedings, it is the concept of necessary and proper party which would have to be considered. This aspect was not involved nor considered by the Co-ordinate Bench in the case of **Amin Khan** (supra). We have held that a complainant would not be a necessary party in a writ petition or an appeal arising therefrom unless any relief has been sought against him but for the reasons already given by us, the writ court in its discretion can order the complainant to be impleaded as a proper party or hear him as an intervener which does not by itself make him a party to the *lis* but as already stated his presence is there for the assistance of the court that too on the satisfaction of the court and not as a matter of right. Therefore, we are of the opinion that what has been held by us hereinabove does not in essence contradict what has been held in **Amin Khan**'s case (supra). We have merely clarified the matter in the context of a proper party (opposite party) in a writ proceedings. Therefore, we see no reason as to why we should refer the judgment in the case of **Amin Khan** (supra) for reconsideration by a larger Bench. This is especially as we have not expressed any opinion on the question as to whether after a final order of removal has been passed by the District Magistrate after a regular enquiry, the complainant would have any *locus standi* or not and have also not expressed any opinion as to whether special appeal would be maintainable at the behest of a complainant against judgment of a writ court which was the question involved in **Amin Khan**'s case (supra)

51) We answer question no.2 accordingly.

52) The writ petition shall now be listed before the writ court on **06.03.2024** along with our answers to the questions referred hereinabove.

(2024) 2 ILRA 1015
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.02.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ - C No. 8449 of 2022

Ray Sahab ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Anurag Shukla, Satish Kumar Sharma

Counsel for the Respondents:
C.S.C., Anurag Srivastava, Manoj Kumar Rai

Civil Law - U.P. Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 – Clause 8(7) – Essential Commodities Act, 1955 – Sections 3/7 – Cancellation of Fair Price Shop License – Summary Inquiry – Principles of Natural Justice – Writ Jurisdiction – Article 226

The petitioner, Ray Sahab, challenged the cancellation of his fair price shop license for Village Panchayat Bishaiya, Raebareli, vide order dated 24.05.2022, upheld by the appellate authority on 19.11.2022, alleging procedural irregularities and violation of natural justice. A complaint on 03.09.2020 led to an inquiry revealing short supply of food grains to ration card holders, resulting in the license's suspension on 10.09.2020 and an FIR under Sections 3/7 of the Essential Commodities Act. Despite a final police report on 25.01.2022 finding no case, which was allegedly approved by the District Magistrate, multiple inquiries confirmed irregularities, leading to the license's cancellation. The petitioner argued: (1) the appellate authority decided without hearing him, (2) the inquiry report was not provided, (3) the police report cleared him, (4) the inquiry

committee was improperly constituted, (5) complainants' St.ments were inconsistent, and (6) the procedure under the Government Order dated 05.08.2019 was not followe Held: The inquiry under Clause 8(7) of the 2016 Control Order is summary, requiring only a show-cause notice, opportunity to respond, and a reasoned order, as per Shankar Prasad Vs St. of U.P. (Mis Single No. 32679 of 2019). There is no mandate for supplying the inquiry report or allowing cross-examination, as confirmed in Radhey Shyam Vs St. of U.P. (Writ-C No. 22891 of 2019). The appellate authority's decision without the petitioner's presence was justified due to his absence despite notice, and no adjournment was sought. The police report's pendency due to a protest petition negated its relevance. The inquiry committee's composition was clarified as valid, with the Additional District Magistrate solely responsible for the report. The inquiry report, based on 32 witnesses, consistently showed short supply and misuse of the e-pass machine, justifying cancellation. The 2019 Government Order was adhered to, requiring no detailed inquiry. The cited judgments (Amar Nath, Amodnath Mishra, Manoj Kumar Pathak) were either distinguishable or superseded by Shankar Prasa The writ petition was dismissed, finding no legal infirmity in the impugned orders.

Case Law Cited:

1. Shankar Prasad Vs St. of U.P. & ors., Mis Single No. 32679 of 2019, decided on 08.12.2021

2. Radhey Shyam Vs St. of U.P. & ors., Writ-C No. 22891 of 2019, decided on 16.02.2022

3. Amar Nath Vs Commissioner, Lucknow Division & ors., Writ-C No. 1001443 of 2007, decided on 19.12.2022

4. Amodnath Mishra Vs St. of U.P. & ors., Writ-C No. 3407 of 2022, decided on 30.11.2023

5. Manoj Kumar Pathak Vs St. of U.P. & ors., Mis Single No. 3739 of 2012, decided on 11.11.2014

(Delivered by Hon'ble Abdul Moin, J.)

1. Personal affidavit of Principal Secretary, Food & Civil Supplies, Lucknow dated 19.02.2024 filed today in Court by the learned Additional Chief Standing Counsel be kept on record.

2. Personal affidavit was required by this Court in terms of the order dated 16.01.2024 which for the sake of convenience is reproduced below:-

"1. Heard.

2. In pursuance to the orders dated 14.02.2023 and 23.02.2023, a supplementary counter affidavit has been filed on 02.03.2023. By placing reliance on the said affidavit, the contention of learned Standing counsel is that the District Magistrate, on an application moved by the petitioner, passed an order dated 06.05.2022, a copy of which is annexure SCA-1 to the said affidavit, per which the Additional District Magistrate was required to examine the explanation of the petitioner and submit a report.

3. In pursuance thereof, the Additional District Magistrate examined the explanation of the petitioner in presence of the Naib Tehsildar, Salon and five other officers and in respect of which an order dated 18.05.2022, a copy of which is annexure SCA-2 to the said affidavit, was also passed.

4. It is contended that the inquiry report was not submitted by the six officers along with the Additional District Magistrate rather the Additional District Magistrate required the other six officers only for the purpose of helping out in the inquiry for examining the statements and not that the inquiry was conducted by the other six officials and hence, the report submitted by the Additional District Magistrate does not bear the signatures of

the other six officials who helped out in the said inquiry.

5. Considering the aforesaid, the explanation is found satisfactory by this Court of the inquiry report only bearing the signatures of the Additional District Magistrate.

6. The contention of learned counsel for the petitioner is that though from the inquiry report dated 21.05.2022, the shortage of supply of ration vis-a-vis the N.I.S. report and also from the statements of ration card holders, it emerged that less ration has been supplied to the ration card holders, yet in the F.I.R. lodged against the petitioner under Section 3/7 of The Essential Commodities Act wherein final report has been submitted on 25.01.2022, a copy of which is annexure 15 to the petition (page 112), per which the Investigating Officer has indicated about the suspicious conduct of the Lekpal Shri Ram Sumer Maurya and Shri Vivek Kumar, Supply Inspector and also indicated that all the witnesses have resiled from their statements that have been given earlier to the authorities, and as such, no case under Section 3/7 of Essential Commodities Act is found against the petitioner. He further contends that the said report was approved by the District Magistrate, Raebareli.

7. The argument is that when the police in the final report has specifically concluded that no case is made out against the petitioner of giving supply of lesser food grains to the ration card holders, consequently no cognizance can be given to the inquiry report which has been conducted behind the back of the petitioner and in which the witnesses have indicated of lesser supply of food grains / ration by the petitioner.

8. Responding to that, the contention of learned Standing counsel, on the basis of averments contained in the counter affidavit are (a) that the Investigating Officer never visited the Gram Panchayat and never verified the stock of fair price license holder and also never recorded the statements of card holders and (b) that the District Magistrate has taken cognizance of the report of the Investigating Officer wherein the approval of the District Magistrate has been alleged to have been accorded by indicating that it is only the District Magistrate himself who is to accord the approval and no other officer and thus, the approval appears to be fake and not genuine. Specific averment to the said effect has been made in paragraph 25 of the counter affidavit dated 25.01.2023.

9. From perusal of the aforesaid facts, it is prima facie apparent that it is only the ration card holders who have not been supplied the full ration to which they are entitled to, as emerges from the inquiry report dated 21.05.2022, who are the ultimate sufferers and who would fall within the ambit of being "collateral damage" in the entire episode that has occurred. The ultimate beneficiary in the entire episode, prima facie, appear to be the fair price shop license holder, the Lekpal Shri Ram Sumer Maurya, the Supply Inspector Shri Vivek Kumar and the Investigating Officer who submitted his report dated 25.01.2022.

10. The Court while exercising jurisdiction under Article 226 of the Constitution of India cannot shut its eyes to the aforesaid sorry state of affairs which, prima facie, emerge from the perusal of record. The Court is also conscious and aware that the District Magistrate has himself indicated that the approval of the report of the Investigating Officer is only to be accorded by the District Magistrate himself and no other officer and as such the approval appears to be fake, yet the further

action that may have been taken on the basis of the said averments, as contained in the counter affidavit filed way back on 25.01.2023 i.e. almost a year back, has still not been indicated.

11. Considering the aforesaid, the Court requires the Principal Secretary, Food & Civil Supplies, Civil Secretariat, Uttar Pradesh, Lucknow i.e. respondent No.1 to file his personal affidavit in the matter addressing all the aforesaid issues and indicating the action which has been taken / is proposed to be taken against the guilty officials in the entire episode and, thus, to ensure that at least the ration card holders get the due amount of food grains to which they are entitled to and the same is not defeated at the behest of either the fair price shop license holder or the other officials who are required to ensure that due food grains are received by the ration card holders.

12. Let the personal affidavit be filed within four weeks.

13. List this case for further hearing on 19.02.2024 at 02:15 P.M.

14. Interim order, if any, shall continue till the next date of listing."

3. Sri Anurag Shukla, learned counsel for the petitioner states that he does not intend to file any reply to the same.

4. From a perusal of the aforesaid order dated 16.01.2024, it emerges that the contention of learned counsel for the petitioner was that when the police in the final report has concluded that no case is made out against the petitioner of giving lesser supply of food grains to the ration card holders consequently, no cognizance can be given to the inquiry report dated 21.05.2022 which enquiry has been conducted behind the back of the petitioner and that despite the inquiry report having indicated the connivance of the lekhpal, the Supply Inspector Investigating Officer, no action has been taken against them.

5. In the supplementary counter affidavit filed today, a specific averment has been made in paragraph 23 that the then Investigating Officer, Sri Praveen Gautam and the then Judicial Assistant, Sri Balaji Vidayarthi have been prima facie found guilty and a preliminary departmental inquiry has been directed to be conducted against Sri Praveen Gautam. As Sri Balaji Vidayarthi has retired as such, a letter dated 02.02.2024 has been sent to Secretary, Government of U.P for according sanction to initiate departmental proceedings against him as per CSR 351-A.

6. So far as the final report is concerned, it has been specifically averred in paragraph 21 of the affidavit that against the said report, a protest has been filed by the Supply Inspector before the learned Additional Chief Judicial Magistrate-I, Raibareilly on 05.12.2023 which is pending before the competent Court.

7. So far as distribution of food grains is concerned, it is contended that the same are being distributed by the shop with which the card holders have been attached.

8. Considering the aforesaid personal affidavit of the Principal Secretary, Food and Supply it is apparent that the action has been taken in pursuance to the order of this Court dated 16.01.2024 which action is found satisfactory.

9. As the pleadings are completed accordingly the Court proceeds to hear and decide the matter finally.

10. Heard Sri Anurag Shukla, learned counsel for the petitioner and Sri Rahul Shukla, learned Additional Chief

Standing counsel appearing on behalf of the State-respondents.

11. Instant writ petition has been filed praying for the following main reliefs:-

(i) Issue a writ, order or direction in the nature or certiorari thereby quashing the impugned order dated 19.11.2022 passed by opposite party no. 2, Joint Commissioner (Food), Lucknow Division, Lucknow in Appeal No. 2576 of 2022, Ray Sahab Singh Vs. State of U.P U/S 13 (3) of Essential Commodities (Regulation of sale and Distribution Control) Order, 2016 and impugned order dated 24.05.2022 passed by the Opposite Party No. 3, Upziladhikari, Tehsil- Salon District Raibareily, contained as Annexure No. 1 & 2 to this writ petition.

(ii) Issue a writ, order or direction in the nature of Mandamus commanding the opposite party no. 3 to permit the petitioner to run the fair price shop of Village Panchayat Bishaiya, Block & Tehsil Salon, District Raibareli during pendency of the present writ petition before this Hon'ble Court

12. The facts set forth by the learned counsel for the petitioner are that the petitioner was having a license of the fair price shop of Village Panchayat-Bisaiya Block & Tehsil- Salon District-Raibareilly and had been running the said shop without any complaint since long. On 03.09.2020, a complaint was made against the distribution of food grains by the petitioner on the public hearing portal. An inquiry was conducted by the Regional Supply Inspector, Salon who submitted his report on 07.09.2020. On the basis of the said report, the license of the petitioner was suspended vide order dated 10.09.2020, a copy of which is annexure 4 to the writ petition. Being aggrieved, the petitioner filed an appeal and the learned appellate authority vide order dated 05.12.2020, a copy of which is annexure 5 to the writ petition remanded back the matter to the competent authority to pass a fresh order after considering the explanation of the petitioner. In pursuance thereof, the petitioner submitted his explanation which was examined by the inquiry committee which submitted its report on 04.03.2021. The petitioner preferred an application for re-inquiry which was also directed and after considering the explanation of the petitioner, the license of the petitioner was cancelled vide order dated 08.07.2021, a copy of which is annexure 9 to the writ petition.

13. The petitioner being aggrieved with the order dated 08.07.2021 filed an appeal. Vide order dated 31.08.2021, a copy of which is annexure 10 to the writ petition, the appeal was allowed and the matter was remitted to the competent authority to pass a fresh order.

14. In pursuance thereof, an inquiry was again conducted and a report was submitted on 04.05.2022. The petitioner being dissatisfied with the said inquiry requested for re-inquiry and again the inquiry report dated 21.05.2022 was submitted, a copy of which is part of annexure 12 to the writ petition.

15. After considering the inquiry report, the competent authority vide order dated 24.05.2022, a copy of which is annexure 2 to the writ petition cancelled the license of the petitioner. Being aggrieved, the petitioner filed an appeal which has been rejected vide order dated 19.11.2022, a copy of which is annexure 1 to the writ petition. Being aggrieved by both the

orders, the instant writ petition has been filed.

16. Learned counsel for the petitioner has raised following arguments in order to challenge the orders impugned namely (a) the appellate authority has decided the appeal without hearing the petitioner (b) copy of the inquiry report has not been supplied to the petitioner on the basis of which the cancellation of license order dated 24.05.2022 has been passed (c) when the final report had been submitted by the police in the case filed against the petitioner under the provisions of Section 3/7 of the Essential Commodities Act which was approved by the District Magistrate, Raibareilly consequently, in the summary proceedings against the petitioner conducted by the respondents it could not be said that the petitioner has not supplied the food grains or has made lesser supply of the food grains (d) the District Magistrate had directed for formation of a six member committee, as stands recorded in the report dated 21.05.2022 (Page 87 & 88 of the writ petition) but the report has been submitted only by one person i.e. the Additional Magistrate as per annexure 12 of the writ petition (e) that there is difference in the statements recorded of the complainants & (f) the Government order dated 05.08.2019 which has been issued subsequent to the Control Order, 2016 gives the detailed procedure for cancellation of the fair price shop license has not been adhered to.

17. No other ground has been urged.

18. Elaborating his arguments, Sri Shukla argues that when the appeal was listed on 08.11.2022, the petitioner or his counsel could not appear and the appellate authority reserved the orders on the appeal and thereafter dismissed the appeal of the petitioner vide order dated 19.11.2022 and as the said order has been passed without hearing the petitioner the same would thus render the order to be in gross violation of the rules of natural justice and as such, the appellate order merits to be quashed on this ground alone.

19. The further argument is that the inquiry report on the basis of which the license of the petitioner has been cancelled, was never supplied to him and thus the order impugned merits to be set aside on account of the report with which the petitioner was never confronted with having been relied upon while passing the order impugned. Placing reliance on the Government order dated 05.08.2019, a copy of which is annexure 17 to the writ petition , the contention is that the said Government order contains a detailed procedure for holding of an inquiry against the license holder and as the petitioner was never accorded an opportunity of cross examining the complainants whose statements have been recorded neither the inquiry report was supplied to him as such, the order of cancellation of license of the petitioner would run foul to the provisions of rules of natural justice and accordingly, merits be quashed on this ground.

20. Reliance has been placed on the judgment of this Court in the cases of **Amar Nath Vs. Commissioner, Lucknow Division and Ors** passed in **Writ-C No. 1001443 of 2007** decided on **19.12.2022, Writ-C No. 3407 of 2022 Inre: Amodnath Mishra Vs. State of U.P and ors** decided on **30.11.2023** as well as a judgment of this Court in the case of **Manoj Kumar Pathak Vs. State of U.P and Ors** passed in **Misc. Single No. 3739 of 2012** decided on **11.11.2014.**

21. On the other hand, Sri Rahul Shukla, learned Additional Chief Standing counsel on the basis of averments contained in the counter affidavit has argued that an inquiry report had been submitted by the Inquiry Officer wherein the statements of the witnesses were examined and the details given by the petitioner regarding supply were also examined as per the details available on the public portal through the MIS report. All the witnesses specifically indicated about less supply of food grains having been made by the petitioner despite the petitioner having taken their thumb impression on the e-pass machine which thus prevailed upon the competent authority to cancel the license of the petitioner. It is also contended that the appeal was required to be decided in terms of the directions issued by the writ Court but as the appeal was not decided, a contempt petition had also been filed indicating that despite expiry of the time prescribed by the writ Court, the appeal has not been decided. It is also contended that the appeal was listed on 18.11.2022 but neither the petitioner nor his counsel were present nor was there any request for adjournment and accordingly, the appellate authority, after considering the order passed in the writ Court dated 06.09.2022 as well as a contempt petition having been filed, reserved the orders on the appeal on 18.11.2022 and upon finding no merits in the appeal, dismissed the appeal vide order dated 19.11.2022.

22. The further argument of Sri Shukla is that a perusal of the inquiry report dated 21.05.2022 would indicate the gross irregularities carried out by the petitioner in supply of food grains to the ration cards holder and he not having made the complete supply rather has given lesser supply to the ration card holders and based on the said report, the competent authority has cancelled the license of the petitioner.

23. Reliance has also been placed on the Division Bench judgment of this Court in the case of **Shankar Prasad Vs. State of U.P and Ors** passed in **Misc. Single No. 32679 of 2019** decided on **08.12.2021** on a reference made by the learned Single Judge of this Court noticing a cleavage of opinion in various decisions to contend that the Division Bench has categorically held that the inquiry envisaged for cancellation of a license in terms of a relevant Government orders is only summary in nature and not a detailed inquiry.

24. Placing reliance on the aforesaid judgment, Sri Shukla argues that as the charges against the petitioner have been proved after a summary enquiry consequently, there was no occasion to either supply of the inquiry report or for cross examination of the witnesses and as such, the orders impugned have correctly been passed in the eyes of law.

25. Heard the learned counsel appearing on behalf of the contesting parties and having perused the records.

26. From a perusal of records it emerges that the petitioner was having the license of a fair price shop. Initially, the license of the petitioner had been suspended on 10.09.2020. An FIR had also been lodged against the petitioner under Section 3/7 of the Essential Commodities Act. The petitioner had preferred an appeal aggrieved against the suspension order which was allowed vide order dated 05.12.2020 and the matter had been remitted to the competent authority to pass a fresh order. After considering the

explanation of the petitioner and the inquiry report, the license of the petitioner was cancelled vide order dated 08.07.2021. The appeal filed by the petitioner against the said order was partly allowed vide order dated 31.08.2021 and the matter was remitted to the competent authority to pass a fresh order. While remitting the matter to the competent authority, the appellate authority has specifically required the competent authority to do two things namely to consider the distribution made by the petitioner as per the MIS report available on the public portal along with statements of the complainants and to pass a reasoned and speaking order after considering the same. Thus, the scope before the Prescribed Authority to pass a fresh order was only confined to the directions as had been given by the appellate authority vide its order dated 31.08.2021. Incidentally, the order dated 31.08.2021 has not been challenged by the petitioner at any stage and as such, the directions issued by the appellate authority have attained finality.

27. Considering the order of the appellate authority , the competent authority called for an inquiry report which was sent on 04.05.2022 against which the petitioner submitted his objections which occasioned another inquiry report to be submitted which was submitted on 21.05.2022 by the Additional Magistrate, Raibareilly. The said report specifically indicates about the statements of the witnesses being seen in the context of the supply as per MIS report available on the public portal from which the Inquiry Officer specifically concluded of lesser ration or in some cases no ration being made available to quite a large number of ration card holders. Incidentally, the report also indicates about the statement of the petitioner being recorded. The report also concluded that the petitioner made the ration card holders put their thumb on the e-pass machine for the purpose of showing the distribution but physically, lesser ration was distributed to the ration card holders. Based on the said report, the license of the petitioner was cancelled vide order dated 24.05.2022 which order has been upheld with the dismissal of the appeal vide order dated 19.11.2022.

28. The grounds taken by the learned counsel for the petitioner while raising a challenge to the orders impugned have already been indicated above. Prior to considering the grounds as raised by the learned counsel for the petitioner while raising a challenge to the order impugned, the Court may indicate the procedure which is required to be followed for the purpose of cancellation of a fair price shop license.

29. In this regard, it would be suffice to refer to the Division Bench judgment of this Court in the case of **Shankar Prasad (supra)** wherein this Court after referring to various Government orders that have been issued in this regard including the Uttar Pradesh Essential Commodities (Regulation of Sale and Distribution Control) Order, 2016 has held as under:-

"47. Thus, we answer the reference as under:-

(i) It is held that the parameters for an enquiry to be conducted against the licensee for the irregularities committed by the licensee in terms of the Distribution of Essential Commodities is on broad principles of natural justice where the competent authority shall provide a show cause notice to the licensee indicating the violations and irregularities committed by the licensee with sufficient particularity to

enable him to respond to the same and after affording an opportunity of hearing, the decision can be taken by the competent authority by a reasoned and a speaking order. ***The enquiry envisaged is summary in nature and does not entail a detailed hearing, akin to a departmental enquiry****;*

(ii) ***It is held that the words "full fledged enquiry" as used by the Full Bench of this Court in the decision of Puran Singh (supra) has to be read in context with paras 4 and 5 of the Government Order of July 2004 and the scheme therein which merely requires adherence to the principles of natural justice and does not provide for a detailed enquiry involving various stages and steps as are required to be met in disciplinary enquiry against a government servant."***

30. From a perusal of the aforesaid judgment it is apparent that the Division Bench has categorically held that the parameters for an inquiry to be conducted against the license holder for the irregularities committed by the licensee is on broad principles of natural justice where a show cause Notice has to be issued to enable the licensee to respond to the same and after affording an opportunity of hearing, the decision has to be taken by the competent authority by a reasoned and speaking order and that the inquiry envisaged is summary in nature and does not entail a detailed hearing akin to a departmental inquiry.

31. The question which arises is as what is a summary inquiry or summary proceedings or an inquiry summary in nature.

32. In this regard, it would be apt to refer to the definition of summary proceedings as given in the **Black's Law Dictionary, Ninth Edition** which defines summary proceeding as under:-

"Summary Proceeding:- *A nonjury proceeding that settles a controversy or* ***dispose of a case in a relatively prompt and simple manner."***

33. "Summary" has been defined in the **Black's Law Dictionary, Ninth Edition** as under:-

Summary:- 1. Short;concise <a summary account of the events on March 6> 2. ***Without the usual formalities****;esp. without a jury<a summary trial>. 3. Immediate; done without delay <the new weapon was put to summary use by the Military.*

34. From a perusal of the meaning of 'summary' and 'summary proceeding' as per the Black's Law Dictionary, it is apparent that summary proceedings would be proceedings without the usual formalities i.e proceedings to be done without any delay so as to settle a controversy or dispose of a case in a relatively prompt and simple manner and without the usual formalities.

35. Armed with the meaning of summary proceeding as per Black's Law Dictionary and the summary procedure required to be adopted as held by this Court in the case of **Shankar Prasad (supra)** it is apparent that there is no requirement while cancelling the license of a fair price shop holder to go in for a detailed inquiry i.e for cross examination of the complainants or the witnesses or for giving a copy of the inquiry report to the licensee for in case such a view is taken, the procedure prescribed would no longer remain summary and would be akin to a detailed

inquiry which is clearly not contemplated under the Control Order, 2016 as interpreted and held by this Court in the case of **Shankar Prasad (supra) .**

36. Subsequent to the Division Bench judgment of this Court in the case of **Shankar Prasad (supra)** this aspect of the matter has also been considered by a co-ordinate bench of this Court in the case of Radhey Shyam Vs. State of U.P and Ors passed in Writ-C No. 22891 of 2019 decided on 16.02.2022 wherein this Court has held as under:-

"26. In the case of Smt. Meena Devi (supra), a coordinate Bench of this Court specifically held after considering the Full Bench decision of this Court in the case of Puran Singh (supra) that the licensee of a fair price shop is only an agent of the Government engaged for ensuring the equitable distribution and availability of the essential commodities at fair prices. The agent having signed the license/agreement is bound by the conditions mentioned therein including all such conditions which the Government chooses to impose during the currency of such license. A need for fairness in procedure adopted for suspension and cancellation of such license/agreement would not mean that these licenses fall within the category of a fundamental right to carry on the business as provided under Article 19(i)(g) of the Constitution of India. In the said judgment, judgments passed in the case of Ashok Kumari Tiwari (supra) and Sanjay Kumar (supra) have been distinguished in paragraphs 19 to 21, which read as under:-

"19. It is this observation of the Hon'ble Full Bench regarding the "fullfledged inquiry" after suspension order and show cause notice is issued, which has been interpreted by the Co-ordinate Benches of this Court to include giving a copy of inquiry report, copies of the statements of witnesses/villagers fixing date, time and place of hearing for such cross-examination as the licensee wishes to carryout of such villagers, besides examination of documentary evidence submitted by him, before the Licensing Authority can pass the order of cancellation.

20. The judgment rendered by the Full Bench of this Court was in reference to the questions referred to it. All observations made by the Full Bench in the aforecited judgments in Puran Singh (supra) are therefore to be taken into consideration in the context in which the reference was made and decided. The Full Bench decision of this Court had examined paragraphs-4 and 5 of the government order dated 29.07.2004 in the context of the reference made to it. The language of paragraph - 4 refers to full opportunity of hearing being given to the licensee in the inquiry to be conducted after suspension order is passed. The inquiry is to be completed within a maximum period of one month necessarily. The final order was to be passed by the Licensing Authority on merits after making a clear mention therein that the concerned licensee had been given opportunity of hearing and in case he did not co-operate in the inquiry, a mention was to be made of the notices served upon him including the notice giving the final opportunity in case he avoided the inquiry.

21. The Hon'ble Full Bench had referred to the object of issuing affair price shop license and appointing agents for distribution of essential commodities and had emphasized that a license is given for the benefit of ordinary citizens, the beneficiaries of the Public Distribution System."

27. In the aforesaid case, this Court has held that observation in paragraph 35 of the judgment in the case of Puran Singh (supra) that a full-fledged inquiry in the matter of misconduct of a licensee in distribution of scheduled commodities should be held, does not mean that full-fledged opportunity to the licensee to cross-examine the witnesses fixing, date, time and place of the inquiry etc. as provided in respect of disciplinary inquiry against Government servants.

28. Learned Single Judge in paragraph 50 of the aforesaid judgment had held that judgments rendered by a coordinate Bench of this Court in the case of Gyan Singh Vs. State of U.P. and others, decided on 12.9.2012, Ashok Kumar Pandey Vs. State of U.P. and others, decided on 13.12.2012 and Abu Baker Vs. State of U.P. and others, 2010 (6) ADJ 339 were clearly per incuriam as no such provision exists in the Government Order dated 29.7.2004 for fixing date, place and time for inquiry/oral hearing and giving opportunity to the licensee to cross-examine the witnesses. Paragraphs 50 and 51 of the said judgment are extracted herein-below:-

"50. The judgment rendered by Coordinate Benches before the issuance of this order dated 16th October, 2014 Viz. Gyan Singh Vs. State of U.P. and others decided on 12.09.2012, in Ashok Kumar Pandey Vs. State of U.P. and others decided on 13.12.2012 on the basis of the judgment in Abu Baker Vs. State of U.P. and others, reported in 2010 (6) ADJ 339 decided on 23rd of February, 2010,which is the first judgment wherein relying upon D.K. Yadav Vs. J.M.A. Industries, (1999) 3 SCC 259 and National Building Construction Corporation Vs. S. Raghunathan: (1998) 7 SCC 66, the observation was made that the inquiry was vitiated because the statements of Cardholders were recorded behind the back of licensee and neither copies of the statements of the aforesaid witnesses was furnished to the petitioner nor he was given any opportunity to cross-examine the witness so examined, were clearly per incuriam as no such provision existed in the government order dated 29.07.2004 at the time for fixing date, place and time of inquiry/oral hearing and giving opportunity for the licensee to cross examine the witnesses/ complainants.

51. This Court is of the considered opinion that a fair price shop licence is only an agent for distribution of scheduled commodities under the Public Distribution System. Such a licensee being only an agent acts for the principal i.e. the Government with a fixed rate of commission on the amount of allocation of essential commodities and their distribution by weight. The Public Distribution System has been envisaged by the government only to help the poor and needy. It is honest tax-payer's money which is used to subsidize the price of such essential commodities so that they come within the reach of poor and needy and they are able to feed themselves and their family in a respectable fashion and are not led to mendicancy and starvation. The principal remaining the State Government, and the licensee being only an agent, the principal is entitled to take away the licence in case of irregularity in distribution. Of course, there should exist valid reasons for taking away of such licence and some opportunity of hearing is required to be given to the agent in case of complaints being received against him. However, there is no fundamental right nor any Constitutional right for such a licensee akin to Article 311 of the Constitution of India. Even in the case of government

servants protected under Article 311 of the Constitution of India the degree of proof required for establishment of guilt is that of "preponderance of probability."

33. A coordinate Bench of this Court in the case of Najakat Ali (supra) has held that after issuance of the Control Order, 2016, the earlier Government Orders of 2004, 2014 and 2015 stood repealed and would not occupy the field of laying down the procedure with respect to suspension and cancellation of the fair price shop. The entire procedure has been prescribed in the Control Order, 2016. Now, the inquiry is to be conducted by the designated officer regarding irregularities/malpractices of the dealer as per the provisions of sub-clause (7) of Clause 8 of the Control Order, 2016, which provides that if the license of the fair price shop is suspended, he has to be issued show cause notice and explanation/reply of the show cause notice is to be examined by an officer one rank above the inquiry officer. It has been further held that Puran Singh's (supra) judgment was delivered considering the Government Order dated 29.7.2004, which since has been repealed. In paragraphs 94 to 96, a coordinate Bench of this Court in the aforesaid case held as under:-

"94. As the existence of agent/dealer arise from the agreement executed between them and the State, any failure on their part or term of license being violated, the matter has to be dealt with by the authority within the scope and ambit of the Act/Control Order under which the same has been executed. The argument advanced that the petitioners have vested right is not correct as the license granted to a dealer/agent does not fall within the ambit of fundamental right to carry on their business, as provided under Article 19(1)(g) of the Constitution.

95. While dealing with the matter of suspension or cancellation of a license, the authority have to confine themselves to the violation of the condition of license and sub-clause (7) of Clause 8 of Control Order, 2016 protects the interest of agent/dealer by affording an opportunity once an inquiry is conducted and any material coming on record against the term of condition of license, the same being suspended and a show cause notice is to be issued seeking reply/explanation.

96. The principle of audi alteram partem is complied once the notice is issued and an opportunity is provided to a dealer/agent to submit his reply and the same being considered by the authorities. The claim that a full fledged inquiry be conducted providing opportunity of cross-examination of witness, copy of documents, complaint and consideration of subsequent affidavits, if filed in favour of the dealer, by the authorities cannot be accepted, as it is not a departmental or regular inquiry under Article 311of the Constitution of India and is only a inquiry of summary nature where in case of violation of terms of conditions of license, action is initiated and opportunity, as provided under the Control Order, 2016, is given before the license is cancelled."

34. It has been further held that under the Control Order, 2016, specific provision having been made for consideration of reply/explanation pursuant to the suspension, the requirement of audi alteram partem having been afforded to a dealer appointed under an agreement, can not claim that a regular inquiry to be conducted giving opportunity for examination of documents, cross-examination of witnesses, providing copy of the inquiry report and taking of

affidavits, as provided under the departmental inquiry.

35. Thus, this Court does not find substance in the submission of learned counsel for the petitioner that petitioner was not afforded full-fledged inquiry and opportunity of cross-examination etc. was not provided to him and, therefore, the order passed by the licensing authority and the appellate authority are bad in law. The authorities have to act in accordance with the provisions contained in sub-clause (7) of Clause 8 of the Control Order, 2016. The dealer does not have a vested right to carry on the license of fair price shop. The licensee is an agent of the Government and the distribution of the essential commodities from the fair price shop should be strictly in accordance with the terms and conditions of the license. Any violation of conditions, would result in proceedings for suspension and revocation of such license.

37. Now the Court proceeds to consider the arguments as raised by the learned counsel for the petitioner.

38. So far as the ground that the appellate authority has decided the appeal without hearing the petitioner is concerned, suffice it to state that the appellate authority while deciding the appeal had reserved the order on 18.11.2022. The order sheet of the said date is on record as annexure 21 to the writ petition which indicates that the case was repeatedly called out but no body appeared on behalf of the appellant, the petitioner herein. The appellate authority specifically made note of the order passed by the writ Court dated 06.09.2022 and of a contempt application being filed for compliance of the said order and as nobody appeared on behalf of the appellant, consequently, reserved the order in the appeal which has subsequently been pronounced on 19.11.2022. There is no endorsement in the order sheet dated 18.11.2022 of any request having been made by the junior colleague of the learned counsel for the appellant as specifically stated in paragraph 48 of the writ petition. Although it has been indicated that an application to argue the matter had been sent on 19.11.2022 through registered post yet by the said date the order had already been pronounced by the appellate authority. Thus, the said ground is rejected as the appellate authority under the order of the writ Court decided the matter within the specified time and in case the learned counsel for the appellant or the appellant himself failed to appear on the said date consequently, no error is found in the appellate authority having reserved the order on the said date in the absence of the appellant or his counsel.

39. So far as the copy of the inquiry report not having been supplied to the petitioner, this aspect of the matter has also been considered threadbare above. Once a summary procedure is to be adopted consequently, there is no occasion for supply of inquiry report to the license holder. Thus, the said ground is rejected.

40. So far as the ground that a final report had been submitted by the police in the case filed by the petitioner under the provisions of Section 3/7 of the Essential Commodities Act which was approved by the District Magistrate which fact should have been considered by the authorities while cancelling the license of the petitioner and while considering the appeal, the said ground may not detain the Court keeping in view the personal affidavit filed by the Principal Secretary, Food and Civil

Supply, Lucknow dated 19.02.2024 wherein in paragraph 21 of the said affidavit it has been indicated that a protest has been filed by the Supply Inspector before the learned Additional Chief Judicial Magistrate-I, Raibareilly which is pending before the competent Court. Thus, the said ground is also rejected.

41. So far as the ground that the District Magistrate had directed for formation of six member committee, as stands recorded in the report dated 21.05.2022 but the report has only been submitted by one person i.e the Additional District Magistrate, the ground may also not detain the Court keeping in view the order dated 16.01.2024 passed by this Court wherein the aforesaid contention of the learned counsel for the petitioner had been recorded and in pursuance thereof, the supplementary counter affidavit has been filed on 02.03.2023 indicating that the inquiry report was not submitted by the six officers rather the Additional District Magistrate required the six officers only for the purpose of helping out in the inquiry for examining the statements and not that the inquiry was required to be conducted by the other six officials and thus, the report submitted by the Additional District Magistrate did not bear the signatures of other six officials which explanation was found satisfactory as recorded by this Court in its order dated 16.01.2024. No objections having been filed to the said factum consequently, the ground raised by the learned counsel for the petitioner in this regard is also rejected.

42. So far as there being difference in the statements as recorded of the complainants, the Court is of the considered view that although the complaint of even one ration card holder would suffice where requisite food grains have not been made available to the citizens belonging to the bottom rung of the society yet the Court, as an abundant precaution, has painstakingly gone through the statements as find placed in the inquiry report dated 21.05.2022. A perusal of the said report would indicate that the statements of 32 complainants/witnesses have been seen wherein all have deposed of lesser supply of food grains, misbehavior by the license holder Sri Ray Sahab with various women card holders and despite the card holders putting their thumb on e-pass machine for supply of requisite food grains as per the number of units indicated in the ration card, lesser food grains were supplied. Thus, the said ground is also rejected.

43. So far as non adherence to the Government order dated 05.08.2019 is concerned, the Court has itself gone through the Government order which is filed as annexure 17 to the writ petition. The said Government order gives the procedure to be followed while cancelling or suspending the license. The said Government order nowhere provides for supply of the inquiry report to the license holder or for that matter cross examining all the complainants or the witnesses rather it provides for strict adherence to the time schedule of one month for completion of an inquiry against the license holder and for passing of a speaking order.

44. Perusal of the impugned order of cancellation dated 24.05.2022 would indicate that there has been strict adherence to the Government order dated 05.08.2019 inasmuch as the petitioner has been heard, the statements of the witnesses have been recorded as per inquiry report dated 21.05.2022 which have also been

considered while cancelling the license of the petitioner by a speaking order. The competent authority has concluded that the petitioner has indulged in the irregularities and in this view of the matter, the license of the petitioner has been cancelled. Thus, when the order impugned dated 21.05.2022 is seen in the light of the Government order dated 05.08.2019, the Court records that there has been strict adherence to the said Government order.

45. So far as the judgments over which reliance has been placed by the learned counsel for the petitioner i.e **Amodnath (supra) & Manoj Kumar Pathak (supra)**, suffice it to state that all the judgments have been rendered by the Single Judges of this Court which judgments would obviously have to give way to the Division Bench judgment of this Court in the case of **Shanker Prasad (supra).**

46. So far as the judgment of this Court in the case of **Amar Nath (supra)** is concerned per which **Shanker Prasad (supra)** has also been considered, suffice it to state that in the said case this Court had specifically concluded that the order of cancellation and rejection of appeal were orders based on extraneous grounds alien to the charges levelled against the petitioner and in this view of the matter the Court interfered. As already indicated above, this Court has examined all the grounds as have been raised by the learned counsel for the petitioner but none of the grounds have been found to be legally tenable in the eyes of law. The orders impugned, both of cancellation of the license and rejection of the appeal, are speaking order having been passed after considering in detail the inquiry report and reply of the petitioner after giving due opportunity of hearing to him.

47. Keeping in view the aforesaid discussion, no case for interference is made out. Accordingly, the writ petition is **dismissed.**

(2024) 2 ILRA 1029
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.02.2024

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ - C No. 9920 of 2023
Connected with
Writ – C No. 10640 of 2023

C/M Dr. Abdul Ali Tibbiya College And Hospital, Lko. & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Rajat Ranjan Singh, Adarsh Saxena, Vidhu Bhushan Kalia

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

Civil Law - National Commission for Indian System of Medicine Act, 2020 – Sections 10 & 55 – National Commission for Indian System of Medicine (Minimum Standards of Undergraduate Ayurveda/Unani Education) Regulations, 2022 – Regulation 5(2) – NEET UG 2023-24 – Lowering of Minimum Percentile – Judicial Review – Article 226

The petitioners, Committees of Management of various Ayurvedic and Unani Colleges in Uttar Pradesh, sought a reduction in the minimum NEET UG 2023-24 percentile (by 10% and 15%) for admission to AYUSH UG Courses (BAMS and BUMS) and an extension of the admission deadline to fill vacant seats in their institutions

for the academic session 2023-24. They argued that despite four rounds of counselling, many seats remained vacant, and cited precedents where percentiles were lowered for medical/dental/AYUSH courses, including a recent reduction to zero for PG medical/dental courses. They relied on Regulation 5(2)(ii) of the NCISM Regulations, 2022, which allows the NCISM, in consultation with the Central Government, to lower the minimum percentile if insufficient candidates meet the required marks. The NCISM countered that 83% of the 59,000 AYUSH seats were filled, with 12,44,686 candidates qualifying at the reduced 45th percentile (from 50th), and further reduction would compromise educational quality. Held: The court, exercising judicial review under Article 226, declined to interfere with the NCISM's policy decision to lower the percentile by only 5%, as it was a reasoned exercise of discretion by an expert body. The petitioners' claim of vacant seats did not justify further reduction, as the availability of 12.44 lakh qualified candidates far exceeded the available seats, and reasons for vacancies could be varie The court followed C/M Alpsankhyak Shiksha Vikas Samiti, Kanpur Vs St. of U.P. (2023 SCC OnLine ALL 80), which rejected similar pleas for 2022-23, and Modern Dental College & Research Centre Vs St. of Madhya Pradesh ((2016) 7 SCC 353), emphasizing that minimum standards ensure quality education. The Delhi High Court's ruling in Dr. Abhinav Kumar Vs U.O.I. (2022 SCC OnLine DEL 2241) was cited to underscore the societal risk of lowering standards, given the life-and-death implications of medical practice. Precedents of percentile reductions were distinguished as case-specific decisions by competent authorities, not binding for 2023-24. The Gujarat High Court's judgment was inapplicable due to differing St. regulations. With the admission deadline (30.11.2023) lapsed and classes commenced, the plea for extension was also rejecte However, the court urged NCISM to devise a pragmatic policy to address recurring seat vacancies while maintaining educational standards. Both writ petitions were dismisse

Case Law Cited:

1. C/M Alpsankhyak Shiksha Vikas Samiti, Kanpur Vs St. of U.P., 2023 SCC OnLine ALL 80

2. Modern Dental College & Research Centre Vs St. of Madhya Pradesh, (2016) 7 SCC 353

3. Dr. Abhinav Kumar & ors. Vs U.O.I. & ors., 2022 SCC OnLine DEL 2241

4. Arogyam Association of Regional Ayush Colleges, Gujarat Vs Admission Committee for Professional Undergraduate Medical Educational Course, R/Special Civil Application No. 19485 of 2023, decided on 30.11.2023 (Guj. HC)

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Shri Rajat Rajan Singh learned counsel for the petitioner, Sri Vijay Kumar, learned Standing Counsel for the State-respondent, Shri Umesh Singh, learned counsel for respondent No.2 and Shri Devak Vardhan learned counsel for respondent No.3.

(2) The above-captioned petitions came to be filed by the various Committee of Management of Ayurvedic and Unani Colleges in the State of Uttar Pradesh, primarily seeking filling of the vacant seats of their institutions by lowering the minimum percentile of National Eligibility-cum-Entrance Test (Undergraduate) (hereinafter referred to as '**NEET UG**') 2023-24 declared for admission in AYUSH UG Courses i.e. Bachelor of Ayurvedic Medicine & Surgery (in short '**BAMS'**) and Bachelor of Unani Medicine & Surgery (in short '**BUMS'**). These petitioners have also sought for extension of time for the last date of admission for these AYUSH UG Courses, wherein Writ-C No. 9920 of 2023 (*Committee of Management, Dr. Abdul Ali Tibbiya College & Hospital & Others Vs State of Uttar Pradesh & Ors.*) have been filed by almost seven Ayurvedic & Unani Institutions and Writ-C No. 10640 of 2023 has been filed by the Committee of

Management, Sahararanpur Ayurvedic Medical College.

(3) Since common issue is engaging attention of this Court, wherein both these petitions have been filed, praying for lowering of the minimum percentile of NEET UG 2023-24 for admission in AYUSH Courses by 10% and 15%, respectively, for the session 2023-24, both these petitions have been heard together and as such are being disposed of by this common judgment.

(4) However, in order to appreciate the issue in its right perspective, the facts of Writ-C No. 9920 of 2023 is being curled out as a narrative to the present issue.

(5) In the said petition, it has been submitted by the learned Counsel for the petitioners that petitioners No.1 to 7, except petitioner No.6, are Unani Medical Colleges and are duly approved by the National Commission for Indian System of Medicine (hereinafter referred to as '**NCISM'**) for imparting BUMS Course for the academic year 2023-24, whereas petitioner No.6 has been approved for BAMS for the said session. It has been contended that vide Government Order dated 18.08.2023, the State Government had notified for conducting counselling for BAMS and BUMS Courses on the basis of NEET UG 2023-24, wherein it was proposed to conduct four rounds of counselling i.e first, second, third and stray vacancy round for the filling up the seats of the institutions. Further, a list of participating institutions was also issued on 12.09.2023, which was updated on 26.10.2023 and the petitioners has contended that the counselling for academic session 2023-24 was held in the following manner :-

Stage of Counselling	**Start date**	**End Date**
First round of Counselling	08.09.2023	25.09.2023
Second round of Counselling	03.10.2023	10.10.2023
Third round of Counselling	26.10.2023	30.10.2023
Stray round of Counselling	03.11.2023	07.11.2023

(6) It has further been submitted by the learned Counsel for the petitioners that although the stray round of counselling ended on 07.11.2023, however, the last date of admission for AYUSH Courses stood extended till 20.11.2023 by the NCISM. The hinge of the argument of the learned Counsel is that even after the conduct of four rounds of counselling, large numbers of seats are still vacant in these institutions and has, thus, sought for lowering the minimum percentile for AYUSH admissions by 10% for the current academic session 2023-24. The learned Counsel has tried to draw an analogy with the decision dated 20.09.2023 taken by the Central Government for PG Courses (Medical/Dental), wherein the Government taking cognizance of the fact that large number of PG seats were vacant, has reduced the minimum qualifying percentile to "zero" across all categories. Thus, it has been contended by the learned Counsel that although Medical/Dental Course are more specialized, superior, serious and difficult Courses than AYUSH Courses, the lowering of the minimum qualifying percentile to 'zero' should be treated as a good example for lowering the minimum percentile for the AYUSH Courses. The learned Counsel has further demonstrated and gave illustration of various instances, wherein the minimum percentile was lowered/reduced for various

Medical/Dental/AYUSH Courses, which can be capitulated in a tabular chart herein-below :

Academic Session	Course	Reduction of minimum percentile criteria
2021-22	NEET UG 2021 for AYUSH Courses	Reduction by 5% across all categories
2020-21	NEET UG 2020 for AYUSH Courses	Reduced from 50 percentile to 40 percentile for unreserved and 40 percentile to 30 percentile for OBC and SCT/ST
2022-23	NEET PG 2022 for MDS Courses	Reduction from 50 percentile to 24.286 percentile
2020-21	NEET PG	Reduction from 50 to 35 percentile

(7) The learned Counsel for the petitioners has drawn the attention of this Court to Regulation 5 (2) (ii) of the National Commission for Indian System of Medicine (Minimum Standards of Undergraduate Ayurveda Education) Regulations-2022 (hereinafter referred to as '**NCISM Regulation, 2022**') which provides for discretionary power vested for lowering of the minimum marks required for admission to UG Program by the Central Government in consultation with the NCISM. According to him, although there exists a statutory empowerment in favour of the Central Government and NCISM for filling of vacant seats, however, for the academic session 2023-24, despite their being a large number of vacancies of seats even after the various rounds of counselling, there had been no decision by the NCISM/Central Government for lowering the minimum percentile of NEET for taking admission in AYUSH UG Course.

(8) The petitioners claimed to have send representation to the Secretary, NCISM, however, the same was without any success and according to them, the inaction on the part of the Central Government/ NCISM in not lowering the minimum percentile for admission in AYUSH Courses has left various seats vacant in the respective institutions, thereby infringing their fundamental rights as guaranteed under the Constitution of India.

(9) A bare perusal of the record of the petitions reveals that after the aforesaid writ petition was filed, notices were issued to the respondents and the matter was adjourned, wherein on one occasion, this Court even recorded the statement of the Counsel for the NCISM that the issue relating to lowering the minimum percentile of NEET-UG 2023-24 towards admission in AYUSH Course was under active consideration with the concerned authority.

(10) This Court has been informed that after the said adjournment, NCISM vide its letter dated 09.11.2023 has decided to lower the cut-off percentile by 5% across all categories for admission to UG and PG Courses and has also extended the last date of admission to 30th of November, 2023. It has been submitted that although, various institutions got their seats filled due to the aforesaid lowering of the percentile by the NCISM in the stray round of counselling, however, even as on date, there are number of vacant seats in these institutions and the cause for filing the present petition still survives. In fact, it has been submitted that the second petition being Writ-C No. 10640

of 2023 (*Committee of Management, Saharaanpur Ayurvedic Medical College*) has been filed after the said lowering of 5% by the NCISM. The petitioners have also relied on certain direction given in a judgment of the Gujrat High Court passed on 30.11.2023 in R/Special Civil Application No. 19485 of 2023 (*Arogyam Association of Regional Ayush Colleges, Gujrat Vs Admission Committee for profession under graduate Medical Educational Course*).

(11) On the other hand, NCISM have filed their counter affidavit refuting the claim of the petitioners, according to the data provided by them, about 11,45,976 were NEET Qualified students with 50 percentile for the present academic session 2023-24 and the said figure of qualified students increased to 12,44,686 by lowering the minimum criteria to 45 percentile. According to them, against the aforesaid 12.44 Lakhs qualified students, the permitted seats across various UG streams of Ayurveda, Siddha, Unani and Homeopathy was only 59000 seats and as such decreasing/lowering the percentile any further would not serve any purpose. According to him, there could be various reasons for these vacant seats and further lowering of percentile would lead to drastic quality of students joining the AYUSH Course, which would neither be good for the Institution/College nor the Society at large. He has contended that amongst the total available seats, 83% seats have been filled and 17% are vacant and as far as the State of Uttar Pradesh relating to UG Ayurveda is concerned, the total permitted seats were 6,993, against which 5732 are already occupied and 1261 is still vacant. He has also relied upon a judgment passed by a Division Bench of this Court in Special Appeal No. 91 of 2023 (*C/M Alpsankhyak Shiksha Vikas Samiti, Kanpur Vs. State of U.P & Others*).

(12) The learned Counsel has argued that the process of admission by lowering minimum percentile cannot be an endless process as the same would result in half-baked doctors and in any case is a policy decision to be exercised by the concerned authority under the National Commission for Indian System of Medicine Act, 2020. The Gujrat High Court Judgment rendered in Arogyam Association of Regional Ayush Colleges, Gujrat (supra) has been distinguished on facts and on the existence of Rule 16 of Gujrat Professional Medical Educational Courses (Regulation of Admission in Undergraduate Courses) Rules, 2017 in the State of Gujrat and non-applicable in the State of Uttar Pradesh or across the country. According to him, it is the NCISM Regulation, 2022, which is the law regulating any admission in AYUSH Courses. Further, the learned Counsel has relied on an interim order dated 21.04.2023 passed by the Karnataka High Court at Dharwad in Writ Petition No. 101793/2023 to negate the relief of any further lowering of the pass percentile. It has been submitted that when NCISM has already exercised its powers for reducing the percentile across the UG and PG courses of AYUSH for the year 2023-24, there was no occasion or justifiable reasons for further lowering the percentile, especially when the last date of admission has already passed and the said process would lead to an endless process and would amount to compromising the medical standards of doctors in the country.

(13) Having regard to the contentions of the parties and going through the record available before this Court, it is required to be noted herein that the centrifugal issue to be dealt in these petitions encircles around

the lowering of the minimum percentile of NEET UG 2023-24 declared as a pre-requisite for admission in AYUSH UG Courses (BAMS & BUMS).

(14) Apparently, National Commission for Indian System of Medicine Act, 2020 (hereinafter referred to as '**NCISM Act, 2020**') was enacted to consolidate the prevailing law relating to admission to AYUSH Courses and with an objective to provide an appropriate medical education system that improves access to quality and affordable medical education and further ensures availability of adequate and high quality medical professionals of Indian System of Medicine in all parts of the country. The functions of the said Commission, as to be found in Section 10 of the NCIMS Act, 2020, *inter alia* relates to laying down policies for maintaining high quality and high standards in education in Indian System of Medicine and to make necessary regulations thereof. Further, Section 55 (1) of the NCISM Act, 2020 empowers the Commission to make regulations to carry out the provisions of the said Act. This Court has been informed that the Commission in exercise of its powers vested in it under sub-section (2) of Section 55 of NCIMS Act, 2020, has framed (i) National Commission for Indian System of Medicines (Minimum Standards of Undergraduate Ayurvedic Education) Regulations, 2022 and (ii) National Commission for Indian System of Medicines (Minimum Standards of Undergraduate Unani Education) Regulations, 2022, notified on 16.02.2022 and 28.02.2022, respectively.

(15) As per the scheme for making admissions available in the aforesaid two regulations, admissions to Undergraduate Courses in Ayurvedic and Unani Systems of Medicine are made through National Eligibility-cum-Entrance Test (NEET) which is to be conducted by an authority to be designated for the said purpose by the Commission. The authority designated for conducting the NEET by the Commission is National Board of Examination in Medical Science, New Delhi.

(16) For appreciating the contention of the petitioners, it would be relevant to note that Regulation 5 of the NCISM Regulation, 2022 prescribes the eligibility criteria for admission, wherein Regulation 5 (1) prescribes the educational eligibility and Regulation 5 (2) prescribes for the national eligibility-cum-entrance test. It is also required to be noted that Regulation 5 (2) of the NCIMS Regulation, 2022 inter-alia states the following :

"(2) National Eligibility-cum-Entrance Test.-(i)There shall be a uniform entrance examination for all medical institutions at the under-graduate level, namely the National Eligibility-cum-Entrance Test (NEET) for admission to under-graduate programme in each academic year and shall be conducted by an authority designated by the National Commission for Indian System of Medicine.

(ii) <u>In order to consider for admission to under-graduate programme for an academic year, it shall be necessary for a candidate to obtain minimum of marks at 50th percentile in the National Eligibility-cum- Entrance Test for under-graduate programme held for the said academic year</u>:

Provided that in respect of-

(i) candidates belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes, the minimum marks shall at 40th percentile;

(ii) candidates with specified disabilities under the Rights of Persons with Disabilities Act, 2016 (49 of 2016) the minimum marks shall be at 45th percentile in the case of general category and 40th percentile in the case of the Scheduled Castes, Scheduled Tribes and Other Backward Classes:

Provided further that where sufficient number of candidates in the respective category fail to secure minimum marks in the National Eligibility - cum - Entrance Test held for any academic year for admission to undergraduate programme, the National Commission for Indian System of Medicine in consultation with the Central Government may at its discretion lower the minimum marks required for admission to undergraduate programme for candidates belonging to respective category and marks so lowered by the Central Government shall be applicable for that academic year only."

(17) There is no gainsaying that although the aforesaid Regulation make it obligatory as a pre-requisite for a candidate to obtain a minimum of marks at 50th percentile in the National Eligibility-cum-Entrance Test for under-graduate programme held for the said academic year to come within the consideration zone for admission to AYUSH Courses, however, the proviso also provides that in case, sufficient number of candidates in the respective category failed to secure minimum marks in the National Eligibility-cum-Entrance Test held for any academic year for admission to undergraduate programme, the NCISM in consultation with the Central Government may lower the minimum marks required for admission to undergraduate programme for candidates belonging to the respective category.

(18) The phrase "*sufficient number of candidates*" in the respective category is of special importance as the non-availability of the said sufficient number of candidates failing to secure the minimum marks in NEET is the triggering point for consultation between the NCISM and the Central Government to lower the minimum marks required for admission to the AYUSH UG Courses. As far as the academic session 2023-24 is concerned, the data as quoted by the learned counsel appearing for NCISM reveals that about 11,45,976 candidates were found to be NEET Qualified students with 50 percentiles against the total available seats across various UG streams of Ayurveda, Siddha, Unani and Homeopathy to be 59000 seats. This Court finds that the said data can never be an indication to the ratio between the number of candidates with 50 percentiles vis-à-vis the number of available seats for AYUSH Courses, as NEET is also used for admission to various Medical Courses including MBSS, BDS etc. Apparently, it is not the case of the petitioners that sufficient number of candidates could not secure the minimum percentile of 50 for the present year, rather it is the case of the petitioners that sufficient number of candidates are not available for taking the AYUSH Courses within the said period and that for that reasons, they are seeking the indulgence of this Court for lowering of the minimum percentile.

(19) However, this Court finds that during the pendency of the present writ petitions, the NCISM in consultation with the Central Government, keeping in view the proviso to Regulation 5 (b) has lowered the minimum percentile across all category by 5%, which has not only reduced the minimum percentile for admission to

AYUSH Courses to 45% but has also brought almost about one lakhs more candidates within the eligibility zone for consideration of admission to these AYUSH Courses.

(20) Having recorded so, the moot point is as to whether this Court, while exercising its power of Judicial review under Article 226 of the Constitution of India, can further lower the minimum percentile, so as to enable the petitioners' college to fill their unfilled seats for the present academic session 2023-24. A Division Bench of this Court in an identical situation had examined the issue for reducing the percentile criteria for admission to BUMS and BAMS Courses for the academic session 2022-23, which had been refused. The Hon'ble Division Bench in the said case, reported as ***C/M Alpsankhyak Shiksha Vikas Samiti, Kanpur Vs State of U.P & Others :*** 2023 SCC Online ALL 80, while upholding the decision of the Co-ordinate Bench of this Court, had been pleased to hold inter-alia as under :

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

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

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

(21) This Court further finds that the grounds taken by the learned Counsel for the petitioners seeking lowering of the minimum percentile for the present academic session 2023-24, is identical to the grounds, which had not found favour with the Hon'ble Division Bench of this Court for the academic year 2022. In any case, even if the said grounds are independently viewed *de hors* the judgement passed by the Hon'ble Division Bench of this Court for the session 2022, this Court finds that the argument of the learned counsel for the petitioners seeking lowering of the minimum percentile, is basically on two folds; the first being large number of vacant seats are available in AYUSH Colleges and the second being there are numbers of precedents, wherein the percentile have been reduced on several occasion earlier.

(22) As far as the first limb of argument is concerned, as per proviso to Regulation 5 (b) of the NCISM Regulation, 2022, a discretion is vested with the NCISM in consultation with the Central Government to lower the minimum percentile, in case of a situation where there are insufficient number of candidates in the respective categories, who have failed to secure minimum marks in the National Eligibility-cum-Entrance Test. This Court finds that the NCISM has already exercising its discretion as aforesaid has lowered the minimum percentile by 5% for the present academic session leading to increase of candidates from 11,45,976 to 12,44,686 against the total availability of AYUSH seats of 59,000. The contention of the petitioners that even after the said increase of candidates, there are still vacant seats lying in their college and as such the lowering of the percentile should ought to have commensurate to the vacancies to be filled in their Colleges, is an argument of convenience and cannot be accepted as has been rightly pointed out by the learned counsel for the respondents that there might be several reasons for these seats remaining vacant.

(23) Apparently, this Court also does not find the reasons suggested by the learned counsel to be a factor for exercising the discretion vested with the NCISM to lower the minimum percentile. The discretion exercised by the NCISM in consultation with the Central Government for lowering the minimum percentile by 5% for the instant academic session, is a matter of policy decision and discretion exercised by an expert body, who are specialist in their field. Thus, the interference of writ Courts on policy decision ought to be minimal. Further, no ground has been agitated by the petitioners that the lowering of the minimum percentile by 5% is arbitrary. The only ground taken by the learned Counsel is the availability of vacant seats, which cannot be a ground for further lowering of the minimum percentile as has been held in various precedents, including by the decision of Division Bench of this Court rendered in C/M Alpsankhyak Shiksha Vikas Samiti, Kanpur (supra).

(24) Further, it is pertinent to mention that prescribing a minimum percentile is an eligibility criteria laid down for admissions to academic and professional courses and is exclusively in the realms of experts and it has to be understood that the NCISM being a specialized and expert agency has been bestowed with the power to maintain high quality and high standards of education in Indian System of Medicine. The Apex Court with respect to NMC, a body constituted on similar lines for MBBS courses as NCISM, having been constituted for Ayush Courses, has held in the case of **Modern Dental College & Research Centre v. State of Madhya Pradesh :** (2016) 7 SCC 353, that the objective in prescribing minimum standards is to provide a benchmark of the caliber and quality of education being imparted by various educational institutions in the entire country. Thus, the standards of education are directly linked to the norms of admissions/selection process, and National Medical Commission is certainly competent to determine such standards and to regulate the admission process as well as the admission criteria. The said findings of the Hon'ble Apex Court apply in equal force even to NCISM.

(25) Time and again, the Hon'ble Supreme Court has held that lack of

minimum standards would result in half-baked doctors and non-availability of eligible candidates could not be a reason to lower the standard. A Division bench of the Hon'ble Delhi High Court, while adjudicating the issue as to whether Regulation 9 (3) of the Postgraduate Medical Education (Amendment) Regulations, 2018 to the extent that it provided for minimum marks of 50 percentile as a mandatory requirement for admission to postgraduate courses should be quashed on the ground that the said requirement is arbitrary, unjustified and contrary to Article 14, Article 19 (1)(g) and Article 21 of the Constitution of India, held in the case reported as **Dr. Abhinav Kumar & Ors. V/s Union of India & Ors.** : 2022 SCC Online DEL 2241, as herein below:

"In the light of the above observations, this Court emphasizes that the lowering of the standards of medical education has the potential of wreaking havoc on society at large due to the risk that practice of medicine entails; it involves in its ambit the matter of life and death, and therefore, it would be unconscionable for this Court to interfere in the standards duly and diligently set by the governing authority. This Court, therefore, cannot issue a mandamus directing the Respondents to fill up the seats, especially when the persons concerned have not obtained the minimum percentile as this Court is dealing with admissions to postgraduate courses in various medical colleges, and there cannot be any compromise on the issue of quality of doctors/specialists as it involves a risk to human lives. Resultantly, no case for interference is made out in the matter.

(26) In any case, as the competent authority has already exercised its discretionary power and reduced the minimum marks by 5 percentiles, directing it to reduce it further would be nothing short of interfering in the affairs of the academic bodies, which are experts and specialised in their own fields and are in a better position to strike a balance between the filling of vacant seats in respective college vis-a-vis the societal requirement of quality health care. Thus, this Court does not find any ground to substitute the discretion already exercised by the NCISM in consultation with the Central Government for further lowering of the minimum percentile for admission to AYUSH Courses for the present academic year 2023-24.

(27) Further, as regards the availability of various precedents, wherein the minimum percentile has been reduced is concerned, it has to be noted that in all the cases, it is the competent authority, who had come to the rescue and had exercised their discretion in lowering the minimum percentile. In any case, the said exercise has to be on case to case and year to year basis and cannot be treated as precedence or a thumb rule as it would defeat the very purpose for which these eligibility criteria have been prescribed to maintain the medical standards. Moreover, the said precedence has to be viewed keeping in mind that as far as the present case is concerned, the authorities have already lowered the minimum percentile by 5% and are resisting any further reduction in the minimum percentile for the present academic session 2023-24. Additionally, this Court has been informed that the last date for all admission has lapsed on 30.11.2023 and the classes for all AYUSH Classes have already been started. Thus,

this Court finds the reliance of the learned counsel for the petitioners on earlier precedence to be unfounded and meritless.

(28) Since, this Court is of the considered view that no directions for further lowering of the minimum percentile can be granted, the other consequential prayer for extending the time for completion of admission for AYUSH Courses is also rejected.

(29) In view of the aforesaid observation and discussion, this Court is of the opinion that no case for lowering of the minimum percentile beyond the already lowered percentile by the authority is possible as the same would result in frustrating the very purpose of prescription of minimum eligibility criteria. Further, this Court finds that prescription of minimum eligibility criteria is in the overall public interest to maintain the standard of education in the field of AYUSH, especially when these days AYUSH is perceived as one of the most ancient well documented system of medicine, wherein prominence to prevention of disease is given rather than cure and there is a dearth of well trained and well qualified AYUSH doctors in the country.

(30) Although, this Court has refrained from lowering the minimum percentile for admission for the academic session 2023-24, however, this Court hope and trust that NCISM should be alive to the perennial problem of these precious medical seats remaining vacant for each academic year and appreciate that vacancy of these seats in a particular year leads to vacancy of these seats for five successive years in a row, which is a national loss, hence NCISM may look into these issues and if it deem fit, may frame a policy in consultation with the Central Government and all the stake holders to ensure that minimum seats goes vacant by prescribing for a more pragmatic and scientific mechanism for exercising the discretionary power of lowering the minimum percentile by balancing the ambitious objective of maintaining the standard of education vis-à-vis the number of seats going vacant each year.

(31) For all the reasons as stated herein above and subject to the observation made by this Court, the above-captioned writ petitions are **dismissed**. There shall be no order as to cost.

(2024) 2 ILRA 1039
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 27.02.2024

BEFORE

THE HON'BLE VIVEK CHAUDHARY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ - C No. 11383 of 2023
Along With
Writ – C No. 514 of 2024
And other connected cases

Syed Hamidul Bari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Kazim Ibrahim, Amrit Khare

Counsel for the Respondents:
C.S.C., Pushpila Bisht, Ratnesh Chandra, Ruchir

Civil Law - U.P. Slum Areas (Improvement and Clearance) Act, 1962 – Section 2(i) – U.P. Urban Planning and Development Act, 1973 – Section 27 – Principles of Natural Justice – Public Trust Doctrine – Slum Dwellers – Illegal Encroachment – Article 226

The petitioners, 25 individuals claiming to be slum dwellers of Akbar Nagar (I) and (II), Lucknow, challenged proceedings under the U.P. Urban Planning and Development Act, 1973, seeking to protect their alleged slum

properties, primarily furniture showrooms/workshops on St.-owned land along the Lucknow-Faizabad Roa They obtained interim stay orders by representing themselves as poor slum dwellers, but evidence revealed they were affluent, filing GST and income tax returns, owning properties in posh Lucknow areas, and having constructed large, unauthorized commercial structures. The court segregated their cases from genuine slum dwellers due to their misrepresentation. Held: The petitioners did not qualify as slum dwellers under the U.P. Slum Areas (Improvement and Clearance) Act, 1962, or common parlance, as their properties were not in unhygienic, substandard conditions typical of slums, being located on a main road with municipal facilities. The term "slum" implies areas inhabited by the poor in squalid conditions, as per S. Sivaprakasa Mudaliar Vs St. of Madras (AIR 1964 Madras 115) and dictionary definitions. The petitioners' commercial establishments, built illegally on government land, did not entitle them to protections meant for impoverished slum dwellers. Their claim under the 1962 Act and the 2021 Slum Policy, which do not explicitly require poverty, was rejected, as common sense and the purpose of slum legislation prioritize aiding the underprivilege The court found no violation of natural justice in the proceedings under Section 27 of the 1973 Act, as per St. of U.P. Vs Sudhir Kumar ((2021) 19 SCC 706), since admitted facts (illegal constructions, tax filings, and property ownership) left no prejudice from procedural lapses, and only one conclusion—illegality—was possible. The Supreme Court's caution in Almitra H. Patel Vs U.O.I. ((2000) 2 SCC 679) against rewarding encroachers was applied, noting the petitioners' actions as organized land-grabbing. The court dismissed the writ petitions, finding no basis for discretionary relief under Article 226, and discharged interim orders. The cases of genuine slum dwellers were to be considered separately.

Case Law Cited:

1. S. Sivaprakasa Mudaliar Vs St. of Madras, AIR 1964 Madras 115

2. St. of U.P. Vs Sudhir Kumar, (2021) 19 SCC 706

3. Almitra H. Patel Vs U.O.I., (2000) 2 SCC 679

4. Olga Tellis Vs Bombay Municipal Corporation, (1985) 3 SCC 545

5. Executive Engineer, Southern Electricity Supply Company of Orissa Lt Vs Sri Seetaram Rice Mill, (2012) 2 SCC 108

6. Dhian Singh Sobha Singh Vs U.O.I., AIR 1958 SC 274

(Delivered by Hon'ble Vivek Chaudhary, J.
&
Hon'ble Om Prakash Shukla, J.)

1. These are 24 writ petitions out of which 22 are filed by individual petitioners and two writ petitions namely Writ-C No.642 of 2024 and Writ-C No.527 of 2024 are filed by 10 and 9 petitioners respectively. Out of them Mohd. Shafeek-Petitioner no.1 and Smt. Shahana-Petitioner No.5 in Writ-C No.642 of 2024 and Abdulla-Petitioner No.6 in Writ-C No.527 of 2024 are involved in present bunch of writ petitions. These 25 petitioners relate to large bunch of writ petitions regarding slum known as Akbar Nagar (I) and (II), Lucknow. The said slum situates along the sides of Kukrail river/nala and falls much inside the city. Petitioners, persons of resources, claiming themselves as slum dwellers, obtained stay orders from the High Court and also attempted to be heard along with actual poor slum dwellers. It was only during course of the argument, that this Court came to know that they actually have illegally occupied large pieces of land of State Government and raised multi-story furniture showrooms/workshops on the main Lucknow-Faizabad Road, or immediately at the back of first row of showrooms, are filing their GST and income tax returns and mostly are living in their own houses in posh or well developed, old settled residential areas/colonies of Lucknow and

in most of the cases also owning other properties.

2. Looking into their GST and income tax returns, location and size of the land occupied and constructions raised by them and also other properties owned by them, their cases are segregated from the main bunch of actual poor slum dwellers and slum areas. Before coming to the submissions of counsel for the parties, the chart, provided by the petitioners on directions of this court, and also added to by the respondents, regarding the GST and income tax returns, area occupied, constructions raised, and other properties owned by these petitioners is as follows:-

Sr. No.	Writ C No.	Name	Nature of building occupied	GST Returns	Income Tax Returns (Total Income)	Land unauthorizedly occupied and total constructed area	Other properties
1.	11383/ 2023	Syed Hamidul Bari husband of Najma (petitioner of writ petition at Sl. No.2)	Commercial Samrat Furniture Manufacturing Shop & Ors.	Rs. 2,29,89,900/ - approx (2022-23)	Rs. 10,00,870/- (2023-24)	1800 sq.ft. Basement+Ground Floor+First Floor+Second Floor 4x1800 sq. ft.=7200 sq. ft.	A. Residing at 536/2/198, new madhganj, near avadh school, mizapur road, Lucknow where he is residing with his family; B. Godown located at Harshita Complex, Faizabad Road, Lucknow. C. Ancestral agricultural land in ancestral village at Rashki majhari, Uraula, District- Balrampur
2.	514/20 24	Najma Bano wife of Syed Hamidul Bari (petitioner of writ petition at sl. no.1)	Commercial Samrat Furniture Manufacturing Shop & Ors.	Rs. 1,43,09,235/ - approx (2022-23)	Rs. 5,29,970/- (2022-23) Rs. 4,95,900/- (2023-24)	1500 Sq. ft. (Ground Floor + First Floor) 1500x2=3000 sq. ft.)	Owns a shop located at Harshita Complex, Faizabad Road, Lucknow with an area of around 200 sq. ft.
3.	11484/ 2023	Sabiha Kaisar	Commercial	Rs. 1,11,02,395/- 73 approx (2022-23) Rs. 72,73,475.1 9 approx (2023-24)	Rs. 4,85,550/- (2022-23) Rs. 4,28,710/- (2023-24)	1100 sq. ft. Basement+Ground Floor+First Floor 3x1100 sq. ft. =3300 sq. ft.	A plot of Land at Madiaon, Tehsil- BKT admeasuring 1600 sq. ft.
4.	11244/ 2023	Suhail Haider Alvi	Commercial M/s Taj Mahal Furniture	Rs. 90,29,089.7 5 approx (2022-23)	Rs. 7,80,000/-	2000 sq. ft. Basement+ Ground Floor+First Floor 3x2000 sq. ft. =6000 sq. ft.	A. Share in ancestral property located at 41, Pragati Vihar, Priyadharshini, Lucknow B. Flat No.B-102, Shalimar, Gallant, Mahanagar.
5.	11477/ 2023	Arshad Warsi	Commercial	Rs. 58,96,916/- approx (2021-22) Rs. 1,06,73,467/ - approx (2022-23)	Rs. 4,96,150/-	2000 sq.ft. Basement+ Ground Floor+First Floor 3x2000 sq. ft.= 6,000 sq. ft.	A. under construction on plot of land at Hasanan, Malhour admeasuring 1250 sq. ft. B. Share in ancestral property admeasuring 1600 sq. ft. and agricultural land admeasuring 7 Bigha in District Kaiganj.
6.	11360/ 2023	Mohd Naushad brother of petitioner in writ petition at sl. 7	Commercial	Rs. 72,15,583/- approx (2022-23) Rs. 55,68,437.1 2 approx (2023-24)	4,94,890/- (2022-23) 4,97,570/- (2023-24)	2,000 sq. ft. (400 sq.ft. Of Mohd Abrar + 1600 sq. ft. of himself holding together) (Basement + Ground Floor) 2x2000=4000 sq. ft.	LIG House in the name of her wife at L-2/644, Vineet Khand Gomti Nagar, Admeasuring 546 sq.ft.
7.	11362/ 2023	Mohd Abrar brother of petitioner in writ petition at sl. 6	Commercial (Shop Merged with brother, no longer in Akbar Nagar)	Rs. 68,61,384/- approx (2022-23) Rs. 41,25,584/- approx (2023-24)	4,80,470/- (2022-23) 4,81,000/- (2023-24)	400 sq. ft Rs. 45,67,519/- approx (2023-24)	A. A shop in Nishaganj located on 500 sq. ft. ; B. A small flat in IMT Building, New Hyderabad, Lucknow located on 950 Sq. ft., by way of a housing loan for 15 years.
8.	642/20 24	Mohd. Shafeek Khan Petitioner No. 1 Husband of Petitioner No.5 Shahana	Commercial cum Residential M/s M.R. Uniform	Rs. 45,67,519/- approx (2023-24)	Rs. 4,97,360/- (2023-24)	540 sq. ft. Ground Floor + First Floor + Second Floor 3x540 sq. ft.= 1620 sq. ft.	Petitioner No.1 owns two plot one at Fatima Colony, Husainabad, admeasuring about 680 sq. ft. and other at Nizampur Malhour measuring 1600 sq. ft. (owns total 2280 sq. ft.)
9.	11480/ 2023	Irshad Ali	Commercial	Rs. 10,06,834/- approx (2022-23)	Rs. 4,98,590/- (2022-23) Rs. 4,94,100 (2023-24)	2,000 sq. ft. (Basement + Ground Floor) 2x2000 sq. ft.=4000 sq. ft.	Ghasiyari Living in Ancestral Property, details of which are not provided.
10.	738/20 24	Fazeel Ahmad	Commercial cum Residential	Rs. 13,14,515/- approx (2021-22) Rs 14,53,009/- approx (2022-23)	Rs. 4,20,650/- (2022-23) Rs 4,86,760/- (2023-24)	1100 sq.ft. (Basement + Ground Floor) 2x1100 sq. ft= 2200 sq. ft.	None
11.	11258/ 2023	Shakeel Ahmed	Commercial	Rs. 6,96,809/- approx (2022-23) Rs. 3,42,000/- approx (2023-24)	Rs. 4,89,560/- (2022-23) Rs. 4,54,080/- (2023-24)	750 sq.ft. (Basement + Ground Floor) 2x750sq. ft. =1500 sq. ft.	Petitioner is currently residing at 234/05, Thawai Tola, Raja Bazaar, Lucknow – 226003, which is owned by his wife
12.	11368/ 2023	Mohd. Saif Khan)	Commercial (Firm registered in the name of father Mr. Mohd Israr	Rs. 5,99,439.38 approx (2017-18) Rs. 3,00,053.94 approx (2018-19)	Rs. 2,92,950/- (2017-18) Rs. 3,09,320/- (2018-19) Rs. 55,945/- (2019-20)	2900 sq. ft. (Basement + Ground Floor) + First Floor) 2x2900 sq. ft. =5800 sq. ft.	Residential details are not given
13.	11372/ 2023	Nameera Khan	Commercial given on rent by her	NA	Rs. 7,03,051/- (2022-23) Rs. 4,37,960/- (2023-24)	1800 Sq. ft. (Basement + Ground Floor + First Floor) 3x1800 sq. ft. =5400 sq. ft.	A-402, Indira Nagar, Lucknow-226016, Late husband joint family house
14.	739/20 24	Syed Mahmood Ali	Commercial	Rs. 14,97,129/- approx (2022-23)	Rs. 7,49,140/- (2022-23) Rs. 4,37,360/- (2023-24)	750 sq.ft. Basement+Ground Floor 2x750 sq. ft.=1400 sq. ft.	Plot of land at Madiaon, Tehsil - BKT admeasuring 1600 sq. ft.
15.	11375/ 2023	Vishnu swaroop Chaurasia	Commercial	Rs. 16,66,800/- approx (2021-22) Rs. 27,45,600/- approx (2022-23)	Rs. 3,73,180/- (2022-23) Rs. 4,39,980/- (2023-24)	770 sq. ft. Basement+Ground Floor+First Floor 3x770 sq. ft.=2310 sq. ft.	Parental House in Ram Tirth Marg, Narhai, Hazratganj
16.	11468/ 2023	Mohd. Shoaib Ali	Commercial	Rs. 8,86,412/- approx (2022-23) Rs. 80,602/- approx (2023-24)	Rs. 4,96,500/- (2022-23) Rs. 4,90,190/- (2023-24)	1200 sq. ft. Ground Floor+First Floor 2x1200 sq. ft.=2400 sq. ft.	Residing in parental house in Ghasiyari mandi, Kaisrbagh
17.	11482/ 2023	Adil Ishtiaq	Commercial	Rs. 8,39,807/- approx (2022-23) Rs. 2,92,576/- approx (2023-24)	Rs. 4,92,010/- (2022-23) Rs. 4,23,930/- (2023-24)	1100sq. ft. Basement+Ground Floor 2x1100 sq. ft.=2200 sq. ft.	Residing in parental house in Ghasiyari mandi, Kaisrbagh
18.	11481/ 2023	Mohd. Abubakar	Commercial cum residential	Rs. 1,65,669/- approx (2022-23) Rs. 2,20627/- approx (2023-24)	Rs. 4,77,980/-	600 sq. ft. Basement+Ground Floor+First Floor 3x600 sq. ft. =1800 sq. ft.	Share in ancestral agricultural land along with his brother admeasuring around 1 Bigha at village- Umrah, Kursi, District- Barabanki
19	11492/ 2023	Mohd. Adil	Commercial M/s Bombay Furniture and Interior Decorator	Rs. 55,04,000/- approx (2022-23) Rs. 29,71,460/- Approx (2023-24)	Rs. 3,46,390/- (2022-23) Rs. 4,59,030/- (2023-24)	1800 sq. ft. Basement+Ground Floor+First Floor 3x1800 sq. ft.=5400 sq. ft	Parental House R/O Old Haidergan), Chowk, Lucknow
20.	729/20 24	Rehan Ali	Commercial Cum House Stamp Manufacturer	Rs. 1,00,378/- approx (2023-24)	Rs. 4,86,140/- approx(202 3-24) Rs. 4,70,200/-	300 sq. ft. Basement+Ground Floor 2x300 sq.t. =600 sq. ft.	A semi constructed house at Khurram Nagar admeasuring about 1800 sq.ft.
21.	11380/ 2023	Deepak Chaurasia	Commercial	Zero GST Closed in the year 2019	Rs. 4,42,700/- (2023-24) Rs. 4,60,040/- (2022-23)	1200 sq. ft. Basement+Ground Floor 2x1200 sq. ft.=2400 sq. t.	A Semi finished housed of 1365 sq. ft., at 9-C/249, Vrindavan Yojana, Lucknow
22.	792/20 24	Mohd. Anwar	Commercial cum Residential Coffee Shop	Rs. 17,32,610/- approx (2022-23) Rs. 2,47,940/- approx (2021-22)	Rs 4,11,220/- (2021-22) Rs. 4,17,470/- (2022-23)	900 sq. ft. Ground Floor	None
23.	494/24	Mohd. Parvez Khan	Commercial cum Residential	Rs. Rs.5,35,007/ - approx (2020-21) Rs. 4,23,106/- approx (2021-2022) Rs. 12,34,602/- approx (2022-23)	Rs 2,12,020/- (2022-23) 3,37,340/- (2023-24)	180 sq. ft. Basement+Ground Floor+First Floor 3x180 Sq. ft. =540 sq. ft.	None
24.	527/20 24	Abdulla- Petitioner No.6	Commercial	Rs.49,960/- approx (2022-23) Rs.40,800/- approx (2023-24)	NA	200 sq. ft. Ground Floor+ First Floor 2x200=400 sq. ft.	Residential detail are not given

3. In the said background, Mr. Sudeep Kumar, Advocate, Sri Anuj Kudesia, Advocate assisted by Sri Ratnesh Chandra, Advocate for the respondent, Lucknow Development Authority, as well as learned Chief Standing Counsel strongly raise preliminary objection, that, these persons are neither slum dwellers nor their properties fall in the category of a slum. They state that by concealing the aforesaid correct facts, with regard to their status, the location and nature of construction and the area occupied by them, they have, by giving false impression to the Court, obtained interim orders on parity. It was incumbent upon them to have approached this Court with clean hands, providing entire details about their status. They have wrongly represented before this Court as poor landless slum dwellers and in the garb thereof are trying to save their huge, illegal and unauthorised constructions on the government land.

4. Attention of this Court is also drawn with regard to case of Sayed

Hamidul Bari & Najma who are husband and wife and have occupied two separate plots of land and are running two separate businesses and have filed two petitions being Writ-C No.11383 of 2023 and Writ-C No.514 of 2024 (at Sl. 1 & 2 in the chart). Similarly, Shafeeq and Shahana, petitioner no.1 and 5 of Writ-C No.642 of 2024 (Sl. No.8 in chart) are husband and wife and have made their two separate claims. However they have not provided details of separate properties occupied by them. Similarly, Naushad and Abrar (Sl No.6 and 7 in the chart) are two real brothers, have occupied two separate properties and have filed two separate petitions being Writ-C No.11360 of 2023 and Writ-C No.11362 of 2023 who now claim that they have merged their shops and entire property is owned by one of the brothers. Nameera Khan, petitioner in Writ-C No.11372 of 2023 (Sl. no.13 in chart) has rented out her illegally constructed showroom while herself lives in posh Indira Nagar, Colony, Lucknow.

5. In support of their case respondents have placed reliance upon the judgment in the case of ***S. Sivaprakasa Mudaliar Vs. The State of Madras; AIR 1964 Madras 115.*** Relevant portion of the same reads :-

"11.....The expression ***"slum dwellers though in popular parlance has acquired some special meaning, namely, those who are economically and socially backward and who huddle themselves together in openings in unhealthy surroundings, the term as such has no such technical meaning. The word "slum" in its, true import means a "street or alley situate in a crowded district of a town or city and inhabited by people of in low class or by the poor".*** *It may be that in some cases the slum area may be a thickly populated one and of a squalid and wretched character, but essentially the word slum is of wide import including within it a crowded place in a city inhabited by the poor....." (emphasis added)*

6. Mr. Jaideep Narain Mathur, Senior Advocate assisted by Mr. Apoorva Tewari, Ms. Aishvarya Mathur, Mr. Amrit Khare and Mr. Kazim Ibrahim is leading arguments for petitioners. He submits that it is not necessary for a slum dweller to be a poor person. Anyone from the slum areas can be a slum dweller, whether he is living there or is running his commercial activities in that area. Since petitioners are running their commercial activities in the said Akbar Nagar area they would fall within the definition of slum dweller. Mr. Mathur submits that the concept of rich and poor has nothing to do either with slum or slum areas. He submits that it is the U.P. Slum Areas (Improvement and Clearance) Act, 1962 which applies and hence, we should look at the said Act to understand these terms. He refers to Section 2(i) of the Act of 1962 and Clause 4(1) of the Policy dated 29.10.2021 issued under the said Act which defines the term 'Slum'. The same read:-

"2(i) Slum area means an area declared as such under Section 3;"

4. परिभाषा-

इस नीति में, जब तक संदर्भ से अन्यथा अपेक्षित न हो, निम्नलिखित शब्दों के वही अर्थ होंगे, जो निम्नवत परिभाषित किये गये हैः-

1. मलिन बस्ती (स्लम) का अभिप्राय उत्तर प्रदेश मलिन बस्ती क्षेत्र (सुधार और निपातन) अधिनियम, 1962 की धारा-3 के अनुसार परिभाषित स्लम से है, जिसमें ऐसी बस्तियां सम्मलित होंगी, जहाँ स्वच्छता, स्वास्थ्य, सुरक्षा, सड़क आदि का समुचित व्यवस्था न हो

तथा मानव निवास के लिए अनुपयुक्त हो। इस नीति के अन्तर्गत ऐसे स्लम मान्य होगें, जिनमें न्यूनतम 300 व्यक्ति हों।

7. He submits that neither of the said definitions uses the word 'poor' with regard to a sum dweller or slum area. Therefore, the concept of poor and rich is wrongly being applied. He submits that it is very much possible that a person may earn money with time and become rich but still could continue to remain in a slum area and he can not be denied the benefits as available to other slum dwellers. Mr. Mathur states that judgment in case of ***S. Sivaprakasaa Mudaliar (Supra)***, arising from the Madras High Court, is a case relating to acquisition of land and the main issue before the Court was, whether the purpose of acquisition of land would be treated to have changed in case along with slum dwellers, the scheme also permits allotment of certain house sites to low and middle-income group persons. He submits that the main issue before the Court was not definition of the slum dwellers and, hence, judgment of the said case is of no assistance. He further submits that the court cannot take GST or income tax returns of the petitioners, or the location or size of area occupied and nature of constructions raised or other properties owned by them, into consideration for not treating them as slum dwellers or their area as slum.

8. Counsel for petitioners fairly accepted before this court that the land occupied by all the petitioners belongs to State Government and furniture or related products showrooms/workshops constructed by the petitioners upon the same are without any authorisation and, thus, are illegal. It is also accepted that they exist on the main Lucknow-Faizabad road or immediately at the back of first row of showrooms. Also admitted are tax returns and other property details as detailed in the chart above. Thus, we proceed to consider rival submissions on aforesaid admitted facts.

9. The term 'slum' and 'slum dweller' is defined in number of dictionaries, some of which read:-

Collins COBUILD Advanced Learner's English Dictionary New Edition

Slum / slum (slums) A slum is an area of a city where living condition are very bad and where the houses are in bad condition

WORLD BOOK DICTIONARY

Slum (slum) *n.,v.,* ***slummed slumming*** *often slums a street, alley, or building in where a crowded, run –down, dirty part of the city or town, where the poorest people live. Poverty and disease are common in the slums. we hear stories now and then of some boys from a slum who makes good and wind up with a fortune. if [his] philosophy prevails, we shall have taken a long step backward toward the sweetshop and the slum (Time)*

2. Extreme poverty and low social class, as in the slums : to rise from the slums to power and wealth.

BLACK 'S LAW DICTIONARY

Slum,n.(1825) *1. An urban area where very poor people live in substandard condition characterized by filth squalor, and frequent violence*

2. A house or apartment located in such a place .

THE OXFORD ENGLISH DICTIONARY

Slum

2. a. A Street, alley, court, etc, situated in a crowded district of a town or city and inhabited by people of a low class or by the very poor; a number of these

streets or courts forming a thickly populated neighbourhood or district where the houses and the conditions of life are of a squalid and wretched character Chiefly pl., and freq. in the phrase back slum(s). Also rarely, a house materially for human habitation."

10. From the aforesaid dictionary meanings, it is clear that in normal parlance the term slum relates to an area in a city where poor and needy people live in an unhealthy, unhygienic and in conditions not fit and suitable for human habitat and poor living in the said conditions are called slum dwellers.

11. Admittedly, all these showrooms/workshops, engaged in furniture and related businesses, exist on main road or are immediately adjacent to it. They are getting all benefits of any regular area of the city. They have widest road possible in the city. The main road is not filthy or lacks in any possible municipal facility. Their huge showrooms/workshops cannot be called filthy, run-down or unfit for humans. It is only that their address is shown as Akbar Nagar. The actual slum, covered by aforesaid definitions, begins behind these showrooms. Thus, petitioners are not suffering any of the challenges faced by the actual slum dwellers of the said slum. In the given circumstances, it is not possible for this court to accept that the showrooms/workshops of petitioners can be called as existing in a slum area. At best they exist at the edge of Akbar Nagar slum area and not in the said slum area. Similarly, the facts that they have had enough money to spend on illegal construction of huge showrooms/workshops, are paying their GST and filing income tax returns and/or most of them are having their own residences in good and posh localities of city and/or other properties, we are unable to hold them as slum dwellers. We are here also reminded the words of Supreme Court:-

"Common sense, which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants." stated in paragraph 35 of ***(1985) 3 SCC 545; 'Olga Tellis and Others Vs. Bombay Municipal Corporation';***

"It must be understood that an interpretation which upon application of the provisions at the ground reality, would frustrate the very law should not be accepted against the common sense view which will further such application." in Paragraph 48 of ***(2012) 2 SCC 108; 'Executive Engineer, Southern Electricity Supply Company of Orissa Limited (Southco) and Another Vs. Sri Seetaram Rice Mill*** *and,*

"We are constrained to observe that the approach of the High Court to this question was not well-founded. The Privy Council no doubt laid down in Bhagchand Dagadusa v. Secretary of State [(1927) LR 54 IA 338] that the terms of this section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from common sense. As was stated by Pollock C.B. in Jones v. Nicholls [(1844) 13 M & W 361, 363 : 153 ER 149, 150] "We must import a little common sense into notices of this kind". Beaumont, C.J., also observed in Chandu Lal Vadilal v. Government of Bombay [ILR (1943) Bom 128.] :"One must construe Section 80 with some regard to common sense and to the object with which it appears to have been passed...." in paragraph 30 of ***AIR 1958***

SC 274; 'Dhian Singh Sobha Singh and another vs. Unin of India'.

12. As per the law settled, the words are to be interpreted in such a manner that they serve the purpose and are not given an interpretation which goes against very common sense. Lets take a hypothetical example to explain the issue further. Presuming in a slum, a businessman finding good business opportunity, takes possession of a large piece of land from the actual slum dwellers and illegally, without required sanctions, constructs a multiplex or a big hotel or a big shopping complex or raises any other such big business constructions. Can he, merely because he did these activities within a slum, claim to be a slum dweller entitled to the protection given to dingy houses of slum dwellers, despite all aspects of the matter reflecting his disparity with actual slum dwellers? The answer 'NO' comes to us too loudly. Thus we do not find our common sense accepting the sense of argument raised for the petitioners. The purpose of all legislation as well as law developed and settled by the courts, with regard to slum dwellers is, that these people, due to their poorness and circumstances are forced to live under inhuman conditions of a slum and all possible sympathies be applied and considered for improving their conditions and also while disturbing their possession. We do not find petitioners entitled to any such sympathies. We shall definitely consider these aspects while hearing the segregated bunch of petitions of actual slum dwellers.

13. The next submission of Mr. Mathur is that proceedings initiated against petitioners and the appeal decided under Section 27 of the U.P. Urban Planning and Development Act, 1973 (hereinafter Act of 1973), both are in violation of principles of natural justice. He states that the large number of documents were accepted by the prescribed authority as well as by the appellate authority at the time of hearing of the matter, copies of which were not provided to the petitioners. Further, the appeals were placed for hearing of stay applications, but were heard on merits. Thus matters should be remanded.

14. We have perused both the proceedings at length with the assistance of counsel for parties. A perusal of the same shows that the documents were called for and considered to ascertain the status of Kukrail river/water channel next to the slum area and impact of slum on the said water channel. Once we have held that neither the petitioners are slum dwellers nor their establishments fall within the slum area, the said documents do not in any manner have any impact on the rights of the petitioners. Both before the prescribed authority as well as appellate authority petitioners represented themselves to be slum dwellers and did not place correct facts. Both the authorities have held proceedings and passed orders against petitioners on the basis of the said incorrect presumption.

15. Further, we have given an exhaustive hearing to the parties. The facts of the case are admitted to both sides. The law is well settled that this court should not issue futile writs. We refer to one of the recent judgment of the Supreme Court reported in ***(2021) 19 SCC 706;'State of U.P. Vs. Sudhir Kumar and Others;*** wherein, after referring to nearly all earlier judgments, supreme court in para 42 held:

"42. An analysis of the aforesaid judgments thus reveals:

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem Rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) ***No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts,*** *in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.*

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."

16. In the admitted facts of the case we have duly considered the rival contentions and already given our findings. Thus, we do not find any reason to remand the matter.

17. Before closing, we also would like to place on record the words of caution of the Supreme Court in case of ***'Almitra H. Patel v. Union of India, (2000) 2 SCC 679*** in paragraph 14:-

"14. Establishment or creating of slums, it seems, appears to be good business and is well organised. The number of slums has multiplied in the last few years by geometrical proportion. Large areas of public land, in this way, are usurped for private use free of cost. It is difficult to believe that this can happen in the capital of the country without passive or active connivance of the land-owning agencies and/or the municipal authorities. The promise of free land, at the taxpayers' cost, in place of a jhuggi, is a proposal which attracts more landgrabbers. Rewarding an encroacher on public land with a free alternative site is like giving a reward to a pickpocket. The Department of Slum Clearance does not seem to have cleared any slum despite its being in existence for decades. In fact more and more slums are coming into existence. Instead of "slum clearance" there is "slum creation" in Delhi. This in turn gives rise to domestic waste being strewn on open land in and around the slums. This can best be controlled at least, in the first instance, by preventing the growth of slums. The authorities must realise that there is a limit to which the population of a city can be increased, without enlarging its size. In other words the density of population per square kilometre cannot be allowed to increase beyond the sustainable limit.

Creation of slums resulting in increase in density has to be prevented. What the Slum Clearance Department has to show, however, does not seem to be visible. It is the garbage and solid waste generated by these slums which require to be dealt with most expeditiously and on the basis of priority."

18. In the said background and looking into the entirety of the matter this Court finds no reason to exercise its discretionary jurisdiction in favour of petitioners. Thus, all the writ petitions are ***dismissed***. Writ-C No.642 of 2024 is ***dismissed*** so far it relates to petitioner no.1 Mohd. Shafeek and petitioner no.5 Smt. Shahana only. Similarly Writ-C No.527 of 2024 is also ***dismissed*** so far it relates to petitioner no.6 Abdulla only. Remaining petitioners in these two writ petitions are being considered along with the other bunch of writ petitions of actual slum dwellers, leading petition being Writ-C No.1372 of 2024.

19. Interim orders, if any, granted earlier, stands discharged with regard to the aforesaid petitioners.

(2024) 2 ILRA 1047
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ - C No. 31168 of 2023

Satendra Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Ritesh Upadhyay, Sri Shesh Kumar

Counsel for the Respondents:
C.S.C., Sri Ashish Kumar Singh, Sri Hridai Narain Pandey, Sri Tarun Agrawal

Civil Law - U.P. Self Financed Independent Schools (Fee Regulation) Act, 2018 – Sibling Fee Relief Scheme – Transfer Certificates – Writ of Mandamus – Article 226-- The petitioners challenged the striking off of petitioner Nos. 2 and 3 (children of petitioner No. 1) from the rolls of a CBSE-affiliated school (respondent Nos. 6 and 7) and the issuance of transfer certificates dated 23.03.2023, seeking their re-enrollment and permission to attend classes. The dispute arose from the denial of a 50% Sibling Fee Relief Scheme for 2022-2024, introduced by the school, due to late fee payment by petitioner No. 1, leading to a cumulative default of Rs. 76,122. The school's refusal to extend the relief, coupled with alleged misbehavior by petitioner No. 1, complaints to the IGRS portal, police, and District Fee Regulatory Committee, and a defamation suit by the school, escalated the conflict. The school issued transfer certificates, though petitioners' children continued attending classes without fee acceptance or attendance marking. Held: The Sibling Fee Relief was conditional, not a right, and the petitioners' late payment (post-05.07.2022) justified its denial. The court found mutual fault in the escalation but prioritized the children's education. Considering the academic session 2023-2024 was nearly over (four weeks left), re-admission for that session was impractical due to closed CBSE registration and low attendance. The court disposed of the petition with mutual conditions: petitioner No. 1 to withdraw all complaints (IGRS, police, Fee Regulatory Committee), deposit defaulted and future fees, and undertake good conduct; respondent No. 7 to withdraw the defamation suit, cancel transfer certificates, and re-admit petitioner Nos. 2 and 3 for 2024-2025. No costs were awarde

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

1. Heard Shri Shesh Kumar, learned counsel appearing along with Shri Ritesh Upadhyay, learned counsel for the petitioners, learned Standing Counsel for

the State-respondent Nos. 1 to 4, Shri H. N. Pandey, learned counsel for the CBSE, New Delhi/respondent No. 5 and Shri Tarun Agarwal, learned counsel for the respondent Nos. 6 and 7.

2. A claim of Sibling Fee relief of 50% introduced by the respondent Nos. 6 and 7 institution for the Session 2022-2023-2024 and its denial on account of a solitary default leading to unpleasantaries being exchanged between the petitioner No. 1 and the school authorities respondent Nos. 6 & 7, lodging of complaints, police complaints, defamation suit and culminating in issuance of transfer certificates against the petitioner Nos. 2 and 3 has travelled to this Court.

3. The writ petition has been filed for issuance of a writ of mandamus commanding the respondent Nos. 6 & 7 to accept the fees of the petitioner No. 2 and 3, enroll their names in the school rolls and permit them to take their respective classes without any hindrance in the interest of justice.

4. The facts giving rise to the controversy involved in the instant writ petition briefly stated are that the petitioner No. 1 is an ex-serviceman having retired from the post of Sergeant in the Indian Air Force. The elder son of the petitioner No. 1, namely, Sushmit Dagar was a student of the school run by the respondent Nos. 6 and 7 and passed out in the academic session 2021-22 and is currently pursuing B.Tech course in IIT, Kanpur. The other children of the petitioner No. 1 i.e. the petitioner Nos. 2 and 3 took admission in the institution of the respondent Nos. 6 & 7 in classes 6th and 4th in the academic Session 2020-2021 and studying in classes 8th and 6th in the academic session 2022-2023.

5. On 5th of August, 2021 the school administration introduced a Scheme/Circular for fee rebate under the head of COVID relief and Sibling Relief for the academic session 2022-2023-2024. The Sibling Relief Scheme provided 50% fee relief to parents who have admitted their two children to the school and such fee relief would be given to the younger sibling who is the biological offspring of the same parents. The relief process would be fully automated and once the application is received, processed and approved, credit note would be automatically posted to the younger ward's fee account. The credit note would be posted only upon timely payment of fee every quarter i.e. 5th April, 5th July, 5th October and 5th January. The scheme further provided that the relief would not be available to parents who wish to pay school fee in monthly installments or fee payment is received beyond due date. The relief would also be available to the parents who deposit the entire year fee in one go, on or before 5th April. The scheme further provided that the full fee of the older sibling and balance fee for the younger sibling must be deposited on or before the due date to avail the relief and would be available to one child only at a time. Apart from the above, the scheme provided that it would remain applicable for session 2023-2024 and that the school reserved its right to withdraw the relief post 2023-2024 or if a child is found guilty of disciplinary misdemeanor damages school property and is unable to pass exams or the parents is found misbehaving with school staff or his behaviour is questionable and any disrespect towards school or its staff by the parents or child would make the relief withdrawn.

6. Learned counsel for the petitioners submits that the combined fee of the

petitioner Nos. 2 and 3 after taking into consideration the benefit of the Sibling Scheme and 10% COVID relief works out to a sum of Rs.52,704/- per quarter which the petitioner No. 1 deposited for the session 2022-2023. A detailed chart has been depicted in Para 12 of the writ petition giving the dates, cheque Nos. and amount deposited. It is contended that for the academic session 2022-2023 the fee of petitioner No. 3 was deposited to the extent of Rs.70,272/- while that of the petitioner No. 2 was deposited to the extent of Rs.1,40,544/- as per the circular dated 5.8.2021. The total fee deposited in respect of petitioner Nos. 2 and 3 is Rs.2,10,816/-. The respondent Nos. 6 & 7, however, demanded deposit of balance fee which according to them was Rs.76,122/-. The issue regarding the balance fee due could not be sorted out and the respondents insisted for deposit of the balance fee and the class teachers of the children required the petitioner Nos. 2 and 3 to get the balance fee deposited. The petitioner No. 1 lodged a complaint against the respondent Nos. 6 & 7 on the IGRS portal and also before the District Fee Regulatory Committee under the U.P. Self Financed Independent School (Fee Regulation) Act, 2018. It is contended that the Regulatory Committee has imposed a penalty of Rs. One Lac upon the respondent nos. 6 and 7 for not providing the details asked for. Learned counsel for the petitioners submits that on account of the above action initiated the respondent nos. 6 and 7 have now struck off the names of the petitioner nos. 2 and 3 from the school rolls and issued ante dated Transfer Certificates on 23.03.2023.

7. A short counter affidavit has been filed on behalf of the respondent no. 7 and the factual controversy is sought to be cleared by submitting that the controversy has been blown out of proportions and the petitioner nos. 2 and 3 have suffered entirely on account of the recalcitrant attitude of the petitioner no. 1 and his wife. The Sibling Fee Rebate Scheme admittedly is subject to certain terms and conditions. It was clearly mentioned in the Scheme that the benefit would be available only upon timely deposit of the fee i.e. on or before 5th April, 5th July, 5th October and 5th January. The fee for the first quarter of the academic session 2022-23 beginning April 2022 was paid before 5th April 2022 and petitioners were extended the benefit of the Scheme. However, for the next quarter beginning July 2022, the fee was got deposited in two installments i.e. on 05.07.2022 and 08.07.2022. As total fee was not deposited before 05.07.2022, the sibling benefit was not extended to the petitioners. In the absence of any rebate in the fee, the total fee payable for second quarter came to be Rs.78,078/- against which only a sum of Rs.52,704/- was got deposited and consequently, there was a default of Rs.25,374/-. This default dis-entitled the petitioners to the sibling rebate in the subsequent quarters. The cumulative default worked out to Rs.76,122/- which was being demanded.

8. The petitioner No. 1 instead of depositing the balance amount, insisted for fee waiver and benefit under the Sibling Fee Relief Scheme. The petitioner No. 1 even began calling up one of the lady teachers of the institution late in the night and misbehaved with her. The said teacher issued a legal notice to the petitioner through her Advocate seeking written apology from the petitioner No. 1. The petitioner No. 1 also approached the police authorities against the Principal for demanding balance fee though no FIR was registered. The parents of the petitioner

Nos. 2 & 3 have also written offensive letters marked to various dignitaries of the State and also filed a complaint before the Fee Regulatory Committee constituted under the U.P. Self Finance Independent Schools (Fee Regulations) Act, 2018. In respect of the complaint lodged by the petitioner No. 1 before the Police Authorities, the parties were called to settle/discuss the issue on 21.3.2023, but the complainant did not present himself and only the representative of the respondent No.7 was present. The representative of the respondent No.7 consented to settle the controversy by waiving the outstanding balance of Rs.76,122/- due and payable towards the account of student fee and issue the transfer certificates. The transfer certificates were not collected by the parents and they continued to send their wards to attend the institution.

9. Learned counsel for respondent No. 6 and 7 has further submitted that there is a deep resentment amongst the teaching staff for not acting against the written complaint of the lady teacher and have also conveyed their strong displeasure at any attempt to re-admit the petitioner Nos. 2 & 3.

10. A short rejoinder affidavit has been filed by the petitioners essentially reiterating the stand taken in the writ petition.

11. In the aforesaid backdrop, this Court has been called upon to consider the relief prayed for in the writ petition.

12. I have heard learned counsel for the parties and have perused the record.

13. I find that the Sibling Fee Relief under the Circular dated 5.8.2021 issued by the respondent No. 7 is a benefit offered to the parents whose two children are studying in the institution subject to certain riders and cannot be claimed as a matter of right.

14. In the opinion of the Court, this unfortunate situation has arisen on account of misunderstanding of the terms of the Sibling Fee Relief Scheme. According to the petitioner No. 1, he was entitled to the benefits under the Scheme as the institution had accepted the fee for 2nd quarter in part. Admittedly, the first deposit towards the fee of the 2nd quarter was made on 5.7.2022 by depositing a sum of Rs.25,000/- and the second deposit towards the said quarter was made on 8.7.2022 for Rs.27,704/-. The total amount deposited was Rs.52,704/- which was the amount required to be deposited towards the fee for both petitioner Nos. 2 & 3 after adjusting the Sibling Fee relief and 10% COVID relief. However, the 2nd deposit was made on 8.7.2022 and not on or before 5.7.2022 as provided under the Scheme and as such, the respondent No. 7 was justified in not extending the benefit of the Sibling Fee Relief to the parents. No benefit of the Scheme has been extended for the deposits made in respect of the subsequent quarters.

15. During the course of the arguments, considering the nature of the dispute, this Court had required the parties to amicably settle the dispute amongst themselves. In furtherance thereof, the respondent No. 7 has expressed its intention to settle the dispute through an e-mail addressed to Shri Tarun Agarwal, learned counsel for the respondent. Shri Tarun Agarwal, learned counsel for respondent has placed the e-mail dated 15.1.2024 before this Court which is taken on record. According to the e-mail, the conditions imposed are:-

1) School agrees to take both admissions, however, two issues needs to be addressed.

(a) CBSE registration has been closed on the portal.

(b) Attendance is drastically short. The children be enrolled for new session 2024-25 as only four weeks of the current session are left before final exams.

2) The parents to submit an unconditional written apology addressed to the Faculty and Management of the school for their past behaviour and conduct and ensure good conduct in future.

3) The parents shall pay the waived fee along with future fee.

4) The parents shall withdraw their complaint filed by them under the U.P. Self Financed Independent Schools (Fee Regulation) Act, 2018 with information to the Appellate Authority before applying for admission.

16. Shri Shesh Kumar, learned counsel for the petitioners is aggreable to the aforesaid terms, however, has expressed some reservations to condition No. 2 and submits that the entire fault cannot be attributed to the parents alone and the conduct of the respondents has been equally not above board. He submits that the apology should be mutual from both sides. He further submits that the petitioner No. 2 and 3 may be taken back on the Rolls of the school for the academic session 2023-2024 by relaxing the requirement of attendance so that the valuable year may be saved. The School Authorities have permitted the petitioner Nos. 1 and 2 to attend their respective classes upto August, 2023. He further undertakes to deposit the balance fee and future fee.

17. Shri Tarun Agarwal, learned counsel for the respondent No. 7 has vehemently opposed the said prayer and submits that the petitioners under no circumstances can be permitted for the session 2023-2024 inasmuch as they have not studied in the said session nor any fee has been accepted from them as the Transfer Certificate had already been issued to them in March, 2023.

18. I have given a thoughtful consideration to the respective submissions of the learned counsels.

19. From the record, I find that the Transfer Certificates were issued to the petitioner Nos. 2 and 3 on 23.3.2023. Though the names of the petitioner Nos. 2 and 3 were struck off from the Rolls of the school, their ID cards withdrawn. Yet, the petitioner No. 2 and 3 continued to be sent to the school by the parents. The final report card for their respective classes were handed over in March, 2023 and they were not promoted to the next higher class. The School Authorities did not prevent them from attending school presumably on the ground that the enquiry by the District Fee Regulatory Authority was underway at the relevant time. The School Authorities did not mark the attendance nor accepted any fee from the petitioners. I also find that the session 2023-2024 is virtually on the last leg with only 04 weeks remaining whereafter the final exams are scheduled to take place. In view of above facts, this Court is constrained to permit the petitioner Nos. 2 and 3 to be re-admitted in the current session.

20. In the opinion of the Court, ends of justice shall stand sub served if the writ petition is disposed of in the following terms:-

21. The petitioner No. 1 shall withdraw all proceedings initiated against the School Authorities which include the

complaint filed by him under the U.P. Self Financed Independent Schools (Fee Regulation) Act, 2018, Complaint before the Police Authorities as also Complaint on the IGRS portal against the institution and its teaching staff and submit an undertaking that such conduct shall not be repeated in future. The petitioner No. 1 shall also deposit the defaulted fee (waived fee) as also the future fee as and when the same shall falls due. The respondent No. 7 in turn will withdraw the defamation case and / or any other cases instituted against the parents of the petitioner Nos. 2 and 3. The respondent No. 7 shall withdraw the transfer certificates dated 23.3.2023 accept the fee in respect of the petitioner Nos. 2 and 3, restore their names on the school rolls and readmit them for the academic session 2024-2025.

22. Ordered accordingly. No order as to costs.

(2024) 2 ILRA 1052
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.02.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ - C No. 1002256 of 2013

State of U.P. & Ors. ...Petitioners
Versus
Sri Sudama Prasad Tiwari ...Respondent

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondent:
C.S.C., Ashish Mishra

Civil Law Payment of Gratuity Act, 1972 – Sections 2(e), 14 – Daily Wage Employee – Entitlement to Gratuity – Government Order – Article 226 - The St. of Uttar Pradesh challenged the order dated 27.06.2012 by the Controlling Authority under the Payment of Gratuity Act, 1972, granting gratuity to respondent No. 1, Sudama Prasad Tiwari, a daily wage employee (Tindail) in the Irrigation Department from 02.01.1984 to 08.11.2004, and later as a Work Supervisor (Karya Paryavekshak) until retirement on 31.07.2009. The respondent claimed gratuity for 25 years, 6 months, and 29 days of continuous service. The St. argued that daily wagers are not entitled to gratuity under Civil Service Regulations and a Government Order dated 28.07.2006, and that the respondent's regularized service (2004-2009) was less than five years, disqualifying him. Held: The respondent, as a daily wage employee, fell within the definition of "employee" under Section 2(e) of the 1972 Act, as he was not covered by any other gratuity-providing law or rules. Section 14 of the Act overrides inconsistent enactments or government orders, rendering the 2006 Government Order inapplicable. The respondent proved continuous service from 1984 to 2009, satisfying the Act's requirements. The St.'s claim of regularization was not substantiated before the Controlling Authority, and even if true, the daily wage period (1984-2004) qualified for gratuity. The court upheld the Controlling Authority's order, finding no infirmity, but modified it to award simple interest instead of compound interest on the gratuity amount from the due date until payment.

The petition was dismisse

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

1. Heard Shri S.K. Khare, learned Standing Counsel for the State/petitioners. No one has appeared on behalf of the respondent no. 1 and perused the material available on record.

2. The State of Uttar Pradesh has filed the present writ petition being aggrieved by the judgment dated 27.06.2012 passed by the Controlling Authority under the

provisions of Payment of Gratuity Act, 1972 whereby the claim of respondent no. 1/workman has been allowed and he has been held to be entitled for payment of gratuity for working on daily wages for a period of 25 years, 6 months and 29 days.

3. The facts in brief are that the respondent no. 1 Sudama Prasad Tiwari had worked as Daily Wage Employee on the post of TINDAIL in the office of Sinchai Khand, Sharda Nagar, Lakhimpur Kheri with effect from 2.1.1984 to 8.11.2004. According to the claim made by respondent no. 1, he had continuously worked from 2.1.1984 to 31.07.2009 and attained superannuation on his retirement on his attaining the age of 60 years. He has stated that for his entire length of service, he had worked on daily wages/Muster Roll in the Irrigation Department, Sitapur in the Work-Charge Establishment on the post of Karya Paryavekshak.

4. It is in the aforesaid fact that despite working for 25 years, 6 months and 29 days, the respondent no. 1 was not given gratuity by the petitioner and consequently had moved an application before the Controlling Authority. The notices were issued to the petitioners being the employer and they appeared before the Controlling Authority and filed their objections opposing the claim of the workman. It was stated on behalf of the petitioner that the service in a work charge establishment falls in a different category and also admitted that he does not fall as a regular government servant and hence he cannot be treated as regular government servant and no gratuity is payable to him. It was further stated that under the various government orders issued by the State of Uttar Pradesh, the daily-wagers are not entitled for gratuity, inasmuch as, according to the Civil Service Regulations, the daily wagers are neither entitled for pension nor gratuity. Thus, the petitioners also relied upon the government orders issued by them.

5. It was further stated that while discharging his duties on the post of Work Supervisor as work charge employee w.e.f. 8.11.2004 till 31.07.2009, the respondent no. 1 had worked only for a period of four years, eight months and twenty three days, which is less than a period of five years, hence on this account also he was not entitled for payment of gratuity. Lastly it was stated that the government order dated 18.07.2006 itself provides that a daily-wage employee shall not be entitled for gratuity, hence prayed for rejection of the claim made by employee/respondent no. 1.

6. The Controlling Authority duly considered the objections filed by the petitioners, as well as the evidence, which was made available on record. It duly considered all the arguments raised by the petitioner in their written submissions with regard to the admissibility of the gratuity to the employee.

7. The arguments of the petitioners were rejected on the ground that as per Section 14 of the Payment of Gratuity Act, 1972. The said Act of 1972 overrides all the other Acts or Rules, which are inconsistent with the said Act. Accordingly, the Authority was of the view that the Government Orders or any other Rules made by the State of Uttar Pradesh in this regard cannot be invoked by the petitioners for denying the valid claim of payment of gratuity to the workman. It also returned the finding that it was duly demonstrated and proved by the workman that he had worked from 2.1.1984 to 31.07.2009 continuously on daily-wages and

accordingly, all the ingredients were available for him under the Payment of Gratuity Act, 1972.

8. This Court has also perused the impugned judgment and considered the arguments raised by the petitioners assailing the impugned order dated 27.06.2012. For admissibility of payment of gratuity, it is to be considered whether the workman falls in the definition of an employee as provided for under Section 2 of the Act of 1972. The definition of an employee is quoted here-in-below:-

"2 (e) ["employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity;]."

9. From perusal of the aforesaid definition, it is clear that any person who is employed for wages in the establishment defined therein would be entitled for payment of gratuity subject to the condition that such employment should not be under the Central Government or the State Government and is not governed by any Act or Rules provided for payment of gratuity.

10. In the present case, the workman was able to prove that he had worked continuously from 2.1.1984 to 31.07.2009 on daily wages and Muster Roll pertaining to his employment were duly proved before the Controlling Authority. Even a perusal of the written submissions filed by the petitioner before the Controlling Authority, it was not their case that the respondent no. 1 was entitled for gratuity under any other law or rules framed by the State of Uttar Pradesh. It could not be demonstrated that the workman was covered by any other rules or enactment so as to exclude with regard to the beneficial provisions of the Gratuity Act.

11. The case of the petitioners before this Court is that the workman had worked on daily wages from 2.1.1984 to 8.11.2004 but subsequently his services were regularized and he was working on the post of Karya Paryavekshak and was being paid regular salary. Though this fact was never proved before the Controlling Authority but in any case there is no denial of the fact that even according to the petitioner the workman had worked continuously from 2.1.1984 to 8.11.2004.

12. Even in the writ petition in paragraph no. 16, it has been stated that *"..... the petitioner worked on the post of Tindail as daily wage employee and was getting a sum of Rs.2,400/- per month, as such, the period for which he remained working on daily wage basis is not computable for calculating the amount of gratuity in view of the Government Order dated 18.07.2006....."*

13. From the above, it is undisputed that the employee had worked from 02.01.1984 to 08.11.2014 on daily wages,and as such he would be entitled to gratuity and these facts support the order passed by the Controlling Authority.

14. The challenge in the present case is primarily on the ground that there is a

government order dated 28.7.2006, which provides that gratuity shall not be made applicable to the employees working on daily wages. To consider the submission of the learned Standing Counsel to the challenge of the order of the Controlling Authority specially with regard to the Government Order dated 28.07.2006, we will have to take into consideration the relevant provisions of the Gratuity Act relating to applicability of other laws. Section 14 of the Payment of Gratuity Act, 1972 provides for the following:-

14. Act to override other enactments, etc.

-The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.

15. Accordingly, the petitioners cannot invoke the provisions of any government order contrary to the provisions of the Repayment of Gratuity Act, 1972 and in case there is any conflict, the provisions of Section 14 of the Act of 1972 provide that the Payment of Gratuity Act would override any such government orders and consequently, merely because the government order dated 28.07.2006 provides for non-payment of gratuity to the persons employed on daily-wages cannot be a ground for denial of gratuity to the respondent no. 1. The provisions of government order dated 28.07.2006 cannot be invoked to deny benefit of gratuity to the petitioner as it would not operate and override the provisions of Gratuity Act, 1972and as per provisions of Section 14 of the Act of 1972, will have to give way to the beneficial provisions of Act, 1972.

15. Accordingly, the challenge made by the petitioners to the impugned order fails and after examining the impugned order, this Court does not find any infirmity. Accordingly, the petition being devoid of merits is dismissed. However, it is provided that the impugned order is only modified only to the extent that instead of compound interest, the workman shall be entitled to simple interest on the admissible amount of gratuity from the date when it was admissible till the date of actual payment.

(2024) 2 ILRA 1055
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.02.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ - C No. 1003197 of 2010

Jagat Pal Singh ...Peitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Dhirendra Singh, Aditya Tiwari

Counsel for the Respondents:
C.S.C., Prashant Kumar Srivastava

Civil Law - U.P. Zamindari Abolition and Land Reforms Act, 1950 – Rule 285B – Transfer of Property Act, 1882 – Section 60 – Constitution of India – Article 300A – Auction Sale – Right of Redemption – Arbitrary Action - The petitioner, Jagat Pal Singh, challenged the auction of his agricultural land in Raebareli, conducted on 16.06.1991 by the Collector to recover an outstanding loan of Rs. 17,929 (later Rs. 69,929) from Bank of Baroda, taken in 1975. The St. purchased the land for Rs. 1/- due to no bidders, with mutation recorded on 05.06.1992. The petitioner, unaware until 2010, claimed he had repaid Rs.

77,000 by 2002 and argued the auction violated his right to redemption and was arbitrary. Held: The court found the auction illegal, as Rule 285B of the U.P.Z. & L.R. Act requires the Collector to bid up to the arrear amount, not a nominal Rs. 1/-, which was below any reasonable reserve price for 1.7 hectares. Citing Union Bank of India Vs Official Liquidator ((2000) 5 SCC 274), Divya Manufacturing Co. Vs U.O.I. (AIR 2000 SC 2346), and Gajraj Jain Vs St. of Bihar ((2004) 7 SCC 151), the court emphasized that auctions must ensure fair valuation and transparency. The St.'s action amounted to confiscation, violating Article 300A, which prohibits deprivation of property without due process. The right of redemption under Section 60 of the Transfer of Property Act persists until a registered sale deed extinguishes it, which did not occur here. The auction and mutation orders were quashed, and the respondents were restrained from interfering with the petitioner's possession unless due process is followe The petitioner was granted liberty to settle the loan with the Bank in installments and seek mutation of his name in revenue records.

The petition was allowe

Case Law Cited:

1. Union Bank of India Vs Official Liquidator, (2000) 5 SCC 274

2. Divya Manufacturing Co. (P) Lt Vs U.O.I., AIR 2000 SC 2346

3. Gajraj Jain Vs St. of Bihar, (2004) 7 SCC 151

4. Surendra Pal Singh Vs Vijaya Bank, Civil Appeal No. 6843 of 2023

Narandas Karsondas Vs S. Kamtam, 1976 CJ (SC) 287

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

1. Heard Shri Giriraj Prajapati, Advocate holding brief of Shri Aditya Tiwari, learned counsel, learned Standing Counsel for the State, Shri Prashant Kumar Srivastava, learned counsel for respondent-Bank and perused the material available on record.

2. By means of the present writ petition, the petitioner has challenged the auction proceedings conducted at the behest of the Collector, District Raebareli whereby the agricultural land of the petitioner situated at Village Malik Mau Chaubarra Pargana, Tehsil and District Raebareli in Khata No. 0002, Gata Nos/area (in Hectare), 198/0.550, 199/0.592, 240/0.048, 241/0.6260, 245/0.2810, 247/0.670, 251/0.600, 280sha/0.1170, 1094/0.6580 and 1104/1.5050 has been auctioned and purchased by the State in lieu of the outstanding amount due to respondent no. 5 i.e. Bank of Baroda.

3. It has been submitted by learned counsel for petitioner that the petitioner had taken an agricultural loan of Rs.33,000/- on 27.06.1975 from the Bank of Baroda, Branch Dedaur, District Raebareli. It is stated that against the said loan, the petitioners had deposit the loan amount of Rs.52,000/- till 1984 and also an amount of Rs. 25,000/- on 23.03.2002 as demanded by the respondent-Bank. It has been stated that on 14.05.2010 some government officials went to the petitioner's land and started measuring the same and it is then the petitioner came to know that the land of the petitioner has been sold by the State Government in an auction and even subsequently, he was able to obtain the records pertaining to the said auction. The petitioner stated that the action was held by the State Government on 16.06.1991 where no bids were made and no one had participated in the said auction. It seems that the State had purchased the land for Rs.1/- and name of the State Government

had also mutated in the revenue record on 05.06.1992. It has been stated that a recovery notice was sent by the respondent-Bank to the Collector for recovery of outstanding amount of Rs.17,929/- on 28.04.1985. Another recovery notice under Form-74 was issued on 09.08.1990 for an amount of Rs.69,929/-. As the petitioner did not pay the outstanding amount of loan, recovery proceedings were initiated and land of the petitioner was auctioned in Rs.1/-.

4. In support of his submissions, learned counsel for the petitioner has relied upon the judgment of Supreme Court in the case of ***Surendra Pal Singh Vs. Vijaya Bank passed in Civil Appeal No.6843 of 2023*** as well as ***Narandas Karsondas Vs. S.A. Kamtam, 1976 CJ (SC) 287*** to canvass his plea that his right to redemption of the mortgaged property existed even subsequent to confirmation of the auction and consequently he may be permitted to deposit the outstanding amount of loan and the impugned orders may be set aside directing the respondents to hand over the property back to the petitioner.

5. In the counter affidavit filed by the State, it has been stated that in 1985, the petitioner was served with an auction notice and again in 1990, they were served with an auction notice but the petitioner did not repay the said amount and subsequently the loan was put for auction but the auction proceedings could not take place and consequently, it is stated that the land vested in the State Government and mutation in this respect was also undertaken by the order dated 09.09.1992. It has further been stated in the counter affidavit that on failure in auction, the land was vested in the State Government. In the aforesaid circumstances, the question which falls for consideration is as to whether where either no one has participated in the said auction or auction has not been conducted by the State, can the land, which is mortgaged with the Bank as security towards the loan taken by the farmers, vest in the State Government.

6. Before dealing with rival contentions of parties, it would be useful to refer some decisions of the Apex Court, having material bearing on the question in controversy involved in the case, hereinafter.

7. In the case of ***Union Bank of India Vs. Official Liquidator, 2000 (5) SCC 274,*** the Apex Court has observed as under:-

"In auction-sale of the property of the company which is ordered to be wound up, the Company Court acts as a custodian for the interest of the Company and its creditors. It is the duty of the Company Court to satisfy itself as to reasonableness of price by disclosing valuation report to secured creditors of the company and other interested persons. It was further held that the Court should exercise judicial discretion to ensure that sale of property should fetch adequate price. For deciding what would be reasonable price, valuation report of an expert is essential. The Company Judge himself must apply his mind to the valuation report. The Court observed that the High Court did not interfere with the auction-sale on the ground of sympathy for the workers which was not proper. The auction-sale was, therefore, set aside by this Court and the Official Liquidator was directed to resell the property after obtaining fresh valuation report and after furnishing copy of such report to secured creditors."

8. In ***Divya Manufacturing Company (P) Ltd. and another Vs. Union of India and others, AIR 2000 SC 2346,*** the Apex

Court held that in appropriate cases, even the confirmed sale can be set aside.

9. In ***Gajraj Jain v. State of Bihar and others, (2004) 7 SCC 151,*** the Apex Court held that in absence of valuation report and reserve price, the auction sale becomes only a pretence and if there is no proper mechanism and if the intending purchasers are not able to know the details of the assets or 10 intemised valuation, the auction-sale cannot be said to be in accordance with law. If publicity and maximum participation is to be attained, all bidders must know the details of the assets and the valuation thereof.

9. The right of redemption which is embodied in section 60 of the Transfer of Property Act is available to the Mortga-gor unless it has been extinguished by the Act of parties. The combined effect of section 54 of the Transfer of Property Act and section 17 of the Indian Registration Act is that a contract for sale in respect of immovable property of the value of more than one hundred rupees without registration cannot extinguish the equity of redemption. In India it is only on execution of the conveyance and registration of transfer of the mortgagor?s interest by registered instrument that the mortgagor?s right of redemption will be extinguished. The conferment of power to sell without intervention of the Court in a Mortgage Deed by itself will not deprive the mortgagor of his right to redemption. The extinction of the right of redemption has to be subsequent to the deed conferring such power. The right of redemption is not extinguished at the expiry of the period. The equity of redemption is not extinguished by mere contract for sale. The mortgagor?s right to redeem will survive until there has been completion of sale by the mortagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further section 69(3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption.

10. From the aforesaid judgements, it is clear that whenever a property is put up for auction to realise the outstanding amount of dues, one of the main considerations is to get the maximum value out of the said property. For the said purpose, it is an essential condition that there should be proper valuation of the property, for which purpose provision has been made even in the Zamindari Abolition and Land Reforms Act. Even in a situation where no person appears to participate in the auction and no bidders participate in the auction, Collector has been given the discretion to bid up to the amount of such arrears. Rule 285B of the said Act is quoted here for ready reference:-

"285B. No officer having any duty to perform in connection with any such sale, and no person employed by, on subordinate to, such officer shall, either directly or indirectly, bid for, acquire or attempt to acquire the property sold or any interest therein :

Provided that where at any auction under Section 248 no bid is offered up to the amount of the arrear, for which the sale has been ordered, the Collector may bid upto the amount of such arrear."

11. In the facts of the present case, according to the State Government no one

participated in the said auction and consequently the property was purchased by the State for Re 1/-. Even in a situation where no person has appeared to bid, it was open for the State to purchase the said property, but the reserve price had to be offered and paid. There is no law which permits the State to purchase the mortgaged property Re 1/-, which would be below the reserve price for 1.7 hectares of land anywhere. The said action of the State is clearly illegal and arbitrary and contrary to the statutory provisions of Rule 285B of the Act of 1950.

12. The State is under a mandate to act reasonably and fairly in all spheres of activity. Even the rules providing for sale of immovable property provide for a detailed mechanism where proper notices have to be issued, the property has to be valued before fixing the reserve price, and even the auction has to be fair and transparent. The action of the State in purchasing the property at an auction conducted by themselves for a price of Re. 1/- is nothing but confiscation of the property. Such a right cannot be vested in a democratic State, to confiscate the property of the citizen under the garb of a realisation of outstanding amount of loan for a paltry sum of Re.1/-. According to Rule 285B even if no one had participated in the auction, the minimum reserve price should have been paid for purchase of the said property. At this stage, we cannot lose sight of the Constitutional provisions contained in Article 300A.

13. According to Article 300 A of the Constitution of India 'no person can be deprived of his / her property save by authority of law' and the State cannot dispossess a citizen of his / her property except in accordance with the procedure provided for in the Zamindari Abolition and Land Reforms Rules, 1952. In the present case, deprivation of the property of the petitioner in purported exercise of the powers to sell mortgaged property to recovery amount of loan by the State Government and to purchase it at Re.1/- is nothing except confiscation of the property. The said action cannot be sustained on the anvil of the provisions contained in U.P.Z.A. and L.R. Act, especially Rule 285 B as quoted hereinabove and Article 300 A of the Constitution. It is surprising that when no person appeared during the auction why was not another date fixed after due publicity to ensure maximum participation at the auction but still the State proceeded with the said auction and settled in their own favour at a paltry sum of Re.1/-. On the touchstone In the Constitutional Scheme as well as under the statutory provisions and rules of U.P.Z.A. and L.R. Act, the said exercise is clearly arbitrary and illegal and deserves to be quashed and is hereby quashed.

14. It has been submitted that the petitioner is still in possession of the agricultural land accordingly, the respondents are restrained from interfering in the possession of the petitioner except by following due process of law. In case the outstanding amount of loan is still due, the petitioner is given liberty to approach the respondent-Bank and settle the same while considering the application of the petitioner, the respondent-Bank may exercise its discretionary power and fix easy installments in case the petitioner is ready and willing to pay the entire loan. In case, the petitioner does not pay the loan, it shall be open for the respondent-Bank to take recourse to auction of the mortgaged property in accordance with law for proper and adequate consideration.

15. Further, the petitioner is given liberty to move an appropriate application for mutation before the competent authority for mutating the name of the petitioner in place of State. On petitioner's moving said application, necessary orders in terms of the directions issued by this Court shall be passed by the competent authority with expedition in accordance with law.

16. Subject to above directions, the writ petition stands allowed.

(2024) 2 ILRA 1060
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.02.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ - C No. 3000014 of 2007

Chakra Manoher & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Dr. L.P. Misra, Lalta Prasad Misra

Counsel for the Respondents:
C.S.C.

Criminal Law - U.P. Imposition of Ceiling on Land Holdings Act, 1960 – Sections 5, 10(2), 11(2) & 14 – Ceiling Proceedings – Non-Issuance of Notice – Right to Possession – Article 226

The petitioners challenged orders dated 08.03.1990, 26.03.1996, and 10.11.2006 passed by the Prescribed Authority and Additional Commissioner in ceiling proceedings under the U.P. Imposition of Ceiling on Land Holdings Act, 1960, concerning 19.152 acres in Village Gurchahi, Shrawasti. The land, originally held by Sampata Devi, devolved to Bindra Devi, from whom the petitioners purchased it via a registered sale deed dated 01.09.1970. No notice under Section 10(2) was issued to the petitioners, despite their recorded possession and inclusion in L.H. Form-3, rendering the proceedings voi The petitioners' application under Section 11(2) and subsequent appeal were rejecte Held: Relying on Shantanu Kumar Vs St. of U.P. (1979 ALL L.J. 1174), the court held that non-issuance of notice to the petitioners, whose names appeared in revenue records and L.H. Form-3, violated Section 10(2), making the proceedings jurisdictionally defective. Explanation II of Section 5 presumes possession by the original holder unless proven otherwise, and the petitioners' sale deed (pre-24.01.1971) excluded the land from ceiling proceedings. The Prescribed Authority's failure to consider possession and the sale deed, coupled with the appellate authority's affirmation, warranted quashing the orders. The matter was remitted to the Prescribed Authority for fresh adjudication within three months, with the petitioners given four weeks to submit evidence, including the original sale dee

The writ petition was allowed

Case Law Cited:

1. Shantanu Kumar Vs St. of U.P., 1979 ALL L.J. 1174

2. Dilbagh Singh Vs St. of U.P., 1978 AWC 393

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

1. Heard Ms. Anapoorna Agnihotri, Advocate holding brief of Dr. Lalta Prasad Misra, learned counsel for the petitioners as well as learned Standing Counsel for the respondents.

2. By means of present writ petition the petitioners have challenged the order dated 26.03.1996, passed by the Prescribed Authority, Bahraich in Case No. 45/106, the order dated 10.11.2006, passed by the Additional Commissioner (Judicial), Devi Patan Division, Gonda in Case No. 238/2 and the order dated 08.03.1990, passed by

the Prescribed Authority in Case No. 778/3/48/15, on the ground that in ceiling proceedings pending before the Prescribed Authority, Bahraich no notice was issued to the petitioners and for want of which the proceedings and the order passed thereunder are vitiated in law.

3. It is submitted by learned counsel for the petitioners that notice under Section 10(2) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (*hereinafter referred to as the "Act, 1960"*) was issued to one Sampata Devi with regard to land holding measuring 19.152 acres situated in Village - Gurchahi, Pargana - Ikauna, District - Shrawasti. Sampata Devi had filed objections to the said notice but did not contest the objections seriously. After Sampata Devi's land dwelled upon Smt. Bindra Devi and petitioners purchased the said land through registered sale deed dated 01.09.1970 from Bindra Devi and the land was also recorded in the name of petitioners subsequent to the registration of sale deed. During the course of pendency of the proceedings before the Prescribed Authority, Smt. Bindra Dei died and the petitioners possession over the land in question has been admitted prior to the cut of date fixed under Section 5 of the Act, 1960, under Explanation II in the light of the sale deed executed in 1970. The land in question stood excluded from the proceedings under Section 5 of the Act, 1960 on account of which for want of notice issued to the petitioners, the order is nullity. When the order came to the knowledge of the petitioners, they preferred an application under Section 11(2) of the Act, 1960, the same has been rejected. The order passed by the Prescribed Aurhority has been affirmed in the appeal.

4. In support of his contentions learned counsel for the petitioners has cited certain decisions of this Court one which is referred hereunder i.e. **Shantanu Kumar Vs. State of U.P. and Others, 1979 ALL L.J. 1174,** wherein it has been held that once the authority concerned has arrived at the conclusion that the land in question included in the statement in C.L.H. Form 3 includes the land ostensively held in the name of any other person, it was incumbent upon the Prescribed Authority to serve upon the petitioners the requisite notice together with the copy of the statement and call upon him to show cause why that statement be not taken as correct. If no notice was issued under Section 11(1) of the Act, 1960, remedy is available to the petitioners to challenge the validity of the proceedings and by considering likewise facts involved in the matter, the Full Bench of this Court had proceeded to allow the writ petition and quash the order passed by the Prescribed Authority on this very ground.

5. From the perusal of the order passed by the Prescribed Authority dated 08.03.1990, it is obvious that the possession of the petitioners over the land in question has been discussed as it was stated by the concerned Lekhpal. The Explanation II of Section 5 of the Act, 1960 speaks that if on or before January 24, 1971, any land was held by a person, who continues to be in its actual cultivatory possession and the name of any other person is entered in the annual register either in addition to or to the exclusion of the former and whether on the basis of a deed of transfer or license or on the basis of a decree, it shall be presumed unless the contrary is proved to the satisfaction of the Prescribed Authority, that the first mentioned person continues to hold the land and that it is so held by him ostensibly in the name of the second mentioned person. He further submits that the sale deed was executed in favour of the petitioners on 1st September, 1970 and since thereafter as per the statement of the

concerned Lekhpal, they were holding the possession over the land in question. Under the circumstances, the benefit of this Explanation is not applicable to the petitioners to include the land treating them as ostensible owner.

6. Learned Standing Counsel on the other hand has opposed the writ petition on the point that the the observations made in the order of the Prescribed Authority has been misinterpreted as while recording the findings of the possession of the petitioners over the land in question, the statement of the concerned lekhpal has not been believed by the authority concerned and still the authority concerned has proceeded to take a decision in the matter. Under the circumstances, he submits that since petitioners have claimed right of possession over the land in question on the basis of the execution of sale deed, their case cannot be excluded from consideration under Explanation II of Section 5 of the Act, 1960, and accordingly, he submits that under Section 5 of the Act, 1960 the land in question had rightly been included under the ceiling proceedings.

7. Learned Standing Counsel has further submitted that from the order passed by the Prescribed Authority it is evident that the application for stay moved by the petitioners on 22nd September, 1999 has been rejected by the Prescribed Authority and the Prescribed Authority fixed the matter for hearing. He has next submitted that it is obvious from the order passed by the Prescribed Authority that the petitioners have no possession over the land in question and accordingly they cannot claim the possession over the land in question as well as any benefit arising out of possession in the proceedings in question.

8. Learned counsel for the petitioners disputes the above contentions of learned Standing Counsel. He submits that from the order of Prescribed Authority it is evident that Smt. Bindra Dei was treated as ostensible owner but she was co-tenure holder and further on the point of possession he submits that in light of the provisions of Section 14 of the Act, 1960, the possession can only be taken over after determination of surplus land in appeal. Since they preferred the appeal before the Additional Commissioner against the order passed by the authority concerned alongwith an application under Section 11(2) of the Act, 1960 and now the appeal is under challenge before this Court from which it is obvious that the proceeding is continuing without attaining finality and it is not open for the respondents to take a stand that the possession has been taken over.

9. It has been submitted by learned counsel for petitioner that they had purchased Gata No. 953, 954 and 987 from Smt. Bindra Dei on 01.09.1970 by a registered sale deed and on the basis of the said sale deed they had sought exclusion of the land from the holding of the recorded tenure holder. The Prescribed Authority as well as the appellate authority has rejected the objections filed by the petitioners. It has been pointed out that before both the authorities below, the petitioner could not demonstrate the title on the said land because of the fact that the petitioner had filed photocopy of the sale deed.

10. Learned counsel for the petitioners on the other hand submits that the petitioners may be given an opportunity to demonstrate before this Court that the aforesaid land was in fact transferred in favour of the petitioners by a registered

instruments and they can produce thus original sale deed before Court to demonstrate that the said land was purchased by the petitioner on 01.09.1970.

11. Heard learned counsel for the parties and perused the record.

12. Learned counsel for the petitioners has produced the copy of original sale deed on the directions of this Court and the same has been looked into by learned Standing Counsel, who does not dispute that it is the same sale deed which was produced before the Prescribed Authority.

13. In the present case objections under Section 11(2) of the Act, 1960 were rejected by the Prescribed Authority, on the ground that the petitioners could not demonstrate their case and satisfy him about the sale deed, as only photo copy of the sale deed was filed and original copy was not filed.

14. From the discussion made above, this Court relying upon the judgment of this Court in the case of **Shantanu Kumar Vs. State of U.P. and Others (supra)**, is of the considered view that name of petitioners existed in C.L.H. Form - 3, which raises presumption with regard to possession of petitioners over the land in question at the relevant point of time when consolidation operations were undertaken. It is also to be seen that the said sale deed was executed on 01.09.1970 which is prior to the cut-off date and according to Explanation II of Section 5 of the Act, 1960, the actual cultivatory possession of the person has to be seen in case sale deed is executed prior to the cut-off date.

15. This Court in the case of **Shantanu Kumar Vs. State of U.P. and Others (supra),** has held :-

"9. It is thus evident that the notice requiring the tenure-holder to show cause why the statement prepared by the Prescribed Authority be not taken as correct is to be issued to the tenure-holder in respect of whose holding the statement has been prepared. Under the proviso, the Prescribed Authority shall cause to be served a notice to the person in whose name the land included in C.L.H. Form 3 is ostensibly held. The Prescribed Authority prepares the statement on the basis of revenue records. If from the revenue records or other information, the Prescribed Authority comes to know that the land included in the statement in C.L.H. Form 3 includes land ostensibly held in the name of any other person, the Prescribed Authority is bound to serve notice on such person. The phrase used is 'shall cause to be served'.

10. The petitioner claimed under a sale deed. It is not disputed that the Petitioner's name was recorded in the revenue papers over the land which was transferred to him. It is admitted that the statement in C.L.H. Form 3 included the land held by the petitioner. He was hence a person in whose name some part of the land mentioned in the statement was believed by the Prescribed Authority to be ostensibly held. In this situation, it was incumbent upon the Prescribed Authority to serve upon the petitioner the requisite notice together with a copy of the statement and call upon him to show cause why that statement be not taken as correct.

11. It is obvious that service of such a notice is preliminary to the acquisition of jurisdiction to proceed in the matter and decide whether the land ostensibly held in the name of the petitioner could be declared as surplus land in the hands of Bhupendra Singh. In the premises, the proceedings were without jurisdiction and void. Learned Standing Counsel submitted that the petitioner had knowledge and he should have filed an objection u/s

11(2) of the Act as has been held by a Division Bench of this Court in Dilbagh Singh v. The State of Uttar Pradesh, 1978 AWC 393. The existence of another remedy under the Act cannot validate the proceedings which are void for lack of jurisdiction and which have resulted in the declaration as surplus land of an area which a person other than the tenure holder who has been heard, claims. The fact that the petitioner could have filed an objection u/s 11(2) will not breath life into or validate these dead proceedings."

16. The aspect of possession, it seems that was never discussed before the Prescribed Authority and accordingly from the aforesaid facts it is clear that the order of the Appellate Authority as well as Prescribed Authority are liable to he quashed, as the petitioners have demonstrated that transfer of land was made prior to 1971 that is they are in possession over the said land and further that their names find mention in C.L.H. Form-3, strongly suggests that contention of the petitioners is correct.

17. In the light of above, the impugned orders dated 08.03.1990, 26.03.1996 and 10.11.2006 are set aside. The matter is remitted back to the Prescribed Authority for deciding the matter afresh. It is provided that the petitioners will have four weeks time from today to file all the evidence to demonstrate that they are owners of the land in question.

18. Considering that much time has lapsed, let the proceedings be concluded expeditiously, say within three months, thereafter, in accordance with law after giving opportunity of hearing to all the parties concerned.

19. The writ petition is **allowed**.

(2024) 2 ILRA 1064
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.02.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 378 (D) No. 138 of 2016

Smt. Sarla Devi ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sushil Kumar Rastogi

Counsel for the Opp. Parties:
G.A., Shailendra Singh Rajawat

Delay Condonation-Rules of limitation are not meant to destroy rights of parties-meant with the objective that parties should not resort to dilatory tactics and sleep over their rights-must seek remedy promptly-complete careless and reckless long delay on the part of appellant-virtually unexplained at all-**Application for condonation of delay and Appeal dismissed.** (E-9)

Cases cited:

1. Collector, Land Acquisition Vs Katiji, 1987(2) SCC 107

2. P.K. Ramachandran Vs St. of Kerala, AIR 1998 SC 2276

3. Shakuntala Devi Jain Vs Kuntal Kumari, AIR 1969 SC 575

4. Brij Indar Singh Vs Kanshi Ram ILR (1918) 45 Cal 94

5. St. of Nagaland Vs Lipok AO & ors., AIR 2005 SC 2191

6. Vedabai @ Vaijayanatabai Baburao Vs Shantaram Baburao Patil & ors., JT 2001(5) SC 608

7. Pundlik Jalam Patil (dead) by LRS. Vs Executive Engineer, Jalgaon Medium Project & anr.(2008) 17 SCC 448

8. Maniben Devraj Shah Vs Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157

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

(Order on C.M. Application No.70037 of 2016: Application for condonation of delay)

1. List has been revised and the case is being taken up in the revised call of the list.

2. Heard Sri Sushil Kumar Rastogi, learned counsel for the applicant and Sri Shailendra Singh Rajawat, Advocate alongwith Ms. Purnima Singh, learned counsel for the respondent nos.2 & 3 as well as Sri Hari Shanker Bajpai, learned A.G.A.-I for the State Opposite Party No.1 and perused the record.

3. This leave to appeal has been filed with a delay of 2 Years 04 Months and 8 Days, as per the report of the stamp reporter, challenging the judgment and order dated 10.06.2013 passed by the learned Additional Chief Judicial Magistrate, Court No.2, Kheri in Criminal Case No.1935 of 2012, Police Station Kotwali Sadar, District Kheri against the acquittal of the accused person/opposite party nos. 2 & 3.

4. Learned counsel for the applicant in the application for condonation of delay supported with the affidavit has taken the ground that the impugned order was passed on 10.06.2023 by the court concerned and the appeal was not filed in time as the clerk of the advocate was ill.

5. Sri Hari Shanker Bajpai, learned A.G.A.-I for the State Opposite Party No.1 as well as Sri Shailendra Singh Rajawat, learned counsel for the opposite party nos.2 & 3 jointly submit that this leave to appeal is time barred by 2 Years 04 Months and 8 Days and the reasons shown in the affidavit supported with application for condonation of delay do not appear to be justified.

6. After considering the arguments advanced by learned counsel for the parties as well as after perusal of record, this Court finds that the explanation given in affidavit accompanying delay condonation application filed under Section 5 of Limitation Act, 1963 is neither acceptable nor trustworthy.

7. The expression "sufficient cause" in Section 5 of Act, 1963 has been held to receive a liberal construction so as to advance substantial justice and generally a delay in preferring appeal may be condoned in interest of justice where no gross negligence or deliberate inaction or lack of bona fide is imputable to parties, seeking condonation of delay. In **Collector, Land Acquisition Vs. Katiji, 1987(2) SCC 107**, the Court said, that, when substantial justice and technical considerations are taken against each other, cause of substantial justice deserves to be preferred, for, the other side cannot claim to have vested right in injustice being done because of a non deliberate delay. The Court further said that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

8. In **P.K. Ramachandran Vs. State of Kerala, AIR 1998 SC 2276** the Court said:

"Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds."

9. The Rules of limitation are not meant to destroy rights of parties. They virtually take away the remedy. They are meant with the objective that parties should not resort to dilatory tactics and sleep over their rights. They must seek remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The statute relating to limitation determines a life span for such legal remedy for redress of the legal injury, one has suffered. Time is precious and the wasted time would never revisit. During efflux of time, newer causes would come up, necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The statute providing limitation is founded on public policy. It is enshrined in the maxim Interest reipublicae up sit finis litium (it is for the general welfare that a period be put to litigation). It is for this reason that when an action becomes barred by time, the Court should be slow to ignore delay for the reason that once limitation expires, other party matures his rights on the subject with attainment of finality. Though it cannot be doubted that refusal to condone delay would result in foreclosing the suiter from putting forth his cause but simultaneously the party on the other hand is also entitled to sit and feel carefree after a particular length of time, getting relieved from persistent and continued litigation.

10. There is no presumption that delay in approaching the court is always deliberate. No person gains from deliberate delaying a matter by not resorting to take appropriate legal remedy within time but then the words "sufficient cause" show that delay, if any, occurred, should not be deliberate, negligent and due to casual approach of concerned litigant, but, it should be bona fide, and, for the reasons beyond his control, and, in any case should not lack bona fide. If the explanation does not smack of lack of bona fide, the Court should show due consideration to the suiter, but, when there is apparent casual approach on the part of suiter, the approach of Court is also bound to change. Lapse on the part of litigant in approaching Court within time is understandable but a total inaction for long period of delay without any explanation whatsoever and that too in absence of showing any sincere attempt on the part of suiter, would add to his negligence, and would be relevant factor going against him.

11. I need not to burden this judgment with a catena of decisions explaining and laying down as to what should be the approach of Court on construing "sufficient cause" under Section 5 of Act, 1963 and it would be suffice to refer a very few of them besides those already referred.

12. In **Shakuntala Devi Jain Vs. Kuntal Kumari, AIR 1969 SC 575** a three Judges Bench of the Court said, that, unless want of bona fide of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

13. The Privy Council in **Brij Indar Singh Vs. Kanshi Ram ILR (1918) 45 Cal 94** observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. This principle still holds good inasmuch as the aforesaid decision of Privy Council as repeatedly been referred to, and, recently in State of Nagaland Vs. Lipok AO and others, AIR 2005 SC 2191.

14. In **Vedabai @ Vaijayanatabai Baburao Vs. Shantaram Baburao Patil and others, JT 2001(5) SC 608** the Court said that under Section 5 of Act, 1963 it should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. In the former case consideration of prejudice to the other side will be a relevant factor so the case calls for a more cautious approach but in the latter case no such consideration may arise and such a case deserves a liberal approach. No hard and fast rule can be laid down in this regard and the basic guiding factor is advancement of substantial justice.

15. In **Pundlik Jalam Patil (dead) by LRS. Vs. Executive Engineer, Jalgaon Medium Project and Anr. (2008) 17 SCC 448**, in para 17 of the judgment, the Court said :

"...The evidence on record suggests neglect of its own right for long time in preferring appeals. The court cannot enquire into belated and state claims on the ground of equity. Delay defeats equity. The court helps those who are vigilant and "do not slumber over their rights."

16. In **Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai, 2012 (5) SCC 157,** in para 18 of the judgment, the Court said as under:

"What needs to be emphasised is that even though a liberal and justice oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the Courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost. What colour the expression 'sufficient cause' would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the Court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. In cases involving the State and its agencies/instrumentalities, the Court can take note of the fact that sufficient time is taken in the decision making process but no premium can be given for total lethargy or utter negligence on the part of the officers of the State and / or its agencies/instrumentalities and the applications filed by them for condonation of delay cannot be allowed as a matter of course by accepting the plea that dismissal of the matter on the ground of bar of limitation will cause injury to the public interest."

17. In my view, the kind of explanation rendered herein does not satisfy the observations of Apex Court that if delay has occurred for reasons which does not smack of mala fide, the Court should be reluctant to refuse condonation. On the contrary, I find that here is a case which shows a complete careless and reckless long delay on the part of appellant which has remain virtually unexplained at all. Therefore, I do not find any reason to exercise my judicial discretion exercising judiciously so as to justify condonation of delay in the present case.

18. Accordingly, the application for condonation of delay is **rejected.**

19. Application for leave to appeal is **dismissed.**

20. Consequently, the appeal does not survive and is accordingly **dismissed.**

21. No order as to costs.

22. Consign to record.

23. Let a copy of this judgment be transmitted to the learned trial court for its compliance.

(2024) 2 ILRA 1068
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 629 of 2024

Informant/Father of Victim ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Rehan Ahmad Siddiqui, Dildar Khan

Counsel for the Opp. Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Section 482 – Indian Penal Code, 1860 - Sections 376-D & 506 - Juvenile Justice Act, - Sections 94 & 94(2) - Information Technology Act, 2000 – Sections 67-A - Protection of Children from Sexual Offences Act, 2012 - Sections 5-G & 6 - Application u/s 482 – challenging the Juvenile Justice Board's order dated 16.11.2023 - which declared the accused (opposite party no. 2) as a juvenile involving serious charges under IPC, IT Act, and POCSO Act – The petitioner argued that the Board ignored discrepancies in age records, particularly the implausible five-month age gap between the accused and his sister, and relied on a medical report instead of school certificates as mandated under Section 94 of the Juvenile Justice Act - St. opposed the petition, asserting that the Board acted within legal bounds by ordering a medical examination due to doubts over the age - held - although the petition was maintainable under Section 482 Cr.P.C. to prevent abuse of process, there was no illegality in the Board's decision, which followed due procedure - consequently, present application is dismissed, with liberty granted to the petitioner to raise all relevant issues before the trial court, which may consider them in accordance with law, especially given the gravity of the allegations.
(Para – 6, 7, 9)

Application Dismissed. (E-11)

List of referred Cases: -
1. Dhariwal Tobacco Products Limited & ors. Vs St. of Mah. & anr. - (2009) 2 SCC 370,

2. Prabha Chawla Vs St. of Rajasthan & anr. - (2016) 16 SCC 30,

3. Dr. Mohd. Iqbal Gaji Vs St. of U.P. & anr. - Application U/S 482 No. 20368/2017 - order dt. 7.4.2023,

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Rehan Ahmad Siddiqui, learned counsel for the petitioner and Sri Anirudh Kumar Singh, learned AGA for State.

2. In view of the proposed order notice to opposite parties no. 2 and 3 are dispensed with.

3. By means of this petition the petitioner has prayed following relief :

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash/ set aside the impugned order dated 16-11-2023 passed by the Juvenile Justice Board, Hardoi in case crime No.263/2023 u/s 376-D, 506 I.P.C. 67-A IT. Act & 5G/6 P.O.CS.O Act of P.S Sandila Distt Hardoi thereby declaring the O.P. No.2 as juvenile without considering the relevant materials available on record, to secure the ends of justice & to prevent the abuse of the process of the Court."

4. Learned counsel for the petitioner has contended that the impugned order dated 16.11.2023 passed by the Juvenile Justice Board, Hardoi is illegal, unwarranted and in the aforesaid order the learned Authority / Board concerned has ignored the apparent error, i.e. the difference of age between the opposite party no. 2 and his real sister is only five months, as per the High School certificates of both the persons and the age difference between the real brother and sister may not be five months in any manner whatsoever. The specific ground has been taken on behalf of petitioner before the Juvenile Justice Board (hereinafter referred to as the 'Board') but the Board, while considering the medical examination report, ignored the High School certificates of the opposite party no. 2 and his sister. Learned counsel has stated that the second eventuality as per section 94 of the Juvenile Justice Act (hereinafter referred to as the 'Act') would come only when the first eventuality may not be liable to be examined and if first eventuality as per section 94 of the Act is available, the other eventuality of section 94 of the Act may not be taken into account, therefore, he has submitted that the order dated 16.11.2023 passed by the Board declaring the opposite party no. 2 as juvenile may be set aside. Section 94 (2) of the Act is being reproduced as under :

"(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."

5. Sri Singh, learned AGA has firstly raised the objection regarding maintainability of this petition by submitting that the order dated 16.11.2023

may be assailed by filing revision but the learned counsel for the petitioner has placed reliance of the dictum of Apex Court in re: ***Dhariwal Tobacco Products Limited and others vs. State of Maharashtra and another : (2009) 2 Supreme Court Cases 370, Prabha Chawla vs. State of Rajasthan and another : (2016) 16 Supreme Court Cases 30*** as well as decision of this Court in ***Application U/S 482 No. 20368 of 2017 : Dr. Mod. Iqbal Gaji vs. State of U.P. and another*** (judgment and order dated 7.4.2023) wherein it has been held that so as to prevent the abuse of the process of the law the extraordinary remedy which is inherent power of this court u/s 482 Cr.P.C. may be invoked. Sri Singh has further submitted that in the present case as per the High School certificate of the opposite party no. 2 he was a person below the age of 16 years but when the aforesaid fact was disputed before the Board on the basis of two High School Mark sheets one of the opposite party no. 2 and second of his real sister wherein the age difference between the brother and sister is only five months the Board directed for medical examination and on the basis of medical examination report dated 1.11.2023 the age of opposite party was determined as 16 years, therefore, on the basis of aforesaid examination the opposite party no. 2 was declared juvenile. Therefore, Sri Singh has stated that there is no infirmity or illegality in the order dated 16.11.2023 and the aforesaid order impugned should not be said to be an abuse of the process of law in any manner whatsoever.

6. Having heard learned counsel for the parties and having perused the material available on record as well as having regard the dictum of Apex Court in re: ***Dhariwal Tobacco Products Limited and others vs. State of Maharashtra and another : (2009) 2 Supreme Court Cases 370, Prabha Chawla vs. State of Rajasthan and another : (2016) 16 Supreme Court Cases 30*** as well as decision of this Court in Application ***U/S 482 No. 20368 of 2017 : Dr. Mod. Iqbal Gaji vs. State of U.P. and another*** (judgment and order dated 7.4.2023), at the outset I held that if there is any case wherein despite there being an alternative remedy but there is also an apparent abuse of the process of law, the powers of this Court u/s 482 Cr.P.C. may be invoked to cure such abuse of the process of law, therefore, in that way this petition is maintainable u/s 482 Cr.P.C.

7. So far as the merits of the case are concerned the perusal of the impugned order dated 16.11.2023 makes it crystal clear that after perusing the High School Certificate of the opposite party no. 2 whereby it appeared to the Board that opposite party no. 2 is juvenile but considering the objection from the side of the petitioner to the effect that there may not be age difference between the real brother and sister of five months, so the direction for medical examination was issued and after perusing the medical examination report dated 1.11.2023 wherein the fact emerged that the opposite party no. 2 appears to be aged about 16 years, he has been declared juvenile, therefore, there is no illegality or infirmity in the order dated 16.11.2023. Hence, there is no need to interfere in this matter.

8. Accordingly, the present petition is ***dismissed.***

9. However, it is always open to the petitioner to raise all the aforesaid pleas and grounds before the learned trial court and it is needless to say that the learned

trial court may consider those pleas and grounds at the appropriate stage of trial strictly in accordance with law. Notably, the allegations against the opposite party no. 2 are very serious and if those allegations are proved beyond all reasonable doubts, the learned trial court may award appropriate punishment considering the amended provisions of Juvenile Justice Act as well as relevant sections of Indian Penal Code, if the trial court finds it appropriate to do so.

(2024) 2 ILRA 1071
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 646 of 2024

Pragat Gupta @ Satyam ...Applicants
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicants:
Siddharth Sinha

Counsel for the Opp. Parties:
G.A., Shishir Pradhan

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Sections 493 - Cohabitation caused by a man deceitfully inducing a belief of lawful marriage, Section 496 - Marriage ceremony fraudulently gone through without lawful marriage, Section 506 - criminal intimidation - essential ingredients of Section 493 : Deceitful representation by the accused - False belief of lawful marriage in the woman - Cohabitation or sexual intercourse resulting from deception - allegations in the FIR must demonstrate these ingredients. (Para -12)

Complainant alleged – Applicant-accused promised to marry her - applied vermilion (sindoor) to her head - raped her - did not fulfill his marriage promise - Applicant-accused was summoned to face trial. (Para - 1 to 4 ,23)

HELD: - Complainant's allegations do not establish the essential ingredients of offenses under Sections 493, 496, and 506 IPC. Applicants' actions did not amount to deception or fraudulent marriage. Criminal proceedings are quashed due to lack of evidence and abuse of the law. (Para -14 to 22 ,24)

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

List of Cases cited:

1. Ram Chandra Bhagat Vs St. of Jharkh., (2013) 1 SCC 562

2. Arun Singh Vs St. of U.P., (2020) 3 SCC 736

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

1. Heard Sri Siddhartha Sinha, the learned counsel for the applicant, Sri Akhilesh Kumar Vyas, the learned A.G.A. appearing on behalf of the State and Sri Shishir Pradhan, the learned counsel for the opposite party no.2.

2. By means of the instant application under Section 482 Cr.P.C. the applicant has sought quashing of the impugned order dated 17.07.2023, summoning the applicant to face trial and the entire proceedings of Complaint Case No.33 of 2019: Vinita Chaudhari Vs. Pragat Gupta, under Sections 493, 496 & 506 I.P.C.Police Station Bachhrawan, District Raebareli pending in the court of learned Civil Judge (Junior Division)/FTC-III, Raebareli.

3. The opposite party no.2 has filed a complaint dated 07.01.2019, under Sections 376, 506 I.P.C. stating that there was a

friendship between the opposite party no.2 and the applicant. The applicant visited Raebareli thrice to meet the complainant and asked her to marry him. He went to the house of the complainant and expressed his desire to marry the complainant before her mother also. He gave copies of his educational certificates to the complainant's mother and the complainant had given photocopies of her educational certificates to the applicant.

4. The applicant made a phone call to the complainant at about 2.00 p.m. on 14.05.2018 and called her to make her meet his parents. The complainant went to Bachhrawan by bus from where the applicant took her to a garage, put sindoor (Vermilion) on her head and said that very soon he will perform court marriage with her. In spite of the complainant's objection he forcibly raped her in garage. The applicant thereafter kept on avoiding to marry her on one pretext or the other and in the month of July he met the complainant at Raebareli and deleted whatsapp chat records from her mobile phone. When the complainant presurrized the applicant to marry her then on 28.08.2018 he stated that he would not continue any relation with her.

5. It is stated in the complainant that the complainant had earlier lodged an F.I.R. No.635 of 2018, under Sections 376, 506 I.P.C. in Police Station Bachhrawan. Her medico legal examination was conducted on 03.10.2018 and thereafter the police pressurized her to enter into a settlement but she declined the same. Thereafter, her statement was recorded before the Magistrate under Section 164 Cr.P.C. She stated that the police was not carrying out investigation in furtherance of the F.I.R. properly and was threatening her to file a final report in case she does not enter into a settlement and therefore she was filing complaint.

6. From the averments made in the complaint, it appears that the complainant was filed when the investigation in furtherance of an F.I.R. lodged by the complainant on same set of allegations was still pending.

7. In her statement recorded under Section 200 Cr.P.C. the complainant supported the complaint allegations and she stated that on 14.05.2018 the applicant had forcibly put sindoor on her head, raped her and promised to marry her but he did not marry her. She further stated that she knows the applicant for the past one and half years. She had made him meet her parents and the applicant had asked her parent about marrying her. Both of them used to talk to each other till 26.08.2018, on which date he told telephonically that he was severing his relations with the complainant.

8. The statements of the complainant's mother and uncle were recorded under Section 202 Cr.P.C. on 27.07.2019 and they reiterated the version of complaint. One Medical Officer of Community Health Centre, Bachhrawan was also examined as a witness and she had stated that she had medically examined the complainant on 03.10.2018 but as four and half months had elapsed since after the alleged incident she could not give any specific opinion regarding commission of rape. A Sub-Inspector was also examined by the complainant who had proved the F.I.R. lodged by the complainant.

9. The Station House Officer has submitted a report to the learned Additional

Chief Judicial Magistrate stating that in the investigation conducted in furtherance of F.I.R. No.635 of 2018 filed by the complainant under Sections 376, 506 I.P.C. he had conducted the investigation and from the whatsapp chat record and the call detail records of the mobile phones of the complainant and the applicant, merely this much could be established that there was a love affair between them. No evidence could be collected regarding commission of rape or criminal intimidation. As per the call detail records, the complainant's presence in the locality where the offence was allegedly committed could not be established on the date of the incident and even after the alleged date of incident the complainant continued to communicate with the applicant, from which it appears that there was a love affair between them.

10. On 11.10.2019, the complainant gave an application to the learned Judicial Magistrate requesting that the final report submitted by the Investigating Officer in furtherance of F.I.R. lodged by her and the complaint be consolidated. On 17.07.2023 the learned trial court passed an order summoning the applicant to face trial for the offences under Sections 493, 496 and 506 I.P.C.

11. While assailing the validity of the aforesaid order, Sri Siddharth Sinha, the learned counsel for the applicant submits that from the allegations levelled in the complaint or the statement of the complainant and other witnesses examined under Section 202 Cr.P.C., the ingredients of offences under Sections 493, 496 and 506 I.P.C. are not made out and therefore the summoning order is bad and is liable to be quashed.

12. Per contra, Sri Shishir Pradhan, the learned counsel for the opposite party no.2-complainant has submitted that the complainant had stated in her statement recorded under Section 200 Cr.P.C. that the applicant had put sindoor on her head which is sufficient to give rise to a belief in the mind of any Indian lady that she has got married to the person putting sindoor on her head. Therefore, the ingredients of Sections 493, 496 and 506 I.P.C. are made out. He has placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Ram Chandra Bhagat Vs. State of Jharkhand** : ***(2013) 1 SCC 562***, wherein the Hon'ble Supreme Court has held that inducement by a person deceitfully to a woman to change her status from unmarried woman to a lawfully married woman and on that inducement making her cohabit with him in the belief that she is lawfully married to him is what constitutes an offence under Section 493 I.P.C.

13. I have considered the submissions made by parties counsel and gone through the material placed on record.

14. The applicant has been summoned to face trial under Sections 493, 496, 506 I.P.C. Section 493 I.P.C. reads as follows: -

"493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.—

Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

15. So far as the law laid down in **Ram Chandra Bhagat** (Supra) relied upon by the learned counsel for the opposite party no.2 is concerned, in that case the Court had found that the appellant-accused

had had signed a form and had got the same signed by the complainant also for getting married. The aforesaid fact had made the complainant believe that the appellant-accused had married her and, therefore, she had started residing with him as his wife, without the appellant having actually married the complainant. The persons related to the complainant and the accused were also made to believe that the complainant was the wife of the appellant, though rituals necessary for Hindu marriage had never been performed and admittedly no marriage had taken place between the complainant and the appellant but only on the basis of the documents signed by the complainant at the instance of the appellant-accused, the complainant was made to believe that she was a lawfully married wife of the appellant-accused. The complainant had started residing with the accused as she believed that she had lawfully married the appellant-accused and this fact was also reflected in the voters' list, which mentioned the name of the complainant as the wife of the appellant. As a result of the cohabitation, the complainant had given birth to two children. The appellant-accused had acknowledged the fact that the said two children were his children. Several ceremonies in relation to the birth of the children had also been performed by the appellant-accused. In the aforesaid factual background, the Hon'ble Supreme Court held that: -

"12. Thus, upon perusal of the evidence, we find that there was sufficient evidence to the effect that the appellant-accused has deceived the complainant, which ultimately resulted into a belief in the mind of the complainant that she was a lawfully married wife of the appellant-accused, though she was not. The aforestated evidence which has been found by all the courts below is sufficient to show that the complainant was made to believe by the deceitful act of the appellant-accused that she was lawfully married to the appellant-accused. The complainant had also cohabited with the appellant and had sexual intercourse with the appellant-accused and thereby she had given birth to two children also.

13. In the aforestated set of circumstances, when there is ample evidence to the effect that only on the deceitful representation of the appellant-accused the complainant believed herself to be a lawfully married wife of the appellant-accused and as she had cohabited with the appellant-accused, there cannot be any doubt with regard to commission of an offence under the provisions of Section 493 IPC."

16. In the present case, although the complainant stated that the applicant had taken her to her garage and had forcibly put sindoor on her head, she has not stated that this act of the applicant had made her believe that she had become wife of the applicant, rather she categorically stated in the same breath that the applicant did not fulfill his promise of marrying her. There is absolutely no averment that the applicant and the complainant have at any point of time cohabited as husband and wife or that they have projected themselves as such to their relatives or to the society. The facts of the present case are in no way similar to the facts of **Ram Chandra Bhagat** (Supra) and, therefore, the principle of law laid down in that case would not apply to the present case.

17. In **Arun Singh v. State of U.P.,** (2020) 3 SCC 736, the Hon'ble Supreme Court referred to the judgment in the case of **Ram Chandra Bhagat** (Supra) and

explained the essential ingredients to constitute the offence under Section 493 I.P.C. as follows: -

"19. A plain reading of the section goes to show that in order to constitute an offence under this section, it has to be demonstrated that a man has deceitfully caused any woman, who is not lawfully married to him, to believe that she is lawfully married wife and thereby to cohabit with him. In other words, the accused must induce a woman, not lawfully married to him, to believe that she is married to him and as a result of such misrepresentation, woman should believe that she was lawfully married to the man and thus there should be cohabitation or sexual intercourse.

* * *

21. The essence of an offence under Section 493 IPC is, therefore, practice of deception by a man on a woman as a consequence of which the woman is led to believe that she is lawfully married to him although she is not and then make her cohabit with him.

22. Deceit can be said to be a false statement of fact made by a person knowingly and recklessly with the intent that it shall be acted upon by another who on believing the same after having acted thereupon suffers an injury. It is an attempt to deceive and includes such declaration and statement that misleads others or causes him to believe which otherwise is false and incorrect.

23. In other words, to constitute an offence under Section 493 IPC, the allegations in the FIR must demonstrate that the appellant had practised deception on the daughter of the complainant causing a false belief of existence of lawful marriage and which led her to cohabit with him."

18. As per the statement of the complainant herself, there was a loving relationship between her and the applicant. The applicant had met her mother and talked about marrying her. The applicant had called her to Bacchrawan to make her meet his parents but he took her to garage situated at some distance from his house, forcibly put sindoor on her head, raped her, promised to marry her and she went back home but the applicant did not marry her. The complaint nowhere stated that at any point of time the applicant had made her believe that she was lawfully married to him or that the applicant had made her go through the ceremony of being married. Therefore, ingredients essential for making out commission of offence under Section 493 I.P.C. are missing in the present case.

19. The applicant has also been summoned to face trial for offence under Section 496 I.P.C., which provides as follows: -

"496. Marriage ceremony fraudulently gone through without lawful marriage.—

Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

20. The complainant does not allege that he applicant had gone through the ceremony of being married, rather she has specifically stated that the applicant did not marry her in spite of having promised to do so. Therefore, the ingredients of Section 496 I.P.C. are also not made out from the case set up by the complainant herself.

21. The next allegation is regarding commission of offence under Section 506 IP.C., which reads as follows: -

506. Punishment for criminal intimidation.—

Whoever commits, the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;If threat be to cause death or grievous hurt, etc.— And if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."

22. There is absolutely no averment made by the complainant or any other witness so as to even prima facie establish that the applicant had threatened the complainant that any injury to her person, reputation or property, or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to the complainant, or to do any act which she is not legally bound to do, or to omit to do any such act. Therefore, the commission of offence under Section 506 I.P.C. is also not made out against the applicant on the basis of the averments made by the complainant in and her witnesses.

23. From the foregoing discussion, it appears that the learned trial court has summoned the applicant to face the trial for the offences under Sections 493, 496, 506 I.P.C without taking into consideration the aforesaid aspects of the matter.

24. Resultantly, the application under Section 482 Cr.P.C. is ***allowed***. The impugned order dated 17.07.2023, summoning the applicant to face trial and the entire proceedings of Complaint Case No.33 of 2019: Vinita Chaudhari Vs. Pragat Gupta, under Sections 493, 496 & 506 I.P.C. Police Station Bachhrawan, District Raebareli pending in the court of learned Civil Judge (Junior Division)/FTC-III, Raebareli are hereby quashed.

(2024) 2 ILRA 1076
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 662 of 2024

Ansad Badruddin ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sheeran Mohiuddin Alavi, Harsh Vardhan Kediya, Ishan Baghel

Counsel for the Opp. Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 – Sections 231, 231(2) & 482 – The Unlawful Activities (Prevention) Act, 1967 – Sections 13, 16, 18 & 20 – Indian Evidence Act, 1872 – Sections 135 & 138 - Arms Act, 1959 - Sections 3, 25 & 35 - Explosive Substances Act, 1908 - Sections 3, 4, 5(v), 11, 12 & 13-B, - Indian Penal Code, 1860 – Sections 120-B & 121-A - Application U/s 482 Cr.P.C. – for quashing the impugned trial court orders allowing examination-in-chief without timely cross-examination as well as the entire criminal proceedings - petitioner claimed that, the trial court conducted examination-in-chief of several prosecution witnesses (PW-3 to PW-7) without allowing timely cross-examination by the petitioner, thereby violating procedural fairness

and natural justice – court after considering the relevant provisions of Section 135 & 138 of the Evidence Act as well as section 231 of Cr.P.C. and also having regard to the dictum of Apex Court in case of '*St. of Kerala Vs Rasheed*',– consequently, present Application is disposed of - with direction to conduct the cross-examination of PW-2 to PW-9 on day-to-day basis before further chief-examinations – direction also issued for expeditious trial.

(Para – 5, 9, 11, 12, 13)

Application Disposed of. (E-11)

List of referred Cases: -

1. St. of Kerala Vs Rasheed – 2019 vol. 13 SCC 297.

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ishan Baghel, learned counsel for the petitioner and Sri Pradeep Tiwari holding brief of Sri Shiv Nath Tilhari, learned counsel for opposite party no. 2 as well as Sri Ram Raj, learned AGA for the State.

2. By means of this petition under Section 482 Cr.P.C., the petitioner has prayed the following main reliefs:

"WHEREFORE, it is most respectfully prayed that this Hon'ble Court may graciously be pleased to set-aside the order dated 24.04.2023 passed by the learned Special Judge NIA/ATS, Lucknow in Sessions Case No. 1309 of 2021 (State of Uttar Pradesh v. Ansad Badruddin and Another), wherein, the examination-in-chief of the prosecution witnesses PW-3 and PW-4 was conducted while the examination-in-chief of the PW-2 remained pending, as well as the orders 02.05.2023 and 15.05.2023 passed by the learned Special Judge NIA/ATS, Lucknow in Sessions Case No. 1309 of 2021 (State of Uttar Pradesh v. Ansad Badruddin and Another), wherein the learned Trial Court has proceeded to direct that examination-in-chief of all the prosecution witnesses, relied upon in the charge-sheet, be conducted and thereafter the said prosecution witnesses be called for cross examination by the defence, may also kindly be quashed, in the interest of justice.

Further, this Hon'ble Court may also kindly be pleased to direct the learned Special Judge NIA/ATS, Lucknow to conduct the proceedings of Sessions Case No.1309 of 2021 (State of Uttar Pradesh v. Ansad Badruddin and Another) in legal and lawful manner, by providing reasonable opportunity to the applicant/accused to cross-examine the prosecution witnesses, before calling the rest of the prosecution witnesses for conducting examination-in-chief, in the interest of justice.

It is further prayed that the entire proceedings of Sessions Case No.1309 of 2021 (State of Uttar Pradesh v. Ansad Badruddin and Another), arising out of FIR No. 04 of 2021, Police Station ATS, Gomti Nagar, District Lucknow, pending in the Court of the learned Special Judge NIA/ATS, Lucknow, under Sections 120-B, 121-A I.P.C., Sections 13, 16, 18 and 20 of UAPA, 1967 and Sections 3, 4 and 5 of Explosive Substances Act, 1908 and 3, 25 and 35 Arms Act, 1959, may kindly remain stayed during the pendency of the present Application, in the interest of justice."

3. At the very outset, learned counsel for the petitioner has informed that the cross-examination of PW-1 has been done by the present petitioner, however the same opportunity has been closed for other co-accused persons. Learned counsel for the petitioner has drawn attention of this Court towards Annexure No. 1 showing the orders dated 24.04.2023, 02.05.2023 and

15.05.2023 whereby the examination-in-chief of PW-3, PW-5, PW-6, PW-7 has been done, however none of the aforesaid prosecution witnesses have been permitted to be cross-examined by the petitioner and the order dated 15.05.2023 reveals that the learned trial court has observed that after recording the examination-in-chief of all the prosecution witnesses, the opportunity of cross-examination would be provided to the petitioner.

4. Learned counsel for the petitioner has referred Section 135 and 138 of the Evidence Act, 1872. Section 135 of the Act provides the order of production and examination of witnesses and Section 138 of the Act provides the order of examinations. For convenience, Sections 135 and 138 of the Evidence Act read as under:

"135. Order of production and examination of witnesses.*?The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.*

138. Order of examinations.*?Witnesses shall be first examined-in chief then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.*

The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief."

5. As per Section 138, the witnesses shall be first examined-in-chief then if the adverse party so desires, cross examined, then if the party calling him so desires, re-examined. In other words, the examination-in-chief of the witness would be done first then he would be cross-examined and if there is any need, he may be re-examined. The aforesaid procedure is adopted by the learned trial court, therefore, for the convenience of the parties and also in the interest of justice, all the three steps, if so required, may be done one by one. After recording of examination-in-chief of any witness, he should be cross-examined, thereafter if it is so needed, he may be re-examined.

6. Learned counsel for the petitioner has stated that if the examination-in-chief of all the prosecution witnesses is recorded, then their cross-examination would not be convenient for the Advocate of the petitioner, therefore he has requested that all the prosecution witnesses whose examination-in-chief has been recorded i.e. prosecution witnesses nos. 2 to 9, they be cross-examined by the petitioner one by one. After the aforesaid cross-examination of PW-2 to PW-9, the examination-in-chief of the other prosecution witnesses be recorded.

7. Learned counsel for the petitioner has stated that for the aforesaid cross-examination, the short dates may be fixed but the petitioner may be given opportunity to cross-examine all the aforesaid prosecution witnesses one by one.

8. On the other hand, learned counsel for opposite party no. 2 has referred Section 231 of the Cr.P.C. which provides evidence for prosecution. Learned counsel has referred Sub Clause 2 of Section 231 Cr.P.C. which provides that the trial judge may, as per his discretion, permit the cross-examination of any witness to be deferred until any witness or witnesses have been

examined or recall any witness for further cross-examination, therefore, the learned trial court has rightly observed in the order dated 15.05.2023 that after chief-examination of all the prosecution witnesses, those may be cross-examined by the petitioner.

9. Replying the aforesaid contention of learned counsel for opposite party no. 2, Sri Baghel has referred a judgment of Apex Court in Re: **State of Kerala Vs. Rasheed reported in [(2019) 13 SCC 297**] wherein the Apex Court in Para nos. 18, 22 and 23 has held that the examination of witness should be done in accordance with Section 138 of the Act, 1872 and there cannot be a straitjacket formula providing for the grounds on which judicial discretion under Section 231(2) Cr.P.C. can be exercised as it shall depend on case-to-case basis. Vide Para 23 thereof, the factors have been explained by the Apex Court, deciding the application under Section 231(2) Cr.P.C. For the convenience, Para nos. 18, 22 and 23 of the judgment read as under:

"18. What follows from the discussion is that the norm in any criminal trial is for the examination-in-chief of witnesses to be carried out first, followed by cross-examination, and re-examination if required, in accordance with Section 138 of the Indian Evidence Act, 1872. Section 231(2) of the Cr.P.C., however, confers a discretion on the Judge to defer the cross-examination of any witness until any other witness or witnesses have been examined, or recall any witness for further cross-examination, in appropriate cases. Judicial discretion has to be exercised in consonance with the statutory framework and context while being aware of reasonably foreseeable consequences.5 The party seeking deferral under Section 231(2) of the Cr.P.C. must give sufficient reasons to invoke the exercise of discretion by the Judge, and deferral cannot be asserted as a matter of right.

22. There cannot be a straitjacket formula providing for the grounds on which judicial discretion under Section 231(2) of the Cr.P.C. can be exercised. The exercise of discretion has to take place on a case-to-case basis. The guiding principle for a Judge under Section 231(2) of the Cr.P.C. is to ascertain whether prejudice would be caused to the party seeking deferral, if the application is dismissed.

23. While deciding an Application under Section 231(2) of the Cr.P.C., a balance must be struck between the rights of the accused, and the prerogative of the prosecution to lead evidence. The following factors must be kept in consideration:

(i) possibility of undue influence on witness(es);

(ii) possibility of threats to witness(es);

(iii) possibility that non-deferral would enable subsequent witnesses giving evidence on similar facts to tailor their testimony to circumvent the defence strategy;

(iv) possibility of loss of memory of the witness(es) whose examination-in-chief has been completed;

(v) occurrence of delay in the trial, and the non-availability of witnesses, if deferral is allowed, in view of Section 309(1) of the Cr.P.C.

These factors are illustrative for guiding the exercise of discretion by a Judge under Section 231(2) of the Cr.P.C."

10. Sri Baghel has also referred Annexure No. 5 which a judgment and order dated 28.04.2023 passed by this Court in Application U/s 482 Cr.P.C. No.

4201 of 2023 (Sallahuddin Vs. State of U.P. and Others), whereby application of Section 231(2) of Cr.P.C. has been discussed in the light of dictum of Apex Court in re: **Rasheed (supra).**

11. Having heard learned counsel for the parties, having perused the material available on record, the relevant provisions of Section 135 and 138 of the Evidence Act as well as Section 231 of Cr.P.C. and also having regard to the dictum of Apex Court in re:**Rasheed (supra)**, I am of the considered opinion that the examination of any witness should be done strictly in accordance with Section 138 of the Act, 1872 and the discretion so conferred upon the trial court under Section 231(2) Cr.P.C. must be applied judicially and carefully giving specific reasons to that effect, so as to achieve the interest of justice of the cause and the parties.

12. In the present case, the learned trial court has not given any reasons as to why he has not permitted the defence side for cross-examination of the prosecution witnesses after completion of examination-in-chief.

13. Hence, I find it appropriate to issue direction to the effect that those prosecution witnesses whose examination-in-chief has been completed i.e. PW-2 to PW-9, their cross-examination be conducted by the petitioner one by one. It is upon the trial court that the aforesaid cross-examination may be conducted on day-to-day bass. After the cross-examination of the aforesaid prosecution witnesses i.e. from PW-2 to PW-9, the examination-in-chief of the other prosecution witnesses may be permitted to be done. The learned trial court shall also ensure that the trial in question is conducted and concluded with expedition and no one unnecessary adjournment is given to any of the parties.

14. In view of the aforesaid observations, this petition is **disposed of**.

(2024) 2 ILRA 1080
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 711 of 2024

Ram Sajiwan & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Dilip Kumar Pandey

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 190 (1) (b) - Magistrate empowered to take cognizance of any offence upon a police report of facts which constitute such offence , Indian Penal Code, 1860 - Sections 323, 354B, 504, 506 - Magistrate has the power to take cognizance of an offence under Section 190(1)(b) CrPC based on the facts disclosed in the police report, even if the police report does not mention the specific offence - Trial court can summon the accused for trial of additional offences not mentioned in the charge sheet if sufficient material exists - Veracity of witness statements is to be evaluated during trial, not at the discharge/quashing stage - Court's jurisdiction under Section 482 CrPC is limited; it cannot conduct a mini-trial or assess evidence.(Para -12,16,19)

Dispute over parking led to altercation and alleged molestation - FIR lodged against

applicants - Charge sheet filed - Trial court took cognizance of additional offense under Section 354-B IPC - Applicants challenged cognizance order, summoning order & entire proceedings. (Para - 2 to 5)

HELD: - Victim's categorically stated facts under Section 354B IPC provide sufficient material for further proceedings against the applicant. Trial court was allowed to take cognizance of the offense based on material collected by the Investigating Officer and available at the time of cognizance. Case for trial of applicant made out. No illegality in the order taking cognizance of the offence.(Para – 20 to 22)

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

List of Cases cited:

1. St. of Guj. Girish Vs Radhakrishnan Varde, (2014) 3 SCC 659

2. Nahar Singh Vs St.of U.P., (2022) 5 SCC 295

3. India Carat (P) Ltd. Vs St.of Karn., (1989) 2 SCC 132

4. Minu Kumari Vs St.of Bihar,(2006) 4 SCC 359

5. Dharam Pal Vs St.of Har., (2014) 3 SCC 306

6. St.of Guj. Vs Girish Radhakrishnan Varde (2014) 3 SCC 659

7. Nahar Singh Vs St.of U. P. & ors., (2022) 5 SCC 295

8. Sadab Vs St. of U.P., 2023 SCC OnLine All 30

9. CBI Vs Aryan Singh, 2023 SCC OnLine SC 379

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

1. Heard Sri Dilip Kumar Pandey, the learned counsel for the applicants, Sri Sanjay Maurya, the learned AGA for the State and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicants have sought quashing of the charge sheet no. 2 dated 22.07.2022, the summoning order dated 03.12.2022 as well as the entire proceedings of Case No. 42325/2022 (State v. Ram Sajiwan & Ors.) arising out of Case Crime No. 439/2021, under Sections 323, 354B, 504, 506 IPC, Police Station Lalganj, District Raebareli.

3. In the FIR lodged on 06.11.2021 against the applicant, the opposite party no. 2 stated that due to a dispute arising from some pieces of wood being carried by the applicant having hit the motorcycle of one of the applicants parked on the passage, all the accused persons started beating the informant and they also beaten up and molested the informant's sister. The informant and his sister had received injuries in the incident and their medico legal examination reports are annexed with the application. The informant's sister stated in her statement recorded by the Investigating Officer as also in her statement recorded by the Magistrate, that when she had gone to save her brother after hearing the hue and cry raised by him, she was also beaten up and molested by the accused persons and her clothes got torn in the process. She further stated that there is an old animosity between the parties as her aunt's daughter had been killed four years ago and the applicant no. 3 - Shubham had remained in custody in connection with the aforesaid case and he was released recently and he threatens regarding the earlier case.

4. Some independent witnesses examined by the Investigating Officer supported the incident but they stated that the allegation of molestation had been leveled because of animosity to put pressure on the accused persons and clothes

of the informant's sister got torn as she had fallen down during the incident.

5. After investigation, the Investigating Officer had submitted a charge sheet dated 22.07.2022 for commission of offences under Sections 323, 504, 506 IPC only but while taking cognizance of the offences, the trial court also took cognizance of the offence under Section 354-B IPC and summoned the accused persons to face the trial for offences under Sections 323, 504, 506 and 354-B IPC.

6. The learned counsel for the applicant has submitted that from the statement of the independent witnesses, allegation of commission of offence under Section 354-B IPC is not supported. He has further submitted that when the offence under Sections 354-B is not there in the charge sheet, it was not open for the trial court to take cognizance of the aforesaid offence. In support of this contention, the learned counsel for the applicant has placed reliance on a judgment of Hon'ble Supreme Court in the case of **State of Gujarat v. Girish Radhakrishnan Varde** (2014) 3 SCC 659 in which it was held that the Magistrate cannot exclude or include any section in the charge sheet after investigation has been completed and charge sheet has been submitted by the police and the same would be permissible by the trial court only at the time of framing of charge under section 216, 218 or under section 228 of the Cr.P.C. as the case may be.

7. The learned trial court has placed reliance on a judgment of Hon'ble the Supreme Court in the case of **Nahar Singh Vs. State of U.P.,** (2022) 5 SCC 295, wherein the Hon'ble Supreme Court has held that the trial court may summon any person, even if he is not named in the police report, in case it appears that on the basis of material available on record, the involvement of that person in commission of offence is prima facie established.

8. I have considered the facts and circumstances of the case and the aforesaid submissions advanced by the learned counsel for the applicants.

9. The victim has categorically stated that the accused persons had molested her and her clothes got torn away in the process. From the statement of the victim, the offence under Section 354-B IPC is made out.

10. Section 190 (1) Cr.P.C. is being reproduced below: -

"190. Cognizance of offences by Magistrates.— *(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2),* ***may take cognizance of any offence—***

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

(b) ***upon a police report of such facts;***

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

11. A bare reading of Section 190 (1) (b) Cr.P.C. indicates that a Magistrate is empowered to take cognizance of any offence upon a police report of facts which constitute such offence. Police report has to be of facts which constitute the offence and it need not mention the offence which is

made out. Even if the police report mentions some offence and it omits to mention some other offence, in case the Magistrate is satisfied from facts stated in the police report that some other offence is also made out, the Magistrate can take cognizance of that offence also.

12. In **India Carat (P) Ltd. v. State of Karnataka**, (1989) 2 SCC 132, a Bench consisting of three Hon'ble Judges of the Hon'ble Supreme Court held that: -

"11. ... On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued.

* * *

13....On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued."

13. In **Minu Kumariv.State of Bihar**,(2006) 4 SCC 359, a Bench consisting of two Hon'ble Judges of the Hon'ble Supreme Court heldthat: -

"11.... The position is, therefore, now well-settled that upon receipt of a

police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused."

14. In **Dharam Pal v. State of Haryana**, (2014) 3 SCC 306, decided on 18.07.2013, a Constitution Bench of five Hon'ble Judges of the Hon'ble Supreme Court had held that: -

"the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) CrPC. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused."

15. **State of Gujarat v. Girish Radhakrishnan Varde** (2014) 3 SCC 659 relied upon by the learned Counsel for the applicant, was decided by a Bench consisting of two Hon'ble Judges was decided on 25.11.2013, and in this judgment, none of the precedents on the point have been considered, including the Constitution Bench judgment in the case of **Dharam Pal** (Supra) and the judgment of a Bench consisting of three Hon'ble Judges in **Minu Kumari** (Supra). It is well settled that where there is a conflict in the judgments of the Hon'ble Supreme Court, the judgment rendered by a larger bench will prevail.

16. In **Nahar Singh versus State of U. P. and others**, (2022) 5 SCC 295, after discussing various precedents on the point, the Hon'ble Supreme Court has held that the Magistrate has to apply his mind while taking cognizance of an offence and if it appears from the material placed before him and any person other than those arrayed as accused also needs to be summoned, the Magistrate can certainly summon him. On the same principle, in case the Magistrate is satisfied that there is sufficient material for trial of the accused for any other offence, he has the power to summon the accused person(s) for trial of that offence also. In case the Magistrate is satisfied by a perusal of the complaint and the material filed with it, that the accused persons appear to have violated any direction, it can take cognizance of the offence under Section 31-A also.

17. In **Sadab versus State of U.P.**, 2023 SCC OnLine All 30, a coordinate bench of this Court held that a Magistrate is having all the authority to take cognizance of any offence on the basis of the material collected by the Investigating Officer during investigation and if he arrives at the conclusion that an offence is also made out, in which, charge-sheet has not been

submitted then he can take cognizance for such offence(s) too and can summon the accused.

18. Therefore, the legal position is settled beyond any confusion and I find no force in the submission of the learned Counsel for the applicant that when Section 354-B was not mentioned in the charge-sheet, the Magistrate had no jurisdiction to take cognizance of that offence.

19. Although some independent witnesses gave statements contrary to the statement of the victim but veracity of the statements has to be evaluated by the trial court during the trial, when the other party will have the opportunity of cross examination the witnesses. In **CBI v. Aryan Singh**, 2023 SCC OnLine SC 379, the Hon'ble Supreme Court has reiterated the cardinal principle of law, that at the stage of discharge and/or quashing of the criminal proceedings, while exercising the powers under Section482Cr. P.C., the Court is not required to conduct the mini trial. This is not the stage where the prosecution/investigating agency is/are required to prove the charges. The charges are required to be proved during the trial on the basis of the evidence led by the prosecution/investigating agency. At the stage of discharge and/or while exercising the powers under Section482Cr. P.C., the Court has a very limited jurisdiction and is required to consider "whether any sufficient material is available to proceed further against the accused for which the accused is required to be tried or not".

20. When the victim has categorically stated the facts establishing commission of offence under Section 354B IPC, there is sufficient material to proceed further against the applicant. The trial court was well within its rights to take cognizance of the offence under Section 354B IPC on the basis of material collected by the Investigating Officer and available before the court at the time of taking of the cognizance.

21. Accordingly, I am of the considered view that a case for trial of the applicant under Section 323, 354B, 504 & 506 IPC is made out.

22. There is no illegality in the order taking cognizance of the offence.

23. The application lacks merit and the same is accordingly ***dismissed.***

(2024) 2 ILRA 1085
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 31.01.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 739 of 2024

Shri Ayush Tandon & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Lalta Prasad Misra, Shashank Shekhar Shukla

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - Quashing of Criminal Proceedings in Matrimonial Disputes - The Code of criminal procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Sections 498-A, 325, 506, The Dowry prohibition Act, 1961 - Section 3/4, Hindu Marriage Act, 1955 - Sections 9 - Restitution of conjugal rights, Section 12 - Voidable marriages - Criminal prosecution cannot be allowed to be misused for ulterior objective to put undue pressure

on the husband, his family members and relatives for restitution of conjugal rights. (Para - 30)

Wife filed a complaint under Section 156(3) CrPC against husband and his family members - after receiving summons for suit under Section 12 of Hindu Marriage Act & after Family Court's deadline for filing written statement had passed - alleging dowry harassment and cruelty - which was decreed - wife's suit under Section 9 was dismissed - wife's complaint was found to contain general allegations without specific incidents or evidence - magistrate found contradictions in the wife's statements and did not summon some accused family members due to lack of specific allegations.(Para -1 to 11 ,26)

HELD: - Wife filed application under Section 156 (3) Cr.P.C. merely to put pressure on applicants and other members of their family for restitution of her matrimonial relationship with Husband. Continuance of the criminal proceedings against the applicants will be a gross abuse of the process of law and will result in the failure of justice to the applicants. Summoning order and related criminal proceedings were quashed to prevent abuse of the legal process. (Para - 30,32,33)

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

List of Cases cited:

1. Preeti Gupta Vs St. of Jharkh., (2010) 7 SCC 667

2. St. of Karn. Vs L. Muniswamy , (1977) 2 SCC 699

3. Mahmood Ali Vs St. of U.P., 2023 SCC OnLine SC 950

4. Geeta Mehrotra & anr. Vs St. of U.P. & anr, (2012) 10 SCC 741

5. Abhishek Vs St. of M.P., 2023 SCC OnLine SC 1083

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

1. The opposite party no. 2 appeared in person and she has filed a counter affidavit. She stated that she will advance her submissions by herself, as she is not in a position to afford to pay the fee of any Advocate. The Court offered to provide the services of an Advocate at the State's expenses but she declined the. After this, the Court proceeded to hear the submissions of Dr. Lalta Prasad Misra, the learned counsel for the applicants, Sri Anurag Verma, learned A.G.A-I for the State and Ms. Disha Kappor, the opposite party no. 2 in person, who has produced her Adhaar Card to establish her identity.

2. By means of the instant application filed under Section 482 Cr.P.C, the applicants have sought quashing of the summoning order dated 08.11.2023 passed by the court of Additional Chief Judicial Magistrate, Room No. 27, Lucknow and the entire proceedings of Complaint Case No. 9780 of 2022 instituted in furtherance of Miscellaneous Case No. 325/2022, which was an application filed by the opposite party no. 2 under Section 156(3) Cr.P.C (Disha Tandon Vs. Ayush Tandon and others) under Sections 498-A, 325, 506 I.P.C. and 3/4 of Dowry Prohibition Act, P.S. Mahila Thana, Hazratganj, District Lucknow, which is pending in the court of Additional Chief Judicial Magistrate, Room No. 27, Lucknow.

3. The opposite party no.2 had filed the application under Section 156(3) Cr.P.C. against 10 persons - (i) Ayush Tandon son of Amit Tandon (the applicant no.1) (ii) Ashutosh Tandon 'Gopal Ji', son of Lalji Tondon (Minister, Government of Uttar Pradesh) (iii)- Madhu Tandon wife of Ashutosh Tandon (iv) Subodh Tandon, son of Lalji Tandon (v)-Vandana Tandon wife of Subodh Tandon (vi) Amit Tandon, son of Lalji Tandon (the applicant no.2) (vii)-

Namita Tandon wife of Amit Tandon (the applicant no. 3) (viii) Teeru Khanna daughter of Ashutosh Tandon (ix)- Saloni Sehgal daughter of Amit Tandon (x) Vansh Tandon son of Subodh Tandon, stating that she got married to the applicant no.1 on 11.12.2019. The grandfather of the applicant no.1 used to treat the opposite party no.2 affectionately and respectfully but after his death, all the accused persons used to harass her mentally and they used to abuse and beat her. Uncle of the applicant no.1, who was an Hon'ble Minister, used to encourage him to beat his wife. About two months after death of the grandfather of the applicant no.1, the opposite party no.2 was turned out of her matrimonial home on 28.09.2020. Prior to it, the entire family had harassed the opposite party no.2 and applicant no.1 had beaten her and caused a fracture in her hand. When the opposite party no.2 went to her matrimonial home on 08.10.2020, all the accused persons had treated her badly. Uncle of the applicant no.1 had threatened the opposite party no.2 to get the opposite party no.2 shot by his matrimonial uncle Chandra Mohan Mehrotra (who had not been arrayed as a party to the application filed under Section 156(3) Cr.P.C). On the first wedding anniversary of the opposite party no.2 summons of a suit for annulment of marriage was issued by the Family Court. The opposite party no.2 categorically stated in the application filed under Section 156(3) Cr.P.C., that she merely wants that she should be given the same respect by her husband and his family members as was given during the lifetime of the grandfather of the applicant no.1 but the uncle of the applicant no.1 keeps on threatening her because of his high political position.

4. It was further stated in the application under Section 156 (3) Cr.P.C. that when the opposite party no.2 had gone with her mother to meet her husband on 16.12.2021, the accused persons abused them from the balcony, threatened them, and stated that till the opposite party no.2 gave Rs. 50 lakhs and a Fortuner car in dowry, she will not be able to live in her matrimonial home. She gave an application to the police on 02.01.2022, but she was pressurized to withdraw her complaint. She gave several applications to the authorities but no action was taken thereon, and, therefore, she filed the application under Section 156(3) Cr.P.C.

5. On 24.02.2022, the learned Additional Chief Judicial Magistrate-III, Lucknow passed an order on the aforesaid stating that the opposite party no.2 and the applicant no.1 are husband and wife and the other persons impleaded in the application are members of the husband's family. Matrimonial disputes are pending between the parties. The nature of allegations levelled in the complaint does not require any investigation by the police and, therefore, it would be just and proper to register the application as a complaint.

6. In the statement of the opposite party no.2 recorded under Section 200 Cr.P.C, she stated that her parents had fulfilled the demands of dowry made by the family members of Ayush Tandon by selling away their property. The demand for dowry started on the date following the day of her marriage and when she declined, all the accused persons started harassing her mentally and physically and she was taunted for bringing less dowry. When she used to take some medicines or go out to get medical treatment, she was locked up in a room. She stated that she had been beaten and turned out of her matrimonial home on 28.09.2020 and when she went to the house of her husband on 08.10.2020, all the accused persons had threaten to get her killed through one Chandra Mohan

Mehrotra and all the accused persons had pressurized the applicant no. 1 to get his marriage with the opposite party no.2 dissolved. The accused persons had called her to talk for a settlement on 16.12.2020 and when she went there, accused Subodh Tandon had stated while standing in a balcony that the applicant can live in her matrimonial home only if she bring Rs. 50 lakhs and a Fortuner car.

7. The statement of the mother and brother of the opposite party no.2 were recorded under Section 202 Cr.P.C. Her brother stated that his family members had spent Rs.50 Lakhs in the wedding ceremony after selling and mortgaging land. Since immediately the marriage, the accused persons used to taunt the opposite party no. 2 that she was from a poor family. The mother of the opposite party no. 2 stated that opposite party no.2 was harassed even during the lifetime of the grandfather of the applicant no.1 and she was harassed for demanding Rs. 50 lakhs and a Fortuner car. In June 2021, she sold some property for Rs.85. Lakhs and arranged Rs.1.5 Lakhs more and gave it to the applicant no. 1.

8. The opposite party no.2 has filed a counter affidavit opposing the application wherein she has *inter alia* stated that even after she was turned out of her matrimonial home, she was hopeful of improvement in the behaviour of her husband and his family members. The applicant no.1 used to repetitively talk to her through mobile phone and assure that he will take her back to her matrimonial home. When the applicant no.1 did not take the opposite party no. 2 to his home, she tried to lodge a report with the police but her report was not registered. Thereafter she sent an application dated 11.12.2022 to the State Women Commission for lodging an F.I.R, but no action was taken thereon. After sometime, the opposite party no.2 got information of petition for annulment of her marriage. She has not accepted the decree and has not withdrawn the amount of ₹30 lakhs and has filed an appeal against the decree.

9. In para 22 of the counter affidavit, the opposite party no.2 has stated that after her marriage, she had gone for honeymoon with the applicant no. 1 to Dubai and the opposite party no.2 and the applicant no.1 both were very happy during the trip. The opposite party no.2 has further stated in the counter affidavit that the applicants are high profile political persons connected with the ruling party and several respected advocates have declined to accept her case and, therefore, she has decided to conduct the case herself. Numerous other allegations have been levelled in the counter affidavit, which were not there in the application under Section 156 (3) Cr.P.C.

10. The learned counsel for the applicant has submitted that the marriage between the opposite party no.2 and the applicant no.1 was solemnized on 11.12.2019. On 28.10.2020 the applicant no.1 had filed a suit no. 2790 of 2020 under Section 12 of Hindu Marriage Act in the Court of the Principal Judge, Family Court, Lucknow. The opposite party no.2 appeared before the Family Court on 17.12.2020 but in spite of repetitive opportunities, she did not file a written statement. On 23.02.2021, the Family Court passed an order giving last opportunity to the opposite party no.2 to file her written statement. On 17.01.2022, she filed the application under Section 156 (3) Cr.P.C alleging harassment by the applicants and numerous other

persons related to them for demanding dowry. Thereafter she filed her written statement on 20.04.2022 and she also filed a Suit No. 349 of 2022 for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. Both the suits have been decided by means of a common judgment dated 18.08.2023 whereby suit number 2790 of 2020 filed by the applicant no.1 under Section 12 of the Hindu Marriage Act has been decreed and suit number 349 of 2022 filed by the opposite party no.2 under Section 9 of the Hindu Marriage Act has been dismissed. The Family Court has ordered the applicant no.1 to pay sum of Rs. 30 lakhs only to the opposite party no.2 as permanent alimony. The applicant no.1 has already deposited the amount of Rs. 30 lakhs before the Family Court. However, the opposite party no.2 has filed first Appeal No. 177 of 2023 against the judgment and decree dated 18.08.2023 passed by the Family Court and she has not withdrawn the amount of Rs. 30 lakhs deposited by the applicant no. 1.

11. In light of the aforesaid facts, the submissions of the learned counsel for the applicants is that the complaint has been filed as an abuse of the process of law for pressurizing the applicants for a favourable outcome in the matrimonial litigation between the parties.

12. The opposite party no.2 has submitted that the applicants have wrongly stated in the application under Section 482 Cr.P.C, that they have no criminal history whereas the applicant no.1 and 2 are accused in F.I.R No. 142 of 2020, Police station, Mall, District Lucknow West, under Sections 447, 323, 504 I.P.C. and 3(1)(da) 3(1)(dha) of SC/ST Act. However, besides lodging of the F.I.R, nothing further has been disclosed in the counter affidavit and in response to a specific query put by the Court, as to what was the outcome of the investigation in furtherance of the F.I.R. and whether the applicant nos. 1 and 2 have been summoned in that case or a final report has been submitted, the opposite party no.2 stated that she is not aware about the further status of the case after lodging the F.I.R.

13. The opposite party no.2 next submitted that she has implicated only those family members of the applicant no.1, who had only actually committed offences against her and had it been her intention to implicate the entire family of the applicant no.1, she would have arrayed the grandfather and grandmother of the applicant no.1 also.

14. The opposite party no.2 lastly submitted that she had filed Writ C No. 1261 of 2022 and it is recorded in the order dated 06.04.2022 passed by the division bench in that case that the parties were willing to make efforts for settlement of the dispute through the process of mediation. The applicant no.1 was directed to deposit a sum of Rs. 30,000/- in the Mediation and Conciliation Centre of this Court but he did not comply with the order by depositing the aforesaid amount. The opposite party no.2 has submitted that she merely wants restitution of her matrimonial relationship and she is making every endeavour with the aforesaid objective. She has filed an appeal before this court challenging the order passed by the Family Court dismissing her suit for restitution of conjugal rights and decreeing the suit filed by the applicant no.1 under Section 12 of the Hindu Marriage Act.

15. Sri. Anurag Verma, learned A.G.A-I stated that the proceedings arise

out of an Application filed under Section 156(3) Cr.P.C filed by the private respondent no.2 which has been registered as a complaint and the state is merely a formal party. However, Sri Verma opposed the application and submitted that while deciding an application under Section 482 Cr.P.C, the court has to look into the allegations levelled by the complainant only and to see whether a case for trial is made out on the basis of allegation of the complainant herself and the court cannot look into the defence taken by the accused persons.

16. I have considered the facts and circumstances of the case and submissions advanced by the learned counsel for the applicants, the opposite party no.1 in person and the learned A.G.A.-I. Before proceeding to analyze the same, it will be appropriate to recollect the law regarding the scope of enquiry while exercising jurisdiction under Section 482 Cr.P.C.

17. While dealing with the scope of interference under Section 482 Cr.P.C. in a case arising out of matrimonial disputes, the Hon'ble held in **Preeti Gupta v. State of Jharkhand**, (2010) 7 SCC 667, that: -

*"**14.**This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent the abuse of process of court. Inherent power under Section 482 CrPC can be exercised:*

(i) to give effect to an order under the Code;

(ii) to prevent the abuse of process of court; and

(iii) to otherwise secure the ends of justice.

* * *

18.The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution but the Court's failing to use the power for advancement of justice can also lead to grave injustice.

* * *

21.This Court inState of Karnatakav.L. Muniswamy[(1977) 2 SCC 699] observed that the wholesome power under Section 482 CrPC entitles the High Court to quash a proceeding when it comes to the conclusion that allowing the proceeding to continue would be an abuse of process of court or that the ends of justice require that the proceeding ought to be quashed. The High Courts have been invested with inherent powers, both in civil and criminal matters, to achieve a salutary public purpose. A court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In this case, the Court observed that ends of justice are higher than the ends of mere law though justice must be administered according to laws made by the legislature. This case has been followed in a large number of subsequent cases of this Court and other courts.

* * *

30.It is a matter of common knowledge that unfortunately matrimonial litigation is rapidly increasing in our country. All the courts in our country including this Court are flooded with matrimonial cases. This clearly demonstrates discontent and unrest in the family life of a large number of people of the society.

* * *

35.The ultimate object of justice is to find out the truth and punish the guilty and protect the innocent. To find out the truth is

a Herculean task in majority of these complaints. The tendency of implicating the husband and all his immediate relations is also not uncommon. At times, even after the conclusion of the criminal trial, it is difficult to ascertain the real truth. The courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases. The allegations of harassment of husband's close relations who had been living in different cities and never visited or rarely visited the place where the complainant resided would have an entirely different complexion. The allegations of the complainant are required to be scrutinised with great care and circumspection."

18. In **Mahmood Ali versus State of U.P.**, 2023 SCC OnLine SC 950, the Hon'ble Supreme Court held that: -

"Whenever an accused comes before the Court invoking either the inherent powers under Section482of theCode of Criminal Procedure(CrPC) or extraordinary jurisdiction under Article226of theConstitutionto get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section482of theCrPCor Article226of theConstitutionneed not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation."

19. What appears from the material placed before this court by the applicants and the opposite party no.2 is that the opposite party no.2 got married to the applicant no.1 on 11.12.2019. The grand-father of the applicant no. 1 was Governor of Madhya Pradesh and an uncle of the applicant was a Minister in U. P. Government. She stated that the Grand-father of the applicant no. 1 had brought her as his Grand daughter-in-law with great enthusiasm and expectations and he always treated her with affection and respect. After his death, all the 10 accused persons started harassing her mentally, abusing and beating her. However, she has not pleaded any specific incident caused by each of the 10 accused persons. She has alleged that she was turned out of her matrimonial home on 28.09.2020, two months after the death of the Grand-father of the applicant no. 1.

Although she has alleged that she was beaten up and a fracture was caused in her hand, no medical documents were produced by her either before the Magistrate or with the counter affidavit filed in this Court to support this contention.

20. Although she has stated in the application under Section 156(3) Cr.P.C. that she was treated with great affection and respect by the grandfather of the applicant no.1 and her ill treatment and harassment started after his death, in the statement recorded under Section 200 Cr.P.C., the opposite party no.2 stated that she was harassed for demanding dowry from the day following the date of her marriage. At the same time, in the counter affidavit filed before this court, she stated that after the marriage, she had gone with her husband for honeymoon to Dubai and both of them had a very pleasant trip. The aforesaid stands taken by the opposite party no.2 at various stages show gross contradiction regarding material facts about her complaint.

21. The Magistrate has himself mentioned in the impugned order dated 08.11.2023, that there are many contradictions in the stand taken by the opposite party no.2 in the application filed under Section 156(3) Cr.P.C. and in the statements recorded under Section 200 and 202 Cr.P.C. It is stated in the complaint that the grandfather of the applicant no.1 had brought her as her grand daughter-in-law with great enthusiasm and after his death, she was harassed by the husband's family members, whereas in her statement recorded under Section 200 Cr.P.C, she stated that her harassment had started immediately after her marriage. In the complaint, the opposite party no.2 has stated that the marriage was solemnized with great pomp and show as per the desire of the grandfather of the applicant no.1 whereas, in her evidence, she stated that her family members had got marriage solemnized after selling some land and mortgaging some other. The learned Magistrate further recorded that the record reveals that some incidents took place due to lack of matrimonial adjustments between the parties and, accordingly, there was sufficient ground to summon the applicants only, who are the husband, father-in-law and mother-in-law of the opposite party no.2, to face trial for offences 498-A, 325, 506 I.P.C. and 3/4 of Dowry Prohibition Act. Regarding the other persons arrayed by the opposite party no.2, the Magistrate came to a conclusion that no specific allegation had been levelled against them and there was no need to summon them in view of the law laid down by the Hon'ble Supreme Court in the case of **Geeta Mehrotra and another Vs. State of Uttar Pradesh and another**: (2012) 10 SCC 741.

22. However, the learned Magistrate erred in summoning the applicants to face the trial without there being any specific allegation of commission of any act by the applicant nos. 2 and 3 which may amount to an offence. Moreover, there is absolutely no material to support the allegations against the applicant no. 1.

23. It is not disputed that the opposite party no.2 received summon of the suit under Section 12 of the Hindu Marriage Act filed by the applicant no. 1 and she had put in appearance before the family court on 17.12.2020 and had sought time for filing written statement. When the opposite party no. 2 did not file her written statement, on 23.02.2021, the Family Court had passed an order granting last

opportunity to the opposite party no. 2 to file her written statement. The application under Section 156 (3) Cr.P.C was filed on 17.01.2022 and the written statement was filed on 20.04.2022. On the same day, the opposite party no.2 filed a suit under Section 9 of the Hindu Marriage Act. The suit filed by the applicant no.1 under Section 12 of the Hindu Marriage act has been decreed and the suit filed by the opposite party no.2 under Section 9 of the Hindu Marriage Act has been dismissed by means of a common judgment dated to 18.08.2023.

24. While decreeing the suit under Section 12 of the Hindu Marriage Act, the family Court has directed the applicant no. 1 to pay Rs. 30 lakhs to the opposite party no.2 as permanent alimony, which amount has been deposited by the applicant no.1 before the Family Court. The opposite party no. 2 has not withdrawn this amount and she has filed an appeal against the judgment and decree passed by the Family Court, which is pending consideration of this court.

25. In **Abhishek versus State of M.P**., 2023 SCC OnLine SC 1083, the Hon'ble Supreme Court has held that where the wife had levelled general allegations against her husband and his family members, the same is insufficient to constitute cruelty in terms of Section 498-A IPC. This factor is also damaging to the case of the complainant that she filed a complaint alleging dowry harassment, long after leaving her matrimonial home and just before the husband initiated divorce proceedings.

26. In the present case, the complaint application under Section 156 (3) Cr.P.C has been filed after receipt of summon of the suit and after the suit filed under Section 12 of the Hindu Marriage Act and after the Family Court had granted last opportunity to the opposite party no.2 to file her written statement and even after the date of that last opportunity had expired.

27. The opposite party no.2 had stated in her complaint that when she went to her matrimonial home on 08.10.2020, all the accused persons had treated her badly; that the uncle of the applicant no.1, who was a Minister, had threatened to get her shot by his matrimonial uncle Chandra Mohan Mehrotra (who had not been arrayed as a party to the application filed under Section 156(3) Cr.P.C), whereas in her statement recorded under Section 200 Cr.P.C., she stated that on 08.10.2020, all the accused persons had threaten to get her killed through one Chandra Mohan Mehrotra.

28. It also seems to be absurd that the family of the opposite party no. 2 had got her married to the applicant no. 1, who is the Grand-son of a Governor and nephew of a Minister, by selling away and mortgaging their land and long after her marriage and her having been turned out of her matrimonial home on 28.09.2020, when she had gone with her mother to meet her husband on 16.12.2021, the accused persons abused and threatened them and demanded Rs. 50 lakhs and a Fortuner car, and that too, while they were standing in the balcony of their house. In her statement recorded under Section 200 Cr.P.C. she assigned the role of demanding Rs. 50 lakhs and a Fortuner car to the co-accused Subodh Tandon, who has not been summoned.

29. The opposite party no.2 categorically stated in the application filed under Section 156(3) Cr.P.C., that she

merely wants that she should be given the same respect by her husband and his family members as was given during the lifetime of the grandfather of the applicant no.1 but the uncle of the applicant no.1 keeps on threatening her because of his high political position. In the counter affidavit filed before this Court, the opposite party no.2 has stated that even after she was turned out of her matrimonial home, she was hopeful of improvement in the behaviour of her husband and his family members. The applicant no.1 used to repetitively talk to her through mobile phone and assure that he will take her back to her matrimonial home. When the applicant no.1 did not take the opposite party no. 2 to his home, she tried to lodge a report. During oral submissions also, she has submitted that she merely wants restitution of her matrimonial relationship and she is making every endeavour with the aforesaid objective.

30. From the aforesaid facts, it appears that the opposite party no.2 has filed the application under Section 156 (3) Cr.P.C. merely to put pressure on the applicants and other members of their family for restitution of her matrimonial relationship with the applicant no.1. However, she had filed a suit under Section 9 of the Hindu Marriage Act with the same objective, which has been dismissed by the Family Court. Criminal prosecution cannot be allowed to be misused for ulterior objective to put undue pressure on the husband, his family members and relatives for restitution of conjugal rights.

31. The foundation of a strong matrimonial relationship is mutual love and respect and the sustainability and quality of matrimonial relations restored under threat of criminal prosecution is to be pondered by the opposite party no. 2 herself and this Court is refraining from making any observation in this regard.

32. In view of the aforesaid discussion, this Court is of the considered view that the continuance of the criminal proceedings against the applicants will be a gross abuse of the process of law and will result in the failure of justice to the applicants.

33. Accordingly, the application is ***allowed*** and the order dated 08.11.2023 passed by the court of Additional Chief Judicial Magistrate, Room No. 27, Lucknow along with the criminal proceedings of Complaint Case No. 9780 of 2022 in Miscellaneous Case No. 325/2022, which was an application filed under Section 156(3) Cr.P.C, is hereby quashed.

(2024) 2 ILRA 1094
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.02.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 771 of 2024

Naseem ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Anand Mani Tripathi, Yugal Kishor Tripathi

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Sections 302, 307, 147, 148, 149, 34, 504 & 506 -

murder, rioting, criminal intimidation, and other offenses - Section 319 - Power to proceed against other persons appearing to be guilty of offence - Power under Section 319 CrPC is discretionary and extraordinary, to be exercised sparingly - To assign the reason and giving subjective satisfaction while passing any order is the first and for most requirement of the order passed by any Court or the Competent Authority in as much as the reasons and satisfaction of the court concerned is backbone of any order, without which, such order may not stand - Any order bereft of the reasoning would be nullity in the eyes of law. (Para - 5,10)

Trial court summoned petitioner under Section 319 CrPC - not named in FIR or charge sheet - based on examination of injured witness - summoning order under challenge - trial court failed to provide reasons and subjective satisfaction for summoning - hence petition. (Para - 3 to 5)

HELD: - Impugned order summoning petitioner under Section 319 CrPC set aside due to lack of reasoning and subjective satisfaction. Matter remanded back to trial court to pass fresh order strictly in accordance with law. Trial court must provide reasons and subjective satisfaction if invoking Section 319 CrPC. Petitioner's right to fair trial and natural justice is upheld.(Para - 10,11)

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

List of Cases cited:

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

2. Brijendra Singh & ors. Vs St. of Raj., (2017) 7 SCC 706

3. Yashodhan Singh & ors. Vs St. of U.P. & anr., (2023) 9 SCC 108

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri A.M. Tripathi, learned counsel for the petitioner and Sri Aniruddha Kumar Singh, learned Additional Government Advocate-I for the State.

2. In view of the order proposed to be passed, the notice to opposite party No.2 is hereby dispensed with.

3. By means of this petition filed under Section 482 Cr.P.C., the petitioner has prayed for the following reliefs:-

"(i) Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash/ set aside the impugned order dated 15.12.2023 passed by the learned Additional Sessions Judge, Court No.1, Pratapgarh in S.T. No.271 of 2022 (State vs. Mustaq and others) in Case Crime No.336 of 2021, under Sections 302, 307, 147, 148, 149, 34, 504 & 506 I.P.C., Police Station-Mandhata, District-Pratapgarh against the applicant/ petitioner, so for as it relates to the present petitioner (Annexure No.1).

(ii) And it is further prayed that this Hon'ble Court may kindly be pleased to stay the operation and implementation of the impugned order dated 15.12.2023 passed by the learned Additional Sessions Judge, Court No.1, Pratapgarh in S.T. No.271 of 2022(State vs. Mustaq and others) in Case Crime No.336 of 2021, under Sections 302, 307, 147, 148, 149, 34, 504 & 506 I.P.C., Police Station-Mandhata, District-Pratapgarh against the applicant/ petitioner, so for as it relates to the present petitioner, during prendency of the aforesaid petition, in the interest of justice."

4. Sri A.M. Tripathi, learned counsel for the petitioner has stated that since the gravity of Section 319 Cr.P.C. is treated to be on a high pedestal and as per the trite law, the learned trial court may exercise such powers sparingly and in a rare circumstances, unless the trial court finds that there is cogent and relevant material available on the record which suggest that the allegations against a person is such, he may be summoned under Section 319 Cr.P.C. The person who is summoned under Section 319 Cr.P.C. is a person against whom the F.I.R. has not been lodged and the charge-sheet has not been filed.

Therefore, as per Sri Tripathi, the Apex Court has held that while summoning such person invoking powers under Section 319 Cr.P.C. the specific reason of his summoning should be indicated in the order passed under Section 319 Cr.P.C. and it should have also been indicated in that order clearly as to what are those sections for which he has been summoned so that at the time of affording an opportunity of hearing, she/ he can defend herself/ himself properly.

5. In support of his aforesaid arguments, Sri Tripathi, has drawn attention of this Court towards paras-105 & 106 of the dictum of Apex Court rendered in the case in re: ***Hardeep Singh vs. State of Punjab*** reported in ***(2014) 3 SCC 92***. The relevant paras-105 & 106 read as under:-

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

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

6. Sri Tripath, has also drawn attention of this Court towards para-15 of the dictum of Apex Court rendered in the case in re: ***Brijendra Singh and others vs. State of Rajasthan*** reported in ***(2017) 7 SCC 706***. The relevant paras-11, 13, 14 &15 read as under:-

"11. In Hardeep Singh case, the Constitution Bench has also settled the controversy on the issue as to whether the word "evidence" used in Section 319 (1) Cr.P.C. has been used in a comprehensive sense and indicates the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial. It is held that it is that material, after cognizance is taken by the Court, that is available to it while making an inquiry into or trying an offence, which the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court. The word "evidence" has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. It means that the power to proceed against any person after summoning him can be exercised on the basis of any such material as brought forth before it. At the

same time, this Court cautioned that the duty and obligation of the Court becomes more onerous to invoke such powers consciously on such material after evidence has been led during trial. The Court also clarified that "evidence" under Section 319 Cr.P.C. could even be examination-in-chief and the Court is not required to wait till such evidence is tested on cross-examination, as 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 trial in the offence.

13. In order to answer the question, some of the principles enunciated in Hardeep Singh case may be recapitulated: power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial i.e. before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some "evidence" against such a person on the basis 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 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so 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 chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 kms. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 Cr.P.C. to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that the appellants' plea of alibi was correct.

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so-called verbal/ocular version. Thus, the "evidence"

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

7. Sri Tripathi has further submitted that the learned trial court concerned has itself indicated para-99 (para-106 in the aforesaid reported judgment) in the impugned order dated 15.12.2023 wherein the Apex Court has categorically observed that at least satisfaction of the court should be indicated while invoking power under Section 319 Cr.P.C. Therefore, as per Sri Tripathi, the impugned order dated 15.12.2023 is non-speaking and unreasoned order and the court concerned has not recorded its satisfaction as to why the petitioner should be summoned under Section 319 Cr.P.C. and if the court summons, what are those sections under which his trial would be required, so the aforesaid impugned order is liable to be set aside on the aforesaid technical ground alone.

8. Sri Aniruddha Kumar Singh, learned Additional Government Advocate-I has fairly submitted that so far as the technical ground was raised by Sri Tripathi, learned counsel for the petitioner that the impugned order dated 15.12.2023 is non-speaking and unreasoned order where the trial court has not indicated its subjective satisfaction as to why the petitioner should be summoned under Section 319 Cr.P.c. and what are those sections under which his trial would be required, he has nothing to say and on that submission any appropriate order may be passed in the interest of justice.

9. However, he has submitted that if the merits of the present case is touched, it is visible in the impugned order itself that on the basis of examination of the injured witness the power under Section 319 Cr.P.C. has been invoked by the learned trial court and the testimony of the injured witness is also considered on high pedestal and such testimony of the injured witness should not be ignored by the learned trial court. He has also submitted that if pursuant to the impugned summoning order the petitioner appears before the court concerned and convinces the court that he has been falsely implicated and during the course of investing nothing incriminating material / evidences have been found, rather, as per the CCTV Footage and the statement of other persons his implication is false, he may establish before the court

and the trial court may pass appropriate order, but at least, the testimony of the injured witness should not be ignored. In support of his aforesaid arguments, Sri Aniruddha Kumar Singh, learned Additional Government Advocate-I has placed reliance upon the dictum of Apex Court rendered in the case in re: ***Yashodhan Singh and others vs. State of U.P. and another reported in (2023) 9 SCC 108.***

10. Having heard learned counsel for the parties and having perused the material available on record as well as having regard to the dictums of Apex Court as considered above, I find that the learned trial court while passing the impugned order dated 15.12.2023 has not indicated its subjective satisfaction as to why the petitioner should be summoned under Section 319 Cr.P.C. and under which sections the trial of the petitioner would be required. To assign the reason and giving subjective satisfaction while passing any order is the first and for most requirement of the order passed by any Court or the Competent Authority inasmuch as the reasons and satisfaction of the court concerned is backbone of any order, without which, such order may not stand. At the same time, if the person summoned under Section 319 Cr.P.C. is not apprised as to what are those sections under which his trial would be required, he would be failed to defend himself properly and in that case the principles of natural justice of that person would be frustrated. Any order bereft of the reasoning would be nullity in the eyes of law. Therefore, on the aforesaid ground alone the impugned order dated 15.12.2023 is not liable to be sustained, hence, the same is set aside and quashed.

11. Since the aforesaid order has been quashed for the reason that the impugned order is bereft of the reasoning and the subjective satisfaction of the court concerned, therefore, the matter is remanded back to the learned trial court to pass a fresh order, strictly in accordance with law and in the light of the aforesaid dictums of Apex Court.

12. It is needless to say that if the learned trial court wishes to invoke powers under Section 319 Cr.P.C. in this case, he may pass appropriate order with expedition, preferably, within a period of one month from the date of receipt of a certified copy of this order, strictly in accordance with law.

13. In view of the aforesaid observations and directions, the instant petition is ***allowed.***

14. No order as to the costs.

(2024) 2 ILRA 1099
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 780 of 2024

Bahori Lal ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Rizwanul Haque Ansari, Santi

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Section

376, 506 - principles regarding the inherent powers of High Courts under Section 482 - High Courts have wide powers to interfere in trials, inquiries, or proceedings to prevent oppression or harassment - powers must be exercised judiciously and consciously - can quash first information reports, investigations, and criminal proceedings if there's clear abuse of process - When quashing proceedings, courts must consider the offence's impact on society, injury severity, voluntary compromise, accused conduct, and other factors - Courts should be cautious when quashing proceedings involving heinous offences, but can still examine evidence - can quash proceedings even after conviction for heinous offences with life imprisonment, if parties have settled - guiding principle is to secure the ends of justice, with no hard and fast rules restricting High Court powers.(Para - 27)

Applicant sought quashing of summoning order and proceedings of Compliant case - ground - parties entered into a settlement - claiming for closer of criminal proceedings instituted by opposite party no.2 against him - during investigation, no witnesses supported allegations - all stated that allegations made by opposite party No. 2 were false.(Para – 2,29)

HELD: - Present case falls in the category of exceptional cases, which warrants interference of this court in exercise of power under Section 482 Cr.P.C by quashing the criminal proceedings on the ground of compromise between the parties. Summoning order and proceedings of Compliant case quashed. (Para - 32,33)

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

List of Cases cited:

1. Daxaben Vs The St. of Guj. & ors., 2022 SCC OnLine SC 936

2. P. Ramachandra Rao Vs St. of Karn., (2002) 4 SCC 578

3. Narinder Singh Vs St. of Punj., (2014) 6 SCC 466

4. Parbatbhai Aahir Vs St. of Guj., (2017) 9 SCC 641

5. P. Dharamaraj Vs Shanmugam, 2022 SCC OnLine SC 1186

6. St. of M.P. Vs Laxmi Narayan, (2019) 5 SCC 688

7. Ramgopal Vs St. of M.P., (2022) 14 SCC 531

8. Ramawatar Vs St. of M.P., (2022) 13 SCC 635

9. Kapil Gupta Vs St. (NCT of Delhi), 2022 SCC OnLine SC 1030

10. K. Dhandapani v. St., 2022 SCC OnLine SC 1056

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

1. Heard Sri Nishant Srivastava, Advocate holding brief of Sri Rizwanul Haque Ansari, the learned counsel for the applicant and Sri Rishikesh Verma, the learned A.G.A appearing on behalf of the State.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has sought quashing of the summoning order dated 18.08.2022 and the proceedings of Compliant case No. 100/2018, under Section 376, 506 I.P.C (Sushila Devi Vs. Bahorilal) which is pending in the Court of Additional Chief Judicial Magistrate-I, District Kheri, on the ground that the parties have entered into a settlement claiming for closer of the criminal proceedings instituted by the opposite party no.2 against him.

3. The opposite party no.2 had filed an application under section 156 (3) Cr.P.C on 23.02.2016 alleging that when she had gone to attend call of nature at about 6:00 am on 09.02.2016 towards in a grave

situated towards a north of a village, the applicant assaulted her with a butt of a pistol and raped her after threatening her. When she got herself freed and raised a hue and cry, Raja Ram and Lalla etc. reached on the spot and thereafter the applicant ran away. On the aforesaid application, an F.IR. No. 160 of 2022 was registered on 8.03.2022.

4. During investigation, the investigating officer has recorded statements of several independent persons, all of whom have stated that the allegations levelled in the F.I.R are false and no such incident had taken place. The complainant's husband stated that he does not remember the date of the incident but it took place around the festival of Khichdi (which normally falls around 15th January). He stated that the complainant had told her about some altercation only.

5. Lalla Ram, regarding whom the informant had stated in the F.I.R that he had reached on the spot, stated that when he had reached the spot, the complainant was alone there. She has suffered some injury but he does not know as to how that injury was caused. He did not state anything further and he merely stated that he would not give any false evidence against any person. The complainant stated in her statement that she has not raised any hue and cry at the spot of occurrence and she declined to get herself examined medically as a long time has elapsed since the incident.

6. After investigation, the investigating officer submitted a Final Report on 03.07.2016. The opposite party no.2 filed a protest on 30.03.2018, which was allowed and the protest application was registered as a complaint.

7. In her statement recorded under section 200 Cr.P.C, the complainant stated that the applicant had caught hold of her and had shut her mouth but she did not state that the applicant had assaulted her with a butt of a pistol, which had been alleged by her earlier. She stated that she did not remember as to who had reached on the spot but her husband had told afterwards that he and his younger brother Lalla Ram had brought her home and the applicant had escaped before anybody could reach there. This statement of the complainant was at material variance with her earlier version.

8. In his statement recorded under section 202 Cr.P.C the complainant's husband, Rajaram supported the complainant's allegations, although before the investigating officer, he had stated that he was present at the home at the time of the incident and he did not even remember the date of the incident.

9. Subsequently, on 20.03.2023 the opposite party no.2 has entered into a compromise with the applicant wherein she stated that she had levelled the allegations against the applicant because of ill advice of some other persons. The parties live in the same village and they have reconciled their differences and no dispute remains between them. She categorically stated that she wants closure of the proceedings initiated by her. The compromise has been signed in presence of some witnesses and it has been attested by a notary public.

10. The applicant had filed an application under section 482 Cr.P.C. No. 12768 of 2023, which was disposed of by means of an order dated 20.12.2023 directing the trial court to verify the compromise. The compromise has been

verified by means of an order dated 06.01.2024 passed by the learned Additional Chief Judicial Magistrate, Court No. 1, Lakhimpur Kheri, a certified copy whereof has been annexed with the application.

11. Ms. Preeti Srivastava, the learned counsel for the opposite party no. 2 has also supported the factum of compromise and has given her consent for proceedings being quashed on the basis of the compromise.

12. The learned A.G.A. has opposed the application and he has submitted that the present case involves allegation of commission of rape which is a heinous offence and in view of the law laid down by Hon'ble the Apex Court in the case of ***Daxaben Vs. The State of Gujarat and others: 2022 SCC OnLine SC 936*** the proceedings of the criminal case cannot be quashed on the basis of a compromise between the parties.

13. In ***Daxaben (supra)*** an F.I.R. was lodged under Section 306 I.P.C. by the cousin of the deceased. The complainant and the accused entered into a settlement and the High Court of Gujarat at Ahamdabad quashed the proceedings upon an application filed under Section 482 Cr.P.C. on this ground alone. The widow of the deceased filed an application for recall of the order which too was dismissed by the High Court after recording that the original first informant had pocketed a hefty amount from the accused and he had gone totally out of picture post allowing of the quashing petition, therefore, the application for recall of order was not maintainable.

14. In appeal the Hon'ble Supreme Court has held that the High Court had erred in declining the prayer of the widow of the deceased for recalling an order passed without hearing her only because the original informant/complainant who was a cousin and the employee of the deceased had been heard. The Hon'ble Supreme Court further held that

"37. Offence under Section 306 of the IPC of abetment to commit suicide is a grave, non-compoundable offence. Of course, ***the inherent power of the High Court under Section 482 of the Cr.P.C. is wide and can even be exercised to quash criminal proceedings relating to non-compoundable offences, to secure the ends of justice or to prevent abuse of the process of Court. Where the victim and offender have compromised disputes essentially civil and personal in nature, the High Court can exercise its power under Section 482 of the CrPC to quash the criminal proceedings. In what cases power to quash an FIR or a criminal complaint or criminal proceedings upon compromise can be exercised, would depend on the facts and circumstances of the case.***

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.

* * *

50. In our considered opinion, the Criminal Proceeding cannot be nipped in the bud by exercise of jurisdiction under Section 482 of the Cr. P.C. only because there is a settlement, ***in this case a monetary settlement, between the accused and the complainant and other relatives of the deceased to the exclusion of the hapless widow of the deceased.*** *As held by the three-Judge Bench of this Court in Laxmi Narayan (supra), Section 307 of the IPC falls in the category of heinous and serious offences and are to be treated as crime against society and not against the individual alone. On a parity of reasoning, offence under section 306 of the IPC would fall in the same category.* ***An FIR under Section 306 of the IPC cannot even be quashed on the basis of any financial settlement with the informant, surviving spouse, parents, children, guardians, care-givers or anyone else."***

(Emphasis supplied)

15. The observations in **Daxaben (supra)** were made in the factual background of the case that husband of the appellant had committed suicide. The deceased's cousin, who was also his employee, had filed the F.I.R. and he had taken hefty sum from the accused persons to enter into a settlement and the proceedings were quashed on the basis of such settlement without hearing the widow of the deceased. There is no evidence in support of the allegation in the present case. During evidence the Investigating Officer had found the allegations to be false and there is no evidence in support of the allegations, except for the statement of the victim herself and the victim herself has resiled from the allegations and there is no allegation of any monitory transaction between the parties. Therefore, the observations made in Daxaben (Supra) will not apply to the present case.

16. The scope of jurisdiction of the High Court under Section 482 Cr.P.C. was explained by a Seven Judge Bench of the Hon'ble Supreme Court in **P. Ramachandra Rao v. State of Karnataka**, (2002) 4 SCC 578, in the following words: -

"21?.In appropriate cases, inherent power of the High Court, under Section 482 can be invoked to make such orders, as may be necessary, to give effect to any order under the Code of Criminal Procedure or to prevent abuse of the process of any court, or otherwise, to secure the ends of justice. ***The power is wide and, if judiciously and consciously exercised, can take care of almost all the situations where interference by the High Court becomes necessary on account of delay in proceedings or for any other reason amounting to oppression or harassment in any trial, inquiry or proceedings.*** *In appropriate cases, the High Courts have exercised their jurisdiction under Section 482 CrPC for quashing of first information report and investigation, and terminating criminal proceedings if the case of abuse of process of law was clearly made out?".*

17. In **Narinder Singh v. State of Punjab,** (2014) 6 SCC 466, the Hon'ble Supreme Court had summed up and laid down the following principles for guidance of the High Courts in giving adequate treatment to the settlement between the parties and exercising its power under

Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings: -

"29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve 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. Similarly, for the offences alleged to have been committed under special statute 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.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. 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 proving 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. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. *In the former case it can refuse to accept the settlement and quash the criminal*

proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, ***the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.***

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, ***those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code,*** *as in such cases the trial court would be in a position to decide the case finally on merits and to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly,* ***in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court.*** *Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime."*

18. Although in **Narinder Singh** the Hon'ble Supreme Court was dealing with the question of permissibility of quashing proceedings involving commission of offence under Section 307 I.P.C., it held that offences under Section 307 IPC would fall in the category of heinous and serious offences and are to be generally treated as crime against the society and not against the individual alone. The Hon'ble Supreme Court held that generally the power to quash proceedings on the basis of a compromise is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc., but yet, this prohibition is not absolute and in certain circumstances mentioned in the portions of the judgment quoted above, the Courts could quash the proceedings even in cases involving heinous and serious offences on the basis of a compromise in the interest of justice. Thus, **Narinder Singh** (Supra) does not lay down that there is an absolute bar against quashing of proceedings on the basis of compromise where the offence is heinous and serious.

19. In **Parbatbhai Aahir v. State of Gujarat**, (2017) 9 SCC 641, the precedents on the subject were considered and the broad principles which emerge from the precedents, were 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 misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

20. In **P. Dharamaraj v. Shanmugam**, 2022 SCC OnLine SC 1186, the Hon'ble Supreme Court again considered the precedents, including **Parbatbhai Aahir** (Supra) and explained the true purport of the precedents in the following words: -

"44. 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."***

21. In **State of M.P. v. Laxmi Narayan**, (2019) 5 SCC 688, the Hon'ble Supreme Court again considered the law on the point and the other decisions of this Court on the point and 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 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."

22. Thus it is clear that **Laxmi Narain** (Supra) also does not lay down that although the proceedings involving heinous and serious offences should not ordinarily quashed on the basis of a compromise between the parties, this bar is not absolute. High Court would not rest its decision merely because there is a mention of a Section of a heinous and serious offence 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 the offence is there for the sake of it or the prosecution has collected sufficient evidence. For this purpose, it would be open to the High Court to go by the nature of allegations and evidence collected during investigation and the charge-sheet is filed/charge is framed and/or during the trial.

23. In **Ramgopal v. State of M.P.,** (2022) 14 SCC 531, the appellants had abused and assaulted the complainant on account of certain monetary disputes. Appellant no. 1 had struck the complainant with a pharsa, which resultantly cut off the little finger of his left hand. Appellant 2 also struck lathi-blows on the body of the complainant. The appellants were thereafter committed for trial under Sections 294, 323 and 326 read with Section 34 IPC and Section 3 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Magistrate had convicted the appellants under Sections 294, 323 and 326 read with Section 34 IPC. During pendency of the appeal filed against conviction, the parties had reconciled their disputes and sought quashing of proceedings under Section 482 Cr.P.C. on this ground. The High Court dismissed the application. While allowing the appeal, the Hon'ble Supreme Court held that: -

"12. The High Court, therefore, having regard to the nature of the offence and the fact that parties have amicably settled their dispute and the victim has willingly consented to the nullification of criminal proceedings, can quash such proceedings in exercise of its inherent powers under Section 482CrPC, even if the offences are non-compoundable. ***The High Court can indubitably evaluate the consequential effects of the offence beyond the body of an individual and thereafter adopt a pragmatic approach, to ensure that the felony, even if goes unpunished, does not tinker with or paralyse the very object of the administration of criminal justice system.***

13. It appears to us that criminal proceedings involving non-heinous offences or where the offences are pre-dominantly of a private nature, can be annulled irrespective of the fact that trial has already been concluded or appeal stands dismissed against conviction. Handing out punishment is not the sole form of delivering justice. Societal method of

applying laws evenly is always subject to lawful exceptions. It goes without saying, that ***the cases where compromise is struck post-conviction, the High Court ought to exercise such discretion with rectitude, keeping in view the circumstances surrounding the incident, the fashion in which the compromise has been arrived at, and with due regard to the nature and seriousness of the offence, besides the conduct of the accused, before and after the incidence. The touchstone for exercising the extraordinary power under Section 482 CrPC would be to secure the ends of justice. There can be no hard-and-fast line constricting the power of the High Court to do substantial justice. A restrictive construction of inherent powers under Section 482CrPC may lead to rigid or specious justice, which in the given facts and circumstances of a case, may rather lead to grave injustice.*** *On the other hand, in cases where heinous offences have been proved against perpetrators, no such benefit ought to be extended, as cautiously observed by this Court in Narinder Singh v. State of Punjab (2014) 6 SCC 466 and State of M.P. v. Laxmi Narayan, (2019) 5 SCC 688.*

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 .***

* * *

19. We thus sum up and hold that as opposed to Section 320 CrPC where the Court is squarely guided by the compromise between the parties in respect of offences compoundable within the statutory framework, the extraordinary power enjoined upon a High Court under Section 482CrPC or vested in this Court under Article 142 of the Constitution, can be invoked beyond the metes and bounds of Section 320 CrPC. Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: -

19.1. Nature and effect of the offence on the conscience of the society;

19.2. Seriousness of the injury, if any;

19.3 Voluntary nature of compromise between the accused and the victim; and

19.4 Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations."

(Emphasis supplied)

24. Thus the Supreme Court had reversed the order of the High Court rejecting the prayer for quashing of the proceedings and had quashed the criminal proceedings on the basis of a compromise between the parties even after conviction of the appellant for offence under Section 326 I.P.C., which is punishable with imprisonment which may extend up to life.

25. In **Ramawatar v. State of M.P**., (2022) 13 SCC 635, the FIR lodged under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of

Atrocities Act), 1989 read with Section 34 IPC alleged that the appellant threw a brick on the complainant and also made filthy and slur remarks on her caste. There was a civil dispute between the parties. The appellant was convicted under Section 3(1)(x) of the SC/ST Act. The appeal filed against his conviction was dismissed by the High Court of Madhya Pradesh, Jabalpur Bench. During pendency of further appeal before the Hon'ble Supreme Court, the complainant filed an application that the parties had settled their disputes through a compromise. The Hon'ble Supreme Court held that: -

"17? where it appears to the Court that the offence in question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste of the victim, ***or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence is covered under a special statute would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482CrPC."***

(Emphasis supplied)

26. **Kapil Gupta v. State (NCT of Delhi)**, 2022 SCC OnLine SC 1030, is a judgment passed by the Hon'ble Supreme Court in an appeal filed against a judgment and order passed by an Hon'ble Single Judge of the High Court of Delhi, dismissing the application filed under Section 482 Cr.P.C. for quashing the proceedings under Section 376 of the Penal Code, 1860 ('IPC') on the ground that the parties had entered into a settlement. While allowing the appeal, the Hon'ble Supreme Court held that: -

"13. It can thus be seen that this Court has clearly held that though the Court should be slow in quashing the proceedings wherein heinous and serious offences are involved, the High Court is not foreclosed from examining as to whether there exists material for incorporation of such an offence or as to whether there is sufficient evidence which if proved would lead to proving the charge for the offence charged with. *The Court has also to take into consideration as to whether the settlement between the parties is going to result into harmony between them which may improve their mutual relationship.*

14. The Court has further held that it is also relevant to consider as to what is stage of the proceedings. *It has been observed that if an application is made at a belated stage wherein the evidence has been led and the matter is at the stage of arguments or judgment, the Court should be slow to exercise the power to quash the proceedings. However,* ***if such an application is made at an initial stage before commencement of trial, the said factor will weigh with the court in exercising its power."***

27. The legal principles which can be culled out from a collective reading of the foresaid precedents, are that the inherent powers of the High Courts recognized by Section 482 Cr.P.C. are wide and can take care of almost all the situations where interference by the High Court becomes

necessary for any other reason amounting to oppression or harassment in any trial, inquiry or proceedings, but the power has to be exercised judiciously and consciously. The High Courts can exercise their jurisdiction under Section 482 CrPC for quashing of first information report and investigation, and terminating criminal proceedings if the case of abuse of process of law is clearly made out. Such powers ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind the nature and effect of the offence on the conscience of the society; the seriousness of the injury, if any, the voluntary nature of compromise between the accused and the victim, the conduct of the accused persons and the other relevant considerations. Though the Courts should be slow in quashing the proceedings wherein heinous and serious offences are involved, the High Court is not foreclosed from examining as to whether there is sufficient evidence which may lead to proving the charges. The High Court can quash the proceedings even in cases where the parties have entered into a settlement after conviction for a heinous offence carrying a maximum punishment for life. The touchstone for exercising the extraordinary power under Section 482 Cr.P.C. would be to secure the ends of justice. There can be no hard and fast rule restricting the powers of the High Court to do substantial justice, as a restrictive construction of inherent powers under Section 482 Cr.P.C. may lead to grave injustice.

28. In **K. Dhandapani v. State**, 2022 SCC OnLine SC 1056, an FIR under Sections 5(j)(ii) read with Section 6, 5(I) read with Section 6 and 5(n) read with Section 6 of Protection of Child from Sexual Offences (POCSO) Act, 2012 was registered alleging that the appellant who is the maternal uncle of the prosecutrix, had physical relations with the prosecutrix on the promise of marrying her, which amounted to committing rape. He was convicted and sentenced by the Sessions Judge to undergo rigorous imprisonment for a period of 10 years. The High Court had upheld the conviction and sentence. In appeal before the Hon'ble Supreme Court, it was submitted that the allegation against the appellant was that he had physical relations with the prosecutrix on the promise of marrying her, whereas he had in fact married the prosecutrix and they had two children and they were being taken care of by the appellant and she was leading a happy married life. The prosecutrix was aged 14 years on the date of the offence and gave birth to the first child when she was 15 years and second child was born when she was 17 years. After taking into consideration these facts, the Hon'ble High Court set aside the conviction and sentence of the appellant in view of the subsequent events by observing that ***"This Court cannot shut its eyes to the ground reality and disturb the happy family life of the appellant and the prosecutrix."*** However, the Hon'ble Supreme Court had also expressed that the order shall not be treated as a precedent.

29. When we examine the facts of the present case in light of the aforesaid law, what we find is that the incident is alleged to have taken place on 09.02.2016. The application under Section 156(3) Cr.P.C was moved on 23.02.2016 and the F.I.R was registered on 08.03.2016. No witness examined during investigation supported the allegation and all of them stated that allegations levelled by the opposite party no.2 are false.

30. After investigation, a final report was submitted on 30.07.2016. The protest application was filed on 30.03.2018 after a long time since filing of the final report. There are material contradictions between the statements recorded under Sections 200 and 202 Cr.P.C and the statements recorded during investigation. There is no medico legal examination report of the complainant in support of the allegations.

31. The opposite party no.2 has signed the compromise in presence of witnesses and there is no mention of any monetary transaction between the parties. Therefore, there appears to be absolutely no possibility of the applicant's conviction even after a full fledged trial in the present case and the continuance of criminal proceedings against the applicant in such peculiar circumstances will only result in persecution of the applicant as well the opposite party no.2

32. Keeping in view the law laid by the Hon'ble Supreme Court which has been referred to above, I am of the view that the present case falls in the category of exceptional cases, which warrants interference of this court in exercise of power under Section 482 Cr.P.C by quashing the criminal proceedings on the ground of compromise between the parties.

33. Accordingly the applicant is ***allowed*** and the summoning order dated 18.08.2022 and the proceedings of Compliant case No. 100/2018, under Section 376, 506 I.P.C (Sushila Devi Vs. Bahorilal) which is pending in the Court of Additional Chief Judicial Magistrate-I, District Kheri, are hereby quashed.

34. In case the opposite party no.2 has received any benefit of any short on the basis of her allegedly being a victim of commission of rape, the same shall be recovered from her as she has resiled from her allegations.

(2024) 2 ILRA 1112
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 824 of 2024

Dr. Faisal Khan & Anr. ...Applicants
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicants:
Anshuman Singh, Fazal Haider Zaidi

Counsel for the Opp. Parties:
G.A., Avinash Chandra, Eshan Garg

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Sections 419, 420, 467, 468, 471, 427, 323, 504, 506 & 34 - High Court's inherent powers under Section 482 Cr.P.C. cannot be invoked where applicants conceal material facts and abuse the process of law. (Para - 37,38)

Application to quash F.I.R. registered under various IPC sections - applicants filed Criminal Miscellaneous Writ Petition seeking quashing of F.I.R. -writ petition was dismissed by a Division Bench without liberty for filing a fresh application for the same relief - applicants then filed a fresh application under Section 482 Cr.P.C. seeking quashing of F.I.R. - applicants concealed fact of filing and dismissal of earlier writ petition - supplementary affidavit was filed - claiming previous writ petition as filed by an advocate without instructions .(Para-37)

HELD: - Court found story in supplementary affidavit to be potentially fabricated. Applicants are not entitled to be granted any relief by this

Court in exercise of its inherent powers, where applicants conceal material facts and abuse the process of law. (Para-37)

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

List of Cases cited:

1. Ramlal Yadava Vs St. of U.P., (1989) 1 MWN (Cr.) 198 All (FB)

2. Bhisham Lal Verma Vs St. of U.P. & anr., 2023 SCC OnLine SC 1399

3. Sarguja Transport Service Vs S.T.A.T., (1987) 1 SCC 5

4. R. P. Kapoor Vs St. of Punj. 1960 SCC OnLine SC 21 and

5. Pratibha Rani Vs Suraj Kumar (1985) 2 SCC 370

6. St. of Haryana Vs Bhajanlal 1992 Supp (1) SCC 335

7. Abhishek Vs St. of M.P., 2023 SCC OnLine SC 1083

8. Mahmood Ali & ors. Vs St. of U.P., 2023 SCC OnLine SC 950,

9. Mitesh Kumar J. Sha Vs St. of Karn. & ors., (2022) 14 SCC 572

10. Ananad Kumar Mohatta Vs St. (NCT of Delhi), (2019) 11 SCC 706

11. Padal Venkata Rama Reddy Vs Kovvuri Satyanarayana Reddy, (2011) 12 SCC 437

12. Inder Mohan Goswami & anr. Vs St. of Uttaranchal & ors., (2007) 12 SCC 1

13. Jawed Aslam Vs St. of U.P. & or., Neutral Citation No. 2023: AHC-LKO:64280

14. Sub Inspector Roop Lal & anr. Vs Lt. Governor through Chief Secretary, Delhi & ors., (2000) 1 SCC 644

15. Ashok Kumar Vs New India Assurance Co. (2024) 1 SCC 357

16. Ambalal Parihar Vs St. of Raj. & ors. 2023 SCC OnLine Raj 1374

17. R. Annapurna Vs Ramadugu Anantha Krishna Shastry & or., (2002) 10 SCC 401

18. Bhisham Lal Verma Vs St. of U.P. & anr., 2023 SCC OnLine SC 1399

19. Kamini Jaiswal Vs U.O.I. & anr. (2018) 1 SCC 156

20. Sarguja Transport Service Vs S.T.A.T., (1987) 1 SCC 5

21. Hari Singh Mann Vs Harbhajan Singh Bajwa & ors. (2001) 1 SCC 169

22. Dheer Singh & anr. Vs St. of U. P. & anr., (2019) SCC OnLine All 2776

23. Abdul Gaffar & anr. Vs Ishtiaque Ahmad & anr., 1989 All.L.J. 297.

24. Ramlal Yadava Vs St. of U.P. , (1989) 1 MWN (Cr.) 198 All (FB)

25. P. Ramachandra Rao Vs St. of Karn. , (2002) 4 SCC 578

26. St. of Haryana Vs Bhajan Lal, 1992 Supp (1) SCC 335

27. Mahmood Aliand ors. Vs St. of U.P.: 2023 SCC OnLine SC 950

28. Abhishek Vs St. of M.P., 2023 SCC OnLine SC 1083

29. U.O.I. Vs Cipla Ltd., (2017) 5 SCC 262

30. Ashok Kumar Vs New India Assurance Co. Ltd., (2024) 1 SCC 357

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

1. Heard Sri. Prashant Chandra Senior Advocate assisted by Sri. Anshuman Singh Advocate, the learned Counsel for the applicants, Sri. Amit Kumar Dwivedi, the learned A.G.A. and Sri. Avinash Chandra,

the learned Counsel for the opposite party no. 2.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicants have sought quashing of F.I.R. No. 39 of 2024 under Sections 419, 420, 467, 468, 471, 427, 323, 504, 506 and 34 I.P.C., Police Station Kotwali, District Barabanki.

3. The learned A.G.A. and the learned Counsel for the opposite party no. 2 raised a preliminary objection that the application under Section 482 Cr.P.C. is not maintainable for quashing of the F.I.R. in view of the law laid down by a Bench consisting of seven Hon'ble Judges of this Court in **Ramlal Yadava versus State of U.P.** (1989) 1 MWN (Cr.) 198 All (FB).

4. Sri. Prashant Chandra, the learned Senior Advocate appearing for the applicant submitted that a First Information Report can be questioned and set aside in proceedings under Section 482 Cr.P.C. which preserve the inherent powers of the High Court's to prevent abuse of the process of court. The availability of extraordinary remedy of Writ Petition under Article 226 of the Constitution of India would not oust the inherent jurisdiction of this Court under Section 482 Cr.P.C.

5. The learned A.G.A. and the learned Counsel for the opposite party no. 2 further submitted that the applicants not only have a remedy of filing a Writ Petition available for the relief sought, rather they have in fact already availed that remedy by filing Criminal Miscellaneous Writ Petition No. 642 of 2024, which was dismissed by means of an order dated 30.01.2024 which reads as follows: -

"Sri. Pawan Kumar Singh, learned Counsel for the petitioners, at the outset prays that he has been instructed by his client to not press this petition and the same may be dismissed as such.

Accordingly, this Writ Petition is dismissed as not pressed."

6. The learned A.G.A. and the learned Counsel for the opposite party no. 2 also submitted that the applicants have not disclosed the fact of filing and dismissal of the Writ Petition which was filed by them for the same relief and they are guilty of concealment of the aforesaid material fact.

7. The learned A.G.A. has placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Bhisham Lal Verma versus State of Uttar Pradesh and another**, 2023 SCC OnLine SC 1399.

8. The learned Counsel for the opposite party no. 2 relied upon the decision of the Hon'ble Supreme Court in **Sarguja Transport Service v. S.T.A.T.,** (1987) 1 SCC 5.

9. After the aforesaid preliminary objection had been raised, the learned Counsel for the applicants filed a supplementary affidavit stating that the applicant no. 1 had met Sri. K. K. Yadav Advocate on 22.01.2024, had told him that there was a grave urgency for filing a petition as he and his brother (the applicant no. 2) could be arrested any moment, and he had handed over the papers of the case to the Advocate, who had told him that the preparation of the case will take some time. In the meanwhile, the Advocate got an affidavit of the applicant no. 1 prepared and got some blank papers signed by him, although the applicant no. 1 had told the Advocate that he had come to seek opinion

only and he had not come prepared to get the case filed and he was not even carrying any fee and expenses. The applicant no. 2 had independently approached Sri. Fazal Haider Zaidi, Advocate for the same purpose on 19.01.2024, who had called both the applicants on the following day. Both the applicants met Sri. Zaidi Advocate on 23.01.2024, who got an affidavit of the applicant no. 1 prepared in the affidavit centre of this Court and told the applicants to contact the Advocate after a couple of days and the petition would be prepared in the meantime. The applicant no. 1 met Sri. Zaidi Advocate on 25.01.2024, on which date the petition was prepared, it was signed on 26.01.2024 and Sri. Zaidi Advocate told him that the petition would be filed on 27.01.2024. The applicant no. 1 received a phone call from Sri. Pawan Kumar Singh Advocate in the evening of 29.01.2024 informing that he had filed the Writ Petition under instructions of Sri. K. K. Yadav Advocate and it would come up on 30.01.2024. The applicants told him that he had not instructed Sri. Yadav Advocate to file any petition and he had already instructed some other Counsel to file the petition. He instructed Sri. Pawan Kumar Singh Advocate to inform the Court that he had not been instructed for filing the petition on behalf of the applicant no. 1.

10. Written submissions have been filed by the learned Counsel for the applicants inter alia submitting that the judgment in **Ramlal Yadava (Supra)** was given in the backdrop of the fact that Section 438 Cr.P.C., which provides for grant of anticipatory bail, had been taken away in the State of U. P. vide U. P. Act No. 16 of 1976. As the fundamental right guaranteed by Article 21 of the Constitution of India was under threat of violation, redress was being granted by this Court in petitions filed under Article 226 of the Constitution of India as an alternative to anticipatory bail under Section 438 Cr.P.C. It is for this reason that when a charge-sheet is filed, the party is relegated to file a petition under Section 482 Cr.P.C. and its legality is not examined in the petition under Article 226, even if it is pending. The learned Counsel for the applicants has submitted that **Ramlal Yadava (Supra)** is no more a good law because it does not take into consideration the law laid down by the Hon'ble Supreme Court in the case of **R. P. Kapoor versus State of Punjab** 1960 SCC OnLine SC 21 and **Pratibha Rani versus Suraj Kumar** (1985) 2 SCC 370 in correct perspective. The aforesaid judgements have been considered by the Hon'ble Supreme Court in **State of Haryana versus Bhajanlal** 1992 Supp (1) SCC 335, wherein it has been held that an F.I.R. can be quashed in exercise of inherent powers under Section 482 Cr.P.C. After the Full Bench decision in Ramlal (Supra), the Hon'ble Supreme Court has consistently held in numerous judgments that a First Information Report can be challenged under Section 482 Cr.P.C. Some of those judgments are **Abhishek versus State of Madhya Pradesh** : 2023 SCC OnLine SC 1083, **Mahmood Ali and others versus State of U.P.** : 2023 SCC OnLine SC 950, Mitesh Kumar J. Sha versus State of Karnataka and others : (2022) 14 SCC 572, **Ananad Kumar Mohatta versus State** (NCT of Delhi) : (2019) 11 SCC 706, **Padal Venkata Rama Reddy versus Kovvuri Satyanarayana Reddy** : (2011) 12 SCC 437 and **Inder Mohan Goswami and another versus State of Uttaranchal and others :** (2007) 12 SCC 1.

11. Reference has also been made to a judgment dated 04.10.2023 rendered by a

coordinate Bench of this Court in Jawed Aslam versus State of U.P. and other : Neutral Citation No. 2023:AHC-LKO:64280, wherein it has been held that a petition filed under Section 482 Cr.P.C. is maintainable for challenging a First Information Report and it is not necessary to invoke the jurisdiction under Article 226 of the Constitution of India. The decision of the coordinate Bench is binding on this Court as per the law laid down by the Hon'ble Supreme Court in Sub Inspector Roop Lal and another versus Lt. Governor through Chief Secretary, Delhi and others : (2000) 1 SCC 644.

12. Regarding the principle laid down in **Sarjuga Transport (Supra)**, it has been submitted that the petitioner has not invoked the jurisdiction under Article 226 again and he had abandoned the remedy under Article 226 by instructing his Counsel, but he had not abandoned the right to file an application under Section 482.

13. Reliance has been placed upon the decision in the case of **Ashok Kumar versus New India Assurance Company : (2024) 1 SCC 357** wherein it has been held that due to an act of a lawyer of withdrawing a complaint, the litigant cannot be precluded to institute a fresh complaint after the withdrawal of the earlier complaint by the lawyer without instructions.

14. The learned Counsel for the opposite party no. 2 has submitted that the conduct of the applicants in first filing a Writ Petition seeking quashing of the F.I.R., thereafter withdrawing the same without seeking any liberty from the Division Bench dealing with Criminal Writ Petition and then filing an application under Section 482 Cr.P.C. before a Single Judge Bench, and that too, without disclosing the fact of filing and dismissal of the Writ Petition, amounts to bench hunting tactics, which has been deprecated time and again. He has relied upon the judgments in the cases of **Ambalal Parihar versus State of Rajasthan and others 2023 SCC OnLine Raj 1374, R. Annapurna versus Ramadugu Anantha Krishna Shastry and other (2002) 10 SCC 401, Bhisham Lal Verma versus State of Uttar Pradesh and another 2023 SCC OnLine SC 1399, Kamini Jaiswal versus Union of India and another (2018) 1 SCC 156, Sarguja Transport Service v. S.T.A.T., (1987) 1 SCC 5, Hari Singh Mann versus Harbhajan Singh Bajwa and others (2001) 1 SCC 169, Dheer Singh and another versus State of U. P. & another (2019) SCC OnLine All 2776 and Abdul Gaffar and another vesrus Ishtiaque Ahmad and another** 1989 All.L.J. 297.

15. In **Ramlal Yadava versus State of U.P.** (1989) 1 MWN (Cr.) 198 All (FB) it was held that an application under Section 482 Cr.P.C. is not maintainable for the relief of quashing of an F.I.R. and this relief can be claimed only by filing a Writ Petition under Article 226 of the Constitution of India. The learned Counsel for the applicants submits that this judgment was delivered without considering the precedents in the correct perspective. There is neither any need nor any occasion to decide the correctness of the seven Judge Bench of this Court in **Ramlal Yadava** (Supra), as there are numerous subsequent decisions of the Hon'ble Supreme Court laying down that an F.I.R. can be quashed in exercise of the inherent powers recognized by Section 482 Cr.P.C., subject to the conditions laid down in those judgments.

16. A Bench consisting of seven Hon'ble Judges of the Hon'ble Supreme Court held in **P. Ramachandra Rao v. State of Karnataka**, (2002) 4 SCC 578 that: -

"21....In appropriate cases, inherent power of the High Court, under Section 482 can be invoked to make such orders, as may be necessary, to give effect to any order under the Code of Criminal Procedure or to prevent abuse of the process of any court, or otherwise, to secure the ends of justice. ***The power is wide and, if judiciously and consciously exercised, can take care of almost all the situations where interference by the High Court becomes necessary on account of delay in proceedings or for any other reason amounting to oppression or harassment in any trial, inquiry or proceedings.*** *In appropriate cases, the High Courts have exercised their jurisdiction under Section 482 Cr.P.C. for quashing of first information report and investigation, and terminating criminal proceedings if the case of abuse of process of law was clearly made out. Such power can certainly be exercised on a case being made out of breach of fundamental right conferred by Article 21 of the Constitution."*

17. In **State of Haryana v. Bhajan Lal,** 1992 Supp (1) SCC 335, the Hon'ble Supreme Court considered numerous precedents on the point and summarized the law on the point in the following words: -

"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.

i. 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.

ii. 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.

iii. 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.

iv. 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.

v. 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.

vi. 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.

vii. 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."

18. In **Mahmood Aliand others versus State of U.P.:** 2023 SCC OnLine SC 950, it was observed that: -

"Whenever an accused comes before the Court invoking either the inherent powers under Section482of theCode of Criminal Procedure(Cr.P.C.) or extraordinary jurisdiction under Article226of theConstitutionto get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section482of theCr.P.C.or Article226of theConstitutionneed not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation."

19. In **Abhishek v. State of M.P.,** 2023 SCC OnLine SC 1083 also, it was held that *"It is well settled that the High Court would continue to have the power to entertain and act upon a petition filed under Section482Cr. P.C.to quash the FIR even when a charge-sheet is filed by the*

police during the pendency of such petition".

20. Thus the Hon'ble Supreme Court has always treated the extraordinary powers under Article 226 of the Constitution of India and the inherent powers recognized by Section 482 Cr.P.C. at par and an F.I.R. can be quashed in exercise of either of the aforesaid two proceedings.

21. It is also settled law that in case there is a conflict in the judgments of the Hon'ble Supreme Court and a High Court, undisputedly the law declared by the High Court has to give way to the law laid down by the Hon'ble Supreme Court. As the law laid down by the seven Judge Bench of this Court in **Ramlal Yadava** (Supra) is in conflict with the law laid down by the Hon'ble Supreme Court in **P. Ramachandra Rao, Bhajan Lal, Mahmood Ali** and **Abhishek** (Supra), undisputedly the law laid down by the Hon'ble Supreme Court would govern the field.

22. Therefore, the applicants had the option to file a Writ Petition or to file an application under Section 482 Cr.P.C. The learned Counsel for the applicants has submitted that the principle of dominus litus entitles the applicants to choose the any one of the fora.

23. There can be no dispute to the proposition that in case a litigant has the option of approaching more than one forum for redressal of his grievances, he has the right to choose the forum of his convenience. However, the question in the present case is not regarding maintainability of the application under Section 482 Cr.P.C. - the question is of propriety of filing of the application.

24. As per the provisions contained in Chapter V Rule 2 of the Allahabad High Court Rules, 1952, the applications under Section 482 Cr.P.C. are to be placed before a single Judge Bench whereas Criminal Writ Petitions filed for quashing of an F.I.R. are to be placed before a Division Bench. Although the powers of the High Court under extraordinary jurisdiction under Article 226 of the Constitution of India and the inherent powers of the High Court recognized by Section 482 Cr.P.C. are the same, the Hon'ble Chief Justice has assigned the roster of Criminal Writ Petitions to a Division Bench and the roster of Applications under Section 482 Cr.P.C. has been assigned to the Single Judge Bench.

25. The principle of dominus litus was applicable at the inception, when the applicants had to choose one of the two remedies available to them. The applicants had chosen to file a Writ Petition in which the scope of enquiry and interference was the same as that under Section 482 Cr.P.C. However, the applicants got the Writ Petition dismissed as not pressed although their grievance still existed. The applicants did not disclose any reason for getting the writ petition dismissed as not pressed. The reason could well be an assessment that they would not be able to get a favourable order from the Division Bench. The Writ Petition was got dismissed as not pressed without seeking a liberty from the Division Bench to approach the Single Judge Bench by filing an application under Section 482 Cr.P.C.

26. In **Union of India v. Cipla Ltd.,** (2017) 5 SCC 262, the Hon'ble Supreme Court held that the Court is required to adopt a functional test vis-à-vis the litigation and the litigant. What has to be

seen is whether there is any functional similarity in the proceedings between one court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not. The facts stated above clearly establish that it is a typical example of forum shopping, which practice has always been deprecated by the Courts.

27. Moreover, the facts of filing and dismissal of the earlier petition filed under Article 226 for the same relief was concealed in the application under Section 482 Cr.P.C. The learned A.G.A. raised a preliminary objection regarding maintainability of the application under Section 482 and the learned Counsel for the applicant replied to it. It was only after the learned Counsel for the opposite party no. 2 had pointed out concealment of the fact of filing of the Writ Petition and its dismissal, that the learned Counsel for the applicants filed the supplementary affidavit. It appears that the supplementary affidavit was kept ready to meet the contingency of the concealment of filing and dismissal of the Writ Petition being brought to the notice of this Court.

28. This conduct of the applicants in concealing the material fact of filing and dismissal of the Writ Petition while they have approached to invoke the inherent powers of this Court to make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice, appears to be an abuse of the process of Court and it does not in any manner secure the ends of justice and it is liable to be deprecated.

29. In **Sarguja Transport Service v. S.T.A.T.,** (Supra), the Hon'ble Supreme Court considered the question whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code of Civil Procedure is adopted in respect of Writ Petitions filed under Articles 226/227 of the Constitution of India also. While answering this question, the Hon'ble Supreme Court held that: -

"8...It is plain that when once a Writ Petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the Writ Petition because he cannot be considered as a party aggrieved by the order passed by the High Court. He may as stated inDaryaov.State of U.P.[AIR 1961 SC 1457] in a case involving the question of enforcement of fundamental rights file a petition before the Supreme Court under Article 32 of the Constitution of India because in such a case there has been no decision on the merits by the High Court. The relevant observation of this Court inDaryao caseis to be found at p. 593 and it is as follows:

"If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these Writ Petitions and no other."

* * *

"9...But we are of the view that ***the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of Writ Petition also, not on the ground of res judicata but on the ground of public policy as explained***

above. It would also discourage the litigant from indulging in bench-hunting tactics. *In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a Writ Petition filed in a High Court without permission to file a fresh Writ Petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the Writ Petition when he withdraws it without such permission. ... We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a Writ Petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We, however leave this question open."*

30. The principle of law laid down in **Sarguja Transport** (Supra) will apply to the present case as well, where although the previous petition was filed under Article 226 of the Constitution of India and the subsequent application has been filed under Section 482 Cr.P.C., the prayers made in both the petitions and the scope of enquiry and interference are the same and the only difference is that the earlier Writ petition was to be heard by a Division Bench while the instant application under Section 482 Cr.P.C. is to be heard by a Single Judge Bench.

31. Now I will proceed to consider the explanation given by the applicants in the supplementary affidavit for withdrawal of the Writ Petition, that the Writ Petition had been filed by a Counsel who had no instructions. The applicant no. 1 has stated in the supplementary affidavit that he had met Sri. K. K. Yadav Advocate on 22.01.2024, had told him that there was a grave urgency for filing a petition as he and his brother (the applicant no. 2) could be arrested any moment, and he had handed over the papers of the case to the Advocate, who had told him that the preparation of the case will take some time. In the meanwhile, the Advocate got an affidavit of the applicant no. 1 prepared and got some blank papers signed by him, although the applicant no. 1 had told the Advocate that he had come to seek opinion only and he had not come prepared to get the case filed and he was not even carrying any fee and expenses.

32. The earlier petition was signed by the applicants on 22.01.2024 and it was filed on 23.01.2024 and it indicates that the Advocate engaged by the applicants acted promptly, keeping in mind the apprehension expressed by the applicant no 1 that he and his brother might be arrested any moment. The applicant no. 1 has disclosed his qualification to be 'B.Tech.' and he is running a business. A reasonable person of ordinary prudence would not accept that an engineer businessman would meet an Advocate, tell him that there was a grave urgency for filing a petition as he and his brother could be arrested any moment, he would hand over the papers of the case to the Advocate, sign an affidavit and some blank papers, but at the same time he would tell the Advocate that he had come to seek opinion only and he had not come prepared to get the case filed, although he was

apprehending arrest any moment. Admittedly the applicant no. 1 had given the relevant papers to the Advocate and he had signed the papers and executed an Affidavit and although the applicants have not stated anything about Vakalanama, the mere filing of the petition establishes that both the applicants had signed a Vakalatnama also. In these circumstances, it cannot be accepted that the Writ Petition filed on 23.01.2024 filed after the applicant no. 1 had handed over and signed the papers on 22.01.2024, had been filed by the Advocate without any instruction. Therefore, the averments made in the supplementary affidavit do not inspire confidence.

33. The supplementary affidavit further states that both the applicants had met Sri. Fazal Haider Zaidi Advocate on 23.01.2024, who had got an affidavit of the applicant no. 1 prepared in the affidavit centre of this Court and told the applicants to contact the Advocate after a couple of days and the petition will be prepared in the meantime. The applicant no. 1 met Sri. Zaidi Advocate on 25.01.2024, on which date the petition was prepared and it was signed on 26.01.2024. However, the affidavit filed with the application under Section 482 discloses that it was signed by the applicant no. 1 and the contents of the affidavit were solemnly affirmed before an Oath Commissioner appointed by this Court on 27.01.2024. While verifying the affidavit, the Oath Commissioner was performing his official function and, therefore, there is a legal presumption that he has performed his official act in a regular manner. There is nothing to rebut this presumption, except the contention of the applicant no. 1 himself, which suffers from serious self-contradictions. Therefore, the declaration made by the Oath Commissioner has to be presumed to be correct.

34. It appears that the applicant no. 1 has cooked up a story to overcome the bar against filing of the second application for the same relief and the charge of concealment of material fact of filing and dismissal of the earlier Writ petition. In this regard, it is also significant to note that even regarding the instant application the applicants claim that they had met and instructed Sri. Fazal Haider Zaidi Advocate only whereas the application has not been filed by Sri. Fazal Haider Zaidi. The application has been signed and filed by Sri. Anshuman Singh and Ms. Geetika Yadav Advocates. Ms. Geetika Yadav has not accepted the Vakalatnama executed by the petitioners. In this manner the applicants have again left the scope of repeating the story and disowning Sri. Anshuman Singh and Ms. Geetika Yadav in case they are not satisfied with the outcome of the case.

35. So far as the judgment in **Ashok Kumar v. New India Assurance Co. Ltd**., (2024) 1 SCC 357 is concerned, in that case the appellant had filed a complaint before the Consumer Forum on 11.06.2009 alleging that the respondent was delaying the settlement of the claim for theft of a stolen truck. On the date of the complaint, the Insurance Company had not repudiated the claim. After that, on 15-10-2009 the respondent Insurance Company repudiated the claim. The complaint came up before the District Forum on 22.11.2020 when the appellant's Advocate made a statement that he did not want to proceed with the case and it may be dismissed. The claimant filed a fresh complaint inter alia stating that after filing the earlier complaint, since the counsel for the Insurance Company sought

numerous adjournments, his counsel got annoyed with the attitude of the said advocate and, by mistake, withdrew the case on 22-11-2020. It was expressly pleaded that the withdrawal of the said complaint was unfortunate, and that the appellant should not be made to suffer for the wrong deeds of the counsel. In the complaint, the appellant prayed for a direction to the Insurance Company to pay the insurance amount.In the aforesaid factual background, the Hon'ble supreme Court held that: -

"21.In any event, we are convinced that interest of justice requires that the appellant, ***in the peculiar facts and circumstances of this case,*** *should not be non-suited on the ground that his earlier complaint was withdrawn. We say so for the following reasons:*

(i)Firstly, the original Complaint No. 515 was filed on 11-6-2009 when the Insurance Company had not taken any decision on the claim. In fact, the complainant had alleged that the Insurance Company was lingering on with the issue and had complained of not rendering "sufficient service";

(ii)Secondly, pending that complaint, it was on 15-10-2009 that the repudiation letter was issued on purported breach of Conditions 1 & 5 of the Policy;

(iii)Thirdly, we find that a separate proceeding has been drawn up recording the statement of only the lawyer of the complainant. The statement of the lawyer stated that "I, Surender Kumar Gulia, Advocate, state that I do not want to proceed with my case. It may be dismissed".

(iv)Fourthly, in the complaint filed on 6-3-2012, the appellant avers that since the lawyer for the opposite party—Insurance Company was taking numerous dates for arguments, his counsel getting annoyed with the attitude of the advocate of the opposite party withdrew the abovesaid case by mistake.

(v)Fifthly, the appellant further avers that the withdrawal was unfortunate and he ought not to have been prejudiced for the deeds of his lawyer.

(vi)Sixthly, the finding of the National Commission is also factually erroneous, on this score. The learned counsel for the appellant drew our attention to para 9 of the order of the National Commission wherein the following erroneous finding was recorded. (Ashok Kumar case[New India Assurance Co. Ltd.v.Ashok Kumar, 2018 SCC OnLine NCDRC 1920] , SCC OnLineNcdrc)

"9. It is not disputed that earlier also, the complainant had filed consumer Complaint No. 515 of 2009 against the opposite party/Insurance Company on the same cause of action. Perusal of record would show that aforesaid complaint filed by the complainant in respect of repudiation of insurance claim regarding the same theft was withdrawn by the complainant unconditionally on 22-11-2010. Copy of the relevant order in CC No. 515 of 2009 is on the record. The order is reproduced as under:

'Statement of learned counsel for the complainant for withdrawal of the complaint recorded separately. In view of the statement, the complaint of the complainant is hereby dismissed as withdrawn. File be consigned to record room after due compliance'."

(emphasis in original)

22. It will be noticed that the National Commission was under the wrong impression that the original Complaint No. 515 of 2009 was filed in respect of repudiation of the insurance claim and it proceeded on the erroneous premise that

having challenged the repudiation in Complaint No. 515, the withdrawal of the complaint unconditionally on 22-11-2010 was fatal to the appellant. The original Complaint No. 515 of 2009 was filed on 11-6-2009 and the respondent Insurance Company repudiated the claim only on 15-10-2009."

36. Thus the aforesaid judgment specifically states that it was passed keeping in view the peculiar facts and circumstances of that case, which are in no manner similar to the facts of the present case and, therefore, it is of no avail to the applicants.

37. Therefore, this Court is of the considered view that the applicants have not acted fairly while approaching this Court to invoke the inherent powers of this Court under Section 482 Cr.P.C. for quashing of the F.I.R. No. 39 of 2024 under Sections 419, 420, 467, 468, 471, 427, 323, 504, 506 and 34 I.P.C., Police Station Kotwali, District Barabanki after dismissal of Criminal Miscellaneous Writ Petition No. 642 of 2024, which was filed with the same prayer and which was dismissed by a Division Bench without liberty for filing a fresh application for the same relief and thereafter by concealing the fact of filing and dismissal of the earlier Writ Petition in the application under Section 482. Thereafter the applicants have filed the supplementary affidavit containing a story regarding the previous Writ Petition having been filed by an Advocate without instructions, which for the reasons stated above, prima facie appears to be a cooked up story. Keeping in view the entire facts and circumstances stated above, the applicants are not entitled to be granted any relief by this Court in exercise of its inherent powers.

38. Accordingly, the application under Section 482 Cr.P.C. is hereby **dismissed** with a cost of Rs.25,000/- which shall be deposited by the applicants with the registry of this Court within a period of 30 days, failing which the Senior Registrar shall initiate proceedings for recovery of the amount by sending a Recovery Certificate to the Collector concerned, who shall recover the amounts as arrears of land revenue and shall remit the same to this Court within a period of three months from the date of issuance of the Recovery Certificate.

39. The Senior Registrar of this Court is directed to transmit the cost amount to Children Home (Girls), Lucknow, which is being run and maintained under the Department of Women and Child Development, Government of U.P.

(2024) 2 ILRA 1124
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 869 of 2024

M/S Albert David Ltd. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Salil Kumar Srivastava, Rahul Srivastava

Counsel for the Opp. Parties:
G.A., Ashok Kumar Verma

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power – Section 200,202 ,295,296 - The Air (Prevention and Control of Pollution) Act, 1981 – Section 31-A – Power to give directions , Section 37 - Penalty for

contravention of certain provisions of the Act - Court will take cognizance of the offence, but it does not mandate that the cognizance has to be taken by using express words that the Court takes cognizance of the offence - mere non-examination of any witness under Section 202 Cr.P.C. would not vitiate the order summoning the accused persons to face the trial. (Para -27 , 32)

(B) The Code of Criminal Procedure, 1973 - rudimentary principle - any judicial authority must apply his mind to the relevant facts, the relevant material placed in support of the material and the relevant provisions of law while passing any order - at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused.(Para - 42,45)

(C) The Air (Prevention and Control of Pollution) Act, 1981 - Offences by companies - Section 40, The Negotiable instruments Act, 1981- Section 141 - Offences by companies - Section 141 of the Negotiable Instruments Act and Section 40 of the Air Act contain pari materia provisions. (Para - 46 to 48)

Complaint was filed by an Assistant Environmental Engineer of Board - authorized by Board's resolution – cognizance - Applicant-firm and its 7 partners summoned - to face trial - allegedly operating an 8TPH PNG fired boiler – not obtained consent from Pollution Control Board - violating Section 21 of Air Act – punishable under Section 37 of Air Act. (Para - 1 to 10)

HELD: - Applicants are in charge of the as well as responsible for the conduct of the day-to-day business of the applicant and they are personally liable for the violation of the provisions of law (Air Act) which meets the requirement set by the Supreme Court in S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, Complaint's allegations are sufficient for trial, and partners' actual liability will be determined after trial. (Para - 49 to 51)

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

List of Cases cited:

1. P. Pramila & ors. Vs St. of Karn. & anr., (2015) 17 SCC 651

2. National Bank of Oman Vs Barakara Abdul Aziz & anr., (2013) 2 SCC 488

3. Sulochana Devi Vs D.M., 1993(1) Crimes108(Ori.)

4. Harsh Mandar Vs Amit Anilchandra Shah, (2017) 13 SCC 420

5. Fakhruddin Ahmad Vs St. of Uttaranchal, (2008) 17 SCC 157

6. Sunil Bharti Mittal Vs C.B.I., (2015) 4 SCC 609

7. India Carat (P) Ltd. Vs St. of Karn., (1989) 2 SCC 132

8. Nahar Singh Vs St. of U. P. & ors., (2022) 5 SCC 295

9. Devendra Vs St. of U.P., (2009) 7 SCC 495

10. U.P.P.C.B. Vs Dr. Bhupendra Kumar Modi, (2009) 2 SCC 147 S.M.S.

11. Pharmaceuticals Ltd. Vs Neeta Bhalla, (2005) 8 SCC 89

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

1. Heard Dr. Salil Kumar Srivastava, the learned counsel for applicant, Sri Gyanendra Singh, learned A.G.A. for the State and Sri Ashok Kumar Verma, the learned counsel for opposite party no.2.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has challenged the validity of the summoning order dated 25.08.2022 passed by the Special Judicial Magistrate, Pollution/CBI, Lucknow in Complaint no.1008 of 2020, whereby the applicant-firm and its 7 partners have been

summoned to face trial under Section 37 of the Air Act.

3. On 10.02.2020, the opposite party no. 2 - the U. P. Pollution Control Board (which will hereinafter be referred to as 'the Board') filed a complaint under Section 37 of the Air (Prevention and Control of Pollution) Act, 1981 (which will hereinafter be referred to as 'the Air Act'), through an Assistant Environmental Engineer of the Board, against the applicant firm and its 7 partners, stating that by means of an order dated 15.02.2018 passed by the Chief Environmental Officer, Circle-1, the applicant - M/s Albert David Ltd was granted consent under Section 21 of the Air Act for 06TPH PNG fired boiler, which was valid for the period from 01.01.2018 to 31.12.2019. However, during an inspection made on 06.12.2019, it was found that the applicant had installed a new 8TPH PNG fired boiler and was operating the same without obtaining consent from the Pollution Control Board in violation of Section 21 of the Air Act, which was punishable under Section 37 of the Air Act.

4. On 25.08.2022, the learned Special Judicial Magistrate, Pollution/CBI, Lucknow passed the impugned order summoning the accused persons to face trial under Section 37 of the Air Act.

5. Dr. Salil Kumar Srivastava, the learned Counsel for the applicant has challenged the validity of the summoning order on numerous grounds. The first submission of the learned Counsel for the applicant is that the complaint has been filed by an Assistant Environmental Engineer of U.P. Pollution Control Board, who is not authorized to file the complaint as per the provisions contained in Section 43 of the Air Act. In reply to this submission, the learned counsel for the opposite party no.2 has submitted that Section 15 of the Air Act provides that 'a State Board may, by general or special order, delegate to the Chairman or the member-secretary or any other officer of the Board subject to such conditions and limitations, if any, as may be specified in the order, such of its powers and functions under this Act as it may deem necessary.'

6. In rebuttal, Dr Salil Kumar Srivastava, learned counsel for the applicant has submitted that the power conferred under Section 15 of the Air Act is a general power whereas the power to institute prosecution has specifically been provided under Section 43 of the Air Act. Section 43 (1) (a) of the Air Act provides that No Court shall take cognizance of any offence under this Act except on a complaint made by a Board or any officer authorised in this behalf by it. Section 15 (1) of the Air Act provides that *"A State Board may, by general or special order, delegate to the Chairman or the member-secretary or any other officer of the Board subject to such conditions and limitations, if any, as may be specified in the order, such of its powers and functions under this Act as it may deem necessary."*

7. Dr. Srivastava has contended that as the resolution dated 23.12.1981 passed by the Board does not contain the name of Sri. Ritesh Tiwari, the Board has not delegated the powers to him and the powers have been delegated to Sri. Ritesh Tiwari by the Member Secretary of the Board, who had no authority to delegate the powers. In support of this contention, he has relied upon the judgment of Hon'ble Supreme Court in the case of **P. Pramila and others versus State of Karnataka and another** reported in (2015) 17 SCC

651, wherein the Hon'ble Supreme Court held that *"there cannot be any doubt, that when the authorities decided to initiate proceedings under the provisions of the Air Act, the complaint could have been made either by the Board or by an officer authorised by the Board."*

8. In **P. Pramila** (Supra), vide Notification/Resolution dated 29-3-1989, the Karnataka State Pollution Control Board had delegated certain powers to the Chairman of the Board as per which a complaint under Section 43(1) of the Air Act could have been filed either by its Chairman. The Chairman passed an order dated 4-4-2006 authorising the Regional Officer, Karwar to initiate criminal action under Section 37 of the Air Act by filing criminal case. In this factual background, the Hon'ble Supreme Court held that: -

"The Notification/Resolution dated 29-3-1989 indicates that the officer authorised was the Chairman of the Board. The Board could delegate the above power to the Chairman of the Board because Section 43(1) of the Air Act authorised the Board to do so. In that view of the matter, either the Board or the Chairman of the Board could have filed the complaints in terms of the mandate contained in Section 43(1) of the Air Act. The power to file the complaint could not be exercised by any other authority/officer. Under the principle of "delegatus non potest delegare", the delegatee (the Chairman of the Board) could not have further delegated the authority vested in him, except by a clear mandate of law. Section 43 of the Air Act vested the authority to file complaints with the Board. Section 43 aforementioned also authorised the Board to delegate the above authority to any "officer authorised in this behalf by it". The "officer authorised in this behalf" was not authorised by the provisions of Section 43 of the Air Act, or by any other provision thereof, to further delegate the authority to file complaints. The Chairman of the Board, therefore, had no authority to delegate the power to file complaints to any other authority for taking cognizance of offences under the Air Act."

9. There can be no dispute against the proposition of law that a delegate cannot further delegate the authority vested in him. However, in the present case, the Board itself had passed a resolution dated 23.12.1981 authorizing the Law Officer, the Assistant Scientific Officers and the Assistant Environmental Engineers of the Board to file cases in Courts and it was further resolved that the case will be filed by that officer who is nominated by the Member Secretary. In furtherance of this general order of delegation passed by the Board, the Member Secretary of the Board has nominated Sri. Ritesh Tiwari, Assistant Environmental Engineer to file the complaint. Therefore, the power has been delegated to the Assistant Environmental Engineer by the Board only and not by the Member Secretary or the Chairman of the Board or any delegate of the Board. Therefore, the well settled principle of law reiterated in **P. Pramila** (Supra) does not apply to the facts of the present case.

10. Hence, I find no force in the first submission of the learned Counsel for the applicant and I hold that the complaint has been filed by an Assistant Environmental Engineer of the Board, who was authorized by the Board's resolution dated 23.12.1981.

11. The learned counsel for the applicant has next submitted that the opposite party nos. 2 to 8 in the complaint, who are partners of the applicant firm, are

residents of places falling outside the territorial limits of jurisdiction of the Special Judicial Magistrate and, therefore, it was mandatory for the Court to have held an enquiry under Section 202 (1) Cr.P.C. before issuing summons to those accused persons. In support of this contention, learned counsel for applicant has relied upon the judgment of Hon'ble Supreme Court in the case of **National Bank of Oman versus Barakara Abdul Aziz and another,** reported in (2013) 2 SCC 488.

12. Per contra, Sri A. K. Verma, the learned counsel for opposite party no.2 has submitted that the applicant, who has approached this Court under Section 482 Cr.P.C., is the firm M/s Albert David Ltd, which is situated at Industrial Area, Ghaziabad, which falls within the territorial jurisdiction of the Magistrate, who has passed the summoning order. None of the partners of the firm, who claim to be residents of places outside jurisdiction of the Magistrate, have approached this Court challenging legality of the order summoning them to face the trial. The applicant is undisputedly situated within the limits of territorial jurisdiction of the Magistrate concerned and therefore, there is no illegality in summoning the applicant. In absence of the persons, who claim themselves to be residents of places outside the limits of territorial jurisdiction of the Magistrate concerned, this Court cannot examine validity of the order summoning those persons.

13. A copy of the complaint has been annexed with the application, wherein the applicant has been arrayed as opposite party no.1 and its address is mentioned as B-12/13, Site-3 Meerut Road Industrial Area, Police Station Sihani Gate, Ghaziabad, through its partners. The partners of the firm, who have been impleaded as opposite party nos.2 to 8 in the complaint, are all the residents of places other than the Ghaziabad, falling outside the limits of State of U.P. but they have not joined the applicant in filing the application under Section 482 Cr.P.C.

14. In **Sulochana Devi Vs. District Magistrate**, 1993(1)Crimes108(Ori.), Hon'ble Mr. Justice Arijit Pasayat dealt with the question of locus standi for filing an application under Section 482 Cr.P.C. in the following manner: -

"9 . Can a person who is not a party to the proceeding invoke the jurisdiction of the Court for exercise of powers under Section 482? Who has locus standi to do so ? The concept of locus standi has undergone a sea-change. It is needless to emphasise that the requirement of locus standi of a party to a litigation is mandatory : because the legal capacity of the party to any litigation whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold. The traditional syntax of law in regard to locus standi for a specific judicial redress, sought by an individual person, or determinate class or identifiable group of persons, is available only to that person or class or group of persons who has or have suffered a legal injury by reasons of violation of his or their legal right or a right legally protected, the invasion of which gives rise to actionability within the categories of law…"

15. What was further held by the Orissa High Court in Sulochana Devi (Supra), was quoted with approval by the Hon'ble Supreme Court in **Harsh Mandar v. Amit Anilchandra Shah**, (2017) 13 SCC 420: -

"41. In Sulochana Devi the petitioner who was not a party to the

proceedings had invoked the powers of the High Court under Section 482 CrPC to challenge the order of issuance of proclamation under Section 82 of the Code and attachment of the property. Raising the issue of locus standi, preliminary objection was raised to the maintainability of the application at the behest of the petitioner. The Orissa High Court after considering the scope of Section 482 CrPC as well as the decisions of the Apex Court in Madhu Limaye (1977) 4 SCC 551, Simranjit Singh (1992) 4 SCC 653, and in Janata Dal v. H.S. Chowdhary (1992) 4 SCC 305, held that:

"... Even if there are million questions of law to be deeply gone into and examined in a criminal case registered against specified accused persons, it is for him/them to raise all such questions and challenge the proceedings initiated at appropriate time before the proper forum and not for third parties either individually or under the garb of public interest litigation. Ordinarily, the aggrieved party, which is affected by any order has the right to seek redress by questioning the legality, validity or correctness of the order unless such party is a minor and insane person or is suffering from any other disability which law recognises as sufficient to permit another person e.g. next friend, to move the court in his behalf."

16. The other 7 accused persons, who are partners of the applicant firm, are not suffering from any disability due to which they are unable to approach this Court and yet they have chosen not to join the applicant firm in filing the application under Section 482 challenging the validity of order summoning them. In these circumstances, the applicant firm cannot challenge the validity of the order so far as it summons the firm's partners who have not approached this Court.

17. Even otherwise, in **National Bank of Oman** (Supra) relied upon by the learned Counsel for the applicant, the High Court had taken the view that prima facie the bare allegation of cheating did not make out a case against the accused for issuance of process under Sections 418 or 420 IPC. Further, it was held that the Magistrate was obliged to postpone the process against the accused and either enquire into the case himself or direct an investigation to be made by a police officer or by such other officer as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding in a case where the accused is residing beyond the area in which the Magistrate exercises his jurisdiction. The Hon'ble Supreme Court upheld the decision of the High Court. However, the Hon'ble Supreme Court has observed in **National Bank of Oman** (Supra) that: -

"10. Section 202 CrPC was amended by the Code of Criminal Procedure (Amendment) Act, 2005 and the following words were inserted:

"and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,"

The notes on clauses for the abovementioned amendment read as follows:

"False complaints are filed against persons residing at far off places simply to harass them. In order to see that innocent persons are not harassed by unscrupulous persons, this clause seeks to amend sub-section (1) of Section 202 to make it obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct investigation to be made by a police officer or by such

other person as he thinks fit, for finding out whether or not there was sufficient ground for proceeding against the accused."

18. The object of holding an enquiry under Section 202 is to ensure that innocent persons, who are residents of far off places, are not harassed by unscrupulous persons by filing of false complaints. The complainant in the present case is U. P. Pollution Control Board, and not any unscrupulous individual. The nature of complaint is that upon inspection of the premises of the applicant firm, it was found that the applicant had installed a new 08 TPH PNG fired boiler and was operating the same without obtaining consent from the Pollution Control Board in violation of Section 21 of the Air Act, which was punishable under Section 37 of the Air Act. The firm is admittedly situated within the territorial limits of jurisdiction of the Magistrate. There is no allegation of personal nature against any of the partners of the firm who are residents of areas falling beyond the territorial limits of jurisdiction of the Magistrate and only this much is revealed from the records that the applicant's partners are responsible for running of its plant. The limited enquiry which the Magistrate can hold at this stage is meant to ascertain whether any case for summoning the accused persons is made out. The enquiry report submitted by a public servant was filed with the complaint and that is sufficient to enable the Magistrate to arrive at a conclusion that a case for taking cognizance of the offence and summoning the accused persons is made out.

19. Thus I am of the considered view that the object of inserting the amendment in Section 202 Cr.P.C. for conducting an enquiry has not been defeated in the present case. The inherent powers of this Court under Section 482 Cr.P.C. are meant to be exercised to secure the ends of justice and not to create hurdles in dispensation of justice on mere technicalities which do not defeat the ends of justice. Therefore, I find myself not in agreement with the submission of the learned Counsel for the applicant that the order summoning the non-applicant accused persons is bad for want of an enquiry under Section 202 Cr.P.C.

20. The next submission made by the learned counsel for the applicant is that the complaint alleges that the applicant was operating without obtaining the requisite consent from the U. P. Pollution Control Board under Section 21 of the Air Act whereas the applicant had due permission under Section 21 of the Air Act and the allegation levelled in the complaint is false on the face of the record.

21. In reply to this submission, the learned counsel for opposite party no.2 has submitted that the applicant was granted consent under Section 21 of the Air Act by means of an order dated 15.02.2018 passed by the Chief Environmental Officer, Circle-1, which was valid for the period from 01.01.2018 to 31.12.2019, but the consent was granted only for 06 TPH PNG fired boiler. When it was found upon inspection that the applicant has installed a new 08 TPH PNG fired boiler and was operating it without obtaining consent from the Pollution Control Board, the complaint was lodged.

22. The record reveals that that the applicant was granted consent under Section 21 of the Air Act only for 06 TPH PNG fired boiler. Section provides for restriction of use of particular industrial

plants, and it does not provide that after consent has been granted to an applicant to run an industry, it may install any other new plant without obtaining consent in respect thereof. The applicant had installed and was operating a new 08 TPH PNG fired boiler without obtaining consent from the Pollution Control Board. These facts, prima facie make out commission of offence under Section 21 which is punishable under Section 37 of the Air Act. Therefore, this submission of the learned Counsel for the applicant is also turned down.

23. The learned Counsel for the applicant has next submitted that the learned Magistrate has summoned the accused persons to face the trial without taking cognizance of the offences.

24. Section 190 (1) Cr.P.C. reads as follows: -

"190. Cognizance of offences by Magistrates.— *(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2),* ***may take cognizance of any offence—***

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

(b) upon a police report of such facts;

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

25. In **Fakhruddin Ahmad v. State of Uttaranchal**, (2008) 17 SCC 157, the Hon'ble Supreme Court answered in the following words the question as to 'what is meant by the expression "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190 of the Code?'

"14. The expression "cognizance" is not defined in the Code but is a word of indefinite import. As observed by this Court in Ajit Kumar Palit v. State of W.B.: (AIR 1963 SC 765)

"19. ... The word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means—become aware of and when used with reference to a court or Judge, to take notice of judicially."

Approving the observations of the Calcutta High Court in Emperor v. Sourindra Mohan Chuckerbutty [ILR (1910) 37 Cal 412], the Court said that

"taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence."

(emphasis supplied)

15. Recently, this Court in Chief Enforcement Officer v. Videocon International Ltd. (2008) 2 SCC 492, speaking through C.K. Thakker, J., while considering the ambit and scope of the phrase "taking cognizance" under Section 190 of the Code, has highlighted some of the observations of the Calcutta High Court in Supdt. & Remembrancer of Legal Affairs v. Abani Kumar Banerjee AIR 1950 Cal 437 which were approved by this Court in R.R. Chari v. State of U.P. AIR 1951 SC 207. The observations are:

"7. ... What is 'taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now to attempt to define it. It seems to me clear, however, that before it can be said that any Magistrate has taken cognizance of any offence under Section

190(1)(a) CrPC, he must not only have applied his mind to the contents of the petition, but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200, and thereafter sending it for enquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

16. From the aforenoted judicial pronouncements, it is clear that being an expression of indefinite import, it is neither practicable nor desirable to precisely define as to what is meant by "taking cognizance". Whether the Magistrate has or has not taken cognizance of the offence will depend upon the circumstances of the particular case, including the mode in which the case is sought to be instituted and the nature of the preliminary action.

17. Nevertheless, it is well settled that before a Magistrate can be said to have taken cognizance of an offence, it is imperative that he must have taken notice of the accusations and applied his mind to the allegations made in the complaint or in the police report or the information received from a source other than a police report, as the case may be, and the material filed therewith. It needs little emphasis that it is only when the Magistrate applies his mind and is satisfied that the allegations, if proved, would constitute an offence and decides to initiate proceedings against the alleged offender, that it can be positively stated that he has taken cognizance of the offence. Cognizance is in regard to the offence and not the offender."

26. In **Sunil Bharti Mittal v. CBI**, (2015) 4 SCC 609, the Hon'ble Supreme Court held that: -

"47....The expression "taking cognizance" has not been defined in the Code. However, when the Magistrate applies his mind for proceeding under Sections 200-203 of the Code, he is said to have taken cognizance of an offence. This legal position is explained by this Court in Chief Enforcement Officer v. Videocon International Ltd.(2008) 2 SCC 492, in the following words:

"19. The expression 'cognizance' has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means 'become aware of' and when used with reference to a court or a Judge, it connoted 'to take notice of judicially'. It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

20. 'Taking cognizance' does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence."

48. Sine qua non for taking cognizance of the offence is the application of mind by the Magistrate and his satisfaction that the allegations, if proved, would constitute an offence. It is, therefore, imperative that on a complaint or on a police report, the Magistrate is bound to consider the question as to whether the same discloses commission of an offence and is required to form such an opinion in this respect. When

he does so and decides to issue process, he shall be said to have taken cognizance. At the stage of taking cognizance, the only consideration before the court remains to consider judiciously whether the material on which the prosecution proposes to prosecute the accused brings out a prima facie case or not."

27. In the impugned order dated 25.08.2022, the Magistrate has considered the facts stated in the complaint that upon an inspection made on 06.12.2019 it was found that the applicant no. 1 company was operating a 08 TPH PNG boiler without obtaining consent under Section 21 of the Air Act, which is an offence punishable under Section 37 of the Air Act, and that the partners of the applicant are responsible for its functioning. The inspection report dated 06.12.2019, the recommendation for filing the complaint, the authorization etc. had been filed with the complaint. After perusal of the complaint and the aforesaid material produced before the Magistrate, he recorded a satisfaction that the accused persons operated the unit without obtaining consent and thus they violated the mandatory provisions of Sections 21 and 31-A of the Air Act. This satisfaction recorded by the Magistrate amounts to taking cognizance of the offences. The law requires that the Court will take cognizance of the offence, but it does not mandate that the cognizance has to be taken by using express words that the Court takes cognizance of the offence. A bare perusal of the order dated 25.08.2022 reveals that the Magistrate has taken cognizance of the allegations levelled in the complaint which constitute the aforesaid offences and this is sufficient to take cognizance of the offence. Hence I find no force in the submission made by the learned Counsel for the applicant that the Magistrate has not taken cognizance of the offences.

28. The learned Counsel for the applicant has also submitted that the Magistrate has not recorded any statements under Section 200 or 202 Cr.P.C. and the Magistrate has summoned he accused persons without holding any enquiry and that the summoning order passed without taking cognizance of the offences is bad in law.

29. Sections 200 and 202 of Cr.P.C. are being reproduced below: -

"200. Examination of complainant.— *A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*

Provided that, ***when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—***

(a) if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; *or*

(b) …

* * *

202. Postponement of issue of process.— (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process

against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:"

30. In **India Carat (P) Ltd. v. State of Karnataka**, (1989) 2 SCC 132, the Hon'ble Supreme Court held that: -

"11. Chapter XV which contains Sections 200 to 203 deals with "Complaints to Magistrates". A Magistrate taking cognizance of an offence on complaint is required by Section 200 to examine the complainant and the witnesses present, if any. Section 202 provides that a Magistrate taking cognizance of a case, upon complaint, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Section 203 empowers the Magistrate to dismiss the complaint, if after considering the statements on oath (if any) of the complaint and of the witnesses and the result of the inquiry or investigation (if any) under Section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding.

12. Chapter XVI deals with "Commencement of Proceedings before Magistrates" and Section 204 empowers a Magistrate to issue summons or a warrant as the case may be, to secure the attendance of the accused if in the opinion of the Magistrate taking cognizance of the offence there is sufficient ground for proceeding.

13. From the provisions referred to above, it may be seen that on receipt of a complaint a Magistrate has several courses open to him. The Magistrate may take cognizance of the offence at once and proceed to record statements of the complaints and the witnesses present under Section 200. After recording those statements, if in the opinion of the Magistrate there is no sufficient ground for proceeding, he may dismiss the complaint under Section 203. On the other hand if in his opinion there is sufficient ground for proceeding he may issue process under Section 204. If, however, the Magistrate thinks fit, he may postpone the issue of process and either inquire into the case himself or direct an investigation to be made by the police officer or such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under Section 200 or Section 202, he may order an investigation to be made by the police under Section 156(3). When such an order is made, the police will have to investigate the matter

and submit a report under Section 173(2). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued."

31. The complaint has been filed by the U. P. Pollution Control Board through its Assistant Environmental Officer, who is a public servant. Section 200 Cr.P.C. itself provides that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint. Therefore, there was no need for examination of the complainant public servant in the present case.

32. Section 202 mandates an enquiry being held by the Magistrate by providing that any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Sub-Section (2) of Section 202 provides that in an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath. Thus there is no mandatory requirement of recording the evidence of any witness. Depending upon the nature of the complaint, the Magistrate can hold enquiry on the basis of documentary evidence also, which has been done in the present case. Therefore, the mere non-examination of any witness under Section 202 Cr.P.C. would not vitiate the order summoning the accused persons to face the trial.

33. The learned Counsel for the applicant has also submitted that no affidavit has been filed under Sections 295 and 209 Cr.P.C. So far as the submission regarding non-compliance of Section 295 and 296 Cr.P.C. is concerned, the two provisions read as follows: -

"295. Affidavit in proof of conduct of public servants.— *When any*

application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servants, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given.

* * *

296. Evidence of formal character on affidavit.*—(1) The evidence of any person whose evidence is of a formal character may be given by affidavit and may, subject to all just exceptions, be read in evidence in any inquiry, trial or other proceeding under this Code.*

(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any such person as to the facts contained in his affidavit.

34. Section 295 applies where any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, containing allegations against any public servants, which is not the case here and, therefore, Section 295 does not apply to the present case. Section 296 gives discretion to the Court to receive the evidence of a formal character on affidavit. It does not mandate that an affidavit is to be necessarily to be taken during an enquiry under Section 202 Cr.P.C., even where the Court is able to record a satisfaction on the basis of documentary evidence produced with the complaint.

35. The learned Counsel for the applicant has also submitted that the complaint does not make a mention of Section 31-A of the Air Act, and in absence of allegation of commission of offence under Section 31-A of the air Act in the complaint, the Magistrate has no jurisdiction to summon the accused persons for that offence.

36. Section 31-A of the Air Act provides as follows: -

"31-A. Power to give directions*.—Notwithstanding anything contained in any other law, but subject to the provisions of this Act and to any directions that the Central Government may give in this behalf a Board may, in the exercise of its powers and performance of its functions under this Act, issue any directions in writing to any person, officer or authority, and such person, officer or authority shall be bound to comply with such directions.*

Explanation.—For the avoidance of doubts, it is hereby declared that the power to issue directions under this section includes the power to direct—

(a) the closure, prohibition or regulation of any industry, operation or process; or

(b) the stoppage or regulation of supply of electricity, water or any other service."

37. The 'directions' referred to in Section 31-A of the Air Act are "any directions in writing" and these are not limited to directions issued expressly stating that the same are issued under Section 31-A. The directions issued with the consent order dated 15.02.2018 which have been annexed with the copy of the complaint filed with the application under Section 482 Cr.P.C., are also directions issued under Section 31-A.

38. A bare reading of Section 190 (1) (a) Cr.P.C. indicates that a Magistrate is

empowered to take cognizance of **any offence** upon receiving a complaint of facts which constitute such offence. The complaint has to narrate the facts only and it need not necessarily mention the offences that are made out on the basis of those facts. Even if the complaint mentions some offence and it omits to mention some other offence, in case the Magistrate is satisfied from facts stated in the complaint that some other offence is also made out, the Magistrate can take cognizance of that offence also.

39. In **Nahar Singh versus State of U. P. and others**, (2022) 5 SCC 295, after discussing various precedents on the point, the Hon'ble Supreme Court has held that the Magistrate has to apply his mind while taking cognizance of an offence and if it appears from the material placed before him and any person other than those arrayed as accused also needs to be summoned, the Magistrate can certainly summon him. On the same principle, in case the Magistrate is satisfied that there is sufficient material for trial of the accused for any other offence, he has the power to summon the accused person(s) for trial of that offence also.

40. In the present case, the Magistrate is satisfied by a perusal of the complaint and the material filed with it, that the accused persons appear to have violated any direction, it can take cognizance of the offence under Section 31-A also. In such circumstances, he has not committed any illegality in taking cognizance of the offence under Section 31-A of the Air Act and in summoning the applicant and its partners for trial of the aforesaid offence.

41. Relying upon the decision of the Hon'ble Supreme Court in **Devendra v. State of U.P.**, (2009) 7 SCC 495, the learned Counsel for the applicant has submitted that it was obligatory on the part of the learned Magistrate to apply his mind to the contents of the complaint and such application of mind on his part should have been reflected from the order.

42. There can be no dispute against the aforesaid preposition of law and this is a rudimentary principle that any judicial authority must apply his mind to the relevant facts, the relevant material placed in support of the material and the relevant provisions of law while passing any order. However, the narration made in preceding paragraphs reveals that the Magistrate has fulfilled this requirement while passing the impugned order dated 25.08.2022.

43. The complaint has been filed by the U. P. Pollution Control Board through its Assistant Environmental Officer, who is a public servant. Section 200 Cr.P.C. itself provides that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses if a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint. Therefore, there was no need for examination of the complainant public servant in the present case.

44. The learned Counsel for the applicant has also submitted that the documents produced with the complaint have to be proved by oral evidence. That stage would arrive during the trial and at the stage of taking cognizance and summoning the accused person for trial the Court has only to arrive at a prima facie satisfaction that a case for trial is made out, which satisfaction can be arrived on the

basis of documentary evidence, without strict proof of the documents.

45. In **U.P. Pollution Control Board v. Dr. Bhupendra Kumar Modi,** (2009) 2 SCC 147, the Hon'ble Supreme Court held that: -

"23. It is a settled legal position that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused.

* * *

41. When exercising jurisdiction under Section 482 of the Code, the High Court could not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it the accusation would not be sustained. To put it clear, it is the function of the trial Judge to do so. The Court must be careful to see that its decision in exercise of its power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. If the allegations set out in the complaint do not constitute offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Criminal Procedure Code. However, it is not necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal."

46. The learned Counsel for the applicant lastly submitted that the trial Court has erred in summoning all the partners of the applicant firm without ascertaining as to which of them were actually responsible for the offence. In support of this contention, he placed reliance on a judgment of the Hon'ble Supreme Court in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla, (2005) 8 SCC 89**, which arose from a reference made by a two-Judge Bench of this Court for determination of the following questions: -

"(a) Whether for purposes of Section 141 of the Negotiable Instruments Act, 1881, it is sufficient if the substance of the allegation read as a whole fulfil the requirements of the said section and it is not necessary to specifically state in the complaint that the person accused was in charge of, or responsible for, the conduct of the business of the company.

(b) Whether a director of a company would be deemed to be in charge of, and responsible to, the company for conduct of the business of the company and, therefore, deemed to be guilty of the offence unless he proves to the contrary.

(c) Even if it is held that specific averments are necessary, whether in the absence of such averments the signatory of the cheque and or the managing directors or joint managing director who admittedly would be in charge of the company and responsible to the company for conduct of its business could be proceeded against."

47. The following answers were given to the aforesaid questions: -

"(a) It is necessary to specifically aver in a complaint under Section 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section 141 and has to be made in a complaint. Without this averment

being made in a complaint, the requirements of Section 141 cannot be said to be satisfied.

(b) The answer to the question posed in sub-para (b) has to be in the negative. Merely being a director of a company is not sufficient to make the person liable under Section 141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for the conduct of its business. The requirement of Section 141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to Question (c) has to be in the affirmative. The question notes that the managing director or joint managing director would be admittedly in charge of the company and responsible to the company for the conduct of its business. When that is so, holders of such positions in a company become liable under Section 141 of the Act. By virtue of the office they hold as managing director or joint managing director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. So far as the signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.

48. **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** was a case arising out of the Negotiable Instruments Act. Section 141 of the Negotiable Instruments Act and Section 40 of the Air Act contain pari materia provisions. Section 40 of the Air Act reads as follows: -

"40. Offences by companies.— *(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was directly in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) "company" means 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.

49. It has specifically been stated in the complaint that the partners of the applicant are in-charge of the as well as responsible for the conduct of the day to day business of the applicant and they are personally liable for the violation of the

provisions of law. Therefore, the averment mandatory as per the answer to question (a) in **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla** (Supra) is there in the present case. Whether each of the partners of the applicant is actually liable to be convicted or sentenced or not, will be decided upon conclusion of the trial and the averments made in the complaint are sufficient for their trial.

50. In view the aforesaid discussion, I find no force in any of the submissions made by the learned Counsel for the applicant. There appears to be no illegality in the impugned order dated 25.08.2022 passed by the Special Judicial Magistrate, Pollution/CBI, Lucknow, taking cognizance of the offence and summoning the accused persons to face trial under Section 37 of the Ari Act.

51. The application filed under Section 482 Cr.P.C. lacks merit and the same is accordingly **dismissed**.

(2024) 2 ILRA 1140
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 16.02.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 1010 of 2024

Atul Kumar Singh ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Anil Kumar Pandey, Vijay Kumar Singh

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Trial court must consider all allegations and evidence - Power under Section 319 CrPC is discretionary and extraordinary - Injured witness's evidence has greater evidentiary value - Though the powers under Section 319 Cr.P.C. are invoked sparingly but at the same time, if there is any cogent material/ evidence available on record, the powers should be invoked so as to conclude the trial to its logical conclusion. (Para - 6,8)

Petitioner (Informant), an injured witness - moved application under Section 319 CrPC - to summon additional accused - rejected - no reason assigned - not recorded their subjective satisfaction - quashing of - claims assailants' names were omitted from charge sheet - but indicated in the chief-examination - request to summon. **(Para - 4,11)**

HELD: -Impugned order set aside due to lack of reasoning and subjective satisfaction. Matter remanded to trial court to decide application afresh, considering injured witness's evidence and allowing petitioner to file application under Section 319 CrPC.**(Para -11,13)**

Petition allowed. (E-7)

List of Cases cited:

1. Balu Sudam Khalde & anr. Vs St. of Maha., AIR 2023 SC 1736

2. Kanchhid Singh Vs St. of U.P. & ors., Appl. U/S 482 No.12491 of 2020

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

4. Sartaj Singh Vs St. of Hary. & anr., (2021) 5 SCC 337

5. Yashodhan Singh & ors. Vs St. of U.P. & anr., (2023) 9 SCC 108

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Awadhesh Kumar Pandey, holding brief of Sri Anil Kumar Pandey, learned counsel for the petitioner, Ms. Nushrat Jahan, learned A.G.A. for the State and Sri Surya Prakash Singh as well as Sri Bipin Kumar Tiwari, who have filed Vakalatnama on behalf of Ankit Verma & Ranvijay Singh Patel, opposite parties no.2 & 3 respectively. Said Vakalatnamas are taken on record.

2. In view of the proposed order, notices to private opposite parties are dispensed with.

3. By means of this petition filed under Section 482 Cr.P.C., the petitioner has prayed the following reliefs:-

"Wherefore, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to quash the order dated 04.09.2023 passed by Additional District and Sessions Judge/Special Judge E.C. Act, Court No. 04, Faizabad in S.T. No. 212/2021 (State vs Ram Shankar and Others) relating to Case Crime No. 223/2020, Police Station - Maharganj, District-Faizabad as contained as Annexure No. 01 of the present petition.

It is further prayed that the trial court may kindly be directed to summon the opposite party No. 02 to 06 of this petition under section 319 Cr.P.C. as accused in S.T. No. 212/2021(State vs Ram Shankar and Others) relating to Case Crime No. 223/2020, Police Station Maharganj, District-Faizabad.

It is also prayed that operation and implementation of order dated 04.09.2023 passed by the court of Additional District and Sessions Judge/Special Judge E.C. Act, Court No. 04, Faizabad vide S.T. No. 212/2021 (State vs Ram Shankar and Others) relating to Police Station - Maharganj, District - Faizabad may kindly be stayed during pendency of this petition.

Any other order or direction may kindly be passed in favour of the Petitioner, which this Hon'ble Court may deem fit and proper under the circumstances of the case."

4. At the very outset, learned counsel for the petitioner has stated that the present petitioner had sustained serious injuries at the time of incident in question. He has further submitted that one application under Section 319 Cr.P.C. was filed (Annexure No.4) by one Dharmendra Kumar Singh, who had intimated the police on behalf of the petitioner regarding the incident in question as the petitioner was not in a position to apprise the police about the incident in question. In the aforesaid application, the applicant of that application, namely, Dharmendra Kumar Singh has stated that though Ankit, Ranvijay Patel, Ramsukh alias Sukhram, Manish and Ajay were amongst the assailants and in the FIR, their names have been indicated, but by filing charge sheet, their names have been deleted and charge sheet has been filed against other accused persons. It has been further stated in such application that Dharmendra Kumar Singh and two other witnesses have been examined. He has further submitted that in the chief-examination of those witnesses, names of above named accused persons have been indicated against whom the charge sheet has not been filed, therefore, the specific request has been made before the court concerned that by invoking powers under Section 319 Cr.P.C.

accusedAnkit, Ranvijay Patel, Ramsukh alias Sukhram, Manish and Ajay be summoned.

5. Learned counsel for the petitioner has also stated that the present petitioner is not only the informant but is an injured person and he has not been examined by the court concerned till date. In the chief-examination of one injured witness Shivam, names of above named accused persons have been indicated, however, during cross-examination, clear version has not come. Learned counsel for the petitioner has relied upon the judgment of the Apex Court in re; **Balu Sudam Khalde and Another v. State of Maharashtra, AIR 2023 SC 1736**, wherein the Apex Court in para-26 observed as under:-

"26. When the evidence of an injured eye-witness is to be appreciated, the under- noted legal principles enunciated by the Courts are required to be kept in mind:

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded."

6. In the aforesaid para, the Apex Court has observed that when the evidence of an injured eye witness is to be appreciated, some relevant facts should be appreciated and if it is found that the injuries sustained in the incident in question, evidence of such injured witness would have greater evidentiary value. Therefore, the impugned order dated 04.09.2023 may be set aside and direction may be issued to the court concerned to summon the accused persons, namely, Ankit, Ranvijay Patel, Ramsukh alias Sukhram, Manish and Ajay.

7. Learned counsel for opposite party no.2 has stated that the present petitioner has got no locus to file this petition inasmuch as he had not filed application under Section 319 Cr.P.C. before the trial court, rather such application was filed one Dharmendra Kumar Singh. He has also stated that the learned court concerned has passed speaking and reasoned order rejecting such application and powers under Section 319 Cr.P.C. are invoked sparingly, therefore, this petition may be dismissed as there is no infirmity in the impugned order dated 04.09.2023. Learned counsels for opposite parties no.2 & 3 have placed reliance upon the judgment of this Court dated 19.11.2020 in re; **Kanchhid Singh v. State of U.P. and 2 Others**, Application U/S 482 No.12491 of 2020, wherein this Court has held that for

invoking powers under Section 319 Cr.P.C., the court concerned must be careful and unless and until the specific material/ evidence is not available on the record/ pleadings, such power should not be invoked inasmuch as power under Section 319 Cr.P.C. is on high pedestal.

8. Ms. Nushrat Jahan, learned A.G.A. has stated that this is a settled law of the Apex Court in re; **Hardeep Singh v. State of Punjab, (2014) 3 SCC 92, Sartaj Singh v. State of Haryana and Another, (2021) 5 SCC 337 and Yashodhan Singh and Others V. State of U.P. and Another, (2023) 9 SCC 108**, to the effect that while considering and disposing of the application filed under Section 319 Cr.P.C., learned trial court must consider all allegations and evidences on record and unless and until the court finds relevant material/ evidence to summon the persons under Section 319 Cr.P.C., those persons should not be summoned in a cursory manner inasmuch as the power under Section 319 Cr.P.C. is on high pedestal. Learned A.G.A. has stated that in view of the aforesaid decisions of the Apex Court, the impugned order dated 04.09.2023 does not appear to be appropriate inasmuch as the request of the injured person, who is informant also, may not be turned down in a cursory manner, though the powers under Section 319 Cr.P.C. are invoked sparingly.

9. The Apex Court in re; **Hardeep Singh (supra)** has held that if the trial court is convinced on the basis of chief-examination, it may summon the accused persons without going into the aspects of cross-examination.

10. In re; **Yashodhan Singh (supra)**, the Apex Court has held that if the learned trial court finds relevant material/ evidence, it can invoke powers under Section 319 Cr.P.C. even if such person/persons is/are not named in the FIR or not named in the charge sheet or has/ have been discharged before framing of the charges.

11. Having heard learned counsel for the parties and having perused the material available on record, I find that while rejecting the application under Section 319 Cr.P.C., the learned trial court has not assigned specific reason and has not recorded their subjective satisfaction inasmuch as after considering the facts and circumstances, documents of the parties and referring the various judgments of the Constitutional Courts, such application has been rejected only for the reason that powers under Section 319 Cr.P.C are invoked sparingly. This is a trite law that while rejecting an application, the court concerned must pass speaking and reasoned order so that it could be understood that the court concerned has applied its judicious mind, therefore, for this reason alone, the order dated 04.09.2023 is liable to be set aside.

12. Further, the Apex Court in re; **Hardeep Singh** (supra), **Sartaj Singh** (supra), **Yashodhan Singh** (supra)and **Balu Sudam Khalde** (supra) has clearly held that though the powers under Section 319 Cr.P.C. are invoked sparingly but at the same time, if there is any cogent material/ evidence available on record, the powers should be invoked so as to conclude the trial to its logical conclusion. In the present case, the petitioner, who is an injured witness, has not been examined by the court concerned till date and on the basis of chief-examination of injured witness and other eye witnesses wherein the names of above named accused persons have been indicated, the court concerned must

evaluate such evidence. Further, the evidentiary value of the injured witness is on the high pedestal and the present petitioner being inured witness and he is stating on oath in this petition that accused persons against whom the charge sheet has not been filed were the assailants. Besides, Dharmendra Kumar Singh and Shivam, who are injured witnesses, have stated in chief examination that the persons against whom the allegations have been levelled in the application filed under Section 319 C.P.C. have assaulted the victim, therefore, such application should have been considered properly.

13. In view of the above, the impugned order dated 04.09.2023 is hereby set aside/ quashed. The matter is remanded back to the learned trial court to decide the application dated 17.10.2022 filed by Dharmendra Kumar Singh afresh. Liberty is also given to the petitioner, who is injured witness, to file such application under Section 319 Cr.P.C. by providing certified copy of this order before the court concerned and that application shall also be decided by the learned trial court, strictly in accordance with law, by speaking and reasoned order, by affording an opportunity of hearing to the parties concerned, with expedition, preferably within a period of six weeks from the date of production of certified copy of this order.

14. Accordingly, the instant petition is **allowed**.

(2024) 2 ILRA 1144
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.02.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 1122 of 2024

Avdhesh @ Avdhesh Kumar ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Bhup Chandra Singh

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law – Alteration of charge by court - The Code of criminal procedure, 1973 - Sections 161, 164, 216, 221, 222, 397, 482 - Inherent power, Indian Penal Code, 1860 -Sections 363, 366, 376 , Protection of Children from Sexual Offences (POCSO) Act, Sections 3, 4, 16, 17 - Trial court has exclusive power to alter or add charges under Section 216 CrPC at any time before the judgment is pronounced - Court must apply judicious mind considering evidence and circumstances - there is no right in any party to seek for such addition or alteration by filing any application as a matter of right - if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge.(Para - 5)

Petitioner seeks to quash order adding charges under Sections 376 IPC and 3/4 POCSO Act - Prosecution filed application based on prosecutrix's testimony - Petitioner granted bail in initial case under Sections 363 & 366 IPC and Sections 16/17 POCSO Act. (Para - 4)

HELD: - Trial court has rightly considered the testimony of the prosecutrix whereby she has stated on oath before the court during trial that the petitioner has committed offence of rape when she was below eighteen years. Trial court's order adding charges upheld. Petitioner can raise defenses and seek leniency in bail. (Para - 7, 9)

Petition disposed of finally. (admission stage) (E-7)

List of Cases cited:

1. P. Kartikalakshmi Vs Sri Ganesh & anr., (2017) 3 SCC 347

2. Hasanbhai Valibhai Qureshi Vs St. of Guj. & ors., (2004) 5 SCC 347

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Bhup Chandra Singh, learned counsel for the petitioner and Sri Aniruddha Kumar Singh, learned Additional Government Advocate-I for the State.

2. In view of the order proposed to be passed, the notices to opposite party Nos.3 and 4 are hereby dispensed with.

3. By means of this petition filed under Section 482 Cr.P.C., the petitioner has prayed for quashing/ setting aside the order dated 11.01.2024 passed in S.T. No.54 of 2021 (State vs. Avdhesh) by the learned Special Judge, POCSO Act, / Additional Sessions Judge, Room No.12, Sultanpur relating to Case Crime No.136 of 2019, under Sections 363 & 366 I.P.C. and Section 16/17 of POCSO Act, Police Station-Kamrauli, District-Amethi, so far as it relates to the present petitioner, as well as the entire criminal proceedings pending against the petitioner may kindly be terminated.

4. Attention has been drawn towards Annexure No.2 of the petition which is F.I.R. registered against the petitioner bearing Case Crime No.136 of 2019, under Sections 363 & 366 I.P.C. and Section 16/17 of POCSO Act, Police Station-Kamrauli, District-Amethi and the petitioner has been granted bail in the aforesaid case crime number. Thereafter, the investigation was completed and the charge-sheet was filed under those sections but during the course of trial, the prosecution has filed an application before the court after examination of the testimony of the prosecutrix to the effect that on the basis of such testimony section 3/4 of Protection of Children from Sexual Offences Act (POCSO) and Section 376 I.P.C. should be added. However, objection has been filed on behalf of the petitioner to the effect that earlier the prosecutrix has not supported the prosecution version while recording her statement under Sections 161 Cr.P.C. & 164 Cr.P.C. and authenticity of those statements may not be ignored.

5. Learned counsel for the petitioner has drawn attention of this court towards the dictum of Apex Court rendered in the case in re: ***P. Kartikalakshmi vs. Sri Ganesh and another reported in (2017) 3 SCC 347*** wherein the Apex Court has observed that the powers of Section 216 Cr.P.C. may not be invoked on the application of the prosecution or the defence but the court while invoking powers under Section 216 Cr.P.C. should apply its judicious mind and must consider the relevant facts, circumstances and evidences available on record. Therefore, the impugned order dated 11.01.2024 whereby the court added Sections 376 I.P.C. and 3/4 of POCSO Act on the application of the prosecution filed under Section 216 Cr.P.C. The Apex Court in the case in re: ***P. Kartikalakshmi (supra)*** in paras-6, 7 & 8 held as under:-

"6. Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent 1. Section 216 CrPC empowers the Court to alter or add any charge at any time before the

judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.

7. We were taken through Sections 221 and 222 CrPC in this context. In the light of the facts involved in this case, we are only concerned with Section 216 CrPC. We, therefore, do not propose to examine the implications of the other provisions to the case on hand. We wish to confine ourselves to the invocation of Section 216 and rest with that. In the light of our conclusion that the power of invocation of Section 216 CrPC is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment, we make it clear that no party, neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 CrPC. If such a course to be adopted by the parties is allowed, then it will be well-nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardised.

8. In such circumstances, when the application preferred by the appellant itself before the trial court was not maintainable, it was not incumbent upon the trial court to pass an order under Section 216 CrPC. Therefore, there was no question of the said order being revisable under Section 397 CrPC. The whole proceeding, initiated at the instance of the appellant, was not maintainable. Inasmuch as the legal issue had to be necessarily set right, we are obliged to clarify the law as is available under Section 216 CrPC. To that extent, having clarified the legal position, we make it clear that the whole proceedings initiated at the instance of the appellant was thoroughly misconceived and vitiated in law and ought not to have been entertained by the trial court. As rightly pointed out by the learned Senior Counsel for Respondent 1, such a course adopted by the appellant and entertained by the court below has unnecessarily provided scope for protraction of the proceedings which ought not to have been allowed by the court below."

(emphasis supplied)

6. Per contra, Sri Aniruddha Kumar Singh, learned Additional Government Advocate-I has submitted that learned counsel for the petitioner has placed appropriate judgment before this Court but the facts and circumstances of the present case are different from the case which was considered by the Apex Court. In the present case, the learned trial court has neither considered an application of the

prosecution nor objection of the defence but has applied its judicious mind considering the testimony of the prosecutrix indicating her statement in the impugned order dated 11.01.2024, therefore, the benefit of the judgment of Apex Court rendered in the case in re: ***P. Kartikalakshmi*** (supra) may not be provided to the petitioner in the present case.

7. Having heard learned counsel for the parties and having perused the material available on record and having regard to the judgment of Apex Court rendered in the case in re: ***P. Kartikalakshmi*** (supra), I find that while passing the impugned order dated 11.01.2024, the learned trial court has rightly considered the testimony of the prosecutrix whereby she has stated on oath before the court during the course of trial that the petitioner has committed offence of rape when she was below eighteen years.

8. In ***Hasanbhai Valibhai Qureshi vs. State of Gujarat and others*** reported in ***(2004) 5 SCC 347***, the Apex Court while dealing with scope of Section 216 Cr.P.C, in para-10 has held as under:-

"10. Therefore, if during trial the trial court on a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so, and there can be no legal bar to appropriately act as the exigencies of the case warrant or necessitate."

9. Therefore, in view of what has been considered above, I am not inclined to interfere with the impugned order dated 11.01.2024 passed by the learned trial court but it is needless to say that the petitioner after surrendering/ appearing before the court concerned may take all pleas and grounds which are available to him to establish himself as innocent in those sections. He may also apprise the court concerned that in the F.I.R. and the charge-sheet, which has been filed by the Investigating Officer, the petitioner has already been granted bail, therefore, in added sections his bail application may be considered leniently.

10. In view of the above, the instant petition is ***disposed of finally*** at the admission stage.

Before parting with, I appreciate the efforts and research work done by Mr. Piyush Tripathi, Research Associate, attached with me and Mr. Vaibhav Tyagi, Law Intern in finding out the relevant case laws applicable in the present case.

(2024) 2 ILRA 1147
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.02.2024

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

Application u/s 482 No. 1327 of 2022
AND
Application u/s 482 No. 1677 OF 2015
connected with
Application u/s 482 No. 3413 of 2014
and
Application u/s 482 No. 6425 of 2023

Pradeep Yadav ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Ashok Kumar Yadav, Aditya Singh

Counsel for the Opp. Parties:

G.A.

(A) Criminal Law - Quashing of Criminal Proceedings in Cases of Consensual Interfaith Marriages - The Code of criminal procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Section 363 - Kidnapping, Section 366 - Kidnapping, abducting or inducing woman to compel her marriage - "Sui juris" - mentally competent, and capable of making their own decisions, including choosing their life partners - where an individual is over 18 years of age, no fetters could be placed on her choice on where to reside or about the person with whom she could stay.(Para - 13)

Multiple couples eloped and got married consensually, facing opposition from parents - FIRs filed under Sections 363 and 366 IPC alleging kidnapping and abduction to compel marriage - Charge sheets and summoning orders issued against couple - Couples filed petitions under Section 482 CrPC seeking quashing of proceedings - Court considered judicial precedents on individual autonomy and privacy. **(Para - 11 to 16)**

HELD: - Prosecution under Sections 363 and 366 IPC is misconceived as marriages were consensual. Couples, being majors, have the right to choose their life partners. Quashing the proceedings would serve the ends of justice and prevent harassment to the couples. Court must consider the humanitarian and societal implications while applying the law. Quashed the charge sheets, summoning orders, and entire criminal proceedings against the applicants. (Para - 12 to 18)

Petitions allowed. (E-7)

List of Cases cited:

1. Vinod Kumar, IAS Vs U.O.I., 2021 SCC Online SC 559

2. Superintendent and Rememberancer of Legal Affairs, W.B. Vs Mohan Singh, (1975) 3 SCC 706

3. Anil Khadkiwala Vs St. (Govt of NCT of Delhi) & anr., (2019) 17 SCC 294,

4. Mafat Lal & Anr. Vs St. of Raj. in Crl. Appeal No.592 of 2022

5. Shafin Jahan Vs Asokan K.M., (2018) 16 SCC 368

(Delivered by Hon'ble Rahul Chaturvedi, J.)

[1]. The aforementioned four Applications u/s 482 Cr.P.C. on behalf of different applicants have been filed with the prayer that the criminal proceedings against them may be quashed in exercise of extraordinary power u/s 482 Cr.P.C. In all aforementioned cases there is a common legal question involved, and thus, for the sake of brevity, all these petitions are being decided by a common judgment and order.

[2]. In Application u/s 482 No.1327 of 2024 Shri Karm Veer Yadav, learned counsel for opposite party no.7 has filed his *Vakalatnama* in the Court, is taken on record.

[3]. Heard learned counsels named above appeared for respective appellants, learned counsel for opposite party as well as learned Additional Government Advocate for the State of U.P. at length and to their satisfaction. Perused the record.

[4]. In Application u/s 482 No.1677 of 2015, despite of the time given to learned A.G.A. as well as notices were served upon opposite party no.2, no one has put his appearance on behalf of opposite party no.2 nor any counter affidavit has been filed. The mater relates to Year 2015, whereby two young persons after attaining their majority decided to marry, and they got married. Applicant- Ram Gopal is the husband, who is knocking the doors of this Court for quashing the entire criminal prosecution against him.

[5]. In Application u/s 482 No.6425 of 2023 the contesting parties are represented by their respective counsels, but despite of the notice issued to opposite party nos.2 and 3, no one has filed any counter affidavit.

[6]. Before analysing the legal aspect of the issue, it is imperative to give a bird's eye view to the facts of each case one by one.

FACTUAL MATRIX :

[7]. APPLICATION U/S 482 No. - 1327 of 2024
(Pradeep Yadav vs. State of U.P. & 6 others)

(i). The prayer sought in the present petition is to quash the impugned Charge Sheet No.2A/16 dated 18.5.2016, summoning order dated 24.01.2017 as well as entire criminal proceeding in Session Trial No.2/17 (State vs. Pradeep Kumar), arising out of Case Crime No.138/2013, u/s 363, 366, 376 I.P.C. and ¾ POCSO Act, P.S.-Kotwali Kunda, District Pratapgrah, pending in the court of Additional Session Judge (POCSO Act), Pratapgarh.

(ii). Affidavit of this petition is sweared by Pradeep Yadav-applicant himself.

Long and short of the case is that way back on 20.7.2023 the informant- Ravi Shankar Mishra has lodged an F.I.R. against Pradeep Yadav, Shyam Sunder Yadav and Ravi Gupta, all are resident of Kunda, Pratapgarh, with the allegation that the informant's daughter Ms. 'K' was pursuing her studies in Kripalu Balika Mahavidyalay, Kunda, a student of B.Sc.-Ist Year. The informant dropped his daughter to the college on 19.7.2013 around 8.00 in the morning and thereafter her daughter did not come back to home. After making inquiry, it is surfaced that Pradeep Yadav- applicant, his father Shyam Sundar Yadav and one Ravi Gupta have enticed her away. It is alleged in the F.I.R. that the date of the birth of the girl is 24.10.1997, allegedly a minor girl on the date of incident, and therefore, it was requested to lodge an F.I.R. against above persons.

(iii). After holding due investigation, the name of Ravi Gupta was exonerated by the police and the name of two more persons were inserted as accused, namely, Bachcha Yadav @ Jagdish and Pawan Kumar Yadav. A charge sheet was submitted by the police on 02.01.2014 against the aforesaid persons u/s 363, 366 I.P.C.

(iv). In paragraph 10 of the petition, in no uncertain terms it is stated that the applicant Pradeep Yadav and the prosecutrix Ms. 'K' have solemnized marriage on 19.8.2014 at Arya Samaj Temple Aliganj, Lucknow and later on at Belha Devi Temple, Pratapgarh on 11.4.2016. Not only this, they have got their marriage registered on 26.5.2023, a copy of Marriage Certificate is annexed as Annexure-5 to the petition.

(v). Submission advanced by the counsel for applicant is that on earlier occasion the Division Bench of this Court had protected the interest of petitioner and the prosecutrix vide order dated 26.9.2014 while disposing of Writ Petition No.9971 (M/B) of 2014 (Smt. Kriti and another vs. State of U.P. and others), directing the couple for their medical examination and recording the statements u/s 161 & 164 Cr.P.C. It was also directed by the Division Bench that till this exercise is over, the

interest of the petitioners was protected and they shall not be arrested during investigation.

(vi) Meanwhile, there were certain issues cropped up for which the couple have again approached this Court for redressal of their grievances and the coordinate Bench of this Court has accommodated them and the statements of the girl u/s 161 & 164 were recorded. But despite of the favourable statement u/s 161 and 164 Cr.P.C., the Investigating Officer, after adopting regular practice, submitted a report u/s 173(2) Cr.P.C./charge-sheet on 18.5.2016 bearing Charge-sheet No.2A/2016 and the learned Magistrate too without applying his judicial mind have taken the cognizance of those offences and passed a summoning order on 24.1.2017. The applicants have again rushed to this Court by filing Crl. Misc. Application u/s 482 No.2072 of 2017 for quashing of the charge sheet and summoning order, but the co-ordinate Bench of this Court without looking into the factual aspects of the issue have dealt the scope and ambit of Section 482 Cr.P.C. In that long order dated 3.4.2017 the scope and ambit of Section 482 Cr.P.C. was discussed without touching any iota of factual issue and it was also held that the police after investigation found a prima facie case against the accused-applicant and submitted a charge sheet before the court below. It was further observed that the offences are cognizable offences and the accused applicants ought to be tried before the court of the law. There is no reason or occasion to quash the charge sheet at this stage and thus that application u/s 482 Cr.P.C. stood dismissed.

(vii) On the other hand, the applicant and his wife-prosecutrix were residing at Delhi and they were leading a happy marital life in the company of each other. This wedlock has given birth to two babies, a girl child was born on 5.2.2017 and a baby boy was born on 26.11.2018. On this ground it has been canvassed by learned counsel for applicant that though this petition is second petition with the same prayer, but under the different and changed circumstances. Now the life of four persons are at stakes. On this score, learned counsel for applicant has drawn attention of the Court to the judgment of Hon'ble Apex Court in the case of ***Vinod Kumar, IAS vs. Union of India, 2021 SCC Online SC 559***, in which, the Apex Court while relying upon yet another judgment of Hon'ble Apex Court in the case of ***Superintendent and Rememberancer of Legal Affairs, West Bengal vs. Mohan Singh, (1975) 3 SCC 706***, have clearly opined that dismissal of earlier 482 application does not create bar in filing of subsequent petition u/s 482 Cr.P.C., in case the facts so justify. A similar view was also taken by the Hon'ble Apex Court in a case of ***Anil Khadkiwala vs. State (Govt of NCT of Delhi) and another, (2019) 17 SCC 294***, in which it has been clearly laid down that successive 482 applications under the changed circumstances or being materially different from earlier application, are maintainable and the dismissal of earlier quashment application shall not come into the way and would not act as a bar.

(viii). Relying upon the above judgments the learned counsel for applicant has hammered his submissions that earlier 482 application No.2072 of 2017 (Pradeep Kumar Yadav vs. State of U.P.) which was dismissed on 03.04.2017 does not contain a single averment, touching the facts of the present case. While dismissing the above 482 application, the Coordinate Bench of this Court has mainly focused upon the scope and ambit of Section 482 Cr.P.C. while taking into account the number of decisions given by Hon'ble Apex Court, in

a most mechanical fashion come to the conclusion that a prima facie offence is made out against the applicant.

(ix). As mentioned above, there is a sea-change in the circumstances. Now the life of four persons are involved in this case and the Court in such a scenario should not apply only legal provisions in a mechanical fashion, but a humane face ought to be given. Thus, I am of the considered opinion that the present 482 application is maintainable in the larger interest of the parties. Though there is no quarrel with the settled legal proposition that successive 482 applications between the same parties is not maintainable, provided there is drastic change in the circumstances of the case.

[8]. APPLICATION U/S 482 No.1677 of 2015 (Ram Gopal vs. The State of U.P. and Another connected with APPLICATION U/S 482 No.3413 of 2014 (Bahau and another vs. State of U.P. and another).

(i) Both these petitions are connected petitions and in their respective parent orders while entertaining and granting the interim order, the Bench of this Court had directed the applicants to file a counter affidavit. Office report dated 12.11.2014 of 482 application No.3413 of 2014, indicates that notices were served upon opposite party no.2 personally, but no counter affidavit has been filed in this matter. Application u/s 482 No.3413 of 2014 (Bahau and another vs. State of U.P. and another) is the leading case. This petition should be decided with Crl. Misc. Application u/s 482 No.1667 of 2015 (Ram Gopal vs. State of U.P. and another). Ram Gopal happens to be close relative of prime accused Bahau.

(ii) The prayer sought in both petitions is same whereby the applicants have sought the quashing of impugned order dated 30.7.2014 passed by the learned C.J.M., Bahraich, arising out of Case Crime No.398 of 2014, u/s 363, 366A, 506 I.P.C., Police Station-Kotwali Nanpara, District Bahraich, including the entire proceeding initiated pursuant thereof. The order dated 26.8.2014 was the parent order directing the applicants and opposite party no.2 to appear in the Court and further proceeding of Case Crime No.398 of 2014 shall remain stayed.

(iii) Brief summary of the present case is that the F.I.R. was lodged by Sitaram Patel on 2.6.2014 which was registered as Case Crime No.398 of 2014, u/s 363, 366A, 506 I.P.C. at P.S.- Nanpara, District Bahraich against Bahau, Ram Gopal and Pairu for the alleged incident said to have taken place on 27.8.2013. It was alleged in the F.I.R. that the informant's sister Ms. 'B' (applicant no.2 in 482 application no.3413/2014) went to attend the call of nature, whereby the above named accused persons have kidnapped her on the gun point. It is contended by the learned counsel for applicants that the averment of the FIR is nothing but ugly case of exaggeration of the incident, just to complicate the issue. In fact, Bahau and Ms. 'B' are in dense love affair with each other and they are major, known to each other and eventually they have decided to marry, but their family members were dead against this relationship and marriage. Left with no other option, both of them have decided to run away from their respective homes and performed their marriage in a temple and now they are leading a happy marital life. This wedlock has been blessed with a baby boy who is now aged about 8 years. As mentioned above, the family members were dead against this marriage, they have decided to harass and malign the

couple to its optimum by filing a false criminal case against them.

(iv) After lodging of the F.I.R., the police have rounded up the prosecutrix and she was put to radiological/ossification test, in which the doctor has opined that the age of the girl is 19+ years. Besides this, the girl was put before the Magistrate for recording her statement u/s 164 Cr.P.C., in which in no uncertain terms she admitted that both of them are in torrid love affair, out of which they have decided to marry with each other. Being major they have every right to choose their life partners and accordingly they have chosen to each other as their life partners. As mentioned above, this wedlock has blessed with a boy, hence, now three lives are involved in the present criminal case.

(v) The interesting feature of this case is that when the girl was in the custody of police, three applications were moved by her father Banke Lal and sister-in-law for taking her custody. Learned C.J.M., Bahraich after assessing the entire circumstances and more particularly the age of the girl and subsequent development that she was a mother of a small kid, who is now 8 years of age, directed the Inspector to set her free so that she may join the company of person of her liking and choice.

(vi) In connected Application u/s 482 No.1677 of 2015 (Ram Gopal vs. State of U.P. and another), Ram Gopal is the real brother of Bahau, who has also been chargesheeted and Ram Gopal in his application has sought a similar prayer as of co-accused Bahau in Crl. Misc. Application u/s 482 No.3413 of 2014 (Bahau vs. State of U.P. and another).

(vii) Thus, as per the facts of the case, there is no allegation of any kidnapping attracting the provisions of Sections 363 or 366A I.P.C. In fact, it is a malicious story tailored by the informant with ulterior motive and harass and malign the couple, but as mentioned above, the most significant circumstance is that the accused-applicant and the prosecutrix are happily and safely residing as husband and wife with their small child.

[9]. APPLICATION U/S 482 NO.6425 of 2023 (Nem Kumar @ Nem Kumar Mishra vs. State of U.P. & 2 others)

(i) The extra-ordinary power of this Court u/s 482 Cr.P.C. is being invoked by the applicant for quashing of the entire proceeding of Case No.4775 of 2021 (State vs. Nem Kumar) pending before the learned First Additional Civil Judge (S.D.), Sitapur, u/s 363, 366 IPC, including the impugned summoning order dated 8.2.2021 and the Charge Sheet No.1 dated 03.10.2020 arising out of Case Crime No.257 of 2020, u/s 363, 366 IPC, Police Station-Rampur Mathura, District Sitapur.

(ii). Facts of the present case in brief is that on 01.8.2020 the opposite party no.2 has lodged an F.I.R. against the petitioner to the effect that during the night on 29.7.2020 around 10.00 in the night, applicant Nem Chandra Mishra has enticed away daughter of opposite party no.2. After lodging of the FIR, as a natural outcome the investigation of the case started rolling and the police have recorded statement u/s 161 Cr.P.C. On 15.9.2020 the prosecutrix opposite party no.3 reached to the police station and disclosed that she married with petitioner Nem Chand Mishra on her own free will and choice, disclosing her age about 18 years. Thereafter, the prosecutrix was produced before the Magistrate for recording her statement u/s 164 Cr.P.C. on 31.7.2020, in which she stated that there was no threat or coercion upon her to enter into this nuptial tie with the applicant. Not

only this, she has also declined and refused to get her medically examined. The high-handedness and atrocities of the police started when they dumped the girl to Bal Kalyan Samiti, Sitapur before sending her to Nari Ashray Grih, Lucknow without taking her consent. Left with no option, they have approached this Court by filing a Habeas Corpus No.17589 of 2020 and the Court has come to rescue of petitioners and released the detenu/prosecutrix in favour of the husband-petitioner by order dated 8.12.2020.

(iii). This matter has got a new angle when on 12.10.2021 the prosecutrix-opposite party no.3 has given birth to a baby boy- Shantanu. As per High School Certificate the date of birth of the prosecutrix is 01.01.2003 and at the time of incident she was about to reach the age of majority. Thereafter the husband and wife with their new born baby were peacefully and happily residing. On the other hand, the police personnel without anticipating the amount of damage to the couple, have submitted a charge sheet u/s 363, 366 IPC and the learned Magistrate without applying judicial mind have taken cognizance of those offence on a proforma order dated 8.2.2021, hence this petition.

LEGAL DISCUSSION :

[10]. Since in all the aforesaid petitions, the report u/s 173(2) Cr.P.C./charge sheet was filed by the police u/s 363, 366 I.P.C., the provisions of Sections 363, 366 I.P.C. are relevant to reproduce here, which reads thus :

"363. Punishment for kidnapping.—

Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

366. Kidnapping, abducting or inducing woman to compel her marriage, etc.—

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid."

[11]. Now taking into account the aforementioned sections of Indian Penal Code and comparing the same with 164 statements of respective victims, it is written on the canvass, that in all the cases the boys and girls are in previous acquiescence and having affair with each other. Both of them ran away from their respective houses, keeping in view the hostile treatment from their parties, who were dead against such type of relationship. Being major, they exercised their right to choose their life partners, and some how or the other they ran away and got married either in temple or some Arya Samaj Temple in a clandestine way. Not only this, they got their marriage registered. After the marriage both of them residing as happily

married couple and were blessed with their progenies.

Under these circumstances, taking into account the victims statement u/s 164 Cr.P.C., the entire prosecution case would be reduced to big nullity. Still asking, the boy to face the criminal case is nothing but the harassment to the couple to its optimum and should be quashed at the earliest given opportunity.

[12]. As mentioned above, the undercurrent of all aforementioned cases is one and identical i.e. the couple who are major got married but their parent for the reason best known to them are creating hurdles and impediments in their marital life, instead of extending their good wishes to them, the parent are poisoning their marital life. In all these cases, there is apparent tussle and tug of war between the requirement of the law on one hand and the marital life of the couple with their kids on the other hand.

[13]. In a recent judgment ***Mafat Lal and Another vs. State of Rajasthan in Crl. Appeal No.592 of 2022 decided on 28.3.2022,*** Hon'ble Apex Court it has been opined in no uncertain terms that when the parties are agreed and living happy marital life with their small kids, there cannot be any conceivable impediment in accepting the marriage. In yet another judgment ***Shafin Jahan vs. Asokan K.M., (2018) 16 SCC 368***, it has been opined by the Hon'ble Apex Court that where an individual is over 18 years of age, no fetters could be placed on her choice on where to reside or about the person with whom she could stay. Whatever may be the date of birth of petitioner, fact remains, that she is at present more than 18 years of age. As the petitioner is sui juris, no fetters could be placed upon her choice of the person to whom she wants to stay, nor any restriction could be imposed regarding the place where she should stay. <u>The court or the relatives of the petitioner can also not substitute their opinion or preference for that of a person in such a matter.</u>

(14). This Court has observed that the girls-prosecutrix, who have decided to marry, are either on the family way or they are blessed with their kids. The Court while deciding the petitions must wear a humane face and the practicality of the issue. The parties are in their marital union for a considerable period and they are parent of one or more kids. At this stage to ask them to face the criminal prosecution would amount to bundle load of injustice to the alleged wrongdoers and to their kids who are nowhere connected with the alleged offence.

[15]. The Court is conscious of its role that the judicial system is tasked not only with interpreting and upholding the law but also with understanding of the dynamics of society. The role of the Court is much more onerous and beyond mere application and interpretation of the statutes. It involves an understanding of the implications of its decisions on individuals and the community at large. Striking this balance requires a thorough examination of the facts, legal precedents and involving ethos of the society it serves. The Court must weigh competing interests, considering the impact of its decisions on the parties involved and the broader implications for justice, fairness and social order.

[16]. The dilemma at times faced by the Court can be of trying to justify State/Police action against an adolescent

couple who got married with each other and continued to lead a peaceful life and raise a family, and respect for obeying the law of the land. This Court has time and again reached to the conclusion that true love between the individuals, one or both of who may be a minor or at the verge of majority, cannot be controlled through rigours of law or State action. The cases as the present one are those where the dilemma of the Judge, which though may be rare, has to take into account the dedicate balance which the constitutional court or courts of law have to strike a balance between the law and its strict application and the repercussions of its judgments and orders by application of such laws in the society as a whole and the individuals who are before it.

[17]. **When the scale of justice has to be weighed, they are not on the basis of mathematical precision or the mathematical formulas or theorems, but at times, while on one side of the scale there is the law and other side of scale may carry the entire life, happiness and the future of toddlers, their parents and the parents of their parents. The scale that reflects and portrays such pure happiness sans any criminality would definitely equal the scale carrying the law as the application of law is meant for maintaining the rule of law and an orderly society.**

[18]. Thus, in the light of the above discussion of factual and the legal aspects of the issue, this Court is of the considered opinion that the subsistence of respective trials of the applicants would make their lives and new couple horrible and terrific. They would lead their life under the sword of democles and may sometimes adversely impact their inter-se marital relationship. This is not the objective of the law. The application of law has to be given a humane face so that it would facilitate an orderly society and not full of turmoil and disturbance, therefore, the Court in exercise its extra-ordinary power u/s 482 Cr.P.C., in order to achieve the larger goal and interest, allows all aforementioned four petitions i.e. (1) APPLICATION U/S 482 No. - 1327 of 2024 (2) APPLICATION U/S 482 No. - 1677 of 2015 connected with (3) APPLICATION U/S 482 No. - 3413 of 2014 and (4) APPLICATION U/S 482 No. - 6425 of 2023. The impugned charge sheets, summoning orders and the entire criminal proceedings arising out thereof, pending against the applicants in above mentioned case crime numbers are hereby quashed.

[19]. All the petitions stand ALLOWED.

[20]. The Senior Registrar of this Court is directed to communicate this judgment to the respective sessions courts within 15 days from today for communication and compliance.

[21]. Copy of this judgment shall be placed in all aforementioned petitions.

(2024) 2 ILRA 1155
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.02.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 1531 of 2024

Anand Kumar Pandey ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Pradeep Kumar, Adarsh Tripathi, Ashutosh Tiwari, Shubham Tiwari

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - Validity of Printed Proformas in Cognizance Proceedings - The Code of criminal procedure, 1973 - Section 482 - Inherent power, Section 190- Cognizance of offence by Magistrate, Section 204 - Issue of process, Indian Penal Code, 1860 - Sections 406,420,467,468 - Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a readymade seal etc. of the order on a plain paper. (Para -17)

Case involved a criminal complaint filed against Applicant – Accused-applicant summoned using a printed proforma without assigning reasons in mechanical manner - without application of judicial mind - for facing trial - entire criminal proceedings - quashing of - hence petition. (Para - 3 to 6)

HELD: - Magistrate's order taking cognizance was invalid. Use of printed proformas without assigning reasons was objectionable. Judicial officers must apply their minds to the facts and law before taking cognizance. Summoning an accused person without assigning reasons is illegal. Summoning order quashed. Matter remitted back to trial court for fresh consideration. (Para - 18 ot 22)

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

List of Cases cited:

1. Dilawar Vs St. of Har., (2018) 16 SCC 521,

2. Menka Gandhi Vs U.O.I., (1978) 1 SCC 248: AIR 1978 SC 597,

3. Hussainara Khatoon (I) Vs St. of Bihar, (1980) 1 SCC 81,

4. Abdul Rehman Antulay Vs R.S. Nayak, (1992) 1 SCC 225 and

5. P. Ramchandra Rao Vs St. of Karn., (2002) 4 SCC 578

6. Bhushan Kumar Vs St. (NCT of Delhi), (2012) 5 SCC 424: AIR 2012 SC 1747

7. Basaruddin Vs St. of U.P., 2011 (1) JIC 335 (All)(LB)

8. Sunil Bharti Mittal Vs CBI, (2015) 4 SCC 609: AIR 2015 SC 923

9. Darshan Singh Ram Kishan Vs St. of Maha., (1971) 2 SCC 654

10. Ankit Vs St. of U.P., Appl. u/s 482 No. 19647 of 2009

11. Kavi Ahmad Vs St. of U.P., Criminal Revision No. 3209 of 2010

12. Abdul Rasheed Vs St. of U.P., 2010 (3) JIC 761 (All)

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Pradeep Kumar, learned counsel for the applicant as well as Ms. Nusrat Jahan, learned A.G.A. for the State and perused the record.

2. In view of the proposed order, the issuance of notice to opposite party no.2 is hereby dispensed with.

3. The instant application under Section 482 Cr. P.C. has been filed by the applicants with a prayer to quash the entire criminal proceedings to the extent of Applicant in pursuance of summoning order dated 26.08.2016 passed by the Additional Chief Judicial Magistrate-IV, Court No. 28, Lucknow in Case No. 2852 of 2016 (State Vs. Anand Kumar Pandey) arising out of chargesheet no. 220/2015 dated 28.12.2015 under Sections 406/420/467/468 I.P.C. arising out of Case Crime No. 497 of 2014 dated 14.10.2014 under Sections 406/420/467/468 I.P.C. P.S Chowk, District Lucknow in respect of the Applicant.

4. The learned Magistrate had taken cognizance and passed the summoning order on 26.08.2016. The cognizance was taken on the printed proforma by filling the sections of IPC, dates and number and in the said proforma the learned Magistrate without assigning any reason has summoned the applicants for facing trial.

5. Learned counsel for the applicants further submits that after submission of charge sheet and cognizance order on printed proforma, the applicants have been summoned mechanically by order dated 26.08.2016 and the court below while summoning the applicants has materially erred and did not follow the dictum of law as propounded by the Hon'ble Supreme Court in various cases that summoning in criminal case is a serious matter and the court below without dwelling into material and visualizing the case on the touch stone of probability should not summon accused person to face criminal trial. It is further submitted that the court below has not taken into consideration the material placed before the trial court along with charge sheet and, therefore, the trial court has materially erred in summoning the applicant. The court below has summoned the applicant through a printed order, which is wholly illegal.

6. It is vehemently urged that the impugned cognizance/summoning order dated is not sustainable in the eye of law, as the same has been passed in mechanical manner without applying the judicial mind, because on the face of record itself it is apparent that impugned cognizance/summoning order dated 26.08.2016 has been passed by the Magistrate concerned on printed proforma by filling up the gaps, therefore the same is liable to be quashed by this Court.

7. I have heard the learned counsel for the parties and perused the record.

8. The main issue for consideration before this Court is that whether the learned Magistrate may summon the accused person on a printed proforma without assigning any reason and take cognizance on police report filed under Sections 173 of Cr. P.C. In this regard, it is relevant to mention here that a Court can take cognizance of an offence only when condition requisite for initiation of proceedings before it as set out in Chapter XIV of the Code are fulfilled. Otherwise, the Court does not obtain jurisdiction to try the offences under section 190 (1) of the Cr. P.C. provided that "subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

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

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

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

9. At this juncture, it is fruitful to have a look so far as the law pertaining to summoning of the accused persons, by taking cognizance on a police report filed under section 173 of the Cr.P.C., is concerned and the perusal of the case law mentioned herein below would clearly reveal that cognizance of an offence on

complaint is taken for the purpose of issuing process to the accused. Since, it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the material collected by the Investigating Officer results in sufficient grounds to proceed further and would constitute violation of law so as to call a person to appear before the criminal court to face trial. This discretion puts a responsibility on the magistrate concerned to act judiciously keeping in view the facts of the particular case as well as the law on the subject and the orders of Magistrate does not suffers from non-application of judicial mind while taking cognizance of the offence.

10. Fair and proper investigation is the primary duty of the Investigating Officer. No investigating agency can take unduly long time in completing investigation. There is implicit right under Article 21 for speedy trial which in turn encompasses speedy investigation, inquiry, appeal, revision and retrial. There is clear need for time line in completing investigation for having in-house oversight mechanism wherein accountability for adhering to lay down timeline, can be fixed at different levels in the hierarchy, vide **Dilawar v. State of Haryana, (2018) 16 SCC 521, Menka Gandhi v. Union of India, (1978) 1 SCC 248 : AIR 1978 SC 597, Hussainara Khatoon (I) v. State of Bihar, (1980) 1 SCC 81, Abdul Rehman Antulay v. R.S. Nayak, (1992) 1 SCC 225 and P. Ramchandra Rao v. State of Karnatka, (2002) 4 SCC 578.**

11. For the purposes of investigation, offences are divided into two categories "cognizable" and "non-cognizable". When information of a cognizable offence is received or such commission is suspected, the proper police officer has the authority to enter in the investigation of the same but where the information relates to a non-cognizable offence, he shall not investigate it without the order of the competent Magistrate. Investigation includes all the proceedings under the Cr. P.C. 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 his behalf). Investigation consists of steps, namely (i) proceeding to spot, (ii) ascertainment of the facts and circumstances of the case, (iii) discovery and arrest of the suspected offender, (iv) collection of evidence relating to the commission of the offence and (v) formation of opinion as to whether on the material collected therein to place the accused before a Magistrate for trial and if so to take necessary steps for the same by filing a charge sheet under Section 173, Cr. P.C., vide **H.N. Rishbud v. State of Delhi, AIR 1955 SC 196**. Thereafter, the learned Magistrate has to take cognizance after application of judicial mind and by reasoned order and not in mechanical manner.

12. In the case of **Bhushan Kumar v. State (NCT of Delhi), (2012) 5 SCC 424 : AIR 2012 SC 1747**, the Hon'ble Apex Court was pleased to observe that section 204 of the Code does not mandate the Magistrate to explicitly state the reasons for issuance of summons. It clearly states that if in the opinion of a Magistrate taking cognizance of an offence, there is sufficient ground for proceeding, then the summons may be issued. This section mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in the section that the explicit

narration of the same is mandatory, meaning thereby that it is not a pre-requisite for deciding the validity of the summons issued. In the case of **Basaruddin v. State of U.P., 2011 (1) JIC 335 (All)(LB)**, the Hon'ble Court was pleased to observed as under:—

"From a perusal of the impugned order, it appears that the learned Magistrate on the complaint filed by the complainant has summoned the accused in a mechanical way filling the date in the typed proforma. Learned Magistrate while taking cognizance of the offence on complaint was expected to go through the allegations made in the complaint and to satisfy himself as to which offences were prima facies, being made out against the accused on basis of allegations made in the complaint. It appears that the learned Magistrate did not bother to go through the allegations made in the complaint and ascertain as to what offences were, prima facie, being made out against the accused on the basis of allegations made in the complaint. Apparently, the impugned order passed by the learned Magistrate suffers from non-application of mind while taking cognizance of the offence. The impugned order is not well reasoned order, therefore, the same is liable to be quashed and the petition deserves to be allowed and the matter may be remanded back to the learned Chief Judicial Magistrate, Lakhimpur Kheri with direction to him to go through the allegations made in the complaint and ascertain as to what offences against the accused were prima facie being made out against the accused on the basis of allegations made in the complaint and pass fresh order, thereafter, he will proceed according to law."

13. In the case of **Sunil Bharti Mittal v. Central Bureau of Investigation, (2015) 4 SCC 609 : AIR 2015 SC 923**, the Hon'ble Apex Court was pleased to observe in paragraph no. 47 of the judgment as under:

"47. However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself.."

14. In the case of **Darshan Singh Ram Kishan v. State of Maharashtra, (1971) 2 SCC 654**, the Hon'ble Court was pleased to observe that the process of taking cognizance does not involve any formal action, but it occurs as soon as the Magistrate applies his mind to the allegations and, thereafter, takes judicial notice of the offence. As provided by Section 190 of the Code of Criminal Procedure, a Magistrate may take cognizance of an offence either, (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been held, taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer. Therefore, when a Magistrate takes

cognizance of an offence upon a police report, prima facie he does so of the offence or offences disclosed in such report.

15. In the case of **Ankit v. State of U.P. passed in Application u/s 482 No. 19647 of 2009** decided on 15.10.2009, this Court was pleased to observe in paragraph No. 8 of the judgment as under—

"8. In the beginning, the name of the court, case number, state vs. ……. under section …… P.S……. District……case crime No……./2009 also have been printed and blanks have been filled up by mentioning the case number, name of the accused, section, P.S. District etc. by some employee. Below afore cited printed matter, the following sentence has been mentioned in handwriting

"अभियुक्त अंकित की गिरफ्तारी मा० उच्च न्यायायल द्वारा ***Crl. Writ No. 19559/08*** *अंकित बनाम राज्य में पारित आदेश दिनांक 5.11.08 द्वारा आरोप पत्र प्राप्त होने तक स्थगित थी।"*

Below aforesaid sentence, the seal of the court containing name of Sri. Talevar Singh, the then Judicial Magistrate-III, has been affixed and the learned magistrate has put his short signature (initial) over his name. The manner in which the impugned order has been prepared shows that the learned magistrate did not at all apply his judicial mind at the time of passing this order and after the blanks were filled up by some employee of the court, he has put his initial on the seal of the court. This method of passing judicial order is wholly illegal. If for the shake of argument, it is assumed that the blanks on the printed proforma were filled up in the handwriting of learned magistrate, even then the impugned order would be illegal and invalid, because order of taking cognizance of any other judicial order cannot be passed by filling up blanks on the printed proforma. Although as held by this Court in the case of ***Megh Nath Guptas v. State of U.P., (2008) 62 ACC 826, in which reference has been made to the cases of Deputy Chief Controller Import and Export v. Roshan Lal Agarwal, (2003) 4 ACC 686 (SC), UP Pollution Control Board v. Mohan Meakins, 2000 (2) JIC 159 (SC) : (2000) 3 SCC 745 : AIR 2000 SC 1456 and Kanti Bhadra v. State of West Bengal, 2000 (1) JIC 751 (SC) : (2000) 40 ACC 441 (SC),*** *the Magistrate is not required to pass detailed reasoned order at the time of taking cognizance on the charge sheet, but it does not mean that order of taking cognizance can be passed by filling up the blanks on printed proforma. At the time of passing any judicial order including the order taking cognizance on the charge sheet, the Court is required to apply judicial mind and even the order of taking cognizance cannot be passed in mechanical manner. Therefore, the impugned order is liable to be quashed and the matter has to be sent back to the Court below for passing fresh order on the charge sheet after applying judicial mind."*

16. In the case of **Kavi Ahmad v. State of U.P. passed in Criminal Revision No. 3209 of 2010**, wherein order taking cognizance of offence by the Magistrate under Section 190(1)(b) on printed proforma without applying his judicial mind towards the material collected by the Investigating Officer has been held illegal.

17. In the case of **Abdul Rasheed v. State of U.P., 2010 (3) JIC 761 (All).** The relevant observations and findings recorded in the said case are quoted below:—

"6. Whenever any police report or complaint is filed before the Magistrate, he has to apply his mind to the facts stated

in the report or complaint before taking cognizance. If after applying his mind to the facts of the case, the Magistrate comes to the conclusion that there is sufficient material to proceed with the matter, he may take cognizance. In the present case, the summoning order has been passed by affixing a ready made seal of the summoning order on a plain paper and the learned Chief Judicial Magistrate had merely entered the next date fixed in the case in the blank portion of the ready made order. Apparently the learned Magistrate had not applied his mind to the facts of the case before passing the order dated 20.12.2018, therefore, the impugned order cannot be upheld.

7. Judicial orders cannot be allowed to be passed in a mechanical manner either by filling in blank on a printed proforma or by affixing a ready made seal etc. of the order on a plain paper. Such tendency must be deprecated and cannot be allowed to perpetuate. This reflects not only lack of application of mind to the facts of the case but is also against the settled judicial norms. Therefore, this practice must be stopped forthwith."

18. In view of the above, I am of the considered opinion that the conduct of the judicial officers concerned in passing orders on printed proforma by filling up the blanks without application of judicial mind is objectionable and deserves to be deprecated. The summoning of an accused in a criminal case is a serious matter and the order must reflect that Magistrate had applied his mind to the facts as well as law applicable thereto, whereas the impugned summoning order was passed in mechanical manner without application of judicial mind and without satisfying himself as to which offence were prima-facie being made out against the applicants on the basis of the allegations made by the complainant. the impugned cognizance order passed by the learned Magistrate is against the settled judicial norms.

19. The order dated 26.08.2016 cognizance taken by the learned Magistrate on printed proforma without assigning any reason is abuse of process of law and the same was without application of mind and was in a routine manner.

20. In light of the judgments referred to above, it is explicitly clear that the order dated 26.08.2016 passed by the ACJM-IV, Court No. 28, Lucknow in Case No. 2852 of 2016 (State Vs. Anand Kumar Pandey) is cryptic and does not stand the test of the law laid down by the Hon'ble Apex Court. Consequently, the cognizance/summoning order dated 26.08.2016 **cannot be** legally sustained, as the Magistrate failed to exercise the jurisdiction vested in him resulting in miscarriage of justice.

21. Accordingly, the present Criminal Misc. Application u/s 482 Cr. P.C. succeeds and is allowed. The impugned summoning order dated 26.08.2016 passed by the ACJM-IV, Court No.28, Lucknow in Case No. 2852 of 2016 (State Vs. Anand Kumar Pandey) arising out of chargesheet no. 220/2015 dated 28.12.2015 under Sections 406/420/467/468 I.P.C. arising out of Case Crime No. 497 of 2014 dated 14.10.2014 under Sections 406/420/467/468 I.P.C. P.S Chowk, District Lucknow is hereby quashed.

22. The matter is remitted back to Trial Court directing him to decide afresh the issue for taking cognizance and summoning the applicants and pass appropriate orders in accordance with law keeping in view the observations made by

this Court as well as the direction contained in the judgments referred to above.

23. Before parting with, I appreciate the efforts, research and drafting work prepared by Sri Piyush Tripathi, Research Associate attached with me, in finding out the relevant case laws applicable in the present case.

(2024) 2 ILRA 1162
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.02.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 4695 of 2023

Suresh Kumar Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Janardan Singh, Madan Gopal Tripathi

Counsel for the Opp. Parties:
G.A., Vishva Nath Pratap Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Section 363, 366 & 376 - Trial court has power to summon persons under Section 319 CrPC if necessary, during trial - Exercise of power under Section 319 CrPC must be sparing and on higher pedestal - Person summoned under Section 319 CrPC cannot avail remedy of discharge under Section 227 CrPC.(Para -13)

Applicant seeks to set aside order passed by trial court - not named in FIR or charge-sheet - prosecutrix had levelled specific allegation against petitioner while recording her statement under Section 164 Cr.P.C - summoned under Section 319 CrPC - Applicant filed discharge application - rejected by trial court. (Para - 2 to 4,14)

HELD: - Court upheld impugned order, rejecting discharge application of applicant who was summoned under Section 319 CrPC, finding no infirmity or illegality in the trial court's decision. Non-bailable warrant issued against applicant kept in abeyance. Applicant granted liberty to appear before trial court to participate in proceedings. Trial court to expedite trial proceedings. (Para - 14 to 17)

Application u/s 482 Cr.P.C. disposed off (admission stage). (E-7)

List of Cases cited:

1. Jogender Yadav Vs St. of Bihar & ors., 2015 ALL-MR (Cri).3707 (SC)

2. Hardeep Singh Vs St. of Punj. & ors., (2014) 3 SCC 92

3. Bhuboni Sahu Vs King, AIR 1949 PC: (1949) Cri LJ 872

4. Yashodhan Singh & Ors. Vs St. of U.P. & anr., (2023) 9 SCC 108

5. Sukhpal Singh Khaira Vs St. of Punj., (2023) 1 SCC 289: (2023) 1 SCC (Cri) 454

6. Brijedra Singh Vs St. of Raj., (2017) 7 SCC 706: (2017) 4 SCC (Cri) 144

7. Dharam Pal Vs St. of Har., (2014) 3 SCC 306: (2014) 2 SCC (Cri) 159

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Mr. Madan Gopal Tripathi, learned counsel for the applicant, Mr. Anirudh Kumar Singh, learned A.G.A.-I appearing for the State and Mr. Vishva Nath Pratap Singh, learned counsel for the opposite party no.2.

2. The instant application under Section 482 Cr.P.C has been filed by the applicant to set aside the impugned order dated 12.04.2023 passed by Additional Session Judge, (P.O.C.S.O.-I), Ambedkar Nagar in Session Trial No.23 of 2020 under

Section 363, 366 & 376 I.P.C. at Police Station- Ahirauli, District- Ambedkar Nagar.

3. Learned counsel for the applicant has contended that despite the fact that the applicant was not named in the F.I.R. nor in the charge-sheet though on the application of the complainant filed under Section 319 Cr.P.C. (Annexure No.19), the learned trial Court summoned the applicant vide order dated 20.08.2015.

4. Learned counsel for the applicant has informed the Court that challenging the order dated 20.08.2015, the applicant has filed a petition before this Court i.e. U/S 482/378/407 No.2023 of 2019 (Suresh Singh Vs. State of U.P. and Another) and this Court vide order dated 14.03.2019 granted liberty to the applicant therein to file a discharge application before the Court concerned. In compliance of the aforesaid order dated 14.03.2019, the applicant filed discharge application before the learned trial Court and that application was rejected by the learned trial Court vide impugned order dated 12.04.2023.

5. Learned counsel for the applicant further submitted that in the meantime, the applicant appeared before the learned trial Court and he has been enlarged on bail.

6. Learned counsel for the applicant has contended that by means of impugned order dated 12.04.2023, the learned trial Court has observed that in view of the dictum of the Hon'ble Apex Court in re: **Jogender Yadav Vs. State of Bihar & Ors., reported in 2015 ALL-MR (Cri).3707 (SC)**, the application for discharge under Section 227 Cr.P.C. is not maintainable, therefore, the same has been rejected.

7. Learned counsel for the applicant has referred the dictum of the Hon'ble Apex Court in re: **Hardeep Singh Vs. State of Punjab & Others, (2014) 3 SCC 92** to submit that the power to summon under Section 319 Cr.P.C should be invoked by the trial Court sparingly in as much as exercise of power under Section 319 Cr.P.C is placed on higher pedestal. He has further submitted that if there being no cogent material/evidence is available on record against the person, he/she should not be summoned under Section 319 Cr.P.C.

8. Learned counsel for the applicant has also placed reliance upon the judgment and order dated 16.1.2019 passed by the Division Bench of this Court in Misc. Bench No.28660 of 2018 (Haider Ali Vs. State of U.P. and other), whereby, the Division Bench of this Court has followed the various dictum of the Hon'ble Apex Court as well as of the Privy Council. The Division Bench has referred the judgement in re: **Bhuboni Sahu Vs. King, AIR 1949 PC: (1949) Cri LJ 872**, wherein, the Privy Council has held that the statement made under Section 164 Cr.P.C. can never be used as substantive evidence of the fact stated but it can be used to support or challenge evidence given in Court by the person who made his statement.

9. Therefore, in view of the aforesaid judgement, the learned counsel for the applicant has stated that the application under Section 319 Cr.P.C was allowed only for the reasons that during the course of investigation, the prosecutrix had recorded her statement under Section 164 Cr.P.C. wherein she had levelled allegations against the present applicant. So, on the basis of such statement of the prosecutrix, the application under Section 319 Cr.P.C.

should not have been allowed at that stage of the trial.

10. Per contra, Mr. Anirudh Kumar Singh, learned A.G.A.-I has submitted that the law relating to Section 319 Cr.P.C. has been developed by the Hon'ble Apex Court firstly, in **Hardeep Singh** *(supra)* and later on in re: **Yashodhan Singh and Others Vs. State of U.P. and Another, (2023) 9 SCC 108**. In the judgement of **Yashodhan Singh** (supra), the details of **Hardeep Singh** (supra), **Sukhpal Singh Khaira Vs. State of Punjab, (2023) 1 SCC 289: (2023) 1 SCC (Cri) 454, Brijedra Singh Vs. State of Rajasthan, (2017) 7 SCC 706 : (2017) 4 SCC (Cri) 144 and Dharam Pal Vs. State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159** have been followed.

11. Mr. Anirudh Kumar Singh, learned A.G.A.-I has further submitted that he is unable to comprehend as to why the Investigating Officer has not filed charge-sheet against the present applicant when there was the statement of the prosecutrix recorded under Section 164 Cr.P.C. wherein, she has levelled specific allegations against the present applicant. He has further submitted that on the basis of statement of the prosecutrix recorded under Section 164 Cr.P.C, the present applicant could have been summoned under Section 319 Cr.P.C.

12. Mr. Anirudh Kumar Singh, learned A.G.A.-I referring to the aforesaid judgement has stated with vehemence that this has been the consistent view of the Hon'ble Apex Court that the persons who are not named in the F.I.R. nor named in the charge-sheet or who have been discharged before framing of the charges may be summoned under Section 319 Cr.P.C.

13. Having considered the material placed on record and having regard to the dictum of the Hon'ble Apex Court (supra), I am of the considered opinion that if the learned trial Court finds it necessary during the course of trial that any person who was not named in the F.I.R. or was also not named in the charge-sheet but there are some material/evidence to suggest that he/she is also responsible in committing such offence, he/she may be summoned under Section 319 Cr.P.C. It is trite that there is no finality attached to Section 319 Cr.P.C. Further, it is also trite that exercise of power under Section 319 Cr.P.C. must be placed on higher pedestal. The accused summoned under Section 319 Cr.P.C. are entitled to invoke the remedy under the law against an illegal and improper exercise of power under Section 319 Cr.P.C but that cannot have the effect of the order being undone by seeking a discharge under Section 227 Cr.P.C., therefore, the Hon'ble Apex Court in re: **Jogendra Yadav** (supra) has held that a person, who is summoned under Section 319 Cr.P.C. cannot avail the remedy of discharge under Section 227 Cr.P.C.

14. In the present case, the petitioner has been summoned under Section 319 Cr.P.C. for the reason that the prosecutrix had levelled specific allegation against the petitioner while recording her statement under Section 164 Cr.P.C. during course of investigation, hence, I do not find any infirmity or illegality in the impugned order dated 12.04.2023 whereby the discharge application of the petitioner has been rejected in view of dictum of Apex Court in re: **Jogendra Yadav** (supra).

15. At this stage, learned counsel for applicant has confined his prayer to the effect that the non-bailable warrant which has been issued against the applicant vide order dated 10.01.2024 may be kept in abeyance and he shall participate in the proceedings. He has also submitted that the applicant has already been enlarged on bail and due to inadvertence and compelling circumstances, he could not appear before the Court concerned, therefore, the Court has issued non-bailable warrant dated 10.01.2024.

16. Considering the aforesaid submissions advanced by learned counsel for the parties and without interfering the impugned order dated 12.04.2023, I hereby ***disposed of*** this instant application filed under Section 482 Cr.P.C., finally, at the admission stage giving liberty to the applicant/petitioner to appear before the Court concerned on the date fixed i.e. 08.02.2024 to participate in the proceedings and he shall further participate in the proceedings and shall not take unnecessary adjournments.

17. If the applicant appears before the learned trial Court on 08.02.2024 i.e. the date fixed, the non-bailable warrant dated 10.01.2024 shall not be executed against him. In case, the applicant does not appear before the Court concerned on the date fixed, the learned trial Court would be at liberty to take steps against him strictly in accordance with law.

18. It is needless to say that the learned trial Court shall expedite the trial proceedings strictly in accordance with law by affording opportunity of hearing to all the parties concerned.

(2024) 2 ILRA 1165
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.02.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application u/s 482 No. 6922 of 2022

Harish Gulla & Anr. ...Applicants
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicants:
Dr. Pooja Singh, Abhinav Trivedi, Lalta Prasad Misra

Counsel for the Opp. Parties:
G.A., Pranjal Krishna

(A) Criminal Law - The Code of criminal procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Sections 406, 419, 420, 506, 467, 468, 471 - Mens Rea is an essential ingredient for composition of offence and all civil wrongs cannot be termed as an offence - Facts of each and every case are to be examined while reaching to the conclusion that whether, a wrong act comes under the purview of offence? (Para -35)

Applicants entered an MoU with opp. no. 2 - for development of Hi-Tech Township City Project - Dispute arose regarding non-transfer of land/plots - FIR lodged under various IPC sections - Applicants arrested, released on bail, and entered into settlement agreement - UPRERA imposed ban on transfer of M/s Ansal API properties - Court examined settlement agreements, MoU, and UPRERA notices.**(Para - 32 ,33)**

HELD: - Dispute is commercial in nature, and mens rea (guilty mind) is missing. Applicants are willing to transfer the remaining properties. Allowing further criminal proceeding would amount to harassment of applicants and therefore the criminal proceedings against the

applicants are abuse of process of law. Criminal proceedings quashed. (Para-34 to 39)

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

List of Cases cited:

1. St. of Haryana Vs Bhajan Lal, (1992) SUPP 1 SCC 335

2. Gold Quest International Pvt. Ltd. Vs St. of T.N., (2014) 15 SCC 235

3. Parbatbahi Ahir @ Parbhatbhai Bhimsinghbhai Karmur & ors. Vs St. of Guj., (2017) 9 SCC 641

4. Mitesh Kumar Jha Vs St. of Karn. & ors., 2021 SCC OnLine SC 976

5.Gulam Mustafa Vs St. of Karn. & Anr., 2023 SCC OnLine SC 603

6. Gian Singh Vs St. of Punj., (2012) 10 SCC 303,

7. Inder Mohan Goswami & anr. Vs St. of Uttarakhand, (2007)12 SCC 1 and

8. Syed Yaseer Ibrahim Vs St. of U.P., (2022) SCC OnLine SC 271

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

1). Heard Sri L.P. Mishra assisted by Sri Abhinav Narayan Trivedi, learned counsel for the applicants, Sri Pranjal Krishna for the opposite party no. 2 and Sri Aniruddh Kumar Singh, learned AGA-I for the state.

2). By means of the instant application, prayer has been made for quashing the impugned charge sheet dated 05.09.2019 and 10.10.2019, in Case Crime No. 162 of 2018, under Sections 406, 419, 420, 506, 467, 468, 471 of IPC at Police Station- Vibhuti Khand, District Lucknow and further the summoning order dated 06.09.2019 and 18.11.2019 has also been assailed.

3). Factual matrix of the case is that the UP Government has formulated Hi-Tech Township Policy, 2003 for planned development in the State of UP on 23.08.2003 and after promulgation of the policy, M/s Ansal Properties and Infrastructure Ltd., being eligible for undertaking township, applied for and was granted Hi-Tech Township licence on 26.11.2005 and it took shape in the name and style of 'Sushant Golf City Lucknow'. The Hi-Tech Township Policy, 2003 was amended time to time and other Hi-Tech Township Policy, 2007 was promulgated on 7th September 2007 while superseding the Hi-Tech Township Policy, 2003 and at the same time it was provided that the existing licences, granted earlier vide Policy 2003, shall remain continue. On 27 January 2010, a Government Order was issued whereby the Hi-Tech Township Policies, 2003 and 2007 were brought to an end, though it was provided that Hi-Tech Township Projects shall continue till it's conclusion and this was informed to the Chairman of various development authorities throughout the State of UP vide Government Order dated 7.04.2021. Having at a glance of the government orders dated 23.08.2003, 17.09.2007 and 7.04.2021, it is apparent that the Government of UP had to facilitate the availability of land to the developers by way of acquisition and payment of compensation and the government land like pathway, land of reserve category, Gaon Sabha land, chakroad, canal, etc. was to be exchanged in favour of the developers and thus, it was incumbent upon the State Government to make procurement of land which was a continuous process and at the same time, it was also provided that State shall take care so as to ensure that no

harassment could be caused to the developer and if any complaint is made against the developer, the action may be taken only after approval of High Power Committee, under the chairmanship of the chief secretary of State of UP.

4). Once the Hi-Tech Township Project in the name of Sushant Golf City, Lucknow was allotted to M/s Ansal Properties and Infrastructures Ltd., as per the eligibility criterion, the opposite party no. 2 and his wife namely, Mrs Sunita Agarwal expressed their desire for booking several plots, flats and villas etc. both in their individual names and also on behalf of their respective companies, for which 11 MoUs were executed in between 2011 to 2012, vide the same, the plots etc. were sought to be booked with the condition of timely payment, as per schedule.

5). Procurement of land bank was a continuous process, therefore, 11 MoUs could not be performed, within time, in favour of the complainant, his wife or any of the company represented by them. Further there is one hurdle of clause (u) which says that the 'second party cannot sell/transfer his right in the FSI, either in full or part, to any third-party without the prior written consent of the first party, which the first party at its sole discretion may allow or deny such transfer, and in case the first party allows such transfer then it will charge the administrative charges for the same. The MoU was to be followed by booking of respective flats/villas/plots etc. and resultantly, the allotment letters were issued and followed by execution of sale deeds and due to all these, certain dispute arose between M/s Ansal Properties and Infrastrucure Ltd. and opposite party no. 2 and his wife and therefore, the opposite party no. 2 instituted an application under Section 156(3) of the Criminal Procedural Code (hereinafter referred as 'Code') and thereafter, an FIR was lodged bearing no. 162 of 2018. As per the content of First Information Report, the complainant, i.e., the opposite party no. 2 met with Director of the company, namely, M/s Ansal API and on assurance given by them regarding the return on the investment, he started investing in the project of Sushant Golf City, Lucknow but various lands and plots, which were initially allotted to him, were not provided and thus, it has been alleged that cheat and fraud has been committed by the applicants.

6.) After the aforesaid FIR, the applicants were arrested by investigating agencies and charge sheet was filed against them and the Chief Judicial Magistrate passed the summoning order, vide the same, the applicants were summoned.

7). In the meantime, a development took place, where the complainant and the petitioners entered into a settlement deed dated 28.12.2019, whereby all the dispute relating to investments and properties amongst each other, were settled amicably. The applicants were granted bail vide orders dated 07.12.2019 and 06.02.2020 and while granting the bail, the court has also taken note of the compromise entered into between the parties.

8). Once the matter was amicably settled, out of the Court, on 28.12.2019, a petition under Section 482 was filed bearing no.1686 of 2020 (Harish Gulla and others Vs. State of U.P. and another) for quashing of the impugned charge-sheet as well as the summoning orders but the same was withdrawn by the applicants with liberty to file afresh vide the order dated 27.04.2022. Thereafter, various

negotiations by way of communication were done and the parties came to understanding and recorded the same in the addendum dated 14.07.2022 to the settlement deed dated 28.12.2019 which shows that opposite party no. 2 does not want to prosecute anyone in Case Crime No. 162 of 2018 and all the disputes were resolved, whereas the compliance of the terms and condition in addendum dated 14.07.2022, became delayed and therefore, the opposite party no. 2 is still pressing the prosecution against the applicants though the case of the applicant is that they are still ready to perform the terms and conditions as per the addendum dated 14.07.2022, but due to certain steps to resolve the problem, on the part of the State Government, is in the way of the performance of the addendum/settlement and therefore, the same is still waiting for its compliance, and thus, there is no mens rea of the applicants for committing any cheat, fraud or any kind of fabrication in the documents as is alleged in the First Information Report.

9). Fact remains that showing the bonafide and the honest performance of the addendum of settlement dated 14.07.2022, out of eight properties, which are in dispute, four were transferred through registered sale deed, i.e., dated 19th July 2022, 16th July 2022, 18th July 2022 and 27th July 2023. So far as the fifth plot is concerned, allotment letter is issued and due to non-availability of the opposite party no. 2, the registered sale deed could not be executed, and so far as the other three disputed properties are concerned, the allotment letters and the transfer of title are issued, which are waiting for it's compliance vide executing registered sale deed.

10). Now vide order dated 19.06.2023, Uttar Pradesh Real Estate Regulatory Authority (hereinafter referred as 'UPRERA') issued the notice while directing the M/s Ansal Properties not to transfer any property unless a particular amount is deposited to UPRERA and therefore, the further compliance is said to be stopped as per the order of UPRERA.

11). Counsel appearing for applicant contended that in fact by way of a MoU between the M/s Ansal Properties and Infrastructure Ltd. and the opposite party no. 2 an amount of Rs. ₹42,56,97,041 was paid till 2014, which is an admitted fact, but thereafter the terms and condition as per the MoUs between the parties could not be honoured timely because of the reasons, which are not in the approach of the applicants and thereafter the First Information Report was lodged by the opposite party no. 2, under misconception that the present applicants have committed cheat and fraud with him. He submits that once the First Information Report was lodged, the applicants tried to make understand the opposite party no. 2 that since the Hi-Tech Township area, wherein the government land, canals, chakroads etc. could not be exchanged as per the policy of 2003 to 2010, which is the part of the compliance of the State Government and as soon as the same would be settled, the MoU entered into between the parties, shall be followed and therefore, the parties entered into between the agreement on 28.12.2019 and further an addendum dated 14.07.2022 to the settlement deed dated 28.12.2019 was also signed by the parties wherein the eight properties were categorized, in dispute, which are mentioned in paragraph 30 of the supplementary affidavit dated 18.09.2023 filed on behalf of the applicants. He added that properties are marked as A, B, C. D, E, F, G and H, wherein the property number A, B, C and D is transferred to the opposite

party no. 2 vide registered sale deeds dated 16 July 2022, 18 July 2022, 19 July 2022 and 27 April 2023, respectively and the fifth property that is 'E', allotment letter is issued, but the registered sale deed could not be executed due to non-availability of opposite party no. 2 and so far as property number F to H are concerned, the allotment number and transfer of title were issued in favour of the opposite party no. 2, but unfortunately, the UPRERA has issued a notice in pursuant to it's meeting dated 19.06.2023 and therefore, the rest of the properties are waiting for its transfer and thus, there is no fault on the part of the applicants.

12). Adding his argument, he submits that this Hon'ble Court vide order dated 29.03.2023, directed the parties to appear before the Senior Registrar of this Court on 12.04.2023 and the Senior Registrar was directed to verify the compromise in presence and participation of both the parties, but due to non-appearance of opposite party no. 2, the verification could not be done. It shows that the opposite party no. 2 himself is not serious about the compliance of the compromise and he intends to harass the applicants by way of pressing the prosecution of Case Crime No. 162 of 2018.

13). Further submission is that in fact, the main issue is regarding non-execution of the sale deed as well as not handing over the possession of certain properties to the opposite party no. 2, but there is express legal bar by virtue of notice issued in a meeting dated 19.06.2023 of UPRERA, on the properties which are mentioned in the addendum of settlement agreement and therefore, there are efficacious remedy to the opposite party no. 2 to approach UPRERA, Civil Court or any other forum of a civil competence. He also added that properties which are under dispute between the parties mentioned in paragraph 30 of the supplementary affidavit, are the admitted fact between the parties as no rebuttal has been filed by the opposite party no. 2.

14). Next submission of the counsel for the applicants is that mens rea is absent in the instant matter as there is no intention of the company or applicants to commit any fraud or misrepresentation with the opposite party no. 2 and the applicants who were the responsible persons, employed in the management of the company, never committed any offence, as is alleged in the First Information Report. He submits that the ingredient of offences charged against the applicants do not attract as the matter is purely civil in nature, which is being given the colour of criminality and it is the best example of arm twisting by the opposite party no. 2.

15). Adding his arguments he submits that the applicants are innocent and law abiding citizens and have not committed any offence and the story which is narrated in the First Information Report, is false and concocted.

16). Concluding his argument, he has submitted that in fact, the circumstances which are not under the control of the applicants, are the reasons of the dispute, as there was a delay on the part of the State Government to hand over the property in question to the applicants and there was certain dispute regarding the government land including the chakroads, canals etc. which are still to be exchanged as per the terms and conditions given in the Hi-Tech Township Policy promulgated time to time. He submits that from the first day, the

applicants are ready to transfer the plots, land etc. as per the MoU to the opposite party no. 2 and it is apparent from the paragraph 30 of the supplementary affidavit that applicants have transferred four properties vide the registered sale deed in favour of the opposite party no. 2, out of eight disputed properties, for which the transfer of title and settlement has also been issued and the applicants undertake with full responsibility that as soon the UPRERA will lift the ban, the rest of the properties immediately shall be transferred to the opposite party no. 2. Further the transfer of the properties which was done in favour of the opposite party no. 2, are not disputed and therefore, looking to the whole scenario, no offence is committed as is alleged in the First Information Report.

17). In support of his contention, counsel for the applicants has placed reliance on a judgement of state of State of Haryana Vs. Bhajan Lal reported in (1992) SUPP 1 SCC 335 and has referred paragraph 6 of the guidelines issued by the Apex Court.

Paragraph 6 of the guidelines of the judgement is reproduced hereinunder:-

"(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/of where there is a specific provision in the Code or the conerned Act, providing efficacious redress fro the grievance of the aggrieved party."

18). Referring the aforesaid, he submits that legal bar arose vide the notice issued by UPRERA, for putting ban on the transfer of the property in question and therefore the efficacious remedy for redressal of the grievance of the parties is to approach the proper forum.

19). He again referred the case reported in (2014) 15 SCC 235, Gold Quest International Private Limited Vs. State of Tamil Nadu and has referred paragraph 8 of the aforesaid judgement.

Paragraph 8 of the judgement is reproduced hereinunder:-

"8. In view of the principle laid down by this Court in the aforesaid cases, we are of the view in the disputes which are substantially matrimonial in nature, or the civil property disputes with criminal facets, if the parties have entered into settlement, and it has become clear that there are no chances of conviction, there is no illegality in quashing the proceedings under Section 482 Cr.P.C. read with Article 226 of the Constitution. However, the same would not apply where the nature of offence is very serious like rape, murder, robbery, dacoity, cases under Prevention of Corruption Act, cases under Narcotic Drugs and Psychotropic Substances Act and other similar kind of offences in which punishment of life imprisonment or death can be awarded. After considering the facts and circumstances of the present case, we are of the view that learned Single Judge did not commit any error of law in quashing the FIR after not only the complainant and the appellant settled their money dispute but also the other alleged sufferers entered into an agreement with the appellant, and as such, they too settled their claims."

20). Referring the aforesaid, he submits that it has been held that 'a dispute which are substantially matrimonial in

nature or civil property dispute with criminal facet, if the parties have entered into settlement and it has become clear that there are no chances of conviction, there is no illegality in quashing the proceeding under Section 482 of CrPC.' He submits that there is civil property dispute with some criminal angle wherein the parties entered into a settlement in which the first party is ready to comply, subject to condition of lifting the ban of transfer of the property by UPRERA, and therefore, the criminal proceeding is proper.

21). Placing reliance on a judgement reported in (2017) 9 SCC 641, Parbatbahi Ahir @ Parbhatbhai Bhimsinghbhai Karmur and others Vs. State of Gujarat, he referred paragraph 16.8 of the above said judgement.

Paragraph 16.8 of the judgement is quoted hereinunder:-

"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 inherein the High Court"

22). Again, referred the judgement reported in 2021 SCC OnLine SC 976, Mitesh Kumar Jha Vs. State of Karnataka and others and a judgement reported in 2023 SCC OnLine SC 603, Gulam Mustafa Vs. State of Karnataka and Another and has paced reliance on paragraph 47 and 36 respectively, which are reproduce hereinunder:-

"47. Moreover, this Court has at innumerable instances expressed its disapproval for imparting criminal color to a civil dispute, made merely to take advantage of a relatively quick relief granted in a criminal case in contrast to a civil dispute. Such an exercise is nothing but an abouse of the process of law which must be discouraged in its entirety."

"36. What is evincible from the extant case-law is that this Court has been consistent in interfering in such matters where purely civil disputes, more often than not, relating to land and/or money are given the colour of criminality, only for the purposes of exerting extra-judicial pressure on the party concerned, which, we reiterate, is nothing but abuse of the process of the court. In the present case, there is a huge, and quite frankly, unexplained delay of over 60 years in initiating dispute with regard to the ownership of the land in question, and the criminal case has been lodged only after failure to obtain relief in the civil suits, coupled with denial of relief in the interim therein to the respondent no. 2/her family members. It is evident that resort was now being had to criminal proceedings which, in the considered opinion of this Court, is with ulterior motives, for oblique reasons and is a clear case of vengeance."

23). Quoting the aforesaid judgement, he submits that the case of the present applicants are squarely covered with the ratio of the judgement and therefore, submission is that the criminal proceeding against the applicants may quashed.

24). On the other hand, learned counsel appearing for the opposite party no. 2 has vehemently opposed the contentions aforesaid and submits that the applicants have committed cheat, and fraud as well as criminal intimidation and therefore, the First Information Report was lodged as Case Crime No. 162 of 2018 at Police

Station- PGI, Lucknow and they were taken into custody. So far as the present case is concerned, when the applicants were in custody, they entered into a settlement agreement on 28.12.2019 and the Hon'ble Court enlarged the applicants on bail with an implied condition that they will honour their obligation under the settlement agreement. But once the applicants were released, they deliberately violated the settlement agreement and thereafter the opposite party no. 2 moved cancellation of bail and thereafter they approached the Apex Court, wherein the notices were issued to the applicants. Again the applicants approached the opposite party no. 2 and the addendum to the settlement agreement was entered into between the parties on 14.07.2022, whereafter the applicants executed three properties in favour of the opposite party no. 2 and under the impression that the applicants are intended to honour the addendum settlement, withdrew the Special Leave to Appeal (Crl) No. 1621 of 2022 on 30.08.2022 but the applicants are not with the clean hands and the good intentions and therefore, as soon as the above said Special Leave to Appeal (Crl) was withdrawn, they started dishonoring the addendum to the settlement thereby not transfering the other properties. The UPRERA has imposed the ban on transfer of the properties, for which, the applicants are directly responsible.

25). Pointing out about the transferred properties, he submits that the Plot no. H/05, allotted to the opposite party no. 2 by the above mentioned addendum, has deliberately been allotted as Khasra no. 76, is a disputed land and case for the same is subjudice before the District Magistrate Lucknow, who affixed the board on the side of the plot, mentioning the details of the dispute, and with the instruction that no sale/purchase can be made with respect to the said plot. He further submits that the plots which are proposed to be given to the opposite party no. 2 exists on the land of canal, which was to be exchanged by the M/s Ansal company, while paying certain amount to the State government, but in case of non-payment on the part of M/s Ansal, the said land is also disputed and thus the land which has already been transferred through registered sale deed or proposed to be transferred are the disputed lands, either in between the M/s Ansal Company and the state or with the private parties, which clearly shows the intention of the applicants.

26). Referring the judgement of the coordinate bench of this Court he pointed out that in Writ A No. 7254 of 2022, Director CBI was directed to constitute an SIT and SIT will submit its progress report on or before 24.05.2023, before the High Court and the final report is required to be submitted on 22.08.2023.

27). Concluding his arguments, he submits that the law is very clear that fraud or cheat shall be looked into on the first date of the offence alleged to be committed and in the instant matter, fraud has been committed by applicants and the First Information Report was lodged, and after thorough investigation, it was found that applicants have committed offence. Therefore, at the later stage when the parties entered into agreement, though failed later on, it cannot be said that no offence was committed by the applicants and therefore, submission is that there is no force in the contention of the learned counsel for the applicants and thus the instant application is liable to be dismissed.

28). Per contra the learned AGA appearing for the State has also vehemently

opposed the contention of the learned counsel for the applicants, while supporting the version of the counsel for the opposite party no. 2 and submitted that once the First Information Report was lodged, it was thoroughly investigated by the Investigating Officer and it was found that the applicants are involved in committing offence and therefore Trial Court after application of mind, took cognizance of the offence and issued summons and therefore, there is no ambiguity or unlawfulness in the charge-sheet filed by the Investigating Officer or the summoning order passed by the trial Court.

29). Having heard the counsels for the parties and after perusal of the material placed on record, it transpires that the State Government promulgated Hi-Tech Township Policy in the year 2003, wherein the company M/s Ansal API succeeded to get the Hi-Tech Township City Project, which is named as Sushant Golf City Lucknow. This policy was replaced by the another policy of the year 2007 and 2010, but as per the version of the applicants, the property which was to be handed over to the company, namely, M/s Ansal, could not succeed, due to certain reasons and there is still dispute regarding the exchange of the lands pertaining to chak marg, canal and some other state land etc.

30). It so happened that the opposite party no. 2 who also represents a developer firm entered into an MoU with the company, namely M/s Ansal to which the present applicants are leading as the high administrative authority and thereafter, certain amount was also deposited with the company which is an admitted fact. But as per the allegations of the complainant, the MoU was not honoured by the applicants and their company, as the plots/apartments/lands which were to be transferred, could not be performed and therefore, wife of the opposite party no. 2 lodged the First Information Report against the applicants and the opposite party no. 2 also moved an application under Section 156(3) of the Code wherein on the direction of the Magistrate the First Information Report was lodged as case crime number 162 of 2018, whereafter investigation was done and the charge-sheet was filed under Sections 406, 419, 420, 506, 467, 468, 471 of IPC at Police Station- Vibhuti Khand, District Lucknow and the Magistrate took cognizance and issued summons, which are under challenge by way of the instant application.

31). When this Court examined the contentions of the learned counsel for the parties as well as the law points, it emerges that the dispute between the parties is with respect to non-transfer of certain land/plots in lieu of the amount deposited before the company, namely M/s Ansal as well as the non-compliance of the terms and condition existed in the MoU between the parties. After the First Information Report was lodged, the applicants were arrested and thereafter, a settlement was done in between the parties by way of reducing the compromise deed, in writing, on 28.12.2019, whereafter the applicants were released on bail and the terms and conditions are mentioned in the bail orders regarding the amicable settlement between the parties, thereafter, in case of non-performance of the terms and conditions of the agreement dated 28.12.2019, opposite party no. 2 moved cancellation of bail and later on, approached to the Apex Court, wherein, notice was issued and thereafter, the addendum dated 14.07.2022 to settlement agreement was entered into between the parties and the admitted

dispute of eight properties is mentioned, disclosure of the same given in paragraph 30 of the supplementary affidavit filed by the counsel for the applicants, whereafter, out of eight properties, four properties were transferred vide registered sale deed in favour of the opposite party no. 2 and his company and the rest of the four properties are also proposed to be transferred, though in the meantime i.e, on 19.06.2023, UPRERA in its meeting, took decision to make a ban over the transfer of the property of the M/s Ansal Company which is an admitted fact and the same is in the knowledge of the opposite party no. 2, as mentioned in paragraph 8 of the short counter affidavit filed on his behalf. After the aforesaid ban was imposed, the property which was proposed to be transferred, for which the allotment letters and the transfer of title was also issued, could not be executed.

32). From perusal of the addendum settlement agreement as well as the notice issued by the UPRERA, indicates that the dispute is relating to the plots/houses between the parties, for which, time and again, they agreed to amicably settle the issue and the settlement agreement was also honoured to some extent, uptil the UPRERA imposed the ban. It has also been admitted and undertaken by the applicants that they are still ready to transfer the rest of the property in favour of the opposite party no. 2 or his company and they are trying to get the ban lifted by the UPRERA.

33). This court has also noticed the fact that it is not the case where the property in question was on the first day of MoU, was in the possession or ownership of the company, namely M/s Ansal and there was also certain terms and conditions in the policy regarding handing over the land to the M/s Ansal Company, subject to exchange of certain lands, canals, chak-marg, etc. and after it was decided that the M/s Ansal succeeded to have the Hi-Tech Township in the name of Sushant Golf City Lucknow, the dispute with respect to exchange of public utility lands were creeping in, throughout years and an MoU was signed in between the M/s Ansal Company as well as the opposite party no. 2 and its company, then certainly the same would have been with implied condition or circumstances, which would arise subsequently and more particularly, where the intent of committing cheat and fraud is under question. It is not understandable that how a company or person can imagine that certain dispute would arose in future, which will create a hurdle for the subsequent performance of an MoU. Might be that there is some recklessness or letharginess on the part of the M/s Ansal Company and its authority to get decide the matter, but ultimately that cannot be termed as an offence, particularly with respect to execution of the MoU between the applicants and the opposite party no. 2.

34). Regarding contention of counsel for the opposite party that fraud or cheat shall be looked into on the first date of occurance of the offence, it is correct but so far as the case in hand is concerned, it is very clear that on the date of MoU between the complaint and the applicants and company, no offence was committed alleged on the date of occurance of the offence as the issue of non performance of the MoU came later, when certain issues arose between State and the applicants company and as result, the MoU could not be honoured and the bonafide of the company and applicants is apparent that they tried to resolve the issue by entering into further settlement and addendum

settlement and those were honoured to the extent of the decision taken by UPRERA, thus this Court is of considred opinion that the dispute is commercial between the parties. So far as any other investigation/enquiry said to be completed against the applicants, that can not be intermingled with the instant matter and that will be investigated and examined, separately.

35). It's trite law that mens rea is an essential ingredient for composition of offence and all civil wrongs can not be termed as an offence. The facts of each and every case are to be examined while reaching to the conclusion that whether, a wrong act comes under the purview of offence? So far as the present matter is concerned, while examining the facts of the case, it emerges that mens rea is missing.

36). This court is also not unmindful to the ratio of the judgement and orders rendered in cases, namely *State of Haryana Vs. Bhajan Lal (1992) SUPP 1 SCC 335, Gian Singh Vs. State of Punjab (2012) 10 SCC 303, Gold Quest International Private Limited Vs. State of Tamil Nadu (2014) 15 SCC 235, Parbatbahi Aahir @ Parbhatbhai Bhimsinghbhai Karmur and others Vs. State of Gujrat (2017) 9 SCC 641, Mitesh Kumar Jha Vs. State of Karnataka; (2021) SCC OnLine SCC 976, Gulam Mustafa Vs. State of Karnataka and another (2023) SCC OnLine SC 603, Inder Mohan Goswami and anr. Vs. State of Uttarakhand (2007)12 SCC 1 and Syed Yaseer Ibrahim Vs. State of Uttar Pradesh (2022) SCC OnLine SC 271.*

37). Admittedly, after the said violation of terms of MoU, the parties have entered into settlement and the addendum settlement and that has been performed and honoured to some extent and which further could not be performed for the circumstances, which are not under control of the applicants. Further, if the Complainant has any grievance for non compliance of the MoU or breach of the terms and conditions of the MoU, it is always open to raise it before the court of civil competence.

38). This court has also taken note of the undertaking of the applicants that they are still ready to perform addendum dated 14.07.2022 to the settlement agreement and therefore this court is of opinion that allowing the further criminal proceeding would amount to harassment of the applicants and therefore the criminal proceedings against the applicants are abuse of process of law.

39). Consequently, the impugned summoning orders dated 06.09.2019 and 18.11.2019 are hereby set aside and the criminal proceedings arising out of Case Crime No. 162/2018 u/S 406,419,420,506,467,468 and 471 of IPC, Police Station- Vibhuti Khand, district-Lucknow, are hereby quashed.

30). The application is **allowed** accordingly.

41). Office is directed to communicate this order to the trial Court concerned.

(2024) 2 ILRA 1175
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 7024 of 2017

Rahul Mishra & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Dineysh Agrawal, Dileep Kumar

Counsel for the Opp. Parties:
G.A. Mahesh Kumar, Prabhat Pandey

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent

power, Indian Penal Code, 1860 - Sections 498A, 323, 504, 506, The Dowry prohibition Act, 1961 - Sections 3/4 - Hindu Marriage Act, 1955 - Section 13 - Divorce - Law relating to quashing - If the allegations are absurd or do not make out any case or if it can be held that there is abuse of process of law, the proceedings can be quashed but if there is a triable case the court does not go into reliability or otherwise of the version or the counter-version - In matrimonial cases, the courts have to be cautious when omnibus allegations are made particularly against relatives who are not generally concerned with the affairs of the couple - Quashing of a charge is an exception to the rule of continuous prosecution - 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.(Para - 28)

Marriage between Applicant No. 1 and Opposite Party No. 2 (Informant's daughter) - Harassment for dowry (car demand) - FIR lodged alleging harassment, dowry demand, physical assault, and false claims about Applicant No. 1's qualifications - Quashing of charge sheet, summoning order, and proceedings. (Para - 2 to 25)

HELD: - Uncontroverted allegations prima facie establishes the offence. Materials submitted by the accused cannot be considered at this stage. Court cannot meticulously examine evidence for acquittal/conviction. Criminal proceedings are not an abuse of process of court leading to injustice.(Para - 32)

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

List of Cases cited:

1. Musstt Rehana Begum Vs St. of Assam, (2022) SCC OnLine SC 82

2. Seth Ramdayal Jat Vs Laxmi Prasad, (2009) 11 SCC 545

3. Sardool Singh Vs Nasib Kaur, 1987 Supp SCC 146

4. Abhishek Vs St. of M.P., 2023 SCC OnLine SC 1083

5. Kahkashan Kausar Vs St. of Bihar, (2022) 6 SCC 599

6. Taramani Parakh Vs St. of M.P., (2015) 11 SCC 260

7. Rajaram Sharma Vs St. of U.P., Criminal Appeal No. 63 of 2024

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

1. Heard Sri D. K. Agrawal and Ms Anupriya Agarwal Advocates, the learned Counsel for the applicants, Sri Virendra Kumar, the learned A.G.A. for the State and Sri Sushil Kumar Singh, Sri Prabhat Pandey and Sri Mahesh Kumar Advocates, the learned Counsel for the opposite party no. 2.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicants have sought quashing of the Charge Sheet No.14 of 2016 dated 24.12.2016 submitted in furtherance of Case Crime No.10 of 2016, Police Station, Mahila Thana, District Amethi under Sections 498A, 323, 504, 506 IPC and Sections 3/4 Dowry Prohibition Act. They have also sought quashing of the order dated 27.03.2017 passed by the learned Chief Judicial Magistrate, Sultanpur in Case No.1818 of 2017, taking cognizance of the aforesaid offences and summoning the applicants to face trial of the aforesaid offences.

3. The aforesaid case was instituted on the basis of an FIR lodged by the opposite party No. 2 on 22.07.2016 stating that the informant had got his daughter married to the applicant No.1 on

15.02.2015. Wedding ceremony was solemnized at Etawah. The informant had spent Rs.15,00,000/- in the wedding and related ceremonies and he had given Rs.6,00,000/- in cash, besides several other valuable articles. At the time of settlement of the marriage, the applicants had told that the applicant No.1 had done MBA from Birmingham University in United Kingdom in first division and that he was working as a Manager in a real estate concern at Gurugram. After the marriage, the accused persons started harassing the informant's daughter for demanding a car. Later on, it came to light that the applicant no.1 did not possess a degree, as had been claimed by the applicants and he merely holds a Post Graduate Diploma in Management, in which he had secured second division and perhaps that diploma is not recognized in India. The FIR alleges that the accused persons had beaten up the informant's daughter on 21.12.2015, took away her stridhan and dropped her near the house of the informant in HAL campus at Korba, Munshi Gunj, District Amethi. The informant tried to resolve the disputes, but he was always insulted.

4. During investigation, the informant and his daughter gave statements supporting the FIR allegations. Accordingly, the investigating officer submitted a charge-sheet against the accused persons. The Court took cognizance of the offences and summoned the applicants to face trial by means of impugned order dated 27.03.2017.

5. The applicants have sought quashing of the charge-sheet, summoning order and the proceedings on the ground that the allegations of huge expenditure in wedding ceremonies by the informant or the demand of dowry by the applicants are absolutely false. The informant had paid merely ₹1,50,000/- for making arrangements of reception and entire expenditure of marriage ceremony and the reception was incurred by applicant Nos.1 and 2, which is supported by plenty of evidence including the videograph and photographs of the ceremonies. It has further been contented that the applicant No.2 and 3 had demonstrated expenditure of more than ₹15,00,000/- to the investigating officer with support of documentary and electronic evidence but the investigating officer has not made the same a part of the case diary or the charge sheet.

6. It has further been stated in the application that the applicant No.1 had filed a suit for divorce, which was pending at the time of filing of the application under Section 482 Cr.P.C. However, during pendency of the application, HMA Suit No.314 of 2016 filed by applicant No.1 under Section 13 of the Hindu Marriage Act was decreed by the Additional Principal Judge, Family Court, Etawah by means of judgment dated 21.10.2021. Surbhi Tiwari, wife of applicant No.1 has filed First Appeal No.936 of 2021, which is pending consideration of this Court sitting at Allahabad.

7. A Supplementary affidavit has been filed on behalf of applicants annexing therewith a copy of the judgment dated 21.10.2021 passed by Additional Principal Judge, Etawah decreeing the suit for divorce filed by applicant No.1, the evidence of defendant in that suit and the statement of the informant recorded in that suit.

8. The Superintendent of Police, District Amethi has filed a counter affidavit

dated 09.06.2022 replying to the contention of the applicants in the application under Section 482 Cr.P.C. that they had provided documentary evidence of the expenditure to the investigating officer. The Superintendent of Police has stated that the applicant has not given any evidence to the investigating officer.

9. In the rejoinder affidavit, the applicants have stated that they had given (i) a copy of an email sent by the informant's daughter to the applicant no.1 admitting her illicit relation with some other person; (ii) a copy of legal notice dated 08.06.2016; (iii) copies of emails sent by applicant No.1 to the informant (iv) recording of mobile chats dated 20.10.2015 between the applicant and informant's wife (v) screenshots of Karva Chauth and other ceremonies, (vi) email chats between the informant's daughter and the person with whom she allegedly having illicit relations, email chats between applicant No.1 and informant's daughter and phone details.

10. Learned counsel for the applicants has submitted that there was a categorical assertion that the applicants had supplied documentary evidence referred to above to the investigating officer of the case and the counter affidavit has been filed by the Superintendent of Police, who was not the investigating officer. Therefore, the Superintendent of Police had no personal knowledge of the documents having been supplied by the applicants to the investigating officer and his refusal is meaningless.

11. The second submission of the learned counsel for the applicants is that the applicant No.1 had filed a suit for divorce, which has already been decreed. The Family Court had framed two charges; (i) whether the plaintiff (applicant No.1) was entitled to get a decree of divorce ? and (ii) whether he was entitled to any other relief ?

12. While deciding issue No.1, the Family Court held that the allegation that the informant's daughter had been beaten up by the applicant No.1 and his family members on 21.12.2015 and was turned out of the matrimonial home, could not be established and informant's daughter had herself left her matrimonial home on 20.12.2015. The Family Court further observed that there are contradictions made by the informant's daughter regarding dowry, which makes the allegation suspicious.

13. The learned counsel for the applicants has further submitted that aforesaid findings recorded in the final judgment passed by the Family Court prove that the allegation in the FIR that the applicants had turned out the informant's daughter out of her matrimonial home after beating her on 21.12.2015 is false. Therefore, continuance of the criminal proceedings instituted on the basis of false allegations, would be an abuse of the process of the law and proceedings are liable to be quashed.

14. The informant's daughter has field First Appeal No. 963 of 2021 before this Court sitting at Allahabad challenging the judgment/decree dated 21.10.2021 passed by the Additional Principal Judge, Etawah dissolving her marriage with applicant No.1. On 29.11.2021, an interim order was passed by a Division Bench of this Court in the aforesaid case staying the effect and operation of the decree dated 21.10.2021. However, the interim order was vacated by means of the order dated 08.02.2023 after noting submissions of the learned counsel

for the appellants that the appellant No.1 has performed a second marriage and the Court was of the view that at this stage, the interim order cannot be extended.

15. Per contra, Sri S. K. Singh, the learned counsel for opposite party No.2, has submitted that the investigating officer had not made the defence evidence a part of case diary, is no ground to challenge the charge-sheet, cognizance and summoning order and the proceedings of the case.

16. Regarding effect of the observations made in the suit for divorce, the learned counsel for the opposite party No.2 has submitted that the findings of the Family Court recorded in the Civil suit, will not bind the criminal court while trying the accused persons for commission of cognizable offence as the scope of civil and criminal proceedings are entirely different.

17. The learned Counsel for the applicants have supplied written submissions wherein it has been stated that although the FIR alleges that the accused persons assaulted Surabhi on 21.11.2015 and left her near her father's home, in her cross examination recorded in the divorce suit, she has admitted that no harassment or ill treatment was done against her on 21.12.2015. The complainant has also admitted that on the date of the alleged incident, his daughter was not at Noida and she was with him at Amethi. The judgment dated 21.10.2021 passed by the Family Court decreeing the suit for divorce filed by the applicant no. 1 records a finding that Surabhi was not turned out of her matrimonial home on 21.12.2015 and no communication was made between the parties on 20.12.2015. The Family Court has found the allegations to be false.

18. The learned Counsel for the applicant has relied upon the judgment in the case of **Musstt Rehana Begum v. State of Assam**, (2022) SCC OnLine SC 82. In that case, the second respondent had filed a complaint stating that he and the appellant got married on 11.01.1996 but later on she came to know that the appellant was previously married to another person. According to the complaint, the appellant has committed an offence punishable under Section 495 of the IPC since she concealed the fact that she had a subsisting marriage when she married the second respondent. The appellant had lodged a complaint under Section 498A of IPC. The second respondent claimed that his earlier marriage had been dissolved by a divorce on 18.08.2011. On 17.09.2011, the appellant instituted proceedings before the Principal Judge of Family Court - I, Kamrup to challenge the purported divorce. By a judgment dated 20.07.2017, the Family Court declared the divorce purportedly given by the second respondent to the appellant as null and void. A Complaint Case under Sections 420, 406, 468 and 34 of IPC was registered on 11.09. 2015, alleging that the second respondent had produced a forged divorce certificate. On 16.10.2015, the second respondent lodged a complaint alleging that the appellant had committed the offence of bigamy. The appellant filed an application under Section 482 of CrPC, which was dismissed by the High Court holding that it was highly disputed whether the appellant had entered into a marital tie with another person prior to the marriage with the complainant and whether the earlier marriage had ended in a valid divorce. Moreover, the High Court held that the appellant had not come up with a specific case that she was neither married earlier or that there was a divorce. Allowing the appeal, the Hon'ble supreme Court held that: -

"17….As between the appellant and the second respondent the issue as to whether she had a subsisting marriage on the date on which she entered into a marriage with the second respondent, had

been conclusively decided by the Family Court, which has attained finality. Explanation (b) to Section 7(1) of the Family Courts Act 1984 expressly confers the Family Court with jurisdiction to determine the matrimonial status of a person. Thus, relying on the judgement of the Family Court which has jurisdiction to decide the gravamen of the offence alleged in the criminal complaint, would not be same as relying on evidentiary materials that are due for appreciation by the Trial Court, such as the investigation report before it is forwarded to the Magistrate.

Therefore, in this case, the Single Judge of the High Court was not justified in coming to the conclusion that the issue as to whether the appellant had a subsisting prior marriage was a 'highly contentious matter' which has to be tried on the basis of the evidence on the record.

19. The only contention raised in **Rehana Begum (Supra)** was regarding whether the appellant was already married at the time she married the second respondent and the issue as to whether she had a subsisting marriage on the date on which she entered into a marriage with the second respondent, had been conclusively decided by the Family Court, which had attained finality. In the present case, the complainant alleges harassment of his daughter for demanding a car, regarding which a finding can be returned only after the trial of the criminal case. Therefore, **Rehana Begum**, which was decided on the basis of the peculiar factual background, would not apply to the present case.

20. The learned Counsel for the applicants has next relied upon a judgment in the case of **Seth Ramdayal Jat v. Laxmi Prasad**, (2009) 11 SCC 545, in which it was held that: -

"20.It is now almost well settled that save and except for Section 43 of the Evidence Act which refers to Sections 40, 41 and 42 thereof, a judgment of a criminal court shall not be admissible in a civil suit. What, however, would be admissible is the admission made by a party in a previous proceeding.

21. The admission of the appellant was recorded in writing. While he was deposing in the suit, he was confronted with the question as to whether he had admitted his guilt and pleaded guilty of the charges framed. He did so. Having, thus, accepted that he had made an admission in the criminal case, the same was admissible in evidence. He could have resiled therefrom or explained away his admission. He offered an explanation that he was wrongly advised by the counsel to do so. The said explanation was not accepted by the trial court. It was considered to be an afterthought. His admission in the civil proceeding was admissible in evidence."

21. There can be no dispute against the aforesaid proposition of law, but that judgment was given in an appeal arising out of an order passed in a Second Appeal under Section 100 of the Civil Procedure Code and the question of scope of interference under Section 482 Cr.P.C. was not involved in that case. It is settled law that the questions of admissibility, relevancy or sufficiency of evidence cannot be decided while deciding an application under Section 482 Cr.P.C.

22. The learned Counsel for the applicant has next relied upon a judgment in the case of **Sardool Singh v. Nasib Kaur**, 1987 Supp SCC 146, in which a civil suit between the parties was pending wherein the respondent was contending that no will had been executed whereas the

contention of the appellants was that a will had been executed by the testator. A case for grant of probate was also pending. The civil court was seized of the question as regards the validity of the will. In view of these facts, the Hon'ble Supreme Court held that: -

"At this juncture the respondent cannot therefore be permitted to institute a criminal prosecution on the allegation that the will is a forged one. That question will have to be decided by the civil court after recording the evidence and hearing the parties in accordance with law. It would not be proper to permit the respondent to prosecute the appellants on this allegation when the validity of the will is being tested before a civil court."

23. The aforesaid judgment was also given keeping in view the particular facts of the case and it does not lay down any general proposition of law of universal application. The question of commission of offence under Section 498-A involved in the present case, is not directly is issue in the appeal against divorce decree pending in this Court and, therefore, the pendency of the appeal will not give rise to a good ground for quashing of the criminal proceedings.

24. The learned Counsel for the applicants has submitted that there are some contradictions in the testimony of Surabhi recorded by the Family Court, but the value of her evidence will have to be assessed by the trial Court, where she can explain or even resile from her admission. The evidence recorded by the Family Court in the divorce suit, the decree passed wherein is under challenge in appeal filed before this Court, cannot give rise to a good ground for quashing the proceedings without trial.

25. The learned Counsel for the applicant next submitted that the allegations leveled in the FIR are false and the informant has converted the matrimonial disputes into a criminal case. He has relied upon the judgments in the case of **Abhishek v. State of M.P.**, 2023 SCC OnLine SC 1083, wherein it was observed that: -

"13.Instances of a husband's family members filing a petition to quash criminal proceedings launched against them by his wife in the midst of matrimonial disputes are neither a rarity nor of recent origin. Precedents aplenty abound on this score. We may now take note of some decisions of particular relevance. Recently, inKahkashan Kausar alias Sonamv.State of Bihar[(2022) 6 SCC 599], this Court had occasion to deal with a similar situation where the High Court had refused to quash a FIR registered for various offences, including Section498AIPC. Noting that the foremost issue that required determination was whether allegations made against the in-laws were general omnibus allegations which would be liable to be quashed, this Court referred to earlier decisions wherein concern was expressed over the misuse of Section498AIPCand the increased tendency to implicate relatives of the husband in matrimonial disputes. This Court observed that false implications by way of general omnibus allegations made in the course of matrimonial disputes, if left unchecked, would result in misuse of the process of law. On the facts of that case, it was found that no specific allegations were made against the in-laws by the wife and it was held that allowing their prosecution in the absence of clear allegations against the in-laws would result in an abuse of the process of law. It was also noted that a criminal trial, leading to an eventual acquittal, would inflict severe scars upon

the accused and such an exercise ought to be discouraged."

26. The learned Counsel for the applicants has also relied upon a judgment in the case of **Kahkashan Kausar v. State of Bihar**, (2022) 6 SCC 599. In that case, the complainant was married to Md. Ikram on 18.09.2017. She filed a criminal complaint on 11-12-2017 against her husband and the appellants, who were her in-laws, alleging demand for dowry and harassment. The learned Magistrate found that upon perusal of material evidence no prima facie case was made against the in-laws and that the allegations levelled against them were not specific in nature and the Magistrate took cognizance for the offence under Sections 498-A, 323 IPC against the husband and summoned him only. This dispute was eventually resolved and the complainant came back to the matrimonial home.Subsequently, on 01.04.2019, the complainant lodged an FIR under Sections 341, 323, 379, 354, 498-A read with Section 34 IPC against her husband and his relatives alleging that all the accused persons were pressurising her to purchase a car as dowry and they threatened to forcibly terminate her pregnancy if the demands were not met. A Writ Petition filed by the husband and his relatives for quashing the FIR was dismissed. In appeal, the Hon'ble Supreme Court referred to various precedents on the point and concluded that: -

"17.The abovementioned decisions clearly demonstrate that this Court has at numerous instances expressed concern over the misuse of Section 498-A IPC and the increased tendency of implicating relatives of the husband in matrimonial disputes, without analysing the long-term ramifications of a trial on the complainant as well as the accused. It is further manifest from the said judgments that false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law. Therefore, this Court by way of its judgments has warned the courts from proceeding against the relatives and in-laws of the husband when no prima facie case is made out against them.

18.Coming to the facts of this case, upon a perusal of the contents of the FIR dated 1-4-2019, it is revealed that general allegations are levelled against the appellants. The complainant alleged that "all accused harassed her mentally and threatened her of terminating her pregnancy". Furthermore, no specific and distinct allegations have been made against either of the appellants herein i.e. none of the appellants have been attributed any specific role in furtherance of the general allegations made against them. This simply leads to a situation wherein one fails to ascertain the role played by each accused in furtherance of the offence. The allegations are, therefore, general and omnibus and can at best be said to have been made out on account of small skirmishes. Insofar as husband is concerned, since he has not appealed against the order of the High Court, we have not examined the veracity of allegations made against him. However, as far as the appellants are concerned, the allegations made against them being general and omnibus, do not warrant prosecution.

19.Furthermore, regarding similar allegations of harassment and demand for car as dowry made in a previous FIR Respondent 1 i.e. the State of Bihar, contends that the present FIR pertained to offences committed in the year 2019, after

assurance was given by the husband Md. Ikram before the learned Principal Judge, Purnea, to not harass the respondent wife herein for dowry, and treat her properly. However, despite the assurances, all accused continued their demands and harassment. It is thereby contended that the acts constitute a fresh cause of action and therefore the FIR in question herein dated 1-4-2019, is distinct and independent, and cannot be termed as a repetition of an earlier FIR dated 11-12-2017.

20.Here it must be borne in mind that although the two FIRs may constitute two independent instances, based on separate transactions, the present complaint fails to establish specific allegations against the in-laws of the respondent wife. Allowing prosecution in the absence of clear allegations against the appellant in-laws would simply result in an abuse of the process of law.

21.Therefore, upon consideration of the relevant circumstances and in the absence of any specific role attributed to the appellant-accused, it would be unjust if the appellants are forced to go through the tribulations of a trial i.e. general and omnibus allegations cannot manifest in a situation where the relatives of the complainant's husband are forced to undergo trial. It has been highlighted by this Court in varied instances, that a criminal trial leading to an eventual acquittal also inflicts severe scars upon the accused, and such an exercise must, therefore, be discouraged."

27. Thus in **Kahkashan Kausar** (Supra) the Hon'ble Supreme Court had taken into consideration the entire facts and circumstances of the case, including the fact that earlier also an FIR was lodged on similar allegations, the allegations against the relatives of the husband could not be established in investigation and a charge-sheet was filed against the husband only and the complainant had entered into a settlement and resumed cohabitation with the husband. The second FIR was lodged without any specific allegations against the in-laws of the wife. The husband had not challenged the FIR. In view of these facts, it was held that allowing prosecution in the absence of clear allegations against the appellant in-laws would result in an abuse of the process of law. In the present case, it is the FIR alleges that the informant had spent Rs.15,00,000/- in the wedding and related ceremonies and he had given Rs.6,00,000/- in cash, besides several other valuable articles, the applicants had claimed that the applicant No.1 had done MBA from Birmingham University, which claim turned out to be false, the accused persons used to harass the informant's daughter for demanding a car. The accused persons had beaten up the informant's daughter on 21.12.2015, took away her stridhan and dropped her near the house of the informant in HAL campus at Korba, Munshi Gunj, District Amethi. The husband also seeks quashing of the proceedings. The ground for quashing is that the allegations are false and contrary to the findings recorded by the Family Court.

28. In **Taramani Parakh v. State of M.P**., (2015) 11 SCC 260, the Hon'ble Supreme Court held that: -

"10.The law relating to quashing is well settled. If the allegations are absurd or do not make out any case or if it can be held that there is abuse of process of law, the proceedings can be quashed but if there is a triable case the court does not go into reliability or otherwise of the version or the counter-version. In matrimonial cases, the courts have to be cautious when omnibus

allegations are made particularly against relatives who are not generally concerned with the affairs of the couple. We may refer to the decisions of this Court dealing with the issue.

11.Referring to earlier decisions, inAmit Kapoorv.Ramesh Chander(2012) 9 SCC 460, it was observed :

"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.***

*27.4.**Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court shou**ld be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.***

27.5.Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6.The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7.The process of the court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8.Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the court may be justified in quashing the charge. Even in such cases, the court would not embark upon the critical analysis of the evidence.

27.9.Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

*27.10.**It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.***

27.11.Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is

maintainable, does not mean that a criminal complaint cannot be maintained.

*27.12.**In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.***

*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.***

27.14.Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15.Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that the interest of justice favours, otherwise it may quash the charge. The power is to be exercisedex debito justitiaei.e. to do real and substantial justice for administration of which alone, the courts exist.

27.16.These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance with the requirements of the offence.

* * *

14.From a reading of the complaint, it cannot be held that even if the allegations are taken as proved no case is made out. There are allegations against Respondent 2 and his parents for harassing the complainant which forced her to leave the matrimonial home. Even now she continues to be separated from the matrimonial home as she apprehends lack of security and safety and proper environment in the matrimonial home. The question whether the appellant has in fact been harassed and treated with cruelty is a matter of trial but at this stage, it cannot be said that no case is made out. Thus, quashing of proceedings before the trial is not permissible."

(Emphasis Supplied)

29. The learned Counsel for the applicants next submitted that the allegations levelled are false and this fact is established from documentary evidence, which has not been made a part of the case diary in spite of the same having been provided to the Investigating Officer. He has further stressed upon the Court that this contention has not been denied by the Investigating Officer himself by filing an affidavit and it has been denied by the Superintendent of Police.

30. In this regard, it is to be considered firstly that while deciding an Application under Section 482 Cr.P.C. seeking quashing of the criminal proceedings, this Court is not expected to consider and scrutinize the material relied

upon in defence and only this much has to be seen as to whether a case for trial of the accused is made out by the allegations levelled in the complaint / FIR and the material collected by the prosecution Secondly, the Superintendent of Police is a responsible superior officer and his personal affidavit cannot be doubted by this Court to the extent that it may give rise to a ground for quashing of the proceedings.

31. The learned Counsel for the applicant has also relied upon a judgment in the case of **Rajaram Sharma versus State of U.P.**, Criminal Appeal No. 63 of 2024. In that case, the appeal was allowed and the proceedings were quashed after recording a satisfaction that the ingredients necessary to constitute the offences under Sections 420, 406, 504 and 506 IPC were not made out, whereas it is not so in the present case.

32. Daughter of the informant has filed First Appeal No. 936 of 2021 in this High Court sitting at Allahabad challenging the decree of divorce granted by the Family Court and, therefore, the findings of the Family Court have not yet attained finality. Although an interim order dated 29.11.2021 was passed in First Appeal No. 963 of 2021 staying the operation and effect of the judgment/decree of divorce dated 21.10.2021, the appellant No.1 has performed a second marriage. When the entire facts and circumstances of the case are scrutinized keeping in view this conduct of the applicant no. 1, in light of the law laid down by the Hon'ble Supreme Court in **Taramani Parakh** (Supra), it appears that the uncontroverted allegations as made from the record of the case prima facie establish the offence. This Court cannot take into consideration the materials relied upon by the accused persons for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution. This Court cannot unduly interfere by examining the evidence meticulously for considering whether the case would end in conviction or not at the stage quashing of charge. The allegations taken constitute a case for trial of the applicants and the criminal proceedings are not an abuse of the process of court leading to injustice.

33. In view of the aforesaid discussion, there is no good ground to quash the proceedings of the criminal case against the applicants. The application under Section 482 Cr.P.C. lacks merits and the same is hereby ***dismissed.***

(2024) 2 ILRA 1186
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Application u/s 482 No. 9084 of 2023
AND
Application u/s 482 No. 10202 of 2023

Alok Mitra Jaiswal & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Shiv Prakash Dwivedi

Counsel for the Opp. Parties:
G.A., Ajai Kumar, Vivek Kumar Rai

Criminal Law – Criminal Procedure Code, 1973 - Section 482 – Indian Penal Code, 1860 - Sections 120-B, 420, 465, 466,

467, 468 & 471 - Two applications under Section 482 Cr.P.C.—seeking quashing of the charge-sheet, summoning order, and entire criminal proceedings—arose from the same criminal case. In the first application, although the St. filed a counter affidavit, it was not pressed. The Court observed that, - (i) procedural directions were issued across multiple dates, including orders for affidavit filings and personal appearances of deponents; maintainability concerns emerged as the affidavit was sworn by someone other than the applicant, resulting in repeated adjournments due to counsel's illness. Despite objections from the St. and private respondents, interim protection was extended - (ii) a civil suit for permanent injunction between the parties remains pending, and the petitioners argued the dispute is civil in nature, sought quashing of criminal proceedings - (iii) the petitioners are deliberately suppressed the material facts from the court, including the existence and restoration of a previously dismissed writ petition with extended interim protection, despite the filing of the charge-sheet and issuance of cognizance and summons - held - litigants who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final - Accordingly, both applications were dismissed – however, liberty was granted to the aged petitioner to surrender and seek bail, which the trial court shall consider expeditiously under Section 437 Cr.P.C., & ors. petitioners may file discharge applications, which must be adjudicated strictly in accordance with law through reasoned and speaking orders.
(Para – 10, 11, 15, 16, 17, 19, 21, 23, 24, 25)

Applications are Dismissed. (E-11)

List of referred Cases: -

1. Mohammed Ibrahim & ors. Vs St. of Bihar & anr. reported in [(2009) 3 SCC (Cri) 929],

2. Pratibha Vs Rameshwari Devi, (2007) 12 SCC 369,

3. K.D Sharma Vs Steel Authority of India Limited & ors., (2008) 12 SCC 481,

4. Dalip Singh Vs St. of U.P.& ors., (2010) 2 SCC 114

5. In K. Jayaram & ors. Vs Bangalore Development Authority & ors., (2022) 12 SCC 816,

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Jyotindra Mishra, learned Senior Advocate assisted by Sri Shiv Prakash Dwivedi, learned counsel for the petitioners in Crl. Misc. Case No. 9084 of 2023 (u/s 482 Cr.P.C.), Sri Rao Narendra Singh and Sri Aniruddh Kumar Singh, learned AGA for the State as well as Sri Vivek Kumar Rai, learned counsel for private opposite party no. 2.

2. Heard Sri Ashok Kumar Bajpai, learned counsel for the petitioner in Crl. Misc. Case No. 10202 of 2023 (u/s 482 Cr.P.C.), Sri Rao Narendra Singh and Sri Aniruddh Kumar Singh, learned AGA for the State as well as Sri Vivek Kumar Rai, learned counsel for private opposite party no. 2.

3. Notably, both the aforesaid cases arise out of the same criminal proceedings, therefore, with the consent of the parties, both the petitions are decided together.

4. In the case of Alok Mitra Jaiswal and others, [Crl. Misc. Case No. 9084 of 2023 (u/s 482 Cr.P.C.)]. though learned AGA has filed counter affidavit but he is not pressing the same making request that the present matter may be decided on the basis of material available on record and also on the basis of arguments so advanced by learned counsel for the parties.

5. Since learned AGA has not pressed his counter affidavit, therefore, the

opportunity to file rejoinder affidavit to learned counsel for the petitioners is not given.

6. By means of aforesaid petition bearing Crl. Misc. Case No. 9084 of 2023 (u/s 482 Cr.P.C.), the petitioners have prayed the following relief:

"Wherefore, it is most humble prayed that this Hon'ble Court may kindly be pleased to quash the impugned cognizance order dated 11.08.2023 as well as Chargesheet No. 01/dated-09.08.2023 in case crime No. 0298/2023, Under Section-120-B, 420, 465, 466, 467, 468, 471 I.P.C., Criminal Case No. 7812/2023, bearing name State V/S Alok Mitra & Others, Police Station- Kotwali Nagar, Distt-Sultanpur which is passed by Chief Judicial Magistrate, Court No. 16, District-Sultanpur in the interest of justice.

It is further prayed that the further proceeding in pursuance to the impugned Cognizance order dated 11.08.2023 as well as Charge sheet No. 01/dated-09.08.2023 in case crime no. 0298/2023, Under Section- 120-B, 420, 465, 466, 467, 468, 471 I.P.C. Criminal Case No. 7812/2023, bearing name State V/S Alok Mitra & Others, Police Station-Kotwali Nagar, District Sultanpur which is passed by Chief Judicial Magistrate, Court No. 16, District-Sultanpur be stayed during the pendency of petition before this Hon'ble Court."

7. By means of aforesaid petition bearing Crl. Misc. Case No.10202 of 2023 (u/s 482 Cr.P.C.), the petitioner has prayed the following relief:

"to quash the entire criminal proceedings including charge sheet of criminal case no. 7812 of 2023 relating to case crime no. 298 of 2023, under Section 120-B, 420, 465, 466, 467, 468 & 471 IPC of Police Station Kotwali Nagar, District Sultanpur, pending in the court of learned C.J.M., Sultanpur, in the interest of justice.

It is further most respectfully prayed that this Hon'ble court may graciously be pleased to stay the further proceedings of criminal case no. 7812 of 2023 relating to case crime no. 0298 of 2023, under section 120-B, 420, 465, 466, 467, 468 & 471 IPC, of Police Station Kotwali Nagar, District-Sultanpur, pending in the court of learned C.J.M. Sultanpur, pending in the court of C.J.M. Sultanpur, till the final disposal of this petition, in the interest of justice."

8. In the case of Alok Mitra Jaiswal and Others, this Court has passed the order dated 19.09.2023 which reads as under:

"Sri Vivek Kumar Rai and Sri Ajai Kumar, advocates, have put in appearance by way of filing vakalatnama on behalf of opposite party no. 2 and the same is taken on record.

Office is directed to print the name of Sri Vivek Kumar Rai and Sri Ajai Kumar as counsels for opposite party no. 2, on the next date of listing.

Learned counsel for opposite party no. 2 submits that he will file counter affidavit within a period of two weeks.

A week time thereafter, shall be available to counsel for the applicants to file rejoinder affidavit, if any.

List/put up this matter in the week commencing 30.10.2023."

9. In the case of Achchhe Lal Jaiswal, this Court has passed the orders dated 19.12.2023, 08.01.2024 and 10.01.2024 which respectively read as under:

"1. Counter affidavits filed by learned A.G.A. for the State and learned

counsel for the private respondent are taken on record.

2. Heard Mr. S.P. Gupta, learned counsel for the applicant, learned counsel for the private respondent and learned A.G.A. for the State.

3. Learned A.G.A. informs that the present petition/application is filed by Achchhe Lal Jaiswal s/o late Ram Adhar Jaiswal r/o B-8-9, Sector- 1, Devendra Nagar, City Center Mall, District- Rapur, Chhattisgarh and in support the present petition/application, the affidavit is filed by Varun Jaiswal s/o Alok Mitra Jaiswal, Aadhar Card No. 263220760644, r/o Village, Alahdadpur, Lohramau By-pass Road, N.H. 56, Police Station- Kotwali Dehat, Sultanpur which is not maintainable as in the criminal cases, it is obligatory on the part of applicant that affidavit should be filed by him.

4. Mr. S.P. Gupta, who appears on behalf of applicant, informs that Mr. Ashok Kumar Bajpai, learned counsel for the applicant is arguing counsel in the present case. He requests that due to illness of Mr Ashok Kumar Bajpai, the matter may be listed on some other date.

5. Accordingly, the above request/prayer is allowed.

6. List this case on 08.01.2024 within top ten cases.

7. On the next date, deponent shall appear in person before this Court.

8. On the next date, learned counsel for the applicant will explain this fact that why the affidavit of applicant is not filed. In case, the counsel for the applicant fails to assist the court then the interim order shall be vacated automatically.

9. In the meantime, learned counsel for the applicant may file rejoinder affidavit.

10. Interim order, granted earlier vide order dated 18.10.2023, shall continue till the next date of listing."

***

"1. Heard Sri Ashok Kumar Bajpai, learned counsel for the petitioner, Sri Rao Narendra Singh and Sri Anirudh Kumar Singh, learned AGA for the State and Sri Vivek Kumar Rai, learned counsel for the opposite party no. 2.

2. In terms of the order of the Court the deponent is present before the Court.

3. On the request of learned counsel for the parties, list / put up on 10.1.2024 within top ten cases.

4. Interim order to continue till the next date of listing.

5. The deponent shall again appear in person in terms of the order of the Court."

***

"Heard Ms. Kadambani Lal, Advocate holding brief of Sri Ashok Kumar Bajpai, learned counsel for the petitioner, Mr. Rao Narendra Singh and Mr. Anirudh Kumar, learned AGA for the State and Sri Vivek Kumar Rai, learned counsel for opposite party no.2.

In terms of the order dated 08.01.2024 the deponent namely Varun Jaiswal son of Alok Mitra Jaiswal is present in person.

Ms Kadambani Lal has filed supplementary affidavit on behalf of the petitioner, the same is taken on record. The petitioner is a deponent in the aforesaid supplementary affidavit and has stated the reason, in paragraph 3, as to why he could not file the affidavit at the time of filing this petition.

Ms Kadambani Lal has stated that her senior Sri Ashok Kumar Bajpai is ill today, therefore he could not come to the Court. She has requested for short adjournment of the present case on the ground of illness of her senior. However, learned AGA for the State as well as learned counsel for the private party have raised strong objections on the aforesaid

request by submitting that after the interim order having been granted in favour of the petitioner, the case is being adjourned on the request of learned counsel for the petitioner for one reason or another. They have drawn the attention of this Court towards the order dated 19.12.2023, on that date the case was adjourned on the illness of Sri Ashok Kumar Bajpai.

Vakalatnama reveals that alongwith Sri Ashok Kumar Bajpai, the vakalatnama has also been signed by Sri Abhishek Kumar, Sri Belal Ahmad, Ms. Kadambani Lal and Surendra Prasad Gupta.

Considering the request of Ms. Kadambani Lal the case is adjourned for today.

List this case on 17.01.2024 alongwith application under Section 482 bearing No.9084 of 2023, in the additional cause list as first case. This case shall be taken up immediately after fresh cases. Learned counsel for the parties may make mention of this case for taking out of turn. It is made clear that this case shall not be adjourned on the next date and if Sri Ashok Kumar Bajpai does not recover by the next date, any other counsel may address the Court.

Interim order to continue till the next date of listing."

10. In the petition of Achchhe Lal Jaiswal (supra), it has been indicated in Para 9 that the co-accused Alok Mitra Jaiswal and Smt. Pramila Jaiswal have filed a Regular Suit in the nature of permanent injunction bearing Regular Suit No. 421 of 2016 against the petitioner and opposite party no. 2 and others alongwith injunction application, in which learned Civil Judge (Senior Division), Court no. 15, Sultanpur has granted injunction vide order dated 15.02.2023 (Annexure No. 3). However, in the petition of Achchhe Lal Jaiswal, the deponent is one Varun Jaiswal S/o Alok Mitra Jaiswal.

11. The learned counsel for the petitioners in both the petitions have stated that their Regular Suit is pending consideration before the Civil Court and the issue in question is civil in nature, therefore, till disposal of the aforesaid Civil Suit, the impugned criminal proceedings may be quashed and set aside. In support of his argument, Sri Jyotindra Mishra, learned Senior Advocate has drawn attention of this Court towards the judgement of Apex Court rendered in the case of **Mohammed Ibrahim and Others Vs. State of Bihar and Another reported in [(2009) 3 SCC (Cri) 929]**, wherein the Apex Court has observed that criminal courts should ensure that proceedings before it are not used for settling scores or to pressurize parties to settle civil dispute, therefore, the present petition may be allowed.

12. Learned counsel for opposite parties have raised strong objection against the aforesaid affidavit by saying that when Achchhe Lal Jaiswal, the petitioner has not authorized Sri Varun Jaiswal to file the petition before this Court how can Varun Jaiswal who is son of rival party, namely, Alok Mitra Jaiswal may swear the affidavit on behalf of Achchhe Lal Jaiswal. Though, Achchhe Lal Jaiswal has filed an affidavit clarifying the position that when the petition was to be filed before this Court on 06.10.2023, he was running ill, therefore on his instructions, Varun Jaiswal has sworn the affidavit on his behalf. However, learned counsel for the opposite parties have stated that the direction may be issued to verify the signatures of Achchhe Lal made on Vakalatnama and also the signatures made on subsequent affidavit,

inasmuch as both the signatures are apparently different and as per their information, Achchhe Lal Jaiswal is a patient of Alzheimer so he could have not authorized Varun Jaiswal to swear the affidavit on his behalf.

13. Since I am disposing of this petition at the admission stage, therefore, I am not going into those contentions of the opposite parties. Learned counsel for the opposite parties have stated that Alok Mitra Jaiswal and his wife has filed a Regular Suit against Achchhe Lal Jaiswal, on the basis of one unregistered Will-deed which has been prepared on the plain papers. The aforesaid Will-deed is a forged and fictitious document, inasmuch as after lodging the FIR to the effect that appropriate investigation has been conducted by the Investigating Officer and on the basis of material and on the basis of evidence collected during the investigation, the chargesheet has been filed against the petitioners in both the petitions.

14. Learned counsel for the opposite parties have also stated that at the time of filing the Regular Suit in the year, 2016, the copy of the Will-deed has not been filed before the court concerned but obtained the order of status-quo, however the photostat copy of such Will-deed has been filed before the court concerned on 15.02.2023 as 12-ga 1/1, as has been shown in second paragraph of the internal page 7 of the interim order dated 15.02.2023 passed by Civil Judge (Senior Division), court no. 15, Sultanpur. Learned counsel for the opposite parties has also stated that the Division Bench of this Court in Crl. Misc. Writ Petition No. 3559 of 2023 (Alok Mitra @ Alok Jaiswal and 3 others Vs. State of U.P. and 3 others) has granted interim protection to the petitioners to the effect that till filing of the chargesheet, the petitioners shall not be arrested. The aforesaid writ petition was dismissed on 18.08.2023 for want of prosecution. Thereafter, the petitioners filed C.M. Application No. 2 of 2023 seeking recall of the order dated 18.08.2023 and restoration of the writ petition in its original number. The aforesaid application was taken up on 13.09.2023 and this Court recalled its order dated 18.08.2023 and restored the writ petition to its original number, issuing notice to private opposite party and extended the interim order till the next date of listing.

15. Learned counsel for the opposite parties have further stated that after getting the interim order recalled and writ petition restored on 13.09.2023, the petitioners filed the petition under Section 482 Cr.P.C. bearing no. 9084 of 2023 before this Court challenging the chargesheet wherein the counter affidavit and rejoinder affidavit have been called for. Learned counsel for the opposite parties have further submitted that in the aforesaid criminal case, the chargesheet was filed on 09.08.2023, learned trial court took cognizance and issued summons on 11.08.2023. The aforesaid charagesheet and summoning order dated 11.08.2023 have been challenged by the petitioner in the aforesaid petition no. 9048 of 2023, therefore, it is clear that the petitioners were aware that the chargesheet has already been filed and cognizance has already been taken on 11.08.2023, therefore, the writ petition bearing Crl. Misc. Writ Petition No. 3559 of 2023 has already lost its efficacy but the petitioners got the aforesaid writ petition restored and got the interim order extended. They have further submitted that when the petition under Section 482 Cr.P.C. was filed wherein the order dated 19.09.2023 was passed, the writ petition before the Division

Bench was already pending wherein there was stay order in favour of the petitioner. Learned counsel for the opposite parties have stated with vehemence that the aforesaid fact has not been disclosed in the present petition filed by Alok Mitra Jaiswal and others.

16. On being confronted, the learned counsel for the petitioners in Re; Alok Mitra Jaiswal (supra) as to why the aforesaid relevant material fact has not been disclosed before the Court, learned counsel for the petitioner has casually stated that due to inadvertence and bonafide mistake, he could not disclose this fact before this Court.

17. Having heard, learned counsel for the parties and having perused the material available on record and having regard the judgment in Re: **Mohammed Ibrahim** (supra), so cited by Sri Jyotindra Mishra, learned Senior Advocate, I am of the considered opinion that if the civil disputes in certain cases have contained ingredients of criminal offences, such dispute have to be entertained notwithstanding, they are also a civil dispute. Para 8 of the judgment of **Mohammed Ibrahim (supra)** is reproduced herein-below:

"This Court has time and again drawn attention to the growing tendency of complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurise parties to settle civil disputes. But at the same, it should be noted that several disputes of a civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes. [See: G. Sagar Suri v. State of U.P. [2000 (2) SCC 636] and Indian Oil Corporation vs. NEPCIndia Ltd. [2006 (6) SCC 736]. Let us examine the matter keeping the said principles in mind."

18. Hon'be Apex Court in the judgment rendered in **Pratibha v. Rameshwari Devi, (2007) 12 SCC 369**, has held that:

"it is well settled that criminal and civil proceedings are separate and independent and the pendency of a civil proceeding cannot bring to an end a criminal proceeding even if they arise out of the same set of facts."

19. Since in the petition of Alok Mitra Jaiswal (supra), the fact has not been disclosed that earlier the aforesaid petitioners have filed a writ petition before this Court and have been granted interim protection and that the aforesaid writ petition was dismissed for want of prosecution, the petitioners got the order dated 18.08.2023 recalled and the writ petition was restored to its original number and got the interim order extended, whereas by that time the chargesheet had been filed, cognizance had been taken and summons had been issued. Not only the above, challenging the aforesaid chargesheet, cognizance order and summoning order, the petitioners filed another petition i.e. instant petition before this Court without disclosing the fact that their one writ petition before the Division Bench is pending and interim order has been extended. Even in Para 1 of the petition, they have stated that they have not filed

any petition before this Court either at Allahabad or Lucknow and they further declared that this is the first petition on behalf of the petitioners against the cause of action.

20. The aforesaid conduct of the petitioners is a deliberate and intentional concealment of facts. In **K.D Sharma Vs. Steel Authority of India Limited and others, (2008) 12 SCC 481**, Supreme Court held that no litigant can play "hide and seek" with the courts or adopt "pick and choose". To hold a writ of the court one should come with candid facts and clean breast. Suppression or concealment of material facts is forbidden to a litigant or even as a technique of advocacy.

21. The Apex Court in **Dalip Singh Vs. State of Uttar Pradesh and others, (2010) 2 SCC 114** came down heavily on unscrupulous litigants by holding that it is now well established that a litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final.

22. In **K. Jayaram and others Vs. Bangalore Development Authority and others, (2022) 12 SCC 816**, Hon'ble Supreme Court held as under:

"It is necessary for us to state here that in order to check multiplicity of proceedings pertaining to the same subject-matter and more importantly to stop the menace of soliciting inconsistent orders through different judicial forums by suppressing material facts either by remaining silent or by making misleading statements in the pleadings in order to escape the liability of making a false statement, we are of the view that the parties have to disclose the details of all legal proceedings and litigations either past or present concerning any part of the subject-matter of dispute which is within their knowledge. In case, according to the parties to the dispute, no legal proceedings or court litigations was or is pending, they have to mandatorily state so in their pleadings in order to resolve the dispute between the parties in accordance with law.

In the instant case, since the appellants have not disclosed the filing of the suit and its dismissal and also the dismissal of the appeal against the judgment of the civil court, the appellants have to be non-suited on the ground of suppression of material facts. They have not come to the court with clean hands and they have also abused the process of law. Therefore, they are not entitled for the extraordinary, equitable and discretionary relief."

23. In view of the aforesaid facts and circumstances of the case, I do not find any infirmity or illegality in the impugned chargesheet, cognizance order and summoning order, therefore, I hereby dismiss both the aforesaid petitions.

24. Needless to say that if the petitioners of both the petitions appear/surrender before the learned court below and file their bail application, the same may be disposed of with expedition without giving any unnecessary adjournment to the prosecution. Further, I find it appropriate to observe here that since Sri Achchhelal Jaiswal (supra) is said to have suffering from various ailments and he is an old aged person, so his bail application may be considered and disposed of by learned court below with expedition in the light of the provisions of Section 437 Cr.P.C.

25. It is also needless to say that if the petitioners of both the petitions file their discharge application, taking all pleas and grounds available to them, the said application shall be decided strictly in accordance with law by affording opportunity of hearing to the parties concerned and that order must be speaking and reasoned order so that it could be understood that the learned trial court has applied its judicious mind.

26. Both the petition under Sections 482 Cr.P.C. are hereby **dismissed.**

27. No order as to costs.

(2024) 2 ILRA 1194
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application u/s 482 No. 9360 of 2009

Mohd. Muslim ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Imran Ullah, Sri Vineet Vikram

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - Approval of gang chart without proper discussion and consideration by District Magistrate and Superintendent of Police - The Code of criminal procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Sections 147, 148, 323, 504, 506, 420, 406, The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986 - Section 2/3 - Criminal Law Amendment Act - Section 7, The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021 - Rule No. 5,7,13,16 and 17. (Para - 19,20,21)

(B) The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Act, 1986 - two essential ingredients to constitute a gang - 'violence' or 'disturbance of public order' - indulged in by a group of persons, acting either singly or collectively, for the purpose of pecuniary gain etc. - violence or disturbance of public order alone are not the sine qua non of a gang as defined under the Act of 1986. (Para - 7,14)

Applicant and co-accused allegedly acquired land from a Scheduled Caste person without permission and intimidated others - Unauthorized land sale - False claims of land ownership and layout approval - Failure to provide receipts for payments - Refusal to refund and threats - DM approved gang chart without proper discussion or recording reasons - No specific offenses disturbing public order or committed for financial gain were mentioned (Rule 13) - Quick action was taken, violating Gangster Rules, 2021, and Article 21 of Indian Constitution - process was mechanical and malicious, depriving applicants of liberty - Procedural compliance is crucial in Gangster Act cases to prevent abuse of power.(Para - 3,19,20,21)

HELD: - Authorities should have considered legal basis and justification when preparing and approving gang-charts under the 1986 Act. They paid lip service to the legislative mandate, conducting the process as a ritualistic formality without due application of mind. This led to a civil dispute relating to land being interpreted as criminality, and Section 2/3 of the Gangster Act being added to the criminal case. The initiation and continuation of criminal proceedings were deemed persecution and harassment, amounting to abuse of the law and court process. Entire proceedings quashed against applicant. (Para -22,23)

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

List of Cases cited:

1. A.K. Dixit Vs St. of U.P., 1987 (34) ACC 164: 1987 ACTR 230: AIR 1987 (All) 235 (All HC, FB)

2. V. Shukla Vs St. of U.P., 2019 (1) ARC 299

3. S. Gupta Vs St. of U.P., (2019) 1 A.Cr.R. 2

4. A.K. Dixit Vs St. of U.P., 2007 (2) ACC 683

5. Alld. Parvez Vs St. of U.P., 2021 Crl.J. 4034 (All)(LB)

6. S. Gupta Vs St. of U.P. & ors., (2022) 17 S.C.R. 622 (Para 10) (635-B-G)

(Delivered by Hon'ble Gajendra Kumar, J.)

1. Heard Sri Vineet Vikram, learned counsel for the applicant and learned AGA for the State-respondents.

2. The instant Application U/S 482 Cr.P.C. has been filed on behalf of the applicants for quashing the entire proceedings pending in the court of learned Special Judge (Gangster Act), Allahabad in Case No.97/08, under Sections 147, 148, 323, 504, 506, 420, 406 IPC and Section 2/3 of Gangster Act.

3. The facts of the case in brief are as follows:

FIR of this case has been lodged by opposite party no.2 (Mohd. Arif) against the applicant and other co-accused persons on 16.06.2007 at 08:10 p.m., in case crime no.113/07 under Sections 147, 148, 323, 504, 506, 406, 420, 34 IPC and Section 7 of Criminal Law Amendment Act, Police Station-Kareli, District-Allahabad. The allegation against the applicant and other accused persons is that they have formed a society and were doing plotting work by the name of Alina City and were taking plots for the purpose of sale and they were involved in taking advance money. It is also alleged that first informant also made contact with the society in its office. He was informed that the land in the name of the society and its lay out has been passed and all the documents are perfect. He took plot having area of 200 sq. yard at Rs.1000/- per sq. yard. It's total cost was Rs.2 lakhs. The first informant was assured that after deposit of the total amount of Rs.2 lakhs, its sale deed shall be executed in favour of the first informant. As the first informant was not having the total amount of Rs.2 lakhs, it was settled that the amount shall be paid in three installments. Thereafter, he deposited the total amount of Rs.75,000/- within six months prior lodging the FIR. No receipt of payment was given and after some time, the first informant knew that the alleged land was belonging to the Scheduled Caste person and no permission of sale was obtained from the District Magistrate, but after intimidation, the land was acquired by the applicant and other co-accused persons. It's lay out was also not passed by the Competent Authority. Thereafter, first informant changed his idea in purchasing the land and demanded the money but the same was not returned and he was extended threat for dire consequences.

4. It is submitted by the learned counsel for the applicant that complainant had lodged the FIR due to pressure of police and after registration of FIR, he had given an application to the I.G. Zone, Allahabad on 12.06.2007 (Annexure-9), in which he had prayed to expunge the FIR lodged by him on 10.06.2007.

5. It is further contended by the learned counsel for the applicant that when no action was taken on the aforesaid application, the complainant filed a petition under Article 226 of the Constitution of India bearing Criminal Misc. Writ Petition No.8187 of 2007 before this Court for quashing the impugned FIR registered as case crime No.113 of 2007, under Sections

147, 148, 323, 504, 506, 420/34, 406 IPC and 7 Criminal Law Amendment Act. with the grounds as follow-

"I) Because, the petitioner is the first informant of the First Information Report in question and he himself disowns the allegations made therein.

ii) Because, the First Information Report is a bundle of concoction and preposterous allegations and the petitioner never intended to lodge any report against the accused arrayed in the First Information Report.

Iii) Because, the petitioner do no want to be used as an instrument in the hands of police for the harassment of innocent persons to appease the person in chair.

iv) Because the written report, which is the basis of the First Information Report was extorted from the petitioner under threat and coercion and he did not willfully submitted the same to the police to register a case thereon.

v) Because, the impugned First Information Report is clear cut case of gross abuse of process of law and is liable to be quashed with awarding heavy costs."

6. It is further contended that the arrest of the applicant was stayed vide order dated 16.07.2007 by a Division Bench of this Court in Criminal Misc. Writ Petition No.7933 of 2007. It is further submitted that amount in question has already been paid by the main accused (Abrar Ahmad) to the complainant and on that basis, he (Abrar Ahmad) was granted bail by this Court vide order dated 04.10.2007 in Criminal Misc. Bail Application No.7933 of 2007. It is further submitted that applicant has no concern with the alleged society and he has been falsely implicated in this case, which is mentioned in the Gang-chart (Annexure-5) at Sl. No.5 bearing case crime No.113 of 2007, under Sections 147, 148, 323, 504, 506, 406 420, 34 IPC and Section 7 of Criminal Law Amendment Act and Section 2/3 of U.P. Gangster and Anti-social Activities (Prevention) Act, Police Station-Kareli, District-Allahabad. The same is reproduced here-in-under respectively:-

GANG-CHART

आपराधिक इतिहास	अच्छे S/o मो० मिया R/o 95B/ 5 चकिया P.S.खुल्दावाद	रफत उल्ला S/o रहमत उल्ला R/o 79 चकिया P.s खुल्दावाद	मो० इमराम S/o मो० जर्हा R/o 207 चकिया P.s खुल्दा.	शेख अकरार अहमद S/o स्व० फरीद अहमद R/o 114 मालवीय नगर P.s मुट्ठीगंज	मो० मुस्लिम S/o मो० मिया R/o चकिया P.sखुल्दाबाद	हमजा उस्मान S/oउस्मान R/o 106 मेंहदौरी P.sशिवकुटी
113/07 U/s 147,148,323, 504,506,406, 420,34 IPC व 7 क्रि०ला० ए.एक्ट P.S.करेली	✓	✓	✓	✓	✓	✓
53/01 U/s 307 IPC P.S.कैंट	✓	✓				
91/01 U/s 147,148,149, 386,504,506, 384,448,427, 482,352,34 IPC व 7क्रि०ला० ए.ऐक्ट	✓	✓				

P.s धूमनगंज						
27/01 U/s 147,148,149, 352,386,504, 506,323,365 IPC व 3(1) Sc/ST Act न 2/3 गैगेस्टर एक्ट शाहगंज	✓	✓				
89/01 U/s 395,397,448, 387, IPC व 7 क्रि.ला. एक्ट 2/3 गैंगस्टर P.S.सिविल लाइन	✓	✓				
253/02 U/s 147,148,149, 452,330,304, 506 IPC व 2/3 गै० एक्ट P.S.धूमनगंज इला०	✓	✓				
311/02 U/s 467,468,471, 420,506,384, 387 IPC व 2/3 गै. एक्ट P.s धूमनगंज इला०	✓	✓				
110/01 U/s 307 IPC P.S.शिव कुटी	✓	✓				
NCR No. 1/01 U/s 323,504 IPC P.S.शिव कुटी	✓	✓				

6. It is submitted that I.O. has submitted chargesheet against the five accused persons having added offence of Section 2/3 of Gangster Act. It is apparent that without forwarding/ recommending/approval of the gang-chart from the authorities concerned, the chargesheet under the aforesaid section was submitted. The summary appended to the charge-sheet is as follows:-

Sir, case above was registered and investigated so far; place of occurrence was inspected; witnesses acquainted with the circumstances of the case were examined; statement of the plaintiff was also recorded; having observed all the documentary evidence against the accused persons as shown in the coloumn No.3, Mohd. Imran and others, prima facie case under Sections 147, 148, 323, 504, 506, 420, 447 IPC and Section 2/3 of Gangster Act is proved. Accused as shown in coloumn No.2, Hamza Usman is absconding and against the other five accused chargesheet have been submitted and against the absconding accused, namely, Hamza Usman, chargesheet will be submitted after his arrest and prayed for summoning the witnesses/evidence. It is also submitted that in chargesheet, there is no violation of provisions of the Gangster Act disclosed.

7. It is submitted by the learned counsel appearing for the applicants, that

even if all allegations in the impugned FIR and charge-sheet are regarded as true, no case under Sections 3(1) of the Act of 1986 is made out against the applicants. In order to support the aforesaid submission, learned counsel has referred to the provisions of the gangster Act of 1986. He submits that there are two essential ingredients to constitute a gang. The two essential ingredients, according to learned counsel for the applicants, are 'violence' or 'disturbance of public order' indulged in by a group of persons, acting either singly or collectively, for the purpose of pecuniary gain etc.

8. It is the learned counsel for the applicants' submission that none of the offences charged against the applicant, either involves violence or the disturbance of public order. Therefore, even if there be allegations about pecuniary gain, the consequences under the Act of 1986 would not be attracted. He next submits that there are three base cases registered against the applicant no.1 and there is only one base case registered against the applicant nos.2 to 5, on the foot of which the present prosecution has been launched under Section 3(1) of the Act of 1986. But, in each of those crimes, the applicants have already been enlarged on bail by the court concerned. Therefore, in the submission of the learned counsel, the base cases are not available to provide foundation to the prosecution to pursue the present case under the Act of 1986. It is in the last submitted by the learned counsel for the applicant that there is violation of Rule No. 5, 7, 13, 16 and 17 of The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021, vitiating the gang-chart. He has emphasized that non-adherence to these rules has vitiated the basis of registration of the crime and a fortiori the police report and the prosecution. He has emphatically submitted that violation of the aforesaid rule is not mere omission but it shows that the proceedings before registering FIR has been carried out mechanically without giving heed to the provisions of law and rules, which are of fundamental importance as any false and malacious prosecution entails serious consequances resulting into the deprivation of life and personal liberty of the accused person, which cannot be deprived except for the procedure established by law as is enshrined in the Article 21 of the Constitution of India. The forwarding, recommending and approving authorities have not paid any heed or attention to relevant law and rules, while exercising their authority with regard to the preparation and approval of the gang-chart. The whole exercise on their part has been carried out without application of mind.

9. In response to the notice issued to respondents, a counter affidavit was filed which is duly sworn by Prakash Singh Yadav, presently posted as Sub-Inspector, Police Station-Kareli, District-Allahabad, in which all the allegations and averments made in the affidavit filed in support of the application under section 482 cr.p.c. have been totally denied and it is asserted that after thoroughly investigation, charge-sheet was submitted and applicant has formed a gang and is indulged in comitting crime to grab the property of the innocent persons.

10. In response to the counter affidavit filed by the opposite parties, rejoinder affidavit was filed in which, the allegations and averments made in the counter affidavit were denied.

11. On the other hand, learned AGA vehemently opposed the aforesaid

contentions and submits that applicant is a members of the gang, which is involved in committing the anti-social activities and crimes for pecuniar and temporal gains.

12. Upon hearing learned Counsel for the parties, this Court is of opinion that in order to consider the submissions of learned counsel for the applicant as well as learned counsel for the State, it is imperative to refer to the relevant provoisions of the Act of 1986, which reads as follows:

As the Act being a special statute- *The Act is a special statute which has been enacted for the prevention of and for coping with gangsterism and anti-social activities. The Object and reasons as well as preamble are quoted hereinbelow:-*

Objects and reasons of the Act:-

Gangsterism and anti-social activities influenced the State Legislature in making introduction of such Act. The objects and reasons of the Act are that gangsterism and anti-social activities were on the increase in the state posing threat to lives and properties of the citizens. The existing measures were not found effective enough to cope with new menace. With a view to break the gangs by punishing the gangsters and to nip their conspirational designs, it was considered necessary to make special provision for the prevention of and for coping with gangsters and anti-social activities in the State. [Ashok Kumar Dixit v. State of U.P., 1987 (34) ACC 164: 1987 ACFR 230 AIR 1987 (All) 235 (All HC, FB)].

Preamble of Act.-*The Act seeks to punish declared criminals who have deliberately chosen the life of crime. The activities of these professional perpetrators of organised crimes, violence and orgy has a far more baneful effect on the health and morals of the society and its people. If the activities of such recidivist are subjected to same punishment as that other ordinary criminals, the confidence of public in the efficacy and efficiency of State Administration is bound to shake. [Ashok Kumar Dixit v. State of U.P., 1987 (34) ACC 164: 1987 ACTR 230: AIR 1987 (All) 235 (All HC, FB)].*

13. It is important to refer to the relevant provisions of the Act of 1986, which reads as follows:-

"2. Definitions.*--In this Act,--*

(a) x x x

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities (Act no. 2 of 1974), namely--

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code (Act no. 45 of 1860), or

(ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 (U.P. Act no. 4 of 1910) or the Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force, or

(iii) occupying or talking possession of immovable property otherwise than in accordance with law, or setting-up false claims for title or

possession of immovable property whether in himself or any other person, or (Act no. 61 of 1985)

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Art, 1956, or

(vi) offences punishable under section 3 of the Public Gambling Act, 1867 (Act no. 104 of 1956), or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking for any lease or right or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under section 171-E of the Indian Penal Code, or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or

(xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

(xvi) offences punishable under the Regulation of Money Lending Act, 1976;

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960;

(xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities;

(xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966;

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xxv) indulging in crimes that impact security of State, public order and even tempo of life.

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;

14. A perusal of the aforesaid provisions shows that violence or disturbance of public order alone are not

the sine qua non of a gang as defined under the Act of 1986. It postulates a group of persons, who either acting singly or collectively, employ violence, or threat or show of violence, or intimidation, or coercion, "or otherwise' with the object of (i) disturbing public order; (ii) or of gaining any undue temporal, pecuniary, material; or other advantage for himself or any other person, indulge in anti-social activities, enumerated in clauses (i) to (xxii) of sub-Section (b) of Section 2 of the Act of 1986.

15. It is a well settled cannon of statutory interpretation that a statute should be read and understood according to its plain grammatical meaning, unless that construction leads to an absurd result, or defeats the object and the very purpose of it.

16. Learned counsel for the applicants has also drawn attention towards the mandatory compliance with the provisions of Rule 5, 13, 16 and 17 of the Rules of 2021 framed under the Act of 1986. These Rules have been made by the State Government in exercise of powers under Section 23 of the Act of 1986 to carry out its purposes. Rules 5, 13, 16 and 17 are extracted below:

*"**5. General Rules.**--(1) To initiate proceedings under this Act, the concerned In-charge of Police Station/Station House Officer/Inspector shall prepare a gang chart mentioning the details of criminal activities of the gang.*

(2) The gang-chart will be presented to the district head of police after clear recommendation of the Additional Superintendent of Police mentioning the detailed activities in relation to all the persons of the said gang.

(3) The following provisions shall be complied with in respect of gang-charts--

(a). The gang-chart will not be approved summarily but after due discussion in a joint meeting of the Commissioner of Police/District Magistrate/Senior Superintendent of Police/Superintendent of Police.

(b). There may be no gang of one person but there may be a gang of known and other unknown persons and in that form the gang-chart may be approved as per these rules.

(c). The gang-chart shall not mention those cases in which acquittal has been granted by the Special Court or in which the final report has been filed after the investigation. However, the gang-chart shall not be approved without the completion of investigation of the base case.

(d). Those cases shall not be mentioned in the gang-chart, on the basis of which action has already been taken once under this Act.

(e). A separate list of criminal history, as given in Form No.--4, shall be attached with the gang-chart detailing all the criminal activities of that gang and mentioning all the criminal cases, even if acquittal has been granted in those cases or even where final report has been submitted in the absence of evidence.

Along with the above, a certified copy of the gang register kept at the police station shall also be attached with the gang-chart. In addition to the above, the information of crime and gang members mentioned in the gang-chart will also be updated on Interoperable Criminal Justice System (ICJS) portal and Crime and Criminal Tracking Network System (CCTNS).

13. Specific statement of offences committed for economic, material and temporal or similar other benefits.- *While writing the abstract below the gang-chart and particulars separately with the gang-chart, the particulars of those offences shall be specifically mentioned:*

(I) which have been committed for pecuniary, materialistic and temporal or similar benefits; or

(ii) which disturb the public order; or

(iii) which are a ground for detention under the National Security Act, 1980 (Act No.65 of 1980).

16. Forwarding of Gang-Chart.--

The following manner shall be followed in the forwarding of Gang-Chart:

(1) Forwarding of the gang-chart by the Additional Superintendent of Police:- *The Additional Superintendent of Police will not only take a quick forwarding action in the case but he will duly peruse the gang-chart and all the attached forms; and when it is satisfied that there is a just and satisfactory basis to pursue the case, only then will he forward the letter along with the recommendation given below on the gang-chart to the Superintendent of Police/Senior Superintendent of Police.*

'Throughly studied the gang-chart and attached evidence. The basis of action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 exists. Accordingly, forwarded with recommendation."

(2) Forwarding of the gang-chart by the district police in-charge:- *When the gang-chart along with all the Forms is received by the Senior Superintendent of Police/Superintendent of Police with the clear recommendation of the Additional Superintendent of Police, he will also thoroughly analyse all the facts and when it is confirmed that all the formalities of the Act have been fulfilled and there is a legal basis for taking action in the case, then he should forward the gang-chart to the Commissioner of Police/District Magistrate stating that: "I have duly perused the gang-chart and attached forms and I am fully satisfied that all the particulars mentioned in the case are correct and there is a satisfactory basis for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. Accordingly, approved."*

(3) Resolution of the Commissioner of Police/District Magistrate:- *When the gang-chart is sent to the Commissioner of Police/District Magistrate along with all the Forms, all the facts will also be thoroughly perused by the Commissioner of Police/District Magistrate and when he is satisfied that the basis of action exists in the case, then he will approve the gang-chart stating therein that: "I duly perused the gang-chart and attached Forms in the light of the evidence attached with the gang-chart satisfactory grounds exist for taking action under the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986. The gang-chart is approved accordingly."*

It is noteworthy that the words written above are only illustrative. There is no compulsion to write the same verbatim but it is necessary that the meaning of approval should be the same as the recommendations written above, and it should also be clear from the note of approval marked.

17. Use of independent mind.--

(1) The Competent Authority shall be bound to exercise its own independent mind while forwarding the gang-chart.

(2) A pre-printed rubber seal gang-chart should not be signed by the Competent Authority; otherwise the same shall tantamount to the fact that the Competent Authority has not exercised its free mind."

17. Thus from perusal of the Rules, all that is required by Rules is that the

Authorities recommending registration of a case under the Act of 1986 should come to the conclusion with an independent application of mind that a case under the Act of 1986 ought to be registered. Likewise, the Authorities approving the gang-chart also should come to the conclusion on an independent application of mind that a case under the Act of 1986 ought to be registered against the accused on the basis of the activities of the gang. However there is no prescription for the employment of particular words to serve as index of due application of mind.

18. It will be apt to take note of what has been held and observed by the Apex Court as well as the High Court with regard to the interpretation and application of the various provisions of the Act.

Status of criminal, not punishable- It is not the status of criminal, but the act which is made punishable. The activities of gangsters are offence under the Act since they pose grave threat to the even tempo of the society and, therefore, call for sterner and more deterrent punishment and speedier trial and early booking. (**Ashok Kumar Dixit Vs. State of U.P.; 1987 (34) ACC 164).**

The person who not liable to be punished- A person is not liable to be punished under the Act merely because he happens to be a member of a group. He comes within the clutches of the Act, when he chooses to join a group which indulges in any anti-social activities defined under the Act with use of force for gaining material and advantage to himself or any other person. **(Ashok Kumar Dixit Vs. State of U.P.; 1987 (34) ACC 164).**

Duty of the State to protect personal liberty of its citizens- Duty of State to protect personal liberty of its citizens, the State is duty bound to protect personal liberty of its citizens beyond doubt which is fundamentally guaranteed under Article 21 of the Constitution of India (**Vimal Shukla Vs. State of U.P.; 2019 (1) ARC 299).**

Necessity of deeper application of mind- The imposition of Gangsters Act calls for a deeper application of mind and the satisfaction of the authorities must be based on a definite opinion against an accused person. **(Shubhankar Gupta Vs. State of U.P.; (2019) 1 A.Cr.R. 2)**

Caution for misuse of the provisions- The provisions of the Act cannot be used as a weapon to wreck vengeance or harass or intimidate innocent citizens or to settle scores on political or other fronts. The prosecution has to bear in mind that it has to bring home the guilt. **(Ashok Kumar Dixit Vs. State of U.P.; 2007 (2) ACC 683 Alld.)**

Judicial scrutiny of the subjective satisfaction- In Gangster Act, a subjective satisfaction is open to limited judicial scrutiny, therefore, it would be wrong to contend that there is a complete embargo on the powers of Court to look at the sufficiency of the ground from any perspective. **[Parvez Vs. State of U.P.; 2021 Crl.J. 4034 (All)(LB)].**

There can be prosecution for single offence/FIR/chargesheet- On a fair reading of the definitions of 'Gang' contained in Section 2(b) and 'Gangster' contained in Section 2(c) of the Gangsters Act, a 'Gangster' means a member or leader or organiser of a gang including any person who abets or assists in the activities of a gang enumerated inclause (b) of Section 2, who either acting singly or collectively commits and indulges in any of the anti-social activities mentioned in Section 2(b) can be said to have committed the offence under the Gangsters Act and can be prosecuted and punished for the offence under the Gangsters Act. There is no specific provision under the Gangsters

Act, 1986 like the specific provisions under the Maharashtra Control of Organized Crime Act, 1999 and the Gujarat Control of Terrorism and Organized Crime Act, 2015 that while prosecuting an accused under the Gangsters Act, there shall be more than one offence or the FIR/charge sheet. As per the settled position of law, the provisions of the statute are to be read and considered as it is. Therefore, considering the provisions under the Gangsters Act, 1986 as they are, even in case of a single offence/FIR/charge sheet, if it is found that the accused is a member of a 'Gang' and has indulged in any of the anti-social activities mentioned in Section 2(b) of the Gangsters Act, such as, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person and he/she can be termed as 'Gangster' within the definition of Section 2(c) of the Act, he/ she can be prosecuted for the offences under the Gangsters Act. Therefore, so far as the Gangsters Act, 1986 is concerned, there can be prosecution against a person even in case of a single offence/FIR/chargesheet for any of the anti-social activities mentioned in Section 2(b) of the Act provided such an anti- social activity is by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person. **[Shraddha Gupta Vs. State of U.P. and others; (2022) 17 S.C.R. 622 (Para 10)(635-B-G)].**

19. Considering the instant case in the light of the provisions of the Act and relevant Rules, it is evident that the gang chart in this case has been approved summarily without due discussion in the joint meeting of District magistrate and Superindentent of police, as is apparent from the perusal of the gang chart. Furthermore there is no specific mention of offences which have been committed for pecuniar, materialistic and temporal or similar benefits or which disturb the public order as per Rule 13. Furthermore, quick forwarding action has been taken in this case without caring for the compliance of the relevant rules. There should be satisfaction recorded to the effect that there is just and legal basis for taking action under the Act and there is satisfactory basis for persuing the case. The satisfaction so recorded should be there by using the mind independently but in the instant case the same is missing.

20. Considering the aforesaid submissions made by the learned counsel for the parties as well as perusal of records, it is evident from the records that at the time of approving the gang-chart, District Magistrate did not apply his mind as no reasons are recorded by him, resultantly, the lodging of FIR under Gangster Act is with malafide intention, in violation of the Gangster Rules, 2021, which shows that forwarding/ recommencing authorities as well as approving authority acted mechanically and the whole exercise lacks application of mind on the parts of the authorities concerned. The applicant has fundamental right to life which include to live with honour and dignity and fundamental right of under Article 21 of the Constitution of India cannot be interferred with lightly. The applicants have been deprived of their liberty by the mechanical excecise/procedure undertaken on the part of the authorities concerned.

21. The procedural compliance in cases of gangster Act is of utmost importance, departure from the due process of law will give chance and provide fodder

to the vested interests with singular agenda to spread false narratives. Verily, gangsterism poses an ominious threat to public order. Vile and abhorrent acts of gangsterism do evoke collective societal anger and anguish. While the war against gangsterism must be waged by the State with unwavering resolve but a civil democratic society can ill afford sacrificing the procedural safeguards legislatively provided, and which is an integrated facet of the due process of law, at the altar of perceived peril to public order.

"The Siren Song that the 'end justifies the means', and that the procedural safeguards are subdervient to the overwhelming need to ensure that the accused is prosecuted and punished, must be muzzled by voice of Rule of Law."

22. For all the reasons recorded above, the court is of the view that at the stage of preparing and approving the gang-chart on the basis of materials placed, the competent Authorities should have satisfied themselves that there is a legal basis and justifiction for taking and persuing action against the accused under the Act of 1986. At the stage of approval of the gang-chart, the approving Authority has to be satisfied that a case for action under the Act of 1986 is made out and that satisfaction should be reflected from the gang chart and other records. But in this case, the competent authorities, unhesitatingly just paid lip service to the legislative mandate and unfortunately had undertaken the whole exercise of preparation and approval of the gang chart as a ritualistic formality without due application of mind. Thus, civil dispute relating to land has been given colour of criminality and to add insult to injury, in the course of investigation, Section 2/3 of Gangster Act has been added in the criminal case that is unnecessarily given shape of act of gangsterism and anti social activities on the part of police and admistrative authorities. the initiation and continuation of the entire criminal proceedings is persecution and harassment of the accused , amounting to be sheer abuse of process of law as well as abuse of process of court, that is in order to sotherwise ensure the ends of justice is liable to be quashed.

23. In such view of the matter, the entire proceedings pending in the court of learned Special Judge (Gangster Act), Allahabad in Case No.97/08, in case crime no.113/07 under Sections 147, 148, 323, 504, 506, 420, 406 IPC and Section 2/3 of Gangster Act is, hereby, quashed against the applicant (Mohd. Muslim).

24. The application is, accordingly, **allowed**.

25. A copy of this order be certified to the lower court forthwith.

(2024) 2 ILRA 1205
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.02.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Application u/s 482 No. 10136 of 2023

Kamlesh Singh & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Dhirendra Pratap Singh

Counsel for the Opp. Parties:

G.A., Shishir Pradhan

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Sections 147, 148, 149 & 302 - Magistrate can summon the accused even if his name does not find place in Column (2) - High Court should exercise its power under Section 482 Cr.P.C. sparingly, only in rare cases, and with due care and caution - High Court should refrain from undue interference, avoiding meticulous examination of evidence - Interference is warranted only to prevent patent miscarriage of justice or correct grave errors Court must balance individual freedom with the prosecution's right to investigate and prosecute - Quashing a charge is an exception, and the High Court should prioritize permitting prosecution over quashing proceedings at the initial stage. (Para - 32 ,36)

FIR was lodged alleging murder - charge sheet prepared but not filed due to interim order passed in writ petition - case was transferred to CBCID - which filed a new charge sheet - sufficient material was available before Magistrate for summoning all accused. (Para - 28,29)

HELD: - Magistrate/Court has not committed any illegality in summoning the accused-applicant(s). Two accused expired during trial trial. Court to proceed matter expeditiously. (Para - 33,38)

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

List of Cases cited:

1. Hasanbhai Valibhai Qureshi Vs St. of Guj. & ors., (2004) 5 SCC 347

2. Vinay Tyagi Vs Irshad Ali @ Deepak & ors., (2013) 5 SCC 762

3. Nahar Singh Vs St. of U.P. & anr., (2022) 2 SCC (Cri) 328

4. CBI Vs Aryan Singh Etc., 2023 SCC OnLine SC 379

5. Supriya Jain Vs St. of Har. & anr., (2023) 7 SCC 711

(Delivered by Hon'ble Saurabh Lavania, J.)

1. Third application for Interim relief filed in the Court today, is taken on record.

2. Heard Sri Dhirendra Pratap Singh, learned counsel for the applicants, Sri Anirudha Kumar Singh, learned AGA for the State and Sri Shishir Pradhan, Advocate, learned counsel for the opposite party No.2.

3. By means of instant application under Section 482 Cr.P.C. Kamlesh Singh and Bhagauti Singh, have approached this Court impeaching the order dated 27.03.2023 passed by the Chief Judicial Magistrate, Court No.9, Raebareli (in short "C.J.M.") in Case No.8528 of 2020 and have also assailed the order dated 30.09.2023 passed by the Additional District and Sessions Judge-II, Raebareli (in short "revisional court") in Criminal Revision No.139 of 2023 as also the Charge Sheet No.369 dated 12.11.1992, Charge Sheet No.49 dated 26.11.1998 and Charge Sheet No.49A dated 12.04.2001, arising out of Case Crime No.373 of 1991 under Sections 147, 148, 149 & 302 IPC, P.S.-Kotwali, District-Raebareli.

4. Vide impugned order dated 27.03.2023, C.J.M. took cognizance against all the accused persons and abated the proceedings against Ashok Kumar Singh and Akhilesh Singh on account of the fact that during pendency of the trial these accused were expired.

5. Vide order dated 30.09.2023 the revisional court dismissed the Criminal Revision No.139 of 2023, which was filed assailing the order dated 27.03.2023 passed by the C.J.M.

6. Brief facts, which are relevant for the purposes of disposal of present application, are to the effect that after lodging of an FIR dated 27.07.1991 of

murder of Iqbal Haider Raza implicating Akhilesh Singh, Kamlesh Singh, Ashok Singh (in documents on record name of the accused is also indicated as Ashok Kumar Singh) and Bhagauti Singh, the local police started the investigation. The investigation subsequently was transferred to CBCID from local police on 01.08.1991, as indicated in the application. Thereafter, investigation was again transferred from CBCID to local police on 15.10.1991. The order of transferring the investigation from CBCID to local police was assailed before this Court by means of Writ Petition No.3523 (M/B) of 1991, which was subsequently dismissed as not pressed vide order dated 01.10.1992. After dismissal of aforesaid writ petition on 01.10.1992, Charge Sheet No.369 dated 12.11.1992 was prepared by the local police, however, the same was not filed before the trial Court on account of interim order dated 13.11.1992 passed in Writ Petition No.4672 (M/B) of 1992 and this Court provided liberty to CBCID to investigate the case. After the order of this Court dated 13.11.1992, the local police on 26.07.1997 sent the entire documents/case diary to CBCID and thereafter, the CBCID started the investigation on 23.05.1998 and after due investigation, the CBCID submitted the Charge Sheet No.49 dated 26.11.1998 before the competent court of jurisdiction upon which the cognizance was taken on 02.12.1998.

7. At this stage, this Court finds it appropriate to reproduce the relevant contents of the Parcha No.25/Charge Sheet dated 26.11.1998, as available on record (Annexure No.10), which reads as under:-

"अब तक की की तमामी विवेचना से संकलित साक्ष्य के आधार पर अभियुक्त अखिलेश सिंह पुत्र धुन्नी सिंह कमलेश सिंह पुत्र धुन्नी सिंह अशोक सिंह पुत्र देवेन्द्र सिंह निवासी लालूपुर चौहान थाना महाराजगंज एवं भगवती सिंह पुत्र श्री देवी बक्स सिंह निवासी पूरे आदमपुर थाना महाराजगंज जनपद रायबरेली के विरूद्ध दिनांक 27 जुलाई 91 को श्री इकबाल हैदर रजा को रात्रि 8:30 बजे उनके घर में दरवाजा खुलवाकर गोली मारकर हत्या करने का अपराध प्रथम दृष्टिया धारा 147 148 149 302 भारतीय दंड विधान के अंतर्गत प्रथम दृष्टिया होना सिद्ध है अभियुक्त अखिलेश सिंह व कमलेश सिंह के विरूद्ध दिनांक12 नवंबर 92 को स्थानीय पुलिस द्वारा माह फरवरी में आरोप पत्र संख्या 369 दिनांक 12 नवंबर 92 को प्रेषित किया गया विवेचना से ताईद एवं तस्दीक की जाती है।

अभियुक्त अशोक कुमार सिंह पुत्र देवेंद्र सिंह उर्फ छोटे लाल सिंह निवासी ग्राम लालपुर चौहान थाना महाराजगंज एवं भगवती सिंह पुत्र देवी बक्स सिंह ग्राम पुरे गोसाई माजरा आदमपुर थाना महाराजगंज जिला रायबरेली के विरूद्ध इकबाल हैदर रजा की हत्या करने और प्रथम दृष्टिया सिद्ध होने के फलस्वरूप धारा 147 148 149 302 भारतीय दंड विधान के अंतर्गत आरोप पत्र प्रेषित।

विवेचना समाप्त की जाती है"

8. The earlier part of above quoted Charge Sheet dated 26.11.1998 indicates that therein Investigating Officer (in short "I.O.") specifically observed that after due investigation, prima facie, offence of murder of Iqbal Haider Raza is made out against accused Akhilesh Singh, Kamlesh Singh, Ashok Singh and Bhagauti Singh and thereafter confirmed and verified the Parcha No.369/Charge Sheet dated 12.11.1992, which was with regard to two accused namely Akhilesh Singh and Kamlesh Singh, the same reads as under:-

"श्रीमान जी से निवेदन है कि दि० 27.7.91 को वादी मुकदमा खाना नं०1 श्री नदीम इकबाल पुत्र श्री इकबाल रजा हैदर के मकान स्थित मो० दक्षिणी जहानाबाद थाना कोतवाली रायबरेली पर लगभग 8.30 बजे रात मुल्जिमान खाना नं०3 मय अपने साथियों मुल्जिमान खाना नं०2 के साथ एक राय होकर सस्त्रों से सुसज्जित पुरानी दुश्मनी के कारण उसके माकन पर पहुंचे और वादी के पिता श्री इकबाल रजा हैदर पुत्र श्री हाजी अब्दुल गफूर को फायर करके गोलियों से मौके पर ही जान से मार डाले। मुल्जिमान वादी व गवाहान द्वारा मौके पर बिजली की रोशनी में देखे व पहचाने वादी की तहरीरी सूचना पर दिनांक 27.7.91 को 21.30 बजे थाना स्थानीय पर मुल्जिमान के विरूद्ध अभियोग पंजीकृत हुआ। विवेचना की गयी। विवेचना से बयानात गवाहान, निरीक्षण घटनास्थल, नतीजा PM से मुल्जिमान के विरूद्ध जुर्म धारा 147/148/149/302 IPC बनता है। अस्तु गिरफ्तार न होने

कारण चालान मफरूरी में किया जाता है। गवाहान सबूत तलब करके इनके विरूद्ध कार्यवाही करने की कृपा की जाय।"

9. From a conjoint reading of contents of the FIR and the above quoted portion(s) of the Charge Sheet(s) dated 26.11.1998 and 12.11.1992, it is apparent that all the accused committed crime against whom the FIR was lodged namely Akhilesh Singh, Kamlesh Singh, Ashok Singh and Bhagauti Singh and therefore in the earlier part of Charge Sheet dated 26.11.1998 the I.O. in specific terms indicated that the Charge Sheet dated 12.11.1992 is confirmed and verified and thereafter in later part of Charge Sheet dated 26.11.1998 the I.O. indicated the names of accused namely Ashok Singh and Bhagauti Singh, against whom the Charge Sheet was not prepared earlier.

10. It is evident from the above quoted portion of Charge Sheet dated 26.11.1998 that I.O. has not indicated therein that the sufficient material/evidence is not available against accused namely Akhilesh Singh and Kamlesh Singh.

11. It would further be relevant to indicate that vide order dated 02.12.1998 the cognizance was taken by the C.J.M. against all the accused persons. The order dated 02.12.1998 on reproduction reads as under:-

"आज आरोप पत्र अन्तर्गत आ० सं० 373/91, धारा 147, 148, 149, 302 भा०द०वि०, थाना-कोतवाली, रायबरेली के अभियुक्तगण अशोक सिंह व भगौती सिंह, अखिलेश कुमार सिंह व कमलेश के विरूद्ध, C.B.C.I.D. द्वारा प्राप्त हुआ। पढ़ा।

आदेश हुआ कि प्रसंज्ञान किया गया। दर्ज रजिस्टर हो। नकलें बनवायी जायें। दि० 10.12.98 के वास्ते आदेश पेश हों।"

12. The order dated 02.12.1998 was assailed by means of Criminal Revision No.6 of 1999. This revision was filed by all the accused namely Kamlesh Singh, Akhilesh Singh, Bhagauti Singh and Ashok Singh. The revisional Court allowed the revision vide order dated 11.05.1999 and remanded the matter back to the C.J.M. for re-consideration in the light of the observation made in the order dated 11.05.1999. The observation being relevant, as pointed by the learned counsel for the applicants, on reproduction, reads as under:-

"As said above, the chargesheet, in which cognizance has been taken, only two accused are named, namely, Ashok singh and Bhagauti Singh, and in the other Charge Sheet Akhilesh Kumar Singh and Kamlesh Singh are accused and Ashok Singh and Bhagauti Singh are named as suspected accused. The subsequent chargesheet (paper no.5Ka/3) is neither duly filed in the court by the investigating agency nor cognizance has been taken by the learned Chief Judicial Magistrate, Raebareli, but all the four accused, mentioned above, have been summoned. In the circumstances, aforementioned, there appears to be material irregularity in exercise of Jurisdiction and it does not appear that mind has been applied by the learned Chief Judicial Magistrate, Rae Bareli on paper no. 5Ka/3 aforementioned.

In view of the aforementioned circumstances, the case deserves to be sent back for reconsideration by the learned Chief Judicial Magistrate, Rae Bareli. The learned Chief Judicial Magistrate, Rae Bareli, shall make enquiry as to who scored out the signature and date on paper no. 5Ka/3 and thereafter, after applying his mind on paper no.5Ka/3 (chargesheet) and its validity, he shall pass necessary orders. The revisions are directed to appear and object before the Chief Judicial Magistrate, Rae Bareli, and if they do so, their submission shall be considered.

ORDER

The revision is allowed and order impugned is set aside. The case is sent back to the learned Chief Judicial Magistrate, Rae Bareli for reconsideration in the light of observations made above."

13. After the aforesaid direction of the revisional Court dated 11.05.1999, the trial Court passed the order of cognizance dated 02.05.2005. This order was again assailed by the accused persons namely Kamlesh Singh, Akhilesh Singh, Bhagauti Singh and Ashok Kumar Singh by preferring the Criminal Revision No.118 of 2005. The revisional Court again interfered in the order of cognizance dated 02.05.2005 and remanded the matter back to the trial Court for re-consideration vide its order dated 07.12.2005. The observation made by the revisional Court in its order dated 07.12.2005 indicates that while taking cognizance in the matter vide order dated 02.05.2005 the concerned Court failed to take note of observations made by the revisional court in its earlier order dated 11.05.1999.

14. After the aforesaid order dated 07.12.2005, the C.J.M. by the impugned order dated 27.03.2023 took cognizance. The relevant portion of the impugned order dated 27.03.2023 is reproduced hereinunder:-

"On perusal of case diary parcha number 5 the special secretary Home UP Lucknow in case Crime number 373/91 U/S 147/148 and 149/302 IPC Reg at PS Kotwali District Raebareli entrusted to CID for investigation. The investigation by local police was stayed and the copy for compliance was sent to the state official dated August 1st 1991. On perusal of case diary the investigation was forwarded to the concerned and the investigation was closed by the local police. Meanwhile the charge sheet was filed by the local police but on perusal it was not filed by in consonance with section 158 CRPC. Later on two charge sheet were filed by CBCID naming four accused as above mentioned. By one order of this court the Cognizance was again taken but it was reverted back for rehearing giving direction above mentioned for reconsideration and set aside the order passed by this court.

Section 460 of CRPC clearly States about the irregularities which do not vitiate proceeding in which mere irregularities in taking Cognizance can be caused.

Now coming on the fact of several charge sheet filed both by local police and CBCID. When due investigation was transferred to CBCID in 1991 and CBCID after investigation file two Charge sheet naming all the four accused. Firstly CBCID has filed charge sheet naming two accused and later on supplementary cahrgesheet naming other 2 accused.

The charge sheet filed by the local police in mere irregularities and it may not be taken in account because the whole investigation was transferred to CB CID and later on CBCID has filed their Charge sheet naming all the four accused.

The Honorable Allahabad High Court in case application under section 482 CrPC number 12578 of 2021 Badri Prasad and 3 others vs. State of UP and another; has stated that "at a stage where it is to be decided as to whether process should be issued, the magistrate would not be required to enter into a detailed discussion on merits or demerits of the case and it would suffice if the evidence led by the complainant in support of the allegation is taken into consideration and determining the question whether any process is to be issued or not, what the

magistrate has to be satisfied is whether there is sufficient ground for proceeding and not whether there is sufficient grounds for conviction."

The Honorable court has stated a distinction drawn between taking Cognizance based upon charge sheet filed by the police under section 190 (1) (b) of the code and taking Cognizance based on a complaint under section 190 (1) (a). As for Cognizance based on a police report is concerned, the magistrate would have the advantage of the charge sheet, statement of witnesses and other evidence collected by the police during the investigation. The fact that after investigation of the case, the police has filed a charge sheet along with the material thereon, may be considered as sufficient ground for proceeding for issuance of summon under section 204 of the code.

Thus, coming to the conclusion of this court, the investigating agency in this case is CBCID and CBCID has filed chargesheet against all the accused. Perused all the document filed by CBCID and this court finds that there are sufficient material and evidence against the accused for proceeding and taking Cognizance and issuance of process against all the accused. The charge sheet filed by local police is mere irregularity and was cured subsequently by filing chargesheet by CBCID. The matter is grave in nature and oldest and this court is of no view for further delaying the case only based on technical grounds. There is sufficient ground for issuance of process against accused.

Order

Cognizance against all the accused is taken by this court under section 147/148/149/302 of IPC in the light of direction given by the Revisional court. The accused have knowledge as the legal representative are arguing and objecting on Cognizance. Thus, issuance of B.W. of 10000 against two accused. Two of the accused have expired during this stage and the proceeding has abated against them by the previous order of the court. Issue Bailable warrant 10000 against Kamlesh Singh and Bhagauti Singh. Case is put up on 21.4.23."

15. At this stage, it would be relevant to indicate that after the order of the revisional Court dated 11.05.1999, it appears that S.P., CBCID, U.P., Lucknow, directed the Circle Officer, CBCID, Lucknow vide his letter dated 18.03.2001 to file the Supplementary Charge Sheet (frfrEek vkjksi i=) and for this purpose the S.P., CBCID in his letter dated 18.03.2001 took note of the fact that the Charge Sheet of CBCID itself indicates that there is sufficient evidence against all the accused persons namely Kamlesh Singh, Akhilesh Singh, Bhagauti Singh and Kamlesh Singh and thereafter in terms of the letter dated 18.03.2001 of S.P., CBCID, the Charge Sheet No. 49A dated 12.04.2001 was filed against Akhilesh Singh and Kamlesh Singh.

16. In the aforesaid background of the case, as per submissions advanced by the learned counsel for the applicants, the present application has been filed under Section 482 of Cr.P.C. on the following main grounds:-

(i) Section 460 of Cr.P.C. would not be attracted as in fact irregularity was committed by the Investigating Agency.

(ii) For filing supplementary Charge Sheet No.49A dated 12.04.2001 no order was passed by the concerned Magistrate under Section 173(8) of Cr.P.C.

(iii) The Charge Sheet No.49A dated 12.04.2001 was filed without further

investigation in the matter. In other words, based upon the earlier evidence available with the prosecution fresh Charge Sheet No. 49A was filed.

(iv) The Court while taking cognizance by the impugned order dated 27.03.2023 failed to observe on the issues indicated by the revisional Court in the order dated 11.05.1999, according to which, the trial Court was under obligation to make an inquiry in respect of Parcha No.5Ka-3 and in this case, no inquiry was carried out, as such, the trial Court failed to conduct the proceedings in accordance with the order of remand dated 11.05.1999 and it is settled principle of law that the subordinate court/authority is under obligation to conduct the proceedings in terms of order of remand.

17. In support of aforesaid submissions, reliance has been placed by the learned counsel appearing for the applicants on the judgment passed by the Hon'ble Apex Court in the case of **Hasanbhai Valibhai Qureshi vs. State of Gujarat And Others; (2004) 5 SCC 347**. Relevant paragraphs 12 and 13 of the same on reproduction read as under:-

"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. We make it clear that we have not expressed any final opinion on the merits of the case."

18. Opposing the present application, learned AGA says that the orders impugned as also the charge sheet(s), in issue, are not liable to be interfered with by this Court. Elaborating the same, learned AGA says that with regard to Charge Sheet No. 369 dated 12.11.1992, the applicants have not pleaded in entire application regarding illegality committed by the prosecution. In regard to the Charge Sheet dated 26.11.1998 only this much has been indicated in the application that while filing the charge sheet, CBCID in the case diary observed that the Charge Sheet prepared by the local police dated 12.11.1992 is

confirmed and verified and alleging this, the Charge Sheet dated 26.11.1998 has been assailed in this application.

19. Learned AGA further submitted that Supplementary Charge Sheet No. 49A dated 12.04.2001 is also not liable to be interfered by this Court on the grounds taken by the applicants in the instant application for the reason that from a bare perusal of charge sheet dated 26.11.1998, it is apparent that the I.O. in specific terms observed that after due investigation, prima facie, offence against all accused is made out and in the same, the names of all accused namely Akhilesh Singh, Kamlesh Singh, Ashok Singh and Bhagauti Singh and were specifically indicated and in this regard, he drawn the attention of the Court on the relevant contents of Charge Sheet dated 26.11.1998, at the cost of repetition, the same is extracted hereinunder:-

"अब तक की की तमामी विवेचना से संकलित साक्ष्य के आधार पर अभियुक्त अखिलेश सिंह पुत्र धुन्नी सिंह कमलेश सिंह पुत्र धुन्नी सिंह अशोक सिंह पुत्र देवेन्द्र सिंह निवासी लालूपुर चौहान थाना महाराजगंज एवं भगवती सिंह पुत्र श्री देवी बक्स सिंह निवासी पूरे आदमपुर थाना महाराजगंज जनपद रायबरेली के विरुद्ध दिनांक 27 जुलाई 91 को श्री इकबाल हैदर रजा को रात्रि 8:30 बजे उनके घर में दरवाजा खुलवाकर गोली मारकर हत्या करने का अपराध प्रथम दृष्टिया धारा 147 148 149 302 भारतीय दंड विधान के अंतर्गत प्रथम दृष्टिया होना सिद्ध है अभियुक्त अखिलेश सिंह व कमलेश सिंह के विरुद्ध दिनांक12 नवंबर 92 को स्थानीय पुलिस द्वारा माह फरवरी में आरोप पत्र संख्या 369 दिनांक 12 नवंबर 92 को प्रेषित किया गया विवेचना से ताईद एवं तस्दीक की जाती है।"

20. He further submitted that the submissions of the learned counsel for the applicant which are to the effect that for the purposes of submitting the Supplementary/Additional Charge Sheet the order of competent Court/Magistrate is required and Parcha No.49-A/Charge Sheet dated 12.04.2001 was submitted without the leave of the Court/Magistrate, as such, the cognizance taken by the Magistrate on the basis of Parcha No.49-A/Charge Sheet dated 12.04.2001 is liable to be interfered with, are completely fallacious.

21. Elaborating the aforesaid, learned AGA submitted that in the instant case, Parcha No.49-A/Charge Sheet dated 12.04.2001 was placed before the Court in the light of letter of S.P., CBCID, dated 18.03.2001 and a perusal of this letter dated 18.03.2001 would show wherein the observations are that sufficient evidence to prosecute all the accused namely Akhilesh Singh, Kamlesh Singh, Ashok Singh and Bhagauti Singh was available but in the later part of Charge Sheet dated 26.11.1998 the name of Akhilesh Singh and Kamlesh Singh was not indicated, though, should have been indicated and for this reason, a direction was issued to file Supplementary/Additional Charge Sheet and therefore, Supplementary/Additional Parcha No.49A/Charge Sheet dated 12.04.2001 was filed before the Court concerned.

22. In continuation, he submitted that the leave of the Court, as per law laid down by the Hon'ble Apex Court in the case of **Vinay Tyagi vs. Irshad Ali @ Deepak and Others ; (2013) 5 SCC 762**, is required for further investigation and in the instant case, no further investigation was carried out by the Investigating Officer for the purpose of filing of Supplementary/Additional Charge Sheet. The Investigating Officer based upon the evidence collected during investigation prior to filing of Charge Sheet dated 26.11.1998 filed the Additional Parcha No.49A/Charge Sheet 12.04.2001. Thus, no illegality was committed in filing

the Parcha No.49A/Charge Sheet dated 12.04.2001.

23. It is also stated that if it is presumed that the said Charge Sheet dated 12.04.2001 ought not to have been taken note of while taking cognizance by the Magistrate concerned even then in view of the evidence available against all the accused the C.J.M. was/is empowered to summon all the accused after taking cognizance against all the accused.

24. He further submitted that in view of law laid by the Hon'ble Apex Court in the case of **Nahar Singh vs. State of U.P. And Another; (2022) 2 SCC (Cri) 328**, the Magistrate is empowered to take cognizance and issue summons to the accused against whom Charge Sheet was not filed if the material is available before the Magistrate/Court concerned. Para(s) 17 to 30 of the judgment, referred above, are extracted hereinunder:-

"17.As regards scope of jurisdiction of the Magistrate in a situation of this nature, it was held by the Constitution Bench inDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] : (SCC p. 319, paras 35-36)

"35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2)CrPC. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in Column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

36. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Sessions Court."

18.Another Constitution Bench inHardeep Singhv.State of Punjab[Hardeep Singhv.State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] followedDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] . It was opined by the Constitution Bench inHardeep Singh[Hardeep Singhv.State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] : (Hardeep Singh case[Hardeep Singhv.State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , SCC p. 139, para 111)"

111. Even the Constitution Bench inDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the charge-sheet, once the case had been committed to it.It means 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."

19.Earlier, a Coordinate Bench inRaj Kishore Prasadv.State of Bihar[Raj Kishore Prasadv.State of Bihar, (1996) 4 SCC 495 : 1996 SCC (Cri) 772] expressed the view that power under Section 209 of the Code to summon a new offender was not vested with a Magistrate. In this decision, the correctness of the view taken inKishun Singhv.State of Bihar[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] andNisarv.State of U.P.[Nisarv.State of U.P., (1995) 2 SCC 23 : 1995 SCC (Cri) 306] was doubted. The latter decision followedKishun Singh[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] . The Constitution Bench inDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] affirmed the view taken by this Court inKishun Singh[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] and overruledRaj Kishore Prasad[Raj Kishore Prasadv.State of Bihar, (1996) 4 SCC 495 : 1996 SCC (Cri) 772] . In fact, again a Coordinate Bench inBalveer Singhv.State of Rajasthan[Balveer Singhv.State of Rajasthan, (2016) 6 SCC 680 : (2016) 2 SCC (Cri) 622] has followed bothDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] andKishun Singh[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] . In the latter authority (i.e.Kishun Singh[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470]), it was, inter alia, held : (Kishun Singh case[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] , SCC pp. 28-29, para 13)

"13. The question then is whether de hors Section 319 of the Code, can similar power be traced to any other provision in the Code or can such power be implied from the scheme of the Code? We have already pointed out earlier the two alternative modes in which the criminal law can be set in motion; by the filing of information with the police under Section 154 of the Code or upon receipt of a complaint or information by a Magistrate. The former would lead to investigation by the police and may culminate in a police report under Section 173 of the Code on the basis whereof cognizance may be taken by the Magistrate under Section 190(1)(b) of the Code. In the latter case, the Magistrate may either order investigation by the police under Section 156(3) of the Code or himself hold an inquiry under Section 202 before taking cognizance of the offence under Section 190(1)(a) or (c), as the case may be, read with Section 204 of the Code. Once the Magistrate takes cognizance of the offence he may proceed to try the offender (except where the case is transferred under Section 191) or commit him for trial under Section 209 of the Code if the offence is triable exclusively by a Court of Session. As pointed out earlier cognizance is taken of the offence and not the offender. This Court inRaghubans Dubeyv.State of Bihar[Raghubans Dubeyv.State of Bihar, (1967) 2 SCR 423 : AIR 1967 SC 1167] stated that once cognizance of an offence is taken it becomes the Court's duty 'to find out who the offenders really are' and if the Court finds 'that apart from the persons sent up by the police some other persons are involved, it is its duty to proceed against those persons' by summoning them because 'the summoning of the additional accused is part of the proceeding initiated by its taking cognizance of an offence'. Even

after the present Code came into force, the legal position has not undergone a change; on the contrary the ratio ofDubey case[Raghubans Dubeyv.State of Bihar, (1967) 2 SCR 423 : AIR 1967 SC 1167] was affirmed inHareram Satpathyv.Tikaram Agarwala[Hareram Satpathyv.Tikaram Agarwala, (1978) 4 SCC 58 : 1978 SCC (Cri) 496] . Thus far there is no difficulty."

20.There is a difference so far as the position of law on which the opinions of the two Constitution Benches were delivered in relation to the facts of the present case. InDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] andHardeep Singh[Hardeep Singhv.State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , summons were issued against the persons whose names had figured in Column (2) of the charge-sheet. Both these authorities also dealt with exercise of jurisdiction of the Court of Session under Section 193 of the Code. This provision reads:

***"193.Cognizance of offences by Courts of Session.**—Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."*

21.It would appear from the Code that the jurisdiction to take cognizance has been vested in the Magistrate (under Section 190 thereof) as also Court of Session under Section 193, which we have quoted above. This question has been examined inDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] and on this point it has been held : (SCC pp. 319-20, para 39)

"39. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session.It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session.The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge."

22.The scope of jurisdiction of the Magistrate in taking cognizance of an offence was earlier examined by a three-Judge Bench of this Court inRaghubans Dubeyv.State of Bihar[Raghubans Dubeyv.State of Bihar, (1967) 2 SCR 423 : AIR 1967 SC 1167] . This authority was relied upon by the Coordinate Bench inKishun Singh case[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] . Dealing with broadly similar provisions of the old Code of 1898, it was observed by this Court : (AIR pp. 1169-70, para 9)

"9. ... In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes

cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence. As pointed out by this Court inPravin Chandra Modyv.State of A.P.[Pravin Chandra Modyv.State of A.P., (1965) 1 SCR 269 : AIR 1965 SC 1185 : (1965) 2 Cri LJ 250] the term "complaint" would include allegations made against persons unknown. If a Magistrate takes cognizance under Section 190(1)(a) on the basis of a complaint of facts he would take cognizance and a proceeding would be instituted even though persons who had committed the offence were not known at that time. The same position prevails, in our view, under Section 190(1)(b)."

23.InKishun Singh case[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] , the scope of jurisdiction of the Court of Session under Section 193 of the Code was explained, relying on an authority dealing with similar provision under the 1898 Code (P.C. Gulativ.Lajya Ram[P.C. Gulativ.Lajya Ram, AIR 1966 SC 595 : 1966 Cri LJ 465 : (1966) 1 SCR 560]). The phrase used to explain the implication of taking cognizance by a Court of Session in the judgment ofKishun Singh[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] was "cognizance in the limited sense".

24.In para 8 of the Report (inKishun Singh case[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470]), it has been held observed : (SCC pp. 24-25)

"8. Section 193 of the old Code placed an embargo on the Court of Session from taking cognizance of any offence as a court of original jurisdiction unless the accused was committed to it by a Magistrate or there was express provision in the Code or any other law to the contrary. In the context of the said provision this Court inP.C. Gulativ.Lajya Ram[P.C. Gulativ.Lajya Ram, AIR 1966 SC 595 : 1966 Cri LJ 465 : (1966) 1 SCR 560] , SCR p. 568, AIR p. 599, Cri LJ p. 469 observed as under : (AIR p. 599, para 21)

'21. When a case is committed to the Court of Session, the Court of Session has first to determine whether the commitment of the case is proper. If it be of opinion that the commitment is bad on a point of law, it has to refer the case to the High Court which is competent to quash the proceeding under Section 215 of the Code. It is only when the Sessions Court considers the commitment to be good in law that it proceeds with the trial of the case. It is in this context that the Sessions Court has to take cognizance of the offence as a court of original jurisdiction and it is such a cognizance which is referred to in Section 193 of the Code.' "

25.Jurisdiction of the Magistrate to take cognizance of an offence triable by a Court of Session is not in controversy before us. The course open to a Magistrate on submission of a police report has been discussed inDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] . In para 39 of the Report inDharam Pal case[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] , such power or jurisdiction of the Magistrate has been spelt out. We have quoted this passage earlier in this judgment.

26.The other difference so far as this case is concerned in relation to the factual basis on which the decision of the Constitution Bench inDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] as also the judgment inRaghubans Dubey[Raghubans Dubeyv.State of Bihar, (1967) 2 SCR 423 : AIR 1967 SC 1167] were delivered is that

in both these cases, the names of the persons arraigned as accused had figured in Column (2) of the charge-sheet. This Column, as it appears from the judgment inRaghubans Dubey[Raghubans Dubeyv.State of Bihar, (1967) 2 SCR 423 : AIR 1967 SC 1167] , records the name of a person under the heading "not sent up". In that case, the person concerned was named in the FIR. But that factor, by itself, in our opinion ought not to be considered as a reason for the Court in not summoning an accused not named in the FIR and whose name also does not feature in charge-sheet at all. These judgments were delivered in cases where the names of the persons sought to be arraigned as accused appeared in Column (2) of the police report. In our opinion, the legal proposition laid down while dealing with this point was not confined to the power to summon those persons only, whose names featured in Column (2) of the charge-sheet.

27.InDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] , the second point formulated (para 7.2) related to persons named in Column (2), but the issue before the Constitution Bench related to that category of persons only. This is the position of law enunciated inHardeep Singh[Hardeep Singhv.State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] andRaghubans Dubey[Raghubans Dubeyv.State of Bihar, (1967) 2 SCR 423 : AIR 1967 SC 1167] . In the latter authority, the duty of the Court taking cognizance of an offence has been held "to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons". Such duty to proceed against other persons cannot be held to be confined to only those whose names figure in Column (2) of the charge-sheet.

28.As we have already observed that in the aforesaid authorities, the question of summoning the persons named in Column (2) of the charge-sheet was involved, in our opinion inclusion in Column (2) was not held to be the determinant factor for summoning persons other than those named as accused in the police report or charge-sheet. The principle of law enunciated inRaghubans Dubey[Raghubans Dubeyv.State of Bihar, (1967) 2 SCR 423 : AIR 1967 SC 1167] ,Dharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] andHardeep Singh[Hardeep Singhv.State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] does not constrict exercise of such power of the Court taking cognizance in respect of this category of persons [i.e. whose names feature in Column (2) of the charge-sheet].

29.InRaghubans Dubey[Raghubans Dubeyv.State of Bihar, (1967) 2 SCR 423 : AIR 1967 SC 1167] ,SWIL Ltd.[SWIL Ltd.v.State of Delhi, (2001) 6 SCC 670 : 2001 SCC (Cri) 1205] andDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] , the power or jurisdiction of the court or Magistrate taking cognizance of an offence on the basis of a police report to summon an accused not named in the police report, before commitment has been analysed. The uniform view on this point, irrespective of the fact as to whether cognizance is taken by the Magistrate under Section 190 of the Code or jurisdiction exercised by the Court of Session under Section 193 thereof is that the aforesaid judicial authorities would not have to wait till the case reaches the stage when jurisdiction under Section 319 of the Code is capable of being exercised for

summoning a person as accused but not named as such in police report. We have already expressed our opinion that such jurisdiction to issue summons can be exercised even in respect of a person whose name may not feature at all in the police report, whether as accused or in Column (2) thereof if the Magistrate is satisfied that there are materials on record which would reveal prima facie his involvement in the offence. None of the authorities limit or restrict the power or jurisdiction of the Magistrate or Court of Session in summoning an accused upon taking cognizance, whose name may not feature in the FIR or police report.

30.In the present case, the name of the accused had transpired from the statement made by the victim under Section 164 of the Code. InDharam Pal[Dharam Palv.State of Haryana, (2014) 3 SCC 306 : (2014) 2 SCC (Cri) 159] , it has been laid down in clear terms that in the event the Magistrate disagrees with the police report, he may act on the basis of a protest petition that may be filed and commit the case to the Court of Session. This power of the Magistrate is not exercisable only in respect of persons whose names appear in Column(2) of the charge-sheet, apart from those who are arraigned as accused in the police report. In the subject proceeding, the Magistrate acted on the basis of an independent application filed by the de facto complainant. If there are materials before the Magistrate showing complicity of persons other than those arraigned as accused or named in Column (2) of the police report in commission of an offence, the Magistrate at that stage could summon such persons as well upon taking cognizance of the offence. As we have already discussed, this was the view of this Court inRaghubans Dubey[Raghubans Dubeyv.State of Bihar, (1967) 2 SCR 423 : AIR 1967 SC 1167] . Though this judgment dealt with the provisions of the 1898 Code, this authority was followed inKishun Singh[Kishun Singhv.State of Bihar, (1993) 2 SCC 16 : 1993 SCC (Cri) 470] . For summoning persons upon taking cognizance of an offence, the Magistrate has to examine the materials available before him for coming to the conclusion that apart from those sent up by the police some other persons are involved in the offence. These materials need not remain confined to the police report, charge-sheet or the FIR. A statement made under Section 164 of the Code could also be considered for such purpose."

25. Based upon the aforesaid proposition, learned AGA also submitted that taking note of the law on the issue the Charge Sheet(s) aforesaid are not liable to be interfered with nor the summoning order is liable to be interfered with.

26. He further submitted that so far as quashing of proceeding is concerned which includes quashing of Charge Sheet, the law is well settled. In exercise of power under Section 482 Cr.P.C. mini trial is not permissible. If from the material available on record, prima facie, case is made out against the accused the criminal proceedings or Charge Sheet shall not be quashed by the High Court while exercising the power under Section 482 Cr.P.C. Reference can be made to the judgment passed by the Hon'ble Apex Court in the case of **Central Bureau of Investigation vs. Aryan Singh Etc.; 2023 SCC OnLine SC 379**. Thus, no case is made out and the application under consideration, is liable to be dismissed.

27. Considered the submissions of the learned counsel for the parties and perused the record.

28. The record indicates that the FIR was lodged on 27.07.1991 at 20:30 Hours under Sections 147, 148, 149 and 302 IPC, making specific allegations of murder of

one Iqbal Haider Raza against the accused namely Akhilesh Singh, Kamlesh Singh, Ashok Singh and Bhagauti Singh. Thereafter, the I.O. prepared Parcha No. 369/Charge Sheet dated 12.11.1992 and it appears from record that the same was not filed in the Court on account of pending Writ Petition No. 3523 (M/B) of 1991 and in terms of the order of the Writ Court dated 13.11.1992, the entire document/case diary was provided to the CBCID and thereafter the CBCID conducted the investigation and filed the Charge Sheet dated 26.11.1998.

29. Thus, from the aforesaid, it is apparent that before the Magistrate sufficient material was available for summoning all the accused namely Akhilesh Singh, Kamlesh Singh, Ashok Singh and Bhagauti Singh.

30. In the Charge Sheet dated 26.11.1998 names of Ashok Singh and Bhagauti Singh have been indicated in the later part. However, in earlier part of this Charge Sheet the I.O. has specifically indicated the name of all the accused and regarding all the accused, named above, also observed that after due investigation, prima facie, offence is made out.

31. From a conjoint reading of documents available on record including FIR dated 27.07.1991, Charge Sheet(s) dated 12.11.1992 and 26.11.1998 it clearly appears that sufficient evidence was available against all the accused namely Akhilesh Singh, Kamlesh Singh, Ashok Singh and Bhagauti Singh but in the later part of the Charge Sheet dated 26.11.1998 inadvertently the I.O. failed to indicate the name of accused namely Akhilesh Singh and Kamlesh Singh. It is for the reason that I.O. in earlier part of Charge Sheet dated 26.11.1998 specifically observed that after due investigation, prima facie, offence of murder of one Iqbal Haider Raza is made out against all the accused Akhilesh Singh, Kamlesh Singh, Ashok Singh and Bhagauti Singh.

32. As per settled law, the Magistrate can summon the accused even if his name does not find place in Column (2).

33. Thus, considering the aforesaid, this Court is of the view that Magistrate/Court has not committed any illegality in summoning the accused-applicant(s) namely Bhaguati Singh (whose name finds place in later part/second paragraph of Charge Sheet dated 26.11.1998) and Kamlesh Singh (whose name finds place in earlier part/first paragraph of Charge Sheet dated 26.11.1998).

34. It would be apt to indicate that Parcha No.49A/Charge Sheet dated 12.04.2001 was not filed after further investigation. In fact, as appears, from record that the same was filed on the basis of collected material/evidence during investigation by local police and CBCID and further, the same was filed on the basis of opinion of legal advisor, as is evident from letter dated 18.03.2001 of S.P., CBCID. As such, the submissions of learned counsel for the applicants, which are based on the issue of further investigation to assail this Charge Sheet, are completely misplaced.

35. Considering the material available on record as also the contents of the application under consideration preferred by the applicants under Section 482 Cr.P.C., this Court is of the view that prima facie, the case against the accused

applicant(s) namely Kamlesh Singh and Bhagauti Singh is made out and accordingly, to the view of this Court, any observation made on the material available on record including the statement of Nadim Iqbal S/o deceased Iqbal Haider Raza recorded under Section 164 Cr.P.C. dated 05.04.1999 i.e. after filing of Charge Sheet dated 26.11.1998 would prejudice the trial before the Court concerned.

36. The law on the issue of interference by the High Court in exercise of power under Section 482 Cr.P.C. is settled. In the recent judgment passed in case of **Supriya Jain vs. State of Haryana and Another; (2023) 7 SCC 711**, the Hon'ble Apex Court observed as under:-

"17.The principles to be borne in mind with regard to quashing of a charge/proceedings either in exercise of jurisdiction under Section 397CrPC or Section 482CrPC or together, as the case may be, has engaged the attention of this Court many a time. Reference to each and every precedent is unnecessary. However, we may profitably refer to only one decision of this Court where upon a survey of almost all the precedents on the point, the principles have been summarised by this Court succinctly. InAmit Kapoorv.Ramesh Chander[Amit Kapoorv.Ramesh Chander, (2012) 9 SCC 460 : (2012) 4 SCC (Civ) 687 : (2013) 1 SCC (Cri) 986] , this Court laid down the following guiding principles : (SCC pp. 482-84, para 27)

"27. ...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.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a "civil wrong" with no "element of

criminality" and does not satisfy the basic ingredients of a criminal offence, the court may be justified in quashing the charge. Even in such cases, the court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

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.

27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that the interest of justice favours, otherwise it may quash the charge. The power is to be exercisedex debito justitiaei.e. to do real and substantial justice for administration of which alone, the courts exist.

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27.16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance with the requirements of the offence.""

37. In view of aforesaid, this Court is of the view that grounds seeking prayer, as indicated in para 16 of this judgment, have no force and for the aforesaid reasons, this Court is not inclined to grant the prayer sought in the present application under Section 482 Cr.P.C. It is accordingly **dismissed**. No order as to costs.

38. Considering the entire facts of the case including the fact that the FIR was lodged on 27.07.1991 and CBCID filed the

Charge Sheet on 26.11.1998, however, on one pretext and other the trial could not be concluded till date and during this period two accused namely Akhilesh Singh and Kamlesh Singh have already been expired, this Court expects from the trial Court to proceed in the matter expeditiously.

(2024) 2 ILRA 1222
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 11366 of 2023

Sachin Kumar Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Ravindra Kumar Dwivedi

Counsel for the Opp. Parties:
G.A. Dharmendra Kumar Tiwari

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - Section 376 - Rape, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(2)(v) - where it appears to Court that offence in question has not been committed or where continuation of legal proceedings would be an abuse of process of law - Court can exercise its powers to quash the proceedings - when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence is covered under a ´special statute´ would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482CrPC. (Para -14)

(B) The Code of criminal procedure, 1973 - Legal Principles on High Courts' Extraordinary Powers under Section 482 Cr.P.C. - Can be invoked beyond Section 320 Cr.P.C.- Powers should be exercised carefully considering nature and effect of offence, seriousness of injury, voluntary nature of compromise, conduct of accused persons, and other relevant considerations - High Court can examine evidence to prove charges, even in cases where parties have entered into a settlement after conviction - ultimate goal of exercising extraordinary power under Section 482 Cr.P.C. is to secure the ends of justice - No hard and fast rule can restrict the High Court's powers to do substantial justice, as a restrictive construction may lead to grave injustice. (Para - 16)

Applicant faced charges of rape and SC/ST Act - Investigating Officer found no evidence supporting allegations – protest petition – summoned to face trial – quashing of - Complainant stated in compromise she leveled allegations due to misunderstanding - Complainant and accused reached settlement. (Para - 2 to 5 ,17)

HELD: - No evidence supports rape allegations against applicant. Alleged victim admitted allegations were due to misunderstanding and entered compromise without coercion. Continuing proceedings would persecute both parties. Court quashed criminal proceedings. Continuance of proceedings would be abuse of the process of law. (Para -18,19)

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

List of Cases cited:

1. Daxaben Vs The St. of Guj. & ors., 2022 SCC OnLine SC 936

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

3. Ramgopal Vs St. of M.P., (2022) 14 SCC 531

4. Ramawatar Vs St. of M.P., (2022) 13 SCC 635

5. K. Gupta Vs St. (NCT of Delhi), 2022 SCC OnLine SC 1030

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

1. Heard Sri Ravindra Kumar Dwivedi, the learned counsel for the applicant, Sri Anurag Verma, the learned A.G.A.-I appearing on behalf of the State and Sri Dharmendra Kumar Tiwari, the learned counsel appearing on behalf of the opposite party no.2.

2. By means of the instant application filed under Section 482 Cr.P.C. the applicant has sought quashing of the entire proceedings of the Complaint Case No.39 of 2019: Kanchan Devi Vs. Sachin Singh, arising out of Case Crime No. 29 of 2018, under Section 376 I.P.C. and Section 3 (2) (v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Sammanpur, District Ambedkar Nagar, pending in the Court of Special Judge, SC/ST Act, Ambedkar Nagar on the ground that the parties have entered into a compromise.

3. The opposite party no.2 had filed an application under Section 156 (3) Cr.P.C. on 13.04.2018 alleging that the applicant is a Police Constable and he came to the complainant's house on 01.04.2017 at about 11.00 a.m. and raped her and thereafter he repetitively raped her on various occasions. After investigation, the Investigating Officer submitted a final report dated 30.07.2018 stating that a Case Crime No.82 of 2016, under Sections 279, 337, 338, 304-A I.P.C. was lodged in Police Station Sammanpur, District Ambedkar Nagar. A police team had gone to arrest the accused persons and recover the stolen vehicle, whereupon some accused persons had resisted them in performance of their official duties. The Investigating Officer had lodged an F.I.R. No.37 of 2017, under Sections 147, 323, 504, 353, 332, 336 I.P.C. and Section 7 of Criminal Law Amendment Act and Section 3 (I) (x) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The complainant works at the brick kiln of one of the accused persons and she had filed the application under Section 156 (3) Cr.P.C. on false allegations under his pressure. The incident was not supported by any independent witness.

4. The opposite party no.2 filed a protest petition against the final report, which was accepted by means of an order dated 13.03.2019, passed by learned Additional Sessions Judge-II, Ambedkar Nagar and it was registered as a complaint. After recording of the statements under Sections 200 and 202 Cr.P.C. the applicant was summoned for trial for offence under Section 376 I.P.C. and Section 3 (2) (v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 by means of order dated 23.08.2022.

5. The applicant has sought quashing of the summoning order and the proceedings of the criminal case on the ground that the parties have entered into a compromise on 14.10.2023. The original compromise is annexed with the application under Section 482 Cr.P.C. wherein the opposite party no.2 stated that she had lodged the F.I.R. due to some misunderstanding, no party was guilty in the matter and both the parties had agreed to get the proceedings quashed by the competent court. It is categorically stated in the compromise that the parties are major and the decision was taken without any fear or coercion. The compromise has been

verified before a Notary Public and it has also been signed by the learned counsel for parties.

6. The opposite party no.2 has filed a counter affidavit accepting the factum of compromise and supporting the application for quashing of the proceedings.

7. Sri Anurag Verma, the learned A.G.A.-I appearing on behalf of the State has opposed the application and he has submitted that the present case involves allegation of commission of rape which is a heinous offence and in view of the law laid down by Hon'ble the Apex Court in the case of ***Daxaben Vs. The State of Gujarat and others: 2022 SCC OnLine SC 936*** the proceedings of such a case cannot be quashed on the basis of a compromise between the parties.

8. In ***Daxaben (supra)*** an F.I.R. was lodged under Section 306 I.P.C. by a cousin and an employee of the deceased. The complainant and the accused entered into a settlement and the High Court of Gujarat at Ahamdabad quashed the proceedings upon an application filed under Section 482 Cr.P.C. on this ground alone. The widow of the deceased filed an application for recall of the order which too was dismissed by the High Court after recording that the original first informant had pocketed a hefty amount from the accused and he had gone totally out of picture post allowing of the quashing petition, therefore, the application for recall of order was not maintainable.

9. In appeal the Hon'ble Supreme Court held that the High Court had erred in declining the prayer of the widow of the deceased for recalling an order passed without hearing her only because the original informant/complainant who was a cousin and an employee of the deceased had been heard. The Hon'ble Supreme Court further held that *"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 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."*

10. In **Escorts Ltd. v. CCE**, (2004) 8 SCC 335, the Hon'ble Supreme Court held that: -

"8. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes;

their words are not to be interpreted as statutes. In London Graving Dock Co. Ltd. v. Horton2 (AC at p. 761), Lord MacDermott observed: (All ER p. 14 C-D)

"The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J., as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge,…"

9. In Home Office v. Dorset Yacht Co.3 Lord Reid said (All ER p. 297g-h),

"Lord Atkin's speech … is not to be treated as if it were a statutory definition. It will require qualification in new circumstances."

Megarry, J. in Shepherd Homes Ltd. v. Sandham (No. 2)4 observed: (All ER p. 1274d-e) "One must not, of course, construe even a reserved judgment of even Russell, L.J. as if it were an Act of Parliament;" And, in Herrington v. British Railways Board5 Lord Morris said: (All ER p. 761c)

"There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

10. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

11. The observations in ***Daxaben (supra)*** were made in the factual background of the case that husband of the appellant had committed suicide. The deceased's cousin, who was also his employee, had filed the F.I.R. and he had taken hefty sum from the accused persons to enter into a settlement and the proceedings were quashed on the basis of such settlement without hearing the widow of the deceased. There is no evidence in support of the allegation in the present case. During evidence the Investigating Officer had found the allegations to be false and there is no evidence in support of the allegations, except for the statement of the victim herself and the victim herself has resiled from the allegations and there is no allegation of any monitory transaction between the parties. Therefore, in view of the law laid down in **Escorts Ltd.** (Supra), the observations made in **Daxaben** (Supra) will not apply to the present case.

12. In **Ramgopal v. State of M.P.**, (2022) 14 SCC 531, the appellants had abused and assaulted the complainant on account of certain monetary disputes. Appellant no. 1 had struck the complainant with a pharsa, which cut off the little finger of his left hand. Appellant 2 also struck lathi-blows on the body of the complainant. The appellants were thereafter committed for trial under Sections 294, 323 and 326 read with Section 34 IPC and Section 3 of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. The Magistrate had convicted the appellants under Sections 294, 323 and 326 read with Section 34 IPC. During pendency of the appeal filed against conviction, the parties had reconciled their disputes and sought quashing of proceedings under Section 482 Cr.P.C. on this ground. The High Court dismissed the application. While allowing the appeal, the Hon'ble Supreme Court held that: -

"12.The High Court, therefore, having regard to the nature of the offence and the fact that parties have amicably

settled their dispute and the victim has willingly consented to the nullification of criminal proceedings, can quash such proceedings in exercise of its inherent powers under Section 482CrPC, even if the offences are non-compoundable. ***The High Court can indubitably evaluate the consequential effects of the offence beyond the body of an individual and thereafter adopt a pragmatic approach, to ensure that the felony, even if goes unpunished, does not tinker with or paralyse the very object of the administration of criminal justice system.***

13.It appears to us that criminal proceedings involving non-heinous offences or where the offences are pre-dominantly of a private nature, can be annulled irrespective of the fact that trial has already been concluded or appeal stands dismissed against conviction. Handing out punishment is not the sole form of delivering justice. Societal method of applying laws evenly is always subject to lawful exceptions. It goes without saying, that ***the cases where compromise is struck post-conviction, the High Court ought to exercise such discretion with rectitude, keeping in view the circumstances surrounding the incident, the fashion in which the compromise has been arrived at, and with due regard to the nature and seriousness of the offence, besides the conduct of the accused, before and after the incidence. The touchstone for exercising the extraordinary power under Section 482 CrPC would be to secure the ends of justice. There can be no hard-and-fast line constricting the power of the High Court to do substantial justice. A restrictive construction of inherent powers under Section 482CrPC may lead to rigid or specious justice, which in the given facts and circumstances of a case, may rather lead to grave injustice.*** *On the other hand, in cases where heinous offences have been proved against perpetrators, no such benefit ought to be extended, as cautiously observed by this Court inNarinder Singhv.State of Punjab(2014) 6 SCC 466 and State of M.P.v.Laxmi Narayan, (2019) 5 SCC 688.*

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´.***

* * *

19.We thus sum up and hold that as opposed to Section 320 CrPC where the Court is squarely guided by the compromise between the parties in respect of offences ´compoundable´ within the statutory framework, the extraordinary power enjoined upon a High Court under Section 482CrPC or vested in this Court under Article 142 of the Constitution, can be invoked beyond the metes and bounds of Section 320 CrPC. Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: -

19.1.Nature and effect of the offence on the conscience of the society;

19.2.Seriousness of the injury, if any;

19.3Voluntary nature of compromise between the accused and the victim; and

19.4Conduct of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations."

(Emphasis supplied)

13. The Hon'ble Supreme Court reversed the order of the High Court rejecting the prayer for quashing of the proceedings and had quashed the criminal proceedings on the basis of a compromise between the parties even after conviction of the appellant for offence under Section 326 I.P.C., which is punishable with imprisonment which may extend up to life.

14. In **Ramawatar v. State of M.P**., (2022) 13 SCC 635, the FIR lodged under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities Act), 1989 read with Section 34 IPC alleged that the appellant threw a brick on the complainant and also made filthy and slur remarks on her caste. There was a civil dispute between the parties. The appellant was convicted under Section 3(1)(x) of the SC/ST Act. The appeal filed against his conviction was dismissed by the High Court of Madhya Pradesh, Jabalpur Bench. During pendency of further appeal before the Hon'ble Supreme Court, the complainant filed an application that the parties had settled their disputes through a compromise. The Hon'ble Supreme Court held that: -

"17… where it appears to the Court that the offence in question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence is covered under a ´special statute´ would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482CrPC."

(Emphasis supplied)

15. **Kapil Gupta v. State (NCT of Delhi),** 2022 SCC OnLine SC 1030, is a judgment passed by the Hon'ble Supreme Court in an appeal filed against a judgment and order passed by an Hon'ble Single Judge of the High Court of Delhi, dismissing the application filed under Section 482 Cr.P.C. for quashing the proceedings under Section 376 of the Penal Code, 1860 ('IPC') on the ground that the parties had entered into a settlement. While allowing the appeal, the Hon'ble Supreme Court held that: -

"13.It can thus be seen that this Court has clearly held that though the Court should be slow in quashing the proceedings wherein heinous and serious offences are involved, the High Court is not foreclosed from examining as to whether there exists material for incorporation of such an offence or as to whether there is sufficient evidence which if proved would lead to proving the charge for the offence charged with. *The Court has also to take into consideration as to whether the settlement between the parties is going to result into harmony between*

them which may improve their mutual relationship.

14.The Court has further held that it is also relevant to consider as to what is stage of the proceedings. *It has been observed that if an application is made at a belated stage wherein the evidence has been led and the matter is at the stage of arguments or judgment, the Court should be slow to exercise the power to quash the proceedings. However,* ***if such an application is made at an initial stage before commencement of trial, the said factor will weigh with the court in exercising its power."***

16. The legal principles which can be culled out from a collective reading of the foresaid precedents, are that the extraordinary powers of the High Courts under Section 482 Cr.P.C. can be invoked beyond the metes and bounds of Section 320 Cr.P.C. Such powers ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind the nature and effect of the offence on the conscience of the society; theseriousness of the injury, if any, the voluntary nature of compromise between the accused and the victim, the conduct of the accused persons and the other relevant considerations. Though the Courts should be slow in quashing the proceedings wherein heinous and serious offences are involved, the High Court is not foreclosed from examining as to whether there is sufficient evidence which may lead to proving the charges. The High Court can quash the proceedings even in cases where the parties have entered into a settlement after conviction. The touchstone for exercising the extraordinary power under Section 482 Cr.P.C. would be to secure the ends of justice. There can be no hard and fast rule restricting the powers of the High Court to do substantial justice, as a restrictive construction of inherent powers under Section 482 Cr.P.C. may lead to grave injustice.

17. When we examine the facts of the present case in light of the aforesaid law, what we find is that after registration of the F.I.R. pursuant to an application under Section 156 (3) Cr.P.C., the Investigating Officer had found that the allegations levelled by the opposite party no.2 could not be established as no evidence could be collected in support thereof. It was recorded in the final report that the dispute had occurred when a police party had gone to arrest the accused and recover the stolen vehicle in connection with Case Crime No.82 of 2016. The complainant is an employee of one of the persons accused in that case and she had lodged the F.I.R. at the behest of that accused person to put undue pressure on the police persons. In the compromise, the complainant has categorically stated that she had levelled the allegations due to some misunderstanding and the applicant was not guilty.

18. When there is absolutely no evidence to support the allegation of rape by the applicant and the alleged victim has herself stated in the compromise that the offence was not committed and she had levelled the allegations due to some misunderstanding, that she is major and she had entered into the compromise without any fear or coercion agreeing for quashing of the proceedings after a long drawn full-fledged trial the applicant will surely be acquitted. In such circumstances, the criminal proceedings will only result in persecution of the applicant, as well as the opposite party no.2.

19. Keeping in view the aforesaid peculiar circumstances of the present case, I am of the considered view that the continuance of the proceedings will only be an abuse of the process of law and the proceedings deserve to be quashed.

20. Accordingly, the application is ***allowed***. The entire proceedings of the

Complaint Case No.39 of 2019: Kanchan Devi Vs. Sachin Singh, arising out of Case Crime No. 29 of 2018, under Section 376 I.P.C. and Section 3 (2) (v) of Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, Police Station Sammanpur, District Ambedkar Nagar, pending in the Court of Special Judge, SC/ST Act, Ambedkar Nagar are hereby quashed.

(2024) 2 ILRA 1229
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.01.2024

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Application u/s 482 No. 12138 of 2017

M/s Kutumb Marketing Co. Prop. Firm & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Uday Shankar Tiwari, Sri Rajiv Lochan Shukla, Sri Siddharth Niranjan

Counsel for the Opp. Parties:
G.A., Sri Munna Pandey

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Negotiable Instruments Act, 1881- Section 138 - Dishonour of cheque due to insufficient funds or stop payment - Section 482 CrPC not applicable for quashing complaint based on disputed facts - Accused must prove defence at trial. (Para - 12,15,16)

Complainant rented office space to accused - Accused issued cheque - dishonoured due to "payment stopped" - Complainant issued statutory notice - accused replied, claiming payment of Rs. 20,000/- in cash. **(Para - 1 to 3)**

HELD: - Ground raised by accused-applicants for quashing of impugned complaint was based upon disputed facts. Instrument in question carried a presumption that it was issued for discharge of debt or other liability, therefore, the applicants were required to rebut the same by leading their defence evidence. No forgery established in documents. Court declined to exercise inherent powers under Section 482 Cr.P.C . **(Para - 11 to 15)**

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

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Applicants have filed this application under Section 482 Code of Criminal Procedure for quashing of Complaint Case No. 3955 of 2015; titled *Vinay Kumar Mittal vs. M/s Kutumb Marketing Company and another*, filed by complainant-opposite party no. 2, under Section 138 Negotiable Instruments Act, 1881.

2. Briefly, the facts leading to the application are that complainant-Vinay Kumar Mittal brought a complaint under Section 138 Negotiable Instruments Act, 1881 against M/s Kutumb Marketing Company, a Proprietorship Firm represented by applicant no. 2 namely Smt. Meetu wife of Paritosh Srivastava, with the averments that the applicant no. 2 is Proprietor of the applicant no. 1-Firm and is responsible for the conduct of business of the Firm, and the complainant has given a office bearing No. 608 S.L. Tower, Alpha Commercial Belt Greater Noida, District Gautam Budh Nagar, to the accused on rent. The accused never paid the rent in time and for the last two years, there is no rendition of the rent account, and whenever

the official of the complainant visits the accused-Firm for demand of rent, he is scolded, and seldom some rent is paid by way of cheques, but the said cheques never cleared on single presentation. On 7th August, 2015, the accused issued a cheque bearing No. 030102 for a sum of Rs. 20,000/-, drawn at Bank of Maharashtra Branch S.L. Tower, Shop No. 3, Alpha-I, Commercial Belt Greater Noida, District Gautam Budh Nagar from account bearing No. 60034507037, in favour of the complainant to clear the debt of rent. The said cheque was presented by the complainant with his bankers, namely, Citizen Cooperative Bank Ltd., affiliated to HDFC Bank for credit in his Saving Account No. 2050, but the same was returned dishonoured through memo dated 13.10.2015. As per the memo of the bank, the cheque was returned with the remarks "Payment Stopped" by the drawer. The complainant issued a statutory notice dated 26.10.2015 through Sri Jabar Singh Advocate by registered A.D. dated 27.10.2015 and demanded the payment of cheque amount within 15 days from the date of the receipt of the notice, but neither any payment was made nor any other information was received from the accused. The complainant filed a complaint against the accused for alleged commission of offence punishable under Section 138 Negotiable Instruments Act, 1881 and also appended the copies of the original cheque dated 7.8.2015, bank return memo, legal notice dated 26.10.2015 and the photo copy of the postal receipt dated 27.10.2015 along with the affidavit.

3. Thereafter, the statement of the complainant was recorded on 29.7.2016 under Section 202 Cr.P.C. by the Judicial Magistrate, Gautam Budh Nagar and after examining the material on record found that prima facie the alleged commission of offence punishable under Section 138 Negotiable Instruments Act, 1881 is made out, and vide order dated 24.1.2017 process against the applicants/accused was issued. Feeling aggrieved against this, the applicants have approached this Court by way of this petition for quashing of the criminal proceedings.

4. Learned counsel for the accused has argued that the complainant has concealed material facts in the impugned complaint (Annexure-2) and did not disclose that before the dishonour of cheque in October, 2015, previously on two occasions the cheque was presented by him on 6.8.2015 and 19.8.2015 and on both occasions it was dishonoured. Learned counsel for the applicants has argued that the cheque is dated 7th August, 2015, but the complainant had presented it before his bankers on 6th August, 2015 and when the bankers of the accused deducted dishonour charges of Rs. 171/- from their account, at that stage, the applicants contacted the complainant and issued another cheque bearing no. 030103 for a sum of Rs. 20,000/- and the said amount was withdrawn by the employee of the complainant, namely, Munna and receipt (Annexure-17) in this regard was also issued.

5. According to the learned counsel for the applicants, since the liability, if any, attached to the cheque no. 030102 stood discharged to the satisfaction of the complainant, therefore, the impugned complaint would not be maintainable. In support of his arguments, learned counsel has drawn the attention of the Court to the pleadings contained in paragraph 11 of the petition and the relevant annexures i.e. the two cheques, Annexures 3 and 16,

respectively, and the receipt dated 18th August, 2015 signed by Munna (Annexure 17).

6. Learned counsel has further argued that the complainant has also not disclosed in his complaint about the reply dated 5th November, 2015 (Annexure 10) sent by the applicants to the statutory notice dated 26.10.2015 (Annxure 7), wherein it is also specifically highlighted that a sum of Rs. 20,000/- stood paid to Munna against the liability of cheque bearing no. 030102 and with this payment, the rent payable upto the month of July, 2015 stood cleared. Sri Rajiv Lochan Shukla, learned counsel for the applicants has pointed out that the averments contained in paragraph '11' of the petition have not been specifically denied by the opposite party no. 2 in their counter affidavit dated 24.06.2017, therefore, in this background, it is apparent that the impugned complaint is based upon the distorted facts and the same is nothing, but an abuse of the process of law. He prays that the impugned complaint be quashed.

7. Though the opposite party no. 2 has filed the counter affidavit, but today no one has appeared on behalf of the complainant.

8. Learned counsel for the applicants has been heard and with his assistance, case file has been perused carefully.

9. After hearing the learned counsel for the applicants and considering his submissions, this Court finds that as far as the relationship of the accused and the complainant as tenant and landlord is concerned, the same is not disputed and even the issuance of subject cheque dated 7th August, 2015 bearing No. 030102 for a sum of Rs. 20,000/- in favour of the landlord-complainant is also admitted. In this regard, reference can be made to the reply dated 5th November, 2015 allegedly sent by the applicants to the complainant. The applicants have mainly relied upon their stand of having discharged the liability attached to the cheque no. 030102 dated 7th August, 2015, as after its dishonour, the said amount of Rs. 20,000/-, was paid to the landlord through a bearer cheque No. 030103, which was encashed by one Munna allegedly an employee of the landlord.

10. During the course of hearing, Sri Rajiv Lochan Shukla, learned counsel for the applicants vehemently argued that on 6th August, 2015, the cheque bearing no. 030102 was presented which is a day before the date contained on the cheque and when the sum of Rs. 171/- for its dishonour was deducted on 7.8.2015 by the bankers, applicants came to learn about it and contacted the landlord and also made the payment of Rs. 20,000/- through bearer cheque bearing no. 030103 on 18.8.2015. Strangely, if the liability attached to the cheque in question stood discharged as claimed by the applicants, on 18.8.2015 then why the cheque was again dishonoured on 19th August, 2015 has not been explained by the applicants, as the complaint is founded upon the subsequent dishonour of the same cheque in October, 2015. Notably, in the reply dated 5.11.2015 sent by the applicants to the complainant, there is no mention either regarding premature presentation of the cheque on 6th August, 2015 or any averment relating to the alleged unjustified presentation of the cheque on 19th August, 2015, i.e. after payment of a sum of Rs. 20,000/- to the complainant. Besides, no explanation has been offered as to why at the time of payment of Rs. 20,000/- to the complainant, the return of the cheque was

not requested. Also the payment of the cheque in question was stopped by applicants much after the alleged payment in cash to the complainant was made, and concededly, no intimation in this regard was sent to the applicants.

11. Apart from the above, a perusal of the vernacular of the photo copy of the receipt dated 7th August, 2015 (Annexure-17) would show that it is issued by Munna, and it also contains the shop number as 608 with an amount mentioned against it as Rs. 15,908/- till June, 2015. Even the applicants have mentioned in paragraph 13 of the application that the sum of Rs. 15,908/- was also paid to the complainant as maintenance charges, thus, the stand of the applicants that a sum of Rs. 20,000/- was paid against the cheque dated 7th August, 2015 cannot be accepted for want of evidence, particularly when in the counter affidavit, the complainant has specifically denied the receipt of cash amount of Rs. 20,000/- as alleged by the applicants.

12. Consequently, in view of the above background, this Court has no hesitation in holding that the ground raised by the accused-applicants for quashing of the impugned complaint are based upon disputed facts, and as the instrument in question carries a presumption that it was issued for discharge of debt or other liability, therefore, the applicants are required to rebut the same by leading their defence evidence.

13. At this stage, learned counsel for the applicants has pointed out that the applicants have also moved an application under Section 340 Cr.P.C. against the landlord-opposite party no. 2 for filing forged letters at pages 11, 12 and 13 of the counter affidavit, which are written by the landlord to the applicant no. 2 relating to the extension of lease agreement, and on these letters, the signatures of the applicant no. 2 with the stamp has been forged. The document is being questioned only on the ground that it contains the signature and stamp of applicant no. 2 which is not possible, but admittedly, there is no denial of the contents and substance of these letters, therefore, prima facie, it does not seem to be a case of any forgery. Thus, no interference is called for in the application under Section 340 Cr.P.C. also.

14. No other argument has been raised.

15. Resultantly, without meaning any expression of opinion on the merits of this case, this Court is not inclined to exercise the inherent powers under Section 482 Cr.P.C and the application is hereby dismissed.

16. However, it is made clear that it shall be open for the applicants to lead evidence before the trial court in support of the defence raised herein.

(2024) 2 ILRA 1232
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 13.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application u/s 482 No. 12798 of 2023

Shivam Kashyap ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:

Trideep Narayan Pandey, Deepankar Kumar, Priya Singh

Counsel for the Opp. Parties:
G.A., G.K. Dikshit, Gopal Krishna Dixit

Criminal Law – Criminal Procedure Code, 1973 – Sections 482 – Indian Penal Code, 1860 – Sections 147, 148, 302 & 307 – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Sections 3(2)(v), 14-A, 18 & 18-A - Application U/s 482 Cr.P.C. – for quashing the charge-sheet and the entire criminal proceeding - preliminary objection – regarding maintainability of the Application u/s 482 Cr.P.C. by relying upon the Full Bench judgment rendered in '*Ghulam Rasool Khan & ors. Vs St. of U.P. & Others'*, - court finds that, applicant has a statutory remedy to file an appeal under Section 14-A of the SC/ST Act, 1989 – and the judgments placed by the applicant in support of maintainability would not affect the binding nature of the law laid down by the Full Bench in a case of 'Ghulam Rasool Khan- - Court held that – law on the point stands clarified by two full benches that inherent power u/s 482 Cr.P.C. cannot be invoked in cases where an appeal would lie under section 14-A of the Act, 1989 – therefore, instant application stands dismissed with liberty to the applicant to available the statutory remedy of filing an appeal under section 14-A, accordingly.
(Para – 12, 13, 14, 15)

Application Dismissed. (E-11)

List of referred Cases: -

1. Ghulam Rasool Khan Vs St. of U.P., 2022 (8) ADJ 691 = 2022 SCC OnLine All 975,

2. In Re: Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act - (2018) 6 ALJ 631 = 2018 SCC OnLine All 2087,

3. U.O.I. Vs St. of Mah. – 2020 (4) SCC 761,

4. Abhishek Awasthi @ Bholu Awasthi Vs St. of U.P. & anr., Application under Section 482 No. 8635 of 2023 – order dated 20.09.2023,

5. Union Territory of Ladakh Vs Jammu & Kashmir National Conference, 2023 SCC OnLine SC 1140.

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

1. Heard Sri Trideep Narayan and Ms. Charu Singh Advocates, the learned counsel for the applicant, Sri Anurag Verma, the learned A.G.A.-I appearing on behalf of the State and Sri G. K. Dikshit, the learned counsel for the opposite party no.2/complainant.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicant has challenged validity of the charge-sheet dated 12.10.2023 and the entire proceedings of Sessions Case No.3088 of 2023, arising out of Case Crime No.385 of 2023, under Sections 147, 148, 302, 307 I.P.C. & Section 3 (2) 5 of Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, registered at Police Station Sushant Golf City, District Lucknow, pending in the Court of Special Judge, SC/ST Act, Lucknow.

3. The learned A.G.A.-I has raised a preliminary objection that the applicant has not challenged the validity of the summoning order and without him having been summoned, the applicant would have no cause of action to challenge the proceedings. He has submitted that the applicant has the statutory remedy of filing an appeal under Section 14-A of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. He has placed reliance upon the Full Bench judgment in the case of **Ghulam Rasool Khan and others versus State of U. P.**

and others : 2022 (8) A.D.J. 691 = 2022 SCC OnLine All 975.

4. In reply to the aforesaid preliminary objection, the learned Counsel for the applicant has placed reliance upon the Full Bench judgment in **"In re Provision of Section 14A of SC/ST (Prevention of Atrocities) Amendment Act, 2015"** : 2018 SCC OnLine All 2087 and **Union of India v. State of Maharashtra**, (2020) 4 SCC 761.

5. Section 14-A of the Scheduled Castes and Scheduled tribes (Prevention of Atrocities) Act, 1989 (which will hereinafter be referred to as 'the Act') provides as follows: -

"14-A. Appeals.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law.

(2) Notwithstanding anything contained in sub-section (3) of Section 378 of the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie to the High Court against an order of the Special Court or the Exclusive Special Court granting or refusing bail.

(3) Notwithstanding anything contained in any other law for the time being in force, every appeal under this section shall be preferred within a period of ninety days from the date of the judgment, sentence or order appealed from:

Provided that the High Court may entertain an appeal after the expiry of the said period of ninety days if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the period of ninety days:

Provided further that no appeal shall be entertained after the expiry of the period of one hundred and eighty days.

(4) Every appeal preferred under sub-section (1) shall, as far as possible, be disposed of within a period of three months from the date of admission of the appeal.

6. A bare perusal of Section 14-A of the Act shows that it starts with the words ***"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)".***

7. **In Re : Provision of Section 14 (a) of SC/ST (Prevention of Atrocities) Amendment Act** ; (2018) 6 ALJ 631 = 2018 SCC OnLine All 2087, the five questions considered by the Full Bench, and answers given to those questions, were as follows: -

"A. Whether provisions of sub-section (2) of Section 14-A and the second proviso to subsection (3) of Section 14-A of the Amending Act, are violative of Articles 14 and 21 of the Constitution, being unjust, unreasonable and arbitrary?

While we reject the challenge to section 14A(2), we declare that the second proviso to Section 14A(3) is clearly violative of both Articles 14 and 21 of the Constitution. It is not just manifestly arbitrary, it has the direct and unhindered effect of taking away the salutary right of a first appeal which has been recognised to be an integral facet of fair procedure enshrined in Article 21 of the Constitution. The absence of discretion in the Court to consider condonation of delay even where sufficient cause may exist renders the measure wholly capricious, irrational and excessive. It is consequently struck down.

B. Whether in view of the provisions contained in Section 14-A of the Amending Act, a petition under the provisions of Article 226/227 of the Constitution of India or a revision under Section 397 of the Code of Criminal Procedure or a petition under Section 482 Cr.P.C., is maintainable. OR in other words, whether by virtue of Section 14-A of the Amending Act, the powers of the High Court under Articles 226/227 of the Constitution or its revisional powers or the powers under Section 482 Cr.P.C. stand ousted?

We therefore answer Question (B) by holding that ***while the constitutional and inherent powers of this Court are not "ousted" by Section 14A, they cannot be invoked in cases and situations where an appeal would lie under Section 14A.*** *Insofar as the powers of the Court with respect to the revisional jurisdiction is concerned, we find that the provisions of Section 397 Cr.P.C. stand impliedly excluded by virtue of the special provisions made in Section 14A. This, we hold also in light of our finding that the word "order" as occurring in sub-section(1) of Section 14A would also include intermediate orders.*

C. Whether the amended provisions of Section 14-A would apply to offences or proceedings initiated or pending prior to 26 January 2016?

We hold that the provisions of Section 14A would be applicable to all judgments, sentences or orders as well as orders granting or refusing bail passed or pronounced after 26 January, 2016. We further clarify that the introduction of this provision would not effect proceedings instituted or pending before this Court provided they relate to a judgment, sentence or order passed prior to 26 January 2016. The applicability of Section 14A does not depend upon the date of commission of the offence. The determinative factor would be the date of the order of the Special Court or Exclusive Court.

D. Whether upon the expiry of the period of limitation for filing of an appeal as specified in the second proviso to Section 14-A(3), Section 439 Cr.P.C. and the powers conferred on the High Court in terms thereof would stand revived?

We hold that the powers conferred on the High Court under Section 439 Cr.P.C. do not stand revived. We find ourselves unable to sustain the line of reasoning adopted by the learned Judge inRohitthat the provisions of Section 439 Cr.P.C. would remain in suspension during the period of 180 days and thereafter revive on its expiry. The conclusion so arrived at cannot be sustained on any known principle of statutory interpretation. We are therefore, constrained to hold that bothJanardan Pandeyas well asRohitdo not lay down the correct law and must, as we do, stand overruled.

E. Whether the power to directly take cognizance of offences shall be exercisable by the existing Special Courts other than the Exclusive Special Courts or Special Courts to be specified under the amended Section 14?"

The existing Special Courts do not have the jurisdiction to directly take cognizance of offences under the 1989 Act. This power stands conferred only upon the Exclusive Special Courts to be established or the Special Courts to be specified in terms of the substituted section 14. However it is clarified that the substitution of Section 14 by the Amending Act does not have the effect of denuding the existing Special Courts of the authority to exercise jurisdiction in respect of proceedings under the 1989 Act. They would merely not have

the power to directly take cognizance of offences and would be bound by the rigours of Section 193 Cr.P.C. Even if cognizance has been taken by the existing Special Courts directly in light of the uncertainty which prevailed, this would notipso factorender the proceedings voidab initio. Ultimately it would be for the objector to establish serious prejudice or a miscarriage of justice as held inRati Ram."

8. In **Ghulam Rasool Khan v. State of U.P.**, 2022 SCC OnLine All 975, another Full Bench of this Court dealt with the following questions: -

(i) Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017In re : Rohitv.State of U.P.vide judgment dated 29.08.2017 correctly permitted the conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section482of theCr. P.C.?

(ii) Whether keeping in view the judgment ofRohit(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 Section439of theCr. P.C.?

(iii) Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section482of theCr. P.C.?

(iv) What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed?

9. The Full Bench answered the aforesaid questions as follows: -

(i) Question No. (I) is answered in negative asRohitv.State of U.P., (2017) 6 ALJ 754 has been overruled by Full Bench of this Court inIn Re : Provision of section 14 (a) ofSC/ST (Prevention of Atrocities) Amendment Act, 2015, (2018) 6 ALJ 631.

(ii) Question No. (II) is answered in negative holding that an aggrieved person will not have two remedies namely, i.e. filing an appeal under Section 14A of the 1989 Act as well as filing a bail application in terms of Section439Cr. P.C.

(iii) Question No. (III) is answered in negative holding that the aggrieved person having remedy of appeal under Section 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section482Cr. P.C.

(iv) Question No. (IV) - There will be no limitation to file an appeal against an order under the provisions of 1989 Act. Hence, the remedies can be availed of as provided.

10. The learned A.G.A. has informed the Court that the following questions have been referred by the order dated 20.09.2023 passed in Abhishek Awasthi @ Bholu Awasthi versus State of U.P. and another, Application under Section 482 No. 8635 of 2023 and other connected matters: -

(i) Whether a Single Judge of this Court while deciding Criminal Appeal (Defective) No. 523/2017 In re : Rohit Vs. State of U.P. and another vide judgment dated 29.08.2017 correctly permitted the conversion of appeal under Section 14 A of the Act, 1989 into a bail application by exercising the inherent powers under Section 482 of the Cr.P.C.?

(ii) 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.?

(iii) ***Whether an aggrieved person who has not availed of the remedy of an appeal under the provisions of Section 14 A of Act, 1989 can be allowed to approach the High Court by preferring an application under the provisions of Section 482 of the Cr.P.C.?***

(iv) What would be the remedy available to an aggrieved person who has failed to avail the remedy of appeal under the provision of Act, 1989 and the time period for availing the said remedy has also lapsed?""

11. Although the questions have been referred to a larger Bench by means of an order dated 20.09.2023 passed by a coordinate Bench of this Court at Allahabad in Application under Section 482 No. 8635 of 2023 and other connected matters, the decision in **Ghulam Rasool Khan** (Supra) will hold good till a decision is taken by a larger Bench. In this regard, a reference to the following passage from judgment of the Hon'ble Supreme Court in **Union Territory of Ladakh v. Jammu & Kashmir National Conference**, 2023 SCC OnLine SC 1140 will be appropriate: -

"35.We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a referenceor a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later CoordinateBench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge BenchinNational Insurance Company Limitedv.Pranay Sethi,(2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it."

12. In **Union of India v. State of Maharashtra,** (2020) 4 SCC 761 relied upon by the learned Counsel for the applicant, the question involved was regarding the bar created under Section 18 of the Act against grant of anticipatory bail in offences under the Act and the question of maintainability of an Application under Section 482 Cr.P.C. was not involved in that case. Therefore, that judgment is no relevant for the decision of the point involved in the present case.

13. Therefore, the mere reference of the aforesaid questions would not affect the binding nature of the law laid down in **Ghulam Rasool Khan** (Supra).

14. In view of the aforesaid discussion, the law on the point stands clarified by two Full Benches, that inherent powers of this Court under Section 482 Cr.P.C. cannot be invoked in cases and

situations where an appeal would lie under Section 14A and aggrieved person having remedy of appeal under Section 14A of the 1989 Act, cannot be allowed to invoke inherent jurisdiction of this Court under Section482Cr. P.C.

15. Accordingly, as the applicant has the remedy of filing an appeal under Section 14-A available to him, he cannot invoke the inherent powers of this Court under Section 482 Cr.P.C. The application under Section 482 Cr.P.C. is ***dismissed*** for this reason, leaving it open to the applicant to file an appeal under Section 14-A of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

(2024) 2 ILRA 1238
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application u/s 482 No. 28166 of 2023

Harkesh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Raghuveer Singh

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Section 321 - Withdrawal from prosecution, Indian Penal Code, 1860 - Sections 147, 148, 149, 435, 427, 395, 397, 506 - Court must ensure the Public Prosecutor's decision isn't improper or an attempt to interfere with justice - Withdrawal from prosecution requires legitimate reasons, good faith, and consideration of public policy and justice and not to thwart or stifle the process of law.(Para - 7)

FIR against 24 persons for setting company property on fire, theft, and physical altercation - Public Prosecutor moved to withdraw prosecution based on the UP-Government's directive - citing incident's connection to farmer's agitation and interest of justice - Sessions court rejected application - noting the case involved riot, loot, harm to police personnel, and absconding accused persons. (Para-7)

HELD: - Trial court erred in rejecting withdrawal application without considering if the Public Prosecutor acted in good faith. Application for withdrawal under Section 321 Cr.P.C. requires court to assess legitimacy and public interest. Impugned order set aside. Case remanded to trial court for fresh consideration after hearing both sides. (Para -7,8,9)

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

List of Cases cited:

1. St. of Kerala Vs K Ajith & ors., (2021) 6 SCR 774

2. St. of Bihar Vs Ram Naresh Pandey & anr,, AIR 1957 SC 389

3. M.N Sankarayaraynan Nair Vs P.V Balakrishnan, (1972) 1 SCC 318

4. R.K. Jain Vs St. through Special Police Establishment & ors,, (1980) 3 SCC 435

5. Sheonandan Paswan Vs. St. of Bihar & ors., (1987) 1 SCC 288

6. Yerneni Raja Ramchandar Vs St. of A.P. & ors,, (2009) 15 SCC 604

7. Bairam Muralidhar Vs St. of A.P., (2014) 10 SCC 380

(Delivered by Hon'ble Gajendra Kumar, J.)

1. Heard learned counsel for the applicants and learned AGA for the State.

2. The present application u/s 482 Cr.P.C. has been filed by the applicants with the prayer to quash the order dated 22.05.2023 passed by ADJ/Special Judge (D.A.A.), Court No.13, Agra as well as the entire proceedings of Case Crime No.211 of 2011 (S.S.T. No.75 of 2013), under Sections 147, 148, 149, 435, 427, 395, 397, 506 IPC, Police Station Etmadpur, District Agra, pending in the court of ADJ/Special Judge (D.A.A.), Court No.13, Agra.

3. Brief facts of the case, as per the pleadings are that on 08.05.2011 at about 07:30 am, the hundreds of people including women, who were armed with deadly weapons, made an attack upon the camp office of Vijay Construction Company Pvt. Ltd., after pouring the kerosene oil, set it on fire and in huge quantity of steel plates and others shattering plates were taken away, had also broken the light, welding machine and when the workers of the company tried to protect the same, the accused persons also committed the tussle with them, they hardly saved their lives from the accused persons and some of them were identified and their names were mentioned in the F.I.R..

4. It is submitted by the learned counsel for the applicants that the applicants are innocent and have been falsely implicated in the present case. Further submission is that the F.I.R. was lodged against the applicants and others on 08.05.2011 at about 11:15 am regarding the alleged occurrence dated 08.05.2011 at about 07:50 am at the place of Bridge Channel Yamuna Express Way, Agra situated at a distance of nine kilometers from the police station. Further submission is that a false and fabricated F.I.R. has been lodged by the complainant against the applicants and others co-accused. Further submission is that applicants had nothing to do with the said incident. Further submission is that neither the applicants went to the place of complainant nor committed tussle with the complainant and others. The name of the applicants were falsely disclosed in the F.I.R. Further submission is that the similar allegations were made against the co-accused persons in another cases, in which government had taken the decision to withdraw the cases and on the basis of the same, the court below passed the orders in favour of the applicants. As such, the impugned order is liable to be set aside.

5. On the other hand, learned AGA has opposed the prayer but did not dispute the aforesaid facts.

6. In the case of ***State of Kerala Vs. K Ajith and others (2021) 6 SCR 774***, the relevant paragraph nos. 14 to 23 are quoted as under:-

14. The powers under Section 321 of the CrPC have been interpreted by this Court on a number of occasions. In ***State of Bihar vs Ram Naresh Pandey & Anr, AIR 1957 SC 389***, a three-judge Bench of this Court analysed Section 494 of the earlier Code of Criminal Procedure 1898 (similar to Section 321 of the CrPC). Justice B. Jagannadhadas observed that in granting consent to withdraw a prosecution, the court exercises a judicial function. However, in doing so, the court need not determine the matter judicially. The court only needs to be satisfied that "the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the

normal course of justice for illegitimate reasons or purposes". This Court also observed that the Magistrate's power under Section 494 was to prevent abuse of power of the executive. Addressing the question of whether insufficiency of evidence is a ground for withdrawal of prosecution, the Court held that:-

"9. [...] we find it difficult to appreciate why the opinion arrived at by both the trial court and the Sessions Court that the view taken of that material by the Public Prosecutor viz. that it was meagre evidence on which no conviction could be asked for, should be said to be so improper that the consent of the Court under Section 494 of the Code of Criminal Procedure has to be withheld. Even the private complainant who was allowed to participate in these proceedings in all its stages, does not, in his objection petition, or revision petitions, indicate the availability of any other material or better material. Nor, could the complainant's counsel, in the course of arguments before us inform us that there was any additional material available. In the situation, therefore, excepting for the view that no order to withdraw should be passed in such cases either as a matter of law or as a matter of propriety but that the matter should [b]e disposed of only after the evidence is judicially taken, we apprehend that the learned Chief Justice himself would not have felt called upon to interfere with the order of the Magistrate in the exercise of his revisional jurisdiction."

(emphasis supplied)

15 In ***M.N Sankarayaraynan Nair vs P.V Balakrishnan, (1972) 1 SCC 318***, this Court held that the powers conferred on the Prosecutor under Section 494 of the Code of Criminal Procedure 1898 are to be exercised in "furtherance of the object of law". On the power of the court to grant consent, Justice P. Jaganmohan Reddy observed that:-

"8. [...] The Court also while considering the request to grant permission under the said section should not do so as a necessary formality — the grant of it for the mere asking. It may do so only if it is satisfied on the materials placed before it that the grant of it subserves the administration of justice and that permission was not being sought covertly with an ulterior purpose unconnected with the vindication of the law which the executive organs are in duty bound to further and maintain."

(emphasis supplied)

16 In ***Rajender Kumar Jain vs State through Special Police Establishment and Ors, (1980) 3 SCC 435***, there was an application for the withdrawal of the prosecution against Mr George Fernandes, Chairperson of the Socialist Party of India. Mr Fernandes had been accused of rousing resistance against the Emergency imposed in 1975 and of participating in a conspiracy to do acts which may have resulted in the destruction of property. After the Emergency was revoked, the Special Public Prosecutor filed an application under Section 321 of the CrPC 'in view of the changed circumstances and public interest'. Given the political background of the dispute, a two judge bench of this Court, speaking through Justice O. Chinnappa Reddy highlighted the importance of the independence of the Public Prosecutor in exercising the power under Section 321. In the context of a withdrawal of prosecution where matters of public policy are involved, the Court held that:-

"16. In the past, we have often known how expedient and necessary it is in the public interest for the public prosecutor

to withdraw from prosecutions arising out of mass agitations, communal riots, regional disputes, industrial conflicts, student unrest etc. Wherever issues involve the emotions and there is a surcharge of violence in the atmosphere it has often been found necessary to withdraw from prosecutions in order to restore peace, to free the atmosphere from the surcharge of violence, to bring about a peaceful settlement of issues and to preserve the calm which may follow the storm. To persist with prosecutions where emotive issues are involved in the name of vindicating the law may even be utterly counter-productive. An elected Government, sensitive and responsive to the feelings and emotions of the people, will be amply justified if for the purpose of creating an atmosphere of goodwill or for the purpose of not disturbing a calm which has descended it decides not to prosecute the offenders involved or not to proceed further with prosecution already launched. In such matters who but the Government can and should decide, in the first instance, whether it should be baneful or beneficial to launch or continue prosecutions. If the Government decides that it would be in the public interest to withdraw from prosecutions, how is the Government to go about this task?

17. Under the Code of Criminal Procedure it is the Public Prosecutor that has to withdraw from the prosecution and it is the court that has to give its consent to such withdrawal. […] it is he that is entrusted with the task of initiating the proceeding for withdrawal from the prosecution. But, where such large and sensitive issues of public policy are involved, he must, if he is right-minded, seek advice and guidance from the policy-makers. His sources of information and resources are of a very limited nature unlike those of the policy-makers. If the policy-makers themselves move in the matter in the first instance, as indeed it is proper that they should where matters of momentous public policy are involved, and if they advise the Public Prosecutor to withdraw from the prosecution, it is not for the court to say that the initiative comes from the Government and therefore the Public Prosecutor cannot be said to have exercised a free mind. Nor can there be any quibbling over words. If ill informed but well meaning bureaucrats choose to use expressions like "the Public Prosecutor is directed" or "the Public Prosecutor is instructed", the court will not on that ground alone stultify the larger issue of public policy by refusing its consent on the ground that the Public Prosecutor did not act as a free agent when he sought withdrawal from the prosecution. What is at stake is not the language of the letter or the prestige of the Public Prosecutor but a wider question of policy. The court, in such a situation is to make an effort to elicit the reasons for withdrawal and satisfy itself, that the Public Prosecutor too was satisfied that he should withdraw from the prosecution for good and relevant reasons."

Thus the fact that the withdrawal was initiated by the government was held not to vitiate the application, so long as the Public Prosecutor had independently applied his mind. Elaborating on the scope of withdrawal on the ground of public justice, and in particular the ambit of the expression 'political offence', the Court held:-

"19.[…] For our present purpose it is really unnecessary for us to enter into a discussion as to what are political offences except in a sketchy way. It is sufficient to say that politics are about

Government and therefore, a political offence is one committed with the object of changing the Government of a State or inducing it to change its policy. Mahatma Gandhi, the father of the Nation, was convicted and jailed for offences against the municipal laws; so was his spiritual son and the first Prime Minister of our country.

21. To say that an offence is of a political character is not to absolve the offender of the offence. But the question is, is it a valid ground for the Government to advise the Public Prosecutor to withdraw from the prosecution? We mentioned earlier that the Public Prosecutor may withdraw from the prosecution of a case not merely on the ground of paucity of evidence but also in order to further the broad ends of public justice and that such broad ends of public justice may well include appropriate social, economic and political purposes. It is now a matter of history that the motivating force of the party which was formed to fight the elections in 1977 was the same as the motivating force of the criminal conspiracy as alleged in the order sanctioning the prosecution; only the means were different. The party which came to power as a result of 1977 elections chose to interpret the result of the elections as a mandate of the people against the politics and the policy of the party led by Shrimati Gandhi. Subsequent events leading up to the 1980 elections which reversed the result of the 1977 elections may cast a doubt whether such interpretation was correct; only history can tell. But, if the Government of the day interpreted the result of the 1977 elections as a mandate of the people and on the basis of that interpretation the Government advised the Public Pr[o]secutor to withdraw from the prosecution, one cannot say that the Public Prosecutor was activated by any improper motive in withdrawing from the prosecution nor can one say that the Magistrate failed to exercise the supervisory function vested in him in giving his consent."

(emphasis supplied)

17 The locus classicus on the interpretation of the powers conferred by Section 321 of the CrPC is the decision of the Constitution Bench in ***Sheonandan Paswan Vs. State of Bihar and others, (1987) 1 SCC 288***. In this case, the Board of Directors of the Patna Urban Cooperative Bank was charged with misdemeanours such as misappropriation of the funds of the bank by giving multiple loans to the same person under different names and approving loans for fictitious persons. The Registrar of Cooperative Societies at the instance of the Reserve Bank of India directed legal action to be initiated against the stakeholders. On investigation, statements were made against Dr Jagannath Mishra, the ex-Chief Minister of Bihar, and it was alleged that he misused his office and made illegal personal gains for himself while holding office of the Chief Minister. A charge sheet was filed and the CJM took cognizance of the matter. However, before the case could progress further, Dr Mishra once again took oath as the Chief Minister of Bihar and a communication was issued by the Government that it had decided to withdraw the case. A withdrawal application was filed by the Public Prosecutor on grounds of lack of evidence, implication due to political vendetta, and that the prosecution would be against public policy and public interest. The CJM gave consent for the withdrawal, and the High Court affirmed the order of the CJM.

18 When the matter came up before this Court, the appeal was dismissed by a 2:1 majority. A review petition was

allowed, and the scope of Section 321 of the CrPC was addressed by a Constitution Bench. Chief Justice Bhagwati in his minority opinion held that in a case where a withdrawal petition has been filed on the ground of paucity of evidence, after the charge sheet has been filed but before the charge has been framed in a warrant case, the exercise of power by the court granting consent is similar to the power of the court to discharge the accused under Section 239 of the CrPC. Hence, in such cases, it would not be competent for the public prosecutor to file a withdrawal petition unless there is material change in the evidence. The Chief Justice was of the opinion that the court must take up the exercise of discharge in such cases since it would carry greater conviction with the people. He observed:-

"30. The second qualification[..] What the court, therefore, does while exercising its function under Section 239 is to consider the police report and the document sent along with it as also any statement made by the accused if the court chooses to examine him. And if the court finds that there is no prima facie case against the accused the court discharges him. But that is precisely what the court is called upon to do when an application for withdrawal from the prosecution is made by the Public Prosecutor on the ground that there is insufficient or no evidence to support the prosecution. There also the court would have to consider the material placed before it on behalf of the prosecution for the purpose of deciding whether the ground urged by the Public Prosecutor for withdrawal of the prosecution is justified or not and this material would be the same as the material before the court while discharging its function under Section 239. If the court while considering an application for withdrawal on the ground of insufficiency or absence of evidence to support the prosecution has to scrutinise the material for the purpose of deciding whether there is in fact insufficient evidence or no evidence at all in support of the prosecution, the court might as well engage itself in this exercise while considering under Section 239 whether the accused shall be discharged or a charge shall be framed against him. It is an identical exercise which the court will be performing whether the court acts.

"Section 239: When accused shall be discharged: If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

under Section 239 or under Section 321. If that be so, we do not think that in a warrant case instituted on a police report the Public Prosecutor should be entitled to make an application for withdrawal from the prosecution on the ground that there is insufficient or no evidence in support of the prosecution. "

(emphasis supplied)

19 Justice Khalid (speaking for himself and Justice Natarajan) rendered the majority opinion holding that the power of the court to grant consent for a withdrawal petition is similar to the power under Section 320 of the CrPC to compound offences. The court in both the cases will not have to enquire into the issue of

conviction or acquittal of the accused person, and will only need to restrict itself to providing consent through the exercise of jurisdiction in a supervisory manner. It was held that though Section 321 does not provide any grounds for seeking withdrawal, "public policy, interest of administration, inexpediency to proceed with the prosecution for reasons of State, and paucity of evidence" are considered valid grounds for seeking withdrawal. Further, it was held that the court in deciding to grant consent to the withdrawal petition must restrict itself to only determining if the Prosecutor has exercised the power for the above legitimate reasons:-

"73 [...]When an application under Section 321 CrPC is made, it is not necessary for the court to assess the evidence to discover whether the case would end in conviction or acquittal. To contend that the court when it exercises its limited power of giving consent under Section 321 has to assess the evidence and find out whether the case would end in acquittal or conviction, would be to rewrite Section 321 CrPC and would be to concede to the court a power which the scheme of Section 321 does not contemplate. The acquittal or discharge order under Section 321 are not the same as the normal final orders in criminal cases. The conclusion will not be backed by a detailed discussion of the evidence in the case of acquittal or absence of prima facie case or groundlessness in the case of discharge. All that the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of law. The court after considering these facets of the case, will have to see whether the application suffers from such improprieties or illegalities as to cause manifest injustice if consent is given. In this case, on a reading of the application for withdrawal, the order of consent and the other attendant circumstances, I have no hesitation to hold that the application for withdrawal and the order giving consent were proper and strictly within the confines of Section 321 CrPC.

78. The section gives no indication as to the grounds on which the Public Prosecutor may make the application, or the considerations on which the court is to grant its consent. The initiative is that of the Public Prosecutor and what the court has to do is only to give its consent and not to determine any matter judicially. The judicial function implicit in the exercise of the judicial discretion for granting the consent would normally mean that the court has to satisfy itself that the executive function of the Public Prosecutor has not been improperly exercised, or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes."

(emphasis supplied)

The Court also held that while granting or denying consent to a withdrawal petition, the court is not to review the purported grounds warranting withdrawal that the public prosecutor has provided, but must only make sure that it is for a legitimate purpose, initiated without mala fides.

20 Both, Justice Khalid in his majority opinion and Justice Venkataramiah (as the learned Chief Justice then was) in his concurring opinion, held that this Court must be circumspect in interfering with the concurrent findings of the courts below, allowing or dismissing the withdrawal petition. Highlighting that this Court is not

a court of facts and evidence it was observed:-

"89. An order passed under Section 321 comes to this Court by special leave, under Article 136 of the Constitution of India. The appeal before us came thus. It has been the declared policy of this Court not to embark upon a roving enquiry into the facts and evidence of cases like this or even an order against discharge. This Court will not allow itself to be converted into a court of PART C facts and evidence. This Court seldom goes into evidence and facts. That is as it should be. Any departure from this salutary self-imposed restraint is not a healthy practice and does not commend itself to me. It is necessary for this Court to remember that as an apex court, any observation on merits or on facts and evidence of a case which has to go back to the courts below will seriously prejudice the party affected and it should be the policy of this Court not to tread upon this prohibited ground and invite unsavoury but justifiable criticism. Is this Court to assess the evidence to find out whether there is a case for acquittal or conviction and convert itself into a trial court? Or is this Court to order a retrial and examination of hundred witnesses to find out whether the case would end in acquittal or conviction? Either of these conclusions in the case is outside the scope of Section 321. This can be done only if we rewrite Section 321."

(emphasis supplied)

21 The decision in Sheonandan Paswan (supra) has held the ground since then. An instance of its application was when this Court dealt with the withdrawal of prosecution of an MLA for offences involving misappropriation of public money. ***In Yerneni Raja Ramchandar vs State of Andhra Pradesh & Ors, (2009) 15 SCC 604***, the appellant, an MLA, was accused of fabricating hospital records to repeatedly claim medical reimbursement for a sum of Rs. 2,89,489, Rs. 1,33,939, and Rs. 1,22,825 from the Government. Amounts of Rs. 289,489, Rs. 60,000 and Rs. 60,000 were sanctioned by the Government time and again in response to these requests. Charges of misappropriation were levelled against him. Since the appellant was an MLA, the matter was referred to the Ethics Committee of the Legislative Assembly, where the appellant tendered an apology and refunded Rs. 60,000 to the Government. Pursuant to this, the Ethics Committee recommended a withdrawal of the prosecution against the appellant. The State Government also issued an order requiring the District Collector to direct the Prosecutor to withdraw the case. Multiple applications for withdrawal of prosecution were made, which were dismissed by the Magistrate. These, however, were ultimately allowed by the High Court. In refusing to allow the withdrawal of the prosecution against the appellant, this Court opined that in view of decision in Sheonandan Paswan (supra), the power of judicial review of the High Court was limited. It could have only interfered if there was an error of law committed by the Magistrate. Further, the Court also considered the implication of the disciplinary action taken by the Ethics Committee of the Legislative Assembly on the withdrawal of prosecution under Section 321 of the CrPC. Justice SB Sinha, speaking for the two-judge Bench, held that:-

"15. The Ethics Committee of the legislature of the State of Andhra Pradesh was empowered to deal with the disciplinary action or otherwise which may

be taken against the Members of the Legislative Assembly. A criminal case against a Member of the Legislative Assembly, ordinarily, should be allowed to be continued on its own merit, particularly, in the light of the facts of the present matter wherein the High Court had refused to interfere at the earlier stages of the proceedings. We have also noticed hereinbefore that the High Court, in fact, had not only been monitoring the investigation, but also directed the learned trial Judge to complete the trial within a period of three months. The action on the part of the State to issue the said government order despite the earlier orders of the High Court must be considered keeping in view the said factual matrix.

18. The government order was issued even according to the State in terms of the recommendations made by the Ethics Committee alone. […] The Ethics Committee had no jurisdiction to make such recommendations. If the State had acted on the basis of recommendations made by a body who had no role to play, its action would be vitiated in law, recommendations of the Ethics Committee being unauthorised, the action of the State would attract the doctrine of malice in law.

19. Even otherwise, the action on the part of the State, in our opinion, suffers from malice on fact as well. The State is the PART C protector of law. When it deals with a public fund, it must act in terms of the procedure established by law. In respect of public fund, the doctrine of public trust would also be applicable so far as the State and its officers are concerned. It could not, save and except for very strong and cogent reasons, have issued the said government order despite the orders of the High Court."

(emphasis supplied)

22 In offences involving the violation of public trust by executive or legislative authorities, this Court has evaluated the gravity of the offence and the impact of the withdrawal of prosecution on public life. ***In Bairam Muralidhar vs State of Andhra Pradesh, (2014) 10 SCC 380***, the Prosecutor was seeking a withdrawal of the prosecution against a police officer who had been accused of demanding a bribe in exchange of not implicating a particular individual for an offence of kidnapping and for reducing the charges against the individual's son. The police officer was accused of offences under Sections 7 and 13(1) of the Prevention of Corruption Act 1988. An application under Section 321 of the CrPC was filed by the Prosecutor based on the fact that the Government had issued an order for withdrawal of prosecution against the officer given his meritorious service and directed that his case be placed before the Administrative Tribunal for disciplinary proceedings. This Court affirmed the concurrent findings of the High Court and the Trial Court and rejected the application for withdrawal. Justice Dipak Misra (as he then was), speaking on behalf of the two judge Bench, held that:-

"19. In the case at hand, as the application filed by the Public Prosecutor would show that he had mechanically stated about the conditions precedent, it cannot be construed that he has really perused the materials and applied his independent mind solely because he has so stated. The application must indicate perusal of the materials by stating what are the materials he has perused, may be in brief, and whether such withdrawal of the prosecution would serve public interest and how he has formed his independent opinion. As we perceive, the learned Public Prosecutor has been totally guided by the order of the Government and really not applied his mind to the facts of the case. The learned trial Judge as well as the High Court has observed that it is a case under the Prevention of Corruption Act. They

have taken note of the fact that the State Government had already granted sanction. It is also noticeable that the Anti-Corruption Bureau has found there was no justification of withdrawal of the prosecution.

22. We have referred to these authorities only to show that in the case at hand, regard being had to the gravity of the offence and the impact on public life apart from the nature of application filed by the Public Prosecutor, we are of the considered opinion that view expressed by the learned trial Judge as well as the High Court cannot be found fault with. We say so as we are inclined to think that there is no ground to show that such withdrawal would advance the cause of justice and serve the public interest. That apart, there was no independent application of mind on the part of the learned Public Prosecutor, possibly thinking that the court would pass an order on a mere asking."

(emphasis supplied)

23 The principles which emerge from the decisions of this Court on the withdrawal of a prosecution under Section 321 of the CrPC can now be formulated:-

(i) Section 321 entrusts the decision to withdraw from a prosecution to the public prosecutor but the consent of the court is required for a withdrawal of the prosecution;

(ii) The public prosecutor may withdraw from a prosecution not merely on the ground of paucity of evidence but also to further the broad ends of public justice;

(iii) The public prosecutor must formulate an independent opinion before seeking the consent of the court to withdraw from the prosecution;

(iv) While the mere fact that the initiative has come from the government will not vitiate an application for withdrawal, the court must make an effort to elicit the reasons for withdrawal so as to ensure that the public prosecutor was satisfied that the withdrawal of the prosecution is necessary for good and relevant reasons;

(v) In deciding whether to grant its consent to a withdrawal, the court exercises a judicial function but it has been described to be supervisory in nature. Before deciding whether to grant its consent the court must be satisfied that:

(a) The function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for illegitimate reasons or purposes;

(b) The application has been made in good faith, in the interest of public policy and justice, and not to thwart or stifle the process of law;

(c) The application does not suffer from such improprieties or illegalities as would cause

(d) The grant of consent sub-serves the administration of justice; and

(e) The permission has not been sought with an ulterior purpose unconnected with the vindication of the law which the public prosecutor is duty bound to maintain;

(vi) While determining whether the withdrawal of the prosecution subserves the administration of justice, the court would be justified in scrutinizing the nature and gravity of the offence and its impact upon public life especially where matters involving public funds and the discharge of a public trust are implicated; and

(vii) In a situation where both the trial judge and the revisional court have concurred in granting or refusing consent, this Court while exercising its jurisdiction under Article 136 of the Constitution would

exercise caution before disturbing concurrent findings. The Court may in exercise of the well-settled principles attached to the exercise of this jurisdiction, interfere in a case where there has been a failure of the trial judge or of the High Court to apply the correct principles in deciding whether to grant or withhold consent.

7. As from the record of the case at hand, it is apparent that an F.I.R. was lodged by the Safety Manager of Vijay Construction Company Pvt. Ltd. Agra against 24 named persons regarding setting on fire the articles of the company and taking away the certain plates of the company and when the people of the company tried to protect the same, they tussled with them and the people of the company hardly saved themselves from the illegal acts. After investigation, charge sheet was submitted and cognizance was taken by the Court. Thereafter, at the stage of appearance of the accused persons, an application dated 20.05.2023 was moved by Uttam Chandel, SPP (DAA) ASJ 13 with the averment therein that as the case is pending before the Court, vide letter/communication no.344 WC/7 Justice-5 2023-24 WC/2022 dated 15.02.2023 of Special Secretary, Justice, Section-5 (Criminal) U.P. Government, his highness the Governor of U.P. has been pleased to withdraw the 24 prosecutions and he has been accordingly directed to seek consent of the court for withdrawal of the same in compliance of the letters/communications Sr. No.(i) to (xxiv). It has been further averred that at the Sr. No. xiv, case crime no.211 of 2011 is related with S.S.T. No.75 of 2013 State Vs. Ashu and others is pending in the court. The complainant of which is Shivsen Safety Manager Vijay Construction Company Pvt. Ltd., Agra, he has lodged an F.I.R. on the basis of information gathered from the people and the witnesses have stated that the named accused persons have been the part of the crowd and no specific roles have been assigned by the witnesses. The incident is connected with the farmer's agitation and it is expedient to withdraw the prosecution in the interest of justice. The learned Additional Sessions Judge/Special Judge (DDA), Court No.13 Agra after hearing thereon has passed the impugned order dated 22.05.2023 to the effect that from the perusal of the record, it is apparent that the present case is connected with the riot and loot committed by the accused persons in prosecution of the common object and being armed with deadly weapons. From the photographs annexed with the C.D. available on record, some accused persons are seen committing the offence and are causing injuries to the police personnel. The case is not connected with any public policy or public interest or any object of judicial administration. Accused persons are absconding and NBW and process under Section 82 Cr.P.C have been issued against them, therefore, in view of the facts and circumstances of the case, accordingly the consent to the withdrawal of the prosecution is not in the public interest and is likely to adversaly affect the judicial administration and resultantly, the application was rejected. From the perusal of the impugned order, in the light of the application made for the withdrawal of the prosecution by the public prosecution, it is apparent that the court needs to be satisfied that the executive function of the public prosecutor has not been improperly exercised or that it not an attempt to interfere with the normal course of justice or illegitimate reasons or purposes. It is also important to note that grant of permission to seek withdrawal cannot be

made only on the mere asking by the public prosecutor, the court has to be satisfied on the material placed before it that the grant of which subserved the administration of justice. As the matter relates to mass agitation launched by the farmer as is disclosed in the application made by the public prosecutor, the court is expected in such situation to make an effort to elicit the reasons for withdrawal and satisfied itself that the prosecutor too was satisfied that he should withdraw from the prosecution for good and relevant reasons. Withdrawal as initiated by the government cannot be held to vitiate the application so long as the public prosecutor had independently applied his mind. The court in deciding to grant consent to withdraw the prosecution must restrict itself to only determining if the public prosecutor has exercised the power for the legitimate reasons. All the court has to see is whether the application is made in good faith, in the interest of public policy and justice and not to thwart or stifle the process of court. The court after considering these facets of the case will have to see whether the application suffers from such improperties or illegalities as to cause manifest injustice if the consent is given. The judicial function implicit in the exercise of judicial discretion for grant of consent would normaly mean that the court has to satisfy itself that the executive function of the public prosecutor has not been improperly exercised or that it is not an attempt to interfere with the normal course of justice for the illegitimate reason and purposes. In this case on the reading of the application for withdrawal, the impugned order and the other attendant circumstances, this Court has no hesitation to hold that the learned court has not considered and recorded his satisfaction whether the application made by the public prosecutor was in good faith and after having applied his independent mind to the facts and circumstances of the case and whether the application suffers from any improprieties or illegalities as to cause manifest injustice if the consent is given specifically in view of the applications moved in other cases have been allowed and consent has been granted to withdraw the prosecution.

8. Keeping in view the entire facts and circumstances of the case and the manner in which the application under Section 321 Cr.P.C. has been considered and decided by the trial court, it is apparent that the order has been passed against the principles of law as stated above, which is not sustainable in the eye of law and the impugned order is liable to be set aside with the direction to the court concerned that after giving opportunity to both sides, matter shall be decided afresh.

9. In view of the such facts and circumstances of the case, the impugned order dated 22.05.2023 passed by ADJ/Special Judge (D.A.A.), Court No.13, Agra is hereby set aside.

10. Accordingly, the instant application u/s 482 Cr.P.C. is **disposed off.**

(2024) 2 ILRA 1249
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.10.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Application u/s 482 No. 28290 of 2019

Kunal Shah & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Rizwan Ahamad, Sri Rajrshi Gupta

Counsel for the Opp. Parties:
G.A., Sri Awadhesh Kumar Pandey, Sri Sanjay Mishra

Criminal Law – Criminal Procedure Code, 1973 – Sections 165(3) & 482 – Indian Penal Code, 1860 – Sections 323, 504, 506 & 427 – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Sections 3(2)(va) - Application under Section 482 Cr.P.C. – Quashing of Summoning Order and Criminal Proceedings - Tenancy dispute arose between the parties, which was amicably resolved through compromise decrees - tenant failed to vacate the premises - execution proceedings - police-assisted in eviction - criminal complaint, filed after an unexplained delay - alleging offences under Sections 323, 504, 506, 427 IPC and Section 3(2)(va) of the SC/ST Act - summoning order - Applicant taken plea that the complaint lacked merits and was a retaliatory measure stemming from the civil dispute - During the pendency of the present application, the complainant filed a withdrawal application before the trial court – court finds that admittedly, the complaint was rooted in the tenancy conflict and expressing a clear intent not to pursue the matter further – further, court, relying on settled judicial precedents, reiterated that the provisions of the SC/ST Act are attracted only when the alleged offence is committed on account of the victim's caste, and since the present matter was purely a tenancy dispute with no caste-based allegations, no case was made out under the SC/ST Act – Held - The criminal proceedings initiated against the applicants were found to be an abuse of process and devoid of merit - accordingly, the summoning order and all related proceedings in Complaint Case, renumbered as quashed - application stands allowed.
(Para – 10, 24, 25, 26, 27, 28)

Application Allowed. (E-11)

List of referred Cases: -

1. Kishan Singh Vs Gurpal Singh - AIR 2010 SC 3624,

2. Indian Oil Corporation Vs NEPC India Ltd. - (2006) 6 SCC 736,

3. Usha Chakraborty Vs St. of W.B.- 2023 SCC Online SC 90,

4. Ramawatar Vs St. of M.P. - (2022) 13 SCC 635,

5. B. Venkateshwaran & ors. Vs P. Bakthavatchalam - AIR 2023 SC 262,

6. Hitesh Verma Vs St. of Uttarakhand - 2021 Cri. L.J.1,

7. Ashrafi Vs St. of U.P.- (2018) 1 SCC 742,

8. Khuman Singh Vs St. of M.P. - AIR 2019 SC 4030.

(Delivered by Hon'ble Neeraj Tiwari, J.)

Civil Misc. Amendment Application No. 7 of 2023

1. Heard learned counsel for the parties.

2. Learned counsel for the applicants submitted that during the pendency of application, trial Court has renumbered the Complaint Case No. 171 of 2017 (Jai Kumar Harijan vs. Kunal Shah and others) as Sessions Case No. 1506 of 2023 (State of U.P. vs. Kunal Shah and others), therefore, he may be permitted to carry out necessary amendment in the prayer clause and further requested that same may be allowed, for which Sri Awadhesh Kumar Pandey, learned counsel for the opposite party no.2 has no objection.

3. Amendment Application is allowed.

4. Learned counsel for the applicants is permitted to carry out necessary amendment during the course of day.

Order on the memo of application

1. Heard Sri Rajrshi Gupta, learned counsel for the applicants, learned AGA and Sri Awadesh Kumar Pandey, learned counsel for the opposite party no.2.

2. Present application has been filed for quashing of the summoning order dated 18.5.2019 as well as entire proceedings of Complaint Case No. 171 of 2017 (Jai Kumar Harijan vs. Kunal Shah and others) renumbered as Sessions Case No. 1506 of 2023 (State of U.P. vs. Kunal Shah and others), under Sections 323, 504, 506, 427 IPC and Section 3(2) (va) of SC/ST Act, pending in the court of Special Judge SC/ST, Allahabad.

3. Brief facts of the case are that opposite party no.2 was tenant of applicant no.1 and there was tenancy dispute between the parties. Applicant no.1 has filed S.C.C. Suit No. 11 of 2014 for eviction of land on the ground of default in payment of rents and has also filed another Suit, which was registered as P.A. Case No. 2 of 2015 before Prescribed Authority for release of premises in dispute on account of bona-fide need. Thereafter, compromise has taken place between the parties and compromise decree dated 12.11.2016 has been passed in SCC Suit No. 11 of 2014 with the undertaking of opposite party no.2-tenant to vacate the said premises within three months. Similarly, P.A. Case No. 2 of 2015 has also been decided vide order dated 29.11.2016 on the basis of compromise with the similar undertaking to vacate the premises in three months. Even after completion of three months, complainant-tenant has not vacated the said premise, therefore, applicants have filed execution application, which was registered as M.P.A. Case No. 1 of 2017. Similarly, opposite party no.2 has filed application in P.A. Case No. 2 of 2015 for setting aside the compromise decree dated 29.11.2016 on the ground of fraud and also filed another application in SCC Suit no. 11 of 2014 for setting the compromise decree dated 12.11.2016 on the similar ground. Court has dismissed the application of complainant vide order dated 3.4.2017 for setting aside the compromise deed dated 12.11.2016 passed in P.A. Case No. 2 of 2015.

4. In Execution Case i.e M.P.A. Case No. 1 of 2017, Court has issued Parwana Bedhakli and directed the SHO, Civil Lines to get the premise vacated and ensure the possession of the said premise to applicants within 24 hours. The said order was complied with by the Police Authority on 7.4.2017 and possession was delivered to the applicant. This fact has also been recorded in the general diary of police. Thereafter, police filed compliance report on 22.4.2017 before the Execution Court about the compliance of order of the Execution Court. Opposite party no.2 has also filed petition under Article 227 of the Constitution of India before this Court challenging the eviction in which this Court vide order dated 20.4.2017 rejected the stay application. Another application preferred by the opposite party no.2 for setting aside the compromise decree dated 12.11.2016 passed in S.C.C. Suit No. 11 of 2014, has also been dismissed by the Court vide order dated 30.7.2018. At this stage, opposite party no.2 has initiated criminal proceedings by filing complaint case after inordinate delay of three months and 20 days.

5. Sri Rajrshi Gupta, learned counsel for the applicants has assailed the summoning order on many grounds. Firstly,

he submitted that complaint has been filed without proper explanation of delay. In support of his contention, he has placed reliance upon the judgment of the Apex Court in the case of ***Kishan Singh vs. Gurpal Singh reported in AIR 2010 SC 3624.***

6. He next submitted that it is pure civil dispute and to settle the same, criminal proceedings has been initiated by the complainant, which is totally abuse of process of law and is required to be set aside. In support of of this contention, he has placed reliance upon the judgment of this Court as well as Apex Court in the cases of ***Indian Oil Corporation Vs. NEPC India Ltd. reported in (2006) 6 SCC 736, Usha Chakraborty vs. State of West Bengal reported in 2023 SCC Online SC 90, Ramawatar vs. State of M.P. reported in (2022) 13 SCC 635 and B. Venkateshwaran and Ors. Vs. P. Bakthavatchalam reported in AIR 2023 SC 262.***

7. He further submitted that as per version of complaint all event took place on the date of eviction i.e. 7.4.2017 before the police authority, but in the complaint, there is no such facts mentioned about the presence of police personal. Not only this, eviction proceedings has also been maintained in the general diary of police and compliance report has also filed before the Execution Court. Same has never been challenged by the opposite party no.2, which clearly shows that no such incident has ever taken place and only to settle the civil dispute, he has initiated criminal proceedings. After eviction proceedings, he has written letter dated 12.4.2017 to District Magistrate, Additional Commissioner, Deputy Chief Minister, Chief Minister and Prime Minister and same is having no reference of any incident as alleged in the complaint upon which summoning order has been issued.

8. He next submitted that not only this, summoning order has been issued under the provisions of SC/ST Act and he submitted that law is very well settled that in case any incident took place on the ground that opposite party no.2 belongs to SC/ST community only then summoning order may be issued under the provisions of SC/ST Act. In the present case, it is undisputed that bone of contention is tenancy dispute and it has nothing to do with the caste of opposite party no.2, therefore, proceedings under the SC/ST Act may not be initiated. In support of his contention, he has placed reliance upon the judgment of this Court as well as other High Courts in the cases of ***Hitesh Verma Vs. State of Uttarakhand reported in 2021 Cri. L.J.1, Ashrafi Vs. State of Uttar Pradesh (2018) 1 SCC 742 and Khuman Singh Vs. State of M.P. reported in AIR 2019 SC 4030.***

9. He lastly informed that now opposite party no.2 has filed withdrawal application on 9.11.2020 before the trial Court to withdraw the complaint earlier so filed with the clear cut assertion that due to tenancy dispute, he had lodged complaint, but presently, he does not want to press the same. Therefore, in light of aforesaid facts and circumstances, criminal proceedings is bad and liable to be set aside.

10. Sri Awadesh Kumar Pandey, learned counsel for the opposite party no.2 has not disputed the aforesaid facts and fairly accepted that now opposite party no.2 has filed withdrawal application before the trial Court to withdraw the complaint earlier so filed and further does not want to

pursue the criminal proceedings any further against applicants.

11. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record as well as summoning order.

12. It is undisputed that a civil dispute of tenancy as referred hereinabove was pending between the parties and ultimately decided by the disposal of SCC Suit No. 11 of 2014 and P.A. Case No. 2 of 2015. Further, criminal proceedings has only been initiated by filing complaint after eviction order has been passed having certain allegations upon the applicant. Before filing of complaint, application has also filed before the District Magistrate, Additional Chief Minister, Chief Minister & Prime Minister having no reference of the present incident, which is part of present complaint, which creates doubt over genuineness of complaint.

13. This complaint has been filed alongwith delay of more than three months without having any explanation. This fact has also been considered by the Apex Court in the matter of ***Kishan Singh (Supra)***. Relevant paragraph of the said judgment are quoted hereinbelow:-

21. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. In case, there is some delay in filing the FIR, the complainant must give explanation for the same. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint is always fatal. [vide: Sahib Singh Vs. State of Haryana, AIR 1997 SC 3247].

22. In cases where there is a delay in lodging a FIR, the Court has to look for a plausible explanation for such delay. In absence of such an explanation, the delay may be fatal. The reason for quashing such proceedings may not be merely that the allegations were an after thought or had given a coloured version of events. In such cases the court should carefully examine the facts before it for the reason that a frustrated litigant who failed to succeed before the Civil Court may initiate criminal proceedings just to harass the other side with mala fide intentions or the ulterior motive of wreaking vengeance on the other party. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case. (vide : Chandrapal Singh & Ors. Vs. Maharaj Singh & Anr., AIR 1982 SC 1238; State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors., AIR 1992 SC 604; G. Sagar Suri & Anr. Vs. State of U.P. & Ors., AIR 2000 SC 754; and Gorige Pentaiah Vs. State of A.P. & Ors., (2008) 12 SCC 531).

14. From perusal of the facts of the case as well as law laid down by the Apex Court, it is required on the part of complainant to explain the delay, if any with cogent reasons, which is absolutely missing in this matter, therefore, criminal proceeding is bad and abuse the process of law.

15. Now coming to next issue as to whether in civil dispute, criminal proceedings may be initiated or not. This matter has very well considered and settled by this Court as well as Apex Court in the

matter of ***Indian Oil Corporation vs. NEPC India Ltd. reported in (2006) 6 SCC 736., Usha Chakraborty vs. State of West Bengal reported in 2023 SCC Online SC 90, Ramawatar vs. State of M.P., reported in (2022) 13 SCC 635 and B. Venkateswaran and ors. Vs. P. Bakthavatchalam reported in AIR 2023 SC 262.***

16. I have perused the judgment of Apex Court in the case of ***Indian Oil Corporation (Supra)*** and relevant paragraph of the said judgment is quoted hereinbelow:-

"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable break down of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure though criminal prosecution should be deprecated and discouraged. In G. Sagar Suri vs. State of U.P [2000 (2) SCC 636], this Court observed :

"It is to be seen if a matter, which is essentially of civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which High Court is to exercise its jurisdiction under section 482 of the Code. Jurisdiction under this Section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice."

17. I have also perused the judgment of Apex Court in the case of ***Usha Chakarborty (Supra)*** and relevant paragraph of the said judgment is quoted hereinbelow:-

15. The materials on record pertaining to the said pleadings instituted in the Civil Suit, produced in this proceeding would reveal that the respondent was in fact ousted from the membership of the trust. In the counter affidavit filed in this proceeding, the respondent has virtually admitted the pendency of the suit filed against his removal from the post of Secretary and the trusteeship and its pendency. The factum of passing of adverse orders in the interlocutory applications in the said Civil Suit as also the prima facie finding and conclusion arrived at by the Civil Court that the respondent stands removed from the post of Secretary and also from the trusteeship are also not disputed therein. Then, the question is why would the respondent conceal those relevant aspects? The indisputable and undisputed facts (admitted in the counter-affidavit by the respondent) would reveal the existence of the civil dispute on removal of the respondent from the post of Secretary of the school as also from the trusteeship. Obviously, it can only be taken that since the removal from the office of the Secretary and the trusteeship was the causative incident, he concealed the pendency of the civil suit to cover up the civil nature of the dispute.

16. By non-disclosure the respondent has, in troth, concealed the existence of a pending civil suit between him and the appellants herein before a competent civil court which obviously is the causative incident for the respondent's allegation of perpetration of the aforesaid offences against the appellants. We will deal with it further and also its impact a little later. There cannot be any doubt with respect to the position that in order to cause registration of an F.I.R. and consequential investigation based on the same the petition filed under Section 156(3), Cr.P.C., must satisfy the essential ingredients to attract the alleged offences. In other words, if such allegations in the petition are vague and are not specific with respect to the alleged offences it cannot lead to an order for registration of an F.I.R. and investigation on the accusation of commission of the offences alleged. As noticed hereinbefore, the respondent alleged commission of offences under Sections 323, 384, 406, 423, 467, 468, 420 and 120B, IPC against the appellants. A bare perusal of the said allegation and the ingredients to attract them, as adverted to hereinbefore would reveal that the allegations are vague and they did not carry the essential ingredients to constitute the alleged offences. There is absolutely no allegation in the complaint that the appellants herein had caused hurt on the respondent so also, they did not reveal a case that the appellants had intentionally put the respondent in fear of injury either to himself or another or by putting him under such fear or injury, dishonestly induced him to deliver any property or valuable security. The same is the position with respect to the alleged offences punishable under Sections 406, 423 , 467, 468, 420 and 120 B, IPC. The ingredients to attract the alleged offence referred to hereinbefore and the nature of the allegations contained in the application filed by the respondent would undoubtedly make it clear that the respondent had failed to make specific allegation against the appellants herein in respect of the aforesaid offences. The factual position thus would reveal that the genesis as also the purpose of criminal proceedings are nothing but the aforesaid incident and further that the dispute involved is essentially of civil nature. The appellants and the respondents have given a cloak of criminal offence in the issue. In such circumstance when the respondent had already resorted to the available civil remedy and it is pending, going by the decision in Paramjit Batra (supra), the High Court would have quashed the criminal proceedings to prevent the abuse of the process of the Court but for the concealment.

17. In the aforesaid circumstances, coupled with the fact that in respect of the issue involved, which is of civil nature, the respondent had already approached the jurisdictional civil court by instituting a civil suit and it is pending, there can be no doubt with respect to the fact that the attempt on the part of the respondent is to use the criminal proceedings as weapon of harassment against the appellants. The indisputable facts that the respondent has filed the pending title suit in the year 2015 , he got no case that he obtained an interim relief against his removal from the office of Secretary of the School Managing Committee as also the trusteeship, that he filed the stated application for an order for investigation only in April, 2017 together with absence of a case that despite such removal he got a right to get informed of the affairs of the school and also the trust, would only support the said conclusion. For all these reasons, we are of the considered view that this case invites

invocation of the power under Section 482 Cr.P.C. to quash the FIR registered based on the direction of the Magistrate Court in the afore-stated application and all further proceeding in pursuance thereof. Also, we have no hesitation to hold that permitting continuance of the criminal proceedings against the appellants in the aforesaid circumstances would result in abuse of the process of Court and also in miscarriage of justice.

18. Similar matter was also come up before the Apex Court in the matter of ***Ramawatar (Supra)***. Relevant Paragraph of the said judgment is quoted hereinbelow:-

"17. On the other hand, where it appears to the Court that the offence in question, although covered under the SC/ST Act, is primarily private or civil in nature, or where the alleged offence has not been committed on account of the caste of the victim, or where the continuation of the legal proceedings would be an abuse of the process of law, the Court can exercise its powers to quash the proceedings. On similar lines, when considering a prayer for quashing on the basis of a compromise/settlement, if the Court is satisfied that the underlying objective of the Act would not be contravened or diminished even if the felony in question goes unpunished, the mere fact that the offence is covered under a 'special statute' would not refrain this Court or the High Court, from exercising their respective powers under Article 142 of the Constitution or Section 482 Cr.P.C.

19. This issue was again come before the Apex Court in the matter of ***B. Venkasteshwaran (Supra)*** wherein Apex Court has also taken the same view. Relevant paragraph of the said judgments are quoted hereinbelow:-

"We have heard Shri Nagamuthu, learned senior counsel for the appellants – original accused and the respondent appearing in person. We have also gone through the complaint and considered the allegations in the complaint made against the accused. Having considered the allegations in the complaint and the material on record, it appears that initiation of the criminal proceedings by the respondent against the appellants – original accused for the offence under the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is nothing but an abuse of process of law and the court and also provision of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. It appears that a private dispute was going on between the parties with respect to the illegal construction. As per the allegations in the complaint, the original complainant had purchased the vacant land and constructed the building. It is alleged that adjacent to his house and on the common pathway, the accused have unlawfully encroached upon the pathway and started constructing the temple and thereby have put up illegal construction on his water pipeline, sewage pipeline and EB Cable. In the entire complaint, there are no allegations that the complainant is obstructed and / or interfered with enjoyment of his right on his property deliberately and willfully knowing that complainant belongs to SC/ST. From the material on record, it appears that a civil dispute is converted into criminal dispute and that too for the offence under the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Prior to filing of the complaint,

it appears that the temple was already in existence since many years. The complainant, who resides adjacent to the temple, filed WP No. 1272 of 2007 before the Madras High Court. Pursuant to the order passed by the High Court, the Commissioner of Corporation, Chennai conducted the inspection and found that there was absolutely no encroachment by the temple. It appears that thereafter the complainant filed another Writ Petition No. 30326 of 2013 before the Madras High Court. The High Court directed the official respondent to proceed with the inquiry against both the parties. At this stage, it is required to be noted that it was the case on behalf of the original accused that in fact complainant had violated all building norms and had constructed a building in blatant violation of the set-back rules and had also put-up unauthorized con14struction on the ground floor and first floor. That thereafter, the Temple filed writ petition being No.3322 of 2017 before the High Court. The Division Bench of the High Court vide order dated 10.2.2017 stayed the proceedings against temple. It appears that thereafter the complainant filed a private complaint for the aforesaid offences under the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. From the aforesaid, it seems that the private civil dispute between the parties is converted into criminal proceedings. Initiation of the criminal proceedings for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, therefore, is nothing but an abuse of process of law and Court. From the material on record, we are satisfied that no case for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is made out, even prima facie. None of the ingredients of Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 are made out and/ or satisfied. Therefore, we are of the firm opinion and view that in the facts and circumstances of the case, the High Court ought to have quashed the criminal proceedings in exercise of powers under Section 482 of the Code of Criminal Procedure. The impugned judgment and order passed by the High Court, therefore, is unsustainable and the same deserves to be quashed and set aside and the criminal proceedings initiated against the appellants deserves to be quashed and set aside."

20. Judgements are very much clear that in the matter of civil dispute, criminal proceedings cannot be initiated. In the present case, it is tenancy dispute, which is civil in nature, therefore, criminal proceedings is bad and gross misuse of process of law.

21. There is another issue as to whether any case is made out under the provisions of SC/ST Act or not. This matter has very well considered by the Apex Court in the case of ***Hitesh Verma (Supra)*** and relevant paragraph of the said judgment is quoted hereinbelow:

"16. There is a dispute about the possession of the land which is the subject matter of civil dispute between the parties as per respondent No.2 herself. Due to dispute, appellant and others were not permitting respondent No.2 to cultivate the land for the last six months. Since the matter is regarding possession of property pending before the Civil Court, any dispute arising on account of possession of the said property would not disclose an offence

under the Act unless the victim is abused, intimated or harassed only for the reason that she belongs to Scheduled Caste or Scheduled Tribe.

22. The appellant had sought quashing of the charge-sheet on the ground that the allegation does not make out an offence under the Act against the appellant merely because respondent No. 2 was a Scheduled Caste since the property dispute was not on account of the fact that respondent No. 2 was a Scheduled Caste. The property disputes between a vulnerable section of the society and a person of upper caste will not disclose any offence under the Act unless, the allegations are on account of the victim being a Scheduled Caste. Still further, the finding that the appellant was aware of the caste of the informant is wholly inconsequential as the knowledge does not bar, any person to protect his rights by way of a procedure established by law."

22. Similar matter was also come before this Court in the matter of ***Ashrafi (Supra)***. Relevant paragraph of the said judgments are quoted hereinbelow:-

"9. The evidence and materials on record do not show that the appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the appellant under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained.

23. The similar view is again taken by the Apex Court in the matter of ***Khuman Singh (Supra).*** Relevant paragraph of the said judgment are quoted hereinbelow:-

"9. The evidence and materials on record do not show that the appellant had committed rape on the victim on the ground that she belonged to Scheduled Caste. Section 3(2)(v) of the SC/ST Prevention of Atrocities Act can be pressed into service only if it is proved that the rape has been committed on the ground that PW-3 Phoola Devi belonged to Scheduled Caste community. In the absence of evidence proving intention of the appellant in committing the offence upon PW-3-Phoola Devi only because she belongs to Scheduled Caste community, the conviction of the appellant under Section 3(2)(v) of the SC/ST Prevention of Atrocities Act cannot be sustained13. In Dinesh alias Buddha v. State of Rajasthan (2006) 3 SCC 771, the Supreme Court held as under:-

"15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine.

As held by the Supreme Court, the offence must be such so as to attract the offence under Section 3(2)(v) of the Act. The offence must have been committed against the person on the ground that such person is a member of Scheduled Caste and Scheduled Tribe. In the present case, the fact that the deceased was belonging to "Khangar"-Scheduled Caste is not disputed. There is no evidence to show that

the offence was committed only on the ground that the victim was a member of the Scheduled Caste and therefore, the conviction of the appellant-accused under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act is not sustainable."

24. Even in the matter of ***Ramawatar (Supra) and Venkateshwaran (Supra)*** discussed hereinabove with regard to civil dispute, Court has also taken the same view that in case offence has not been committed on account of caste of victim, no case is made out under the provisions of SC/ST, Act.

25. From perusal of the judgments, it is apparently clear that Apex Court has taken consistent view that in case incident took place due to caste of victim then provisions of SC/ST Act would be attracted, but the in the present case, it was tenancy dispute having nothing to do with the caste of opposite party no.2, therefore, proceedings under the SC/ST Act is bad and cannot not be permitted to continue.

26. Therefore, under such facts and circumstances of the case as well as settled provisions of law, criminal proceedings initiated against the applicants are bad and liable to be quashed.

27. Now at belated stage, it appears that good sense prevailed in the mind of opposite party no.2 and in turn, he decided to file withdrawal application before the trial Court to withdraw the complaint, but even otherwise on merits too, no case is made out against the applicants in light of observations made hereinabove.

28. Accordingly, summoning order dated 18.5.2019 as well as entire proceedings of Complaint Case No. 171 of 2017 (Jai Kumar Harijan vs. Kunal Shah and others) renumbered as Sessions Case No. 1506 of 2023 (State of U.P. vs. Kunal Shah and others), under Sections 323, 504, 506, 427 IPC and Section 3(2) (va) of SC/ST Act, pending in the court of Special Judge SC/ST, Allahabad are hereby quashed.

Application succeeds and **allowed**.

29. No order as to costs.

(2024) 2 ILRA 1259
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2023

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Application u/s 482 No. 29005 of 2010

Smt. Indra Devi & Ors. ...Applicants
Versus
The State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Deepak Singh Yadav

Counsel for the Opp. Parties:
G.A., Sri Gorakh Yadav

Criminal Law – Criminal Procedure Code, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 323, 504, 506, 452 & 427 - Application u/s 482 – for quashing of Complaint Case, instituted by opposite party no. 2 as well as summoning order – complaint Case - alleged commission of offences punishable u/section 323, 504, 506, 452, 427 IPC – Preliminary objection - a previous identical petition having been dismissed on merits by the Court - applicants deliberately concealed this earlier dismissal while filing the present petition - Court finds that, the applicants had engaged in dishonest conduct by filing a second petition under Section 482 Cr.P.C. to quash a complaint

that had already been dismissed on merits in an earlier proceeding - This repeat attempt, made without disclosing the prior dismissal, caused an unjustified delay of nearly 13 years in the trial, adding hardship to the complainant - as a result, the Court dismissed the application with exemplary costs of Rs. 1,00,000/- to be paid to the complainant within one month - directing the Chief Judicial Magistrate, Azamgarh to ensure recovery - Additionally, the Court ordered that the trial be concluded expeditiously, preferably within one year, by avoiding unnecessary adjournments.
(Para – 9, 10, 11)

Application Dismissed. (E-11)

List of referred Cases: -

1. Dalip Singh Vs St. of U.P. & ors. (2010) 2 SCC 114,

2. Amar Singh Vs U.O.I. & ors. (2011) 7 SCC 69,

3. St. of Uttaranchal v Balwant Singh Chaufal & ors. (2010) 3 SCC 402],

4. Kishore Samrite Vs St. of U.P. & ors. reported in (2013) 2 Supreme Court Cases 398.

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Applicants (Accused) had filed this application under Section 482 Code of Criminal Procedure for quashing of the Complaint Case No. 144 of 2008; titled Patharu vs. Radhey Shyam and others, instituted by opposite party no. 2 for alleged commission of offences punishable under Sections 323, 504, 506, 452, 427 IPC, Police Station Phoolpur, District Azamgarh as well as the summoning order dated 26th November, 2008 passed by the Judicial Magistrate, Azamgarh.

2. Learned counsel for the opposite party no. 2 has raised a preliminary objection relating to the maintainability of the petition, as the previous petition filed by the applicants-accused for the similar relief bearing Criminal Misc. Application No. 857 of 2009; titled Radhey Shyam and 5 others vs. State of U.P. and another, was dismissed by this Court on 29th January, 2009. In this regard, he has invited the attention of the Court to the said order appended with the counter affidavit filed by opposite party no. 2.

3. It is submitted by learned counsel for the opposite party no. 2/complainant that the accused have deliberately concealed their previous unsuccessful attempt before this Court, and again filed the similar petition seeking quashing of the complaint, and vide order dated 17th September, 2010 passed by this Court, further proceedings before the trial court were stayed.

4. At this stage, Sri Deepak Singh Yadav, learned counsel for the applicants fairly states that the applicants had never informed him about the earlier case filed by them through Criminal Misc. Application No. 857 of 2009, therefore, the fact relating to the filing of the earlier petition on behalf of the applicants is not mentioned in the petition. Mr. Yadav, learned counsel further states that he was not the counsel in the previous case, therefore, he too had no knowledge of the order dated 29.1.2009, whereby the petition seeking quashing of subject complaint was dismissed on merits.

5. Upon hearing the learned counsel for the parties and considering the objection raised by the learned counsel for the complainant, it becomes clear that the issues raised in the petition have already been considered by this Court on merits and the claim of the applicants for quashing of the impugned criminal proceedings initiated by opposite party no. 2 through

Complaint Case No. 144 of 2008; titled Patharu vs. Radhey Shyam and others, has already been dismissed on 29.1.2009.

6. The above background of the case clearly reveals dishonest conduct of the applicants who wilfully and deliberately concealed the filing of Criminal Misc. Application No. 857 of 2009 and the dismissal order dated 29.1.2009, while filing this petition again on the old cause of action.

7. By now, it is well settled law that a litigant who approaches the Court must come with clean hands, and if, the litigant plays mischief with the Court by concealing the material facts which have direct bearing on the case, such a conduct has to be condemned and punished in order to deter the litigants to not to toy with the process of law or the Courts. Further, a careful perusal of case file shows that the title Radhey Shyam and 5 others vs. State of U.P. and another contained in previous petition has been changed skillfully with the title Smt. Indra Devi and 5 others vs. State of U.P. and another, wherein initially Radhey Shyam was not impleaded as applicant, but subsequently, on 17.9.2010, his name was inserted by way of correction at serial no. 4 in the memo of parties.

8. At this juncture, it will be useful to refer the decision of the Hon'ble Supreme Court in ***Kishore Samrite vs. State of U.P. and other*** reported in ***(2013) 2 Supreme Court Cases 398***, wherein the Hon'ble Supreme Court while dealing with the issue of suppression of material facts by a litigant made the following observations:-

29. Now, we shall deal with the question whether both or any of the petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

(i) Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

(ii) The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

(iii) The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

(iv) Quests for personal gains have become so intense that those

involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

(v) A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

(vi) The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

(vii) Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

(vii) The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it.

[Refer : ***Dalip Singh v. State of U.P. & Ors. (2010) 2 SCC 114; Amar Singh v. Union of India & Ors. (2011) 7 SCC 69 and State of Uttaranchal v Balwant Singh Chaufal & Ors. (2010) 3 SCC 402]***

x x x

x x x

33. The party not approaching the Court with clean hands would be liable to be non-suited and such party, who has also succeeded in polluting the stream of justice by making patently false statements, cannot claim relief, especially under Article 136 of the Constitution. While approaching the court, a litigant must state correct facts and come with clean hands. Where such statement of facts is based on some information, the source of such information must also be disclosed. Totally misconceived petition amounts to abuse of the process of the court and such a litigant is not required to be dealt with lightly, as a petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the court. A litigant is bound to make "full and true disclosure of facts". (Refer : Tilokchand H.B. Motichand & Ors. v. Munshi & Anr. [1969 (1) SCC 110]; A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam & Anr. [(2012) 6 SCC 430]; Chandra Shashi v. Anil Kumar Verma [(1995) SCC 1 421]; Abhyudya Sanstha v. Union of India & Ors. [(2011) 6 SCC 145]; State of Madhya Pradesh v. Narmada Bachao Andolan & Anr. [(2011) 7 SCC 639]; Kalyaneshwari v. Union of India & Anr. [(2011) 3 SCC 287)].

34. The person seeking equity must do equity. It is not just the clean hands, but also clean mind, clean heart and clean objective that are the equi-fundamentals of judicious litigation. The legal maxim jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem, which means that it is a law of nature that one should not be enriched by the loss or injury to another, is the percept for Courts. Wide jurisdiction of the court should not become a source of abuse of the process of law by the disgruntled litigant. Careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose the true facts and approach the court with clean hands.

35. No litigant can play 'hide and seek' with the courts or adopt 'pick and choose'. True facts ought to be disclosed as the Court knows law, but not facts. One, who does not come with candid facts and clean breast cannot hold a writ of the court with soiled hands. Suppression or concealment of material facts is impermissible to a litigant or even as a technique of advocacy. In such cases, the Court is duty bound to discharge rule nisi and such applicant is required to be dealt with for contempt of court for abusing the process of the court. {K.D. Sharma v. Steel Authority of India Ltd. & Ors. [(2008) 12 SCC 481].

36. Another settled canon of administration of justice is that no litigant should be permitted to misuse the judicial process by filing frivolous petitions. No litigant has a right to unlimited drought upon the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be used as a licence to file misconceived and frivolous petitions. (Buddhi Kota Subbarao (Dr.) v. K. Parasaran, (1996) 5 SCC 530).

9. Thus, the above noticed facts and circumstances of this case clearly establish that the applicants have adopted unfair means to make a repeat attempt to get the relief from this Court, which earlier stood rejected and this conduct of the applicants have delayed the trial of complaint for a long period of approximately 13 years. This has added insult to the injury of the complaint, who all these years has been contesting this frivolous case, and is still waiting to pursue the trial of the complaint case, therefore, this Court finds it to be a fit case for imposing exemplary costs upon the applicants, in view of the decision in ***Kishore Samrite's case (Supra).***

10. Resultantly, the application under Section 482 Cr.P.C. is dismissed with a costs of Rs. 1,00,000/- to be paid to the complainant within a period of one month. The Chief Judicial Magistrate, Azamgarh is directed to ensure the recovery of cost and payment to the complainant.

11. Further considering the delay in commencement of the trial, it is ordered that the trial be concluded expeditiously by avoiding unnecessary adjournments, preferably within a period of one year.

(2024) 2 ILRA 1263
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.12.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application u/s 482 No. 40122 of 2023
with
Application u/s 482 No. 44609 of 2023

Ajay Garg & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Mohammad Khalid, Sri Zain Abbas

Counsel for the Opp. Parties:
G.A., Sri Jagannath Maurya

Criminal Law – Criminal Procedure Code, 1973 - Sections 202, 202(1) & 482 – Water Pollution (Prevention and Control) Act, 1974 - Sections 25(5), 25, 26, 43, 44 & 49 - Air (Prevention and Control of Pollution) Act, 1981 – Section 22 - Application under Section 482 Cr.P.C. – Quashing of entire criminal proceedings – Environmental Law – inland surface Water Pollution – Authorization to file complaint – Procedural compliance under Section 202

Cr.P.C. – in a Complaint Case, filed under Sections 43/44 of the Act, 1974, against M/s Teerthanker Mahaveer University - The complaint, alleging unauthorized discharge of sewage without a treatment plant - who lacked specific authorization from the U.P. Pollution Control Board and violating section 49 of the Act - Procedural and legal infirmities - Court finds that, the University had complied with legal norms, obtained final consent in 2020, and no vicarious liability was established – court held that, delegated authority cannot be further delegated *(delegata potestas non potest delegari)* - Moreover, the Magistrate failed to conduct a mandatory inquiry under Section 202(1) Cr.P.C., despite the accused residing outside the court's territorial jurisdiction, rendering the cognizance and summoning orders invalid - Accordingly, the application stands allowed and the proceedings is quashed against the applicant.
(Para - 15, 16, 20)

Application Allowed. (E-11)

List of referred Cases: -

1. S.K. Alagh Vs St. of U.P.reported as (2002) 5 SCC 662,

2. Paritosh Kumar Vs U.O.I. & ors. 2014 (84) ACC 143,

3. P. Pramila & ors. Vs St. of Karn. & anr., AIR 2015 SUPREME COURT 2495,

4. Krishna Nand Shastri @ K.N. Shastri & anr. Vs St. of Jharkhand through its Inspector of Drugs Deoghar - passed in Cr. M. P. No. 1525 of 2014,

5. Udai Shankar Awasthi Vs St. of U.P. & anr., (2013) 2 SCC 435.,

6. Odi Jerang Vs Nabjyoti Baruah & ors.; 2023 Live Law (SC) 702.

(Delivered by Hon'ble Gajendra Kumar, J.)

1. Since these applications arise out of same complaint case, they have been heard together and are being decided by a common order. Application u/s 482 Cr.P.C. No. 40122 of 2023 is being treated as a leading case.

2. Counter and rejoinder affidavits filed today are taken on record.

3. Heard learned counsel for the applicants, learned counsel for the opposite party no.2 and learned AGA for the State.

4. The present applications have been filed by the applicants with the prayer to quash the entire proceedings of Complaint Case No.31 of 2013, under Sections 43/44 of Water Pollution (Prevention and Control) Act, 1974, pending in the court of Special Judicial Magistrate, Pollution, Lucknow.

5. The genesis of the present applications arose when the opposite Party no.2 filed criminal complaint against the M/s Teerthanker Mahaveer University and other employees and directors of the same (hereinafter referred as "University"), before the learned Special Judicial Magistrate, Pollution, Lucknow with wholly false, concocted, and frivolous story. The university is a State minority University established by the society Teerthanker Mahaveer Institute of Management and Technology under the U.P. Act No. 30 of 2008, vide Government Order No. 154/Seventy-1-08-20 (13) / 2006 dated 06.02.2008, also all the construction of the University including the medical facilities in the same were constructed as per the norms of the concerned authorities, after taking the requisite permissions and sanction of plans.

6. It is submitted by the learned counsel for the applicants that the opposite party no. 2, (U.C. Shukla), is not authorized representative of U.P. Pollution Control Board (hereinafter to be referred as 'Board), who alleges that the University is knowingly discharging its noxious and polluted sewage, which met with the nala, which met with the septic tank stored in open pits which is likely to

cause inland surface pollution by seepage, thereby causing continuous pollution on land in the stream. He further alleged that the University has not provided any sewage treatment plant to treat its waste in accordance with the standards laid by the board, and hence the accused has committed an offence u/s 24 and 25 of the Water Pollution (Prevention and Control) Act 1974 (hereinafter referred to as the "Act of 1974").

7. Further submission is that neither the applicants nor the University has acted at that particular time, had committed any offence as alleged in the complaint. Further submission is that the university has followed all the rules and regulations prescribed by law at the time of its establishment. Further submission is that as per the procedure as well as the perusal of the above-mentioned Government Order, it is evident that there is no requirement to take prior permission of the U.P. Pollution Control Board. Further submission is that the University being an educational institution cannot be treated as an industry and the rules applicable to the industries are not applicable to the university, however as one of the officials of the board visited the University and directed the University to obtain permission from the board and further directed to establish sewage treatment plant, under bona fide and good faith the University made an application for grant of permission on 20.05.2011, however the permission was rejected by the Board on 21.09.2011 as there were certain inadvertent technical errors in the application, such as the Laboratory report of the water test was not provided and other such procedural formalities were also committed by the Board.

8. It is further submitted that the another application for grant of permission was made by the University on 12.06.2013 and in the said application, it had been specifically mentioned that the work of the sewage treatment plant has been initiated and the same would be concluded in the year 2014. Further submission is that in the said application, it had been specifically stated that the waste concerned was only generated from residential blocks where the staff and teachers lived and no other such noxious or dangerous substance was being released by the University. Further submission is that before filing of the present compliant, no show cause notice was ever served upon the university or its officials in accordance with Section 25(5) of the Act of 1974. Further submission is that a co-ordinate Bench of this Hon'ble Court observed that in case of ***S.K. Alagh vs. State of Uttar Pradesh reported as (2002) 5 SCC 662***, whereby it was held that there is no such concept as vicarious liability under criminal law. Hence, a person cannot be held accountable for a criminal act, solely, on account of his designation in the company. In support of his submission, learned counsel for the applicants has placed reliance upon the judgement of Hon'ble Apex Court in the case of ***Paritosh Kumar Vs. Union of India and others 2014 (84) ACC 143***. Later on, U.P. Pollution Control Board granted consent under Section 25/26 of the Water (Prevention and Control of Pollution) Act, 1974 on 04.06.2020, as such, no offence has been committed by the applicants-University and in due course consent has been granted and obtained.

9. It is further submitted that the complaint has not been filed by the Board nor its authorized agent rather it has been filed by the one person called U.C. Shukla, who has not been authorized specifically for filing the complaint on behalf of the Board. It is further submitted by the learned

counsel for the applicants that no due enquiry under Section 202(1) Cr.P.C. has been conducted as is mandatory under the provisions of Cr.P.C. as the accused persons are residents of Moradabad district while the Court situated at district-Lucknow. The very cognizance order as well as summoning order is illegal and without jurisdiction.

10. On the other hand, learned AGA as well as the learned counsel for the opposite party no.2 have opposed the prayer and submitted that the applicant no.1 was working as a Director and applicant no.2 was working as a Chairman in the said company and all the other applicants in connected matters, who are in-charge of, and responsible to the University for the conduct of, the business of the University., therefore, they are vicariously liable for discharging the polluted sewage effluents on the open land for percolation and seepage to the nearby Nala and inland surface water, beyond the standards laid down by the Board, regarding which, the present complaint case filed. It is further submitted that complaint has been filed by the person duly authorized by the Board and due enquiry as contemplated under the provisions of Cr.P.C. has been made before summoning the accused/applicants.

11. I have considered the rival submissions made by the learned counsel for the parties as well as the case laws and have perused the record.

12. In this matter, as is evident from the record that the complainant Board has authorized its Officer to file the complaint on behalf of the Board and Dr. U.C. Shukla, Assistant Scientific Officer has been nominated by Member Secretary to file this complaint against the opposite parties. It is also evident that such authorization should be for a particular case and general authorization is not permissible. Dr. U.C. Shukla has not been specifically authorized by the Board as is apparent from the para 17 of the complaint which is as follow:-"that the complainant board has authorized its officer to file the complaint on behalf of the Board and Dr. U.C. Shukla, Assistant Scientific Officer has been nominated by Member Secretary, to file this complaint against the opposite parties."

13. Section 49 Water (Prevention and Control of Pollution) Act, 1974 provides for cognizance of offence under the Act.

49. Cognizance of offences.-(1) No court shall take cognizance of any offence under this Act except on a complaint made by-

(a) a Board or any officer authorized in this behalf by it; or

(b) any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of his intention to make a complaint, to the Board or officer authorized as aforesaid,

and no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act."

14. In the case of ***P. Pramila and others Vs. State of Karnataka and another, AIR 2015 SUPREME COURT 2495***, it has been observed that the appellants engaged in the business of stocking iron ore, had allegedly violated certain norms prescribed under Section 22 of the Air (Prevention and Control of Pollution) Act, 1981. So Criminal proceeding had been initiated against them.

They were challenged by application u/s 482 Cr.P.C., seeking quashing of proceeding on the ground of inadequate authorisation to file complaint. Hence, either the Board or the Chairman of the Board could have filed the complaints.

15. From the perusal of the records, it is natural therefore to conclude, that the complaint against the applicants was neither filed by the Board nor its Chairman, but was filed by the Assistant Scientific Officer, Regional Office Moradabad (Dr. U.C. Shukla), who was nominated by Member Secretary, which shows that the Board has authorized Member Secretary to file the complaint case under the Act but the Member Secretary instead of filing complaint himself has nominated Dr. U.C. Shukla to file the complaint. It is settled proposition of law that a delegated authority can not further delegate its power to some other person (Delegata potesta non potest deligari). As such, it appears that criminal complaint, filed by the opposite party no.2 against the M/s Teerthanker Mahaveer University and other employees and directors of the same (hereinafter referred as "University"), before the learned Special Judicial Magistrate, Pollution, Lucknow is without authority. Therefore, the conclusion is reached from the perusal of the record that the complaint has not been lodged by the competent and duly authorized person.

16. It is also evident from the record that the court concerned while issuing process u/s 204 Cr.P.C. has not complied with the mandatory provisions of Section 202(1) Cr.P.C. as amended in the year, 2005, with an object that the enquiry in relation to the accused person residing outside territorial jurisdiction has to be satisfactory and sufficient made, merely treating the documents filed by the complainant u/s 202 Cr.P.C. It cannot be said that enquiry as contemplated under Section 202(1) Cr.P.C. has been carried out.

17. In the case of ***Krishna Nand Shastri @ K.N. Shastri and another Vs. State of Jharkhand through its Inspector of Drugs Deoghar passed in Cr.M.P. No. 1525 of 2014***, it has been observed that the person who is looking into the day to day affairs of the company and was responsible at the time of offence can only be prosecuted and in that view of the matter in absence of any averment to that effect vicarious liability upon the petitioners are not liable to be fastened upon them as there is no such averment in the complaint petition and the case of the petitioners is fully covered in view of the judgment rendered in the case of State of (N.C.T. of Delhi) v. Rajeev Khurana (supra). So far the record further suggest that in absence of any enquiry under Section 202 Cr.P.C the learned court has taken cognizance. Reference may be made to the case of ***Udai Shankar Awasthi v. State of U.P. and another, (2013) 2 SCC 435***. Paragraph no.40 of the said judgement is quoted below:

"40. The Magistrate had issued summons without meeting the mandatory requirement of section 202 Cr. P.C though the appellants were outside his territorial jurisdiction. The provisions of Section 202 Cr.P.C were amended vide Amendment Act, 2005, making it mandatory to postpone the issue of process where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to

enquire into the case himself, or to direct investigation to be made by police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases."

18. The Hon'ble Apex Court in the case of **Odi Jerang Vs. Nabjyoti Baruah and other; 2023 Live Law (SC) 702** has held that " in a case where one of the accused is a resident of a place outside the jurisdiction of the learned Magistrate, following the procedure under Section 202(1) Cr.P.C. is mandatory".

19. The impugned order dated 08.05.2014 passed by the court below is reproduced here-in-under:-

"08.05.2014

पुकार करायी गयी। पुकार पर परिवादी बोर्ड के विधि सहायक उपस्थित हैं।

परिवादी एक लोकसेवक है एवं उनके द्वारा पदीय कर्तव्यों के निर्वहन के लिए उक्त परिवाद लिखित रूप में दाखिल किया गया है। अतः परिवादी के बयान अ०धारा 200 द०प्र०सं० की आवश्यकता नहीं है। धारा 202 दं०प्र०सं० के अंतर्गत मूल दस्तावेज संलग्नक- 1 लगायत 12 दाखिल किये गये हैं।

परिवादी बोर्ड द्वारा अधिकृत प्रतिनिधि डा० यू० सी० शुक्ला द्वारा विपक्षीगण मै० तीर्थकर महावीर यूनिवर्सिटी आदि के विरूद्ध प्रस्तुत परिवाद अ० धारा 43 एवं 44 जल प्रदूषण (निवारण एवं नियंत्रण) 1974 पर सुना गया। पत्रावली का अवलोकन किया गया।

परिवाद के समर्थन में परिवादी द्वारा धारा 202 दं०प्र०सं० के अंतर्गत दस्तावेजीय साक्ष्य में संलग्नक-1 सदस्य सचिव द्वारा कम्पनी को जल अधिनियम के प्राविधानो के अनुपालन हेतु प्रेषित पत्र की प्रति, संलग्नक-2 सदस्य सचिव द्वारा कम्पनी को प्रेषित पत्र वास्ते अस्वीकार किये जाने सहमति आवेदन, संलग्नक-3 प्रश्नगत विश्वविद्यालय द्वारा सदस्य सचिव को प्रेषित पत्र दिनांकित 12.06.2013 संलग्नक-4 नोटिस आफ इन्सपेक्शन दिनांकित 19.07.2013 संलग्नक-5 निरीक्षण आख्या दिनांक 9.07.2013, संलग्नक-6 नोटिस आफ इन्टेन्शन टू हैव सैम्पल एनालाइज, संलग्नक-7 प्रोफार्मा टू एकम्पनी दि सैम्पल आफ इण्डस्ट्रीज, संलग्नक-8 विश्लेषण आख्या दिनांक 25.07.2013, संलग्नक-9 श्रेत्रीय अधिकारी मुरादाबाद द्वारा अभियुक्त सं०-15 को प्रेषित पत्र दिनांक 16.08.2013, संलग्नक-10 अभियोजनात्मक कार्यवाही हेतु अध्यक्ष उ०प्र० प्रदूषण नियंत्रण बोर्ड द्वारा अनुमोदित प्रस्ताव, संलग्नक-11 बोर्ड निर्णय दिनांक 12.12.1981 एवं संलग्नक-12 परिवाद दाखिल करने हेतु सदस्य सचिव द्वारा जारी प्राधिकार पत्र की मूल प्रति दाखिल की गयी।

परिवाद पत्र एवं 202 द०प्र०सं० के अन्तर्गत प्रपत्र को देखते हुये प्रथमदृष्टया न्यायालय इस निष्कर्ष पर पहुँचती है कि, प्रथमदृष्टया विपक्षीगणों द्वारा प्रश्नगत उद्योग का संचालन उ०प्र० प्रदूषण नियंत्रण बोर्ड की सहमति के बिना किया जा रहा था एवं संचालित करते हुये प्रदूषित उत्प्रवाह निस्तारित किया जा रहा था जो प्रदूषण नियंत्रण बोर्ड के निर्धारित मानकों से अत्यधिक है इस प्रकार से मैं, विपक्षीगणों को इस मामले में समन किया जाना न्यायोचित पाती हूँ।"

20. Thus, from the order itself, it is apparent that the learned Magistrate has not postponed process as contemplated under Section 202(1) Cr.P.C., as the University is situated at Moradabad and all the other accused persons are shown to be residents of District-Moradabad, therefore, in this case the accused are residing at a place beyond the area in which the Court exercised its jurisdiction. The impugned order has been passed by the court situated at Lucknow. It is worth considering that there is no exception to Section 202(1) Cr.P.C. and in view of the matter even in the government complaint case, Section 202(1) Cr.P.C. is mandatory and it is admitted that applicants are stationed at Moradabad and seeing that the learned Magistrate was required to follow the mandatory provisions of Section 202(1) Cr.P.C., which has been amended by vide Amendment Act, 2005, making it mandatory to postpone the issue of process where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned.

21. With cumulative effect of the above discussion and the analysis of the Court here-in-above, the entire criminal proceedings in connection with Complaint Case No.31 of 2013, under Sections 43/44 of Water Pollution (Prevention and Control) Act, 1974, pending in the court of Special Judicial Magistrate, Pollution, Lucknow is, hereby, quashed against the applicants.

21. The applications are, accordingly, **allowed**.

22. A copy of this order be certified to the lower court forthwith.

(2024) 2 ILRA 1269
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.11.2023

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Application u/s 482 No. 42306 of 2023

Chandrabhan Singh ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Kaushlendra Pratap Singh

Counsel for the Opp. Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 173(2) & 482 - Indian Penal Code, 1860 - Sections 419 & 420 - - the Court finds that - Application u/s 482 – for quashing the charge-sheet, summoning order as well entire criminal proceedings – offence of Cheating arising from two sale deeds involving the same parcel of land - Complaint - FIR – investigation - Charge-sheet – cognizance order - plea taken by the applicant that, neither the applicant is the beneficiary of the transaction in any manner nor he signed the instrument as witness and his role was limited to witnessing an agreement to sell – court finds that - (i) though charge-sheet has been filed but the same is yet to be considered by the trial court, as concededly, the charges have not been framed against the accused person, - (ii) applicant's prior knowledge of the land's sale and his role in identifying the vendor in the second transaction distinguish his case from other witnesses and justify the continuation of proceedings – consequently, the Court declines to exercise its inherent powers to quash the impugned proceedings, holding that the allegations, if taken at face value, do make out a prima facie case against the applicant – application fails and is accordingly, dismissed.
(Para – 11, 12)

Application Dismissed. (E-11)

List of referred Cases: -

1. Pepsi Foods Ltd. & ors. Vs Special Judicial Magistrate & ors., reported in 1997 (4) R.C.R. (Criminal), 761

2. St. of Har. & ors. Vs Ch. Bhajan Lal & ors., reported in 1991 (1) R.C.R. (Criminal), 383.

3. Dharmatma Singh Vs Harminder Singh & ors. reported as 2011 (3) RCR Criminal 38.

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Applicant being accused has approached this Court through this application under Section 482 Code of Criminal Procedure seeking quashing of the charge sheet dated 13.01.2022, filed under Section 173(2) Cr.P.C. as well as the cognizance/ summoning order dated 20.4.2023 (both Annexure No.6) passed by Chief Judicial Magistrate, Sant Kabir Nagar and the proceedings arising in Case Crime No.0718 of 2021, under Sections 419, 420 I.P.C., Police Station Khalilabad, District Sant Kabir Nagar.

2. The above F.I.R. (Annexre No.1) was registered on the basis of complaint

given by Smt. Rekha Sharma, wherein it is alleged that she is the resident of Khalilabad, District Sant Kabir Nagar and accused persons, namely, Ramnarain @ Ramnarainpur son of Indal, Chandrabhan Singh, son of Gopal Singh, who are engaged in the business of property dealing, in connivance with each other had sold 0.134 hect. land comprised in gata nos.701, 702, 723, 736 through sale deed dated 03.06.2017 executed in favour of Jaiprakash Mishra, wherein accused Chandrabhan Singh is the witness to the sale deed. As per allegations, Chandrabhan Singh in a fictitious way got the sale deed of the land executed in favour of the complainant. On these broad allegations, the F.I.R. was registered for alleged commission of offence of cheating punishable under Section 420 I.P.C.

3. After registration of the case, the investigation in subject F.I.R. was carried out and upon completion of the same the impugned charge sheet dated 13.01.2022 was submitted before the court of competent jurisdiction under Section 173(2) Cr.P.C., whereupon vide order dated 20.04.2023 cognizance order was passed. Hence this petition.

4. Learned counsel appearing on behalf of the applicant has argued that the case of the prosecution is not maintainable against Chandrabhan Singh, the applicant, who is not involved in execution of the sale deed dated 22.11.2018, which was executed by accused Ramnarain in favour of complainant-Reeta Sharma. He submits that neither the applicant is the beneficiary of this transaction in any manner nor he signed the instrument as witness. He submits that the land, if any, which is subject matter of the case was owned by Ramnarain and both the sale deeds were executed by him, whereas the applicant was only a witness to the first sale deed executed on 03.06.2017, which has never been questioned in any manner, much less by the complainant or the vendee-Jai Prakash.

5. Learned counsel has further argued that prior to the execution of the sale deed dated 22.11.2018, the vendor had executed an agreement to sell dated 13.11.2018, wherein the agreed sale consideration was fixed as Rs.3.75 lacs, and that too with Santosh Kumar Sharma, husband of the complainant, so, learned counsel while drawing attention of the Court to the agreement to sell dated 13.11.2018 has argued that the contents of this document are not part of the F.I.R., therefore, case of the applicant is distinguishable from the other co-accused. He submits that on these grounds, the interference of this Court is warranted by exercise of inherent powers under Section 482 Cr.P.C., as his prosecution is nothing, but an abuse of process of law.

6. Upon hearing the learned counsel for the applicant and considering his submission this Court finds that the entire case of the prosecution is based upon the documentary evidence and though the charge sheet under Section 173 (2) Cr.P.C. has been filed, but the same is yet to be considered by the trial court, as concededly, the charges have not been framed against the accused persons.

7. In **Dharmatma Singh vs. Harminder Singh & Ors. reported as 2011 (3) RCR Criminal 38**, the Hon'ble Supreme Court has observed that if a party can avail alternative remedy according to the provisions of Code of Criminal Procedure, in that eventuality the inherent

powers under Section 482 CrPC cannot be exercised. The relevant observations read as under :

"13. Section 482 of the Cr.P.C. saves the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice. It has been held by this Court in R. P. Kapur v. State of Punjab [AIR 1960 SC 866] that Section 561-A of the Criminal Procedure Code, 1898 (which corresponds to Section 482 of the Criminal Procedure Code, 1973) saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice and such inherent power cannot be exercised in regard to matters specifically covered by the other provisions of the Code and therefore where the Magistrate has not applied his mind under Section 190 of the Cr.P.C. to the merits of the reports and passed order, the High Court ought not to consider a request for quashing the proceedings. In the case of R. P. Kapur (supra) on 10.12.1958, M.L. Sethi lodged a First Information Report against R.P. Kapur and alleged that he and his mother-in-law had committed offences under Sections 420-109, 114 and 120B of the Indian Penal Code. R.P. Kapur moved the Punjab High Court under Section 561-A of the Code of Criminal Procedure for quashing the proceedings initiated by the First Information Report. When the petition of R.P. Kapur was pending in the High Court, the police report was submitted under Section 173, Cr.P.C. and the High Court held that no case had been made out for quashing the proceedings under Section 561-A of the Criminal Procedure Code, 1898 and dismissed the petition. R. P. Kapur carried an appeal by way of Special Leave to this Court and this Court dismissed the appeal for inter alia the following reasons:

" In the present case the magistrate before whom the police report has been filed under S. 173 of the Code has yet not applied his mind to the merits of the said report and it may be assumed in favour of the appellant that his request for the quashing of the proceedings is not at the present stage covered by any specific provision of the Code. It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Ordinarily, criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage..."

As we have found in the present case that learned Magistrate had not applied his mind to the merits of the reports filed under Section 173, Cr.P.C., we are of the considered opinion that the exercise of power by the High Court under Section 482, Cr.P.C., was at an interlocutory stage and was not warranted in the facts of this case."

8. At this stage, learned counsel for the applicant submits that the inherent powers under Section 482 Cr.P.C. can also be exercised in a case, if, the criminal proceedings against the accused are attended with malafide intentions and the case of the applicant would also fall within the ambit of such cases where the exercise of powers under Section 482 Cr.P.C. is justified.

9. At this juncture, this Court deems it appropriate to refer the decision of Hon'ble Supreme Court in the case of **State of Haryana and others Vs. Ch. Bhajan Lal and others, reported in 1991 (1) R.C.R. (Criminal), 383** wherein the Apex Court while analyzing the exercise of inherent powers of the High Court vested through Section 482 Cr.P.C., laid down the following guidelines :

"The following categories of cases can be stated by way of illustration wherein the extraordinary power under Article 226 or the inherent powers under Section 482, Cr. P.C. can be exercised by the High Court 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 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 specific provision in the Code or the concerned Act, providing\ efficacious redress for the grievance of aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafide 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.*

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."

10. The above view was again reiterated by the Hon'ble Supreme Court in

the case of **Pepsi Foods Ltd. and Ors. Vs. Special Judicial Magistrate and Ors., reported in 1997 (4) R.C.R. (Criminal), 761** and in the said case, Hon'ble Supreme Court while examining the powers of the High Court under Section 482 Cr.P.C. laid down as under :

"It is settled that High Court can exercise its power of judicial review in criminal matters. In State of Haryana and others Vs. Bhajan Lal and others, 1992 Supp (1) ACC, 335, this court examined the extraordinary power under Article 226 of the Constitution and also the inherent powers under Section 482 of the Code which it said could be exercised by the High Court either to prevent abuse of the process of any court or otherwise to secure the ends of justice. While laying down certain guidelines where the court will exercise jurisdiction under these provisions, it was also stated that these guidelines could not be inflexible or laying rigid formulae to the followed by the facts and circumstances of each case but with the sole purpose to prevent abuse of the process of any court or otherwise to secure the ends of justice. One of such guideline is 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....."

11. Now, while testing the applicant's case and considering the argument raised by learned counsel for the applicant that since Chandrabhan Singh is not involved in the subsequent transaction dated 22.11.2018, therefore, he can not be accused of any offence for causing wrongful loss to the complainant, Reeta Sharma, much less in the absence of any wrongful gain by him, the prosecution against him, is without any basis, this Court finds that as per prosecution, the applicant was a witness to the first sale deed 03.06.2017, and the land sold by Ramnarain through both the sale deeds is the same, therefore, once the applicant was aware that Ramnarain has already sold the land to Jaiprakash, therefore, it was very much in his knowledge that the land does not belong to Ramnarain for entering into subsequent transaction.

12. Admittedly, in the agreement to sell dated 13.11.2018, the applicant is signatory as witness and at that stage he identified the vendor Ramnarain to Santosh Kumar Sharma, husband of the complainant-Reeta Sharma. Notably, Shailendra another witness to agreement to sell like the applicant is not made accused as he was not a witness to the earlier sale deed dated 03.06.2017, therefore, the argument of learned counsel for the applicant that his case is at par with Shailendra is misconceived, as his case stands on different footings. In view of this, it can be safely concluded that the facts and circumstances of this case do not make out a case for exercise of inherent powers under Section 482 Cr.P.C., as it is not a case, where if, the allegations are taken to be true on its face value, no case against the applicant-accused is made out. Thus, without expressing any opinion on merits of the case, this Court is not inclined to exercise the inherent powers under Section 482 Cr.P.C.

13. Resultantly the application fails and is accordingly, dismissed.

(2024) 2 ILRA 1274
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.12.2023

BEFORE

THE HON'BLE MANOJ BAJAJ, J.

Application u/s 482 No. 45056 of 2023

Akshay & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Ajatshatru Pandey

Counsel for the Opp. Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 155(2), 173(2), 173(8) & 482 - Indian Penal Code, 1860 - Sections 307, 323 & 506 - Application u/s 482 – challenging the summoning order – NCR – investigation - applicant arguing that the investigation into Case Crime (initially NCR) was invalid due to non-compliance with Section 155(2) Cr.P.C. when Section 307 I.P.C. was added - Court finds that - the accused had not raised this issue at the appropriate time, and the Magistrate had already permitted investigation under Section 155(2) Cr.P.C. curing any procedural irregularity - held - the summoning order under Section 307 I.P.C. is valid and based upon correct appreciation of law and conflicting police reports must be judicially examined - finding no merits in the application, therefore Application is accordingly, dismissed.
(Para – 6, 8)

Application Dismissed. (E-11)

List of referred Cases: -

1. Vinay Tyagi Vs Irshad Ali @ Deepak & ors., 2013 (5) SCC 762.

(Delivered by Hon'ble Manoj Bajaj, J.)

1. Applicants being accused have approached this Court through this application under Section 482 Code of Criminal Procedure to challenge the order dated 21.11.2023 passed by Additional Chief Judicial Magistrate, Court No.1, Mathura in Case No. 7075 of 2019, titled State Vs. Akshay Bhardwaj and another, arising out of Case Crime No. 1297 of 2017, under Sections 307, 323, 506 I.P.C., Police Station Kotwali, District Mathura, summoning them in relation to the added offence punishable under Section 307 I.P.C.

2. Learned counsel for applicants submits that initially NCR No. 94/2017 dated 28.9.2017 under Sections 323, 506 I.P.C. was registered against the accused at Police Station Kotwali, Chowki Krishna Nagar, Mathura at the instance of complainant namely, Prem Singh, and subsequently, during the pendency of the investigation, the offence punishable under Section 307 I.P.C. was added on 18.12.2017. According to him, the investigation in the alleged crime commenced without the compliance of the mandatory provisions of Section 155(2) Cr.P.C. and on the basis of the opinion given by the doctor relating to the injuries suffered by the victim, a charge sheet bearing No. 803 of 2018 dated 6.8.2018 was filed under Section 173(2) Cr.P.C. against the applicants. He submits that NCR Case No. 94 of 2017, after addition of Section 307 I.P.C. was converted as Case Crime No. 1297 of 2017.

3. Learned counsel for applicants has further pointed out that on the basis of

request by the accused made before S.S.P. Mathura, followed by an order of the Magistrate dated 18.12.2019, further investigation commenced in the above case and the offence punishable under Section 307 I.P.C. was substituted with the offence punishable under Section 308 I.P.C. on 29.10.2020. According to learned counsel, at this stage also, further investigation remained pending, wherein through charge sheet dated 7.12.2020 the offence punishable under Section 307 I.P.C. stood deleted, and the concession of regular bail too was extended to the accused in respect of the remaining offences i.e. Sections 323 and 506 I.P.C.

4. Learned counsel further drew the attention of the Court to the order dated 15.11.2022 and submitted that in the criminal revision no. 386 of 2022 filed by the complainant-opposite party no.2, the order dated 22.4.2022 passed by the Magistrate, summoning the applicants for the offence punishable under Section 323, 506 I.P.C. was set aside and case was remanded back before the Magistrate for deciding it afresh in accordance with law. Learned counsel for applicants submits that now through the impugned order dated 21.11.2023, applicants have been summoned for the alleged commission of offences punishable under Section 307 I.P.C., and he prays for indulgence of this Court on the sole ground that the investigation being in violation of Section 155(2) Cr.P.C. is without jurisdiction, therefore, it deserves to be set aside.

5. During the course of hearing, it is not disputed by learned counsel for applicants that offence punishable under Section 307 I.P.C. was added on 18.12.2017 and thereafter, the investigation had commenced. He fairly states that after submission of final report under Section 173(2) Cr.P.C., further investigation commenced on the request of the accused persons.

6. After hearing the learned counsel for applicants and considering the sole ground pressed in this application to challenge the order dated 21.11.2023, this Court finds that grievance relating to the non compliance of the provisions of Section 155(2) Cr.P.C. ought to have been raised by the accused when initially the investigation in NCR No. 94 of 2017 commenced in the year 2017. Admittedly, the accused never made any such grievance at that stage and this argument has been raised after addition of Section 307 I.P.C., which is otherwise rendered insignificant in view of the conduct of the accused, who even did not raise this issue when charges against them were framed on 15.6.2022 (Annexure No. 12) for alleged commission of offences punishable under Section 323 and 506 I.P.C.

7. Notably, initially the case was registered as NCR No. 94 of 2017 for alleged commission of offences punishable under Section 323 and 506 I.P.C., but subsequently, the offence punishable under Section 307 I.P.C. was also added and the investigation, if any, before the addition of Section 307 I.P.C. did not result in any miscarriage of justice to the accused, much less any prejudice, therefore, in the given facts, this circumstance alone would not vitiate the investigation as the irregularity, if any, committed by the Investigating Officer stood cured by the Magistrate vide order dated 19.12.2017 permitting the investigation in NCR No. 94 of 2017. Above all, vide order dated 19.12.2017 the Additional Chief Judicial Magistrate, Mathura had passed the order in terms of

Section 155(2) Cr.P.C. relating to the investigation in NCR No. 94 of 2017, and the said order was also never challenged by the accused, much less in this application. Thus, this Court does not find any merit in the argument relating to the violation of Section 155(2) Cr.P.C., which has been raised after a long delay, therefore, the same is hereby rejected.

8. Now, while analysing the impugned order dated 21.11.2023, it becomes clear that the Additional Chief Judicial Magistrate, Mathura has specifically observed that as per the first report filed under Section 173(2) Cr.P.C., the offence punishable under Section 307 I.P.C. is made out against the accused, but when cognizance order against the accused was passed solely on the basis of supplementary report under Section 173(8) Cr.P.C. relating to the offences punishable under Section 323, 506 I.P.C., it would not mean that charge regarding Section 307 I.P.C. contained in the first report stood rejected, as there is no such order passed by the court. Consequently, the court proceeded to summon the accused for the alleged commission of offence punishable under Section 307 I.P.C. also. A reading of the impugned order would show that the same is based upon correct appreciation of law, and if, there are conflicting reports submitted by police in a case, the court of competent jurisdiction is to examine both the reports to arrive at a just conclusion. In this regard, a reference can be made by Hon'ble Supreme Court in *Vinay Tyagi v. Irshad Ali @ Deepak and others, 2013 (5) SCC 762.*

9. No other argument has been raised by the learned counsel for the applicants.

10. Resultantly, this Court does not find any convincing ground to exercise the inherent powers under Section 482 Cr.P.C. The application is accordingly, dismissed.

(2024) 2 ILRA 1276
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application u/s 482 No. 45646 of 2023

Netrpal ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Surya Nath Bhatt, Sri Gaurav Kumar Srivastava

Counsel for the Opp. Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power, Indian Penal Code, 1860 - The Scheduled Castes and The Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 15-A , 15-A(3), 15-A(5) & 15-A(11) - Rights of victims and Witnesses, The Protection of Children from Sexual Offences Act, 2012 - Sectio 7/8, The Protection of Children from Sexual Offences Rules, 2020 - Rule 4(15) - Victim/complainant has right to information about proceedings - Investigating Officer must inform them. (Para -7)

Petitioner seeks to quash summoning order under POCSO Act - Court expresses displeasure over police authorities' failure to serve notice to complainant/victim despite statutory provisions. (Para - 1,2)

HELD: - Court directs Director General of Police, UP, to issue guidelines ensuring compliance with statutory provisions. Police must intimate complainant/victim about case pendency and submit report with instructions. (Para - 9)

Put up as Fresh. (E-7)

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

1. Heard learned counsel for the applicant and learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the impugned summoning order dated 20.10.2023 passed by Additional Sessions Judge/Special Judge, POCSO Act (Budaun) in Complaint Case No.159 of 2023, Rama Devi Vs. Netrpal, under Section- 7/8 of POCSO Act, Police Station-Mujariya, District- Badaun.

3. It appears from the record that offence in question is arising out of the POCSO Act, there is a statutory provision to serve notice upon the complainant before passing any order.

4. It is informed by learned AGA that the intimation by the office of Government Advocate, High Court, Allahabad was sent to the concerned I.O. through Superintendent of Police and Joint Director of Prosecution on 01.12.2023 for seeking instructions and in reply thereto, instructions was also supplied on 07.02.2024 by the concerned I.O. but, the report regarding service of notice upon the victim and/or complainant was not sent. Therefore, in such situation because of the statutory provision, court has no option except to issue notice to the complainant and/or the victim. This will cause further delay in disposal of Application u/s 482 which some times may result injustice to the party who approach this court by filing Application u/s 482 because during long period, the applicant may be arrested or may have faced continuous harassment on the part of police authorities.

5. This court expressed displeasure over the action of the police authorities for not serving the notice upon the complainant or the victim of POCSO Act. Despite the fact that there is a specific rule, directing to the police authorities to inform each and every stage of the case including the bail application to the victim and the complainant of POCSO Act. Rule 4(15) of Protection of Children from Sexual Offences Rules, 2020 is being quoted as below:

"4(15). The information to be provided by the SJPU, local police, or support person, to the child and child's parents or guardian or other person in whom the child has trust and confidence, includes but is not limited to the following:-

(i) the availability of public and private emergency and crisis services;

(ii) the procedural steps involved in a criminal prosecution;

(iii) the availability of victim's compensation benefits;

(iv) the status of the investigation of the crime, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation;

(v) the arrest of a suspected offender;

(vi) the filing of charges against a suspected offender;

(vii) the schedule of court proceedings that the child is either required to attend or is entitled to attend;

(viii) the bail, release or detention status of an offender or suspected offender;

(ix) the rendering of a verdict after trial; and

(x) the sentence imposed on an offender."

6. Similarly, Section 15-A of the Scheduled Castes And The Scheduled Tribes (Prevention of Atrocities) Act, 1989 also provides timely information to the victim or his/her dependents regarding any proceeding under the SC/ST Act. Sections 15-A(3), 15-A(5), 15-A(11) of the SC/ST Act, 1989 are being quoted as below:

"15-A(3) A victim or his dependent shall have the right to reasonable, accurate, and timely notice of any Court proceeding including any bail proceeding and the Special Public Prosecutor or the State Government shall inform the victim about any proceedings under this Act.

(5) A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing.

(11) It shall be the duty of the concerned State to specify an appropriate scheme to ensure implementation of the following rights and entitlements of victims and witnesses in accessing justice so as-

(a) to provide a copy of the recorded First Information Report at free of cost;

(b) to provide immediate relief in cash or in kind to atrocity victims or their dependents;

(c) to provide necessary protection to the atrocity victims or their dependents, and witnesses;

(d) to provide relief in respect of death or injury or damage to property;

(e) to arrange food or water or clothing or shelter or medical aid or transport facilities or daily allowances to victims;

(f) to provide the maintenance expenses to the atrocity victims and their dependents;

(g) to provide the information about the rights of atrocity victims at the time of making complaints and registering the First Information Report;

(h) to provide the protection to atrocity victims or their dependents and witnesses from intimidation and harassment;

(i) to provide the information to atrocity victims or their dependents or associated organisations or individuals, on the status of investigation and charge sheet and to provide copy of the charge sheet at free of cost;

(j) to take necessary precautions at the time of medical examination;

(k) to provide information to atrocity victims or their dependents or associated organisations or individuals, regarding the relief amount;

(l) to provide information to atrocity victims or their dependents or associated organisations or individuals, in advance about the dates and place of investigation and trial;

(m) to give adequate briefing on the case and preparation for trial to atrocity victims or their dependents or associated organisations or individuals and to provide the legal aid for the said purpose;

(n) to execute the rights of atrocity victims or their dependents or associated organisations or individuals at every stage of the proceedings under this

Act and to provide the necessary assistance for the execution of the rights."

7. From the above provisions of the POCSO Act as well as of the SC/ST Act, 1989, it is clear that the victim or the complainant has right to information about the pendency of any proceeding in the respective acts and it is duty of Investigating Officer, to inform them.

8. If on receiving the intimation from the office of Government Advocate, High Court, Allahabad, concerned police officer informs the complainant and victim about the pendency of case involving the offence under the POCSO Act or SC/ST Act and submit its report along with the instructions to the office of Government Advocate, then it will save the precious time for disposal of case and there will be no requirement on the part of court to issue notice to the victim and complainant at the time of admission of case.

9. Therefore, this court directs the Director General of Police, UP, Lucknow to issue necessary direction to all the police officials that whenever they receive any letter or intimation from the office of Government Advocate, High Court, Allahabad seeking instructions regarding the cases involving offence under the POCSO Act or SC/ST Act, then the concerned police officer before sending instructions to the High Court must intimate to the complainant/victim about the pendency of case before the High Court and there should be endorsement of complainant or victim regarding service of that notice or intimation, which should be forwarded to the office of Government Advocate, High Court, Allahabad along with instructions.

10. Registrar (Compliance) is directed to send copy of this order to the Director General of Police,
UP, Lucknow for necessary compliance.

11. Issue notice to opposite party no.2.

(2024) 2 ILRA 1279
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE

THE HON'BLE ARUN KUMAR SINGH DESHWAL, J.

Application u/s 482 No. 45953 of 2023

Rajendra ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Sunil Kumar, Sri Chandan Singh, Sri Narendra Singh

Counsel for the Opp. Parties:
G.A.

Criminal Law – Criminal Procedure Code, 1973 - Sections 161 & 482 – Negotiable Instruments Act, 188 – Sections 94, 138 & 142(1)(b) - Indian Evidence Act, 1872 - Sections 65-B & 114 - Information Technology Act, 2000 – Sections 2(1)(r), 4, 12 & 13 - General Clauses Act, 1977 – Section 27 - Application u/s 482 – for quashing the summoning order as well as the entire criminal proceedings - cheque dishonour case – complaint case – Summoning order – question of law – maintainability of premature complaint case - applicant contended that the complaint was premature, having been filed before the mandatory 15-day period post service of notice had lapsed, and further argued that the absence of a specific service date rendered the complaint defective - court, relying on the Supreme Court's ruling in *C.C. Alavi Haji*, held that service of notice sent via registered post to the correct address can be presumed under Section 27 of the General Clauses Act and Section 114 of the Evidence Act, and that the complaint need not explicitly mention the date of service - The court also recognized electronic modes of service such as email and WhatsApp as valid under Sections

4, 12, and 13 of the Information Technology Act, 2000, read with Section 65-B of the Evidence Act, provided the records are accessible for future reference – Since, the cheque had bounced on 13.07.2022, notice was sent on 23.07.2022, and the complaint was filed on 31.08.2022, the court found no procedural defect and direction issued to the trial court to insist on post tracking reports and accept electronic notices as valid – consequently, instant application stands dismissed. (Para – 20, 22, 24, 25, 26, 27, 28)

Application Allowed. (E-11)

List of referred Cases: -

1. Ali Jan Vs St. of U.P. & anr. – (Application u/s 482 No.98 of 2020 – decided vide order dt. 31.01.2020),

2. Santosh Kumar Shrivastava Vs St. of U.P. & anr. – (Application u/s 482 No.29097 of 2023 – decoded vide order Dt. 21.08.2023),

3. Yogendra Pratap Singh Vs Savitri Pandey & anr. - 2014 (10) SCC 713,

4. Manoj Kumar Nag Vs St. of Jharkhand & anr. – (Criminal Revision No.827 of 2012 decided vide order Dated 16.07.2021),

5. C. C. Alavi Haji vs Palapetty Muhammed & anr. - 2007 (6) SCC 555,

6. Subodh S. Salaskar vs Jayprakash M. Shah & anr. - (2008) 13 SCC 689,

7. K. Bhaskaran Vs Sankaran Vaidhyan Balan - (1999) 2 SCC 510,

8. Vinod Shivappa vs Nandabelliappa - 2006 (6) SCC 456,

9. M/s Ajeet Seeds vs K. Gopal Krishnaiah - 2014 (12) SCC 685.

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

1. Heard learned counsel for the applicant and Sri Padmakar Rai, learned AGA for the State.

2. The present application u/s 482 Cr.P.C. has been filed to quash the summoning order dated 09.11.2022 as well as the entire proceedings of Complaint Case No.3721 of 2022 (Shiv Prakash Tiwari Vs. Rajendra), under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the 'Act, 1881'), Police Station- Nagirabad, District- Kanpur Nagar, pending in the court of learned Metropolitan Magistrate, VIII, Kanpur Nagar.

3. The learned counsel for the applicant contends that the impugned complaint is itself defective as the same was filed before the expiration of 15 days from the date of service of notice. It is further contended by learned counsel for the applicant that after bouncing the cheque on 13.07.2022, legal notice was sent to the applicant by the opposite party no.2 on 23.07.2022 and, thereafter, without mentioning any date for service of notice, the complaint was filed on 31.08.2022. It is further contended by learned counsel for the applicant that in the absence of any date of service mentioned in the complaint, the presumption of 30 days under Section 27 of the General Clauses Act, 1977, should come into play, and it should have been filed after 45 days of sending a notice. In support of his contention, learned counsel for the applicant has relied upon the judgement of the co-ordinate Bench of this Court passed in **Application u/s 482 No.98 of 2020 (Ali Jan Vs. State of U.P. and Another)** vide order dated 31.01.2020 and another judgement of the co-ordinate Bench of this court in **Application u/s 482 No.29097 of 2023 (Santosh Kumar Shrivastava Vs. State of U.P. and Another)** vide order dated 21.08.2023. Learned counsel for the applicant has also relied upon the judgement of **Yogendra Pratap Singh Vs. Savitri Pandey & Anothers reported in 2014 (10) SCC 713**, as well as the judgement of Jharkhand High Court in **Criminal Revision No.827 of 2012**

(Manoj Kumar Nag Vs. State of Jharkhand & Another) vide order dated 16.07.2021. Lastly, it was contended by learned Counsel for the applicant that in the above judgment, it is clear that if the complaint is filed before the expiry of 15 days from the date of service of notice, then that is no complaint in the eyes of the law.

4. Per contra, learned AGA has contended that it is an established legal position of law that date of service of notice sent by the complainant upon the drawer of the cheque is not required to be mentioned in the complaint and the defence whether notice has been served or not upon the drawer of the cheque can be considered during the trial, and that cannot be a case for quashing the proceeding of a complaint under the Act of 1881.

5. After hearing the parties, the following questions arise for consideration;

i. Whether the impugned complaint is defective under Clause (c) of the proviso to Section 138 of the Negotiable Instrument Act, being filed before the expiry of Fifteen days from the date of service of notice.?

ii. Whether the law requires to mention the date of service of notice upon drawer in the complaint filed against him under Section 138 N.I. Act ?

6. from the perusal of the record, it appears that after the bouncing of the cheque on 13.07.2022 legal notice was sent by opposite party no.2 through registered post on 23.07.2022, though no date of service was mentioned in the complaint, and the same was filed on 31.08.2022.

7. Hon'ble Apex Court in **C. C. Alavi Haji vs Palapetty Muhammed and another; 2007 (6) SCC 555** observed that in case of notice through registered post on the correct address of the drawer, the presumption of service upon drawer can be made under Section 27 of General Clause Act by taking into consideration the time for service of notice in the ordinary course of business. The Hon'ble Apex Court further observed that in that case, apart from the Section 27 of General Clause Act presumption under Section 114 of Evidence Act is available to presume the service upon the drawer in the common course of business. Paras 13, 14, 15 and 17 of the judgement **C. C. Alavi Haji (supra)** are being quoted hereinbelow;

"13. According to Section 114 of the Act, read with Illustration (f) thereunder, when it appears to the courtthat the common course of business renders it probable that a thing would happen, the court may draw a presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the GC Act is a far stronger presumption. Further, while Section 114 of the Evidence Act refers to a general

presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of the GC Act is extracted below:

"27. Meaning of service by post.? Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed. (Vide Jagdish Singh v. Natthu Singh; State of M.P. v. Hiralal and V. Raja Kumari v. P. Subbarama Naidu.) It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the court to draw presumption or inference either under Section 27 of the GC Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the court is required to be prima facie satisfied that a case under the said section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to

provide him an opportunity to make amends.

17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of criminal law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the GC Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran case 2 if the "giving of notice" in the context of Clause (b) of the proviso was the same as the "receipt of notice" a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

8. From the observation of the Apex Court mentioned above in **C. C. Alavi Haji (supra)**, it is a clear case that if the complainant sends notice to the drawer through registered post though no date of service is mentioned, even then, the court can presume under Section 114 of the Evidence Act as well as Section 27 of the General Clause Act that the notice has been served in time when a letter sent through the registered post would have been delivered in the ordinary course of business. The question arises: what would be the time the court may presume delivery of the registered letter in the ordinary course of business because no such time is mentioned in Section 114 of the Evidence Act or Section 27 of the General Clause Act. For reference, Section 114 of the Evidence Act, as well as Section 27 of the General Clause Act are being quoted hereinbelow respectively ;

"Section 114- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

Section 27- Meaning of service by post.- Where any Central Act or Regulation made after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve' or either of the expression 'give' or 'send' or any other expression is used, then, unless a the different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

9. Hon'ble Apex Court in the case of **Subodh S. Salaskar vs Jayprakash M. Shah and another (2008) 13 SCC 689** after considering Section 27 of General Clause Act and Order 5 Rule 9(5) of the Code of Civil Procedure, 1908, observed that ordinarily 30 days must be held to be

sufficient for service of notice if same is sent through registered post and with further observation that if service of notice is effected through speed post, ordinarily the service takes place within a few days. Para 23 of the judgement of Subodh S. Salaskar's (supra) case is being quoted hereinbelow;

"23. Thirty days ordinarily must be held to be sufficient for service of notice. In fact, when the service of notice is sought to be effected by speed post, ordinarily the service takes place within a few days. Even under Order 5 Rule 9 (5) of the Code of Civil Procedure, 1908, summons is presumed to be served if it does not come back within thirty days. In a situation of this nature, there was no occasion for the Court to hold that service of notice could not be effected within thirty days."

10. The above judgement of the Hon'ble Supreme Court was delivered in the year 2008 considering the efficiency of service of the post office at that time. Even Hon'ble Apex Court has not presumed that 30 days will always be counted for service of notice if the same is sent through registered post and is not returned. Now, almost 15 years have passed, much water has flown under the bridge and delivery of letters through the postal department has become so fast that presuming 30 days for service delivery for the registered post does not appear correct. Even the Order 5 Rule 9(5) of C.P.C. provides presumption for delivery of service of summons through registered post, if not received back within 30 days from the date of issuance of summons cannot be equated with the present service of notice under N.I. Act because giving of notice cannot be equated with the service of notice under N.I. Act, and if such pleas are allowed, then dishonest drawer of the cheque may get an unnecessary advantage, especially when drawer of the cheque did not denied the receiving of statutory notice.

11. In the **K. Bhaskaran Vs. Sankaran Vaidhyan Balan; (1999) 2 SCC 510**, Hon'ble Apex Court Observed, "it must be born in mind that the court should not adopt an interpretation, which helps a dishonest evader and clips an honest payee, as that would defeat the very legislative measure."

12. Proviso (b) of Section 138 N. I. Act provides giving a notice in writing, but no mode of sending notice is provided in Section 138 N.I. Act but Section 94 of N.I. Act provides that notice of dishonour may be given oral or written and may, if written, be sent by post. But this section does not mandatorily provide that written notice should be sent only by post.

13. Section 4 of the Information Technology Act, 2000 (hereinafter referred to as 'I.T. Act') provides where any law provides the information shall be in writing or in typewritten or printed form then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information is given in electronic form and accessible so as to be usable for subsequent reference. Section 4 of I. T. Act is being reproduced hereinbelow;

"4. Legal recognition of electronic records.- Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

(a) rendered or made available in an electronic form and

(b) accessible so as to be usable for a subsequent reference."

14. Therefore, Section 4 of the I.T. Act very clearly provides that notwithstanding anything contained in such law which provides notice in written form then written will also include the notice rendered or made available in electronic form, which should be available for subsequent reference. The word 'electronic form' is defined in Section 2(1)(r) of I.T. Act, which provides any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. Therefore, it is clear from the provision the notice mentioned in Section 138 N.I. Act will also include email or WhatsApp if the same remains available for subsequent reference.

15. Section 65(B) of the Indian Evidence Act, 1972 also accepts the admissibility of electronic records. Section 12 of the I.T. Act also provides the procedure for acknowledgement of receipt of notice in electronic form. Similarly, Section 13 of the I.T. Act also provides the time and place of dispatch of electronic records.

16. As per Section 13 of the I.T. Act, as soon as the notice in electronic form is entered, a computer resource outside the control of the originator, it is deemed to be dispatched and as soon as the notice in electronic form is entered, the designated computer resource or enters the computer resources of the addressee, and then it is deemed to be served. Sections 12 and 13 of I.T. Act are being quoted as below;

"12. Acknowledgement of receipt. *- (1) Where the originator has not [stipulated] that the acknowledgement of receipt of electronic record be given in a particular form or by a particular method, an acknowledgement may be given by-*

(a) any communication by the addressee, automated or otherwise; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

(2) Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgement of such electronic record by him, then, unless acknowledgement has been so received, the electronic record shall be deemed to have been never sent by the originator.

(3) Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then, the originator may give notice to the addressee stating that no acknowledgement has been received by him and specifying a reasonable time by which the acknowledgement must be received by him and if no acknowledgement is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

13. Time and place of dispatch and receipt of electronic record.- *(1) Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.*

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely :?

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records,?

(i) receipt occurs at the time when the electronic, record enters the designated computer resource; or

(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

(4) The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).

(5) For the purposes of this section, ? (a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

(c) "usual place of residence", in relation to a body corporate, means the place where it is registered."

17. From the above analysis, it is clear that notice sent through 'email or WhatsApp' shall be deemed to be dispatched and served on the same date, if it fulfill the above requirement of Section 13 of I.T. Act, 2000.

18. In the present time of digitalization and computerisation, delivery of post has become so fast that the court can presume that a correctly addressed registered post has been served upon the addressee within a maximum period of 10 days if the date of service is not mentioned in the complaint. After the initiation of the online post tracking system, it is too easy to know the date of delivery of the registered post. In the ordinary course of business, the registered letter is delivered within 3 to 10 days if correctly addressed. **Therefore, this Court holds that if no date of service has been mentioned in the complaint, then the court can presume under Section 114 of the Evidence Act and Section 27 of the General Clause Act that notice would have been served within ten days from the date of its dispatch. Though it is always open to the drawer of the cheque to take the plea during trial, the notice was never served upon him.**

19. In the cases relied upon by the applicant in **Ali Jan (supra), Santosh Kumar Shrivastava (supra) and Yogendra Pratap Singh (supra)**, High Court as well as the Hon'ble Supreme Court observed that complaint beyond the expiry of 15 days from the date of service is no complaint in the eyes of the law that legal position is not disputed. However in none of the judgement, the court observed that 30 days is required to be presumed for service of notice from the date of dispatch through registered post if date of service is not mentioned in the complaint.

20. In the present case, as per the complaint, notice was dispatched by the

complainant to opposite party no.2 on 23.07.2022; therefore, after presuming ten days of service of notice upon the applicant, 15 days will be counted from 2nd August 2022 within which applicant was required to pay the cheque amount as demanded by the notice. After that, a complaint can be filed after 17.08.2022. In the present case, the complaint was filed on 31.08.2022. Therefore, the complaint was not defective under Clause (c) of the proviso of Section 138 as well as Section 142(1)(b) of N.I. Act.

21. So far as the second question is concerned, whether the date of service of notice upon drawer is required to be mentioned in the complaint itself.

22. The Apex Court in **C.C. Alavi Haji (supra)** case observed that while interpreting the Section 138 N.I. Act regarding service of notice it must be borne in mind the court should not adopt an interpretation that helps the dishonest drawer of the cheque to evade and trap the honest payee, and it should be incorporated liberally in favour of the honest payee. The court further observed that as soon as the payee dispatched the registered post with the correct address of drawer, the presumption of service as under Section 27 of the General Clause Act would be attracted. Para 10 of the **C.C. Alavi Haji (supra)** case is being quoted hereinbelow;

"10. It is, thus, trite to say that where the payee dispatches the notice by registered post with the correct address of the drawer of the cheque, the principle incorporated in Section 27 of the GC Act would be attracted; the requirement of Clause (b) of the proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address."

23. In the case of **Vinod Shivappa vs Nandabelliappa; 2006 (6) SCC 456**, the Hon'ble Apex Court observed that while interpreting the statute, the court must adopt construction, which suppress the mischief and advance the remedy as per the rule laid down in Heydon's case which is known as purposive construction or mischief rule. Para 12 of the **Vinod Shivapapa (supra)** case is quoted hereinbelow;

"12. It is well settled that in interpreting a statute the court must adopt that construction which suppresses the mischief and advances the remedy. This is a rule laid down in Heydon's case also known as the rule of purposive construction or mischief rule."

24. In the judgement of **M/s Ajeet Seeds vs K. Gopal Krishnaiah; 2014 (12) SCC 685**, the Hon'ble Apex Court observed that it is necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that addressee have knowledge of the notice because the same is a matter of evidence, and there is presumption of service of the registered post under Section 27 of the Evidence Act.

25. Therefore, this Court holds that there is no legal requirement to mention the date of service of notice upon the drawer of the cheque in the complaint itself, if the notice was sent through registered post,

then presumption under Section 27 of the General Clause The act will automatically come into the picture.

26. In view of above analysis and the legal position discussed above, this Court is of the view that in the present case, the complaint was filed after the expiry of 15 days of service of notice upon the applicant. Therefore, there is no defect in the complaint. Hence, there is no illegality in the summoning order.

27. This Court also feels it appropriate to issue following directions to all learned Magistrates/Courts:-

(i) Where complaint under N.I. Act is filed, then the concerned Magistrate/ Court will emphasis for filing the post tracking report along with the complaint, if sent through Registered Post, so as to leave no scope for the dishonest drawer of cheque from taking the plea of non-service of statutory notice of 15 days.

(ii). Notice sent through **'email or WhatsApp'** , if it fulfils the requirement of Section 13 of I.T. Act will also be a valid notice under Section 138 N.I. Act to the drawer of cheque, and same will be deemed to be served on the date of dispatch, itself.

28. Accordingly, the present application is **dismissed**. However, the applicant is free to raise the issue of service during the trial of the complaint in question.

29. Registrar (Compliance) is directed to circulate a copy of this order to all learned District Judges of the state of Uttar Pradesh, for further appraisal to concerned Magistrate/Court.

(2024) 2 ILRA 1288
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Appeal U/s 37 of Arbitration & Conciliation Act 1996 NO. 874 of 2023

Sushil Kumar Mishra ...Appellant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Appellant:
Sri Vinod Sinha, Sri Mahesh Sharma, Sri Sharad Sinha

Counsel for the Opp. Parties:
S.C.

Civil Law - Arbitration and Conciliation Act, 1996 - Section 34 - Instant appeal preferred by claimant/award holder against order of District Judge whereby appeal was partly allowed and rate of interest awarded by Arbitrator was reduced from 14% to 6% p.a - Held, it is well settled by catena of Supreme Court decisions that court has no power u/s 34 of Act, 1996 to modify award - Under Section 34(2), court may only set aside award, wholly or in part, if severable, without affecting remaining award - In Larsen Air Conditioning and Refrigeration Co. (infra), Supreme Court held that modification of rate of interest u/s 34 is impermissible - Thus, rate of interest that was awarded to be paid on principle sum was 14% p.a from 25.3.2000 till payment was made - In impugned order , rate of interest reduced to 6% without providing any cogent reasons for same - Reduction of interest is nothing but modification of original arbitration award, accordingly same is illegal and against principles established by Supreme Court. (Para 1, 7, 8)

Appeal allowed. (E-13)

List of Cases cited:

1. Project Director Vs M. Hakeem reported in 2021 (9) SCC 1, (Para 46)

2. S.V. Samudram Vs St. of Karn. & anr., Civil Appeal No. 8067 of 2019, dated January 4, 2024, (Paras 14 to 16, 42)

3. Larsen Air Conditioning and Refrigration Company Vs U.O.I. & ors. reported in 2023 SCC Online SC 982, (Paras 13 to 16)

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

1. This is an appeal filed by the claimant/award holder against the order passed by the District Judge, Kaushambi dated January 15, 2008, wherein the appeal was partly allowed and the rate of interest awarded by the Arbitrator was reduced from 14% to 6% per annum.

2. Counsel appearing on behalf of the appellant submits that the Court does not have the power to modify an award and to buttress his arguments reliance has been placed on the judgements of the Supreme Court in the case of ***Project Director Vs. M. Hakeem reported in 2021 (9) SCC 1 and in S.V. Samudram Vs. State of Karnataka & Anr. in Civil Appeal No. 8067 of 2019 dated January 4, 2024.*** Specific reference is placed on paragraph no.46 of the judgement in ***Project Manager (Supra)***, which is quoted below:-

"46. Quite obviously if one were to include the power to modify an award in Section 34, one would be crossing the Lakshman Rekha and doing what, according to the justice of a case, ought to be done. In interpreting a statutory provision, a Judge must put himself in the shoes of Parliament and then ask whether Parliament intended this result. Parliament very clearly intended that no power of modification of an award exists in Section 34 of the Arbitration Act, 1996. It is only for Parliament to amend the aforesaid provision in the light of the experience of the courts in the working of the Arbitration Act, 1996, and bring it in line with other legislations the world over."

3. He further referred to paragraph nos.14, 15 and 16 and 42 of the judgement in ***S.V. Samudram (Supra)***, which are quoted below :-

"14. The position as to whether an arbitral award can be modified in the proceedings initiated under Sections 34/37 of the A&C Act is no longer res integra. While noting the provisions, more specifically, Section 34(4) of the A&C Act; the decisions rendered by this Court, including the principles of international law enunciated in several decisions recorded in the treatise "Redfern and Hunter on International Arbitration, 6th Edition", this Court in National Highways Authority of India v. M. Hakeen and Another, categorically held that any court under Section 34 would have no jurisdiction to modify the arbitral award, which at best, given the same to be in conflict with the grounds specified under Section 34 would be wholly unsustainable in law. The Court categorically observed that any attempt to "modify an award" under Section 34 would amount to "crossing the Lakshman Rekha".

15. On the exact same issue we may also note another opinion rendered by this Court in ***Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited*** in the following terms:-

"44. In law, where the court sets aside the award passed by the majority

members of the Tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding. Under Section 34 of the Arbitration Act, the court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub- sections (2) and (2-A) are made out. There is no power to modify an arbitral award. In ***McDermott International Inc. v. Burn Standard Co. Ltd. [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181]*** *, this Court held as under : (SCC p. 208, para 52).*

"52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."

(Emphasis Supplied)

16. The principle stands reiterated as late as 2023 in ***Larsen Air Conditioning and Refrigration Company v. Union of India & Others.***

42. In our considered opinion, the court while confirming the modification of the award committed the very same mistake which the Court under Section 34 of the A&C Act, made.

The Court under Section 37 had only three options:-

(a) Confirming the award of the Arbitrator;

(b) Setting aside the award as modified under Section 34; and

(c) Rejecting the application (s) under Section 34 and 37."

4. One may also examine the Apex Court judgement in ***Larsen Air Conditioning and Refrigration Company Vs. Union of India and others reported in 2023 SCC Online SC 982***, where the court was examining as to whether the High Court erred in modifying the arbitral award to the extent of reducing the interest, from compound interest of 18% to 9% simple interest per annum. The Supreme Court delineated on the issue of modification as follows :-

"13. In the present case, given that the arbitration commenced in 1997, i.e., after the Act of 1996 came into force on 22.08.1996, the arbitrator, and the award passed by them, would be subject to this statute. Under the enactment, i.e. Section 31(7), the statutory rate of interest itself is contemplated at 18% per annum. Of course, this is in the event the award does not contain any direction towards the rate of interest.

Therefore, there is little to no reason, for the High Court to have interfered with the arbitrator's finding on interest accrued and payable. Unlike in the case of the old Act, the court is powerless to modify the award and can only set aside partially, or wholly, an award on a finding that the conditions spelt out under Section 34 of the 1996 Act have been established.

The scope of interference by the court, is well defined and delineated [refer to Associate Builders v. Delhi Development Authority, Ssangyong Engineering Construction Co. Ltd v. National Highways Authority of India (NHAI) and Delhi

Airport Metro Express Pvt. Ltd. v Delhi Metro Rail Corporation Ltd].

14. The reliance on Kalsi Construction Company (supra) by the respondent-state, is inapt, given that this court had exercised its Article 142 jurisdiction in light of three pertinent factors - the award had been passed 20 years prior, related to construction of a Paediatrics Centre in a medical institute, and that the parties in that case had left the matter to the discretion of the court.

Similarly, in Oriental Structural Engineers (supra) this court held that since the contract stipulated interest entitlement on delayed payments, but contained no mention of the rate of interest applicable - the Tribunal ought to have applied the principles laid down in G.C. Roy (supra), and therefore, in exercise of Article 142, this court reduced the rate of interest awarded by the tribunal on the sum left unpaid.

The judgment in Municipal Corporation of Greater Mumbai (supra) no doubt discusses the inherent powers of the High Court as a superior court of record, but relates specifically to the jurisdiction to recall its own orders, and offers little assistance in the present dispute.

15. The limited and extremely circumscribed jurisdiction of the court under Section 34 of the Act, permits the court to interfere with an award, sans the grounds of patent illegality, i.e., that "illegality must go to the root of the matter and cannot be of a trivial nature"; and that the tribunal "must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground" [ref: Associate Builders (supra)].

The other ground would be denial of natural justice. In appeal, Section 37 of the Act grants narrower scope to the appellate court to review the findings in an award, if it has been upheld, or substantially upheld under Section 34. It is important to notice that the old Act contained a provision which enabled the court to modify an award. However, that power has been consciously omitted by Parliament, while enacting the Act of 1996.

This means that the Parliamentary intent was to exclude power to modify an award, in any manner, to the court. This position has been iterated decisively by this court in Project Director, National Highways No. 45E and 220 National Highways Authority of India v M. Hakeem:

"42. It can therefore be said that this question has now been settled finally by at least 3 decisions [McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181] , [Kinnari Mullick v. Ghanshyam Das Damani, (2018) 11 SCC 328 : (2018) 5 SCC (Civ) 106] , [Dakshin Haryana Bijli Vitran Nigam Ltd. v. Navigant Technologies (P) Ltd., (2021) 7 SCC 657] of this Court.

Even otherwise, to state that the judicial trend appears to favour an interpretation that would read into Section 34 a power to modify, revise or vary the award would be to ignore the previous law contained in the 1940 Act; as also to ignore the fact that the 1996 Act was enacted based on the Uncitral Model Law on International Commercial Arbitration, 1985 which, as has been pointed out in Redfern and Hunter on International Arbitration, makes it clear that, given the limited judicial interference on extremely limited grounds not dealing with the merits of an award, the "limited remedy" under Section 34 is coterminous with the "limited right", namely, either to set aside an award or remand the matter under the

circumstances mentioned in Section 34 of the Arbitration Act, 1996."

16. In view of the foregoing discussion, the impugned judgment warrants interference and is hereby set aside to the extent of modification of rate of interest for past, pendente lite and future interest.

The 18% per annum rate of interest, as awarded by the arbitrator on 21.01.1999 (in Claim No. 9) is reinstated. The respondent-state is hereby directed to accordingly pay the dues within 8 weeks from the date of this judgment."

5. Counsel appearing on behalf of the respondents has submitted that the modification is only in terms of the interest and reasons have been provided in the impugned order for reducing the same.

6. I have perused the documents and the judgements cited by counsel appearing on behalf of the petitioner.

7. It is trite law, settled by a catena of Supreme Court judgements that the Court does not have the power under Section 34 of Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") to modify an award. The Court under Section 34(2) of the Act has the power to sever parts of the award and set aside the same in toto, if the severance does not impact the remaining award that is upheld under Section 34 of the Act. The principle expounded by the Supreme Court in ***Larsen Air Conditioning and Refrigration Company (supra)*** is specifically on the point of the modification of the rate of interest and Supreme Court has categorically held that no such modification is permissible under Section 34 of the Act.

8. In the present case, I find that the rate of interest that was awarded to be paid on the principle sum was 14% per annum from 25.3.2000 till the payment was made. In the impugned order this rate of interest has been reduced to 6% without providing any cogent reasons for the same. Reduction of interest is nothing but a modification of the original arbitration award, and accordingly, the same is illegal and against the principles established by the Supreme Court.

9. In the light of the above findings, the impugned judgement and order is quashed and set aside. The appeal is, accordingly, allowed.

(2024) 2 ILRA 1292
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE

THE HON'BLE SAMEER JAIN, J.

Crl. Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 280 of 2024

Rajesh Kumar ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Sujeet Kumar, Ms. Chhaya Gupta

Counsel for the Respondents:
G.A.

Anticipatory Bail-Applicant was District Social Welfare Officer-allegation-he with the help of his four private computer operators misappropriated the public money- FIR was lodged after due enquiry conducted by three members committee- and after enquiry- committee found the Applicant misappropriated the public money -the Court should consider the nature of allegation- severity of punishment, status/ position of the accused and magnitude of offence alleged to have been committed-**Application dismissed.** (E-9)

Cases cited:

1. Siddharth Vs St. of U.P.& anr.(2022) 1 SCC 676

2. Siddharam Satlingappa Mhetre Vs St. of Mah. & ors. (2011) 1 SCC 694

3. Pratibha Manchanda & anr.Vs St. of Har. & anr.(2023) 8 SCC 181

4. Shri Gurbaksh Singh Sibbia & ors. Vs St. of Pun. (1980) 2 SCC 565

5. Sushila Aggarwal Vs St. (NCT of Delhi)-2020 SCC online SC 98

(Delivered by Hon'ble Sameer Jain, J.)

1. Heard Ms. Chhaya Gupta, learned counsel for the applicant and Sri Ravi Kant Kushwaha, learned A.G.A. for the State.

2. The present anticipatory bail application has been filed on behalf of the applicant in F.I.R./Case Crime No. 0646 of 2023, under Sections 420, 467, 468, 471 IPC, Police Station Sadar Bazar, District Shahjahanpur, with a prayer to enlarge him on anticipatory bail.

Brief facts

3. FIR of the present case was lodged against applicant and eight others on 19.09.2023 and according to the FIR, applicant was District Social Welfare Officer, Shahjahanpur and he with the help of his four private computer operators misappropriated the public money of Rs.2 crores 52 lacs 39 thousand with the help of touts and mediators by changing bank accounts of old age pensioners.

Submissions advanced on behalf of applicant

4. Learned counsel for the applicant submitted that entire allegation made against the applicant is totally false and baseless and applicant never misappropriated any money. She further submitted that applicant was transferred to Shahjahanpur in the month of December, 2021 and on the direction of Director Social Welfare Officers, Lucknow, U.P., the work was given to all the Social Welfare Officers to link the old age pensioners' registration with Aadhar for authentication and when applicant being District Social Welfare Officer started to link old age pensioners' registration with Aadhar then he found certain irregularities and on 21.02.2023, he himself informed in writing about irregularities to the Branch Manager, Baroda U.P. Bank, Karkor, Jayantipur, Shahjahanpur and requested to stop the withdrawal of the amount from these accounts of old age pensioners and thereafter on the basis of a news item published in a news paper with regard to irregularities in the account of old age pensioners, District Magistrate constituted a five members committee to enquire the matter and after enquiry committee found that out of 21 old age pensioners' account only accounts of 9 old age pensioners were changed and on the basis of the report of five members committee, applicant was suspended from his service on 06.04.2023.

5. She further submitted that a subsequent enquiry was also conducted by three members committee on the letter issued by one of the Member of Legislative Assembly and during enquiry, the three members committee found that there was a misappropriation of Rs. 2 crores 52 lacs 39 thousands and on the basis of report of three members committee dated 24.05.2023, the FIR of the present case was lodged against the applicant and others.

6. She further submitted that as earlier five members committee found irregularities with regard to only nine accounts of old age pensioners, therefore, the subsequent committee report dated 24.05.2023 does not appear to be correct one. She further submitted that applicant never misused his position and he was the

person, who pointed out the irregularities in accounts and also requested to stop the payments from these accounts. She further submits, however, due to pressure of work applicant had to appoint two private computer operators but merely on this basis, it cannot be said that he siphoned off the public money of more than Rs. 2.5 crores with their help.

7. She further submitted that applicant was appointed in the year 1998 and till date, his service record was clean and no complaint was ever lodged against him. She further submitted that applicant is a responsible public servant and he is ready to cooperate with the investigation and if investigation is conducted properly then applicant is hopeful that no charge sheet can be filed against him as he did not commit any offence.

8. She further submitted that investigation of the case is still pending and police is trying to arrest the applicant. She further submitted that there is no need of the arrest of the applicant. She further submitted that if there is no need of the arrest of an accused then in spite of the fact that Investigating Officer is having power to arrest an accused, the accused should not be arrested.

9. She further submitted that personal liberty of a person is a fundamental right provided under Article 21 of Constitution of India. She placed reliance on the judgment of the Apex Court in case of Siddharth Vs. State of Uttar Pradesh and another (2022) 1 SCC 676

10. She further submitted that as per the government orders dated 19.07.2005 and 24.05.2012, it is mandatory to take permission of appointing authority of the public servant before lodging any FIR against him and in the present matter, in spite of the fact that applicant is public servant no such permission from his appointing authority was taken before lodging FIR of the present case, therefore, even FIR of the present case lodged against the applicant is bad.

Submissions advanced on behalf of State

11. Per contra, learned AGA vehemently opposed the prayer for anticipatory bail and submitted that applicant was District Social Welfare Officer posted at District Shahjahanpur and he misused his position and misappropriated more than Rs. 2.5 crores and FIR of the present case was lodged after due enquiry conducted by three members committee duly constituted under the law.

12. He further submitted that from the enquiry report, which has been annexed alongwith the instant anticipatory bail application, it reflects that after enquiry, applicant was found responsible for huge misappropriation of more than Rs. 2.5 crores.

13. He further submitted that applicant committed offence under Sections 420, 467, 468 IPC and maximum punishment for the offence under Section 467 IPC is life imprisonment.

14. He further submitted that considering the fact that huge amount of Rs.2.5 crores alleged to have been misappropriated by the applicant alongwith other accused persons, applicant should not be released on anticipatory bail.

15. He further submitted that applicant has already challenged the FIR of the present case before Division Bench of

this Court in Criminal Misc. Writ Petition No. 16293 of 2023 and Writ filed by him has already been dismissed, therefore, it cannot be said that FIR of the present case lodged against the applicant is bad.

Analysis

16. I have heard both the parties and perused the record of the case.

17. From the record, it reflects that FIR of the present case was lodged after due enquiry conducted by three members committee and after enquiry, committee found that applicant with the help of other accused persons misappropriated the public money of more than Rs. 2.5 crores by manipulating the bank account of old age pensioners.

18. Applicant is District Social Welfare Officer and allegation against him is quite serious. No doubt, personal liberty of a person is the most cherished fundamental right provided under Article 21 of Constitution of India but law is settled that while deciding the anticipatory bail application, the Court should also consider the nature of allegation, severity of punishment, status/ position of the accused and magnitude of offence alleged to have been committed by the accused.

19. The Apex Court in the case of ***Siddharam Satlingappa Mhetre Vs. State of Maharashtra and others (2011) 1 SCC 694*** in paragraph no. 112 observed as-:

"122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused's likelihood to repeat similar or the other offences;

v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code,1860 the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in

the normal course of events, the accused is entitled to an order of bail."

20. The Apex Court in case of ***Pratibha Manchanda and another Vs. State of Haryana and another (2023) 8 SCC 181***, in paragraph no. 21 also observed as-:

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

21. It goes without saying that allegations levelled against applicant are grave in nature.

22. Further, however, learned counsel for the applicant also contended that FIR of the present case lodged against the applicant is bad but as applicant has already challenged the FIR of the present case before this Court in Criminal Misc. Writ Petition No. 16293 of 2023 and after haring the parties, the Division Bench of this Court has already dismissed his writ petition on 02.11.2023, therefore, it can not said that FIR of the present case filed against the applicant is bad.

23. Further, as per Section 438 Cr.P.C. (as per U.P. Amendment Act), "reason to believe that accused may be arrested on accusation" is the condition precedent for releasing him on anticipatory bail. In paragraph no. 6 to the affidavit applicant expressed his apprehension of arrest as-:

"That the applicant is having apprehension of his arrest in Case Crime No. 646 of 2023, under Section 420, 467, 468, 471 of I.P.C, Police Station- Sadar Bazar, District- Shahjahanpur, which does not fail under the offences provided under sub Section 438 Cr.P.C."

24. Merely on the basis of such averment, which was made by the applicant in paragraph no. 6 to the affidavit filed in support of the instant anticipatory bail application, it cannot be said that he was having reason to believe his arrest. The apprehension of arrest of accused should be based on concrete facts and it should not be imaginary. Mere fear of arrest is not the belief of arrest.

25. The Five Judges Constitution Bench in case of ***Shri Gurbaksh Singh Sibbia and others Vs. State of Punjab (1980) 2 SCC 565*** categorically observed in paragraph no. 35 as-:

"35. Section 438(1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe" that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non- bailable offence, must be capable of being examined by the court objectively, because it is then alone that the

court can determine whether the applicant has reason to believe that he may be so arrested. Section 438(1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely."

26. Recently again Five Judges Constitution Bench of the Apex Court in case of ***Sushila Aggarwal Vs. State (NCT of Delhi)-2020 SCC online SC 98*** reaffirmed the law laid down by the Constitution Bench in case of Shri Gurbaksh Singh Sibbia (supra) that belief of arrest of accused should be based on concrete facts and it cannot be accepted on the basis of vague averment.

27. In case at hand, FIR of the present case was lodged in the month of September, 2023 and since then four months have been passed and till date applicant was not arrested, therefore, in light of the vague averment made in paragraph no. 6 of the affidavit filed in support of the instant anticipatory bail application with regard to apprehension of arrest, this Court is of the view that applicant failed to bring on record any concrete fact and reason on the basis of which this Court can infer that he is having apprehension of his arrest in the instant matter.

28. Further, law is also settled that power to grant anticipatory bail is an extraordinary power, however, it is not necessary to exercise it sparingly only in exceptional cases but it should be exercised with care and circumspection. [see-: Constitution Bench of the Apex Court in case of ***Shri Gurbaksh Singh Sibbia (supra)].*** In view of this Court this extraordinary power should not be exercised in routine manner, otherwise provisions of pre arrest bail would become vulnerable.

29. Therefore, considering the facts and circumstances of the case discussed above, in my view, the instant anticipatory bail application filed by the applicant is devoid of merit and he is not entitled to be released on anticipatory bail.

30. Accordingly, without expressing any opinion upon ultimate merits of the case either ways which may adversely affect the trial of the case, the anticipatory bail application filed by the applicant is hereby ***dismissed.***

31. It is made clear that observations made in granting anticipatory bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

(2024) 2 ILRA 1297
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.02.2024

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Crl. Misc. Bail Application No. 869 of 2024

Sanjay Yadav Pradhan ...Applicant
Versus
The State of U.P. ...Respondent

Counsel for the Applicant:
Arun Sinha, Ram Chandra Singh, Umang Agarwal

Counsel for the Respondent:
G.A., Mahesh Kumar, Sanjeev Kumar Dwivedi

Bail-Merely because applicant has a criminal history -will not dis-entitle him to be enlarged on bail.- case of the applicant is on better footing than the named co-accused Persons. **Bail Application allowed.** (E-9)

Cases cited:

1. Maulana Mohd. Amir Rashadi Vs St. of U.P. & Anr. [Criminal Appeal No.159 of 2012]

2. Prabhakar Tewari Vs St. of U.P.[AIRONLINE 2020 SC 96]

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

1. Heard Sri Arun Sinha, learned counsel for the applicant, Sri Mahesh Kumar and Sri Sanjeev Kumar Dwivedi, learned counsel for the complainant, learned A.G.A. for the State and perused the record.

2. The present bail application has been filed by accused-applicant seeking bail in Case Crime No.30 of 2023, under Sections 147, 148, 149, 302, 307, 34, 120-B, 201, 427 I.P.C., Section 3/25 Arms Act and Section 5/27 Arms Act, P.S. Musafirkhana, District Amethi.

3. It is alleged in the first information report that on 27.2.2023 in the evening at around 7.00 p.m., uncle of the informant Suresh Yadav and brother Brijesh Yadav were coming home from Bolero car. On the way at Dadra Road, before Amar Bahadur Singh Degree college, two without numbered motorcycle stopped the Bolero car and started making indiscriminate firing and also hurled crude bombs, due to which, uncle and brother of the informant died. It is further alleged that the accused persons are inimical due to 2015 punchayat election. In 2016 also, the uncle Suresh Yadav had received gun shot injuries, in which Jalaluddin and others were named.

4. Learned counsel for applicant submits that informant is not an eye witness. Incident has been narrated by Shubham Verma. The named accused persons Vaseer Khan and Jalaluddin have been enlarged on bail by this Court vide orders dated 05.01.2024 & 18.01.2024 passed in Criminal Misc. Bail Application Nos.13143 of 2023 & 15248 of 2023. He submits that apart from the above named two co-accused persons, co-accused Manoj Yadav and Manish Yadav alias Kallu who were not named in the F.I.R. have also been enlarged on bail by this Court as well as Co-ordinate Bench of this Court vide orders dated 08.01.2024 & 06.12.2023 passed in Criminal Misc. Bail Application Nos.10378 of 2023 & 12350 of 2023.

It is contended on behalf of the applicant that there is absolutely no material against the applicant except the information given by a secret informer on parcha No.1 of the case diary that in the influence of the applicant Rahul Yadav commits the criminal activity. He submits that his case is on better footing than the named accused persons namely, Jalaluddin and Vaseer Khan. The applicant is in jail since 04.03.2023.

5. Learned A.G.A. as well as learned counsel for the complainant have opposed the bail prayer. They have submitted that applicant has criminal history of 17 cases and, therefore, he is not entitled to be enlarged on bail.

6. Rebutting the aforesaid, learned counsel for the applicant submits that he

has explained the criminal history in para 47 of the bail application. He is on bail in all the 17 cases. He submits that merely because applicant has a criminal history will not dis-entitle him to be enlarged on bail. He has relied on judgment of Supreme Court in the case of ***Maulana Mohd. Amir Rashadi vs. State of U.P. & Anr. [Criminal Appeal No.159 of 2012]***. He submits that role of the accused in the particular case has to be seen while granting bail, emphasis is on para 6. He has further relied on the judgment of Supreme Court in the case of ***Prabhakar Tewari vs. State of Uttar Pradesh [AIRONLINE 2020 SC 96]***.

7. On due consideration to the submissions advanced, perusal of the record as also the bail orders of the co-accused persons named above who have been enlarged on bail, period of incarceration gone into by the applicant and the explanation of the criminal history so also the judgment of Supreme Court passed in ***Maulana Mohd. Amir Rashadi & Prabhakar Tewari (supra)***, prima facie, this Court is of the opinion that case of the applicant is on better footing than the named co-accused persons Jalaluddin and Vaseer Khan, without expressing any opinion on merits of the case, I find it to be a fit case for enlarging the applicant on bail.

8. Accordingly, the bail application is **allowed**.

9. Let the applicant ***Sanjay Yadav Pradhan*** be released on bail in aforesaid case crime number subject to his furnishing a personal bond and two reliable sureties each in the like amount to the satisfaction of the trial court concerned with the following conditions:

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not pressurize/ intimidate the prosecution witness.

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

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

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

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

(2024) 2 ILRA 1299
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.02.2024

BEFORE

THE HON'BLE KRISHNA PAHAL, J.

Crl. Misc. Anticipatory Bail Application U/S 438
Cr.P.C. No. 872 of 2024

Ranjeet ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri Naveen Tiwari, Sri Ritik Raj

Counsel for the Respondent:
G.A.

Criminal Law - Code of Criminal Procedure-Section 438-Allegation that the

applicant has applied for Passport thrice -by altering his name and parentage in them-failed to highlight the animosity carried by the police against the applicant- satisfaction of the court for granting protection under Sectiontion 438 Cr.P.C. is different from the one under Sectiontion 439 Cr.P.C. **Application rejected.** (E-9)

Case law:

1. P. Prathapachandran Vs Central Bureau of Investigation, Ernakula, 1999 CrLJ 2002 (Ker)

2. R.S. Nayak Vs A.R. Antulay, (1984) 2 SCC 183

3. Satpal Singh Vs St. of Pun., (2018) 13 SCC 813

4. Pratibha Manchanda & anr.Vs St. of Har. & anr., (2023) 8 SCC 181

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.

2. Heard Sri Harsh Vardhan Singh, learned counsel for applicant as well as Sri Ram Mohit Yadav, learned A.G.A. for State and also perused the material available on record.

3. The present application for anticipatory bail has been filed for protection in regard to FIR/Case Crime No. 444 of 2023, under Sections 419, 420, 467, 468, 471 I.P.C. and 12 of Passport Act, 1967, P.S.- Barhalganj, District- Gorakhpur.

PROSECUTION STORY:

4. The FIR was instituted by the SI Gyan Prakash Shukla PS Barhalganj, Distt. Gorakhpur on 26.06.2023 with the allegations that it has come to his knowledge that RANJEET s/o Ram Bahadur has procured three passports i.e. No. K3464309 as Ranjeet Sahani s/o Ram Bahadur Sahani, No. P4364782 as Ranjeet Nishad s/o Bahadur Nishad and No. W8305151 as Ranjeet Nishad s/o Bahadur Nishad.

RIVAL CONTENTIONS:
Arguments for Applicant:

5. Learned counsel for the applicant has stated that the he is maliciously being prosecuted in the present case due to ulterior motive and has the apprehension of his arrest. The applicant has nothing to do with the said offence as alleged by the prosecution. Learned counsel has next stated that the informant is the Sub Inspector and he has not divulged the person from whom he had received the said information. The applicant is an illiterate and rustic person and for the sake of employment he had got his passport applications filed through broker and the discrepancy, if any, is due to his negligence.

6. Learned counsel for the applicant has further argued that the passports have been issued after due enquiry and investigation. The police had demanded bribe from him and after the refusal to grease their palm, the instant FIR has been instituted.

7. It is also argued by the counsel for the applicant that after getting the knowledge of the said multiplicity of applications for passport, he had given an application for the closure of the File on 10.04.2023. The same is filed as Annexure-4 to the affidavit filed with the anticipatory bail application. The instant FIR has been lodged two months thereafter. The files of the applicant have been closed and the same have been filed as Annexure-5 to the affidavit filed with the bail application, as such nothing remains against the applicant.

8. It is further argued that a letter for apology has been sent by the applicant to the Regional Passport Officer, Lucknow on 04.07.2023 which is filed as annexure-7 to

the affidavit filed with the anticipatory bail application.

9. Learned Counsel for the applicant has vehemently argued that the instant FIR has no legs to stand as it has been lodged without mandatory previous sanction of the Central government as provided under Section 15 of the Passports Act, 1967. The said provision is as under:

15. Previous sanction of Central Government necessary.— *No prosecution shall be instituted against any person in respect of any offence under this Act without the previous sanction of the Central Government or such officer or authority as may be authorized by that Government by order in writing in this behalf.*

10. Learned counsel for the applicant has further specified that the applicant had filed a criminal Miscellaneous Writ No. 17320 of 2023 which was dismissed for want of prosecution and not on merits. There is no iota of evidence against him and he has no criminal antecedents.

Arguments for State:

11. Learned AGA Shri. Ram Mohit Yadav has stated that the applicant is an imposter as he has procured three passports by altering his name and parentage altogether bearing No.'s K3464309 as Ranjeet Sahani s/o Ram Bahadur Sahani, P4364782 as Ranjeet Nishad s/o Bahadur Nishad and W8305151 as Ranjeet Nishad s/o Bahadur Nishad while his Aadhar card reveals his name to be RANJEET s/o Ram Bahadur. The applicant has obtained the passports by not only suppressing the information but has produced fake and doctored documents and got them issued.

12. It is further argued by learned AGA that there is no plausible or proper explanation to the fact of applying for a passport thrice. It is an open and shut case, although he could not dispute the fact that the applicant has no criminal antecedents.

CONCLUSION:

13. The argument of learned counsel for the applicant as to whether FIR can be lodged without previous sanction of the Central government as provided under Section 15 of the Passports Act, 1967 requires further exploration.

14. The word used in section 15 of the Passports Act, 1967 is 'prosecution' and not the 'FIR.' As per the **sixth edition** of the **BLACK'S LAW DICTIONARY** the word 'prosecution' is defined as:

'a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime.'

15. Thus, the proper interpretation of the provision would be that for institution of a First Information Report (FIR) and investigation thereupon, there is no obligatory requirement to secure prior sanction, even against a public servant, as per the mandate of Section 197 of the Code of Criminal Procedure, 1973. It shall equally apply to the persons charged under The Passports Act, 1967. When obtaining sanction is a prerequisite for initiating legal proceedings, it must be secured at the stage of presentation of charge sheet before the magistrate and taking of the cognizance thereupon.

16. In ***P. Prathapachandran Vs. Central Bureau of Investigation, Ernakula***[1], it was opined by the High Court that the point of time relevant for the

competent authority to accord sanction to prosecute under Section 19(1)(c) of the Act is the time when the Court is called upon to take cognizance of the offence. Therefore, the contention raised by the petitioner against the validity of the sanction accorded under Section 19(I)(c) of the Act and the competency of the officer who granted the sanction are untenable.

17. In **R.S. Nayak Vs. A.R. Antulay**[2], the five-Judges Bench of the Supreme Court has observed that existence of a valid sanction is a pre-requisite to the taking of cognizance of the enumerated offences alleged to have been committed. Thus, the said argument of non-availability of sanction to prosecute at the stage of FIR or investigation does not carry any force. Therefore, no sanction is required to investigate the instant matter.

18. **Eminent jurist Benjamin N. Cardozo** in his book *'Nature of the Judicial Process'* at page 70 has stated "The general framework furnished by the statute is to be filled in for each case by means of interpretation, that is, by following out the principles of the statute. In every case, without exception, it is the business of the court to supply what the statute omits, but always by means of an interpretative function."

19. Learned counsel has failed to highlight the animosity carried by the police against the applicant. The applicant has applied for Passport thrice by altering his name and parentage in them.

20. The satisfaction of the court for granting protection under Section 438 Cr.P.C. is different from the one under Section 439 Cr.P.C. while considering regular bail as settled by the Apex Court in ***Satpal Singh Vs. State of Punjab***[3].

21. The relief of anticipatory bail is aimed at safeguarding individual rights. While it serves as a crucial tool to prevent the misuse of the power of arrest and protects innocent individuals from harassment, it also presents challenges in maintaining a delicate balance between individual rights and the interests of justice. The tight rope we must walk lies in striking a balance between safeguarding individual rights and protecting public interest as laid down in the latest judgement of the Supreme Court in **Pratibha Manchanda and another Vs. State of Haryana and another**[4].

22. In view of the above, the present anticipatory bail application is found devoid of merits and is, accordingly, **rejected**.

23. It is clarified that the observations made herein are limited to the facts brought in by the parties pertaining to the disposal of anticipatory bail application and the said observations shall have no bearing on the merits of the case.

(2024) 2 ILRA 1302
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No. 1224 of 2023

Vivek Yadav & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Respondents.

Counsel for the Applicants:
Nadeem Murtaza, Aditya Vikram Singh

Counsel for the Respondent:
G.A., Lalta Prasad Misra, Prafulla Tiwari

Criminal law - Code of Criminal procedure-Section 362-Anticipatory bail granted with

certain conditions-application by the applicants seeking deletion of the condition (ii) -restraining the applicants from leaving India without permission of the trial Court-anticipatory bail already granted-application has been filed by the applicants seeking deletion of the condition (ii) imposed in the aforesaid order restraining the applicants from leaving India without permission of the trial Court-trial court declined the permission – seeking modification of the condition by filing a miscellaneous application in the decided matter-not maintainable u/s 362 Cr.P.C.-**Application dismissed.** (E-9)

Cases cited:

1. Nazma Vs Javed Alias Anjum; 2013 1 SCC 376,

2. A.P. SRTC & ors. Vs Abdul Kareem; 2007 2 SCC 466

3. Barun Chandra Thakur Vs Ryand Augustine Pinto & anr.;2019 SCC OnLine 1899

4. Ramadhar Sahu Vs The St. of Maharasthra, in SLP (Crl.) No. 11130 of 2023 decided on 16.10.2023

5. Atul Shukla Vs St. of M.P., (2019) 17 SCC 299

6. Hari Singh Mann Vs Harbhajan Singh Bajwa, (2001) 1 SCC 169

7. Nazma Vs Javed Alias Anjum: (2013) 1 SCC 376

8. A.P.SRTC & ors. Versus Abdul Kareem ; 2007 2 SCC 466

9. Bhavnagar University Vs Palitana Sugar Mill (P) Ltd.: (2003) 2 SCC 111

10. Jagdish Arora and Ajay Arora Vs Union of Indian : 2022 (3) CriminalCC 384

11. Atul Shukla Vs St. of M.P. & Another (2019) 17 SCC 299

12. Parvez Noorodin Lokhandwalla Vs St. of Maharashtra: (2020) 10 SCC77

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

Order on IA-03/2024

1. Heard Sri Vikas Tiwari and Sri Nadeem Murtaza, the learned counsel for the applicants, Sri Puneet Kumar Yadav, the learned State Counsel and Dr. Lalta Prasad Misra and Sri Prafulla Tiwari, the learned counsel for the opposite party no. 2 and perused the record.

2. The applicants were granted interim anticipatory bail in F.I.R. No. 896 of 2021, under Sections 409 and 420 I.P.C., Police Station Gomti Nagar, District Lucknow, by means of an order dated 23.05.2023 passed by this court, subject to the following conditions:-

(i) The applicants shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or tamper with the evidence;

(ii) The applicants shall not leave India without the previous permission of the court;

(iii) (iii)The applicants shall not pressurize/ intimidate the prosecution witness;

(iv) (iv)The applicants shall appear before the trial court on each date fixed unless personal presence is exempted;

(v) In case of breach of any of the above conditions the court below shall have the liberty to cancel the bail;

3. The interim anticipatory bail already granted to the applicants by means of the order dated 23.05.2023, was confirmed by means of an order dated 27.10.2023 and it was provided that the aforesaid order shall continue to remain in force till pendency of the trial.

4. This application has been filed by the applicants seeking deletion of the condition (ii) imposed in the aforesaid order restraining the applicants from

leaving India without permission of the trial Court.

5. In the affidavit filed in support of the application for deletion of the condition, it has been stated that the applicant no.2 had approached the trial court seeking permission to leave India to meet her children, who are studying abroad, but the trial court declined the permission. The applicants challenged the order passed by the trial court refusing permission for her travel abroad by filing application under Section 482 Cr.P.C. No. 6743 of 2023. During pendency of that application, the interim anticipatory bail order dated 23.05.2023 was made absolute by the order dated 27.10.2023 and the applicants contend that the application under Section 482 Cr.P.C. No. 6443 of 2023 has become infructuous. Now they have moved this application for invoking the inherent powers of this court for deletion of the condition.

6. The applicants have stated that the applicant no.1 is a businessman and is the Managing Director of a Company known as 'Piscesia Power Transmission Pvt. Ltd.' (P.P.T.P.L). The company is working in a joint-venture with a Turkish Company named as 'Savronik Elektronik Sanayi Ve Ticaret A.S.' for carrying out some projects of national importance across India. The applicant no.1 has to travel abroad for business purposes as he is having tie ups with some companies in other countries. Daughter of the applicants is currently studying at Amity School, Dubai, U.A.E in standard IX and has been staying with the applicant no. 2 whereas the applicants' son aged about 19 years is studying in Boston, USA. The applicant no. 2 is employed in a Hotel at U.A.E since 21.01.2023. She had returned to India to participate in the proceedings of the case but in light of the restrictions imposed by the interim order dated 23.05.2023, she is unable to travel and report for her job. The applicants have undertaken to appear before the trial court as when directed and not to abscond from the process of law.

7. The opposite party no.2 has filed objections against the application wherein a preliminary objection regarding maintainability of the application has been raised stating that Section 362 Cr.P.C. provides that:- *no court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."* It has been stated that the application filed for deletion of the condition amounts to an application seeking review of the order passed by this court, which is not maintainable.

8. It has further been stated in the application that the condition sought to be deleted itself contains a provision that the applicants can travel abroad with the permission of the court. The applicants had sought permission from the trial Court and they have filed an application under Section 482 Cr.P.C. challenging the order passed by the trial court refusing permission for their travel abroad which is still pending and, therefore, the applicants cannot seek the same relief by filing the instant application.

9. In support of the preliminary objection, the learned counsel for the opposite party no.2 has relied upon the decision of the Hon'ble Supreme Court in **Nazma vs. Javed Alias Anjum; 2013 1 SCC 376, A.P. SRTC and Others Vs. Abdul Kareem; 2007 2 SCC 466 and Barun Chandra Thakur Vs. Ryand**

Augustine Pinto and another; 2019 SCC OnLine 1899.

10. Replying to the preliminary objections, the learned counsel for the applicants placed reliance on a decision of the Hon'ble Supreme Court in the case of **Ramadhar Sahu Vs. The State of Maharasthra, in SLP (Crl.) No. 11130 of 2023 decided on 16.10.2023.**

11. Section 438 was omitted from Cr.P.C. in the State of U.P. by U.P. Act No. 16 of 1976 with effect from 28-11-1975. The following new Section 438 has been introduced in Cr.P.C. in the State of U. P. vide U.P. Act No. 4 of 2019, which received the assent of the President on 1-6-2019 and was published on 6-6-2019: -

"438. Direction for grant bail to person apprehending arrest.—(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely—

(i) the nature and gravity of the accusation;

(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) the possibility of the applicant to flee from justice; and

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested;

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant, the applicant on the basis of the accusation apprehended in such application.

(2) Where the High Court or, as the case may be, the Court of Session, considers it expedient to issue an interim order to grant anticipatory bail under sub-section (1), the Court shall indicate therein the date, on which the application for grant of anticipatory bail shall be finally heard for passing an order thereon, as the Court may deem fit, arid ***if the Court passes any order granting anticipatory bail, such order shall include inter alia the following conditions****, namely—*

(i) that the applicant shall make himself available for interrogation by a police officer as and when required;

(ii) that the applicant shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer,

(iii) that the applicant shall not leave India without the previous permission of the Court; and

(iv) such other conditions as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.

Explanation.—The final order made on an application for direction under sub-section (1); shall not be construed as an interlocutory order for the purpose of this Code.

(3) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(4) On the date indicated in the interim order under sub-section (2), the Court shall hear the Public Prosecutor and the applicant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order.

(5) The High Court or the Court of Session, as the case may be, shall finally dispose of an application for grant of anticipatory bail under sub-section (1), within thirty days of the date of such application;

(6) Provisions of this section shall not be applicable,—

(a) to the offences arising out of,—

(i) the Unlawful Activities (Prevention) Act, 1967;

(ii) the Narcotic Drugs and Psychotropic Substances Act, 1985;

(iii) the Official Secret Act, 1923;

(iv) the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986.

(b) in the offences, in which death sentence can be awarded.

(7) If an application under this section has been made by any person to the High Court, no application by the same person shall be entertained by the Court of Session."

(Emphasis supplied)

12. The conditions that were imposed in the order dated 23.05.2023 granting interim anticipatory bail to the applicants, were in accordance with the statutory mandate contained in sub-Section (2) of Section 438 Cr.P.C., as it applies to the State of UP.

13. Sub-Section (4) of Section 438 Cr.P.C. empowers the Court to confirm, modify or cancel the interim order after hearing the Public Prosecutor and the applicant and after due consideration of their contentions. After hearing the learned Counsel for the parties, this Court had passed the final order dated 27.10.2023, whereby it confirmed the order dated 23.05.2023 granting interim anticipatory bail to the applicants subject to the aforesaid conditions.

14. The applicants have sought deletion of the condition on the ground that the applicant no. 2 is serving abroad, the applicant no.1 has to frequently travel abroad in connection with his business and their children are studying abroad in two different countries.

15. The fact that the applicant no. 2 is serving abroad, was not disclosed in the anticipatory bail application filed by the applicants. It was a relevant factor, which ought to have been disclosed to this court. The fact of an accused person serving abroad would increase the likelihood of his unavailability to face the trial. This factor might have influenced the discretion of the court at the time of deciding the anticipatory bail application. The applicants have disclosed this fact for the first time in the application for deletion of condition filed after the interim anticipatory bail was granted to them and after the same was confirmed while the application was decided finally. This conduct of the applicants would weigh heavily against

them while deciding their application seeking to invoke the inherent powers of this Court which are meant to secure the ends of justice.

16. While opposing the application, the learned Counsel for the opposite party no. 2 has submitted that after the anticipatory bail application was disposed off finally, this Court became *functus officio* and it has no authority to pass any further order regarding that application.

17. Section 362 Cr.P.C. provides that "No *court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."* The prayer for deletion of the condition that the applicants will not leave India without the previous permission of the trial Court, does not seek correction of any clerical or arithmetical error and deletion of the condition will amount to a modification of the order after final disposal of the anticipatory bail application.

18. In **Atul Shukla v. State of M.P.,** (2019) 17 SCC 299, A first information report was registered for the offences under Sections 364 and 323 read with Section 34 I.P.C. and a charge-sheet was filed on 08.09.2016. A petition under Section 482 Cr.P.C. was filed for quashing of the F.I.R. In the meantime, charges were framed on 24.04.2017. On 20.07.2018, the High Court dismissed the petition under Section 482 in the following terms: -

"6. Considering the circumstances, this petition under Section 482 Cr.P.C. has no merit. The petitioner may challenge the framing of charge under appropriate provisions.

7. With the above observation, this petition is dismissed."

After the above order, the second respondent filed another petition under Section 482, praying for recall and modification of the order dated 20-7-2018. The High Court allowed the petition and recalled its earlier order dated 20-7-2018. Allowing the appeal, the Hon'ble Supreme Court held ***"In view of the specific bar which is contained in Section 362, we are of the view that the impugned order of the High Court is unsustainable. Such an application for review or modification could not have been entertained."***

19. In **Hari Singh Mann v. Harbhajan Singh Bajwa, (2001) 1 SCC 169**, the Hon'ble Supreme Court held that: -

"8. We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. ***No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7-1-1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of the Code of Criminal Procedure or the rules of the court, cannot be resorted to as a substitute of fresh litigation.*** *The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because Respondent 1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side.* ***The impugned orders dated***

30-4-1999 and 21-7-1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court.

(Emphasis supplied)

20. In **Nazma vs. Javed Alias Anjum**: (2013) 1 SCC 376 relied upon by the learned Counsel for the opposite party no. 2, the Hon'ble Supreme has held that:-

"12. We are of the view that the High Court has committed a grave error in not only entertaining the criminal miscellaneous application in a disposed of writ petition, but also passing an order not to arrest the 1st respondent till the conclusion of the trial. Grant of bail or not to grant, is within the powers of the regular Criminal Court and the High Court, in its inherent jurisdiction, not justified in usurping their powers. ***Once the criminal writ petition has been disposed of, the High Court becomes functus officio and cannot entertain review petitions or miscellaneous applications except for carrying out typographical or clerical errors. In the instant case, the High Court has entertained a petition in a disposed of criminal writ petition and granted reliefs, which is impermissible in law."***

21. In **A.P.SRTC and Others Versus Abdul Kareem** ; 2007 2 SCC 466, the Hon'ble Supreme Court deprecated the attempt to seek a review under the guide of making an application for clarification.

22. In **Ramadhar Sahu** (Supra), the appellant had been granted bail by means of an order dated 28.04.2023 passed by the High Court of Madhya Pradesh, wherein it is recorded that the appellant had volunteered to deposit a sum of Rs. 65,92,460/-. The order contained a condition that he had to deposit Rs. 10 lakhs before the trial court and Rs.55,92,460/- was to be deposited under protest within a period of three months from the date of his release. The appellant was released on bail on depositing Rs. 10 lakhs but thereafter he failed to deposit the remaining amount and he surrendered on 24.07.2023. After having gone into custody again, the appellant again applied for bail mainly on the ground of parity, as a co-accused had already been granted bail. The fresh application for bail was rejected by the High Court, stating that in the event the appellant was granted bail without compliance of the condition specified in the earlier order that would constitute modification of the order, which is prohibited by Section 362 Cr.P.C. In the aforesaid factual background the Hon'ble Supreme Court observed that:-

"An order for refusal of bail however, inherently carries certain characteristics of an interlocutory order in that certain variation or alteration in the context in which a bail plea is dismissed confers on the detained accused right to file a fresh application for bail on certain changed circumstances. Thus, an order rejecting prayer for ball does not disempower the Court from considering such plea afresh if there is any alteration of the circumstances. Conditions of bail could also be varied if a case is made out for such variation based on that factor. Prohibition contemplated in Section 362 of the Code would not apply in such cases."

23. The aforesaid observations in **Ramadhar Sahu** (Supra) were made by the Hon'ble Supreme Court in the background of the peculiar facts of the case where the earlier the applicant was granted bail subject to the condition of his depositing Rs. 10 lakhs prior to his release on bail and Rs.55,92,460/- within three months from the date of his release. The appellant did not deposit the balance amount and surrendered to custody. Thereafter, he filed a fresh application mainly on the ground of parity. In these circumstances, the Hon'ble Supreme Court held that granting of bail without imposing the condition which was there in the earlier bail order, would not amount to variation of the condition of the bail orders as the fresh bail application had to be considered on its merits keeping in view the changed circumstances, which in that case were grant of bail to an co-accused person.

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

25. Therefore, **Ramadhar Sahu** (supra) has to be read in light of the factual background of the case and it does not laid down a law of universal application that variance or deletion of conditions imposed in an order granting bail to an accused person is permissible by way of modification of order in spite of the provision contained in Section 362 Cr.P.C.

26. The learned counsel for the applicants next relied upon a decision of a Division Bench of the Madhya Pradesh, Jabalpur in the case of **Jagdish Arora and Ajay Arora Vs. Union of Indian** : 2022 (3) CriminalCC 384, wherein an application under Section 482 Cr.P.C. was filed seeking modification of final order granting bail under Section 439 of Cr.P.C. subject to the condition that "the applicants shall submit their passports, if any, before the trial Court and shall not leave India without prior permission of this Court." The Learned counsel for the prosecuting agency had relied upon the judgment in the case of **Atul Shukla vs. State of M.P. & Another** (2019) 17 SCC 299 to contend that no recall, review or modification of an order passed under Cr.P.C. is permissible by exercise of inherent powers under Section 482 Cr.P.C. However, power to correct a condition, subject to which a bail order is passed, is vested with the Court under Section 439(1)(b) of Cr.P.C., but the same cannot be exercised by invoking inherent powers u/S. 482 of Cr.P.C. as it is a power to be independently exercised on the invocation of aggrieved person.

27. The Madhya Pradesh High Court held in **Jagdish Arora** (Supra) that Section 439(1)(b) Cr.P.C. empowers the High Court to modify any condition imposed by a Magistrate while passing an order of bail u/S. 437 of Cr.P.C. whereas Section 439(1)(a) of Cr.P.C. empowers the High Court to release a person on bail but when doing so in connection with offences punishable with imprisonment of seven years or more under Chapter VI, XVI and XVII of I.P.C. or of abetment or conspiracy or attempt to commit such offences, the High Court in its discretion may impose any condition considered necessary in the

attending facts and circumstances. The Madhya Pradesh High Court held that: -

"8.1 It is also settled that grant of bail is a rule whereas its denial is an exception. Once bail is granted subject to certain conditions by the High Court u/S. 439(1)(a) of Cr.P.C. as is the case herein, the power to modify or delete the conditions subject to which bail is granted, is also inherently vested with the High Court.

8.2. The power of amending or deleting any condition, subject to which bail order u/S. 439(1)(a) of Cr.P.C. is granted, is however not expressly provided in Cr.P.C. Thus, the only course available for seeking and granting modification/deletion of such a condition is by invoking the inherent powers of this Court u/S. 482 of Cr.P.C. to ensure the ends of justice.

8.3. Section 482 of Cr.P.C. saves inherent powers of this Court to be exercised inter alia to secure the ends of justice. The ends of justice can only be secured when in absence of any express provision this Court is not prevented from deleting/modifying any of the conditions subject to which an order of bail u/S. 439(1)(a) of Cr.P.C. is passed. If such inherent powers are otherwise not available to this Court u/S. 482 of Cr.P.C., then object of insertion of Section 482 of Cr.P.C. would stand defeated and this Court would be rendered a toothless tiger.

9. The Legislature while enacting the Code of Criminal Procedure could never have approved a situation where this superior Court is handicapped to exercise its inherent powers to modify/delete a condition imposed u/S. 439(1)(a) of Cr.P.C. despite existence of compelling circumstances merely because of absence of enabling provision in the Cr.P.C.

9.1. The object behind bestowing inherent powers in this Court is to do complete justice and to prevent miscarriage of justice. The inherent powers are saved with this Court to be exercised in such circumstances where cause for doing complete justice or preventing failure of justice exists, but there is no express provision in Cr.P.C. As such Constitutional Courts are saved with such inherent powers to do complete justice without being inhibited or disabled by absence of enabling provision."

Although the Madhya Pradesh High Court has mentioned in the judgment the learned State Counsel's contention that as per the law laid down in **Atul Shukla vs. State of M.P. & Another** (2019) 17 SCC 299 no recall, review or modification of an order passed under Cr.P.C. is permissible by exercise of inherent powers under Section 482 Cr.P.C., it did not deal with this contention.

28. Moreover, in **Jagdish Arora** (Supra) the accused had not filed a Miscellaneous Application for modification or deletion of the condition filed in the bail application itself after its final decision, rather he had filed a fresh application filed under Section 482 Cr.P.C. Therefore, even the Division Bench of the Madhya Pradesh has not laid down in **Jagdish Arora (supra)** that after final decision of a bail application, the court granting bail can modify or delete any condition that was there in the bail order, by filing a miscellaneous application in the decided case.

29. In the present case also, the applicants had filed an application before the trial Court seeking permission to travel abroad. The application was rejected and

the order of rejection was challenged by filing an application under Section 482 Cr.P.C. No. 6443 of 2023 and that application is still pending. Even if the applicants contend that the application has become infructuous as a final order has been passed on 27.10.2023 confirming the order, it is open to the applicants to file a fresh application seeking permission from the trial Court or to file a fresh application under Section 482 Cr.P.C. However, seeking modification of the condition by filing a miscellaneous application in the decided matter for deletion of condition, would not be maintainable in view of the provision contained in Section 362 Cr.P.C. and in view of the law laid down by the Hon'ble Supreme Court in **Atul Shukla vs. State of M.P. & Another** (2019) 17 SCC 299.

30. The learned counsel for the applicants has next submitted that a co-accused person Shailendra Yadav was arrested in the present case and he has been enlarged on bail and no such condition has been imposed in the order granting bail to the aforesaid co-accused. Shailendra Yadav was granted bail under Section 437 Cr.P.C, which does not mandate imposing any such condition, as are required to be imposed while granting anticipatory bail to any person under Section 438 Cr.P.C. The applicants were granted interim anticipatory bail by means of the order dated 23.05.2023 and the condition, which is being sought to be deleted by the applicants, was imposed in accordance with the mandatory provision contained in Section 438(2) Cr.P.C. as it applies to the State of U.P.

31. The learned counsel for the applicants has lastly submitted that the complainant is also an accused in a criminal case initiated by the applicants by filing an F.I.R. and in the order granting bail to the complainant also no such conditions have been imposed. The complainant has been granted bail under Section 439 Cr.P.C., like the aforesaid Shailendra Yadav, and he has not been granted anticipatory bail under Section 438 Cr.P.C. Therefore, the non-imposing of condition which is mandatory under Section 438 Cr.P.C. and not mandatory under Section 439 Cr.P.C, cannot be a ground for deletion of the condition in an order granting anticipatory bail to the applicants under Section 438 Cr.P.C.

32. The learned counsel for the applicants submitted that the application for deletion of condition has been filed under Section 482 Cr.P.C. However, this is a miscellaneous application filed in the decided application and it is not a fresh application under Section 482 Cr.P.C. The applicants are very well aware of the mode and manner of filing fresh applications under Section 482 Cr.P.C. and the applicants have themselves already filed an application under Section 482 Cr.P.C. No. 6443 of 2023, challenging the order passed by the trial court refusing permission for their travel abroad. However, this application has been filed as a miscellaneous application after final decision of the application under Section 438 Cr.P.C. by means of the order dated 27.10.2023, after which the court became functus officio and can only order correction of clerical or arithmetical mistakes in the order dated 27.10.2023 and it cannot modify the order by deleting the condition.

33. The applicants have placed reliance on a decision of the **Parvez Noorodin Lokhandwalla Vs. State of**

Maharashtra: (2020) 10 SCC 77. However, the question of entertainablity of a miscellaneous application seeking modification of an order after final decision of the case, was not involved in that case and, therefore, that case is of no relevance for decision of this issue.

34. In view of the aforesaid discussions, I find that the miscellaneous application for deletion of a condition after final decision of the Anticipatory Bail Application No. 1224 of 2023, is not maintainable and the application is accordingly ***dismissed*** as such.

(2024) 2 ILRA 1312
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.02.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Crl. Misc. Bail Application No. 1311 of 2024

Vikas Singh ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Trilok Nath Yadav

Counsel for the Respondent:
G.A.

Bail; Delay in Trial--First bail application rejected- in judicial custody for more than six years- More than one year has passed since the first bail application was rejected- no possibility to conclude the trial shortly-these reasons may be considered as fresh grounds to allow Sectionond bail application. **Bail Application allowed.** (E-9)

Cases cited:

1. U.O.I.Vs K.A. Najeeb,AIR 2021 Supreme Court 712

2. Paras Ram Vishnoi Vs The Director, Central Bureau of Investigation- Criminal Appeal No. 693 of 2021 (Arising out of SLP (Crl) 3610 of 2020)

3. Gokarakonda Naga Saibaba Vs St. of Mah., (2018) 12 SCC 505

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri T.N. Yadav, learned counsel for the applicant and learned A.G.A. for the State.

2. It has been submitted by the learned counsel for the applicant that this is second bail application and the applicant is in jail since 15.1.2018 in Case Crime No. 6/2018 u/s 302, 201/34 IPC, P.S. Jahangirganj, District Ambedkar Nagar. It has been submitted that the applicant has been falsely implicated in this case as he has not committed any offence as alleged.

3. The first bail application bearing Bail Application No. 4266 of 2022 has been rejected by this Court vide order dated 25.1.2023, which reads as under :

"Heard learned counsel for the applicant and the learned Additional Government Advocate for the State.

As per learned counsel for the applicant, the present applicant (Vikas Singh S/O Lakhan Singh Alias Laxman Singh) is languishing in jail since 15.01.2018 in Case Crime No.06 of 2018, under Sections 302/201/ 34 I.P.C., Police Station-Jahangirganj, District-Ambedkar Nagar.

After arguing the matter at some length, learned counsel for the applicant

has requested that the present bail application may be disposed of at this stage as he shall not address the Court on merits of the bail application but the direction may be issued to the learned trial court to conduct and conclude the trial with expedition.

Learned Additional Government Advocate has no objection if the direction for conclusion of trial is issued by this Court.

Therefore, without entering into merits of the issue, the present bail application is rejected at this stage.

However, learned trial court is directed to conduct and conclude the trial, strictly in accordance with law, with expedition preferably within a period of six months from the date of receipt of a certified copy of this order. If any of the witnesses does not co-operate in the trial proceedings properly, the learned trial court may take appropriate coercive steps against him/her/them. It is further directed that the learned trial court shall fix short dates and if possible the trial in question may run on day-to-day basis in terms of provisions of Section 309 Cr.P.C. which provides that the proceedings of trial court may run on day-to-day basis.

I am unable to comprehend that when there is specific provision in the Cr.P.C. to conduct the trial on day-to-day basis in the serious offence, as to why such exercise is not carried out by the learned trial court.

However, it is made clear that if the trial in question is not concluded within the aforesaid stipulated time, the liberty is given to the applicant to file second bail application and in such bail application the point of non conducting the trial within stipulated time may be considered as a fresh ground."

4. In the aforesaid bail order the detail of case crime number etc. has been indicated and it has also been indicated with the present applicant is in jail since 15.1.2018, therefore, the petitioner is in judicial custody for more than six years.

5. While arguing the first bail application the learned counsel for the applicant had not addressed the merits of the case and had requested that the direction may be issued to expedite the trial. This Court vide order dated 25.1.2023 has directed to conclude the trial within a period of six months by observing that there is specific provision in Code of Criminal Procedure to conduct the trial on day to day basis in the heinous cases, therefore, the trial may be conducted invoking such provisions of law.

6. More than one year period has passed w.e.f. the date when the first bail application was rejected on 25.1.2023 but the trial in question has not been concluded. As per para 15 of the bail application the trial has been fixed for examination of the defense evidence. Further in para 26 of the bail application it has been categorically indicated that the present applicant has got no criminal history of any kind whatsoever except the present case and he has not been convicted in any offence. Therefore, learned counsel for the petitioner has prayed that considering the period of long incarceration of the applicant and also the fact that despite the specific direction issued by this Court to conclude the trial within stipulated time, such trial has not been concluded within time stipulated, he may be granted bail.

7. The learned counsel for the applicant has given an undertaking on

behalf of applicant that the applicant shall not misuse the liberty of bail and shall cooperate with the trial proceedings and shall abide by all terms and conditions of bail, if granted.

8. Learned A.G.A. has however, tried to convince the Court to the effect that by filing second bail application no fresh ground has been taken but being confronted as to whether the aforesaid two grounds which have been taken by the petitioner i.e. the trial has not been concluded within time so stipulated and the period of incarceration i.e. long incarceration of more than six years may not be considered as fresh grounds, the learned AGA could not dispute.

9. The main points raised by Sri Yadav are that since there is no possibility to conclude the trial in near future, therefore, the period of long incarceration of the present applicant in jail i.e. more than six years may be considered in view of the dictum of Apex Court in re: ***Union of India vs. K.A. Najeeb reported in AIR 2021 Supreme Court 712*** and in the case of ***Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation passed in Criminal Appeal No. 693 of 2021 (Arising out of SLP (Crl) 3610 of 2020).*** More particularly, despite the direction issued by this Court on 25.1.2023 to conclude the trial within six months but trial has not been concluded.

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

11. The Apex Court in re: ***Union of India vs. K.A. Najeeb (supra)*** wherein it has been held as under :

"This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India, it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, Courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, Courts would ordinarily be obligated to enlarge them on bail."

12. In the case of ***Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation (supra)*** the Apex Court has held as under :

"On consideration of the matter, we are of the view that pending the trial we cannot keep a person in custody for an indefinite period of time and taking into consideration the period of custody and that the other accused are yet to lead defence evidence while the appellant has already stated he does not propose to lead any evidence, we are inclined to grant bail to the appellant on terms and conditions to the satisfaction of the trial court."

13. Besides, the dictum of the Hon'ble Apex Court in re; ***Gokarakonda Naga Saibaba v. State of Maharashtra, (2018) 12 SCC 505***, wherein it has been held that if all fact/ material witnesses have been examined, the bail application of the accused may be considered.

14. In the present case, the trial has not been concluded within the time so

stipulated by this Court while rejecting the first bail of the present applicant. All prosecution witnesses have been examined. The petitioner is in judicial custody for more than 6 years and there is no possibility to conclude the trial shortly. Hence, all the aforesaid reasons may be considered as fresh grounds to allow second bail application in view of the dictum of Apex Court in re: ***Union of India vs. K.A. Najeeb (supra), Paras Ram Vishnoi vs. The Director, Central Bureau of Investigation (supra) and Gokarakonda Naga Saibaba (supra).*** So, the applicant is entitled to be released on bail in this case.

15. Therefore, without entering into the merits of the case, the present bail application is **allowed**.

16. Let the applicant ***Vikas Singh***, involved in aforesaid case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions which are being imposed in the interest of justice:-

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

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

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

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

(v) The applicant shall not leave the country without permission of the Court concerned.

[Before parting with, I appreciate the efforts and research done by Mr. Piyush Tripathi, Research Associate and Mr. Vaibhav Tyagi, Law Intern, attached with me, in finding out the relevant case laws, applicable in the present case.]

(2024) 2 ILRA 1315
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.12.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Crl. Misc. Bail Application No. 9126 of 2023

Jitendra ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri J.B. Singh

Counsel for the Respondents:
G.A.

Bail-delay-Registers of processes to be maintained under Rule 12 of the General Rules (Criminal) shall be regularly updated by the learned trial courts- all issues which create impediments or legal issues that arise during the course of bail hearings-are necessary to be decided for fair administration of justice in bail jurisdiction- ought to be decided by the Court hearing the bail application. **Application allowed.** (E-9)

Cases cited:

1. Criminal Misc. Bail Application No. 16871 of 2023, (Bhanwar Singh @ Karamvir Vs St. of U.P.)

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

1. Heard Shri J.B. Singh, learned counsel for the applicant and Shri Ashok Mehta, learned Additional Advocate General assisted by Shri Paritosh Kumar Malviya, learned AGA-I for the State.

2. Personal affidavits filed on behalf of Principal Secretary (Home), Government of U.P., Lucknow and Director General of Police, Government of U.P., Lucknow is taken on record.

3. This Court in **Criminal Misc. Bail Application No. 16871 of 2023, (Bhanwar Singh @ Karamvir Vs. State of U.P.)** noticed the issues arising in administration of justice in bail jurisdictions. This Court has repeatedly held that bail jurisdiction does not denude the constitutional status of the Court. All issues which create impediments or legal issues that arise during the course of bail hearings and are necessary to be decided for fair administration of justice in bail jurisdiction ought to be decided by the Court hearing the bail application. **Bhanwar Singh (supra)** noticed the problem of delay in trial being caused by chronic failure of the police authorities to serve summons and execute coercive processes issued by the Court for appearance of witness on appointed dates before the trial court.

4. This Court vide order dated 14.09.2023 issued certain guidelines. In compliance of this order, the Director General of Police, Government of U.P., Lucknow and Principal Secretary (Home), Government of U.P. have filed their affidavits.

5. The relevant paragraphs of the affidavit filed by the Principal Secretary (Home) is being extracted hereunder:

"5. That in respect of the directions given by Hon'ble High Court from time to time and specially in 'Bhanwar Singh Case' regarding timely execution of processes issued by the learned trial courts the deponent vide Government Order No. HC-100/6-PO-9-2023 Dated 14.10.2023 has issued the following directions.

i. A Superintendent of Police rank officer has been appointed as a Nodal officer for effective execution of processes (summons/warrants/notices) issued by learned trial courts, in every police Commissionerate/District. In this respect D.G. police circular dated 10.10.2023 will be strictly complied by every Nodal officer.

ii. All District Nodal officers will ensure the strict compliance of DG police circular dated 10.10.2023.

iii. All District Magistrates, Executive Magistrates, District Incharge of police will ensure the compliance of Government Order dated 23.11.2022 issued

by Department of Home, Government of Uttar Pradesh, Lucknow

iv. Additional Director General (Prosecution) is directed to issue a direction regarding maintainability of witness register with 'Court Moharrir', in which name and address, mobile number, Aadhar number of every prosecution witnesses will be mentioned and a direction is also issued to insert a column in the 'Pairavi Register' of concerned Pairokar of Police Station.

v. District nodal officer will ensure that the Public Prosecutor and concerned 'Court Moharrir' will have access to process register of learned trial courts so that police station/ summon cell process register could be matched. A direction to learned trial courts to this effect, by Hon'ble High court, will be required.

vi. As per provision of chapter 3 read with rule 12 of General Rules Criminal as well as circular order C.L Number 42/98 dated 20.8.98 issued by Hon'ble High court the name, designation, mobile number of police official who received the court process will be clearly mentioned in the column of process register of learned trial court, so that his responsibility could be fixed. A copy of Government Order No. HC-100/6-PO-9-2023 Dated 14.10.2023 is annexed as Annexure no.2 to this affidavit.

6. That it is pertinent to submit here that regarding timely execution of processes issued by the learned trial courts the Director General of Police, Uttar Pradesh vide DG Circular No. 40/2023, Dated 10.10.2023 has issued the following directions.

i. A central register will be prepared for entering processes received from different trial courts in the office of the Nodal Officer and a Desk will be established for sending the summon/ warrants for its execution daily processes will be recorded in central register, policeman will be deployed at the process desk.

ii. The service receipt received after service of summons/warrants will be entered in the central register by policeman posted at summon desk and service report will be communicated to the concerned trial court.

iii. In compliance with the processes served, the details of the witnesses present and examined in trial courts will also be complied through summon/warrant desk and it will be reviewed from time to time at the competent officer level.

iv. Nodal officers will weekly examine the Summons/warrants execution register.

v. A monthly statement will be prepared in respect of the service of processes and same will be presented before Nodal officer for perusal. The Nodal Officer will warn in writing to subordinate Officers and station in charge who are on laxity and after three consecutive months of laxity, so cause notice will be issued against the subordinate Officers and In-charge of Police Station.

vi. At District level Deputy Superintendent of Police/Additional Superintendent of Police and at Police Commissionerate level Assistant Police Commissioners will monitor the service of processes by the concerned police stations under their local jurisdiction and if any laxity will be found Supervisory officers will be accountable.

vii. Every Nodal Officer will be responsible for execution of service of processes (summons / warrants/ notices) under their local jurisdiction.

viii. Work of Nodal Officers will be regularly assessed by Additional

Director General of Police (Zonal) and Regional Inspector General of Police / Deputy Inspector General of Police in case of any laxity, he will inform the head quarter of Director General of Police.

ix. As discussed above D.G. Circular no. 30/2023 dated 16.08.2023 has been partially changed as Superintendent of Police will be a Nodal Officer in place of Additional Superintendent of Police. A copy of DG police circular dated 10.10.2023 is annexed as Annexure No. 3 to this affidavit.

8. That this Hon'ble Court time to time observed that non presence of police witnesses in trial court is a main impediment for delaying of criminal trials. It is a issue of great concern, deponent is trying to fix departmental accountability for the timely presence of police personnel/witnesses (i.e. investigation officer etc.) in Criminal trial."

6. Similarly, the relevant paragraphs of the affidavit filed by the Director General of Police, Government of U.P., Lucknow are extracted hereunder:

"5. That in respect of the directions given by Hon'ble High Court from time to time and specially in 'Bhanwar Singh Case' regarding timely execution of processes issued by the learned trial courts the Principal Secretary (Home), Govt. of U.P. vide Government Order No. HC-100/6-PO-9-2023 Dated 14.10.2023 has issued the following directions:

i. A Superintendent of Police rank officer has been appointed as a Nodal officer for effective execution of processes (summons/warrants/notices) issued by learned trial courts, in every police Commissionerate/District. In this respect D.G. police circular dated 10.10.2023 will be strictly complied by every Nodal officer.

ii. All District Nodal officers will ensure the strict compliance of DG police circular dated 10.10.2023.

iii. All District Magistrates, Executive Magistrates, District Incharge of police will ensure the compliance of Government Order dated 23.11.2022 issued by Department of Home, Government of Uttar Pradesh, Lucknow.

iv. Additional Director General (Prosecution) is directed to issue a direction regarding maintainability of witness register with 'Court Moharrir', in which name and address, mobile number, Aadhar number of every prosecution wintess will be mentioned and a direction is also issued to insert a column in the 'Pairavi Register' of concerned Pairokar of Police Station.

v. District Nodal officer will ensure that the Public Prosecutor and concerned 'Court Moharrir' will have access to process register of learned trial courts so that police station/summon cell process register could be matched. A direction to learned trial courts to this effect, by Hon'ble High Court, will be required.

vi. As per provision of Chapter 3 read with Rule 12 of General Rules Criminal as well as circular order C.L. Number 42/98 dated 20.08.98 issued by Hon'ble High Court the name, designation, mobile number of police official who received the court process will be clearly mentioned in the column of process register of learned trial court, so that his responsibility could be fixed. A copy of Government Order No. HC-100/6-PO-9-2023 Dated 14.10.2023 is annexed as Annexure No. 2 to this affidavit.

6. That in respect of the directions given by Hon'ble High Court from time to time and specially in 'Bhawar Singh Case' regarding timely execution of processes issued by the learned trial courts the

deponent has issued the following directions.

i. A central register will be prepared for entering processes received from different trial courts in the office of the Nodal Officer and a Desk will be established for sending the summon/warrants for its execution daily processes will be recorded in central register, policeman will be deployed at the process desk.

ii. The service receipt received after service of summons/warrants will be entered in the central register by policeman posted at summon desk and service report will be communicated to the concerned trial court.

iii. In compliance with the processes served, the details of the witnesses present and examined in trial courts will also be complied through summon/warrant desk and it will be reviewed from time to time at the competent officer level.

iv. Nodal officers will weekly examine the Summons/warrants execution register.

v. A monthly statement will be prepared in respect of the service of processes and same will be presented before Nodal officer for perusal. The Nodal officer will warn in writing to subordinate Officers and station in charge who are on laxity and after three consecutive months of laxity, so cause notice will be issued against the subordinate Officers and In-charge of Police Station.

vi. At District level Deputy Superintendent of Police/Additional Superintendent of Police and at Police Commissionerate level Assistant Police Commissioners will monitor the service of processes by the concerned police stations under their local jurisdiction and if any laxity will be found Supervisory officers will be accountable.

vii. Every Nodal Officer will be responsible for execution of service of processes (summons /warrants/ notices) under their local jurisdiction.

viii. Work of Nodal Officers will be regularly assessed by Additional Director General of Police (Zonal) and Regional Inspector General of Police / Deputy Inspector General of Police in case of any laxity, he will inform the Headquarter of Director General of Police.

ix. As discussed above D.G. Circular no. 30/2023 dated 16.08.2023 has been partially changed as Superintendent of Police will be a Nodal Officer in place of Additional Superintendent of Police. A copy of DG police circular dated 10.10.23 is annexed as Annexure No.3 to this affidavit.?

7. The Government Orders and the directions issued by the Principal Secretary (Home), Government of U.P., Lucknow as well as Director General of Police, Government of U.P., Lucknow extracted herein earlier from now on shall be treated as orders of this Court for purposes of implementation.

8. The Director General of Police, Government of U.P., Lucknow and other responsible officials shall ensure strict compliance of the directions extracted earlier.

9. Registers of processes to be maintained under Rule 12 of the General Rules (Criminal) shall be regularly updated by the learned trial courts.

10. The Judicial Training and Research Institute report submitted by Shri Vinod Kumar Rawat, Director, Judicial Training and Research Institute in regard to expeditious service of summons and execution of coercive measures to compel the appearance of witnesses shall also be examined by the Government.

11. It needs to be emphasized that non appearance of witnesses is one very critical factor but not the sole cause for delays in trials. Hence, this cause of delay cannot be looked at in isolation to the exclusion of infrastructure which is required for discharge of judicial functions. For a long term and enduring solution, a composite vision has to be adopted and holistic endeavours have to be made. Mere presence of witnesses in itself will not be sufficient to curtail the delays in the trials. The problem of delayed trials requires that various elements of judicial infrastructure have to grow in tandem with the administrative scheme drawn up by the Uttar Pradesh Police and the State Government for compelling appearance of witnesses.

12. The Government, other stakeholders as well as the Courts shall strive to meet all corresponding requirements of the Courts; and make endeavours to upgrade infrastructure so that witnesses can be duly examined when they appear before the trial court on the appointed dates.

13. The directions issued by the Director General of Police, Government of U.P. as well as Principal Secretary (Home) shall be treated as directions of this Court.

Order in Bail Application

14. This is the second bail application.

15. By means of the the bail application the applicant has prayed to be enlarged on bail in Case Crime No. 483 of 2020 at Police Station- Dankaur, District- Gautam Budh Nagar under Sections 498A, 304B, 201, 120B IPC and Section 3/4 Dowry Prohibition Act. The applicant is in jail since 08.03.2021.

16. The applicant is on interim bail granted by this Court by order dated 22.05.2023.

17. The applicant is entitled to bail for the reasons narrated in the order passed this Court on 22.05.2023.

18. Let the applicant- **Jitendra** be granted bail in the aforesaid case crime number under the same conditions.

19. The bail application is allowed.

20. Government Advocate to send a copy of this order to Director General of Police, Government of U.P. and Principal Secretary(Home), Government of U.P., Lucknow.

21. The Court appreciates the assistance rendered by Shri Ashok Mehta, learned Additional Advocate General assisted by Shri Paritosh Kumar Malviya, learned AGA-I for the State.

(2024) 2 ILRA 1320
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 29.01.2024

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Crl. Misc. Bail Application No. 15239 of 2022

Yogendra Kumar ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:

Sunil Kumar, Akhil Bajpai, Madima Trivedi, Rakesh Kumar Tripathi

Counsel for the Respondent:
G.A.

Narcotic Drugs and Psychotropic Substances Act, 1985-Section 50, 52A- Non-compliance of Sectiontion 50 NDPS Act- not been searched by the gazetted officer or by the magistrate- no independent witness to the recovery- no other case under NDPS Act-**Bail Application allowed.** (E-9)

Cases cited:

1. Bothilal Vs Narcotics Control Bureau, 2023 SCC OnLine SC 498

2. Simarnjit Singh Vs St. of Punjab, 2023 SCC OnLine SC 906

3. U.O.I.Vs Mohanlal,(2016) 3 SCC 379

4. Ranjitsing Brahmajeetsing Sharma Vs St. of Maharashtra, (2005) 5 SCC 294

5. Mohd. Muslim @ Hussain Vs St. of (NCT of Delhi): 2023 Livelaw (SC)260

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

1. Heard learned counsel for the applicant, learned AGA for the State and perused the record.

2. It is alleged in the prosecution case that on 21.11.2022 at 5:20 hours, while the police party was patrolling and reached near Janjadwapur crossing, one person was coming from Debiyapur on foot. On seeing the police personnel, he turned towards Jadwapur road and when the police tried to speak him, he started running, thereafter, he was followed and caught after 30 paces away. After being asked the reason for running, he confessed his guilt. Upon being apprised that under NDPS Act he has option to be searched by some gazetted officer or the magistrate, he gave his consent to be searched by the police officials who caught him. Written consent was taken from him and after that he was personally searched and bag held in his hand was also searched. From the bag, 11 wrappers were found, total weight of which was found to be 554 grams, out of which 40 gram was taken as a sample and remaining contraband was sealed.

3. Learned counsel for the applicant submits that there is total non-compliance of Section 50 NDPS Act. The applicant has not been searched by the gazetted officer or by the magistrate. There is no independent witness to the recovery. The applicant is languishing in jail since 21.11.2022. The applicant has explained his criminal history in para 13 of the bail application. There is no other case under NDPS Act against the applicant.

4. Learned counsel for the applicant further submits that there is total non-compliance of Section 52A of NDPS Act. The samples have been drawn on the spot and not in front of the magistrate. Prosecution has not obtained any certificate from the magistrate as required under Section 52A of NDPS Act. No photographs of the substance have been taken. Even no application has been filed before the magistrate under sub section 2 of Section 52A of NDPS Act. The alleged contraband has been seized and representative samples have been drawn without the permission of the concerned magistrate. List of samples so drawn have not been certified by the magistrate. The process of drawing the samples is not under supervision of the magistrate and the entire exercise has not been certified by the magistrate.

5. It is further submitted that there is no possibility of the applicant of fleeing away after being released from jail or tampering with the witnesses. In case the

applicant is enlarged on bail, he shall not misuse the liberty of bail.

6. Learned AGA has opposed the bail application submitting that the applicant has a criminal history of 9 cases and therefore, he is not entitled to be enlarged on bail. However, he could not show anything from the record that there is compliance of Section 52A of NDPS Act.

7. Learned counsel for the applicant in support of his contention has relied on the judgment of the Supreme Court passed in the case of ***"Bothilal v. Narcotics Control Bureau, 2023 SCC OnLine SC 498"***. Emphasis is on para 16 of the judgment. He has further placed reliance on the judgment of the Supreme Court passed in the case of ***"Simarnjit Singh v. State of Punjab, 2023 SCC OnLine SC 906"***, wherein the Court while relying on the judgment of ***"Union of India v. Mohanlal, (2016) 3 SCC 379"***, has held that drawing of samples from all the packets at the time of seizure is not in conformity with the law laid down by the Supreme Court in the case of ***Mohanlal (supra)***.

8. So far as the criminal history of the applicant is concerned, he has relied on the judgment of the Supreme Court passed in the case of ***"Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294"***. Emphasis is on para 49 of the judgment.

9. Perused the record.

10. From perusal of the record, prima facie it appears that recovery was effected from polythene carried out by the accused and allegedly the said polythene contained 554 gram of alprazolam and prima facie there appears to be a clear non-compliance of the mandate of Section 52 A of NDPS Act as drawing of representative samples have not been done in presence of the magistrate. There is no record to show that samples have been enlisted and the correctness of the list of sample so drawn have been certified by the magistrate, neither there are any photographs of the substance which were taken in presence of the magistrate, thus, prima facie mandate of Section 52A(3) NDPS Act is not followed.

11. In view of the law laid down by the Supreme Court in the case of ***Bothilal (supra)***, recovery made by the prosecution prima facie becomes doubtful being an act of violation of Section 52A of NDPS Act, hence, following the law explained in the case of ***Mohd. Muslim @ Hussain Vs. State of (NCT of Delhi): 2023 Livelaw (SC)260***, the first test of Section 37 of NDPS Act is satisfied in this case. The applicant has no criminal history of the offence under NDPS Act and the criminal history of rest of the cases cannot be portrayed as a bar as held by the Supreme Court in the case of Ranjitsing Brahmajeetsing Sharma (supra), hence, the second test is also satisfied.

12. Accordingly, in view of the discussions made herein above, I am of the opinion that the applicant is entitled to be enlarged on bail.

13. The bail application is allowed.

14. Let the applicant, ***Yogendra Kumar***, involved in Case Crime/FIR No. 357/2022, under Sections 8/22 NDPS Police Station - Sadarpur, District - Sitapur, be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions

which are being imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence during the trial.

(ii) The applicant will not pressurize/ intimidate the prosecution witness.

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

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

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

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

(2024) 2 ILRA 1323
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE
THE HON'BLE KRISHNA PAHAL, J.

Crl. Misc. Bail Application No. 17725 of 2023

Anil Kumar Mishra ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri Niraj Kumar Dwivedi, Sri Pradeep Kumar Singh, Sri Prabhakar Awasthi

Counsel for the Respondent:
G.A., Sri Saurabh Chaturvedi, Sri Shyam Shankar Mishra, Sri I.K. Chaturvedi, Sri Rajat Sharma

Bail-Allegation- amount of Rs. 34,79,175/- has been embezzled- FIR lodged regarding the embezzlement of amount of Rs. 31,39,638/- only-all the withdrawal has been made through cheques - no FSL report on record to suggest that the signatures have been forged-applicant has no criminal history- grant of bail is a rule and refusal is an exception. **Bail Application allowed.** (E-9)

Cases cited:

1. Emperor Vs H.L. Hutchinson, AIR 1931 All 356

(Delivered by Hon'ble Krishan Pahal, J.)

1. List has been revised.

2. Heard Sri Prabhakar Awasthi and Sri Niraj Kumar Dwivedi, learned counsels for the applicant and Sri I.K. Chaturvedi, learned Advocate assisted by Sri Rajat Sharma, learned counsel for the informant as well as Sri R.P. Patel, learned A.G.A. for the State and also perused the record.

3. Applicant seeks bail in F.I.R./Case Crime No. 55 of 2023, under Sections 420, 409, 467, 468, 471 IPC, Police Station Sujanganj, District Jaunpur, during the pendency of trial.

PROSECUTION STORY:-

4. As per prosecution story, the applicant is stated to be the Additional Clerk in the institution being run by the informant, who happens to be its manager. The job of the applicant was to take care of the documents of the College including pertaining to the bank accounts in Union

Bank of India, Branch Sujanganj, Jaunpur and he used to take care of all the transactions. Without any information, the applicant is stated to have absented himself since 9.3.2022. Despite many letters and reminders being sent to the applicant, no clarification was accorded by him. On suspicion, the statement of the account of the institution was taken from the Bank which indicated that an amount of Rs. 31,39,638/- has been wrongly withdrawn and the same has been transferred to the account number 366602010020750 of the applicant and he has misused the same.

5. It is also alleged in the FIR that the applicant had forged the signatures of the informant on the cheques and has caused loss to the State Ex-chequer including the institution. The Principal of the institution is also stated to have sent several letters to the applicant but he did not respond to any of them. On 16.1.2023, the Management Committee of the institution held an extraordinary meeting and passed a resolution that a 3-member committee shall open the wardrobe belonging to the applicant and get it video graphed. The said 3-member committee of Vijay Shankar Mishra, Sri Rakesh Kumar Tiwari and Heera Lal, in presence of the informant, had broke open the said wardrobe on 28th, 29th and 30th of January, 2023 and found several documents and files missing from it. A bare perusal of the record indicated that the applicant (Anil Kumar Mishra) had interpolated the documents and had taken them away.

RIVAL CONTENTIONS:

Contention On Behalf of Applicant:-

6. Learned counsel for the applicant has stated that the applicant is maliciously being prosecuted in the present case due to ulterior motive and has the apprehension of his arrest. The applicant has nothing to do with the said offence as alleged by the prosecution. Learned counsel has next stated that the applicant is stated to be working on the said post since 2018. Learned counsel has further stated that as per the letters sent to the applicant dated 25.12.2022, filed as Annexure-7 to the affidavit, an amount of Rs. 18,09,263/- is stated to have been withdrawn by the applicant, an amount of Rs. 13,30,375/- is stated to have been withdrawn by Kallu, and an amount of Rs. 3,39,537/- is stated to have been withdrawn by one Shyam Bahadur Yadav. It is next stated that the said letter indicates towards the embezzlement of Rs. 34,79,175/- but the FIR has been instituted regarding the embezzlement of Rs. 31,39,638/- only, which pertains to the said amount withdrawn by the applicant and Kallu. Learned counsel has stated that the said fact itself falsifies the prosecution story. It is stated that the alleged third person i.e. Shyam Bahadur Yadav had deposited the said amount in the account of the institution.

7. Learned counsel has stated that the co-accused person Kallu is stated to have sent a letter to the Manager/Principal of the institution on 18.4.2023 stating that he was ready to return the stipulated amount of Rs. 13,30,375/- due towards him. It is also alleged by the said person Kallu that it was the applicant, who used to give him cheques and take him to the Branch of the Bank and used to get the amount withdrawn from the account and retained the money with him. He was fleeced and fooled on the ground that he shall be promoted from Class IV employee to the post of Clerk. It is stated that the said

statement is also contradictory, as the said Kallu is stated to be committing the said forgery from the year 2013 and the applicant came into existence on the said post in the year 2018, as such, the complete prosecution story falls to the ground.

8. Learned counsel has also stated that all the money transactions have taken place through cheques and there is no FSL report on record to suggest that the said signatures of the informant have been forged by anybody. Learned counsel has further stated that no bank official could pass such large number of cheques bearing fake signatures without collusion.

9. Learned counsel has also placed reliance on the account statement of the applicant filed as Annexure-2 to the rejoinder affidavit dated 11.1.2024, whereby he has indicated that the money deposited was immediately withdrawn, as is evident from the transactions dated 6.11.2018, 29.5.2019, 12.7.2019, 30.8.2019, 30.12.2019, 17.1.2020, 8.5.2020, 5.8.2020 and 18.5.2021. Learned counsel has stated that it was the modus operandi of the informant was that he himself issued cheques to the applicant and other persons including Kallu and Shyam Bahadur Yadav and used to retain the amount in cash with him but he has himself exonerated the two other persons and the applicant has been made a scapegoat by the informant, to save his own skin.

10. Several other submissions have been made on behalf of the applicant to demonstrate the falsity of the allegations made against him. The circumstances which, as per counsel, led to the false implication of the applicant have also been touched upon at length. It is further stated that there is no criminal history of the applicant. The applicant is languishing in jail since 17.3.2023. In case, the applicant is released on bail, he will not misuse the liberty of bail.

Contention On Behalf Of The Informant:-

11. On the other hand, learned A.G.A. and learned Senior Counsel for the informant have vehemently opposed the prayer for grant of anticipatory bail on the ground that the applicant is the chief architect of the said crime and the signatures on the said cheques through which the amount has been withdrawn have been sent to the forensic laboratory by the investigating officer, although final report (charge sheet) has been filed. The FSL report is still awaited. Learned Senior Counsel has further stated that the said amount received in the account of the applicant has been siphoned off to the loan account of the applicant and even income tax has been paid from it.

CONCLUSION:-

12. This Court in ***Emperor vs. H.L. Hutchinson, AIR 1931 All 356***, has observed that the grant of bail is a rule and refusal is an exception. A liberal interpretation to the provision for bail is the cardinal principle of criminal jurisprudence. It has also been observed by the Apex Court and this Court in a number of judgements that bail is not to be withheld as a punishment.

13. Keeping in view the nature of the offence, evidence on record regarding complicity of the accused, larger mandate of the Article 21 of the Constitution of India, and taking into consideration the fact that in total, an amount of Rs. 34,79,175/-

has been embezzled and FIR has been instituted regarding the embezzlement of amount of Rs. 31,39,638/- only, as such, there cannot be pick and choose in the said matter of embezzlement and also taking into consideration that all the withdrawal has been made through cheques and there is no FSL report on record to suggest that the signatures have been forged, coupled with the fact that the applicant has no criminal history, without expressing any opinion on the merits of the case, the Court is of the view that the applicant has made out a case for bail. The bail application is allowed.

14. Let the applicant- **Anil Kumar Mishra** who is involved in aforementioned case crime be released on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to following conditions. Further, before issuing the release order, the sureties be verified.

(i) The applicant shall not tamper with evidence.

(ii) The applicant shall remain present, in person, before the Trial Court on dates fixed for (1) opening of the case, (2) framing of charge and (3) recording of statement under Section 313 Cr.P.C. If in the opinion of the Trial Court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the Trial Court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

15. In case of breach of any of the above conditions, it shall be a ground for cancellation of bail.

16. It is made clear that observations made in granting bail to the applicant shall not in any way affect the learned trial Judge in forming his independent opinion based on the testimony of the witnesses.

(2024) 2 ILRA 1326
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.02.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Appeal No. 3 of 2019

Ajay Kumar ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Radhey Shyam Yadav, Sri Indra Sen Singh, Sri Sachin Mishra, Sri Dileep Kumar (Sr. Advocate)

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 302, 404, 406, 420, 467, 468 & 471 - Code of Criminal Procedure, 1973 - Sections 27, 173 & 313 - Indian Evidence Act, 1872 - Section 27 - Appellant challenged conviction under Sections 302, 404, 406, 420, 467, 468, 471 I.P.C. for murder of elderly couple and unauthorized withdrawal from their bank account. Court held: (1) Prosecution failed to prove appellant's involvement in homicidal deaths, as postmortem showed ante-mortem injuries but no poisoning evidence contradicted confession; viscera report negative for toxins (Sharad Birdhichand Sarda Vs St. of Mah., AIR 1984 SC 1622). (2) Recovery of deceased's mobile from appellant unproven, as sole witness (PW-1) turned hostile and no Section 27 disclosure St.ment existed (Pulukuri Kottaya Vs King-Emperor, AIR 1947 PC 67). (3) Unauthorized withdrawal of Rs. 6,70,000/- using appellant's cheque leaflets from deceased's account established, but bank officials' complicity and Shahnawaj's role unexplained; appellant's loss report and address change

probablized non-involvement (St. of Mah. Vs Damu, (2000) 6 SCC 269). (4) Circumstantial evidence chain incomplete; no motive beyond uncorroborated loan repayment, and alternate hypothesis (cheque book theft) viable (Jabir Vs St. of Uttarakhand, 2023 SCC OnLine SC 32). (5) Appellant's quick shift to new residence post-incident not proven, as bank records showed prior address change. Conviction and sentence reversed; appellant acquitted. (Paras 24-40)

Criminal Appeal Allowed.

Case Law Cited:

1. Sharad Birdichand Sarda Vs St. of Mah., AIR 1984 SC 1622 (Para 38)

2. Hanumant Vs St. of M.P., AIR 1952 SC 343 (Para 38)

3. Shivaji Sahabrao Bobade Vs St. of Mah., (1973) 2 SCC 793 (Para 38)

4. Pulukuri Kottaya Vs King-Emperor, AIR 1947 PC 67 (Para 28)

5. St. of Mah. Vs Damu, (2000) 6 SCC 269 (Para 33)

6. Jabir Vs St. of Uttarakhand, 2023 SCC OnLine SC 32 (Para 38)

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Dileep Kumar, learned Senior Counsel assisted by Sri Sachin Mishra, who have appeared to assist the Court as Amicus Curiae and Ms. Archana Singh, learned Additional Government Advocate appearing for the State.

2. This Criminal (Capital) Appeal has been filed by the accused/appellant Ajay Kumar against the Judgement and Order dated 04.04.2019 passed by learned Sessions Judge, Auraiya in Sessions Trial No. 54 of 2016 (State Vs. Ajay Kumar and 3 others) arising out of Case Crime No. 142 of 2014, under Sections 452, 302/34, 506 and 225 IPC, Police Station-Arwakatra, District-Auraiya whereby appellant has been convicted and sentenced to death for offence under Section 302 IPC and to pay a fine of Rs. 1,00,000/-, for offence under Section 452 IPC to undergo rigorous imprisonment for three years and a fine of Rs. 5000/- and in Sessions Trial No. 55 of 2016 (State Vs. Ajay Kumar) arising out of Case Crime No. 143 of 2014, under Section 25/27 of the Arms Act, Police Station-Arwakatra, District-Auraiya whereby appellant has been convicted for offence under Section 25 of the Arms Act and to undergo rigorous imprisonment for three years and a fine of Rs. 5000/-, for offence under Section 27 of the Arms Act to undergo rigorous imprisonment for five years and a fine of Rs. 5000/-. The fine shall be recoverable as an arrear of revenue. In default of payment of fine, there shall be no stipulation for additional imprisonment. Eighty per cent of the fine recovered shall be payable to the parents of the deceased as compensation.

3. In the present matter, the Trial Court has proceeded to send a Reference under Section 366 Cr.P.C. for confirmation of death sentence which is being decided herein below:-

4. Prosecution story, in brief, is as follows:-

The first informant Ram Pratap Awasthi, son of Shiv Shankar Lal, resident of Erwatipur, Police Station-Arwakatra, District-Auraiya moved a written Tehrir dated 10.10.2014 at 20:10 P.M. stating that on 10.10.2014 at around 6:30 P.M., when the first informant was sitting in his house talking to Prabha Kant and Ravish Kumar

while his young daughter Km. Nisha, aged about 14 years, was busy studying in the courtyard, in the meantime, his neighbourer Ajay Kumar, son of Ram Naresh alias Naresh Chandra Kori, entered into the house and fired at his daughter on her chest with a country-made pistol. Hearing the noise, people gathered and tried to nab the accused but the accused escaped leaving the country-made pistol on the spot. While nabbing, the parts of his torn clothes were left in his hands. The mother of the accused Radha Devi, brother Vijay and his wife intervened and helped him in escaping. Accused Ajay Kumar often stalked his daughter while she was on her way to school and extended threats. He did not complain to anyone due to family prestige. His daughter died on the spot due to fire-arm injury. Hence the FIR.

5. Thus, on the basis of the written report (Tehrir), a Chik FIR No. 142/2014, under Sections 452, 302, 506/34 IPC, Police Station Arwakatra, District-Auraiya was registered against four persons on 10.10.2014. The investigation was entrusted to Station House Officer-Vinod Kumar.

6. On 11.10.2014, on the pointing of accused/appellant Ajay Kumar, a country-made pistol of 315 bore, an empty cartridge and five live cartridges were recovered in a plastic bag kept inside his house. On the basis of which another FIR arising out of Case Crime No. 143 of 2014, under Section 25/27 of the Arms Act, Police Station Arwakatra, District-Auraiya was registered against Ajay Kumar.

7. During the course of investigation, plain earth and blood stained earth were recovered on 10.10.2014. The inquest report was prepared on 10.10.2014 at 9.00 P.M. On 11.10.2014, post-mortem report was prepared. During the post-mortem examination, following ante-mortem injuries were found on the body of the deceased (Km. Nisha):-

"(i) Entry Firearm wound size (1x1 cm) right side of chest in upper inner quadrant of breast 9 cm away from nipple. Blackening present. Margin inverted.

(ii) Exit wound of Firearm 11 cm, below left scapula and 12 cm. from spinal cord Size (1.5 x 1.5) cm.

(iii) Injury No. 1st through and through injury No. 2nd."

8. The cause of death was shown as 'shock and haemorrhage' due to firearm injury.

9. On 12.10.2014, the site plan was prepared and, subsequently, statement of witnesses were recorded under Section 161 Cr.P.C. After completion of investigation, the charge-sheet was submitted in Case Crime No. 142 of 2014 against Ajay Kumar and 3 others under Sections 302, 452, 506 IPC and the co-accused Vijay, Radha Devi and Geeta Devi were charge-sheeted additionally under Section 225 IPC and in Case Crime No. 143 of 2014 only appellant Ajay Kumar was charge-sheeted under Section 25/27 of the Arms Act.

10. After taking cognizance, the charges were framed in Sessions Trial No. 54 of 2016 against Ajay Kumar, Smt. Radha Devi, Vijay and Geeta Devi, under Sections 452, 302, 34, 506 IPC and against Radha Devi, Vijay and Geeta Devi under Section 225 IPC as well. In Sessions Trial No. 55 of 2016, the charges were framed against Ajay Kumar under Section 25/27 of the Arms Act. The accused denied their guilt and claimed to be tried.

11. During the trial proceedings, six prosecution witnesses were examined.

(i) P.W.-1 Ram Pratap Awasthi (father of the deceased/eye witness)

(ii) P.W.-2 Smt. Shashi Prabha (mother of the deceased/eye witness)

(iii) P.W.-3 Ram Chandra Shukla, (Panch Witness)

(iv) P.W.-4 Dr. Shailendra Kumar Singh, (conducted the post mortem)

(v) P.W.-5 S.I. Vinod Yadav (Investigating Officer)

(vi) P.W.-6 Awaneesh Dwivedi (I.O. of Case Crime No. 143 of 2014).

12. After the closure of prosecution evidence, statement of all the accused were recorded under Section 313 Cr.P.C. The accused/appellant denied the commission of crime and stated that due to village party bandi, he was falsely implicated in the present case. The other co-accused also denied the commission of crime.

13. The accused-appellant Ajay was convicted by the Trial Court under Sections 302, 452 IPC and Section 25/27 of the Arms Act and was acquitted from rest all other charges. The co-accused Radha Devi, Geeta and Vijay were acquitted from all the charges by the Trial Court.

14. The accused/appellant Ajay Kumar after having been convicted under Sections 302, 452, IPC and Section 25/27 of Arms Act preferred the present Criminal (Capital) Appeal challenging the Judgement and Order dated 04.04.2019. A Death Reference No. 02 of 2019 has also been filed under Section 366 Cr.P.C. for the confirmation of death sentence.

15. At the outset, learned counsel for the accused-appellant argued that during the trial proceedings, reasonable opportunity was denied to the defence to cross-examine the prosecution witnesses. Though application (63Kha) was moved to recall P.W.-1 and P.W.-2 for cross examination, but it was rejected by the learned Trial Court. It was also argued that the compliance of section 309 Cr.P.C. was not done.

16. Referring to the order-sheet recorded by the Trial Court, it transpires that only two witnesses of fact were examined i.e. P.W.-1, Ram Pratap Awasthi (informant/Father/Eye Witness) and P.W.2, Smt. Shashi Prabha, (Mother/Eye Witness).

17. The examination-in-chief of PW-1 Ram Pratap Awasthi (father of the deceased/first informant) was recorded on 1.10.2016. The order-sheet shows that PW-1 was examined as a witness by the prosecution and his examination-in-chief was recorded on 1.10.2016. PW-1 in his statement has stated that the incident is of 10.10.2014 at about 6.30 in the evening when he was at home and talking to Prabhakant Dubey, Ravish Kumar Tiwari and his fourteen year old young daughter was studying in the courtyard. It was at this stage that the accused Ajay Kumar Kori entered the house and fired on the deceased by a country-made pistol on her chest. Hearing the voice, near-by residents also came to the house. Although the witness tried to apprehend him but on account of country-made pistol as well as threat rendered to him by his wife, mother Radha Devi and brother Vijay, the accused could flee from the place of occurrence. PW-1 further stated that the accused/appellant used to harass his daughter and often stalked her. This fact was disclosed by the deceased on which he had scolded the accused but the accused extended threats and said that he would take away his daughter and would kill him. With an intent to save the prestige of the family, he had not reported the incident to the police. The deceased, consequently, stopped going to school and the witness

was looking after her. It is for this reason that the accused committed the murder of the deceased. He had got the written report scribed by Awadesh Kumar, and has proved it, which got marked as Ex.Ka.1. He has further disclosed that the police came on the spot and inquest was conducted whereafter the body was sent for postmortem. His statement was recorded under Section 161 Cr.P.C. PW-1 also showed the spot where the incident occurred. The cross examination of the PW-1 was deferred on an application for adjournment moved on behalf of the defence. The order-sheet clearly shows that the accused was present in the court on 1.10.2016. The case was adjourned to 6.10.2016.

18. On 6.10.2016, the accused was produced from the jail who refused to put his signatures. Co-accused Geeta Devi was present. The witness i.e. PW-1, however, was not present. Summons were thus issued to the witness fixing 21.10.2016 as the date.

19. On 21.10.2016 also the accused was produced from the jail but he did not incorporate his signatures. PW-1 was present. The matter, however, was deferred to 7.11.2016. The order-sheet dated 21.10.2016 is reproduced hereinafter:-

21.10.16

"पुकार पर अभियुक्त अजय जिला कारागार से जेरे हिरासत हाजिर आया। किन्तु आदेश तक हस्ताक्षर नही किये। साक्षी रामप्रताप अवस्थी हाजिर आये। शेष अभियुक्ता गीता देवी, राधा देवी जेरे जमानत हाजिर आये।

पत्रावली वास्ते शेष साक्ष्य दिनांक 7.11.16 को पेश हो।"

20. From the perusal of the order-sheet of 21.10.2016, it appears that no proceedings were conducted and it is even doubtful whether the witness was put to cross examination. For further evidence the matter was deferred to 7.11.2016.

21. On 7.11.2016 again the accused was produced from the jail but he denied making signatures on the order-sheet. The witness i.e. PW-1 was again not present and the court passed an order for summoning of the witness. This is clearly reflected from the order-sheet of 7.11.2016. The order-sheet dated 7.11.2016 is reproduced hereinafter:-

07.11.16

"पुकार पर अभियुक्त अजय जिला कारागार से उपस्थित आया लेकिन हस्ताक्षर करने से मना किया अभियुक्त विजय की हा० मा० जरिये अधि० माफ। अभियुक्ता गीता देवी व राधा देवी जमानत पर उपस्थित है। साक्षी अनु० साक्षी तलव हो।

पत्रावली वास्ते साक्ष्य दिनांक 21.11.16 को पेश हो।"

22. On 21.11.2016 the accused was again produced from the jail. Application for adjournment was allowed by imposing a cost of Rs.1,000/-. From the perusal of order-sheet dated 21.11.2016 it is not clear as to whether the witness was even present on that day or not? There is no mentioning in the order-sheet about the presence of PW-1. The order-sheet dated 21.11.2016 is thus reproduced hereinafter:-

21.11.16

"पुकार पर अजय जिला कारागार से जेरे हिरासत हाजिर आया। अभियुक्त विजय की ओर से 26ख दिया गया सुना स्वीकृत। शेष अभियुक्त गण गीता, राधा देवी हाजिर आयी। अभियुक्त की ओर से स्थगन प्रा० पत्र 27ख वास्ते जिरह हेतु अन्य तिथि दिलाये जाने के लिए दिया था।

आदेश हुआ Heard. Approved.

Allowed Rs. One thousand according Cost be deposited to the Gov. Account.

Put up on 5.12.16

ह० अपठनीय

ASJ/FTC I"

23. On 5.12.2016 the accused was produced from the jail. PW-1 was present. Defence, however, did not examine the witness. Trial court noticed that the examination-in-chief was conducted on 1.10.2016 and the defence was deliberately not cross-examining the witness. The witness also informed that he had been extended threats. It is at this stage that the right to cross-examine PW-1 was forfeited and the proceedings were adjourned to 21.12.2016. The order-sheet dated 5.12.2016 is reproduced hereinafter:-

05.12.16

"सत्र परीक्षण पेश हुआ पुकार कराई गई अभियुक्त अजय जेर हिरासत जेल से हाजिर आया। अभियुक्ता राधा देवी की हाजिरी माफी प्रार्थना पत्र केवल आज के लिए स्वीकृत। अभियुक्तगण गीता व विजय जेर जमानत हाजिर आए, गवाह राम प्रताप अवस्थी (PW-1) हाजिर आया। बचाव पक्ष द्वारा जिरह नहीं की गई। गवाह राम प्रताप अवस्थी की मुख्य परीक्षा दि०01/10/16 को अंकित की गई है और बचाव पक्ष द्वारा जानबूझ कर जिरह नहीं की जा रही है। समय 03 बजकर 22 मिनट हो रहा है। कोई स्थगन प्रार्थना पत्र भी नही दिया गया। गवाह राम प्रताप अवस्थी द्वारा कहा गया कि उसे जान से मारने की धमकी मुल्जिमान की ओर से दी जा रही है। गवाह PW-1 श्री राम प्रताप अवस्थी से बचाव पक्ष का जिरह का अवसर समाप्त किया जाता है। पत्रावली दि०21/12/16 वास्ते शेष साक्ष्य पेश हो।"

24. From the proceedings of the trial, it is clearly reflected that the examination-in-chief of PW-1 was held on 1.10.2016. The cross-examination on that day was deferred on the prayer of the defence. On 6.10.2016 and 7.11.2016, PW-1 was not present and, therefore, the question of his cross-examination on these two dates would not arise. In the order-sheet of 21.10.2016 there is no mention that the witness was produced for cross-examination or that the defence failed to cross-examine him. On 21.11.2016 also it is not clear as to whether the witness was present in court or not. On 5.12.2016 the right to cross-examine PW-1 was nevertheless forfeited. On the date when the witness was present, the defence did not cross-examine him on the plea that their lawyer Saurabh Pathak was engaged in some other matter.

25. There is nothing on record to show that the accused was warned by the court that if his lawyer fails to cross-examine the witness then his testimony would be read against him. The trial court also made no endeavours to offer the services of an Amicus Curiae, who could have conducted cross-examination on behalf of the accused. The accused was also not informed that he could himself cross-examine PW-1 if he so wishes. The order-sheet reveals that though the right of cross-examination was forfeited by the trial court on 5.12.2016 but the proceedings were routinely adjourned and the next witness i.e. Shashi Prabha (PW-2), who happens to be the mother of the deceased was produced in evidence on 7.5.2018.

26. The testimony of PW-2 has been produced before us as per which the incident occurred at about 6.30 PM when the witness was cooking food and her husband (PW-1) was sitting with villagers Prabhakant and Ravish Kumar. Her daughter aged fourteen years was studying in the courtyard. It is at this stage that the accused entered the house and shot at the chest of his young daughter with a country-made pistol. Hearing the gunshot, neighbours from the locality rushed to the spot. Effort was made to apprehend the accused but he fled. PW-2 also stated that her daughter was harassed by the accused on account of which she had stopped going

to the school. The accused felt annoyed and maintained enmity for such reasons. On 7.5.2018 both the counsels of accused did not turned up to cross-examine PW-2. The right of cross-examination on that day itself was forfeited. For the remaining evidence, the matter was deferred to 12.6.2018. The accused undisputedly was present in court. The part of the order-sheet dated 7.5.2018 is reproduced hereinafter:-

"x x x x x x x x x x x

अभियुक्तगण के दोनो विद्वान अधिवक्ताओं को सूचना दी गयी परन्तु विद्वान अधिवक्ता गण प्रतिपरीक्षा हेतु नहीं आये। अतः अवसर समाप्त किया जाता है।

कोर्ट सर्टिफिकेट सुनकर तस्दीक किया।

ह० अपठनीय

ह० अपठनीय

ए०डी०जे०-1 औरैया

ए०डी०जे०-1 औरैया

07.5.18

07.5.18

ह० शशिप्रभा"

07.05.2018:-

"पुकार पर अभियुक्तगण जेल से हाजिर आये। साक्षी श्रीमती शशि प्रभा उपस्थित आयी PW-2 अंकित किया गया। पत्रावली वास्ते शेष साक्ष्य दिनांक 12/6/18 को पेश हो। शेष साक्षी तलब हो।

ह० अपठनीय

ADJ I Au."

27. From the order-sheet, it is clear that PW-2 was not examined since the two lawyers of accused failed to turn up. There is nothing in the order-sheet to show that any legal aid was offered to the accused or he was told about his right to cross-examine the witness.

28. During the course of arguments, learned counsel for the accused/appellant carried our attention to the application 63 (Kha) dated 15.03.2019 which was moved by the defence seeking permission for the cross-examination of P.W.-1/first informant, on the ground, that their opportunity of cross-examining the prosecution witnesses was closed. The order-sheet of the Trial Court is as follows:-

Order dated 15.03.2019:-

"पुकार पर अभियुक्तगण हाजिर आये। अभियुक्तगण के अधिवक्ता ने 63ख प्रा०पत्र वादी से जिरह करने की अनुमति हेतु दिया।

P.O. महोदय केन्द्रीय नजारत के वार्षिक मुआइने में व्यस्त है।

सत्र परीक्षण वास्ते सुनवाई 63 ख प्रा०पत्र व साक्ष्य 313 CrPC दिनाँक 25-3-19 को पेश हो।

ह० अपठनीय

S.J. Auraiya"

29. On 25.3.2019, the application for recall of witness was considered and rejected by the court below vide following orders:-

25.03.2019:-

"पत्रावली पेश। अभियुक्तगण उपस्थित है।

आवेदन ६३ ख का निस्तारणः-

यह आवेदन अजय कुमार आदि की ओर से इस आशय का प्रस्तुत किया गया है कि वादी मुकदमा से जिरह समाप्त कर दी गयी है, इसलिए, वादी मुकदमा से जिरह का अवसर प्रदान किया जाना चाहिए।

सुना तथा पत्रावली का अवलोकन किया।

पत्रावली के अवलोकन से ज्ञात होता है कि यह पत्रावली आज धारा 313 दं०प०सं० के बयानों में नियत है। वादी पी०डब्लू०-१ का बयान दिनांक ०१.१०.२०१६ को दर्ज किया गया। इस तिथि को इस साक्षी से जिरह करने के लिए कोई अधिवक्ता उपस्थित नहीं हुए, इसलिए जिरह का अवसर समाप्त किया गया। इस प्रकार दो वर्ष से अधिक अवधि व्यतीत हो जाने के बाद यह आवेदन प्रस्तुत किया गया है, जो जाहिर करता है कि अभियुक्तों का उद्देश्य विचारण में देरी कारित करने का है। अन्यथा धारा 313 दं०प०सं० के अन्तर्गत नियत हो जाने के पूर्व भी इस प्रकृति का आवेदन प्रस्तुत किया जा सकता था। आवेदन में यह तथ्य अंकित नहीं है कि नियत तिथि को साक्षी से जिरह क्यों नहीं की जा सकी। अतः आवेदन में जिरह न कर सकने का कारण नहीं दर्शाया गया है, न्यायालय द्वारा साक्षी से जिरह का पर्याप्त अवसर प्रदान किया गया है। आवेदन में कोई कारण दर्शित न करने के कारण यह निष्कर्ष दिया जाना सम्भव नहीं है कि क्या यथार्थ में ऐसा कारण मौजूद था, जिसकी वजह से अभियुक्तों द्वारा

पी०डब्लू०-१ से जिरह नहीं की जा सकी। अतः इस स्थिति में आवेदन ६३ख स्वीकार नहीं किया जा सकता है। तदनुसार आवेदन खारिज किया जाता है। धारा ३१३ दं०प०सं० के अन्तर्गत बयान दर्ज किये जाये।

ह० अपठनीय

सत्र न्यायाधीश,

औरैया"

30. PW-1 and PW-2 were the only two witnesses of fact produced by the prosecution. Their testimony forms the basis of conviction and sentence awarded to the accused. Denial of cross-examination of these two witnesses had serious adverse consequences for the accused. Cross-examination otherwise confers a valuable right upon the accused to challenge the credibility of witness and also test the veracity of their statement. Right of cross-examination cannot be taken away unless a fair opportunity is given to the accused to defend himself. Whether or not such fair opportunity has been given to the accused appellant in this case is the core question to be answered by us.

31. In order to consider the issue raised we may gainfully refer to the provisions contained in Section 309 and 231 Cr.P.C. which throw light on the manner in which a fair trial is to be conducted. Section 309 Cr.P.C. empowers the court to postpone or adjourn the proceedings. Sub-section 2 of Section 309 Cr.P.C. allows the court jurisdiction to postpone the commencement of, or adjourn, any inquiry or trial, from time to time for reasons to be recorded. The proviso to it stipulates that the remand of accused shall not exceed fifteen days at a time; provided further that witness are in attendance, no adjournment or postponement shall be granted without examining them, except for special reasons to be recorded in writing. The statute, however, provides that no adjournment would be granted at the request of a party unless the circumstances are beyond the control of that party. The fact that pleader of a party is engaged in another court is expressly excluded as a ground for adjournment. Power is also vested in the court to record the statement of witness if the party or his pleader is either not present or even though present is not ready to examine or cross-examine the witness. In such an event the court also has the power to dispense with the examination-in-chief or cross-examination of a witness, as the case may be. Section 231 Cr.P.C. of the Code, moreover, states that on the date fixed for the evidence of prosecution the Judge shall proceed to take all such evidence as may be produced in support of the prosecution. Sub-section 2 of Section 231 Cr.P.C. vests discretion in the Judge to defer cross-examination until other witness or witnesses have been examined or recall the witness for further cross-examination.

32. Upon a perusal of the order-sheet we have already noticed that on the date of examination-in-chief of PW-1 and PW-2, the defence lawyer did not cross-examine them. Right of cross-examination was forfeited in respect of PW-2 on the very day when her examination-in-chief was recorded. In respect of PW-1, the proceedings were adjourned to 6.10.2016 but on that day the witness himself was not present. On 21.10.2016 though PW-1 was present but the order-sheet nowhere records that the witness was produced for cross-examination and there was a failure on part of the defence to cross-examine him. On 7.11.2016 though PW-1was again not present and, therefore, it cannot be assumed that there is a failure on part of the defence to examine PW-1. On 21.11.2016 the

proceedings were adjourned on the request of defence by imposing a cost of Rs.1,000/-. It is not clear as to whether the witness was not available for cross-examination in court. On 5.12.2016 the right of cross-examination of PW-1 was forfeited after noticing his statement that threats are being extended to him.

33. The order-sheet clearly reveals that PW-1 and PW-2 both were present for cross-examination but they were not cross-examined by the defence. The adjournment applications on record merely state that counsel for the defence was engaged elsewhere. Section 309 Cr.P.C. stipulates that engagement of pleader in another court cannot be a ground for adjournment.

34. The exercise of jurisdiction vested in the trial court to dispense with the cross-examination of an important witness, on account of failure on part of the lawyer to cross-examine the witness has to be examined in the context of valuable right of accused to cross-examine such witness. We cannot loose sight of the fact that accused often are not familiar with the procedures to be followed in a court of law or the consequences which may result on account of failure on part of his lawyer to cross-examine an important witness. The socio-economic conditions of the accused is also required to be kept in mind. Incalculable harm can be caused to an accused on account of incompetence on part of the lawyer. In this case the accused is to be sent to the gallows relying upon the testimony of the two witnesses who were never cross-examined on account of abdication of duties by the lawyer. We have also gone through the original records and find that various questions were available to the defence counsel for cross-examining the two witnesses of fact but those questions were never put. Since we are not inclined to make any observations regarding the merits of the case as such we refrain from elaborating any further on this aspect.

35. Hon'ble Supreme Court in Munna Pandey vs. State of Bihar 2023 SCC OnLine SC 1103 has quoted with approval Harry Browne to state that *"A fair trial is one in which the rules of evidence are honored, <u>the accused has competent counsel,</u> and the judge enforces the proper court room procedures - a trial in which every assumption can be challenged."*

(emphasis supplied by us)

36. Availability of a competent counsel is thus of critical importance in a fair trial. The rights of an accused cannot be protected if the lawyer is either not available or fails to act with due diligence. It is in this context that the courts have recognized the right in an accused to be defended by a competent lawyer. In a case where services of a lawyer are not available to the accused the court can appoint an Amicus Curiae to protect his right. In the context of hearing of a criminal appeal, the Supreme Court in Kabira vs. State of U.P. 1981 (Supp) SCC 76 held that dismissal of criminal appeal in default would not be a proper disposal. The court held that if the appellant was not present, the learned Judge should have appointed a lawyer as Amicus Curiae and then proceed to dispose of the appeal on merits. The following passages of the judgment of Kabira (supra) is extracted hereinafter:-

"We are, therefore, of the view that there has not been a proper disposal of the appeal preferred by the appellant. The appeal could not be dismissed by the learned Judge for default of appearance. If the appellant was not present, the learned

Judge should have appointed some advocate as amicus curiae and then proceeded to dispose of the appeal on merit."

37. Recently in K. Muruganandam & Ors. vs. State of Rep. By the Deputy Superintendent of Police & Anr. 2021 SCC OnLine SC 690 the Court reiterated the observations made in Kabira (supra) in para 8 of their Lordships judgment which is reproduced hereinafter:-

"8. ……..if the accused does not appear through counsel appointed by him/her, the Court is obliged to proceed with the hearing of the case only after appointing an amicus curiae, but cannot dismiss the appeal merely because of non-representation or default of the advocate for the accused."

38. In Shaik Mukthar and Another vs. State of Andhra Pradesh (Now State of Telangana), (2020) 19 SCC 178 wherein it has been held that:

"It is by now well settled by a catena of judgments such as the decision of this Court in Rakesh & Anr. V. State of Madhya Pradesh, 2011 (12) SCC 513, that it is in the interest of justice to appoint an amicus curiae to assist the court where the accused is unrepresented. The Court may also refer the matter to the Legal Services Committee, which may appoint an advocate to represent the accused."

39. Learned Single Judge of this Court in Maneesh Pathak vs. State of U.P. 2023 SCC OnLine All 64 has emphasized the importance of personal liberty to observe that protection of liberty is the crown of the court processes. In the event of non-appearance of a prisoner's counsel the court may appoint an Amicus Curiae to proceed with the hearing of the matter. In Munna Pandey (supra) the Court has reiterated that free and fair trial is sine-qua-non of Article 21 of the Constitution of India. The importance of a free and fair trial has been emphasized in following words:-

"Free and fair trial is sine-qua-non of Article 21 of the Constitution of India. If the criminal trial is not free and fair, then the confidence of the public in the judicial fairness of a judge and the justice delivery system would be shaken. Denial to fair trial is as much injustice to the accused as to the victim and the society. No trial can be treated as a fair trial unless there is an impartial judge conducting the trial, <u>an honest, able and fair defence counsel</u> and equally honest, able and fair public prosecutor. A fair trial necessarily includes fair and proper opportunity to the prosecutor to prove the guilt of the accused and opportunity to the accused to prove his innocence."

(emphasis supplied by us)

40. In Rahul vs. State of Delhi Ministry of Home Affairs & Anr. (2022) Supreme (SC) 1136 the Court has emphasized the importance of the role to be played by a Judge in a criminal appeal. Referring to Section 165 of the Indian Evidence Act, 1872 the Court made following observations:-

"The Court is constrained to make these observations as the Court has noticed many glaring lapses having occurred during the course of the trial. It has been noticed from the record that out of the 49 witnesses examined by the prosecution, 10 material witnesses were not cross-examined and many other important

witnesses were not adequately cross-examined by the defence counsel. It may be reminded that Section 165 of the Indian Evidence Act confers unbridled powers upon the trial courts to put any question at any stage to the witnesses to elicit the truth. As observed in several decisions, the Judge is not expected to be a passive umpire but is supposed to actively participate in the trial, and to question the witnesses to reach to a correct conclusion. This Court while not accepting the submission that it was improper for the Court to have interjected during the course of cross-examination of the witness, had observed in the case of State of Rajasthan vs. Ani alias Hanif and Others, (1997) 6 SCC 162 thus:

We are unable to appreciate the above criticism. Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question."

41. Applying the principles relating to conduct of a fair trial in the facts of the present case we find that the Court of Sessions has not adequately protected the right of the accused who has been denied a fair trial in the matter. In the event the court intended to forfeit the right of cross-examination of the accused it ought to have alarmed the accused of the consequences which were to follow if the witnesses were not being cross-examined. The Court was also enjoined to offer an opportunity to the accused either to cross-examine the witness himself or to offer him the services of an Amicus Curiae so that the witness could be cross-examined. Unless adequate opportunity is offered to the accused to defend himself in a fair trial his conviction and sentence cannot be approved of in a country governed by rule of law. There is nothing on record to show that the trial Judge ever informed the accused of the consequences which were to befall on him on account of failure to cross-examine PW-1 and PW-2 nor the accused was extended the opportunity of legal aid by providing him an Amicus Curiae. The accused was also not informed of his right to cross-examine his witness if his lawyer was not available, before the testimony of PW-1 and PW-2 could be relied upon against the accused.

42. For the above reasons, we cannot confirm the death sentence awarded to the accused in the matter.

43. For all the afore-stated reasons, in the interest of justice and fair trial as well as taking all the circumstances collectively, we are of the considered view that the matter be remitted back to the Trial Court with a direction to afford the accused-appellant a fresh opportunity to cross-examine the prosecution witnesses (witnesses of fact) i.e. P.W.-1 and P.W.-2 within a period of three months in accordance with law. The reference submitted by the Trial Court is hereby rejected. The impugned Judgment and Order dated 04.04.2019 passed by learned Sessions Judge, Auraiya convicting and

sentencing the accused/appellant is hereby set aside.

44. The matter is remitted back to the Trial Court for necessary compliance as discussed herein above.

45. The Trial Court shall provide an appropriate Advocate to the accused-appellant, in case the appellant does not make any arrangement for their representation.

46. We also direct the Trial Court to make all sincere effort to conclude the trial in accordance with law, expeditiously within a period of six months from the date of receipt of the certified copy of this judgment.

47. It is made clear that we have not expressed any opinion on the merits of the case.

48. We record our appreciation for the able assistance rendered to us by the Amicus Curiae, who would be entitled to his fee as per the rules of the High Court Legal Services Committee.

49. Copy of this Judgment along with the Trial Court record be sent back.

(2024) 2 ILRA 1337
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2024

BEFORE

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

Criminal Appeal No. 379 of 1983

Manvir Singh & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri S.P.S. Raghav, Sri A. Misra, Sri Alok Ranjan Mishra, Sri Apul Misra,Sri P.N. Misra, Sri Rajendra Prasad Dubey,Sri Gopal Swaroop Chaturvedi (Sr. Advocate)

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 302/34, 307/34 & 323 - Appellants challenged conviction under Sections 302/34 and 307/34 I.P.C. for murder of Yashpal and attempt to murder Naresh, arising from boundary dispute. Court held: (1) Incident stemmed from sudden altercation over boundary marks; appellants used spades (agricultural tool) without premeditation or intent to kill (Virsa Singh Vs St. of Punj., AIR 1958 SC 465). (2) Injuries on deceased (incised/lacerated wounds on head, fractured skull) caused death by shock and haemorrhage, but no vital organ targeted; intent was to assault, not murder (Pulicherla Nagaraju Vs St. of A.P., (2006) 11 SCC 444). (3) Knowledge that assault with sharp-edged spade could cause death present, but no intention for such injury; offence under Section 304 Part I I.P.C., not Section 302 (Kesar Singh Vs St. of Har., (2009) 3 SCC (Cri) 1193). (4) Appellant No. 4 (Brijesh) caused simple injury to Risalo (mother of deceased) by pulling hair and pushing; conviction under Section 323 I.P.C. upheld. (5) Sentence reduced to 10 years' R.I. for appellants Nos. 1-3; fine of Rs. 500/- for appellant No. 4 affirmed. Judgment modified; appellants Nos. 1-3 to surrender within one month. (Paras 30-58)

Appeal Partly Allowed.

Case Law Cited:

1. Virsa Singh Vs St. of Punj., AIR 1958 SC 465 (Para 45)

2. Pulicherla Nagaraju Vs St. of A.P., (2006) 11 SCC 444 (Para 45)

3. Kesar Singh Vs St. of Har., (2009) 3 SCC (Cri) 1193 (Para 28)

4. Hardev Bhanji Joshi Vs St. of Gujarat, 1992 Supp (2) SCC 561 (Para 28)

5. Mathri Vs St. of Punj., AIR 1964 SC 986 (Para 35)

6. Basdev Vs St. of Pepsu, AIR 1956 SC 488 (Para 36)

7. Reg. Vs Monkhouse, (1849) 4 COX CC 55 (Para 37)

8. Anbazhagan Vs St. of T.N., Criminal Appeal No. 2043 of 2023 (Para 32)

9. Rampal Singh Vs St. of U.P., (2012) 8 SCC 289 (Para 44)

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

1. Heard Sri Gopal Swaroop Chaturvedi, Senior Advocate assisted by Sri Alok Ranjan Mishra, learned counsel for the appellants, Sri Jitendra Kumar Jaiswal, learned AGA for the State and perused the record.

2. The present criminal appeal has been filed against the judgment and order dated 10.2.1983 passed by 4th Addl. Sessions Judge, Bulandshahr in S.T. No. 412 of 1982 (State Vs. Manvir Singh and others) and S.T. No. 1 of 1983 (State vs. Smt. Brijesh) arising out of Case Crime No. 21 of 1982, P.S. Jahangirpur Khurja, District- Bulandshahr, by which the appellant Nos. 1, 2 and 3 have been convicted for the offence under Section 302/34 IPC and awarded the sentence of life imprisonment and also under Section 307/34 IPC and awarded the sentence of 5 years' rigorous imprisonment and further appellant No. 4 has been convicted under Section 323 IPC and directed to pay a fine of Rs. 500/- and in default to undergo two months' rigorous imprisonment.

3. Shorn of unnecessary details, the prosecution case is unraveled in an oral report lodged by one Naresh, which was registered vide Case Crime No. 21 of 1982, under Sections 302, 307 IPC, P.S. Jahangirpur Khurja, District- Bulandshahr registered vide G.D. No. 22. The chik FIR has been marked as Ex. Ka-1 prepared by Om Prakash Tyagi (P.W.-7) at the relevant date and time.

4. The allegations made in the first information report are that Manvir Singh, Omvir Singh and Mahesh son of Amolak Singh, his own cousins, were on inimical terms, on account of dispute over boundary marks. At about 4 p.m. on the day of incident, he alongwith his brother Yashpal Singh and mother Risalo were sowing Maize crops in the field of his uncle Mahipal Singh on batai, Manvir Singh, Omvir and Mahesh were demolishing his boundary marks with their spades. On raising resistance not to demolish their boundary marks, Manvir Singh stated that they will continue to do so, as he, behind his back has been harassing his brothers and this time he has come after taking leave to settle scores. Manvir Singh then exhorted to assault them, consequent to which, all three armed with spades ran to assault them, however they with an intention to rescue them ran towards the village, however, all the three assailants waylaid them near the enbankment of the canal distributory near the culvert and attacked them. On account of their assault, his brother Yashpal Singh fell down but they continued to assault him and when he tried to rescue his brother, he was also assaulted by spade. His mother and niece-Poonam and other villagers Suraj Bhan and

Ashok Kumar rushed to rescue them and saved him, however his brother, on receiving injuries died instantaneously on the spot.

5. It is further stated that when his mother tried to rescue his brother then Brijesh wife of Manvir Singh also reached there, who pulled her by her hair and pushed her. Leaving his mother and other villagers near the dead body of his brother, he reached the police station and lodged an oral report, which was reduced in writing by Head-Moharrir Om Prakash Tyagi (P.W.-7) in presence of Investigating Officer (P.W.-6), who took over the investigation and recorded the statement of first informant Naresh and thereafter sent the victim Naresh to Khurja for medical examination.

6. The Investigating Officer thereafter alongwith other police personnel reached the place of incident where dead body of Yashpal was found lying near the culvert. The inquest was thereafter conducted on the person of the deceased by S.I. R.S. Chattori, who also prepared the inquest (Ex.Ka-7), challan-nash (Ex. Ka-8), photo-nash (Ex. Ka-9), letter to the C.M.O. for post-mortem (Ex. Ka-11) and letter to the R.I. (Ex.Ka-12) and sample seal. The site-plan (Ex.Ka-15) was also prepared by the Investigating Officer. The blood stained shirt and bellbottom taken from the dead body were sealed in a packet and thereafter dead body was sealed and dispatched for autopsy through constable Om Prakash. The blood soaked earth and plain earth was also collected from the spot and sealed in separate containers. The mother of the deceased Smt. Risalo was also sent for medical examination, who was medically examined on 13.6.1982 at 6.45 a.m.

7. The eye witnesses Km. Poonam and Tejvir were also interrogated. At about 6 in the morning an information was received from informer that accused persons Manvir Singh and Omvir are trying to escape by boarding a bus. On the said information the police reached the bus-stop and arrested the accused Manvir and Omvir. On interrogation they disclosed that the spades by which they have committed the incident, has been concealed in a heap of fodder and assured to get them recovered. They were accordingly taken to the heap of fodder and in presence of Hosiyar Singh (P.W.-5) and one Dalvir Singh, the appellants Manvir Singh and Omvir got recovered the three spades from the heap of straw. The blood stained kurta of Manvir as well as blood stained bellbottom of Omvir were also taken alongwith blood stained spades. Respective recovery memos were drawn by the Investigating Officer and marked as Ex. Ka-4, Ex. Ka-5, Ex. Ka-6, Ex. Ka-13 and Ex.Ka-14 and thereafter the accused persons were lodged in the police station. Smt. Risalo and other witnesses were also interrogated by the Investigating Officer. On 21.6.1982 Mahesh surrendered before the court and his statement was recorded. The blood stained articles were also sent for chemical examination and chemical examination report was obtained, which is marked as Ex.Ka-17 and Ex. Ka-18.

8. An autopsy was conducted on the person of the deceased Yashpal in District Hospital Bulandshahr on 13.6.1982. In the post-mortem, the doctor has noted the following injuries :-

1. Incised wound 3/4" x 1/2" X skull cavity deep by the side of lateral end of right eye brow.

2. Lacerated wound 1" x ¾ " X bone deep on right parietal head 1" above right ear.

3. Incised wound 1½ " X 3/2" X bone deep on right cheek bone.

4. Incised wound 1/2" x 1" X eye socket deep on right side face, just below medial end of right eye. Right eye ball cut through and through. Also right optic nerve severed off. Nasal bone fracture under-neath. Right optic nerve severed off. Nasal bone fractured under-neath.

5. Lacerated wound 1½" X 1/2" X bone deep on left side face just below lateral end of left eye.

6. Incised wound 1/2" X 1/4" X muscle deep on back of left shoulder.

On opening the body right side skull was found fractured into multiple pieces under-neath injuries Nos.1 & 2. The membranes of brain were lacerated under-neath injury No.2 and cut under injury No.1 and ¼ oz of clotted blood was present in anterior and right cranial fossa. Brain was cut and lacerated under-neath injury No. 1 & 2. Both the chambers of the heart were empty. There was quarter ounce of partially digested food in the stomach. The intestines contained usual gases and faecal matter. The bladder was full. The cause of death was shock and haemorrhage, resulting from injury nos.1 & 2. The post mortem report has been proved as Ext. Ka-24.

9. The injured Naresh was medically examined by Dr. S.C. Pandey, Superintendent of S.S.M.J Hospital, Khurja on 12.6.1982 at 7.50 p.m. who noted an incised wound on the right side of scalp and an abraded contusion on the right temple region. The injury report was accordingly proved and marked as Ex. Ka-2.

10. Similarly, Risalo was examined on 13.6.1982 at 6.45 a.m. The doctor has noted three injuries on her person, which is marked as Ex.Ka-3 :-

(i) Contusion 2 cm x 1 cm on the left side of upper part of nose.

(ii) Abraded contusion 3 cm x 1 cm obliquely on the right forearm upper part.

(iii) Contusion 3 cm X 1 cm oblique on the left upper scapular region.

11. The Investigating Officer thereafter concluded the investigation and submitted charge-sheet against the accused persons, which is marked as Ex.Ka-19. On the basis of said charge sheet, learned Magistrate has taken cognizance and since the case was exclusively triable by the court of Sessions, made over the case to the court of Sessions for trial. The Sessions Court vide orders dated 4th January, 1982 and 16th September, 1982 framed the charges against the accused appellants Manvir, Omvir, Mahesh and Brijesh under Sections 302 read with section 34 IPC and 307 read with section 34 IPC. All the accused appellants abjured the charges and claimed to be tried.

12. During the course of trial, the prosecution has examined as many as three witnesses of fact and five formal witnesses. Their testimony in brief is enumerated hereunder :-

13. Naresh Kumar (P.W.-1) is the brother of the deceased and the first informant. He has stated that Manvir Singh, Omvir Singh and Mahesh appellants are the real sons of his tau whereas appellant No. 4 Brijesh is the wife of Manvir Singh and they were on inimical terms over the dispute of boundary marks. On the date of

incident while he alongwith his mother Risalo and brother Yashpal were sowing Maize crops in the field of his uncle Mahipal Singh, Manvir, Mahesh and Omvir came there and started demolishing his boundary marks with their spades. On raising resistance not to demolish their boundary marks, Manvir stated that they will continue to demolish the boundary marks and thereafter on the exhortation of Manvir to assault, all the three appellants ran to assault them, however they in order to escape, ran towards the village, however, all the three assailants waylaid them near the enbankment of the canal distributory near the culvert and attacked them. On account of their assault, his brother Yashpal Singh fell down but they continued to assault him and when he tried to rescue him, he was also assaulted by Manvir and Mahesh with spades.

14. On account of assault, his brother fell down, then Mahesh caught hold of him, however Omvir and Manvir continued to assault his brother, then his mother Risalo rushed and tried to rescue him, however, she was also assaulted by Brijesh by pulling her by her hair and pushed her. Her niece Poonam also tried to rescue them but the assailants did not yield. On raising alarm, Tejvir and Ashok Kumar also reached the place of incident and saved him, however Manvir further assaulted Yashpal on his face, consequent to which he died. The FIR is said to be lodged on his oral information, which was reduced in writing by the Moharrir, who read out the same and thereafter affixed his thumb impression.

15. During cross examination, he has supported the prosecution story and nothing adverse could be elicited to doubt the credibility of the said witness. During cross examination, he has further stated that western side of his boundary marks was being demolished by the appellants. He has further clarified in his cross examination that after being struck by the spade, his brother fell down. Thereafter Mahesh caught hold of him, however Omvir and Manvir continued to assault his brother and on account of assault made by Manvir, his brother died. He has categorically denied the suggestion that no assault was made by the appellants and on account of enmity he is falsely deposing against the appellants. He has further denied the suggestion that his injuries were self inflicted and manipulated.

16. Tejvir (P.W.-2) is another eye witness, who is said to have reached the place of incident on the alarm raised by P.W.-1- Naresh Kumar and his mother Risalo. He has further stated that on the exhortation of Manvir, the appellants have assaulted Yashpal and Naresh by their spades and on account of assault made by spades, Yashpal fell down and died after receiving injuries. Thereafter the assailants left the place of incident alongwith their spades. It is further stated that when Risalo tried to rescue her son, Brijesh had caught hold of her by her hair and pushed her, consequent to which she suffered injuries. During his cross examination, he has reiterated the prosecution story and has further stated at the time of assault, he had heard their alarm and had seen the assailants assaulting Naresh and Yashpal. He has further clarified that Yashpal was assaulted by the assailants for two minutes. It is further stated that when Naresh was being assaulted, her mother came to his rescue but she was also assaulted by Brijesh. He has further denied the suggestion that no incident had taken place in his presence and because of enmity, he has falsely implicated the assailants.

17. Poonam (P.W.-3) is a child witness and has stated that while she was grazing her buffalo, she had heard the

alarm raised by the Yashpal and Naresh, who are her maternal uncle. She has further categorically stated that Omvir, Manvir and Mahesh appellants assaulted Yashpal and when Naresh tried to rescue him, Manvir and Mahesh assaulted him by the spades and when her grand maternal aunt (Nani) tried to save him then she was also assaulted by Brijesh. On account of assault made by the assailants, Yashpal died instantaneously. The said witness has also been subjected to lengthy cross examination, however, she has corroborated the prosecution story in all material particulars and nothing adverse could be elicited from her testimony. She has further denied the suggestion that nothing has taken place in her presence and on account of being the niece of the deceased, she is falsely deposing in the court.

18. Dr. S.C. Pandey (P.W.-4) had medically examined the injured Naresh on 12.6.1982 at 7.50 p.m. and has proved the said injury report. He has further proved the injuries of Risalo, which has been marked as Ex. Ka-3. He has denied the suggestion that injury No. 2 of Naresh could not be caused by wooden part of the spade and further all the three injuries of Risalo could be caused by fall and the said injuries could not be self-inflicted.

19. Hosiyar Singh (P.W.-5) is the witness of the recovery memo of the blood stained spades, which were recovered from the heap of fodder and marked as Ex.Ka-4. The other recoveries of pant, shirt and kurta were also prepared by the Investigating Officer, which were signed by him and marked as Ex.Ka-6 and 7. During course of his cross examination, he has denied the suggestion that recoveries were not made in his presence and on account of inimical terms, he is falsely deposing in the court.

20. Kalyan Singh Yadav (P.W.-6) is the Investigating Officer, who has stated that in his presence on the basis of the oral information by Naresh, the first information report was registered. He has further stated that after registration of the first information report, he had sent the injured Naresh for medical examination and thereafter alongwith police personnel and S.I. R.S. Chattori had reached the place of incident and found the dead body of the deceased lying near the culvert and conducted the inquest. The statements of the witnesses were recorded after completion of the inquest and the dead body was sealed and sent for post-mortem. The inquest was proved as Ex.Ka-7 and other related documents were proved and marked as Ex.Ka-8 to Ex.Ka-12. The recovery memo of spades were also proved. The recovered articles were also sent for chemical examination and chemical examination report was also obtained, which is marked as Ex.Ka-17 and Ex. Kha-18 and after completion of the investigation, the charge sheet was submitted on 30.6.1982 and marked as Ex.Ka-19. The Investigating Officer has deposed that he had reached the place of incident at about 6 p.m. and got conducted the inquest and thereafter made the recoveries of plain and blood soaked earth and prepared the site plan. He has further stated that he had sent the victim Risalo for medical examination and on the pointing out of Tejvir, had prepared the site plan. He has denied the recoveries of clothes from the house of assailants and blood stained spades. The suggestion made by the defence that the report was prepared at the police station was also categorically denied.

21. Om Prakash Tyagi (P.W.-7) is the head constable, who had reduced in writing the oral information given by the first informant Naresh Kumar at the police station on 12.6.1982 at 5.30 p.m., on the basis of which, chik FIR marked as Ex.Ka-1 was registered. The G.D. report of which was drawn vide G.D. Report No. 22 and marked as Ex.Ka-20. He has further stated that on 13.6.1982 at about 10.30 a.m., the Investigating Officer returned back to the police station and all the recoveries made, were kept in the malkhana. Necessary entries in respect of recovery of clothes was also made by him in respective G.D. During cross examination, he has categorically denied the suggestion made by the defence that the chik report was prepared anti-time and the entries in respect of sending of the special report to the higher police authorities has been manipulated and the G.D. was withheld.

22. Dr. Chandra Prakash (P.W.-8) is the doctor, who had conducted the post-mortem on the person of the deceased and has proved the entries made in the post-mortem, which is marked as Ex.Ka-24. He has further stated that proximate time of death could be at 4 p.m. on 12.6.1982. He had narrated the cause of death to be shock and haemorrhage as a result of injury Nos 1 and 2.

23. Thereafter, statement of accused under Section 313 Cr.P.C. has been recorded by putting all the incriminating circumstances to the appellants. The appellants denied the incriminating circumstances and stated that they have been falsely implicated. Accused Omvir and Manvir were arrested from their gher on the day of occurrence in the evening and their clothes were sent from their house. Accused Manvir stated that father of the deceased was the real brother of his father and their mothers are also real sisters and on account of inimical terms over partition of holding they have been falsely implicated and denied his presence in the village on the date of occurrence. Appellant Brijesh claimed to have been falsely implicated only on account of being the wife of Manvir. The defence has however not led any evidence to prove its case. The trial court after appreciating the evidence has held that the prosecution has successfully established its case against the appellant Nos. 1, 2 and 3, for the charged offence, however, acquitted the appellant No. 4- Brijesh for the offence under Section, 302/34 and 307/34 IPC and convicted her only under Section 323 IPC. The explanation tendered by the other appellants has been found to be false and inadequate and as such they are liable for conviction.

24. Learned Senior Counsel appearing for the appellants has submitted that on account of sudden altercation between the cousins, over trivial dispute, for demolishing boundary marks, the present incident had taken place. He has further submitted that no regular weapon has admittedly been used by the appellants for assaulting the victims and only an agricultural implement, namely, spade is said to have been used to cause injuries to the victim.

25. Learned counsel for the appellants has next submitted that there was absolutely no intention on the part of the appellants to have caused death of deceased Yashpal nor to cause any injury to the injured Naresh. Learned counsel for the appellants has next submitted that no specific role of assaulting the victims has been assigned to anyone and rather in

general and omnibus manner, it has been stated that all the three appellants assaulted Yashpal and Naresh by their spades and caused injuries, which proved fatal and Yashpal succumbed to the said injuries.

26. Learned Senior Counsel appearing for the appellants has further submitted that considering the manner in which the incident had occurred and the role attributed to the appellants, the case does not travel beyond the scope of the offence u/s 304 Part II, 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 appellants can be convicted for the offence u/s 304 Part II of IPC.

27. Learned counsel for the appellants has further submitted that so far as the appellant No. 4- Brijesh is concerned, she has not assaulted either the deceased or the injured Naresh and she is only said to have caused simple injuries to Risalo when she tried to rescue his son and, therefore, she is liable to be acquitted.

28. In order to buttress his argument, learned counsel for the applicants has relied upon a decision reported in Kesar Singh and another Vs. State of Haryana **reported in (2009) 3 SCC (Cri.) 1193 and Hardev Bhanji Joshi Vs. State of Gujarat reported in 1992 Supp (2) SCC 561.**

29. Per contra, learned AGA has submitted that prosecution has proved its case beyond all reasonable doubt against the appellants and from the evidence adduced during the course of trial both intention and knowledge could be attributed to the appellants in causing the death of Yashpal and causing injuries to Naresh and, therefore, the trial court has rightly convicted the appellants under Section 302 read with Section 34 IPC and 307 read with section 34 IPC and supported the impugned judgment and order.

30. 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 falls for our consideration is that whether the conviction of the appellants would fall within the scope of Section 300 of the Code 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.

31. 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. P.W.-8- Dr. Chandra Prakash was examined by the prosecution being the medical officer who conducted the post-mortem on the person of the deceased. In the post-mortem report, the doctor has noted six injuries, (1) Incised wound 3/4" x 1/2" X skull cavity deep by the side of lateral end of right eye brow, (2) Lacerated wound 1" x ¾ " X bone deep on right parietal head 1" above right ear, (3) Incised wound 1½ " X 3/2" X bone deep on right cheek bone, (4) Incised wound 1/2" x 1" X eye socket deep on right side face, just below medial end of right eye. Right eye ball cut through and through. Also right optic nerve severed off. Nasal bone fracture under-neath. Right optic nerve severed off. Nasal bone fractured under-neath, (5) Lacerated wound 1½" X 1/2" X bone deep on left side face just below lateral end of left eye and (6) Incised wound 1/2" X 1/4" X muscle deep on back of left shoulder.

The cause of death has been noted in the post-mortem report appears to be shock and haemorrhage resulting from Injury Nos. 1 and 2.

32. The Hon'ble Supreme Court in its recent decision in Criminal Appeal No. 2043 of 2023 (Anbazhagan Vs. The State Represented by the Inspector of Police) has very lucidly explained distinction between the terms 'intention' and 'knowledge'.

33. The word "intent" is derived from the word archery or aim. The "act" attempted to must be with "intention" of killing a man.

34. Intention, which 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.

35. 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. They are 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."

(Emphasis supplied)

36. 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."

(Emphasis supplied)

37. In para 9 of the judgment, at page 490, the observations made by Coleridge J. in **Reg. v. Monkhouse**, (1849) 4 COX CC 55(C), have been referred to. They can be referred to, with advantage at this stage, as they are very illuminating:-

"The inquiry as to intent is far less simple than that as to whether an act has been committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does or says, and if he says nothing, then his act alone must guide you to your decision. It is a general rule in criminal

law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another's head, and fire it off, without intending to kill him; but even there the state of mind of the party is most material to be considered. For instance, if such an act were done by a born idiot, the intent to kill could not be inferred from the act. So if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely; was he rendered by intoxication entirely incapable of forming the intent charged?"

(Emphasis supplied)

38. Bearing in mind the test suggested in the aforesaid decision and also bearing in mind 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.

39. In another case reported in **2006 (11) SCC 444, Pulicherla Nagaraju @ Nagaraja Reddy vs State of A.P**, 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.

40. 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." (**Russell on Crime, Twelfth Edition, Volume 1 at page 40**).

41. 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.

42. Thus, in order that the requirements of law with regard to intention may be satisfied for holding an offence of culpable homicide proved, it is necessary that any of the two specific intentions must be proved. But, 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 to cause death, that is, with the knowledge that the result of his doing his act may be such as may result in death.

43. The important question which has engaged our careful attention in this case is, whether on the facts and in the circumstances of the case we should maintain the conviction of the appellant herein for the offence under Section 302 or we should further alter it to Section 304 Part II of the IPC?.

44. 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. As is clear from a reading of this provision, the former part of 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 of the IPC, however, deals with 'murder', although there is no clear definition of 'murder' in Section 300 of the IPC. As has been repeatedly 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'. (see **Rampal Singh vs. State of U.P., (2012) 8 SCC 289**).

45. The scope of clause thirdly of Section 300 of the IPC has been the subject matter of various decisions of this Court. The decision in **Virsa Singh** (supra) has throughout been followed in a number of cases by this Court. In all these cases the

approach has been to find out whether the ingredient namely the intention to cause the particular injury was present or not? If such an intention to cause that particular injury is made out and if the injury is found to be sufficient in the ordinary course of nature to cause death, then clause thirdly of Section 300 of the IPC is attracted.

46. The Hon'ble Supreme Court further in its decision in Criminal Appeal No. 2043 of 2023 (supra) has thus held that the distinction between culpable homicide (Section 299 of the IPC) and murder (Section 300 of the IPC) has always to be carefully borne in mind while dealing with a charge under Section 302 of the IPC. Under the category of unlawful homicides, both, the cases of culpable homicide amounting to murder and those not amounting to murder would fall. Culpable homicide is not murder when the case is brought within the five exceptions to Section 300 of the IPC. But, even though none of the said five exceptions are pleaded or prima facie established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 of the IPC to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300 of the IPC, namely, 1stly to 4thly, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299 of the IPC.

47. 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.

48. Intention to kill is not the only intention that makes a culpable homicide a murder. The intention to cause injury or injuries sufficient in the ordinary cause of nature to cause death also makes a culpable homicide a murder if death has actually been caused and intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

49. When single injury 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.

50. Now we recapitulate the facts and circumstances of the case. On the fateful day of the incident, the cousin brothers were working in their field and on account of resistance raised over demolishing of the boundary marks an altercation ensued between the first cousin and the victim/deceased and the appellants having spades in their hands started to assault them and thereafter caused injuries to the victim without their being any intention to cause his death and, therefore, we find it difficult to come to the conclusion that when the appellants struck the deceased with the weapon of offence, he intended to cause

such bodily injury as was sufficient in the ordinary course of nature to cause death. The weapon of offence admittedly in the present case is a common agricultural tool i.e. spade.

51. It is true that in the post mortem report, right side skull was found fractured into multiple pieces underneath injuries Nos. 1 and 2 and membranes of brain were lacerated underneath injury No. 2. The deceased died on account of cerebral haemorrhage i.e. internal head injury, however the important question is whether that by itself is sufficient to draw an inference that the appellants intended to cause such bodily injuries as was sufficient to cause death. Therefore, we are of the view that the appellants could only be attributed with the knowledge that it was likely to cause an injury which was likely to cause the death.

52. Thus, from the aforesaid discussion, we are of the view that none of the clauses of Section 300 of the Code 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.

53. Thus, 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", which is punishable under Section 302 of the Code. The incident had occurred without any premeditation and on trivial matter of demolishing of boundary marks, which was resisted by the victim and the deceased resulting in an assault by the assailants by a spade which they were carrying at the time of incident for agricultural purposes. Thus, the offence committed by the appellants would fall within the meaning of "culpable homicide not amounting to murder" under Section 304 of the Code.

54. Now the next question would be as to whether the appellants would be guilty in Part-I or Part-II of Section 304 IPC as is evident from the record. On resistance being raised by the victims' party for demolishing their boundary marks, the appellants with an intention to assault the victims/deceased ran and assaulted the deceased/victim, it, therefore, cannot be said that the death was caused by mistake or accident. The spades which the appellants were carried, were having sharp edges and the the appellants were aware of the fact that the use of such spade could cause death. It, thus, proved that there was knowledge on the part of the appellants that if by assaulting the deceased by spades that too on the head, the possibility of the deceased being killed could not be ruled out. But this itself is not necessarily conclusive of the fact that there was an intention on the part of the appellants to kill the deceased. The intention probably was merely to cause bodily injury. Considering the weapon used and the place and nature of the injuries, the act of the appellants was clearly with the intent to cause bodily injury which could result in the death of the deceased. In the instant case, there may be an absence of the intention to cause death but it is not where there is also an absence of intention to cause such bodily injury as is likely to cause death, which in the ordinary course of things is likely to cause death.

55. In view of the foregoing discussion, we are of the opinion that the appellants are not guilty of murder punishable under Section 302 of the Code

but they are guilty of committing an offence which is punishable under Section 304 Part I of the Code "Culpable homicide not amounting to murder", punishable under Section 304 Part I of the Code. We, therefore, do not agree with the contentions of the learned counsel for the appellant that the offence committed by the appellant would fall in the Second part of Section 304 IPC. Having held that the appellant Nos. 1, 2 and 3 are guilty of the offence under Section 304 Part I IPC, we partially accept this appeal and alter the offence from that of Section 302 of the Code to one under Section 304 Part I of the Indian Penal Code.

56. Further, having regard to the facts and circumstances of the instant case, we find that the sentence of 10 years' rigorous imprisonment would be adequate for the offence of which the appellants have been held guilty.

57. We, therefore, award a sentence of 10 years' rigorous imprisonment to the appellant Nos. 1, 2 and 3. The judgment under appeal is modified accordingly.

58. So far as appellant No. 4 Brijesh is concerned, she is said to have assaulted the victim Risalo mother of the deceased by pulling her by her hair and pushing her when she tried to rescue her son, consequent to which she suffered simple injuries, however she has not participated in the main incident of assault to the deceased Yashpal and injured Naresh, as such she has rightly been convicted u/s 323 IPC for causing injury only to Risalo and sentenced to fine of Rs. 500/- with default stipulation. Accordingly, conviction and sentence, in her behalf, is affirmed. She would deposit the fine within one month, if already not deposited.

59. The Chief Judicial Magistrate, Bulandshahr is directed to take appellant Nos. 1, 2 and 3 in custody in the aforesaid case and send them to jail to serve out the sentences awarded to them by the trial court. Appellant No. 4 need not to surrender.

60. The appeal is allowed in part.

61. Let a copy of this judgment and order be sent to the court concerned alongwith the lower court record within a week for compliance. The compliance report shall be sent by the court concerned to this Court within a further period of fifteen days.

(2024) 2 ILRA 1350
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.02.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE JYOTSANA SHARMA, J.

Criminal Appeal No. 651 of 1989

Durga Prasad ...Appellant
Versus
State ...Respondent

Counsel for the Appellant:
S.H. Ibrahim, Angad Kumar Vishwakarma, G.R. Chhabra, Moti Chand Yadav

Counsel for the Respondent:
V.K. Misra, G.A., O.P. Dwivedi

Criminal Law - Indian Penal Code, 1860 - Sections 302/34, 304, 323 & 325 - Appellant challenged conviction under Section 302/34 I.P.C. for murder of Babu Lal, arising from dispute over clearing a drain. Court held: (1) Incident involved throwing brick pieces during an altercation without premeditation; no weapon used, only bricks (Virsa Singh Vs St. of

Punj., AIR 1958 SC 465). (2) Single lacerated wound on head caused skull fracture and death due to shock and haemorrhage; no evidence of intent to cause death or injury likely to cause death (Anbazhagan Vs St., Criminal Appeal No. 2043 of 2023). (3) Accused had knowledge that throwing bricks could cause hurt or grievous hurt, not death; offence under Section 325/34 I.P.C., not Section 302/34 (Dhupa Chamar Vs St. of Bihar, (2002) 6 SCC 506). (4) Conviction altered to Section 325/34 I.P.C.; sentence reduced to 3 years' R.I. and Rs. 30,000 fine, with Rs. 25,000 as compensation to deceased's son; default imprisonment of 3 months. (5) Period of imprisonment served adjusted; appellant to surrender immediately. (Paras 24-36)

Appeal Partly Allowed.

Case Law Cited:

1. Virsa Singh Vs St. of Punj., AIR 1958 SC 465 (Para 27)

2. Dhupa Chamar Vs St. of Bihar, (2002) 6 SCC 506 (Para 26)

3. Jai Prakash Vs State (Delhi Administration), (1991) 2 SCC 32 (Para 28)

4. Mahesh Balmiki Vs St. of M.P., (2000) 1 SCC 319 (Para 29)

5. Anbazhagan Vs State, Criminal Appeal No. 2043 of 2023 (Para 30)

6. Kudumula Mahanandi Reddi, AIR 1960 AP 141 (Para 30)

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

1. Heard Sri Moti Chand Yadav, learned counsel for the appellant no. 2, who is the only surviving appellant and Sri O.P. Dwivedi, learned AGA for the State and perused the material on record.

2. The appellants-Durga Prasad and Bhawani Prasad have preferred this criminal appeal, challenging the judgment and order dated 12.09.1989 passed by Additional Session Judge, Sultanpur in Session Trial No. 74 of 1985 whereby the appellants were convicted under section 302 read with 34 IPC and sentenced to undergo rigorous imprisonment for life.

3. The facts relevant for the purpose of this case are as under:-

The first informant-Jagdish Prasad Sharma submitted a written report before the police station concerned stating therein that at about 3 in the afternoon of 29.06.1981, his father was clearing a drain. The accused persons Durga Prasad and Bhawani Prasad came using foul words. When his father protested, he was attacked with pieces of bricks. The incident was witnessed by the first informant-Jagdish Prasad and witnesses Ram Kalp, Devkali, Gayabaksh Singh. They rescued him, otherwise they would have killed his father. This information was given to the police station concerned, on the basis whereof NCR under section 323 IPC was registered on 01.07.1981 at about 09.45. The injured Babu Lal Sharma was medically examined on 30.06.1981 at 8.00 AM at District Hospital, Sultanpur. Later on he died of injuries and his postmortem examination was done. The case came to be converted into section 302 IPC. After completion of investigation both the accused persons were chargesheeted. The case was committed to the Court of Sessions. The accused persons were charged for the offence under section 302 read with section 34 IPC. They denied the charge and claimed trial.

The prosecution produced Jagdish Prasad as PW1. Ram Kalp as PW2, Constable-Laljit Singh as PW3, Radhey Shyam Tiwari as PW4 and Dr. T.N.

Sharma as PW5. The statement of the accused persons under section 313 Cr.P.C. were recorded. No evidence in defence was produced. After hearing both the sides the accused persons were convicted under section 302/34 I.P.C. and sentenced to undergo rigorous imprisonment for life.

4. Before the contentions of the accused persons are taken up, we find it appropriate to briefly refer to the evidence produced by the prosecution for proving its case.

• The gist of the statement given by **PW1-Jagdish Prasad** is that the accused persons were his first cousins and that they have been staying in separate portions of the same house after mutual partition. There had been incessant rain on the day of occurrence. Both the sides had a common drainage which was closed by the accused persons, therefore, the rain water had collected in his 'aangan'. His father went for clearing the drain (naali). Both the accused persons stopped him from doing so and they had an argument. Accused threw pieces of bricks causing injuries to his father on his head, right shoulder and the lower lip. His father fell down. His mother Devkali, uncle Ram Kalp, witness Sharmajeet and Gayabaksh and he himself witnessed the incident and rescued Babu Lal. He has further stated that he went to police station next day. When rain stopped, he got his father admitted to civil hospital. From their, he was referred to Medical College, Lucknow. Later on, he died.

• **PW2-Ram Kalp** is another witness of fact produced by the prosecution, who has subsequently narrated the same story as PW1.

• **PW3-Laljit Singh** (Constable) is a formal witness, who has stated that S.I.-Ram Ashrey conducted inquest. Thereafter the dead body was sent for postmortem. The postmortem was done at 1.30 on the day, on 08.07.1981. Babu Lal died on 07.07.1981 at about 12 in the afternoon.

• **PW4-Radhey Shyam Tiwari** is a witness, who has proved that the NCR was written by constable-Shyam Narayan Dubey in his own handwriting. He has further stated that on the basis of the information, as regards death of Babu Lal, the case was converted into section **304 IPC** and the investigation was entrusted to him. He visited the place of occurrence at about 6 pm on 26.07.1981. The statements of the eye-witnesses were recorded on 05.10.1981. He prepared the site map. On his transfer, the investigation was handed over to S.I. Dharmraj, who submitted the chargesheet.

• **PW5-Dr. T.N. Sharma,** is the witness who conducted the postmortem on the dead body. He has stated that he noted down the ante-mortem injuries and gave an opinion that Babu Lal died of shock and haemorrhage, as a result of ante-mortem injuries. He has also stated on oath that the injuries were sufficient to cause death.

5. In the statement given under section 313 Cr.P.C., the accused persons denied their involvement and said specifically that no injuries were caused by them and that they have been falsely implicated because of enmity with the informant's side. Both the accused persons said that the injured sustained injuries because he had fell down after having slipped in his house and that they are innocent.

6. No witness has been examined by the defence.

7. The prosecution case is based on oral evidence of two witnesses of fact i.e. PW-1 Jagdish Prasad, son of the deceased and PW-2 Ram Kalap, brother of the deceased and further on the evidence of medical officer who conducted post-

mortem. Rest of the two witnesses are formal in nature.

8. Considerable jurisprudence has evolved, on the basis of the myriad of cases decided by the Supreme Court and the High Courts with regard to medical evidence. More often then not the injuries, the nature and dimensions thereof, the seat of the injuries and the weapons used to inflict them, may occupy a key position for deciding the actual intent or the knowledge and may hold a pivotal place in a criminal case involving offence under section 302 or 304 I.P.C. This may not be a sweeping statement that when the Court is faced with a question that which section defining the offences affecting life within Chapter XVI of I.P.C., a particular act is covered, the discussion may revolve around the medical evidence. Presence of injuries, matters incidental thereto or related to them or even lack of injuries may hold a centre stage in a criminal case.

9. In the instant case, PW-5, the medical officer testified that he found following ante mortem injuries at the time of post-mortem.

(i) A 7cm long stitched wound with seven stitches on right side of head, 3 cm above the left eyebrow.

(ii) A swelling 15cm x 10cm at the back of left side head, 3cm above the left ear and 4cm above the left eyebrow.

(iii) Abraded contusion 1.5cm x 1cm on top of right shoulder.

(iv) Abrasion 6cm x 5cm right side of chest, 1.5 cm below right scapula bone.

The doctor found a burr hole 4cm x 3cm membrane deep, below injury no.(i) and a **linear facture 17cm on frontal/temporal and occipital bones and a haematoma** of 17cm x 16cm under the membrane, below injury no. (i) and (ii), on opening.

10. PW-5 has given an opinion that deceased died of shock and haemorrhage due to ante mortem injuries. He has further given an opinion that injuries were sufficient to cause death. In his cross examination, he said that injury no.(ii) was only a swelling and was caused as a consequence of injury no.(i). He further said that the injuries may be caused, if deceased had slipped and fell down on bricks and that he cannot say that the swelling was because of post-mortem staining or not.

11. Before I compare and discuss the medical evidence given by the Doctor who conducted the post-mortem with the injuries shown in the medical examination of the deceased done earlier (conducted seven days before the post mortem), I find it appropriate to refer to certain evidence which has come in the testimony of witnesses of fact, in the background of the prosecution story.

12. The indisputable facts are that the incident occurred on 29.06.1981 at 3 in the afternoon inside the house, where both the sides used to reside after partition. The prosecution story is that deceased was trying to open a drain to release the rain water which had collected in his aangan. The accused persons Durga Prasad and Bhawani Prasad started hurling abuses and they asked him not to open the drain. An altercation ensued, and the accused persons started throwing pieces of bricks from above, causing him injuries. It is not disputed that the first informant had earlier gone to police station and an N.C.R. under section 323 and 504 I.P.C. was written on

the basis of his written complaint. This N.C.R. was registered on 01.07.1981 i.e. about two days after the incident. This is also not disputed that injured Babu Lal died on 07.07.1981 in medical college. Subsequently a written complaint was given by his son. The CO directed for registration of an F.I.R. Therefore, the case got converted into Crime No. 163 of 1981 under section 304 I.P.C. vide G.D. entry of 22.07.1981. Earlier the injured Babu Lal had been medically examined on 30.06.1981 privately at 8.00 AM at District Hospital Sultanpur and the post-mortem was done on 07.07.1981.

13. PW-1 the first informant has stated that when his father went to ask for opening the drain, the accused persons refused to do so. His father protested and said that he should be permitted to open the same. The accused persons started throwing pieces of bricks on him causing him injuries. As there was continuous rain, therefore, he did not go to the police station. The next day, he took his father to a hospital in Sultanpur, where he was medically examined on 30.06.1981 at 8.00 A.M. at District Hospital, Sultanpur and was referred to Medical College, Lucknow.

In his cross-examination, he stated that when his father was digging open the drain, the accused persons climbed on the rooftop of their kitchen and started throwing brick pieces. When asked, he said that he does not remember that accused persons threw one or two, 10 or 20 , 50 or 100 pieces of bricks. He stated that his father sustained an injury on the back of his head from which blood came out.

14. PW-2 Ram Kalap has stated that when the accused did no permit Babu Lal to open the drain, he started doing it himself. Both the accused persons started throwing brick pieces from their rooftop. Babu Lal fell in his aangan and became unconscious. Falling is an admitted fact. He has testified that because of heavy rains, he could not be brought to the hospital or the Thana, the same day and was instead given treatment by some local Doctor. It was only next day, when Babu Lal was brought to civil hospital at Sultanpur and from there he was referred to medical college.

Giving description of the acts done by the accused persons, this witness testified that the accused persons threw only four to five pieces of bricks.

15. It is established that the incident was preceded by an altercation as regards opening of drain. This too is established that the accused persons threw pieces of bricks from the rooftop. They were standing on their rooftop and the deceased was in his aangan. This too is undisputed that deceased was brought to civil hospital Sultanpur. He was examined the next day of the incident. The genuineness of medical examination report dated 30.06.1981 has been admitted by the defence side, therefore this is an admitted fact that deceased was medically examined at 8 AM on 30.06.1981.

16. This medical examination describes three injuries having been found on the person of the deceased:

"(i) ***Lacerated wound 3.5cm x 0.4 cm scalp deep*** *over left occipital region, 10cm away from left ear. No fresh bleeding. Kept under observation.*

(ii) Abrasion 1cm x 0.5 cm over right shoulder, 3.5 below from tip of shoulder, scab found.

(iii) Abrasion 1cm x 1.5cm over middle of lower tip inner aspect.

General condition was low, unconscious, Admitted to hospital, X-ray skull advised.

Remark- Injury No. 1 kept under observation. Rest injuries are simple. Injury No.1 caused by blunt object and rest by friction.

Duration is about half day old."

17. In this case the patient was advised X-ray, but no X-ray has been produced. The doctor gave opinion that injury no.(i) was caused by blunt object and rest by friction. His general condition was low and he was unconscious and was admitted to hospital.

18. The prosecution has not explained the reasons for non production of papers like reference slip or discharge certificate or x-ray report etc. No question has been put to the I.O. in this regard by either of the parties. Definitely it was duty of I.O. to collect those papers to prove that the deceased was in fact referred to medical college and was put to X-ray examination. However, this missing link may not have any bearing on the prosecution case and is a defect for which only the I.O can be blamed, not the prosecution. This defect does not seem to have any far reaching consequence and is liable to be ignored in the facts and circumstance of the case, in view of the discussion to follow in the body of the judgment. The prosecution further relies on pre-mortem medical examination and on post- mortem report. Now, this Court has before it a medical examination done on 30.06.1981 and a post mortem report done on 08.07.1981 to draw appropriate inferences.

19. As per the medical examination report, there is only one injury worth mentioning i.e. a lacerated wound on occipital region. The dimensions were 3.5cm x 4 cm. This injury was only scalp deep. At that time there was no fresh bleeding. Rest of the two injuries were quite minor, of the nature of abrasions. The dimensions too were quite petty.

20. The doctor, who conducted post mortem examination, opened the body and found a linear fracture 7cm covering frontal, temporal and occipital bone. It was situated 1cm above the occipital bone to above the left eyebrow. He also found haematoma under the membrane below injury no.(i) and (ii). This evidence establishes that there was a long linear fracture on the bones of his head and this caused an internal bleeding. The blood had collected and therefore, the doctor had to drill through the bones to take out the blood collected below the injuries. The burr holes are drilled into skull to release the pressure which collected fluid may build up.

21. From all the medical facts taken together, the only inference which can be drawn is that injury no.(i) was outwardly, merely a lacerated wound but had in fact caused linear facture of the three bones. The dimension of 17cm shows that the blow had a deep impact on the bones causing fracture. This injury caused an accumulation of blood below it. The injury no.(ii) i.e. swelling of 15cm x 10cm on the right side head was nothing but accumulation of fluid/blood caused by internal bleeding and therefore, the doctor had to burrow a hole of 4cm x 3cm to release the pressure created by the fluid collected in the skull.

The prosecution case is that the deceased sustained injury from the pieces of bricks and fell down. Act of falling down explains the rest of the injuries which were in the nature of abrasions. In the medical examination dated 30.06.1981, the doctor found his general condition as low and he

was unconscious at that time too. All these facts cumulatively show that the deceased died of the injury caused on his head by a piece of brick.

22. The contention of the defence is that that the prosecution has failed to demonstrate that how many pieces of brick were thrown and what was their size. No pieces of brick were collected by the I.O. It may be noted that the only defence which has been taken by the accused is that the deceased sustained injuries while he slipped in the rain. If injury no.(i) is excluded and rest of the injuries which are in the nature of abrasions, are considered, this statement appears to have substance that he fell down and therefore, sustained those injuries but as far as injury no.(i) is concerned, it may confound and compel the Judge to think over whether the same was caused by the impact of a blunt object thrown from above or just by slipping down on a solid surface.

23. In these circumstances, the seat of the injury, the nature thereof assumes great significance and to draw a conclusion undoubtedly this court has to depend upon the testimony of the witness of fact coupled with other circumstances of the matter. For this purpose the Court has no resources except to rely upon the evidence produced by the prosecution. P.W.-1 Jagdish Prasad who has supported prosecution story, has stated in unambiguous terms that the accused persons started throwing pieces of bricks which hit his father's head from the rooftop of their kitchen. PW.2 -Ram Kalap is another eyewitness, who admittedly happens to be uncle of P.W.1 and resided in the third portion of the same house after its partition, has supported the prosecution. P.W.-2 has testified that because of excessive rain, water had collected in their angan and that when his brother i.e. deceased Babu Lal asked the accused persons to clear the drain, they did not pay any heed and therefore the deceased started digging the drain himself for release of water. Annoyed over this act of the deceased, the accused persons started throwing pieces of brick from their rooftop.

24. The prosecution has examined two witnesses of fact. Both are eyewitnesses, whose presence on the spot is nothing but natural. The accused and the witnesses are closely related. There appears no good reason why they should falsely implicate the accused persons when they had already accepted the partition of the house at least 6 to 7 years before this incident. In our view, the Court is not expected to go about the prosecution story with an air of disbelief from the very beginning. In our opinion, unless, the defence has been able to demolish the prosecution case by impeaching the credibility of the witnesses or by demonstrating probability of false implication or by demonstrating the inherent weakness or by at least creating reasonable doubts in any other manner, of course by producing some evidence or from the prosecution evidence itself, the Court would ordinarily believe the statements given by prosecution witnesses. This is not to say that the prosecution witnesses have to be believed blindly. Of course, the evidence has to be scrutinised for finding out the grains of truth in it. The defence may dismantle the prosecution case by demonstrating the falsity thereof which may emanate from inherent infirmities in the story or because the evidence of the witnesses are shaky in material particulars or because the witnesses are likely to falsely implicate the accused persons for certain objectives to be attained or where

witnesses are not found reliable for any other good reason or their evidence is found deficient. The factors enumerated herein definitely do not lay down any strict formula for prosecution to stand on its own legs. The only point this Court wants to impress upon is that the Court has to depend upon the evidence which has been led by the prosecution or by the defence for inferring whether the charges stand proved or not. The Court cannot depend upon conjectures and surmises or entertain doubts without having good reasons to have them. In the instant case, the Court do not find substance in the alternative theory given by defence that injury was not caused by their act and rather it was a result of his slipping down in the rain. My view is fortified by the fact that the fatal injury was on his skull with a 17cm fracture right from frontal to temporal to occipital bone. In our opinion there is a strong probability that injury of such nature and dimension is caused by the impact of a blunt object thrown with strong force, therefore, this Court is of the view that injury no.1 on the head of the decease was caused by throwing of brick piece and not just by slipping down.]

25. A question may arise that the prosecution has not been able to show that it was accused Durga Prasad alone who threw the piece of brick which actually hit him in the head, therefore, he may be given benefit of doubt. We do not find much substance in this argument. The prosecution story is that the accused Durga Prasad and one more Bhawani Prasad (whose appeal stands abated) both started throwing brick pieces. In such circumstances common intention, covered under section 34 of I.P.C. comes into play. Therefore, it is not necessary to show that who threw a particular piece of brick which hit his head leaving him injured. In our opinion, if this Court embarks upon such an enquiry that who threw that particular piece of brick which hit Babu Lal's head, it would tantamount to adding a new angle in the prosecution case. The prosecution case is that both the accused who were real brothers, climbed over their roof and started throwing brick pieces. The act of both accused speaks of their common intention. The prosecution case cannot be bifurcated as if that one of the accused was throwing brick pieces and the other just kept standing without sharing the intention of co-accused! This type of presumption is, not only not supported by the evidence of the witnesses but is like substituting one's own new story in the prosecution case. Ordinarily, in criminal cases the prosecution sets up a story from the evidence which has been collected. The courts are not permitted to add or modify or change or substitute with its own – unless the court is compelled to do so for good and strong reasons. Such a course of action, if frequently resorted to may not only prejudice the defence, may also crumble the criminal justice administration system.

26. Next important legal issue is whether prosecution has been able to prove charge of section 302/34. In **Dhupa Chamar & Ors Vs. State of Bihar, (decided on 02.08.2002)**, the Supreme Court had to grapple with a case of death caused by single bhala blow in the neck. A question arose whether clause 'Thirdly' of section 300 I.P.C. is attracted. The Supreme Court observed as below:-

" The ingredient 'intention' in that Clause is very important and that gives a clue in a given case whether offence involved is murder or not. Clause Thirdly of Section 300 of the Penal Code reads thus:-

"Thirdly. If it is done with the intention or causing bodily injury to any person and the bodily injury intended to be

inflicted is sufficient in the ordinary course of nature to cause death, or" Intention is different from motive. It is the intention with which the act is done that makes difference, in arriving at a conclusion whether the offence is culpable homicide or murder"

27. In the celebrated and landmark judgment given by the Supreme Court in **Virsa Singh Vs. State of Punjab AIR 1958 SC 465**, it was held as below:

" To put it shortly, the prosecution must prove the following facts before it can bring a case under s. 300, 3rdly " ; (i) First, it must establish, quite objectively, that a bodily injury is present ; (ii) Secondly, the nature of the injury must be proved; These are purely objective investigations.(iii) Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further and,Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

28. The Supreme Court in **Dhupa Chamar (supra)**, quoted from another judgment of itself given in **Jai Prakash Vs. State (Delhi Administration), (1991) 2 SCC 32** in which the meaning of term 'knowledge' and 'intention' was elaborated as below:

"It can thus be seen that the 'knowledge' as contrasted with 'intention' signify a state of mental realisation with the bare state of conscious awareness of certain facts in which human mind remains supine or inactive. On the other hand, 'intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event. Therefore, in the case of 'intention' mental faculties are projected in a set direction. Intention need not necessarily involve premeditation. Whether there is such an intention or not is a question of fact. In Clause Thirdly the words "intended to be inflicted" are significant. As noted already, ***when a person commits an act, he is presumed to expect the natural consequences. But from the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death it does not necessarily follow that the offender intended to cause the injury of that nature.*** *However, the presumption arises that he intended to cause that particular injury. In such a situation the court has to ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. However, as pointed out in Virsa Singh's case (supra), the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number of injuries inflicted and their nature and the part of the body where the injury was inflicted are some of the relevant factors.* ***These and other factors which may arise in a case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused."***

29. In **Mahesh Balmiki alias Munna Vs. State of M.P. 2000 (1) SCC 319**, the

Supreme Court pointed out that there is no principle that in all cases of a single blow, 302 I.P.C. is not attracted. A 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 Supreme Court observed as below:-

"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, 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."

30. The Supreme Court of India, in **Criminal Appeal No. 2043 of 2023 Anbazhagan Vs. The State represented by the Inspector of Police**, decided on 20.07.2023, differentiated between word 'intent' and 'knowledge' observing that intention which 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. The relevant consideration **may include nature of weapon used, place where injury was inflicted, nature of injury**, the opportunity available to the accused. The Supreme Court quoted from the **Kudumula Mahanandi Reddi MANU/AP/0128/1960 : AIR 1960 AP 141**, as below :-

'18. … A man's intention has to be inferred from what he does. But there are cases in which death is caused and the intention which can safely be imputed to the offender is less grave. The degree of guilt depends upon intention and the intention to be inferred must be gathered from the facts proved. Sometimes an act is committed which would not in an ordinary case inflict injury sufficient in the ordinary course of nature to cause death, but which the - offender knows is likely to cause the death. Pro*of of such *knowledge throws light upon his intention."

The Supreme Court further reproduced para 26 from Kudumala judgment as below:

"26. …Where the evidence does not disclose that there was any intention, to cause death of the deceased but it was clear that the accused had the knowledge that their acts were likely to cause death the accused can be held guilty under the second part of sec. 304, I.P.C. The contention that in order to bring the case under the second part of sec. 304, I.P.C. it must be brought within one of the exceptions to sec 300, I.P.C. is not acceptable."

'Knowledge' and 'intention' are essential ingredients of offence of culpable homicide as defined in section 299 of I.P.C. Section 299 I.P.C. is as below:

"Whoever causes death by doing an act with the intention of causing death, or

with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

31. In our opinion the aforesaid precedents set up a right background for this court to proceed, keeping in mind the real intent of law and its application to the facts of instant case. This Court has to first find out whether the act is covered under section 299 I.P.C. as defined above. The facts of this case are that in the background of a dispute which arose because of accumulation of rain water in a enclosure which is inside portion of house popularly known as 'angan' (courtyard) of the deceased and when his brother's family refused to open the drain, he attempted to clear the same on his own which annoyed the accused persons i.e. his real brother's sons and they started throwing brick pieces. In this case only one injury was of such nature which could have caused death. There has not been any repetition of act of throwing bricks when the deceased had slipped and fell down. The accused threw pieces of bricks (not wielded any weapon) which is enough to show that there has not been any pre-meditation. This is not the case that they had come prepared with some object which may properly fall in category of a weapon. This is not a case where after the altercation, accused persons had come again with a plan in their mind. This is not a case where they had brought some weapon. The circumstances show that there was an act which can be called rather reckless. When a piece of brick is thrown, it is difficult to say where it will hit the body, if at all it hits, unless somebody is so trained that he can exactly pin point the part of the body where he wanted to hit with the object. Unless someone is skilled enough, it is not possible to hit with a stone or brick at a target with precision. Here the act, and the intended consequence have to be considered with caution. Moreover, it has not come in evidence that accused had specifically targetted head of the deceased for inflicting injury and he was successful in doing the same.

32. Now comes another aspect that is the nature of injury actually caused. In this case, the impact of the blow by piece of brick caused fracture of skull bones. The deceased survived for seven days, thereafter he succumbed to this injury. In our view a single injury caused by throwing a piece of brick, which is not a hand held weapon, cannot be categorised as an injury likely to cause death. In our opinion the facts and circumstances exclude the proposition that the accused persons did the act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death. Further the act is not covered in the third part of section 299 I.P.C. that the act was done with a 'knowledge' that he is likely by such act to cause death.

33. In **Anbazhagan (supra)**, the Supreme Court in para 42 of the judgment observed that it is fallacious to contend that wherever there is single injury, a case of culpable homicide is made out, irrespective of other circumstances. In the same judgment, the Supreme Court reproduced para 23 of the judgment in **Virsa Singh (supra)** with a view to impress upon that the court has to confine itself to the fact whether accused intended to inflict the injury which is proved to be present and that if he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course the 'intent' that the section requires, is not proved. The

Supreme Court said that whether he knew of its seriousness or intended serious consequence is neither here not there.

34. In the instant case, the existence of injury is proved. Now the question is whether circumstances warrant conclusion that he intended to cause such an injury which has actually been caused or whether he had the requisite knowledge that he will cause such an injury which may ultimately cause his death. Even in cases which involved a single blow by lathi, the Courts have convicted accused under section 304 I.P.C. and in some cases even under section 302 I.P.C. Having said that it may be noted that lathi is a weapon which has to be held by hands and when a blow is caused, the accused must be presumed to have knowledge that on which part of the body, whether some vital parts like head or any other part like limbs which are non-vital, he is going to hit.

Another difference is that when an accused is using lathi, he must be presumed to be aware of the force he is about to use or has used and therefore, can be attributed with the necessary 'knowledge' of consequence of his act, whether accused had necessary intention or 'knowledge'. **Most fundamental formula which may be applied for deducing the requisite intention or knowledge, is whether he was aware of the consequences which shall follow or likely to follow as a direct consequence of his act**. Where such an awareness of the direct consequences or the higher degree of probability cannot be attributed to the accused, the offence may not fall either under section 302 I.P.C. or section 304 I.P.C. In our firm opinion, in such cases the offence may be covered under section 323, 324 and 325 I.P.C. as the case may be.

35. Interestingly, the term 'intention' and term 'knowledge' form essential ingredient of section 321 I.P.C. which defines voluntarily causing hurt and section 322 I.P.C. which defines voluntarily causing grievous hurt. Broadly, when an act is done with the intention of causing hurt/grievous hurt or with a **'knowledge'** that he is likely to cause hurt or grievous hurt to any person, he shall be punishable under appropriate sections. The prosecution has already been successful in showing that the deceased got injured on his head by a piece of brick thrown from above by the accused. P.W.2 has said that accused person was throwing 'addhi' i.e. more or less half piece of a brick. Therefore, definitely he had an intention to cause hurt or that he had a 'knowledge' that he is likely to cause grievous hurt. When he threw the brick piece, he was standing on his rooftop and the deceased was in his 'angan'. The impact of injury was such that it caused fracture of skull bones. In our opinion, in the totality of facts and circumstances and taking into account that there was a verbal altercation (not a fight) over an issue of opening the drain for release of water and there was no pre-meditation and that the accused obviously picked up a piece of brick and that he did not come prepared and armed with any weapon at all, in our opinion an offence under section 325 I.P.C. is proved beyond reasonable doubt against accused and not the offence under section 302 or 304 I.P.C.

36. (i) The accused has been convicted under section 302 read with section 34 I.P.C. and sentenced to undergo life imprisonment. For the reasons already discussed hereinabove, the Trial Court has erred in convicting the appellant under Section 302 read with 34 IPC. Hence, the conviction of accused Durga Prasad is

altered from 302 read with section 34 I.P.C. to section 325 read with section 34 I.P.C.

(ii) This Court finds that the interest of justice shall be served by sentencing the accused Durga Prasad for a term of three years and a fine of Rs. 30,000/-.

(iii) Out of the total amount of fine, Rs. 25,000/- shall be payable to the son of the deceased Durga Prasad as compensation.

(iv) In case fine is not deposited, the accused shall undergo three months simple imprisonment for default in payment of fine.

(v) The period of imprisonment already undergone shall be adjusted towards the substantive sentence of imprisonment.

37. The accused shall surrender before the court concerned immediately.

38. The bail bond and the personal bond shall stand discharged. **Accordingly, the judgment and order of sentence are modified. Appeal is allowed in part.**

39. Let a copy of the judgment be immediately transmitted to the court concerned for preparation of conviction warrant.

(2024) 2 ILRA 1362
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.02.2024

BEFORE

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

Criminal Appeal No. 1557 of 1983
connected with
Criminal Appeal No. 1610 of 1983

Mihi Lal & Anr. ...Appellants
Versus
State ...Respondent

Counsel for the Appellants:
Sri Pt. Mohan Chandra, Sri Apul Misra, Sri P.N. Misra, Sri Vinay Kumar Pathak

Counsel for the Respondent:
D.G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 302, 323 & 34 - Appellants challenged conviction and sentence of life imprisonment under Section 302 read with Section 34 IPC and six months' rigorous imprisonment under Section 323 read with Section 34 IPC by Additional Sessions Judge, Budaun, dated 31.05.1983. Court held: (1) Evidence of eye-witnesses PW-1 (Angoori Devi, injured), PW-2 (Kunwar Sen), and PW-4 (Laung Shree, daughter of deceased) consistent and truthful; minor inconsistencies trivial and not fatal (Balu Sudam Khalde Vs St. of Mah., Criminal Appeal No. 1910 of 2010). (2) Presence of PW-1 and PW-4, relatives of deceased, natural and credible; relationship not a ground to discard testimony unless enmity proven to cause false implication (Dalip Singh Vs St. of Punj., AIR 1953 SC 364; Hari Obula Reddy Vs St. of A.P., (1981) 3 SCC 675). (3) Medical evidence (post-mortem and injury reports) corroborated prosecution case. (4) FIR lodged promptly, no evidence of anti-timing. (5) Enmity a double-edged sword, not sufficient to discredit prosecution evidence. No perversity in trial court's findings. Appeals dismissed; surviving appellants (Banwari and Jhamman Lal) to be taken into custody to serve sentences. (Paras 49-73)

Case Law Cited:

1. Balu Sudam Khalde Vs St. of Mah., Criminal Appeal No. 1910 of 2010 (Para 49)

2. Dalip Singh Vs St. of Punj., AIR 1953 SC 364 (Paras 61, 62)

3. Piara Singh Vs St. of Punj., (1977) 4 SCC 452 (Para 63)

4. Hari Obula Reddy Vs St. of A.P., (1981) 3 SCC 675 (Para 64)

5. S. Sudershan Reddy Vs St. of A.P., (2006) 10 SCC 163 (Para 65)

6. Kamta Yadav Vs St. of Bihar, (2016) 16 SCC 164 (Para 66)

7. Nand Kumar Vs St. of Chhattisgarh, (2015) 1 SCC 776 (Para 66)

8. Ashok Rai Vs St. of U.P., (2014) 5 SCC 713 (Para 67)

9. Mritunjoy Biswas Vs Pranab alias Kuti Biswas, (2013) 12 SCC 796 (Para 68)

10. Inder Singh Vs St. of Raj., (2015) 2 SCC 734 (Para 69)

11. Bharwada Bhoginbhai Hirjibhai Vs St. of Gujarat, 1983 Cri LJ 1096 (Para 49)

12. Leela Ram Vs St. of Har., (1999) 9 SCC 525 (Para 68)

13. Rammi Vs St. of M.P., (1999) 8 SCC 649 (Para 68)

14. Shyamal Ghosh Vs St. of W.B., (2012) 7 SCC 646 (Para 68)

15. Tahsildar Singh Vs St. of U.P., AIR 1959 SC 1012 (Para 49)

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

1. Heard Shri Apul Mishra, learned counsel for the appellants, Shri Jitendra Kumar Jaiswal, learned AGA for the State and perused the record.

2. The instant criminal appeals have been filed against the judgment and order dated 31.05.1983 passed by Additional Sessions Judge, Budaun in Session Trial No. 27 of 1981, arising out of Case Crime No. 162 of 1980, under Sections 302, 323 IPC, Police Station Jarif Nagar, District Budaun, whereby the accused-appellants have been convicted for the offence under Section 302 read with Section 34 IPC and awarded the sentence of life imprisonment and also under Section 323 read with Section 34 IPC and awarded the sentence of six months' rigorous imprisonment.

3. It has been informed that appellant no.1 Mihi Lal in Criminal Appeal No. 1557 of 1983 had already expired and as such, the instant appeal qua appellant no.1 Mihi Lal was dismissed as abated by this Court vide order dated 27.10.2018.

4. As per the prosecution case, as unraveled in the FIR lodged by one Dumbar Singh, vide written report (Ex. Ka-1) dated 16.10.1980 at 8:45 PM, which was registered vide Case Crime No. 162 of 1980, under Sections 302/323 IPC in Police Station Jarif Nagar, District Budaun vide G.D. No. 24 (Ex. Ka-11) of the written report and chik FIR (Ex. Ka-3) prepared by PW-6 Hari Ram Sharma at the relevant date and time.

5. The allegations made in the FIR are that about two years back, Choban Singh, son of Mihi Lal was murdered, in which, Khemai, Virendra Singh and Tara Singh along with seven other villagers were falsely nominated as accused and they were put to trial, however, about 8-9 days back, the said case ended in acquittal. Consequent to the said acquittal, the appellants and his relatives started bearing animosity against them. There were certain other cases also, on account of which, the appellants used to bear enmity against them.

6. It is further alleged that on 16.10.1980 in the forenoon, while the first informant Angoori alongwith his cousin father-in-law Khemai and sister-in-law Laung Shree were returning back to their village after cutting the paddy crops and reached near the boundary marks of the

field of Gyani and Udaiveer, then from the eastern side of the bushes, Mihi Lal, son of Abhai Ram, armed with farsa and his sons Jhamman, Aaram Singh, armed with lathis and Banwari Lal, nephew of Mihi Lal, armed with SBBL gun, emerged and exhorted to kill his cousin father-in-law Khemai, who threw the bundle of paddy crops, which he was carrying on his head and tried to make his escape good, however, Banwari fired a shot, which hit him, due to which, he fell down near the boundary marks of the field of Udaiveer, thereafter, Mihi Lal, Jhamman and Aaram Singh started assaulting him with their respective weapons. They raised alarm after throwing away the bundle of paddy crops, which they were carrying on their head and tried to rescue Khemai by laying down on him, however, she was also assaulted by the assailants with lathis. Laung Shree, who was ahead of the two, also threw away the bundle of paddy crops, which she was carrying and raised alarm. On the alarm being raised by them, Kunwar Sen (PW-2) and Tara Singh reached the place of incident and challenged the assailants, who made their escape good towards north. Khemai died on the spot itself.

7. The aforesaid FIR was lodged alleging therein that accused-appellants along with Banwari had killed Khemai and caused injuries to the first informant Angoori Devi. The said FIR was registered in the presence of S.I. Hari Ram Sharma (PW-6), who took over the investigation and recorded the statement of Head Constable Azhar Hussain (PW-7), who had drawn the chik FIR and made the G.D. entry and thereafter, reached the place of incident at about 10:30 PM and thereafter, recorded the statement of Angoori Devi, Laung Shree, Tara Singh, Kunwar Sen and Dumbar Singh and stayed in the village.

8. On the next morning at 6:30 AM, Investigating Officer S.I. Hari Ram Sharma again reached the place of incident and conducted the panchayat nama (Ex. Ka-4). He also prepared the photo-nash (Ex. Ka-5) and challan-nash (Ex. Ka-6) and sent a letter to the C.M.O. (Ex. Ka-7) and prepared a sample seal. The site plan was also prepared by the Investigating Officer and marked as Ex. Ka-8. Thereafter, the dead body of the deceased was sealed and dispatched for autopsy. The Investigating Officer has also found three bundles of paddy crops, which the deceased and two other eye-witnesses were carrying at the time of incident and drawn its recovery memo alongwith sample of plain earth, blood soaked earth and pieces of broken bangles, which were marked as Ex. Ka-9.

9. An autopsy was conducted on the person of the deceased Khemai in District Hospital on 18.10.1980. In the post-mortem report, the Doctor has noted the following injuries:-

(i) Lacerated wound 3.5 C.M. x 0.5 cm x bone over part of fore-head, 2.5 cm above root of nose.

(ii) Lacerated would 2 cm x 1.5 cm x bone over left side of fore-head, 1 cm above eye-brow.

(iii) Lacerated wound 5.5 cm x 1 cm x bone over left parietal region, 1 cm above ear.

(iv) Incised wound 2.5 cm x 0.5 cm x bone over left parietal region. 4.5 cm behind injury no.3.

Clean cut margins with sharp edges.

(v) Incised wound 1.5 cm x 0.5 cm x scalp over left occipital region.

(vi) Incised wound 1 cm x 0.5 cm x scalp over left occipital region, 1 cm below injury no.v.

Clean cut margins with sharp edges.

(vii) Lacerate wound 5.5 cm x 0.5 cm x bone over right parietal region, 10 cm above ear.

(viii) Incised wound 2 cm x 1 cm x muscle deep over left side of body left lower jaw at its lower border clean cut margins with sharp edges.

(ix) Incised wound 2 cm x 1/2 cm x skin over left side of face, 2 cm in front of tragus of left ear.

(x) Gunshot abrasion due to burning 6 cm x 1 cm over left side of neck at its middle 1/3rd placed horizontally.

(xi) Abrasion 2 cm x 2 cm over back of left shoulder.

(xii) Abrasion 2 cm x 1 cm over front of right knee.

On internal examination, the Medical Officer found fracture of both parietal bones and frontal bone under injury no.1, 2, 3 and 7. Membranes were also lacerated and teared at places, brain was also congested and lacerated at places. Right chamber of heart contained clotted blood, while left chamber was empty. About 400 gm digested food material was present in the stomach. The small and large intestines were full of gases and faecal matter. Bladder was empty. According to the Medical Officer, the death was caused due to shock and hemorrhage as a result of antemortem injuries.

10. The medical officer also proved the post-mortem report (Ex. Ka-2). Smt. Angoori Devi was also medically examined by Dr. O.P. Agarwal (PW-8) of P.H.C., Dehgawan on 17.10.1980 at 6:50 PM. The Doctor has noted following injuries:-

(i) An abrasion on the back of left hand 3 cm below the wrist joint size 0.4 cm x 0.2 cm surrounded by painful swelling.

(ii) Painful swelling of right fore-arm in 1 cm area, 4 cm above the wrist joint.

(iii) The patient tells pain in right scapular region. No visible sign of injury.

11. The medical officer also proved the injury report of Angoori Devi (Ex. Ka-12).

12. After concluding the investigation, the Investigating Officer had filed the charge-sheet (Ex. Ka-10) against all the nominated accused persons under Sections 302, 323, 324 IPC.

13. On the basis of the said charge-sheet, learned Magistrate had taken cognizance and since the case was exclusively triable by the court of Sessions, made over the case to the court of Sessions for trial. The Sessions Court vide its order dated 28.04.1981 framed the charges against the accused persons under Section 302 read with Section 34 IPC and Section 323 read with Section 34 IPC. All the accused-appellants abjured the charges and claimed to be tried.

14. During the course of trial, the prosecution has examined as many as four witnesses of fact and four formal witnesses. Their testimony in brief is enumerated hereunder :-

15. PW-1 Angoori Devi is an eye-witness of the incident and also received injuries at the time of the incident. The FIR was scribed at her dictation, which was scribed by one Rajendra Singh. She tried to lodge the report at the Police Station, however, since the accused persons had obstructed her way, she returned back to her house and thereafter, the report was handed over to Dumbar Singh, who reached the Police Station and lodged the first information report.

16. PW-1 Angoori Devi in her statement has categorically stated that while they were returning back to their house after cutting paddy crops and had reached near the fields of Gyani and Udaiveer, the assailants emerged from

eastern side and exhorted to kill Khemai, who tried to make his escape good by throwing away the bundle of paddy crops, which he was carrying, however, he was fired upon by the assailant Banwari by the SBBL gun, which hit him and he fell down. Thereafter, he is said to have been assaulted by Mihi Lal, armed with farsa, Jhamman and Aaram Singh, both armed with lathi.

17. PW-1 tried to rescue his father-in-law Khemai by bending over him, however, the assailants assaulted her by lathi causing injuries on her person. An alarm was raised by the said witness and one Laung Shree, who was also accompanying her. The alarm attracted other witnesses, namely, Kunwar Sen and Tara Singh, who reached there and challenged the assailants, who made their escape good. On account of assault made by the assailants, Khemai died on the spot. The FIR in respect of the incident was scribed at the dictation of the said witness, which was scribed by one Rajendra Singh and the FIR was lodged in the Police Station by one Dumbar Singh (P.W.3).

18. The said witness has been exclusively cross-examined by the defence, however, nothing adverse could be elicited from her statement. The witness however denied the suggestion that she had not seen the incident and that the FIR was lodged after three days of the incident. She categorically stated that she had received three injuries on her person and she had shown her injuries to the Investigating Officer, who had reached in the village to investigate the case and was also medically examined at P.H.C. Dehgawan, Budaun.

19. She has further categorically denied the fact that she was not present at the time and scene of the incident and her injuries are fake and self-inflicted. She has further denied not to have gone with the victims to cut the paddy crops. During cross-examination, she has further stated that at the time of incident, she along with Laung Shree and Khemai were returning back to her home. She has further categorically stated that Banwari fired a shot from the distance of about 15-16 paces and in order to rescue Khemai from the assault of accused-assailants, she had, in fact, bent over him but did not lay upon him. She has further denied the factum that at the time of incident, Mihi Lal was in Khadrabad market alongwith Jhamman and Aaram Singh and Banwari was in his village. She has further categorically denied the fact that on account of inimical terms with the assailants, she had lodged the report.

20. PW-2 Kunwar Sen is another eye-witness of the incident, who has clearly deposed that at the time of the incident, he was at his field and on raising alarm by Angoori Devi and Laung Shree, he had rushed to the place of incident and saw the deceased Khemai lying on the boundary marks of field of Gyani and Udaiveer and was being assaulted by Mihi Lal by farsa and Jhamman and Aaram Singh by lathis, whereas Banwari was standing there with his SBBL gun. Angoori Devi with an intention to rescue Khemai had bent over him, who was also assaulted by lathi, consequent to which, she suffered injuries and her bangles were also broken. The assailants, on being challenged, made their escape good. At the relevant time, Laung Shree, Dumbar Singh and other villagers were also present.

21. The said witness has also been extensively cross-examined by the defence

and has explained the alleged inimical terms with the accused persons. He has further stated that while he was keeping guard of dead body of Khemai, the Investigating Officer had reached there at about 10-11:00 PM and interrogated him and on the next day, recorded his statement and he had clearly told him that he is an eye-witness of the incident and the fact that at the relevant time, Angoori and Laung Shree were also present there. In his cross-examination, he has further stated that at the time of incident, he was present at his field, where mustard crop were grown and had reached the place of incident, which was at a distance of 30 to 40 paces. He has further categorically stated that when he rushed to the place of incident after hearing the fire shot, he had seen Banwari standing on the road but he had not actually seen Banwari firing from his SBBL gun and could not state as to who fired the shot. He has further stated that while rushing to the place of incident, he had challenged the assailants alongwith Tara Singh. He has categorically denied the suggestion that he along with Khemai formed a gang nor he is a member of the gang. He has further denied the suggestion that there were illicit relations between the wife of Khemai with one Virendra, due to which, Virendra had caused the murder of Khemai. He has further denied the fact that Khemai was killed in an incident of dacoity and false case has been cooked up by him.

22. PW-3 Dumbar Singh is not an eye-witness of the incident, however, he is the person, who had carried written report scribed by Rajendra Singh at the dictation of PW-1 Angoori and had lodged the report in the Police Station. In his cross-examination, he has categorically stated that the FIR was scribed by Rajendra Singh at the dictation of Angoori Devi, which was heard by him. He has further categorically stated that he reached the Police Station in an hour and Head Moharrir had lodged the report in presence of the Investigating Officer, who had reached the village to investigate the case. He has categorically denied the suggestion that FIR was lodged after three days of the incident.

23. PW-4 Laung Shree is the daughter of the deceased and another eye-witness of the incident, who was accompanying the deceased and Angoori Devi at the time of the incident. She had categorically stated that after cutting paddy crops, she along with her father Khemai and sister-in-law Angoori Devi were returning back to their village and when they reached near the boundary marks of Gyani and Udaiveer, the assailants Banwari, Mihi Lal, Jhamman and Aaram Singh emerged from the bushes. She has further stated that Banwari was armed with gun, Mihi Lal was armed with farsa, Jhamman and Aaram Singh, both were armed with lathis. Mihi Lal exhorted to kill Khemai as he has been acquitted by the court but could not escape from their clutches. On exhortation, her father threw away the bundle of paddy crops and started running towards the west, he was chased by Banwari, who fired a shot upon him. They also threw away the bundle of paddy crops, which they were carrying on their head. On account of fire made by Banwari, his father received injuries and fell down on the boundary marks of Gyani and Udaiveer and thereafter, Mihi Lal armed with farsa, Jhamman and Aaram Singh, armed with lathis, assaulted him. She along with her sister-in-law Angoori Devi raised alarm and Angoori tried to rescue his father by bending over him, however, she was also assaulted by lathi, consequent to which, she received injuries and her bangles were broken and fell down there.

24. She has further stated that on raising alarm, Kunwar Sen and Tara Singh reached there and on their challenge, the assailants made their escape good. Her father died on the spot. The police has reached the place of incident and recorded her statement.

25. During cross-examination, she had categorically narrated the manner how her father was assaulted by Banwari and three other assailants. She has denied the suggestion that she had not actually seen the incident. She has further stated that when the police reached the place of incident, she was present by the side of his father and had categorically denied the fact that dead body of her father was shifted to the fields of Kunwar Sen. She was examined by the Investigating Officer alongwith other witnesses. She had disclosed to the Investigating Officer that during assault, glass bangles of Angoori Devi were broken and fell on the ground in the said incident, however, she could not explain as to how the said fact has not been mentioned in her statement recorded by the Investigating Officer. She has further denied the suggestion that on the date of incident, Mihi Lal and his sons had gone to Khadrabad Bazar and Banwari was in his village. She further stated that Mihi Lal had falsely implicated his father and brother in a murder case.

26. PW-5 Dr. N.P. Singh had conducted an autopsy on the person of the deceased, who had proved the autopsy report and contents thereof and the autopsy report has been exhibited as Ex. Ka-2. He has further stated that death of the deceased could be caused on 16.10.1980 at 3-4:00 PM and lacerated wounds on the person of the deceased could be caused by lathi and incised wounds on his person could be caused by farsa. He has further denied the suggestion that the deceased died in the midnight between 15/16.10.1980. He has further stated that only one gun shot injury has been found on the person of the deceased having burning. He has further denied the suggestion that the said injury could be caused by the tip of a knife.

27. PW-6 S.I. Hari Ram Sharma is the Investigating Officer and he proved the various stages of the investigation and has inspected the spot and recorded the statement of the witnesses and prepared the site plan (Ex. Ka-8) and took the possession of plain earth, blood soaked earth, broken bangles and three bundles of paddy crops and has drawn its recovery memo (Ex.Ka-9) and had sent the victim Angoori Devi through constable for her medical examination. He has further stated that on 23.10.1980, the appellants surrendered before the court and on 31.10.1980, he interrogated them and thereafter, concluded the investigation and submitted the charge-sheet (Ex. Ka-10).

28. He has further categorically stated that on the eastern side of the boundary marks of Gyani and Udaiveer, the crops were cut, where the dead body was lying. During cross-examination, he has categorically stated that the FIR was lodged in his presence and thereafter, he had left the Police Station for the investigation. He has further categorically denied the fact that when he reached the place of incident, the dead body was kept in the Madahiya of Satyam Singh and thereafter in the next morning, the dead body was kept at the boundary mark of Udaiveer in the field of Gyani, where mixed crops of Jwar and Arhar were sown. The panchayat nama was conducted on the next day because there was no adequate arrangement of light. He

has further categorically stated that the FIR was sent along with dead body and the factum of sending the FIR is clearly mentioned in the panchayat nama numbered as Paper No.9. He has further categorically denied that the suggestion that the FIR was registered after conducting the post-mortem.

29. PW-7 is the Head Constable Azhar Hussain of the Police Station Wazir Ganj, who made G.D. entry of the written report and drawn the chik FIR in connection therewith. The chik FIR and written report were exhibited as Ex. Ka-3 and Ex. Ka-11. He has further stated that Dumbar Singh had given the written report on 16.10.1980 at 8:45 PM or 20:45 hours, however, in the G.D., it has not been mentioned as to how the said FIR was sent to the S.P. Office but an entry has been made that the FIR was sent on 17.10.1980 at 7:00 AM. He has further denied the suggestion that FIR was lodged on the third day after the post-mortem.

30. PW-8 Dr. O.P. Agrawal is the doctor, who examined the injuries of the victim Angoori Devi, who is said to have been examined on 17.10.1980 at 6:30 PM. He has proved the said injury report (Ex. Ka-12). In his cross-examination, he has further categorically stated that the victim was examined, when she had reached there and the time of medical examination has been noted in the injury report. He has further stated that the injuries have been noted on the other side of Majroobi Chitthi. He has further stated that the injuries has been caused by the hard blunt weapon.

31. Thereafter, the statement of accused under Section 313 CrPC has been recorded by putting all the incriminating circumstances to the surviving appellants Banwari and Jhamman. The appellants denied the incriminating circumstances and stated that they have been falsely implicated. The accused-appellant Jhamman has stated that at the time of incident, he was in Khadrabad market and in the next morning, the dead body of the deceased Khemai was lying in Madahiya of Satyam Singh and the police kept it in the field of Gyani, however, no specific plea has been taken by the appellant Banwari in his statement under Section 313 CrPC.

32. The defence, however, has not led any evidence to prove its case. The trial court after appreciating the evidence, has held that the prosecution has successfully established the case against the surviving appellants by relying upon the testimony of prosecution witnesses, namley, Angoori Devi, who is the injured eye-witness as well as Laung Shree, who is the daughter of the deceased and natural witness. The explanation tendered by the appellants is false and inadequate and as such, they are liable to be convicted.

33. Learned counsel for the appellants has submitted that actual incident of the assault has not been witnessed by anyone and only on the basis of cooked up and concocted story, an attempt has been made to the create an eye-witness of the incident in the form of statement of PW-1, PW-2 and PW-4, who are the closed relatives of the deceased being his daughter and daughter-in-law, who are highly partisan and interested witnesses.

34. Learned counsel for the appellants has further submitted that injuries shown to be received by the victim Angoori Devi are superficial, self-inflicted and manipulated, though the deceased is said to have been brutally assaulted.

35. Learned counsel for the appellants has further submitted that in the FIR, it is stated that the victim Angoori Devi, in order to rescue his father-in-law Khemai, laid upon him, however subsequently, it has been stated that she, in order to rescue his father-in-law, bent over him and she was also assaulted, which is a clear improvement just to falsely implicate the appellants. Learned counsel for the appellants has next challenged the presence of second eye-witness Laung Shree, being daughter of the deceased, who is highly interested and partisan witness.

36. Learned counsel for the appellants has next submitted that the appellants are on the inimical terms with the deceased and eye-witnesses, therefore, the appellants have been falsely implicated. There is a delay in lodging the FIR, which has not been explained at all.

37. Learned counsel for the appellants has further submitted that in the instant case, Angoori Devi had lodged the FIR despite the fact that Laung Shree, daughter of the deceased was present there, which further makes the prosecution case doubtful. The factum of assailants stopping Angoori Devi to lodge the FIR stands falsified from the circumstances that Dumbar Singh went to lodge the FIR, who otherwise could have also been stopped by the assailants.

38. Learned counsel for the appellants has next submitted that FIR was infact lodged after conducting the post-mortem of the deceased but has been shown to be registered at the relevant time by making it anti-time.

39. Learned counsel for the appellants has further submitted that there is no reason for Banwari to join the said incident being nephew (sister?s son) of the other assailants, who are on inimical terms.

40. In the backdrop of the said circumstances, it is thus submitted that prosecution has miserably failed to prove its case against the appellants and as such, they are liable to be acquitted.

41. Per contra, learned AGA has submitted that prosecution has successfully proved the case against the appellants by cogent and reliable evidence. He has placed implicit reliance upon the testimony of PW-1 Angoori Devi and PW-4 Laung Shree, who were accompanying the deceased at the time of the incident and are natural witnesses.

42. Learned AGA has further submitted that injuries of Angoori Devi, received at the time of incident and her unimpeachable testimony as an injured eye witness, clinchingly proves the case against the appellants.

43. Learned AGA has further submitted that Investigating Officer as well as Head Moharrir had categorically stated that FIR was lodged in their presence on 16.10.1980 at 8:45 PM and there is nothing to show that the said FIR has been lodged by making it anti-time.

44. Learned AGA has further submitted that even PW-2 Kunwar Sen is also a reliable witness, which is evident from the circumstances that he had categorically stated that at the time of the incident, when he rushed to the place of incident on the alarm raised by Angoori and Laung Shree, he saw Banwari standing there with a gun and thereafter, stated that he had seen the other assailants, namely,

Mihi Lal, Jhamman and Aaram Singh assaulting the deceased by farsa and lathi. Had he not been a truthful witness, he would have safely stated that he had even seen Banwari firing upon the deceased, which clearly shows that PW-2 is a truthful witness and has only mentioned that part of the incident, which he had actually seen and observed without making any attempt of false implication or exaggeration.

45. Learned AGA has further submitted that Laung Shree is a young girl aged about 20 years and grief stricken on account of death of her father and as such, there is no reason to doubt the lodging of the FIR by Angoori Devi, who was also accompanying the deceased at the time of the incident and being a grown up lady had witnessed the entire incident of assault on the deceased and was also injured in the said incident, whose injuries has been examined and proved by the Doctor.

46. Learned AGA has further submitted that enmity between the parties is a double edged sword and therefore, merely on the ground of inimical terms, the prosecution story can not be doubted and thrown over board, which otherwise has been truthfully and cogently proved by the prosecution.

47. Learned AGA has further submitted that time, place and manner of the incident has been clinchingly established by the prosecution. The post-mortem and the injury report of the victim clinchingly corroborates the prosecution story and as such, it can not be said that the prosecution has failed to prove its case beyond reasonable doubt and has supported the impugned order.

48. Having considered the rival submissions made by learned counsel for the parties and having gone through the material available on record, the only question that falls our consideration is whether the trial court committed any error in passing the impugned judgment and order.

49. So far as the appreciation of oral evidence is concerned, the Hon'ble Apex Court in a recent decision in ***Criminal Appeal No. 1910 of 2010 (Balu Sudam Khalde and Another Vs. The State of Maharashtra)*** has held that:

25. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

"I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness.?

[See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat 1983 Cri LJ 1096 : (AIR 1983 SC 753) Leela Ram v. State of Haryana AIR 1995 SC 3717 and Tahsildar Singh v. State of UP (AIR 1959 SC 1012)].

26. When the evidence of an injured eye-witness is to be appreciated, the under- noted legal principles enunciated by the Courts are required to be kept in mind:-

(a) The presence of an injured eye-witness at the time and place of the occurrence cannot be doubted unless there are material contradictions in his deposition.

(b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.

(e) If there be any exaggeration or immaterial embellishments in the evidence of an injured witness, then such contradiction, exaggeration or embellishment should be discarded from the evidence of injured, but not the whole evidence.

(f) The broad substratum of the prosecution version must be taken into consideration and discrepancies which normally creep due to loss of memory with passage of time should be discarded.

50. Thus, while appreciating the evidence of eye-witnesses, two principal considerations are to be kept in mind (i) whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence and (ii) whether there is anything inherently improbable or unreliable in their evidence.

51. Keeping the aforesaid principle of law in mind, we are now analyzing the oral evidence of three eye-witnesses i.e. PW-1 Angoori Devi, PW-2 Kunwar Sen and PW-4 Laung Shree. Going through the oral evidence of all the three eye-witnesses, we find that they are consistent and truthful in their statements and there is no good reason for us to disbelieve the ocular version as narrated by the aforesaid three eye-witnesses.

52. Learned counsel for the appellants also could not point out any material inconsistency in the statement of all the three eye-witnesses, except the fact that in the FIR, which was registered at the instance of PW-1 Angoori Devi, it has been stated that while the deceased Khemai was being assaulted, she in order to rescue him laid upon him, however, in her subsequent statement before the trial court, it has been stated that in order to rescue him, she bent over him, consequent to which, she was also assaulted and received injuries, however, the said inconsistency is of very trivial nature and that too in the FIR, which can not said to be a substantive piece of evidence.

53. Moreover admittedly, PW-1 is a rustic witness and as such, inconsistency as pointed out by the learned counsel for the appellants is meaningless and has no bearing on the outcome of the trial. From her entire evidence,nothing has been elicited to doubt the credibility of the said witness. Her presence with the deceased at the time of the incident is quite natural and there is nothing to doubt the presence of the said witness at the scene of occurrence and there is nothing inherently improbable or unreliable in her evidence.

54. So far as the credibility of PW-2 Kunwar Sen is concerned, he admittedly was present in his field at the time of the incident and on hearing the alarm raised by the two eye-witnesses, namely, PW-1 Angoori Devi and PW-4 Laung Shree, had

rushed to the place of the incident and had challenged the assailants, who thereafter made their escape good. In his testimony, he has clearly stated that when, he reached the place of incident, he had seen Banwari, armed with his gun, was standing on the way, whereas Mihi Lal was assaulting the deceased with farsa and Jhamman and Aaram Singh with their lathis and when Angoori Devi tried to rescue him, she was also assaulted by lathis, consequent to which, she also suffered injuries and her bangles were broken, and was medically examined, which has been duly proved.

55. The truthfulness of the said witness is evident from the fact that he had narrated in his statement only that much of fact, which he had actually seen and observed. Had he not been the truthful witness, he could well have stated that he had even seen Banwari firing upon the deceased but the said fact was not at all stated by him and only noted his presence at the place and time of incident armed with a gun.

56. So far as the question of inimical terms between the assailants and the said witnesses is concerned, he, though being the uncle, has truthfully narrated the incident and there is no reason for him to spare the actual assailants and falsely implicate the present appellants.

57. So far as the PW-3 Dumbar Singh is concerned, he is the person, who had lodged the FIR in the Police Station on the basis of written report given to him by the first informant Angoori Devi as she was unable to personally visit the Police Station on account of the fact that the assailants were obstructing the way in order to ensure that the FIR be not registered. The testimony of the said witness has also been proved to this extent and there is nothing on record to establish that the FIR was lodged by making it anti-time.

58. So far as the PW-4 Laung Shree is concerned, she is daughter of the deceased and her presence with the deceased at the time of the incident is quite natural, who along with her sister-in-law and the father had gone to cut the paddy crops and while she was returning to her village, the incident has taken place, wherein her father was done to death. She had precisely and truthfully narrated the entire incident in her testimony and nothing could be elicited to doubt the credibility of the said witness also.

59. Thus, from the testimony of the aforesaid witness, her presence at the scene of occurrence has been clearly and cogently established and there is nothing inherently improbable or unreliable in her evidence.

60. Now, we may consider the submission of learned counsel for the appellants that PW-1 and PW-4 are relatives of the deceased and they are highly partisan and interested witnesses of the incident, being daughter-in-law and daughter of the deceased, hence, their statement could not relied upon.

61. The above submission was considered by the Hon'ble Apex Court in the case of ***Daleep Singh Vs. State of Punjab reported in AIR 1953 SC 364***, wherein the Court observed that ordinarily a close relative would not spare the real culprit, who has caused the death and implicate an innocent person.

62. The above noted submission was considered by Hon'ble Supreme Court elaborately way back in ***Dalip Singh v.***

State of Punjab AIR 1953 SC 364. The Court observed that ordinarily a close relative would not spare the real culprit who has caused the death and implicate an innocence person. His/her evidence can only be discarded, when it is established that the witness has a cause, due to enmity to implicate him falsely. In Dalip Singh (supra) case also, the testimonies of two women witnesses was impeached on the ground that they were close relatives of the deceased. Following principles were enunciated in ***Dalip Singh (supra)***:-

"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."

63. In ***Piara Singh Vs. State of Punjab, (1977) 4 SCC 452***, same principles were reiterated:-

"4. The central evidence against the appellant consisted of the three eye-witnesses, namely, P.W. 3 Harbhajan Singh, P.W. 5 Chanan Kaur and P.W. 6 Kesar Kaur. It is true that the three witnesses were relatives of the deceased and bear enmity against the accused but as the occurrence had taken place near the door of the house of the deceased , these persons were the natural witnesses and were in fact sitting in the court-yard, when the occurrence took place. It may be difficult to get witnesses from the village, when an assault of the type suddenly takes place in the house of the deceased. It is well settled that the evidence of interested or inimical witnesses is to be scrutinized with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence, the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence. The High Court was fully alive to these principles and has in fact found that the evidence of these three witnesses has a ring of truth. After having perused the evidence also, we fully agree with the view taken by the High Court. In fact, the learned Sessions Judge has not made any attempt to dwell into the intrinsic merits of the evidence of these witnesses but has rejected them mainly on general grounds most of which are either unsupportable in law or based on speculation. The evidence of the eye-witnesses is sought to be corroborated by the evidence of P.W. 7 Kundan Singh to whom the whole occurrence was narrated immediately after the accused left the house. There is also the evidence of Balbir Singh, P.W. 17, who is a Sarpanch of the village and an independent witness and who proves that the appellant Piara Singh had made an extra judicial confession before him, in which, he admitted to have committed the murder of the deceased Surjit Singh along with his companions Kashmir Singh, Gian Singh and Joginder Singh. This witness also proves that Kashmir Singh on being narrated by the details made a disclosure which resulted in the recovery of the Kirpan from the sugar-cane field of Meja Singh for which a search list was prepared and the Kirpan was also

found stained with human blood. According to the Investigating Officer an empty cartridge was also found at the spot and he sent the same to the Ballistic Expert along with the rifle recovered from Piara Singh who was a constable in the Border Security Force and the Ballistic-Expert found that the empty could have been shot from the rifle in question. These circumstances fully corroborate the evidence of the eye-witnesses. Finally, there is the medical evidence of Dr. Jatinder Singh who performed the postmortem examination on the deceased and he found as many as 7 incised wounds on the various parts of the body of the deceased and 7 incised punctured wounds on some vital parts of the body. Apart from these injuries the deceased had also sustained a gun shot injury with a wound of entry and exit on the left buttock, which according to Dr. Jatinder Singh could be; caused by a fire-arm including a rifle. The Doctor further deposed that the contusions and abrasions were caused by a blunt weapon and the other incised wounds were caused by a sharp cutting instrument like the Gandasa. Another Doctor was examined by the Sessions Judge as Court Witness No. 1 who on seeing the post-mortem report of Dr. Jatinder Singh was of the view that Injury No. 11 could not have been caused by a rifle and much capital was made by the accused but of the evidence given by Dr. Paramjit Singh."

64. A three Judge Bench 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."

65. 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."

66. In this context the reference may be made to the judgement of Hon'ble

Supreme Court in the cases of ***Kamta Yadav Vs. State of Bihar (2016) 16 SCC 164 and Nand Kumar vs. State of Chhatisgarh (2015) 1 SCC 776.***

67. In the case of ***Ashok Rai vs. State of U.P. (2014) 5 SCC 713***, the facts are some what similar. In that case also wife of deceased was sleeping near to her husband when her husband was shot. The testimony of wife was relied by the Court in following terms:-

"13. The most important witness is PW-4 Bijula Devi, the wife of deceased Kailash Rai. She was sleeping in the ahata in the courtyard, on the same cot along with her husband deceased Kailash Rai in the night in question. She is the most natural witness. Her clothes were found bloodstained. According to the serologist's report, the blood group of the blood found on her clothes matched the blood group of the blood found on her husband's clothes. Her presence in the house at the dead of night cannot be doubted."

68. In ***Mritunjoy Biswas Vs. Pranab alias Kuti Biswas and Another (2013) 12 SCC 796*** also, there was similar fact. In this case, husband was eye witness when his wife was shot by the accused persons from a window. The incident had taken place in the night when husband and wife were sleeping in bed room on cot. In that case, also a lamp was burning near the cot as the home did not have any electric light. The Supreme Court set aside Judgment of the High Court amongst other ground that High Court has referred some discrepancies which were found by the Supreme Court in the realm of minor discrepancies. The Court held as under:-

*"28. As is evincible, the High Court has also taken note of certain omissions and discrepancies treating them to be material omissions and irreconcilable discrepancies. It is worthy to note that the High Court has referred to the some discrepancies which we find are absolutely in the realm of minor discrepancies. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission of discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies, It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission [**See Leela Ram v. State of Haryana (1999) 9 SCC 525, Rammi v. State of MP. (1999) 8 SCC 649, and Shyamal Ghosh v. State of W.B. (2012) 7 SCC 646.**]"*

69. In the case of ***Inder Singh vs. State of Rajasthan (2015) 2 SCC 734***, the Hon'ble Supreme Court held as under:-

"Some argument was advanced on there being lack of any clear motive but that is not at all necessary or material when the offences have been

proved by clear and cogent evidence including eye-witnesses."

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

71. Furthermore, close scrutiny of the eye-witnesses PW-1 and PW-4 goes to show that they witnessed the incident in question. The evidence of PW-5 Dr. N.P. Singh, who conducted the post-mortem and the post-mortem report points out conclusively to the culpability of the appellants for the commission of the offence.

72. Even the evidence of PW-8 Dr. O.P. Agrawal, who medically examined the injured P.W.-1 Angoori Devi, also points out conclusively to the culpability of the appellants for the commission of the offence.

73. From the statement of P.W.-1 and P.W.-4, we are satisfied about the commission of the offence by the appellants. We have carefully gone through the judgment of the trial court and we are satisfied that the trial court has appreciated the material on record in right perspective and learned counsel for the appellants could not point out any perversity in the finding of the trial court. Thus, we do not find any infirmity, illegality or perversity in the judgment and order dated 08.07.1983 passed by 2nd Additional Sessions Judge, Budaun in S.T. No.27 of 1981, under Section 302 read with Section 34 IPC and Section 323 read with 34 IPC recorded conviction of the appellants and the sentence awarded to them by the impugned judgment.

74. In view of the foregoing discussions, these appeals lack merits and are accordingly **dismissed**. There shall be no order as to costs.

75. The surviving appellants Banwari and Jhamman Lal are on bail. Chief Judicial Magistrate, Badaun is directed to take them in custody in the aforesaid case and send them to Jail to serve out the sentences awarded by the trial court and affirmed by us.

76. Let a copy of this judgment and order be sent to the court concerned alongwith the lower court record within a week for compliance. The compliance report shall be sent by the court concerned to this Court within a further period of fifteen days.

(2024) 2 ILRA 1378
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.02.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1593 of 2019

Anita Gajraj ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Bal Krishna Shukla, Manoj Kumar Singh

Counsel for the Respondent:
G.A.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8, 20, 50, 56 & 57 - Appellant challenged conviction under Section 8/20 NDPS

Act and sentence of 10 years' rigorous imprisonment with a fine of Rs.1,00,000/-, with 6 months' additional imprisonment in default, by Additional Sessions Judge, Bahraich, dated 28.02.2019. Court held: (1) No illegality or perversity in trial court's findings; prosecution evidence, including recovery of 5.238 kg charas, consistent and corroborated. (2) Procedural requirements under NDPS Act complied with; appellant's consent to search by police recorded, negating claims of non-compliance with Section 50. (3) Conviction and substantive sentence of 10 years confirmed as minimum prescribed under Section 20. (4) Default imprisonment reduced from 6 months to 2 months, considering appellant's poverty and family circumstances (*Shanti Lal Vs St. of M.P.*, 2007 SCC OnLine SC 1077). Appeal partly allowed; appellant to be released if 10 years' sentence and 2 months' default imprisonment served, unless required in another case. (Paras 15-27)

Appeal Partly Allowed.

Case Law Cited:

1. Shanti Lal Vs St. of M.P., 2007 SCC OnLine SC 1077 (Para 16)

2. Alister Anthony Pareira Vs St. of Mah., (2012) 2 SCC 648 (Para 17)

3. Dhananjay Chatterjee Vs St. of W.B., (1994) 2 SCC 220 (Para 19)

4. Ravji Vs St. of Raj., (1996) 2 SCC 175 (Para 20)

5. St. of M.P. Vs Bablu Natt, (2009) 2 SCC 272 (Para 21)

6. St. of M.P. Vs Mehtab, Criminal Appeal No. 290/2015, dated 13.02.2015 (Para 22)

7. Brajendra Singh Vs St. of M.P., (2012) 4 SCC 289 (Para 23)

8. St. of M.P. Vs Surendra Singh, (2015) 1 SCC 222 (Para 24)

9. Bachan Singh Vs St. of Punj., (1980) 2 SCC 684 (Para 23)

10. Machhi Singh Vs St. of Punj., (1983) 3 SCC 470 (Para 23)

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

1. List has been revised.

2. Heard learned Counsel for the appellant, Shri Awadhesh Kumar Pandey, learned A.G.A. for the State-respondents and perused the material placed on record.

3. This appeal has been filed against the judgment and order dated 28.02.2019 passed by learned Additional Session Judge VIIth, Bahraich in Special Session No.32/2014 Case Crime No.1139/2013, Police Station-Rupaidiha, District-Bahraich thereby convicting the appellant under Section 8/20 N.D.P.S. Act and whereby sentencing under Section 8/20 to appellant to undergo imprisonment of ten years and also pay fine of Rs.100000/- (One Lakhs) in the condition of default of fine passed under Section 8/20 of N.D.P.S. Act appellant shall further undergo six months further imprisonment and all the sentences run concurrently inter-alia on the following amongst other grounds.

4. Brief fact of the case emerges as such that on 26.12.2013 at 20.00 hours, the informer informed to the police that one Nepali woman wearing green color dress carrying illegal drug will arrive India via Nepalganj Rupaidiha main highway from Nepal. On receiving this information, Ravi Shankar Kumar, Assistant Commander made Special Checking Squad comprising of Sub-Inspector, Munni Bai, Head Constable, Vallabh Joshi, Constable Hari Om Yadav and other personnel. The special checking squad along with the informant reached the check post which was situated at Nepalganj Rupaidiha highway and

started waiting for accused-appellant. At 18:30 hours a woman carrying a baby alongwith her luggage de-boarded a bus and on pointing out of informer, the suspected accused was intercepted for checking. Even as the accused opened the bag, she started fleeing from the spot. But the special checking squad immediately nabbed her and on asking her name and address and the reason for fleeing, she told that there is charas in her bag and further told her name Anita Gajraj, W/o Heera Singh, R/o Village-Rukaza, P.O-Khadi, Police Station-Musikat, District-Rukum, Nation-Nepal, aged 30 years. The special team informed the accused about her right as per the provisions of N.D.P.S. Act, that she can let her search be conducted before the Magistrate or a gazetted officer, on which she replied that I am carrying charas then I do need to create more witnesses in my case and she insisted the squad team to search her, thereafter a consent letter was drafted and the woman was searched thoroughly and contraband article was tested by Drug Testing Kit and prima facie, the recovered contraband article was found to be charas, therefore, the accused-appellant was immediately arrested. It was found that a box containing charas, Indian Rs. 1500/- and a Micromax Mobile. Then, the information regarding arrest of the accused-appellant was given by the police authority to her relatives. On weighing by the scale available there, the recovered charas was 5kg and 238gms. Out of which, 25-25 gms charas was separately sealed for sample and the remaining charas was sealed in another packet. The accused was brought to the police station- Rupaidiha, where the case under section 8/20 of NDPS Act was registered as case crime no. 1139 of 2013.On asking the reason for bringing or taking the alleged charas, the accused told that she is habitual seller of charas which costs around Rs. 15,000/- per Kilogram and she works in a Hotel and doing this business for seven to eight years.

5. After investigation, charge-sheet was submitted against the accused-appellant before concerned court, Bahraich. This case was transferred to the VIIth Additional Sessions Judge, Bahraich, where the charge was framed. The accused-appellant pleaded not guilty of the charges leveled against her and she contended that she was falsely implicated in this case and claimed to be tried.

6. In order to prove its case, the prosecution examined PW 1 Ravi Shankar Kumar; PW 2 Munni Bai, PW 3 Ram Kumar Gautam and PW4 Ram Daras Yadav.

7. The trial court on the basis of evidence adduced by the prosecution held that the prosecution succeeded to prove the charges against the appellant. It was also held that all the procedural technicalities were complied with. Thus, the trial court convicted the appellant for possessing the contraband article Charas from her possession and sentenced the appellant as aforesaid.

8. Being aggrieved and dissatisfied with the aforesaid order, the appellant preferred this appeal before this Court.

9. I have heard learned counsel for the parties and perused the record.

10. Submission of the counsel for the appellant is that the finding given by the trial court is perverse and bad in the eye of law. There are major contradictions in the statement of the witness. He has also

submitted that there is no independent witness examined by the prosecution. All the witnesses shown in the recovery memo is false and concocted and there was non-compliance of the mandatory provision of NDPS Act at the time of search and seizure. It was not told to the appellant that he has right to be searched before the Gazetted officer or magistrate. Thus, there was also non-compliance of Sections 50, 56 and 57 of NDPS Act.

11. The counsel for the appellant further argued that the appellant was neither in possession of any narcotics nor any incriminating article recovered from his possession.

12. Lastly, learned counsel for the appellant submits that the appellant has no previous criminal history and she is languishing in jail since 27.12.2013. The appellant has already undergone the sentence of 10 years as awarded by the trial court. Since she is not able to pay the fine of Rs. 1 lakh as aforesaid. So, in default of the same, the appellant shall undergo for six months' additional imprisonment as awarded by the trial court. Therefore, the counsel submits that liberal view may be taken against the appellant and the appellant be released forthwith as she has already remained in incarceration about 10 years.

13. Learned A.G.A. opposed the contents advanced by learned Counsel for the appellant and submitted that all the procedure literally complied by the arresting officer at the time of search. He further contended that provision of CrPC makes it clear that the court of law can award imprisonment in default of payment of fine, one fourth of the term of the imprisonment which the court is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine. Thus, in this case, in default of payment of fine, the court is competent to award 2 years and 6 months in addition to substantive sentence. However, the trial court already taking liberal view awarded six months' additional simple imprisonment in default of payment of fine, which could not be said to be unlawful or otherwise illegal. Thus, the appeal deserves to be dismissed.

14. I have considered the arguments advanced by learned Counsel for the appellant as well as learned A.G.A. and perused the material placed on record.

15. Insofar as conviction recorded by the trial court is concerned, there is no illegality, irregularity or perversity in the impugned order passed by the trial court. The appellant has already undergone substantial part of sentence of 10 years rigorous imprisonment and in default of payment of fine, she has already spent more than 40 days in jail and she has already undergone substantial period of detention.

16. The Apex Court in Shanti Lal vs. State of M.P. decided on 8.10.2007 was pleased to observe paragraph No.36 and 37 as under:-

"36. We are mindful and conscious that the present case is under the NDPS Act Section 18 quoted above provides penalty for certain offences in relation to opium poppy and opium. Minimum fine contemplated by the said provision is rupees one lakh [fine which shall not be less than one lakh rupees]. It is also true that the appellant has been ordered to undergo substantive sentence of

rigorous imprisonment for ten years which is minimum. It is equally true that maximum sentence imposable on the appellant is twenty years. The learned counsel for the State again is right in submitting that clause (b) of sub-section (1) of Section 30, CrPC authorizes the Court to award imprisonment in default of payment of fine up to one-fourth term of imprisonment which the Court is competent to inflict as puni0.00shment for the offence. But considering the circumstances placed before us on behalf of the appellant-accused that he is very poor; he is merely a carrier; he has to maintain his family; it was his first offence; because of his poverty, he could not pay the heavy amount of fine (rupees one lakh) and if he is ordered to remain in jail even after the period of substantive sentence is over only because of his inability to pay fine, serious prejudice will be caused not only to him, but also to his family members who are innocent. We are, therefore, of the view that though an amount of payment of fine of rupees one lakh which is minimum as specified in Section 18 of the Act cannot be reduced in view of the legislative mandate, ends of justice would be met if we retain that part of the direction, but order that in default of payment of fine of rupees one lakh, the appellant shall undergo rigorous imprisonment for six months instead of three years as ordered by the trial court and confirmed by the High Court.

37. For the reasons aforesaid, the appeal is partly allowed, conviction recorded and sentence imposed on the appellant to undergo rigorous imprisonment for ten years is confirmed. An order of payment of fine of rupees one lakh is also upheld. But an order that in default of payment of fine, the appellant shall undergo rigorous imprisonment for three years is reduced to rigorous imprisonment for six months. To that extent, the appeal filed by the appellant is allowed. If the appellant has undergone substantive sentence of rigorous imprisonment for ten years as also rigorous imprisonment for six months as modified by us in default of payment of fine, the appellant shall be set at liberty forthwith unless he is required in any other offence. If the appellant has not completed the said period, he will be released after the period indicated hereinabove is over. The appeal is accordingly disposed of."

17. Further in ***Alister Anthony Pareira v. State of Maharashtra, (2012) 2 SCC 648***, Hon'ble Supreme Court was pleased to observe as under:

"One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: the twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

18. The Apex court has held in various decisions that the theory of proportionality, deterrence, seriousness and rehabilitation should be taken into account while exercising discretion in sentencing.

19. Also In ***Dhananajay Chaterjee vs State of W.B 1994 (2) SCC 220***; Apex

Court has been pleased to observe that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment."

20. Similar view has also been expressed in **Ravji v. State of Rajasthan, [1996] 2 SCC 175**. It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

21. Further in ***State of M.P. v. Bablu Natt, (2009) 2 SCC 272***, Hon'ble Apex Court was pleased to held that in recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 year old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the legislature under Section 376(1) of the Act."

22. Further, the Hon'ble Apex Court in ***State of Madhya Pradesh vs Mehtab, (Cri. appeal No. 290/2015, dated 13.02.2015)*** has been pleased observe that;

"We find force in the submission. It is the duty of the Court to award just sentence to a convict against whom charge is proved. While every mitigating or aggravating circumstance may be given due weight, mechanical reduction of sentence to the period already undergone cannot be appreciated. Sentence has to be fair not only to the accused but also to the victim and the society."

23. Further in ***Brajendra singh v. State of M.P., (2012) 4 SCC 289***, the

Hon'ble Apex Court was pleased to held that the law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] and thereafter, in Machhi Singh [Machhi Singh v. State of Punjab, (1983) 3 SCC 470:1983 SCC (Cri) 681]. The aforesaid judgments, primarily dissect these principles into two different compartments one being the "aggravating circumstances' while the other being the "mitigating circumstances'. The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

24. In ***State of M.P. v. Surendra Singh, (2015) 1 SCC 222***, based on the Theory of Proportionality, it is laid down by Hon'ble Apex Court as under:

"That undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.

Meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of the society. One of the prime objectives of criminal law is the imposition of adequate, just proportionate punishment which commensurate with gratity, nature of crime and the manner in which the offence is committed. One should keep in mind the social interest and conscience of the society while considering the determinative factor of sentence with gravity of crime.

The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, solemn duty of the court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers. Imposition of sentence must commensurate with gravity of offence."

25. In view of the discussions made above and the reasons aforesaid and laws rendered by Hon'ble Supreme Court referred above, the impugned judgment and order of conviction recorded by the Additional Sessions Judge as well as sentence imposing rigorous imprisonment for a period of 10 years and fine of Rs.1 lakh is confirmed. However, the order in respect of six months rigorous imprisonment in case of default in payment

of fine, is modified and reduced in the manner that in case of default in payment of fine the appellant instead of undergoing rigorous imprisonment for a period of six months is reduced and shall undergo rigorous imprisonment for a period of two months' only. The period of imprisonment in case of default in payment of fine is accordingly modified and reduced as above.

26. Thus, the appeal to the above extent is ***partly allowed***.

27. If the appellant has undergone substantive sentence of rigorous imprisonment for ten years as also rigorous imprisonment for two months' as modified by this Court above in default of payment of fine, the appellant shall be set at liberty forthwith unless she is required in any other offence. If the appellant has not completed the said period, she will be released after the period indicated hereinabove is over.

28. Senior Registrar of this Court as well as office is directed to communicate this order to the court concerned, forthwith and lower court record, if any, be returned back to the court concerned.

(2024) 2 ILRA 1385
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.02.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1876 of 2008

Jagdish Prasad & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Abhishek Ranjan

Counsel for the Respondents:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 446 - Appellants challenged orders dated 30.06.2008 and 02.08.2008 forfeiting their surety bonds of Rs.10,000/- each by Additional District Judge/Fast Track Court-III, Faizabad, under Section 446 CrPC, in Criminal Misc. Case No. 7 of 2008, arising from Sessions Trial Nos. 29/2008 (Sections 41/411/413 IPC) and 27/2008 (Section 4/25 Arms Act). Court held: (1) Appellants, sureties for accused Ram Ashish, made efforts to trace and ensure his arrest after his non-appearance in April 2008. (2) Accused was arrested on 17.07.2008 due to sureties' efforts and discharged by trial court on 25.07.2008. (3) Considering appellants' efforts, discharge of accused, and 16-year pendency of appeal, a lenient view was warranted. Orders forfeiting surety bonds set aside; appeal allowed. (Paras 9-11)

Appeal Allowed.

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

1. List of cases has been revised and the case is being taken up in the revised call for hearing.

2. Heard learned counsel for the parties.

3. This is an appeal under Section 449 Cr.P.C. against the judgment and orders dated 30.06.2008 and 02.08.2008 passed by learned Additional District Judge / Fast Track Court-III, Faizabad exercising the power under Section 446 Cr.P.C. in Criminal Misc. Case No.7 of 2008, initiated in Original Sessions Trial No.29/2008, under Sections 41/411/413 I.P.C. connected with Sessions Trial No.27 of 2008, under

Section 4/25 of Arms Act, Police Station G.R.P., District Faizabad by means of which the surety bonds of the appellants have been forfeited.

4. Learned counsel for the appellant submitted that in the above F.I.R., the accused Ram Ashish was implicated and he was enlarged on bail by the learned court below. He further submitted that the accused is son of the servant of appellants, as such, the appellants took the surety of accused Ram Ashish and submitted the surety bonds of Rs.10,000/- each.

5. He further submitted that in the month of April, 2008, due to non appearance of accused Ram Ashish before the trial court, the learned court below issued notices to sureties i.e. the instant appellants and after getting the knowledge of the same, the appellants appeared before the learned trial court on 21.04.2008 and sought some time to trace and produce the accused Ram Ashish before it.

6. He further submitted that on 02.05.2008 and 12.05.2008, the appellant no.1 himself moved an application before the learned trial court and informed the location of accused Ram Ashish and requested to direct the concerned police station to arrest the accused Ram Ashish, but the learned trial court ignoring the fact that the appellants i.e. sureties are doing their best efforts to trace the accused Ram Ashish, had passed the impugned order to forfeit the surety bonds of the appellants.

7. He further submitted that on 17.07.2008, the accused Ram Ashish was arrested due to efforts of sureties and was sent to jail. He further submitted that the learned trial court had discharged the accused Ram Ashish vide order dated 25.07.2008. Thereafter, the appellants i.e. the sureties moved an application on 26.07.2008 before the learned trial court for recalling of the order of forfeiting the surety bonds but the learned trial court has rejected the same.

8. Learned counsel for the appellant further submitted that he does not want to press the appeal on merits and since the impugned order is of the year 2008 and the instant appeal is pending since 16 years, thus, a lenient view be taken by this Court.

9. It is admitted that the appellants are not the accused in the case. They stood sureties and even the accused Ram Ashish was arrested and sent to jail by the efforts of the sureties and thereafter was discharged by the learned trial court.

10. The proceeding under Section 446 Cr.PC. is as follows:-

"(1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.

Explanation.- A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or

as the case may be, for production of property, before any Court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code. 1 provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.

(3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and,; if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

11. Considering the overall facts and circumstances of the case and also the argument of learned counsel for the appellants that the accused of the instant case has been discharged from the offence by learned trial court, the present criminal appeal is **allowed** and orders dated 30.06.2008 and 02.08.2008 passed by learned Additional District Judge / Fast Track Court-III, Faizabad exercising the power under Section 446 Cr.P.C. in Criminal Misc. Case No.7 of 2008, initiated in Original Sessions Trial No.29/2008, under Sections 41/411/413 I.P.C. connected with Sessions Trial No.27 of 2008, under Section 4/25 of Arms Act, Police Station G.R.P., District Faizabad by means of which the surety bonds of the appellants have been forfeited, are hereby **set aside**.

12. A certified copy of this order be sent to the court concerned for necessary compliance.

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

(2024) 2 ILRA 1387
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.02.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1877 of 2008

Daya Ram & Anr. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Abhishek Ranjan

Counsel for the Respondent:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 446 - Appellants challenged orders dated 30.06.2008 and 02.08.2008 forfeiting their surety bonds of Rs.10,000/- each by Additional District Judge/Fast Track Court-III, Faizabad, under Section 446 CrPC, in Criminal Misc. Case No. 8 of 2008, arising from Sessions Trial Nos. 29/2008

(Sections 41/411/413 IPC) and 27/2008 (Section 4/25 Arms Act). Court held: (1) Appellants, sureties for accused Ram Ashish, made diligent efforts to trace and ensure his arrest after his non-appearance in April 2008. (2) Accused was arrested on 17.07.2008 due to sureties' efforts and discharged by trial court on 25.07.2008. (3) Considering appellants' efforts, discharge of accused, and 16-year pendency of appeal, a lenient view was justified. Orders forfeiting surety bonds set aside; appeal allowed. (Paras 9-11)

Appeal Allowed.

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

1. List of cases has been revised and the case is being taken up in the revised call for hearing.

2. Heard learned counsel for the parties.

3. This is an appeal under Section 449 Cr.P.C. against the judgment and orders dated 30.06.2008 and 02.08.2008 passed by learned Additional District Judge / Fast Track Court-III, Faizabad exercising the power under Section 446 Cr.P.C. in Criminal Misc. Case No.8 of 2008, initiated in Original Sessions Trial No.29/2008, under Sections 41/411/413 I.P.C. connected with Sessions Trial No.27 of 2008, under Section 4/25 of Arms Act, Police Station G.R.P., District Faizabad by means of which the surety bonds of the appellants have been forfeited.

4. Learned counsel for the appellant submitted that in the above F.I.R., the accused Ram Ashish was implicated and he was enlarged on bail by the learned court below. He further submitted that the accused is son of the servant of appellants, as such, the appellants took the surety of accused Ram Ashish and submitted the surety bonds of Rs.10,000/- each.

5. He further submitted that in the month of April, 2008, due to non appearance of accused Ram Ashish before the trial court, the learned court below issued notices to sureties i.e. the instant appellants and after getting the knowledge of the same, the appellants appeared before the learned trial court on 21.04.2008 and sought some time to trace and produce the accused Ram Ashish before it.

6. He further submitted that on 02.05.2008 and 12.05.2008, one of the appellants moved an application before the learned trial court and informed the location of accused Ram Ashish and requested to direct the concerned police station to arrest the accused Ram Ashish, but the learned trial court ignoring the fact that the appellants i.e. sureties are doing their best efforts to trace the accused Ram Ashish, had passed the impugned order to forfeit the surety bonds of the appellants.

7. He further submitted that on 17.07.2008, the accused Ram Ashish was arrested due to efforts of sureties and was sent to jail. He further submitted that the learned trial court had discharged the accused Ram Ashish vide order dated 25.07.2008. Thereafter, the appellants i.e. the sureties moved an application on 26.07.2008 before the learned trial court for recalling of the order of forfeiting the surety bonds but the learned trial court has rejected the same.

8. Learned counsel for the appellant further submitted that he does not want to press the appeal on merits and since the impugned order is of the year 2008 and the

instant appeal is pending since 16 years, thus, a lenient view be taken by this Court.

9. It is admitted that the appellants are not the accused in the case. They stood sureties and even the accused Ram Ashish was arrested and sent to jail by the efforts of the sureties and thereafter was discharged by the learned trial court.

10. The proceeding under Section 446 Cr.PC. is as follows:-

"(1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.

Explanation.- A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code. 1 provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.

(3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and,; if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

11. Considering the overall facts and circumstances of the case and also the argument of learned counsel for the appellants that the accused of the instant case has been discharged from the offence by learned trial court, the present criminal appeal is **allowed** and orders dated 30.06.2008 and 02.08.2008 passed by learned Additional District Judge / Fast Track Court-III, Faizabad exercising the power under Section 446 Cr.P.C. in Criminal Misc. Case No.8 of 2008, initiated in Original Sessions Trial No.29/2008, under Sections 41/411/413 I.P.C. connected with Sessions Trial No.27 of 2008, under Section 4/25 of Arms Act, Police Station G.R.P., District Faizabad by means of which the surety bonds of the appellants have been forfeited, are hereby **set aside**.

12. A certified copy of this order be sent to the court concerned for necessary compliance.

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

(2024) 2 ILRA 1390
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.02.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 1951 of 2008

Dharmendra Kumar Singh ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Ajay Pratap Singh

Counsel for the Respondent:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 446 - Appellant challenged orders dated 17.03.2008 and 18.08.2008 forfeiting his surety bond of Rs.20,000/- and imposing 6 months' imprisonment in default under Section 446 CrPC by Additional Sessions Judge/F.T.C.-5th, Faizabad, in Criminal Misc. Case No. 03/08, arising from Sessions Trial No. 114/97 (Sections 147, 148, 149, 302 IPC). Court held: (1) Forfeiture orders justified due to accused Radhey Shyam's non-appearance, but appellant ensured accused's surrender on 24.07.2008. (2) Appellant, a surety, not an accused, and served 11 days' imprisonment. (3) Considering accused's surrender and appellant's brief incarceration, sentence modified to period already undergone. Conviction upheld; sentence reduced; appeal partly allowed. (Paras 9-11)

Appeal Partly Allowed.

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

1. Heard Sri Ajay Pratap Singh, learned counsel for the appellant and Sri Ashok Kumar Srivastava, learned A.G.A. for the State and perused the material available on record.

2. This is an appeal under Section 449 Cr.P.C. against the judgment and order dated 18.08.2008 in Criminal Misc. Case No. 03/08 (State Vs. Dharmendra Kumar Singh), under Section 446 Cr.P.C., Police Station Kotwali Ayodhya and against the judgment and order dated 17.03.2008 passed by learned Additional Session Judge/F.T.C.-5th, Faizabad in Sessions Trial No. 114/97, arising out of Case Crime No. 1497/97 : State Vs. Radhey Shyam and others, under Sections 147, 148, 149 and 302 I.P.C., Police Station Kotwali Ayodhya, Faizabad.

3. Learned counsel for appellant has submitted that on 07.07.2005 the appellant had taken surety of accused Radhey Shayam in Sessions Trial No. 114/97, arising out of Case Crime No. 1497/97 : State Vs. Radhey Shyam and others, under Sections 147, 148, 149 and 302 I.P.C., Police Station Kotwali Ayodhya, Faizabad and regarding this bond of surety of Rs. 20,000/- was submitted before the court concerned.

4. Learned counsel for appellant has further submitted that when accused Radheshyam did not appear before the court, notice was issued to appellant (surety) Dharmendra Kumar Singh under Section 446 Cr.P.C., thereafter the court below vide order dated 17.03.2008 forfeited the surety of Rs.20000/- and issued recovery warrant and in default of payment, the trial court also imposed six months imprisonment.

5. Learned counsel for appellant has further submitted that the appellant filed representation for quashing of the proceedings initiated against him vide order

dated 17.03.2008 stating therein that on 24.07.2008 the appellant produced the accused Radhey Shyam before the Court and the accused was sent to jail.

6. Learned counsel for appellant has further submitted that without considering the averments of the appellant and considering that the accused has already been surrendered before the court below and sent to jail, the trial court vide order dated 18.08.2008 disposed of the representation of the appellant and send the appellant to jail for six months, in default of payment of surety, with the observation that if the surety deposited the surety amount, he shall be released from jail.

7. Learned counsel for the appellant has further submitted that thereafter the appellant filed the instant Criminal Appeal for quashing of the impugned orders and prayed for bail and this Court vide order dated 29.08.2008 allowed the bail application of appellant, thus the appellant was in jail about eleven days.

8. Learned counsel for the appellant has further submitted that the appellant is not the accused in this case. He stood surety and proceeding under Section 446 Cr.P.C. is as follows:

"(1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. Explanation.- A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code. 1 provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.

(3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and,; if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

9. Learned counsel for appellant has further submitted that since the appellant was surety of accused Radhey Shayam in Sessions Trial No. 114/97, arising out of Case Crime No. 1497/97 : State Vs. Radhey Shyam and others, under Sections 147, 148, 149 and 302 I.P.C., Police Station Kotwali Ayodhya, Faizabad and accused Radhey Shyam appeared and surrendered before the court concerned on 24.07.2008 and he is facing trial, therefore, the sentence of surety appellant Dharmendra Kumar Singh be reduced to the period already undergone by him.

10. Learned A.G.A. submits that it was the duty of the surety to ensure that accused was appearing in the Court on each and every date. Sureties have failed to ensure it because accused did not appear in Court, hence the court below had no option but to pass the impugned orders, thus the learned court below had rightly passed the impugned orders dated 18.08.2008 and 17.03.2008, but did not dispute this fact that appellant was surety of accused Radhey Shayam in Sessions Trial No. 114/97, arising out of Case Crime No. 1497/97 : State Vs. Radhey Shyam and others, under Sections 147, 148, 149 and 302 I.P.C., Police Station Kotwali Ayodhya, Faizabad and accused Radhey Shyam appeared and surrendered before the court concerned, therefore, the sentence of surety appellant Dharmendra Kumar Singh may be reduced to the period already undergone by him.

11. After considering the arguments advanced by learned counsel for the parties and after perusal of record, this Court finds that the appellant is the surety of accused Radheshyam, when accused Radheshyam did not appear before the court, the court below had no option but to pass the impugned orders, thus the learned court below had rightly passed the impugned orders dated 18.08.2008 and 17.03.2008, which do not require any interference by this Court, thus the conviction of the appellant is maintained.

So far as the sentence of the appellant is concerned, as the accused Radhey Shyam had appeared and surrendered before the court concerned and the appellant had already undergone sentence for eleven days in compliance of the order dated 18.08.2008 and 17.03.2008 passed by the court below, considering the entire facts and circumstances of the case, in the interest of justice, this Court is of the view that the sentence is modified for the period which is already undergone by the appellant.

12. With the above modification, the instant criminal appeal is **partly allowed**.

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

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

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

(2024) 2 ILRA 1392
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.02.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Appeal No. 2197 of 2017

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

Counsel for the Appellant:
Surendra Kumar, Nisha Srivastava

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 302 & 201 - Appellant challenged conviction under Section 302 IPC and sentence of life imprisonment with a fine of Rs.25,000/- (with 1 year's additional rigorous imprisonment in default) by Additional Sessions Judge/Special Judge, Essential Commodities Act, Barabanki, dated 30.11.2017, in Sessions Trial No. 269 of 2015. Court held: (1) Prosecution failed to prove guilt beyond reasonable doubt due to inconsistencies in witness testimonies, particularly regarding the depth of water at the alleged drowning site and the deceased's clothing. (2) P.W.-1's testimony unreliable as FIR was not of her own volition, and no independent witnesses supported the prosecution's claim of appellant's apprehension at the scene. (3) Lack of evidence on water depth at site and discrepancies in clothing cast doubt on prosecution's story (Bhagwan Sahai Vs St. of Raj., (2010) 9 SCC 543; Upendra Pradhan Vs St. of Orissa, (2015) 11 SCC 124). (4) Suspicion cannot substitute proof; benefit of doubt granted to appellant. Conviction under Section 302 IPC set aside; appellant acquitted; appeal allowed. (Paras 25-29)

Appeal Allowed.

Case Law Cited:

1. Bhagwan Sahai Vs St. of Raj., (2010) 9 SCC 543 (Para 26)

2. Upendra Pradhan Vs St. of Orissa, (2015) 11 SCC 124 (Para 27)

3. Narendra Singh Vs St. of M.P., (2004) 10 SCC 699 (Para 27)

(Delivered by Hon'ble Ajai Kumar Srivastava-I, J.)

1. Heard Ms. Nisha Srivastava, learned counsel for the appellant, Sri Rajdeep Singh, learned A.G.A. for the State and perused entire record.

2. Under challenge in this criminal appeal is the impugned judgment and order dated 30.11.2017 passed by the learned Additional Sessions Judge/ Special Judge, Essential Commodities Act, Barabanki in Sessions Trial No.269 of 2015 titled as State of U.P. vs. Ram Chandra arising out of Crime No.104 of 2015, under Sections 302 and 201 of the Indian Penal Code1, Police Station Haidergarh, District Barabanki whereby the appellant, Ram Chandra has been convicted and sentenced to undergo life imprisonment with a fine of Rs.25,000/- for the offence under Section 302 I.P.C. and in default of payment of fine, he has further been directed to undergo one year's additional rigorous imprisonment. However, he has been acquitted of charge under Section 201 I.P.C.

3. The case of the prosecution in nutshell is that a written report was submitted by the first informant, Poonam Kumari at Police Station Haiderganj, District Barabanki stating therein that on 14.05.2015, the first informant along with her husband, Premchandra was returning to their village from her brother-in law's house by a D.C.M. When they alighted from D.C.M. at about 09:00 PM near their Village, Narauli, a person, whom they could not recognize, started staring at the first informant and thereafter, he pounced upon the first informant and her husband. When the husband of the first informant tried to defend his wife/ first informant, the unknown person grabbed her husband with an intention to kill him and dragged him into a nearby pond and tried to strangulate the first informant's husband. When the first informant raised alarm, many villagers

reached the place of occurrence. The villagers saved her husband and also apprehended that person. The first informant's husband, being in a serious condition, was taken to the Government Hospital, Haidergarh, where her husband was declared dead. The first informant later came to know the name of the accused/ murderer of her husband, who is the present accused/ appellant herein.

4. The inquest proceeding started on 15.05.2015 at 06:30 AM and got concluded on 15.05.2015 at 07:30 AM. The inquest report has been duly proved by P.W.-4, Batjor Singh as Ex. Ka-2.

5. According to postmortem report of the deceased, Ex. Ka-10, which has been proved by P.W.-6, Dr. Saroj Kumar, the cause of death of the deceased is reported to be asphyxia as a result of antemortem drowning.

6. On the basis of aforesaid written report, Ex. Ka-1 submitted by the first informant, Poonam Kumari, the first information report, Ex. Ka-8 came to be lodged against the appellant on 14.05.2015 at 10:30 PM for the offence under Section 302 I.P.C.

7. The Investigating Officer recorded the statements of the witnesses under Section 161 of the Code of Criminal Procedure2. He visited the place of occurrence and prepared a site plan, Ex. Ka-11 thereof.

8. Upon conclusion of investigation, the Investigating Officer submitted a charge sheet, Ex. Ka-12 against the accused/ appellant for the offences under Sections 302 and 201 I.P.C.

9. Charges for the offences under Sections 302 and 201 I.P.C. were framed against the present accused/ appellant, who denied the charges and claimed to be tried.

10. In order to bring home guilt of the accused/ appellant, the prosecution has examined Poonam Kumari, who is the first informant, as PW-1, Smt. Tapeshwari Mishra as PW-2, Ms. Khushbu as PW-3, S.I. Batjor Singh as PW-4, Head Constable Ramrudra Tiwari, who is the chik writer, as PW-5, Dr. Saroj Kumar as PW-6 and the Investigating Officer, Inspector Chandrashekhar Singh as PW-7.

11. The appellant in his statement recorded under Section Section 313 Cr.P.C. has stated the prosecution story to be false. He has also stated to have been falsely implicated in this case and he claimed to be innocent.

12. No evidence in defence was adduced by the accused/ appellant before the learned trial court.

13. The learned trial court, after appreciating the evidence available on record adduced by the prosecution, convicted and sentenced the accused/ appellant as stated herein above.

14. Aggrieved by the impugned judgment and order dated 30.11.2017, the accused/ appellant has preferred the instant criminal appeal.

15. Learned counsel for the appellant has submitted that the appellant is innocent, who has been falsely implicated in this case. The finding of guilt of the appellant recorded by the learned trial court is against

the weight of evidence, therefore, the same cannot be sustained.

16. Her further submission is that the prosecution story is unbelievable. The prosecution has been unable to prove that the incident occurred at the place, which has been shown in the site plan, Ex. Ka-11. The prosecution has not brought forth true prosecution story. The appellant has been falsely implicated on the basis of false and fabricated facts. The prosecution witnesses did not prove and corroborate the prosecution case. The statements of witnesses of fact have not been considered in their right perspective. The appellant came to be convicted by the impugned judgment and order dated 30.11.2017, which is not based on due analysis of evidence available before the learned trial court. She has also contended that the learned trial court failed to appreciate the fact that there were major contradictions in the testimony of P.W.-1, Poonam Kumari, which renders her testimony wholly unreliable.

17. Learned counsel for the appellant has, thus, prayed to set aside the impugned judgment and order dated 30.11.2017 and to acquit the appellant accordingly.

18. Per contra, learned A.G.A. for the State has submitted that the accused/ appellant rightly came to be convicted vide impugned judgment and order dated 30.11.2017, which is well discussed and reasoned. The appellant was named in the first information report. He has also contended that minor contradictions in the statements of the prosecution witnesses are very natural having regard to the fact that they come from rural background, therefore, any minor contradiction in their testimonies cannot be stressed too far. Accordingly, interference by this Court is neither warranted nor is justified. He, accordingly, prays for dismissal of the instant criminal appeal.

19. At the outset, it is relevant to mention that S.I. Batjor Singh has been examined as P.W.-4, who has proved the panchayatnama as Ex. Ka-2 and letter to CMO as Ex. Ka-3. This witness has also proved the letter to R.I. as Ex. Ka-4 and photo of the corpse as Ex. Ka-5. He has also proved challan of the deceased as Ext. Ka-6 and specimen seal as Ext. Ka-7. Head Constable Ramrudra Tiwari has been examined as P.W.-5, who has proved the first informant report as Ext. Ka-8. He has also proved G.D. as Ext. Ka-9. Dr. Saroj Kumar has been examined as P.W.-6, who has conducted the postmortem of the deceased and he has reported the cause of death of the deceased to be forceful drowning. He has proved the postmortem report of the deceased as Ex. Ka-10. The Investigating Officer, Inspector Chandrashekhar Singh has been examined as P.W.-7. He has stated that the panchayatnama proceedings were completed under his supervision by P.W.-4, S.I. Batjor Singh. He has proved the site plan as Ext. Ka-11 and the charge sheet as Ex. Ka-12.

20. Having heard the learned counsel for the appellant, learned A.G.A. for the State and upon perusal of record, it transpires that the first informant, Poonam Kumari, wife of the deceased, has been examined as P.W.-1. She has proved the written report as Ex. Ka-1. According to the written report, Ex. Ka-1, on 14.05.2015, she was returning to her home from the house of her brother-in-law *(jeth),* Lallan from Lucknow. They came to Haidergarh and thereafter, they boarded a DCM for her

village. At about 09:00 PM, they alighted from DCM. When they were about to pay the fare, the appellant rushed towards the first informant to grab her. Her husband/ deceased, Prem Chandra intervened. Whereupon the appellant caught hold of the deceased by his neck. Thereafter, the appellant while pressing the neck of her husband, the deceased, brought him down in a nearby pond. This witness made hue and cry, which led to other persons to rush to the spot. The appellant was apprehended on the spot and her husband was taken to Haidergarh District Hospital where he was declared dead. P.W.-2, Smt. Tapeshwari Mishra, in her testimony, has stated that on the date of incident, she, upon hearing of screams, rushed to the spot. She was carrying a wooden stick (*danda*) and a torch with her. She saw that the appellant had caught hold of deceased's neck and had pounced upon the deceased. The other persons of the vicinity also came to the spot. The man, who had pressed the neck of the deceased, revealed his name as Ram Chandra Rawat R/o Alpi ka Purwa, Police Station Subeha, District Barabanki.

21. A careful perusal of testimony of P.W.-2, Smt. Tapeshwari Mishra reveals that she has very categorically stated that on the date of incident, upon hearing screams, she along with wife of Ram Kumar only had reached at the spot. No other persons had reached there. She has also stated that it was a dark night and there was no source of light. She has also stated the fact that the place, where the deceased, Prem Chandra allegedly drowned because of the appellant pressing his neck in the water, in fact, had no water there. P.W.-3, Ms. Khushbu is a child witness, who has also stated to have seen the incident and has stated that on 14.05.2019 at about 09:00 PM, she also heard screams and when she reached at the spot, she saw that his uncle's neck was being pressed by a man, who, on being asked, revealed his name as Ram Chandra R/o Alpi ka Purwa.

22. If we scrutinize the testimony of P.W.-6, Dr. Saroj Kumar, we find that he had conducted the postmortem of the deceased and has proved the postmortem report as Ex. Ka-10. According to postmortem report, Ex. Ka-10 of the deceased, the cause of death of the deceased is reported to be asphyxia as a result of ante-mortem drowning. If we peruse the site plan, Ex. Ka-11, we find that the place, where according to prosecution story, the appellant killed the deceased by pressing him in a water body, is not a pond or a regular water body. The site plan does not reveal as to how deep water was there at place 'C' in the site plan, Ex. Ka-11 where the deceased, Prem Chandra was done to death by pressing his neck into water. It needs to be stated that death by drowning could occur only when it is established that the place, where the deceased, Prem Chandra is said to have been killed by drowning, had sufficient water for doing so.

23. We have been able to notice that P.W.-1, Poonam Kumari has stated, in her testimony, that while her husband, the deceased, was done to death, he was wearing a black pant, black shirt and a vest. P.W.-2, Smt. Tapeshwari Mishra has also stated that the deceased was wearing only an underwear. She has stated the fact that she had taken off shirt, pant and vest of the deceased at the place of occurrence for the first time in the court during trial, which appears to us as an effort to improve the prosecution story to lend support to prosecution's case. Even P.W.-3, Ms. Khushbu, who is a child witness, has stated

that the deceased had put on a pant and shirt when he left his home. However, a perusal of postmortem report, Ex. Ka-10 reveals that the deceased was wearing only an underwear. It is not the case of the prosecution that the appellant had disrobed the deceased while they were in scuffle.

24. In this regard, we have carefully perused the entire record and are constrained to say that the shirt, pant and vest, which were allegedly worn by the deceased once he left the home, were neither recovered by the Investigating Officer near the alleged place of occurrence nor the same were handed over by P.W.-2, Smt. Tapeshwari Mishra to the Investigating Officer, therefore, it does not rule out possibility of the fact that the prosecution has not come up with the true chronology of the incident; rather the prosecution has tried to shield some facts.

25. We say so because in want of any evidence to suggest as to what was the depth of water at point 'C' in the site plan, Ex. Ka-11, which is shown as the place where the deceased was done to death by the appellant by pressing his neck into water, it is difficult to comprehend as to how and in what manner, the deceased was killed. The fact that the deceased was found wearing only underwear also casts doubt on the prosecution story. Admittedly, on the date of alleged incident, it was a dark night. The time of occurrence is stated to be about 09:00 PM in the night. P.W.-1, Poonam Kumari, who is stated to be an eye witness, has categorically stated in her testimony that she was informed by the police personnel that the appellant has been made an accused, only thereafter, she put her signature on the written report, Ex. Ka-1. She has also stated that the written report was scribed by the police personnel and only thereafter, the police personnel obtained her signature on it. This clearly shows that the written report was not an outcome of her own volition. She has very categorically stated that she does not know whether real culprit was apprehended on the spot or some other person. It is not out of place to mention that it is the prosecution's own case that the first informant was not acquainted with the appellant and she did not know his name prior to the date of incident. In want of depth of water at point 'C' as shown in the site plan, Ex. Ka-11, it is difficult to determine as to whether there was sufficient water where the deceased could have been done to death in a manner as shown in the postmortem report. We say so because in a given case, such lapse of not mentioning deft of water at place 'C' would have been considered as such a trivial lapse on the part of the Investigating Officer, which could not have lent any benefit to the appellant. However, as aforesaid fact goes to the very root of the matter and it makes the entire prosecution story improbable, therefore, it cannot also be ruled out that the prosecution did not disclose the real genesis and correct situs of the place of occurrence. According to written report, Ex. Ka-1, when the first informant, P.W.-1, Poonam Kumari raised alarm, many villagers of the vicinity had reached the sopt and according to recital made in the written report, Ex. Ka-1, they apprehended the appellant. However, no such witness has been examined by the prosecution. Therefore, we are of the considered view that the prosecution has miserably failed to establish the fact that on 14.05.2015, the appellant, who belonged to a different village and, who, according to prosecution's own story, had no prior enmity with the deceased or the first informant, P.W.-1, Smt. Poonam Kumari,

had killed the deceased only because he was apprehended near the alleged place of occurrence.

26. Hon'ble the Supreme Court in **Bhagwan Sahai and another vs. State of Rajasthan**[3] in paragraph No.8 has held as under :-

"8.The aforesaid view of the High Court is devoid of legal merits. Once the Court came to a finding that the prosecution has suppressed the genesis and origin of the occurrence and also failed to explain the injuries on the person of the accused including death of father of the appellants, the only possible and probable course left open was to grant benefit of doubt to the appellants. The appellants can legitimately claim right to use force once they saw their parents being assaulted and when actually it has been shown that due to such assault and injury their father subsequently died. In the given facts, adverse inference must be drawn against the prosecution for not offering any explanation much less a plausible one. Drawing of such adverse inference is given a go-by in the case of free fight mainly because the occurrence in that case may take place at different spots and in such a manner that a witness may not reasonably be expected to see and therefore explain the injuries sustained by the defence party. This is not the factual situation in the present case."

27. We are oblivious of the fact that in the case at hand, a young man has died, but the fact remains that it is the duty of prosecution to prove its case against the accused-appellant beyond reasonable doubt. Suspicion, howsoever grave cannot take place of a proof. In this regard, Hon'ble the Supreme Court in **Upendra Pradhan vs. State of Orissa**[4] in paragraph No.14 has held as under:-

"14. Taking the first question for consideration, we are of the view that in case there are two views which can be culled out from the perusal of evidence and application of law, the view which favours the accused should be taken. It has been recognised as a human right by this Court. In Narendra Singh v. State of M.P., [(2004) 10 SCC 699 : 2004 SCC (Cri) 1893], this Court has recognised presumption of innocence as a human right and has gone on to say that: (SCC pp. 708 & 709, paras 30-31 & 33)

"30. It is now well settled that benefit of doubt belonged to the accused. It is further trite that suspicion, however grave may be, cannot take place of a proof. It is equally well settled that there is a long distance between 'may be' and 'must be'.

xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx
xxxx xxxx xxxx xxxx"

(emphasis supplied by us)

28. Thus, in view of what has been discussed above, we are constrained to hold that the learned trial court, while appreciating evidence adduced by the prosecution to bring home guilt of the appellant, lost sight of aforesaid facts and circumstances of this case. Therefore, we find the impugned judgment and order dated 30.11.2017 passed by the learned Additional Sessions Judge/ Special Judge, Essential Commodities Act, Barabanki unsustainable. We are of the considered view that the appellant deserves to be given benefit of doubt.

29. The upshot of aforesaid discussion is that the impugned judgment and order dated 30.11.2017 whereby the appellant,

Ram Chandra came to be convicted for the offence under Section 302 I.P.C., is not sustainable and deserves to be set aside, which is, accordingly, set aside. The appellant is acquitted of charge under Section 302 I.P.C. Consequently, the present criminal appeal is **allowed**.

30. The accused/ appellant, Ram Chandra is in jail. Let the accused/ appellant be released from jail forthwith, if he is not wanted in any other case.

31. The appellant is directed to file a personal bond and two sureties in the like amount to the satisfaction of the court concerned in compliance of Section 437-A Cr.P.C. within eight weeks from today.

32. Let the record of trial court along with a copy of this order be transmitted forthwith to the learned trial court concerned for necessary information and compliance.

(2024) 2 ILRA 1399
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 02.02.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 2235 of 2008

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

Counsel for the Appellant:
Madan Mohan Pandey

Counsel for the Respondent:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 323, 504, 506 & 34 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Section 3(1)(x) - Appellants challenged conviction under Section 323/34 IPC and fine of Rs.300/- each (with 2 months' imprisonment in default) by Additional Special Sessions Judge/S.C. & S.T. Act, Sultanpur, dated 23.07.2008, in Sessions Trial No. 9/2007. Court held: (1) Prosecution failed to prove guilt beyond reasonable doubt; injuries on P.W.-1 and P.W.-3 caused by friction, not lathi/danda as alleged, and appeared old per medical evidence. (2) Witnesses (P.W.-1, P.W.-3) were interested (close relatives), and P.W.-2's testimony contradictory, casting doubt on presence and incident. (3) Trial court's reliance on interested witnesses without proper scrutiny erroneous; principle of falsus in uno falsus in omnibus inapplicable, but evidence lacked credibility (Khujji @ Surendra Tiwari Vs St. of M.P., AIR 1991 SC 1853; Sucha Singh Vs St. of Punj., AIR 2003 SC 3617; Paramjeet Singh Vs St. of Uttarakhand, AIR 2011 SC 200). (4) Delay in FIR and lack of corroborative evidence further weakened prosecution case. Conviction set aside; appellants acquitted; appeal allowed. (Paras 17-25)

Appeal Allowed.

Case Law Cited:

1. Khujji @ Surendra Tiwari Vs St. of M.P., AIR 1991 SC 1853 (Para 18)

2. Sucha Singh Vs St. of Punj., AIR 2003 SC 3617 (Para 19)

3. Paramjeet Singh Vs St. of Uttarakhand, AIR 2011 SC 200 (Para 20)

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

1. List has been revised.

2. Heard learned Counsel for the parties.

3. The present Criminal Appeal under Section 374(2) of the Cr.P.C. has been filed against the judgment and order dated

23.07.2008 passed by learned Additional Special Sessions Judge/S.C. & S.T. Act/F.T.C.-4, Court No.13, Sultanpur, in Special Sessions Trial No.9/2007 "State vs. Jagesar Verma and Others", arising out of Case Crime No./Court Case No.5/2005, relating to Police Station-Sangrampur, District-Sultanpur, by which the appellants have been convicted under Section 323/34 with a fine of Rs.300/- and in default of payment of fine two months imprisonment.

4. The prosecution case in brief is that the complainant as well as accused persons are resident of same village. There was some old enmity in between the parties. On 22.06.2005 at about 7:00 A.M., the accused persons were building a chappar on the agricultural land of the complainant, when the complainant stopped them from placing a chappar in her land, the accused persons got annoyed and started abusing with caustic words and caste language, and thereafter, when the complainant raised her voice they started beating the complainant, her husband and daughter-in-law. On hue and cry, the other family members reached the spot and tried to save them, they were also beaten brutally by the accused persons. The report regarding aforesaid incident was lodged on 27.09.2005 after moving an application under Section 156(3) Cr.P.C. before the concerned Magistrate, which was registered as Court Case No.05/2005 under Section 323, 504 and 506 and Section 3(1)(x) of SC/ ST Act and charge sheet was submitted by the Investigating Officer under Sections 323, 504 and 506 I.P.C. and Section 3(1)(x) of SC/ST Act on 29.10.2005.

5. Charges were framed by the court below under Sections 323/34 and 506(2) I.P.C. and Section 3(1)(x) of SC/ST Act. The accused persons denied charges and sought trial.

6. Prosecution examined the informant/complainant, Ram Lali, as P.W.1, who reiterated the allegations mentioned in the FIR and she proved the lodging of first information report. Munnu Lal was produced as P.W.-2, who stated that on the date of incident he was present at the spot but in his statement under Section 161 Cr.P.C., he clearly stated that one day before the date of incident, he went to Ganga river to take bath and returned on the date of incident at about 7:30 A.M. i.e. after the alleged incident, and further he has not received any injuries in the alleged incident, which clearly shows that he was not present at the spot at the time of alleged incident. P.W.-3, Phool Kali, testified before the court that appellants had brutally beaten the complainant and her family members, she further stated that she tried to save his Father-in-Law and Mother-in-law but the accused persons beat her also, she also admitted that a case is pending regarding the land in dispute. P.W.-4, Dr. Vinod Singh, stated that he has prepared the injury report of P.W.1 and P.W.3 and also stated that they complained about pain in their body on the date of incident but the time of injury was about 6:20 A.M. and 6:00 A.M on 23.06.2005 and further stated that normally an injury caused by lathi blow leaves mark on the body for two weeks but when P.W.1 came for examination, there was no mark of lathi blow nor any kind of mark was seen on her body and in respect of P.W.3 he stated that during the course of examination, the colour of injury caused to her was blue that gives an impression that the injury was not new. P.W.5 Ramhit Saroj, the inscribe of F.I.R., did not state anything to falsify the story of prosecution. P.W.6 Aditya Kumar

Shukl, Investigating Officer, stated that on the basis of complaint made by the complainant and statements of her family members, he visited the site and created site plan and he further stated that the land in dispute belongs to the appellants for which they have filed an application before the Sud Divisional Engineer but the same has not been verified. He further stated that he does not know whether the complainant's husband is a security guard or not but as he has taken his statements in the present case, thus, he know him.

7. The accused were examined under Section 313 Cr.P.C. and they denied their involvements in the alleged incident and they further stated that there was some old enmity between the parties, therefore, they have been roped in this case and the police authorities also have falsely implicated them in the present case due to village politics.

8. The Doctor opined that the injuries which were received by the P.W.1 and P.W.3 were caused by friction nd no opinion can be given. Duration about two weeks and injuries were simple in nature.

9. The trial court exonerated all the appellants from charges under Section 506(2) I.P.C. The trial court found that the offence under Section 506 (2) I.P.C. has not been proved against the appellants. The trial court further observed that so far as the charges under Section 3(1)(x) of the SC/ST Act are concerned, P.W.1 and P.W.3 gave contradictory statements, thus, trial court observed that the words which were used by the accused persons at the place of incident were not meant for public humiliation and consequently, exonerated the appellants under Section 3(1)(x) of the SC/ST Act, and offences under Section 323 read with Section 34 I.P.C. was found proved against the appellants. They were convicted and were awarded fine of Rs.300/- each and in case of default of payment, the appellants have to undergone imprisonment for two months.

10. The counsel for the appellant has submitted that the first information report was lodged after filing an application under Section 156(3) Cr.P.C. against the appellants only and thereafter questions was made by the police stating whether the informant/complainant will recognize the accused persons and informant/ complainant replied that she knows them well as they resident of same village. He has further submitted that no recovery of any arm was made by the police from the appellant as the incident took place in the month of June, 2005 and report was lodged in the month of September, 2005. He has further submitted that the offences against the appellants were not found to be proved since allegation in the FIR was that appellants caused injuries to the informant/complainant by the lathi and danda. The injuries from the lathi and danda in the nature of contusion with swelling and blue marks on injury. The injuries on the persons of the informant/complainant and also the other injured, Phool Kali, shows that they were caused by friction and not by any hard and blunt object. He has submitted that the prosecution has failed to prove its case beyond reasonable doubt but the court below without applying its judicial mind and without perusing the material facts placed on record convicted the appellants under Section 323/34 I.P.C. He has further submitted that the doctor has given opinion that the injuries were not caused due to blow by lathi and danda, rather they appear to be caused by friction and also they are

simple in nature and they appear to be old injuries.

11. Learned A.G.A. has opposed the aforesaid arguments and has submitted that the judgment of the court below is justified and calls for no interference.

12. After having heard the rival submissions of parties, the Trial Court found appellants-accused guilty, therefore, convicted and awarded them fine of Rs.300/- each under Section 323/34 I.P.C., and in default of payment of fine, they shall undergo imprisonment for two months.

13. Feeling aggrieved by the judgment of conviction and sentence passed by Trial Court, the appellants-accused have preferred this appeal.

14. Learned Counsel for the appellants has contended that the judgment and order passed by the Trial Court is wrong both on facts and law. The learned trial court had misread and misconstrued the statements of prosecution witnesses.

15. Opposing the contention of learned Counsel for the appellant-accused, the learned A.G.A. has contended that sufficient evidence was given by the prosecution to prove the factum of assaulting the injured by the accused persons, though, the F.I.R. could not be lodged immediately due to inaction on the part of police authorities, as such, the impugned order does not require any interference by this Court and the appeal is liable to be dismissed.

16. Through out the web of the Criminal Jurisprudence, one golden thread is always seen that it is the duty of the prosecution to prove the guilt of the accused. This burden of proof on prosecution to prove guilt is also known as presumption of innocence. The presumption of innocence, sometimes refer to by the latin expression "ei incumbit probatio qui dicit, non qui negat" (the burden of proof is on one who declares, not to one who denies) is the principle that one is considered innocence unless proven guilt. In criminal jurisprudence every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. The prosecution may obtain a criminal conviction only when the evidence proves the guilt of accused beyond reasonable doubt.

17. In the present case, almost all the prosecution witnesses have stated their own version of the prosecution story. Thus, the testimony appears to be based on interested witnesses from which guilt of accused may be inferred.

18. Witnesses may be categorized into three distinct categories. They may be wholly reliable. Similarly there may be witnesses who can be considered wholly unreliable. There is no difficulty in placing reliance or disbelieving his evidence when an evidence is wholly reliable or wholly un-reliable, but difficulty arises in case of third category i.e. where witness is neither wholly reliable nor wholly unreliable. Hostile/ interested witness ordinarily falls in category of those witnesses who are neither wholly reliable nor wholly un-reliable. Hon?ble Apex Court in ***Khujji @ Surendra Tiwari Vs. State of M.P. AIR 1991 SC page 1853*** was pleased to observe as under :-

"The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be

treated as effaced or washed off the record altogether, but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

19. The principle of ?falsus in uno falsus in omnibus? (false in one thing, false in everything) has no application in India. It is duty of Court to separate grain from chaff. Keeping in view the above principles Hon'ble Apex Court in the case of ***Sucha Singh v. State of Punjab, AIR 2003 SC 3617*** was pleased to observe as under :-

"*even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well."*

20. Similarly in ***Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200*** also Hon'ble Apex Court was pleased to observe as under:-

"When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting embloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony".

21. It feels pain to observe that in our present system of trial despite having sufficient power to the judge to ask questions to the witnesses in order to find out truth, most of them do not ask questions to the witnesses to shift the grain from the chaff. Practice of leaving witnesses to the Advocates, when a witness becomes hostile or is a interested witness, is not un-common in the trial Courts. Time and again Hon'ble Apex Court has reminded that a Judge does not preside over a criminal trial merely to see that no innocent man is punished, but a Judge also presides to see that a guilty man does not escape. Both are public duties, which the Judge has to perform. Therefore, the trial Court must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice.

22. No proper explanation of injuries on the person of injured witnesses have been given. Mere suggestion is not sufficient. Moreover it itself indicates a false case. All the witnesses being the close relatives, it is beyond apprehension that they instead of naming out real culprit, they would falsely implicate the accused persons knowing them innocent.

23. This Court has gone through the impugned judgment and evidence on

record. The trial court relying on the testimony of witnesses, even though who were interested witnesses, has concluded that the accused had assaulted the injured persons. Looking into the totality of statement of witnesses, the conclusion drawn by the trial court cannot be said to be reasonable.

24. It is established principle of law of evidence that statement of witness is to be read as a whole and conclusion should not be drawn only by picking up a single sentence of the statement of a witness. Thus the trial court has overlooked the material evidence available on record with regard to guilt of accused and to that extent conclusion drawn by the trial Court suffers with patent infirmity and perversity and therefore, liable to be reversed and set aside.

25. Thus in view of above, after analysis of circumstances of present case in the light of aforesaid settled legal principles, I come to the conclusion that the trial court has erred passing the impugned judgment and order, therefore, this appeal succeeds and is ***allowed***. The judgment and order dated 23.07.2008 passed by learned Additional Special Sessions Judge/S.C. & S.T. Act/F.T.C.-4, Court No.13, Sultanpur, in Special Sessions Trial No.9/2007 "State vs. Jagesar Verma and Others", arising out of Case Crime No./Court Case No.5/2005, relating to Police Station-Sangrampur, District-Sultanpur, by which the appellants have been convicted under Section 323/34 with a fine of Rs.300/- and in default of payment of fine two months imprisonment is set aside and reversed. The appellants, namely, appellant no.1 Babu Lal, appellant no.2, namely-Ram Asarey and appellant No.3, namely-Raj Bahadur Verma are acquitted of charges under Section 323/34. Their personal bonds and surety bonds are canceled and sureties are discharged.

26. Let record of lower Court be sent back to Court concerned along with copy of judgment and order for information.

(2024) 2 ILRA 1404
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.02.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 3121 of 2023

Sudha Singh & Anr. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
Anurag Shukla, Birendra Pratap Singh, Pankaj Shukla

Counsel for the Respondent:
G.A.

Criminal Law - Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2, 3, 14, 15, 16 & 17 - Appellants challenged orders dated 23/27.04.2022 (attachment of property), 16.08.2022 (rejection of representation), and 19.10.2023 (upholding attachment) by District Magistrate, Amethi, and Special Judge, Gangster Act, Sultanpur, under Section 14(1) of the Gangster Act. Court held: (1) No material evidence supported District Magistrate's belief that properties were acquired by appellant no.2 through offences under the Gangster Act; orders based on mere police reports and suspicion. (2) Appellants provided evidence of legitimate income sources (appellant no.1's business since 2015), rebutting presumption under Section 14. (3) Properties acquired prior to 2022 Gangster Act case; no nexus established between alleged crimes and property acquisition. (4) District Magistrate and trial court failed to conduct proper inquiry under Sections 15, 16, and 17,

rendering orders arbitrary and illegal (Smt. Maina Devi Vs St. of U.P., 2013(83) ACC 902; Smt. Shanti Devi Vs St. of U.P., 2007(2) ALJ 483; Rajbir Singh Tyagi Vs St. of U.P., 2018 SCC Online All 5986). All impugned orders quashed; properties ordered to be released; appeal allowed. (Paras 17-23)

Appeal Allowed.

Case Law Cited:

1. Smt. Maina Devi Vs St. of U.P., 2013(83) ACC 902 (Para 18)

2. Smt. Shanti Devi Vs St. of U.P., 2007(2) ALJ 483 (Para 19)

3. Rajbir Singh Tyagi Vs St. of U.P., 2018 SCC Online All 5986 (Para 20)

4. Badan Singh alias Baddo Vs St. of U.P., 2002 Cri LJ 1392 (Para 19)

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

1. Pleadings in the case have been exchanged between the parties.

2. Heard Shri Anurag Shukla, learned counsel for the appellants as well as Shri Ashok Kumar Singh, learned A.G.A-I for the State and perused the material available on record.

3. The present appeal under Section 18 of U.P. Gangster and Anti Social (Prevention of Activities) Act, 1986 (hereinafter referred to as the '**Gangster Act**') has been preferred by the appellants, namely, Sudha Singh and Vijay Pratap Singh @ Gallan Singh with a prayer to set aside the order dated 19.10.2023 passed by the learned Additional District and Sessions Judge / F.T.C.-II / Special Judge, Gangster Act, District Sultanpur in Crl. Misc. Case No.4/2022 (State Vs. Vijay Pratap @ Gallan) as well as the order dated 23/27.04.2022 passed by the District Magistrate, Amethi attaching/seizing the property of the appellants and the order dated 16.08.2022 passed by the District Magistrate, Amethi, rejecting the representations of the appellants and making reference to the learned trial court.

4. In short, the facts of the case are that appellant no.2, namely, Vijay Pratap Singh @ Gallan Singh was implicated in following cases:-

I) Case Crime No.257 of 2021, under Sections 302, 120-B I.P.C., Police Station Munshiganj, District Amethi.

II) Case Crime No.207 of 2021, under Sections 323, 504 I.P.C. read with Section 3(1)(d)(dha), 3(2)(5)(ka) of S.C./S.T. Act, Police Station Munshiganj, District Amethi.

III) Case Crime No.1120 of 2014, under Sections 147, 148, 149, 188, 307, 302, 336, 382, 353, 357, 427, 506, 504, 120-B I.P.C. and Section 7 of C.L.A. Act, Police Station Amethi, District Amethi.

IV) Case Crime No.327 of 2001, under Sections 147, 323 I.P.C., Police Station Munshiganj, District Amethi.

V) Case Crime No.83 of 1995, under Section 307 I.P.C., Police Station Munshiganj, District Amethi.

VI) Case Crime No.68 of 1991, under Sections 363, 366, 368, 376 I.P.C., Police Station Munshiganj, District Amethi.

VII) Case Crime No.93 of 1991, under Sections 394, 504, 506 I.P.C., Police Station Munshiganj, District Amethi.

5. Learned counsel for the appellants submitted that the appellant no.2, namely, Vijay Pratap Singh @ Gallan Singh, who is the husband of the appellant no.1, namely, Sudha Singh has been implicated in the aforesaid cases due to enmity and the case under the Gangster Act was imposed upon

him in the year 2022 whereas the property of the appellants which was attached vide order dated 23/27.04.2022 passed by the District Magistrate, Amethi under section 14 (1) of U.P. Gangster Act, was acquired by him much earlier to the imposition of Gangster Act upon him.

6. Learned Counsel of the appellants further submitted that in furtherance of the FIR bearing Case Crime No.35 of 2022, under Section 2/3(1) of the Uttar Pradesh Gangster and Anti Social (Prevention of Activities) Act, 1986, Police Station Gauriganj, District Amethi, the District Magistrate, Amethi proceeded to exercise its power under Section 14(1) of the Gangster Act and passed an order for attaching the property of the appellant on 23/27.04.2022.

7. Being aggrieved by the aforesaid attachment order dated 23/27.04.2022 passed by District Magistrate, Amethi, representation dated 02.05.2022 was preferred by the appellants before District Magistrate, Amethi seeking release of the appellants' property from attachment. However, the aforesaid representation was dismissed in a cursory manner by the District Magistrate, Amethi vide order dated 16.08.2022. While passing the order dated 16.08.2022, the District Magistrate, Amethi referred the case to the learned Gangsters Court under Section 16 of the Gangster Act in respect of property which was not released by him; and, the learned Gangsters Court, thereafter, proceeded to pass the impugned order dated 19.10.2023 in exercise of its powers under Section 16 of the Gangster Act.

8. Learned counsel for the appellant further submitted that the District Magistrate, Amethi has wrongly and incorrectly attached the properties of the appellant on the wrong presumption that the said properties have been acquired from the income earned by the appellant no.2 by his involvement in anti social activities, whereas the appellant no.2 is neither Gangster nor he has earned this property from his involvement in anti social activities.

9. Learned counsel for the appellants further submitted that the learned trial court while passing the impugned order dated 19.10.2023, without properly perusing the contents of application and documents annexed with the release application has wrongly and incorrectly rejected the same by presuming that the property in question has been acquired by the appellant no.2 from the income earned by indulging in anti social activities without going through documentary evidence filed on behalf of appellants and wrongly interpreting that appellants have not filed any document to prove that the properties in question have not been acquired by the appellant no.2 from the income earned by indulging in anti social activities. Thus, the trial court erred in law while rejecting the application of appellants for release of properties in question. He has further submitted that the appellants had given the complete details of the properties which has been attached vide order dated 23/27.04.2022 by the District Magistrate, Amethi.

10. Learned counsel for the appellant further submitted that appellant No.1 who is the wife of appellant No.2 is a business lady with registered/approved contractor possessing the requisite license for running a proprietorship firm having owned and accommodated exclusively by sole proprietor Smt. Sudha Singh i.e. appellant No.1 since 2015 and she also holds a valid

license for running liquor shops since 2016. Further, she belongs to a very reputed family and her father was a Zamidar and a popular figure in the society. He further submitted that appellant No.1 had categorically and comprehensively explained her source of income to build the property, which has been attached/seized vide impugned orders. The presumption of procurement of the property by a gangster by illegal means could only arise, had there been no other source of income. Needless to say that a presumption is always a presumption and is always rebuttable.

Thus, he further submitted that in the present case the appellants are not only rebutting the presumption as provided under Section 14 of the Gangsters Act but are contradicting the same in stricto senso by disclosing their other source of income.

11. Learned counsel for the appellant further submitted that the impugned order dated 23/27.04.2022 passed by the District Magistrate, Amethi does not reveal that the District Magistrate, Amethi had "reason of believe" that the properties in question were acquired by the appellant no.2 as a commission of an offence under the Gangster Act rather the aforesaid order is passed on mere suspicion, surmises and conjectures and the appellate court has also passed the order dated 19.10.2023 in cursory manner without analyzing the documents of the appellants. Thus, both the impugned orders are not sustainable in the eye of law.

12. Per contra, Shri Ashok Kumar Singh, learned AGA-I, has argued that the learned appellate court has correctly appreciated the material on record before passing the impugned order. The District Magistrate, Amethi has also passed the impugned order dated 23/27.04.2022 after being fully satisfied that appellant no.2 has acquired the properties in question by illegal means after involving himself in anti social activities as defined under the Gangster Act, as such there is no illegality, infirmity or perversity in the impugned orders. Moreover, the competent authority has passed the order after considering the report of the Superintendent of Police, as also the report of Station House Officer, Police Station Gauriganj, District Amethi and, as such, it is wrong to say that the impugned order of attachment passed by the competent authority suffers from infirmities.

13. Learned AGA-I has further submitted that the learned trial court pointed out that the appellants were also not able to produce the source of income from which the appellants have acquired the properties attached by the learned District Magistrate, Amethi. Thus, the learned trial court after considering the entire material including the documentary evidence available on record have passed the impugned orders in correct perspectives and they need no interference.

14. I have heard learned counsel for the appellants, learned AGA-I for the State and gone through the impugned orders passed by the trial court.

15. It seems to be just and expedient to refer to the relevant provisions of the Gangster Act which are as under :-

"2. Definitions- *In this Act,- (a) "Code" means the Code of Criminal Procedure, 1973;*

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or

intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code, or (ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 or the Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims, for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956, or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867, or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code, or in preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or (xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

**(xvi) offences punishable under the Regulation of Money Lending Act, 1976;*

(xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960; (xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities; (xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966;

(xx) printing, transporting and circulating of fake Indian currency notes;

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition

in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and The Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xvv) indulging in crimes that impact security of State, public order and even tempo of life,"

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;

(d) "public servant" means a public servant as defined in Section 21 of the Indian Penal Code or any other law for the time being in force, and includes any person who lawfully assists the police or other authorities of the State, in investigation or prosecution or punishment of an offence punishable under this Act, whether by giving information or evidence relating to such offence or offender or in any other manner;

(e) "member of the family of a public servant" means his parents or spouse and brother, sister, son, daughter, grandson, granddaughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a person in whose welfare the public servant is interested;

(f) words and phrases used but not defined in this Act and defined in the Code of Criminal Procedure, 1973, or the Indian Penal Code shall have the meanings respectively assigned to them in such Codes.

3. Penalty-*(1) A gangster, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:*

Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.

(2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine".

16. The issue involved in the present case may be resolved with the help of the consideration of provisions of sections 14, 15, 16 and 17 of the Gangsters Act, which read as under:

"14. Attachment of property.-*(1) If the District Magistrate has reason to believe that any property, whether movable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.*

(2) The provisions of the Code shall mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District

Magistrate may appoint an Administrator of any property attached under sub-section (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property .- *(1) Where any property is attached under Section 14, the claimant thereof may, within three months from the date of knowledge of such attachment, make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.*

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such 6 property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by court .-

(1) Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this Act. Such court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3) (a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub-section (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or on any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3), the Court shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No. V of 1908), in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath ;

(b) requiring the discovery and production of documents;

(c)receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office ;

(e) issuing commission for examination of witnesses or documents;

(f) dismissing a reference for default or deciding it ex parte;

(g) setting aside an order of dismissal for default or ex parte decision.

(5) In any proceedings under this section, the burden of proving that the

property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence Act, 1872 (Act No. 1 of 1872), notwithstanding.

17. Order after inquiry.- *If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise."*

17. It is now well settled that **property being made subject matter of an attachment under Section 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act.** The District Magistrate has to record its satisfaction on this point. The satisfaction of the District Magistrate is not open to challenge in any appeal. Only a representation is provided for before the District Magistrate himself under Section 15 of the Act and in case he refuses to release the property on such representation, in that case the person aggrieved has to make a reference to the Court having jurisdiction to try an offence under the Act. The Court, while dealing with the reference made under sub-section (2) of Section 15 of the Act has to see whether the property was acquired by a gangster as a result of commission of an offence triable under the Act and has to enter into the question and record his own finding on the basis of the inquiry held by him under Section 16 of the Act. If the Court comes to the conclusion that the property was not acquired by the gangster as a result of commission of an offence triable under the Act, the Court shall order for release of the property in favour of the person from whose possession it was attached.

The object behind providing the power of judicial scrutiny under Section 16 of the Code is to check arbitrary exercise of power by the District Magistrate in depriving a person of his property and to restore the rule of law, therefore a heavy duty lies upon the Court to hold a formal enquiry to find out the truth with regard to the question, whether the property was acquired by or as a result of the commission of an offence triable under the Act. The order to be passed under Section 17 of the Act must disclose reasons and the evidence in support of finding of the Court. <u>The Court is not empowered to act as a post office or mouthpiece of the State or the District Magistrate.</u> If a person has no criminal history during the period the property was acquired by him, how the property can be held to be a property acquired by or as a result of commission of an offence triable under the Act is a pivotal question which has to be answered by the Court. Besides, the aforesaid question, the other important question to be considered by the Court is whether the property which was acquired prior to the registration of the case against the accused under the Act or prior to the registration of the first case of the Gangster chart can be attached by District Magistrate under Section 14 of the Act.

The provisions of Section 14 of the Act, referred to above, empowers the District Magistrate to attach the property acquired by the Gangster as a result of

commission of an offence triable under this Act. The District Magistrate may appoint an Administrator of any property attached, **to administer such property in the best interest thereof but there must be reason to believe that any property whether movable or immovable in possession of any person, has been acquired by a Gangster as a result of commission of an offence, triable under this Act but the District Magistrate in its order has not recorded his satisfaction having reason to believe with regard to the property attached that it was acquired by appellant as a result of commission of an offence triable under Gangster Act, even though while deciding the reference under Section 16 of the Act, the trial court does not appreciate the evidence and in a mechanical manner passed the impugned order relying upon the observations made by the District Magistrate which is illegal and an unjustified approach.**

18. A Coordinate Bench of this Court in the case of **Smt. Maina Devi versus State of U.P. 2013(83) ACC 902** in paras-8, 9 and 10 has been pleased to held as under:-

"8. Considering the facts, circumstances of the case, submissions made by the learned Counsel for the appellant and the learned A.G.A. and from the perusal of the record it appears that the issue involved in the present case may be resolved with the help of the consideration of the provisions of section 14, 15 and 17 of the Gangsters Act, which read as under:

***15. Release of property.**—(1) Where any property is attached under section 14, the claimant thereof may within three months from the date of knowledge of such attachment make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.*

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

***17. Order after inquiry—**If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.*

9. In light of above mentioned provisions of the Gangster Act the District Magistrate is empowered to attach movable or immovable properties in possession of any person acquired by a gangster as a result of the commission of an offence triable under this Act. But for exercising such powers there must be the reason to believe to the District Magistrate that such property was acquired by a gangster as a result of the commission of an offence triable under this Act. The words reason to believe are stronger than the word "satisfied", it must be passed on reasons which are relevant and material. In the present case, from the perusal of the lower Court record it appears that only on the basis of the police report submitted by the officer incharge of P.S. Sarai Lak-hansi, District Mau, the District Magistrate, Mau has attached two houses of the appellant, no material was supplied to the District Magistrate to have a reason to believe that the property in question was acquired by

the gangster Raj Bahadur Singh as a result of commission of an offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also. The learned District Magistrate was having no material in support of the police report that both the houses of the appellant were acquired by his son Raj Bahadur Singh. The learned District Magistrate rejected the application under section 15 of the Gangsters Act moved by the appellant for releasing the attached houses. The application was moved well within the time, the application was a representation to the District Magistrate, Mau, it was having all the details disclosing the sources by which both the houses were acquired by the appellant. But learned District Magistrate did not consider the sources disclosed by the appellant and rejected the application vide order dated 29.12.2008. The explanation of all the sources by which the appellant acquired the houses has not been properly considered. Therefore, impugned order dated 29.12.2008 has become illegal. The learned Special Judge (Gangsters Act), Azamgarh rejected the application moved by the appellant under section 17 of the Gangsters Act without considering the provisions of the section 14 of the Gangsters Act and the 'relevancy of the reasons' recorded by the District Magistrate to believe that both the attached houses were acquired by a gangster Raj Bahadur Singh son of the appellant as a result of commission of an offence triable under this Act. The order dated 17.3.2009 passed by learned Special Judge (Gangsters Act)/Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 is also illegal.

10. In view of the above discussion, the order passed by District Magistrate, Mau under section 14(1) of the Gangsters Act attaching two houses of the appellant the order dated 29.12.2008 passed by District Magistrate, Mau by which the application under section 15(1)(2) of the Gangster Act has been rejected and the order dated 17.3.2009 passed by learned Special Judge (Gangster Act), Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 are illegal, the same are hereby set aside and the District Magistrate, Mau is hereby directed to release both the houses No. 204-D/8 and 205-D/9 situated in Mohalla Chandmari, Imiliyan, P.S. Sarai Lak-hansi, District Mau in favour of the appellant forthwith."

19. Further, another Coordinate Bench of this Court in the case of **Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483 (All)** in paras-9, 10 and 11 has been pleased to held as under:-

"9. The conjoint reading of these sections shows that first it has to be proved that gangster or any person on his behalf is or has been in possession of the property, and such property has been acquired by the commission of any offence triable under this Act, only then the District Magistrate acquires jurisdiction to proceed in the matter and to attach the property. Only when the initial burden is discharged, the onus shifts to the gangster or such person, to account for the same satisfactorily. But if it is found that the concerned person was not a gangster and did not acquire the property in commission of any offence triable under this Act, it has to be released as provided in Section 17. In other words the initial burden is on the prosecution to show that the concerned person is a gangster and has acquired property on account of his criminal activity as triable under the Act.

10. Therefore, in order to proceed under section 14 there must be materials for objective determination of the District Magistrate that the person is either a

member, leader or organiser of a gang and has acquired any property in commission of any offence under the Act. There must be a nexus between his criminal acts as enumerated therein and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words what is necessary to find is whether, his acquisition of property was a result of commission of any offence enumerated in the Act being a member, leader or organiser of a gang. One might have committed several offences but if the property acquired by him was with the aid of his earning from legal resources no action under Section 14 of the Act can be taken against him.

11. In the case of Badan Singh alias Baddo v. State of U.P., 2002 Cri LJ 1392 : 2001 All LJ 2852 it has been held by this Court that Section 14 of the Act is a harsh provision that affects one's right to property, which is a fundamental right under the Constitution. Therefore, initial burden was upon the State to satisfy the District Magistrate with necessary materials that a gangster acquired the properties as a result of commission of any offence. It has also been held in this case that the Act does not provide that the aggrived person seeking release of the properties from attachment must prove the source of income for acquisition thereof."

20. Further, another Coordinate Bench of this Court in the case of ***Rajbir Singh Tyagi Vs State of U.P. and Others 2018 SCC Online AII 5986*** in paras 16 and 18 has been pleased to held as under:-

"16. A conjoint reading of the aforesaid two definitions what appears is that for taking action under Section 14 against a person, there must be materials for objective determination of the District Magistrate that he either as a member, leader or organizer of a gang acquired any property as a result of commission of any offence under the Act. <u>There must be nexus between his criminal act and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words, what is necessary to find is whether his acquisition of property was as a result of commission of any offence enumerated in the Act being a member, leader or organizer of a gang.</u> One might have committed several offences, but if the property acquired by him was with the aid of his earning from legal source, no action under Section 14 of the Act can be taken against him.

18. Section 14 of the Act is a harsh provision that affects one's right to property which is a constitutional right under the Constitution. Therefore, initial burden was upon the State to satisfy the District Magistrate with necessary materials that petitioner Rajbir Singh Tyagi being a gangster acquired the properties as a result of commission of any offence. That was however, not done. So, complaining the attachment order to be illegal, a move was made by the petitioners by filing a representation for release of the properties. The said prayer was rejected with the observation that the petitioners could not establish the source of income to build the house and acquire the movables. This approach of the District Magistrate, in my opinion, has no sanction under law. The Act does not provide that-aggrieved person seeking release of the properties from attachment must prove the source of income for acquisition thereof. So, on a conspectus of the relevant provisions of the Act, I am of the considered opinion that the order of attachment passed by the District Magistrate, Muzaffar Nagar is illegal, arbitrary and against the weight of the materials on record."

21. Keeping in view the aforesaid settled proposition of law and the

judgments rendered by this Court in the case of ***Smt. Maina Devi versus State of U.P. 2013(83) ACC 902 and Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483 (All), and Rajbir Singh Tyagi Vs State of U.P. and Others 2018 SCC Online AII 5986,*** this Court is of the view that the properties, which were attached, were not acquired by the appellants by commission of any offence triable under the Act as it is settled law that the properties being made subject matter of attachment under Section 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act and also the impugned orders were not passed on reasons which are relevant and material. In the present case from the perusal of the impugned order dated 23/27.04.2022 and record it appears that only on the basis of the police report, the District Magistrate, Amethi has attached the properties in question, no material was supplied to the District Magistrate to have reasons to believe that the properties in question were acquired by the gangster i.e. the present appellants as a result of commission of any offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also from the record. The District Magistrate has no material in support of the police report that the properties in question were acquired by the appellants being gangster even though the procedures were not followed as per the provisions of the Act. From the record it transpires that the appellants had acquired the property much prior to the imposition of Gangster Act, which was invoked in the year 2022 and the impugned order of attachment was passed in mechanical manner without application of mind and is arbitrary. Thus, it appears that the impugned order dated 23/27.04.2022 passed by the District Magistrate, Amethi attaching/seizing the property of the appellants and the order dated 16.08.2022 passed by the District Magistrate, Amethi, rejecting the representations of the appellants and making reference to the learned trial court and order dated 19.10.2023 passed by the trial court are illegal, arbitrary and have been passed in a cursory manner without considering the material available on record and without considering the explanation/reply given by the appellants, thus, the orders impugned hereinabove are liable to be quashed.

22. In view of above facts and circumstances of the case, the impugned orders passed by the trial court cannot be said to be passed in correct perspectives as they are not sustainable in the eye of law and require interference by this Court, the prosecution has failed to establish that the provisions of Sections 2 and 3 of the Gangster Act are attracted in the case of appellants, and further the appellants' properties are also not attached in accordance with law, as the prosecution has failed to establish that the properties in question acquired and owned by the appellants have been earned from the income indulging in anti social activities. The inquiry under Section 16 was not done in accordance with the Act, the provisions of Sections 14, 15 & 17 were also not followed in accordance with the Act, thus the entire proceeding initiated in pursuance thereof is vitiated.

23. Accordingly, the present appeal is **allowed**. The impugned order dated 19.10.2023 passed by the learned Additional District and Sessions Judge / F.T.C.-II / Special Judge, Gangster Act, District Sultanpur in Crl. Misc. Case No.4/2022 (State Vs. Vijay Pratap @ Gallan) as well as the order dated

23/27.04.2022 passed by the District Magistrate, Amethi attaching/seizing the property of the appellants and the order dated 16.08.2022 passed by the District Magistrate, Amethi, rejecting the representations of the appellants and making reference to the learned trial court, are hereby **quashed.**

The District Magistrate, Amethi is directed to release all the properties of the appellants attached vide order dated 23/27.04.2022 in favour of appellants, forthwith.

24. No order as to costs.

(2024) 2 ILRA 1416
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.02.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 3200 of 2022

Nabi Sarvar ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Farooq Ayoob

Counsel for the Respondents:
G.A.

Criminal Law - Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 2, 3, 14, 15, 16 & 17 - Appellant challenged orders dated 23.09.2020 (attachment of vehicles), 15.03.2021 (rejection of representation), and 18.10.2022 (upholding attachment) by District Magistrate, Ambedkar Nagar, and Special Judge, Gangster Act, under Section 14(1) of the Gangster Act. Court held: (1) No material evidence supported District Magistrate's belief that vehicles (three trucks and one Scorpio) were acquired through offences under the Gangster Act; orders relied solely on police reports without objective basis. (2) Appellant provided evidence of legitimate income from farming, milk distribution, and fisheries, and vehicles were financed through loans, acquired prior to 2020 Gangster Act case. (3) No nexus established between alleged criminal activity (single case under Cow Slaughter Act) and property acquisition. (4) District Magistrate and trial court failed to conduct proper inquiry under Sections 15, 16, and 17, rendering orders arbitrary and illegal (Smt. Maina Devi Vs St. of U.P., 2013(83) ACC 902; Smt. Shanti Devi Vs St. of U.P., 2007(2) ALJ 483; Rajbir Singh Tyagi Vs St. of U.P., 2018 SCC Online All 5986). All impugned orders quashed; vehicles ordered to be released; appeal allowed. (Paras 16-20)

Appeal Allowed.

Case Law Cited:

1. Smt. Maina Devi Vs St. of U.P., 2013(83) ACC 902 (Para 17)

2. Smt. Shanti Devi Vs St. of U.P., 2007(2) ALJ 483 (Para 18)

3. Rajbir Singh Tyagi Vs St. of U.P., 2018 SCC Online All 5986 (Para 19)

4. Badan Singh alias Baddo Vs St. of U.P., 2002 Cri LJ 1392 (Para 18)

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

1. Heard Shri Farooq Ayoob, the learned counsel for the appellant and Shri Ashok Kumar Srivastava, learned A.G.A. for the State and perused the record.

2. The instant Criminal Appeal has been filed under Section 18 of Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021 against the order dated 23.09.2020 passed by the District Magistrate, Ambedkar Nagar,

whereby the District Magistrate, Ambedkar Nagar attached the Vehile No. U.P. 45 D 5797 Truck, U.P. 45 T 2245 Truck, UP 45 T 1738 Truck and UP 45Q0287 Scorpio with the finding that the appellant has purchased the aforesaid vehicles from the income earned by involving in anti social activities and he has no source of income.

The appellant has also prayed for quashing of the order dated 15.03.2021 passed by the Court of District Magistrate, Ambedkar Nagar in Criminal Misc Case No. 648 of 2020, arising out of F.I.R./Case Crime No. 393 of 2020, under Section 3 (1) U.P. Gangster Act, 1986, Police Station Akbarpur, District Ambedkar Nagar and order dated 18.10.2022 passed by the Court of Special Judge, Gangster Act Ambedkar Nagar in Misc. Case No. 153/2021 CNR No. UPAN0100116872021: State of U.P. Vs. Nabi Sarvar, whereby the learned trial court has rejected the application under Section 16 (1) of Gangster Act, 1986 and confirmed the order dated 15.03.2021 passed by the District Magistrate,Ambedkar Nagar.

3. Learned counsel for the appellant has submitted that being aggrieved by the aforesaid attachment order dated 23.09.2020, the appellant preferred representation dated 03.02.2021 before the District Magistrate, Ambedkar Nagar, under Section 14 (1) of the Gangster Act seeking release of the appellant's properties from attachment, alleging therein that neither there is any Gang nor the applicant is a member of any Gang. Only one Case Crime No. 01/18 under Section 3/5A/8 of Cow Slaughter Prevention Act police Station Bewana is registered against the appellant, apart from this, neither any case is pending or disposed of against the applicant. The appellant has further stated in his representation that Vehicle number UP 45-5797 was purchased twelve years ago, firstly from Tata Company then thereafter from Sriram Company by depositing margin money; Vehicle number UP 45T 2245 was purchased in the year 2012 and is currently financed by Shriram Finance; Vehicle No. UP 45T 1738 truck was purchased in the year 2012 by depositing margin money and getting it financed; Vehicle No. UP 45 Q 0287 Scorpio is financed by Mahindra Company. However, the aforesaid representation was dismissed in a cursory manner by the District Magistrate, Ambedkar Nagar vide order dated 15.03.2021 and referred the case to the court of learned Special Judge, Gangsters Act, Ambedkar Nagar under Section 16 (1) of the Gangster Act; and, the learned Gangsters Court vide order dated 18.10.2022 confirmed the order dated 15.03.2021 passed by the District Magistrate,Ambedkar Nagar.

4. Learned counsel for the appellant further submitted that the District Magistrate, Ambedkar Nagar has wrongly and incorrectly attached the aforesaid vehicle on the wrong presumption that the said properties have been acquired from the income earned by the appellant by involving in anti social activities, whereas the appellant is neither Gangster nor he has earned these properties from involving in anti social activities.

5. Clarifying the position, it has been urged by the learned counsel for the appellant that as a matter of fact the appellant and his family member who was doing farming since long time and milk distribution as well as fisheries pond was also running and he has further submitted that the aforesaid attached vehicle was purchased by the appellant on installment.

6. Learned counsel for the appellant further submits that the property of the appellant and his family members has not properly verified and with ill motive property of the appellant has attached under Section 14 (1) of U.P. Gangster Act by impugned order dated 23.09.2020 without issuing any show cause notice to the appellant and against impugned order dated 23.09.2020 appellant has submitted representation, but without considering the same District Magistrate Ambedkar Nagar has not release the property of the appellant and he passed the order dated 15.03.2021. In support of his submission, the appellant has submitted finance paper as Annexure No. 6 to the affidavit filed in support of the criminal appeal.

7. Learned counsel for the appellant has further submitted that the appellant has filed his objection aginst the order dated 23.09.2020 and has specifically given the details of the property in question as and how the same was purchased, but the District Magistrate, Ambedkar Nagar without considering the same passed impugned order dated 15.03.2021 and has rejected the claim of the appellant.

8. Learned counsel for the appellant further submits that the appellant has falsely roped in the cases mention in the gang chart and in the said case appellant is on bail and after a long delay impugned proceeding have been initiated against the appellant in the month of July, 2020.

9. Learned counsel for the appellant further submitted that the learned trial court while passing the impugned order dated 23.09.2020, without properly perusing the contents of application and documents annexed with the release application has wrongly and incorrectly rejected the same by presuming that the property in question has been acquired by the appellant from the income earned by indulging in anti social activities without going through documentary evidence filed on behalf of appellant and wrongly interpreting that appellant has not filed any document to prove that the property in question has not been acquired from the income earned by indulging in anti social activities. Thus the trial court erred in law while rejecting the application of appellant for release of property in question. The learned counsel submits that the appellant had given the complete detail of mmovable property which have been attached vide order dated 23.09.2020 by the District Magistrate, Ambedkar Nagar.

10. Learned counsel for the appellant further submits that the impugned order dated 23.09.2020 passed by the District Magistrate, Ambedkar Nagar does not reveal that the District Magistrate, Ambedkar Nagar had “reason of believe” that the property in question was acquired by the appellant as a commission of an offence under the Gangster Act rather the aforesaid order is passed on mere suspicion, surmises and conjectures and learned Special Judge, Gangster Act Ambedkar Nagar vide order dated 18.10.2022 in cursory manner without analysing the documents of the appellant. Thus both the impugned orders are not sustainable in the eye of law.

11. Per contra, Srhi Ashok Kumar Srivastava, learned AGA-1, has argued that the learned trialourt has correctly appreciated the material on record before passing the impugned order. The District Magistrate, Lucknow has passed the impugned order dated 23.09.2020 after being fully satisfied that appellant has

acquired the property in question by illegal means involving himself in anti social activities as defined under the Gangster Act, as such there is no illegality, infirmity or perversity in the impugned orders. Moreover, the competent authority has passed the order after considering the report of the Superintendent of Police as also the report of Station House Officer, Bewana and as such it is wrong to say that the impugned order of attachment passed by the competent authority suffers from infirmities.

12. Learned AGA has further submitted that the learned trial court pointed out that the appellant was also not able to show the source of income from which the appellant has acquired the properties which was attached by the learned District Magistrate, Ambedkar Nagar. The learned trial court also pointed out that when the vehicle of the appellant i.e.,Truck number UP 45-5797, Truck UP 45T 2245 ; Truck No. UP 45T 1738; Scorpio VLX No. UP 45 Q 0287 Scorpio were purchased by the appellant on loan then from what source of income has the appellant purchased the land without loan, which was seized by the District Magistrate. Thus the learned trial court after considering the entire material including the documentary evidence available on record have passed the impugned orders in correct perspectives and they need no interference.

13. I have heard learned counsel for the appellant, learned AGA for the opposite parties and gone through the impugned orders passed by the trial court as well as by the District Magistrate.

14. It seems to be just and expedient to refer to the relevant provisions of the Gangster Act which are as under :-

*"2. **Definitions-** In this Act,- (a) "Code" means the Code of Criminal Procedure, 1973;*

(b) "Gang" means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely-

(i) offences punishable under Chapter XVI, or Chapter XVII, or Chapter XXII of the Indian Penal Code, or (ii) distilling or manufacturing or storing or transporting or importing or exporting or selling or distributing any liquor, or intoxicating or dangerous drugs, or other intoxicants or narcotics or cultivating any plant, in contravention of any of the provisions of the U.P. Excise Act, 1910 or the Narcotic Drugs and Psychotropic Substances Act, 1985 or any other law for the time being in force, or

(iii) occupying or taking possession of immovable property otherwise than in accordance with law, or setting-up false claims, for title or possession of immovable property whether in himself or any other person, or

(iv) preventing or attempting to prevent any public servant or any witness from discharging his lawful duties, or

(v) offences punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956, or

(vi) offences punishable under Section 3 of the Public Gambling Act, 1867, or

(vii) preventing any person from offering bids in auction lawfully conducted, or tender, lawfully invited, by or on behalf of any Government department, local body or public or private undertaking, for any lease or rights or supply of goods or work to be done, or

(viii) preventing or disturbing the smooth running by any person of his lawful business, profession, trade or employment or any other lawful activity connected therewith, or

(ix) offences punishable under Section 171-E of the Indian Penal Code, or in

preventing or obstructing any public election being lawfully held, by physically preventing the voter from exercising his electoral rights, or

(x) inciting others to resort to violence to disturb communal harmony, or

(xi) creating panic, alarm or terror in public, or

(xii) terrorising or assaulting employees or owners or occupiers of public or private undertakings or factories and causing mischief in respect of their properties, or

(xiii) inducing or attempting to induce any person to go to foreign countries on false representation that any employment, trade or profession shall be provided to him in such foreign country, or

(xiv) kidnapping or abducting any person with intent to extort ransom, or (xv) diverting or otherwise preventing any aircraft or public transport vehicle from following its scheduled course;

**(xvi) offences punishable under the Regulation of Money Lending Act, 1976; (xvii) illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of Cow Slaughter Act, 1955 and the Prevention of Cruelty to Animals Act, 1960; (xviii) human trafficking for purposes of commercial exploitation, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and the like activities; (xix) offences punishable under the Unlawful Activities (Prevention) Act, 1966; (xx) printing, transporting and circulating of fake Indian currency notes;*

(xxi) involving in production, sale and distribution of spurious drugs;

(xxii) involving in manufacture, sale and transportation of arms and ammunition in contravention of Sections 5, 7 and 12 of the Arms Act, 1959;

(xxiii) felling or killing for economic gains, smuggling of products in contravention of the Indian Forest Act, 1927 and The Wildlife Protection Act, 1972;

(xxiv) offences punishable under the Entertainment and Betting Tax Act, 1979;

(xvv) indulging in crimes that impact security of State, public order and even tempo of life,"

(c) "gangster" means a member or leader or organiser of a gang and includes any person who abets or assists in the activities of a gang enumerated in clause (b), whether before or after the commission of such activities or harbours any person who has indulged in such activities;

(d) "public servant" means a public servant as defined in Section 21 of the Indian Penal Code or any other law for the time being in force, and includes any person who lawfully assists the police or other authorities of the State, in investigation or prosecution or punishment of an offence punishable under this Act, whether by giving information or evidence relating to such offence or offender or in any other manner;

(e) "member of the family of a public servant" means his parents or spouse and brother, sister, son, daughter, grandson, granddaughter or the spouses of any of them, and includes a person dependent on or residing with the public servant and a person in whose welfare the public servant is interested;

(f) words and phrases used but not defined in this Act and defined in the Code of Criminal Procedure, 1973, or the Indian Penal Code shall have the meanings respectively assigned to them in such Codes.

3. Penalty-(1) A gangster, shall be punished with imprisonment of either description for a term which shall not be

less than two years and which may extend to ten years and also with fine which shall not be less than five thousand rupees:

Provided that a gangster who commits an offence against the person of a public servant or the person of a member of the family of a public servant shall be punished with imprisonment of either description for a term which shall not be less than three years and also with fine which shall not be less than five thousand rupees.

(2) Whoever being a public servant renders any illegal help or support in any manner to a gangster, whether before or after the commission of any offence by the gangster (whether by himself or through others) or abstains from taking lawful measures or intentionally avoids to carry out the directions of any Court or of his superior officers, in this respect, shall be punished with imprisonment of either description for a term which may extend to ten years but shall not be less than three years and also with fine".

15. The issue involved in the present case may be resolved with the help of the consideration of provisions of sections 14, 15 and 17 of the Gangsters Act, which read as under:

"14. Attachment of property.-*(1) If the District Magistrate has reason to believe that any property, whether movable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.*

(2) The provisions of the Code shall mutatis mutandis apply to every such attachment.

(3) Notwithstanding the provisions of the Code the District Magistrate may appoint an Administrator of any property attached under sub-section (1) and the Administrator shall have all the powers to administer such property in the best interest thereof.

(4) The District Magistrate may provide police help to the Administrator for proper and effective administration of such property.

15. Release of property *.- (1) Where any property is attached under Section 14, the claimant thereof may, within three months from the date of knowledge of such attachment, make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.*

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such 6 property shall be made over to the claimant.

16. Inquiry into the character of acquisition of property by court .-

(1) Where no representation is made within the period specified in sub-section (1) of Section 15 or the District Magistrate does not release the property under sub-section (2) of Section 15 he shall refer the matter with his report to the Court having jurisdiction to try an offence under this Act.

(2) Where the District Magistrate has refused to attach any property under sub-section (1) of Section 14 or has ordered for release of any property under sub-section (2) of Section 15, the State Government or any person aggrieved by such refusal or release may make an application to the Court referred to in sub-section (1) for inquiry as to whether the property was acquired by or as a result of the commission of an offence triable under this

Act. Such court may, if it considers necessary or expedient in the interest of justice so to do, order attachment of such property.

(3) (a) On receipt of the reference under sub-section (1) or an application under sub-section (2), the Court shall fix a date for inquiry and give notices thereof to the person making the application under sub-section (2) or, as the case may be, to the person making the representation under Section 15 and to the State Government, and also to any other person whose interest appears to be involved in the case.

(b) On the date so fixed or on any subsequent date to which the inquiry may be adjourned, the Court shall hear the parties, receive evidence produced by them, take such further evidence as it considers necessary, decide whether the property was acquired by a gangster as a result of the commission of an offence triable under this Act and shall pass such order under Section 17 as may be just and necessary in the circumstances of the case.

(4) For the purpose of inquiry under sub-section (3), the Court shall have the power of a Civil Court while trying a suit under the Code of Civil Procedure, 1908 (Act No. V of 1908), in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath ;

(b) requiring the discovery and production of documents;

(c)receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any court or office ;

(e) issuing commission for examination of witnesses or documents;

(f) dismissing a reference for default or deciding it ex parte;

(g) setting aside an order of dismissal for default or ex parte decision.

(5) In any proceedings under this section, the burden of proving that the property in question or any part thereof was not acquired by a gangster as a result of the commission of any offence triable under this Act, shall be on the person claiming the property, anything to the contrary contained in the Indian Evidence Act, 1872 (Act No. 1 of 1872), notwithstanding.

17. Order after inquiry.- *If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise."*

16. It is now well settled that property being made subject matter of an attachment under Section 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act. The District Magistrate has to record its satisfaction on this point. The satisfaction of the District Magistrate is not open to challenge in any appeal. Only a representation is provided for before the District Magistrate himself under Section 15 of the Act and in case he refuses to release the property on such representation, in that case the person aggrieved has to make a reference to the Court having jurisdiction to try an offence under the Act. The Court, while dealing with the reference made under sub-section (2) of Section 15 of the Act has to see whether the property was acquired by a gangster as a result of commission of an offence triable under the Act and has to enter into the question and

record his own finding on the basis of the inquiry held by him under Section 16 of the Act. If the Court comes to the conclusion that the property was not acquired by the gangster as a result of commission of an offence triable under the Act, the Court shall order for release of the property in favour of the person from whose possession it was attached.

The object behind providing the power of judicial scrutiny under Section 16 of the Code is to check arbitrary exercise of power by the District Magistrate in depriving a person of his property and to restore the rule of law, therefore a heavy duty lies upon the Court to hold a formal enquiry to find out the truth with regard to the question, whether the property was acquired by or as a result of the commission of an offence triable under the Act. The order to be passed under Section 17 of the Act must disclose reasons and the evidence in support of finding of the Court. The Court is not empowered to act as a post office or mouthpiece of the State or the District Magistrate. If a person has no criminal history during the period the property was acquired by him, how the property can be held to be a property acquired by or as a result of commission of an offence triable under the Act is a pivotal question which has to be answered by the Court. Besides, the aforesaid question, the other important question to be considered by the Court is whether the property which was acquired prior to the registration of the case against the accused under the Act or prior to the registration of the first case of the Gangster chart can be attached by District Magistrate under Section 14 of the Act.

The provisions of Section 14 of the Act, referred to above, empowers the District Magistrate to attach the property acquired by the Gangster as a result of commission of an offence triable under this Act. The District Magistrate may appoint an Administrator of any property attached, **to administer such property in the best interest thereof but there must be reason to believe that any property whether moveable or immovable in possession of any person, has been acquired by a Gangster as a result of commission of an offence, triable under this Act but the District Magistrate in its order has not recorded his satisfaction having reason to believe with regard to the property attached that it was acquired by appellant as a result of commission of an offence triable under Gangster Act, even though while deciding the reference under Section 16 of the Act, the court below does not appreciate the evidence and in a mechanical manner passed the impugned order relying upon the observations made by the District Magistrate which is illegal and an unjustified approach.**

17. A Coordinate Bench of this Court in the case of **Smt. Maina Devi versus State of U.P. 2013(83) ACC 902** in paras-8, 9 and 10 has been pleased to held as under:-

"8. Considering the facts, circumstances of the case, submissions made by the learned Counsel for the appellant and the learned A.G.A. and from the perusal of the record it appears that the issue involved in the present case may be resolved with the help of the consideration of the provisions of section 14, 15 and 17 of the Gangsters Act, which read as under:

***15. Release of property.**—(1) Where any property is attached under section 14, the claimant thereof may within three*

months from the date of knowledge of such attachment make a representation to the District Magistrate showing the circumstances in and the sources by which such property was acquired by him.

(2) If the District Magistrate is satisfied about the genuineness of the claim made under sub-section (1) he shall forthwith release the property from attachment and thereupon such property shall be made over to the claimant.

***17. Order after inquiry**—If upon such inquiry the Court finds that the property was not acquired by a gangster as a result of the commission of any offence triable under this Act it shall order for release of the property of the person from whose possession it was attached. In any other case the Court may make such order as it thinks fit for the disposal of the property by attachment, confiscation or delivery to any person entitled to the possession thereof, or otherwise.*

9. In light of above mentioned provisions of the Gangster Act the District Magistrate is empowered to attach movable or immovable properties in possession of any person acquired by a gangster as a result of the commission of an offence triable under this Act. But for exercising such powers there must be the reason to believe to the District Magistrate that such property was acquired by a gangster as a result of the commission of an offence triable under this Act. The words reason to believe are stronger than the word "satisfied", it must be passed on reasons which are relevant and material. In the present case, from the perusal of the lower Court record it appears that only on the basis of the police report submitted by the officer incharge of P.S. Sarai Lak-hansi, District Mau, the District Magistrate, Mau has attached two houses of the appellant, no material was supplied to the District Magistrate to have a reason to believe that the property in question was acquired by the gangster Raj Bahadur Singh as a result of commission of an offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also. The learned District Magistrate was having no material in support of the police report that both the houses of the appellant were acquired by his son Raj Bahadur Singh. The learned District Magistrate rejected the application under section 15 of the Gangsters Act moved by the appellant for releasing the attached houses. The application was moved well within the time, the application was a representation to the District Magistrate, Mau, it was having all the details disclosing the sources by which both the houses were acquired by the appellant. But learned District Magistrate did not consider the sources disclosed by the appellant and rejected the application vide order dated 29.12.2008. The explanation of all the sources by which the appellant acquired the houses has not been properly considered. Therefore, impugned order dated 29.12.2008 has become illegal. The learned Special Judge (Gangsters Act), Azamgarh rejected the application moved by the appellant under section 17 of the Gangsters Act without considering the provisions of the section 14 of the Gangsters Act and the 'relevancy of the reasons' recorded by the District Magistrate to believe that both the attached houses were acquired by a gangster Raj Bahadur Singh son of the appellant as a result of commission of an offence triable under this Act. The order dated 17.3.2009 passed by learned Special Judge (Gangsters Act)/Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 is also illegal.

10. In view of the above discussion, the order passed by District Magistrate,

Mau under section 14(1) of the Gangsters Act attaching two houses of the appellant the order dated 29.12.2008 passed by District Magistrate, Mau by which the application under section 15(1)(2) of the Gangster Act has been rejected and the order dated 17.3.2009 passed by learned Special Judge (Gangster Act), Additional Sessions Judge, Azamgarh in Criminal Misc. Application No. 2 of 2009 are illegal, the same are hereby set aside and the District Magistrate, Mau is hereby directed to release both the houses No. 204-D/8 and 205-D/9 situated in Mohalla Chandmari, Imiliyan, P.S. Sarai Lak-hansi, District Mau in favour of the appellant forthwith."

18. Further, another Coordinate Bench of this Court in the case of **Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483 (All)** in paras-9, 10 and 11 has been pleased to held as under:-

"9. The conjoint reading of these sections shows that first it has to be proved that gangster or any person on his behalf is or has been in possession of the property, and such property has been acquired by the commission of any offence triable under this Act, only then the District Magistrate acquires jurisdiction to proceed in the matter and to attach the property. Only when the initial burden is discharged, the onus shifts to the gangster or such person, to account for the same satisfactorily. But if it is found that the concerned person was not a gangster and did not acquire the property in commission of any offence triable under this Act, it has to be released as provided in Section 17. In other words the initial burden is on the prosecution to show that the concerned person is a gangster and has acquired property on account of his criminal activity as triable under the Act.

10. Therefore, in order to proceed under section 14 there must be materials for objective determination of the District Magistrate that the person is either a member, leader or organiser of a gang and has acquired any property in commission of any offence under the Act. There must be a nexus between his criminal acts as enumerated therein and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words what is necessary to find is whether, his acquisition of property was a result of commission of any offence enumerated in the Act being a member, leader or organiser of a gang. One might have committed several offences but if the property acquired by him was with the aid of his earning from legal resources no action under Section 14 of the Act can be taken against him.

11. In the case of Badan Singh alias Baddo v. State of U.P., 2002 Cri LJ 1392 : 2001 All LJ 2852 it has been held by this Court that Section 14 of the Act is a harsh provision that affects one's right to property, which is a fundamental right under the Constitution. Therefore, initial burden was upon the State to satisfy the District Magistrate with necessary materials that a gangster acquired the properties as a result of commission of any offence. It has also been held in this case that the Act does not provide that the aggrived person seeking release of the properties from attachment must prove the source of income for acquisition thereof."

19. Further, another Coordinate Bench of this Court in the case of ***Rajbir Singh Tyagi Vs State of U.P. and Others 2018 SCC Online AII 5986*** in paras 16 and 18 has been pleased to held as under:-

" 16. A conjoint reading of the aforesaid two definitions what appears is that for taking action under Section 14 against a person, there must be materials for objective determination of the District

Magistrate that he either as a member, leader or organizer of a gang acquired any property as a result of commission of any offence under the Act. There must be nexus between his criminal act and the property acquired by him. His mere involvement in any offence is not sufficient to attach his property. In other words, what is necessary to find is whether his acquisition of property was as a result of commission of any offence enumerated in the Act being a member, leader or organizer of a gang. One might have committed several offences, but if the property acquired by him was with the aid of his earning from legal source, no action under Section 14 of the Act can be taken against him.

18. Section 14 of the Act is a harsh provision that affects one's right to property which is a constitutional right under the Constitution. Therefore, initial burden was upon the State to satisfy the District Magistrate with necessary materials that petitioner Rajbir Singh Tyagi being a gangster acquired the properties as a result of commission of any offence. That was however, not done. So, complaining the attachment order to be illegal, a move was made by the petitioners by filing a representation for release of the properties. The said prayer was rejected with the observation that the petitioners could not establish the source of income to build the house and acquire the movables. This approach of the District Magistrate, in my opinion, has no sanction under law. The Act does not provide that-aggrieved person seeking release of the properties from attachment must prove the source of income for acquisition thereof. So, on a conspectus of the relevant provisions of the Act, I am of the considered opinion that the order of attachment passed by the District Magistrate, Muzaffar Nagar is illegal, arbitrary and against the weight of the materials on record."

19. Keeping in view the aforesaid settled proposition of law and the judgments rendered by this Court in the case of **Smt. Maina Devi versus State of U.P. 2013(83) ACC 902** and **Smt. Shanti Devi wife of Sri Ram versus State of U.P. 2007(2) ALJ 483 (All),** and ***Rajbir Singh Tyagi Vs State of U.P. and Others 2018 SCC Online AII 5986***, this Court is of the view that the properties, which were attached, were acquired by the appellant with the aid of his earning from legal resources and not by commission of any offence triable under the Act as it is settled law that the properties being made subject matter of attachment under Section 14 of the Act must have been acquired by a gangster and that too by commission of an offence triable under the Act and also the impugned orders were not passed on reasons which are relevant and material. In the present case from the perusal of the impugned order dated 15.03.2021 and record it appears that only on the basis of the police report, the District Magistrate has attached the property in question, no material was supplied to the District Magistrate to have reasons to believe that the property in question was acquired by the gangster the present appellant as a result of commission of any offence triable under this Act. It vitiates the subjective satisfaction of the District Magistrate also from the record. It appears that the District Magistrate has no material in support of the police report that the property in question was acquired by the present appellant being gangster even though the proceedings were not followed as per the provisions of the Act. It appears that the appellant was having enough source of income from his farming, milk distribution as well as fisheries and even the properties were acquired by the appellant much prior to the registration of criminal cases and imposition of Gangster Act, which was invoked in the year 2020 and the impugned order of attachment was passed in mechanical manner without

application of mind and is arbitrary. Thus the impugned orders dated 23.09.2020 and 15.03.2021 passed by the District Magistrate, Ambedkar Nagar and the impugned order dated 18.10.2022 passed by the Court of Special Judge, Gangster Act Ambedkar Nagar in Misc. Case No. 153/2021 CNR No. UPAN0100116872021: State of U.P. Vs. Nabi Sarvar are illegal and the same are liable to be quashed.

20. In view of above facts and circumstances of the case, the impugned orders passed by the trial court cannot be said to be passed in correct perspectives as they are not sustainable in the eye of law and require interference by this Court, the prosecution has failed to establish that the provisions of Sections 2 and 3 of the Gangster Act are attracted in the case of appellant, and further the appellant's property is also not attached in accordance with law, as the prosecution has failed to establish that the property in question acquired and owned by the appellant has been earned from the income indulging in anti social activities. The enquiry under Section 16 was not done in accordance with the Act, the provisions of Sections 14, 15 & 17 were also not followed in accordance with the Act, thus the entire proceeding initiated in pursuance thereof is vitiated.

21. Accordingly, the present appeal is **allowed**. The impugned order dated 23.09.2020 and order dated 15.03.2021 passed by the District Magistrate, Ambedkar Nagar in Criminal Misc Case No. 648 of 2020, arising out of F.I.R./Case Crime No. 393 of 2020, under Section 3 (1) U.P. Gangster Act, 1986, Police Station Akbarpur, District Ambedkar Nagar and order dated 18.10.2022 passed by the Court of Special Judge, Gangster Act Ambedkar Nagar in Misc. Case No. 153/2021 CNR No. UPAN0100116872021: State of U.P. Vs. Nabi Sarvar are hereby **quashed**.

The District Magistrate, Ambedkar Nagar is directed to release all the properties of the appellant attached vide order dated 23.09.2020 in favour of appellant, forthwith.

No order as to costs.

(2024) 2 ILRA 1427
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.02.2024

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 6549 of 2018

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

Counsel for the Appellants:
Sri Murtaza Ali, Sri Gufran Ahmad Khan, Sri Imtiyaj Ali, Sri Sadrul Islam Jafri, Sri N.I. Jafri (Sr. Advocate)

Counsel for the Respondent:
G.A.

Criminal Law - Narcotic Drugs and Psychotropic Substances Act, 1985 - Sections 8, 15(c), 42 & 52A - Appellants challenged conviction and sentence of 10 years rigorous imprisonment and Rs.1,50,000 fine under Section 8/15(c) NDPS Act for possession and transportation of 43 quintals and 30 kg of poppy straw. Court held: (1) Non-compliance with mandatory provisions of Section 52A, as samples were not drawn in the presence of a Magistrate, and inventory was not certified, rendering samples invalid as primary evidence. (2) Bulk contraband (43 quintals and 30 kg) not produced during trial or remand, reportedly destroyed due to rain, without following Section

52A disposal procedures, leading to a negative inference under Section 114(g) of the Indian Evidence Act, 1872. (3) Non-compliance with Section 42, as secret information was not recorded or reported to superiors, further vitiating the prosecution case. (4) Lack of evidence on the number of sacks, sealing, and proper sampling raised doubts about the recovery's authenticity. Conviction set aside due to failure to produce primary evidence and procedural lapses; appellants acquitted; appeal allowed. (Mangilal Vs St. of M.P., Criminal Appeal No. 1651 of 2023; U.O.I. Vs Jarooparam, (2018) 4 SCC 334; Noor Aga Vs St. of Punj., (2008) 16 SCC 417; Jitendra Vs St. of M.P., (2004) 10 SCC 562; Gorakh Nath Prasad Vs St. of Bihar, AIR 2018 SC 704). (Paras 19-33)

Appeal Allowed.

Case Law Cited:

1. Mangilal Vs St. of M.P., Criminal Appeal No. 1651 of 2023 (Para 20)

2. U.O.I. Vs Jarooparam, (2018) 4 SCC 334 (Para 21)

3. Noor Aga Vs St. of Punj., (2008) 16 SCC 417 (Para 20)

4. Jitendra Vs St. of M.P., (2004) 10 SCC 562 (Para 20, 24)

5. Gorakh Nath Prasad Vs St. of Bihar, AIR 2018 SC 704 (Para 23)

6. Kishan Chand Vs St. of Har., AIR 2013 SC 357 (Para 22)

7. Mohd. Idris and another Vs St. of U.P., 2017 0 Supreme (All) 1327 (Para 10)

8. Javed A. Bhat Vs U.O.I., 2007 Cr.LJ 3145 (Bom) (Para 10)

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

1. The instant Criminal Appeal has been preferred by the accused/convict Satyapal and Saifuddin Urf Sheruddin who are convicted and sentenced on 02.10.2018 for charge under Section 8/15-(C) NDPS Act, Case No.39 of 2018 (State of U.P. Vs. Satyapal and other) arising out of Case Crime No.994 of 2004, Police Station Kotwali, District Bareilly by Additional Sessions Judge, Court No.30 Bareilly and sentenced to 10 years rigorous imprisonment and Rs.1,50,000/- fine with a default stipulation. Another co-accused Pappu died during trial and the case was abated in respect of him due to his death.

2. Heard Sri N.I. Jafri, learned senior counsel assisted by Sri Sadrul Islam Jafri, learned counsel for the appellant and learned AGA for the State and perused the material available on record.

3. The brief facts of the case, leading to filing of present Criminal Appeal are that on 03.05.2004 PW1 S.S.I. Jagdish Kumar Arora accompanied by SI Siddhartha Mishra and SI Subhash Tiwari (PW2) two constables came to Chowki Crossing P.S. Kotwali, Bareilly in connection with their official duty on 03.05.2004. They inspected the Truck Bearing Registration No.DL-1 GA-6583 on a tip off received from a secret informer around 11:20 am. Prior to this they tried to enjoin public witnesses amongst passersby but they refused to stand as a witness. The truck driver disclosed his name as Saifuddin Urf Sheruddin and admitted that in that truck Poppy straw (doda) was loaded which belonged to businessmen Pappu and Satyapal, who were sitting on sacks keeping in the truck. These two persons have collected Poppys Straw near Bhamaura area and were taking this contraband to Bahedi District Bareilly to sell. The two persons were found to be sitting on sacks in the truck were asked to

get down, who disclosed their name as Pappu and Satyapal, and on interrogation they confessed that they had collected these Poppy's Straw from Bhamaura, Awlan and Aliganj area and were taking it to sell in Bahedi, district Bareilly. They are engaged in trade of Poppy's Straw. The three persons caught by police were offered an option by Investigating Officer, that if they wish, their search may be conducted in presence of competent Magistrate or Gazetted Officer, they can even be called on the spot, whereupon the concerned persons reposed their faith in arresting officer, and stated that there is no need to call any other officer, they repose their faith in police team present on the spot, and they may be searched out by them. Thereupon , the police team search the plastic sacks loaded on the truck which found to be having Poppys Straw on smell. The truck was seized and all three persons caught from the truck were taken into police custody. The truck alongwith sacks containing the contraband was sent for weighing at nearby Jaiswal Dharamkata Shahjahanpur, Bareilly alongwith truck driver Saifuddin Urf Sheruddin; they were accompanied by two Police Officers, for being weighted at said Dharamkata. The total weight of contraband was found to be 43 quintal and 30 Kg. and weight of truck and contraband was recorded in receipt dated 03.05.2004, which was annexed with recovery memo. 5Kg sample was taken from the sack of recovered Poppy's Straw (doda powder), and it was kept and sealed in a cloth, as the concerned persons could not produce any authority for having such huge quantity of Poppy's Straw with them, they were arrested after disclosure of reasons of arrest at around 12:15 hours on 03.05.2004 in presence of police witnesses. Recovery memo was prepared on the spot and FIR was lodged at P.S. concerned at 15:30 hours on the basis of recovery memo prepared by SSI Jagdish Kumar Arora, which bears signature of other members of police team and thumb impression of arrested accused persons. The sample was taken on the spot from one sack containing Poppy straw and sent for chemical examination at Forensic Science Laboratory, Agra which was found as pieces of doda opium in chemical examination report submitted by Joint Director FSL to the Special Judge NDPS Act bearing dated 08.06.2004. The investigation of the case was carried out by S.I. Harveer Singh, P.S. Kotwali, Bareilly who recorded statements of the witnesses, prepared site plan of the place of incident and after collection of evidence filed chargesheet against three arrested accused persons under Section 8/15 NDPS Act, before the court of Special Judge with payer to prosecuted them.

4. Before commencement of prayer accused Pappu died and trial in respect of him was abated vide order dated 07.03.2014.

5. Learned Additional Session Judge, Court No.8, Bareilly framed charge under Section 8/15(C) NDPS Act against surviving accused Satyapal and Saifuddin Urf Sheruddin on 21.04.2007.

6. Prosecution examined PW1 Jagdish Kumar Arora, the search and arresting officer who proved recovery memo in his own signature and in hand-writing of his colleague Sidharth Mishra as Ex. Ka1 in his evidence. PW2 SI Subhash Tiwari was also examined as witness of search, recovery and arrest and he acknowledged his signature on recovery memo Ka1. 5Kg Opium Poppy was taken from one sack as sample and sent for chemical examination

at FSL Agra was produced before the court during evidence of PW2 who proved the plastic sack containing 5 Kg of Opium Poppy taken as sample as material Exhibit ME1 and contents of sample of Poppy straw as ME2. He also corroborated the evidence of PW1 in regard to search, seizure and arrest PW3 SI Harveer Singh who is Investigating Officer of the said case who proved site plan of the place of arrest and recovery as Exb. Ka2 and chargesheet submitted by him against the accused persons as Exb. Ka3 by his evidence. The statement of accused appellants were recorded under Section 313 Cr.P.C. after conclusion of prosecution evidence. The accused persons declined to adduce any defence evidence, their defence is of denial and false implication.

7. Learned counsel for the appellants submitted that they were falsely implicated in the case, they were enlarged on bail during trial by the orders of this Court. The entire action of search and seizure is wholly illegal.

8. He further submitted that the judgment of the trial court, whereby the appellants were convicted and sentenced, is vitiated by legal and factual errors committed by the learned trial court in appreciation of evidence on record. There is no cogent and plausible evidence on record, which is sufficient for recording conviction of the appellants. Infact, prosecution failed to prove its case beyond reasonable doubt. Inasmuch as the bulk of case property was not produced during trial as material exhibit and only 5kg sample which was allegedly taken on the spot from one sack of Poppy straw (Doda) and sent for chemical examination to FSL was only produced during evidence of PW2. In absence of production of bulk of case property before the Court, link evidence, which is very relevant in cases based on recovery of contraband is missing in the case. There is total non-compliance of Sections 57, 42(2) and particularly Section 52(A) of NDPS Act,1985 which is held as mandatory in recent pronouncements of Hon'ble Apex Court. Even number of sacks containing Poppy straw is neither mentioned in recovery memo nor in statement of the witnesses. The truck owner was not made accused during investigation which also raises suspicion in case set up by the police. The accused persons have denied the recovery of contraband from their possession from very beginning and in the absence of production of case property during remand proceedings as well as during trial, it cannot be discerned that such huge quantity of contraband was recovered from the possession of the appellants. The appellants have stated in their statements under Section 313 Cr.P.C. before the trial court that in the truck polish of rice was loaded and not Doda Poppy. The truck mistakenly entered into no entry zone. The appellants were not in conscious position of any contraband what so ever, and they were falsely implicated by the police. The truck in which alleged contraband was being transported, was released in favour of its registered owner Anis vide order dated 28.10.2004 passed by this Court subject to certain conditions. The search and seizure operation was conducted in violation of the mandatory provisions of Section 52A of the Act as the procedure prescribed therein was not followed in drawing the samples and seizing the alleged contraband. Further there is a serious doubt about the correctness of samples for analysis as to whether they were actually the samples of seized contraband.

9. Per contra, learned A.G.A. for the State submitted that there is no infirmity or

legal and factual error in the impugned judgment and order passed by learned court below. The prosecution has successfully proved its case against the appellants during trial by legal evidence. The appellants were found to have transported 43 quintal and 30 Kg contraband i.e. Opium Poppy with a truck driven by accused Saifuddin Urf Sheruddin, appellant Satyapal and deceased accused Pappu were found to be sitting on sacks contained Doda Poppy in said truck. It is neither possible nor natural on the part of the police officer who were performing their official duty to plant such huge quantity of contraband against the appellants. The contraband could not be produced before the trial court as the same was disposed of under the provisions of Section 52-A of NDPS Act, which provides for disposal of seized Narcotic Drugs and Psychotropic Substances. The appeal is devoid of merit and is liable to be dismissed.

10. Learned counsel for the appellants placed reliance on judgment of Hon'ble of this Court in Mohd. Idris and another Vs. State of U.P., 2017 0 Supreme (All) 1327, Kishan Chand vs State Of Haryana AIR 2013 (SC) 357, Gorakh Nath Prasad Vs. State of Bihar AIR 2018 (SC) 704, Javed A. Bhat Vs. Union of India, 2007 Cr.LJ, 3145 (Bom) in support of his submissions.

11. Let us examine the statutory provision relevant to present Section 8 of N.D.P.S. Act, 1985 reads as under:-

"8. Prohibition of certain operations.*—No person shall—*

(a) cultivate any coca plant or gather any portion of coca plant; or

(b) cultivate the opium poppy or any cannabis plant; or

(c) produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or tranship any narcotic drug or psychotropic substance, except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorisation also in accordance with the terms and conditions of such licence, permit or authorisation:

Provided that, and subject to the other provisions of this Act and the rules made thereunder, the prohibition against the cultivation of the cannabis plant for the production of ganja or the production, possession, use, consumption, purchase, sale, transport, warehousing, import inter-State and export inter-State of ganja for any purpose other than medical and scientific purpose shall take effect only from the date which the Central Government may, by notification in the Official Gazette, specify in this behalf:

[Provided further that nothing in this section shall apply to the export of poppy straw for decorative purposes.]"

12. Section 15 of N.D.P.S. Act of 1985 is reproduced as under:-

"[15. Punishment for contravention in relation to poppy straw.*—Whoever, in contravention of any provisions of this Act or any rule or order made or condition of a licence granted thereunder, produces, possesses, transports, imports inter-State, exports inter-State, sells, purchases, uses or omits to warehouse poppy straw or removes or does any act in respect of warehoused poppy straw shall be punishable,—*

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to 2 [one year], or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:

Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

13. The notification of Central Government with regard to quantity of contraband which may be recovered a small, commercial or intermediate quantity for the purposes of Section 15 are specified vide S.O. 1055 (E) dated 19.10.2001 published in the Gazette of India Extra. dated 19.10.2001 in this schedule the quantity of different kind of Narcotic Drugs and Psychotropic Substances Act, 1985 for purposes of specifying the same in said quantity is provided by said notification in a table at the end of the Act of 1985 as amended by the Narcotic Drugs and Psychotropic Substance (amendment) 2001. In this table at Serial No.110 it is provided that accordingly 1 Kg of Poppy straw is comes within 1Kg Poppy's Straw comes under small quantity and 50Kg under commercial quantity. Therefore, Poppy straw more than 1 Kg and less than 50 Kg will be considered as intermediate quantity for the purposes of Section 15 of the Act which provides for punishment according to quality of contraband involved in the case. In the present case, the quantity of Poppy straw is shown as 43 quintal 30 Kg which apparently comes under commercial quantity.

14. In the present case, the charge against the appellants is that 43 quintal and 30 Kg of illegal opium powder, recovered from joint possession of the appellants who were travelling in a truck and contraband was found to be loaded in the truck on the date of search, seizure, recovery and arrest. All the sacks from which contraband was recovered were loaded in the truck according to prosecution version and 5 Kg sample was taken out from one of the sacks on the spot. The contraband was weighted in a nearby Dharamkata and for that purpose a truck was sent to Dharamkata when the raiding team intercepted the truck and was apprised that illegal Poppy's Straw in huge quantity was loaded in the truck.

15. PW3 Inspector Harveer Singh CB CID stated in his evidence that he received FSL report from the office of Police Station on 20.06.2004 and transcribed its content in the case diary. Police Team left the police station at 11:20 hours on the date of incident by making an entry in G.D. vide Rapat No.27. The docket was prepared from the court, where jurisdiction of NDPS Act case was entrusted and for that purpose sample was brought from the police station. He had send the sample for FSL examination after receiving the same from Thana Malkhana. The docket was sent for chemical analysis through constable 414 Brijesh Mishra. He has not taken any action in respect of Section 52-A of NDPS Act. PW2 had produced the sample for doda

powder (Poppy's Straw) which was sent for chemical analysis to FSL, Agra in sealed cover which was opened before the Court. This is admitted fact that except sample taken from one of the sacks containing Poppy's Straw seized in the case and send for chemical analysis to FSL was produced before the court during the evidence of PW2, but entire case property was never produced before the Court either at the time of seeking judicial remand of the accused persons or during trial.

16. PW3 Inspector Harveer Singh has proved the FSL report as Ka4 during his evidence. He also proved the copy of Chick FIR prepared by Constable Kripal Giri related to Crime No.994 of 2004, in the absence of its author and stated that he was posted with Constable Harveer Singh at relevant time. He also stated that said constable Harveer Singh has transcribed the copy of recovery memo on the back of chick FIR word to word. He also proved copies of general diary of registration of case while GD No.34 time 15:30 hours dated 03.05.2004. The Chick FIR is exhibited as Ka5, and copy of GD of registration of Case as Ex.Ka7. He also produced a copy of report of SSP Office, in which it is stated that Original GD of Registration of Case dated 03.05.2004 has been weeded out.

17. The appellants are presently held in jail custody since 20.10.2018. There is a report in the record of trial court submitted by S.H.O. Kotwali, Bareilly bearing dated 10.08.2018, in which it is stated that according to Malkhana Register of 2014, 43 quintal and 30 Kg doda related to Case Crime No.994 of 2004, under Section 8/15-C of NDPS Act, which was loaded in the truck got rotten due to rain and an entry in this regard has been made in G.D. Report No.54 dated 15.11.2004. Although there is an over writing in date of report of GD, as well as GD number and date of GD.

18. From this report it is obvious that contraband could not be produced before the court below on account of being destroyed to to rain, since the same was kept in Malkhana; after getting this report, the trial court took strong objection to this state of affair, and he had written a letter to the Director General of Police, Lucknow apprising him of the fact that the case property in the case was not produced before the court and a brief report has been filed by concerned Police Official that same has been destroyed, whereas it was kept in the Malkhana. Therefore, this reveals that the slackness and negligence on the part of concerned police officials with regard to upkeep of case property, he shall issue directions to various officers facing responsibility including concerned Investigating Officer/Station House Officer or any other person with regard to destruction of case property during the pendency of appeal.

19. The Hon'ble Supreme Court in **Mangilal Vs. State of Madhya Pradesh** in similar case while deciding the appeal against conviction and sentencing for charge under Section 8(b) read with Section 15-C of NDPS, Act in Criminal Appeal No.1651 of 2023 Mangilal Vs. State of Madhya Pradesh considering scope of Section 52-A of NDPS, Act, which reads as under:-

SCOPE OF SECTION 52A OF THE NDPS ACT, 1985:

Section 52A of the NDPS Act

[52A. Disposal of seized narcotic drugs and psychotropic substances.-

(1) The Central Government may, having regard to the hazardous nature, vulnerability to theft, substitution, constraint of proper storage space or any other relevant consideration, in respect of any narcotic drugs, psychotropic substances, controlled substances or conveyances, by notification in the Official Gazette, specify such narcotic drugs, psychotropic substances, controlled substances or conveyance or class of narcotic drugs, class of psychotropic substances, class of controlled substances or conveyances, which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the[narcotic drugs, psychotropic substances, controlled substances] or conveyances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of--

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of 4[such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the innventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

20. Hon'ble Supreme Court observed in ***Mangilal Vs. State of Madhya Pradesh (supra)*** as follows:-

"4. Sub-section (1) of Section 52A of the NDPS Act facilitates the Central Government a mode to be prescribed to dispose of the seized narcotic substance. The idea is to create a clear mechanism for such disposal both for the purpose of dealing with the particular case and to safeguard the contraband being used for any illegal purpose thereafter.

5. Sub-section (2) of Section 52A of the NDPS Act mandates a competent officer to prepare an inventory of such narcotic drugs with adequate particulars. This has to be followed through an appropriate application to the Magistrate concerned for the purpose of certifying the correctness of inventory, taking relevant

photographs in his presence and certifying them as true or taking drawal of samples in his presence with due certification. Such an application can be filed for anyone of the aforesaid three purposes. The objective behind this provision is to have an element of supervision by the magistrate over the disposal of seized contraband. Such inventories, photographs and list of samples drawn with certification by Magistrates would constitute as a primary evidence. Therefore, when there is non-compliance of Section 52A of the NDPS Act, where a certification of a magistrate is lacking any inventory, photograph or list of samples would not constitute primary evidence.

6. The obvious reason behind this provision is to inject fair play in the process of investigation. Section 52A of the NDPS Act is a mandatory rule of evidence which requires the physical presence of a Magistrate followed by an order facilitating his approval either for certifying an inventory or for a photograph taken apart from list of samples drawn. In due compliance of Section 52A(1) of the NDPS Act the Ministry of Finance (Department of Revenue) issued a Notification No. G.S.R. 339(E) dated 5 10.05.2007 which furnishes an exhaustive manner and mode of disposal of drugs ending with a certificate of destruction:

"4. Manner of disposal

1) Where any narcotic drug or psychotropic substances has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, of the Act, or if it is seized by such an officer himself, he shall prepare an inventory of such narcotic drugs or psychotropic substances as per Annexure 1 to this notification and apply to any Magistrate under sub-section (2) of section 52A as per Annexure 2 to this notification.

2) After the Magistrate allows the application under sub-section (3) of section 52A, the officer mentioned in clause (1) above shall preserve the certified inventory, photographs and samples drawn in the presence of the Magistrate as primary evidence for the case and submit details of the drug consignments to the Chairman of the Drug Disposal Committee for a decision by the committee on the disposal. The officer shall send a copy of the details along with the drug consignments to the officer-in-charge of the godown.

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4.2 Mode of disposal of drugs. (i) Opium, morphine, codeine and thebaine shall be disposed of by transferring to the Government Opium and Alkaloid Works under the Chief Controller of Factories. (ii) In case of drugs other than the drugs mentioned in clause (i), the Chief Controller of Factories shall be intimated by the fastest means of communication available, details of drug consignments that are ready for disposal. (iii) The Chief Controller of Factories shall indicate within 15 days of the date of receipt of the communication, the quantities of drugs, if any, that are required by him to supply as samples under Rule 67B. (iv) Such quantities of drugs, if any, as required by the Chief Controller of Factories under clause (iii) shall be transferred to him and the remaining quantities of drugs shall be destroyed as per the procedure outlined in para 4.1.2. (v) Destruction shall be by incineration in incinerators fitted with appropriate air pollution control devices, which comply with emission standards. Such incineration may only be done in places where adequate facilities and security arrangements exist. In order to

ensure that such incineration may not be a health hazard or polluting, consent of the State Pollution Control Board or Pollution Control Committee, as the case may be, should be obtained. Destruction shall be carried out at the presence of the Members of the Drug Disposal Committee.

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4.4 Certificate of destruction. A certificate of destruction (in triplicate) containing all the relevant data like godown entry number, gross and net weight of the drugs seized, etc., shall be prepared and signed by the chairman and members of the Drug Disposal Committee as per format at Annexure 3. The original copy shall be pasted in the godown register after making necessary entries to this effect, the duplicate to be retained in the seizure case file and the triplicate copy will be kept by the Drug Disposal Committee. Details of disposal of drugs shall be reported to the Narcotics Control Bureau in the Monthly Master Reports."

7. To be noted, the aforesaid notification was in existence at the time of the commission of the offence alleged in the case on hand, stood repealed with effect from 23.12.2022 ***vide Notification No. G.S.R.899(E).*** *In any case a notification issued in derogation of the powers conferred under sub-section (1) of Section 52A of the NDPS Act can never contradict the main provision, particularly sub-Section (2). However, any guideline issued by way of a notification in consonance with Section 52A of the NDPS Act has to be followed mandatorily.*

8. Before any proposed disposal/destruction mandate of Section 52A of the NPDS Act requires to be duly complied with starting with an application to that effect. A Court should be satisfied with such compliance while deciding the case. The onus is entirely on the prosecution in a given case to satisfy the Court when such an issue arises for consideration. Production of seized material is a factor to establish seizure followed by recovery. One has to remember that the provisions of the NDPS Act are both stringent and rigorous and therefore the burden heavily lies on the prosecution. Non-production of a physical evidence would lead to a negative inference within the meaning of Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as the Evidence Act). The procedure contemplated through the notification has an element of fair play such as the deposit of the seal, numbering the containers in seriatimwise and keeping them in lots preceded by compliance of the procedure for drawing samples. The afore-stated principles of law are dealt with in extenso in Noor Aga v. State of Punjab, (2008) 16 SCC 417:

"89. Guidelines issued should not only be substantially complied with, but also in a case involving penal proceedings, vis-à-vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of ***Kerala v. Kurian Abraham (P) Ltd. [(2008) 3 SCC 582]*** *, following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.*

91. The logical corollary of these discussions is that the guidelines such as

those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution.

92. Omission on the part of the prosecution to produce evidence in this behalf must be linked with a second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court. The respondents contended that the same had been destroyed. However, on what authority it was done is not clear. Law requires that such an authority must flow from an order passed by the Magistrate. Such an order whereupon reliance has been placed is Exhibit PJ; on a bare perusal whereof, it is apparent that at no point of time had any prayer been made for destruction of the said goods or disposal thereof otherwise. What was necessary was a certificate envisaged under Section 110(1-B) of the 1962 Act. An order was required to be passed under the aforementioned provision providing for authentication, inventory, etc. The same does not contain within its mandate any direction as regards destruction.

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95. The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution. Even for the said purpose the retracted confession on the part of the accused could not have been taken recourse to.

96. Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act.

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100. Physical evidence of a case of this nature being the property of the court should have been treated to be sacrosanct. Non-production thereof would warrant drawing of a negative inference within the meaning of Section 114(g) of the Evidence Act. While there are such a large number of discrepancies, if a cumulative effect thereto is taken into consideration on the basis whereof the permissive inference would be that serious doubts are created with respect to the prosecution's endeavour to prove the fact of possession of contraband by the appellant. This aspect of the matter has been considered by this Court in Jitendra v. State of M.P. [(2004) 10 SCC 562 : 2004 SCC (Cri) 2028] in the following terms: (SCC p. 565, para 6)

"6. ... In the trial it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of charas and ganja were seized from the possession of the accused. The best evidence would have been the seized materials which ought to have been produced during the trial and marked as material objects. There is no explanation for this failure to produce them. Mere oral evidence as to their features and production

of panchnama does not discharge the heavy burden which lies on the prosecution, particularly where the offence is punishable with a stringent sentence as under the NDPS Act.""

9. On the issue of seizure in the presence of Magistrate, we wish to place reliance upon the decision of this Court in Union of India v. Mohanlal, (2016) 3 SCC 379:

"16. Sub-section (3) of Section 52-A requires that the Magistrate shall as soon as may be allow the application. This implies that no sooner the seizure is effected and the contraband forwarded to the officer-in-charge of the police station or the officer empowered, the officer concerned is in law duty-bound to approach the Magistrate for the purposes mentioned above including grant of permission to draw representative samples in his presence, which samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing of samples has to be in the presence and under the supervision of the Magistrate and the entire exercise has to be certified by him to be correct. 17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure. 18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government would, therefore, do well, to re-examine the matter and take suitable steps in the above direction."

21. On Section 52A of the NDPS Act, this Court in **Union of India v. Jarooparam, (2018) 4 SCC 334** has held as follows:

"8. What transpires from the abovequoted paragraph is that after taking out two samples of 30 gm each, the Executive Magistrate returned the entire remaining seized property to the investigating officer PW 6. To further ascertain the same, we have also carefully perused the exact content of the proceedings dated 14-10-2004 (Annexure P-5) recorded by the Executive Magistrate, Singoli Tappa. The proceedings recorded as far as the respondent herein is concerned, read thus: Proceedings 14-10-2004:

Proceedings

Case submitted. Shri Harvinder Singh, Inspector (Investigating Officer), Narcotics Bureau, Singoli has submitted three sealed packets of seized stuff in Crime No. 1 of 2004 under Sections 8/18 and 8/29 of the NDPS Act, 1985. These packets were marked A, B and C and the details are given as under: 1-A: On the packet marked "A" it was indicated that packet contains 7.200 kg opium seized from Jaroopram, s/o

Ganga Ram Bishnoi. On opening the packet, transparent polythene bag was found, in which again two polythene packets were found. One polythene indicated 4.000 kg and the second one 3.200 kg opium, respectively. A composite sample of 30-30 gm each have been taken from the two packets and kept in a small plastic polythene and marked A-3 and A-4 and sealed. The remaining seized stuff and samples sealed as usual are handed over to the presenting officer Shri Harvinder Singh, Inspector.

9. From the above proceedings, it is crystal clear that the remaining seized stuff was not disposed of by the Executive Magistrate. The contraband stuff as also the samples sealed as usual were handed over physically to the Investigating Officer Harvinder Singh (PW 6). Also the trial court in its judgment specifically passed instructions to preserve the seized property and record of the case in safe custody, as the co-accused Bhanwarlal was absconding. The trial court more specifically instructed to put a note with red ink on the front page of the record for its safe custody. In such a situation, it assumes importance that there was nothing on record to show as to what happened to the remaining bulk quantity of contraband. The absence of proper explanation from the prosecution significantly undermines its case and reduces the evidentiary value of the statements made by the witnesses.

10. Omission on the part of the prosecution to produce the bulk quantity of seized opium would create a doubt in the mind of the Court on the genuineness of the samples drawn and marked as A, B, C, D, E, F from the allegedly seized contraband. However, the simple argument that the same had been destroyed, cannot be accepted as it is not clear that on what authority it was done. Law requires that such an authority must flow from an order passed by the Magistrate. On a bare perusal of the record, it is apparent that at no point of time any prayer had been made by the prosecution for destruction of the said opium or disposal thereof otherwise. The only course of action the prosecution should have resorted to is for its disposal is to obtain an order from the competent court of Magistrate as envisaged under Section 52-A of the Act. It is explicitly made under the Act that as and when such an application is made, the Magistrate may, as soon as may be, allow the application (see also Noor Aga v. State of Punjab, (2008) 16 SCC 417 : (2010) 3 SCC (Cri) 748).

11. There is no denial of the fact that the prosecution has not filed any such application for disposal/destruction of the allegedly seized bulk quantity of contraband material nor was any such order passed by the Magistrate. Even no notice has been given to the accused before such alleged destruction/disposal. It is also pertinent here to mention that the trial court appears to have believed the prosecution story in a haste and awarded conviction to the respondent without warranting the production of bulk quantity of contraband. But, the High Court committed no error in dealing with this aspect of the case and disbelieving the prosecution story by arriving at the conclusion that at the trial, the bulk quantities of contraband were not exhibited to the witnesses at the time of adducing evidence.

22. In **Kishan Chand vs State Of Haryana (supra)** the Hon'ble Supreme Court observed as follows:-

15. The learned Trial Court in para 34 of its judgment clearly recorded that admittedly in the present case, the

secret information was received against the accused. The Investigation Officer did not reduce the secret information in writing nor did he send the same to the higher officer or to the police station for registration of the case. However, stating that if this was done, there was possibility that the accused escaped, the trial court observed that if the Investigating Officer did not reduce into writing the secret information and sent the same to the superior officer, then in light of the given circumstances, it could not be said that any prejudice was caused to the accused.

16. We are unable to contribute to this interpretation and approach of the Trial Court and the High Court in relation to the provisions of sub- Section (1) and (2) of Section 42 of the Act. The language of Section 42 does not admit any ambiguity. These are penal provisions and prescribe very harsh punishments for the offender. The question of substantial compliance of these provisions would amount to misconstruction of these relevant provisions. It is a settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, ought to be construed strictly. The doctrine of substantial compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the cases where the language of the provision strictly or by necessary implication admits of such compliance.

17. In our considered view, this controversy is no more res integra and stands answered by a Constitution Bench judgment of this Court in the case of Karnail Singh (supra). In that judgment, the Court in the very opening paragraph noticed that in the case of ***Abdul Rashid Ibrahim Mansuri v. State of Gujarat [(2000) 2 SCC 513],*** *a three Judge Bench of the Court had held that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of Sajan Abraham (supra), again a Bench of three Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, if there is total non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not, will be a question of fact in each case. The Court in paragraph 35 of the judgment held as under:-*

35. In conclusion, what is to be noticed is that Abdul Rashid did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did Sajan Abraham hold that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:

(a) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (a) to (d) of Section 42(1).

(b) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or

destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (a) to (d) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(c) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally precede the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(d) While total non-compliance with requirements of subsections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non- sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

23. Reverting to the facts of the present case, we have already noticed that both the Trial Court and the High Court have proceeded on the basis of substantial compliance and there being no prejudice to the accused, though clearly recording that it was an admitted case of total non-compliance. The statement of PW7 puts the matter beyond ambiguity that there was 'total non-compliance of the statutory provisions of Section 42 of the Act'. Once, there is total non-compliance and these provisions being mandatory in nature, the prosecution case must fail.

23. In **Gorakh Nath Prasad Vs. State of Bihar** (supra) one the main plank of arguments of learned defence counsel was that seized contraband allegedly 59 kg of Ganja was never produced as material exhibit during the trial. Therefore, the benefit of doubt will have to be given to the appellants. The Hon'ble Supreme Court allowed the criminal appeal preferred by the accused/appellant against the judgment of High Court, wherein conviction and sentence awarded to the appellant by Additional Session Judge was affirmed and acquitted the appellant.

24. The Hon'ble Supreme Court while placing reliance on a earlier judgment in ***Jitendra and another Vs. State of M.P. (2004) 10 SCC 562***, observed in paragraph 7 as under:-

"7. In the facts of the present case, the independent witnesses with regard to the search and seizure, PW-2 and PW-3, having turned hostile deposing that their signatures were obtained on blank paper at

the police station, the mere fact of a FSL Report (Exhibit 8), being available is no confirmation either of the seizure or that what was seized was Ganja, in absence of the production of the seized item in Court as an exhibit. The non-production of the seized material is therefore considered fatal to the prosecution case. The issue whether there has been compliance with Sections 42 and 50 of the NDPS Act loses its relevance in the facts of the case."

25. On the facts of the case, we find many irregularities which finds no justification what so ever maybe. On perusal of alleged evidence adduced by prosecution witnesses in light of recovery of arrest memo Ex. Ka1. According to prosecution version three accused persons were arrested from the truck loaded by contraband Poppy's Straw (doda) on the date and time of incident. Accused Saifuddin @ Sheruddin who was driver of the truck and other two accused persons were traders, who were staying on sacks loaded on the body of the truck containing contraband Poppy's Straw. This is admitted fact that sample was not taken from the bulk of Poppy's Straw recovered from the joint possession of the accused persons on the spot and not before the Magistrate as provided under Section 52A of the NDPS Act. According to PW1 and PW2 the bulk of the contraband was weighed by sending the same on said truck, by which it was being transported to a nearby Dharamkata, where total weight of contraband was found to be 43 quintal and 30 kg. Out of which 5kg sample was taken from one of the sack and kept in a empty sack. The police witnesses could not disclose, whether the empty sack was kept on seized truck or it was arranged from some other place. This is also mentioned in recovery memo Ex. Ka1 that it was prepared on the spot, where search and seizure was carried out by police team. The signature and thumb impression of the accused persons and signature of the police witnesses is appended on recovery memo Ex. Ka1.

26. The GD Entry of departure of PW1 the search and recovery officer, from police station on the day of search and seizure has not been brought on record. The witnesses have stated that, when they reached at Chowki crossing at around 11:30 am, the secret informer reached there, who informed them about a truck loaded with doda Opium, which was likely to pass. However, PW1 has admitted in his cross-examination that he neither recorded the information nor informed any high police official about this information, resulting in total non-compliance of the mandatory provisions of Section 42 of NDPS Act. He subsequently, informed superior officers about the recovery, but even a copy of that information has not been brought on record. PW1 has stated that after receiving information about the movement of the said truck, he asked passersby to be a witness, but they refused his request due to citing personal reasons. He did not record name of any such person in recovery memo, due to this omission it is difficult to believe that in fact PW1 had asked any passersby to be a witness of imminent police action with regard to search and recovery from said truck.

27. PW1 has stated in his evidence that truck driver was sitting in cabin alone. The contraband was loaded on the truck in plastic sacks, but they were not counted. He was even not able to tell the number of sacks recovered from said truck which contained contraband. Even in recovery memo, number of sacks recovered from the truck is not mentioned. This is prosecution

case that truck loaded with contraband was sent for weighing in nearby Dharamkata, which was accompanied by two Sub Inspectors of Police Team from the place of seizure to Dharamkata, and a receipt comprising the weight of truck, and the weight of loaded and empty truck was mentioned therein. PW1 stated that in the said receipt the weight of goods loaded on truck (doda) is shown as 43 quintal and 30 kg, the receipt bears No.3213 dated 35/2004. But this receipt was not exhibited during the evidence of PW1 who produced said receipt. This receipt is mentioned in recovery memo, but PW1 admitted in cross examination that receipt was mutilated and the portion thereof, in which weight and part of truck is missing. The sample was weighed on the spot by bringing a weighing balance machine, but he could not specify the mode and manner of weighing the sample.

28. PW2 is also a witness of search and recovery, who was a member of police team engaged in process of search and seizure. He has corroborated the evidence of PW1 in his evidence before the court and proved the sample taken from bulk of Opium Doda, which was sent for chemical examination at FSL, Agra as material Ex.Ka 2. He has stated that in a bag containing the sample the figure 994/04 is mentioned, which is a crime number. He stated the sample was taken and weighed on the spot. He also admitted that the sacks which was seized from the spot were not sealed and out of seized sacks sample was taken, but he could not specify as to whether the empty sack was procured from where. He could not speak as to what quantity of doda powder was kept in each of the sacks. Thus non sealing and stamping of sacks containing contraband either on spot or thereafter at police station is a major omission in prosecution case. This prosecution case that sample was taken from one of the sacks and not from each one of them. Thus it is difficult to comprehend, as to what was in fact filled up in remaining sacks. Inasmuch, the bulk was never produced before the court, either at the time of remand for judicial custody of the accused persons or during trial.

29. Hon'ble Apex Court in aforementioned judgments, has observed that non production of the bulk before the court during trial and disposal of contraband in violation of mandatory provisions of Section 52A of NDPS Act, is fatal to prosecution case. In the present case the bulk of contraband reportedly got destroyed in Malkhana, due to heavy rain during passage of time. This is nothing, but gross negligence in upkeep of case property that too in a case under NDPS Act, for which severe punishment has been provided under the Act. It is evident that the case property got destroyed, in violation of the provisions of Section 52A of NDPS Act, as stated above.

30. Section 52A (2), (3) and (4) of the NDPS Act provides for the procedure and and manner of seizing, preparing the inventory of the seized material, forwarding the seized material and getting inventory certified by the Magistrate concerned. It is further provided that the inventory or the photographs of the seized substance and any list of samples in connection thereof on being certified by the Magistrate shall be recognized as a primary evidence in connection with the offences alleged under the NDPS Act.

31. A perusal of the aforesaid provisions reveals that any contraband/narcotic substance seized and

forwarded to the police or to the officer so mentioned under Section 53, of the Act, the officer so referred to in sub section (1) shall prepare its inventory with details and the description of the seized substance like quality, quantity, mode of packing, numbering and identifying marks and then make an application to any Magistrate for the purposes of certifying its correctness and for allowing to draw representative samples of such substances in the presence of the Magistrate and to certify the correctness of the list of samples so drawn.

32. No evidence has been brought on record to the effect that the procedure prescribed under subsections (2), (3) and (4) of Section 52A of the NDPS Act was followed while making the seizure and drawing sample such as preparing the inventory and getting it certified by the Magistrate. No evidence has also been brought on record in the case in hand that the samples were drawn in the presence of the Magistrate and the list of the samples so drawn were certified by the Magistrate. It is an admitted position on record that the samples from the seized substance were drawn by the police team in the presence of the gazetted officer, nor in the presence of the Magistrate. There is no material on record to prove that the Magistrate had certified the inventory of the substance seized or the list of samples so drawn. Even no inventory as envisaged under Section 52A of the Act has been prepared and only the weight of seized contraband namely doda (power) Poppy's Straw is mentioned in recovery memo. For non-compliance of mandatory provisions of Section 52A, the samples drawn from the bulk could not be treated as a valid piece of primary evidence in the trial, and for want of primary evidence the trial stands vitiated on this count also.

33. Accordingly, this Court is of the opinion that the failure of the police team which carried out the proceedings of interception of truck search and seizure failed to lead primary evidence in regard to seized contraband and samples drawn there from, due to non production of bulk of the seized contraband and non drawing of samples in presence of the Magistrate, and in view of foregoing discussion the conviction of the appellants deserves to be set-aside.

34. The impugned judgment passed and sentence awarded by trial court convicting the appellants Satyapal and Saifuddin Urf Sheruddin and sentencing them to undergo 10 years rigorous imprisonment and Rs.1,50,000/- fine with a default stipulation is hereby set-aside. Accordingly, the appeal stands **allowed**.

35. Consequently, the appellants stand acquitted of the aforesaid charge, as they are held in jail custody, the court concerned will issue a release order in compliance of this judgment, and if they are not wanted in other case, they shall be set at liberty forthwith.

36. The appellants will execute, a personal bond and two sureties each in the like amount to the satisfaction of the court concerned, within one week of their release from jail, in compliance of provision of Section 437 (A) Cr.P.C. to the effect that they would appear before the higher court, as and when such court issues notice

in respect of any appeal or petition filed against the judgment of this Court, such bail bonds shall be enforced for six months.

(2024) 2 ILRA 1445
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.01.2024

BEFORE

THE HON'BLE SHAMIM AHMED-I, J.

Criminal Revision No. 86 of 1996

Haibat Ram ...Revisionist
Versus
Govind Lal & Ors. ...Respondents

Counsel for the Revisionist:
M. Naseerullah, Ayush Singh, Sushil Kumar Singh

Counsel for the Respondents:
Govt. Advocate, Devi Prasad Singh, Rajesh Kumar Srivastava

Criminal Law - Indian Penal Code, 1860 - Sections 147/148, 323/149, 308/149 & 426/149 - Against acquittal order - As per prosecution, complainant and accused, residents of same village, had prior enmity. On 31.08.1988 at about 6:00 A.M., accused were cutting trees in complainant's field - When objected, they assaulted him with lathi and danda - On intervention, complainant's family members were also beaten - Villagers arrived on hearing cries, whereupon accused fled - Trial court, after considering evidence, acquitted accused - Counsel for revisionist contends that trial court failed to appreciate evidence and ignored witness St.ments and acquittal was based on conjectures and surmises - However, from prosecution witnesses' testimony, appears that prosecution failed to establish accused's involvement, no direct evidence produced by prosecution regarding involvement of opposite parties in crime - Court below adopted probable and logical view based on valid reasons. (Para 4-7, 8)

Revision dismissed. (E-13)

List of Cases cited:

1. Sadhu Saran Singh Vs St. of U.P. & ors. reported in (2016) 4 SCC 357, (Paras 20, 21)

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

(Order on C.M. Application No.IA/3/2023; Substitution Application)

Heard Shri Sushil Kumar Singh, learned Counsel for the revisionist, Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite party.

The present application seeks to substitute the revisionist/ Haibat Ram, who has died and the applicant/Satish Kumar, being the son of the revisionist to prosecute the respondents in the present revision, which is against the acquittal.

Learned Counsel for the revisionist submits that the original revisionist/Haibat Ram had expired during the pendency of the present revision, thus, he submits that the present applicant, namely-Satish Kumar being the son of the revisionist be substituted in the present revision to prosecute the respondents in the present revision, which is against the acquittal.

Learned A.G.A-I has no objection to the contention made on behalf of the revisionist.

Accordingly, the present application is allowed. Learned Counsel for the revisionist is directed to substitute the revisionist/ Haibat Ram, who has died with the applicant/Satish Kumar, being the son

of the revisionist to prosecute the respondents in the present revision, during the course of the day.

(Order on Memo of Revision)

1. List has been revised and the case is being taken up in the revised call of the list.

2. Heard Shri Sushil Kumar Singh, learned Counsel for the revisionist, Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite party.

3. The present revision under Section 397/401 Cr.P.C. has been filed against the judgment and order dated 01.02.1996 of acquittal of the respondent Nos.1 to 24, passed by V Additional Sessions Judge, Pratapgarh in Sessions Trial No.119/1991; State vs. Govind Lal and 23 Others acquitting all the accused persons under Sections 147/148, 323/149, 308/149 and 426/149 I.P.C.

4. The prosecution case in brief is that the complainant and the accused persons are resident of same village. There was some old enmity in between the parties. On 31.08.1988 at about 6:00 A.M., the accused persons were toiling and cutting the trees planted by the complainant in his field, the complainant tried to stop them but the accused persons started beating him with lathi and danda. Thereafter, the family members of the complainant also reached the spot and tried to save him but they were also brutally beaten. On hue and cry, the nearby villagers arrived at the spot, then accused persons fled away from the spot.

5. The court below after taking into consideration the facts and circumstances of the case and evidence available on record, passed the judgment and order of acquittal dated 01.02.1996.

6. Learned counsel for the revisionist submits that the court below did not appreciate the evidence on record. He further submits that prosecution has successfully proved the offence against the accused on the basis of evidence. The judgment was passed without considering the statement of witnesses and the case set up by the prosecution and the judgment of the acquittal was passed on surmises and conjectures.

7. I have heard the submissions advanced by the earned counsel for the revisionist and gone through the judgment passed by the court below.

8. In the present case from the statements given by the witnesses produced by the prosecution, I found that prosecution has failed to establish that the crime in question has been committed by the accused and there was no direct evidence produced by the prosecution regarding involvement of the opposite parties in the crime.

9. Further, learned counsel for the revisionist could not point out any illegality or infirmity in the judgment and order of acquittal passed in favour of respondents which is before this Court.

10. Further, this Court observed that an revision against acquittal stands on a different footing from the revision against conviction. Hon'ble the Apex Court in a very recent judgment in the case of ***Sadhu Saran Singh Vs. State of Uttar Pradesh and Others reported in (2016) 4 SCC 357*** has considered this difference and has observed in paragraph nos.20 and 21 as under:

*"20. Generally, an appeal against acquittal has always been altogether on a different pedestal from that of an appeal against conviction. 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 raise 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. This Court, while enunciating the principles with regard to the scope of powers of the appellate court in an appeal against acquittal, in S**ambasiva V. State of Kerala 1998 SCC (Cri) 1320** has held:*

"7. The principles with regard to the scope of the powers of the appellate court in an appeal against acquittal, are well settled. The powers of the appellate court in an appeal against acquittal are no less than in an appeal against conviction. But where on the basis of evidence on record two views are reasonably possible the appellate court cannot substitute its view in the place of that of the trial court. It is only when the approach of the trial in acquitting an accused is found to be clearly erroneous in its consideration of evidence on record and in deducing conclusions therefrom that the appellate court can interfere with the order of acquittal."

21. The Court, in several cases, has taken the consistent view that the appellate court, while dealing with 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. If the appellate court, on scrutiny, finds that the decision of the court below is based on erroneous views and against settled position of law, then the interference of the appellate court with such an order is imperative."

11. In the light of the aforesaid guidelines, the impugned judgment has to be considered from the point of view whether the view taken by the court below was a probable view based on the material on record or it is an absolutely erroneous judgment devoid of merits.

12. A criminal trial proceeds with the presumption of innocence of the accused persons. With the acquittal of the accused persons this presumption of innocence stands fortified. So very strong and cogent reasons must exist in interfering the judgment of acquittal.

13. Keeping in view the aforesaid weakness of the prosecution case, as noted by the court below, I am of the view that the view taken by the court below was a probable and logical view, which is based on valid reasons. The judgment of the court below cannot be said to be illegal, illogical and improbable and not based on material on record or is based on erroneous views and is against the settled position of law. So, this Court is satisfied that there is absolutely no hope of success in this revision and accordingly, no interference is called for.

14. Accordingly, the present revision against acquittal is ***dismissed***.

15. No order as to costs.

16. Copy of this judgment be sent to the court below for its compliance.

(2024) 2 ILRA 1448
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 192 of 2011

Bipin Bihari Chaurasiya ...Revisionist
Versus
State of U.P. ...Respondent

Counsel for the Revisionist:
Rajesh Kumar Tiwari, Indrajeet Shukla, Manoj Kumar Nishad, Skand Bajpai

Counsel for the Respondent:
Govt. Advocate

Criminal Law - Indian Penal Code, 1860 - Sections 148, 302, 307, 504 & 506 - Arms Act, 1959 - Section 25 - Explosives Substance Act, 1908 - Section 4/5- Juvenile Justice (Care and Protection of Children) Act, 2000 - Section 7-A - Juvenility - Plea of - In view of law laid down in Paul George (infra), order dated 15.11.2022, passed in absence of counsel and without reasons, being ex parte, devoid of adjudication on merits, recall application allowed - Revisionist claim juvenility on basis of High School certificate issued in year 1997, which records his date of birth as 09.07.1981 - Under Rule 12(3)(i), date of birth recorded in matriculation certificate to be treated conclusive proof, no further inquiry warranted - Trial court, while examining said claim, relied upon testimony of AW-1, who deposed that he was aged about 73 years and that his younger sister, i.e. mother of accused was 7–8 years junior to him, making her present age about 65 years - Witness St.d that his sister married at age of 16–17 years, delivered her first child in 1975 - Trial court observed that if mother is presently about 65 years of age and married at 16–17 years (or at most 20 years), assertion of first child being born in 1975 is not believable - Consequently, held that revisionist not be treated as below 18 years of age on date of incident - Trial court's rejection of High School certificate not permissible in law - Impugned order, set aside, trial court directed to determine juvenility on basis of date of birth recorded in High School certificate. (Para 6, 14 to 16)

Revision allowed. (E-13)

List of Cases cited:

1. Paul George Vs St.: (2002) 2 SCC 406, (Paras 6, 7)

2. Brij Mohan Singh Vs Priya Brat Narain Sinha & ors.: AIR 1965 SC 282

3. Ashwani Kumar Saxena Vs St. of M.P., (2012) 9 SCC 750, (Paras 32, 33, 35)

4. Abuzar Hossain Vs St. of W.B., (2012) 10 SCC 489, (Paras 39.1 to 39.6)

5. Rishipal Singh Solanki Vs St. of U.P., (2022) 8 SCC 602, (Paras 33.1 to 33.11)

(Delivered by Hon'ble Subhash Vidyarthi J.)

Order on Crl. Misc. Application No.6 of 2023 & 7 of 2023:

1. Heard Sri Skand Bajpai, the learned counsel for the revisionist, Smt. Parul Kant, the learned A.G.A. appearing on behalf of the State and perused the records.

2. These are applications seeking condonation of delay in filing application for recall and the application for recall of ex-parte order dated 15.11.2022, passed by a coordinate Bench of this court on the ground that the revisionist had engaged Sri Indrajeet Shukla, Advocate as his counsel,

who was subsequently appointed as an Additional Chief Standing Counsel for the State of U.P. and for this reason he could not appear any further on behalf of the revisionist. The revisionist did not have any knowledge about his counsel having been appointed as Additional Chief Standing Counsel and therefore he did not engage another counsel. In these circumstances the revision was dismissed in absence of the learned counsel for the revisionist on 15.11.2022.

3. Although, the order dated 15.11.2022 has been passed in absence of the revisionist or his learned counsel, it records the submission of the learned State Counsel that there is not illegality or infirmity in the impugned order. The court has recorded in the order dated 15.11.2022 as follows:

"The court below has given cogent, convincing and satisfactory reasons while passing the impugned order. Reasons mentioned therein are good enough to satisfy the passing of impugned order and no fault could be found with the approach adopted by the court below. Even otherwise also, none has appeared on behalf of the revisionists to press this revision though the revision is pending since 2011.

In view of the above, I do not find any illegality, infirmity or perversity in the impugned order which may warrant any interference.

The revision is, accordingly, dismissed."

4. Submission of the learned counsel for the revisionist is that the aforesaid order was passed in absence of the learned counsel for the revisionist and therefore it is an ex-parte order, which deserves to be recalled. He has submitted that the observations made regarding the revision being merit have been made in a cursory manner without adverting to the contents of the order or the contentions raised in the memo of revision.

5. In the case of **Paul George Vs. State: (2002) 2 SCC 406**, the Delhi High Court dismissed a Criminal Revision by the following order: -

"I have heard the learned counsel for the petitioner. I find no illegality, impropriety or jurisdictional error in the judgment under challenge.

Dismissed."

The Hon'ble Supreme Court set aside the aforesaid order after making the following observations: -

"6. ...We feel that whatever be the outcome of the pleas raised by the appellant on merits, the order disposing of the matter must indicate application of mind to the case and some reasons be assigned for negating or accepting such pleas....

7....The order impugned however does not indicate any trace of application of mind on the facts or the pleas raised before the Court. We would like to point out that we come across with such orders quite frequently as of now. There is no need to emphasize that the reasons, howsoever brief they may be, are to be indicated in an order disposing of any matter, more so when such orders are subject to appeal or review before the higher forum."

6. In view of the aforesaid law laid down by the Hon'ble Supreme Court in the case of **Paul George** (supra), it is clear that the order dated 15.11.2022 passed in the absence of learned counsel for the revisionist without recording any reasons engaging adjudication of the revision by

this court is an ex-parte order, which does not discuss the merits of the case and it deserves to be recalled.

7. Accordingly, the applications are allowed. The delay in filing recall application is hereby condoned. The order dated 15.11.2022 is hereby recalled and the revision stands restored to its original number.

Order on memo of revision:

8. The instant revision has been filed challenging the validity of the impugned order dated 27.04.2011 passed by the learned Additional Sessions Judge, Court No.11, Pratapgarh, in Sessions Trial No. 369 of 1998, under Sections 148, 302, 307, 504, 506 I.P.C., Sessions Trial No.372 of 1998, under Section 25 of Arms Act and Sessions Trial No.373 of 1998, under Section 4/5 Explosives Substance Act, Police Station Kandhai, District Pratapgarh, whereby three different applications filed in the aforesaid three cases for declaring the revisionist to be a juvenile-delinquent on the ground that the high school certificate in the year 1997 mentions his date of birth as 09.07.1981 was recorded. The learned trial court has disbelieved the date of birth of the revisionist mentioned in the high school certificate on the ground that from the statement of PW-1 recorded by the learned trial court, the date of birth of the revisionist mentioned in the high school certificate appears to be incorrect. The learned trial court has relied upon the judgment of Hon'ble Supreme Court in the case of **Brij Mohan Singh Vs. Priya Brat Narain Sinha and others**: AIR 1965 SC 282, which was a case arising out Representation of People Act, 1951, wherein the court disbelieved the age of a person mention in the high school record, keeping in view the peculiar facts and circumstances of the case.

9. Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides that: -

"7-A. 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 enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:*

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders, and the sentence if any, passed by a court shall be deemed to have no effect."

10. Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007 provides as follows: -

"12. Procedure to be followed in determination of age.

(1)In every case concerning a child or a juvenile in conflict with law, the Court or

the Board, as the case may be, the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2)The Court or the Board or, as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or, as the case may be, the juvenile in conflict with law, prima facie on the basis of physical appearances or documents, if available, and send him to the observation home or in jail.

(3)In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(i)the matriculation or equivalent certificates, if available; and in the absence whereof;

(ii)the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii)the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4)If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or, as the case may be, the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5)Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7-A, section 64 of the Act and these rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6)The provisions contained in this rule shall also apply to those disposed off cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

11. In **Ashwani Kumar Saxena v. State of M.P.**, (2012) 9 SCC 750, it was held that: -

32. "Age determination inquiry" contemplated under Section 7-A of the Act read with Rule 12 of the 2007 Rules enables the court to seek evidence and in

that process, the court can obtain the matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court needs to obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court needs to obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the abovementioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

33. Once the court, following the abovementioned procedures, passes an order, that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in sub-rule (5) of Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of Rule 12. Further, Section 49 of the JJ Act also draws a presumption of the age of the juvenility on its determination.

* * *

35. We have come across several cases in which the trial courts have examined a large number of witnesses on either side including the conduct of ossification test and calling for odontology report, even in cases, where matriculation or equivalent certificate, the date of birth certificate from the school last or first attended, the birth certificate given by a corporation or a municipal authority or a panchayat are made available. We have also come across cases where even the courts in the large number of cases express doubts over certificates produced and carry on detailed probe which is totally unwarranted."

12. In **Abuzar Hossain v. State of W.B.,** (2012) 10 SCC 489, the Hon'ble Supreme Court summarized the legal principles in this regard as follows: -

"39.1. A claim of juvenility may be raised at any stage even after the final disposal of the case. It may be raised for the first time before this Court as well after the final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in the appeal court.

39.2. For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.

39.3. As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(a)(i) to (iii) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule

12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected. In Akbar Sheikh (2009) 7 SCC 415 and Pawan (2009) 15 SCC 259 these documents were not found prima facie credible while in Jitendra Singh (2010) 13 SCC 523 the documents viz. school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.

39.4. An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of the age of the delinquent.

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."

(Emphasis supplied)

13. In **Rishipal Singh Solanki v. State of U.P.,** (2022) 8 SCC 602, the Hon'ble Supreme Court referred to numerous precedents on the point and summarized the principles of law as follows: -

"33.1.A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court.

33.2.An application claiming juvenility could be made either before the court or the JJ Board.

33.2.1.When the issue of juvenility arises before a court, it would be under sub-sections (2) and (3) of Section 9 of the JJ Act, 2015 but when a person is brought before a committee or JJ Board, Section 94 of the JJ Act, 2015 applies.

33.2.2.If an application is filed before the court claiming juvenility, the provision of sub-section (2) of Section 94 of the JJ Act, 2015 would have to be applied or read along with sub-section (2) of Section 9 so

as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

33.2.3.When an application claiming juvenility is made under Section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a court, then the procedure contemplated under Section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall, for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the criminal court concerned, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide Section 9 of the JJ Act, 2015).

33.3.That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the court to discharge the initial burden. However, ***the documents mentioned in 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 side.

33.5.That the procedure of an inquiry by a court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the criminal court concerned. In case of an inquiry, the court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of Section 94 of the 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of evidence scrutinised and accepted only if worthy of such acceptance.

33.6.That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

33.7.This Court has observed that a hypertechnical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

33.8.If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

33.9.That ***when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.***

33.10.Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the court or the JJ Board provided such public document is credible and authentic as per the provisions of the Evidence Act viz. Section 35 and other provisions.

33.11.Ossification test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015.

14. When this court examines the facts of the present case in the light of the law laid down by the Hon'ble Supreme Court in the aforesaid case, it appears that the revisionist claims himself to be a juvenile on the ground that the high school certificate issued in the year 1997 mentions his date of birth to be 09.07.1981. When the high school certificate was available, as per the provisions contained in Rule 12 (3) (i), no further enquiry is permissible to ascertain the date of birth of the juvenile. The learned trial court has stated that as per the statement of AW1 Ram Pal Chaurasiya, witness is aged about 73 years, his younger sister i.e. mother of the accused is about 7-8 years younger to him, from which it can be assumed that presently the mother of the accused would be aged about 65 years; the witness has stated that his sister got married when she was aged about 16-17 years and her first daughter was born two years after her marriage, in the year 1975. In case his sister is presently aged about 65 years and she got married in the age of 16-17 years or at the most 20 years, the contention of the birth of the daughter in the year 1975 is not believable. In case the mother of the accused got married in the year 16-17 years, it cannot be believed that she delivered her first child in the year 1975 and from the aforesaid facts the age of the revisionist cannot be below 18 years on the date of the incident i.e. 11.04.1998.

15. This assessment made by learned trial court for disbelieving the high school certificate is not permissible in law.

16. Accordingly, the order dated 27.04.2011 passed by the learned Additional Sessions Judge, Court No.11, Pratapgarh is not sustainable. The revision is ***allowed.*** The learned trial court is directed to decide the issue of juvenility of the revisionist by treating his date of birth mentioned in the high school certificate to be correct and to proceed with the trial accordingly.

(2024) 2 ILRA 1455
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Revision No. 347 of 2001

Bhagwan Laxmi Narain Mandir Trust ...Revisionist
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Revisionist:
R.C. Mishra, Awadhesh Kumar

Counsel for the Respondent:
Govt. Advocate, S.K. Rastogi

Criminal Law - Code of Criminal Procedure, 1973 - Section 133 -

Revisionist filed application u/s 133 Cr.P.C. asserting that disputed double-storied building, over 125 years old, was in dilapidated condition except for three shops on ground floor - Stay order against declaration of vacancy was continuing, other proceedings pending before Rent Control Authority and Small Causes Court - By application, demolition was sought, which was opposed on ground of pendency of multiple proceedings concerning building - Executive Magistrate rejected application - Proceedings u/s 133 Cr.P.C. are summary in nature and meant to ensure removal of nuisance and to order demolition of building causing nuisance in cases of imminent danger to public - In instant case, various civil litigation regarding building already pending between parties when application u/s 133 Cr.P.C. filed - From conduct of revisionist in filing revision in year 2001 and thereafter repetitively seeking adjournments and not trying to get revision decided even after 23 years, indicates there is no imminent danger of building collapsing - Revisionist taken recourse to proceedings u/s 133 Cr.P.C. to bypass adjudication of rights in pending civil proceedings - Revision lacks merit, dismissed. (Para 6, 7, 11)

Revision dismissed. (E-13)

List of Cases cited:

1. Sukhlal Vs Brijbasi Lal: 1979 AWC 306

2. Sukh Lal Vs Dr. Brij Basi Lal, 1979 SCC OnLine All 89 : 1979 All LJ 456, (Para 5)

3. Vasant Manga Nikumba Vs Baburao Bhikanna Naidu, 1995 Supp (4) SCC 54, (Paras 3, 4)

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

1. The case is a 23 years' old case listed under the heading 'These cases shall not be adjourned' yet a request for adjournment of the case has been made by the learned Counsel for the revisionist by sending a printed slip which does not make a mention of any reason for seeking adjournment.

2. Earlier, the case was last listed on 01.02.2024 and the following order was passed on that date: -

"The present revision has been filed against the dismissal order of the application of revisionist under Section 133 Cr.P.C. The interim order is of dated 6.6.2001.

The matter is quite old.

Learned counsel for the revisionist has moved the application for adjournment of the case for the day.

AGA has submitted that approximately 23 years have gone by and the matter might have been frustrated.

A perusal of the record indicates that the parties have taken so many adjournments on different dates. In view of above, it is directed that on the next date of listing, no further adjournment shall be granted and in absence of any party, the Court may consider to decide the revision on the basis of material available on record.

List this case on 20.2.2024 in top ten listed cases."

3. In these circumstances the request for adjournment made in a casual manner by merely sending a slip which does not contain any reason for seeking adjournment, is not reasonable and it cannot be accepted.

4. Accordingly, the request for adjournment of the case is turned down and the court proceeds to examine the merits of the case with the help of Smt. Parul Kant,

the learned A.G.A. appearing on behalf of the State.

5. This is a revision under Section 397 read with Section 401 Cr.P.C. filed on 30.08.2001 challenging the validity of the order dated 06.06.2001,passed by the learned Additional Executive Magistrate, Kheri closing proceedings under Section 133 Cr.P.C.

6. The revisionist had filed an application under Section 133 Cr.P.C. on 07.05.1999 stating that the double storied building in dispute had been constructed more than 125 years prior to filing of the application. The building was in a dilapidated condition, except for three shops situated on the ground floor of the building. A stay order passed by this court in Writ Petition No.2066 (M/S) of 1991 against the declaration of vacancy of the building was continuing. Some other proceedings were also pending before the Rent Control Authority and in the Small Causes Court. By means of the application the revisionist had prayed for demolition of the building. Objections were filed against the application stating that several proceedings were going on regarding the building which was sought to be demolished by the revisionist.

7. The learned Additional Executive Magistrate, Kheri has rejected the application by means of an order dated 06.06.2001 wherein it is stated that a suit under Section 92 C.P.C. regarding the building in dispute was pending. The opposite party had contended that the building was maintained in a proper condition and it was not under threat of falling down. After taking into consideration the judgment in the case of **Sukhlal Vs. Brijbasi Lal**: 1979 AWC 306, the learned Magistrate came to a conclusion that the proceedings under Section 133 Cr.P.C. could not be continued and accordingly the application was rejected.

8. Section 133 of the Code provides that: -

"133. Conditional order for removal of nuisance.— (1) Whenever a District Magistrate or a Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers—

* * *

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure or the removal or support of such tree, is necessary; or

* * *

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order—

* * *

(iv) to remove, repair or support such building, tent or structure, or to remove or support such trees;".

9. In **Sukh Lal v. Dr. Brij Basi Lal**, 1979 SCC OnLine All 89 : 1979 All LJ 456, this Court had held that: -

"5…. the summary procedure prescribed under S. 133 Cr. P.C. is intended to meet situations of emergency, wherein taking of an immediate action is necessary. If such a situation does not exist and if constructions are long-standing, the proper remedy for the parties is to enforce their rights in a civil court and not to take recourse to the speedy and summary procedure prescribed under S. 133 Cr. P.C. This view has also been expressed earlier by a single Judge of this court in AIR 1965 All 215 Asharfi Lalv.Statein the following words:—

"A proceeding under S. 133 should be taken in case of emergency where the public shall be put to great inconvenience and shall suffer an irreparable injury if the encroachment or nuisance is not removed at once by adopting the summary procedure contained in Ch. 10 and, therefore, ordinarily no action under S. 133, can be taken where the obstruction or nuisance has been in existence for a long period. However, there is no legal bar to seeking remedy under Sec. 133 where there exists a genuine emergency to have the encroachment or nuisance removed. Such an action can be taken even though the encroachment or nuisance has been in existence for a reasonably long period. But if the obstruction has been in existence for a long period without any change in circumstances the removal of such obstruction cannot be said to be urgent and the remedy must be sought in civil courts."

10. In **Vasant Manga Nikumba v. Baburao Bhikanna Naidu**, 1995 Supp (4) SCC 54, the Hon'ble Supreme Court held that: -

"3. ...The object and public purpose behind Section 133 is to prevent public nuisance that if the Magistrate fails to take immediate recourse to Section 133 irreparable damage would be done to the public. The exercise of the power should be one of judicious discretions objectively exercised on pragmatic consideration of the given facts and circumstances from evidence on record. ***The proceedings under Section 133 is not intended to settle private disputes or a substitute to settle civil disputes though the proceeding under Section 133 is more in the nature of civil proceedings in a summary nature.***

4. A reading of Section 133 would clearly indicate that the Executive Magistrate has been empowered, on receiving a report of the police officer or other information and on taking such evidence as he thinks fit that any building, tent or structure is in such a condition that, due to failure to remove, disrepair, or without support it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by and that in consequence he is empowered to specify the time to remove, repair or provide support to such building, tent or structure or tree. Two options are open to the Executive Magistrate on considering whether structure, building etc. is in such a dilapidated condition which requires to be demolished immediately which brooks no delay to avert danger to the life and property of the neighbourhood or passers-by unless they could be suitably repaired or supported so as to avert danger to the public or have it removed, etc. ***The condition precedent to exercise the power under Section 133 is the imminent danger to the property and consequential***

nuisance to the public. *The removal of the building is so urgently required as it is likely to fall and cause injury to persons living or carrying on business in the neighbourhood or passers-by. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The dangerous condition of the building is in praesenti but not in future. The section is limited to injuries likely to be caused to the passers-by or persons living or carrying on business in the neighbourhood. Each case has to be considered in the light of the facts and circumstances obtained in each case."*

11. The proceedings under Section 133 Cr.P.C. are summary in nature and primarily meant to ensure removal of nuisance and to order demolition of a building causing nuisance in cases of imminent danger to the public. In the present case various civil litigation regarding the building in question were already pending between the parties when the application under Section 133 Cr.P.C. was filed. From the conduct of the revisionist in filing the revision in the year 2001 and thereafter repetitively seeking adjournments of the revision and not trying to get the revision decided even after 23 years, indicates that there is no imminent danger of the building collapsing. It appears that the revisionist had taken recourse to the proceedings under Section 133 Cr.P.C. to bypass adjudication of rights in the pending civil proceedings.

12. In these circumstances, there appears to be no illegality in the impugned order dated 06.06.2001 declining to continue the proceedings under Section 133 Cr.P.C. The revision lacks merit and the same is accordingly ***dismissed.***

(2024) 2 ILRA 1459
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.02.2024

BEFORE

THE HON'BLE JYOTSNA SHARMA, J.

Crl. Revision Defective No. 576 of 2023

Diwakar Nath Tripathi ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Ramesh Chandra Dwivedi

Counsel for the Respondent:
Sri M.C. Chaturvedi, Sr. Advocate/AAG, Sri A.K. Sand, GA, Sri Ajay Singh, AGA-I, Sri Neeraj Kant Verma AGA, Sri Rajeev Lochan Shukla

Criminal Law - Limitation Act, 1963 - Section 5 - Condonation of delay - Revision, presented on 12.04.2023, was reported time-barred by 318 days (limitation up to 29.05.2022) - A delay condonation application dated 11.04.2023 with supporting affidavit was filed - Upon filing before J.R. (J) on 21.04.2023, delay was noted as 327 days - Held, revisionist, claims himself as social worker and RTI activist in his application u/s 156(3) Cr.P.C. and he cannot be treated as casual, non-vigilant - Neither delay condonation application nor its supporting affidavit discloses any concrete ground or substantiated reason for delay; averments are vague - Revisionist failed to show sufficient cause for condonation of delay - Delay condonation application must disclose proper and substantiated grounds, which are absent here - Dispute being filing of application challenging impugned order, withdrawal of his application u/s 482 Cr.P.C. for seeking remedy, delayed filing of present revision without disclosing date of applying for certified copy and unsubstantiated

reasons indicate lack of seriousness in pursuing matter - Hence, no ground exists to condone delay. (Para 3, 22)

Revision dismissed. (E-13)

List of Cases cited:

1. N. Balakrishnan Vs M. Krishnamurthy : (1998) 7 SCC 123, (Paras 9 to 13)

2. Lanka Venkateswarlu Vs St. of A.P. : (2011) 4 SCC 363, (Paras 20, 23, 28, 29)

3. Maniben Devraj Shah Vs Municipal Corpn. of Brihan Mumbai : (2012) 5 SCC 157, (Paras 19, 23, 24)

4. Basawaraj Vs Land Acquisition Officer : (2013) 14 SCC 81, (Paras 9 to 12, 15)

5. Majji Sannemma Vs Reddy Sridevi : (2021) 18 SCC 384, (Paras 6.2, 7, 8

6. Sheo Raj Singh Vs U.O.I. : (2023) 10 SCC 531, (Para 31, 32)

7. Aleque Padamsee Vs U.O.I.: 2007 (6) SCC 171, (Para 7)

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

Order on Crl. Misc. Delay Condonation Application No. 1 of 2023

1. List revised.

2. The present revision U/s 397/401 Cr.P.C. has been filed before this Court by the revisionist Diwakar Nath Tripathi with the following prayers:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may graciously be pleased to summon the lower Courts record, allow the present Revision and be pleased to set aside the Judgment and Order dated 04.09.2021, passed by the Learned Additional Chief Judicial Magistrate, Court No. 17, Allahabad, C.N.R. No. 2750/2021, Misc Case No. - 102 / X II / 2021, Diwakar Nath Tripathi Vs. Keshav Prasad Maurya, P.S. Cantt, District- Prayagraj by which the application filed by the revisionist U/S 156(3) Cr.P.C. was rejected otherwise the Revisionist shall suffer irreparable loss and injury."

3. The revision was presented before the Section Officer, Stamp Reporter (Criminal) High Court, Allahabad on 12.04.2023 and was reported to be in limitation upto 29.05.2022 and thus beyond time by 318 days. A delay condonation application dated 11.04.2023 supported by an affidavit dated 10.04.2023 of the revisionist has been filed with it. Subsequently the revision after being presented for reporting was then presented before J.R. (J) (Computer), High Court Allahabad on 21.04.2023 for its filing after which it was marked to be beyond time by 327 days.

4. Previously the applicant had filed a Crl. Misc. Application U/s 482 No. 27198 of 2021 (Diwakar Nath Tripathi Vs. State of U.P. and another) which after some arguments was prayed to be dismissed as withdrawn by learned counsel appearing therein as he intended to explore the remedy available to him under law and as such the same was dismissed as withdrawn by this Court. The said order dated 24.11.2022 reads as under:-

"List revised.

Heard Sri Kamal Krishna Roy, learned counsel for the applicant, Sri M.C. Chaturvedi, learned Senior Advocate/Additional Advocate General assisted by Sri A.K. Sand, learned AGA for

the State. The present applicant under Section 482 Cr.P.C has been filed by the applicant with the following prayer:-

"It is, therefore, most respectfully prayed that this Hon'ble Court may most graciously be pleased to allow this application to quash/set aside the impugned order dated 04.09.2021 passed by Addl. Chief Judicial Magistrate, Allahabad in CNR No.2750 of 2021 Misc. Case No.102/XII/2021 Diwakar Nath Tripathi Police Station Cantt. District Prayagraj and also stay the operation of order dated 04.09.2021 and further direct to the learned Magistrate to exercise their power under Section 156(3) Cr.P.C. and direct to lodge the first information report, during the pendency of present application Under Section 482 Cr.P. before this Hon'ble Court, otherwise the applicants shall suffer grave irreparable loss and injury."

The applicant is the complainant of the case.

After some arguments, learned counsel for the applicant prays that the present application under Section 482 Cr.P.C. be dismissed as withdrawn as he intends to explore the remedy available to him under law.

The prayer is allowed.

The present application under Section 482 Cr.P.C. is dismissed as withdrawn."

The order is annexed as annexure 1 to the affidavit in support of the criminal revision.

5. Vide order dated 21.11.2023 passed by a co-ordinate Bench of this Court, notice was issued to the respondent no.2 on the delay condonation application. The said order reads as under:-

"Heard learned counsel for the revisionist and Sri P.K. Giri, learned Additional Advocate General along with learned A.G.A. for the State.

This criminal revision has been filed with delay of 327 days.

Issue notice to the respondent no.2 returnable at an early date for hearing on delay condonation application filed under Section 5 Limitation Act.

The opposite parties may file counter affidavit within four weeks.

Put up on 21.12.2023 as fresh."

6. Heard Sri Ramesh Chandra Dwivedi, learned counsel for the revisionist, Sri M.C. Chaturvedi, Senior Advocate / learned Additional Advocate General, Sri A.K. Sand, learned Government Advocate, Sri Ajay Singh, learned Additional Government Advocate-I and Sri Neeraj Kant Verma, learned Additional Government Advocate for the State of U.P. and Sri Rajeev Lochan Shukla, learned counsel for the opposite party no.2/ Keshav Prasad Maurya and perused the records.

7. Learned counsel for the revisionist argued that the delay in filing of the present revision is not wilful. It is argued that due to the illness of the revisionist he could not file the revision in time and as such the same was reported to be delayed. It is argued that the reasons for delayed filing of the revision have been pleaded in paras 3 to 7 of the affidavit in support of the application for condonation of delay. It is argued that the reasons as pleaded in the said paragraphs go to show that their has been no deliberate delay in filing of the present revision and as such the delay condonation may be allowed and the revision be treated to have been filed in time.

8. Per contra, learned counsels appearing for the Respondent No. 1/ State of U.P and learned counsel for the Respondent No. 2/ Keshav Prasad Maurya vehemently opposed the delay condonation application and submitted that the filing of the revision is with malafides. It is argued that the delay in filing of it is without any justifiable reason. It is argued that the reasons as pleaded in the affidavit in support of the delay condonation application are totally vague, without any justifiable reason and go to show the casualness of the revisionist in filing of the present revision. It is argued that the present revision is barred by limitation and there is also no cause in it serving a fruitful purpose which could be considered for condoning the unexplained delay and latches. It is argued that the delay condonation application be dismissed.

9. A delay condonation application under Section 5 of the Limitation Act, 1963 dated 11.04.2023 has been filed by the revisionist with the following prayers:

"It is, therefore, Most Respectfully prayed that this Hon'ble Court may kindly be pleased to condone the delay, if any, occurred in filing the present Criminal Revision and further kindly hear the matter on merit, otherwise the Revisionist shall suffer irreparable loss and injury.

And/or to pass such other and further order which this Hon'ble Court may deem fit and proper in the circumstances of the case."

10. In the affidavit dated 10.04.2023 in support of the delay condonation application, paras 3 to 7 have been averred as the reasons for the delay in filing of the present revision. The said paragraphs read as under:-

"3. That in Criminal Misc. Application No. 27198 of 2021, the Hon'ble Court passed an Order on 24.11.2022 mentioning therein that the present Application be dismissed as withdrawn as the Applicant intends to explore the remedy available to him.

4. That thereafter the Applicant decided to challenge the Impugned Order dated 04.09.2021 by filing Criminal Revision and applied for the certified copy of the Order which could be available 02.02.2023.

5. That thereafter the Applicant fell ill suffering from dengue which lasted for two months from the first week of February to the first week of April in which he was taking treatment and advised bed rest.

6. That a valuable time has passed in recovery of the Petitioner/Applicant from the prolonged illness.

7. That the reason for filing the Criminal Revision in delay is genuine and bona-fide and not intentional."

11. The order impugned in the present revision is an order dated 04.09.2021 passed by the Additional Chief Judicial Magistrate, Court No. 17, Allahabad in Criminal Case No. 102/XII/2021 (Diwakar Nath Tripathi Vs. Keshav Prasad Maurya), Police Station Cantt, District Prayagraj by which an application moved under Section 156(3) Cr.P.C. of the revisionist has been rejected.

12. The perusal of the grounds as averred in the affidavit in support of the delay condonation application goes to show that the revisionist states that his application under Section 482 Cr.P.C. was dismissed as withdrawn vide order dated 24.11.2022 since he intended to explore the remedy available to him after which he decided to challenge the impugned order dated 04.09.2021 by filing a criminal revision and applied for the certified copy of the same which could be available to him on 02.02.2023. Thereafter he fell ill suffering from dengue since last two months from 1st week of February to 1st week of April and was taking treatment and advised bed rest. His valuable time passed in the recovery from the prolonged illness, the reason for filing the criminal revision

with delay is genuine and bonafide and not intentional.

13. The perusal of the said paragraphs go to show that except for the bald statement of the deponent of the affidavit in support of the delay condonation application who is the revisionist himself, there is no material concrete in any nature to substantiate his averments. Moreso para 4 of the affidavit although mentions the date on which the order impugned could be made available to him which is mentioned therein as 02.02.2023 but there is no disclosure whatsoever as to on which date the certified copy of it was applied for, the date when it was ready for being issued and the date on which it was notified to be ready for being issued. The said events and facts have conveniently been avoided. The order impugned is from page 15 to 19 of the paper book which is along with the memo of the revision. A perusal of the same would go to show that the certified copy of the same was applied for by an Advocate on 02.02.2023, the same was ready on the same day i.e. 02.02.2023 and even the same was issued on the same day i.e. 02.02.2023. In between the other formalities for it were also done on the same day. The calculation of the period of limitation was thus counted by the Stamp Reporter of this Court who give his report that the revision is beyond time by 318 days upto 12.04.2023 which was the date of the said report. Even otherwise the 482 Cr.P.C. petition filed by the revisionist was got dismissed as withdrawn on 24.11.2022 after which the certified copy and the order impugned was applied for as late as on 02.02.2023. The law with regards to the consideration of an application for condonation of delay is trite.

14. Section 5 of the Limitation Act, 1963 empowers a Court to condone delay in filing a motion before it. It reads as under:

"5. Extension of prescribed period in certain cases.- *Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*

Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."

15. In the case of **N. Balakrishnan v. M. Krishnamurthy : (1998) 7 SCC 123** the Apex Court has held that exercise of discretion in condoning delay should be on satisfactory grounds, acceptable explanation and a party should not resort to dilatory tactics but seek their remedy promptly. It is held as follows:

"9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the

superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim interest republican up sit finis litium (it is for the general welfare that a period be put to litigation). Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jainv. Kuntal Kumari [AIR 1969 SC 575 : (1969) 1 SCR 1006] and State of W.B. v. Administrator, Howrah Municipality [(1972) 1 SCC 366 : AIR 1972 SC 749].

13. It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss."

16. In the case of **Lanka Venkateswarlu v. State of A.P. : (2011) 4 SCC 363** the Apex Court reiterated the view as take in the case of N. Balakrishnan (supra) and further held that once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant,

particularly when the delay is directly a result of negligence, default or inaction of that party and further that Justice must be done to both parties equally. It was held as follows:

"20. In N. Balakrishnan [(1998) 7 SCC 123] this Court again reiterated the principle that: (SCC p. 127, para 11)

"11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that [the] parties do not resort to dilatory tactics, but seek their remedy promptly."

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23. The concepts of liberal approach and reasonableness in exercise of the discretion by the courts in condoning delay, have been again stated by this Court in Balwant Singh [(2010) 8 SCC 685 : (2010) 3 SCC (Civ) 537] , as follows: (SCC p. 696, paras 25-26)

"25. We may state that even if the term 'sufficient cause' has to receive liberal construction, it must squarely fall within the concept of reasonable time and proper conduct of the party concerned. The purpose of introducing liberal construction normally is to introduce the concept of 'reasonableness' as it is understood in its general connotation.

26. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party to arise (sic a lis). These principles should be adhered to and applied appropriately depending on the facts and circumstances of a given case. Once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Justice must be done to both parties equally. Then alone the ends of justice can be achieved. If a party has been thoroughly negligent in implementing its rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to it in law as a result of his acting vigilantly."

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28. We are at a loss to fathom any logic or rationale, which could have impelled the High Court to condone the delay after holding the same to be unjustifiable. The concepts such as "liberal approach", "justice oriented approach", "substantial justice" cannot be employed to jettison the substantial law of limitation. Especially, in cases where the court concludes that there is no justification for the delay. In our opinion, the approach adopted by the High Court tends to show the absence of judicial balance and restraint, which a Judge is required to maintain whilst adjudicating any lis between the parties. We are rather pained to notice that in this case, not being satisfied with the use of mere intemperate language, the High Court resorted to blatant sarcasms.

29. The use of unduly strong intemperate or extravagant language in a judgment has been repeatedly disapproved by this Court in a number of cases. Whilst considering applications for condonation of delay under Section 5 of the Limitation Act, the courts do not enjoy unlimited and unbridled discretionary powers. All discretionary powers, especially judicial powers, have to be exercised within reasonable bounds, known to the law. The discretion has to be exercised in a systematic manner informed by reason. Whims or fancies; prejudices or

predilections cannot and should not form the basis of exercising discretionary powers."

17. In **Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai : (2012) 5 SCC 157** the Apex Court held that if the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay. It was held as follows:

"19. In P.K. Ramachandran v. State of Kerala [(1997) 7 SCC 556], this Court while reversing the order passed by the High Court which had condoned 565 days' delay in filing an appeal by the State against the decree of the Sub-Court in an arbitration application, observed that: (SCC p. 558, para 6)

"6. Law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds."

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23. What needs to be emphasised is that even though a liberal and justice-oriented approach is required to be adopted in the exercise of power under Section 5 of the Limitation Act and other similar statutes, the courts can neither become oblivious of the fact that the successful litigant has acquired certain rights on the basis of the judgment under challenge and a lot of time is consumed at various stages of litigation apart from the cost.

24. What colour the expression "sufficient cause" would get in the factual matrix of a given case would largely depend on bona fide nature of the explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bona fides, then it may condone the delay. If, on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

18. In **Basawaraj v. Land Acquisition Officer : (2013) 14 SCC 81** the Apex Court held that "sufficient cause" means that the party should not have acted in a negligent manner or there was a want of bonafide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". It was further held that the applicant must satisfy the court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow the application for condonation of delay, the court has to examine whether the mistake is bonafide or was merely a device to cover an ulterior purpose. It was held as under:

"9. Sufficient cause is the cause for which the defendant could not be blamed for his absence. The meaning of the word "sufficient" is "adequate" or "enough", inasmuch as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude, which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case, duly examined from the viewpoint of a reasonable standard of a cautious man. In this context, "sufficient cause" means that the party should not have acted in a

negligent manner or there was a want of bona fide on its part in view of the facts and circumstances of a case or it cannot be alleged that the party has "not acted diligently" or "remained inactive". However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously. The applicant must satisfy the court that he was prevented by any "sufficient cause" from prosecuting his case, and unless a satisfactory explanation is furnished, the court should not allow the application for condonation of delay. The court has to examine whether the mistake is bona fide or was merely a device to cover an ulterior purpose. (See Manindra Land and Building Corpn. Ltd. v. Bhutnath Banerjee [AIR 1964 SC 1336], Mata Din v. A. Narayanan [(1969) 2 SCC 770 : AIR 1970 SC 1953], Parimal v. Veena [(2011) 3 SCC 545 : (2011) 2 SCC (Civ) 1 : AIR 2011 SC 1150] and Maniben Devraj Shah v. Municipal Corpn. of Brihan Mumbai [(2012) 5 SCC 157 : (2012) 3 SCC (Civ) 24 : AIR 2012 SC 1629].)

10. In Arjun Singh v. Mohindra Kumar [AIR 1964 SC 993] this Court explained the difference between a "good cause" and a "sufficient cause" and observed that every "sufficient cause" is a good cause and vice versa. However, if any difference exists it can only be that the requirement of good cause is complied with on a lesser degree of proof than that of "sufficient cause".

11. The expression "sufficient cause" should be given a liberal interpretation to ensure that substantial justice is done, but onlyso long as negligence, inaction or lack of bona fides cannot be imputed to the party concerned, whether or not sufficient cause has been furnished, can be decided on the facts of a particular case and no straitjacket formula is possible. (Vide Madanlal v. Shyamlal [(2002) 1 SCC 535 : AIR 2002 SC 100] and Ram Nath Sao v. Gobardhan Sao [(2002) 3 SCC 195 : AIR 2002 SC 1201].)

12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. "A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation." The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim dura lex sed lex which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that, "inconvenience is not" a decisive factor to be considered while interpreting a statute.

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15. The law on the issue can be summarised to the effect that where a case has been presented in the court beyond limitation, the applicant has to explain the court as to what was the "sufficient cause" which means an adequate and enough reason which prevented him to approach the court within limitation. In case a party is found to be negligent, or for want of bona fide on his part in the facts and circumstances of the case, or found to have not acted diligently or remained inactive, there cannot be a justified ground to condone the delay. No court could be justified in condoning such an inordinate delay by imposing any condition whatsoever. The application is to be decided only within the parameters laid

down by this Court in regard to the condonation of delay. In case there was no sufficient cause to prevent a litigant to approach the court on time condoning the delay without any justification, putting any condition whatsoever, amounts to passing an order in violation of the statutory provisions and it tantamounts to showing utter disregard to the legislature."

19. Further in **Majji Sannemma v. Reddy Sridevi : (2021) 18 SCC 384** the Apex Court while referring to its various judgments has held that that in the absence of reasonable, satisfactory or even appropriate explanation for seeking condonation of delay, the same is not to be condoned lightly. It has been held as follows:

"6.2. We have gone through the averments in the application for the condonation of delay. There is no sufficient explanation for the period from 15-3-2017 till the second appeal was preferred in the year 2021. In the application seeking condonation of delay it was stated that she is aged 45 years and was looking after the entire litigation and that she was suffering from health issues and she had fallen sick from 1-1-2017 to 15-3-2017 and she was advised to take bed rest for the said period. However, there is no explanation for the period after 15-3-2017. Thus, the period of delay from 15-3-2017 till the second appeal was filed in the year 2021 has not at all been explained. Therefore, the High Court has not exercised the discretion judiciously.

7. At this stage, a few decisions of this Court on delay in filing the appeal are referred to and considered as under:

7.1. In Ramlal [Ramlal v. Rewa Coalfields Ltd., 1961 SCC OnLine SC 39 : (1962) 2 SCR 762 : AIR 1962 SC 361] , it is observed and held as under : (AIR pp. 363-64, para 7)

"7. In construing Section 5 it is relevant to bear in mind two important considerations. The first consideration is that the expiration of the period of limitation prescribed for making an appeal gives rise to a right in favour of the decree-holder to treat the decree as binding between the parties. In other words, when the period of limitation prescribed has expired the decree-holder has obtained a benefit under the law of limitation to treat the decree as beyond challenge, and this legal right which has accrued to the decree-holder by lapse of time should not be light-heartedly disturbed. The other consideration which cannot be ignored is that if sufficient cause for excusing delay is shown discretion is given to the court to condone delay and admit the appeal. This discretion has been deliberately conferred on the court in order that judicial power and discretion in that behalf should be exercised to advance substantial justice. As has been observed by the Madras High Court in Krishna v. Chathappan [Krishna v. Chathappan, 1889 SCC OnLine Mad 1] : (SCC OnLine Mad para 2)

'2. ... Section 5 gives the Court a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; the words "sufficient cause" receiving a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fides is imputable to the appellant.' "

7.2. In P.K. Ramachandran [P.K. Ramachandran v. State of Kerala, (1997) 7 SCC 556], while refusing to condone the delay of 565 days, it is observed that in the absence of reasonable, satisfactory or even appropriate explanation for seeking condonation of delay, the same is not to be condoned lightly. It is further observed that the law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes and the courts have no power to extend the period of limitation on equitable grounds. It is further observed that while

exercising discretion for condoning the delay, the court has to exercise discretion judiciously.

7.3. In Pundlik Jalam Patil [Pundlik Jalam Patil v. Jalgaon Medium Project, (2008) 17 SCC 448 : (2009) 5 SCC (Civ) 907], it is observed as under : (SCC p. 450)

"... the laws of limitation are founded on public policy. Statutes of limitation are sometimes described as "statutes of peace". An unlimited and perpetual threat of limitation creates insecurity and uncertainty; some kind of limitation is essential for public order. The principle is based on the maxim "interest reipublicae ut sit finis litium", that is, the interest of the State requires that there should be end to litigation but at the same time laws of limitation are a means to ensure private justice suppressing fraud and perjury, quickening diligence and preventing oppression. The object for fixing time-limit for litigation is based on public policy fixing a lifespan for legal remedy for the purpose of general welfare. They are meant to see that the parties do not resort to dilatory tactics but avail their legal remedies promptly. Salmond in his Jurisprudence states that the laws come to the assistance of the vigilant and not of the sleepy."

7.4. In Basawaraj [Basawaraj v. LAO, (2013) 14 SCC 81], it is observed and held by this Court that the discretion to condone the delay has to be exercised judiciously based on facts and circumstances of each case. It is further observed that the expression "sufficient cause" cannot be liberally interpreted if negligence, inaction or lack of bona fides is attributed to the party. It is further observed that even though limitation may harshly affect rights of a party but it has to be applied with all its rigour when prescribed by statute. It is further observed that in case a party has acted with negligence, lack of bona fides or there is inaction then there cannot be any justified ground for condoning the delay even by imposing conditions. It is observed that each application for condonation of delay has to be decided within the framework laid down by this Court. It is further observed that if courts start condoning delay where no sufficient cause is made out by imposing conditions then that would amount to violation of statutory principles and showing utter disregard to legislature.

7.5. In Pundlik Jalam Patil [Pundlik Jalam Patil v. Jalgaon Medium Project, (2008) 17 SCC 448 : (2009) 5 SCC (Civ) 907], it is observed by this Court that the court cannot enquire into belated and stale claims on the ground of equity. Delay defeats equity. The courts help those who are vigilant and "do not slumber over their rights".

8. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and considering the averments in the application for condonation of delay, we are of the opinion that as such no explanation much less a sufficient or a satisfactory explanation had been offered by Respondents 1 and 2 herein—appellants before the High Court for condonation of huge delay of 1011 days in preferring the second appeal. The High Court is not at all justified in exercising its discretion to condone such a huge delay. The High Court has not exercised the discretion judiciously. The reasoning given by the High Court while condoning huge delay of 1011 days is not germane. Therefore, the High Court has erred in condoning the huge delay of 1011 days in preferring the appeal by Respondents 1 and 2 herein—original defendants. Impugned

order [Reddy Sridevi v. Majji Sannemma, 2021 SCC OnLine AP 3977] passed by the High Court is unsustainable both, on law as well as on facts."

20. Then in the case of **Sheo Raj Singh v. Union of India : (2023) 10 SCC 531** the Apex Court has held that there is a distinction between "explanation" and "excuse" and held that care must be taken to distinguish them and each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. It was held as under:

"31. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases, delay of long periods can be condoned if the explanation is satisfactory and acceptable. Of course, the courts must distinguish between an "explanation" and an "excuse". An "explanation" is designed to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault. Care must, however, be taken to distinguish an "explanation" from an "excuse". Although people tend to see "explanation" and "excuse" as the same thing and struggle to find out the difference between the two, there is a distinction which, though fine, is real.

32. An "excuse" is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an "excuse" would imply that the explanation proffered is believed not to be true. Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. At this stage, we cannot but lament that it is only excuses, and not explanations, that are more often accepted for condonation of long delays to safeguard public interest from those hidden forces whose sole agenda is to ensure that a meritorious claim does not reach the higher courts for adjudication."

21. Even otherwise by deciding the application for delay condonation and not entering into the merits of the matter would not in any manner prejudice the revisionist. The law on the grievance of the revisionist is also well settled. In the case of **Aleque Padamsee Vs. Union of India : 2007 (6) SCC 171** it has been held by the Apex Court that the correct position in law is that the police officials ought to register the FIR whenever facts brought to their notice show that cognizable offence has been made out but in case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code of Criminal Procedure. It has been held as follows:

"7. Whenever any information is received by the police about the alleged commission of offence which is a cognizable one there is a duty to register the FIR. There can be no dispute on that score. The only question is whether a writ can be issued to the police authorities to register the same. The basic question is as to what course is to be adopted if the police does not do it. As was held in All India Institute of Medical Sciences case [(1996) 11 SCC 582 : 1997 SCC (Cri) 303] and

reiterated in Gangadhar case [(2004) 7 SCC 768 : 2005 SCC (Cri) 404] the remedy available is as set out above by filing a complaint before the Magistrate. Though it was faintly suggested that there was conflict in the views in All India Institute of Medical Sciences case [(1996) 11 SCC 582 : 1997 SCC (Cri) 303], Gangadhar case [(2004) 7 SCC 768 : 2005 SCC (Cri) 404], Hari Singh case [(2006) 5 SCC 733 : (2006) 3 SCC (Cri) 63], Minu Kumari case [(2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310] and Ramesh Kumari case [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678 : AIR 2006 SC 1322], we find that the view expressed in Ramesh Kumari case [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678 : AIR 2006 SC 1322] related to the action required to be taken by the police when any cognizable offence is brought to its notice. In Ramesh Kumari case [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678 : AIR 2006 SC 1322] the basic issue did not relate to the methodology to be adopted which was expressly dealt with in All India Institute of Medical Sciences case [(1996) 11 SCC 582 : 1997 SCC (Cri) 303], Gangadhar case [(2004) 7 SCC 768 : 2005 SCC (Cri) 404], Minu Kumari case [(2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310] and Hari Singh case [(2006) 5 SCC 733 : (2006) 3 SCC (Cri) 63]. The view expressed in Ramesh Kumari case [(2006) 2 SCC 677 : (2006) 1 SCC (Cri) 678 : AIR 2006 SC 1322] was reiterated in Lallan Chaudhary v. State of Bihar [(2006) 12 SCC 229 : (2007) 1 SCC (Cri) 684 : AIR 2006 SC 3376]. The course available, when the police does not carry out the statutory requirements under Section 154 was directly in issue in All India Institute of Medical Sciences case [(1996) 11 SCC 582 : 1997 SCC (Cri) 303], Gangadhar case [(2004) 7 SCC 768 : 2005 SCC (Cri) 404], Hari Singh case [(2006) 5 SCC 733 : (2006) 3 SCC (Cri) 63] and Minu Kumari case [(2006) 4 SCC 359 : (2006) 2 SCC (Cri) 310]. The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to their notice show that cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code. It appears that in the present case initially the case was tagged by order dated 24-2-2003 with WP (C) No. 530 of 2002 and WP (C) No. 221 of 2002. Subsequently, these writ petitions were delinked from the aforesaid writ petitions."

(emphasis supplied)

22. The revisionist claims himself to be in the field of social service as pleaded by him in his application filed under Section 156(3) Cr.P.C. which is annexure 3 to the affidavit in support of the revision. In para 1 he claims himself to be a social worker and an R.T.I. Activist and as such he cannot be found as a person to be casual, non-serious and non-vigilant. He also cannot be taken to be a rustic and an ignorant villager. There is no ground taken in the application for condonation of delay and the affidavit in support of it to show that there has been seriousness by the revisionist in perusing the matter. The averments in the affidavit in support of the application for condonation of delay are vague and unsubstantiated submissions. The revisionist has failed even remotely to demonstrate sufficient cause for condonation of delay. Although the length of the delay has never been a consideration before the Courts for deciding an application for condonation of delay provided there has been proper, efficient and substantiated grounds mentioned therein which could have stood

uncontroverted. Although the grounds to allow the application for delay condonation to advance substantial justice could have been considered but looking to the history of the issue and dispute being the filing of an application under Section 482 Cr.P.C. before this Court challenging the order impugned, getting it withdrawn for seeking appropriate remedy as per law, then the filing of the present revision that too with a delay and conveniently avoiding the disclosure of the date on which the order impugned was applied for, for being filed with the memo in the revision before this Court along with the fact that there has been unsubstantiated submissions as reasons for delay in filing of the revision it does not show any seriousness in persuasion of the matter.

23. This Court views the applicant to be casual, non-serious and non-vigilant in preferring the present revision.

24. Thus looking to the entire facts as stated above and the law as culled out along with fact of non-prejudice, this Court is of the opinion that the application for condonation of delay is without any cogent reason, convincing justification and substantiated material and as such is not inclined to condone the delay.

25. The Criminal Misc. Delay Condonation Application No. 1 of 2023 dated 11.04.2023 is ***dismissed.***

26. Since the misc. application for condonation of delay is dismissed, the revision also would not survive and is also consigned to records.

(2024) 2 ILRA 1472
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.05.2023

BEFORE

THE HON'BLE JYOTSNA SHARMA, J.

Crl. Revision No. 1058 of 2023

Raghunath ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Rahul Singh Dahiya

Counsel for the Respondents:
G.A., Sri Chandra Kumar Singh

Criminal Law - Indian Penal Code, 1860 - Sections 307 & 504 - Code of Criminal Procedure, 1973 - Sections 227 & 319 - F.I.R. lodged by informant against accused and co-accused, alleging that owing to prior enmity, both abused his son, when his objected, co-accused fired at him with pistol, causing gunshot injury at back of his neck - Victim was medically examined where firearm entry wound confirmed - Investigation culminated in charge sheet against co-accused alone - During trial, after examination of two witnesses, application u/s 319 Cr.P.C. was allowed, summoning accused - Criminal Revision against summoning order dismissed by High Court - Discharge application rejected by trial court - Impugned order - Held, revisionist contends that prosecution witnesses deposed falsely - It is settled law that at this stage, evidence cannot be meticulously scrutinized, nor can categorical finding on its credibility be recorded - Such determination is permissible only upon evaluation of entire material and evidence produced by prosecution at trial - Opportunity of hearing afforded to accused person u/s

227 Cr.P.C. is limited to consideration of prosecution material alone - Credibility of evidence by witnesses to be tested in cross-examination - No illegality in impugned order. (Para 3, 9, 10)

Revision dismissed. (E-13)

List of Cases cited:-

1. St. of Raj. Vs Ashok Kumar Kashyap, 2021 SCC Online 314 (SC)

2. St. by Karnataka Lokayukta Vs M. R. Hiremath, (2019) 7 SCC 515

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

1. Sri Rahul Singh Dahiya, learned counsel for the revisionist, Sri Chandra Kumar Singh, learned counsel for the opposite party no.2 and learned A.G.A. for the State are present.

2. This criminal revision has been filed challenging the order dated 13.02.2023 passed by Additional Sessions Judge, Court No.6, Bulandshahar in S.T. No.814 of 2021 (State vs. Arun), whereby the application under section 227 of Cr.P.C. of the revisionist has been rejected.

3. Relevant facts emerging from the record are as below:-

(I) The first informant- Rajveer filed an F.I.R. naming two persons Arun and Raghunath with the allegations that owing to old enmity, both of them began using abusive words against his son Dheeraj; when Dheeraj protested, Arun whipped out his pistol and shot at him; the shot hit at the back of his neck; he was referred to District Hospital, Meerut;

(II) The matter was investigated upon; the injured was examined at District Hospital, Bulandshahar; a fire arm wound of entry was found behind his neck; the statement of witnesses were recorded and thereafter one of the named accused persons Arun was charge-sheeted;

(III) The Sessions Trial against him proceeded and two witnesses were examined by the court concerned; an application under section 319 Cr.P.C. was moved for summoning Raghunath as accused; the Court passed an order dated 02.07.2022 summoning him to face trial under sections- 307 and 504 I.P.C.;

(IV) Challenging the above summoning order, a Criminal Revision No.3018 of 2022 was filed by Raghunath, which was dismissed by order dated 21.11.2022 by the High Court;

(V) Thereafter, discharge application on behalf of Raghunath Singh was moved before the trial court on 13.02.2023; the trial court dismissed the same by order dated 13.02.2023, which is now under challenge before this Court.

4. Following grounds have been taken by the revisionist to assail the impugned order:-

It was the revisionist- Raghunath, who brought injured Dheeraj for treatment at District Hospital, Bulandshahar.

The injured sustained only one fire arm injury.

Eye-witness Deepanshu has stated that the shot was fired upon by co-accused Arun and that the present revisionist was not present at the spot.

Certain witnesses have given notarized affidavit during the course of investigation confirming absence of revisionist on the spot, at the time of occurrence.

The Investigating Officer did not find sufficient evidence against him, therefore he did not charge-sheet him.
During the course of investigation, an inquiry was conducted by Additional Superintendent of Police and he found that revisionist- Raghunath was not involved in the instant incident.
The evidence given by P.W.1 is false.
The revision filed by him challenging the order passed under section 319 Cr.P.C. was not disposed of on merit. Hence that order cannot be considered as estopping the revisionist from raising the objections against framing of charge.
The impugned order is cryptic, non-speaking, illegal and arbitrary.

5. Heard both the sides and perused the material on record.

6. One of the forceful contentions of the revisionist is that the dismissal of his criminal revision by the High Court filed against order passed under section 319 Cr.P.C., cannot be treated as an obstacle for considering his discharge application on merit for the reason that it was not considered on merit. Besides raising above point, it is argued that there are several facts, which should have been considered by the trial court as they point out towards the innocence of the revisionist. It is argued that the fact that it was the revisionist himself who brought the injured in the hospital and that several witnesses gave evidence during the course of investigation as well that he was not present on the spot at the time of occurrence should have been given importance but these facts were completely ignored by the trial court.

7. As far as the scope of Section- 227 Cr.P.C. is concerned, the Supreme Court in **State of Rajasthan vs. Ashok Kumar Kashyap, 2021 SCC Online 314 (SC)** held that:-

"At the stage of framing of the charge, it has to be seen whether or not a prima facie case is made out and the defence of the accused is not to be considered."

8. In another case, the Supreme Court in **State by Karnataka Lokayukta vs. M. R. Hiremath, (2019) 7 SCC 515**, has held that:-

"It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence."

9. At this juncture, it may be noted that the revisionist-accused has been summoned by the trial court by exercise of powers under section- 319 Cr.P.C. and that the order has become final as it remains unchallenged. It will create a anomalous situation, if court is allowed to give a finding, though there were sufficient material to take cognizance against an accused person under section 319 Cr.P.C., but there is no sufficient ground to frame charge against him. This legal position is also noteworthy that at this stage the Court is not allowed to consider any extraneous material, which is not already part of record. In other words, it is not permissible for the Court to consider the defence of the accused. He cannot bring any evidence in his defence though it is perfectly within his

rights to point out the deficiencies, flaws or infirmities in the prosecution case. In this view of the matter, the Court has to act in a narrow purview. The revisionist-Raghunath has specifically mentioned that the witnesses of fact have given false evidence; this is a settled position of law that the evidence on record cannot be evaluated in a meticulous manner at this stage; this is not the stage to give a categorical finding that evidence given by the witnesses is not worthy of credit; any such determination can only take place on the basis of evaluation of all the material and evidence produced by the prosecution during the proceeding of trial; The questions which have been raised by the revisionist shall assume importance at the appropriate stage of the trial i.e. at the time of conclusion thereof.

10. In my view, the opportunity of hearing afforded to the accused person under the provisions of Section 227 should be understood in a narrow compass in as much the points raised by him must be decided on the basis of the record/material produced by the prosecution and nothing more; As far as the credibility or the reliability of the evidence given by the witness is concerned, it can only be tested by putting those witnesses through cross-examination and thereafter sifting the evidence through the judicial lens; In the light of above discussion, I do not find any irregularity, impropriety or illegality in the order so as to prompt this court to interfere or to exercise its powers under Section 397 Cr.P.C.

11. Accordingly, this criminal revision is **dismissed**.

(2024) 2 ILRA 1475
REVISIONAL JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 21.12.2022

BEFORE

THE HON'BLE JYOTSNA SHARMA, J.

Crl. Revision No. 1506 of 2022

Juvenile X ...Revisionist
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Revisionist:
Sri Arvind Kumar Mishra

Counsel for the Respondent:
G.A., Sri Ashok Kumar Rai

Criminal Law - Indian Penal Code, 1860 - Sections 363, 366, 376, 342 & 506 - POCSO Act, 2012 - Section ¾ - SC/ST Act, 1989 - Section 3(2)5 - Juvenile Justice Act, 2015 - Section 15 - FIR lodged against juvenile and charge-sheet submitted under aforesaid Sections - On application, he was declared "child in conflict with law" on basis of his recorded date of birth (19.04.2002 / 01.07.2003), both showing him below 18 years, case was transmitted to J.J.Board - Informant thereafter sought inquiry u/s 15 JJ Act, as juvenile was above 16 years - J.J.Board ordered inquiry, further affirmed in appeal - Impugned order - Challenged on ground that Principal of institution proved date of birth showing age 15 years 9 months; thus, no provision to apply section of JJ Act, inquiry was illegal and legality of initiating inquiry under JJ Act after expiry of prescribed period - Held, mother of juvenile, on oath, St.d his date of birth as 16.04.2002, which remained unshaken in cross-examination - Admission in primary school made by grandmother, no authentic document produced at that time, recorded date of 01.07.2003 based on estimation by guardian - No evidence shown to prefer primary school record over date of birth corroborated by mother's St.ment and high school

certificate - Courts below rightly relied on latter, corroborated by entry in High School papers - Though Section 14(3) is couched in mandatory terms, it cannot be interpreted to defeat statute's object - Inquiries u/s 15, 17, or 18 must reach their logical conclusion; hence, plea that inquiry beyond period prescribed in Section 15 is barred is untenable. (Para 3, 6, 7, 10)

Revision dismissed. (E-13)

List of Cases cited:

1. Barun Chandra Thakur Vs Master Bholu & anr., Criminal Appeal No. 950 of 2022 decided on 13.07.2022

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

1. Heard Sri Arvind Kumar Mishra, learned counsel for the revisionist, Sri Ashok Kumar Rai, learned counsel for the respondent no. 2 and Sri O.P. Mishra, learned AGA for the State.

2. This Criminal Revision has been filed on behalf of the revisionist through his mother challenging the impugned orders dated 10.01.2022 passed by learned Additional Session Judge/Special Judge (POCSO Act), Court No. 1, Gorakhpur in Criminal Appeal No. 62 of 2021 as well as impugned order dated 04.03.2021 passed by Juvenile Justice Board, Gorakhpur in Case Crime No. 147 of 2019, under Sections 363, 366, 376, 342, 506 IPC, Section 3/4 of POCSO Act and Section 3(2)5 of SC/ST Act, Police Station-Barahalganj, District Gorakhpur by which a preliminary assessment inquiry was ordered to be conducted and that order was affirmed by the appellate court.

3. The relevant facts giving rise to this revision are as below:

An FIR, Case Crime No. 0147 of 2019 under Sections 366 and 342 IPC, was registered against the juvenile and after investigation, chargesheet was submitted under Sections 363, 366, 376, 342, 506 IPC, Section 3/4 of POCSO Act and Section 3(2)5 of SC/ST Act; an application was moved before the court concerned Special Judge (POCSO Act) to declare him "child in conflict with law' stating therein that his recorded date of birth was 19.04.2002, therefore, he was merely 16 years 11 months and 15 days on the date of occurrence; his mother and another witness Ajay Kumar of Surya Bal Vidya Mandir, Gorakhpur were examined; the court noticed the fact that in the marksheet of high school, his date of birth was shown as 19.04.2002; other witness who too was examined on behalf of the juvenile deposed that as per the record of this school, his date of birth was 01.07.2003; the court gave an opinion that in both the contingencies, the applicant was below 18 years, therefore, he was declared a "child in conflict with law' and the file was transmitted to the Juvenile Justice Board by order dated 20.10.2020; an application by the informant was, thereafter, moved before the Juvenile Justice Board submitting that the juvenile was admittedly above 16 years of age, hence, an inquiry under Section 15 of the Juvenile Justice Act was incumbent to be conducted. The Juvenile Justice Board ordered for enquiry on 04.03.2021 and that order was affirmed in appeal on 10.01.2022. This revision has been filed challenging the aforesaid orders.

4. Both the sides were heard and perused the papers.

5. When the question of applicability of Section-15 of the Juvenile Justice Act, 2015 was raised, the Juvenile Justice Board

had to deal with his two dates of birth. Firstly, 19.04.2002 as shown in his high school marksheet. Secondly, 01.07.2003 as shown in the papers of the school first attended by him. The Juvenile Justice Board was of the opinion that the date of birth as given in high school certificate was reliable and thus he was adjudged as above 16 years of age. Consequently, an order for conducting preliminary assessment under Section 15 of the Juvenile Justice Act, 2015 was passed on 04.03.2021. In the appeal filed on behalf of the minor, the appellate court was of the view that the genuineness of the high school marksheet was verified by the concerned police station and that his mother also stated that his date of birth was 19.04.2002, hence, that date of birth should be relied upon.

6. The impugned orders have been challenged specifically on two grounds.

Firstly, that the Principal of the institution which he attended first, was examined and he proved his date of birth, on the basis whereof his age came merely 15 years 9 months, hence, there was no reason to apply provisions of Section-15 of the Juvenile Justice Act, 2015 and conduct a preliminary assessment; therefore, the order for inquiry is illegal and void.

Secondly, as the provisions of law required that preliminary assessment must be carried out within 3 months of first production of a "child in conflict with law' before the court and in case this inquiry is conducted now, naturally the results will be very different, as he has attained sufficient maturity by now. Any such inquiry at this stage is bound to create prejudice against him. Therefore, the impugned orders are liable to be set aside.

7. I went through the papers on record which include the copy of the statement given by mother of the juvenile. It may be conspicuously noted that his mother stated on oath that his correct date of birth is 16.04.2002. Nothing came in her cross examination to raise any suspicion on her statement. She fairly admitted that it was his grandmother who went for his admission in primary school and that neither she (mother) nor his father went for his admission. She has declined the suggestion that his date of birth was recorded on the basis of guessestimate. The statement of clerk from primary school where he admittedly studied in Class 1st onwards is on record. He has stated that in the papers of that school, his date of birth was mentioned as 01.07.2003 as told by his guardian and on the basis of how old he looked. Admittedly, no birth certificate or any other paper was produced before the school at the time of his admission in Class 1st. No reliable evidence or reasons have been unveiled before me by revisionist to place reliance on this particular date of birth. No grounds have been avowed before me to justify giving precedence to date of birth recorded in papers of his primary school over date of birth in other documents. In such circumstances, the courts below cannot be faulted for relying on date of birth given by his mother in her statement on oath and further corroborated by the entry of date of birth in High School papers.

8. Second contention relates to legality of initiating the inquiry under Section 15 of the J.J. Act after lapse of prescribed time period. It shall be useful to reproduce the relevant provisions of Section-15 of the Juvenile Justice Act, 2015 which is as below:-

"(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the

consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation.--For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14."

Section 14(3) of the Juvenile Justice Act, 2015 provides that a preliminary assessment in case of heinous offences under Section 15 shall be disposed of by the Board **within a period of three months from the date of first production of the child before the Board.**

9. The contention of the revisionist, on the basis of the above provisions of law is that as a mandatory provision has been given as aforesaid providing for conduct of inquiry within the period of three months, hence, no inquiry may proceed after lapse of above time period. In my opinion, the language of the above provision, undoubtedly fixes an outer limit for conduct of inquiry and is worded in a mandatory language, however, it is nowhere provided in the Act that in case for some reason, the inquiry could not proceed or concluded within that period what can be the consequences thereof. It is nowhere provided that in such an eventuality, the proceeding shall stand vitiated or that in such case the juvenile shall be tried as one below 16 years of age.

10. In my view, the provisions lays stress on the fact that as far as possible the inquiry under Section 15 of the Juvenile Justice Act, 2015 shall be conducted within the above time period. This time period, in my view has been fixed by the legislature keeping in mind the whole of the scheme of the Juvenile Justice Act, 2015, through which a broader vision towards the juveniles or child in conflict with law runs. It may also be noted that Section 14(2) of the J.J. Act, 2015, carrying forward the same spirit, fixes an outer limit for completion of inquiry. Similarly time periods have been fixed for inquiries under Sections 17 and 18 of the J.J. Act, 2015 but it is nowhere provided that in case such a time limit could not be adhered, the proceedings against the juvenile shall be dropped. In my view, the language of Section 14(3), though couched in a mandatory manner, cannot be construed in a way so as to thwart or defeat the very purpose of the statute. The inquiry whether under Sections 15, 17 or 18 of the Act, have to reach to their logical ends, hence, the arguments that inquiry cannot be conducted beyond the statutory time period fixed under Section 15 has no legs to stand.

11. The second question arises is how the court shall have to proceed in case the inquiry under Section 15 is being conducted after a lapse of prescribed time period or even longer. It appeals to reason

that when there is a long gap probably the juvenile may have attained sufficient maturity. It may be noted that in ***Barun Chandra Thakur vs Master Bholu and Another in Criminal Appeal No. 950 of 2022*** decided on 13.07.2022 , the Apex Court has directed that when a preliminary assessment under Section 15 of the J.J. Act, 2015 is undertaken, assistance of expert psychologist/psychiatrist, psycho social workers or other experts has to be taken mandatorily. In my view, experts are the persons, who, while examining the juvenile for the purpose of preliminary assessment, can take care of the fact that they have a juvenile before them, who has added certain months or years to his mental age by lapse of time. No doubt the appellate Court/Juvenile Justice Board has to tread very carefully where such an eventuality has arisen but it may never be taken to mean that the preliminary assessment is a step which can be skipped over by the Juvenile Justice Board.

11. In view of the above, no interference is required in the order, hence, it is **dismissed**.

(2024) 2 ILRA 1479
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2024

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Crl. Revision No. 2098 of 2021

Priyanka Mall @ Mahima ...Revisionist
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Revisionist:
Sri Rahul Singh Dahiya

Counsel for the Respondents:
G.A., Sri Chandra Kumar Singh

Criminal Law - Indian Penal Code, 1860 - Section 364 - Code of Criminal Procedure, 1973 - Section 319 - Against summoning order - Motive has been attributed to respondent no. 4 that he got sale deed executed in favour of his wife through father of victim, of his property, which was fraudulent transaction and victim and many co-villagers alongwith Gram Pradhan visited office of SDM to lay their protest - Victim allured by accused persons for being ride on their motorcycle to travel for journey to her village - She was taken to other route and perpetrators said that they were bribed by her uncle to kill her, she got herself rescued anyhow and one of kidnappers chased and caught by villagers - She St.d in FIR regarding presence of PW-2 and PW-3 at time of her kidnapping - Only evidence laid against respondent no. 4 is that perpetrators of offence told victim in course of her kidnapping that they were bribed by her uncle to kill her - Allegation of conspiracy against respondent no.4 rests on alleged extra-judicial confession of co-accused to victim during her kidnapping - P.W.2 and P.W.3 did not depose to any extra-judicial confession by accused implicating respondent no.4, they only St.d having heard that co-accused claimed to be bribed by him to kill victim - Trial court rightly rejected application u/s 319 Cr.P.C., as parameters given in Hardeep Singh (infra) not fulfilled, no cogent evidence exists against respondent no.4 - Thus, revision lacks merit, dismissed. (Para 14, 15, 20)

Revision dismissed. (E-13)

<u>List of Cases cited:</u>

1. Shiv Prakash Mishra Vs St. of UP, 2019(4) CCSC 1974(SC), (Paras 9 to 11)

2. Hardeep Singh Vs St. of Punj. (2014) 3 SCC 92, **(Relied on)**

3. Brijendra Singh Vs St. of Raj., (2017) 7 SCC 706, **(Relied on)**

4. Subramanya Vs St. of Karnataka, 2022 Live Law (SC) 88

5. Jitendra Mishra Vs St. of U.P., (2023) 7 SCC 344

6. Priyanka Mishra Vs St. of U.P., 2023 (SCC online) SC 978

7. Moorthy Vs St. of Tamilnadu, Criminal Appeal No. 975 of 2011, dated 18.8.2023

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

1. Heard learned counsel for the revisionist, learned counsel for respondent no. 2 and learned AGA for the State.

2. By means of instant criminal revision, revisionist has assailed the impugned order dated 10.8.2021 passed by learned Additional District and Sessions Judge, Fast Track Court No. 1, Deoria by which the learned Judge has dismissed the application 131 Kha under section 319 Cr.P.C. in Session Trial No. 134 of 2018 (State vs. Ramkeshwar and others), under Section 364 IPC for summoning the respondent no. 4, Satendra @ Santosh Mall as conspirator to face trial with the accused, respondent nos. 2 and 3, who are already facing trail.

3. Factual matrix of the case in brief is that the informant/ revisionist lodged F.I.R. at P.S. Kotwali on 2.10.2012 at 6:25 hours stating therein that she is resident of village Parwa Tarwa (Parsia Mall), P.S. Kotwali, Deoria. Her uncle Santosh Mall @ Satendra Mall has got executed a fraudulent sale deed of property of her father in the name of his wife. She had gone to the court of SDM, Deoria in connection with that sale deed and after getting her statement recorded, she came to Kotwali. Her father went to Tehsil from there and she left for her village. When she reached near overbridge, her co-villagers Ramkeshwar Chauhan and Sambha Bhartiya offered her lift on their motorcycle and assured her that they will leave her at her village. As they were also going on same route, she sat at pillion of the motorcycle on their request. However, she noticed on the way that instead of taking her towards village, they were going to Kasaya road and when she asked as to why they had changed the route, they stated that they were taking her away from the village as her uncle has given money to them for her murder. They stopped the motorcycle near Ranchhor Kuti and consumed liquor. She anyhow get herself rescued from the clutches and run towards her village by shouting for help whereupon Gram Pradhan and other persons assembled there and caught one accused and other succeeded to escape from the place. FIR was lodged against Ramkeshwar and Sambha Bhartiya.

4. The victim, in her statement under section 161 Cr.P.C., has stated that Ramkeshwar was caught by the public at around 7:30 pm on 1.10.2012 but Sambha Bhartiya escaped from the place. IO also recorded statement of Durgesh Mall, constable Omkar Nath Tiwari and other witnesses during investigation. This fact surfaced during investigation that Ashok Mall, father of the victim is two brothers. The other is Satendra @ Santosh Mall, the proposed accused Santosh Mall got disputed sale deed executed in the name of his wife Savita which was strongly opposed by the victim and her family and they had gone to the court of SDM on the day of incident to get their statement recorded alongwith number of co-villagers in protest

of this act of respondent no. 4. The victim was abducted on the way by the co-accused who are already facing trial. The allegations against the respondent no. 4 are that he conspired with named co-accused persons to get the victim abducted who was to be killed subsequently but she got narrow escaped from the clutches of perpetrators of crime.

5. On commencement of trial, evidence of PW-1 Priyanka Mall, PW-2 Durgesh, PW-3 Tribhuvan was recorded who supported the FIR version in their testimony. The informant moved an application under section 319 Cr.P.C. before the trial court to summon Satendra @ Santosh Mall to face trial together with accused Ramkeshwar and Sambha who are already facing trial in the case. He has been attributed role of chief conspirator in the offence.

6. Learned court below dismissed the application under section 319 Cr.P.C. with observations that proposed accused Satendra @ Santosh is not named in the FIR. No particulars are disclosed during evidence that who has conspired for kidnapping and murder of the informant alongwith co-accused persons and as to how she got rescued herself during course of evidence. It is also not clear that whether there is any evidence that any money (Supari) paid by the proposed accused to co-accused. The evidence required to summon the proposed accused in exercise of power under section 319 Cr.P.C. is not of such quality that it is of higher degree than that is required for framing of charge. The only fact with regard to uncle of the victim has emerged in the FIR that kidnappers had told the victim that her uncle has given money to kill her and same fact has been narrated by her in her statement as PW-1 during trial. No cogent evidence is found on record with regard to third person Satendra @ Santosh which could justify his summoning to face trial in exercise of power under section 319 Cr.P.C.

7. Learned trial court has dismissed the application under section 319 Cr.P.C. with above observations. Feeling aggrieved by the impugned order the victim / informant has filed present revision with prayer to set aside the impugned order and pass appropriate order in the case with regard to summoning of respondent no. 4.

8. Learned counsel for the revisionist pressing the ground taken in present revision submitted that uncle of victim has falsely executed the sale deed in favour of his wife on behalf of her father and for that reason she went to get her statement recorded before the SDM Deoria alongwith her mother and father and after giving her statement she left for her home. Two co-accused persons Ramkeshwar and Sambha met her on the way to her village and offered ride on their motorcycle and they also assured her to drop her at the village. However, they changed the route and when she asked the reasons for that they told her that her uncle has given money to kidnap and kill her. The victim has supported her FIR version in the statement under section 161 Cr.P.C. and statement recorded during trial. She has disclosed the name of her uncle in the statement under section 161 Cr.P.C. and further in statement recorded during trial as PW-1. The version of PW-1 is corroborated by the statement of PW-2 and PW-3 who has stated in their statement that they are co-villagers of the victim. PW-3 has stated that father of the victim is of feeble minded person and taking benefit of that the respondent no. 4 got sale deed executed in the name of his wife. The

victim and co-villagers had appeared before the SDM Deoria in protest of this act of respondent no. 4 who got sale deed of the land of father of victim executed by playing fraud. PW-2 and PW-3 left for the village after meeting SDM by riding motorcycle. They had seen that their co-villagers Ramkeshwar and Sambha were also riding motorcycle and going towards the village. They asked victim to take ride on their bike and assured her to drop her in the village but the subsequently she came to know that instead of taking village, she was taken to Ranchhor Kuti. The accused intended to kill her, however, she got herself rescued and one of them Ramkeshwar was arrested by the villagers and taken to police station where victim was also present.

9. Per contra, learned counsel for respondent no. 2 and learned AGA submitted that there is no cogent evidence on record which could form satisfaction of the court below to exercise of its power under section 319 Cr.P.C. to summon the respondent no. 4 as accused to face trial with respondent no. 2 and 3 who are already facing trial. The impugned order is prompted by reasoned and speaking order. There is no infirmity or illegality in the impugned order whereby learned trial court has dismissed the application under section 319 Cr.P.C. moved by the revisionist/ informant.

10. Learned counsel for respondent no. 2 further submitted that even no time of occurrence is mentioned in the FIR except the version of victim that co-accused had told her during course of kidnapping that they were bribed by her uncle to kill her. There is no independent evidence against the respondent no. 4. The disputed sale deed executed in favour of wife of respondent no. 4 has already been challenged by the parents of the victim before the civil court by instituting Civil Suit as OS No. 713 of 2012 (Ashok and another vs. Savita Devi) which is pending in the court of Civil Judge (SD) court no. 18, Deoria and competent court has to decide regarding as to whether the disputed sale deed is fraudulent. Ashok Kumar, father of the victim has assailed the sale deed and sought his cancellation by claiming him as feeble minded whereas in said civil suit itself he has filed an affidavit to the effect that he is healthy and seeks to prosecute the suit personally. There is no particulars of offer or payment of any money by respondent no. 4 to accused persons who are already facing trial as contract money to kill or kidnap the victim. There is enmity of litigation between respondent no. 4 and PW-3 Tribhuvan and he is being implicated in the case due to village party bandi.

11. The stand of the accused persons who are facing trial, is that they were implicated in the offence at the behest of Gram Pradhan Anil Mall who was having enmity with previous Pradhan Neelamber who is brother of present accused Sambha Bhartiya. Neelamber had also visited the office of SDM on the date of incident.

12. Learned court below while rejecting the application placed reliance on the judgement of Hon'ble Apex Court in **Shiv Prakash Mishra vs. State of UP, 2019(4) CCSC 1974(SC)**, wherein, Hon'ble Supreme Court placed reliance on its Constitution Bench judgement in **Hardeep Singh vs. State of Punjab (2014) 3 SCC 92 and Brijendra Singh vs. State of Rajasthan, (2017) 7 SCC 706** wherein it was held that power under Section 319 Cr.P.C. has to be exercised by the trial court sparingly, only on the existence of

compelling reasons. Provision of Section 319 Cr.P.C. is being reproduced as under:

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

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

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

(4) Where the Court proceeds against any person under Sub-Section (1) then—

1. the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

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

13. Hon'ble Apex Court in Shiv Prakash (supra) has held as under:-

"9. The standard of proof employed for summoning a person as an accused person under Section 319 Cr.P.C. is higher than the standard of proof employed for framing a charge against the accused person. The power under Section 319 Cr.P.C. should be exercised sparingly. As held in Kailash v. State of Rajasthan and another (2008) 14 SCC 51, "the power of summoning an additional accused under Section 319 Cr.P.C. should be exercised sparingly. The key words in Section are "it appears from the evidence"…."any person"…."has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under Section 319 Cr.P.C. would be used by the court."

10. As held by the Constitution Bench in Hardeep Singh (supra), the power under Section 319 Cr.P.C. is discretionary and is to be exercised sparingly which reads 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."

11. The above view was followed in Brijendra Singh as under:-

"13. In order to answer the question, some of the principles enunciated in Hardeep Singh case (2014) 3 SCC 92 may be recapitulated: ….. 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. In present case motive has been attributed to respondent no. 4 that he had got sale deed executed in favour of his wife through father of the victim, of his property, which was a fraudulent transaction and victim and many co-villagers alongwith Gram Pradhan Nilamber Singh had visited the office of SDM to lay their protest. The victim was allured by present accused persons for being ride on their motorcycle to travel for journey to her village. However, she was taken to other route and alleged perpetrators said that they were bribed by her uncle to kill her, however, she got herself rescued anyhow and one of the kidnappers was chased and caught by the villagers. She has nowhere stated in FIR regarding presence of PW-2 and PW-3 at the time of her kidnapping. The only evidence laid against respondent no. 4 is that perpetrators of offence had told the victim in course of her kidnapping that they were bribed by her uncle to kill her.

15. The allegation with regard to complicity of respondent no. 4 in present case as conspirator is based on alleged extra-judicial confession of co-accused persons before the victim during course of her kidnapping to the effect that they were bribed by her uncle to kill her. Motive has also been attributed to respondent no. 4 by the victim and witnesses as he had got a sale deed executed through father of the victim allegedly in a fraudulent manner, which was objected by the victim and her family members and a representation was made to this effect before the SDM. PW-2 and PW-3 have nowhere stated that accused persons had made any extra-judicial confession regarding their complicity in the offence or involvement of respondent no. 4 before them. They have only deposed before the court that they came to know that accused Ramkeshwar and Sambha had stated that they were bribed by respondent no. 4, Satendra @ Santosh to kill the victim.

16. Insofar as extra-judicial confession is concerned, it is treated a very weak piece of evidence and has to be

received with care and caution, it can be relied upon only when it is consistent, clear and convincing. To use extra- judicial confession as evidence, the court requires some materials independent or satisfactory corroboration. It should not suffer from any material discrepancy and inherent improbabilities. There has been consistent view of various High Courts in this regard that confession of co-accused could be used solely in a corroborative capacity and not itself a basis of conviction. Hon'ble Supreme Court in **Subramanya vs. State of Karnataka, 2022 Liv-law (SC) 88** recently held that extra-judicial confession of co-accused should not be reduced as substantive evidence. Confession of co-accused could be used only in respect of evidence and could not be made foundation of conviction.

17. Hon'ble Supreme Court in **Hardeep Singh (supra)** settled the legal position that crucial test, which must be implied while summoning a person as additional accused, in exercise of power under section 319 Cr.P.C., is to find out more than a prima facie case against the accused as exercised at the time of framing of charge but falls short of satisfaction to the effect that evidence if unrebutted would lead to conviction.

18. Above view has been reiterated by the Apex Court in **Jitendra Mishra vs. State of U.P., (2023) 7 SCC 344** as well as in **Priyanka Mishra vs. State of U.P., 2023 (SCC online) SC 978**. Section 30 of Evidence Act deals with confession of a co-accused, which provides as under:-

"Consideration of proved confession affecting person making it and others jointly under trial for same offence.—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."

19. On perusal of this provisions it appears that it is discretionary for the court to take into consideration the confession of co-accused while dealing with case of concerned person as well as against the person, who is maker of such confession. Therefore, it is mandatory for the court to take into consideration the confession of co-accused in every case. The provision is enabling in nature. In recent judgement Hon'ble Supreme Court in **Moorthy vs. State of Tamilnadu** in Criminal Appeal No. 975 of 2011 observed in its judgement dated 18.8.2023 as below:-

"Generally, it is a weak piece of evidence. However, a conviction can be sustained on the basis of extra judicial confession provided that the confession is proved to be voluntary and truthful. It should be free of any inducement. The evidentiary value of such confession also depends on the 1 (2011) 11 SCC 111 2 (2013) 12 SCC 383 3 2023 SCC OnLine SC 259 Crl.A.No.975 of 2011 person to whom it is made. Going by the natural course of human conduct, normally, a person would confide about a crime committed by him only with such a person in whom he has implicit faith. Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the Court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it is made. As a matter of rule, corroboration is not required. However, if an extra judicial

confession is corroborated by other evidence on record, it acquires more credibility.".

20. With foregoing discussion and considering the rival submissions of learned counsel for the parties as well as material on record including the impugned order, I find no infirmity or illegality in the impugned order passed by the court below while rejecting the application under section 319 Cr.P.C. moved by the revisionist to summon the respondent no.4 as accused to face trial together with accused, who are already facing trial. The parameters laid down by Hon'ble Supreme Court for invoking power under section 319 Cr.P.C. in Hardeep Singh (supra), is not fulfilled by facts of this case in respect of respondent no. 4. There is no cogent and strong evidence against the respondent no. 4 to invoke power under section 319 Cr.P.C. available to the trial court. There was no prima facie material and evidence for satisfaction of the court below that there was more than prima facie case as exercised at the time of framing of charge but short of satisfaction to the extent that evidence if goes unrebutted would lead to conviction. Revision devoid of merits and deserves to be dismissed.

21. Accordingly, the instant revision is dismissed with above observations.

(2024) 2 ILRA 1486
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.09.2022

BEFORE

THE HON'BLE JYOTSNA SHARMA, J.

Crl. Revision No. 2126 of 2021

Minor s/o Moolchand ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Adesh Kumar, Priyanka Sharma, Sri Avnish Kumar Srivastava

Counsel for the Respondent:
G.A., Sri Vivek Kumar Srivastava

Criminal Law - Indian Penal Code, 1860 - Section 302 - As per FIR, informant's son shot by revisionist (a minor) with country-made firearm near his college gate, leading to his death on the same day - FIR u/s 302 IPC lodged within five hours - During investigation, revisionist found to be about 13 years 6 months old, matter was placed before J.J.Board where order for determination of age passed - His bail application rejected, appeal also dismissed - Held, it was juvenile who came prepared and armed with country-made firearm and though he accompanied his brother, but it was he, who fired upon deceased, killing him almost instantaneously - Before commission of crime, he picked firearm from his own house indicating that incident was not committed at spur of moment, rather it was planned - This can also not be pushed aside that bail application and revision filed on behalf of minor through his grandfather and not by his mother or father - District Probation Officer reported that juvenile lacked proper family care and fell into bad company - It is doubtful that his grandfather alone can provide adequate care at his age of 13–14 years - Juvenile requires supervision, professional counseling and behavioral therapy - In view of facts and circumstances, revisionist not entitled to bail. (Para 3, 22, 23, 25)

Revision dismissed. (E-13)

List of Cases cited:

1. Amit Kumar Vs St. of U.P., Criminal Revision No. 2732 of 2010, decided on 14.09.2010

2. Kanchan Sonkar Vs St. of U.P., Criminal Revision No. 1266 of 2020, decided on 01.12.2020

3. Amit Vs St. of U.P., Criminal Revision No.1852 of 2015, decided on 16.03.2016

4. Prakash Vs St. of Raj., 2006 Cri.L.J.1373

5. Vijendra Kumar Mali Vs St. of U.P., 2003 (1) J.I.C. 103

6. Om Prakash Vs St. of Raj. & anr.; (2012) 5 SCC 201

7. Mangesh Rajbhar Vs St. of U.P. & anr.; 2018 (2) ACR 1941, (Paras 13, 25)

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

1. Heard Sri Adesh Kumar, learned counsel for the revisionist, Sri Vivek Kumar Srivastava, learned counsel for the opposite party no. 2 as well as Sri O.P. Mishra, learned AGA for the State and perused the record.

2. This criminal revision under Section 102 of the Juvenile Justice Act, 2015 has been filed on behalf of the minor 'X' S/o Moolchand through his natural guardian/grandfather Sri Ved Prakash S/o Late Desh Raz R/o Village- Akbarpur Shadat, Police Station Bahsuma, District- Meerut with the prayer to admit the minor to bail alongwith the prayer to set aside the order dated 07.07.2021 passed by the Juvenile Justice Board, Meerut and order dated 26.08.2021 passed by the Additional Sessions Judge/Special Judge, POCSO Act, Meerut in Criminal Appeal No. 52/2021 arising out of Case Crime No. 34 of 2021 under Section 302 IPC, Police Station- Bahsuma, District- Meerut by which the bail to the juvenile was declined.

3. As per the version of the FIR, the informant's son- Nitin had gone to his college on his bullet motorcycle to receive his report card. When he approached the gate of his college, he found the revisionist (minor) and his brother- Arjun standing there. He got engaged in some kind of conversation with them. Suddenly, the minor whipped out a country-made firearm and shot at Nitin. He was referred to Meerut Hospital, where he succumbed to his injuries and died. On the basis of the FIR lodged by deceased's father within less than 5 hours of the incident on the same day, Case Crime No. 0034 of 2021 under Section 302 IPC, was registered and investigated upon. On finding one of the accused person, who is the present revisionist, a minor, the matter was placed before the Juvenile Justice Board, Meerut where an order for determination of age was passed on 23.06.2021 and he was found of the age of little over 13 years and 6 months. The minor applied for bail through his guardian/father namely, Mool Chand but the same was rejected by the Board. The Appeal No. 52 of 2021 filed against the above noted order dated 07.07.2021, was also dismissed by the learned Appellate Court below.

4. Aggrieved by the above two orders, the minor through his guardian/grandfather has come in criminal revision.

5. It is submitted by the revisionist that the courts below have not proceeded in accordance with the provisions of Section 12 of the Juvenile Justice Act, 2015 which are mandatory in nature and have dis-entitled the minor from bail without any good reason. The courts below failed to consider that no material has been collected to demonstrate that there was any likelihood of juvenile being brought in association with any known criminals or to expose him to any moral, physical or psychological danger or that his release is likely to defeat the ends of justice. It is next submitted that the juvenile has had no criminal history and that the learned courts

below have only considered the gravity of crime and dismissed his application on merits of the matter which clearly goes against the statutory provisions of Section 12 of the Juvenile Justice Act.

6. It has been submitted that gravity of the offence is not relevant consideration for refusing bail to the juvenile as has been held by this Court in **Criminal Revision No. 2732 of 2010 (Amit Kumar vs. State of U.P.) decided on 14.09.2010, Criminal Revision No. 1266 of 2020 (Kanchan Sonkar vs. State of U.P.) decided on 01.12.2020, Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.)** decided on 16.03.2016 and held by the Apex Court in **Prakash vs. State of Rajasthan, 2006 Cri.L.J. 1373.**

7. In **Criminal Revision No. 1852 of 2015 (Amit vs. State of U.P.) decided on 16.03.2016**, this Court referred to the earlier judgement in **Vijendra Kumar Mali vs. State of U.P., 2003 (1) J.I.C. 103**, wherein this Court reiterated that in a number of judgements, it has been categorically held that bail to the juvenile can only be refused if one of the grounds as provided in proviso to Section 12(1) of the Juvenile Justice Act, 2015 exist. So far as the ground of gravity is concerned, it is not covered under the relevant provisions. If the bail application of the juvenile was to be considered under the provisions of Cr.P.C., there would have been absolutely no necessity for the enactment of the aforesaid Act. The Section 12 of the Act contains a non-obstante clause, which indicates that the general provisions of Cr.P.C. shall not apply. Therefore, the gravity or seriousness of the offence should not be taken as an obstacle or hindrance to refuse the bail to delinquent juvenile.

8. It is contended that there exist no material to justify rejection of bail on the grounds envisaged in Section 12 of the Act. In view of the above provisions, the 'child in conflict with law', who has been in custody for quite some time deserves to be released on bail otherwise, the purpose of provisions of Section 12 of the Juvenile Justice Act shall stand defeated. It is also contended that care of the juvenile in a child care institution cannot be preferred over his care in his biological family.

9. Learned AGA as well as learned counsel for opposite party no. 2 have opposed the prayer for bail.

10. I perused the impugned orders. It appears that the Juvenile Justice Board, Meerut took into consideration the report of the District Probation Officer and made it a sole ground for dismissal of his bail application.

11. The learned Appellate Court below took into consideration amongst other facts, the fact that the weapon of offence was recovered from guardian/father of the juvenile which was bought almost a year before the incident of this case. The juvenile took that country-made firearm out from the almirah kept in his house and used that very firearm to carry out this frightful crime of murder. The learned Appellate Court below took into consideration the family background and the fact that because of disturbed and not so tranquil atmosphere in the family, he was driven to commit this kind of offence at a tender age of 13 1/2 years and that in all probability, he is not likely to get good guidance from his family members and therefore, on the basis of above observations, the learned Appellate Court below has dismissed the appeal.

12. In **Om Prakash vs. State of Rajasthan and another; (2012) 5 SCC 201**, the Hon'ble Apex Court observed that the Juvenile Justice Act was enacted with a laudable object of providing a separate

forum or a special court for holding trial of juvenile as it was felt that the children become delinquent by force of circumstance and not by choice and hence they need to be treated with care and sensitivity while dealing and trying cases involving criminal offence. It was further observed that when an accused is involved in grave and serious offence which he committed in a well planned manner reflecting his maturity of mind the court ought to be more careful. **Thus, the Hon'ble Apex Court has brought in focus the nature of offence, the conduct of an accused as reflected in the method employed and connected facts in the commission of crime, in other words merits of the case, a relevant consideration while considering the matters of bail.**

13. It may be noted that the Hon'ble Apex Court gave the above view in the background of the facts that age of the victim as determined by the courts below was not free from doubts. In the peculiar circumstances, the Hon'ble Apex Court observed that where accused commits grave and heinous offence and thereafter attempts to take statutory shelter under the guise of being a minor, a casual or cavalier approach while recording his age, is not acceptable and that the shelter of the principle of benevolent legislation of the Juvenile Justice Act is meant for minors, who are innocent law breakers and not otherwise. Nevertheless, in my view, the spotlight is again on the nature of crime particularly when the alleged crime is grave and heinous and factors connected thereto.

14. In **Mangesh Rajbhar vs. State of U.P. and Another; 2018 (2) ACR 1941**, this Court observed as under:

"13. No doubt, the Juvenile Justice Act is a beneficial legislation intended for reform of the juvenile/child in conflict with the law, ***but the law also demands that justice should be done not only to the accused, but also to the accuser."***

25. It is not that this aspect of the gravity of the offence has been considered irrelevant to the issue of grant or refusal of bail to a minor in the past and before the present Act of 2015 came into force. In a decision of this Court under the Juvenile Justice Act, 2000 where the interest of the society were placed seemingly not on a level of playing field with the juvenile, this Court in construing the provisions of Section 12 in that Act that were pari materia to Section 12 of the Act in the matter of grant of bail to a minor held in the case of ***Monu @ Moni @ Rahul @ Rohit v. State of U.P., 2011 (74) ACC 353*** *in paragraph Nos. 14 and 15 of the report as under:*

"14. Aforesaid section no where ordains that bail to a juvenile is a must in all cases as it can be denied for the reasons".....if there appears reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice."

15. In the light of above statutory provision bail prayer of the juvenile revisionist has to be considered on the surrounding facts and circumstances. Merely by declaration of being a juvenile does not entitle a juvenile in conflict with law to be released on bail as a matter of right. The Act has a solemn purpose to achieve betterment of juvenile offenders but it is not a shelter home for those juvenile offenders who have got criminal proclivities and a criminal psychology. It has a reformative approach but does not completely shun retributive theory. Legislature has preserved larger interest of society even in cases of bail to a juvenile. The Act seeks to achieve moral physical and psychological betterment of juvenile

offender and therefore ***if, it is found that the ends of justice will be defeated or that goal desired by the legislature can be achieved by detaining a juvenile offender in a juvenile home, bail can be denied to him.*** *This is perceptible from phraseology of section 12 itself. Legislature in its wisdom has therefore carved out exceptions to the rule of bail to a juvenile."*

15. This Court in **Criminal Revision 2808 of 2019, Sonu (Minor) vs. State of U.P.**, clearly opined that the gravity and heinous nature of offence become relevant while judging the entitlement of a juvenile to bail under last of the three disentitling categories under Section 12(1) of the Act. I fully agree with the above observation of this Court.

16. Though cases of juveniles who have allegedly committed a heinous crime and are of the age of above 16 years have been treated differently from those who are found to be of the age of below 16 years in the Juvenile Justice Act, 2015. However, by no stretch of imagination, it can be said that the Courts are bound to release the juvenile below the age of 16 years once he is found to be of that age and no more.

17. Ordinarily to dis-entitle the juvenile from the benefits of bail, as envisaged in Section 12 of the Juvenile Justice Act, the merits or say the allegations against him are not important and relevant as has been consistently held by the Hon'ble Courts from time to time. However, as said earlier the allegations may assume importance where the Court has to form an opinion about the ends of justice. The Courts are under obligation to address the concerns of both the sides while deciding upon whether or not the ends of justice shall stand defeated in case the juvenile is admitted to bail.

18. In my firm view, the manner of commission of the crime, the nature thereof cannot be ignored while striking a balance between the demands of justice of either of the sides. It shall be impudent to hold, regardless of the age of the juvenile, that the nature of the crime or merits of the matter are of no relevance when judging the entitlement of a juveniles to bail in cases where heinous crimes are committed. In other words, the nature of crime, the manner of commission, the methodology applied, the mental state, the extent of involvement, the evidence available shall be the factors to be taken into account in both the types of cases where the juvenile is below 16 or where the juvenile is above 16. No artificial line can be drawn between the two categories when considering the bail from this particular angle.

19. A word of caution may be added that no useful purpose may be served by looking into background of the offender or as to reasons and circumstances as revealed from social investigation report, which led him to this juncture or which brought him into such a quagmire. They may be factors which are for a social scientist to ponder over and to suggest the corrective action. A judge is only concerned with the facts arising out of the commission of crime with a view to decide upon whether or not to release him on bail. The Court is not expected to embark on inquiry going back in times and search for reasons and justifications for commission of a dastardly crime by a person of rather a very young and tender age and get swayed by it. **From this point of view, a social background or a social investigation report may have a very limited purpose to serve. The**

findings cannot be solely based on such reports, which are more than often very superficial and unscientific. It is a common knowledge that social investigation reports are usually prepared on printed formats without proper research. In my opinion, not much reliance can be placed on such half baked reports. The Court may have to depend on its own judicial discretion and objective assessment of the things while still going strictly according to the provision of law as to bail and also keeping in mind that the Act has intertwined approach reformatory as well as retributive. The judge has to strike a precarious balance between interest of the child and interest of the victim and also the society at large.

20. The vastness of the ends of justice may pull within its sphere facts and circumstances, which may otherwise seem quite immaterial, extraneous, irrelevant, impertinent, not so important or even innocuous at first glance for the purpose of the applicability of proviso to Section 12 of the Juvenile Justice Act. The provisions of the Juvenile Justice Act though largely enacted with a reformative theories in mind do not obliterate streaks of retributive justice in them.

21. Another dimension which sweeps in, to be weighed, when considering the bail to juvenile, grant or refusal thereof, is the PRINCIPLE OF BEST INTEREST as described in Chapter IV, Section 3 (iv) of the Juvenile Justice Act, 2015. And undeniably and unarguably keeping in mind the reformative goals of the Act, the bail can definitely be denied, where there are circumstances to arrive at a conclusion that bail should be declined because of the fact that juvenile shall not get such conducive atmosphere as may be needed **for his own welfare and betterment**, if released to his family or parents.

22. Coming to the facts of present matter, this cannot be ignored that it was the juvenile who came prepared and armed with a country-made firearm and though he accompanied his brother, but it was he, who fired upon Nitin, killing him almost instantaneously or sometime thereafter. Before commission of crime, he picked the firearm from his own house indicating that this incident was not committed at a spur of moment, rather it was planned. This fact can also not be pushed aside that the bail application and the present revision has been filed on behalf of the minor through his grandfather and not by his mother or father.

23. The District Probation Officer has reported that he was not properly taken care of in his family and that he fell into bad company. It is not very clear that how a grandfather can properly take care of a boy who is aged about 13 or 14 years. This fact is also worth notice that he may be in specific need of supervision or intervention and that he may be needing proper professional counseling and behavioral therapy.

24. The fact of matter is that in this case, a school going juvenile of a very tender age of little over 13 years and 6 months, indulged in a very heinous crime in a well planned manner, who came ready with a firearm and had a main role of shooting the victim; the victim herein was also a school going boy; sudden loss of a young member must have sent shock waves to victim's family members and they certainly must have gone through emotional trauma. **The Court is, in such circumstances expected to strike a**

delicate balance between competing and more often than not, conflicting demands of justice where liberty of an individual is pitted against the larger interest of the society. In such cases, the need for specific supervision of the juvenile and wider need to convert the juvenile into a healthy adult by giving him professional counseling and behavioral therapy under the scheme of the Act cannot be underestimated. Moreover, it may be necessary to keep him away from the company of elements, which he previously had.

25. Considering all the above facts and circumstances of the matter, I concur with the conclusions arrived at by the Appellate Court and by the Juvenile Justice Board and am of the opinion that the revisionist is not entitled to bail.

26. Subject to orders of the Juvenile Justice Board, in this regard, the District Probation Officer shall sincerely attend to his duties as assigned to him in Rule 64 of Juvenile Justice (Care and Protection) Model Rule, 2016 and prepare individual care plan, if need arises; likewise person in charge of child care institution shall provide care and protection to the child as per scheme of the Act.

27. Accordingly, the present criminal revision is **dismissed**. However, the Juvenile Justice Board is directed to expedite the hearing and conclude the same at the earliest.

(2024) 2 ILRA 1492
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2024

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 2680 of 2023

Harikesh & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicants:
Sri Vimal Kumar Pandey

Counsel for the Respondents:
G.A., Sri Rajneesh Kumar Singh

Criminal Law - Indian Penal Code, 1860 - Section 323 & 308 - Code of Criminal Procedure, 1973 - Section 227 - Informant/injured mentioned in his written report that on date of occurrence when he along with his son, reached District Headquarter, accused persons alongwith co-accused enquired from him about work done in village - Accused assaulted him and his son with rod, lathi and danda causing head injury to them - Informant further St.d that accused had assaulted him with intention to kill him - His son fell on ground and started vomiting and became unconscious - Eye - witnesses also mentioned same in their St.ments - Under Section 308 IPC, grievous injury or injury on vital part is not essential, what is material is assault on victim with requisite intention or knowledge - On basis of injured's St.ment, eyewitnesses testimony and injury report, trial court rightly found prima facie case against accused and directed framing of charges, thus, no illegality or infirmity in impugned order. (Para 21, 30, 32)

Revision dismissed. (E-13)

List of Cases cited:

1. Trilok Chand & anr. Vs St. of Raj. & anr., 2011 SCC Online Raj 121

2. Amit Kapoor Vs Ramesh Chander & anr., (2012) 9 SCC 460, (Paras 12, 13, 20, 28 to 30)

3. Ghulam Hassan Beigh Vs Mohammad Maqbool Magrey & Ors. in S.L.P. (Crl.) No. 4599 of 2021, (Paras 15 to 17, 25)

4. U.O.I. Vs Prafulla Kumar Samal & anr., (1979) 3 SCC 4, (Para 10)

5. Dipakbhai Jagdishchandra Patel Vs St. of Guj., (2019) 16 SCC 547, (Paras 15, 23)

6. Sajjan Kumar Vs C.B.I, (2010) 9 SCC 368, (Para 21)

7. St. of Karnataka Vs M.R. Hiremath, (2019) 7 SCC 515

8. Tukaram Gundu Naik Vs St. of Mah., (1994) 1 SCC 465

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Vimal Kumar Pandey, learned counsel for the revisionists, Sri Rajneesh Kumar Singh, learned counsel for the opposite party no. 2 and learned A.G.A. for the State.

2. This criminal revision has been filed against the impugned order dated 16.11.2022 passed by Sessions Court, Kushi Nagar at Padrauna in Sessions Trial No. 772 of 2021 arising out of Case Crime No. 1247 of 2015 u/s 323 & 308 I.P.C., Police Station- Kotwali Padrauna, District- Kushi Nagar.

3. By the impugned order, the trial court rejected the application of the revisionists u/s 227 Cr.P.C. for discharging them of the offence.

4. The facts relating to the case in brief is that the informant Ram Chandra Kushwaha s/o Late Shiv Shankar, on being summoned by the Gram Sewak, Devendra Mishra, reached District Headquarter with his son Mithilesh. When he reached there, Gram Sewak, Devendra Mishra, accused Hrishikesh, Ajay and Pankaj started making enquiry about the work done in the village. The accused assaulted them with rod, lathi and danda causing head injury to them. Due to the assault of the accused, tension spread in the village. The accused are violent and criminal in nature. On the basis of the written report of the informant, Case Crime No. 1247 of 2015 u/s 323, 308 I.P.C. was registered against Hrishikesh, Ajay and Pankaj in P.S.- Kotwali Padrauna, District- Kushi Nagar on 25.08.2015 at 7 p.m.

5. It has been submitted by learned counsel for the revisionists that without considering the evidence on record, the trial court illegally rejected the discharge application of the revisionists. It has next been submitted in the medical examination report dated 25.08.2015 that the injuries of Mithilesh Kushwaha and Ram Chandra Kushwaha are simple in nature. In the x-ray report, no fracture was found on the persons of the injured. No injury was found on the vital part of the body of the informant and his son. It has also been submitted that the informant Ram Chandra Kushwaha has merely reiterated the facts given in the report. It has also been submitted that in the statements of prosecution witnesses, Mahendra and Buneli, only general allegations have been made. No specific role has been assigned to the revisionist in the scuffle. It has also been submitted that in the second statement recorded u/s 161 Cr.P.C. of informant Ram Chandra Kushwaha, he has for the first time mentioned that the accused with the intention to kill his son had caused injury on his neck. The injured Mithilesh Kushwaha in his statement dated 22.11.2015 recorded u/s 161 Cr.P.C. has merely repeated the statement of his father, informant Ram Chandra Kushwaha. The other prosecution witnesses, namely, Habib Ansari and Sagar in their statements recorded u/s 161 Cr.P.C. on 22.11.2015 have made specific allegations only against Hrishikesh regarding his attacking the injured with a rod. The other prosecution

witness, Jitendra Madheshiya, in front of whose shop the scuffle took place has also made general allegations against the accused. It has also been submitted that since injuries caused to the injured, Ram Chandra Kushwaha and Mithilesh Kushwaha are simple in nature, therefore, offence u/s 308 I.P.C. is not made out against the accused. It has also been submitted that the Investigating Officer has not produced any incriminating material or evidence to establish the ingredients of Section 308 I.P.C. Learned counsel for the revisionists has placed reliance on the judgement of the Apex Court in **Trilok Chand and Another Vs. State of Rajasthan and Another, 2011 SCC Online Raj 121**.

6. Per contra, learned counsel for the opposite party no.2 and learned A.G.A. submitted that after examining the facts and circumstances of the case and the evidence produced by the Investigating Officer, the trial court has rightly rejected the application u/s 227 Cr.P.C. filed by the revisionists. The revision is devoid of any merit and it should be rejected.

7. Learned counsel for the revisionists, learned counsel for the opposite party no.2 and learned A.G.A. have been heard. Perused the entire trial court record and the record of the revision.

8. Before examining the merits of the present case, the ambit, scope and power of the Sessions Court as well as the High Court u/s 397 Cr.P.C. should be discussed and ascertained.

9. The Hon'ble Apex Court in **Amit Kapoor Vs. Ramesh Chander and Another, (2012) 9 SCC 460** in paragraph nos. 12 and 13 of its judgement has narrated the ambit and scope of revision by the High Court u/s 397 Cr.P.C. which are as follows :

12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case

substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the CrPC.

10. In paragraph nos. 17 and 19 of the aforesaid judgement, the Apex Court has narrated that before framing a charge, what documents should be considered by the trial court. It has also provided about the extent of evidence required for framing of a charge. In paragraph no. 20 of the aforesaid judgement, the Apex Court has compared the power and extent of jurisdiction of the High Court u/s 397 Cr.P.C. which is given hereunder :

20. The jurisdiction of the court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression "prevent abuse of process of any court or otherwise to secure the ends of justice", the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest i.e. when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The section confers very wide power on the Court to do justice and to ensure that the process of the court is not permitted to be abused.

11. After comprehensive survey and discussion of the judgement of the Hon'ble Supreme Court and the factors to be considered by the trial court while disposing of application u/s 227 Cr.P.C. and framing charge u/s 228 Cr.P.C., the Apex Court in **Amit Kapoor (supra)** has given following directions :

27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to

find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

12. The statutory provisions regarding consideration of the case with a view to framing of charge or discharging the accused as given in Sections 226, 227 and 228 Cr.P.C. has been laid down by the Hon'ble Supreme Court in the case of ***Ghulam Hassan Beigh Vs. Mohammad Maqbool Magrey & Ors.*** in S.L.P. (Crl.) No. 4599 of 2021 :

15. Section 226 of the CrPC corresponds to sub-section (1) of the old Section 286 with verbal changes owing to the abolition of the jury. Section 286 of the 1898 Code reads as under:-

"286.(1) In a case triable by jury, when the jurors have been in chosen or, in any other case, when the Judge is ready to hear the case, the prosecutor shall open his case by reading from the Indian Penal or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused. (2) The prosecutor shall then examine his witnesses."

Section 226 of the 1973 Code reads thus:

"226. Opening case for prosecution.— When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused."

Section 226 of the CrPC permits the prosecution to make the first impression regards a case, one which might be difficult to dispel. In not insisting upon its right under Section 226 of the CrPC, the prosecution would be doing itself a disfavour. If the accused is to contend that the case against him has not been explained owing to the non-compliance with Section 226 of the CrPC, the answer would be that the Section 173(2) of the CrPC report in the case would give a fair idea thereof, and that the stage of framing of charges under Section 228 of the CrPC is reached after crossing the stage of Section 227 of the CrPC, which affords both the prosecution and accused a fair opportunity to put forward their rival contentions.

16. Section 227 of the CrPC reads thus:

"227. Discharge.— If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

17. Section 228 of the CrPC reads thus:

"228. Framing of charge.- (1) If, after such consideration and hearing as

aforesaid,the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused. (2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

13. While framing charge, the Court has to ensure that a prima facie case must be made out against the accused. The Hon'ble Apex Court in **Union of India Vs. Prafulla Kumar Samal and another, (1979) 3 SCC 4**, considered the scope of enquiry a judge is required to make while considering the question of framing of charges. After an exhaustive survey of the case law on the point, in paragraph no. 10 of the judgement, has laid down the following principles :

(1) That the Judge while considering the question of framing the charges under section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

14. The Hon'ble Apex Court in paragraph nos. 15 and 23 of its judgement in ***Dipakbhai Jagdishchandra Patel Vs. State of Gujarat, (2019) 16 SCC 547***, has elaborately discussed the law relating to the framing of charge and discharge of the accused which is as under :

15. We may profitably, in this regard, refer to the judgment of this Court

in State of Bihar v. Ramesh Singh [State of Bihar v. Ramesh Singh, (1977) 4 SCC 39 : 1977 SCC (Cri) 533 : AIR 1977 SC 2018] wherein this Court has laid down the principles relating to framing of charge and discharge as follows: (SCC pp. 41-42, para 4)

"4. … Reading Sections 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. … If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the court is expected to do is, it does not act as a mere post office. The court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the court dons the mantle of the trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a

strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.

15. In **Sajjan Kumar Vs. C.B.I, (2010) 9 SCC 368,** the Hon'ble Apex Court after elaborately discussing the scope of Sections 227 and 228 Cr.P.C. has laid down principles which emerge therefrom in paragraph no. 21 which is as under :

21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

16. In the case of ***State of Karnataka Vs. M.R. Hiremath, (2019) 7 SCC 515***, the Hon'ble Apex Court has laid down

principles to be considered by the Magistrate while dealing with discharge application of the accused u/s 239 Cr.P.C. in warrant trial case. The directions given by the Apex Court is equally applicable to the discharge of accused u/s 227 Cr.P.C.

17. In paragraph no. 25 of **Ghulam Hassan Beigh (supra)**, the Apex Court held as under :

25. In the case of Asim Shariff v. National Investigation Agency, (2019) 7 SCC 148, this Court, to which one of us (A.M. Khanwilkar, J.) was a party, in so many words has expressed that the trial court is not expected or supposed to hold a mini trial for the purpose of marshalling the evidence on record. We quote the relevant observations as under:-

"18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases(which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, 3 2018(13) SCC 455 4 2019(6) SCALE 794 the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not supposed to hold a mini trial by marshalling the evidence on record.

18. In paragraph nos. 28, 29 and 30 of the judgement in **Amit Kapoor (supra)**, the Hon'ble Supreme Court has held as hereunder :

28. At this stage, we may also notice that the principle stated by this Court in Madhavrao Jiwajirao Scindia[(1988) 1 SCC 692 : 1988 SCC (Cri) 234] was reconsidered and explained in two subsequent judgments of this Court in State of Bihar v. P.P. Sharma [1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192 : AIR 1991 SC 1260] and M.N. Damani v. S.K. Sinha [(2001) 5 SCC 156 : 2001 SCC (Cri) 823 : AIR 2001 SC 2037] . In the subsequent judgment, the Court held that, that judgment did not declare a law of universal application and what was the principle relating to disputes involving cases of a predominantly civil nature with or without criminal intent.

29. In the light of the above principles, now if we examine the findings recorded by the High Court, then it is evident that what weighed with the High Court was that firstly it was an abuse of the process of court and, secondly, it was a case of civil nature and that the facts, as stated, would not constitute an offence under Section 306 read with Section 107 IPC. Interestingly and as is evident from the findings recorded by the High Court reproduced supra that "this aspect of the matter will get unravelled only after a full-fledged trial", once the High Court itself was of the opinion that clear facts and correctness of the allegations made can be examined only upon full trial, where was

the need for the Court to quash the charge under Section 306 at that stage. Framing of charge is a kind of tentative view that the trial court forms in terms of Section 228 which is subject to final culmination of the proceedings.

30. We have already noticed that the legislature in its wisdom has used the expression "there is ground for presuming that the accused has committed an offence". This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the Court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste. A Bench of this Court in State of Maharashtra v. Som Nath Thapa [(1996) 4 SCC 659 : 1996 SCC (Cri) 820] referred to the meaning of the word "presume" while relying upon Black's Law Dictionary. It was defined to mean "to believe or accept upon probable evidence"; "to take as proved until evidence to the contrary is forthcoming". In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of Section 313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion and delivering its judgment. Merely because there was a civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence.

19. In the light of the law propounded by the Apex Court in the aforesaid judgement, now it will be examined whether the trial court has rightly framed the charge against the accused u/s 308 I.P.C. Section 308 I.P.C. defines the offence of attempt to commit culpable homicide and provides punishment therefor which is as follows :

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.

20. Before an accused can be held to be guilty u/s 308 I.P.C., it was necessary to arrive at a finding that the ingredients thereof namely requisite intention or knowledge was existing. The essential ingredients of the offence u/s 308 I.P.C. are as follows :

(1) accused committed an act;

(2) the act was committed with the intention or knowledge of committing culpable homicide not amounting to murder;

(3) the act was committed in such circumstances that if the accused by that act had caused the death of the victim, he would have been guilty of culpable homicide.

21. The informant/injured, Ram Chandra Kushwaha has mentioned in his written report that on the date of occurrence when he along with his son, Mithilesh

Kushwaha reached the District Headquarter, the accused, Ajay, Hrishikesh and Pankaj, enquired from him about the work done in the village. The accused assaulted him and his son with rod, lathi and danda causing head injury to them.

22. The informant Ram Chandra Kushwaha in his statement recorded u/s 161 Cr.P.C. has supported the averments in the first information report and has stated as follows :

"दिनांक 25-08-2015 को ग्राम सेवक देवेन्द्र मिश्र के बुलाने पर मै व मेरा लड़का मिथिलेश जिला मुख्यालय गये थे। दोनो लोग पहुँचे तो ग्राम सेवक ने पहले से ही ऋषिकेश, अजय व पंकज जो उसके गांव के निवासी हैं, को बुलाया था। गांव के कार्यों के विषय में पूछने पर तीनो लोग लाठी डण्डा से पीटने लगे और प्राणघातक हमला कर दिये, जिससे मुझे व मेरे लड़के को चोटे आयी। साथ ही सड़क पर हम दोनो को पटक दिये। जिससे सर में भी चोटें आयी। गांव में तनाव उत्पन्न है। यह घटना 11 बजे दिन की है।"

23. The informant Ram Chandra Kushwaha in his additional statement has stated that :

"ऋषिकेश मेरे बेटे को जान से मारने की नीयत से अचानक राड से उसके गर्दन पर व कन्धे पर प्रहार कर दिये, जिससे वह नीचे गिर गया और बेहोश हो गया तथा उल्टी करने लगा। मुल्जिमान मुझे भी मारे पीटे व सड़क पर पटक दिये। मै व मेरा बेटा दोनो लोग जिला अस्पताल में अपना इलाज कराये उसके बाद मेडिकल कालेज में भर्ती रहे।"

24. The informant's son, injured Mithilesh Kushwaha has adopted the statement u/s 161 Cr.P.C. of his father as his statement.

25. The eye-witness, Habib Ansari in his statement u/s 161 Cr.P.C. given to the Investigating Officer has stated that :

"दिनांक 25-08-2015 को मै जितेन्द्र मद्धेशिया की दुकान पर मौजूद था। वहां पर ऋषिकेश, अजय व पंकज भी मौजूद थे। मेरे गांव का रामचन्द्र कुशवाहा व उनका बेटा मिथिलेश कुशवाहा वहां आये तथा ग्राम विकास अधिकारी पहले से वहां मौजूद थे। ऋषिकेश ने दोनो को राड से मारा। मिथिलेश के गर्दन पर लगने के कारण वह नीचे गिर गया तथा बेहोश हो गया। दोनो को उठाकर अस्पताल ले जाया गया। अजय व पंकज भी लोहे की राड से वार किये थे।"

26. The other eye-witness, Jitendra Madheshiya in his statement u/s 161 Cr.P.C. has stated to the Investigating Officer as follows :

"मै भी दुकान पर मौजूद था। मेरी चाय की दुकान है। सिसवा मठिया के प्रधान ऋषिकेश तथा अजय व पंकज ने अपने ही गांव के रामचन्द्र कुशवाहा तथा मिथिलेश को मारे पीटे थे, जिससे मिथिलेश के गर्दन पर राड से चोट आयी थी। वह मौके पर बेहोश हो गया था।"

27. Thus, the informant and the eye-witnesses have mentioned in their statements that accused, Ajay, Hrishikesh and Pankaj, attacked the informant Ram Chandra Kushwaha and his son, Mithilesh Kushwaha on their head with lathi, danda and rod due to which they received fatal injuries. The informant Ram Chandra Kushwaha has also stated that accused had assaulted him with the intention to kill him. His son, Mithilesh fell on the ground and started vomiting and became unconscious.

28. The injured Mithilesh Kushwaha was medically examined on 25.08.2015 at 6.30 p.m. Following injuries were found on the person of Mithilesh Kushwaha :

(1) Multiple contusion 7 x 4 cm over left side back 2 cm above from interior angle of right scapula.

(2) Abrasion 8 x 1.5 cm over right side back 4 cm above from interior angle of right scapula.

(3) Contused swelling 4 x 3 cm over tip of right shoulder. KUO.

(4) Complain of pain over lower back. KUO

(5) Complain of pain over chest, back of chest, abdomen.

29. The injured Ram Chandra Kushwaha was medically examined on 25.08.2015 at 5.50 p.m. Following injuries were found on the person of Ram Chandra Kushwaha :

(1) Contused swelling 5 cm x 4 cm over top of right shoulder joint. KUO.

(2) Contused swelling 3.5 cm x 2 cm over right side chest. 6 cm above from right nipple. KUO. Red in colour.

(3) Complain of pain over lower back.

(4) Complain of pain over anterior chest.

(5) Complain of pain over left side back.

30. From the definition of the offence of attempt to commit culpable homicide provided u/s 308 I.P.C., it is obvious that no grievous injury or injury on the vital part of the body is required. Only the injured must be attacked by the accused with requisite intention or knowledge.

31. In **Tukaram Gundu Naik Vs. State of Maharashtra, (1994) 1 SCC 465**, where none of the injuries had affected any vital part of the body and it was doubtful whether the accused had intended to commit murder of the victim, the Apex Court attributed only knowledge that by inflicting such injuries, he was likely to cause death and it was held that an attempt to such an offence would be punishable u/s 308 I.P.C.

32. In the light of the statement of the injured, Ram Chandra Kushwaha and that of eye-witnesses, Habib Ansari and Jitendra Madheshiya and the injury report of the aforesaid injured, the trial court has rightly held that prima facie offence u/s 323 and 308 I.P.C. is made out against the accused and has directed framing of charges under these sections. There is no illegality, irregularity or impropriety in the impugned order passed by the trial court.

33. There is no merit in the criminal revision and the same is liable to be dismissed.

34. The criminal revision is **dismissed**, accordingly.

35. Let a copy of this order be sent to the concerned trial court for necessary action.

(2024) 2 ILRA 1503
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.05.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 3268 of 2023

Devinderjeet Singh ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionist:
Sri Sanjay Kumar Mishra, Sri Arvind Kumar Shukla

Counsel for the Respondents:
G.A., Sri Aushim Luthra, Sri Syed Imran Ibrahim, Sri Vikas Chandra Srivastava, Sri Manish Tiwary (Sr. Advocate), Sri V.P. Srivastava (Sr. Advocate)

Criminal Law - Indian Penal Code, 1860 - Sections 406, 420, 467, 468, 471 & 120B - Code of Criminal Procedure, 1973 - Section 245(2) - Complainant lodged FIR

against revisionist and four others alleging that, after inducing business relations in 2012, revisionist persuaded him to hand over original share certificates, blank share forms, and signed blank papers on assurance of payment of ₹13.22 crore for his shareholding - These were misused to remove him from directorship of M/s J.S.S. Build Con Pvt. Ltd., leading to separate registration of F.I.R where investigation is pending - Informant alleged despite repeated demands, revisionist failed to return his papers, continued to advise him on various matters including proceedings before NCLT - On 01.07.2017, revisionist, in conspiracy with others, misused signed blank papers to fraudulently transfer 2,500 shares into his own name without his consent - Case registered against revisionist & ors. - Protest petition of informant treated as complaint case, upon examination, accused, including revisionist summoned - Summoning order challenged in Criminal Revision, dismissed - Revisionist preferred application for quashing of summoning order, rejected - Accused moved discharge application, dismissed - Revisionist contends that dispute is purely civil, arising out of money claim, and cannot be given criminal case - Summoning order, though ex parte in nature, requires judicial satisfaction based on evidence on record - While accused cannot adduce defence evidence at this stage, entitled to point out defects or infirmities in prosecution case - Trial court's refusal to consider objections given by accused on ground that no new evidence produced, reflects flawed approach, contrary to law - Impugned order, set aside. (Para 3, 7)

Revision allowed. (E-13)

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

1. Heard Sri V.P. Srivastava, learned Senior Advocate holding brief for Sri Vikas Chandra Srivastava, Sri Manish Tiwary, learned Senior Advocate assisted by Syed Imran Ibrahim, learned counsel for the opposite party no.2, Sri O.P. Mishra, learned A.G.A. for the State and perused the record.

2. This criminal revision has been filed by the **revisionist- Devinderjeet Singh Sethi** challenging the order dated 27.07.2022 passed in Complaint Case No.2322 of 2018 "Rishi Agarwal vs. Devinderjeet and Others", whereby the court of Additional Chief Judicial Magistrate dismissed an application filed under section- 245(2) Cr.P.C. and posted the case for framing of charge under sections- 406, 420, 467, 468, 471 and 120B I.P.C.

3. Relevant facts as emerging from record are as below:-

(I) The complainant- Rishi Agarwal lodged an F.I.R. against the revisionist- Devinderjeet Singh, four other named persons and certain unknown persons with the allegations in nutshell that the first informant's company is in the business of sale and purchase of property in Delhi NCR; the accused-revisionist Devinderjeet Singh Sethi came in his contact in 2012 telling him that he is engaged in the business of giving money on credit; a meeting was fixed by one Piyush Tiwari and they entered into business relations; the complainant trusted the accused Devinderjeet; over a period of time certain disagreements arose with co-accused Piyush Tiwari; Devinderjeet Singh Sethi offered to settle the matter between him and the first informant; a meeting was arranged between all the shareholders and it was agreed that the shareholders shall purchase the first informant's share holding of Rs.13,22,50,000/-; Devinderjeet Singh

Sethi was successful in persuading him to handover original share certificates, blank share forms and certain signed blank papers saying that he will keep them in safe custody and will utilize only when the price thereof Rs.13,22,50,000/- is actually paid to the first informant. A few days thereafter he came to know that by misusing his signed paper, he has been removed from the directorship of the company, M/s. J.S.S. Build Con Pvt. Ltd.; therefore, he filed a separate F.I.R. (Case Crime No.728 of 2016) at Kalikaji, New Delhi in which the investigation is going on.

Further, the first informant asked the accused-revisionist to return all his papers but he kept on avoiding on different pretext; till then, he never doubted the intentions of the accused-revisionist and has always been discussing and getting advised from him about his matters and also about the case, which is going on in NCLT, New Delhi; he came to know on 01.07.2017 that the accused-revisionist has given an application for transfer of 2500 shares in his name by misusing his signed blank papers; it is alleged that he hatched a conspiracy with others; the first informant had never given any consent for transfer of his shares and he got the shares transferred in his own name in a fraudulent manner. Therefore, the case is registered under sections- 406, 420, 467, 468, 471 and 120B I.P.C. against the accused-revisionist and others.

(II) The investigation commenced and statements of witnesses were recorded. The Investigating Officer filed a final report purportedly for lack of evidence against the accused persons.

(III) The protest application of first informant was treated as a complaint case and after examination of complainant, his witnesses and inquiry under section 202 Cr.P.C., accused- Devinderjeet Singh Sethi, Piyush Tiwari, Paritosh Kumar Sharma and Ankti Sharma were summoned for the offence under sections- 406, 420, 467, 468, 471 and 120B I.P.C. by an order dated 31.07.2018.

(IV) The accused person challenged the summoning order by filing a revision before the court concerned. The Criminal Revision No.187 of 2018 was dismissed and the summoning order was affirmed by an order dated 18.02.2019. It may be noted that the copy of order passed by the revisional court is not available on record.

(V) The instant revisionist preferred an Application (u/s 482 Cr.P.C.) No.10622 of 2019, which was heard and decided refusing the relief of quashing the order of summoning.

(VI) Thereafter, the accused persons filed a discharge application under section- 245(2) of Cr.P.C. giving his side of the story.

(VII) In nutshell, it is stated in application for discharge that infact the first informant duly sold the shares against full and final payment by the accused over a period from 31th March, 2013 to 2016; details whereof have been given in the application itself; before filing of this F.I.R., the first informant- Rishi Agarwal had filed another F.I.R. against Piyush Tiwari, Paritosh Sharma and Ankit Sharma on the basis of same set of documents/evidence which have been given with the instant F.I.R.; there has not been any conspiracy; no signed papers were misused by him; the sale transaction are duly reflected in balance-sheets of the company; the balance-sheets have been duly audited by the CA; the accused has cleared all the amount due to the first informant; no such meeting as alleged by

the first informant was held on 11.03.2014; at the most the dispute can be termed one of civil nature only; there has not been any dishonest inducement or intention etc.; as no forged paper was prepared and no conspiracy was hatched, therefore no offence is made out against him.

(VIII) The learned trial court heard both the sides on this application and the same was dismissed on 27.07.2022. Now accused is before this Court in this criminal revision.

4. The crux of the contentions placed before this Court relate to the plea taken by the revisionist that it is a matter of claim of money and no more, therefore dispute is merely of civil nature and the complainant cannot be allowed to convert the same into a criminal case. **Secondly**, the learned Magistrate did not even look into the documents like bank statements, the balance-sheets, the true copy of share certificates and other documents produced on his behalf in support of his discharge application. **Thirdly**, there is no material to show that the revisionist nurtured a dishonest intention since the very beginning or practised any deception to induce delivery of property or that any forged paper was prepared by him. It is vehemently argued that the learned trial court should have considered the pleas and the contentions placed on his behalf instead of passing a cryptic order.

5. I went through the impugned order; the learned trial court has noted down the facts as alleged by the complainant; and thereafter has noted down the other side of the story as given in the application by the accused. In the last but one para of the order, the trial court has held as below:-

"प्रस्तुत मामले में वादी ने अभियुक्तगण के विरूद्ध प्रोटेस्ट प्रार्थना पत्र न्यायालय में दाखिल किया। प्रार्थनापत्र को स्वीकार करते हुए दिनांक 09.05.2018 को अंतिम आख्या 02/2018 दिनांक 24.01.2018 को निरस्त करते हुए उक्त प्रकरण परिवाद के रूप में दर्ज किया गया। परिवादी द्वारा धारा-200द०प्र०सं० व 202 द०प्र०सं० में पेश किये गये साक्षीगण की साक्ष्य के उपरान्त प्रथम दृष्टया मामला पाते हुए न्यायालय द्वारा पारित आदेश दिनांकित 31.07.2018 के तहत अभियुक्तगण दिवीन्द्रजीत सिंह सेठी, पीयूष तिवारी, परितोष कुमार शर्मा व अंकित शर्मा को धारा-420,406,467,468,471,120b आई०पी०सी० में तलब किया गया। अभियुक्तगण को तलब किये जाने के तलबी आदेश दिनांकित 31.07.2018 के विरूद्ध परिवादी द्वारा माननीय निगरानी न्यायालय में दाण्डिक पुनरीक्षण संख्या-187सन् 2018 देवेन्द्रजीत सिंह सेठी बनाम उत्तर प्रदेश सरकार व रिषी अग्रवाल आदि निगरानी प्रस्तुत की। माननीय पुनरीक्षण न्यायालय द्वारा उपरोक्त पुनरीक्षण में पारित आदेश दिनांकित 18.02.2019 में यह आदेश पारित किया गया कि- **"निगरानी खारिज की जाती है। दाण्डिक परिवाद संख्या 2300/2018 ऋषि अग्रवाल बनाम देवेन्द्रजीत सिंह सेठी आदि अं० धारा 406,420,467,468,471, 120b IPC थाना सैक्टर-49 नोएडा जिला गौतमबुद्धनगर में द्वितीय अपर मुख्य न्यायिक मजिस्ट्रेट, गौतमबुद्धनगर द्वारा पारित आदेश दिनांकित 31.07.2018 पुष्ट किया जाता है।" अभियुक्त को तलब किये जाने के उपरान्त अभी तक ऐसा कोई नवीन साक्ष्य अथवा नवीन तथ्य अथवा कोई स्थिति परिवर्तन होने का साक्ष्य नहीं है। अभियुक्तगण द्वारा जो तथ्य प्रस्तुत किये गये वह साक्ष्य का विषय है, जिनको साक्ष्य के स्तर पर ही देखा जाना है।"**

6. Before proceeding any further, provisions of **Section**- 245(2) of Cr.P.C. must be noted, which is as below:-

"(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

7. The law gives an opportunity to the accused person to place his contentions before the court concerned, even before the complainant has had an opportunity to

produce his evidence under section- 244 Cr.P.C. Undoubtedly, the provisions of Section- 245(2) Cr.P.C. have certain purpose. The opportunity which has been provided by law cannot be dealt perfunctorily. It appears that the trial court just took shelter of the order passed by the revisional court by which the summoning order was challenged. A minute difference between the two stages may be noted. The summoning order is passed at a stage where the accused has no say in the matter and at that stage, the order is passed rather in an ex-parte manner, if I may be permitted to use this word. No doubt at that stage as well, the Court is obliged to consider the evidence before it and to arrive at a satisfaction that there are grounds for summoning the accused. However, the opportunity as provided to the accused person under section- 245(2) Cr.P.C. is different inasmuch at that stage the accused has an opportunity to place his side of the story and therefore at that stage, the trial court is better equipped to weigh the evidence (which is already on record) in a more balanced manner. The opportunity which was not available to the accused is now available to him at that stage. The trial court is not expected to not consider the merits of the contentions of the accused side and merely pass an order saying nonchalantly that no new evidence has come in between. It is noteworthy at this juncture, that though the accused side cannot produce any evidence in defence, but he has every right to point out the defects, deficiencies or infirmities, which may already be there in the prosecution story or the evidence produced by the complainant. As is very clear from the order itself, the learned trial court refused to go into the merits of the objections raised by the accused person on the premise that no new evidence has come. This is a flawed approach and against the provisions of law. The impugned order suffers from illegality, impropriety and is therefore liable to be set-aside.

8. The impugned order is set-aside. The learned trial court is directed to pass a fresh order after giving an appropriate opportunity of hearing.

9. Copy of this order be transmitted to the court concerned immediately.

(2024) 2 ILRA 1507
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.11.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 3478 of 2023

Kumari Nidhi Gupta ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri Ashwani Kumar Sachan, Sri Saurabh Sachan

Counsel for the Respondents:
G.A., Sri Bipin Kumar, Sri Mohd. Naushad Siddiqui

Criminal Law - Code of Criminal Procedure, 1973 - Section 125 - Hindu Adoption and Maintenance Act, 1956 - Section 20 - Against rejection of maintenance application - Family Court erred in dismissing applicant's claim for maintenance from her father solely on ground of her attaining majority, despite her being unmarried at time of impugned judgment - Parents' marriage dissolved by decree of divorce, wherein lump-sum maintenance awarded only to mother and minor son, as revisionist was then residing with her father - Family Court

ought to have treated application u/s 125 Cr.P.C. moved by revisionist seeking maintenance from her father as one u/s 20(3) Act, 1956, rather than dismissing it on technical ground that application not maintainable as applicant-daughter already attained age of majority and she was not entitled to seek maintenance - As held by Apex Court in Abhilasha v. Prakash (infra), Section 20(3) imposes statutory obligation on Hindu to maintain his unmarried daughter who is unable to maintain herself, even though she has become major, a right absolute in nature and enforceable against her father until her marriage - Impugned order, set aside. (Para 14)

Revision allowed. (E-13)

List of Cases cited:

1. Dr. Jagdish Jugtawat Vs Smt. Manjulata & ors., (2002) 5 SCC 424, (Paras 3, 4)

2. Noorsaba Khatoon Vs Mohammad Quasim, AIR 1997 SC 3282

3. Nanak Chand Vs Chandra Kishore Agrawal, AIR 1970 SC 446

4. Abhilasha Vs Prakash & ors., AIR 2020 SC 4355

5. Yamunabai Anantrao Adhav Vs Anantrao Shivram Adhav & anr., (1988) 1 SCC 530

6. Noor Saba Khatoon Vs Mohd. Quasim, (1997) 6 SCC 233, (Paras 33, 34, 36, 38, 39)

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

1. Heard learned counsel for the revisionist, learned counsel for the opposite party No.2, learned AGA for the State and perused the material placed on record.

2. By means of instant criminal revision, the revisionist has assailed the order dated 25.4.2022, passed by Additional Principal Judge, Family Court No.3, Kanpur Nagar, in Maintenance Case No.12 of 2017, under Section 125 Cr.P.C., whereby the application for maintenance moved by the revisionist, who is daughter of opposite party No.2 has been dismissed on the ground that she was not entitled to seek maintenance from her father after attaining age of majority, as under the provisions of Section 125 Cr.P.C., only minor children of a person are entitled to seek maintenance whether married or not.

3. The factual matrix of the case in brief which led to filing present revision are that the marriage of the revisionist's mother and father was solemnized on 21.4.1994 and two children were born out of their wedlock, out of whom the applicant/revisionist is elder one. She was born on 13.9.1995 and her younger sibling born on 1.9.2000. The relations between the parents of the applicant got strained and father of the applicant filed a Divorce Petition No.65 of 2011, before Principal Judge, Family court, Kanpur Nagar and consequently, a decree of divorce dated 12.7.2016 followed. The Family Court also granted a lump-sum amount of Rs.5 lacs as maintenance to the mother of the applicant. The applicant was initially residing with her father/opposite party No.2. After filing of divorce petitioner, her father expelled her from his home on 31.12.2010 at the age of 15 years and since then, she is residing alone alongwith her mother. The applicant is completely dependant on her mother for food, clothing, shelter, education and other expenses also. Therefore, she filed an application under Section 125 Cr.P.C. for maintenance before the court below on 8.12.2016 at the age of 21, as she intended to receive higher education and also for bearing expenses of her marriage. During

pendency of proceedings under Section 125 Cr.P.C., before the family court, the applicant had moved an application under Section 125(c) Cr.P.C. for interim maintenance, in which a meagre amount of interim maintenance of Rs.2,000/- per month was paid to the applicant, which was not in consonance with the financial needs of the applicant. The respondent No.2, in his belatedly filed written statement, has stated that he has already paid Rs.5 lacs as lump-sum amount towards the maintenance, which is part of decree of divorce. The applicant has filed rejoinder affidavit before the court below, in which she filed receipt of educational fees which show that her mother has been bearing her educational expenses and she is not having enough resources to meet out educational and other expenses of the applicant. However, the family Court without going into the merits of the case, dismissed the application under Section 125 Cr.P.C. in limine by impugned order dated 25.4.2022 on impression that as the applicant had already attained age of majority, she is not entitled to seek maintenance from her father/the respondent No.2 under Section 125 Cr.P.C. and she has to seek maintenance under Section 20 of Hindu Adoption and Maintenance Act, 1956, as appropriate remedy available to her. While giving this finding, the Court placed reliance on a judgement of Apex Court in **Dr. Jagdish Jugtawat vs Smt. Manjulata And Ors, (2002) 5 SCC 424**.

4. Learned counsel for the revisionist submitted that from the joint reading of two judgments of Hon'ble Apex Court in **Noorsaba Khatoon v. Mohammad Quasim, AIR 1997 SC 3282** and **Nanak Chand vs. Chandra Kishore Agrawal, AIR 1970 SC 446**, it is apparent that Section 125 Cr.P.C. is a summary remedy of secular character and provisions of Hindu Marriage Act, which is part of personal law, does not repel nor affect the beneficial provisions of Section 125 Cr.P.C., which are applicable to every citizen in the country, irrespective of his or her personal law. A Hindu major daughter, who is not able to maintain herself can claim maintenance from her father till she gets married in the same manner as a Muslim major daughter, who is entitled to seek maintenance from his father. The learned court court has misread the judgment of Hon'ble Apex Court in **Dr. Jagdish Jugtawat vs Smt. Manjulata And Ors,** (supra) and has drawn long long conclusion. A judgment of Hon'ble Apex Court in **Abhilasha vs. Prakash and others, AIR 2020 SC 4355**, Hon'ble Supreme Court has considered the claim of a daughter, who has attained age of majority and held that there may be a case where family court has jurisdiction to decide a case under Section 125 Cr.P.C. as well as a suit under Section 20 of Hindu Adoption and Maintenance Act, 1956 and in such eventuality, the 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 of the Act, 1956, so as to avoid multiplicity of the proceeding as observed by this Court in the case of **Dr. Jagdish Jugtawat vs Smt. Manjulata And Ors, (supra)** . However, the magistrate in exercise of powers under Section 125 Cr.P.C. cannot pass such orders.

5. He lastly submitted that if a major daughter is unable to maintain herself because of her illiteracy, unemployment or if being student, she will be considered at par with a person having physical or mental abnormality and will be entitled to seek

maintenance. Even after attaining age of majority under provisions of Section 125 Cr.P.C. before the Family Court. The applicant is a unemployed major and unmarried girl. She is a victim of domestic friction and matrimonial discord between her father and mother. Her father is a man of sufficient economic resources and he is under liability to look after his daughter, who is socially vulnerable and unemployed.

6. Per contra, learned AGA and learned counsel for the respondent No.2 submitted that revision is ill conceived. There is no illegality or infirmity in impugned order passed by the court below. A Hindu daughter, who has attained age of majority is not entitled to seek maintenance under provisions of Section 125 Cr.P.C. from her father or mother and only remedy available to her, if she is unable to maintain herself or is unmarried, to seek maintenance under provisions of Section 20 of Hindu Adoption and Maintenance Act, 1956. The provisions of Section 20 of the Act, bestow the Court specific power of grant of maintenance to such daughter who has attained age of majority.

7. The revisionist had initially filed a petition under Section 482 Cr.PC. Feeling aggrieved by the impugned order before this Court, however, during the course of pendency of application under Section 482 Cr.P.C. No.2695 of 2022, an application for amendment was moved by her with prayer to permit her to convert the application under Section 482 Cr.P.C. into criminal revision under Section 397/401 Cr.P.C. and the prayer was allowed eventually by this Court and application was converted into present criminal revision by the order of this Court dated 23.3.2023.

8. From the perusal of record, it appears that the decree of divorce under Section 13 of Hindu Marriage Act was passed on 12.7.2016 on application of respondent No.2 against his wife Smt. Alka Gupta @ Bebi, the mother of the applicant and Rs.5 lacs was granted as lump-sum amount of maintenance in said judgment for maintenance of the applicant and her son, as at that time present applicant was residing with her father and her younger brother was living with her mother and probably, for that reason, no provision was made for present applicant in said decree of divorce. The applicant has stated before the court below in her representation that she was undergoing MCA course. In **Jagdish Jugtawat vs Smt. Manjulata And Ors**, *(supra)*, the petitioner was father of Kumari Rekha, respondent No.3, who is minor and unmarried daughter of respondent No.1, wife of petitioner, had filed a claim for maintenance before the family court by order dated 22.7.2000, granted maintenance at the rate of Rs.500/- per month to each of the applicants. The petitioner filed a revision petition before the High Court, assailing the order of family court on the ground, inter-alia that respondent No.3 was entitled to maintenance only till she attains majority and not thereafter. Considering the points, learned Single Judge of the High Court 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. A minor daughter is entitled to maintenance only till she attains majoirty, but declined to interfere with the order passed by family court taking cue from Section 20(3) of the Hindu Adoption and Maintenance Act, 1956, under which the right of maintenance is given to a minor daughter till her marriage. Learned Single Judge was persuaded to maintain the order of the

family court with a view to avoid multiplicity of proceeding. Hon'ble Apex Court observed as under:-

"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. A similar question came up for consideration by this Court in the case of Noor Saba Khatoon v. Mohd. Quasim , AIR 1997 SC 3280 : 1997 (6) SCC 233 : 1997 SCC (Cri) 924 relating to the claim of a Muslim divorced woman for maintenance from her husband for herself and her minor children. This Court while accepting the position that Section 125, CrPC does not fix liability of parents to maintain children beyond attainment of majority, read the said provision and Section 3(l)(b) of the Muslim Women (Protection of Rights on Divorce) Act together and held that under the latter statutory provision liability of providing maintenance extends beyond attainment of majority of a dependent girl.

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 Cr.P.C. 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 judgement/order of the High Court is called for.

With above observations, the Hon'ble Apex Court dismissed the Special Leave Petition.

9. In **Abhilasha vs. Prakash and others (supra)**, a Special Leave to Appeal was filed by the appellant, the daughter of the respondent No.1 and 2, challenging the order of the High Court of Punjab and Haryana dated 16.8.2018, by which the order, the High Court dismissed the application U/S 482 Cr.P.C. filed by the appellant praying for setting aside the order of Judicial Magistrate Ist Class, Revari, dated 16.2.2011 as well as 17.2.2014, passed by the revisional court. The original application for maintenance was filed by the respondent No.2 against her husband, the respondent No.1 Prakash claiming maintenance of herself as well as her three children. The learned Judicial Magistrate dismissed the application in respect of applicant Nos.1, 2 and 3 but granted maintenance to applicant No.4, the appellant before the Apex Court till she attains majority. Aggrieved by the said judgement dated 16.2.2011, all the four applicants filed a criminal revision before the Court of Session, which was also dismissed by order dated 17.2.2014 with the only modification that the revisionist No.4 (appellant) shall be entitled to maintenance till 26.4.2005, when she attains majority, as post majority maintenance can only be granted to a daughter, if she is by reason of any physical or mental abnormality or injury, unable to maintain herself, as she was not suffering from any physical or mental abnormality or injury, she was not entitled to obtain maintenance after the date on which, she attains majority. The High Court by judgement dated 16.2.2018, dismissed the application under Section 482 Cr.P.C. filed

by the applicants and affirmed the orders of court below.

10. Hon'ble Supreme Court while discussing its previous judgments in **Abhilasha vs. Prakash and others (supra)** as well as its judgment in Nanak Chand vs. Chandra Kishore Agrawal and others (supra) and some other previous cases, framed two question for consideration in that appeal:-

(i) Whether the appellant, who although had attained majority and is still unmarried is entitled to claim maintenance from her father in proceedings under Section 125 Cr.P.C. although she is not suffering from any physical or mental abnormality/injury?

(ii) Whether the orders passed by learned Judicial Magistrate as well as learned Revisional Court limiting the claim of the appellant to claim maintenance till she attains majority on 26.04.2005 deserves to be set aside with direction to the respondent No.1 to continue to give maintenance even after 26.04.2005 till the appellant remains unmarried?

11. Hon'ble Apex 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.

12. Hon'ble Apex Court in Abhilasha vs. Pralasj and others (supra), clarified in paragraph No.24 of its judgement that the judgement of this Court in Jagdish Jugtawat (supra) cannot be read to laying down the ratio that in proceedings under Section 125 Cr.P.C. filed by the daughter against her father, she is entitled to maintenance relying on the liability of the father to maintain her unmarried daughter as contained in Section 20(3) of the Act, 1956. The High Court in exercise of Criminal Revisional jurisdiction can very well refuse to interfere with the judgment of Courts below by which maintenance was granted to unmarried daughter. This Court while hearing criminal appeal against the above judgment of High Court was exercising jurisdiction under Article 136 of the Constitution of India, and in the facts of that case, this Court refused to interfere with the judgment of High Court but in refusal to interfere by this Court, no ratio can be read in the judgment of Jagdish Jugtawat (supra) as contended by learned counsel for the appellant. 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 – 22 nd Edition**, in paragraph No.543, a father is bound to maintain his unmarried daughters. On the death of the father, they are entitled to be maintained out of his estate.

13. Hon'ble Apex Court further observed that Muslim Law also recognises the obligation of father to maintain his daughters until they are married and his sons until they have attained the age of puberty. **(Mulla's Principles of Mohammedan Law (19th Edn.)** 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. 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 of the Act. This Court in **Noor Saba Khatoon Vs. Mohd. Quasim, (1997) 6 SCC 233**, which was a case under Section 125 Cr.P.C. as well as provisions of Muslim Women (Protection of rights on Divorce), Act 1986, held that affect of a beneficial legislation like Section 125 Cr.P.C. cannot be allowed to be defeated except through clear provisions of statute. In the case before us, the application was filed under Section 125 Cr.P.C. before Judicial Magistrate First Class, Rewari who passed the order dated 16.02.2011. The Magistrate while deciding proceedings under Section 125 Cr.P.C. could not have exercised the jurisdiction under Section 20(3) of Act, 1956 and the submission of the appellant cannot be accepted that the Court below should have allowed the application for maintenance even though she has become major. We do not find any infirmity in the order of the Judicial Magistrate First Class as well as learned Additional Magistrate in not granting maintenance to appellant who had become major. The maintenance as contemplated under Act, 1956 is a larger concept as compared to concept of maintenance under Section 125 Cr.P.C. 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. Hon'ble Apex Court further held as under:-

33. 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 as observed by this Court in the case of Jagdish Jugtawat (supra). However the Magistrate in exercise of powers under Section 125 Cr.P.C. cannot pass such order.

34. In the case before us, the application was filed under Section 125 Cr.P.C. before Judicial Magistrate First Class, Rewari who passed the order dated 16.02.2011. The Magistrate while deciding proceedings under Section 125 Cr.P.C. could not have exercised the jurisdiction under Section 20(3) of Act, 1956 and the submission of the appellant cannot be accepted that the Court below should have allowed the application for maintenance even though she has become major. We do not find any infirmity in the order of the Judicial Magistrate First Class as well as learned Additional Magistrate in not granting maintenance to appellant who had become major.

36. The purpose and object of Section 125 Cr.P.C. as noted above is to provide immediate relief to applicant in a summary proceedings, whereas right under Section 20 read with Section 3(b) of Act, 1956 contains larger right, which needs

determination by a Civil Court, hence for the larger claims as enshrined under Section 20, the proceedings need to be initiated under Section 20 of the Act and the legislature never contemplated to burden the Magistrate while exercising jurisdiction under Section 125 Cr.P.C. to determine the claims contemplated by Act, 1956.

38. We, thus, accept the submission of the learned counsel for the appellant that as a preposition of law, an unmarried Hindu daughter can claim maintenance from her father till she is married relying on Section 20(3) of the Act, 1956, provided she pleads and proves that she is unable to maintain herself, for enforcement of which right her application/suit has to be under Section 20 of Act, 1956.

39. In facts of the present case the ends of justice be served by giving liberty to the appellant to take recourse to Section 20(3) of the Act, 1956, if so advised, for claiming any maintenance against her father. Subject to liberty as above, the appeal is dismissed.

14. In the present case, the family court has committed a legal error while dismissing the application for maintenance filed by the applicant from her father-present respondent No.2 only on the ground that she has attained age of majority despite the admitted fact that she was unmarried at the time of impugned judgement. The marriage of parents of the revisionist has already been dissolved by a decree of divorce passed on 12.7.2016, in Matrimonial Suit No.65 of 2021, Lalit Gupta @ Manoj Gupta vs. Smt. Alka @ Bebi, under Section 13 of Hindu Marriage Act and a lump-sum maintenance has been awarded in said order for maintenance to the mother and minor brother of the revisionist therein as the revisionist was residing with her father at that time. The family court is empowered to treat the application under Section 125 Cr.P.C. moved by the revisionist seeking maintenance from her father may be treated as maintenance petition under Section 20(3) of the Act, 1956 by the court below and same should have been liable to be decided accordingly, without dismissing the application under Section 125 Cr.P.C. on technical ground that the application was not maintainable under Section 125 Cr.P.C. as the applicant-daughter had already attained age of majority and she was not entitled to seek maintenance under Section 125 Cr.P.C. A fine distinction has been drawn by Hon'ble Apex Court in Abhilasha vs. Prakash and others (supra) in this regard, where it is held that the provision of Section 20 of Act, 1956 cast clear statutory obligation on a Hindu to maintain his unmarried daughter who is unable to maintain herself. The right of unmarried daughter under Section 20 to claim maintenance from her father when she is unable to maintain herself is absolute and the right given to unmarried daughter under Section 20 is right granted under personal law, which can very well be enforced by her against her father. Unmarried daughter is clearly entitled for maintenance from her father till she is married even though she has become major, which is a statutory right recognised by Section 20(3) and can be enforced by unmarried daughter in accordance with law.

15. In the light of forgoing discussion and placing reliance on dictum of Hon'ble Apex Court in Abhilasha vs. Prakash and others (supra), it is clear that in order to avoid multiplicity of proceedings, a consistent stand is liable to be taken that the petition under Section 125 Cr.P.C. can

be entertained by Family Court without pushing the major daughter of the opposite party to file an independent petition seeking maintenance under Section 20(3) of the Act. The family court has got jurisdiction to decide the case under Section 125 Cr.P.C. as well as maintenance suit under Section 20 of the Act, 1956. Therefore, the family court can exercise jurisdiction under both the acts and in appropriate case can grant maintenance to unmarried major daughter from her father, even though she has become major, enforcing her rights under Section 20 of the Act, 1956, so as to avoid multiplicity of the proceedings.

16. Hon'ble Apex Court also held that 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 proceeding.

17. Accordingly, present criminal revision stands **allowed** and the impugned order passed by learned family court is set aside.

18. The Family Court concerned is directed to treat the application moved by the applicant/revisionist under Section 125 Cr.P.C. as an application moved under Section 20(3) of Hindu Adoption and Maintenance Act, 1956 and decide the same afresh in accordance with law and on merits of the case, after giving opportunity of hearing to both the parties, preferably within a period of three months from the date of presentation of certified order of this Court.

(2024) 2 ILRA 1515
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2024

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Revision No. 6033 of 2023

Smt. Soni Saxena @ Neetu Saxena ...Revisionist
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Revisionist:
Sri Jitendra Singh

Counsel for the Respondents:
G.A., Sri Vikesh Kumar Tiwari

Criminal Law - Indian Penal Code, 1860 - Section 342, 376(3) & 506 - POCSO Act, 2012 - Section 5(dha)/6 - Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 37(c), 101 - Child Welfare Committee refused to release victim-girl in care and custody of her mother for reasons which have been elaborately dealt with in impugned order dated 23.08.2023 - Appellate court instead of deciding matter on merits, declined to exercise its powers on patently wrong assumptions - It is difficult to understand how such view has been taken by appellate court that it had no jurisdiction to hear challenge to order passed by Child Welfare Committee, in appeal - As is quite obvious, appeal shall lie to children court against all orders passed by Child Welfare Committee except where order has been passed relating to foster care or sponsorship foster care - Appellate court's order set aside, matter remanded for fresh decision in accordance with law. (Para 5, 6)

Revision disposed of. (E-13)

List of Cases cited:

1. Girish Kumar Vs St. of U.P. & ors., 2022:AHC:206879 decided on 25.11.2022, (Paras 6, 10, 11)

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

1. Heard Sri Jitendra Singh, learned counsel for the revisionist, Sri Vikesh Kumar Tiwari, learned counsel for the opposite party no. 2-the first informant and learned AGA for the State.

2. This criminal revision has been filed challenging the order dated 20.07.2023 and 23.08.2023 passed by the Child Welfare Committee, Shahjahanpur in relation to a matter arising out of case crime no. 01 of 2023 under sections 342, 376(3), 506 IPC and section 5(dha)/6 POCSO Act, by which firstly she was put in a government protection home under section 37(c) of the Juvenile Justice (Care and Protection of Children) Act, 2015 by Child Welfare Committee vide order dated 20.07.2023 and further an application moved by her mother for taking her into her custody, was rejected by order passed by the Child Welfare Committee on 23.08.2023. By means of a supplementary affidavit filed by the revisionist an order passed by the appellate court on 31.10.2023 in an appeal preferred against the order dated 23.08.2023 whereby the appeal was dismissed on the ground that the children court had no jurisdiction to hear the same, has also been challenged in this criminal revision.

3. Relevant facts are as below:-

Pradeep Saxena lodged an FIR against Soni Saxena and several others with the allegations that he got married to Soni Saxena about 20 years ago and that she stayed in conjugal relationship with him for 12 years and gave birth to four children. Thereafter she deserted him and started living with one Monu s/o Payarelal @ Ram Kishan along with their four kids. About 20 days ago his younger daughter aged 14 years was sold off to one Saurabh s/o Ramesh Lal with the assistance of co-accused persons. It is alleged in the FIR that Saurabh is aged 35 years and his daughter is merely 14 years. When the first informant tried to contact the co-accused Manorama, she said that his daughter has been sold off and he may have his share in the money. On the basis of this FIR case crime no. 01 of 2023 was lodged on 13.07.2023. The statement of the victim girl under section 161 Cr.P.C and other witnesses were recorded. She was put to medical examination and was found aged about 16 years. The victim was produced before the Special Judge, POCSO Act, and the Court ordered her to be produced before the Child Welfare Committee. Before the Child Welfare Committee, she stated that she wanted to accompany her mother-Soni Saxena and Vinay Saxena. The Child Welfare Committee considered the fact that Soni Saxena is named as an accused and Vinay Saxena is not her father, therefore it will not be proper to send her with them and directed to lodge her in a juvenile home. The victim girl sent an application on 24.07.2023 through Superintendent, Women Protection Home, with a prayer that she desired to stay with her mother-Soni Saxena. The Child Welfare Committee considered the application and declined her to be handed over to her mother, giving detailed reasons as mentioned in the impugned order. This order refusing her custody to her mother, was passed on 23.08.2023. She challenged the same by filing a Criminal Appeal No. 73 of 2023 (Smt. Soni Saxena @ Neetu Saxena vs. State of UP and 3 Others). The learned appellate court dismissed the appeal holding that it has no jurisdiction to hear the challenge to the order passed by the

Child Welfare Committee. The appellate court expressed an opinion that such orders can only be challenged before the Court of District Magistrate, as provided in section 27(10) of the Juvenile Justice Act, 2015.

4. The appellate court seems to have passed the order in the light of the provisions of section 27(10) of the J.J. Act, 2015. Section 27 deals with the Constitution of the Child Welfare Committee, the qualifications of a person as regard eligibility of the person to be appointed as a member of a Committee, disqualifications, the tenure of the members, the procedure for inquiry as regard termination of the members etc. Section 27(10) of the J.J. Act, 2015 empowers the District Magistrate to entertain any grievance arising out of **functioning of a Committee**. This section further empowers the affected child or any one connected with the child, as the case may be, to file a complaint before the District Magistrate for the purpose that he may take suitable action as regard the complaints or the grievances which an affected person may have against the Committee. These provisions definitely do not deal with legal challenges to the order passed by the Committee. An aggrieved person can challenge the order passed by the Child Welfare Committee under section 101 of the Juvenile Justice Act, 2015.

Section- 101 of the Juvenile Justice Act, 2015 is as below:-

"(1) Subject to the provisions of this Act, any person aggrieved by an order made by the Committee or the Board under this Act may, within thirty days from the date of such order, prefer an appeal to the "Children's Court", except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate."

The Allahabad High Court in ***Girish Kumar vs. State of U.P. and 3 Others, 2022:AHC:206879*** decided on 25.11.2022 observed in Para no. 6 as below:-

"6. It is quite clear from this provision of law that appeal shall lie to the District Magistrate with respect to decisions by the Child Welfare Committee relating to foster care and sponsorship after care only. The appeal in respect of other orders passed by the Child Welfare Committee shall lie to the 'Children's Court' within 30 days from the date of order. Before analysing this provision, it will be appropriate to peruse the order passed by the Child Welfare Committee to decide upon whether this order falls in the category where the appeal may lie to Children's Court or in the category where appeal shall lie to District Magistrate."

It was further observed in Para nos. 10 and 11 as below:-

"10. I went through the material on record in the light of submissions before this Court. As per scheme of the Juvenile Justice Act, the Child Welfare Committee, irrespective of any other law, has power to deal exclusively with all proceedings relating to 'children in need of care and protection' under Section-29 of the Juvenile Justice Act, 2015. The functions and responsibilities of Committee include taking cognizance of and receiving the child produced before it, conducting inquiry on all issues relating to safety and well being of a child as well as ensuring care, protection, appropriate rehabilitation and most importantly

restoration of 'children in need of care and protection' (Section-30 of the Juvenile Justice Act, 2015). Section-37 of the Juvenile Justice Act, 2015 empowers the Committee, after being satisfied through an inquiry, consideration of social investigation report submitted by Child Welfare Officer and taking into account the child's wishes, in case the child is sufficiently matured, to take a view and pass one or more of following order, namely:-

(a) declaration that a child is in need of care and protection;

(b) restoration of the child to parents or guardian or family with or without supervision of Child Welfare Officer or designated social worker;

(c) placement of the child in Children's Home or fit facility or Specialized Adoption Agency for the purpose of adoption for long term or temporary care, keeping in mind the capacity of the institution for housing such children, either after reaching the conclusion that the family of the child cannot be traced or even if traced, restoration of the child to the family is not in the best interest of the child;

(d) placement of the child with fit person for long term or temporary care;

(e) foster care orders under section 44;

(f) sponsorship orders under section 45;

(g) .....;

(h) .....

10. On perusal of the above provisions of Juvenile Justice Act, 2015, it is demonstrated that Child Welfare Committee is given vast powers on the principles of best interest of a child, a thread which goes through the whole of the scheme of the Juvenile Justice Act, 2015. It has been specifically provided by the section-3 of the Juvenile Justice Act, 2015 that Central Government, State Governments, the Board and other agencies, as the case may be, while implementing the provisions of the Act, shall be guided by the fundamental principles which include principles of best interest, principle of family responsibilities, the principle of safety, the principles of repatriation and restoration and several others.

11. The provisions of law as aforesaid are being reproduced here with the twin object; firstly, that when an order is passed of the nature as is under challenge before this Court, the appeal shall be entertainable by the Children's Court and not by the District Magistrate; the District Magistrate is empowered to hear appeals only against the decisions of the Committee relating to foster care and sponsorship after care. The order in question does not fall in this category. The appellate court was thus wrong in holding that appeal did not lie before it. Therefore, the impugned order is liable to be set-aside; secondly, it may be noted that when a child in need of care and protection is lodged in any shelter home, it is a measure of temporary nature; the Child Welfare Committee is fully empowered to take a decision where it is found no more necessary to detain her. It may be noted that legally a child in need of care and protection may be detained for a further period even if he/she has attained majority if it is found that it will not be in his/her best interest to release him/her immediately."

5. In the instant case, the Child Welfare Committee refused to release the victim-girl in care and custody of her

mother for reasons which have been elaborately dealt with in the impugned order dated 23.08.2023. The learned appellate court instead of deciding the matter on merits, declined to exercise its powers on patently wrong assumptions. It is difficult to understand how such a view has been taken by the appellate court that it had no jurisdiction to hear the challenge to an order of this nature passed by the Child Welfare Committee, in appeal. As is quite obvious, an appeal shall lie to children court against all the orders passed by the Child Welfare Committee except where order has been passed relating to foster care or sponsorship foster care.

6. In view of the above, I find it appropriate to set-aside the order passed by the appellate court and remand the matter for decision afresh, according to law.

7. Therefore, this revision is finally **disposed of** with a direction to the appellate court to adjudicate the matter of custody of the victim, according to law and the order dated 31.10.2023 passed by the appellate court is hereby set-aside. The learned appellate court is expected to decide the appeal expeditiously.

8. Copy of the order be immediately transmitted to the court concerned.

Note:- Copy of the order may be circulated to all the District Courts in the State of U.P.

(2024) 2 ILRA 1519
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2024

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 6307 of 2023

Raju Patel ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
Sri C.P. Upadhyay, Sri Santosh Kumar Mishra

Counsel for the Respondents:
G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 304 r/w 34 & 506 - Code of Criminal Procedure, 1973 - Sections 319 & 397 - Against summoning order - In her written report, informant/P.W.1 (wife of deceased) St.d that accused took her husband to Jhunjhunpur crossing, where he was later assaulted - On being informed by neighbour, she and alongwith co-villagers reached spot and were told by P.W.2 that revisionist and four others had beaten her husband and thereafter they fled away from place of occurrence - She found him lying injured and groaning - P.W.1 to P.W.4 consistently corroborated FIR version, implicated revisionist and co-accused in assault - On consideration of depositions of P.W.1 to P.W.4 and law laid down by Hon'ble Apex Court, there is prima facie evidence to summon revisionist - Trial Court, being satisfied with evidence on record, rightly exercised power u/s 319 Cr.P.C., committed no illegality - Revision lacks merit, dismissed. (Para 17 to 19)

Revision dismissed. (E-13)

List of Cases cited:

1. Amit Kapoor Vs Ramesh Chander & anr., (2012) 9 SCC 460, (Paras 12, 13, 20)

2. Hardeep Singh Vs St. of Punj.; (2014) 3 SCC 92, (Paras 105, 106, 117.3 to 117.5)

3. S. Mohammad Ispahani Vs Yogendra Chandak (2017) 16 SCC 226, (Para 35)

4. Rajesh Vs St. of Haryana (2019) 6 SCC 368

5. Yashodhan Singh & ors. Vs St. of U.P.& anr.; (2023) 9 SCC 108, (Paras 22.6 to 22.8)

(Delivered by Hon'ble Surendra Singh-I, J.)

1. Heard Sri Dr. C.P. Upadhyay, Advocate assisted by Sri Santosh Kumar Mishra, learned counsel for the revisionist and Sri Alok Sharma, learned A.G.A.-I for the State.

2. This criminal revision has been filed challenging the impugned judgement and order dated 19.05.2023 passed by Additional Sessions Judge/Fast Track Court No.1, Maharajganj in S.T. No. 48 of 2017 (State Vs. Vishambhar Patel and others) arising out of Case Crime No. 672 of 2016 u/s 304 r/w 34, 506 I.P.C., Police Station- Kotwali, District- Maharajganj.

3. By the impugned order, the trial Court has allowed the application u/s 319 Cr.P.C. filed by opposite party no.2/informant, Smt. Heera Devi and summoned revisionist/accused, Raju Patel for trial u/s 304 r/w 34, 506 I.P.C.

4. The prosecution case, in brief, is that informant, Smt. Heera Devi w/o late Gyanesh Yadav had submitted a written report on 10.12.2016 at 23.50 hours in Police Station- Kotwali, District- Maharajganj to the effect that she is original resident of village- Kashmariya, Police Station- Chowk, District- Maharajganj. On 10.12.2016, Vishambhar Patel s/o Bansidhar Patel of her village took her husband to Jhunjhunpur crossing. At about 8 p.m., her neighbour, namely, Durgesh Yadav received a call on his mobile from his co-villager Ganesh that some persons have assaulted and injured her husband. The informant along with co-villagers reached Jhunjhunpur crossing. There when she met P.W.2 Vijay Kumar Jaiswal of her village, then he informed her that accused, Vishambhar Patel, Santosh Patel, Raju Patel, Vimlesh and Bhunwar Patel assaulted and caused injury to her husband, and thereafter, they fled away from the place of occurrence. When she reached at the place of occurance along with co-villagers, she found that her husband was lying there groaning with pain. The villagers accompanying her called upon an ambulance 108 and carried her husband to District Hospital where after examination, the doctor declared that her husband had died.

5. It has been submitted by learned counsel for the revisionist that the trial Court has passed the impugned order without considering the evidence on record. It has next been submitted that the trial Court has passed the impugned order only on the basis of evidence of P.W.1 Smt. Heera Devi. The prosecution has examined P.W.1 Smt. Heera Devi, P.W.2 Vijay Kumar Jaiswal, P.W.3 Subhash Yadav and P.W.4 Durgesh Yadav out of which only P.W.2- Vijay Kumar Jaiswal is said to be an eye-witness and other witnesses have deposed that they came to know about the incident as told by P.W.2 Vijay Kumar Jaiswal. There is contradiction in the statement of witnesses with regard to weapon of offence used by the accused persons as well as who informed the informant about the occurrence, in which her husband received fatal injuries. It has also been submitted that in the First Information Report, it is mentioned that Ganesh Yadav informed the informant, Smt. Heera Devi about the incident whereas in her statement, she has deposed that Rajesh Yadav informed her about the occurrence in which her husband, Gyanesh was fatally assaulted. It has also been submitted that P.W.2 Vijay Kumar Jaiswal has stated that when he tried to save the injured/deceased Gyanesh Yadav, accused also assaulted him but P.W.2 Vijay

Kumar Jaiswal has not been medically examined and no injury report has been submitted. It has further been submitted that P.W.3 Subhash Yadav has not mentioned who informed him about the incident. P.W.4 Durgesh Yadav has stated that both Ganesh Yadav and P.W.2 Vijay Kumar Jaiswal informed him about the occurrence. Therefore, there is contradiction in the statement of witnesses regarding how they came to know about the incident.

6. Per contra, learned A.G.A. has opposed the criminal revision and has submitted that the trial court after considering the evidence on record as well as law laid down by the Hon'ble Supreme Court regarding summoning of persons u/s 319 Cr.P.C. who have not been named in the charge-sheet, has rightly summoned the revisionist for trial. It has also been submitted that the name of the revisionist was mentioned in the First Information Report and sufficient evidence was obtained during investigation against him but the Investigating Officer illegally dropped his name from the charge-sheet.

7. Heard learned counsel for the revisionist, learned A.G.A. for the State and perused the entire record.

8. Before examining the merits of the present case, the ambit, scope and power of the Sessions Court under Sections 397 as well as 319 Cr.P.C. should be discussed and ascertained.

9. The Hon'ble Apex Court in **Amit Kapoor Vs. Ramesh Chander and Another, (2012) 9 SCC 460** in paragraph nos.12 and 13 of its judgement has narrated the scope of revision by the High Court u/s 397 Cr.P.C. which is as follows :

"12.Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13.Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the CrPC."

10. In paragraph nos.17 and 19 of the aforesaid judgement, the Hon'ble Apex Court has narrated that before framing a charge, what documents should be considered by the trial court. It has also provided about the extent of evidence required for framing of a charge. In paragraph no.20 of the aforesaid judgement, the Apex Court has compared the power and extent of jurisdiction of the High Court u/s 397 Cr.P.C. and Section 482 Cr.P.C. which is given hereunder :

"20.The jurisdiction of the court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression "prevent abuse of process of any court or otherwise to secure the ends of justice", the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maximquando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potesti.e. when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The section confers very wide power on the Court to do justice and to ensure that the process of the court is not permitted to be abused."

11. The Hon'ble Apex Court in para 117.3 and 117.4 in the case of **Hardeep Singh vs. State of Punjab; (2014) 3 SCC 92** has explained the meaning of word 'evidence' as used under Section 319 Cr.P.C.. The relevant paragraphs of the judgement reads as under:-

"117.3. In view of the above position the word "evidence" in Section 319CrPC has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question (ii)—Whether the word "evidence" used in Section 319(1)CrPC could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?Answer

117.4. Considering the fact that under Section 319CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4)CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination."

12. The Hon'ble Apex Court in para 117.5 of the case of Hardeep Singh (supra) has also explained the nature of satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused. The relevant paragraph of the judgement reads as under:-

"117.5. Though under Section 319(4)(b)CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319CrPC would be the same as for framing a charge.The difference in the degree of satisfaction for summoning the

original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different."

13. The scope and ambit of Section 319 Cr.P.C. has been well-settled by the pronouncement of Constitution Bench of the Hon'ble Apex Court in ***Hardeep Singh Vs. State of Punjab and others, (2014) 3 SCC 92*** and paras 105 and 106 which are relevant for the purpose are reproduced hereunder :

"105. Power under Section 319 Cr.P.C, 1973 is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C., 1973. In Section 319 Cr.P.C., 1973, the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 Cr.P.C., 1973 to form any opinion as to the guilt of the accused."

14. In ***S. Mohammad Ispahani Vs. Yogendra Chandak (2017) 16 SCC 226***, this Court has observed and held as under :

"35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 of the Cr.P.C. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."

15. In the case of ***Rajesh Vs. State of Haryana (2019) 6 SCC 368***, after considering the observations made by this

Court in Hardeep Singh (supra) referred to hereinabove, this Court has further observed and held that even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in F.I.R. but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 Cr.P.c. and even those persons named in the F.I.R. but not implicated in charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

16. The Hon'ble Apex Court in the case of ***Yashodhan Singh and others vs. State of Uttar Pradesh and Another; (2023) 9 SCC 108*** has explained the law purported by the Hon'ble Apex Court in the case of ***Hardeep Singh (supra)*** regarding the evidence required the satisfaction of the Court for summoning a person under Section 319 Cr.P.C. The paragraph Nos. 22.6, 22.7 and 22.8 which are relevant for the purpose are reproduced hereunder :

"22.6. It was also observed by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] that apart from evidence in the strict legal sense recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319CrPC. Holding that the expression "evidence" must be given a broad meaning, it was observed that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. Such material would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have been suppressed or had escaped the notice of the court. Therefore, any material brought before the court even prior to the trial can be read within the meaning of the expression "evidence" for the purpose of Section 319CrPC. While considering the evidence that emanates during the trial, it was observed by this Court that evidence recorded by way of examination-in-chief and which is untested by cross-examination is nevertheless evidence which can be considered by the court for the exercise of power under Section 319CrPC so long as, it would appear to the court that some other person who is not facing the trial, may also have been involved in the offence.

22.7. Further, Section 319CrPC also uses the words "such person could be tried", which means not to have a mini-trial at the stage of Section 319CrPC by having examination and cross-examination and thereafter coming to a prima facie conclusion on the overt act of such person sought to be added. Such a mini-trial will affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all. As under Section 319(4)CrPC, such a person has the right to cross-examine the prosecution witnesses and examine the defence witnesses and advance his arguments. It was further observed that the power under Section 319CrPC can be exercised even after completion of examination-in-chief and the court does not have to wait till the said evidence is tested on cross-

examination, for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other persons, not facing the trial in the offence.

22.8. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes 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."

17. In light of the law laid down by the Hon'ble Apex Court in the above mentioned judgements regarding the ambit and scope of criminal revision under Section 397 Cr.P.C., requirement of evidence for summoning the accused under Section 319 Cr.P.C. and facts and circumstances of the present case and evidence available on the trial Court record is being examined. The First Information Report related to Case Crime No.672 of 2016, under Sections 147 and 304 I.P.C. was lodged by the informant, namely, Heera Devi w/o Gyanesh Yadav (deceased) on 10.12.2016. In her written report, she has narrated that on 10.12.2016 in the night, the accused, Vishambar Patel, who is resident of her village, took her husband Gyanesh Yadav to Jhunjhunpur crossing. At about 8 p.m., Ganesh Yadav informed on the mobile of her neighbour Durgesh Yadav that some persons have assaulted and injured her husband, Gyanesh Yadav. On the information given by Durgesh Yadav, informant along with co-villagers reached Jhunjhunpur crossing, where P.W.2-Vijay Kumar Jaiswal informed her that revisionist-Raju Patel and four other named accused persons have beaten and assaulted her husband and thereafter, they fled away from the place of occurrence. When she reached there along with co-villagers, she found that her husband was lying there groaning with pain. P.W.1-Heera Devi has given similar statement before trial Court regarding her husband, leaving her house with co-accused, Vishambar Patel. Her neighbour- Durgesh Yadav informed her about the incident. P.W.2 Vijay Kumar Jaiswal also informed the informant about the name of revisionist along with four other accused persons involved in the alleged crime of assault on her husband. P.W.1-Heera Devi has also narrated in her deposition that P.W.3 Subhash Yadav and Rajesh Yadav informed about the complicity of the accused persons in the assault her husband. P.W.1-Heera Devi is consistent in corroborating the facts given by her in the FIR. On the basis of her written report that when she reached the place of occurrence, P.W.2 Vijay Kumar Jaiswal informed her about the accused persons, who had participated in the aforesaid crime in question. P.W.2 -Vijay Kumar Jaiswal also deposed in his evidence that he saw the participation of revisionist and other co-accused persons in the assault of informant's husband. P.W.3 Subhash Yadav and P.W.4 Durgesh Yadav have also deposed in their evidence that when they reached at the place of occurrence, they saw the injured, who was lying there groaning with pain. They have also deposed that P.W.2 Vijay Kumar Jaiswal informed them the name of revisionist and four other accused persons, who had participated in the assault on the deceased Gyanesh Yadav.

18. Taking into the consideration of the deposition of P.W.1, P.W.2, P.W.3 and P.W.4 and in the light of law laid down by the Hon'ble Apex Court in the aforesaid decisions, there is prima facie evidence to summon the revisionist, namely, Raju Patel for trial under Sections 304/34 and 506 I.P.C.

19. From the above discussions, it can be concluded that the Additional Sessions Judge/Fast Track Court No.1, Maharajganj has after being satisfied with the evidence on record summoned the accused as per provision under Section 319 Cr.P.C. The trial Court has not committed any illegality, irregularity or impropriety in passing the impugned order. Therefore, I do not find any merit in the revision which is liable to be dismissed and is hereby **dismissed** accordingly.

20. It is hereby made clear that I have not expressed any opinion on the merits of the case and the veracity or deposition of the witnesses. The trial Court is free to give its own findings and may decide the case in question, in accordance with law, without being prejudiced by any observation made in this order.

(2024) 2 ILRA 1526
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.02.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Misc. Writ Petition No. 248 of 2024

Rakesh Babu ...Petitioner
Versus
The U.P. Rajkiya Nirman Nigam Ltd. & Anr. ...Respondents

Counsel for the Petitioner:
Shireesh Kumar, Utkarsh Kumar

Counsel for the Respondents:
Shishir Jain

Criminal Law - The Prevention of Corruption Act, 1988 - Section 19 - Quashing of Prosecution Sanction Order Denied The Allahabad High Court dismissed the writ petition challenging the prosecution sanction order dated 26.06.2023 under Section 19 of the Prevention of Corruption Act, 1988, holding that such challenges are not maintainable at the pre-trial stage. The court emphasized that the validity of the sanction order, including compliance with procedural requirements, should be assessed during trial after evidence is presente (Paras 11, 42-43)

Non-Applicability of Section 17A of the Prevention of Corruption Act The court rejected the petitioner's argument that prior approval under Section 17A of the Prevention of Corruption Act, 1988, was mandatory, as the alleged offence of amassing disproportionate assets under Section 13(1)(b) was not directly relatable to recommendations or decisions made in discharge of official duties. Section 17A applies only to offences linked to official functions, not to illicit enrichment. (Paras 14, 24, 30-31)
Prior Disciplinary Exoneration Not a Bar to Criminal Prosecution The court held that the petitioner's exoneration in earlier disciplinary proceedings (concluded on 06.06.2023) did not preclude criminal prosecution on the same charges, distinguishing Ashoo Surendranath Tewari Vs Deputy Superintendent of Police (2020). The court clarified that disciplinary proceedings, based on preponderance of probability, differ from criminal trials requiring proof beyond reasonable doubt. (Paras 33-34, 39-41)

Judicial Precedents on Sanction and Investigation Citing Nara Chandrababu Naidu Vs St. of Andhra Pradesh (2024), Yeshwanth Sinha Vs CBI (2020), and Yash Kumar Verma Vs St. of U.P. (2023), the court underscored that Section 17A's requirement for prior approval does not apply to offences unrelated to official duties. The court also relied on CBI Vs Ashok Kumar Aggarwal (2013) to hold that sanction orders' validity must be tested during trial. (Paras 15, 24-26, 42)

Cases Cited:

1. Romesh Lal Jain Vs Naginder Singh Rana, 2006 (1) SCC 294 (Para 7)

2. CBI Vs Ashok Kumar Aggarwal, (2013) 15 SCC 222 (Paras 8, 42)

3. Kanhaiya Lal Saraswat Vs St. of U.P., [2021 (116) ACC 815] (Para 11)

4. Rajeev Kumar Singh Vs St. of U.P., 2020 AIR Online 447 (Paras 11, 12, 42)

5. Yash Kumar Verma Vs St. of U.P., CRLP 2372 of 2023 (All HC, 14.07.2023) (Paras 11, 42)

6. Nara Chandrababu Naidu Vs St. of Andhra Pradesh, 2024 SCC OnLine SC 47 (Paras 15, 24)

7. Yeshwanth Sinha Vs CBI, (2020) 2 SCC 338 (Paras 18, 25)

8. St. of Rajasthan Vs Tejmal Chaudhary, 2021 SCC OnLine SC 3477 (Paras 26, 29)

9. Ashoo Surendranath Tewari Vs Deputy Superintendent of Police, Criminal Appeal No. 575 of 2020 (SC, 08.09.2020) (Para 34)

10. Matajog Dobey Vs HC Bhari, AIR 1956 SC 44 (Para 23)

11. Shambhu Mishra Vs St. of U.P., 1997 (5) SCC 326 (Para 21)

12. St. of U.P. Vs Parasnath Singh, 2009 (6) SCC 372 (Para 21)

13. Subramanyam Swami Vs Manmohan Singh, (2012) 3 SCC 64 (Para 29)

14. Subramanyam Swamy Vs Director, CBI, (2014) 8 SCC 682 (Para 29)

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J. & Hon'ble Ajai Kumar Srivastava-I, J.)

(1) Heard the learned counsel for the petitioner and the learned A.G.A. appearing for the State.

(2) This writ petition has been filed with the following main prayers:-

"(i) issue a writ, order or direction in the nature of Certiorari quashing the order dated 26.06.2023 as contained in Annexure No.8 to this writ petition and declare the petitioner entitled to all consequential service benefits.

(ii) issue any other appropriate writ, order or direction which is deemed just and proper in the nature and circumstances of the case in favour of the petitioner in the interest of justice along with the cost of this writ petition."

(3) Such relief has been sought on the grounds (as mentioned in the writ petition) that the impugned order dated 26.06.2023 has been passed in violation of mandatory provisions of Section 19 of the Prevention of Corruption Act and ignoring the fact that the petitioner has not committed any criminal misconduct within the meaning of Section 13 (1) (b) and Section 13 (2) of the Prevention of Corruption Act, 1988 (hereinafter referred as the Act of 1988).

(4) It has also been stated that initially a Departmental Inquiry was held against the petitioner on the basis of Charge-sheet dated 14.09.2021 wherein a similar charge was framed regarding expenditure of 124% more than his actual income, a copy of which has been filed as Annexure no.2 to the petition. The allegation was that during the check period with effect from 01.01.2007 to 31.12.2011, the petitioner's expenditure on himself and his family members and dependents and also acquisition of immovable and Movable property worth more than his known sources of income i.e. his income from all sources was Rs.42,92,116/- whereas he had spent Rs.96,38,455/-.

(5) In pursuance of the Charge-sheet, the petitioner had submitted his reply

which was considered by the Inquiry Officer who exonerated him from the said charge. The Enquiry Report dated 11.11.2021 has been filed as Annexure-3 to the writ petition. In the Enquiry Report, the Enquiry Officer had found that during check period (with effect from 01.01.2007 to 31.12.2011) the petitioner earned a total of Rs.35,20,785/- whereas his wife was making Stuffed Toys and Garments and doing Share Trading and had also sold off Gold jewellery and taken a loan of Rs.10 lacs and her income during the check period was Rs.65,69,613/- and therefore his total income was more than what he had spent. The Managing Director had accepted such report on 06.06.2023 and concluded the Disciplinary Proceedings on 16.06.2023. However, on the very next day i.e. on 07.06.2023, the Opposite party no.2 again passed an order instituting a fresh inquiry on the same charge and evidence. The Charge-sheet was issued to him on 16.06.2023 containing only one charge. The petitioner challenged the order dated 07.06.2023 and Charge-sheet dated 16.06.2023 in Writ-A No.6261 of 2023 [Rakesh Babu Vs. the U.P. Rajkiya Nirman Nigam Ltd. and another], in which this Court granted interim protection to him on 24.08.2023 and stayed further proceedings in pursuance of impugned orders. Not being satisfied, the respondent No.2 has also passed an order on 26.06.2023 giving Prosecution Sanction under Section 197 of the Prevention of Corruption Act, in a matter identical to the subject matter of the Charge-sheet dated 14.09.2021 and 16.06.2023.

(6) In the order dated 26.06.2023 a reference has been made to letters of the State Government dated 20.06.2023 and 26.05.2023, on the basis of Investigation Report No.A-143 of 2021 where the Vigilance Department had prima facie found evidence of commission of offence under Section 13 (1) (b) read with Section 13 (2) of the Prevention of Corruption Act.

(7) It has been stated in the writ petition that in the case of ***Romesh Lal Jain Vs. Naginder Singh Rana and others reported in 2006 (1) SCC 294***, the Supreme Court has held that Sanctioning Authority has to take a decision as per the opinion of the Law Department but the order dated 26.06.2023 does not show that any legal opinion has been sought in the matter from the Law Department.

(8) It has also been stated in the writ petition that the Supreme Court in the case of ***Central Bureau of Investigation Vs. Ashok Kumar Aggarwal reported in (2013) 15 SCC 222***, laid down the Guidelines that have to be mandatorily followed while considering the sanction for prosecution. In pursuance of such Guidelines, the Central Vigilance Commission has issued a Circular on 25.05.2015 wherein it has been provided that while considering the proposal for sanction of prosecution, the Guidelines as given in the judgment of Ashok Kumar Aggarwal should be followed. A copy of the judgment rendered in the Ashok Kumar Aggarwal has been filed as Annexure No.9 to the petition.

(9) The Guidelines as mentioned in the Ashok Kumar Aggarwal provide that the prosecution must send the entire relevant record to the Sanctioning Authority and the Sanctioning Order must show that the Sanctioning Authority has been made aware on all relevant Facts / Materials and has applied its mind before giving such sanction. A copy of the Circular dated 25.05.2015 issued by the

Central Vigilance Commission has been filed as Annexure No.10 to the writ petition.

(10) It has been stated in the writ petition that the impugned order dated 26.06.2023 issued by the Opposite party no.2 has been issued on the same set of facts and evidence which was taken into consideration by the Enquiry Officer and the Opposite party no.2 when the Disciplinary Proceedings were concluded against the petitioner without any punishment order.

(11) A preliminary objection has been raised by the learned counsel appearing on behalf of the State-respondents that the writ petition praying for quashing of the prosecution sanction granted under Section 197 of the Cr.P.C. and Section 19 of the Prevention of Corruption Act, is not maintainable and he has referred to judgment rendered by Co-ordinate Benches of this Court in the case of ***Kanhaiya Lal Saraswat Vs. State of U.P. reported in [2021 (116) ACC 815]*** decided on 18.06.2021 and judgment rendered in the case of Rajeev Kumar Singh Vs. State of U.P. passed in Criminal Misc. Writ Petition No.25382 of 2020 and other connected matters decided on 21.01.2021 and judgment rendered by a Division Bench on 14.07.2023 in the case of ***Yash Kumar Verma Vs. State of U.P. and others.***

(12) Learned counsel for the petitioner during the course of arguments has also referred to the interim order passed by a Co-ordinate Bench of this Court on 23.01.2024, where the Court had noted the arguments made by the learned counsel for the petitioner that the Provisions of Section 17A of the Act of 1988 had not been followed and consequently there was no sanction in the eye of law and the judgment rendered by this Court in ***Rajeev Kumar Singh Vs. State of U.P.*** would not come in the way of maintainability of the writ petition.

(13) Learned counsel for the petitioner has pointed out the order passed by this Court earlier on 23.01.2024 in this petition. The Division Bench passed the order on 23.01.2024 which is being quoted hereinbelow:-

"Supplementary affidavits filed today are taken on record.

Petitioner is permitted to implead the State authorities as party in the writ petition, during course of the day and provide copy to learned A.G.A.

The question is as to whether the provisions of Section 17A of the Prevention of Corruption Act, 1988 have been adhered or not, as the submission is that there is no adherence to the said provision, consequently, there is no sanction in the eyes of law, and accordingly the Division Bench judgment in Rajeev Kumar Singh Vs. State of U.P. & others, (Misc Bench No.25382 of 2020) AIR Online All 447, does not come in the way of maintainability of the writ petition.

All pleas are open for consideration on the next date. Learned counsel may address the court on the aforesaid issues.

List on 12th February, 2024, as fresh."

(14) Heard the learned counsel for the petitioner at some length and we have also perused the provisions of Section 17A of the Prevention of Corruption Act, 1988, which is being quoted hereinbelow:-

"17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken

by public servant in discharge of official functions or duties.—No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties" (Emphasis supplied by us)

(15) In **Nara Chandrababu Naidu Versus State of Andhra Pradesh and another 2024 SCC online SC 47** A Division Bench of the Court was considering the challenge by the appellant to the initiation of criminal proceedings against him and his detention in connection with the same by the respondent State . Allegations were made against him for commission of offences under various Sections of the I.P.C. and Section 12 and Section 13 (2) read with Section 13 (1) (c) (d) of the Prevention of Corruption Act, 1988. The said offences were alleged to have been committed between the years 2015 to 2019 during which period he was Chief Minister of the State of Andhra Pradesh. Initially FIR was lodged on 9th December 2021 against 36 persons in which the appellant was not included. The offences related primarily to siphoning of public funds. The list of accused persons was subsequently expanded and the appellant was also arraigned as an accused before the Special Judge, (SPE and ACB cases). The appellant along with a former minister of Andhra Pradesh cabinet who was also arraigned applied before the High Court for quashing of the FIR implicating them invoking the jurisdiction of the court under Section 482, Cr.P.C. The legality of the remand order was also challenged in the same petition. The petition was rejected. The appeal was filed before the Supreme Court against dismissal of the 482 petition by the High Court.

(16) Primarily the allegation against the appellant was of facilitating diversion of public money of around 370 crores of rupees which was to be used for setting up of six clusters of Skill Development Centres in Andhra Pradesh. During the course of investigation in the FIR it was discovered that certain shell companies were made payments on the basis of invoices issued by them without providing any service and that they were used as vehicles for diverting funds. The allegation against the appellant was that he had fast tracked the project and approved the cost estimation with criminal intent and by pursuing the government officers he had ensured release of ₹370, crores to such companies on nomination basis without following any tender process. Misappropriation of government funds through corrupt and illegal methods was alleged and abuse of official position was attributed to the appellant. It was alleged that by abusing his official position, he had fraudulently committed criminal beach of trust with a common intention to cause wrongful loss to the government exchequer by allowing the accused to divert APS SDC funds by using fake invoices as genuine ones, for the purpose of cheating through shell, defunct companies without providing materials/services to the APS SDC – Siemens project.

(17) On behalf of the appellant, the main argument which was made before the High Court was of non-compliance of Section 17A of the Prevention of Corruption Act, 1988 in implicating the appellant under Section 12, 13 (2) read with section 13 (1) (c) and (d) of the Act of 1988. It was argued that absence of prior

approval as mandated under Section 17 A of the Act of 1988, vitiated the conduct of enquiry or inquiry or investigation; the initiation and continuation of investigation in the FIR including various investigative steps of adding the appellant as an accused and arresting him and the remand of the appellant into custody, pursuant to the orders passed by the Special Court. It was argued that Section 17A of the Prevention of Corruption Act which was introduced with effect from 26th July 2018, interdicts

"– – any enquiry or inquiry or investigation into an offence to have been committed by public servant — without previous approval of functionaries specified in clauses (a) (b) or (c) as the case maybe, the only exception being where a public servant is apprehended red-handed.

(18) It was argued that Section 17A constitutes a complete legal bar to the very initiation of any enquiry, inquiry or investigation as was noted by the Supreme Court in the case of ***Yeshwanth Sinha Versus Central Bureau of Investigation reported in (2020) 2 SCC 338;*** Section 17 A uses the phrase "any offence" hence, the requirement of obtaining prior approval under Section 17A is applicable to all offences, and not just offences under Prevention of Corruption Act and even investigation for offences under the I.P.C. cannot be countenanced as the basic material for constituting both kinds of offences is the same. It was also argued that a legal bar to prosecution is a valid ground for quashing the proceedings as held by the Supreme Court in the case of ***R. P. Kapoor Versus State of Punjab and State of Haryana versus Bhajan Lal.***

(19) Both the judges constituting the Division Bench in ***Nara Chandrababu Naidu (Supra)***, gave differing opinions but in both such opinions the object of introducing section 17A and the consequences of not taking prior approval in conducting any enquiry, inquiry or investigation have been discussed in detail.

(20) After quoting Section 17A which was introduced in the statute book with effect from 26th July 2018, Justice Anirudh Bose has observed in paragraph 12 and 13 that Section 17A postulates prior approval from the appointing authority in relation to any enquiry, inquiry or investigation under the 1988 Act. While the expression Inquiry has been defined in the 1973 Code, there is no specific definition of the word 'Enquiry'. The Concise Oxford English Law Dictionary, (revised 10th edition), defines the said expression as "an act of asking for an information, it is commencement of an active search to ascertain the truth or veracity of an alleged wrongful act". In ordinary perception, enquiry by police officer would imply positive exercise for searching certain details or particulars pertaining to allegations of commission of an offence by an accused person or a set of accused persons.

(21) After referring to the counsel for the Appellant's argument regarding Standard Operating Procedure for processing cases under Section 17A of the 1988 Act, Justice Bose referred to a Department of Personnel and Training's Office Memo dated 3.9.2021 which records in detail how the aforesaid provision would apply and it mentions that enquiry for the purposes of this SOP means any action taken, for verifying as to whether the information pertains to the commission of an offence under the Act. The court disagreed with the observations made by the High Court citing judgements in the

case of ***Shambhu Mishra Versus State of U.P. 1997 (5) SCC 326***; and the ***State of U.P. Versus Parasnath Singh 2009 (6) SCC 372***; that the protection of sanction sought by the accused persons cannot be applied because when a public servant is alleged to have committed the offence of fabrication of records or misappropriation of public funds, it cannot be said that he acted in discharge of his official duty. Obviously, it cannot be said that such a conduct on the part of a public servant can be related to his official duties.

(22) Justice Bose was of the opinion that judgement rendered in *Shambhunath Misra and Paras Nath Singh (Supra)*, relate to interpreting the provisions of Section 197 of the 1973 Code. The requirement of previous Sanction contemplated in Section 197 of the 1973 Code comes at the stage of taking cognizance of an offence. Thus, a judicial authority in such a context has the advantage of coming to some form of opinion, as to whether the offending act can be said to have been committed in the discharge of official duty or not by merely looking at the nature of allegations in the complaint. If it was found impossible to conclude that the action has been done by the accused while in discharge of official duty, the judicial authority can proceed at the stage of taking cognizance by holding that requirement for taking sanction is not necessary at all.

(23) Justice Bose relied upon the observations made by the Supreme Court in ***Matajog Dobey versus HC Bhari (AIR, 1956, Supreme Court Court 44)*** to say that the need for sanction under Section 197 of the Cr.P.C. must be considered, not as soon as the complaint is lodged and on the allegations contained therein, but at the time of taking cognizance or at any stage of the proceedings where the Court is required to consider the question whether the case against the accused to be proved against him relates to acts done or purportedly done by him in the execution of his duty. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial enquiry, or even in the course of the prosecution or Evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary or not, may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case. The requirement of taking sanction under section 19 of the 1988 Act also is at the same stage.

(24) However, Justice Anirudh Bose in his judgement has distinguished the question of sanction obtained under section 197 of the Cr.P.C. or Section 19 of the 1988 Act from that of section 17 A of the Act of 1988. He observed thus:-

"Section 17A of the 1988 Act imposes restriction on police officer at the enquiry stage itself from proceeding against a public servant in relation to any offence, alleged to have been committed by him, ***relatable to any recommendation made or decision taken by such public servant*** *(emphasis added), without previous approval of the authorities, stipulated in the said section. We do not think that cases arising out of Section 197 of the 1973 Code would give proper guidance for interpreting the provisions of Section 17A of the 1988 Act because in the cases under section 197, the decision on requirement for sanction is to be taken at the stage of taking cognizance. Thus, there is inbuilt scope of application of judicial mind to*

assess, at least prima facie , if analysed act falls within the discharge of official duty or not. Under the provisions of Section 17A of the 1988 Act, there is no scope of judicial application of mind in determining if the act of making recommendation or taking decision is intertwined with the discharge of official duty or function or not. Moreover, the qualified embargo therein is on the police officer on the point as to assessing whether offending act is in discharge of official duty or not. Having regard to the nature of duties of a police officer, he is less equipped to asses that factor, which involves some form of judicial application of mind."

Section 19 of the 1988 Act requires the court to satisfy itself whether such sanction stated therein has been taken at the stage of taking cognizance. *So far as act of a public servant in making recommendation or taking decision in discharge of official duties are concerned, an entry check, prior in time has been contemplated for the investigating agencies.*

The requirement of taking prior approval could arise at that stage, being the beginning or commencing of the enquiry, inquiry or investigation.

(25) Justice Bose while considering the legality of a proceeding which was started without complying with the requirement of the previous approval under Section 17 A of the 1988 Act, referred to the judgement rendered by the Supreme Court in ***Yeshwanth Sinha Versus Central Bureau of investigation through its Director reported in 2020 (2) SCC 388***, where in the concurrent judgement of Justice K. M. Joseph, in paragraph 117 it was observed:—

117. In terms of section 17A no police officer is permitted to conduct any enquiry or inquiry or conduct investigation into any offence done by public servant where the offence is relatable to any recommendation made or decision taken by the public servant in discharge of his public functions without previous approval, of the authority competent to remove the public servant from his office at the time when the offence was said to have been committed.––"

(emphasis supplied by us)

(26) The same view has been been reiterated by the Supreme Court in the case of ***State of Rajasthan Versus Tejmal Chaudhary reported in 2021 SCC online SC 3477***, Justice Bose in conclusion, observed that if an enquiry, inquiry or investigation is intended in respect of a public servant on the allegation of commission of offence under 1988 Act, after section 17A thereof becomes operational, *which is relatable to any recommendation made or decision taken, at least prima facie in discharge of his official duty,* previous approval of the authority postulated in Subsection (a) or (b) or (c) of Section 17 A of the 1988 Act shall have to be obtained. In absence of such previous approval, the action initiated under section 1988 Act shall be held illegal.

(27) Justice Bela M. Trivedi gave a separate judgement relating to the interpretation of Section 17 A of the 1988 Act. She noted the Object and Reason of promulgation of the Prevention of Corruption Act, 1988. It was observed that the 1988 Act sets the framework for prosecuting individuals involved in corrupt activities and provides measures to prevent corruption in various spheres of the society. The very objectives of the Act are to prevent Corruption, to promote transparency and accountability in public administration, to deter individuals from engaging in corrupt practices by imposing strict penalties, and it protects whistle

blowers et cetera. It also provides for investigation and prosecution of corruption cases, outlining the procedure for gathering evidence, conducting trials and ensuring a fair and expeditious legal process. By the amendment Act of 2018, the gaps in the 1988 Act were filled in with respect to description and coverage of offences of bribery so as to bring it in line with the current international practices and also to meet more effectively, the country's obligations under the United Nations Convention against Corruption. By the Amendment Act of 2018 several provisions, more particularly offences described under Section 7, 8, 9, 10 and 13 in Prevention of Corruption Act, 1988 were substituted with new provisions; and several new provisions like Section 7 A, 17 A, 18 A and 209A etc. inserted. Certain provisions pertaining to the punishment of the offences under the Act were also amended. A positive approach for interpreting the Act was necessary. The aim and object of the Act must be given its full effect. The text and context of the entire Act must be looked into while interpreting any of the expressions used in the statute. If two views were possible, the view, which most advances the object of the Act, and which makes the Act workable, must necessarily be the controlling view . Even penal statues are governed, not only by the literal language, but also by the object sought to be achieved by Parliament. Even if the words occurring in the statute are plain and unambiguous, they have to be interpreted in a manner which would fit in the context of the other provisions of the statute and bring about real intention of the legislature.

(28) Justice Trivedi thereafter observed in Paragraph 55 as follows: –

"55. Although not specifically mentioned in the Statement of Object and Reasons of the Amendment Act, 2018, the object of inserting section 17A in the Prevention of Corruption Act, which is in Pari materia with the provisions contained in Section 6A of the Delhi Special Police Establishment Act, 1946, is to protect honest public servants from harassment by way of enquiry or investigation in respect of decisions taken or acts done in bona fide performance of their official functions or duties. Whereas Section 19 bars the courts from taking cognizance of an offence punishable under the 1988 Act to have been committed by public servants, except with the prior sanction of the concerned authorities mentioned therein, Section 17A bars the police officer from conducting any enquiry or enquiry or investigation of offences relatable to recommendations made or decision taken by the public servant in the discharge of official functions or duties, without approval of the concerned authorities mentioned therein. From the bear reading, it is discernible that section 17 A has the following four main facets: –

(i) enquiry or enquiry or investigation of offences under prevention of corruption act. (ii) alleged offences should be relatable to the recommendation made or decision taken by a public servant. (iii) Such recommendations made or decisions taken by public servant should be in discharge of official functions and duties and (iv) previous approval of the authorities mentioned therein.

(29) Justice Trivedi relied upon the object of the Prevention of Corruption Act and also referred to judgement of the Supreme Court in State of Rajasthan Versus Tejmal Chaudhary where the Supreme Court set aside the interim order passed by the High Court which had stayed the proceedings only on the ground that approval was not obtained under section

17A of the Prevention of Corruption Act by observing interalia, that the legislative intent in the enactment of a statute is to be gathered from the express words used in the statute, unless the plain words literally construed give rise to absurd results. The court had observed that it has to go by the plain words of the statute to construe the legislative intent and that it could not possibly have been the intent of the legislature that all pending investigations up to July 2018 should be rendered infructuous. Justice Trivedi also observed on the basis of judgement rendered in ***Subramanyam Swami Versus Manmohan Singh reported in (2012) 3 SCC 64***, that in case of two possible constructions of a provision in the 1988 Act, it would be the duty of the court to accept the one that seeks to eradicate corruption, to the one which seeks to perpetuate it. In ***Subramanyam Swamy Versus Director, CBI reported in (2014) 8 SCC 682***; the Constitution Bench had observed while dealing with Section 19 of the 1988 Act that the protection against malicious prosecution which is extended in public interest, cannot become a shield to protect corrupt officers.

Justice Trivedi thereafter observed in paragraph 67 as follows: –

"67. Even otherwise, absence of approval before conducting any enquiry or inquiry or investigation into an offence, alleged to have been committed by public servant, as contemplated in Section 17A could never be a ground for quashing the FIR registered against the public servant or the proceedings conducted against him, more particularly, when he is also charged for other offences under the I.P.C. in respect of the same set of allegations. As stated earlier, there are other important facets contained in Section 17A, like whether the offence is relatable to the recommendation made or the decision taken by the public servant or not, and whether such recommendation or decision was made or taken in the discharge of his official functions or duties or not etcetera. Such facets would be examined only when evidence is lead during the course of trial. The acts which prima facie constitute offences, though done under the purported exercise of official function or duty, could not fall within the purview of section 17A. The protection sought to be granted to public servant under section 17A could not be extended to his acts which prima facie were not in the discharge of his official functions or duties. Any other interpretation would certainly tantamount to scuttling the investigation at a very nascent stage. Such could neither be the intention of the Legislature nor could such provision be interpreted in the manner which would be counter-productive or frustrating the very object of the Prevention of Corruption Act."

(emphasis supplied by us)

(30) In the instant petition the counsel for the petitioner says that even the amassing of alleged disproportionate assets more than the known sources of income can be said to be a consequence of a recommendation made or a decision taken by him as a Resident Engineer of U.P.R.N.N.L. He has also argued that Section 13 (1) (b) added by way of the same Amending Act No.16/2018 with effect from 26.07.2018 and therefore, Section 17A should be read conjointly with Section 13 (1) (b).

(31) We do not find the argument raised by the learned counsel for the petitioner convincing as these are two

different provisions operating in two different spheres. Section 13 in its entirety is being quoted hereinbelow:-

"13. Criminal Misconduct by a public servant-- [(1)] *A public servant is said to commit the offence of criminal misconduct-*

(a) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or any property under his control as a public servant or allows any other person so to do; or

(b) if he intentionally enriches himself illicitly during the period of his office."

(32) We have gone through the Annexure No.8 to the writ petition which is an order dated 26.06.2023 which has been passed by Managing Director of the U.P. Rajkiya Nirman Nigam Limited while placing reliance upon the State Government's letter dated 20.06.2023 which enclosed with it, the letter of the Vigilance Establishment dated 26.05.2023 and the Report dated 21.03.2023 relating to amassing of disproportionate assets allegedly by the petitioner in discharge of his official duties. This Court, therefore, finds that after investigation sanction has been given by the Government / Competent Authority and such sanction cannot be said to be no sanction at all as was argued by the learned counsel for the petitioner before the Co-ordinate Bench which lead to the passing of the interim order dated 23.01.2024.

(33) At this stage it has also been submitted by the learned counsel for the petitioner that he has also challenged the prosecution Sanction order on the ground that for the offence committed by the petitioner for amassing disproportionate assets during his tenure of service, the respondents-U.P.R.N.N. Ltd. had initiated a Disciplinary proceeding against him, a copy of the Charge-sheet has been filed as Anneuxre No.2 to the petition. After regular Enquiry, the Enquiry report was submitted by the Enquiry Officer, a copy of which has been filed as Annexure No.3 to the petition. The Enquiry Officer had not found him guilty of amassing disproportionate assets. The Enquiry Officer's report was accepted by the Managing Director of U.P.R.N.N. Ltd. by his order dated 06.06.2023, a copy of which has been filed as Anneuxre No.4 to the petition.

(34) It has been submitted by the learned counsel for the petitioner that the Hon'ble Supreme Court in the case of **Ashoo Surendranath Tewari Vs. The Deputy Superintendent of Police, EOW, CBI & Anr. in Criminal Appeal No.575 of 2020**, in its judgment and order dated 08.09.2020 has held that where the Disciplinary proceedings are initiated against a delinquent employee and on merits, the said Disciplinary proceedings are concluded and the report by the Enquiry Officer has been accepted exonerating the delinquent employee, then on the very same charge the prosecution sanction should not be given and no criminal prosecution should be allowed to continue.

(35) Learned counsel for the petitioner has placed reliance upon a copy of the judgment rendered by the Hon'ble Supreme Court filed as S.A.-2 of his affidavit filed on 19.01.2024.

(36) We have gone through the judgment rendered by the Hon'ble Supreme Court. The facts in the said case were arising out of an F.I.R. that was registered on 09.12.2009 with regard to a MSME

Receivable Finance Scheme operated by the Small Industries Development Bank of India (SIDBI). Some vendors were complaining of delay in getting their payments. SIDBI in consultation with Tata Motors Limited, directed the vendors of Tata Motors Limited to furnish RTGS details for remittance of funds. The vendors' account was shown to be in Federal Bank, Thriupporur. Tata Motors Limited made payment through RTGS for various purchases done by it, to the tune of Rs.1,64,17,551/-. Subsequently, the vendors informed the SIDBI that they had an account in Central Bank Bangalore, and not with Federal Bank, Thriupporur. On account of diversion of funds in a different bank account, the F.I.R. was lodged in which a number of accused persons were arrested. The Charge sheet was filed before the Court of Special Judge, CBI. The Special Judge, CBI, found that since no sanction was taken under the Prevention of Corruption Act, the trial under the Act, cannot be proceeded with. The Special Judge also found that there was no need to get sanction under Section 197 Cr.P.C. as no offence under the Indian Penal Code was made out.

(37) The order passed by the Special Judge, CBI, was challenged before the High Court. The High Court by its judgment and order dated 11.07.2014 had agreed with the Special Judge, CBI, observations regarding no need for sanction under Section 197 Cr.P.C. being necessary. However, the High Court had failed to consider order of the Central Vigilance Commission dated 22.12.2011 which had gone into the facts of the case in great detail. The Court observed that the Central Vigilance Commission in its order had rightly observed that the petitioner Ashoo Surendranath Tewari, was only negligent and there may be no criminal culpability. In fact, there was a positive finding of the CVC that the appellant- petitioner appeared to be a victim of the Master mind's plot to defraud the purchasers and the vendors and also SIDBI.

(38) It is in such a context that the Supreme Court had made observations in Paragraph-7 which have been emphasized by the learned counsel for the petitioner during the course of his arguments referring to a number of judgments regarding standard of proof in a departmental proceeding being based on preponderance of probability, as somewhat lower than the standard of proof in a criminal proceeding where the case has to be proved beyond reasonable doubt.

(39) This Court is convinced that the Supreme Court in the facts of the case has made observation that it was clear from the detailed CVC order which had held the petitioner only to be guilty of negligence, that there were very bleak chances of conviction in a criminal trial involving the same facts.

(40) The Supreme Court did not hold that even F.I.R. should not be lodged and investigation should not be conducted in a case where an employee has been exonerated in a disciplinary proceeding. In the case of the petitioner fresh disciplinary proceedings were initiated but have been stayed by the writ Court till further orders in the pending writ petition.

(41) This Court is of the considered opinion that the judgment that has been cited by the learned counsel for the petitioner to substantiate his arguments that once he is exonerated in the Disciplinary proceedings by the Competent Authority,

the same Competent Authority cannot give sanction for criminal prosecution under the Prevention of Corruption Act, is not applicable in the facts of the instant case.

(42) In so far as the relief clause as framed in the writ petition is concerned, regarding challenge to Sanction Order and grounds taken for such challenge in the pleadings on record, a Co-ordinate Division Bench of this Court in ***Yash Kumar Verma Vs. State of U.P.*** C.R.L.P. 2372 of 2023 decided on 14.07.2023 after considering the law as settled by the Supreme Court and considering the Division Bench judgment of this Court in the case of ***Rajeev Kumar Singh Vs. State of U.P.*** reported in 2020 AIR Online 447 has observed in Para-32 as follows:-

"This Court is of the considered opinion that in view of the law settled by the Supreme Court in the aforecited cases of Dinesh Kumar versus Chairman, Airports Authority of India and another, C.B.I. versus Ashok Kumar Agarwal, C.B.I. versus Pramila Virendra Kumar Agarwal, and Sukh lal Yadav versus State of U.P. and others, till evidence is led by the prosecution before the Trial Court, the facts and circumstances leading to the competent authority granting sanction for prosecution cannot be appreciated to the fullest. Even if for the sake of argument, it is to be believed that necessary material was not kept before the sanctioning authority for it to apply its mind, then also the prosecution would have to be given a chance to first lead evidence to the effect that all relevant material including material which may favour the accused, was laid before the sanctioning authority. To Appreciate such evidence, the trial court is competent."

(43) We do not find any merit in this challenge and consequently the writ petition stands dismissed.

(2024) 2 ILRA 1538
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 31.01.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Misc. Writ Petition No. 7850 of 2023

M/S Brijwasi Sarraf ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
Vinod Kumar Singh

Counsel for the Respondents:
A.S.G.I., Amit Jaiswal Ojus Law., C.S.C., Sudhir Kumar, Vijay Kumar Dubey

Criminal Law - Criminal Procedure Code,1973 - Code of Criminal Procedure, 1973 – Sections 102, 451 & 457 – Seizure of Bank Account – Freezing of Account – Right to Property – Alternative Remedy – Writ Jurisdiction – Article 226 of the Constitution

The petitioner, M/s Brijwasi Sarraf, challenged the freezing of its Axis Bank account (No. 407010200000347) by the Investigating Officer, alleging non-compliance with Section 102(3) Cr.P. , which mandates reporting seizures to the jurisdictional Magistrate, and claimed that the freezing deprived it of its right to property. The account was frozen based on complaints filed on the National Cyber Crime Reporting Portal (NCCRP) on 17.08.2023 and 24.08.2023, alleging that funds from fraudulent transactions by Gravity Solutions, linked to accused Amarnath Awasthi, were transferred to the petitioner's account via Jugal Kishore Jewellers. The St. argued that Section 102(3) is directory, not mandatory, as per *Amit Singh Vs St. of U.P.*, and that the petitioner had an alternative remedy under Sections 451 and 457 Cr.P. to seek release of the seized property. Held: The

Supreme Court in *St. of Maharashtra Vs Tapas Neogy* (1999) 7 SCC 685 clarified that a bank account is "property" under Section 102 Cr.P. , and police can freeze it if linked to an offence, as confirmed in *Teesta Atul Setalvad Vs St. of Gujarat*. Freezing is a temporary investigative measure, not a deprivation of property rights, per *Vinoshkumar Ramachandran Valluvar Vs St. of Maharashtra* (2011 SCC OnLine Bom 112). The petitioner's failure to report the seizure under Section 102(3) does not render it illegal, as the provision is directory. The petitioner could seek interim custody or disposal of the seized property under Sections 451 or 457 Cr.P. before the jurisdictional Magistrate, an effective alternative remedy. Thus, the writ petition was not maintainable under Article 226 due to the availability of statutory remedies. The petition was disposed of, with liberty to the petitioner to pursue remedies under the Cr.P.

Case Law Cited:

1. Amit Singh Vs St. of U.P. (Allahabad HC)

2. St. of Mah. Vs Tapas Neogy, (1999) 7 SCC 685

3. Teesta Atul Setalvad Vs St. of Guj.

4. Vinoshkumar Ramachandran Valluvar Vs St. of Mah., 2011 SCC OnLine Bom 112

(Delivered by Hon'ble Mrs. Sangeeta Chandra, J. & Hon'ble Ajai Kumar Srivastava-I, J.)

(Oral)

1. Heard learned counsel for the petitioner, Sri Amit Jaiswal, learned counsel for the opposite party no.10, Learned A.G.A. for the State Respondents and Sri Sudhir Kumar, Advocate, who has appeared and filed his vakalatnama on behalf of the opposite party no. 11 in the Registry yesterday.

2. The instant writ petition has been filed by the petitioner with the following main reliefs:-

(i). Issue a writ, order or direction in the nature of certiorari whereby order passed by opposite party directing the bank to freeze the current account 407010200000347; IFSC Code IFSC-UTIB0000407 existed in Branch Hawett Road, Lucknow in the Axis Bank Ltd. of petitioner's firm be quashed and set aside.

(ii). Issue a Writ, Order or Direction in the nature of mandamus directing the opposite parties no. 9 to de-freeze the current account 407010200000347; IFSC Code IFSC-UTIB0000407 existed in Branch Hawett Road, Lucknow in the Axis Bank Ltd. of the petitioner's firm and the petitioner may be allowed to operate the account as earlier he was able to operate.

(iii). Issue a Writ, Order or Direction in the nature of mandamus commanding opposite parties specifically opposite party no. 10 i.e. Branch Manager, Axis Bank Ltd., Branch Hawett Road Shivaji Marg, 226001, Lucknow, that he may not permit to the opposite parties no. 5 to 9 to deduct any amount from the current account the current account 407010200000347; IFSC Code IFSC-UTIB0000407 existed in Branch Hawett Road, Lucknow in the Axis Bank Ltd. of the petitioner's firm, in any manner, during pendency of the present writ petition.

3. It is submitted by learned counsel the petitioner that seizure made by the Investigating Officer in these cases have not been reported to the Magistrate having jurisdiction, therefore, due to non-compliance of provisions contained under Section 102 (3) of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.) such seizure is not sustainable in the eye of law. His further submission is that freezing of account of the petitioner amounts to deprivation of his right to property as the money in his account belongs to the petitioner.

4. Per contra, learned Additional Government Advocate argued that the question as to whether Section 102 (3)

Cr.P.C. is mandatory or directory, is no more res integra, has already been decided by a Co-ordinate Bench of this Court at Allahabad in ***Amit Singh v. State of U.P.***[1] that Section 102 (3) Cr.P.C. is not mandatory but it is directory. It was also observed that non-reporting of the seizure forthwith, as provided under Section 102 (3) Cr.P.C., shall not ipso facto render the seizure illegal particularly as no period is specified and it's consequences have not been provided. He has also submitted that the petitioner has a statutory remedy as provided under Sections 451 to 457 Cr.P.C. against any seizure made under Section 102 Cr.P.C. Therefore, he prays that the instant writ petition is also liable to be dismissed.

5. An affidavit of service filed today by Sri Vinod Kumar Singh, learned counsel for the petitioner, is taken on record.

6. Learned A.G.A. for the State has produced before this Court written instructions sent by the Sub-Inspector of Police, Cyber Crime Cell Police, Police Station- Amroli, District- Surat City, Gujarat and also from Cyber Police Station, Pune, Maharashtra.

7. Sri S.P. Singh, learned A.G.A. for the State has stated on the basis of said instructions that one Amarnath Awasthi was running a company by the name of Gravity Solutions which had falsely promised the investors of earning 20 to 30 percent profit on invested amount. The investigation has revealed that Rs. 6,01,000/- were transferred online from Yes Bank Account No. 001885800006111 of the accused Amarnath Awasthi to HDFC Bank Account No. 50200026791298 of Messers Jugal Kishore, The Jewellers, Eldeco Green, Gomti Nagar, Lucknow. The investigation has further revealed that out of the amount of fraudulently transferred money in the Bank Account of Jugal Kishore in HDFC Bank Account, an amount of Rs.6,21,750/- was transferred online to Axis Bank Account No. 407010200000347 of the accused Brijwasi Saraf, Jhandewala Park, Aminabad, Lucknow, Uttar Pradesh on 15.07.2023.

8. Mr. Parag Patel, the complainant in the said crime, had filed a complaint online on cybercrime.gov.in on National Cyber Crime Register Portal (NCCRP) on 24.08.2023. The bank account of the petitioner, Brijwasi Saraf has been debit frozen through NCCRP Portal. The investigation of the crime through money trail has revealed that money received in the said Axis Bank of the petitioner is from the complainant's Bank Account.

9. Sri S.P. Singh has also produced before this Court instructions sent by Senior Police Superintendent, Police Station Pune City, Shivaji Nagar, Pune, Maharashtra, wherein a mention has been made of online complaint made on 24.08.2023 by one Parag Arun Patil under Sections 419/420/34 I.P.C. read with Section 66D of the Information Technology Act. In the said complaint while mentioning several named accused mention has also been made of one company by the name of Gravity Solutions with Yes Bank Account No. 001885800006111 and account holders and user of Canara Bank Account No.110115106665. The amount cheated from the complainant as mentioned in the said complaint is 31 lakhs. The complainant saw an advertisement on Facebook issued by the Managers of Gravity Solutions Company saying that company handles a trading pool account and they can give 50% profit on the money invested by anyone. Similarly, Managers of

one Lovotrade company also said that their company trades in Bullion and Foregin Currencies and they can give 20% return on the amount invested in their company. The complainant being lured was duped online and he transferred a total amount of Rs.31 lakhs to a different Bank Accounts. The Pune Police on investigation has found that on 12.05.2023 the complainant transferred Rs. 9 lakhs to the Account of accused Amar Nath Awasthi R/o Vibhuti Khand Gomti Nagar Lucknow in his Yes Bank Account No. 001885800006111 and Rs.6 lakhs was transferred to the Yes Bank Account of the company Gravity Solutions on 04.07.2023. Further investigation revealed that the Accused Amar Nath Awasthi took a total amount of Rs.15 lakhs into the two accounts maintained in his Bank and then transferred it to different bank Account. Rs.6,01,000 was transferred online from Bank Account of Amar Nath Awasthi to HDFC Bank Account of M/s Jugal Kishore Jewellers, Eldeco Green, Gomti Nagar. Jugal Kishore Jewellers transferred Rs.6,21,750/- from their HDFC Bank account to Axis Bank Account of the petitioner Brijwasi Sarraf Aminabad, Lucknow, on 15.07.2023.

On the basis of online complaint made on cybercrime.gov.in/nationalcybercrimeregistrationportal on 24.08.2023, the Bank Account of the petitioner has been debit frozen. Not only the Pune Police, Cybercrime Cell, has requested for debit freeze of the petitioner's account, but a request has also been made by other three Investigating Agencies as the money trail has revealed that the money received in the petitioner's Bank Account in Axis Bank is from the complainant's Bank Account.

10. The Police Personnel, namely, Mr. M. N. Katuriya, Sub-Inspector of Police, Salabatpura and Mr. G. D. Gadhavi, Sub-Inspector of Police, Amroli, Surat City, Gujarat have also given written instructions which relate to one complainant by the name of Dharmesh Bhai Gopal Bhai Vashi, who had made a complaint on 17.08.2023 regarding Gravity Solutions which had duped the complainant and the other investors. Some of the accused have also been apprehended and now lodged in Sabarmati Central Jail since 24.08.2023. The exact modus operandi of the accused has been given in detail in the said instructions. Initially, the small amounts were transferred every month in the accounts of the investors to make them believe that they will be getting better returns on the money that they had invested in Gravity Solutions, later on such money stopped coming and on suspicion of fraud, the complainant lodged a complaint with the Cyber Crime Cell which was uploaded on the NCCRP Portal, which resulted in the money trail being traced to the account of the petitioner, Brijwasi Saraf maintained in Axis Bank.

11. Hon'ble Supreme Court in the case of **Teesta Atul Setalvad v. State of Gujarat**[2] in paragraph nos.17 & 18 has held as under:-

"17. The sweep and applicability of Section 102 of the Code is no more res integra. That question has been directly considered and answered in State of Maharashtra v. Tapas D. Neogy [State of Maharashtra v. Tapas D. Neogy, (1999) 7 SCC 685 : 1999 SCC (Cri) 1352] . The Court examined the question whether the police officer investigating any offence can issue prohibitory orders in respect of bank accounts in exercise of power under Section 102 of the Code. The High Court, in that case, after analysing the provisions of Section 102 of the Code had opined that bank account of the accused or of any

relation of the accused cannot be held to be "property" within the meaning of Section 102 of the Code. Therefore, the investigating officer will have no power to seize bank accounts or to issue any prohibitory order prohibiting the operation of the bank account. This Court noted that there were conflicting decisions of different High Courts on this aspect and as the question was seminal, it chose to answer the same. In para 6, this Court noted thus : (SCC p. 691)

"6. A plain reading of sub-section (1) of Section 102 indicates that the police officer has the power to seize any property which may be found under circumstances creating suspicion of the commission of any offence. The legislature having used the expression "any property" and "any offence" have made the applicability of the provisions wide enough to cover offences created under any Act. But the two preconditions for applicability of Section 102(1) are that it must be "property" and secondly, in respect of the said property there must have been suspicion of commission of any offence. In this view of the matter the two further questions that arise for consideration are whether the bank account of an accused or of his relation can be said to be "property" within the meaning of sub-section (1) of Section 102 CrPC and secondly, whether circumstances exist, creating suspicion of commission of any offence in relation to the same."

18. After analysing the decisions of different High Courts, this Court in para 12, expounded the legal position thus : (SCC pp. 694-95)

"12. Having considered the divergent views taken by different High Courts with regard to the power of seizure under Section 102 of the Code of Criminal Procedure, and whether the bank account can be held to be "property" within the meaning of the said Section 102(1), we see no justification to give any narrow interpretation to the provisions of the Criminal Procedure Code. It is well known that corruption in public offices has become so rampant that it has become difficult to cope up with the same. Then again the time consumed by the courts in concluding the trials is another factor which should be borne in mind in interpreting the provisions of Section 102 of the Criminal Procedure Code and the underlying object engrafted therein, inasmuch as if there can be no order of seizure of the bank account of the accused then the entire money deposited in a bank which is ultimately held in the trial to be the outcome of the illegal gratification, could be withdrawn by the accused and the courts would be powerless to get the said money which has any direct link with the commission of the offence committed by the accused as a public officer. We are, therefore, persuaded to take the view that the bank account of the accused or any of his relations is "property" within the meaning of Section 102 of the Criminal Procedure Code and a police officer in course of investigation can seize or prohibit the operation of the said account if such assets have direct links with the commission of the offence for which the police officer is investigating into. … In the aforesaid premises, we have no hesitation to come to the conclusion that the High Court of Bombay [Chandrashekar Ramprakash Agarwal v. State of Maharashtra, 1997 SCC OnLine Bom 632] committed error in holding that the police officer could not have seized the bank account or could not have issued any direction to the bank officer, prohibiting the account of the accused from being operated upon."

After this decision, there is no room to countenance the challenge to the action of seizure of bank account of any person

which may be found under circumstances creating suspicion of the commission of any offence."

(Emphasis supplied by us)

12. The action of seizing a movable property, which includes freezing of the Bank account, is taken under Section 102 of the Cr.P.C. which is reproduced hereinunder:-

"102. Power of police officer to seize certain property.— (1) Any Police Officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer in charge of a Police Station, shall forthwith report the seizure to that officer.

(3) Every Police Officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court or where there is difficulty in securing proper accommodation for the custody of such property, or where the continued retention of the property in police custody may not be considered necessary for the purpose of investigation, he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same:

Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of Sections 457, and 458, shall, as nearly as may be practicable, apply to the net proceeds of such sale."

13. In ***Vinoshkumar Ramachandran Valluvar v. State of Maharashtra***[3] it was observed as under:—

"18. It is, therefore, clear that like any other property a bank account is freezable. Freezing the account is an act in investigation. Like any other act, it commands and behoves secrecy to preserve the evidence. It does not deprive any person of his liberty or his property. It is necessarily temporary i.e. till the merit of the case is decided. It clothes the Investigating Officers with the power to preserve a property suspected to have been used in the commission of the offence in any manner. The property, therefore, requires to be protected from dissemination, depletion or destruction by any mode. Consequently, under the guise of being given information about the said action, no Accused, not even a third party, can overreach the law under the umbrella of a sublime provision meant to protect the innocent and preserve his property. It would indeed be absurd to suggest that a person must be told that his Bank account, which is suspected of having been used in the commission of an offence by himself or even by another, is being frozen to allow him to have it closed or to have its proceeds withdrawn or transferred upon such notice."

(Emphasis supplied by us)

14. We find that for freezing the account invoking provision as contained under Section 102 Cr.P.C. cannot, by any stretch of imagination, be held to be

deprivation of right of property available to the petitioner. Such argument of learned counsel for the petitioner appears to be misconceived.

15. It is apposite to refer Section 451 of Cr.P.C. which enables the trial Court to grant interim custody pending trial. Similarly, Section 457 also vests power in the Magistrate to deal with the seized property as deemed proper and necessary. An accused whose property is seized by police officer can file application for grant of interim custody. This is an effective and efficacious remedy. Section 457 of Cr.P.C. for ready reference is reproduced here-in-under:-

"457. Procedure by police upon seizure of property.

(1) Whenever the seizure of property by any police officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property.

(2) If the person so entitled is known, the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit and if such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him and establish his claim within six months from the date of such proclamation."

(Emphasis supplied by us)

16. Thus, on the basis of what has been discussed above, the petitioner ought to have approached the jurisdictional Magistrate seeking appropriate remedy in respect of the property seized and therefore, when an alternative remedy is available, in our considered opinion the present writ petition is not maintainable.

17. In view of the above, the petition lacks merit, which is accordingly, finally ***disposed of,*** leaving it open to the petitioner to avail appropriate remedy as may be available to him in accordance with law.

8. Interim order, if any, stands discharged.

(2024) 2 ILRA 1544
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 17595 of 2023

Ajay Rai ...Petitioner
Versus
State Of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Awadhesh Kumar Malviya

Counsel for the Respondents:
G.A., Sri Rajesh Kumar Madhesia(S.L.O.)

Criminal Law - Uttar Pradesh Co-operative Societies Act, 1965 – Sections 16, 17, 65(2), 68, 103 & 105 – Code of Criminal Procedure, 1973 – Sections 154 & 155 – First Information Report (F.I.R.) – Quashing of F.I.R. – Article 226 – Embezzlement – Cognizable Offence

The petitioner, Ajay Rai, challenged the F.I.R. registered as Case Crime No. 0182 of 2023 under Section 409 IPC at P.S. Dullahpur, Ghazipur, alleging misappropriation of Rs. 16,17,833 as the Officiating Secretary of Sikhadi Samiti. The F.I.R. followed an inquiry under

Section 66 of the U.P. Co-operative Societies Act, 1965, which confirmed illegalities after the petitioner's suspension. The petitioner argued: (1) false implication with ulterior motives, (2) no offence under Section 409 IPC disclosed, (3) F.I.R. registration by the Additional District Co-operative Officer violated a 2000 Government Order vesting such power in the Regional Deputy Commissioner, (4) lack of prior approval from the Registrar under Sections 103 and 105, (5) non-invocation of arbitration under Sections 16 and 17, and (6) no prior inquiry under Section 65(2). Held: The F.I.R. registration complied with Section 154 Cr.P. , as per Lalita Kumari Vs Government of U.P. ((2014) 2 SCC 1), mandating registration for cognizable offences like embezzlement. The 2000 Government Order, being administrative, does not override statutory provisions, and the Assistant Commissioner's delegation to the Additional District Co-operative Officer was vali The inquiry committee's findings, based on ledger scrutiny, established a prima facie case, unchallenged by the petitioner. Sections 16 and 17 (arbitration) were irrelevant to criminal proceedings, and Sections 65 and 68 inquiries were duly conducte Section 105's prior sanction was not mandatory at the F.I.R. stage. The petitioner failed to demonstrate malice or fit within the quashing criteria of St. of Har. Vs Bhajan Lal ((1992) Supp (1) SCC 335). With the investigation at a preliminary stage, no interference under Article 226 was warrante The petition was dismissed as meritless.

Case Law Cited:

1. Lalita Kumari Vs Government of U.P., (2014) 2 SCC 1

2. St. of Har. Vs Bhajan Lal, (1992) Supp (1) SCC 335

3. Dilawar Singh Vs St. of Delhi, (2007) 12 SCC 641

4. Abhay Gupta Vs St. of U.P., 2010 SCC OnLine All 2033

(Delivered by Hon'ble Vinod Diwakar, J.)

1. Heard Shri Awadhesh Kumar Malviya, learned counsel for the petitioner, Shri Rajesh Kumar Madhesia, learned State Law Officer for the State-respondents, and perused the record.

2. By way of the instant petition, the petitioner has challenged the legality and correctness of the impugned F.I.R. registered as Case Crime No.0182 of 2023, under section 409 IPC at P.S. Dullahpur, District Ghazipur.

3. In brief, the prosecution case is that during an inspection by the Additional District Co-operative Officer at Sikhadi Samiti, the Officiating Secretary i.e. the petitioner was observed engaging in certain illegalities. Immediately, the matter was reported to the Chairman of the Samiti, leading to the petitioner's suspension. Subsequently, vide order dated 23rd November 2022, by invoking section 66 of the Uttar Pradesh Co-operative Societies Act, 1965, a detailed inquiry was conducted by a three-member committee. The findings of the inquiry revealed that the petitioner had misappropriated a sum of Rs.16,17,833/-.

4. In support of the prayer, learned counsel for the petitioner has made the following submissions:

4.1 The petitioner has been falsely implicated by the department with ulterior motives.

4.2 Upon reading the F.I.R., no offence under section 409 IPC is made out at its face.

4.3 The registration of the F.I.R. is in contravention of the Government Order dated 16.8.2000, which stipulates that in such cases, the Regional Deputy Commissioner, Co-operative, Varanasi, is empowered to register the F.I.R. However, in this instance, the impugned F.I.R. was registered based on the complaint of the Additional District Co-operative Officer, Jakhniya, Ghazipur.

4.4 The petitioner asserts that, in accordance with Sections 103 and 105 of the Uttar Pradesh Co-operative Societies Act, 1965, requisite approval from the Registrar, Co-operative, was not obtained prior to the registration of the impugned F.I.R.

4.5 The petitioner emphasizes that Sections 16 and 17 of the Uttar Pradesh Co-operative Societies Act, 1965, providing for arbitration proceedings have not been invoked as a remedy.

4.6 No inquiry was conducted prior to the registration of the impugned F.I.R. as required under section 65(2) of the Uttar Pradesh Co-operative Societies Act, 1965.

5. *Per contra*, learned A.G.A. submits that during on-the-spot inspection by the Additional District Co-operative Officer at Sikhadi Samiti, illegalities were noted. The complainant, satisfied with *prima-facie* evidence of the petitioner's involvement in embezzlement and illegal recovery of loan amounts from the farmers, constituted a committee comprising three members. The committee's report, dated 17.10.2022, reveals findings on five points, indicating the petitioner's engagement in the illegal recovery and embezzlement of funds. The committee scrutinized the ledgers of 56 account holders, revealing significant irregularities in the pass-books, with substantial differences in the amounts disbursed and subsequently recovered. Serious allegations against the petitioner, evident from the F.I.R. and the inquiry report, establish the ingredients of a cognizable offense. The investigation is in their preliminary stages, and no intervention in writ jurisdiction is deemed necessary by this Court at this juncture.

6. For the sake of clarity, sections 65(2), 68, 105 and 106 of the Uttar Pradesh Co-operative Societies Act, 1965 are reproduced herein below:

"Section 65. (2) *An inquiry of the nature referred to in sub-section (1) shall be held by the Registrar or by a person authorized by him in writing on this behalf on the application of- (a) a cooperative 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.*

Section 68. (1) *If in the course of an audit, inquiry, inspection or the winding up of a cooperative 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 willful negligence or has misappropriated or fraudulently retained any money or other property belonging to such society, the Registrar may of his 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 any person under sub-section (2) for having caused any deficiency in the assets of the society by*

breach of trust or willful 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 cooperative society for five years from the date of the order of surcharge.

Section 105. (1) *No court inferior to that of a stipendiary magistrate of the first class shall try any offence under this Act. (2) No prosecution shall be instituted under this Act without the previous sanction of the Registrar, and such sanction shall not be given without affording the person sought to be prosecuted an opportunity to present his case.*

Section 106*. No person other than a cooperative society shall trade or carry on business under any name or title of which the word Sahkari or its equivalent in English, cooperative forms part, Provided that nothing in this section shall apply to the use by any person or his successor in interest of any name or title under which he carried on business at the date on which the Cooperative Societies Act, 1912, had come into operation."*

7. The First Information Report, stands as an indispensable document in the realm of criminal justice. It serves as the linchpin, marking the commencement of criminal proceedings and facilitating the subsequent investigation into alleged offenses. The legal foundation for registration of F.I.R. is firmly grounded in Sections 154 and 155 of the Code of Criminal Procedure, which delineate the procedure and authority for lodging an F.I.R. Section 154 of the Cr.P.C. lays down the mandate for the registration of an F.I.R. It underscores the obligation of the police to register an F.I.R. upon receiving information about the commission of a cognizable offense. This provision encapsulates the immediacy and compulsoriness with which the F.I.R. must be lodged to set the criminal justice machinery in motion promptly by the informant. Section 155 provides certain exceptions in cases where there might be a delay in lodging the F.I.R. due to exceptional circumstances. Despite this, the general thrust of Section 154 emphasizes the expeditious registration of the F.I.R. to ensure the prompt initiation of the investigative process. The conjoint reading of sections 154 & 155 of Cr.P.C. explicitly state that anyone possessing knowledge about the commission of a cognizable offense has the authority to file an F.I.R. This includes not only the victim or an eyewitness but also any person who becomes cognizant of the offense, extending even to police officers themselves. The universality of the authority to lodge an F.I.R. is a foundational principle ensuring that the criminal justice system remains accessible to those with information about potential criminal acts. This inclusivity empowers informants comprising victims, eyewitnesses, and even law enforcement officers to initiate the process, fostering a collaborative and comprehensive approach to crime reporting. In essence, the legal framework governing the registration of F.I.R. is intricately woven into the fabric of criminal justice. Sections 154 and 155, in conjunction with numerous judgments of the Supreme Court, establish the foundation upon which the F.I.R. stands as an essential document initiating the process of criminal justice. The universal authority granted to individuals, including victims, eyewitnesses, and even police officers, underscores the inclusive nature of the

F.I.R. registration process, ensuring the swift and effective administration of justice.

8. In **Lalita Kumari v. Government of Uttar Pradesh and others**[1], a watershed judgment on the guiding principle for registration of the F.I.R. makes it clear that the police officer is under the authority of law to register an F.I.R. on receipt of information of a cognizable offence. The police officer cannot avoid his duty of registering the F.I.R. if a cognizable offence is disclosed. The object sought to be achieved by registering the earliest information as F.I.R. is, among other things, two-fold: i) that the criminal process is set into motion and is well documented from the very start, and ii) that the earliest information received in relation to the commission of cognizable offence is recorded so that there cannot be any embellishment etc. One way of keeping a check on the authorities with such power is by documenting every action of theirs. Accordingly, under the Code of Criminal Procedure, police actions are provided to be written and documentary.

9. It is noteworthy that whenever an F.I.R. is registered, it does not mean that the investigation is mandatory to be commenced, and there are no inbuilt safeguards with the Code to prevent a likelihood of misuse. In ***Dilawar Singh v. State of Delhi*** [2], it is held that even if an F.I.R. has been registered and the police have commenced the investigation, the aggrieved person may approach the Magistrate under section 156(3) Cr.P.C. to seek an order for proper investigation. In this regard, the reliance is also placed in **Abhay Gupta v. State of U.P.**[3].

10. If there is sufficient evidence to corroborate the complainant's allegations, the charge sheet is filed, or else, a final report mentioning that no evidence was found could be filed in the Court.

11. Shri Malviya's primary contention is that the complainant has no authority to register the impugned First Information Report, as per the provisions outlined in the notification dated 16.8.2000 issued by the office of the Registrar, Cooperative Societies, Uttar Pradesh. According to the said notification, the power to register the F.I.R. in instances of embezzlement involving Rs.25000/- or more is exclusively vested in the Regional Deputy Commissioner, Co-operative. In the instant matter, the F.I.R. has been registered by the Additional District Cooperative Officer, thus contravening, according to the petitioner, the stipulations set forth in the aforementioned notification.

12. In this context, it is prudent to assert that an administrative order lacks the authority to conclusively establish or adjudicate the rights of the parties involved. Rather, these orders are confined to considerations of policy regulation and expediency- subjective elements within the discretion of the administrative officer. The distinction between administrative and judicial processes becomes evident as administrative determinations are usually applied to matters situated within the realm of public policy, a conceptualization of law seen as inherently inflexible. In contrast, the adjudication of legal rights is explicitly reserved for the judicial domain, representing a crucial departure from the more adaptable and policy-oriented nature of administrative decisions. A crucial distinction emerges is that legal rights fall squarely within the realm of judicial functions. Judicial determinations, in contrast to administrative orders, are contemplated as mechanisms for

definitively deciding legal rights. Courts are equipped with the authority, procedural frameworks, and legal principles necessary for resolving disputes and determining the rights and obligations of parties involved. The administrative decisions are driven by the discretionary powers of the administrative officer. This subjectivity introduces an element of flexibility that may not align with the precision and rigidity often associated with the adjudication of legal rights.

13. Learned Additional Government Advocate has drawn our attention to the order dated 23.10.2023 emanating from the office of the Assistant Commissioner-cum-Assistant Registrar, Co-operative. In this directive, the Assistant Commissioner specifically instructs the Additional District Co-operative Officer to initiate the process for registration of the First Information Report against the petitioner in the present case. Essentially, the Assistant Commissioner has delegated his authority to the Additional District Co-operative Officer for the purpose of registering the F.I.R., therefore, the petitioner's argument has no legal strength and is thus misplaced.

14. The combined examination of the concept of delegated legislation in administrative jurisprudence and the guiding principles derived from *Lalita Kumari's case (supra)* judgment clarifies that registration of F.I.R. by the Assistant Commissioner or Additional District Co-operative Officer is inconsequential. The crucial consideration lies in determining weather the contents of the F.I.R. forms part of the cognizable offence or not.

15. The second noteworthy argument of the petitioner's counsel is non-compliance of sections 16, 17, 65(2), 68, 103 and 105 of the Uttar Pradesh Co-operative Societies Act, 1965 before registration of the impugned FIR.

16. The legal mandates delineated in the Uttar Pradesh Co-operative Societies Act of 1976 underscore various procedural aspects and criteria pertinent to Co-operative Societies. Section 16 specifically prescribes the procedure for the division of assets and liabilities of these societies, while Section 17 delineates eligibility criteria for individuals seeking membership in Co-operative Societies. Section 65 imposes a mandatory inquiry by the Registrar into the constitution, functioning, and financial condition of the Co-operative Society, and Section 68 empowers the Registrar to initiate an inquiry, either on his own motion or in response to an application from the Committee, Liquidator, or any Creditor. This authority extends to directing an appointed individual, through written order, to investigate the conduct of the concerned person.

17. Furthermore, Section 103 addresses offenses and penalties within the purview of the Co-operative Societies Act, and Section 105 establishes a crucial procedural safeguard, stipulating that no prosecution under the Act shall be initiated without the prior sanction of the Registrar.

18. These statutory provisions, collectively governing the affairs of Co-operative Societies registered under the Act, align with the overarching objective of the legislation. The enactment of the Co-operative Societies Act is rooted in the intent to shield farmers from exploitation by traditional middlemen, ensuring they receive fair prices for their produce and safeguarding their economic interests. The Co-operative Department's vision dovetails

with these objectives, aiming to facilitate accessible credit to farmers through co-operative societies on equitable terms.

19. In light of the stated aims and objectives of the Co-operative Societies Act of 1965, it is reasonably deduced that the registration of the impugned First Information Report in the present case does not prima facie contravene any provisions of the Act. The regulatory framework appears to be in consonance with the broader objectives of shielding the agricultural community from exploitation and promoting their economic well-being through co-operative initiatives. In the wake of the aims and objective of the Act, it could be safely concluded that no provisions of the Co-operative Societies Act, 1965 have prima facie been violated for registration of the impugned F.I.R. in the instant case.

20. *Lalita Kumari case (supra)* explicitly emphasizes the mandatory nature of First Information Report registration, as outlined in Section 154 of the Code of Criminal Procedure. The Uttar Pradesh Co-operative Societies Act, 1965 remains silent on the specific procedure for registering an F.I.R. in cases involving embezzlement of society funds and the illicit recovery of credit from farmers, therefore, general legal principles in the regards would be applicable. The petitioner neither contends that the criminal proceedings against him is tainted with malice nor suggests any ulterior motives in the initiation of the prosecution.

21. Furthermore, the petitioner fails to align their case with any of the seven illustrations provided in the landmark judgment of ***State of Haryana and others v. Bhajan Lal and others***[4], which delineates circumstances warranting the quashing of criminal proceedings.

22. Turning to the facts of present case, serious allegations of embezzlement amounting to Rs.16,17,833.00, collected unlawfully from impoverished farmers by the Officiating Secretary of the Samiti, form the crux of the matter. The registration of the F.I.R. follows a conclusive determination of embezzlement by a three-member committee. No substantive reasons have been proffered by the petitioner's counsel to dispute the findings of this committee, which serves as the basis for the impugned F.I.R. In the legal context, the delegation of the power to register the F.I.R. holds no consequential weight, both in light of Lalita Kumari case (supra) and on broader legal grounds.

23. As the investigation is in its initial stages, the extraordinary power vested in this Court under Article 226 of the Constitution of India to quash the F.I.R. is deemed unwarranted given the current facts-circumstances.

24. The instant petition is devoid of merits, and hence ***dismissed***.

(2024) 2 ILRA 1550
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE VINOD DIWAKAR, J.

Criminal Misc. Writ Petition No. 18834 of 2023

Adil & Ors. ...Petitioners
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Brijesh Kumar Pandey

Counsel for the Respondents:
G.A., Sri Vinod Singh

Criminal Law - Code of Criminal Procedure, 1973 – Sections 173(8) & 156(3) – Further Investigation – Power of

Investigating Agency – Judicial Review – Article 226

The petitioners sought to quash the order dated 06.10.2023 by the Superintendent of Police, Rampur, directing further investigation in Case Crime No. 252 of 2023 (P.S. Bilaspur, Rampur) under Sections 420, 376, 452, 504, 342, 376D, 506, 120-B IPC, and to restrain their arrest or harassment. The F.I.R., lodged based on an application under Section 156(3) CrPC by respondent no. 4 (Km. Nisha Naaz), alleged rape and forgery by co-accused Furkan Ali and others. After investigation, a charge-sheet was filed on 24.08.2023 against only Furkan Ali under Sections 498A, 504, and 506 IPC, exculpating the petitioners, and cognizance was taken by the Magistrate on 30.09.2023. Respondent no. 4's writ petition (No. 15260 of 2023) led to the impugned order for further investigation without disclosing the charge-sheet's filing. The petitioners argued that the Superintendent lacked jurisdiction to order further investigation post-cognizance without Magistrate's permission, citing *Peethambaran Vs St. of Kerala* (2023 SCC OnLine SC 553). Held: The court, relying on *St. through CBI Vs Hemendra Reddy* (2023 SCC OnLine SC 515), *Sri Bhagwan Samardha Vs St.* ((1999) 5 SCC 740), and *Ram Lal Narang Vs St.* (AIR 1979 SC 1791), held that Section 173(8) CrPC permits further investigation post-charge-sheet without mandatory prior permission from the Magistrate, though informing the court is desirable. In this case, the Investigating Officer sought and obtained Magistrate's permission on 12.10.2023 for case diary copies, complying with the practice noted in *Peethambaran*. The petitioners' reliance on *Peethambaran* was distinguished, as permission was sought and grante The court found no illegality in the impugned order, as the investigating agency's powers under Section 173(8) are unfettered, and further investigation is a continuation, not a de novo investigation. The petition was dismissed as meritless.

Case Law Cited:

1. Peethambaran Vs St. of Kerala, 2023 SCC OnLine SC 553

2. St. through Central Bureau of Investigation Vs Hemendra Reddy, 2023 SCC OnLine SC 515

3. Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj Vs St., (1999) 5 SCC 740

4. Ram Lal Narang Vs St. (Delhi Admn.), AIR 1979 SC 1791

5. Jitendra Singh @ Bablu Vs St. of U.P., Criminal Mis Writ Petition No. 10247 of 2023, decided on 09.11.2023 (All. HC)

6. Smt. Preety Verma Vs St. of U.P., Criminal Mis Writ Petition No. 11257 of 2023, decided on 17.08.2023 (All. HC)

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard Sri Brijesh Kumar Pandey, learned counsel for the petitioner as well as Sri Virendra Kumar Pal, learned AGA appearing for the State respondents and Sri Vinod Singh, learned counsel for the informant and perused the record.

2. Present petition has been filed for quashing the impugned order dated 6.10.2023 whereby the respondent no. 2 has passed the order for further/transfer of the investigation in Case Crime No. 252 of 2023, P.S. Bilaspur, District Rampur. A further prayer is to direct the respondent no. 2 and his subordinates not to arrest/harass the petitioners in pursuance of the order dated 6.10.2023.

3. Brief facts of the case are that the respondent no. 4-Km. Nisha Naaz filed an application under Section 156 (3) CrPC before the concerned Magistrate for registering the FIR with the allegation that she had love affairs with co-accused-furkan Ali and she had physical relationship with him and on being insisted for marriage, he prepared forged nikahnama and married with her. It is being alleged that Gulshan Kajafi and Furkan Ali committed r.ape upon her. Thereafter, a first information report dated 29.7.2023 has been lodged under Section 420, 376, 452, 504, 342, 376D, 506, 120-B of IPC, P.S. Bilaspur, District Rampur against the six accused persons. After the investigation was completed, a charge-sheet dated 24.8.2023, under Sections 498A, 504 and 506 IPC

only against the husband (Furkan Ali). After submission of the charge-sheet, learned Magistrate has taken the cognizance vide order dated 30.9.2023. In between, respondent no. 4 filed a Criminal Misc. Writ Petition No. 15260 of 2023 (Km. Nisha Naaz vs. State of UP and others), with the prayer to direct the respondent no. 2 to transfer the investigation of the Case Crime No. 252 of 2023 without disclosing the fact that the chargesheet has already been filed. In the said writ petition, the Hon'ble Court directed the respondent no. 4 to approach the respondent no. 2-Superintendent of Police, Rampur. By the impugned order dated 6.10.2023, the respondent no. 2-Superintendent of Police, Rampur has directed to further investigation by transferring the investigation to another officer. Hence the present petition.

4. Learned counsel for the petitioner submits that the order impugned herein is illegal as after Investigating Officer after full-fleged investigation submitted the charge-sheet dated 24.8.2023, under Section 498A, 504 and 506 IPC only against Furkan Ali (husband) and the Investigation Officer exculpated the petitioner from the aforesaid case. It is further submitted that the writ petition being Criminal Misc. Writ Petition No. 15260 of 2023 (Km. Nisha Naaz vs. State of UP) without disclosing the fact that the charge-sheet has already been submitted in the aforesaid case crime, is totally misconceived. It is next submitted that once the Magistrate has taken cognizance in the matter, then only the Magistrate, having jurisdiction, is empowered to pass the order for further investigation, if he is in position that from perusal of the case diary or material available, further investigation is required, but in the present case on the basis of the application filed by the respondent no. 4 herein, the respondent no. 2 passed the impugned order for further investigation. Submission is that the impugned order dated 6.10.2023 passed by the respondent no. 2 is illegal as once the charge-sheet has been submitted and the learned Court below has taken cognizance, the respondent no. 2 has no jurisdiction directing for further investigation without the prior permission from the concerned Magistrate. He has placed reliance on the judgement of Hon'ble Apex Court in the case of *Peethambaran vs. State of Kerala and another*, 2023 SCC Online SC 553 . Submission, therefore, is that the order impugned herein is liable to be quashed.

5. Learned counsel for the AGA appearing for the State respondents, on instructions, submits that in the instant case, after the order 6.10.2023 passed by the respondent no. 2, the Investigating Officer, after taking charge of the further investigation, has informed in writing to the concerned Magistrate on 10.10.2023, with regard to the further investigation as Directed by the Superintendent of Police, Rampur vide order dated 6.10.2023 and sought photocopy of entire case diary and all other relevant documents for this purpose. On 12.10.2023, the application was allowed and the relevant record was actually received by the Investigating Officer. Relying upon the provisions of Section 173 (8) of the Code, learned AGA as well as learned counsel for the informant submit that the powers of investigating agency after registration of the F.I.R. are unfettered and for further investigation, no prior permission from Magistrate is required even when the cognizance has been taken by the learned Magistrate. It is further submitted that in any case, even assuming for the sake of arguments that

such permission is required, the same was duly received and there is/was no legal infirmity in proceeding with the further investigation.

6. Learned counsel for the informant, drawing attention to photocopy of the application of the Inspector Srikant Dwivedi along with endorsement of the concerned officer and order of the leaned Chief Judicial Magistrate (annexed as Annexure CA-4 to the counter affidavit) submits that no interference is warranted in the order impugned herein as application seeking permission for further investigation before the concerned Magistrate on 10.10.2023 was allowed on 12.10.2023. Submission, therefore, is that the writ petition is devoid of merits.

7. At the very outset, we may note that the facts about filing of such application and that the same had been allowed stands verified from paragraphs 10, 13, 14 and 19 of the instructions supplied by the learned AGA, hence no rebuttal thereof is required by the petitioner.

8. We have considered the rival submissions and have perused the record.

9. We have already considered the entire law on the issue involved in the present petition in our judgement and order passed by a co-ordinate Bench (one of us, Hon'ble Vivek Kumar Birla, J., was a Member) dated 9.11.2023 passed in Criminal Misc. Writ Petition No. 10247 of 2023 (Jitendra Singh @ Bablu and 12 others vs. State of UP and 3 others) extensively. The relevant paragraphs 27 to 32, 34 and 35 of the said judgement are quoted as under:

*"27. In the case of **Peethambaran (supra)** relied on by learned counsel in the petitioners, decided on 03.05.2023, relying upon judgments in **Vinay Tyagi (supra)**, which was based on doctrine of "contemporanea expositio", the Apex Court has observed the requirement of permission from learned Magistrate for further investigation and file supplementary report. Paragraph 20 of the aforesaid judgement is quoted as under:*

"20. The Chief Police Officer of a district is the Superintendent of Police who is an officer of the Indian Police Service. Needless to state, an order from the District Police Chief is not the same as an order issued by the concerned Magistrate. Referring to Vinay Tyagi (supra), this Court in Devendra Nath Singh v. State of Bihar noted that there is no specific requirement to seek leave of the court for further investigation or to file a supplementary report but investigation agencies, have not only understood it to be so but have also adopted the same as a legal requirement. The doctrine of contemporanea exposito aids such an interpretation of matters which have been long understood and implemented in a particular manner to be accepted into the interpretive process. In other words, the requirement of permission for further investigation or to file a supplementary report is accepted within law and is therefore required to be complied with."

(emphasis supplied)

*28. Hence, on facts **Peethambaran (supra)** is also distinguishable as in the present case on application, clearly asking for supply of record as further investigation has been directed by the competent police authority, was filed in the court, which was allowed.*

29. In the case of ***State through Central Bureau of Investigation vs. Hemendra Reddy and Another : 2023 SCC OnLine SC 515****, the Apex Court has held as under:*

"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."

(emphasis supplied)

30. In the case of ***Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj, 1999 (5) SCC 740,*** the Hon'ble Apex Court in paragraphs 10 and 11 has held as under:-

"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.) (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 law does not require it, we would not burden the magistrate with such an obligation."

(emphasis supplied)

31. We may also refer to the judgment of this Court dated 17.8.2023 passed in Criminal Misc. Writ Petition No. 11257 of 2023 (Smt. Preety Verma vs. State of U.P. and others), wherein identical questions were raised and rejecting the same the petition was dismissed.

32. Therefore, it is settled principles of law that the police has a right to further investigate the matter even after the submissions of the charge sheet/report before the learned Magistrate and even after the Magistrate had taken cognizance of the report/charge sheet. In exercise of power u/S 173 (8) Cr.P.C of the Code, it has been statutorily recognized that there is no

statutory requirement that before initiating further investigation, investigation agency must take permission of the concerned Magistrate. Further, investigation is very distinct from the re-investigation/de novo investigation or fresh investigation. Further investigation is the continuance of the investigation, which has already been done and on discovery of new facts or the facts which were left out during the investigation. Whereas in the case of the fresh, De-novo or reinvestigation, the investigation already done is required to be wiped out and investigation is required to begun from its inception. Further investigation can be carried out even without any permission from the concerned Magistrate. However, fresh, de-novo or reinvestigation cannot be done without the specific orders by the competent Court.

34. In view of the law discussed hereinabove, which clearly reflects that the powers of the Superintendent of Police regarding further investigation are unfettered and there is no statutory requirement of taking permission and there being no specific proforma provided for seeking such permission or the order, which is required to be passed for the purpose of allowing such application, we are of the opinion that this was sufficient compliance of the law as laid down by various judgments stating from ***Ram Lal Narang (supra)*** *onwards, which is based on long accepted practice of moving such application before the court.*

35. To our mind as the police report has already been submitted, the object of filing such application is that the court must be aware of the fact that further investigation has been directed in the matter."

10. In view of the law as discussed above where it has come on record that after submission of police report, further investigation was directed by respondent no. 2 vide order dated 6.10.2023 and thereafter an application seeking permission of the Magistrate was filed on 10.10.2023 and prayer was made to supply certified copies of the original case diary/charge-sheet, which was allowed on 12.10.2023 (Annexure CA-4 to the affidavit filed by respondent no. 4), we find no illegality in the impugned order dated 6.10.2023.

11. Accordingly, present petition lacks merit and is hereby dismissed.

12. The office is directed to keep a photocopy of the instructions dated 30.11.2023 containing (21) paragraphs submitted by Srikant Dwivedi, Inspector/Investigating Officer, Crime Branch, District Rampur on record and return the instructions in original to learned AGA within three days.

(2024) 2 ILRA 1555
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.01.2024

BEFORE

THE HON'BLE RAJESH SINGH CHAUHAN, J.

Transfer Application (Criminal) No. 83 of 2023

Deepanshu @ Sudhanshu Tripathi ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
Ganga Singh

Counsel for the Respondent:
G.A.

Criminal Law - Code of Criminal Procedure-Sectiontion 181-Genesis of all the six cases is a single recovery memo -which has been executed -three cases are pending consideration - the cases, so indicated be

transferred to the Competent Court. **Application allowed.** (E-9)

Cases cited:

1. Nahar Singh Yadav & anr.Vs U.O.I. & ors. reported in [(2011) 1 SCC 307]

(Delivered by Hon'ble Rajesh Singh Chauhan, J.)

1. Heard Sri Ganga Singh, learned counsel for the petitioner and Sri Aniruddh Kumar Singh, learned Additional Government Advocate for the State.

2. By means of this petition filed U/s 482 Cr.P.C., the petitioner has prayed the following relief:

"It is therefore most respectfully prayed that this Hon'ble Court may kindly be pleased to pass an order, directing for transfer of Sessions Trial No. 1088 of 2022, pending in the court of Special Judge (E.C. Act)/Additional Sessions Judge, Court no. 4, Kanpur Nagar, having Case Crime No. 436 of 2020, under section 379 I.P.C., Police Station -Gwaltoli, District-Kanpur Nagar and Case No. 1025 of 2021, pending in the court of chief Judicial Magistrate Unnao, having Case Crime No. 291 of 2021, under section-379, 411 I.P.C., Police Station-Kotwali, District-Unnao as well as Case No. 1087 of 2021, pending in the court of Chief Judicial Magistrate Unnao, having Case Crime No. 373 of 2021, under section- 379, 411 I.P.C., Police Station-Kotwali, District-Unnao, to the court of Sessions Judge, Lucknow and in the court of Chief Judicial Magistrate, Lucknow, from where the cases will be committed to the concerned Session Courts."

3. Learned counsel for the petitioner has stated that the petitioner has falsely been implicated in the certain cases, on the basis of single recovery which has been executed at Lucknow. Attention has been drawn towards Para 4 so as to show the cases pending against the petitioner. Para 4 of the petition reads as under:

"4. That the applicant has been falsely dragged by the police involving the applicant in the cases detailed herein below as there exists no name of the applicant in either of the first information reports.

(A) That the cases pending at Lucknow in the court of Judicial Magistrate/Additional Civil Judge (S.D.), court no. 20, Lucknow are detailed herein below:-

(1) Case No. 228 of 2021, vide Case Crime No. 113 of 2021, under Section-379, 411, 413 I.P.C., Police Station-Para, District Lucknow South.

(2) Case No. 229 of 2021, vide Case Crime No. 227 of 2021, under section- 379, 411, 420 I.P.C., Police Station- Para, District- Lucknow South.

(3) Case No. 308 of 2021, vide Case Crime No. 236 of 2021, under Section- 420, 411, 413 I.P.C., Police Station - Para, District- Lucknow South

(B) That the cases pending at Unnao in the court of Chief Judicial Magistrate, Unnao are detailed herein below :-

(1) Case No. 1025 of 2021, vide Case Crime No. 291 of 2021, under section - 379, 411 I.P.C., Police Station- Kotwali, District-Unnao.

(2) Case No. 1087 of 2021, vide Case Crime No. 373 of 2021, under section- 379, 411 I.P.C., Police Station-Kotwali, District- Unnao.

(C) That the case pending at Kanpur in the court of Special Judge E.C. Act/Additional Sessions Judge, Court no. 4, Kanpur Nagar is detailed herein below:-

(1) Session Trial No. 1088 of 2022, vide Case Crime No. 436 of 2020, under Section - 379 I.P.C., Police Station - Gwaltoli, District- Kanpur Nagar."

4. In Para nos. 5, 6 and 7, the learned counsel for the petitioner has narrated the details of the afoaresaid cases and stated that in all the aforesaid cases, the subject matter is same. Learned counsel for the petitioner has further submitted that the 3 cases, as have been indicated in Para 4(A) are pending consideration before the Lucknow courts.

5. By means of this petition, the prayer of the present petitioner is confined relating to the cases which have been indicated vide Para 4(B) and 4(C). Two cases are pending consideration before the Unnao courts and one case is pending consideration before Kanpur Nagar.

6. He has submitted that all the aforesaid cases be transferred at one place. He has also stated that appropriate order may be passed in view of Section 181 of Cr.P.C. He has further submitted that Chapter XIII of the Cr.P.C. describes the jurisdiction of the criminal courts in inquiries and trials. He has further submitted that in view of Sub Section 3 of Section 181 of Cr.P.C., any offence of theft, extortion or robbery may be inquired into by a Court within whose local jurisdiction the offence was committed. For the convenience, Section 181(3) of Cr.P.C. reads as under:

"Any offence of theft, extortion or robbery may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property which is the subject of the offence was possessed by any person committing it, or by any person who received or retained such property knowing or having reason to believe it to be stolen property."

7. Learned counsel for the petitioner has stated that genesis of all these cases is a single recovery memo which has been executed at Lucknow, therefore, in view of Section 181 (3) of Cr.P.C., the aforesaid cases may be transferred to one place. He has submitted that 3 cases are already pending before Lucknow courts, therefore, the remaining 3 cases may also be transferred to the competent court of Lucknow.

8. Sri Aniruddh Kumar Singh, learned AGA has submitted that under Chapter XIII of the Cr.P.C., the mechanism/procedure has been provided to determine the places of trial in certain offences. He has also stated that Section 181 Cr.P.C. clearly provides such modality. He has also stated that in view of Sub Section 3 of Section 181 Cr.P.C., any offence of theft, extortion or robbery may be tried by a Court within whose local jurisdiction the offence was committed and in the present case, the genesis of all the six cases is a single recovery memo which has been executed at Lucknow itself, therefore, Sri Singh has stated that in the interest of justice, any appropriate order may be passed by this Court. Sri Aniruddh Kumar Singh has referred the dictum of Apex Court in the case of **Nahar Singh Yadav and Another Vs. Union of India and Others** reported in [(2011) 1 SCC 307] by submitting that in the aforesaid judgment the Apex Court has interpreted the modalities in such cases. For the convenience, para 29 of the aforesaid judgment of Apex Court in Re; **Nahar Singh Yadav (supra)** reads as under:

"Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 of the Cr.P.C. should be exercised, it is

manifest from a bare reading of sub-sections (2) and (3) of the said Section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:-

(i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;

(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;

(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State Exchequer in making payment of travelling and other expenses of the official and non-official witnesses;

(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and

(v) existence of some material from which it can be inferred that the some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice."

9. Having heard learned counsel for the parties, having perused the material available on record, having regard to the relevant provisions of law so defined under Chapter XIII, more particularly, Section 181(3) of Cr.P.C. and also having regard to the dictum of Apex Court in Re; Nahar Singh Yadav (supra), I am of the considered opinion that since in the present case the genesis of all the six cases is a single recovery memo which has been executed at Lucknow and three cases are pending consideration before the Lucknow courts, therefore, the cases, so indicated in Para nos. 4(B) and 4(C) may be transferred to the Competent Court of Lucknow.

10. Accordingly, the concerning Judge/competent court at Unnao where the Case No. 1025 of 2021, vide Case Crime No. 291 of 2021, under Sections 379, 411 IPC, Police Station Kotwali, District Unnao and Case No. 1087 of 2021 vide Case Crime No. 373 of 2021, under Sections 379, 411 IPC, Police Station Kotwali, District Unnao as well as the competent court at Kanpur where Sessions Trial No. 1088 of 2022 vide Case Crime No. 436 of 2020, under Section 379 IPC, Police Station Gwaltoli, District Kanpur Nagar, are pending consideration, may do the needful to transfer those cases to District Judgeship, Lucknow.

11. The District & Sessions Judge, Lucknow, after receiving the paper books of the aforesaid cases, shall do the needful to assign the aforesaid cases to the Competent Courts, as per the nature of allegations, so indicated in the chargesheet of the aforesaid cases.

12. It is expected from the learned trial courts concerned that all the aforesaid six cases be conducted and concluded with expedition strictly in accordance with law by affording ample opportunity of hearing to the parties concerned.

13. The instant petition U/s 482 Cr.P.C. is hereby allowed.

(2024) 2 ILRA 1559
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.02.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ-A No. 1201 of 2024

Akash Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Deepak Singh

Counsel for the Respondent:
C.S.C.

Service Law – U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 – Rule 5 – Compassionate Appointment – Petitioner challenged rejection orders dated 27.04.2022 and 06.05.2022 denying compassionate appointment – Held, petitioner's father, a Constable, died on 23.10.2004; mother's application for compassionate appointment (26.08.2006) rejected on 12.05.2009, unchallenged – Petitioner, attaining majority on 02.07.2014, applied on 15.09.2016 (over 11 years after father's death, 2 years after majority) – Rule 5 allows relaxation of 5-year limitation period, but application filed after 11 years and 10 months deemed unreasonable – *Malaya Nanda Sethy Vs St. of Orissa* distinguished, as it pertains to applicable rules at time of death, not delay – *Anit Kumar Yadav Vs St. of U.P.* inapplicable, as applicant there applied within 12 days of majority, unlike petitioner's 2-year delay to pursue preferred post – *Umesh Kumar Nagpal Vs St. of Haryana* and *Sanjay Kumar Vs St. of Bihar* followed, holding compassionate appointment aims to address immediate financial crisis, not provide vested right exercisable after long delay – Petitioner's delay to qualify for preferred post (Constable) contravenes Rules' purpose – Rejection orders upheld, no interference warranted. (Para 9-17)

Writ petition dismissed.

List of Cases Cited:

1. Malaya Nanda Sethy Vs St. of Orissa; Civil Appeal No. 4103 of 2022, decided on 20.05.2022

2. Anit Kumar Yadav Vs St. of U.P.; Service Single No. 6439 of 2021, decided on 02.12.2021

3. Umesh Kumar Nagpal Vs St. of Har.; (1994) 4 SCC 138

4. Sanjay Kumar Vs St. of Bihar; 2000 SCC (L&S) 895

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

1. Heard learned counsel for the petitioner and Ms. Deepshikha, learned Chief Standing Counsel assisted by Mr. Sandeep Sharma, learned Standing Counsel for the opposite parties/respondents.

2. The present writ petition has been preferred for quashing of the impugned order dated 27.04.2022 passed by respondent no.1 and the impugned order dated 06.05.2022 passed by the Senior Superintendent of Police, Etah whereby the claim of the petitioner for compassionate appointment under U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred as 'Rules of 1974') has been rejected.

3. Learned counsel for the petitioner has submitted that the father of the petitioner had expired on 23.10.2004 while he was working on the post of Constable (Civil Police). After the demise of the father of the petitioner, the mother of the petitioner i.e. Smt. Usha Yadav, wife of the

deceased, had moved an application for compassionate appointment on 26.08.2006, which was rejected by the Senior Superintendent of Police, Etah by its order dated 12.05.2009.

4. It is further submitted that thereafter the petitioner, after attaining the age of majority, had moved an application on 15.09.2016 for compassionate appointment but the authorities without considering the case of the petitioner regarding the hardship had rejected the application arbitrarily.

5. It is further submitted that the candidature of the petitioner for compassionate appointment has been rejected by the State Government by passing the impugned order dated 27.04.2022 and the consequential order has been passed by the Senior Superintendent of Police, Etah by impugned consequential order dated 06.05.2022 i.e. after more than about 5 years from the date of moving an application by the petitioner which is not permissible. Such a delay on the part of the respondents in taking decision, makes the decision bad in the eyes of law and in support of his submission the learned counsel for the petitioner has relied upon the judgment dated 20.05.2022 of the Hon'ble Apex Court in the case of Malaya Nanda Sethy Vs. State of Orissa and Others, passed in Civil Appeal No.4103 of 2022.

6. It is further submitted that the delay of more than 11 years cannot be a ground for rejection of the claim of the petitioner and in support of his submission learned counsel for the petitioner has relied upon the judgment of this Court in the case of Anit Kumar Yadav Vs. State of U.P. and Others, Service Single No.6439 of 2021, where the application was preferred after more than 8 years of the demise of father of the petitioner in the said writ petition.

7. On the other hand, learned counsel for the State has submitted that the petitioner after attaining the age of majority on 02.07.2014 had applied after more than 2 years for compassionate appointment by moving an application on 15.09.2016.

8. It is further submitted that the impugned order dated 27.04.2022 has been passed in the light of the judgments of the Hon'ble Supreme Court hence there is no illegality in the impugned orders which are under challenge in the present writ petition.

9. After hearing the learned counsel for the parties and going through the record of the case and the judgments relied by the learned counsel for the parties, the position which emerges out in the present case is that earlier the mother of the petitioner had applied after 1 year 10 months and 3 days of the demise of her husband i.e. father of the petitioner. Her claim was rejected vide order dated 12.05.2009. The said rejection order was never challenged by the mother of the petitioner/ wife of the deceased.

10. The learned counsel for the petitioner has very fairly admitted this fact that the petitioner had attained the age of majority on 02.07.2014 i.e. after about 11 years of the demise of his father and moved the application after more than 2 years 2 months from the date of attaining majority as he was pursuing the intermediate course so he could apply against the post of Constable.

11. In totality, the representation made by the petitioner after the expiry of more than 11 years and 10 months from the date

of demise of his father and Rule 5 of the Rules of 1974 empowers the State Government to relax the period of 5 years from the date of demise of the deceased employee.

12. The judgment in the case of Malaya Nanda Sethy (supra) relied by the learned counsel for the petitioner is not applicable on the facts of the present case as the said judgment is on the point that the rules which were existing at the time of the demise of the deceased employee would be applicable or by subsequent amended Rules and it has been held by the Hon'ble Supreme Court that the candidature would be considered as per the rule which were in existence at the time of the demise of the deceased employee not the rules amended during the pendency of the application moved by any family member of the deceased employee. It is further held that the delay which was taken into consideration by the Hon'ble Apex Court in taking decision on the application of the petitioner is to be read with the issue i.e. applicability of the rules.

13. The judgment relied by the learned counsel for the petitioner dated 02.12.2021 passed in Anit Kumar Yadav (supra) is also not applicable in the present case. As in the case of Anit Kumar Yadav (supra), after the demise of the father of Anit Kumar on 03.04.2008, he had left behind his widow, 2 minor sons and minor daughters, due to which the mother of the petitioner went into depression and was unable to apply for compassionate appointment.

14. The petitioner i.e. Mr. Anit Kumar after attaining the age of majority on 10.07.2016 had immediately moved an application on 22.07.2016 i.e. within 12 days after attaining majority whereas the petitioner of the present writ petition had waited for more than 2 years just to get the appointment on the post of his choice.

15. The judgment relied by the learned counsel for the State which has been mentioned in the impugned order in the case of Umesh Kumar Nagpal Vs. State of Haryana and Others with Anil Malik Vs. State of Haryana and Others, reported in (1994) 4 SCC 138, wherein the Hon'ble Supreme Court has held that the employment cannot be granted after lapse of reasonable period which must be specified in the rules and in the Rules of 1974 that period has been provided as 5 years.

16. The another judgment relied by the learned counsel for the State which has been mentioned in the impugned order in the case of ***Sanjay Kumar Vs. State of Bihar and Others, reported in 2000 SCC (L&S) 895,*** wherein it has been held that the compassionate appointment is intended to enable the family of the deceased employee to tied over the sudden crisis. The petitioner was minor and was not eligible for appointment and there cannot be any reservation of vacancy till such as petitioner becomes a major after number of years, unless there are some specific provisions.

17. It has further been held by the Hon'ble Supreme Court that employment is not a vested right which can be exercised at any time in future as the object is to enable the family to get over the financial crisis which it faces at the time of death of the sole bread earner, the compassionate appointment cannot be demanded and offered whatever be the lapse of time and after the crisis is over. In the present case,

the petitioner moved an application after more than 11 years and 10 months and more than 2 years after attaining the age of majority, meaning-hereby, he had unduly waited for a very long time. On attaining the age of majority the petitioner was eligible to be appointed on Class-IV post but he chose not to apply at the appropriate time and took more than 2 years thereafter to better qualify himself educationally to procure a job of his choice, which is not aim and purpose of Rules of 1974.

18. In view of the discussion made here-in-above, the present writ petition is devoid of merit and hence, no interference is required. Therefore, the writ petition is **dismissed**.

(2024) 2 ILRA 1562
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.02.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 6568 of 2018

Jitendra Kumar Chaudhary ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Budhi Ram Gupta, Sri Madan Mohan

Counsel for the Respondent:
C.S.C., Sri Yogendra Singh Bohra

Service Law – Intermediate Education Act, 1921 – U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 – Code of Criminal Procedure, 1973 – Sections 125 & 128 – Protection of Women from Domestic Violence Act, 2005 – Section 20 – Unauthorized Notice by District Inspector of Schools – Petitioner challenged notice dated 29.08.2017 issued by District Inspector of Schools (DIOS) directing compliance with Family Court's maintenance order dated 16.09.2016, threatening salary deduction – Held, DIOS lacked authority under Intermediate Education Act, 1921 or Payment of Salaries Act, 1971 to enforce Family Court's order or entertain Pvt. complaints for execution – Execution of maintenance orders under Section 125 Cr.P.C. governed by Section 128 Cr.P.C., and under Section 20 of Domestic Violence Act, enforceable by Magistrate, not DIOS – Regulations 46-52 of Intermediate Education Act and Section 3 of Payment of Salaries Act prohibit unauthorized salary deductions except as per law or court orders – Notice per se illegal, quashed – DIOS's subsequent order dated 08.03.2018 stopping deduction upheld – Pvt. respondents to pursue execution before appropriate forum – Petitioner may seek adjustment of any recovered amount in maintenance proceedings. (Para 6-11)

Writ petition allowed.

(Delivered by Hon'ble Ajit Kumar, J.)

1. Heard Sri Budh Ram Gupta, learned counsel for the petitioner, learned Standing Counsel for the State respondents and Sri Y.S. Bohra, learned counsel for respondent nos. 5,6 and 7.

2. The petitioner before this Court is aggrieved of the notice issued by the District Inspector of Schools on 29th August, 2017 whereby he was required to comply the judgment and order of the Principal Judge, Family court dated 16.09.2016 in maintenance case no. 495 of 2008 failing which recovery shall be proceeded with from his salary.

3. The argument advanced by learned counsel for the petitioner is that District Inspector of Schools does not enjoy any authority to act as an executing authority of an order of court of law. He submits that as

per maintenance law, proper remedy for the respondent nos. 5,6 and 7 was to apply for execution before the concerned court to get judgment and order executed . The District Inspector of Schools being an education authority could not have terrorized the petitioner to comply with directions of the family court else deduction would be made from his salary. He submits that power can be exercised by District Inspector of Schools vis-a-vis an employee of educational institution in terms of regulations prescribed for under relevant chapter of the Intermediate Education Act, 1921. Here there being not a case qua service or employment otherwise relating to the petitioner, nor there was any complaint as such, the District Inspector of Schools was not even competent to entertain a private complaint made by of respondent nos. 5,6 and 7 for the execution of the judgment of the Principal Judge, Family Court, Varanasi.

4. Learned Standing Counsel as well as learned counsel for the private respondent submits that it was a mere notice to which petitioner could have offered explanation to the District Inspector of Schools but they are not in a position to demonstrate as to under which section and regulation framed under the Intermediate Education Act, the District Inspector of Schools enjoys any such authority to entertain such application and then to proceed to take cognizance so as to issue notice for the execution of an order of a court of law, not arising out of any contract of employment or even relating thereto.

5. Learned Standing Counsel appearing on behalf of the State respondents submits that District Inspector of Schools later on realized the mistake and accordingly passed order on 08th March, 2018 stopping the deduction from salary of petitioner.

6. Having heard learned counsel for the respective parties and having perused the records, I find that the Principal Judge, Family, Court Varanasi passed the judgment and order under Section 125 of the Cr.P.C. and The protection of Women from Domestic Violence Act, 2005. For execution of an order passed under Section 125 of Cr.P.C. there is ample provision contained under Section 128 of Cr.P.C and therefore, private respondents could have approached the Court concerned for getting its order executed under Section 128 of the Code of Criminal Procedure that runs as under:

"A copy of the order of maintenance or interim maintenance and expenses of proceeding, as the case may be shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance for the maintenance or the allowance for the interim maintenance and expenses of proceeding, as the case may be is to be paid; <u>and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance or as the case may be expenses, due."</u>

(emphasis added)

7. Similarly in respect of order passed under Section 20 of the The protection of Women from Domestic Violence Act, 2005 empowers the Magistrate to realized the amount and ensure that monetary relief is paid to the complainant. Section 20 of Domestic Violence Act is reproduced hereunder:

20. Monetary reliefs.—(1) While disposing of an application under sub-section (1) of section 12,the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to,—

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent."

(Emphasis added)

8. From the relevant provisions framed under Chapter II and III of the Intermediate Education Act, 1921, I do not find any provision in existence to permit the District Inspector of schools to have taken cognizance of such matter. Chapter II deals with appointment vide its Section 16E, 16 F and 16FF and qualification prescribed under its Appendix 'A' and Chapter III deals with conditions of service of employees of such recognized and aided institution read with regulation contained under said Chapter. Regulation 46 to 52 provides for regular payment of salary to the employees without any deduction by the competent authority and the employee shall also be conferred upon with the benefit of the annual increments which shall not be stopped unless an employee visited with punishment withholding the same. Regulation 46 to 52, which are relevant for the purpose are reproduced hereunder:

"46. Employees shall be allowed the scale of pay sanctioned by the State Government from time to time.

47. The pay of an employee on his first joining service in an institution shall be fixed at the Initial stage of the time-scale attaching to his post: Provided that if he has served previously in another institution and earned increments, he may be given the benefit of such increments under conditions laid down by Government or the

regulations. Provided further that advance increments may be allowed in special cases with the prior approval of Government.

48. On promotion to a higher post the initial pay of an employee will be fixed at the minimum of the new scale if his pay is less than his minimum otherwise at the stage of the new time. scale next above his pay.

49. The Committee will pay the salary of an employee for a month by the 15th day of the following month.

50. The payment of salary will be made in cash or by cheque. If an employee desires regular payment to be made by cheque instead of in cash necessary arrangements shall be made by the Committee, provided banking facilities are locally available, on receiving his salary by cheque or in cash, the employee shall sign the acquaintance oll duly stamped (if necessary) in token of such payment.

51. संस्था में स्थानापन्न अथवा मौलिक रूप से की गयी अविरल सेवा, वेतन के कालमान एवं वार्षिक वेतन वृद्धि के लिए संगणित की जायेगी, प्रतिबन्ध यह है कि कर्मचारी की ग्राह्य से अधिक बिना वेतन के अवकाश की अवधि अथवा चिकित्सीय आधार अथवा निजी कार्य पर लिये गये अवकाश की अवधि के लिये वेतन वृद्धि देय नहीं होगी। किसी विशेष वर्ष में अवकाश की अवधि में पड़ने वाली वेतन वृद्धि की तिथि उस तिथि तक स्थगित कर दी जायेगी, जिसको कर्मचारी अवकाश की समाप्ति पर कार्यभार ग्रहण करता है। अध्यापक वेतन की तिथि के दो माह पूर्व शिक्षा निदेशक द्वारा निर्धारित स्वमूल्यांकन प्रपत्र पर सूचनायें भरकर प्रधानाचार्य के माध्यम से प्रबन्ध तंत्र को देगा। प्रबन्ध तन्त्र आवश्यक अभिलेख जिसे वह उचित समझे, मांगेगा तथा वेतन वृद्धि समय से अनुमन्य किये जाने हेतु प्रधानाचार्य, अध्यापक को निर्देश देगा। यदि वेतन वृद्धि की तिथि तक कोई निर्देश नहीं देता तो मान लिया जायेगा कि अनुमति दे दी गई है।

52. कर्मचारी को वेतन के कालमान में वार्षिक वेतन वृद्धियों ग्राह्य होगी, जब तक कि उसकी वेतन वृद्धियाँ रोकने का दण्ड नहीं दिया जाता है अथवा वह दक्षतारोक पर निरुद्ध नही किया जाता है।

ऐसे किसी कर्मचारी को वेतन वृद्धि ग्राह्य नहीं होगी अथवा उसकी दक्षता रोक पार नहीं की जायेगी, जिसे सार्वजनिक परीक्षाओं में प्रश्न-पत्रों को निर्धारित समय के पूर्व प्रकाशित (प्रकटित) करने अथवा कराने में प्रत्यक्ष या परोक्ष रूप से सहायक होने अथवा परिषद परीक्षाओं में परीक्षार्थी/परीक्षार्थियों को नकल करने अथवा नकल कराने में प्रत्यक्ष या परोक्ष रूप से सहायक होने अथवा अनुचित साधन के प्रयोग के प्रकरणों से संबंधित अवैध सामग्री नष्ट करने अथवा प्रकरण को दबाने अथवा जिला प्रशासन तथा शिक्षा विभाग के अधिकारियों अथवा सचल दलों के निरीक्षण कार्य में बाधा डालने तथा उनके साथ हिंसा, मारपीट करने अथवा संकलन/मूल्यांकन केन्द्रों से उत्तर पुस्तकों के गायब होने अथवा जानबूझ कर गायब किये जाने अथवा उत्तर पुस्तकों में किसी भी प्रकार की हेरा-फेरी करने अथवा परीक्षा संचालन में किसी भी प्रकार लापरवाही बरतने आदि अनियमितताओं के आरोप में दोषी पाया गया हो।"

9. Similarly under the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971, there is no power vested with the District Inspect of Schools to make deductions from the salary unless there is an order by the competent court of law directing for any recovery or deduction from the salary. Section 3 of the payment of Salaries Act, 1971 for appreciation of what has been observed above, is reproduced hereunder:

"3. Payment of salary within time and without unauthorised deduction. *- (1) Notwithstanding any contract to the contrary, the salary of a teacher or other employee of an institution in respect of any period after the thirty-first day of March, 1971 shall be paid to him before the expiry of the twentieth day, or such earlier day as the State Government may, by general or special order in that behalf appoint, of the month next following the month in respect of which or any part of which it is payable.*

(2) The salary shall1 [subject to the provisions of sub-section (3), be paid without deduction of any kind except those authorised by the regulations or by any rules made under the Act or by any other law for the time being in force.

[(3) Where the salary of a teacher employee of an institution is not paid in accordance with sub-section (1) due to any default on the part of the management, the Inspector may, without prejudice to any other provision of this Act, pay or cause to be paid within ten days from the date mentioned in sub-section (1) of Section 4 at the rate of salary last drawn by such teacher or employee as the case may be, and in case fresh appointment at the rate of the minimum of the pay scale in which he has been appointed and any adjustment in respect of such payment shall, thereafter be made as soon as possible."

(emphasis added)

10. As a matter of fact vide Section 6 of the said Act duty has been cast upon the District Inspector of Schools to ensure enforcement of the provisions and directions issued under this Act of 1971. Section 6 of the Act is reproduced hereunder:

"6. Enforcement of provisions and directions. - (1) Where the Inspector, on the basis of an inspection of an institution or its records or otherwise, is satisfied that its management has committed default in complying with any direction given under Section 4 or with any provisions of Section 3 or Section 5, he may recommend to the Regional Deputy Director, Education, that action be taken against the institution under sub-section (2).

(2) On receipt of a recommendation under sub-section (1) the Regional Deputy Director, Education, may call upon the management to comply with the said direction or provisions or to show cause with a weeks why the management should not be suspended.

(3) Where the management fails to comply as aforesaid or to show cause, or the Regional Deputy Director, Education, considers the cause shown to be insufficient, he may by order supersede the management for such period not exceeding one year as may be specified in the Order, and authorise any person (hereinafter referred to as Authorised Controller) to take over the management of the institution for the said period :

Provided that the Regional Deputy Director, Education, may where he considers it necessary or expedient so to do, -

(i) extend the said period, from time to time, so however, that the period so extended does not exceed five years in the aggregate; or

(ii) revoke the order at any time :

Provided further that nothing in clause (ii) of the preceding proviso shall bar the passing of a fresh order under this section.

(4) On an order being made under sub-section (3) the Authorised Controller shall, to the exclusion of the management and subject only to the Direction, the Director or the State Government, exercise all the powers and perform all the functions of the management, including management of the property belonging to or vested in the institution and in particular, operate singly the bank account referred to in Section 5 :

Provided that nothing in this section shall be construed to confer on the Authorised Controller the power to transfer any such property (except by way of letting from month to month in the ordinary course of management) or to create any charge thereon (except as a condition of receipt of any grat-in-aid of the institution from the State Government).

(5) Any order made or direction given under this Section shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or instrument relating to the management and control of the institution

(including any scheme of administration) or relating to the property belonging to or vested in the institution."

(emphasis added)

11. In view of above, the District Inspector of Schools could not have entertained such application and, therefore, notice issued to the petitioner dated 29.08.2017 is held per se bad. The Court finds that District Inspector of Schools has stayed the recovery by its order dated 8th March, 2018 and that he has rightly done so.

12. In view of above, writ petition succeeds and is allowed. The order of notice dated 29.08.2017 issued by the District Inspector of Schools is hereby quashed. However, leaving it open for the contesting private respondent nos, 6,7 and 8 to pursue the remedy by moving appropriate application before appropriate forum. Regarding already recovered amount, it will be open for the petitioner to get it adjusted against maintenance amount, which he was liable to be pay under the order passed by the Principal Judge, Family Court, in appropriate proceedings.

(2024) 2 ILRA 1567
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2024

BEFORE

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

Writ-A No. 19152 of 2021

Israr Ali ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shamim Uddin Khan

Counsel for the Respondent:
C.S.C., Sri Manoj Kumar Srivastava

A. Service Law – UP Power Corporation's order dated 05.07.2011 – Honorarium – Entitlement of regularly appointed driver – St. denied payment on the ground that the work of a driver was done through an outsourcing agency as the petitioner was seriously ill – Mandamus sought – Held, mere fact that a person has suffered a medical condition related to the heart or his lungs, for which he has received treatment, cannot *ipso facto* lead to a conclusion that he has become disabled to function as a driver – There is, thus, no basis or warrant for this Court to infer that the petitioner, during the relevant period of nine years, has not been performing the duties of a driver so as to disentitle him to honorarium during every financial year, equivalent to his basic pay, in accordance with the Corporation's order of 05.07.2011. (Para 15 and 16)

Writ petition allowed. (E-1)

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

1. This writ petition has been instituted by the petitioner, praying that a mandamus be issued, ordering the Superintending Engineer, Electricity Works Division, Purvanchal Vidyut Vitran Nigam Limited, Prayagraj, to pay arrears of salary due to the petitioner on account of his entitlement to receive the equivalent of one month's basic pay every year of his service as honorarium, in accordance with the UP Power Corporation's order dated 5th July, 2011, making provision in that behalf for regular drivers.

2. The short case of the petitioner is that he was a permanent driver in the employ of the UP Power Corporation Ltd. (for short, 'the Corporation') and working under the immediate control of the Purvanchal Vidyut Vitran Nigam Limited, Vidyut Madhyamik Karya Khand, Prayagraj. He retired from service on

30.06.2019 upon attaining the age of superannuation. The UP Power Corporation issued an order, bearing Letter No. 622-काविनी एवं वे0प्र0-29/पाकालि/11-5-पी/90 (टीसी-ब) dated 5th July, 2011, making provision for the payment of a month's extra salary in every financial year as honorarium to regular drivers of the Corporation attached to a vehicle. The sum of money payable on this account was directed to be the equivalent of the driver's basic pay for a month. This provision was made, bearing in mind the difficult services rendered by drivers as a class. The Corporation's order of 5th July, 2011 was made applicable from the then current financial year 2010-11. The petitioner retired on 30.06.2019, but was never paid the aforesaid honorarium, equivalent to a month's basic pay. He represented the matter to the respondents thrice: once on 17.02.2021, and again on 28.09 to 2021 and 18.10.2021.

3. In response to these demands, the petitioner states that a memo dated 01.11.2021 was issued by an Executive Engineer on behalf of the Chief Engineer (Distribution), Purvanchal Vidyut Vitran Nigam Limited, Prayagraj, addressed to the Superintending Engineer, Electricity Works Division, Prayagraj, bringing to his notice the fact that the petitioner has not been paid his honorarium equivalent to a month's basic pay each year in terms of the Corporation's order dated 05.07.2011, which he has claimed. The letter mentions that the Executive Engineer has been instructed to say that the petitioner's claim for a month's extra pay should be dealt with according to rules. The petitioner's case further is that despite the aforesaid instructions issued from the office of the Chief Engineer (Distribution), the Superintending Engineer, respondent No.3, has failed to make good the petitioner's arrears on account of his unpaid honorarium.

4. A counter affidavit has been filed on behalf of respondent Nos.2 and 3 by the Executive Engineer, Electricity Works Division, Purvanchal Vidyut Vitran Nigam Limited, Prayagraj. The petitioner's claim, which works out to nine month's extra salary, as the Executive Engineer says, has been denied as misconceived. The reason pleaded in Paragraph No.6 of the counter affidavit is that the petitioner is not entitled to draw extra salary as honorarium for nine month's, because he was suffering from heart disease as well as lung ailments, and on that account, did not work as a driver on his own request. He was assigned office work as a record keeper. It is pleaded that it was for the said reason that the driver's work was undertaken through outsourcing with the respondents entering into a contract with a certain Prakhar Enterprises. A copy of the agreement with Prakhar Enterprises has been annexed to the return filed on behalf of respondent Nos.2 and 3.

5. In Paragraph No.9 of the counter affidavit, it is averred that from 2010 to 2019, the work of a driver was done through an outsourcing agency as the petitioner was seriously ill with his heart ailment and lung disease. It is also averred that for the said reasons, the petitioner's request was accepted on humanitarian grounds, assigning him office work, where he had to maintain record. It is also pleaded in the same paragraph that the petitioner was paid medical reimbursement worth Rs.1,39,600/- for the treatment of his heart disease from 05.07.2013 to 18.07.2013, when he was hospitalized at the Heartline Cardiac Care Centre, Prayagraj. A copy of the relative bill along with the medical certificates is annexed as Annexure CA-2

to the return filed on behalf of the respondents. The case of the respondents, therefore, is that the petitioner never worked as a driver during the relevant period of time, and on his own request, was assigned to office duties. The driver's work was outsourced.

6. In the rejoinder affidavit, the petitioner has disputed the respondents' stand. In Paragraph No.6, it is averred that the petitioner was appointed a driver and retired as such. He has asserted that according to the Corporation's order dated 05.07.2011 vide Paragraph No.2, it has been clarified that all regular drivers would be entitled to payment of a sum of money equivalent to a month's salary, every financial year. It is averred that the petitioner was never detailed to office work. He performed the duties of a driver. He was a Corporation employee, serving as a driver. So far as the agreement for outsourcing is concerned, the petitioner has nothing to do with it, as that is a matter between the Corporation and the contractor. It is averred in Paragraph No.9 of the rejoinder that during the course of his service, he needed treatment for once alone, which was reimbursed under the medical scheme by the respondents. The petitioner has averred that he was hospitalized for fifteen days and the fact that he received medical reimbursement for the treatment that he received in those fifteen days, is a matter of right for him under the medical scheme. It is specifically averred in Paragraph No.10 of the rejoinder affidavit that the petitioner has worked as a permanent driver, and his payslip, appended as Annexure-RA1, shows that he has received his salary as a driver.

7. Heard Mr. Shamim Uddin Khan, learned Counsel for the petitioner, Mr. Manoj Kumar Srivastava, learned Counsel for respondent Nos. 2 and 3 and Ms. Amrita Singh, learned Additional Chief Standing Counsel on behalf of the State.

8. This Court finds upon hearing learned Counsel for the parties that there is no issue about the entitlement of a regularly appointed driver of the Power Corporation, or one who is assigned to a Distribution Corporation, to receive in every financial year a sum of money as honorarium, which is equivalent to his basic pay. This provision, which virtually entitles a driver to be paid thirteen months of salary during the course of a year, that has twelve months, has been made bearing in mind the difficulty level of a driver's job and the fact that it may involve working outside normal working hours. It may also involve working extra duty hours. This, the Court supposes, is the basis for providing a month's extra emoluments during the course of a year to regular drivers, serving in the respondents establishment.

9. A perusal of the Corporation's order dated 05.07.2011, which is the source for this entitlement for drivers, serving either the Power Corporation or a Distribution Corporation, shows in the first paragraph that the entitlement to a month's extra emoluments is provided for regular drivers, who are actually assigned to vehicles. In the second paragraph, which is clarificatory in nature and appears to have been necessitated on account of answering queries or removing difficulties in the application of this extra payment scheme, it is said in unequivocal words that all working and regular drivers, whether a vehicle is allotted to them or not, are entitled to the honorarium.

10. The first paragraph of the Corporation's order of 5th July, 2011 would seem to suggest that the entitlement to honorarium, equivalent to a month's extra salary in a year, is admissible to those regular drivers alone, who are attached to a vehicle, but the clarification makes it evident that all regular drivers of Corporation's vehicles, who are working, are entitled to the equivalent of a month's extra salary during each financial year.

11. There is no dispute on facts that the petitioner was a regular and permanent

driver in the employ of the respondent Corporation. The intent of the Corporation's order of 5th July, 2011 appears to be that regular drivers, who are working as such or driving vehicles, are entitled to be paid honorarium as envisaged in the said order.

12. This Court thinks that a regular driver must be presumed to be assigned driving duties, unless the contrary is proved by the employer, the respondent Corporation here. One of the possible cases, that could be pleaded and proved by the Corporation to say that a driver, like the petitioner, did not have to drive at all, is that the Corporation did not have a vehicle at all in the establishment, which he could drive. Here, this is not the respondents' case. What the respondent Corporation pleads is that they have, through outsourcing, hired a vehicle together with the driver on contract to work for the Executive Engineer for reason that the petitioner was ailing and could not drive due to his ill-health. It is not at all pleaded that there was no vehicle belonging to the Corporation available with them, during the period of time the petitioner was posted in the particular establishment. The case that a vehicle along with the driver was taken on contract through outsourcing does not show anywhere, the purpose why outsourcing was resorted to. It is nowhere mentioned in the contract or any other document, preceding the decision to outsource and hire a vehicle along with the driver, that the measure had to be taken because the petitioner, who was unwell, could not drive. In the absence of something, at least on record, prior to the decision to outsource, as the respondents say, to show that the petitioner was unwell, on account of which he could not drive and that was the reason for the respondent Corporation to outsource the services of a driver together with a vehicle, it cannot be inferred or even assumed that the outsourcing of a vehicle together with a driver, was a result of the petitioner's physical or medical disability to work as a driver.

13. There is another reason for this Court to think so. Considering the circumstantial angle, if it was a sick petitioner, who could not function as a driver, the respondents would not have hired a vehicle on contract along with the driver. They would have simply hired the services of a driver on contract through outsourcing, as it is done these days, utilizing what has been lately called the facility of a service provider. A driver hired through a service provider would then have been posted on the establishment's vehicle to drive it in the face of the regular driver's physical or medical inability. Much contrary to what the respondents endeavour to suggest, the hiring of a vehicle along with a driver, seems to suggest that the Corporation were in the need of an extra vehicle, where instead of buying one, they secured one through outsourcing along with the driver on contract.

14. Quite apart, to dispel the presumption that a regular driver was not in a position to discharge his duties as such, there would be orders and record to show the fact. There would be orders of arrangement made, assigning the petitioner to office duties, or as it is called ‘light duty’. No such order, office memorandum or other record, has been mentioned in the return filed by the respondents, much less annexed to it, that may establish that the petitioner was assigned to office duties on account of his failing health. This was particularly imperative for the respondents in the face of a clear denial by the

petitioner in his rejoinder that he was never assigned office duties because he was unable to drive on account of ill health. The petitioner's stand is that he was once hospitalized for a heart condition, for which he was treated. The fact, that this involved medical reimbursement of expenses, is quite irrelevant to determine the issue that the petitioner has become a disabled driver.

15. What has been placed on record, would show that the petitioner was hospitalized for a heart ailment in the year 2013 from 05.07.2013 to 18.07.2013, a period of fourteen days. The mere fact that a person has suffered a medical condition related to the heart or his lungs, for which he has received treatment, cannot ipso facto lead to a conclusion that he has become disabled to function as a driver. This Court has already remarked that for the said fact to be proved, the respondents would have to show some orders assigning light duties to the petitioner or office duties, as they plead. There is absolutely no record or material about assignment of duties to the petitioner away from his job as a driver and in the office, as the respondents say. The respondents could also establish the fact that the petitioner had become a disabled driver by producing a medical certification of the fact – the result of a test employees of Government owned establishments often undergo to assess their ability to discharge the kind of duties originally assigned to them. There is no medical certification on record produced by the respondents in support of their case that the petitioner has, in any manner, become disabled to function as a driver. There is nothing either, as earlier remarked to show, that he has actually been relieved of his duties as a driver and assigned some other work.

16. On this state of facts, material and evidence, it is difficult to accept the respondents' case that the petitioner has not been discharging his duties as a driver. It is not even a possibility, in the face of the presumption that the petitioner, a regular driver, would be discharging those duties. There is, thus, no basis or warrant for this Court to infer that the petitioner, during the relevant period of nine years, has not been performing the duties of a driver so as to disentitle him to honorarium during every financial year, equivalent to his basic pay, in accordance with the Corporation's order of 05.07.2011. The respondents are obliged to pay the petitioner honorarium for the period of nine years, that is to say, from the financial year 2010-11, as mentioned in the order dated 5th July, 2011 itself until the year of his retirement. The payment of the said sum of money, which has been unlawfully withheld by the respondents, would carry simple interest at the rate of 6% per annum from the date it fell due until realization.

17. In the result, this petition succeeds and is allowed. A mandamus is issued to the Superintending Engineer, Electricity Works Division, Prayagraj, ordering him to pay the petitioner arrears of honorarium from the financial year 2010-11 until the financial year till he retired, in accordance with the Corporation's

order dated 5th July, 2011 together with 6% interest due from the date that each year's honorarium fell due until payment.

18. There shall be no order is to costs.

(2024) 2 ILRA 1572
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.02.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ-C No. 9952 of 2023

Hakimuddin ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rajesh Kumar Srivastava

Counsel for the Respondent:
C.S.C.

Civil Law-Constitution of India, 1950-Article 226 - Rules 15 and 16 of the Arms Rules 2016-cancellation of the arms license on the grounds of not obtaining a unique identification number as per government notification dated 22 january, 2020-petitioner license was issued in 1987 and last renewed in 2018, was wrongfully cancelled because the licensing authority failed to generate the UIN-The court held that Rules 15 and 16 assign the responsibility of generating the UIN to the licensing authority, not the license holder-Hence, the cancellation was illegal and the directions issued to the authority to generate the UIN within four weeks and imposed exemplary costs of Rs.25000 on the State.(Para 1 to 22)
The petition is allowed.(E-6)

<u>List of cases cited:</u>

1. Subrata Roy Sahara Vs U.O.I.(2014) 8 SCC 470

(Delivered by Hon'ble Abdul Moin, J.)

1. Heard the learned counsel for the petitioner and learned Standing counsel appearing on behalf of the State-respondents.

2. Instant writ petition has been filed praying for the following main reliefs:-

"1. Issue a writ, order or direction in the nature of Certiorari thereby quash impugned order dated 07.10.2023 annexed as Annexure No. 7 to this petition.

2. Issue a writ, order or direction in the nature of mandamus commanding the opposite parties specially opp. Party No. 2/ District Magistrate to restore and renew arm license No. 838/ADM/City/87 of the petitioner and also generate Unique Identification Number."

3. The contention of learned counsel for the petitioner is that the petitioner was having an arms license which was issued on 19.06.1987 from Rajasthan and subsequently was transferred to Uttar Pradesh. The last renewal of the license took place on 06.06.2018 by which it was renewed upto 17.05.2021 by the competent authority in District- Pratapgarh. Copy of the renewal is annexure 3 to the writ petition.

4. Subsequent thereto, the respondent no. 2 i.e District Magistrate, Pratapgarh vide impugned order dated 07.10.2023, a copy of which is annexure 7 to the petition has cancelled the arms license of the petitioner placing reliance on a report dated 29.09.2023 and Government orders issued from time to time per which it has been indicated that as the petitioner failed to get a Unique

Identification Number (hereinafter referred to as "UIN") as such, the license has been cancelled.

5. Placing reliance on Rules 15 & 16 of the Arms Rules, 2016 (hereinafter referred to as "Rules, 2016") which have come into force w.e.f 15.07.2016, the argument of the learned counsel for the petitioner is that a duty is cast upon the licensing authority while either granting or renewing a license to enter the data of the record locally in an electronic format specified by the Central Government and for generation of UIN. It is also contended that once the rules themselves provide that it is the duty of the licensing authority to generate the UIN and to upload it on the portal on the National Database of Arms License (hereinafter referred to as "NDAL") consequently, the order impugned by which the license of the petitioner has been cancelled on the ground of the petitioner not having obtained the UIN, is clearly an act not countenanced in the eyes of law and thus it is prayed that the impugned order be set aside with exemplary cost against the respondents who have failed to follow the statutory rules which have been issued in this regard.

6. On the other hand, learned Standing counsel on the basis of averments contained in the counter affidavit argues that it is the duty of the license holder to obtain the UIN number keeping in viewthe notification dated 22.01.2020, a copy of which is part of annexure CA-2 to the counter affidavit. He argues that the said notification provides that those license holder whose license has not been recorded on the NDAL portal, it should be ensured that the licenses are endorsed on the NDAL portal and a UIN is issued and those licenses which are not uploaded by 29.06.2020 on the NDAL portal should be considered as invalid w.e.f 30.06.2020. Considering this notification and a report dated 29.09.2023 submitted by the Additional Superintendent of Police indicating the said fact that the competent authority has passed the order dated 07.10.2023 by recording that as the petitioner's license is not having a UIN as such, his license is being cancelled.

7. Placing reliance on the aforesaid notification, the argument of learned standing counsel is that it was the duty of the petitioner to have obtained the UIN and to have had it endorsed on his license and he having failed to do so, no error has been committed by the respondent no. 2 in cancelling the license of the petitioner by means of the order dated 07.10.2023.

8. Responding to the same, the argument of the learned counsel for the petitioner is that once a duty has been cast upon the licensing and renewing authority in terms of Rules 15 & 16 of the Rules, 2016 to generate the UIN and to upload it consequently, even if a notification dated 22.01.2020 has been issued the same would not resile from the fact that the duty has been cast upon the licensing authority in terms of the Rules, 2016 for having the UIN endorsed at the time of renewal as specifically provided in Rule 15 of the Rules, 2016 and thus, in case it is the licensing authority who has failed to discharge his duties, the burden thereof cannot be placed upon the petitioner in order to enable the licensing authority to cancel the license of the petitioner.

9. Heard the learned counsel appearing on behalf of the contesting parties and perused the records.

10. From the arguments as raised by the learned counsel appearing on behalf of the contesting parties and a perusal of records it emerges that the petitioner was having an arms license, the last renewal of which took place in District - Pratapgarh on

06.06.2018 per which the license was renewed upto 17.05.2021. Subsequent thereto, the licensing authority vide order impugned dated 07.10.2023 has cancelled the license of the petitioner by observing that in terms of the relevant notifications and the Government orders, as the petitioner has failed to obtain a UIN, consequently, as no license without a UIN can subsist subsequent to 30.06.2020, as such, has cancelled the license of the petitioner.

11. The question which is to be considered by this Court as to whether the licensing authority was empowered to cancel the license of the petitioner on the ground that the petitioner has failed to obtain the UIN ?

12. For answering the said question, the Court will have to consider the provisions of Rules 15 & 16 of the Rules, 2016 which for the sake of convenience are reproduced below:-

"Rule 15 - Maintenance of records in electronic format and consolidation of licences

(1) Every licensing authority and the renewing authority specified in Schedule II, while granting a license or renewing a licence, thereof, shall enter the data of the record locally in an electronic format specified by the Central Government.

(2) Every licensing authority and the renewing authority shall also enter such data in the NDAL system which shall generate a unique identification number (UIN) and with effect from the 2[30th June, 2020], any arms license without UIN shall be considered invalid.

(3) The UIN so generated under sub-rule (2) shall be unique for a licensee.

(4) Any existing licensee holding multiple licences in Form III shall on or before the 2[30th June, 2020] make an application for grant of a single licence in respect of all the firearms held by him under his UIN, to the concerned licensing authority:

Provided that where the applicant applying a licence for restricted category of arms or ammunition specified in Schedule I is also a holder of a licence for permissible category of arms or ammunition specified in the said Schedule; or where the applicant, applying for permissible category of arms or ammunition is also a holder of a licence for restricted category of arms or ammunition specified in the said Schedule, the licensing authority concerned shall issue a new licence for such restricted or permissible category of arms or ammunition, as may be applicable, under the existing UIN of the licensee:

3[Provided further that separate licence either in book form or in electronic form shall be generated in case of each licence in Form II, Form III, Form IIIA and Form IV and in case of a licence in Form III, separately for restricted and permissible categories of arms and ammunition specified in Schedule I, with an overall ceiling of two firearms under a single UIN.]

(5) The licensing authority on receipt of an application from a multiple licence holder under sub-rule (4) shall cancel the existing multiple licences of the applicant and issue in lieu thereof, a new licence endorsing therein, all the existing firearms of the said licensee.

(6) The period of validity of the new licence so issued by the licensing authority under sub-rule (5) shall be the farthest period as mentioned in any of the cancelled licences and the area validity

endorsed on the new licence shall be the more extensive area in any of the cancelled licences.

Rule 16 - Duty of licensing authority under NDAL

(1) The licensing authority, while granting or renewing a licence or at the time of providing any allied service to any licensee under these rules shall ensure that the data of the transaction approved by him, is simultaneously updated in the electronic format locally and on the NDAL system under its log-in ID:

Provided that the licensee shall not be held accountable for failure on the part of the licensing authority to update such data in the electronic format.

(2) The licensing authority shall ensure compliance of delivery of different services specified in column (2) of Schedule V, within the time specified in column (4), of the said Schedule."

13. From a perusal of Rule 15 of the Rules, 2016 it emerges that the responsibility of maintenance of records in electronic format and consolidation of the licenses has been put on the shoulders of the licensing authority and the renewing authority as specified in Schedule II. Rule 15, of the Rules, 2016 categorically provides that every licensing authority and the renewing authority while granting a license or renewing a license thereof shall enter the data of the record locally in an electronic format specified by the Central Government. Every licensing authority and the renewing authority shall also enter such data in the NDAL system which shall generate a UIN and with effect from 30.06.2020, any arms license without UIN shall be considered invalid. Sub Rule (3) of Rule 15 of the Rules, 2016 provides that the UIN so generated under sub-rule (2) shall be unique for a licensee. Though sub Rule (4) of Rule 15 of the Rules, 2016 provides that an existing licensee holding multiple licenses in Form III shall on or before 30.06.2020 make an application for grant of single license in respect of all the firearms held by him under his UIN yet the said sub rule would not be attracted as it is not the case where the petitioner is holding multiple licenses.

14. Rule 16 of the Rules, 2016 also casts a duty on the licensing authority under NDAL while granting or renewing a license or at the time of providing any allied service to any licensee under these rules to ensure that the data of transaction approved by him is simultaneously updated in the electronic format locally and on the NDAL system under its log-in ID. The proviso to Rule,16 of the Rules, 2016 also provides that the licensee shall not be held accountable for failure on the part of the licensing authority to update such data in the electronic format.

15. Thus, from a perusal of Rules, 15 & 16 of the Rules, 2016 it clearly emerges that a duty has been cast on the licensing or the renewing authority while generating or renewing a license to enter the data of the record locally in an electronic format and to generate the UIN.The proviso to Rule, 16 of the Rules, 2016 categorically provides that the licensee shall not be held accountable for failure on the part of the licensing authority to update the data in the electronic format.

16. Thus, it can safely be said from a perusal of Rules, 15 & 16 of the Rules, 2016 that the duty has been cast upon the licensing or renewing authority to ensure the generation of the UIN and for feeding of the same on the NDAL portal.

17. In the instant case, the competent authority, though had renewed the license of the petitioner on 06.06.2018 i.e after the promulgation of the rules, 2016 which have

come into force, having been published in the gazette, on 15.07.2016 yet it emerges that the licensing authority failed to discharge the duty which was entrusted upon him for generating the UIN and for uploading it on the NDAL portal. Merely placing reliance on the various Government orders that may have been issued from time to time including the notification dated 22.01.2020, the competent authority has cancelled the license of the petitioner by means of the order impugned dated 07.10.2023 putting the entire burden of generation and endorsement of the UIN on the shoulders of the petitioner. This act on the part of the licensing authority, as emerges from a perusal of the order dated 07.10.2023, is clearly not countenanced in the eyes of law and would also run foul to the statutory provisions of Rules 15 & 16 of the Rules, 2016.

18. So far as the notification dated 22.01.2020 is concerned which has been cited by the learned Standing counsel, a perusal of the same would indicate that the said notification has been issued by the State Government addressed to all the District Magistrates through out the State of Uttar Pradesh in pursuance to the Rule 15 of the Rules, 2016. By the said order, the State Government has required all the District Magistrates, while considering the notification issued by the Government of India on 03.01.2020, to take adequate steps to ensure that those valid license holders who are not entered in the NDAL portal, they should be entered by 29.06.2020 and UIN be provided to them and all such license holders who are not entered on the portal by 29.06.2020, their license should be considered as invalid. The said order nowhere stipulates that it is the license holders who are required to get their UIN or would get their details uploaded on the NDAL portal rather the District Magistrates of all the Districts are required to ensure the adherence of the provisions of Rule 15 & 16 of the Rules, 2016. This order cast a duty on the licensing and renewing authority to generate the said data and UIN and upload the same on the NDAL portal as such, there cannot be any occasion for shelving the said duty on the shoulders of the license holder and thereafter cancelling the said license.

19. Keeping in view the aforesaid discussion, the Court is constrained to hold that the competent authority has failed to discharge the duty which was cast upon him while renewing the license of the petitioner as done on 06.06.2018 i.e for generating the UIN and for updating the same on the NDAL portal. The modus adopted by the licensing authority of cancelling the license of the petitioner is patently illegal and de hors the Rules, 2016.

20. Accordingly, the writ petition is allowed. The order impugned dated 07.10.2023, a copy of which is annexure 7 to the writ petition is quashed. The licensing authority is required to generate a UIN and to upload it on the NDAL portal within a period of four weeks from today. If the license of the petitioner has lapsed in the interregnum it be also extended after completion of necessary formalities.

21. As the Court has specifically observed of the licensing authority having specifically shirked and not discharged the mandatory duty which was cast upon him in terms of Rules, 2016 and the petitioner having been made the scapegoat of such act on the part of the licensing authority and in having approached this Court for the redressal of his grievances as such, the Court also proposes to impose exemplary cost on the respondents.

22. Accordingly, keeping in view the judgment of the Apex Court passed in the case of ***Subrata Roy Sahara Vs. Union of India reported in (2014) 8 SCC 470***, this Court imposes a token cost of Rs. 25,000/- on the respondents.

23. Let the said cost be paid to the petitioner initially by the State Government within six weeks from today with the liberty to recover the same from the authority who is responsible in passing the order impugned.

(2024) 2 ILRA 1577

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.02.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 1646 of 2024

Nitesh Kumar Rastogi & Anr. ...Applicant
Versus
State of U.P & Anr. ...Opposite Parties

Counsel for the Applicants:
Sanandan Kumar Misra, Bina Kumari Bajpai, Lakshmi Kant Tripathi, Rakesh Kumar Chaudhary

Counsel for the Opposite Parties:
G.A.

(अ) फौजदारी कानून - भारतीय दंड प्रक्रिया संहिता, (1973) - धारा 482 - अंतर्निहित शक्तियां - भारतीय दंड संहिता, 1860 - धारा 188, 420, 427, 447 - धारा 482 का सावधानी से उपयोग - उच्च न्यायालय को इस शक्ति का उपयोग करते समय मामले का सतही परीक्षण नहीं करना चाहिए और यह देखना चाहिए कि क्या दीवानी प्रकृति के मामले को अपराध का रूप दिया गया है - जहाँ पक्षों के मध्य दीवानी प्रकृति के विवाद को मात्र दूसरे पक्ष पर दबाव डालने के लिए आपराधिक रंग दे दिया जाता है, ऐसी कार्यवाही न्यायिक प्रक्रिया का दुरुपयोग है। (पैरा -15,16,17)

पक्षों के बीच विवाद दीवानी प्रकृति का - प्रथम सूचना रिपोर्ट द्वारा भूमि पर कब्जा करने का आरोप लगाया गया - अस्थायी निषेधाज्ञा आदेश पारित - जिसके विरुद्ध शिकायतकर्ता द्वारा अपील की गई - पुलिस ने प्रकरण को दीवानी प्रकृति का बताते हुए हस्तक्षेप करने से इकार कर दिया - राजस्व कर्मियों की दो रिपोर्ट प्रार्थीगण के पक्ष में - एक रिपोर्ट शिकायतकर्ता के पक्ष में। (पैरा - 19)

निर्णय: - आपराधिक प्रक्रिया मात्र दीवानी प्रकृति के विवाद में प्रार्थीगण पर अनुचित दबाव डालने के उद्देश्य से संस्थित की गई। ऐसी परिस्थिति में आपराधिक कार्यवाही का जारी रहना न्यायिक प्रक्रिया का दुरुपयोग होगा। पक्षी के मध्य आपराधिक प्रक्रिया निरस्त की गई । आदेश में दिए गए कोई भी कथन आपराधिक प्रक्रिया के अलावा किसी भी दीवानी या राजस्व प्रकृति के विवाद के निर्णय में प्रभावी नहीं होंगे।(पैरा - 19,20)

धारा 482 के तहत आवेदन स्वीकृत । (E -7)

<u>उद्धृत मामलों की सूची</u>: -

1. कमल शिवाजी पोकरनेकर बनाम महाराष्ट्र राज्य और अन्य, (2019) 14 एससीसी 350

2. जी सागर शूरी बनाम उ०प्र० राज्य ,(2000) 2 एससीसी 636

3. इंडियन ऑयल कार्पोरेशन बनाम NEPC इंडिया लिमिटेड ,(2006) 6 एससीसी 736

4. गुलाम मुस्तफा बनाम कर्नाटक राज्य ,(2023) एससीसी online SC 603

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

1. प्रार्थीगण के विद्वान अधिवक्ता श्री सनन्दन कुमार मिश्रा एवं श्रीमती बीना कुमारी

बाजपायी, विद्वान अतिरिक्त शासकीय अधिवक्ता श्री अनंत प्रताप सिंह तथा विपक्षी संख्या 2 के विद्वान अधिवक्ता श्री राकेश कुमार चौधरी तथा श्री लक्ष्मीकान्त त्रिपाठी को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 482 दण्ड प्रक्रिया संहिता के अंतर्गत प्रस्तुत इस प्रार्थना पत्र द्वारा प्रार्थीगण ने प्रथम सूचना रिपोर्ट संख्या 854 सन 2020 अंतर्गत धारा 188, 420, 427, 447 भा०दं०सं० थाना पी.जी.आई. जिला लखनऊ के अनुक्रम में प्रस्तुत आरोप पत्र संख्या 02 सन 2022 दिनांक 20.06.2022 तथा उसके आधार पर विद्वान मुख्य न्यायिक मजिस्ट्रेट, लखनऊ द्वारा वाद संख्या 88492 सन 2022 में पारित आदेश दिनांक 26.09.2022 जिसके द्वारा उपरोक्त अपराध का संज्ञान लिया गया तथा प्रार्थीगण को विचारण हेतु तलब किया गया, की वैधता को चुनौती दी गयी है।

3. विपक्षी संख्या 2 ने दिनांक 9.11.2020 को प्रथम सूचना रिपोर्ट संख्या 854 सन 2020 प्रार्थीगण तथा 2 अन्य व्यक्तियों शैलेन्द्र मिश्रा एवं देवी शंकर पाण्डेय के विरुद्ध लिखाते हुए यह कहा कि शिकायतकर्ता की भूमि खसरा संख्या 2004 ग्राम हैवत मऊ मवइया सरस्वती पुरम कालोनी में लगभग 16,000 वर्ग फीट स्थित है, जिस पर विगत 25 वर्षों से उसकी बाउण्ड्री वाल बनी है। शिकायतकर्ता की माता जी की मृत्यु के पश्चात उनकी वसीयत के आधार पर शिकायतकर्ता को भूमि का स्वामित्व मिला है। प्रार्थी संख्या 1 तथा 2 अन्य सह-अभियुक्त शैलेन्द्र मिश्रा एवं देवी शंकर पाण्डेय भूमि को हड़पने की नियत से खसरा संख्या 2006 ख की भूमि का विक्रय-पत्र फर्जी प्रपत्रों के आधार पर कराकर शिकायतकर्ता की भूमि पर कब्जा करने के उद्देश्य से चहार दिवारी तोड़ रहे थे जबकि खसरा संख्या 2006 ख के भूमिधर अजय कुमार द्वारा वर्ष 2005 में भूमि को एक पंजीकृत विक्रय विलेख द्वारा समिति को बेचा जा चुका था। इसके बाद भी अभियुक्तगण अजय कुमार की पत्नी मालती देवी से बिना किसी अधिकार के फर्जी रजिस्ट्री कराकर शिकायतकर्ता की भूमि पर कब्जा कर रहे हैं। शिकायतकर्ता द्वारा पूर्व में ही मालती देवी के खिलाफ न्यायालय से स्थगन आदेश प्राप्त कर लिया गया था। विवेचना के उपरान्त दिनांक 20.6.2022 को चारों अभियुक्तगण के विरुद्ध धारा 188, 420, 427, 447, 120-B भा०दं०सं० के अपराधों के लिए आरोप-पत्र प्रस्तुत किया गया है, जिनका संज्ञान मुख्य न्यायिक मजिस्ट्रेट लखनऊ ने आदेश दिनांक 26.9.2022 द्वारा लेते हुए अभियुक्तगण को समन किया।

4. प्रार्थना-पत्र के साथ प्रस्तुत शपथ-पत्र में कहा गया है कि प्रार्थी ने जो भूमि विक्रय की है, उसके भूमिधर के रूप में विक्रेता श्रीमती मालती देवी का नाम खतौनी में अंकित था तथा मालती देवी द्वारा प्रार्थिनी संख्या 2 के पक्ष में निष्पादित विक्रय विलेख दिनांक 1.10.2020 की प्रति प्रार्थना पत्र के साथ संलग्न की गयी है, जिसके द्वारा प्रार्थी संख्या 2 ने खसरा संख्या

2006 ख में से 210.315 वर्ग मीटर भूमि खरीदी है, जिसकी सीमाएं विक्रय-पत्र में अंकित हैं। प्रार्थी संख्या 1 ने मालती देवी से एक अन्य विक्रय-पत्र दिनांक 5.10.2020 से खसरा संख्या 2006 ख में से 207.434 वर्ग मीटर भूमि खरीदी है, जिसकी सीमाएं भी उक्त विक्रय-पत्र में अंकित हैं, जिसकी प्रति प्रार्थना-पत्र के साथ संलग्न है।

5. शिकायतकर्ता ने सिविल जज हवाली (अवर खण्ड), लखनऊ के न्यायालय में मूल वाद संख्या 1465 सन 2019 प्रस्तुत करते हुए प्रश्नगत भूमि के संबंध में स्थायी निषेधाज्ञा तथा वाद के लंबित रहने के दौरान अस्थायी निषेधाज्ञा की मांग की तथा अस्थायी निषेधाज्ञा के प्रार्थना-पत्र में यह लिखा गया है कि वादी ने घटना की शिकायत थाने पर किया परन्तु संबंधित थाने की पुलिस ने मामला दीवानी बताकर मामले में हस्तक्षेप करने से इंकार कर दिया। उक्त कथन दिनांक 11.8.2021 को किया गया जबकि शिकायतकर्ता प्रथम सूचना रिपोर्ट दिनांक 9.11.2020 को ही अंकित करा चुका था।

6. प्रभारी निरीक्षक द्वारा उपजिलाधिकारी सरोजिनीनगर लखनऊ को प्रेषित की गयी एक रिपोर्ट दिनांक 10.11.2020 की प्रति प्रार्थना-पत्र के साथ संलग्न की गयी है, जिसमें उपनिरीक्षक ने शिकायतकर्ता द्वारा लिखाई गई प्रथम सूचना रिपोर्ट के संबंध में उपजिलाधिकारी से अनुरोध किया है कि शिकायतकर्ता तथा अभियुक्त का भूमि संख्या अभिलेखों में अलग-अलग प्रदर्शित है किन्तु दोनों पक्ष एक ही स्थल को अपनी अपनी भूमि बताते हैं तथा इस कारण से राजस्व टीम द्वारा स्थलीय निरीक्षण किया जाना आवश्यक है जिससे सत्यता की जांच की जा सके। उपजिलाधिकारी ने दिनांक 10.12.2020 को राजस्व कर्मियों के एक दल द्वारा मौके की जांच करने के बाद एक रिपोर्ट दी, जिसके अनुसार गाटा संख्या 2006 ख के संक्रमणीय भूमिधर श्रीमती मालती, पंकज, अजय तथा प्रेम कुमार आदि हैं। उपरोक्त गाटा में से भूमि प्रार्थी संख्या 1 नितेश कुमार रस्तोगी व प्रार्थी संख्या 2 नीलम पाण्डेय तथा एक अन्य व्यक्ति सह-अभियुक्त शैलेन्द्र कुमार मिश्रा को विक्रय किया गया है।

7. दिनांक 12.11.2021 को लेखपाल ने एक और आख्या प्रस्तुत करके प्रार्थीगण द्वारा गाटा संख्या 2006 ख में से भूमि क्रय किये जाने के बाद की बात कही।

8. प्रार्थी संख्या 1 ने शिकायतकर्ता के विरुद्ध मूल वाद संख्या 788 सन 2021 सिविल जज (प्रवर खण्ड) लखनऊ के न्यायालय में प्रस्तुत किया, जिसमें दिनांक 05.07.2021 को एक अंतरिम निषेधाज्ञा का आदेश पारित करते हुए शिकायतकर्ता तथा उसके सहयोगियों को खसरा संख्या 2006 ख में प्रार्थी संख्या 1 द्वारा क्रय की गयी 2260 वर्ग फीट भूमि पर प्रार्थी संख्या 1 के शांतिपूर्ण अध्यासन में किसी भी प्रकार से हस्तक्षेप करने से निषेधित किया गया। इसके उपरान्त शिकायतकर्ता को सुनने

के उपरान्त सिविल जज (प्रवर खण्ड) द्वारा अस्थायी निषेधाज्ञा के प्रार्थना-पत्र का निस्तारण आदेश दिनांक 07.03.2022 द्वारा किया गया, प्रार्थिनी संख्या 2 नीलम पाण्डेय ने भी सिविल जज (प्रवर खण्ड) लखनऊ के न्यायालय में मूल संख्या 868 सन 2021 प्रस्तुत किया, जिसमें दिनांक 12.07.2021 को उनके पक्ष में अस्थायी निषेधाज्ञा आदेश पारित हुआ तथा दिनांक 07.03.2022 के आदेश द्वारा शिकायतकर्ता प्रतिवादी की आपत्तियों पर विचार करने के उपरान्त अन्तरिम निषेधाज्ञा प्रार्थना-पत्र स्वीकार कर शिकायतकर्ता को आदेशित किया गया कि वह प्रार्थी संख्या 2 द्वारा खरीदी गयी भूमि पर उसके शांतिपूर्ण अध्यासन में किसी तरह का कोई हस्तक्षेप न करे।

9. शिकायतकर्ता ने प्रार्थिनी संख्या 2 के पक्ष में पारित अस्थायी निषेधाज्ञा आदेश के विरुद्ध प्रकीर्ण दीवानी अपील संख्या 202 सन 2022 प्रस्तुत की, जो अपर सत्र न्यायाधीश कक्ष संख्या 6 विशेष न्यायाधीश भ्रष्टाचार निवारण, लखनऊ ने अपने निर्णय तथा आदेश दिनांक 13.04.2023 द्वारा निरस्त कर करते हुए अस्थायी निषेधाज्ञा आदेश दिनांक 07.03.2022 पुष्ट कर दिया।

10. उपरोक्त तथ्यों के आधार पर प्रार्थी के विद्वान अधिवक्ता का कथन है कि जब सक्षम न्यायालय द्वारा प्रार्थीगण के पक्ष में विवादित भूमि के संबंध में शिकायतकर्ता के विरुद्ध अस्थायी निषेधाज्ञा पारित की जा चुकी है, जो आदेश अपील में पुष्ट किया जा चुका है, उसी विषयवस्तु के लिए आपराधिक कार्यवाही जारी रहना न्यायसंगत नहीं है।

11. प्रार्थीगण की तरफ से एक पूरक शपथ-पत्र प्रस्तुत किया गया है जिसमें पक्षों के मध्य राजनैतिक द्वेष होने का कथन किया गया है।

12. विपक्षी संख्या 2 ने एक प्रतिशपथ-पत्र प्रस्तुत करते हुए प्रार्थना पत्र का विरोध किया है। जिसमें उन्होंने सह-अभियुक्त देवी शंकर पाण्डेय, जो प्रार्थी संख्या 2 के पति हैं, के आपराधिक इतिहास का वर्णन किया है तथा साथ ही यह भी कहा है कि उपजिलाधिकारी सरोजिनीनगर लखनऊ ने दिनांक 23.6.2021 को एक आख्या दी जिसमें यह कहा गया कि भूमि के पूर्व स्वामी अजय कुमार भूमि को पहले ही बेच चुके थे तथा उनकी पत्नी मालती देवी को भूमि को विक्रय करने का कोई अधिकार प्राप्त नहीं था।

13. विपक्षी संख्या 2 के विद्वान अधिवक्ता ने माननीय उच्चतम न्यायालय द्वारा कमल शिवाजी पोकरनेकर बनाम महाराष्ट्र राज्य और अन्य 2019 14 SCC 350 में पारित निर्णय का आश्रय लिया, जिसमें माननीय उच्चतम न्यायालय ने कहा है कि यदि शिकायत में कहे गये अपराध प्रथम दृष्टया कारित होना प्रतीत होते हैं तो उक्त शिकायत की कार्यवाही प्रारंभिक स्तर पर इस आधार पर निरस्त नहीं की जानी चाहिए कि शिकायत से दीवानी वाद भी होना प्रतीत होता है। विपक्षी संख्या 2 के विद्वान अधिवक्ता ने यह भी तर्क दिया कि प्रार्थी ने धारा 227

दं०प्र०सं० के अंतर्गत उन्मोचन हेतु प्रार्थना-पत्र भी प्रस्तुत कर रखा है तथा इस कारण से धारा 482 दं०प्र०सं० के अंतर्गत प्रार्थना-पत्र पोषणीय नहीं है।

14. उक्त कथन के उत्तर में प्रार्थी के विद्वान अधिवक्ता ने कथन किया कि इस प्रार्थना-पत्र की नोटिस दिनांक 19.02.2024 को दे दी गयी थी तथा उसी दिन यह प्रार्थना-पत्र प्रस्तुत कर दिया गया था। इसके उपरान्त प्रार्थी ने दिनांक 20.02.2024 को विचारण न्यायालय के समक्ष उन्मोचन प्रार्थना पत्र प्रस्तुत किया। धारा 482 दं०प्र०सं० के अंतर्गत प्रार्थना-पत्र प्रस्तुत किये जाने के समय तक प्रार्थी ने उन्मोचन हेतु कोई प्रार्थना-पत्र प्रस्तुत नहीं किया था और इस कारण यह प्रार्थना पत्र बाद में प्रस्तुत किया गया। उन्मोचन प्रार्थना-पत्र से इस प्रार्थना-पत्र की पोषणीयता पर कोई विपरीत प्रभाव नहीं पड़ेगा।

15. जी सागर शूरी बनाम उ०प्र० राज्य (2000) 2 SCC 636 में माननीय उच्चतम न्यायालय ने यह सिद्धान्त प्रतिपादित किया कि धारा 482 दं०प्र०सं० के अन्तर्गत प्राप्त क्षेत्राधिकार को अत्यन्त सावधानीपूर्वक प्रयोग करना चाहिए। इस शक्ति का प्रयोग करते हुए उच्च न्यायालय को प्रकरण का परीक्षण मात्र सतही तौर पर नहीं करना चाहिए। न्यायालय को यह देखना चाहिए कि क्या मूलतः एक दीवानी प्रकृति के प्रकरण को एक अपराध का जामा पहनाने का प्रयास किया गया है। आपराधिक प्रक्रिया विधि के अनुसार अनुतोष प्राप्त करने की अन्य प्रक्रिया के शॉर्टकट के रूप में प्रयोग नहीं की जा सकती। आपराधिक प्रकरण में अभियुक्त को विचारण के लिए आहूत करने के पहले न्यायालय को अत्यन्त सावधानी बरतनी चाहिए क्योंकि एक अभियुक्त के लिए यह एक अत्यन्त गंभीर विषय है। धारा 482 दं०प्र०सं० के अंतर्गत प्राप्त शक्तियों का प्रयोग न्यायिक प्रक्रिया का दुरूपयोग करने अथवा अन्यथा न्याय के हितों की रक्षा करने के लिए करना चाहिए।

16. इंडियन ऑयल कार्पोरेशन बनाम NEPC इंडिया लिमिटेड (2006) 6 SCC

736 में माननीय उच्चतम न्यायालय ने व्यावसायिक क्षेत्र के लोगों में दीवानी मामलों को आपराधिक मामलों में बदलने की प्रवृत्ति का संज्ञान लेते हुए कहा कि ऐसी धारणा बन रही है कि यदि व्यक्ति को किसी भी प्रकार से आपराधिक प्रक्रिया में लपेटा जा सके तो इससे विवाद के तुरन्त निपटारे की संभावना बढ़ जाती है। जहाँ कोई अपराध कारित नहीं हुआ हो, वहाँ दीवानी प्रकृति के वादों को निपटाने के लिए आपराधिक प्रक्रिया का दुरूपयोग करके दबाव बनाने की प्रवृत्ति को रोका जाना अनिवार्य है।

17. इसके विपरीत प्रार्थी के विद्वान अधिवक्ता ने गुलाम मुस्तफा बनाम कर्नाटक राज्य (2023) SCC online SC 603 का आश्रय लिया, जिसमें माननीय उच्चतम न्यायालय ने कहा है कि जहाँ पक्षों के मध्य दीवानी प्रकृति के

विवाद को मात्र दूसरे पक्ष पर दबाव डालने के लिए आपराधिक रंग दे दिया जाता है, ऐसी कार्यवाही न्यायिक प्रक्रिया का दुरूपयोग है।

18. उपरोक्त तथ्यों के दृष्टिगत रखते हुए प्रार्थना पत्र स्वीकार किया जाता है। प्रथम सूचना रिपोर्ट संख्या 854 सन 2020 अंतर्गत धारा 188, 420, 427, 447 भा०दं०सं० धाना पी.जी.आई. जिला लखनऊ के अनुक्रम में प्रस्तुत आरोप पत्र संख्या 02 सन 2022 दिनांक 20.06.2022 तथा उसके आधार पर विद्वान मुख्य न्यायिक मजिस्ट्रेट, लखनऊ द्वारा वाद संख्या 88492 सन 2022 में पारित आदेश दिनांक 26.09.2022 जिसके द्वारा उपरोक्त अपराध का संज्ञान लिया गया तथा प्रार्थीगण को विचारण हेतु तलब किया गया, तथा उपरोक्त आपराधिक वाद की संपूर्ण कार्यवाही प्रार्थीगण के विरुद्ध निरस्त की जाती है।

19. जब उपरोक्त विधि व्यवस्थाओं के आलोक में प्रस्तुत मामले के तथ्यों का परीक्षण किया जाये तो यह प्रतीत होता है कि पक्षों के मध्य दीवानी विवाद लंबित है, जिसमें प्रार्थीगण के पक्ष में अस्थायी निषेधाज्ञा आदेश पारित हो चुका है। एक अस्थायी निषेधाज्ञा आदेश के विरुद्ध शिकायतकर्ता द्वारा प्रस्तुत अपील निरस्त करते हुए अस्थायी निषेधाज्ञा आदेश अपीलीय न्यायालय द्वारा पुष्ट किया जा चुका है। प्रथम सूचना रिपोर्ट द्वारा भूमि पर कब्जा करने के प्रयास का आरोप लगाया गया, जो कृत्य निषेधाज्ञा आदेश से संबंधित है। यद्यपि शिकायतकर्ता ने प्रथम सूचना रिपोर्ट दिनांक 09.11.2020 को अंकित करायी थी, उसने अपने द्वारा प्रस्तुत वाद संख्या 1465 सन 2019 में यह कहा है कि जब वह घटना की शिकायत करने थाने पर गया तो संबंधित थाने की पुलिस ने प्रकरण को दीवानी प्रकृति का बताते हुए हस्तक्षेप करने से इंकार कर दिया। राजस्व कर्मियों की दो रिपोर्ट प्रार्थीगण के पक्ष में हैं तथा एक बाद की रिपोर्ट शिकायतकर्ता के पक्ष में है किन्तु वह रिपोर्ट दीवानी न्यायालय द्वारा निषेधाज्ञा में दी गयी प्रारंभिक फाइंडिंग में अंकित किये गये प्रारंभिक संतोष के विरुद्ध हैं। इन कथनों से पक्षों के मध्य विवाद दीवानी प्रकृति का प्रतीत होता है तथा ऐसा प्रतीत होता है कि आपराधिक प्रक्रिया मात्र दीवानी प्रकृति के विवाद में प्रार्थीगण पर अनुचित दबाव डालने के उद्देश्य से संस्थित की गयी हैं।

20. ऐसी परिस्थिति में आपराधिक कार्यवाही का जारी रहना न्यायिक प्रक्रिया का दुरुपयोग होगा।

21. यह स्पष्ट किया जाता है कि इस आदेश में कहे गये कोई भी कथन पक्षों के मध्य आपराधिक प्रक्रिया, जो निरस्त की जा रही है, के अतिरिक्त किसी भी विवाद के निर्णय के लिए दीवानी अथवा राजस्व प्रकृति के विवाद के निर्णय में प्रभावी नहीं होंगे तथा उनको गुण-दोष के आधार पर विधिनुसार बिना इस आदेश में किये गये किसी भी कथन से प्रभावित हुए निर्णीत किया जायेगा।